No. 10-1147

IN THE
Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* JAPAN COMPETITION LAW FORUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ETHAN E. LITWIN
HUGHES HUBBARD & REED LLP
ONE BATTERY PARK PLAZA
NEW YORK, NY 10004

WILLIAM R. STEIN
COUNSEL OF RECORD
JOHN F. WOOD
ADAM E. CEARLEY
DANIEL T. LLOYD
HUGHES HUBBARD & REED LLP
1775 I STREET, N.W.
WASHINGTON, DC 20006
(202) 721-4600
stein@hugheshubbard.com

Counsel for Amicus Curiae Japan Competition Law Forum

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

TREATISES AND PERIODICAL MATERIALS

OTHER AUTHORITIES

Blank Page

INTEREST OF THE *AMICUS CURIAE*[*]

The Japan Competition Law Forum ("JCLF") is a group of over 200 Japanese lawyers specializing in antitrust law. The JCLF aims to: 1) improve the competition law-related knowledge and skills of its members, 2) promote an exchange of information with other legal associations, including the International Bar Association and the American Bar Association, 3) improve and strengthen policies related to competition in the marketplace, and 4) improve the administration of justice in proceedings arising out of competition law. As such, the JCLF and its members have an interest in ensuring that procedures that promote international comity between antitrust enforcement regimes are respected, that Japan's antitrust regime (including its leniency program) is not undermined by cross-border discovery practices, and that Japanese

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[*] The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part. Only JCLF and its counsel participated in the drafting of this brief. The JCLF, a non-profit association of Japanese competition attorneys, will not bear the cost of the drafting of this brief or receive any financial contribution to it from third parties. One of the counsel members of JCLF and the undersigned outside counsel prepared this brief, subject to the direction and approval of JCLF's executive committee. Toshiba Corporation, a client of Petitioner White & Case LLP and a defendant in the related civil antitrust litigation, will pay the cost of undersigned outside counsel's work in drafting this brief.

companies and individuals are not subject to uncertain and potentially abusive discovery practices.

ARGUMENT

The per se rule adopted by the Ninth Circuit and two other circuits does not permit consideration of the important international interests that are implicated by a grand jury subpoena for access to foreign evidence that was produced in the United States under a civil protective order. Of particular concern to the JCLF and other foreign nationals is that the per se rule, as evidenced by the Ninth Circuit's decision in the case at hand, leaves no room for the consideration of important issues of international comity and the existence of well-established processes for obtaining foreign discovery in criminal cases. These processes, including Mutual Legal Assistance Treaties, letters rogatory, and informal diplomatic channels, respect the interests and rights of foreign states over conduct that occurred in, or persons and documents located in, their nation and involve cooperation or permission from the foreign state's enforcement agencies, courts, or diplomatic agencies.

As described below, the use of grand jury subpoenas to obtain access to materials that are in the United States only because of civil discovery under a strict protective order circumvents those procedures and potentially interferes with other nations' enforcement of their own antitrust regimes.

Of particular importance to the JCLF, the use of grand jury subpoenas rather than established methods of international criminal discovery threatens to undermine Japan's leniency program for corporate self-disclosures by preventing the Japanese government from weighing in on the appropriateness of U.S. criminal discovery of leniency applications under that program. The circuit split on the treatment of grand jury subpoenas that would pierce civil protective orders thus creates uncertainty that undermines the very purpose and efficacy of Japan's leniency program and similar programs in other countries.

The circuit split also creates intolerable uncertainty for Japanese companies and other potential foreign litigants that are subject to civil discovery in the United States but do not know the extent to which a civil protective order will be respected and enforced in the event of a grand jury investigation. The circuit split thus creates a disincentive for foreign litigants to cooperate in U.S. civil discovery.

The Japan Competition Law Forum therefore respectfully supports the petition for a writ of *certiorari* in this case so this Court can resolve the current three-way circuit split on this important issue.

A. The Per Se Rule Relied on by the Court Below Does Not Permit the Consideration of Important International Comity Concerns.

The discovery materials in this case came into the U.S. only because they were produced by foreign parties in civil discovery pursuant to a protective order. If the grand jury's subpoena is ultimately quashed, then the Department of Justice may seek foreign discovery through established methods that, as discussed below, are intended to respect foreign states' interests. Under the per se rule favoring grand jury subpoenas over civil protective orders, however, the interests of a foreign state (in this case Japan) may be wholly ignored. The Ninth Circuit's decision below thus exacerbates the existing circuit split by enabling prosecutors to circumvent the geographic limitations on grand jury subpoena authority and the well-established processes for criminal discovery that were designed to protect international comity interests.

