OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HOFFMANN-La ROCHE, INC., Petitioner V. RICHARD SPERLING, ET A

CASE NO: 88-1203

PLACE: WASHINGTON, D.C.

DATE: October 2, 1989

PAGES: 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

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HOFFMANN-La ROCHE, INC., :

Petitioner :

v. : No. 88-1203

RICHARD SPERLING, ET AL. :

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Washington, D.C.

Monday, October 2, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

JOHN A. RIDLEY, ESQ., Newark, New Jersey; on behalf of the Petitioner.

LEONARD N. FLAMM, ESQ., New York, New York; on behalf of the Respondent.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 88-1203, Hoffmann-La Roche, Inc. v. Richard Sperling.

Mr. Ridley.

ORAL ARGUMENT OF JOHN A. RIDLEY

ON BEHALF OF THE PETITIONER

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

This matter involves an action brought pursuant to the Age Discrimination and Employment Act. Under that statute, joinder in the suit by perspective plaintiffs is governed by Section 16(b) of the Fair Labor Standards Act, which requires these individuals to file a consent to join action with the court.

The issue before the Court is whether any ascertainable source of judicial power exists to permit the district court, as the district court itself here put it, to offer the mechanisms of judicial process to aid Plaintiffs in filling their class with all its possible members. Specifically, the district court here facilitated Plaintiff's solicitation effort in several ways. It compelled Hoffmann-La Roche to disclose to Plaintiffs the names and addresses of all those persons who Plaintiffs considered to be similarly situated, solely for the purpose of inviting them to assert money damage

claims against Roche.

QUESTION: Would they -- would the Plaintiffs eventually have been able to get that by discovery anyway, do you think?

MR. RIDLEY: Your Honor, that is uncertain, and of course, the district court here entered its order exclusively on the basis of facilitating the solicitation of claims.

QUESTION: Without treating it as a discovery matter yet.

MR. RIDLEY: That is correct, Your Honor. It directed -- in addition to compelling the disclosure, the court also directed the Plaintiffs to send notice to those persons with the notice, expressly stating that it had been authorized by the court.

In my argument this afternoon I would like to make three principal points.

QUESTION: Did you say they did three things? The court did three things?

MR. RIDLEY: Well, Your Honor, the court did three things --

QUESTION: It ordered the names, it ordered the -- it authorized the notice --

MR. RIDLEY: That is correct. It reviewed and authorized the notice.

QUESTION: And what else?

MR. RIDLEY: And it put its imprimatur on the notice which was to be sent out.

QUESTION: Did the Plaintiffs pay for the notice?

MR. RIDLEY: They would have paid for the notice. It was not to be sent out by the clerk of the court or the clerk, the court itself, although that had been the Plaintiffs original request to the court.

QUESTION: Mr. Ridley, we have a good microphone system here. I don't think you need to speak quite as loud.

MR. RIDLEY: I apologize for the Court.

In my argument this afternoon, I would like to make three principal points. First, judicial facilitation of notice is inconsistent with basic principles of judicial restraint and neutrality. Second, no authority for judicial facilitation can be gleaned from either the FLSA or the ADEA. And third, the attempt by the Plaintiffs here to rely on the court's inherent power or to engraft a notice provision onto the Federal Rules of Civil Procedure, and in particular Rule 83, must fail.

QUESTION: Mr. Ridley, you don't refer, I think, to Rule 16 of the Federal Rules in your brief. That rule provides that the district court may adopt special procedures for managing potentially difficult actions that may involve multiple parties. Do you think that rule might have some bearing on this matter?

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MR. RIDLEY: Your Honor, there has never been a suggestion as I recall it in the papers below that that rule would govern the situation, and I submit that that would be a rule which would involve the regulation of the action by the district court, as opposed to the facilitation of the joinder of new parties not necessary to the action into the action.

The Plaintiffs, in effect, concede here that due process does not mandate notice. And virtually every court which has addressed the issue has held expressly that notice is not required by due process in Section 16(b) cases. This is, of course, because non-parties are not bound by the judgment of the court in 16(b) cases. Moreover, potential opt-ins in these cases are not necessary parties, and their joinder is not required for the just adjudication of the claims of those who are already parties before the court.

QUESTION: Would they then, do you think, have any information bearing on ADEA?

MR. RIDLEY: I am sorry, Justice, I did not hear.

QUESTION: Would they have any information, do you know?

MR. RIDLEY: The potential opt-ins?

QUESTION: Yes.

MR. RIDLEY: May have information. Yes, we would agree to that, Judge -- Justice.

QUESTION: Uh-huh.

MR. RIDLEY: But that does not make them necessary parties to the action.

QUESTION: Well, if they had information sufficient so that a discovery order were issued requiring the -- the employer to divulge the names and addresses of all the affected employees, and if that is a given, in other words, would the court not then have power to condition the discovery request on the transmission of notice that the court approved?

MR. RIDLEY: Justice, we submit that there is nothing in the rules which would provide for disclosure for this purpose, and the purpose was expressly --

QUESTION: No, no, I am assuming, because Mr. Justice Brennan asked you if these other parties might not have some information, I am assuming that in a case, a court would find that the names and addresses of all the affected employees are discoverable.

MR. RIDLEY: Your Honor --

QUESTION: Could the court then, as a condition to its discovery order, impose restrictions setting forth the kinds of statements that should be made to the employees if a mailing went out?

MR. RIDLEY: Justice, I believe that if there were a discovery order which was appropriate under the federal rules governing discovery, I think that the court would and should enter a protective order against the utilization of that

information for the purpose of solicitation.

QUESTION: Well, is that consistent with our Shapero case? Is that consistent with the First Amendment rights of the litigant to advise all interested persons of the pendency of the litigation? That would be a very odd order, wouldn't it?

MR. RIDLEY: No, Your Honor. We have no difficulty with -- Shapero. We believe that the Plaintiffs were free here to solicit the non-parties whom they wished to have joined. Our objection is exclusively with the court's involving itself in that process --

QUESTION: But you just answered my question by saying that you think the court, if the names and addresses of all the employees were disclosed by discovery, could prohibit the use of that list for solicitation. And I am just curious to know why that isn't an infringement on First Amendment rights.

