No. _____

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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In re: GOSPEL FOR ASIA, INC., GOSPEL FOR ASIA-INTERNATIONAL, K.P. YOHANNAN, GISELA PUNNOSE, DANIEL PUNNOSE, DAVID CARROLL, PAT EMERICK

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# PETITION FOR WRIT OF MANDAMUS

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On Petition for Writ of Mandamus to the United States District Court
for the Western District of Arkansas, Case No. 5:17-cv-5035
Honorable Timothy L. Brooks, District Judge

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## CORPORATE DISCLOSURE STATEMENT

The "Petitioners" in this case are as follows:

1. Gospel for Asia, Inc. ("GFA") is a nonprofit 501(c)(3) organization. There is no parent corporation for GFA, and no publicly held corporation owns more than 10% of its stock.

2. Gospel for Asia-International ("GFA-International") is no longer in existence. GFA-International ceased to exist before this lawsuit was filed.

3. K.P. Yohannan, Gisela Punnose, Daniel Punnose, David Carroll, and Pat Emerick are all individuals who are or were affiliated with GFA in a capacity as an employee, officer, and/or director.

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## RELIEF SOUGHT

Petitioners seek a writ of mandamus directing the district court to vacate its June 4, 2018 Order, grant Petitioners protection from the pending order compelling production of third-party documents, and withdraw the sanctions it imposed. Mandamus review is appropriate because this Petition raises "novel and important questions presented in [a] discovery order that are likely to recur." *In re Societe Nationale Industrielle Aeorospatiale*, 782 F.2d 120, 123 (8th Cir. 1986), *vacated on other grounds*, 482 U.S. 522 (1972).

First, the Petition seeks a ruling on the legal standard for "control" under Fed. R. Civ. P. 34(a)(1), which this Court has not yet addressed. Most federal circuit courts hold that Rule 34 requires the "legal right" to obtain documents on demand, not merely the "practical ability" to obtain documents. *E.g.*, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993); *see infra*. n.5. Without acknowledging those authorities, the district court adopted a minority view—the "practical ability" standard—and then found it was met without requiring Plaintiffs to offer any competent evidence to prove control.

This case presents compelling circumstances to address this issue, as Petitioners have been ordered to gather millions of hard copy documents held by third parties in diverse locations across India to produce them to Plaintiffs in the

United States. Petitioners (and future litigants) should not be subjected to this burden based on the erroneous "practical ability" standard. There is no meaningful post-judgment appellate relief available that could cure the harms to Petitioners if they are subjected to this erroneous burden.

Second, this Petition presents an important, recurring issue regarding the relationship between Rule 26(b)'s "proportionality" requirements and class action litigation. The new Rule 26(b) "mark[s] significant change, for both lawyers and judges, in the future conduct of civil trials," and "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." Chief Justice John G. Roberts, Jr., *2015 Year-End Report on the Federal Judiciary* 5-6.[1] Wide-ranging, disproportional discovery exerts unfair pressure on parties to forego their rights to defend claims on the merits. *See Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007). This case presents compelling circumstances to address this issue. Plaintiffs who, at best, have a claim regarding their $34,911 in donations, seek to represent a class. It has not been certified. Nevertheless, the district court is compelling Petitioners to produce discovery at a cost of millions of dollars to show how $376 million in charitable donations were fulfilled over seven years in Asia. The effect of the

[1] Available at https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

court's reasoning is that Petitioners must transport every "receipt, bill of sale, transmittal letters, etc." (A00015-A00016) held by third parties to the United States, and that making those documents available where they are kept in the ordinary course (which has already been done, by obtaining permission from those third parties to allow inspection), is not enough. This is not proportional to the needs of the case. A qualified forensic accountant would not review every receipt regarding $376 million in expenditures, and the thrust of Plaintiffs' motions is not to obtain access to such financial information, but rather to use this issue to attempt to preclude Petitioners from presenting any evidence that designations were fulfilled.

Review is urgently needed. The district court has ruled, and has even sanctioned Petitioners for asserting their rights. Supervisory intervention through mandamus is necessary to correct the district court's clear abuse of discretion.

## ISSUES PRESENTED

1. Whether the district court clearly abused its discretion by applying the wrong legal definition of "control" when ordering Petitioners to produce third party documents from India.

2. Whether the district court clearly abused its discretion by ignoring the enormous discovery burden it has imposed on Petitioners without considering whether that discovery was proportional to the needs of the case.

3. Whether the district court clearly abused its discretion by imposing sanctions.

## FACTUAL BACKGROUND

### A. THIS IS A PUTATIVE CLASS ACTION AGAINST A CHARITABLE ORGANIZATION

GFA is a nonprofit religious missionary organization that raises funds to assist local efforts in Asia, sponsor missionaries and children, invest in community development, and help families in need. Plaintiffs allege that GFA raised $376 million from tens of thousands of donors during the lawsuit's relevant time period.

Plaintiffs donated $34,911 to GFA between 2009 and 2014, allegedly relying on a promise that GFA "would apply 100% of every donation exactly as Plaintiffs designated." ECF1, ¶42. Over the relevant time period GFA utilized 179 different Project Codes correlating to the various donation decisions donors could make. Plaintiffs allege that donations for all Project Codes (and not just the ones Plaintiffs selected) were diverted to purposes other than as designated. Plaintiffs essentially argue breach of some "contract" between the donor and GFA,

but their causes of action are for RICO violation, fraud, violations of the Arkansas Deceptive Trade Practices Act, and unjust enrichment.

