The Burger Court Opinion Writing Database

Oppenheimer Fund, Inc. v. Sanders

437 U.S. 340 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 23, 1978

Dear Lewis:

Re: 77-335 Oppenheimer Fund Inc. v. Sanders

I join.

Regards,

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1978

RE: 77-335 - Oppenheimer Fund v. Sanders

Dear Lewis:

Your changes give me no problem, and I remain "joined."

Regards,

WEB/ss

Mr. Justice Powell

cc: Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1978

Re: No. 77-335, Oppenheimer Fund, Inc. v. Sanders

Dear Potter and Lewis,

I voted at conference to affirm the judgment below, largely because I thought this case governed by the discovery rules and because I thought the imposition of class identification costs on the petitioner was within the bounds of discretion afforded by those rules. I have since come to feel less strongly about this, and am willing to be convinced that petitioners made a proper tender of the requested information under Rule 33, which shifted the cost of programming back to the respondent.

I do think Potter is correct to question whether this case should turn on Rule 23 or on the discovery rules simpliciter. I think Rule 23 very clearly requires identification information to be produced. While such information does not relate to the merits of the plaintiff's claim, it is, given the procedural requirements of Rule 23, as relevant to the resolution of a class lawsuit as information relating to the merits of the claim. Not only is the identity of class members necessary to distribute any ultimate damages relief, but it is necessary if the trial judge is to make a proper assessment of the propriety of class treatment, the need for sub-classing, etc. I see little to commend a system where identification information is treated distinctly from all other discoverable information. Moreover, I think our very busy trial judges will be appalled that they are now saddled with the necessity to get involved in pre-trial discovery orders when we have an elaborate skein of discovery rules that are (or at least can be) effective and efficient means for producing needed information. Certainly the discovery rules reflect the assumption that

it is generally better to allow discovery to be self-executing, than to have it under the close supervision of the trial judge.

For the reasons stated above, I would be prepared to join at least most (and maybe all) of an opinion which held that identification information is discoverable and that the allocation of costs is to be worked out by applying those rules to the facts of this case.

Sincerely,

Bill

Mr. Justice Stewart

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1978

RE: No. 77-335 Oppenheimer Fund v. Sanders

Dear Lewis:

I agree.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 18, 1978

Re: No. 77-335, Oppenheimer Fund, Inc. v. Sanders

Dear Lewis,

Your opinion holds that Rule 23, rather than the discovery rules, is the source of a District Court's authority to require a defendant to cooperate in the task of identifying class members, but that a court's discretion in framing an "appropriate" order under Rule 23(d) should be informed by the "principles embodied in the discovery rules for allocating the performance of tasks and payment of costs ...." I do not irrevocably disagree with this approach, but it seems to me that your discussion of the import of certain discovery rules is somewhat misleading, and that the two approaches do produce significantly different practical consequences.

The discovery rules do reflect the general rule that each party is required to bear his own costs of litigation. But responding to reasonable discovery requests is one such cost, and nothing in the discovery rules expressly provides for a "shifting" of those costs. A party has an automatic duty to comply with discovery requests unless he obtains an order under Rule 26(c) protecting him from "annoyance, embarrassment, oppression, or undue burden or expense." Moore, and the cases he collects in ¶ 33.20 of his Treatise, emphasize that mere expense is not a valid objection to an interrogatory if the information sought is relevant and material.

I do not think that Rule 33(c) can be said to provide, as your opinion suggests, that a "party whose case would be furthered must perform the task [of gathering information] and thus bear the expense." It simply provides that "it is a sufficient answer to [an] interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity" to gather the information he wants. This is an option

Wm Brennan

077

that a responding party has without resort to a court order, and without regard to any exercise of judicial discretion under Rule 26(c).

