

Identifying Class Members in Stockholder Class Actions: *Oppenheimer Fund, Inc. v. Sanders*¹—Oppenheimer Fund, Inc. (Fund) is an open-ended, diversified investment fund which sells shares to the public at a price representing the net asset value of the shares plus a sales charge.² Oppenheimer Management Corporation (Management Corporation) manages the Fund's investment portfolio.³ Eighty-two percent of the stock of Management Corporation, including all of its voting stock, is owned by the brokerage firm of Oppenheimer and Co. (Brokerage Firm).⁴ Sanders and other plaintiffs who had purchased shares in the fund during 1968 and 1969 filed complaints in 1969 alleging that Management Corporation and Brokerage Firm had violated federal securities laws.⁵ They contended that Management Corporation and Brokerage Firm failed to disclose that the Fund invested in restricted securities,⁶ the potential risks of such investments, and the methods used to value the restricted securities.⁷ In addition, Sanders and the other plaintiffs alleged that the restricted securities were overvalued on the Fund's books, and that the overvaluation artificially inflated the price of shares in the Fund.⁸ Sanders and the other plaintiffs sought damages from Brokerage Firm and Management Corporation on behalf of shareholders who paid excessive prices for their shares.⁹

Plaintiffs moved for an order allowing them to represent a class of persons who had purchased shares in the Fund between March 28, 1968, and April 24, 1970.¹⁰ Depositions of the Fund's transfer agent revealed that the

¹ 437 U.S. 340 (1978).

² The Fund is registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 to 80a-52 (1976). 437 U.S. at 342.

³ 437 U.S. at 342. The Fund pays Management Corporation a fee, which is computed as a percentage of the Fund's net asset value, in accordance with an investment advisory agreement. *Id.* at 342-43.

⁴ *Id.* at 343. The individual defendants were directors or officers of the Fund or Management Corporation, or partners in Brokerage Firm. *Id.*

⁵ *Id.* Plaintiffs originally filed three complaints on March 26, May 12, and June 18, 1969, but later consolidated them. *Id.* The complaints alleged violations of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1976), the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1976), the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* (1976), and rules promulgated under these Acts. 437 U.S. at 343 n.1.

⁶ The Securities Exchange Commission defines "restricted securities" as "securities acquired directly or indirectly from the issuer thereof, or from an affiliate of such issuer, in a transaction or chain of transactions not involving any public offering . . ." 17 C.F.R. § 230.144(a)(3) (1977). The Court in *Oppenheimer* noted that "[t]he public sale or distribution of such securities is restricted under the Securities Act of 1933 until the securities are registered or an exemption from registration becomes available." 437 U.S. at 343 n.2.

⁷ *Id.* at 343.

⁸ *Id.*

⁹ *Id.* at 343-44. Plaintiff's counsel estimated that the aggregate recovery might be \$1,500,000; each class member would recover about \$15. *Id.* at 344 n.3.

¹⁰ *Id.* at 344. The motion was made pursuant to FED. R. Civ. P. 23(b)(3). *Id.* Rule 23(b)(3) states that an action may be maintained as a class action if:

(3) the court finds that the question of law or fact common to the members of the class predominates over any questions affecting only indi-

proposed class consisted of approximately 121,000 former and present shareholders.¹¹ From the transfer agent's testimony, it was estimated that the cost of obtaining the names and addresses of these 121,000 class members from the computer files of the transfer agent would exceed \$16,000.¹² Learning this, plaintiffs moved to redefine the class to include only the 103,000 people who still held shares in the Fund and who had purchased them between March 28, 1968, and April 24, 1970.¹³ This redefinition would have reduced the expense necessary to compile a list of class members since all present shareholders were already on a regular mailing list.¹⁴

More than six years after the litigation began, the district court rejected plaintiffs' motion for redefinition of the class.¹⁵ The district court reasoned that the proposed redefinition constituted an arbitrary reduction of the class since the inflated price of shares in the Fund had harmed shareholders who later sold their shares as much as those who retained their shares.¹⁶ The district court held, however, that the cost of compiling the list of class members was the responsibility of the defendants, not the plaintiffs.¹⁷ The district court based its conclusion on two grounds: first, that the expense of compiling the list was "relatively modest"; and second, that it was the defendants who sought to have the class defined in a manner requiring the expense.¹⁸

The defendants appealed the district court ruling. A divided panel of the United States Court of Appeals for the Second Circuit reversed the order requiring the defendants to bear the expense of compiling the list of class members and their addresses.¹⁹ The panel based its decision on *Eisen v. Car-*

vidual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

¹¹ 437 U.S. at 344-45.