Petitioners deny the allegations, and further do not believe this case may be certified as a class action. As explained in opposition to Plaintiffs' certification motion, GFA encouraged donors to participate in the good works GFA was sponsoring in Asia, but it's the representations it made to donors varied. ECF73. For example, GFA told many donors that "100% of what you give toward sponsorship goes to the field," ECF1, ¶17, but donations must be made "without restrictions" with GFA retaining discretion to use donations to best fulfill its mission. ECF71 at 4. There was no guarantee that each of the $376 million donated would be used for its exact designated purpose. Thus, for many putative class members, they did not donate based on the alleged representation that donations would be used "exactly" as designated, and for others, they would have donated to GFA's overall mission, not relying on the representation at the center of Plaintiffs' claims. ECF71. For example, if donations designated for goats were used to purchase lambs, most donors would not claim fraud, as Plaintiffs do. Petitioners intend to vigorously defend the claims against them.

Despite the relatively small size of Plaintiffs' individual claims, Plaintiffs seek class-wide discovery to trace all $376 million in donations from donors to the

ultimate fulfillment in India. Petitioners have produced over 1,000,000 pages of documents, including detailed financial information, responsive to Plaintiffs' requests using the search terms Plaintiffs demanded. Petitioners are not withholding responsive documents. A00249. Nevertheless, Plaintiffs want Petitioners to spend millions of dollars trying to gather millions of documents from others in India to produce to Plaintiffs in the United States, including but not limited to back-up receipts and bills of sale showing the exact fulfillment in India.

### B. PETITIONERS RESPONDED TO PLAINTIFFS' DISCOVERY IN GOOD FAITH AND IN COMPLIANCE WITH THE FEDERAL RULES

To understand why review is urgently needed, it is necessary to recap the history of this discovery dispute in some detail. The order subject to this Petition imposes sanctions on Petitioners, accusing them of "abusive conduct," providing "evasive" discovery answers, and committing "a willful violation of [the court's] clear discovery orders." A00017. This is objectively not true.

This dispute arises from 1,073 requests for admission ("RFAs") and 178 document requests ("RFPs") served on November 21, 2017.[2] A00032. For each Project Code that donors could designate, Plaintiffs requested Petitioners to:

[2] This was the first discovery dispute before the court. Petitioners responded to two earlier discovery sets. The first included interrogatories asking Petitioners to trace all funds sent to the field. SA00722. The second asked Petitioners to produce wide-ranging discovery from third parties in Asia. SA00729. Although Petitioners objected to those requests for many reasons, Petitioners produced extensive records for Plaintiffs' review, including audited financial

a. Admit that for the period from January 1, 2009 through March 31, 2016, GFA received $_____[exact amount] in contributions from donors with donor designations for Project Code ____.

b. Admit that from January 1, 2009 through March 31, 2016, GFA recorded donor contributions for Project Code ___ in the amount of $_____[exact amount].

c. Admit that GFA did not spend the $_____[exact amount] on ___ (particular item).

d. Admit that GFA's "field partners" did not spend the $_____[exact amount] on the ____ (particular item).

e. Admit that you have produced to Plaintiffs all evidence you possess regarding how the $_____[exact amount] designated by donors for (particular item) was spent.

f. Admit that you have no evidence as to how the $_____[exact amount] for (particular item) was spent.

g. Produce all documents in your possession, custody, or control reflecting how the $_____[exact amount] designated for (particular item) was actually spent.

A00043 n.2. These requests asked Petitioners to analyze and produce every document in their possession, custody, or control regarding each of the $376 million in donations. The requests ask for admissions about the contents of those documents before any ruling on certification, before discovery has closed, before Petitioners' expert deadlines, and while the parties were still investigating the facts.

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statements, bank statements, individual tax returns, emails (using Plaintiffs' search terms), field reports and updates, etc. Plaintiffs did not move to compel relating to those prior responses, and there were no rulings on Petitioners' objections.

Petitioners served initial responses in December 2017, and an amended response on January 10, 2018. SA00759. Petitioners fully answered 894 out of 1,073 requests for admission, but explained they lacked sufficient knowledge to admit or deny 179 (all subpart (d)'s)). Petitioners responded:

- for each subpart (a) and (b), with an unqualified "admit," or if Plaintiffs used the wrong dollar number in the RFA, the correct dollar number with a source document reference for the correction;

- for all subparts (c), by "admit[ting] that GFA-USA did not spend (as opposed to send to the field) the money recorded for this specific Project Code;"

- for subpart (d), by stating in accordance with Rule 36(a)(4) that "Defendants have made and will continue to make a reasonable inquiry regarding this request; however, although Defendants have made a reasonable inquiry and are continuing to inquire, the information they know or can readily obtain is insufficient to enable them to admit or deny a specific dollar amount at this time."

