No. 19A906

In the Supreme Court of the United States

ACTAVIS HOLDCO US, INC. ET AL., APPLICANTS

v.

STATE OF CONNECTICUT, ET AL.

ON APPLICATION TO JUSTICE ALITO FOR PARTIAL STAY OF INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA PENDING FURTHER PROCEEDINGS IN THIS COURT

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INTRODUCTION

Respondents strive to portray the Third Circuit's sharply divided affirmance of the discovery order here as a "fact-bound" matter of whether the order is properly "tailored to the unique circumstances of this case." Opp. 4. It is nothing of the sort. The Third Circuit invoked not a single case-specific reason for upholding the CMO, the details ("tailoring") of which are not at issue. The CMO's key language—which is so damning Respondents never quote it—states that Applicants "may not withhold prior to production *any documents* based on relevance or responsiveness." App. A at 2 (emphasis added). That sweeping language turns the ordinary discovery process upside down. It defies both Rule 26(b)(1), which limits the "scope of discovery" to "relevant" material, and Rule 26(b)(2)(C)(iii), which says "the court must limit" discovery to "the scope permitted by Rule 26(b)(1)."

Contrary to Respondents' assertion, the Third Circuit's reasons for upholding this CMO could apply to nearly any case. The court cited the "wide latitude" that all district courts enjoy in "controlling discovery," and such courts' discretion "to compel the production of documents within broad parameters" (App. D at 2)—points common to all cases. It cited the fact that identifying "custodians" and "search terms" would "narrow" the production (*ibid.*)—a point common to all cases using custodians and search terms. And it cited the CMO's confidentiality and "claw back" provisions — which is no reason at all, but at best a mitigating measure. *Ibid.* None of this reasoning is remotely "unique" to this case. Opp. 4. If not reversed, the disclose-first-determine-relevance-later approach threatens to accelerate a disturbing trend confirmed by Respondents' own cases, effectively repealing the protections of Rule 26(b).

The Third Circuit's reasoning conflicts with this Court's and five circuits' decisions, as well as the Federal Rules. Rule 26(b)(1) "should be firmly applied" (*Herbert* v. *Lando*, 441 U.S. 153, 177 (1979)), and district courts do not have discretion to "disregard[] [the Rule's] plainly expressed limitations." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 121 (1964). Respondents say the parties in the five conflicting circuit decisions "*sought* irrelevant material," whereas the production of irrelevant material here is merely "incidental." Opp. 13, 15. The CMO's text exposes that assertion as nonsense.

Respondents also insert into the case a charge that Applicants are a "demonstrated failure" when it comes to "accurately" deciding "whether a document is relevant." Opp. 3. Yet none of the judges who heard that claim below mentioned it, much less found misconduct. And for good reason. The allegation is unfounded, relates to just three of 37 corporate defendants, and has nothing to do with this case.

Respondents' offer just two paragraphs in answer to Applicants' detailed showing of irreparable harm. They insist that the CMO's confidentiality and clawback provisions will protect Applicants' trade secrets. But the prior leaks of sealed information in this case provide powerful empirical reasons to doubt that assertion. And Respondents do not deny that the substantial expense of producing and clawing back irrelevant documents is non-recoverable—classic irreparable harm.

In sum, a brief stay will ensure that the Court has an opportunity to review a question of exceptional importance, arising from a decision that conflicts with both this Court's and other circuits' precedents, before Applicants are forced to produce millions of sensitive documents in violation of Rule 26's relevance requirement.

ARGUMENT

I. There is a strong prospect that certiorari will be granted.

Nothing in Respondents' opposition undermines our showing that the question presented in the petition is both exceptionally important and recurring. Respondents offer various factual distinctions between the divided decision below and the many conflicting decisions of this Court and other circuits, but none of those distinctions is relevant to the legal principles for which those cases stand. Further, Respondents ignore this Court's repeated efforts to strengthen Rule 26, and their opposition only confirms that this case is an excellent vehicle to decide the question presented.

A. The ruling below conflicts with this Court's teaching that Rule 26(b)'s relevance requirement must be firmly applied and calls for the Court's exercise of its supervisory authority.

1. According to Respondents, "none of the four cases [of this Court] upon which defendants rely addresses the merits of Rule 26 or relevance objections." Opp. 14. Yet Respondents never mention *Lando*, which teaches that "the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied," and that "the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.' Rule 26(c)." 441 U.S. at 177. Respondents cannot reconcile the CMO—which bars "withhold[ing] prior to production any documents based on relevance or responsiveness" (App. A at 2)—with *Lando*.