If the serving party believes that a tender of documents under Rule 33(c) is an "evasive or incomplete answer" to his interrogatory, his remedy is to seek an order compelling discovery under Rule 37. Thus I think it is misleading to say that, in the usual discovery context, Rule 33(c) "does not allow a [responding] party ... to force the serving party to undertake research that [he] could undertake more readily himself," or that such cases call for an exercise of discretion under Rule 26(c) to determine "whether the answering party or the beneficiary should bear the cost of the research that the answering party must perform."

In short, in the usual discovery situation the answering party must respond in some appropriate form without the necessity for any court order. And it is implicit in this self-executing scheme of the discovery rules that the responding party will ordinarily bear the costs of responding to reasonable discovery requests. The burden is placed squarely on him to seek a protective order, which will be appropriate only if a particular request is found to be oppressive or unduly burdensome.

Two important practical consequences flow from the holding that the identity of class members is not discoverable: first, a court order under Rule 23(d) will always be necessary before a defendant is under a duty to provide the information in any form; and second, the usual presumption will be that the cost will be borne by the requesting party, not, as in the discovery situation, by the responding party. Because the court will be framing an "appropriate" order for notice to the class as an original matter, rather than ruling on a request for a protective order or on a motion to compel discovery, it will have considerable leeway to "order the defendant to perform the task if his own interests would not be prejudiced thereby," or to consider whether certain expenses "may be so insubstantial as not to warrant the effort required to calculate and impose [them] on the representative

plaintiff." But, for the reasons stated above, it seems to me misleading to suggest that this breadth of discretion is derived directly from the discovery rules.

I agree that it makes no difference in this case whether the order is evaluated under Rule 23 or Rule 33, since the tender of documents was an appropriate response on either approach, but it might make a difference in other cases. To the extent that this is so I wonder whether it is not an exercise in formalism to hold that one particular type of request for information is not governed by the discovery rules simply because of the plaintiffs' reason for requesting it. As you acknowledge in notes 13 and 18, much information about the potential class is properly discoverable for other purposes. And it would seem that the identity of class members is always relevant to the scope of relief to be granted, which is an ultimate question to be litigated in the case. Should it make a difference, for purposes of allocating the costs of gathering the information, that a plaintiff asks who was injured by the allegedly wrongful acts, rather than who the members of the potential class are?

I would be interested in knowing the views of those who voted at Conference that the information requested in this case is discoverable, but that the Court of Appeals' decision was incorrect under Rule 33.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 19, 1978

Re: No. 77-335, Oppenheimer Fund, Inc. v. Sanders

Dear Lewis,

I seem sometimes to have an instinctive talent for choosing the wrong word, and apologize for the word "misleading" if it caused offense. My basic concern simply is that in applying principles gleaned from the discovery rules to a procedure that "is not normal discovery" we might cause some misunderstanding in the world of "plain vanilla" discovery because of the difference in approach and emphasis.

Perhaps my thoughts, such as they are, can best be summarized as a tentative conclusion that the discovery rules provide a less useful source for Rule 23 notification practice than I at first had thought. If so, then perhaps the procedure we settle on should be based more discretely either on Rule 23 as such or on discovery as such.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 30, 1978

No. 77-335, Oppenheimer Fund

Dear Lewis,

The proposed revisions enclosed with your letter of May 29 would substantially resolve my difficulties with this opinion. If you are able to incorporate these revisions, I shall be glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copy to Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1978

No. 77-335, Oppenheimer Fund v. Sanders

Dear Lewis,

I am glad to join your opinion for the Court, as recirculated today.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 18, 1978

Re: 77-335 - Oppenheimer Fund, Inc.,
v. Sanders

Dear Lewis,

I join your opinion in this case with a minor comment or two. On page 17, I have some problem with the reach and impact of the last 9 words of the second sentence of the paragraph beginning on that page. Wouldn't the defendant always be prejudiced by helping plaintiff with his case?

Also, with respect to footnote 27 on page 17, the class notice may be bulky and require larger envelopes and more postage. I would think the defendant stays on the hook for these amounts.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 31, 1978

Re: No. 77-335 — Oppenheimer Fund

Dear Lewis:

Although I much prefer your initial effort, if you can live with these revisions I shall go along.