As explained in the petition for *certiorari*, the appellate courts are divided between three competing and irreconcilable approaches to weighing the effect of a civil protective order on a grand jury subpoena. (Pet. at 14.) The crux of the circuit split is the extent to which a district court may consider the interests implicated by a grand jury subpoena when ruling on whether the subpoena should supersede a civil protective order. Two of the three tests adopted by the courts of appeals allow a district court to consider the many potential interests

implicated by a grand jury subpoena, including international comity concerns.

The Second Circuit's approach, by creating a presumption in favor of respecting civil protective orders, provides the most authority to district courts to protect the interests of foreign states. *See In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221, 1226 (2d Cir. 1991).

The balancing test utilized by the First and Third Circuits, while creating a presumption in favor of the subpoena, provides a vehicle for courts to consider important interests such as international comity concerns. *See In re Grand Jury*, 286 F.3d 153, 162 (3d Cir. 2002); *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir. 1998); . The JCLF believes that the international comity concerns implicated by this case merit quashing the subpoenas under either of these two approaches, particularly in light of the existence of well-established methods of international criminal discovery that the government chose not to pursue. But at the very least, these two approaches would allow the district court to consider the comity concerns.

In contrast, the per se rule adopted by the Ninth Circuit, and also followed by the Fourth and Eleventh Circuits, inflexibly prioritizes grand jury subpoenas over civil protective orders in all circumstances. The rule leaves no room for consideration of important concerns such as

international comity and the effect that the subpoena could have on a foreign state's interests and on foreign litigants. *See In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1227 (9th Cir. 1995); *In re Grand Jury (Williams)*, 995 F.2d 1013, 1015 (11th Cir. 1993); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477-78 (4th Cir. 1988).

In the present case, the district court recognized that the grand jury subpoenas implicated a number of concerns, including the territorial limitations of the grand jury's subpoena power and the fact that, but for the production under a protective order in civil litigation, the discovery at issue would have remained outside the U.S. (Pet. App. at 6A-7A.) The district court distinguished prior Ninth Circuit case law utilizing the per se rule on that basis and quashed the subpoena. (*Id.* at 7A-8A.) The Ninth Circuit, however, concluded that the district court's consideration of the territorial limitations on grand jury subpoena power was inconsistent with the per se rule. (*Id.* at 3A.) The Ninth Circuit ruling leaves little doubt that the per se rule removes all discretion from district courts to consider any of the reasons why it or another district court may have granted a civil protective order, including international comity interests and the protection of foreign litigants from unreasonable criminal discovery.

Comity concerns are especially acute in the context of criminal investigations, where the risk of

infringing on a foreign sovereign's legitimate and inherent interests is far greater than in civil litigation. *See* Restatement (Third) of Foreign Relations Law § 403 (1989), reporter's note 8 ("[T]he exercise of criminal [as distinguished from civil] jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive.") In fact, the Department of Justice acknowledges as much in its own policies and procedures. For example, the Department of Justice's Criminal Resources Manual observes that "the use of unilateral compulsory measures can adversely affect the law enforcement relationship with [a] foreign country." United States Department of Justice, Criminal Resource Manual § 279, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm. For this reason, the Manual imposes a strict approval process for subpoenas to persons or entities in the U.S. for records located abroad. *Id.* Likewise, the Department of Justice Antitrust Division's Grand Jury Manual emphasizes that "[d]ocuments in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty" and that "courts may decline to require production of documents on comity grounds." *See* United States Department of Justice, Antitrust Division, Grand Jury Manual III-11 (1991), *available at* http://www.justice.gov/atr/public/guidelines/206696.pdf.

Likewise, this Court and others have repeatedly emphasized the importance of international comity concerns in numerous other contexts. For example, international comity considerations underlie several important and long-standing doctrines of U.S. law, such as the presumption that Congress does not intend its laws to apply extraterritorially and the Court's practice of construing ambiguous statutes to avoid unreasonable interference with foreign sovereignty. *See, e.g.*, *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2885-86 (2010); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817-19 (1993) (Scalia, J. dissenting); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 248, 248 (1991); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

The circuit-split at issue in this case raises the very type of international comity concerns that this Court and even the Department of Justice have repeatedly recognized.

B. The Per Se Rule Does Not Permit Consideration of the Availability of Established Criminal Discovery Procedures That Protect International Comity and the Interests of Foreign States.