Respondents' attempts to brush off this Court's other Rule 26 cases are equally unconvincing. They dismiss *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 350 (1978), where the plaintiffs sought to use discovery to obtain names of absent class

members, as holding that "'Rule 23(d), not the discovery rules, is the appropriate source of authority' for 'a district to order a defendant to help identify the members of a plaintiff class.'" Opp. 15. But Respondents do not mention the *reason* Rule 23(d) governed: "[The] attempt to obtain the class members' names and addresses cannot be forced into the concept of 'relevancy,'" and thus was outside "the scope of legitimate discovery" under "Rule 26(b)(1)." *Id.* at 352, 353. That is the situation here.

Respondents quote *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), for the proposition that the discovery rules warrant "broad and liberal" reading. Opp. 15. As the same paragraph explains, however, "[discovery] has ultimate and necessary boundaries," and the limitations of "Rule 26(b)" kick in "when the inquiry touches upon the irrelevant." 329 U.S. at 507, 508. Similarly, *Schlagenhauf* teaches that the Rules "should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." 379 U.S. at 121. Here, Rule 26(b)(2)(C)(iii) imposes a *mandatory duty* whereby "the court must limit the * * * extent of discovery" to "the scope permitted by Rule 26(b)(1)." Yet the courts below and Respondents never even mention this "plainly expressed limitation." *Schlagenhauf*, 379 U.S. at 121.

The issue here is whether the CMO complies with the rule that, regardless of the "discovery device[]" at issue, "[t]he scope of discovery" is "limited by Rule 26(b)'s provision" limiting discovery to "relevant" material. *Id.* at 117. That this case involves the "production of documents," and not "examinations of parties" (*ibid.*) does not excuse compliance with that rule. Thus, Respondents have not rebutted our

showing that the ruling below conflicts with Rule 26(b)(1)'s "key phrase"—the relevance requirement. *Oppenheimer Fund*, 437 U.S. at 351.

2. Respondents also ignore that the Court has repeatedly tightened Rule 26(b), noting only that "[s]ince the 2015 Amendments * * * other courts similarly have ordered the production of documents hitting on search terms without subjective review for relevance." Opp. 17. Many of these decisions are distinguishable, and other district courts come out the other way. Stay App. 22 nn.2–4. But the cases that are *not* distinguishable make the case *for* certiorari, not against it. They confirm that this case involves an acute example of a recurring issue, and that courts continue to ignore this Court's repeated attempts to limit the scope of discovery under Rule 26(b)(1).

3. Finally, the decision below breaks sharply "from the accepted and usual course of judicial proceedings." S. Ct. R. 10(a). Respondents deride the "accepted and usual course" of pre-production review by the producing party, calling it "subjective" and declaring that the Rules provide no "procedures for determining relevance." Opp. 17, 16. But as Judge Phipps stated, "[the Rules] allow for a review for responsiveness and relevance *before* production." App. D at 3 n.1 (citing Rules 26(b)(1), 34(b)(2)(C)).

As Judge Phipps recognized, Rule 34(b)(2)(C) gives parties a right to object to producing documents, provided they "state whether any responsive materials are being withheld on the basis of that objection." If the serving party believes the documents are discoverable, it can move "to compel disclosure" under Rule 37(a)(3)(B)(iv). If appropriate, the court may grant the motion, and any party that "fails to obey an order to provide or permit discovery" may be sanctioned under Rule 37(b)(2)(A).

Contrary to Respondents' assertions, therefore, the Rules *do* prescribe "procedures for determining relevance," and those procedures *do* "grant the producing party the right to determine relevance unilaterally" in the first instance, but *not* "in a manner that essentially is unreviewable by the district court." Opp. 16. Remarkably, one searches Respondents' brief in vain for any reference to Rule 34 or Rule 37.

B. The five conflicting circuit decisions cited in the petition are not legally distinguishable.

Five circuit decisions have granted mandamus to prohibit irrelevant discovery. Respondents' efforts to distinguish those decisions are untenable. Unlike here, they say, the five circuits "concluded that the discovery *sought* irrelevant material." Opp. 13. Respondents can make this point with a straight face only because they never—even once—quote the CMO's provision that Applicants "may not withhold prior to production any documents based on relevance or responsiveness." App. A at 2. As that language confirms, Respondents' discovery of millions of irrelevant documents is no accident, or merely the "incidental" effect of the CMO. Opp. 15.

It is thus plain that the other five circuits' decisions cannot be distinguished on factual grounds. For example, the order in *In re: Ford Motor Co.* gave the requesting party access to a database containing competitively sensitive information without allowing the producing party to withhold irrelevant material. 345 F.3d 1315, 1316–1317 (11th Cir. 2003). As the Eleventh Circuit held, a party "is unentitled to this kind of discovery without—at the outset—a factual finding of some non-compliance with discovery rules by [the other party]." *Ibid.* The Fifth, Eighth, Ninth, and Tenth Circuits have all granted mandamus "to forbid discovery of irrelevant information."

