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In the

Supreme Court of the United States

OPPENHEIMER FUND, INC., et al.,

Petitioners,

v.

IRVING SANDERS, et al.,

Respondents.

No. 77-335

Washington, D.C.
February 28, 1978
and
March 1, 1978

Pages 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

OPPENHEIMER FUND, INC., ET AL., Petitioners, v. IRVING SANDERS, ET AL., Respondents.	No. 77-335

Washington, D. C.

February 28, 1978

The above-entitled matter came on for argument at 2:39 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALFRED BERMAN, ESQ., Guggenheimer & Untermyer, 80 Pine Street, New York, New York 10005; on behalf of the Petitioners

DONALD N. RUBY, ESQ., Wolfe, Popper, Ross, Wolfe & Jones, 845 Third Avenue, New York, New York 10022; on behalf of the Respondents

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
ALFRED BERMAN, ESQ., on behalf of the Petitioners	3
- - -	
DONALD N. RUBY, ESQ., on behalf of the Respondents	16
ALFRED BERMAN, ESQ., on behalf of the Ptetioners--Rebuttal	40

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-335, Oppenheimer Fund v. Sanders.

Mr. Berman, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALFRED BERMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BERMAN: Mr. Chief Justice, and may it please the Court:

This case is a sequel to the classic litigation that preoccupied the lower courts for some eight years until it reached this Court as a result of a decision by this Court which is generally referred to as Eisen IV. It is officially reported in the hearing reports as Eisen v. Carlyle and Jacklyn at 417 U.S. Reports.

In Eisen, this Court held that Rule 23 of the Federal Civil Rules imposes an unambiguous requirement that individual notice be sent to every class member who can be identified through reasonable efforts.

This Court further held that the cost of notice was the burden of the plaintiffs as part of the normal burden of financing their litigation.

In the instant case, the Second Circuit Court of Appeals, in an en banc decision, ruled that the District Court was nevertheless entitled to impose the cost of -- the considerable cost of the furnishing of a list of shareholder class names at the expense of the defendants and without cost to the plaintiffs. And the Court of Appeals in this en banc decision, with three judges strongly dissenting, the Court of Appeals said it reached

to that determination is at war itself.

We think that on the face of it the decision of the en banc majority is built on non sequiturs, because the proportion that they refer to came from the fact that this Court, having held that Rule 23 requires individual notice to the members of the class, that, said the majority, that meant that the discovery proceedings of the federal rules came into full play because it might be necessary in some cases to deal with the contention that some class member had not received individual notice, and to do this he had to -- the court would have to have or the parties would have to have resort to the discovery proceedings of the federal rules and specifically the emphasis was placed on Rule 34 because in Rule 34, said the majority opinion, where records are computerized, the

respondent may have to furnish a printout at its own cost, and there is some quotation in the advisory committee's report that in some instances that a printout might have to be furnished by a respondent where the records are computerized.

But in this case the record before this Court shows -- and that record was before the lower court, of course -- that there is no such printout that can be furnished, there is no such computerized record listing the members of the class.

QUESTION: Do you mean a new program would have to be prepared?

MR. BERMAN: A new program, eight new programs would have to be prepared specificaly because there are two groups of shareholders, those who are direct shareholders, owners of the Oppenheimer Fund, and those who are members of the OSCAP plan which periodically buys shares and they all have a pro-rata interest, and four programs would be needed for each. But it is not solely a question of the new programs, computerized programs that would have to be prepared.

The fact of the matter is that if the Second Circuit majority had felt propelled to look at the record, which you will find in the latter part of the appendix before you, where the testimony of the transfer agent taken on deposition by Mr. Ruby of the plaintiffs' counsel, it will be found that the basic documents that are needed to obtain the information identifying members of the class are to be found in

semi-obsolete papers in the warehouse of the transfer agent which are in the form of ledger sheets called the daily journal which in effect were transaction sheets on which were listed back in 1968 and '69 the relevant period as determined here the transactions that took place. In other words, there is a list of purchases made and transfers made of shares of Oppenheimer Fund on each trading day during that two-year period. And the job that has to be done, at least as to half of the class members to be determined, is for punch-key operators to sit down and punch-key cards, a card for each one of these transactions.

QUESTION: Is there any agreement, Mr. Berman, on how much all of this is going to cost?

MR. BERMAN: Yes. At that time, in 1973, the transfer agent came up with a price of some $16,500.

QUESTION: And we proceed here on that premise?

MR. BERMAN: The record hasn't been altered, but I think that --

QUESTION: What is the value of the plaintiffs' investments in Oppenheimer?

MR. BERMAN: The Oppenheimer Fund had assets of aggregating at that time some $500 million.

QUESTION: The plaintiffs?

QUESTION: I am talking about the plaintiffs.

MR. BERMAN: The plaintiffs?

QUESTION: Yes.

MR. BERMAN: The plaintiffs had at that time some 2,000 in the aggregate, the three plaintiffs had some 2,000 shares that had an asset value of a little more than that $16,000 that --

QUESTION: How much more, do you know?

MR. BERMAN: I think it was in the $20,000 range.

QUESTION: Would that still be true today?

MR. BERMAN: No, it has been sharply -- they have been redeeming shares over the years and on the basis of the latest figures furnished they have some 800 shares in total which would have an asset value or a market value of some $5,000.

QUESTION: That is all?

MR. BERMAN: That is all.

QUESTION: I wondered because this was a collateral order doctrine appeal, wasn't it?

MR. BERMAN: Yes, that is --

QUESTION: And I gather the panel found that this appeal fitted within the collateral order doctrine?

MR. BERMAN: Yes, it did, Your Honor.

QUESTION: I wonder where the irreparable injury was if they had $23,000 worth of stock and the cost involved here was $16,000. Do we have a jurisdictional question on this at all?