- for all subparts (e), by denying they had produced "all evidence" to the Plaintiffs because, among other reasons, Petitioners intended to call live witnesses who could not be "produced" to Plaintiffs; and

- for all subparts (f), by denying they had "no evidence" as to how donations were spent on particular items because, among other evidence, they had financial statements, spreadsheets, and reports (including from the field) regarding how funds were spent (all of which have been produced to Plaintiffs), as well as live witnesses with knowledge on the listed topics.

SA00759-SA01005. Petitioners also answered all 178 document requests, listing the categories and bates-ranges of documents Petitioners believed were responsive,

and agreeing to continue producing documents when they became available. SA00759-SA01005. Petitioners were not (and are not) withholding documents within their possession.

The district court and Plaintiffs have not been satisfied with the documents produced, apparently wanting back-up receipts, bills of sale, and other documents showing the exact disposition of donations in India. Petitioners explained that these field documents are in the custody of third parties in India who are not under Petitioners' control. Nevertheless, Petitioners used their relationships with those entities to secure, for Plaintiffs' review, access to source documents in India, where they are kept in the ordinary course of business. ECF39 at 6-7; A00038. There are millions of such documents spread over 12,000 locations in almost every part of India. SASA00718-SA00720. Plaintiffs have made no effort to inspect those documents. Petitioners also secured and produced over 60,000 pages of bank statements, ledgers, and summaries from the field. SA00691.

### C. THE DISTRICT COURT HAD CONCERNS ABOUT WHAT IT ANTICIPATED PETITIONERS' ANSWERS WOULD BE BEFORE THEY WERE EVEN DRAFTED

As the district court later acknowledged, it was concerned about what Petitioners' discovery responses were going to be, *before the requests were served*: "[i]t could sense that it needed to get involved fairly quickly because it understood what the defendants' response was going to be." A00278. Given the volume of

requests, Plaintiffs moved for leave to serve them, and the district court conducted a telephone conference on that motion before Petitioners' response to the motion for leave was even due. A00230. The district court was concerned about Petitioners "putting up illegitimate barriers to that discovery or [serving] evasive answers." A00262.

Several points from the motion for leave, hearing, and related order are relevant. First, when seeking leave to file the RFAs and RFPs, Plaintiffs told the district court that they were "not asking what [GFA's] international partners had." A00247. Second, the district court did not order Petitioners to obtain documents from the third parties in India. *See* A00032, A00230. Instead, the district court explained that "if, after reasonable inquiry, Defendants do not have within their possession information by which they could honestly admit or deny these RFAs, then that is the answer that should be provided." A00038. "[T]o the extent that you don't have the documentation and you do not control in any manner production of documents that have been requested, then I get it. You may not be in a position to provide the documents that you don't have or that you don't have access or control over; but if that's the case, that's your response." A00257. The court further said "I would suggest that you try a little bit harder" if you have the ability to obtain documents "because you control the pursestrings." A00262.

The district court did not elaborate on the control standard it believed should apply. It did not decide whether Petitioners had control over the third parties, nor could it because that issue had not been teed up for decision.[3] Petitioners believe their January 10, 2018 discovery responses not only complied with the Rules, but also with the district court's September 2017 instructions.

### D. PLAINTIFFS MOVED FOR SANCTIONS

On January 26, 2018, Plaintiffs moved for sanctions. ECF54. Plaintiffs never went to India to review the third party documents made available through Petitioners' efforts. Plaintiffs never requested any depositions to inquire about what documentation existed, where it was, or how funds were tracked. Plaintiffs offered no expert or accounting testimony to explain what was inadequate about the documents produced.

Plaintiffs complained that Petitioners would not "simply admit they lack documentary evidence of how the donations were spent." ECF56 at 1. This statement apparently related to subpart (f) of the RFAs, but Plaintiffs' request did not focus on *documentary evidence*; it asked Petitioners to admit they have "no evidence" of how funds were spent. Regardless, Petitioners responded with a detailed explanation showing they had documentary evidence, including summary

[3] The issue of Petitioner Yohannan's ability to control the Indian entities had been discussed with the Court during the May 2017 Case Management Hearing. The Court made no rulings on control at the hearing, recognizing that evidence was needed to resolve the issue. A000123.

reports GFA received from India and produced to Plaintiffs. ECF62. Petitioners also continued to work with the third parties in India to obtain additional documentation. ECF62.

### E. THE DISTRICT COURT IMPOSED ADDITIONAL BURDENS ON PETITIONERS, DISALLOWING PRODUCTION OF DOCUMENTS WHERE KEPT IN THE ORDINARY COURSE OF BUSINESS, AND INCLUDING THE OBLIGATION TO OBTAIN MILLIONS OF DOCUMENTS FROM INDIA TO PRODUCE IN THE UNITED STATES

The district court held a hearing on February 16, 2018, and ordered all named parties to attend regardless how far away they lived, even if (as for one person) from another country. A00041. The court described the situation as being like the movie "Groundhog Day," and said "I feel like when I read the defendants' answers and when I read their response that it is as if this Court had not already addressed and ruled on some of these same issues at least twice, if not more and, yet, here we are again." A00281-A00282.