The grand jury's power to investigate is expansive, but not without limits. *U.S. v. R. Enter., Inc.*, 498 U.S. 292, 299 (1991). For example, as

recognized by the district court in this case, there are geographical limitations on the subpoena power. (Pet. App. at 7A); *see also U.S. v. Drogul*, 1 F.3d 1546, 1553 (11th Cir. 1993) ("Because the witnesses are foreign nationals located outside the United States, they are beyond the subpoena power of the district court."); *U.S. v. Padilla*, 869 F.2d 372, 377 (8th Cir. 1989) (where witness was a Canadian citizen residing in Canada, "a subpoena issued under Fed. R. Crim. P. 17(e)(2) would have no force"). Under the per se rule, however, grand juries can, in effect, conduct foreign discovery simply by hijacking the civil discovery process.

Unlike the other two approaches in the three-way circuit split, the per se rule utilized in the case at hand does not allow district courts to consider the existence of alternative means of securing evidence, such as Mutual Legal Assistance Treaties (MLATs), letters rogatory, and diplomatic channels. *See* Restatement (Third) of Foreign Relations Law § 442 (1989) (stating that courts should consider several factors before ordering the production of foreign documents or information, including "the availability of alternative means of securing the information"). Each of these processes is designed to respect the interests of foreign states.

For example, the Mutual Legal Assistance Treaty ("MLAT") between the United States and Japan was created for exactly the type of situation featured in this case. The MLAT allows for liberal discovery between the nations and also provides for

the cooperative prosecution of matters that affect both American and Japanese interests. Treaty Between Japan And The United States Of America On Mutual Legal Assistance In Criminal Matters, U.S.-Japan, art. 1 sec. 2, Aug. 5, 2003, S. Treaty Doc. No. 108-12. The MLAT ensures respect for the legal cultures and enforcement activities of each signatory nation by requiring the nations to consult and work with one another in furtherance of solutions that are optimal for both nations. *See id.*

Likewise, letters rogatory provide another means of obtaining international discovery, while ensuring that the interests and concerns of foreign countries are considered. *See In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada*, 523 F.2d 562, 563 n.1 (6th Cir. 1975) ("Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country . . . .") (internal quotation and citation omitted). The United States and Japan have a long history of successful use of letters rogatory. *See, e.g., In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216 (9th Cir. 1976) (granting the request of a Japanese judge for assistance through the use of letters rogatory). The letters rogatory system protects a country's comity-related interests by allowing the nation's judiciary to weigh in on the

discovery process. A judge answering a letter rogatory can take issues such as the ones present in this case into account when determining how to best fulfill a discovery request in a way that is respectful of both nations' potential concerns.

Similarly, even in the absence of an MLAT, informal diplomatic channels are frequently used in international criminal discovery. In fact, the Department of Justice's Criminal Resource Manual envisions six primary means for using informal channels to gather foreign discovery: 1) joint investigations, 2) diplomatic requests, 3) voluntary depositions, 4) informal requests similar to those made under an MLAT, 5) informal police-to-police requests, and 6) requests through Interpol. United States Department of Justice, Criminal Resource Manual § 278, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm. These methods have been used by the United States to great effect. *See, e.g.*, Bruce Zagaris, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty*, 14 Ariz. J. Int'l & Comp. L. 1, 11 (1997) (documenting the use of informal diplomatic channels to gather evidence in Mexico prior to the signing of the MLAT between the United States and Mexico).

The use of MLATs, letters rogatory, and diplomatic channels helps to ensure that if the United States is conducting a criminal investigation involving documents or witnesses located abroad, the foreign government will be informed and will have

an opportunity to communicate any concerns that it may have regarding how discovery in the U.S. investigation could affect its own enforcement activity. Application of the per se rule in this case allowed an end-run around these tried and tested mechanisms and thereby undermined the very comity interests those mechanisms were designed to protect.

C. The Circuit Split Implicates Other Nations' Important Interests in the Enforcement of Their Own Antitrust Regimes, Including Japan's Interest in the Effectiveness of Its Antitrust Leniency Program.

While antitrust law has become increasingly standardized internationally, important distinctions remain that should be considered when cross-border criminal investigations take place. *See, e.g.*, *Empagran* at 167 (citing W. Fugate, Foreign Commerce and the Antitrust Laws § 16.6 (5th ed. 1996)); Charles A. James, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Address before the OECD Global Forum on Competition: International Antitrust in the 21st Century: Cooperation and Conversion (Oct. 17, 2001) (noting that despite similar antitrust laws the United States and European Commission analyzed the same GE/Honeywell transaction and reached completely different results). The use of grand jury subpoenas to obtain evidence that is located in the U.S. solely because it was produced by foreign litigants under a strict civil protective order provides

no mechanism for the consideration of such differences. This is because such an approach does not require that foreign governments be informed–much less have an opportunity to object – before the evidence is used in cross-border criminal investigations. As such, the important interests that different nations have in the enforcement of their own antitrust regimes, including their interests in any ongoing investigations of their own, may be ignored entirely in favor of parochial U.S. enforcement interests.