MR. BERMAN: Well, I wouldn't think so because they allege that --

QUESTION: The court in fact never reached the --

MR. BERMAN: -- they allege violations, of course, of the Investment Company Act, the Securities Act, 10b-5 and all the usual and therefore they assert federal courses of action and --

QUESTION: Well, in any event, I gather your adversary hasn't raised any jurisdictional question?

MR. BERMAN: No.

QUESTION: Until you appeal?

MR. BERMAN: None whatever. Now, the --

QUESTION: Which wouldn't mean anything if we thought there was any merit to the jurisdictional issue.

MR. BERMAN: Now, the point I was seeking to make was that we are dealing here essentially with business records, not this series of arcane computerized records that require secret devices to cause them to be operative and so forth, to which the majority opinion refers time and time again. And there is no reason, as a matter of fact, why they couldn't go in and perform this operation by hand if they were willing to take the burden of doing it.

QUESTION: Was this ever presented to the District Court as a discovery matter?

MR. BERMAN: It never was presented as a discovery

matter. In fact, the District Court, in making its determination, said that this involved a question of the cost of notice to the members of the class.

QUESTION: You never had an opportunity then to make a protective order motion under rule 26?

MR. BERMAN: I did not, and that is of course one of the points we raise here.

QUESTION: Was a motion ever made for discovery?

MR. BERMAN: No, only to the extent that Mr. Ruby did move to or gave notice of his desire to take the deposition of the transfer agent with a view to determining the question of the class members, and so forth. The defendant merely suggested that that be done by interrogatory rather than everybody trooping up to Boston to take the deposition, but the judge overruled that and we all went up to Boston and that deposition was taken and that is the fifty pages of evidence in the back of the appendix to which I have referred you, which discloses, I say, that we are dealing here essentially with business records of the type that, under rule 33 -- even the federal discovery rules are applicable under 33(c) -- all the defendant would have to do would be to make these records available to the parties seeking discovery and permit him to make any copies he wants, and even under Rule 34, Moore Federal Practice confirms what every practitioner knows to be the case, that where someone wants to come in, your opponent wants to

come in and see your records, you make them available and if he says make me copies of those, you say at your cost, of course, and he either does that or you lend them to him long enough to have them photostated or whatever, and Moore says that that is the rule even in 34.

So the only point that the majority opinion, the en banc opinion was basing itself on was the notion that we are dealing here with computerized records and that Rule 34 is intended to give the applicant for computerized records the right to make the respondent, give him a copy of his computerized, give them a printout. We have no printout to give them.

Now, there are some tapes. For example, there is a current tape listing all the current shareholders of the Oppenheimer Fund, at that time 170,000 in number. Of that 170,000, 70,000 were not shareholders in the 1968-69 period so they weren't shareholders in the relevant period, which is about 40 percent. Since then, that percentage has climbed, has multiplied greatly and is probably two-thirds of the shareholders are not members of the class.

That is the only computerized record. We don't keep a computerized record of drop-out shareholders, those who have gone by the wayside. Perhaps we should, like some institutions of higher learning have a list of alumni who are frequently circularized, it might be a good idea. It hasn't been done. So that we have to go back to those transaction sheets

in 1968 and '69 and laboriously compile those 300,000 cards by this keypunch operation, and then from those cards make tapes which combined with the existing tapes and various programs, eight in number, would ultimately produce a list of the class members as it was as of 1968 and '69, and that would entail this cost. And we are perfectly willing to cooperate in every way. We have offered to have them see the records, we did not oppose their taking the deposition of the transfer agent. But why should we be obliged to go and pay for it. Of course, you could take judicial notice of what has happened to the trend of prices in the last five years. It goes without saying that the cost is very much higher today, in fact double, I would say.

And at the same time what has happened is -- and the record shows that the start had already been made -- there was a wave of redemptions going on, that is shareholders have the right to come in and tender their shares to the management to receive their money. The market had gone down in 1973, the time when this class action motion was made, and there was a wave of redemptions which we were fearful would be further instigated if the class action letter went to the 70,000 members who weren't class members but mere shareholders of the fund.

Now, that trend has continued and to the point where today I was told that 43 million shares of the then 67 million

have been the subject of redemptions over the intervening years, so that it is probable that now two-thirds of the current shareholders are not class members, and simultaneously the cost of locating the records for those who have dropped out again will continue to pile up.

QUESTION: Mr. Berman, perhaps the briefs tell and I don't remember, but how was the class period defined, the base? What gave rise to this selection of this particular period?

MR. BERMAN: The plaintiffs allege that when they purchased shares, very modest amounts of shares in 1968 and '69, that they were not given -- they were either given no information about the so-called restricted securities that the fund had commenced to purchase in 1968 or when they did get information it didn't correctly set forth how the value of the securities were determined for purpose of determining the total assets of the fund on the basis of which the selling price of the shares was determined, that is they are sold at a net asset value per share plus a servicing charge --

QUESTION: Was the '68 date then the date of the first purchases of restricted shares?

MR. BERMAN: In '68, the first report emerged in which there was some reference to these restricted securities and that was amplified further and the district judge said he thought that -- and actually the fund suggested that the relevant period be limited to the year 1968 so as to narrow

the costs to everybody involved, but the district judge said no because the prospectus for 1970 gave more information than was given in the 1969 prospectus, so he thought he had better leave it at that two-year, '68-69, as the relevant period, and that is the way it was.

Now, all this emphasis on these restricted securities and nondisclosure, the alleged nondisclosure leave out of account the fact that there was nothing arcane or secret or unusual about purchase by investment companies of these so-called restricted securities and, of course, I believe you all realize that what is meant by restricted securities is that they are securities not yet the subject of a registration statement which has become effective under the Securities Act of '33, so a public offering at that point cannot be made but each purchase was accompanied by an undertaking of the seller, of the selling company, the issuing company, that it would register these securities with the SEC on demand or at a certain time, and most of them then, that was carried out in due course.