Petitioners are puzzled by this statement. To the extent the district court provided guidance on how to answer the discovery back in September 2017, Petitioners' answers were consistent with the Court's statements. Petitioners fully answered subparts (a), (b), (c), (e), and (f), stated they lacked sufficient knowledge to answer subpart (d), did not object to subpart (g), and used their relationships with the third parties to secure the opportunity for Plaintiffs to review documents

where they are kept in the ordinary course. Nevertheless, the district court compared (unfairly in Petitioners' view) Petitioners' discovery answers to "attempting to nail Jell-O to the wall," and "like a hog searching in the woods for truffles." A00303-A00305.

Moving from hyperbole to substance, the district court imposed several new obligations on Petitioners. Regarding the document requests, the court explained what it expected to see in the documents—receipts, bills of sale, etc., A00306, which are the very type of documents that would be located in the field offices of the third parties. In response to Petitioners' concern that there were millions of such documents in India, the court said: "[a]t this point, I do not believe that that's the plaintiffs' problem." A00359. "You have the power of the pursestrings so to speak. The Court believes that the named defendants here, including individually named defendants, have the ability to produce these documents in the United States, in the State of Texas where y'all practice, if you want." A00360. This was the district court's *first* ruling on the issues of control and Petitioners' obligations to obtain documents from India to produce to Plaintiffs in the United States. The district court cited no legal authority or evidence when making its ruling.

In addition to requiring Petitioners to gather the documents from India, the district court essentially turned subpart (g) of the requests into a multi-part

interrogatory, ordering Petitioners to answer each of the 178 requests, by identifying, by bates number, the "general evidence" and "specific evidence" regarding the listed Project Code. A00049-A00050, A00358-A00359.

The district court also addressed Petitioners' RFA answers. The court took no issue with Petitioners' answers to subparts (a), (b), or (c). A00044 n.3. For subpart (d), the court mandated the exact language Petitioners were required to use in the response.[4] A00354. The court also addressed subpart (e), apparently wanting answers on whether Petitioners had produced the "documentary evidence" in their possession, instead of "all evidence" (as Plaintiffs had drafted the RFA). *See* A00047, A00049, A00356-A00357. Petitioners were given three weeks to respond, A00365, which was extended one week by agreement.

Petitioners amended their responses to comply with the order. For subpart (d), based on the additional inquiry Petitioners promised to perform (as stated in their original answers), Petitioners provided an unqualified "admit," or "deny" for most, but still answered a few under Rule 36(a)(4) using the exact language instructed by the district court. SA1006-SA1303. Given the change in scope of

[4] The district court took issue with Petitioners' answers to subpart (d) because they allegedly created "uncertainty" regarding the response. A00047. The court instructed that the correct phrasing for a Rule 36(a)(4) answer was: "Defendants have made a reasonable inquiry, and the information they know or can readily obtain is insufficient to enable them to admit or deny." A00046, A00049, A00354. As explained on page 32 below, Petitioners' answers to subpart (d) tracked Rule 36(a)(4), and were not materially different from the district court's wording.

subpart (e) (*i.e.* from "all evidence" to "documentary evidence"), Petitioners were able to admit those requests. SA1006-SA1303. Petitioners also devoted tremendous time and expense to attempt to catalog the documents they produced in the "general" and "specific" evidence as the district court requested for subpart (g). SA00002-SA00003, SA1006-SA1552. As discussed below, the process of making these amendments cost Petitioners several hundred thousand dollars.

### F. PETITIONERS MOVED FOR PROTECTION AGAINST THE ORDER

Petitioners moved for protection from the district court's document production order because it was based on the wrong standard of control, not proportional to the needs of the case, and a violation of due process. ECF85; ECF86. Petitioners' counsel testified that Petitioners:

(a) produced over 1,000,000 pages of documents,

(b) produced over 50,000 pages of documents obtained from third parties,

(c) made trips to India to meet with record custodians, making attempts to gather and produce documents, and

(d) incurred $260,000 in expenses just for ninety contractors to review documents, plus 200 hours of their own counsel and staff's time to prepare the March 16, 2018 responses to the district court's February 2018 order.

SA00003.

Daniel Varghese, a representative from Believers Eastern Church ("BEC") in India, which was a recipient of GFA funds but not a party to this case, also

provided a declaration explaining the process and expense required to gather the hard-copy documents, such as receipts, held in India. SA00673. The documents were located in over 12,700 separate locations including in local churches in distant rural belts, some of which can only be reached by motorcycle, bicycle, or on foot. SA00675-SA00688. The documents were kept by hand and in hard copy format, and in many cases, at locations far from copying services. He estimated (a) there were 6.42 crores (or 64,200,000) of pages, (b) it would take 200 people 120 days working 8 hours a day to gather the documents, totaling 192,000 hours, (c) it would require using at least 45 copying services given the diversity of locations where the documents were kept, and (d) the total volume of documents would weigh over 350,000 kilograms, resulting in enormous shipping costs to the United States. SA00674, SA00688.

BEC has already incurred 5.5 crores INR in expenses working with Petitioners in this case, which converts into approximately $814,000. Varghese estimated it would cost BEC an additional 17.28 crores INR (more than $2.5 million) to gather and copy the hard-copy documents. SA00688.

Plaintiffs offered no rebuttal evidence. Instead, Plaintiffs responded by saying the court had already decided and should not revisit the issues regarding Petitioners' obligation to produce documents from India. ECF92. Plaintiffs never

briefed the standards for compelling a party to obtain documents from third parties. Plaintiffs just assume Petitioners should incur this burden.

