NO. 23-_____

In the Supreme Court of the United States

GARY TOPOLEWSKI,

Petitioner,

v.

URS HOLDINGS, INC., AN OHIO CORPORATION, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 209 (1958) ("*Societe Internationale*") this Court held that district courts, when imposing discovery sanctions, cannot rely on their "inherent authority" and instead must apply only jurisprudence under Federal Rule of Civil Procedure 37 ("Rule 37"). Subsequently, in the 1991 case *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) ("*Chambers*") this Court held, in a 5-4 decision, that an "inherent authority" analysis could be used in place of some procedural statutes. However, the Court suggested in *dicta* (and in Justice Scalia's dissent) that *Societe Internationale* still applies to Rule 37 discovery sanctions.

Despite this, the Ninth Circuit has consistently upheld discovery sanctions through an "inherent authority" analysis, completely deviating from the protections of Rule 37. For example, in the present case, the Ninth Circuit applied an "inherent authority" analysis—without even a mention of Rule 37—to affirm $36 million in evidentiary and terminating sanctions against one defendant for another defendant's discovery failings. In addition, the Ninth Circuit affirmed the district court's imposition of both evidentiary sanctions (regarding damages) and terminating sanctions (regarding liability) "for the same discovery misconduct."

The Questions Presented Are:

1. Is *Societe Internationale* still good law, thereby making the Ninth Circuit's practice of substituting an "inherent authority" analysis for Rule 37 jurisprudence a legal error?

2. Does a district court violate Due Process protections when it determines both damages and liability as a matter of sanctions "for the same discovery misconduct"?

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant-Appellant below

- Gary Topolewski, an individual

Respondent and Plaintiff-Appellee below

- URS Holdings, Inc., an Ohio Corporation (fka AECOM Energy & Construction, Inc., an Ohio Corporation)

Respondent and Defendant-Appellant below

- Morrison Knudsen Corporation
- Morrison-Knudsen Company, Inc.
- Morrison-Knudsen Services, Inc.
- Morrison-Knudsen International Inc.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

No. 22-55546 / No. 22-55547 (consolidated)

No. 22-55546: URS Holdings, Inc., *Plaintiff-Appellee*, v. Gary Topolewski, *Defendant-Appellant*, and John Ripley, et al., *Defendants*.

No. 22-55547: URS holdings, Inc., an Ohio Corporation, *Plaintiff-Appellee*, v. John Ripley; Et Al., *Defendants*, and Morrison Knudsen Corporation, a Nevada Corporation; Et Al., *Defendants-Appellants*.

Date of Opinion: September 18, 2023

Date of Rehearing Denial: December 15, 2023

U.S. District Court, Southern District of California

Docket No. 2:17-cv-05398

AECOM Energy & Construction, Inc., an Ohio Corporation., *Plaintiff*, v. Gary Topolewski and John Ripley, et al., *Defendants*.

Date of Jury Verdict: none

Date of Terminating Sanctions: February 25, 2022

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PETITION FOR A WRIT OF CERTIORARI

Gary Topolewski ("Gary"), who was Defendant and Appellant below, hereby petitions this Court for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished Memorandum Opinion (the "Memorandum Opinion") of the Ninth Circuit is attached at Petitioner's Appendix ("App.") at 1a. The Amended Final Judgment of the U.S. District Court, C.D. California and the underlying opinion imposing sanctions and holding Gary jointly and severally liable with the Corporate Defendants are at App.8a, 12a.

JURISDICTION

The Ninth Circuit filed its decision affirming judgment in favor of Respondent on September 18, 2023. *See* App.1a. The Ninth Circuit filed its order denying Petitioner's petition for rehearing on December 15, 2023. *See* App.108a.

This Court has jurisdiction over this matter under 28 U.S.C. § 1254(1), which provides: "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any

civil or criminal case, before or after rendition of judgment or decree."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be deprived of life, liberty, or property, without due process of law

Fed. R. Civ. P. 37(b)

(b) Failure to Comply with a Court Order.

(1) Sanctions Sought in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—

fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for exam-

ination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(d)

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWERS TO INTERROGATORIES, OR RESPOND TO A REQUEST FOR INSPECTION.