But in the meantime, of course, they were not salable to the public as freely as the others.

QUESTION: That was because what you are telling us now goes to the merits of this litigation, does it not?

MR. BERMAN: Yes, it does. I was just trying to --

QUESTION: And not to the issue now before us?

MR. BERMAN: Precisely. But I do want to point out

that we cite in our brief that the Securities & Exchange Commission itself said that as of the end of 1968, the mutual fund industry owned $4.25 billion of these restricted securities. They were in great demand and the public was very interested in them to the point where a fund was launched in 1968 -- and we cite that again -- and raised $55 million for investment predominantly in these restricted securities, and it was a great success on the selling end, and so forth.

Now, our opponent here has made a big point in his brief about the special fiduciary obligations of directors and officers and affiliates of the mutual funds. They are indeed under special fiduciary obligations --

QUESTION: Did the Court of Appeals pass on that point in the en banc opinion?

MR. BERMAN: No, they did not. It had been made, that point had been made by Judge Hays as a member of the three-judge panel --

QUESTION: As a sitting judge of the three-judge panel.

MR. BERMAN: -- but when it came to the opinion of the en banc court, that was not touched on at all, as the dissenters pointed out.

MR. CHIEF JUSTICE BURGER: We will resume there at 10:00 o'clock in the morning.

[Whereupon, at 3:00 o'clock p.m., the case in the above-entitled matter was recessed.]

IN THE SUPREME COURT OF THE UNITED STATES

OPPENHEIMER FUND, INC., ET AL.,

Petitioners,

v. No. 77-335

IRVING SANDERS, ET AL.,

Respondents.

Washington, D. C.

March 1, 1978

The above-entitled matter came on for further argument at 10:09 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DONALD N. RUBY, ESQ., Wolfe, Popper, Ross, Wolfe & Jones, 845 Third Avenue, New York, New York 10022; on behalf of the Respondents

ALFRED BERMAN, ESQ., Guggenheimer & Untermyer, 80 Pine Street, New York, New York 10005; on behalf of the Petitioners

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 77-335, Oppenheimer Fund v. Sanders.

Do I understand you are submitting now?

MR. BERMAN: Mr. Chief Justice, I have been informed I have only nine minutes of my time remaining, and with your leave I would like to reserve those for rebuttal.

MR. CHIEF JUSTICE BURGER: You may do so.

MR. BERMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ruby, you may proceed.

ORAL ARGUMENT OF DONALD N. RUBY, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. RUBY: Mr. Chief Justice, and may it please the Court:

Before proceeding with the body of my argument, I would like to correct an erroneous statement that was made by petitioners' counsel yesterday in response to a question I believe from Mr. Justice Rehnquist.

Contrary to petitioners' contention, a request for information as to the names and addresses of class members pursuant to the discovery rules was orally made by the plaintiffs at a conference with the District Court in June 1974 and the defendants had a full opportunity to argue in the District Court that the cost of discovery of this information should be borne by the plaintiffs rather than the defendants. This is

manifestly clear from the briefs submitted by the parties in July of 1974 as requested by the District Court dealing with the issue of whether such information may be obtained through discovery and, if so, the appropriate application of the cost of discovering this information in this case.

QUESTION: Mr. Ruby, what was the ruling of the District Court on that discovery motion?

MR. RUBY: Mr. Justice Rehnquist, the court finally issued a decision, as you know, in which it determined that the defendants should bear the cost of obtaining this information. As I will indicate in connection with the briefs submitted, the matter of the application of the discovery rules and who should bear the cost under them was argued and considered. The District Court did not specifically in its opinion make reference to it, but I think the thrust of petitioners' position is that they were in some way prejudiced because they had no opportunity to in effect make a protective order or to deal with the question. And I think as far as that is concerned, the record would indicate clearly that they had a full opportunity to express their views.

QUESTION: Well, one of the District Court's reasons, as I read it, for requiring your opponents to bear the $16,000 cost was that they had opposed your motion to define the class action, and I would think that might have more relevance if it had gone on class action so far as Judge Griesa was

concerned than if it had come up at the discovery stage.

MR. RUBY: Well, I think, Mr. Justice Rehnquist, and I cannot, of course, state preicsely what was in Judge Griesa's mind, but I can say clearly thathe did give consideration to the question of the discovery rules. For example, if I may just refer to a brief submitted by the unaffilidated defendants which was requested by Judge Griesa -- and I am quoting now from Document 90, which is referred to in the index of documents filed in the appendix -- page 3 of the defendant's brief says, "Since the discovery here sought is solely for the purpose of enabling plaintiffs to fulfill their obligations under Rule 23, the cost of such discovery should clearly be borne by plaintiffs." They go on on page 4 to say, "Even if, as suggested by the Court" -- meaning the District Court -- "the cost of identifying the members of the class to whom notice can be mailed is a cost of discovery. The pertinent decisions in the area of discovery make it clear that such costs must be borne by the plaintiffs." And likewise the defendant, Oppenheimer Manager Corporation, submitted a brief in which one of their topic headings was in Document 92, "Under the discovery rules, the cost of identifying class members are properly chargeable to the plaintiffs." So at least I think it is clear that the Court considered it and they had a full opportunity to argue it.

QUESTION: But you said Judge Griesa did not rule on

it?

MR. RUBY: Well, I cannot say that, Mr. Chief Justice. I can simply say he didn't specifically refer to it in his opinion, but I think a fair reading of his opinion would indicate that he considered all of the arguments that were made.

QUESTION: Mr. Ruby, Judge Mulligan in his opinion said that the plaintiffs have never sought discovery relief under Rule 34. I take it you view that as erroneous?

