No. 21-828

IN THE

Supreme Court of the United States

THE ESTATE OF OMAR FONTANA, *et al.*,

Petitioners,

v.

ACFB ADMINISTRACAO JUDICIAL LTDA – ME,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Should the Court grant certiorari to resolve a conflict among the courts of appeals over whether a stand-alone discovery order entered in a Chapter 15 case is final and appealable?

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REPLY

Respondent's lead argument rests upon a sematic error: a misperception of the meaning of a "stand-alone" discovery order. A discovery order in a Chapter 15 case may be entered in one of two ways: on a stand-alone basis as part of the overall administrative Chapter 15 case, or as an integral part of some discrete proceeding initiated within the Chapter 15 matter (*e.g.*, an adversary proceeding akin to an ordinary lawsuit). Both *Barnet* and this case involve the former. *See In re Barnet*, 737 F.3d 238 (2d Cir. 2013). The Second Circuit treated such a stand-alone order as final for appellate purposes; the decision below reached the opposite conclusion. More important, the court below reached its conclusion by rejecting the legal reasoning of the Second Circuit. The conflict is thus not "fact-specific," turning on whether one order is a "stand-alone" order and the other not. Both are stand-alone orders, and the conflict involves opposing conclusions of law regarding whether such orders are final.

Respondent insists nonetheless that the order in this case is not truly a "stand-alone" discovery order because the discovery obtained might be used later in a subsequent proceeding in the Chapter 15 case—*i.e.*, to implement the "Freeze Order." As noted, that misperceives the meaning of the term "stand-alone." More important, what Respondent describes (that the discovery might be used later) is exactly the situation in *Barnet*. Rather than establishing a factual distinction between the two cases, Respondent highlights how they are, in fact, fundamentally the same.

In addition, the decision below did far more than reject *Barnet* on its facts: it treated a procedurally identical order as non-final for reasons the Second Circuit rejected. Further, the decision below plainly failed to follow this Court's decision in *Ritzen*. The Eleventh Circuit did not apply the criteria this Court identified; it chartered its own path, disregarding this Court's admonition that "[i]t does not matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case . . . ." *Ritzen, Group, Inc. v. Jackson Masonry, LLC*, __ U.S. __, 140 S. Ct. 582, 591 (2020). Indeed, according to the court below (as Respondent emphasizes), that consideration was essentially the only thing that mattered—that the discovery might be pertinent to some later dispute involving the Freeze Order.

Finally, as Respondent conceded in the court below, this controversy is not moot. If the discovered material should not have been produced, it may be returned and Respondent barred from using it in any subsequent proceeding—which is exactly the relief Petitioners seek. Certiorari is warranted.

I. THE DECISION BELOW CREATES A SPLIT OF AUTHORITY BETWEEN THE SECOND AND ELEVENTH CIRCUITS.

In *Barnet*, the Second Circuit treated the stand-alone discovery order in question as one that, on its own, finally resolved a discrete dispute in the Chapter 15 case. In the decision below, the Eleventh Circuit refused to do the same. The two decisions irreconcilably conflict because only one may be correct, and the reasoning of

one is fundamentally inconsistent with the reasoning of the other.

Contrary to Respondent's contention, the relevant distinction between this case and *Barnet* is not factual. It is legal in nature based on the different rationales of the two cases. The Eleventh Circuit relied (essentially conclusively) on the general principle that discovery orders are characteristically non-final because the court is left with more to do than simply enter a final judgment. *See* App. at 6a. The court below found nothing special about stand-alone discovery orders entered in Chapter 15 cases or other ancillary proceedings.

For the Second Circuit, however, the distinction between discovery orders generally and those arising in ancillary proceedings like Chapter 15 cases made all the difference. It found particularly relevant that, if stand-alone discovery orders in Chapter 15 cases were not final, there would often be no effective appeal because the final resolution of disputes between the parties often occurs in foreign courts—the discovery is used there, not here. It concluded that a stand-alone discovery dispute within a Chapter 15 case is necessarily a discrete proceeding conclusively resolved by the order granting or denying the discovery.

It is also evident that the discovery obtained in *Barnet* might well have been used in some other subsequent proceeding in the Chapter 15 case. For example, nothing prevented the trustee from using any discovery regarding the location of the debtor's assets in the United States to later gain control of them through some subsequent Chapter 15 proceeding. *See* 11 U.S.C. § 1521(a)(3) & (5).

That eventuality, however, did not render the stand-alone discovery order non-final. What mattered to the Second Circuit was that the trustee might *not* do so, instead using the discovery obtained in some foreign proceeding. The same is true here, where no subsequent proceeding has, in fact, been pursued.

The differences in the reasoning of the two courts extends further. The Second Circuit relied on an analogy between the issuance of discovery orders in Chapter 15 cases and relief under section 1520(a), which imposes an automatic stay in the Chapter 15 context. The *Barnet* court reasoned that, because an order imposing an automatic stay under section 1520(a) is final, a discovery order under section 1521(a)(4) should also be treated as final. *In re Barnet*, 737 F.3d at 244.

