

In The
Supreme Court of the United States

STATE OF ARKANSAS, STATE OF TEXAS,
STATE OF ALABAMA, STATE OF ARIZONA,
STATE OF COLORADO, STATE OF FLORIDA,
STATE OF IDAHO, STATE OF INDIANA, STATE OF
KANSAS, COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA, STATE OF MICHIGAN,
STATE OF MONTANA, STATE OF NEBRASKA,
STATE OF NEVADA, STATE OF NORTH DAKOTA,
STATE OF OHIO, STATE OF OKLAHOMA,
STATE OF SOUTH CAROLINA, STATE OF UTAH,
STATE OF WEST VIRGINIA, STATE OF CALIFORNIA,
STATE OF IOWA, STATE OF MARYLAND,
STATE OF OREGON, COMMONWEALTH
OF VIRGINIA, AND STATE OF WASHINGTON,

Plaintiffs/Counter-Defendants,

v.

STATE OF DELAWARE,

Defendant/Counter-Plaintiff.

**RESPONSE IN OPPOSITION TO DELAWARE'S
MOTION FOR LEAVE TO AMEND COUNTERCLAIM**

KEN PAXTON
Texas Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

LEE RUDOFKY*
Arkansas Solicitor General

NICHOLAS J. BRONNI
Arkansas Deputy
Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St.
Little Rock, AR 72201
(501) 682-8090

**Counsel of Record*

lee.rudofsky@arkansasag.gov

TABLE OF CONTENTS

	Page
RESPONSE IN OPPOSITION TO DELA- WARE'S MOTION FOR LEAVE TO AMEND COUNTERCLAIM.....	1

TABLE OF AUTHORITIES

Page

CASES

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	3
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	3
<i>Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc.</i> , 233 F.3d 697 (2d Cir. 2000)	6
<i>In re Pegasus Gold Corp.</i> , 394 F.3d 1189 (9th Cir. 2005)	6

RULES

Fed. R. Civ. P. 13	6
S. Ct. R. 17.2	6

OTHER AUTHORITIES

5 C. Wright & A. Miller, <i>Federal Practice & Procedure</i> § 1202 (3d ed. 2004).....	3
6 C. Wright & A. Miller, <i>Federal Practice & Procedure</i> §§ 1409-1410 (3d ed. 2016).....	6
6 C. Wright & A. Miller, <i>Federal Practice & Procedure</i> § 1420 (3d ed. 2016).....	7

Nos. 220146 & 220145, Original (Consolidated)

—◆—
In The
Supreme Court of the United States
—◆—

STATE OF ARKANSAS, STATE OF TEXAS,
STATE OF ALABAMA, STATE OF ARIZONA,
STATE OF COLORADO, STATE OF FLORIDA,
STATE OF IDAHO, STATE OF INDIANA, STATE
OF KANSAS, COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA, STATE OF MICHIGAN,
STATE OF MONTANA, STATE OF NEBRASKA,
STATE OF NEVADA, STATE OF NORTH DAKOTA,
STATE OF OHIO, STATE OF OKLAHOMA,
STATE OF SOUTH CAROLINA, STATE OF UTAH,
STATE OF WEST VIRGINIA, STATE OF
CALIFORNIA, STATE OF IOWA, STATE OF
MARYLAND, STATE OF OREGON,
COMMONWEALTH OF VIRGINIA,
AND STATE OF WASHINGTON,

Plaintiffs/Counter-Defendants,

v.

STATE OF DELAWARE,

Defendant/Counter-Plaintiff.

—◆—
RESPONSE IN OPPOSITION TO
DELAWARE’S MOTION FOR LEAVE
TO AMEND COUNTERCLAIM
—◆—

The States of Arkansas, Texas, California, Ala-
bama, Arizona, Colorado, Florida, Idaho, Indiana,

Iowa, Kansas, the Commonwealth of Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Utah, the Commonwealth of Virginia, Washington, and West Virginia (“Plaintiff States”) submit this Response in Opposition to the State of Delaware’s Motion to Amend Counterclaim Against the Plaintiff States.

The Plaintiff States do not oppose Delaware’s motion to amend its counterclaim to add California, Iowa, Maryland, Oregon, Virginia, and Washington to its original counterclaim.