In re Lombardi, 741 F.3d 888, 895 (8th Cir. 2014); accord *In re Reyes*, 814 F.2d 168, 171 (5th Cir. 1987); *Hartley Pen Co.* v. *U.S. Dist. Court for S. Dist. of Ca.*, 287 F.2d 324, 328 (9th Cir. 1961); *Sanderson* v. *Winner*, 507 F.2d 477, 479 (10th Cir. 1974). No factual difference between those cases and this one is relevant to their holdings.

Respondents repeatedly note that "the parties have reached agreement on search terms." Opp. 11; see Opp. 6, 13, 17, 22, 23. But nothing turns on this, as Applicants are not challenging the search terms; they are challenging the prohibition on withholding any documents from production based on relevance or responsiveness. On that score, it is no answer to say that *some* produced documents would be relevant, since "the agreed-upon custodians have relevant documents" and "searches based upon the agreed-upon keywords are likely to identify them." Opp. 13. Rule 26(b)(1) limits "the scope of discovery" to "relevant" documents, and Rule 26(b)(2)(C)(iii) states that "the court *must limit* * * * discovery" to "the scope permitted by Rule 26(b)(1)." Discovery is limited by law to what is *actually* relevant. And "[a]s every law school student * * * knows, when performing a computer search on WESTLAW and/or LEXIS, not every case responsive to a search command will prove to be relevant to the legal issues for which the research was performed. Searching tens of thousands, and hundreds of thousands, of electronic documents is no different." *Gardner* v. *Cont'l Cas. Co.*, 2016 WL 155002, *3 (D. Conn. 2016).

Under Respondents' position, by contrast, so long as the net lands many fish that may legally be caught, vast numbers of illegal fish are simply "incidental." Opp. 15; see Opp. 13 ("some irrelevant documents might *also* be produced"). This approach

cannot be what this Court had in mind when it deleted the "reasonably calculated to lead to the discovery of admissible evidence" phrase from Rule 26(b)—a phrase that some courts had "misuse[d]" to "define the scope of discovery." Stay App. 17–18.

C. The decision below cleanly presents an exceptionally important and recurring question.

Equally unconvincing is Respondents' argument that this case presents no "important interpretive question" under Rule 26(b). Opp. 15. First, whatever discretion they possess, district courts may not "disregard[] plainly expressed limitations" in the Rules. *Schlagenhauf*, 379 U.S. at 121. Here, however, the majority below cited Rules 16(b) and 26(b)(1), while ignoring the mandatory duty imposed by Rule 26(b)(2)(C)(iii). Only by neglecting key rules could the court below conclude that "a district court [may] compel the production of documents within broad parameters," even "without a manual relevance review." App. D at 2.

Second, the majority below did not offer any case-specific reasons why the discovery order was any more appropriate here than in other MDLs or class-action litigation. App. D at 2. Instead, the court relied heavily on district courts' "wide latitude in controlling discovery" and "compel[ling] the production of documents," the effect of identifying "custodians" and "search terms" in "narrow[ing]" what is produced, and the availability of confidentiality designations and "claw back" requests. *Ibid.*

Finally, the ruling below is certain to have "broader impact" (Opp. 4) because discovery issues, while recurring daily in district courts across the nation, only rarely reach the circuit courts and produce a written opinion. That this one did confirms that it will be influential—particularly given the Third Circuit's broad reasoning.

II. Respondents' merits arguments are wholly unpersuasive.

A. If the mandamus standard applies here, the decisions of five circuits confirm that it is easily satisfied.

Respondents' lead response on the merits is to invoke the mandamus standard. Opp. 20. When exercising certiorari jurisdiction, however, this Court has often reversed the denial of mandamus relief without applying that standard. *E.g.*, *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) (referencing "mandamus" only in the case history). In *Societe Nationale Industrielle Aerospatiale* v. *United States District Court for Southern District of Iowa*, for example, the Court reversed the denial of mandamus relief and held simply that circuit court "erred * * * in stating that the [Hague] Evidence Convention does not apply" to certain "discovery demands." 482 U.S. 522, 527–529, 547 (1987). And even if the mandamus standard applied, the five circuit decisions discussed above confirm that it is satisfied here. *Ford Motor*, 345 F.3d at 1316 (finding "a clear abuse of discretion or a usurpation of judicial power"); *Reyes*, 814 F.2d at 170 (finding that the district court exceeded "a lawful exercise of its prescribed jurisdiction"); *Sanderson*, 507 F.2d at 479 (finding "a judicial 'usurpation of power'"); *Lombardi*, 741 F.3d at 893 (finding "'a judicial usurpation of power or a clear abuse of discretion'"); *Hartley Pen*, 287 F.2d at 331.