¹² *Id.* at 345. To compile a list of the class members' names and addresses, a large volume of paper records had to be sorted manually, between 150,000 and 300,000 computer cards had to be key punched, and eight new computer programs had to be created. *Id.*

¹³ *Id.*

¹⁴ *Id.* Plaintiffs also asked the court to allow it to insert a class notice in one of the Fund's periodic mailings to current shareholders. The plaintiffs proposed to pay the \$5,000 expense of printing and inserting the notices in the Fund's periodic mailing. Use of the Fund's periodic mailing would have saved plaintiffs the additional expense of a separate mailing of the class notice. *Sanders v. Levy*, 558 F.2d 636, 647 (2d Cir. 1976).

¹⁵ *Sanders v. Levy*, 20 Fed. R. Serv. 2d 1218, 1221 (S.D.N.Y. 1975).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Sanders v. Levy*, 558 F.2d 636, 643 (2d Cir. 1976).

*lisle & Jacquelin*²⁰ (*Eisen IV*),²¹ where the Supreme Court held that a plaintiff in a class action must pay the cost of notifying class members of the suit.²² The panel reasoned that since identification of class members is an integral step in the process of notification, the *Eisen IV* decision also requires plaintiffs to bear the cost of identification.²³

On rehearing en banc, however, the Second Circuit reversed the panel's decision,²⁴ holding that the names and addresses of class members are within the scope of discovery. The court noted that, under rule 26(b)(1), "any matter . . . which is relevant to the subject matter involved in the pending action" is discoverable.²⁵ Since the adequacy of plaintiffs' notice to class members might arise as an issue in the ensuing litigation,²⁶ the court concluded that any matter relating to this issue—including identification of class members—was discoverable. In addition, the court stated that rule 34 was the proper discovery rule for obtaining the class members' names and addresses in this case, since rule 34 applies specifically to the discovery of computerized information.²⁷ Turning to the issue of which party should bear the expense of

²⁰ 417 U.S. 156 (1974).

²¹ There were four appellate court decisions in *Eisen v. Carlisle & Jacquelin*: *Eisen I*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035; *Eisen II*, 391 F.2d 555 (2d Cir. 1968); *Eisen III*, 479 F.2d 1005 (2d Cir. 1973); and *Eisen IV*, 417 U.S. 156 (1974). For a complete chronology of all district and appellate court decisions of *Eisen*, see *In re Franklin Nat'l Bank Sec. Litigation*, 574 F.2d 662, 664 n.3 (2d Cir. 1978).

²² 417 U.S. at 178-79.

²³ *Sanders v. Levy*, 558 F.2d 636, 639 (2d Cir. 1976). The court found that plaintiffs should bear the cost in the absence of special circumstances, such as a relationship between the parties which is not truly adversary. *Id.* at 639-40.

²⁴ *Id.* at 646.

²⁵ *Id.* FED. R. CIV. P. 26(b)(1) provides:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

²⁶ *Sanders v. Levy*, 558 F.2d 636, 648 (2d Cir. 1976).

²⁷ *Id.* FED. R. CIV. P. 34 provides in relevant part:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served

discovery, the court stated that *Eisen IV* was not controlling. The court reasoned that in *Eisen IV* there was no statutory authority for allocating the cost of notifying class members to defendants. By contrast, the court of appeals concluded, rule 34 provides statutory authority for a court to allocate the cost of identifying class members to defendants.²⁸ Moreover, the court concluded that the district court had not abused its discretion under rule 26(c),²⁹ which protects parties from undue expense in complying with discovery requests, when it refused to relieve defendants of the expense of compiling the list of class members.³⁰

The Supreme Court granted certiorari,³¹ and, in a unanimous decision written by Justice Powell, reversed the en banc decision of the Second Circuit. The Court HELD: Rule 23(d),³² which authorizes courts to make certain orders necessary to the conduct of a class action, is the appropriate source of authority for a court to order the defendant in a class action to compile a list of the members of the plaintiff class.³³ The Court thus rejected the Second Circuit's conclusion that the discovery rules are the appropriate source of authority for such orders, reasoning that the names and addresses of class members are not within the scope of discovery as set forth in rule 26(b)(1).³⁴ The Court held that an order requiring a class action defendant to compile a list of the class members' names and addresses is appropriate only if the task can be performed more efficiently by the defendant.³⁵ Furthermore, the *Oppenheimer* Court indicated that, with few exceptions, courts should place the cost of compiling a list of class members on the representative plaintiff, rather than on the defendant.³⁶ Turning to the case before it, the Court concluded that the district court had abused its discretion by requiring the defendants to bear the cost of compiling the list of class members.³⁷

Oppenheimer is significant because the Court made clear for the first time that a district court's power to order one party to provide the names and

²⁸ 558 F.2d at 648.

²⁹ FED. R. CIV. P. 26 (c).

³⁰ 558 F.2d at 650.

