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

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In re ARAB BANK, PLC,

Petitioner.

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**PETITION FOR WRIT OF MANDAMUS**

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Proceeding Below: Linde v. Arab Bank, PLC, No. 04 CV 2799 (NG) (VVP) and all related cases (E.D.N.Y.), Honorable Nina Gershon


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the undersigned hereby certifies as follows:

Petitioner Arab Bank, plc has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

s / Jeffrey W. Sarles
One of Petitioner's attorneys

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Petitioner Arab Bank, plc (the "Bank") respectfully petitions for a writ of mandamus ordering the district court to vacate its July 12, 2010 Decision and Order ("Sanctions Order") (A1). This petition is filed as an alternative to the Bank's appeal pursuant to the collateral order doctrine (noticed Nov. 3, 2010).

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1651 and F.R.A.P. 21.

## STATEMENT OF THE ISSUE PRESENTED

Whether mandamus should issue to vacate sanctions imposed for a Jordanian bank's failure to produce account records where (i) the sanctions deprive the bank of its due process right to defend against claims that it knowingly assisted terrorist acts, (ii) production would be a criminal offense in the countries where the bank and records are located, and (iii) the court refused to apply principles of international comity despite the protests of three foreign nations.

## INTRODUCTION

In these consolidated actions, thousands of plaintiffs allege that they were victimized by terrorist attacks in the Middle East and seek massive damages against the Bank under the Alien Tort Statute or Anti-Terrorism Act. Plaintiffs claim that by providing routine banking services to organizations and individuals that allegedly encouraged or engaged in terrorist acts, the Bank knowingly or purposefully assisted in the commission of such acts. The Bank produced over

200,000 documents and agreed to the depositions of its officers, but declined to produce account records where doing so would violate the financial privacy laws of three foreign nations, subjecting the Bank and its employees to criminal penalties. The Magistrate Judge, who has overseen discovery in these matters for four years, recommended measured sanctions designed to restore the evidentiary balance, but expressly found no basis in the record to impose any sanctions regarding the Bank's knowledge or intent. Judge Gershon rejected that recommendation, holding that because the Bank was unable to fully produce all the requested documents, the jury will be instructed that it may infer that the Bank knowingly and purposefully aided terrorists and the Bank will be precluded from introducing virtually *any* evidence that proves its innocent state of mind.

The issue presented here—whether and how a litigant may be sanctioned for not producing records where disclosure is barred by foreign penal law—is of exceptional importance. To avoid a glaring denial of due process in this enormous case and give much-needed guidance to courts addressing similar conflicts between U.S. and foreign law, this Court's review is urgently needed.

The Sanctions Order disregards basic principles of international comity and risks serious harm to U.S. foreign relations. Comity requires courts to minimize conflicts with the laws of other nations. The Sanctions Order instead uses the Bank's obedience to foreign penal law as a reason to deprive it of any effective

defense against plaintiffs' massive damages claims. As Lebanon told the district court, the sanctions order "violates principles of mutual respect for the laws of sovereign nations," and will result in "legal action against Arab Bank and its employees if it attempts to comply with the discovery orders of the court." A2. Letters from Jordan and the Palestinian Authority made the same point. A3, A4. The Sanctions Order flouts decades of precedent—including recent Supreme Court pronouncements —warning against this kind of "legal imperialism." *E.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).

Understandable sympathy for victims of terrorism should not interfere with resolution of the comity and due process questions at issue. It "is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.). The Bank abhors terrorism and seeks only to prove the truthfulness of the statement of the Israeli Defense Forces that there is no evidence that "[Arab] Bank or any of its employees were involved in any way whatsoever in terrorist activities, or funded terrorism." A5. Depriving the Bank of a fair opportunity to show that it never knowingly or purposefully aided terrorists is inconsistent with "our Nation's commitment to due process" and

a shocking penalty for its unwillingness to violate the criminal laws of its place of domicile. Mandamus review is warranted.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Plaintiffs' allegations

Plaintiffs are foreign nationals asserting claims under the Alien Tort Statute, 28 U.S.C. § 1350, and U.S. nationals asserting claims under the Anti-Terrorism Act, 18 U.S.C. § 2333. Plaintiffs seek treble and punitive damages against the Bank, which is headquartered in Jordan and has 500 offices in 30 countries and the world's major financial centers, including London, New York, Singapore, Zurich, Paris, Frankfurt, Dubai, Sydney, and Bahrain. Jordan has explained that the Bank is "the leading financial institution" in that nation, and "a pivotal force of economic stability and security in the Kingdom and the broader region." A3.

Plaintiffs claim that the Bank maintained bank accounts and performed routine fund transfers on behalf of charitable organizations that plaintiffs contend were terrorist "fronts." They also allege that the Bank administered a program whereby the Saudi Committee for the Support of the Intifada Al Quds ("Saudi Committee")—a Saudi government-created charity—distributed payments to family members of persons killed or imprisoned as a result of the Israeli-Palestinian conflict. As the district court recognized, plaintiffs must prove that the Bank not only provided these services but did so "with the purpose of financing or

incentivizing the terrorist acts alleged." A1 at 4. Four years of costly pretrial discovery, including depositions of key bank officers, have focused on that pivotal state of mind issue. But for the Sanctions Order, the Bank would be entitled to prove its innocence.