B. Respondents' other merits arguments misrepresent the record or otherwise lack merit.

1. Respondents' other merits arguments are no more convincing. For example, the divided ruling below cannot be saved by their appeal to the "necessarily broad" nature of antitrust discovery or their assertion that "the district court properly exercised its discretion in fashioning an appropriate balancing of interests in light of the

nature of the claims and the prior discovery history." Opp. 20 (citation omitted). As discussed, district courts do not have discretion to "disregard[] plainly expressed limitations" in the Rules (*Schlagenhauf*, 379 U.S. at 121), and they "must limit the * * * extent of discovery" to "the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2). Unlike the decision below, moreover, the courts in Respondents' cases expressly applied the relevance standard. See *In re Automotive Refinishing Paint Antitrust Litig.*, 2004 WL 7200711, *3 (E.D. Pa. 2004) (relevance is "the 'touchstone' of any discovery request."); *In re Mushroom Direct Purchaser Antitrust Litig.*, 2012 WL 298480, *4 (E.D. Pa. 2012). One of the cases even *denied* the discovery demanded as insufficiently relevant. See *In re Microcrystalline Cellulose Antitrust Litig.*, 221 F.R.D. 428, 430 (E.D. Pa. 2004) ("While recognizing that a broad scope of discovery in this large class action is appropriate, I conclude that plaintiffs' request for sales data through the end of 2003 is unreasonable given [its] minimal potential benefits[.]").

2. Respondents say that documents' relevance can be difficult to discern, but they cite no authority for the proposition that this warrants denying Applicants their right to make relevance judgments in the first instance, "so that all parties" can make them. Opp. 22. Nor are Respondents' theories unique. Most price-fixing suits involve claims that seemingly innocuous communications furthered the alleged conspiracy. Absent misconduct findings, the fact that Applicants must make some judgment calls does not justify forcing them to produce millions of irrelevant documents.

3. Lacking a misconduct finding, Respondents attempt to rewrite the record by claiming that a prior "clawback" of documents produced to the States shows that

Applicants cannot be trusted. Opp. 2, 3, 17, 21. Respondents pressed this allegation below, however, and none of the judges who heard it mentioned it, much less found that Applicants engaged in wrongdoing. Opp. 17. That was for good reason.

For starters, these clawback disputes involved just three of 37 corporate defendants. That Respondents say their allegations involve all "defendants" reflects an astonishing lack of candor. Opp. 2, 17, 21; cf. *Compagnie des Bauxites de Guinee* v. *Ins. Co. of N.A.*, 651 F.2d 877, 886 (3d Cir. 1981) ("The sanction imposed * * * because of the other insurers' failure to produce the requested documents should not apply to these three companies [that complied with the order]."), *aff'd sub nom Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

Viewing the facts in context, moreover, there is no basis to the claim that even the three corporate defendants cannot "make accurate relevance determinations," or that Respondents "never would have learned of the[] existence" of various documents but for these Applicants' actions. Opp. 17, 21. At the request of the Private Respondents, the district court ordered the State Respondents to produce to all MDL parties the documents collected pursuant to state investigatory subpoenas. Applicants could ask to "claw back" documents that they had turned over to the States, but only within 30 days of the States' production. The States' May 10, 2019, complaint—which added some 100 new products to the MDL, making many more documents relevant—was filed midway through many of the Applicants' clawback periods. Thus, Applicants had to choose between clawing back documents based on the pre-May 10, 2019, pleadings and conducting an expedited, high-level review to address the new complaint.

The clawback disputes that Respondents cite (Opp. 21–22) thus involved documents that they already had received. Any decision to withdraw clawback requests did not reflect a concession that these documents were somehow relevant, but rather a desire to avoid litigating costly document-by-document disputes involving material that Respondents presumably had reviewed. Each resulting dispute either was later resolved by the parties or is now being addressed in the meet-and-confer process; the district court has never had to intervene, and there has been no misconduct finding. Accordingly, Respondents' allegations—which, again, were not credited by any judge below or the Special Master—do not remotely justify prohibiting any Applicants, let alone all of them, from withholding irrelevant material. See also Stay App. G at A59-A61 (further explanation of facts).