MR. RUBY: Mr. Justice Powell, I view that as erroneous. It is true that we did not file a piece of paper, but I don't think that is really the issue here. At a conference with the District Court, an application was made, considered, and everyone had an opportunity to address themselves to it.

QUESTION: Orally?

MR. RUBY: Orally, yes, sir.

QUESTION: Mr. Ruby, that was before the class had been determined, was it not?

MR. RUBY: Yes, it was, Mr. Justice Stevens.

QUESTION: What exactly did you request orally?

MR. RUBY: What we requested, Mr. Justice Stevens, was that if this information should be required and --

QUESTION: What information?

MR. RUBY: That is information as to the names and

addresses of class members.

QUESTION: Which you couldn't possibly know who they would be until you know what the class was, could you?

MR. RUBY: Well, we had requested the class definition, Mr. Justice Stevens. We had asked the court to define a class which would encompass people between March 28, 1968 and April 24, 1970 and who were still stockholders of the fund. Now, we took the position --

QUESTION: Of course, your opponents took a different view of what the --

MR. RUBY: They opposed our class definition.

QUESTION: -- and the court agreed with them?

MR. RUBY: The court issued a decision, Mr. Justice Stevens, in which it determined that it would accept the proposal made by the defendants, but I would respectfully submit that a fair reading of the District Court's opinion and the whole proceedings relating thereto would indicate that the District Court was issuing a decision which really was interrelated in the sense that it was considering what the various proposals were, and I think it took into account the defendants' position as to the class definition and then determined that -- and I don't think it determined necessarily on this ground alone, but at least it took into account that fact in deciding that it should have the defendants bear this --

QUESTION: But if I understand you correctly, if he

had granted your discovery request at the time you made it, namely asking for those who were still stockholders in 1970, you still would have needed more --

MR. RUBY: No, Mr. Justice --

QUESTION: -- because that wouldn't have been the whole class.

MR. RUBY: Mr. Justice Stevens, if I can answer you in this way, our position was that if we had the class defined as we proposed, which was the people who bought during this period who were still stockholders of the fund, it would not have been necessary at all to obtain this information because what we could have done is to send out a notice to all of the current stockholders of the fund directing, of course, the notice in a sense having an introductory part that said this is directed to those who purchased during this period. If we had done that, individual notice would have gone to all the class members, the class would have been sufficiently defined so that judgment could have been entered under the rules of 23(c)(3), and the information would not have been needed at all.

So what we were really saying to the District Court is, Your Honor, we don't think we need this information, however, if you were to accept the position taken, then we ask that it be obtained through discovery.

The main issue before this Court, at least as initially presented by petitioners' brief, is whether the

District Court has discretion to require defendant Oppenheimer Fund to bear the expense of identifying class members in this case as the Court of Appeals for the Second Circuit held in its en banc decision, or whether, as the petitioners contend, there should be a hard and fast rule in all cases that the plaintiff must bear the expense of obtaining information as to the names and addresses of class members and that that the District Court should have no discretion in this area.

It would appear from petitioners' argument yesterday, during which petitioner scarcely mentioned this question, that petitioner does not place great weight upon its position on this issue. The petitioner instead appeared to place primary emphasis upon a subsidiary contention, that is that the District Court abused its discretion by requiring the defendant fund to bear the expense of culling out the names of class members from its computer tapes, and that the Court of Appeals erred in affirming the District Court's discretionary determination.

The question of whether the District Court abused this discretion is a rather limited one since, of course, the issue is not what appellate judges would have done in like circumstances but rather was the District Court's determination so clearly erroneous or arbitrary as to constitute an abuse of discretion.

I might note that this Court in fact has usually

declined to even review cases involving discretionary determinations.

In the instant case, as I will more fully discuss in my argument later, the District Court's discretionary determination was well supported by the record in this case, by the applicable discovery rule, and by well recognized commentators on the subject.

QUESTION: You are relying then on the discovery provisions?

MR. RUBY: We say, Mr. Justice Rehnquist, that the District Court had discretion in this case and we believe that the discovery rules are applicable.

QUESTION: Well, if it weren't the discovery rules, what statutory or case authority is there for the District Court to shift the cost of financing a part of the law suit from the plaintiff to the defendant?

MR. RUBY: I only suggest this to you, Mr. Justice Rehnquist: In the Nissan case, which my adversary relies upon heavily, the Court took the position that it did not believe that the discovery rules controlled or governed the question of whether or not the plaintiff or the defendant should obtain the information and who should pay for it; although it did not say that the spirit of those rules and the decisional law under them may offer guidance. It felt, however, that Rule 23(d) was in fact the more appropriate rule.

But I think the important thing from Nissan is that the court in that case, the Fifth circuit, reviewed the decisions in this area and noted that the courts, contrary to what this Court had indicated in Eisen, that is that the cost of preparing and mailing the notice has to under the usual rule be borne by the plaintiff, the courts that had dealt with the question of the identification of class members or the attaining of information thereto had in some cases placed the burden on the plaintiffs and in some cases placed the burden on the defendants because it was recognized there that you were not dealing with the same kind of activity and that the District Courts should have discretion.

And even the Firth Circuit, Mr. Justice Rehnquist, did not set down any hard and fast rule.

QUESTION: Do you think the District Court would have authority if the plaintiff came in and made a motion saying that he had run out of fees to pay his attorney and needed $10,000 to continue to maintain the lawsuit to require the defendant to supply the $10,000 pending the outcome of the lawsuit?

MR. RUBY: Not at all, sir. Not at all. I think this is an entirely different situation.

QUESTION: Well, what happens if he comes in and says I have ordered these records and they cost $17,000 and I only have $7,000?

MR. RUBY: I would say this, Mr. Justice Marshall, that the question would not be whether or not the plaintiff has the money. And we don't take the position that this determination --

QUESTION: You do recognize that back in the good old days the defendant would tell you to go shop, wouldn't he?