The Eleventh Circuit disagreed. It rejected the *Barnet* court's analogy, and it distinguished *Barnet* itself more generally as "irrelevant" on the ground that "the Second Circuit did not have the benefit of *Ritzen* when it issued *Barnet*, so it did not wrestle with the question of whether discovery under Chapter 15 is a 'discrete' or 'separate' proceeding." Pet. App. at 11a-12a.

The Second Circuit's analysis, however, is perfectly consistent with *Ritzen*; it is the Eleventh Circuit's approach that is not, further highlighting the conflict. In *Ritzen*, this Court held that an order denying a creditor's motion for relief from the automatic stay under section 362(a), and thus continuing the stay in place, is final and appealable because it resolved a discrete proceeding. It did not matter that further proceedings on the particular creditor's claim were yet to be resolved in the bankruptcy court at

the time of the order denying relief from stay. Nor did it matter that the creditor might possibly renew its motion for relief from stay at a later date. What mattered was that (1) a motion for relief from stay "initiates a discrete procedural sequence, including notice and a hearing," (2) it is "separate from the rest of the case," (3) it "occurs before and apart from proceedings on the merits of the creditors' claims," and (4) the relevant order "grants or denies relief according to a statutory standard." *Ritzen*, 140 S. Ct. at 586, 589, 591. The same is true of a stand-alone discovery order in a Chapter 15 case, and the Second Circuit correctly viewed the matter in this way.

In contrast—as Respondent highlights—the Eleventh Circuit determined that what mattered was that the discovery might be used in a subsequent proceeding involving the Freeze Order (even though no such proceeding was in prospect or has yet been pursued). That, however, is exactly what this Court directed is *not* important: "[i]t does not matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case . . . ." *Ritzen*, 140 S. Ct. at 591. The conflict could not be any clearer: in reaching its legal conclusion, the Eleventh Circuit relied upon a rationale this Court has rejected; the Second Circuit, in reaching the opposite conclusion, applied a rationale consistent with this Court's approach. Moreover, Respondent simply protests too much in distinguishing *Barnet* as a pre-*Ritzen* decision: it is the Eleventh Circuit, which had the full benefit of *Ritzen*, that failed to follow its reasoning.

In *Barnet*, the Second Circuit also properly framed the issue as whether a discovery order under section

1521(a)(4) resolves a discrete proceeding. The court answered that question with a resounding "yes"—just like this Court did in *Ritzen*. In contrast, the Eleventh Circuit answered with a resounding "no," creating the circuit split at issue here. Certiorari is warranted.

II. THE DECISION BELOW COFLICTS WITH THIS COURT'S DECISION IN *RITZEN*.

As explained in the prior section, the decision below not only conflicts with the Second Circuit's decision in *Barnet*, it conflicts irreconcilably with this Court's approach in *Ritzen*. Respondent implies that the court below did, in fact, apply this Court's criteria, but that is plainly not so. Rather, as noted, the court below relied on the possibility that the discovery obtained might be used in a subsequent proceeding involving the Freeze Order. That reliance plainly conflicts with this Court's approach.

In this case, Petitioners' motion for a protective order initiated a discrete procedural sequence, including notice and a hearing. Notably, proceedings on the motion for a protective order were separate and apart from the rest of the Chapter 15 case. They were not part of a larger proceeding to implement the Freeze Order because no such proceeding existed (and still does not). The *only* connection between the discovery order and some other proceeding in the Chapter 15 case is that the discovery obtained *might* be used in some subsequent proceeding—that is the actual basis for the decision below. But that is exactly what this Court instructed in *Ritzen* is not controlling: "[once again] [i]t does not matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case

. . . ." *Ritzen*, 140 S. Ct. at 591. There is no way to reconcile the decision below with this Court's analysis. Certiorari is warranted.

III. THE CASE IS NOT MOOT.

As the Court below observed:

> Our Court has an obligation to consider sua sponte whether an appeal is moot, so we pressed counsel at oral argument on this issue. The parties agreed that, even of the documents have been produced, there is at least some relief a court could give, such as ordering the Trustee to destroy the documents in the United States.

Pet. App. at 5a, n.5. Respondent's flip-flop on this issue is untenable. As noted, if the discovered material should not have been produced, it may be returned (or destroyed) and Respondent barred from using it in any subsequent proceeding. As Respondent conceded below, this case is not moot.

IV. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF LAW.

Respondent does not deny the gravity of the obligation of the Courts of Appeals to exercise the jurisdiction conferred upon them. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Respondent likewise does not deny that the issue is recurring, particularly given the frequency with which requests for discovery are made in Chapter 15 cases. For these additional reasons, certiorari is warranted.

V. THE DECISION BELOW IS WRONG.

Finally, for all of the reasons addressed above and in the Petition, the decision below is wrong. Given the conflict among the Courts of Appeals on the question presented, the conflict between the decision below and this Court's decision in *Ritzen*, and the importance of the question presented, certiorari is warranted.

CONCLUSION

For the foregoing reasons, as well as those set forth in their Petition, Petitioners respectfully request that the Court grant certiorari to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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