4. Finally, Respondents' appeals to the breadth of district courts' discretion in MDL proceedings do not support affirmance. Opp. 15–17. MDL court rulings must still be "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. 1407(f); *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 496–497 (1933) ("[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties."). Indeed, each of Respondents' cases affirmed the dismissal of claims where the plaintiffs had defied multiple scheduling and discovery order under the same test that would be used to review such decisions in non-MDL cases. *Dzik* v. *Bayer Corp.*, 846 F.3d 211, 216 (7th Cir. 2017) (applying general circuit precedent on terminating sanctions); accord *In re Asbestos Products Liability Litig.*, 718 F.3d 236, 246 (3d Cir.

2013); *In re Guidant Corp. Implantable Defibrillators Products Liability Litig.*, 496 F.3d 863, 866–867 (8th Cir. 2007); *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 460 F. 3d 1217, 1226 (9th Cir. 2006).

As Judge Phipps recognized, the "extraordinary" process sanctioned by the majority below inverts the ordinary sequence of discovery into one where "production comes first, followed by objections." App. D at 3. That was "a serious and exceptional error" (*ibid.*) that cannot be reconciled with the ordinary meaning of the Rules or precedent. Thus, there is more than a fair prospect that this Court will correct it.

III. Applicants face certain irreparable harm absent a stay.

Respondents' half-hearted response on irreparable harm consists of two paragraphs of unconvincing analysis. Opp. 24–25. They first say the petition raises only the question "[w]hether the documents that are produced are 'relevant,'" not "whether those documents contain confidential information that could be inappropriately disclosed." Opp. 24. But that is irrelevant. To be sure, the answer to the question presented in the petition does not turn on whether the irrelevant documents that must be disclosed contain sensitive information, as here. See Pet. i. But that fact remains relevant to the case's importance, and—most importantly here—to whether a stay would prevent irreparable harm to Applicants.

Respondents' only other point is that confidentiality designations and claw-back procedures will prevent any irreparable harm. Opp. 24–25. Respondents do not deny, however, that this case has already seen multiple leaks of sealed filings and confidential materials. Stay App. 3, 29–30; Pet. 34 n.8. Thus, there is an empirical

basis to believe that confidential restrictions and clawbacks will not secure the confidentiality of irrelevant but sensitive documents as well as withholding such documents from production—a course that Rules 26 and 34 unambiguously permit—while this Court determines whether to grant certiorari. Stay App. 28–31.

Moreover, the clawback procedures here were developed to address a limited universe of documents that had been produced by Applicants pursuant to the States' investigations. The scope of that production was far narrower than what the CMO requires. None of Respondents' cases (Opp. 25) suggests that confidentiality designations can justify mass production of irrelevant, commercially sensitive material.

Finally, Respondents do not deny that the high costs associated with producing and clawing back irrelevant documents cannot be recovered—classic irreparable harm that independently warrants a stay. Stay App. 31–32.

IV. Respondents' claims of harm from the stay are not credible, and a stay clearly promotes the public interest.

In contrast to the irreparable harm that denying a stay would impose on Applicants, staying the CMO while the Court considers the petition would not harm Respondents. Respondents' brief in opposition is due on March 16, 2020, just one week after the March 9 discovery deadline. Even assuming a modest extension of the March 16 due date, the Court could consider the case at its April 24 or May 1, 2020, conference. Given the stakes, and the nature of this MDL—where complaints are still being filed, Respondents already have materials from the state investigative subpoenas, and Applicants are producing extensive relevant documents—a brief delay pending the Court's decision would not meaningfully burden Respondents.

As evidence of burden, Respondents cite the deaths of two witnesses during the pendency of the case and the fact that part of a single file from a single Defendant may be unavailable to them. Opp. 23. But there is no reason to expect that other such events will occur in the modest period while this Court reviews the petition.

The proposed stay would not make "discovery grind to a halt." Opp. 23. Relevant documents are already being produced, and Respondents will have relevant discovery while the case is pending before this Court. Should depositions be permitted during that time, Respondents may examine witnesses on relevant documents, including those produced before the March 9 deadline and those already obtained via the state investigative subpoenas. Respondents' generalized concerns about a modest delay cannot outweigh the real, concrete, and imminent harms that Applicants face if Paragraph 3(b) of the CMO is enforced before this Court's review is complete.

Respondents say this case has "peculiar" public importance (Opp. 24), but a stay of Paragraph 3(b) of the CMO pending certiorari will not affect any public interest in exploring issues actually material to the litigation; it will simply ensure that the documents produced pending this Court's review of the matter are relevant. The public interest lies with ensuring discovery in this matter conforms to Rule 26.

CONCLUSION

For the foregoing reasons, the application for a stay should be granted.

Respectfully submitted,

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