MR. RUBY: Yes, he would, sir. Yes, he would. And certainly that is our primary position. I simply wanted to point out, in response to Mr. Justice Rehnquist's question, that even the Firth Circuit in Nissan, which the defendants rely on heavily, recognized that there should be discretion in this area, even if Rule 23(d) were to be appropriate rather than discovery rules.

Since the petitioners do devote a fairly extensive part of --

QUESTION: Mr. Ruby, on the question of discretion, do you think that it was an appropriate exercise of discretion for the trial judge to rely on the fact that since the defendants had taken a position with respect to the proper definition of the class and he agreed with them, that therefore they should pay the cost?

MR. RUBY: I think it was fair, Mr. Justice Stevens. I think, as the Court of Appeals pointed out, the arguments made by the defendants may have been entitled to some consideration, but they did not require a determination that the class

should be defined as the defendants wanted to have it defined. I think this Court has indicated that classes may be defined in various ways, there is no magical one definition necessarily, and I think in a footnote in the Eisen case this Court indicated that it may be permissible for the plaintiff in that case to redefine its class with the specific intention of reducing the costs of notice involved.

I would say this in answer to your question, Mr. Justice Stevens, that if a defendant takes a position and says I want to have a class defined more broadly than the plaintiff does, I think it is fair for a court, as long as you are not dealing with an obviously improper class that the plaintiff was proposing -- and I suggest we did not offer an improper class and I think the Court of Appeals believe that to be the case --

QUESTION: But your class would have excluded people who had in some sort of an equitable sense an equal interest in the recovery?

MR. RUBY: Not necessarily, Mr. Justice Stevens.

QUESTION: They would have paid too much for their shares, wouldn't they?

MR. RUBY: No. I think there is a distinction which even the Court of Appeals noted, that people who were no longer stockholders because they had both bought and sold, might not have been damaged because they might have been --

QUESTION: Oh, I see your point.

MR. RUBY: -- selling during the period. So I would suggest that it was a fair point for the District Court to take into account. I would --

QUESTION: What is your reason for saying that notice and the names of parties should be treated differently?

MR. RUBY: Well, if I may get to that, Mr. Justice White --

QUESTION: Before you do, let me ask you this: You say this is a discretionary powerof the District Court. Now, what factors would enter that discretion? Assume hypothetically that a case were, instead of $16,000, as it is now or it was at the time the case arose, the cost was $100,000, would the judge say as part of his exercise of discretion, well, that is just too much, we won't go that high? Is the cost one factor or what enters into the exercise of discretion?

MR. RUBY: Mr. Chief Justice, I think that the question here is not dissimilar from the problem which faces the District Court any time it is dealing with discovery questions. If a plaintiff seeks to obtain information from the defendant or the other way around, the question of whether or not the burden involved is undue, and I think that is the critical thing, whether it is undue. It is a factor which the District Court must consider, and if we sought to require a defendant or in another case another litigant sought to require his adversary to produce information that cost him $100,000, as you

have indicated, Mr. Chief Justice, it is quite possible that the District Court would say that is an undue burden and would enter some order which would protect the interests of the defendant.

So I think what you are dealing with here is the facts in this case, and I suggest to the Court that based upon the facts in this case, it cannot be said that the District Court abused its discretion.

If I might go on, and in answering Mr. Justice White--

QUESTION: Do you think the court would have it within its power, its discretionary power requirement that the plaintiffs put up a bond sufficient to cover the costs?

MR. RUBY: Yes.

QUESTION: He could have done that here, you think?

MR. RUBY: He was asked to do so. He was asked to do so, because I think he considered the fact that bonds, of course, are onerous, was it really necessary. I think the petitioner indicated in response to a question from Mr. Justice Brennan yesterday that the plaintiffs here had about $25,000 worth of stock. I don't think the District Court felt under the circumstances that it was necessary.

The defendants' argument on this point about the question of a hard and fast rule is based upon the premise that the plaintiff is required in all cases to bear the cost of discovery or obtaining information as to the names and addresses

of class members under Eisen IV as part of his obligation to bear the cost of printing and mailing the notice to the class. Eisen IV, however, did not hold, as defendants erroneously claim, that information as to the names and addresses of class members may not be obtained through discovery, nor did it indicate that the cost of obtaining this information must be borne in all cases by the plaintiff.

In point of fact, Eisen IV did not even deal with the question of allocating the costs of obtaining information as to the names of class members.

Defendants argue, nevertheless, that it is a prerequisite to sending the notice mandated by Eisen IV that plaintiffs obtain the names and addresses of those to whom the notice will be sent and therefore the cost of obtaining this information must be borne by the plaintiff under Eisen IV.

Defendants' argument is not well founded, for several reasons. First, defendants mistakenly assume that simply because it is necessary to obtain the names and addresses of class members prior to giving notice to the class, this information may not be obtained under the discovery rules. If this were true, however, it would also logically follow that information relating to the definition or scope of the class, whether the members of the class can be identified through reasonable effort, what is the best practical notice under the circumstances, all of which presumably must be obtained prior

to giving notice to the class could not be obtained through discovery.

In this very case, discovery was permitted by the District Court without objection by the defendants with respect to these matters and other matters relating to the method and cost of sending notice to the class, and indeed defendants in their reply brief, I believe on page 9, appear to concede the fact that such information may be obtained through discovery.

If plaintiffs are permitted under the discovery rules to obtain information as to all of these matters pertaining to class action requirements, it would be arbitrary, we submit, to hold that the plaintiffs may not obtain information under the discovery rules as to the names and addresses of the class members.

QUESTION: The question though is the cost?

MR. RUBY: Well, I think, Mr. Justice White, that basically what I am saying is that if you were talking about the discovery rules, that the question of the allocation of cost becomes a matter within the discretion of the District Court, and the question is normally whether there is an undue burden or expense.