(1) *In General.*

(A) *Motion; Grounds for Sanctions*. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification*. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act*. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions*. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

INTRODUCTION

To briefly summarize the relevant facts and rulings, Respondent AECOM Energy & Construction, Inc. ("AECOM") sued several corporations (the "Corporate Defendants")—as well as allegedly related individuals (including Gary)—for infringement-related claims arising from the Corporate Defendants' use of the "Morrison Knudsen" name. In the first of several inexplicable rulings, the district court—based only on inadmissible hearsay—entered summary judgment in the amount of about $2 billion. In turn, the Court of Appeals for the Ninth Circuit reversed that ruling as being factually unfounded. However, the district court on remand simply re-entered judgment (against all defendants and, again, without a trial) for $36 million instead. This time, the district court claimed judgment could be summarily entered as a form of punitive evidentiary and terminating sanctions, based on the failure of the Corporate Defendants to produce certain financial documents.

On appeal, Gary argued that under Rule 37 he could not be held to answer for another defendant's supposed discovery failures, and, in any event, neither the district court nor Respondents cited to any law to justify the imposition of both damages and liability sanctions "for the same discovery misconduct." In its Memorandum Opinion affirming the judgment, the Ninth Circuit failed to reference Rule 37 even once and instead held that, pursuant to the district court's "inherent authority," it could levy punitive sanctions against Gary for the Corporate Defendants' discovery misconduct.

Given the Ninth Circuit relied solely on an "inherent authority" analysis to affirm the discovery sanctions, this case is the perfect vehicle for this Court to reaffirm its holding in *Societe Internationale* that discovery sanctions are within the exclusive province of Rule 37. Alternatively, and for the same reason, this case is also a perfect vehicle for the Court to affirm that a district court's "inherent authority" to issue discovery sanctions may supplant Rule 37 pursuant to *Chambers*.

STATEMENT OF THE CASE

A. The Complaint

On July 21, 2017, AECOM filed its Complaint against the Corporate Defendants, Gary in his individual capacity, and four other individual defendants. App.282a-315a. In essence, the Complaint alleged infringement-based causes of action related to the Corporate Defendants' alleged use of the "Morrison Knudsen" name and trademark. *Id.* Notably, Gary is the only individual defendant who appeared in the case and participated in litigation; the others defaulted. *See* App.280a.[1]

B. Discovery

AECOM served Interrogatories and Requests for Production on the defendants in December of 2017 and January of 2018, respectively. App.78a, 278a. In

[1] Throughout the litigation, the Corporate Defendants were represented by and spoke through a common officer, Mike Johnson. *See, e.g.*, App.338a.

response to those requests, Gary confirmed that he was "no longer affiliated with [the Corporate Defendants]" and did not have access to corporate records. App.279a.

In ruling on successive motions to compel further responses to those requests, the magistrate judge assigned to the case confirmed that (1) Gary did not have to produce information or documents about his personal finances and (2) Gary did not have access to the Corporate Defendants' records and therefore was not individually required to produce documents in response to requests for those documents. App.68a, 85a, 104a.

On June 18, 2018, Gary sat for a deposition, where he again confirmed his minimal connection to the Corporate Defendants. *See* App.146a. At that deposition, Gary detailed that he was contacted by (defaulting defendant) Henry Blum in around 2007 or 2008 regarding "reviving" the Morrison Knudsen trademark. App.151a-152a, 177a-178a. Gary's only role was to file the necessary paperwork and to obtain a contractor's license. App.153a. Gary candidly admitted that he expected to receive monetary compensation if the company ever obtained work but, to his knowledge, it never did. App.195a. He also confirmed that his role with the Corporate Defendants was minimal even from the start—amounting to no more than "maybe half a dozen hours a year." App.195a

C. Summary Judgment and First Appeal

AECOM moved for summary judgment. In a truly inexplicable decision, the District Court granted AECOM's motion as to all defendants and entered a damages award totaling over $1.8 billion, based solely

on three hearsay "press releases" AECOM found online. *See generally AECOM Energy & Constr., Inc. v. Morrison Knudsen Corp.*, 851 F. App'x 20 (9th Cir. 2021).