³¹ 434 U.S. 919 (1977). The Court granted certiorari to resolve a conflict between the Second Circuit and the Fifth Circuit. *Oppenheimer*, 437 U.S. 340, 348-49. The Fifth Circuit held, in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977), that a court could order a party to provide the names and addresses of members of a plaintiff class only through rule 23(d).

³² FED. R. CIV. P. 23(d) states in relevant part that a court in the conduct of class actions, may make appropriate orders

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; . . . (5) dealing with similar procedural matters.

³³ 437 U.S. at 355.

³⁴ *Id.* at 354.

³⁵ *Id.* at 356-57.

³⁶ *Id.* at 358.

³⁷ *Id.* at 359.

addresses of class members stems from rule 23. The Court also delineated the discretion a trial court may exercise in allocating the costs of identifying members of a plaintiff class: The Court's admonition that courts should generally assign these expenses to the plaintiff inevitably will increase the burden on plaintiffs bringing stockholder class actions since they will now have to bear not only the cost of actual notification of class members, but also the cost of their identification.

This casenote will first analyze the rationale for the Court's decision in *Oppenheimer*. Next, *Oppenheimer's* impact on stockholder class actions will be considered in light of the policies which motivated Congress to enact rule 23 of the Federal Rules of Civil Procedure and the Securities Acts.³⁸ Finally, this casenote will examine two strategies for minimizing the impact of *Oppenheimer* on stockholder class actions.

I. THE *OPPENHEIMER* DECISION

In reaching its decision to place the expense of compiling the list of class members and their addresses on the plaintiffs rather than on the defendants in *Oppenheimer*, the Court first focused on whether the information which the plaintiffs sought was "relevant to the subject matter involved in the pending action,"³⁹ and thus within the scope of discovery as set forth in rule 26(b)(1) of the Federal Rules of Civil Procedure.⁴⁰ The Court rejected the Second Circuit's opinion that since the adequacy of notice to class members might arise as a "potential issue" in litigation, the names and addresses of members of the plaintiff class were within the scope of discovery.⁴¹ The Court noted that the plaintiffs had argued in the district court that they desired the list of class members for only one purpose: to enable them to send the required class notice.⁴² The Court stated that Sanders never pretended to be anticipating that the list of class members and their addresses would prove helpful in resolving the "potential issue" of whether adequate notice had been sent.⁴³ In addition, the Court noted that until plaintiffs received the information and sent the class notice, no issue could arise as to whether it had been sent prop-

³⁸ The Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1976); Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1976).

³⁹ 437 U.S. at 350-51.

⁴⁰ *Id.* See note 25 *supra*. The Court refused to rely on any distinction between the Fund and the other defendants. There was a distinction, however, because the Fund had not been named as a defendant in the class action portion of the suit. 437 U.S. at 347 n.9. The Court stated:

[T]he Fund itself, which is in the position of a defendant because it ultimately may be liable for any damages that respondents and their class recover . . . does not argue in this Court that it should not bear the expense because it is not a formal defendant. We therefore do not rely on any distinction that might be drawn between the Fund and the other petitioners in this respect.

Id.

⁴¹ *Id.* at 354.

⁴² *Id.* at 353.

⁴³ *Id.* at 354.

erly.⁴⁴ On this basis, the Court concluded that the discovery rules were not the proper tool for acquiring the list of class members in this instance.⁴⁵

The proper source of authority for obtaining the names and addresses of class members, according to the Court, is rule 23(d).⁴⁶ The Court pointed out that under rule 23(d) a district court can order a defendant in a class action to perform tasks that are necessary for the sending of notice.⁴⁷ Reasoning that identification of class members is merely another task that must be performed as part of the notification process, the *Oppenheimer* Court determined that rule 23(d) allows a district court to require a defendant's cooperation. The Court decided that it would be appropriate for a district court to order a defendant to identify the class members when the defendant can perform the task with less difficulty or expense than the plaintiff.⁴⁸ In the instant case, since the Fund controlled the records kept by its transfer agent, and since the class members could be identified only by reference to these records, the Court concluded that the district court acted within its authority under rule 23(d) in ordering the Fund to make the records available to the plaintiffs.⁴⁹

The Court then considered the issue of which party should bear the expense of identifying class members in situations where it is appropriate to order the defendant's cooperation in the identification process. The Court stated that although a district court has discretion to allocate to either party the expense of identification of class members, there are limits to this discretion.⁵⁰ The Court asserted that *Eisen IV* strongly suggests that the plaintiff, who in most circumstances benefits from having the class identified,⁵¹ should bear the expense of performing the task of identification.⁵² The Court explained that a district court should require the defendant to bear the expense only in situations where the task of identification is one which the defendant performs during the ordinary course of his business, or where the expense is insubstantial.⁵³

⁴⁴ *Id.*

⁴⁵ *Id.* The Court noted, however, that it was not implying that a plaintiff could never obtain class members' names and addresses under the discovery rules. The Court stated that the discovery rules may apply when the identity of class members is relevant to issues that arise under rule 23, such as common questions, numerosity, and adequacy of representation. *Id.* at 354 n.20. The Court doubted, however, that any of these issues would require compilation of the names and addresses of all members of a large class. *Id.*

⁴⁶ *Id.* at 354. For the text of rule 23(d), see note 32 *supra*. The court thus agreed with the decision in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977), where the Fifth Circuit held that rule 23(d) was the proper source of authority for obtaining the identity and addresses of class members.