QUESTION: Maybe so, but the argument on the other side, I suppose -- I imagine, I think it is that the discretion is controlled by Rule 23 policies with repsect to cost.

MR. RUBY: Well, I think there is no authority, Mr.

Justice White, that would suggest that the discovery rules and the policies under the discovery rules should not apply. Even in the Nissan case, as I mentioned before, which is the only court I know which has really suggested that Rule 23(d) rather than discovery rules might be governing the issue, even Nissan says that the discovery rules, the spirit of those rules, the decision in law under them may provide guidance with regard to the question of the allocation of costs. So I would really suggest to the Court that while we believe that the discovery rules are applicable, as the Court of Appeals in its en banc decision found and we have cited authority in our brief supporting that decision, I think the federal discovery rules themselves, the language support our position -- but even if you were to say, as the Nissan court did, that Rule 23(d) should govern, I think it is a distinction without a difference because I think the issue is still whether or not within the discretion of the court there is an undue burden or expense, and that the spirit of the discovery rules would apply anyway.

QUESTION: Why wouldn't Rule 33(c) govern if it is the discovery rules, where it says the burden of deriving or ascertaining the answer is substantially the same for the parties serving the interrogatories for the party served?

MR. RUBY: Well, the Court of Appeals dealt with that, Mr. Justice --

QUESTION: I realize that.

MR. RUBY: -- and I would like to answer your question.

QUESTION: Do you rely on anything other than Judge Hayes' distinction?

MR. RUBY: Well, we rely on first of all the fact that what we are dealing with here is clearly computerized information. We are dealing with computer tapes, we are dealing with computer material --

QUESTION: But isn't it a fact that the defendant would have had to prepare a new program in order to provide you with this information? It isn't as if he could just have a printout on an existing computer system.

MR. RUBY: That is true, Mr. Justice Rehnquist. But in terms of what is the appropriate rule, as you have asked, I think the rules themselves plus the textual commentators I think have recognized, also the advisory committee notes have recognized, that there is a significant difference in how you treat discovery of ordinary business records and how you treat discovery of computerized information.

Of course, in the Second Circuit's en banc opinion, they pointed out that Rule 34 is specifically applicable to the computerized information, and in the opinion the court indicated that unlike Rule 34, Rule 33 was not especially tailored to the discovery problems posed by contemporary computer technology, and then the court also went on to say

that the draftsmen of Rule 34 chose wisely in light of the relative judicial inexperience with discovery problems posed by computer technology not to burden discovery of computerized information with the more rigid principle of Rule 33(c).

QUESTION: Well, h at difference does it really make what the process is? If it costs $16,000, what difference does it make whether it has to be done manually or by computer or by some other method?

MR. RUBY: I think it makes this difference, Mr. Chief Justice. The concept behind Rule 33(c) is that there are records, ordinary business records and that one party, the responding party can simply take these records and turn them over to the discoving party because the burden of going through the records and examining them is the same for both parties. But we are not dealing with that situation here. It is unrealistic to say that we can take their computer tapes, we can take their computerized information as we would take their business records --

QUESTION: Is it true that they don't have that on computer?

MR. RUBY: Mr. Justice Marshall --

QUESTION: Is that true or false?

MR. RUBY: They have the information on the computer tapes but it is necessary for them to add to existing programs in order to extract the information from the computer tapes.

QUESTION: Well, I thought in 1958 -- what was it, 1959?

MR. RUBY: '68 and '69.

QUESTION: Those are not on computer tapes at all?

MR. RUBY: No, sir. I think it is clear from the record in this case and all the decisions that what we are dealing with here is information on computer tapes but, it is quite true that it is necessary to add to existing programs -- now we are not just dealing with some records and some papers, we are dealing with tapes and information on tapes that --

QUESTION: Well, don't you think that when the rule was adopted they were talking about where it existed, it was already programmed and all you had to do was push a couple of buttons? Isn't that what they were talking about?

MR. RUBY: I don't think so, Mr. Justice Marshall.

QUESTION: Can you show me anything that says that is not what they were talking about?

MR. RUBY: Well, let me quote from Professors Wright and Miller's treatise which I think has been fairly well accepted in dealing with these matters.

QUESTION: Do you have anything from Moore?

MR. RUBY: I think that -- no, but if I may I will just quote from Wright and Miller. I don't have -- I don't think Moore dealt with it in the same way that Wright and Miller

did. Wright and Miller say, "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on showing under Rule 26(c) that justice so requires in order to protect himself from undue burden or expense. In many instances, the peculiarities of computerized information actually will oblige the disclosing party to engage in fairly sophisticated electronic manipulation and analysis of the data in his computer system" --

QUESTION: Mr. Ruby?

MR. RUBY: Yes, sir?

QUESTION: Who has this information?

MR. RUBY: The information is in the possession of the defendants' transfer agent.

QUESTION: The transfer agent?

MR. RUBY: Yes, sir.

QUESTION: The transfer agent is not a party to this case, is it?

MR. RUBY: The transfer agent is not a party to this case but has been essentially treated -- and I think the parties have treated him as the defendants' agent.

QUESTION: Well, is that conceded?

MR. RUBY: The defendants have not raised such a question, Mr. Justice Powell.

QUESTION: I am sure that the defendants pay the transfer agent, but to whom does a transfer agent owe its primary duty?

MR. RUBY: I think the defendant.

QUESTION: The defendant?

MR. RUBY: I think the defendant.

QUESTION: What about the holders of the shares?

MR. RUBY: It would be my understanding, sir, that they are employed by and retained by the defendant fund.

QUESTION: Let's assume for the moment that the material you seek were in the hands of a wholly independent party, how would you proceed to get it?