The defendants all timely appealed, and the Ninth Circuit reversed, finding the unauthenticated press releases had essentially no evidentiary value:

> Even if we were to view the press releases in the light most favorable to AECOM, we doubt they would support an inference that there were "sales"—*i.e.,* monies actually received—by Defendants-Appellants, in any amount, much less in the amount of $1.8 billion. And this is without even considering that there was no evidence in the record that Defendants-Appellants had started any of the claimed massive construction contracts or were remotely able to undertake any of the construction

Id., n. 4.

The Court mused in *dicta*, however, that evidentiary sanctions might be appropriate, if the Corporate Defendants failed to produce evidence of sales or profits on remand. *Id.*, n. 5 ("We express no opinion on whether any such sanction would be appropriate.").

D. Remand

On remand, the district court reprimanded both sides, with particular emphasis on the lack of diligence on the part of AECOM:

> To a large extent, the defendants did nothing and left me in a very terrible position. The plaintiff likewise did nothing because they

> could have done other forms of discovery without utilizing the Court's procedures because, for crying out loud, if [Bureau of Land Management] had such a big contract with the defendants, I'm sure that there would be other areas where they could find the information instead of just giving me the announcement.
>
> [. . .]
>
> I was not happy with the $1.8 billion because of the lack of materials presented by the plaintiffs.
>
> You guys, plaintiff, could have done more period. I was very upset at you guys.

App.132a.

Thereafter, AECOM did not propound new discovery on any of the defendants, did not ask Gary or Mike Johnson to sit for another deposition, and did not subpoena the organizations in the press releases (*e.g.*, the Bureau of Land Management) as the district court suggested they do. App.255a-256a. Instead, AECOM served third-party subpoenas on banks, telephone providers, and other entities, seeking information about the Corporate Defendants and Gary individually. *See generally* App.53a-58a. Since the magistrate had already ruled that AECOM was not entitled to Gary's personal information, Gary (now represented independently) successfully moved to quash those subpoenas. *See* App.57a-58a.

The upshot of AECOM's overbroad subpoenas and Gary's successful motion to quash them was that the subpoenaed entities refused to produce any docu-

ments until the resolution of Gary's motion. Therefore, the production of the Corporate Defendants' information would not occur until likely after the discovery cut-off. App.255a. Counsel proposed a stipulation to continue the discovery cut-off and trial date to allow that information to produced, but AECOM refused to agree to the stipulation. *Id.* Instead, they immediately moved for sanctions.

E. Sanctions and the Memorandum Opinion

On February 25, 2022, the district court entered its sanctions order, granting $36 million in evidentiary sanctions and terminating sanctions against all defendants. App.12a-51a. The majority of the order pertained to the Corporate Defendants' failures to produce adequate financial information and their violation of a preliminary injunction. *Id.*

The order then addressed Gary in only a single paragraph that linked Gary to the Corporate Defendants, despite his sworn testimony to the contrary:

> [Gary's] attempt to distance himself from Corporate Defendants is unavailing. As this Court has found, he was extensively involved with Corporate Defendants despite his current statements to the contrary. [Gary] himself has also failed to comply with his discovery obligations which were in his control. He failed to appear for his first deposition, arrived late to his second deposition and left early, and failed to respond to discovery requests propounded on him. Accordingly, it is proper for the Court to refer to Defendants as a collective and find that [Gary's] conduct, too, was willful and bind him to

this Order.

App.34a.[2]

Gary (and the Corporate Defendants) appealed, and the Ninth Circuit affirmed the sanctions in its Memorandum Opinion, which failed to reference Rule 37—even once—and instead affirmed the sanctions based solely on an "inherent authority" analysis. App.1a. Gary petitioned for rehearing, which was summarily denied. App.8a.