⁴⁷ 437 U.S. at 354.

⁴⁸ *Id.* at 356.

⁴⁹ *Id.* at 359.

⁵⁰ *Id.* at 358.

⁵¹ *Id.* The Court noted that the benefits of *res judicata* which accrue to defendants in class actions do not justify forcing an unwilling defendant to bear the expense of notice. *Id.* at 361 n.30.

⁵² *Id.* at 359.

⁵³ *Id.*

Turning to the case at hand, the Court examined the district court's reasons for requiring the defendant to bear the expense of compiling the class list in light of this new standard of discretion under rule 23. The district court had reasoned that the Fund should bear the expense because it opposed the redefinition of the plaintiff class which would have avoided the expense of compiling the class list.⁵⁴ The Supreme Court, however, found this to be an unreasonable justification, noting that it is "neither fair nor good policy to penalize a defendant for prevailing in an argument."⁵⁵ The district court also had reasoned that the Fund should bear the cost of identifying class members because the expense of \$16,000 was a "relatively modest" sum in comparison to the Fund's total assets of over \$500,000,000.⁵⁶ The Supreme Court rejected this rationale as well. It stated that the test under rule 23 for determining if an expense should be shifted to the plaintiff is whether the cost is substantial, not whether the expense is an undue burden.⁵⁷ Since the Court viewed \$16,000 as far from insubstantial, it determined that the cost should have been shifted to the plaintiffs.⁵⁸ Thus, the Court concluded that the district court ran afoul of the principle of *Eisen IV* when it required the defendants to bear the cost of compiling the class list.⁵⁹

II. OPPENHEIMER'S IMPACT ON STOCKHOLDER CLASS ACTIONS

Prior to *Oppenheimer*, the issue of who should bear the expense of identifying members of a plaintiff class was unresolved. Most courts placed the expense on the party, usually the defendant, who possessed the records from which a list of class members could be compiled.⁶⁰ By requiring a plaintiff

⁵⁴ *Sanders v. Levy*, 20 Fed. R. Serv. 2d 1218, 1221 (S.D.N.Y. 1975).

⁵⁵ 437 U.S. at 360.

⁵⁶ *Sanders v. Levy*, 20 Fed. R. Serv. 2d 1218, 1221 (S.D.N.Y. 1975).

⁵⁷ 437 U.S. at 361-62.

⁵⁸ *Id.* at 362.

⁵⁹ *Id.* at 359. In the final part of its opinion, the Court considered and rejected plaintiff's contention that the defendants should bear the expense of identification because they breached their fiduciary duty to the plaintiff class. *Id.* at 363. The Court stated that a "bare allegation of wrongdoing" does not justify requiring a defendant to assume the financial burden of furthering a plaintiff's case. *Id.* The Court added that it would not benefit the class of persons to whom a fiduciary duty is owed to require them to help finance all class suits brought by one of their class alleging a breach of fiduciary duty. *Id.*

⁶⁰ Some courts have characterized the identity of the class members as discoverable information and required the possessor of the information, nonparties or defendants, to compile a list and bear the expense. See *In re Franklin Nat'l Bank Sec. Litigation*, 574 F.2d 662, 675-76 (2d Cir. 1978) (court held that stockholders' names held by nonparty brokerage firms were discoverable by use of a subpoena duces tecum and that the expense of responding fell on the responding party); *Blank v. Talley Indus., Inc.*, 54 F.R.D. 627, 627 (S.D.N.Y. 1972) (court refused to shift the cost of identifying class members from nonparty brokerage firms to the plaintiff); *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 148 (E.D. Pa. 1976) (court held that class members' names and addresses in the defendants' possession were discoverable pursuant to Fed. R. Civ. P. 34 and 26(b) and that the expense of compiling the list fell on the defendants). Other courts have placed the expense of identifying class members on defend-

bringing a stockholder class action to bear the expense of identifying the plaintiff class, the Court in *Oppenheimer* has increased significantly the financial burden that a representative plaintiff must bear. Thus, *Oppenheimer* will seriously hinder the usefulness of class actions for stockholders seeking damages.