Sincerely,

Mr. Justice Powell
The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 6, 1978

Re: 77-335 - Oppenheimer Fund, Inc.
v. Sanders

Dear Lewis,

I am still with you.

Sincerely yours,

Byron

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1978

Re: No. 77-335 - Oppenheimer v. Sanders

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1978

Re: No. 77-335 - Oppenheimer Fund, Inc. v. Sanders

Dear Lewis:

Please join me.

Sincerely,

HAB.

Mr. Justice Powell

cc: The Conference

To: The Chief ...
Mr. Justice ...nan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 17 MAY 1978

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-335

Oppenheimer Fund, Inc., et al., Petitioners, v. Irving Sanders et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents are the representative plaintiffs in a class action brought under Fed. Rule Civ. Proc. 23 (b)(3). They sought to require petitioners, the defendants below, to help compile a list of the names and addresses of the members of the plaintiff class from records kept by the transfer agent for one of petitioners so that the individual notice required by Rule 23 (c)(2) could be sent. The Court of Appeals for the Second Circuit held that the federal discovery rules, Fed. Rules Civ. Proc. 26–37, authorize the District Court to order petitioners to assist in compiling the list and to bear the $16,000 expense incident thereto. We hold that Rule 23 (d), which concerns the conduct of class actions, not the discovery rules, empowers the District Court to direct petitioners to help compile such a list. We further hold that, although the District Court has some discretion in allocating the cost of complying with such an order, that discretion was abused in this case. We therefore reverse and remand.

I

Petitioner Oppenheimer Fund, Inc. (Fund) is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U. S. C. § 80a *et seq.* The Fund and its agents sell shares to the public at their net asset value

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 18, 1978

No. 77-335 Oppenheimer Fund v. Sanders

Dear Potter:

Thank you for writing so fully about my opinion. I must say, however, that however erroneous one may deem it to be, I am a bit surprised to have it characterized three times as "misleading". Apart from this, I now make a point by point response.

1. I will address your last point first: In my view it is not "an exercise in formalism to hold that one particular type of request for information is not governed by the discovery rules simply because of the plaintiffs' reason for requesting it." Letter at 3. If it were, then the district courts would be powerless to prevent serious abuses of the discovery rules, as where parties seek discovery for use in proceedings other than the pending suit, or to delay trial, or to embarrass or harass another party. It is settled, however, that a district court can and should consider whether a party seeks information because it bears on an issue in the case, or for some other, impermissible reason. See cases cited in my opinion at 12 n. 17; 4 J. Moore, Federal Practice ¶ 26.69, pp. 26-499 to 26-500.

You also suggest that the names and addresses of class members should be discoverable because they "always [are] relevant to the scope of relief to be granted, which is an ultimate question to be litigated in this case." Letter to 3. If I correctly understand your theory, there are three reasons why I disagree with it. First, it depends on a bootstrap argument just as much as the Court of Appeals' theory, which I believe you reject. The scope of relief cannot arise until it is determined that the action properly may proceed as a class action. But the suit cannot proceed as a class action until the plaintiff obtains the names and addresses of the class

members and sends the class notice. Compare my opinion at 13 & n. 19. Second, respondents themselves never pretended to be anticipating this "potential issue." Compare id., at 13. Third, if the plaintiffs in this case had argued that they sought this information because it was relevant to the scope of relief, the district court almost certainly would have been required to postpone discovery on this issue until the trial on liability was completed and it was determined that the defendants were in fact liable. See 4 J. Moore, Federal Practice ¶ 26.56[5].

In short, I do not think that we would adopt a mere "formalism," if adhering to the Rules as written ever can be characterized as such. Instead, we would reject a fiction that could only lead to further abuse of the discovery rules.