REASONS FOR GRANTING THE PETITION

This Ninth Circuit's Memorandum Opinion ratifies an outrageous violation of Gary's Due Process rights—to the tune of $36 million. Worse, the Ninth Circuit has in effect approved of the district court doing something no other court would allow: wield "inherent authority" sanctions against a defendant to completely decide both liability and damages against him—without a trial—as a punishment for another defendant's discovery misconduct. That cannot be an outcome contemplated by the Federal Rules of Civil

[2] On a slight merits diversion, it is worth noting that AECOM submitted no evidence in the district court in support of its claim that Gary "missed his first deposition." AECOM submitted the certificates of nonappearance for Mike Johnson and for the other Corporate Defendants but not for Gary. The record shows Gary did sit for a full day of deposition, regardless of whether it was the first or second noticed. Also, the record shows Gary only "failed to respond" to one set of requests for admission—which came due during a change in counsel—and that failure was promptly remedied without prejudice to AECOM.

Procedure, and it certainly cannot be tolerated by Due Process. This Court must intervene to resolve the conflict between the Ninth Circuit's decision and the protections of both the U.S. Constitution and Rule 37 jurisprudence.

A. THE SANCTIONS UNQUESTIONABLY IMPLICATE DUE PROCESS

This Court has long held that the power of a district court to levy sanctions "must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law." *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 209 (1958) ("*Societe Internationale*"). Within that framework, a sanction for the failure to produce documents violates Due Process where the sanctioned party demonstrates the failure "was due to inability fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211. That is precisely the scenario presented here, where Gary testified time and again—and the magistrate judge confirmed—that Gary had no access to the financial records of the Corporate Defendants.

B. THE NINTH CIRCUIT IGNORED RULE 37 AND INSTEAD APPLIED AN "INHERENT AUTHORITY" ANALYSIS

A well-established body of case law on Rule 37 holds that a party cannot be sanctioned unless it willfully (or with fault) failed to respond to discovery requests. *See, e.g.*, *Societe Internationale*, 357 U.S. at 211 [holding sanctions inappropriate where failure to produce "was due to inability fostered neither by [the party's] own conduct nor by circumstances within its

control"]; *Liberty Insurance Corporation v. Brodeur* (9th Cir. 2022) 41 F.4th 1185, 1192 ("the court abused its discretion by relying on erroneous conclusions and failing to adequately analyze whether the Brodeurs acted with willfulness or fault"); *Eugene S. v. Horizon Blue Cross Blue Shield of New Jersey* (10th Cir. 2011) 663 F.3d 1124, 1130 (affirming denial of sanctions on grounds there was "no evidence of bad faith or willfulness); *The Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 738 (10th Cir. 2005) ("Dismissal with prejudice represents an extreme sanction, and thus is considered appropriate only in cases involving willfulness, bad faith, or [some] fault on the part of the party to be sanctioned") (internal quotation marks removed).

Other important restrictions on Rule 37 sanctions include:

(1) "Severe sanctions such as taking allegations as established and awarding judgment on that basis, dismissal and default judgment are authorized only in extreme circumstances." *Refac Int'l, Ltd. v. Hitachi, Ltd.*, 921 F.2d 1247, 1254 (Fed. Cir. 1990) (citing *United States for the Use and Benefit of Wiltec Guam, Inc. v. Kahaluu Constr. Co., Inc.*, 857 F.2d 600, 603 (9th Cir.1988)).

(2) A party cannot be sanctioned for failure to produce documents that are not in its "possession, custody, or control." *See, e.g.*, *The Procter & Gamble Co. v. Haugen*, 427 F.3d at 739 (reversing dismissal on grounds party did not have control of documents supposedly withheld); *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224,

1232 (Fed. Cir. 1996) (same: "Federal Rule 37 is not a legal requirement to do the impossible, and the courts have declined to assess a penalty for a failure to do that which it may not have been in its power to do."); *Taydus v. Cisneros*, 902 F. Supp. 288, 296 (D. Mass. 1995) (same).