MR. RUBY: I think if the information I were seeking were not in the hands of the defendant and I had treated and they have treated it as in effect being in their hands, you would have a different, a wholly different case because we are proceeding on the basis that we are seeking in effect through discovery --

QUESTION: But you agree, do you, that if information were in the hands of an independent party, you would have to subpoena that and pay any costs that were involved?

MR. RUBY: I think there would be entirely different issues involved. Even where you are dealing with third parties, Mr. Justice Powell, you can seek under federal rules discovery from them, but the District Court would then have to make a

decision in the context of the fact that you are seeking it from a third party having no relationship to either the plaintiff or the defendant. So I would only say you would have a different issue.

And I would only conclude by saying here that we are in a situation here where we have a very different situation than you have where you have ordinary business records.

I see that my time is up and I will only conclude by saying that we believe that the Court of Appeals was correct in holding that there was discretion under the discovery rules and that the District Court did not abuse its discretion and --

QUESTION: Mr. Ruby, just before you sit down, because I didn't quite finish before, what factor is there that supports the exercise of the discretion the way the District judge exercised it, just the fact that there was a lot of money in the fund?

MR. RUBY: No, sir. No, sir. I think what would support their position is the Court of Appeals in reviewing this pointed out two things: They said first of all that --

QUESTION: The defendant opposed the class and there was a relatively small amount of money involved?

MR. RUBY: Well, not a relatively small amount. They said that the burden imposed was not unreasonable in light of the nature of the information sought and the extent and character of the fund's business operations. The Court of

Appeals pointed out that there was not an injustice when you are talking about whether it is an undue burden or expense, it was not an injustice in requiring one whose business is vast and complex to go to proportionately greater lengths, and they also pointed out that it was not unreasonable to demand of the respondent that it employ its computer resources to provide discovery information of a relatively simple nature where, as in this case, the respondent fund makes extensive use of computers in the operation of its business.

So really what they were doing was considering whether the burden was undue, and for those reasons plus the fact that they said it wasn't unreasonable because the defendant had in effect necessitated the costs by opposing the class definition. So it was a combination of those things. And I would support that, given the rather limited consideration here about abuse of discretion that it should not be found that the court abused its discretion.

I would respectfully submit that the Court of Appeals' en banc decision be --

QUESTION: Could I ask just one more question. Would it have cost your clients approximately the same amount of money to get the information from the transfer agent, assuming the defendants had authorized the transfer agent to give you the information?

MR. RUBY: By "the information," Mr.Justice White,

do you mean the raw material?

QUESTION: No, no. I mean furnish whatever it was you wanted the defendants to furnish you, they were going to get it from the transfer agent, I take it?

MR. RUBY: Yes, sir.

QUESTION: And they were the ones who had the information.

MR. RUBY: Yes, sir.

QUESTION: Now, if they had said to the transfer agent, furnish it to the plaintiffs but get the money, get the cost from them, would it have cost you approximately the same amount of money as it would have cost the defendants, $16,000?

MR. RUBY: I can't answer your question other than saying that I have no information that it would cost us more or less. It is possible that because of their relationship with the defendant, it might cost the defendant less, but I do not know.

QUESTION: Well, assuming that it would cost you the identical amount of money, do you still think it is a Rule 34 thing rather than a 33 matter?

MR. RUBY: Yes, sir, I would say that the federal rules and the text writers, I think it is a Rule 34 case.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Berman.

ORAL ARGUMENT OF ALFRED BERMAN, ESQ.,

ON BEHALF OF THE PETITIONERS--REBUTTAL

MR. BERMAN: On the question of what the District Court had before it and what in the way of requests for discovery, the District Court's opinion at the very outset states that plaintiffs have moved for class action treatment of a part of these consolidated cases which consist of both class and derivative claims, certain problems have been raised mainly as to the definition of the class and as to who is to bear certain expenses connected with the giving of notice. That is the issue that the District Court thought he was dealing with. He didn't say we have here a problem in relation to the discovery rule but as to who is to bear the cost of giving notice.

Now, Mr. Ruby says that giving notice doesn't necessarily mean coming up with a list of names and addresses to which the notices are to be sent. But if you are going to start to fragment the giving of notice, then he might as well say Eisen IV, in saying that it is the duty of the plaintiffs to pay for the cost of notice, doesn't say that we have to pay for the cost of printing the letters that are to go to the security holders. They may even have a printing press in their plant, let them print the notices. It merely says that we have to pay the cost of sending the notices. Once you start to fragment what is involved here --

QUESTION: Mr. Berman, could I interrupt, because there is one -- the district judge seemed to place great emphasis on the fact that the defendants' position with respect to the definition of the class was adopted, and since the defendants urged a particular definition they should be responsible, and it is kind of a strange situation. If I understand it correctly, the defendants wanted a larger class than the plaintiffs did, is that correct?

MR. BERMAN: No. There was a shifting about in this sense during the course of the proceedings in the District Court. The plaintiffs, of course, initially asked that the class be defined precisely as it was finally defined in the court's order, that is covering --

QUESTION: Oh, they did. I understood him to say that he asked to exclude those who had sold their shares.

MR. BERMAN: After the decision in Eisen II came down and it became clear that the plaintiffs would have to bear the cost of notice if Eisen III were sustained by this Court, then the plaintiffs tried to diminish the cost and they said, well, let's drop out all those shareholders who --

QUESTION: Sold their shares.

MR. BERMAN: -- are no longer shareholders.

QUESTION: Now, why did the defendants oppose that?

MR. BERMAN: And the defendants opposed it because, as they read Eisen IV, Eisen IV said it is an unambiguous

requirement of Rule 23 that members of the class receive no individual notice, and it --

QUESTION: Well, that is how the class has been defined, but I am asking why did the defendants -- it is normally in the defendants' interest to have a smaller class because their potential for liability is smaller.