But the Plaintiff States do oppose Delaware’s motion to amend its counterclaim to include a claim that undisclosed companies have wrongfully remitted sums payable on unspecified “negotiable instruments to [the Plaintiff States] based on the State of purchase of the negotiable instrument.” Delaware Amended Counterclaim ¶ 18; *see id.* at ¶¶ 19-25. This Court should deny Delaware’s motion for three reasons.

First, Delaware’s proposed counterclaim fails to meet basic pleading requirements or assert a claim that warrants this Court’s exercise of original jurisdiction. The proposed counterclaim seeks to recover sums payable from unspecified States on unidentified instruments that may or may not resemble the MoneyGram official checks that are the subject of the Plaintiff States’ bill of complaint and Delaware’s original counterclaim. *See* Delaware Amended Counterclaim ¶ 19. It consists of nothing more than speculation that

there are “certain other unclaimed negotiable instruments, including but not limited to official checks which were issued by companies other than MoneyGram,” and the conclusory statement that such unidentified instruments “do not fall within the definition of [the Federal Disposition Act]” and sums payable on them should have been remitted to Delaware. *Id.* The proposed counterclaim is devoid of factual allegations concerning the particular instruments that it purports to concern, how those instruments function, what characteristics allegedly make them exempt from the Federal Disposition Act, what entities sell or market those items, where they are sold, how they are treated under various State laws, or what, if any, instruments are sold in what States. Thus, rather than consisting of factual allegations that, if true, would demonstrate an entitlement to relief, Delaware’s proposed counterclaim consists of nothing more than a “bare averment that [it] wants relief and is entitled to it.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.3 (2007) (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1202 (3d ed. 2004)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The only reference to any specific products in the proposed counterclaim consists of a cross-reference to the Plaintiff States’ bill of complaint’s notation that two other companies issue official checks and properly remit sums payable on the abandoned and unclaimed official checks that they sell. *See Delaware Amended Counterclaim* ¶ 24. No other factual allegations are included concerning those or any other instruments that

would purportedly be covered by Delaware’s amendment. Delaware’s passing reference to two other companies that issue official checks does not provide a plausible factual basis for concluding that Delaware is entitled to recover sums payable on those instruments (from unspecified States), let alone that Delaware is entitled to recover sums payable on unspecified instruments with unknown characteristics sold by unnamed entities in unidentified States.

Second, Delaware’s motion to amend its counterclaim will unduly slow and unnecessarily complicate this straightforward legal dispute over sums payable on unclaimed MoneyGram official checks. “This matter concerns instruments captioned ‘official checks’ sold by MoneyGram,” and this Court exercised original jurisdiction to resolve a dispute between the Plaintiff States and Delaware concerning whether sums payable on such abandoned and unclaimed instruments were properly reported and remitted to Delaware or should have been reported and remitted to the State of purchase. Compl. ¶ 10; *see id.* at ¶¶ 14-18; *see also* Delaware Counterclaim ¶¶ 8-17 (alleging case concerned dispute over MoneyGram official checks and not alluding to other claims); Delaware Complaint, *Delaware v. Pennsylvania and Wisconsin*, No. 22O145 (May 2016), ¶¶ 9-15, 20-21 (invoking this Court’s original jurisdiction to resolve dispute between Delaware and Pennsylvania and Wisconsin over MoneyGram official checks and not alluding to other instruments). Delaware’s proposed counterclaim asks the Court to resolve a *different* question – namely, whether any “unclaimed

negotiable instruments” that Delaware believes have been wrongfully reported and remitted to 29 other States are covered by or exempt from the Federal Disposition Act. *See* Delaware Motion to Amend, p. 2; Delaware Motion to Amend, *Delaware v. Pennsylvania and Wisconsin*, No. 22O145, p. 2.