(3) A party can be sanctioned only for its own conduct in failing to obey a court order or to answer discovery, not the conduct of other defendants. Fed. R. Civ. Proc. 37(b)(2)(A) ("If a party . . . fails to obey an order"), 37(c)(1) ("If a party fails to provide information . . . "). *See, e.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 995 (N.D. Cal. 2012) (reversing sanctions as to some parties where record showed only one party engaged in discovery abuse)

At both the district court level and on appeal, Gary argued that those Rule 37 protections precluded him from incurring sanctions for the Corporate Defendants' discovery misconduct. Indeed, as the magistrate judge confirmed, Gary had no access to the Corporate Defendants' financial documents that were not produced. Instead of applying Rule 37 jurisprudence—which absolutely bars sanctions against and compels a reversal as to Gary—the Ninth Circuit held that the district court could effectively skirt those protections by levying the sanctions here pursuant to its "inherent authority."[3]

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[3] Notably, the Memorandum Opinion states—without any legal support of its own—that there is "no support for [Gary's] assertion that the district court's inherent authority is limited such that

C. THE NINTH CIRCUIT MEMORANDUM OPINION IMPLICATES AN AMBIGUITY IN THIS COURT'S PRECEDENT

While the Ninth Circuit's egregious error is apparent simply from the face of the ruling, Gary recognizes that a legal error alone is insufficient to invoke the action of this Court. That said, this case presents much more than a legal error; it presents a legal question that can only be resolved by this court: *Can a district court (or a court of appeals) use an "inherent authority" analysis to circumvent the protections of Rule 37?* The answer to that must be, No. However, that question—and the Ninth Circuit's Memorandum Opinion—strikes right at the heart of a conflict in this Court's precedent.

In *Societe Internationale* this Court held that "whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37." *Societe Internationale*, 357 U.S. at 207. Thus, "a Rule 37 analysis normally should stand alone and not blend together with a less-structured, inherent-authority analysis." *Sentis Grp., Inc., Coral Grp., Inc. v. Shell Oil Co*, 559 F.3d 888, 899 (8th Cir. 2009) (citing *Societe Internationale*, 357 U.S. at 207).

Several decades later, in a 5-4 decision, this Court held in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) that in some circumstances a district court may invoke its "inherent authority" to skirt procedural

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it may not impose both monetary and terminating sanctions for the same discovery conduct." Thus, even the Ninth Circuit seems to agree that this Court's intervention is required to resolve the second issue presented by this Petition.

requirements and precedent under a statutory scheme. *Id.* at 48. Although the majority opinion addressed *Societe Internationale* in a footnote that suggests the primacy of Rule 37 is intact with respect to discovery sanctions—*id.* at n. 14—the question has never been addressed by this court. *See also id.* at 65 (J. Scalia, dissenting) (discussing *Societe Internationale* and the primacy of Rule 37).

Over the years, the Ninth Circuit has latched onto *Chambers*—ignoring both this Court's *dicta* and Justice Scalia's dissenting opinion in *Societe Internationale*—and consistently allowed district courts to circumvent the protections of Rule 37 jurisprudence in favor of an "inherent authority" analysis. For example, in *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363 (9th Cir. 1992) the Ninth Circuit expressly held that the district court's discovery sanctions would not be allowed under a Rule 37 analysis, but it affirmed the sanctions anyway under an "inherent authority" analysis. *Id.* at p. 368 (citing *Chambers*, 501 U.S. 32). In another striking example, the Ninth Circuit held that a district court was "within its discretion" under its "inherent authority" to dismiss a complaint for discovery abuse; therefore, in the Ninth Circuit's reasoning, it "need not address whether dismissal was appropriate under the alternate authority of Rule 37." *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995). *See also e.g. In re USA Com. Mortg. Co.*, 462 F. App'x 677, 679 (9th Cir. 2011) (affirming sanctions against attorney for discovery violations under "inherent authority")

This case provides the perfect vehicle for this Court to reaffirm the holding of *Societe Internationale*

and to put a stop to the Ninth Circuit's Wild West approach to discovery sanctions.

D. GARY WILL PREVAIL ON THE MERITS UNDER A RULE 37 ANALYSIS

The law compels a reversal as to Gary under a Rule 37 analysis for two simple reasons. First, the "evidentiary sanctions" of $36 million against the Corporate Defendants cannot be imputed to Gary, who had no access to the withheld documents. Second, Gary's actual conduct in discovery would not warrant terminating sanctions.