2. Your letter states that my opinion includes a "misleading" statement with regard to Rule 33(c):

> "I do not think that Rule 33(c) can be said to provide, as your opinion suggests, that a 'party whose case would be furthered must perform the task [of gathering information] and thus bear the expense." Letter at 1, quoting opinion at 16.
>
> "I think it is misleading to say that, in the usual discovery context, Rule 33(c) 'does not allow a [responding] party . . . to force the serving party to undertake research that [he] could undertake more readily himself,' or that such cases call for an exercise of discretion under Rule 26(c) . . ." Letter at 2, quoting opinion at 16.

The statement which you characterize as "misleading" reflects my own view of a proper application of the rules. It also is supported by the Advisory Committee's Notes to Rule 33(c), 28 U.S.C. App., p. 7793, where it is said:

> "[This] subdivision gives the party an option to make the records available and place the burden of research on the party who seeks the information. 'This provision . . . places the burden of discovery upon its potential benefitee,' Louisell, Modern California Discovery, 124-125 (1963), and alleviates a problem which in the past has troubled Federal courts. [cite] The interrogating party is protected against abusive

> use of this provison through the requirement that the burden of ascertaining the answer be substantially the same for both sides. . . . At the same time, the respondent unable to invoke this subdivision does not on that account lose the protection available to him under new Rule 26(c). . ."

Even if one disagrees, my statements hardly could be viewed as "misleading".

3. You state that under the discovery rules, a "party has an automatic duty to comply with discovery requests unless he obtains an order under Rule 26(c)." Letter, at 1 "[I]t is implicit in this self-executing scheme of the discovery rules that the responding party will ordinarily bear the costs of responding to reasonable discovery requests." Id., at 2. You then argue that two consequences will flow from holding that the information sought in this case is not discoverable:

> "first, a court order under]Rule 23(d)] will always be necessary before a defendant is under a duty to provide the information in any form; and second, the usual presumption will be that the cost will be borne by the requesting party, not as in the discovery situation, by the responding party." Letter at 3.

I do not disagree with your description of how the discovery rules operate, nor do I think our opinion can be read as calling that description into question.* But as to the two consequences that you think will flow from my holding, we do differ:

First, I see no objection to requiring a court order under Rule 23(d) before a defendant must provide the identities of class members to whom notice must be sent. The parties already will be before the court, which must approve the definition of the class, the method of sending notice, and the form of the notice, before notice is sent. As this case and all the other cases dealing with obtaining identities of class members demonstrate, the identification

*We make it clear that a Rule 26(c) protective order only can be entered "for good cause shown." Opinion 17 n. 12.

problem naturally is dealt with as part and parcel of the other class-action problems. Often, the problem is one of large proportions, quite unlike the usual self executing discovery request under Rule 26. In any event, the desire to economize judicial time - which is the reason for making the discovery rules "self-executing," see 4 J. Moore, ¶ 26.02 - would not be furthered by their application in this situation.

In addition, the district court always will have to pass on requests to require the defendant to perform tasks necessary to sending notice other than identification; the "self-executing" discovery rules have no possible application to those tasks. I see no reason why the identification tasks should be treated any differently. Finally, after it is held that identities may be obtained under Rule 23(d), defendants will have no ground to oppose such requests, unless they are burdensome. Thus, as a practical matter, the holding here will add little to the burden on the district courts.

As to your second point, the opinion does not say that "the usual presumption [under Rule 23(d)] will be that the cost will be borne by the requesting party, not, as in the discovery situation, by the responding party." I think my language at 17-18 makes it sufficiently clear that the question under Rule 23(d) will be whether to leave the cost where it falls - on the defendant - or shift it back to the representative plaintiff. I certainly make it clear that the usual justification for leaving a substantial burden on the defendant are less likely to be present in this context than under normal discovery. Opinion 17-18. This simply is a function of the fact that this is not normal discovery. Because the information sought does not bear c- issues in the case, it is unlikely that the defendant "would need the information sought to prepare his own case or that he, as well as the [opposing] party, would benefit from having assembled it." Id., at 18.