The increased financial burden on stockholder plaintiffs in class actions involving alleged violations of federal securities laws conflicts with the primary purposes of the Securities Acts⁶¹ and rule 23 of the Federal Rules of Civil Procedure. The legislative history of the Securities Act of 1933 indicates that one of the primary purposes of the Act is to protect investors against fraud. The report of the Senate Committee on Banking and Currency stated that "the purpose of this bill is to protect the investing public and honest business."⁶² Congress saw the imposition of civil liability as an important element of the protection provided for investors.⁶³

Stockholder class actions are frequently the vehicle for imposing civil liability on offenders of the securities laws.⁶⁴ Professor Kaplan, Reporter of the

ants who possessed the information without citing specific statutory authority for their action. See *Berland v. Mack*, 48 F.R.D. 121, 133 (S.D.N.Y. 1969); *Lamb v. United Security Life Co.*, 59 F.R.D. 25, 43 (S.D. Iowa 1972). In contrast, a few courts have placed the expense of identifying members of the plaintiff class on the representative plaintiff. These courts have relied on FED. R. CIV. P. 23 and on *Eisen IV*, 417 U.S. 156 (1974). See *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977); *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322, 359-60 (E.D. Pa. 1976).

⁶¹ The Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1976); the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.* (1976). While § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.* (1976), does not by its terms provide an express civil remedy and the legislative history is inconclusive, the Supreme Court has found that private enforcement may "[provide] a necessary supplement to commission action." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729-30 (1975) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

⁶² S. REP. NO. 47, 73d Cong., 1st Sess. 1 (1933). Senator Fletcher presented the report from the Senate Committee on Banking and Currency. See also H.R. REP. NO. 85, 73d Cong., 1st Sess. 2 (the President, in his message to Congress, stated: "This is but one step in our broad purpose of protecting investors and depositors.").

⁶³ H.R. REP. NO. 85, 73d Cong., 1st Sess. 5 (1933). Mr. Rayburn of the Committee on Interstate and Foreign Commerce submitted the report. He stated, "Instead of impeding honest business, the imposition of [civil] liabilities of this character carries over into the general field of security selling, ethical standards of honesty and fair dealing common to every fiduciary undertaking." *Id.*

⁶⁴ See Patrick, *The Securities Class Action for Damages Comes of Age* (1966-1971), 29 BUS. LAW. 159, 159 (March 1974) ("During the past eight years, class actions have become increasingly numerous and increasingly important as a practical remedy and an effective deterrent for violations of federal securities laws."); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501, 501 (1969) ("In the brief period since its amendment, effective July 1, 1966, Federal Rule 23 has dramatically altered the nature and scope of private litigation in this country, and it portends further widespread changes. To date these changes are most noticeable in the securities and antitrust fields."); Bernstein, *Class Actions in the Securities Field*, 9 TRIAL LAW. Q. 23, 24 (1973) ("[F]ederal statutory remedies for recovery of damages for security fraud have existed for over forty years. Why then is it only in the last few years that massive securities litigation has burgeoned? The reason is that up until the

Advisory Committee on the Federal Rules of Civil Procedure, stated that the major purpose of rule 23, which governs class actions, is "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."⁶⁵ Since a small, individual investor's damages generally are insufficient to justify "bringing his opponents into court," it is only natural that small investors have turned to the class action as an avenue for seeking relief. By requiring aggrieved stockholders to bear the expense of identifying members of the plaintiff class as well as sending notice to them, however, *Oppenheimer* seriously hinders the usefulness of class actions for stockholder suits and thus conflicts with the purpose for which rule 23 was enacted and the purpose for imposing civil liability under the Securities Acts.

III. METHODS OF AVOIDING THE HARSH EFFECTS OF *OPPENHEIMER*

There are at least two possible methods that a plaintiff in a stockholder class action can use to avoid the harsh effects of *Oppenheimer*. First, a plaintiff can characterize his request for the identity of the class members as a request for information relevant to issues arising under rule 23. Second, a plaintiff can divide the class into subclasses to decrease the number of members of the class and thereby decrease the expense of identification.

The first method involves classifying the request for the names and addresses of the members of the plaintiff class as a request for information within the scope of the discovery rules. Although the Court in *Oppenheimer* held that the identity of class members was not discoverable information in that case, the Court did not hold that the identity of class members is never discoverable. Indeed, the Court noted that the identity of class members often bears upon issues that a district court must consider when deciding whether a suit should proceed as a class action: whether the class is so numerous that joinder of all members is impractical, whether there are questions of law and fact common to the class, and whether the class will be adequately represented by the named plaintiff.⁶⁶ The Court also noted that the identity of class

amendment of the federal class action rule (F.R.C.P. Rule 23) in 1966, the victimized shareholder could only sue effectively for himself."); Note, 23 KAN. L. REV. 309, 317 (1975) ("One of the most efficacious uses of Rule 23(b)(3) class actions is to remedy violations of the antifraud provisions of the federal securities laws.")