1. The Evidentiary Sanctions Cannot Apply to Gary

As a general rule, a defendant cannot be sanctioned for the conduct of a co-defendant. *See e.g. Loops, LLC v. Phoenix Trading, Inc.*, 594 F. App'x 614, 619 (Fed. Cir. 2014); *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 995 (N.D. Cal. 2012)

Here, the district court's grant of sanctions was based almost entirely on the Corporate Defendants' failings in this case. The district court cites the Corporate Defendants' failures to respond to discovery, to produce documents ordered by the court, and to abide the preliminary injunction. *See generally* App.12a. As Gary testified—and as the magistrate judge in the case agreed—Gary had no hand in that conduct, had no access to corporate records, and could not control or speak for the Corporate Defendants.

The district court's contrary finding that Gary was "extensively involved with Corporate Defendants despite his current statements to the contrary" is

made without explanation or factual support. As Gary testified under oath, the plan to "revive" the Morrison Knudsen trademark was developed by Henry Blum—the real "mastermind"—who approached Gary in around 2007 or 2008. *See supra*, p. 9. Gary filed the paperwork naming himself "president," expected compensation (which never came), and put a grand total of about six hours of work into the Corporate Defendants in any given year. *See id*. His involvement was, in fact, very little. To the extent the district court disbelieved that testimony, that is a jury function and, indeed, precisely what due process protections are meant to ensure. *Cf. United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995), as amended (Feb. 13, 1995) ("The district court was not obligated to decide the credibility question and strike their testimony, because the determination of credibility is for the jury.")

Accordingly, Gary cannot be held to answer for the Corporate Defendants' failure to produce documents to which he had no access. *Cochran Consulting, Inc*, 102 F.3d at 1232 ("Federal Rule 37 is not a legal requirement to do the impossible, and the courts have declined to assess a penalty for a failure to do that which it may not have been in its power to do.")

2. Gary's Own Conduct Does Not Justify Terminating Sanctions

The mere failure to sit for a deposition or answer discovery responses—if eventually remedied, as occurred here—is not grounds for sanctions.

For example, in *U.S. for Use and Ben. of Wiltec Guam, Inc. v. Kahaluu Const. Co., Inc.*, 857 F.2d 600, 603 (9th Cir. 1988) ("*Kahaluu*"), a defendant (Kahaluu)

missed a first noticed deposition but later sat for a deposition. *Id.* at 601. The district court granted terminating sanctions for the failure to appear at the noticed time and entered judgment against Kahaluu. *Id.* at 602. In reversing the sanctions on due process grounds, the Ninth Circuit explained that there was "no indication that the defendants' violations in any way threatened to distort the resolution" of the plaintiff's claims because "Kahaluu's deposition, while delayed, was in fact taken before the motion for sanctions was heard." *Id.* at 604.

The only actual conduct of Gary's that the district court (and the Ninth Circuit) cites to justify the extreme sanctions in this case is that Gary "failed to appear for his first deposition, arrived late to his second deposition and left early, and failed to respond to discovery requests propounded on him" However, as *Kahaluu* demonstrates, that conduct cannot justify the extreme sanctions here because Gary (1) sat for his deposition, (2) offered another day (which AECOM's counsel refused), and (3) eventually answered the discovery. The district court's decision thus raises the question: *What more could Gary even have done to avoid these sanctions?*

3. Conclusion as to the Merits of Rule 37

In sum, it is axiomatic that a party cannot be sanctioned for another party's discovery failures. That is precisely what the district court's order and the Memorandum Opinion do, and in dramatic fashion. Gary's only attributable transgressions (if one could call them that) was his supposed (and unsubstantiated) failure to appear at a deposition and his late arrival to the rescheduled deposition. That simply

cannot justify $36 million in evidentiary and terminating sanctions, and this Court should remedy that deprivation of Gary's right to a trial.

CONCLUSION

This Petition provides the Court with an opportunity to resolve the tension between *Societe Internationale* and *Chambers*. Because the Ninth Circuit did not reference Rule 37 at all in its Memorandum Opinion, and instead relied entirely on an "inherent authority" analysis, the case presents the perfect vehicle to resolve that tension.

Respectfully submitted,

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