You state further that it is "misleading to suggest that [the] breadth of discretion [under Rule 23(d) is derived directly from the discovery rules." Letter at 3. But even under the discovery rules, "The district Cour has a broad discretion in deciding whether to require answers to interrogatories," or to enter some form of protective order. 8 Wright & Miller, p. 557. Moreover, m opinion makes it clear that we are drawing on principles that are embodied in the discovery rules; we are not adopting those rules. It would be unwise to try to

anticipate every situation that may arise when a district court is asked to order the defendant to perform one of the tasks necessary to send notice, or to suggest whether or exactly how an analogy to principles in the discovery rules might apply to those situations.

4. Miscellaneous points: You state that "nothing in the discovery rules expressly provides for a 'shifting' of costs." Letter at 1. I view the rules quite differently. Rule 26(c) provides that the district court "may make any order which justice requires to protect a party . . . including . . . (2) that the discovery be had only on specified terms and conditions . . ." It is settled that this provision authorizes the district court to condition discovery on the payment of costs by the discovering party. 4 J. Moore, ¶ 26.77; 8 Wright & Miller pp. 277-278.

Your letter also states that 4 J. Moore ¶ 33.20 "emphasize[s] that mere expense is not a valid objection to an interrogatory if the information sought is relevant and material." I view Moore's own summary (cited in the opinion at 17 n. 26) as a more accurate statement:

> "All interrogatories are burdensome and expensive to some degree, and the question is just how much burden and expense is justified in the particular case. If the interrogated party has to go into the matter in any event, in order to prepare his own case, there is usually no reason why he should not furnish the information to his adversary; on the other hand, a party should not be compelled to prepare his adversary's case for him."

4 J. Moore, ¶ 33.20, pp. 33-113-33-114. See also 8 Wright & Miller, p. 550:

> "As a general rule a party in answering interrogatories must furnish information that is available to him and that can be given without undue labor and expense. However a party cannot ordinarily be forced to prepare his opponent's case."

* * * * *

According to my notes, the vote at the Conference on March 3, was 7 to 1 to reverse. Thurgood, absent on the 3rd, also voted to reverse in his letter of March 6.

Although the discussion was not particularly full, my notes indicate a range of views. As you put it, the majority opinion of CA2 was an "end run" around Eisen. You thought that "to the extent discovery rules apply", Rule 33 is relevant. Bill Rehnquist said that Rule 33 was amended to prevent a plaintiff from imposing the expense of copying records upon the defendant. John Stevens emphasized a view, expressed by several of us, that "it is the plaintiff's burden to prepare his own case - a principle applicable to any law suit".

There was a difference of opinion as to whether in a class action suit we looked first to Rule 23 or to Rule 33. After considerable study, it seems to me that Rule 23 governs. It was adopted specifically for class actions, and vests broad discretionary powers in the district court. But, as CA5 held in Nissan Motor, in making orders under the authority granted by Rule 23, a district court may be informed by the principles embodied in the discovery rules - particularly Rules 26(c) and 33(c).

I drafted the opinion in light of the foregoing considerations. If you have specific suggestions, I would be happy to consider them.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1978

No. 77-335 Oppenheimer Fund

Dear Potter and Bill:

I would like to get this case off of "dead center" if we can find common ground. I now have "joins" from the Chief and Byron, and have heard nothing from Bill Brennan, Thurgood, Harry or John.

I have your letter, Bill, making suggestions that I much appreciate. Although I am not entirely sure as to Potter's position, I take it that you and he are fairly close together.

In any event, I have attempted a revision of my opinion beginning with the second paragraph of Part II-B on page 15 ["It is settled law . . ."] and ending with the end of that subpart on page 18. As rewritten, this subpart says a good deal less about practice under the discovery rules than did my original version. It also makes clear that the analogy to such rules is a "rough" one. At the same time, I have continued the thought that although Rule 23(d) controls, a district court may draw some guidance from Rule 26(c) and particularly 33(c). I have thought that this was about where a majority of us ended up at Confernce.