⁶⁵ Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969).

⁶⁶ 437 U.S. at 351 n.13. See FED. R. CIV. P. 23; Annot., *Discovery for Purposes of Determining Whether Class Action Requirements Under Rule 23(a) and (b) of Federal Rules of Civil Procedure Are Satisfied*, 24 A.L.R. Fed. 872 (1975).

Rule 23(a) of the Federal Rules of Civil Procedure, which sets forth the prerequisites for a class action, states:

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,

members is within the scope of discovery if there is reason to believe that some members of the class could supply information bearing on other issues relevant to the matter being litigated.⁶⁷ However, the Court added, "it may be doubted whether any of these purposes would require compilation of the names and addresses of all members of a large class."⁶⁸ This suggestion is dicta, though, and other courts that have directly confronted the question have allowed discovery of the entire plaintiff class.⁶⁹ Thus, the identity of class members may fall within the scope of discovery even after *Oppenheimer*.

If the information sought is within the scope of discovery, a plaintiff may be able to avoid the expense of compiling a list of members of the plaintiff class since the presumption is that the responding party bears the expense of complying with discovery requests.⁷⁰ The final determination of who bears the expense of discovery, however, depends largely on which of the two potentially applicable discovery rules applies: rule 34,⁷¹ dealing with the production of documents; or rule 33,⁷² dealing with the production of business records. Which of these rules applies to the discovery of the identities of class members is crucial because the two rules differ in assigning the expenses arising from discovery.⁷³ If rule 33 applies, the plaintiff must bear the expense of compiling the information since rule 33(c) requires a responding party

and (4) the representative parties will fairly and adequately protect the interests of the class.

⁶⁷ 437 U.S. at 351 n.13.

⁶⁸ *Id.* at 354 n.20.

⁶⁹ See *Wolfson v. Solomon*, 54 F.R.D. 584, 591 (S.D.N.Y. 1972) (court allowed discovery of the identity of class members to determine the issue of numerosity); *Burnstein v. Slote*, 12 Fed. R. Serv. 2d 577, 579-80 (S.D.N.Y. 1968) (court allowed discovery of the names of security holders of the defendant corporation in order to determine whether the class was so numerous as to make joinder of all members impracticable). See also *Blank v. Talley Indus., Inc.*, 54 F.R.D. 627, 627 (S.D.N.Y. 1972) (court allowed discovery of the names and last known addresses of the stock holders of General Time). See generally Annot., *Discovery for Purposes of Determining Whether Class Action Requirements under Rule 23(a) & (b) of Federal Rules of Civil Procedure Are Satisfied*, 24 A.L.R. Fed. 872 (1975).

⁷⁰ 437 U.S. at 358. The *Oppenheimer* Court noted, however, that the responding party "may invoke the District Court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense' . . ."

⁷¹ See note 27 *supra*.

⁷² FED. R. CIV. P. 33(c) states:

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such 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 examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

⁷³ See 66 CALIF. L. REV. 105, 112-15 (1978); 91 HARV. L. REV. 703, 709-11 (1978).

merely to make its records available to discovering parties, rather than to compile the information in those records, where the burden of researching them is substantially the same for both parties.⁷⁴ Rule 33 does not require the discovering party to bear the expense, however, if the burden of researching the records is greater for the discovering party and not unduly burdensome for the responding party.⁷⁵ In a situation like that in *Oppenheimer*, where the relevant records are stored in computer files, the expense of compiling the information is the same for both the plaintiff and the defendant. Thus, in such a situation, rule 33(c) places on the plaintiff the expense of compiling the list of class members.

In contrast, if rule 34 applies to a plaintiff's request for discovery of the names and addresses of class members, a district court could place the expense of compiling the information on the defendant, unless the cost is excessive.⁷⁶ In determining whether the cost is excessive, a district court can consider such factors as the relative ability of the parties to bear the financial burden.⁷⁷ Perhaps the clearest discussion of this point is in the Second Cir-

⁷⁴ For the text of rule 33(c), see note 72 *supra*. See Advisory Committee Note to rule 33, 48 F.R.D. 522, 524-25 (1970). The Committee stated:

[33c] is a new subdivision, adapted from Calif. Code Civ. Proc. § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The 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, without undermining the liberal scope of interrogatory discovery, 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. See Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132, 1142-1144 (1951). The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. 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) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

See generally 4A MOORE'S FEDERAL PRACTICE ¶ 33.20, at 33-103 to 33-105 (2d ed. 1975).

⁷⁵ See Advisory Committee Note to rule 33, note 74 *supra*. See also *Daiflon Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 223-24 (10th Cir.), *cert. denied*, 429 U.S. 886 (1976).