MR. RIDLEY: Your Honor, I believe that the Plaintiffs could use a list which they got for valid purposes of discovery to obtain information from non parties. I do not believe that the court should permit them to come into court to request that information to solicit them, and --

QUESTION: Well, I won't take too much longer, but I am assuming that it is properly discoverable. I am assuming the Plaintiff has all of the names. And I am asking you what basis it is for you to make the further statement that the

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court could restrict the Plaintiffs from using that list to advise all employees similarly situated.

MR. RIDLEY: Justice, only if the court has a basis for believing that that discovery would be used for solicitation purposes would the court then, I believe, find it appropriate to enter the protective order that it not be used for that sole purpose.

We have -- in this particular case, of course, there was no request to the court below for the discovery of names and addresses for any purpose other than to solicit. The court's decision below was based solely on its perception of its power to aid the Plaintiffs to go out to bring in all of the non parties before the court. That is the objection which we have, not to what discovery might be required at a subsequent date by the court.

QUESTION: I think Justice Kennedy's question is perhaps directed to the at least implication of your statement that solicitation is a bad word.

MR. RIDLEY: Oh, no. Judge -- Justice, we have never objected to the solicitation by the Plaintiffs of non parties. We recognize that they have that First Amendment right and, in fact --

QUESTION: -- (Inaudible) the court, that is -- to get the names and addresses of the people even though those people may have information that would be useful --

MR. RIDLEY: That is correct, Justice.

QUESTION: -- in reaching a determination.

MR. RIDLEY: And if, in fact, they obtain that information through some appropriate means for an appropriate purpose, so be it. But we do not believe that the -- that the court should be involved in generating that solicitation.

QUESTION: Why --

MR. RIDLEY: And that is the evil that occurred here.

QUESTION: Why?

MR. RIDLEY: Your Honor, because it cuts against the basic principles of neutrality, judicial restraint, which govern the courts of our country. We believe that the court should be the adjudicator of disputes, not the generator. And here there is no due process reason for these people to receive notice.

QUESTION: Mr. Ridley, as, as I understand your, your, your brief, you do think the court has authority to deny an opt-in on the basis that the -- that the notice was inadequate. Right?

MR. RIDLEY: No, Justice.

QUESTION: No?

MR. RIDLEY: I don't believe we took that position. We --

QUESTION: Well, let me ask you, do you think the court has the power to -- to refuse to permit a particular plaintiff

to opt-in on the basis that the notice that that plaintiff was given was -- was misleading or inadequate?

MR. RIDLEY: Oh, if it were misleading or inadequate, Your Honor, we don't believe that it has the, power, power to preclude the individual from opting-in, but we do believe that, under Rule 11, it then has the power.

QUESTION: It can review the notice that was sent to these people by the lawyers inviting them to opt-in, and if it finds that notice misleading can refuse to allow them to opt-in. Is that your position?

MR. RIDLEY: Justice, if, in fact, there were an application brought after the notice were sent out, yes, I believe the court does have that power.

QUESTION: Why?

MR. RIDLEY: Because those people, if, in fact, the notice were misleading, those people would be in the court as parties plaintiff in violation of Rule 11.

QUESTION: In violation of Rule 11?

MR. RIDLEY: Or, with, with counsel having violated Rule 11. But in this instance, for example, Judge -- Justice, there was the R.A.D.A.R. letter which was sent out. We did not ask --

QUESTION: What about approving the letter in advance? Can the -- can the court approve the letter in advance? Counsel brings it to the court and says since I don't want you

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to throw out these opt-in plaintiffs that I bring to you, why don't we both save ourselves some time; you approve the letter in advance. Can the court do that?

MR. RIDLEY: Justice, if the plaintiff were voluntarily to come before the court, I think the first question the court should ask is why is the plaintiff coming here. Why should the court be involved in any way in this solicitation process? Ultimately, we would have no specific concern with that as Defendants, if, in fact, there were a commitment that this was going to be the only time that the plaintiffs came before the court, that they felt that they needed that guidance, and that they wouldn't use the court's having reviewed the document for solicitation.

Where we draw the line is that if the court were to require the plaintiffs to come before it, we believe that this is inconsistent with the First Amendment rights of the plaintiffs.

QUESTION: Well, what -- you must be, you are probably confining your argument to the Age Discrimination Act where there is a class action, because it certainly is normal to, in, in many class actions, for the court to become deeply involved in notice.

MR. RIDLEY: That is correct, Justice, but --

QUESTION: Rule 23, the court actually orders notice.

MR. RIDLEY: That is correct, Justice, but those cases

are not claims generation. Rule 23 is not involved in any way in claims generation. Those parties have been certified as parties. After the certification procedure, they are parties before the court. And that notice is sent out to ensure that their due process rights are honored.

This is a uniquely -- different situation. Here, Rule 23 does not govern ADEA or 16(b) actions, generally, and there is no due process or necessary party requirement that mandates that non parties go out, be given notice. These people are, are just the same as, as individuals who have been the victims for example of a mass air crash, where no Rule 23 class action has been certified.

QUESTION: When you say a 16(b) action, 16(b) of what, Mr. Ridley?

MR. RIDLEY: I am sorry.

QUESTION: Is that of 29 U.S.C?

MR. RIDLEY: Yes, it is Section 16(b) of the Fair Labor Standards Acts; it's, it's Section 216(b) of Title 29. But there is a -- I, I believe, a critical difference between the notice which is required to be sent out in Rule 23 cases when classes have been certified, and the notice which the court wished to send out here, where there has been no class certified, where no Rule 23 class will be certified because it is inconsistent because the statute, the 16(b) statute, requires the individuals to affirmatively opt-in. Given that,

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we submit that Rule 23 case law jurisprudence is totally inapposite to what is before the Court today.

QUESTION: Of course, it is true in the Rule 23 class actions that, I suppose, that the court is not totally neutral, or is it, when it certifies a class. It takes the action of the district court to make the other members of the class actually become parties.

MR. RIDLEY: That they, the district court --

QUESTION: They are not parties just because a complaint is filed.

MR. RIDLEY: That is correct, and we submit, Justice, that that process whereby the district court certifies an action as a class action, which is wholly absent in a 16(b) situation: we have no requirements, no criteria to be satisfied before notice is sent out, if --

QUESTION: But you wouldn't say that a judge, when a district judge certifies a class the judge isn't acting in a neutral fashion, would you?