The district court denied Petitioners' motion. A00001. The court applied the "practical ability" control test to conclude that Petitioners could produce the documents from India. A00009-A00012. The court rejected Petitioners' arguments based on burdens and expense, holding they were too late even though the motion was filed just four weeks after the court first ordered Petitioners to produce the documents from India. A00007-A00009. The court refused to defer full-blown merits discovery (*i.e.*, tracing $376 million in donations from source to fulfillment) until after the court rules on class certification because of Petitioners' alleged "lack of good faith efforts to comply with the Court's prior orders." A00012-A00013. The court did not even address its prior Case Management Order, which provided:

> The scope of discovery may include both class and merits discovery. That said, discovery which clearly has no purpose other than for merits issues should be deferred until after the Court rules on class certification.

A00024.

### G. PLAINTIFFS MOVED FOR SANCTIONS

Plaintiffs moved for sanctions, arguing Petitioners acted improperly by (a) requesting a protective order, (b) refusing to admit they lacked specific evidence to

show that donations were spent on particular items, and (c) failing to produce specific evidence of how the donations were spent in the field—*i.e.* "receipts, bills of sale, etc." ECF96 at 1-2. Petitioners responded to each point. ECF100.

The district court granted Plaintiffs' motion. To impose sanctions, the court recognized: "there must be an order compelling discovery, a willful violation of that order, and prejudice to the other party." A00013 (citing *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019 (8th Cir. 1999)). The sanctions are based on the February 2018 order, as well as Petitioners' alleged failure to cite to "receipts, bills of sale, transmittal letters, etc." in the "specific evidence" Petitioners listed in subpart (g) of the discovery. A00015-A00016. Those are the documents in India. Thus, the sanctions are based in significant part on the document production and control issues addressed in Petitioners' motion for protection.

As a sanction, the district court has stated its intent to appoint a special master at Petitioners' expense. Given that the court is suggesting delegating ultimate issues to be decided to a special master, Petitioners have objected. A00367. Plaintiffs have suggested a scope for a special master that would deprive Petitioners of their Seventh Amendment right to a jury trial. A00373. An order appointing a special master has not been entered, so that issue is not ripe for further discussion here.

## LEGAL STANDARDS

"Extraordinary writs like mandamus are useful safety valves for promptly correcting serious errors." *In re Lombardi*, 741 F.3d 888, 893 (8th Cir. 2014) (en banc). Mandamus is available to correct "a clear abuse of discretion," which occurs when the court "relies on erroneous legal conclusions" or "fail[s] to consider relevant factors or apply the proper legal standard." *In re Bieter Co.*, 16 F.3d 929, 932 (8th Cir. 1994). The movant must have no adequate alternate means to obtain relief, the right to relief must be clear and indisputable, and the Court must be satisfied that review is appropriate under the circumstances. *In re Borowiak IGA Foodliner, Inc.*, 879 F.3d 848, 849 (2018). To determine whether review is appropriate, the Court may consider the following factors:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. … (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

*In re Bieter*, 16 F.3d at 932. It is not necessary to satisfy all factors. *Id.* As *Bieter* and *Societe Nationale* show, mandamus relief may be appropriate for discovery orders, including to address novel and important legal issues. Here, at least factors (1), (2), (3), and (5) are present.

## ARGUMENT

### A. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION WHEN IT HELD THAT PETITIONERS HAD "CONTROL" OVER THE THIRD-PARTY DOCUMENTS IN INDIA AND AN OBLIGATION TO PRODUCE THEM IN THE UNITED STATES

Rule 34 permits discovery of documents within a party's "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). "The burden of establishing control over the documents sought is on the party seeking production." 7 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE ¶34.14[2][b] (3d ed. 2017); *SEC v. Credit Bancorp., Ltd.*, 194 F.R.D. 469, 472 (S.D.N.Y. 2000) (citing cases). The phrase "possession, custody, or control" is disjunctive; only one of the enumerated requirements need be met. Here, Plaintiffs produced no evidence and made no argument that the requested documents are in Petitioners' actual possession or custody. The dispute focuses on "control."

#### *1. The District Court Applied an Erroneous Legal Standard*

The district court based its decision on an erroneous standard for "control":

> While Defendants insist that the only relevant factor when assessing control is whether the Defendants have the legal ability to obtain these documents, courts around the country have required production of documents allegedly in the hands of a third party where the named parties have the practical ability to control the third party…

A00009-A00010.