⁷⁶ Advisory Committee Note to rule 34, 48 F.R.D. 526, 526-27 (1970). The Committee stated that "[p]rotection may be afforded to claims of . . . undue burden or expense under what is now Rule 26(c). . . . To be sure, an appraisal of 'undue' burden inevitably entails consideration of the needs of the party seeking discovery." *Id. See, e.g., Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 148 (E.D. Pa. 1976).

⁷⁷ *Sanders v. Levy*, 558 F.2d 636, 650 (2d Cir. 1976). See, e.g., *Babcock & Wilcox Co. v. Public Serv. Co. of Indiana*, 22 Fed. R. Serv. 2d 340, 341 (S.D. Ind. 1976); *United States v. Imperial Chem. Indus., Inc.*, 8 F.R.D. 551, 553 (S.D.N.Y.

cuit's en banc decision in *Oppenheimer*. The court of appeals in that case held that the district court had not abused its discretion in requiring the responding party to shoulder the expense. The court of appeals reasoned that "[t]here is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple."⁷⁸ Since the Supreme Court's opinion in *Oppenheimer* only attacked the premise of the court of appeals' decision—that the information was sought for a purpose placing it within the scope of discovery—the court of appeals' application of rule 34 is still valid. Therefore, if plaintiffs in situations where the identity of class members is stored on computers can characterize their request for the names of the class members as within the scope of discovery, rule 34 applies and they may successfully avoid the expense of discovery.

Since a court can allocate the expense of discovery differently under rule 34 and rule 33, it is important to determine which rule applies to a plaintiff's request for the names of class members. Where, as in *Oppenheimer* and in an increasing number of stockholder suits, the names and addresses of stockholders are stored in computer files, it is submitted that rule 34 should govern. Rule 34, unlike rule 33, provides specifically for the discovery of data stored on computers.⁷⁹ It requires the responding party to provide the data in useable form; and, as the Advisory Committee specifically noted, in many instances the only useable form is a printout of computer data.⁸⁰

Even if the plaintiff cannot characterize his request for the identification of the class members as within the scope of discovery, the plaintiff in a stockholder class action can avoid the ramifications of *Oppenheimer* by using a subclass of plaintiffs to limit the size of the plaintiff class, and thereby decrease his identification and notification costs.⁸¹ Rule 23(c)(4)(B) of the Fed-

1949); 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2036, 269 n.32 (1970).

⁷⁸ *Sanders v. Levy*, 558 F.2d 636, 650 (2d Cir. 1976).

⁷⁹ For the text of rule 34, see note 27 *supra*.

⁸⁰ Advisory Committee Note on rule 34, 48 F.R.D. 526, 527 (1970). The Committee stated:

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data.

⁸¹ Justice Powell in his majority opinion in *Eisen IV*, recognized this alternative when he stated:

The record does not reveal whether a smaller class of odd-lot traders could be defined, and if so, whether petitioner would be willing to pay the cost of notice to members of such a class. We intimate no view on whether any such subclass would satisfy the requirements of Rule 23. We do note, however, that our dismissal is without prejudice to any efforts petitioner may

eral Rules of Civil Procedure states: "a class may be divided into subclasses and each subclass treated as a class" ⁸² A class cannot be divided arbitrarily into subclasses, however; ⁸³ a subclass must have interests divergent from those of the class as a whole. ⁸⁴ Courts have found divergent interests within classes of stockholders and have certified subclasses in stockholder suits. ⁸⁵ Thus, plaintiffs in stockholder class actions should consider subdividing their class to avoid the often overwhelming burden of identifying and notifying members of a large class.

There are, however, at least three problems with using subclasses to minimize the impact of *Oppenheimer* on stockholder class actions. The first problem is that it is unclear whether a subclass can proceed alone in an action if other members of the class cannot find a representative. This is likely to occur, for example, in cases like *Oppenheimer* where a representative for the subclass of securities purchasers who had subsequently sold their shares would be forced to incur large expenses identifying the members of that subclass.

make to redefine his class either under Rule 23(c)(4) or Fed. Rule Civ. Proc. 15.

417 U.S. at 179 n.16.

⁸² Rule 23 (c)(4)(B) states "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." See 2 H. NEWBURG, CLASS ACTIONS ¶ 2425a, at 87-93 (1977).