MR. RIDLEY: Those individuals, once the class has been certified --

QUESTION: No, no, I said in the, in the process of certifying the class the judge is acting in a perfectly neutral way, is he not?

MR. RIDLEY: Yes, and that is, he is adjudicating the rights where the, where the issue --

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QUESTION: Well, why isn't it equally -- why isn't it also neutral if Congress has said that persons similarly situated may join a suit by affirmative act, why isn't it neutral for the judge to participate in the process by which they find out about the case?

MR. RIDLEY: Justice, I believe that the analogy is to those who might be joined under Rule 24(b), under a permissive intervention situation, where they have claims which might properly be joined because they have common questions of law or fact with the claims of those already before the court. But there is no need for them to be parties in order to adjudicate the claims of those who are before the court.

QUESTION: No, but, but is there anything that is not neutral about a judge thinking well, we may have 40 or 50 law suits; it makes sense to me to have them all disposed of in the same proceeding, so I will arrange to have notice sent to all the -- all this group of people. Why is that not -- you say that it is a question of judicial neutrality, and I don't see that there is any bias involved in that.

MR. RIDLEY: Well, Justice, I submit that if the issue is claims consolidation, rather than claims gathering, we have procedures which amply cover that. Obviously, 140 -- Section 1404 of the Judicial Panel for Multi District Litigation and the like, all those sections, that law, that body of law provides for consolidating claims which individuals have

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brought, whether in the same form or different forms. That's not, I suggest, the issue here.

The issue here is the court assisting the Plaintiffs, very actively assisting the Plaintiffs in going out and generating and bringing in those potential claimants. And that, I submit, is a radical departure for the court to do. I think what happens is that we are accustomed to notice in the context of Rule 23, but I believe that there is a significant difference between the Rule 23, situation where you have already an adjudication that these individuals are parties to the action, and here -- and, and their due process rights obviously are affected because they are to be bound by that action -- and the situation here, where there is no due process consideration, nobody suggests that. There is no effect on these non parties if the court does not assist in bringing them before the court.

QUESTION: Well, the statute might run, I suppose.

MR. RIDLEY: Your Honor, that can happen with respect to any potential litigant who might have a claim out there. And we have never, I don't think it has ever been suggested that it is the role of the judiciary to go out and to ensure that those who have statutes of limitation which might be running are brought in before the court so that the court can adjudicate their claims in a timely fashion.

QUESTION: But Justice Stevens is right, it does ---

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does it have anything to do with neutrality? Is neutrality the problem or is it perhaps that there is no case or controversy. Is that what you are saying?

MR. RIDLEY: Well, there is -- there is a case of controversy in the sense that there are parties before the court whose claims will be adjudicated. But what we suggest here is that the court is assisting the Plaintiffs in a tactical maneuver. I, I don't use maneuver in the bad sense of, of the term, but --

QUESTION: It sounds like it.

QUESTION: Let me ask you another kind of a practical side of this thing. Supposing that we agreed with you, you say you can't do this this way, and so then the plaintiff says to himself well, these people are all potential witnesses because they are all affected by the same employment decision, same facts. Every one of them might have some story to tell that will shed light on whether there was discrimination. So I would like the list, whole list just to use them as -- to interview them as prospective witnesses. The judge would have to grant the discovery request, wouldn't he?

MR. RIDLEY: He may well.

QUESTION: And if he does, and then they say now that I have got the list I am going to send them all a letter, you couldn't stop them from sending a letter, could you? I -- I'm just wondering if whether you aren't asking that a different

procedure be followed to get to precisely the same result anyway.

MR. RIDLEY: Justice, in this case, there was no claim --

QUESTION: I know they didn't do that here, but I am just saying supposing you win and then they come back and say well, judge, we have got another theory, we want to do it this way. Why can't they prevail that way?

MR. RIDLEY: The district court's -- the district court's purpose here was extremely candidly expressed. It was to aid plaintiffs in filling their class.

QUESTION: I understand that. But I'm saying supposing you have won, and I, I'm a smart lawyer and I say well I can get around this, I'll ask for them because I want to take their depositions, and then I use the list to, to tell them about the law suit.

QUESTION: But in that event -- in that event he wouldn't have the imprimatur on it.

MR. RIDLEY: Well, he may or may not under Justice Stevens' hypothesis.

QUESTION: Well, no, you wouldn't, but when you're --a separate question is whether the notice is proper when it says is it done with the authority of the court. But you would really have a problem even if you didn't have that in there. You really would.

MR. RIDLEY: Yes, we would.

QUESTION: But I am just wondering if we are really fighting about anything.

MR. RIDLEY: Oh, I think so, Justice. I -- I take comfort in the ability of the district courts to enter protective orders when necessary to --

QUESTION: But how could you enter protective orders saying you can't solicit these people as clients? They have got a First Amendment -- as Justice Kennedy pointed out, they've got a First Amendment right to do that, no matter how they get the names.

MR. RIDLEY: It is customary in the age cases which the courts, the district courts adjudicate, for example, for them to set cut-off dates for opt-ins. Typically, those cut off dates are not long after the filing of the initial complaint. Now, that is a pure case management concern. But I believe that a district court could enter a protective order which would ensure --

QUESTION: But I don't think he would have to.

MR. RIDLEY: -- that, given the good faith of the counsel --

QUESTION: Maybe the judge would do that, but he might not grant the plaintiffs' request here, either. But our question is one of power. And,a and it seems to be quite clear the judge would have power to grant discovery, and

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having done so, unless he had a very short period of opting-in, the, the plaintiff could normally follow up with notice.

MR. RIDLEY: I believe that the court does have the power to grant discovery on an appropriate application, and I believe the court has the power to limit the plaintiffs' use of that discovery, and to direct the plaintiff not to use that for improper -- for solicitation purposes.

QUESTION: But why is that improper, in view of the previous colloquy that we had?

MR. RIDLEY: Justice, we have no problem with the plaintiffs' using any means available to them to go out to solicit the joinder. The Plaintiffs have done it here, they have done it in any number of cases we cite in our briefs where the court has not given notice or assisted in the giving of notice, and there have been hundreds and even thousands of individuals brought in. That's the plaintiff's right, that's the counsel's right under Shapero. Where we draw the line is when the court involves itself in that process.