Expanding the current litigation to include that distinct (and ill-defined) issue would significantly alter the scope of the case over which this Court agreed to exercise its original jurisdiction. Instead of addressing a discrete legal question about sums payable on a specific instrument sold by a single entity that have been remitted to a single State, the case would sweep in an unknown number of instruments – with potentially differing characteristics – sold by different entities and allegedly remitted to different States. Addressing those distinct claims could require this Court to resolve numerous discrete disputes involving different kinds of instruments that might require the application of alternative legal principles and dozens of different State laws, and inquire into the regulatory activity of all of the Plaintiff States. Examining those actions and resolving the various factual and differing legal issues potentially raised by Delaware’s counterclaim would make this litigation unmanageable and unnecessarily tax this Court’s resources. Adding these claims to the litigation, moreover, would not assist the Court’s resolution of the interpretive question presented in this case – the scope and meaning of the Federal Disposition Act. That legal question is well framed by the

existing dispute over which the Court has already agreed to exercise its original jurisdiction.

Third, Delaware's proposed counterclaim is not consistent with the rules governing compulsory or permissive counterclaims. *See* S. Ct. R. 17.2; Fed. R. Civ. P. 13. With respect to whether the claim is compulsory, Delaware's filings contain no allegation that its proposed counterclaim "arises out of the transaction or occurrence that is the subject matter of the [Plaintiff States'] claim." Fed. R. Civ. P. 13(a)(1)(A). To the contrary, even the minimal information contained in Delaware's pleadings demonstrates that its claim concerns entities, instruments, and State actions not at issue here. *See* Delaware Amended Counterclaim ¶ 19 (not limiting claim to MoneyGram, official checks, or instruments that resemble MoneyGram official checks).

Delaware's pleadings likewise contain nothing establishing that "the essential facts of the claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Critical-Vac Filtration Corp. v. Minute-man Int'l, Inc.*, 233 F.3d 697, 699 (2d Cir. 2000) (internal quotation marks and emphasis deleted); *accord In re Pegasus Gold Corp.*, 394 F.3d 1189, 1197 (9th Cir. 2005); *see also* 6 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 1409-1410 (3d ed. 2016) (discussing various tests used to determine if claim is compulsory but emphasizing interest in judicial economy underlying test).

Nor does the proposed counterclaim satisfy the standards for permissive counterclaims. *See id.* at § 1420 (“Although Rule 13(b) encourages a party to advance all [permissive] counterclaims in the responsive pleading, the court has discretion to refuse to entertain any counterclaim, *when allowing it would unduly complicate the litigation.*” (emphasis added)). Rather than promoting judicial economy and fairness, granting Delaware’s motion will complicate this matter, unnecessarily tax this Court’s resources, and unduly delay resolution of the original question presented.

Accordingly, this Court should deny Delaware’s motion to amend its counterclaim to include a claim that it is entitled to recover sums payable on unspecified instruments with unknown characteristics sold by unnamed entities in unidentified States.

Respectfully submitted,

KEN PAXTON
Texas Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

LUTHER STRANGE
Alabama Attorney General

LEE RUDOFSKY*
Arkansas Solicitor General

MARK BRNOVICH
Arizona Attorney General

NICHOLAS J. BRONNI
Arkansas Deputy
Solicitor General

XAVIER BECERRA
Attorney General of California

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St.
Little Rock, AR 72201

CYNTHIA H. COFFMAN
Colorado Attorney General

(501) 682-8090
lee.rudofsky@arkansasag.gov

PAMELA JO BONDI
Attorney General of Florida

**Counsel of Record*

LAWRENCE G. WASDEN Idaho Attorney General	ELLEN F. ROSENBLUM Attorney General State of Oregon
CURTIS T. HILL, JR. Attorney General of Indiana	ALAN WILSON South Carolina Attorney General
THOMAS J. MILLER Attorney General of Iowa	SEAN D. REYES Utah Attorney General
DEREK SCHMIDT Attorney General of Kansas	MARK R. HERRING Attorney General Commonwealth of Virginia
ANDY BESHEAR Kentucky Attorney General	ROBERT W. FERGUSON Attorney General of Washington
JEFF LANDRY Attorney General State of Louisiana	PATRICK MORRISEY West Virginia Attorney General
Brian E. Frosh Attorney General of Maryland	
BILL SCHUETTE Michigan Attorney General	
TIMOTHY C. FOX Montana Attorney General	
DOUGLAS J. PETERSON Nebraska Attorney General	
ADAM PAUL LAXALT Attorney General of Nevada	
WAYNE STENEHJEM Attorney General of North Dakota	
MICHAEL DEWINE Attorney General of Ohio	
E. SCOTT PRUITT Oklahoma Attorney General	

January 26, 2017