In proposed new footnote 24, I meet Potter's point (well taken) that we should make clear that the discovery rules are self executing, whereas Rule 23 presents a different situation.

If I could satisfy both of you along the lines of the enclosed revision, I would submit it to Byron and the Chief before recirculating.

Sinerely,

Mr. Justice Stewart
Mr. Justice Rehnquist

lfp/ss

May 30, 1978

No. 77-335 Oppenheimer Fund

Dear Chief and Byron:

In an effort to get this case off of "dead center" I have had conversations with Potter and Bill Rehnquist.

I was pleased to find that their views really are not substantially different, as I understand them, from those expressed in my first circulation. Their only problem was with some of the language in Part II-B (p. 15, et seq.). They thought that my draft appeared to rely too heavily on the discovery rules, although they agree that a "rough analogy" might be drawn to the practice under Rule 33(c) in particular.

In sum, the difference between us is one of emphasis. Accordingly, I have prepared a proposed revision of my opinion beginning with the second paragraph of Part II-B on page 15 ["It is settled law . . ."] and ending with the end of that subpart on page 18. I enclose two copies of this revision.

You will note that, as revised, I say a good deal less about practice under the discovery rules than in my first draft. Also, conforming to the suggestion of my Brothers, I have made clear that the analogy I draw is a "rough" one. But I do not view the changes to be substantive. I still think that the opinion, as revised, would leave a district court with sufficient flexibility to deal with almost any situation.

If you approve of this revision, I will incorporate it - and recirculate promptly. This would give us a Court.

Sincerely,

The Chief Justice
Mr. Justice White

lfp/ss

pp. 9, 15-18, 21

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 5 JUN 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-335

Oppenheimer Fund, Inc., et al., Petitioners, *v.* Irving Sanders et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents are the representative plaintiffs in a class action brought under Fed. Rule Civ. Proc. 23 (b)(3). They sought to require petitioners, the defendants below, to help compile a list of the names and addresses of the members of the plaintiff class from records kept by the transfer agent for one of petitioners so that the individual notice required by Rule 23 (c)(2) could be sent. The Court of Appeals for the Second Circuit held that the federal discovery rules, Fed. Rules Civ. Proc. 26–37, authorize the District Court to order petitioners to assist in compiling the list and to bear the $16,000 expense incident thereto. We hold that Rule 23 (d), which concerns the conduct of class actions, not the discovery rules, empowers the District Court to direct petitioners to help compile such a list. We further hold that, although the District Court has some discretion in allocating the cost of complying with such an order, that discretion was abused in this case. We therefore reverse and remand.

I

Petitioner Oppenheimer Fund, Inc. (Fund) is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U. S. C. § 80a *et seq.* The Fund and its agents sell shares to the public at their net asset value

Pp. 6, 16, 21

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

3rd DRAFT

Circulated: _____

Recirculated: 14 JUN 1978

SUPREME COURT OF THE UNITED STATES

No. 77-335

Oppenheimer Fund, Inc., et al., Petitioners, *v.* Irving Sanders et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents are the representative plaintiffs in a class action brought under Fed. Rule Civ. Proc. 23 (b)(3). They sought to require petitioners, the defendants below, to help compile a list of the names and addresses of the members of the plaintiff class from records kept by the transfer agent for one of petitioners so that the individual notice required by Rule 23 (c)(2) could be sent. The Court of Appeals for the Second Circuit held that the federal discovery rules, Fed. Rules Civ. Proc. 26–37, authorize the District Court to order petitioners to assist in compiling the list and to bear the $16,000 expense incident thereto. We hold that Rule 23 (d), which concerns the conduct of class actions, not the discovery rules, empowers the District Court to direct petitioners to help compile such a list. We further hold that, although the District Court has some discretion in allocating the cost of complying with such an order, that discretion was abused in this case. We therefore reverse and remand.