QUESTION: Well, you say where the court involves itself in that process. Now, you mean something more by that than just having the notice go out under the -- on the, the stationery of the court, or the -- and have the district court sign it. You, you mean something more than that?

MR. RIDLEY: Yes, Justice. When the court orders the production from Hoffmann-La Roche of the names of all of the

individuals so that the Plaintiffs can use that to go out and solicit.

QUESTION: But why, why is that improper?

MR. RIDLEY: Because it is the use of the courts for a purpose which is not provided by the rules of discovery, we submit.

QUESTION: So you say if it were requested in terms of discovery, that would be for the trial of a lawsuit which the court is going to do eventually. If you use it just for purposes of getting additional clients, that is something the court ought not to be involved in?

MR. RIDLEY: That is correct, Justice, if I understand --

QUESTION: But now, if, if the court didn't has sent out a notice on its own, isn't it likely that the Plaintiffs would send a notice out on their own?

MR. RIDLEY: Well, in this instance the court should not be sending out notice on its own, under -- under --

QUESTION: But my question was, assuming that the court said -- agreed with you, that the judge said, well,I can't send out any notice, then aren't the Plaintiffs going to send out a notice?

MR. RIDLEY: Yes, and so be it. We have no problem with the plaintiff sending out --

QUESTION: But they did in this case.

MR. RIDLEY: They did in this case; they do it in any number of cases.

QUESTION: Well, then -- then does, does the defendant in, in practice in this kind of case have a right to come into court and object to that notice?

MR. RIDLEY: In this instance, we did object to the so-called R.A.D.A.R. letter, in which the Defendants, the Plaintiffs sent out before instituting the suit.

The facts here, Justice, Chief Justice, were these. After the reduction in force, in which over 1,000 individuals were terminated, the Plaintiffs and counsel got together very, very promptly and had a list of some 600 plus names out of a total of, potential total of 700 individuals who might come within their definition of that class, and they sent out letters to all of them. Right after the terminations.

QUESTION: One, one, one reason the court of appeals, I believe, it might have been the district court, I think, gave for affirming the district court was that the district court was going to spend some time on this matter anyway. If the Plaintiffs pick up and send out a notice, the Defendants object to it, the district court is going to have to consider that anyway.

MR. RIDLEY: Chief Justice, we understand that. We acknowledge it, if in fact the notice is a, is a problem notice. But that is not to suggest that the court should

involve itself in restraining the Plaintiffs First Amendment rights by reviewing -- by mandating the review of that notice.

QUESTION: If a defendant comes in and objects to the notice, surely the defendant is asking the court to put some restrictions on the plaintiffs.

MR. RIDLEY: We do not believe that the defendant has the right to come in and ask the court to enter a prior restraint against their notice going out.

QUESTION: But didn't, didn't you come in and object to the notice in this case?

MR. RIDLEY: After the -- after the individual, after the 400 individuals opted-in on the basis of the R.A.D.A.R. letter, which we considered to be incomplete and inflammatory and inappropriate, we came in and said at this point in time we are objecting because these people were never contacted by counsel. They got a letter with a consent to form -- consent to join form and they sent in their opt-ins.

QUESTION: Were they -- were they objecting to it? Were these people objecting to it? I don't see how the court gets involved in that?

MR. RIDLEY: At that point in time, Justice --

QUESTION: You are willing to have the court get involved in the acquisition of clients for the benefit of your side of the case, but not for the benefits of the other side of the case. What business was it of the court's whether,

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whether these people who chose to join felt that they had gotten adequate or inadequate notice? At this stage, what business is it?

MR. RIDLEY: Well, with respect to the R.A.D.A.R. letter which went out from Plaintiffs, we believed that that letter was so incomplete and misleading that those people who were brought -- came in as a result of that letter, should be sent corrective notice. We did not ask that they not be permitted to join. We simply said that the consents should be vacated without prejudice to a corrective notice. And there was -- there is a precedent in the Ninth Circuit for precisely that in the Partlow decision, which we relied on.

But here you have the court dealing with people, parties, who are now before the court. Once those people send in the consents they are parties to the action, and we believe that the court has all the power it needs to deal with those parties.

QUESTION: Mr. Ridley, do you assert that the trial court violated some constitutional right of your client by the trial court's action?

MR. RIDLEY: No, Justice, we do not.

QUESTION: All right, you complain then that the trial court violated some rule?

MR. RIDLEY: Your Honor, we suggest that the appropriate analysis is whether there is a source of power to

authorize the trial court to do this, and we say there is --

QUESTION: Well, don't we recognize a broad scope of authority in trial courts to manage the cases assigned to them. Isn't this a critical tool that trial courts must have to manage the caseloads that they have? I don't understand why you are suggesting that it's an obligation that we limit the power of the trial court to manage its cases.

MR. RIDLEY: Obviously, we have no objection to the management of the cases which are before the district court. There are a number of additional --

QUESTION: Well, there is a case before the district court in, in which at least some plaintiffs were properly before it and your client was properly before it.

MR. RIDLEY: That is correct, Justice, but what is happening here is not case management, by any stretch. The court has all the power to consolidate the cases which are brought before it, but we are suggesting here that this is pure claims generation. These parties are not before the court, in any sense of the word, the individuals who would receive the notice from the court. They have in many, many instances already received notice from Plaintiffs' counsel. 600 letters were sent out, 400 opted-in, 200 out of a 300 universe of potential recipients of court notice have already received notice.

And we submit, respectfully, that that is inappropriate

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for the court now to come and request that these people, if they believe that they have any claims, come before the court.

It -- it -- if the Court can appreciate how unique a situation this is, and how different it is from Rule 23 situations where there has been an adjudication by the court, that the "non parties" are in fact before the court and, and, and the class has been certified, we submit here that there is absolutely no precedent. We believe that the Ninth Circuit decision in the Pan Am air crash case puts this entire situation in proper context, where the court there was facing the issue of a district court requesting notice to go out to non-parties who were not necessary for the adjudication of the case, and whose due process rights were not impacted by the adjudication of the case which was before the court.

I see that my time is up, Chief Justice. Thank you.

QUESTION: Thank you, Mr. Ridley. Mr. Flamm, we'll hear now from you.