MR. BERMAN: In fact, the defendants --

QUESTION: Why did they oppose a smaller definition of the class in this case?

MR. BERMAN: Because we felt, as the District judge concluded, that this was an arbitrary and unreasonable exclusion of those who were properly in the class and if we proceeded on that basis --

QUESTION: Could the District Court have reasonably inferred that you thought this might impose an additional notice caused on the plaintiffs and therefore possibly win the lawsuit?

MR. BERMAN: Well, I can't see how he could, in view of his saying that this is an arbitrary reduction of the class and I will not do it.

QUESTION: The defendants really wanted to try to protect the benefits of these fringe members of the plaintiffs' class, protect the interests of those members of the class who would be excluded by narrowing the definition?

MR. BERMAN: Well, it seemed to us that the District

judge having concluded that it would be an abirtary exclusion that he couldn't sustain, then to turn around and say to us now you pay for it because you raised the question with which I have reached agreement and therefore you pay for it for --

QUESTION: It is just sort of an interest in symmetry. It would have been arbitrary to exclude them, that is the only reason, there was no financial gain for the defendants by narrowing the claim?

MR. BERMAN: No. In fact, the defendants then suggested to the judge narrow the claim --

QUESTION: I mean by broadening the class, by broadening the class.

MR. BERMAN: -- the defendants suggested to the judge, narrow the class to just the year 1968 because there can't be any question that our prospectus for 1969 gave the kind of information they were talking about, and the judge said, well, I don't think I will, I think I will keep it at those two years because the subsequent prospectus gave still more information and I think it is at least arguable or it is a triable issue that perhaps the '68 prospectus was not -- the '69 prospectus was not adequate.

So we had ourselves suggested the narrowing it to the one year, but the judge felt that it was not proper in the circumstances. So we were not trying to keep it as expensive as possible, it would have been less expensive --

QUESTION: But once the time frame had been established, you wanted to keep it -- between the two alternatives within the given time frame, you wanted the larger class?

MR. BERMAN: We thought we would all be vulnerable if we proceeded by this arbitrary narrowing of the class, that at some point in the proceeding we would be told that it was wrong and it had to be done all over again with added expense for everybody.

Now, there has been some suggestion by my opponent that the Nissan decision does not actually hold that the cost of assembling the names and addresses must be borne by the plaintiffs, and in our reply brief, since he has made that point in his, we say that this contention ignores Nissan's statement at 552 F. 2d 1102, reading, "Upon commencing a class action, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members as well as paying the cost of their individual notice." So it says it as plainly as English would seem to be able to say it, that they must bear the cost of identifying the class members and, of course, the whole thrust of the decision is to that effect.

Now, a very important point that I would like to mention to the Court, although I assume that it senses it is, that if the en banc Circuit Court of Appeals decision is to be accepted with the type of reasoning set forth therein as to

the duties of one who has computerized information and has to engage in furnishing devices to unlock it and so forth, if that goes on and the costs have to be borne by the respondent, there is going to occur a very significant broadening of the discovery rules and procedures at a time when there is great demand from the bench and the bar for a narrowing of discovery procedures and to do away with the obvious abuses that have been taking place in the discovery field.

QUESTION: Isn't there a committee of the Judicial Conference addressing itself to that problem?

MR. BERMAN: There is indeed, Your Honor.

QUESTION: Wasn't that the appropriate place to solve the problem?

MR. BERMAN: That is my thought, too, Your Honor, and we cite some --

QUESTION: One of us is a member of that, so there is no use arguing to us. There is only one member and that is the Chief Justice.

MR. BERMAN: Again, we find --

QUESTION: Any rules they change must be passed upon by the entire Court though.

MR. BERMAN: That is a useful precaution, I would think.

Again, there is a consistence by the plaintiffs' counsel --in talking about computerized information --

QUESTION: Mr. Berman, may I ask one more question about the alternative definitions of the class? Do I correctly understand that if the plaintiffs' version had been accepted rather than the defendants' version, most of this cost would have been avoided?

MR. BERMAN: What was accepted was plaintiffs' initial --

QUESTION: I understand, but you know what I am talking about.

MR. BERMAN: -- but what was accepted was plaintiffs' language with a modified request.

QUESTION: Yes.

MR. BERMAN: Yes, if their request had been accepted and you disregarded the then 18,000 shareholders --

QUESTION: People who had sold.

MR. BERMAN: -- who had sold, which incidentally by now, of course, as I mentioned yesterday, there were many times that amount, since there had been some 43 million shares --

QUESTION: Then the notice problem would have been relatively simple?

MR. BERMAN: Then it would have been relatively simple because you have narrowed it to a much smaller group.

QUESTION: And because they would have been identified on the existing list, that is the main point.

MR. BERMAN: But of course, that is assuming that it

didn't also go to all the non-class members who were shareholders who would then decide that there was a lot of wickedness going on here and accelerate the rush for redemption of shares with great harm to the enterprise, and so forth.

Again, there is an ignoring of the fact that the basic important records that would have to be resorted to by the transfer agent, as I said yesterday, and I hope you will forgive the repetition, are those paper ledger sheets, not tapes, that they have to start with, those transactions, those daily transaction sheets which were recorded in '68 and '69, every sale and every purchase and every transfer of shares. The transfer agent said it would be great work to get them out of the warehouse, but we will get those out of the warehouse and we will then proceed to have these keypunch operators, we are going to hire a keypunch machine, hire operators and they are going to have to make a card for each purchase of shares and we have estimated that there are 300,000 such transactions, 300,000 keypunch cards will have to be prepared, and from those cards we will then proceed to make magnetic tapes and then those magnetic tapes which will have those transactions and the account numbers will then combine with other magnetic tapes and go on and after eight programs we will have the list we finally want.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The

case is submitted.

[Whereupon, at 10:54 o'clock a.m., the case in the above-entitled matter was submitted.]

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