The majority of circuit courts, however, hold that for purposes of Rule 34, "control" requires the "legal right" to obtain the documents on demand, not merely theoretical control or a "practical ability" to obtain the documents. *In re Citric Acid Litig.*, 191 F.3d 1090, 1107-08 (9th Cir. 1999). This view has been adopted by the Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and Federal Circuits,[5] as well as by district courts in other circuits.[6]

Wright & Miller's warns against the minority view: "[c]aution must be exercised when the notion of control is extended in this manner, however, because sometimes the party's ability to obtain compliance from nonparties may prove

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[5] *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 821 (5th Cir. 2004) (subpoena for documents to which recipient had "access" was overbroad); *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229-30 (Fed. Cir. 1996) ("control" means "the legal right to obtain the documents requested upon demand"); *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) ("federal courts have consistently held that documents are deemed to be within the 'possession, custody or control' for purposes of Rule 34 if the party has *actual* possession, custody or control, or has the legal right to obtain the documents on demand"); *Chaveriat*, 11 F.3d at 1427 ("the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody or control; in fact it means the opposite"); *Gerling Int'l Ins. Co. v. Comm'r*, 839 F.2d 131, 140 (3d Cir. 1988) ("control" requires the "legal right" to obtain documents on demand and that in the absence of control over requested documents a litigant "has no duty to produce"); *Searock v. Stripling*, 736 F.2d 650, 653-54 (11th Cir. 1984) ("control" is defined "as the legal right to obtain the documents requested upon demand.").

[6] Contrary to the district court's suggestion, A00010, the Colorado court in *Resolution Trust Corp. v. Deloitte & Touche*, did not apply the "practical ability" test. *See* 145 F.R.D. 108, 110 (D. Colo. 1992) ("The federal courts have universally held that documents are deemed to be within the possession, custody or control of a party for purposes of Rule 34 if the party has actual possession, custody or control of the materials or has the legal right to obtain the documents on demand."); And contrary to the district court's reliance on *Ice Corp. v. Hamilton Sundstrand Corp.*, courts in Kansas have not uniformly adopted the "practical ability" standard. *See, e.g., Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 501 (D. Kan. 2001) (rejecting the "practical ability" standard because it conflicts with Rule 45 and is "unsupported by law").

more modest than anticipated." 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE §2210 (3d ed. 2010). When the Ninth Circuit rejected the "practical ability" standard in *In re Citric Acid Litig.*, it reasoned that "[o]rdering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents," and noted that its conclusion was consistent "with all of our sister circuits who have addressed the issue." *Id.* at 1107, 1108. The Seventh Circuit explains that the "legal right" standard does not prejudice the party seeking discovery because the requesting party can always use the formal mechanisms for third-party discovery to seek the documents directly from their source, without depending on its adversary. *See Chaveriat*, 11 F.3d at 1427; *see also Searock*, 736 F.2d at 653 (holding that requesting party who made no attempt on its own to secure documents from third party was not sufficiently prejudiced to support sanctions).

The district court clearly abused its discretion by applying the wrong standard for "control" under Rule 34.

### *2. The District Court Rendered Decision Without Requiring Plaintiffs to Produce Evidence to Satisfy the Requisite Control Standard*

The district court further abused its discretion by rendering decision without requiring Plaintiffs to meet their burden to prove control, either legal or under the

incorrect "practical ability" standard. *See* 7 MOORE'S FEDERAL PRACTICE ¶34.14[2][b]. Plaintiffs did not introduce evidence to prove that Petitioners had control over the documents in India. Instead, the court's decision relied on what it termed "the power of the pursestrings." A00262, A00360. Because GFA made large donations to third parties in India, the court assumed that Petitioners could compel the third parties to produce the documents Plaintiffs wanted. The court's assumptions are no evidence of control, regardless of which standard is applied.

The district court also assumed that control existed because Petitioner K.P. Yohannan held a prominent position in BEC, and his family members were allegedly involved in related entities. A00011. Of course, there is a significant difference between being an ecumenical leader in a church and having the legal right to compel production from over 12,700 churches all over India on demand. And involvement in transferring funds does not equate to the legal ability to compel production of documents (and bank records have already been produced). Plaintiffs offered no evidence to connect Yohannan's family members with particular entities from whom documents were requested, nor do Plaintiffs show that Yohannan could compel these unnamed family members to use their alleged positions to obtain documents from any, much less, all of the 12,000 locations in

India where documents are located. The district court's reasoning is all based on assumptions of control, not evidence.[7]

That Petitioners used their relationships to facilitate discovery in this case is a sign of "good faith," not something to be sanctioned. Based on Petitioners' efforts, they were able to gather and produce to Plaintiffs over 50,000 pages of documents from third parties. Petitioners were also able to persuade third parties to permit Plaintiffs to review documents as kept in the ordinary course, which Plaintiffs refused to do. That Petitioners successfully persuaded the third parties to make available the hard-copy documents to Plaintiffs for inspection and copying, does not mean Petitioners have the ability or right to compel those third parties to spend thousands of hours and millions of dollars gathering, copying, and shipping documents for Plaintiffs.

A fundamental flaw in the district court's reasoning is that it is attempting to shift the Plaintiffs' litigation burdens to Petitioners and third parties. This Court should hold that it was a clear abuse of discretion for the district court to find that Petitioners controlled documents in India when there was no evidence or insufficient evidence proving that alleged control.

[7] The district court's reliance on assumptions was surprising because, previously, it recognized that the issue of control could not be resolved without evidence. A000122-A000123.