To give an example of particular concern to the JCLF, the per se approach could undermine Japan's antitrust leniency program for companies that voluntarily self-disclose certain antitrust violations. *See* Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, art. 7-2, para. 10-26, http://www.jftc.go.jp/e-page/legislation/ama/amended_ama09.pdf (Japan). As explained in the petition for *certiorari*, (Pet. at 34-37), plaintiffs in civil lawsuits frequently seek discovery of leniency or amnesty applications submitted to the Japan Fair Trade Commission or to other governmental authorities that have leniency or amnesty programs, such as the European Commission.[1] *See, e.g., In re Rubber*

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[1] The Japan Fair Trade Commission and the European Commission filed objections in the district court in the underlying civil actions in this case. Both stressed the importance of safeguarding the confidentiality of amnesty and leniency applications. *See* Letter from the Director

Chemicals Antitrust Litig., 486 F. Supp. 2d 1078, 1080-82 (N.D. Cal. 2007); *In re Vitamins Antitrust Litig.*, No. 99-197, 2002 U.S. Dist. LEXIS 26490, *123-29 (D.D.C. Jan. 23, 2002). The disclosure of these applications would create a disincentive for companies to participate in the leniency programs, for fear that their disclosures could be obtained in civil litigation in the U.S. and then subpoenaed by a grand jury for use in U.S. criminal proceedings. Such a result would undermine the very purpose and efficacy of the leniency programs.

The existence of the current circuit split thus creates great uncertainty, which threatens to undermine Japan's antitrust leniency program and similar programs in other nations.

D. The Circuit Split Creates Opportunities for Abuse and Forum Shopping, and a Disincentive for Japanese Companies and Other Foreign Litigants to Cooperate in U.S. Civil Litigation.

The circuit split creates opportunities for substantial abuse. In the case at hand, the Japanese defendants participated in U.S. civil discovery under

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General of the Investigative Bureau, Japan Fair Trade Commission, to Hon. Susan Y. Illston, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 3, 2011), ECF No. 2392; Letter from the Director General of the Directorate for Competition, European Commission, to the Hon. Susan Y. Illston, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 15, 2011). ECF No. 2450.

a protective order. To their surprise, the protective order did not prevent disclosure to the grand jury of the discovery materials and testimony provided. If the circuit split continues, it will create uncertainty for foreign civil litigants, whose confidentiality expectations can be dashed – or preserved – depending on where the federal prosecutor chooses to initiate grand jury proceedings. And it will permit the U.S. government to abuse this circuit split by choosing favorable jurisdictions in which to initiate grand jury proceedings against such foreign litigants.

The per se rule in the Ninth Circuit could have a particularly significant impact on Japanese companies, which commonly base their U.S. operations on the west coast (in the Ninth Circuit) and therefore might be more likely to face grand jury investigations in that Circuit. *See generally* 2010 Survey of Japanese Companies in Southern California 1, *available at* http://www.jetro.org/documents/losangeles/2010_survey_of_japanese_companies%20_completed.pdf. Meanwhile, companies with their U.S. headquarters in the Second Circuit (including New York City) may be more likely to face grand jury investigations there and would be subject to a completely different standard in this situation.

Allowing such a divide to continue would be in conflict with this Court's most basic principles regarding the prevention of forum shopping. Moreover, this uncertainty would create a

disincentive for companies to cooperate in civil litigation and put at risk any future good faith cooperation on the part of foreign litigants during the course of U.S. civil discovery.

Such a scenario is particularly likely in antitrust cases, as civil class action follow-on suits are common when a grand jury investigation into a matter becomes public. (Pet. App. at 8A.) In such cases, Department of Justice prosecutors would have virtually unchecked authority to forgo all traditional channels for extraterritorial discovery – as well as the Department of Justice's internal procedural requirements discussed above – and simply seize the civil discovery, as it appears to have done here. This is especially problematic considering the broad scope of civil discovery and that grand juries can be empanelled for any reason and without any evidence, and conducted with minimal judicial supervision.

CONCLUSION

For the reasons stated above and in the petition for a writ of *certiorari*, the Japan Competition Law Forum respectfully urges the Court to grant the petition in order to resolve this pressing and important circuit split.

Respectfully submitted,

ETHAN E. LITWIN
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004

WILLIAM R. STEIN
Counsel of Record
JOHN F. WOOD
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006
(202) 721-4600
stein@hugheshubbard.com

Attorneys for Amicus Curiae Japan Competition Law Forum

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