⁸³ The plaintiffs in *Oppenheimer* attempted to redefine the class to include only the current shareholders. They failed, however, because the district court felt that the proposed limitation was "an arbitrary reduction in the classes." *Sanders v. Levy*, 20 Fed. R. Serv. 2d 1218, 1221 (S.D.N.Y. 1975). The court reasoned that shareholders who had purchased the shares at inflated prices and subsequently sold those shares were affected "as much as those who happened to have retained their shares." *Id.* The Court apparently overlooked a divergence of interest between purchasers who sold their shares and those that have retained their shares. This divergence of interest arises from the difference between the damages suffered by purchasers who presumably benefited from the inflated value of the shares because they resold them before the public knew of the inflation of the Fund's assets, and the damages suffered by purchasers who retained their shares until after the asset inflation became public and therefore could not recover their investment. Thus, at least two subclasses could have been created in *Oppenheimer* pursuant to rule 23(c)(4)(B).

⁸⁴ For text of rule 23(c)(4)(B), see note 82, *supra*. The Rules Advisory Committee explained that "[w]here a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 98, 106 (1966).

⁸⁵ See *Oscar Gruss & Son v. Geon Indus., Inc.*, 75 F.R.D. 531, 535 (S.D.N.Y. 1977) (class subdivided into those who purchased during the pendency of a takeover bid but before the downward revision of the offering price, and those who purchased during the pendency of the takeover bid but after the downward revision of the offering price); *In re Home-Stake Prod. Co. Sec. Litigation*, 23 Fed. R. Serv. 2d 1373, 1395-99, (N.D. Okla. 1977) (subclasses allowed where the sale of each subsidiary corporation's securities was a unique activity, allegedly involving specific fraudulent conduct by a certain group of defendants that was aimed at a particular group of investors under varying factual circumstances); *Lamb v. United Sec. Life Co.*, 59 F.R.D. 25, 30 (S.D. Iowa 1972) (court stated that it would order creation of subclasses if, even though the conflict appeared minimal, at any time two groups of stockholders were drawing distinctions among defendants in order to protect the corporations in which they held stock).

Nevertheless, the language of rule 23(c)(4) which states that a court shall treat a subclass like a class suggests that a subclass could proceed alone.⁸⁶ Also, the Court's reference in *Eisen IV* to the plaintiff's option of proceeding in a subclass as a method of avoiding large notification costs⁸⁷ suggests that a subclass could proceed alone despite any difficulty the remaining class members might have in finding a representative. Moreover, the use of subclasses in stockholder class actions accords with the major purpose of rule 23, which was enacted to allow groups of people to protect rights which they could not protect individually,⁸⁸ as well as the purpose for which civil liabilities are imposed by the Securities Acts.⁸⁹ It is thus submitted that courts should permit the formation of subclasses when dealing with large stockholder class actions.

The second problem with the use of subclasses is that the subclass still must satisfy the prerequisites for maintaining a class action as set forth in rule 23(a).⁹⁰ In particular, the subclass must still be large enough that joinder of all members is impractical.⁹¹ In large stockholder class actions such as *Oppenheimer*, the subclasses usually are large enough, but small stockholder class actions may not qualify and, thus, plaintiffs cannot use subclasses to avoid the harsh effects of *Oppenheimer*.

The third problem with the use of subclasses is that the smaller recovery that a subclass will obtain may not cover the great expenses of a suit. With a large class, the damage recovery should be enough to cover the costs of suit—notification, court costs, and attorney fees. With a smaller class, however, the damage recovery is smaller and, as is very often the case with individual investors, may not be sufficient to cover the costs of a suit.

These three problems suggest that the use of subclasses is only a limited remedy for mitigating the effects of *Oppenheimer* on stockholder class actions. Also, the technique of classifying requests for the identity of class members as discovery will not always be available to a plaintiff wishing to avoid the expenses of identifying class members. Thus, congressional action will be necessary to effectively mitigate the effects of *Oppenheimer*.

CONCLUSION

The *Oppenheimer* Court's decision to require the plaintiff in a stockholder class action to bear the cost of identifying class members in all but a few circumstances inevitably will increase the burden of bringing such actions. The plaintiff in a stockholder class action now must bear not only the cost of actual notification of class members, but also of their identification. This in-

⁸⁶ See note 82 *supra* for the exact language of the statute. The Advisory Committee stated: "Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interests, the class may be divided correspondingly, and each subclass treated as a class." Advisory Committee Note, 39 F.R.D. 69, at 106.

⁸⁷ 417 U.S. at 179 n.16. See note 81 *supra*.

⁸⁸ See text at note 65 *supra*.

⁸⁹ See text at notes 61-63 *supra*.

⁹⁰ The prerequisites to maintaining a class action are set forth in note 66 *supra*.

⁹¹ FED. R. CIV. P. 23(a)(1). See note 66 *supra*.

crease in expense conflicts with the purposes and policies behind rule 23 and the Securities Acts. Plaintiffs may be able to avoid the harsh effect of the *Oppenheimer* decision by using subclasses of plaintiffs or by classifying their request for the names of class members as a discovery request. These methods should prove effective only in certain circumstances, however. Thus, the ultimate revitalization of stockholder class actions will depend on future congressional action.

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