I

Petitioner Oppenheimer Fund, Inc. (Fund) is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U. S. C. § 80a *et seq.* The Fund and its agents sell shares to the public at their net asset value

Jim - What do you think?,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 26, 1978

PERSONAL

Re: No. 77-335 - Oppenheimer Fund v. Sanders

Dear Lewis:

Following up on our phone conversation earlier this week, here are the two or three ideas I talked with you about in connection with this case. The suggestions are obviously somewhat rough, and if you are disinclined to use them my feelings will not be hurt at all. My attempt has been to suggest a form of specific response to Potter's observations, without detracting from your desire (which I suspect is shared not only by me but by Potter) that the opinion should not lend itself to use for either undermining Eisen or further loosening what few limits there are on discovery.

The major change which I offer is a substitution of the following language for the present language on pages 15 through 17, beginning with the paragraph "It is settled law . . ." and ending with the language in the 7th line of page 17 "sending of notice":

"That portion of the Rules dealing with discovery proceeds on the assumption that in the first instance discovery shall be made by one party upon notice or request by another without intervention by the Court, and the cost of making such discovery is normally to be on the responding party. If the responding party wishes to shift the initial payment of such

cost, he must seek a protective order from the Court pursuant to Rule 26. Rule 33(c) provides a means whereby the responding party may shift some of the effort and expense of answering interrogatories to the requesting party, where the burden of examining the business records of the responding party is substantially the same as that which would be encountered by the requesting party in answering the interrogatories. Similarly to Eisen IV, this provision places "the burden of discovery upon its potential benefitee." 24/ Nissan quite clearly applies this principle in the context of Rule 23(d). See pp. 7-8, supra.

If the requesting party believes that the tender of documents pursuant to Rule 33(c) is an "evasive or incomplete answer" to his interrogatory, he may seek an order from the Court compelling discovery pursuant to Rule 37. Although a variety of factors may inform the exercise of the Court's discretion where it is called upon to intervene in the discovery process and allocate burdens and expenses, a district court may not stray too far from the fundamental principle that a responding party may not be conscripted by a requesting party into expending time, effort, and money in making discovery which would benefit only the requesting party.

Since it is a great deal less likely that a defendant's provision of names and addresses of a plaintiff class, for the performance of other tasks necessary to the sending of notice under Rule 23, will be of any benefit to itself than will its answering of interrogatories or requests for admission under the discovery rules, the general principle of discovery that the responding party must bear the expense of the response cannot be carried over unchanged to the acquisition of information for Rule 23 purposes. But the same sort of exercise of informed discretion which governs the application of Rule 26 can and should be brought to bear in the administration of Rule 23(d). When a defendant can perform a task necessary."(Back to page 17 of your circulating first draft).

Sincerely,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1978

Re: No. 77-335 Oppenheimer Fund v. Sanders

Dear Lewis:

Please join me.

Sincerely,

Wm

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

June 12, 1978

Re: 77-335 - Oppenheimer Fund v. Sanders

Dear Lewis:

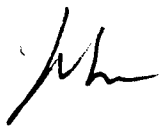
With apologies for my long delay in responding to your most recent circulation, I am now prepared to join if you will make two very trivial changes.

First, on page 6 line 1, could you omit the word "interlocutory" or perhaps rephrase the sentence? Since the appeal is under 1291, we treat the order under review as though it were final.

Second, and of only slightly more importance, in lines 9 and 10 on page 16 where you describe the option under Rule 33(c), could you insert qualifying language such as this?

> ". . . the responding party has the option of specifying the records containing the answer and producing those records for examination . . . ."

Respectfully,



Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 13, 1978

Re: 77-335 - Oppenheimer v. Sanders

Dear Lewis:

Please join me.

Respectfully,

JPS

Mr. Justice Powell

Copies to the Conference