ORAL ARGUMENT OF LEONARD N. FLAMM

ON BEHALF OF THE RESPONDENTS

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

How the issue before this Court is to be answered may well boil down to how the question is phrased. The question is couched in the form of whether there is anything in any court rule or statute or otherwise which bars a district court

from exercising its power to facilitate notice to potential litigants. Why, Respondents have shown that the answer to that question is clearly no, based upon an absence of any conflict, of any statute, rule, legislative history or policy.

Aside from asserting some generalized objections which we have heard about impartiality and judicial passivism, Roche apparently does not -- does not even disagree. That would seem to end the matter, except Roche has asked that this Court rephrase the question from, is there anything that bars court-facilitated notice, to the question, is there any specific authority for having it. Of course, in so doing, Roche has attempted to shift the burden of justification squarely upon the Respondents in this case.

QUESTION: The courts can do anything that, that is, is not barred. Is that --

MR. FLAMM: That is our position, Your Honor.

QUESTION: That is the rule we operate. Court -- courts can do anything that is not barred. That is wonderful, I never --

(Laughter)

QUESTION: You can't mean that, can you?

MR. FLAMM: We would agree that the Roche approach is incorrect, but we are prepared for purposes of the argument today to play into Roche's rules that we have an affirmative obligation and we have met our affirmative obligation, and

that there -- and that there is affirmative standing in the statute and in the rules and in the legislative history for what we propose --

QUESTION: Suppose -- suppose a court has before it a case involving a train wreck, in which there are a lot of injured people, no special statute governing this train wreck like the Age Discrimination Act. It has one suit, and it says, gee, this court's probably going to get a lot of other suits from this same train wreck; it is sort of a shame to have to try them one by one. Do you think that court could -- could send out notice to, to all the other people saying, you know, save us some trouble will you, we, we have one case in front of us, we'd like not --

Can a court do the --

MR. FLAMM: I'd like to add to that question two parts. The Ninth Circuit has addressed a very similar issue and has, unfortunately, found that the court does not have some residual power. I would assert that there is, of course, a case management power within the court, so the answer to the question is, I think, in disagreement with the Ninth Circuit, is yes, the court has the power.

QUESTION: Now --

MR. FLAMM: And for that reason --

QUESTION: (Inaudible) management?

MR. FLAMM: -- the case management authority that is

inherent in the court's general jurisdiction is inherent --

QUESTION: You would regard it as case management when you have got one plaintiff in a personal injury action before you, or where it was a train wreck and there are probably a lot of other plaintiffs, to say let's send out notice to everybody else who we can find that might have suffered injury in that to come in and join this suit, when, WHEN there is no set thing similar as 216(b)? That is an extraordinary notion of case management.

MR. FLAMM: Well, obviously, we have 216(b) here. But leaving the 216(b) question aside, if the court had some basis to believe that these people are going to come crashing through the court door anyway, there, there may be a basis for it. I don't know that I have to reach that issue for purposes of this appeal. We think 216(b) satisfies any of the concerns that were previously expressed by Roche that this is somehow proceeding without any statute or basis.

QUESTION: Well, then what you, but you said unfortunately the Ninth Circuit has said the court wouldn't have. Why do you regard that as unfortunate?

MR. FLAMM: Well, I think there is a basis for a Court, if they see that there is an, an imminent likelihood of a number of actions about to be brought -- this was -- that was an airplane crash, and we, we all know there was not only one survivor, there were a number of persons who were facially

similarly situated. The district court, through the special master who had experience apparent -- apparently in the airline crashes, was eager to have these people come in because he knew well from his experience that that was a case in which it would be desirable for multiplicity of litigation purposes, case management purposes, to get all the cases heard.

I, I don't know that we need to reach that issue, Sir, because we have the 216(b) position of -- of the -- of Congress on that.

QUESTION: How does 216(b) change it? I mean, let's assume I disagree with you on the first one, that I agree with the Ninth Circuit. How does 216(b) change it?

MR. FLAMM: 216(b) is a specific affirmative statement by Congress that it's a good idea that all persons with similarly-situated claims be allowed to intervene in that action -- maybe, though, intervene is not the right word, to come into the action.

QUESTION: Don't the federal rules of permissive joinder amount to a similar -- a similar endorsement of joining actions by the Congress?

MR. FLAMM: Well, if we are talking 24, you have to start with the fact that people in, in a 24 situation know themselves about the fact that the action is, is out there. In 216(b) it is neutrally phrased. It just says that all

persons who are similarly situated may, through a, through a mechanism, find themselves in the litigation by filing the opt-in consent form.

So, I think 216(b) is the clearest statement on the part of Congress that we could get that the idea of a group action is something that they want to be promoting, and, and, and when you apply that in the ideal situation you have even greater --

QUESTION: I think the permissive joinder as well as mandatory joinder provisions of the, of the rules amount to a similar endorsement of the desirability of that, of that action.

MR. FLAMM: Well, then, then, we're not arguing. I am just --

QUESTION: Well, then, then we're only arguing if we disagree as to, as to what the court can do in the railroad case.

MR. FLAMM: I would agree with that.

Roche's principal argument on this appeal is that -- their first argument is that Section 216(b), although it provides for a joinder situation or a collection action, is specifically silent on the issue of court-facilitated notice. Of course, that statement is, is true, but silence alone is, as we have seen in many other decisions before this Court, is an unhelpful guide to plumbing congressional intent either

way.

This is not a case, if I may, where we have pregnant silence. This is not an area where the issue would be expected normally to be addressed in a statute. This is a detail, if I may use that word, which should be left to the court, the detail of notice. So the absence of expressed language should not have any significance, apart from the fact that Congress didn't feel the need to speak on the subject.

There is a second argument that Roche has made that Roche, that than the Congress, when they selected 216(b), somehow intended to adopt the judicial gloss of 1938 or the judicial gloss of 1947 that was surrounding 216(b), and since that judicial gloss was less than clear on the issue of court-facilitated notice, why that would mean that the Congress was making some kind of affirmative direction that the -- that the gloss that, whatever it was, should not be accepted.

The case law that pre-existed the ADEA 1967 shows that there was no widespread use of a judicially authorized notice, but there was, nonetheless, some case law support for it. We will concede that the number of cases supporting judicial notice were, were not legion, but the likely explanation for that in 1947 was that the unions, who were the principal disseminators of the notice, didn't need the names and addresses. So Congress really had no need to be concerned about whether notice was needed -- would be given to people

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who didn't have the names and addresses already.