### *3. Production in the Ordinary Course of Business Was Sufficient*

The district court further abused its discretion by ordering Petitioners to gather and copy documents for Plaintiffs to deliver to the United States. Even if the documents were under Petitioners' control, Rule 34 does not obligate Petitioners to move or copy large volumes of documents for Plaintiffs. As Professor Moore explains: "A party producing documents will ordinarily not be put to the expense of making copies for the requesting party. Rule 34(b) merely requires that the responding party make documents available for inspection and copying." 7 MOORE'S FEDERAL PRACTICE ¶34.14[5].[8] Production of voluminous documents in the ordinary course of business was sufficient.[9] 1 DISCOVERY PROCEEDINGS IN FEDERAL COURT §17:16 (3d ed. September 2017 Update) ("The general rule is that business records should be examined at the place where they

[8] *See also Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611, 634 (D. Kan. 2005) ("[U]nder Rule 34, a responding party need only make requested documents available for inspection and copying; it need not pay the copying costs."); *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25, 27 (D.C. Cir. 1947) (federal rules do not permit courts to require producing party to make copies).

[9] *See also Betts v. Agri-Tech Servs., Inc.*, 1990 WL 5731, *1 (D. Kan. Jan. 23, 1990) ("Business records should usually be examined at the place where they are kept and at reasonable hours"); *Patroski v. Ridge*, 2011 WL 5593738, *2 (W.D. Pa. Nov. 17, 2011) ("Ordinarily, where records of a business are to be examined for discovery, they should not be required to be delivered to the adversary"); *Petruska v. Johns-Manville*, 83 F.R.D. 32, 36 (E.D. Pa. 1979) (production in place is usual "where the documents requested are large in number and their production poses some inconvenience.").

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are kept, at least when the documents are large in number and their production poses some inconvenience.").

#### *4. Post-Judgment Relief Is Inadequate*

Post-judgment appellate relief is inadequate to protect Petitioners' rights. Petitioners run a nonprofit organization that depends on donations. Donors are not likely interested in funding litigation. The costs of the court-ordered discovery are extraordinary, imposing a multi-million dollar burden. If Petitioners had to wait to appeal post-trial, it is unlikely they could ever recover these costs from the individual Plaintiffs were the courts to later agree that the discovery was inappropriate.

Given that the district court has already started to sanction Petitioners for actions they believe were in good faith, review is urgently needed to prevent this situation from deteriorating further and to insure that Petitioners will have the opportunity for a fair trial and proceedings going forward.

### B. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION WHEN IT IMPOSED CLASS-WIDE DISCOVERY BURDENS ON PETITIONERS WITHOUT ADDRESSING PROPORTIONALITY

#### *1. Guidance Is Needed on the Relationship Between Rule 26's Proportionality Standard and Discovery in Class Actions*

The Supreme Court has warned that class action discovery may used as a coercive litigation tactic to pressure defendants to settle or forego their legal rights.

*See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("not[ing] the risk of 'in terrorem' settlements that class actions entail"); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."). Applied correctly, the new "proportionality" standard in Rule 26(b)(1) should reduce the potential for abusive discovery in class actions.

Despite the amendments to Rule 26, the problems associated with overly-burdensome discovery continue. The issue was recently before the Court in *In re State Farm Fire & Casualty Co.*, but the discovery issue became moot. 872 F.3d 567, 578 (8th Cir. 2017). The lower courts and litigants will all benefit from clear guidance on the role of proportionality on pre-certification discovery. This case presents compelling circumstances to address this issue.

### *2. The Discovery Burden Imposed on Petitioners Is Not Proportional to the Needs of the Case*

No matter how this case is viewed, the discovery burden imposed on Petitioners is not proportional to the needs of the case. Given that no class has been certified, the only merits claims pending before the court are the individual Plaintiffs' claims relating to $34,911 in donations. *See Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 672 (2016) ("a class lacks independent status until

certified"). Requiring full discovery on $376 million in donations for a $34,911 claim is absurd, and grossly out of proportion to the needs of the case.

Plaintiffs have the right to conduct some discovery beyond their individual claims to test whether class certification is appropriate. *See Campbell-Ewald*, 136 S.Ct. at 672. But that opportunity is not a reason to require extensive merits discovery before a class is certified. The Rule 23 "rigorous analysis" to determine whether a class may be certified requires a "limited preliminary inquiry" into the merits of the claims and defenses at issue. *IBEW Local 98 Pension Fund v. Best Buy Co., Inc*, 818 F.3d 775, 783 (8th Cir. 2016). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). Pre-certification discovery should generally be limited "to the requirements of Rule 23" to test "whether the claims and defenses are susceptible to class-wide proof." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (Federal Judicial Center 2018). "Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary." *Id.*

Here, the district court is allowing Plaintiffs to conduct discovery as if a class had been certified and every GFA donor was a class member. Plaintiffs are literally asking for the documentation to show how every donation designation was fulfilled in the field. This is precisely the kind of wide-ranging discovery the Supreme Court warned against in *Concepcion* and *Stoneridge Inv. Partners, LLC*. *See also Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

Plaintiffs cannot contend that they are seeking this wide-ranging discovery for any legitimate purpose relating to class certification. They filed their motion to certify a class on January 19, 2018, and did not request a continuance because they needed more discovery—much less the massive discovery they are seeking in India. This discovery dispute relates entirely to the merits of a yet-to-be certified case. Even then, it is unlikely that a qualified financial expert would trace each dollar of the $376 million donated to GFA. Sampling or other methods to control the scope of discovery would be used. What Petitioners are being ordered to gather and produce is outrageously burdensome, and grossly disproportional to the needs of the case (now or in the future). The upshot is that Petitioners are being

sanctioned for not producing myriads of documents that a forensic accountant would likely never require or utilize.