But it is instruct --

QUESTION: (Inaudible) bring a class action under the ADEA, under Rule 23?

MR. FLAMM: Your Honor, that's -- that's a wonderful question that is technically not before the Court. The statute has designated a specific mechanism, the 216(b) mechanism, and it seems to --

QUESTION: Well, it just says that parties may opt-in.

MR. FLAMM: I understand that, Sir. It is a question that certainly has troubled us deeply. It -- it case law seems to be settled --

QUESTION: You think that would just preclude bringing -- having a certification of the class?

MR. FLAMM: If we could use Rule 23 this discussion would be, would be highly academic.

QUESTION: That is exactly right.

MR. FLAMM: I, I follow your point. The settled case law followed by the circuit and the district in which we were in seemed to accept as a given that Rule 23 would not apply for the reason that 216(b) was a, was a specifically-designated provision in the FLSA, and that Congress took a rifle shot to bring that particular mechanism in, and by somehow a process --

QUESTION: It meant to preclude -- ordinary ways of

bringing in class actions?

MR. FLAMM: It seems that that's the case law that has fairly gotten to the point where the, the reliance on 216(b) became necessitated. That is correct.

But the point I want to make about --

QUESTION: Counsel, last term near the end, this Court decided Martin against Wilks. Does that case, in your estimation, help you or hinder you?

MR. FLAMM: Well, in our final section of our brief we thought that the general language of that --

QUESTION: I have just read what you said.

MR. FLAMM: I understand that, sir. Our position would be that the general direction, that the burden is now devolving back on the Plaintiffs to get the people up and Martin v. Wilks, to that extent, supports our position before this Court.

The point I want to make on the 1947 amendment is that Congress had a scalpel in its hand in 1947. It took out a certain type of action, it took out that representative action in which the person who brought the action was not himself a grievant. But it left in the other kind of collective action in which the representative was himself a, a, grievant. And when Congress was wielding that scalpel in '47, and if they were aware of what that judicial practice or non practice was with respect to notice, and they didn't see fit to take out

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all these collective actions, that failure to weed -- to wield the scalpel in that case, in our view, would constitute some additional evidence that Congress was quite content to allow 216(b) to be interpreted by the courts in a way to promote the continued use of the collective action device in Section 216(b).

QUESTION: Counsel, how many hundred other people did you get to opt-in?

MR. FLAMM: During the course of the litigation, we got approximately 400 people, a good bulk of--

QUESTION: And then why do you need the rest of them, other than to have additional clients and additional fees?

MR. FLAMM: Your Honor, the reason is the pooling of resources that enable ADEA actions to proceed on this basis. The word need is -- is a word that has a lot of meanings. I don't need them for, for, for necessarily winning the case, although I might, because every person who comes in and tells me about his case provides some additional piece of pooling of information. He provides that much additional financial resource, he provides that much of additional story to tell the jury, if it is to go that far about what his particular problem is.

QUESTION: That is true of any multiple plaintiff tort litigation, isn't it?

MR. FLAMM: Yes, sir.

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QUESTION: And yet, you wouldn't be doing that in tort litigation.

MR. FLAMM: That is correct, sir.

The statute is our authorization. The statute doesn't say you can -- you have to stop when you've got enough people -- when you've got the critical mass to win your case. The statute says you can go and get, as we read it, all the people who are similarly situated. And to argue that I have to stop because I am filled, I am sated with enough people, seems at least unfair to the people who by sheer happenstance or the vagaries of rumor weren't among the first wave or the second wave of people who learned through the grapevine about this case. It seems, as stewards of this class, that we are the attorneys and we have an obligation to go and see this through and see that all persons are receiving the equal opportunity of notice that this statute seems to require.

QUESTION: Mr. Flamm --

QUESTION: And it is true that some don't need it, but who is to say who doesn't need it after our critical mass has been reached?

QUESTION: Mr. Flamm, could I ask you a question about that?

MR. FLAMM: Sure.

QUESTION: When, when a person signs a consent to join the suit and joins it, and assume you lose the suit, sometimes

plaintiffs lose these suits, are they liable for costs?

MR. FLAMM: The question of the opt-ins' liability for costs, we have indicated in our -- in the notice that we would ask the court to, to circulate, that it's an open question, but we would have no objection if that issue were, were fairly addressed in the notice. I, I don't know the answer to the question, to be perfectly honest.

QUESTION: I see. And notice doesn't provide an answer, does it?

MR. FLAMM: The -- if there is a full court notice, some courts have considered the propriety and desirability of putting in a paragraph regarding the liability for costs. Some district courts have said there is a chilling effect to the inclusion of that language --

QUESTION: I would think they would.

MR. FLAMM: We don't take a position on that at this time, because obviously if we lose down the line, I think,we would probably be happy if we could disperse the allocation of costs among all the litigants. But I think that,again,is a detail that ought to be left to --

QUESTION: It is not really raised,I guess,by this proceeding.

MR. FLAMM: Yes, sir.

QUESTION: Because the notice, as I remember, it doesn't say anything about that, does it?

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MR. FLAMM: We took the position in the district court that it was chilling, but we certainly realize that that was an issue of discretion for the district court to determine on its own basis depending upon what he thought these people ought to know as part of the information they were receiving to join the action.

QUESTION: Mr. Flamm, can I ask, and -- it, it sort of gets back to the same thing again, but I want to know why Section 216 is any more an indication of the government favoring the court reaching out to bring in these plaintiffs than is Rule 20 of the Federal Rules, which says all persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative, in respect of or arising out of the same transaction, occurrence or series of transactions where there are common facts. Now, that says they all have a right to, to appear as -- jointly in the same case.

216 says that any employee, if he gives his consent, can join this case. In one case, as in the other, the Congress is endorsing a right to proceed that way. Now, why wouldn't it be so, well -- you, you say it is so, you say it is so, that under Rule 20 the court can go out and, and seek plaintiffs as well, right?

MR. FLAMM: I think the distinction, Sir, is that in Rule -- in 216(b) there seems to be a declaration of a class

concept in the sense that it says -- it doesn't say all persons who have a feeling that they would like to come in may come in, it says all persons who are "similarly situated" may come in and have a representative prosecute the lawsuit on their behalf.