### *3. The District Court's Order Should Be Corrected Immediately*

Despite the significance of the financial burden being imposed on Petitioners, the district court's proportionality analysis is found in a single sentence: "given the posture of this putative class action, the amount in controversy, and the fact that this discovery goes to the very heart of the issues for trial, the Court continues to conclude that production of these documents at Defendants' expense is appropriate and proportional under Rule 26." A00009. There was no prior analysis of proportionality. The district court clearly abused its discretion and applied an improper legal standard when it failed to conduct any meaningful proportionality analysis for this putative class action.

There is no relief on appeal that can undo the harm to Petitioners from having to bear the burden of wide-ranging, class-wide discovery. Not only will this impose a multi-million dollar liability on Petitioners that they likely will not be able to recoup against the individual Plaintiffs should Petitioners' prevail, but the court's orders are likely to adversely impact Petitioners' ability to pursue donations for its mission, as donors will be concerned their donations will be used to fund

Plaintiffs' class action lawsuit. Review is urgently needed to protect Petitioners' against these irreparable harms.

### C. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION BY IMPOSING SANCTIONS

The district court's sanctions order is based on, and inextricably intertwined with, the discovery issues addressed above, and should be reversed for the reasons stated above. The sanctions order itself is also objectively wrong, and a clear abuse of discretion in many ways:

1. The district court claims Petitioners were engaged in "abusive conduct in this case since August [2017]." A00017. The record shows otherwise. Other than opposing Plaintiffs' request for leave to serve over 1,000 RFAs, the district court was not presented with any discovery disputes in this matter before 2018. There was nothing "abusive" about urging the court to impose reasonable limits on discovery back in 2017.

2. The district court said Petitioners had a pattern of "evasive" discovery answers, focusing on Petitioners' January 2018 responses to the subparts (d), (e), and (f) of the RFAs, A00014, first making that accusation in February 2018. A00048. Petitioners' answers were direct and complied with the Rules. For example, Petitioners answered subpart (d):

> Defendants have made and will continue to make a reasonable inquiry regarding this request; however, although Defendants have made a reasonable inquiry and are continuing to inquire, the information they know or can readily obtain is insufficient to enable them to admit or deny a specific dollar amount at this time.

This answer tracked Rule 36(a)(4), which provides:

> if a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. … The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and the information it knows or can readily obtain is insufficient to enable it to admit or deny.

Fed. R. Civ. P. 36(a)(4). There was nothing evasive or sanctionable about promising to continue investigating to find the information needed to answer the RFA, which Petitioners successfully did for most subpart (d)'s by March 16, 2018.

Regarding subpart (e), Petitioners refused to admit they had produced "all evidence" to Plaintiffs regarding the particular Project Code because, among other reasons, Petitioners intended to use live witnesses. When the request was limited to "documentary evidence" only, Petitioners updated their answers to unequivocally "admit" they had produced all such documents. This is not evasive.

Petitioners' refusal to admit they had "no evidence" to support their positions was appropriate in subpart (f) because Petitioners have witnesses and documents that will support them. Trial or summary judgments are the place to

resolve factual disputes on the sufficiency of evidence; not through briefing and hearings on sanctions.

Although Petitioners disagree with the district court that there was anything improper with their January 2018 responses, Petitioners amended their responses in compliance with the district court's instructions in February 2018. Since the amended answers were served in March 2018, neither the district court nor Plaintiffs have taken issue with Petitioners' RFA responses.

3. The district court accused Petitioners of willfully violating the February 2018 order, but ignored the undisputed evidence of the extraordinary efforts Petitioners made to comply. There is no dispute that Petitioners fully answered the RFAs and provided the "general evidence" listings under subpart (g), as neither Plaintiffs nor the district court have taken issue with those responses. Thus, the entire focus of the alleged failure to comply is on (1) the listing of "specific evidence" in subpart (g) and (2) Petitioners' failure to gather and produce the back-up documents from India. These are related points, as the district court and Plaintiffs have argued that the "specific evidence" listings are inadequate because they are missing "receipts, bills of sale, transmittal letters, etc.," ignoring the fact that these documents are in India would be extraordinarily burdensome to

produce, if it were possible at all. This is also the issue covered by Petitioners' motion for protection, which was denied based on improper legal standards.

Petitioners do not lightly request intervention through mandamus, but review is urgently needed to protect Petitioners' rights and to avoid ruinous burdens on Petitioners. The district court's sanctions order is based on a misconception of the factual record and improper legal standards on the scope of discovery. It should be reversed.

## CONCLUSION

Petitioners pray that this Petition is granted.

Respectfully submitted by:

*/s/ W. Scott Hastings*

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## CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because this petition contains 7,787 words.

2. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in a 14-point Times New Roman font.

Date: June 18, 2018

*/s/ W. Scott Hastings*
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## CERTIFICATE OF SERVICE

I certify that the Petition for a Writ of Mandamus was filed with the Court electronically on June 18, 2018, and an electronic copy of the brief was served on the individuals below via electronic mail on the same date.

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