That is going at least a couple steps beyond, if I may, what is in Rule 20, which just says, well, if there is a similar transaction everybody can go and put their own case in. In 216(b) you've got a representative situation and you've got a limitation that it ought to be a class that at least has some cognizability, namely that it be a class of similarly situated persons.

QUESTION: Where does it say that, I am looking for the --

MR. FLAMM: In -- I think you trivialize 216(b) if you say it is nothing more than Rule 20.

QUESTION: -- on behalf of themselves and other employees similarly situated, that is the -- that is the --

MR. FLAMM: Justice, I think you, you trivialize 216(b) if it means, if it means nothing more than a permissive joinder provision, because here you have got a representative doing the prosecuting and you also have, it seems to me in the statute, a self-formed class. It is not just anybody who feels like it can come in. The -- that's certainly going beyond what is in Rule 20 and Rule 24, in answer to your

question.

Roche has made an argument here that, that Congress failed to include court notice in the ADEA in 1967, despite an express inclusion by the Advisory Committee of court notice in Rule 23 only one year earlier. And it tributes to congressional inaction to add notice to Rule -- to Rule 216(b) actions that there was some kind of congressional rejection.

I would point out to the court that this argument is based upon a gratuitous juxtaposition that the federal rules amendment came in '66, ADEA was passed in '67. If there was a different time frame the Defendant's argument would lose some of its force. The legislative history --

QUESTION: Mr. -- Mr. Flamm, do you rely at all on Rule 16(b) as authority?

MR. FLAMM: Your Honor, I heard your question earlier and I, I, I hadn't put it in the brief, and I wish I had. The answer is I'd have to take a closer look, but it does seem to raise again the general power of a court to supervise and manage a, a litigation.

QUESTION: So, you still assert that as part of case management alone that a trial judge can go out and facilitate notice to potential party plaintiffs?

MR. FLAMM: I would say he could use 16. I'd say he has the power reflected in 20, in 24, in 23, and we haven't discussed it but Rule 83, which is the old -- the, the catch-

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all category, which says you can regulate your practice in any reasonable manner --

QUESTION: Mr. Flamm, exactly what section of -- what part of Rule 16(b) do you think authorizes the sort of thing that was done here, Rule 16(b)?

MR. FLAMM: I, I was just picking up Justice O'Connor's point --

QUESTION: Well, yes, but you said you agree --

MR. FLAMM: I, I, I meant statute. I'm sorry, sir. I meant Section 216(b). I apologize.

QUESTION: I'm sorry, I thought Justice -- I, I -- I thought you were referring to Rule 16.

MR. FLAMM: No, sir, I meant Section 216(b) of the statute.

QUESTION: You mean 216. You don't rely at all on Rule 16?

MR. FLAMM: I have not asserted that in the brief, although as I said to you in candor, I wish that we had put that point in as well, that Rule 16 also provides still another --

QUESTION: Well, then let me ask you --

MR. FLAMM: All right, go.

(Laughter)

QUESTION: -- just where in Rule 16 do you find this? Just where in Rule 16(b), what language do you --

MR. FLAMM: I don't have the rule in front of me, sir.

QUESTION: Well then how can you say you think it provides it?

MR. FLAMM: Because it is a case management point and the court has the power --

QUESTION: It is a pretrial conference scheduling (inaudible). That is what the rule says, the heading says. And you are not prepared to cite any language in the rule supporting, and yet you say you rely on it?

MR. FLAMM: No, no, sir. We had not put this point in our brief.

QUESTION: No, but you said you wished you had.

MR. FLAMM: Because the argument seemed to have some persuasiveness as --

QUESTION: Why, why? Because it was made by one of the Justices?

(Laughter)

QUESTION: Let the record show that counsel is nodding his head.

(Laughter)

MR. FLAMM: Implicit in Roche's argument regarding Rule 23's -- Rule -- Rule 23's inclusion of notice and the absence of notice in 216(b) is that Congress had some duty to take a step, and amend 216(b) or to make sure that when 216(b) was incorporated into ADEA that notice language would specifically

go in. It, it is our feeling that Congress does not have the duty to rush out and make a series of conforming legislative amendments each time a federal rules change could conceivably impact on a procedural aspect on a federal right. The, the type of change that Congress would have had to have made would have involved precisely what we think are, are procedural matters, which are normally left to the court's discretion.

Finally, the, the point is made that somehow notice, the concept of court notice is indigenous to Rule 23, and sprang fully blown from Rule 23 and never preexisted. Of course, the concept of court notice existed well before Rule 23, and Rule 23 does not actually confer the power on a court to give notice so much as it merely confirms a court's original inherent power all along.

The Advisory Committee was bestirred to put explicit notice provision in the Rule 23 because of due process considerations, which are certainly not present at bar. But there is Rule 23(d)(2), which provides for an optional form of court notice when due process concerns are not implicated. And to that extent, Rule 23(d)(2)'s power is broad enough to encompass what a court would be doing here today: the power of, of ordering notice for the fair conduct of the litigation.

I would also point out that the Advisory Committee note to Rule 23 states that the present provisions of 216(b) are not intended to be affected by Rule 23 as amended. And yet if

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you look at Rule 23 and you argue it somehow to impact on 216(b), you're precisely countermanding, countermanding, the, the directive of the Advisory Committee note. Because to argue that 216(b) ought to have notice because Rule 23 has notice, why, that is doing the very thing that the Advisory Committee note cautions not to do: not to interpret 216(b) in light of anything that is going on or has gone on with -- with Rule 23.

Roche's final argument is that the 1947 amendments reflect some general hostility, 1947 amendments to 216(b) reflect some general congressional hostility to all mass joinder actions. Of course, I made the point earlier that to cut out half, but to leave half, is hardly to suggest that they had a hostility to all mass joinder actions. If they had the scalpel, they took care of what they had to take care of, and left what they had to left -- had to leave.

Briefly, I would like to address some general observations about helping the plaintiffs or not helping the plaintiffs. On one hand, Roche seems to argue that this unduly helps the Plaintiffs. It, it is our position that this is not an invitation to join, it is not an exhortation, it is not a conscription to join. It is an advisory notice in which the court, for its own reasons, is not acting as an umpire but is acting on its own for its own case management reasons. And those are interests which go beyond the needs of the

litigants.

Roche also argues conversely the Plaintiffs don't need the help, and we heard the point earlier discussed that we had successfully gotten 400, why don't we leave the dinner table? We should be filled up. The answer is you don't know how many people are going to come in. The process of informal networking, which is what we would be relegated to, is slow, it is inefficient, it's unreliable, it's incomplete. Networking can never be effective as court notice.

But networking is inevitable, Your Honors, and it is unregulated. And because it is inevitable and because it is unregulated, those are two reasons in an of themselves why this Court ought to be concerned -- ought to be concerned with giving court-facilitated notice.

We have heard it said that this is helping strangers to a litigation. Well, it is true it does. But to a great extent, the pooling of resources, both monetary and informational, also benefits the litigants, who are desirous of proceeding with as many people in their corner as they want.

Now, the point may be made, well, this -- isn't this class action run amuck? That may raise a question for congressional resolution. But we are talking here about everybody being given a chance to come into this action on the, one the basis of fair notice, on the basis of fair

conduct. And for us to say at one point, well, you have got enough and we don't want to help any more strangers because the people already before the court have enough help, I don't think the court, at least at this stage of the game, ought to be making those determinations.

In any event, that is an issue of the appropriateness of class notice. That goes back to the very issue that we started out with: is this a notice question or is this a question of what is judicial discretion here? If a court says you have already got 400 and you don't need any more, then let the district court say that. But in this particular case the court is not going -- we are not addressing the discretion or the propriety of the court's exercise of discretion. It is a power issue only and, therefore, the questions that were raised about maximizing litigation, stockpiling plaintiffs, seem to have no application to this case.

As I said before, the precise issue before you is really a limited one. It is a power issue. Obviously, the order that is sought by the Plaintiffs in this case will benefit them. There is no question about that. Indeed class actions under the ADEA may never get off the ground if the -- if this court notice procedure is not followed. In our case we had 400, but in the next case there may be only a plaintiff who is not well connected and who is not well heeled. And what is he supposed to do if he can't find the friends and,

and conduct the grapevine activities that he needs to, to, to build a case with some degree of force against an employer?

Roche has essentially skirted the basic issue of power, and they have argued what should be done, not what can be done. And to the extent that this Court is being asked to limit --

QUESTION: Why do you want to involve the court in the, in the business of building the case? You, you sent out a notice of your own to 600 people --

MR. FLAMM: We, we would have done it on our own. All we, all we needed was --

QUESTION: Well, you did it. You did it on your own, but you didn't -- you only got 400 responses to your own notice, is that right?

MR. FLAMM: That is correct, sir.

QUESTION: But you thought the court would be -- could help you scare up some more?

MR. FLAMM: Well, I, I, I mean that phrasing of the question sort of puts me in a difficult position. We thought we had a responsibility to the existing class --

QUESTION: Maybe it's a different word than saying building a case.

MR. FLAMM: All right, sir, we thought we had responsibilities to our clients and to the class as a whole to promptly --

QUESTION: Well, why didn't you just send out another notice yourself?

MR. FLAMM: I'm sorry. We didn't have any more names. We had --

QUESTION: Well, you sent it out to 600; you didn't get answers from all of them.

MR. FLAMM: We -- I -- I didn't send out any, but 600 may have been sent out. 400 responses came in, but we well knew there were even more than the 600, and should we have let -- should we have cast them adrift? Did we have a responsibility to that class that we did represent?

QUESTION: Well, how about -- how about just getting -- how about just using discovery to get the names and then sending out the notice without involving the court?

MR. FLAMM: We were concerned that if, that if we just took the names without the purpose of -- we wanted to be straightforward to say that we were going to use the names for a solicitation purpose. Now, it has come up today that we could --

QUESTION: Well, I know, but so you do that, you get the names, but why did you want the court to -- why did you want to involve the court in, in -- to say that the judge has authorized this?

MR. FLAMM: Sir, we don't, we didn't need that language. I will be candid enough to say that that was --

something we asked for, but something we could certainly have lived without. We could have been content in this case with the names and addresses without more. We thought for case management purposes that it provided the court with an opportunity to -- to send that notice.

QUESTION: You don't think it did you any good to have the court expressly involved in it?

MR. FLAMM: It did us a great deal of good for case management purposes. We're happy the court came involved in this. But in terms of our strict needs, the names and addresses would have sufficed. The court notice set cut offs, set limitations, provided a form of fair notice and provided a host of benefits that we were quite content with. But we could have lived without it, in the strict sense of, of getting the names and addresses and facilitating the matter.

QUESTION: You just wanted to help the court; you didn't want to help yourself?

MR. FLAMM: Well --

(Laughter)

QUESTION: You want me to believe that?

(Laughter)

MR. FLAMM: I, I thought we chose the path that we were obliged to take in terms of best representing the class.

QUESTION: Why didn't you just, as Justice White said, just ask for another list?

MR. FLAMM: Because the solicitation issue hadn't been as clear with Shapero not yet decided.

QUESTION: It was clearer than what you have now, isn't -- wasn't it?

MR. FLAMM: Well, we didn't --

QUESTION: Wasn't it clearer than what you have now?

MR. FLAMM: I don't know, sir.

QUESTION: Well, you're up here defending it.

MR. FLAMM: We didn't know how -- we didn't have Shapero on the books --

QUESTION: You wanted to try something new?

MR. FLAMM: No, we wanted to see that -- it -- it -- that the case law, Seventh Circuit, Second Circuit, had said use a court notice; it, it, it, it's a better procedure than just grabbing the names.

QUESTION: Did the court ask you for this help?

MR. FLAMM: I could be content with the names and addresses. I think the, the court's additional involvement in the notice has good case management --

QUESTION: You thought you were helping the court, not yourself?

MR. FLAMM: The court can participate if it chooses to involve itself in the formulation of the notice. We would make -- we would condition our communication to these people on the court's reviewing the notice. We don't require it as

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an immediate need for this particular litigation.

I think we have shown that we have met the burden that we have before the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Flamm. The case is submitted.

(Whereupon, at 1:59 o'clock p.m., the case in the above-entitled matter was submitted.)

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No. 88-1203 - HOFFMANN-La ROCHE, INC., Petitioner V. RICHARD SPERLING, ET AL.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lyona M. Mayo

(REPORTER)