### B. Applicable financial privacy laws

Most of the records at issue are located in the Bank's branches in Jordan, Lebanon, and the Palestinian territories. A6 at 3-4. Those governments have enacted laws that prohibit banks from disclosing records without customer consent, reflecting their longstanding commitment to personal privacy as a fundamental human right. *Id*. at 6. Violations carry criminal penalties, including fines and incarceration. *Id*. at 5. It is undisputed, as the Magistrate Judge overseeing discovery found, that disclosure of these records "would violate the laws of foreign jurisdictions and expose not only the Bank, but its employees, to criminal sanctions." A7 at 5. As Jordan's government wrote to Secretary of State Clinton in a letter filed with the district court, "any violations by Arab Bank of these banking laws will expose it to the imposition of sanctions," including fines, imprisonment, and damages awards. A3.

Each of the affected governments provided their views directly to the district court, describing the importance of their banking laws and urging the court to respect them. The Central Bank of Jordan wrote that it "would strongly urge the

New York Court not to take a position that would place the Arab Bank in violation of the Banking Law." A8. The Palestinian Monetary Authority similarly declared that "any such disclosure would constitute a criminal violation and subject Arab Bank and Bank employees to possible imprisonment fines, or both." A9. Jordan, Lebanon and the Palestinian Authority repeated these formal statements in recent filings urging Judge Gershon to reconsider her Sanctions Order. A2, A3, A4.

### C. The Bank's significant efforts to produce information without violating foreign-law obligations

The Bank has made extensive and extraordinarily costly efforts to comply with plaintiffs' discovery demands within the framework of these privacy laws. Most importantly, in June 2006 the Bank obtained the Saudi Committee's consent to disclose all documents relating to its transactions. The Bank then produced *every document in its possession* relating to the Saudi Committee, including each of the Committee's payment instructions and all of the Bank's internal communications relating to those instructions. The only exceptions were individual beneficiaries' account documents and other beneficiary records over which the Saudi Committee lacked disclosure authority. The Bank's production of Saudi Committee materials contained some 180,000 documents. A7 at 7.

In early 2006, the Bank also obtained permission from the Lebanese Special Investigation Committee ("LSIC") to produce documents relating to a specific account identified in plaintiffs' pleadings. A10. The Bank likewise produced all

documents previously provided to the Department of Justice for its prosecution of the Holy Land Foundation and to the Office of the Comptroller of Currency for its examination of the Bank. Overall, as the Magistrate Judge noted, "defendant's efforts have resulted in the disclosure of over 200,000 documents that are subject to bank secrecy laws." A7 at 8.

Other efforts made by the Bank to secure permission were rejected by government authorities. The Bank petitioned the Jordanian courts to allow it to disclose records covered by Jordan's financial privacy law and obtained a ruling allowing it to do so, but that ruling was overturned on an appeal by the account holder. The Bank's request to the LSIC for additional account records also was turned down. The Bank's petitions to Palestinian authorities for permission to produce documents were denied. And the governments of Germany, France, and the United Kingdom, among others, also denied permission to produce additional records sought by plaintiffs. Surveying these efforts, the Magistrate Judge found that "defendant has undertaken a number of steps contemplated to permit disclosure of documents prohibited by foreign bank secrecy laws, and by virtue of those steps has been able to produce a substantial quantity of documents sought by plaintiffs." A7 at 10. The only requested records not produced were those for which the Bank would face criminal liability for unauthorized disclosure.

### D. The Bank's further efforts to secure permission to disclose confidential records after its objections were overruled

Against this backdrop, plaintiffs moved for an order overruling the Bank's objections to producing information barred by foreign law. On November 25, 2006, the Magistrate Judge granted plaintiffs' motion. A6. Judge Gershon affirmed that ruling on appeal, summarily rejecting the Bank's objection that international comity required a different result. A11 at 3.

Plaintiffs also asked for sanctions, which Judge Pohorelsky refused. Instead, he gave the Bank an opportunity to make additional good-faith efforts to secure permission to produce documents. He noted that the Bank already had submitted a motion for the issuance of letters rogatory to the governments of Lebanon and Jordan and to the Palestinian Monetary Authority. A1 at 7 & n.3. Accordingly, in June 2007, the Bank prepared—and the Magistrate Judge issued—formal Letters of Request to the Palestinian and Jordanian authorities seeking waiver of their financial privacy laws. A7 at 7.

These Letters of Request were denied in September 2007. The governments explained that they lacked power to waive the applicable laws based on a request from a U.S. court. A12. In denying the court's request, Jordan's banking authorities expressly warned that "waiving banking secrecy as reflected in the request would expose your bank to the imposition of a sanction or action or

broader sanctions or actions provided for in Article (88) of the Banking Law," including imprisonment, fines, and damages. *Id*. at 1.

**E. The Magistrate Judge's sanctions report**

Plaintiffs then renewed their request for sanctions. Having closely supervised discovery for four years, Judge Pohorelsky was intimately familiar with the bank records dispute. Drawing on that knowledge, he fashioned a limited sanction that would "restore the evidentiary balance" created by the missing documents, while not unduly punishing the Bank for its unwillingness to produce materials protected by bank confidentiality laws. A7 at 2-3. In particular, he drew a distinction between sanctions addressing the Bank's performance of financial services and sanctions addressing the Bank's *state of mind*.

Because the withheld records would have revealed the identity of the customers for whom the Bank performed financial services, the Magistrate Judge held that the jury should be allowed to draw adverse inferences on that issue. Thus, for example, the jury could infer that certain individuals who received assistance through the Saudi Committee program were terrorists or relatives of terrorists. A7 at 17-19; A13.

Significantly, however, Judge Pohorelsky rejected plaintiffs' proposed state-of-mind sanctions. He explained that an instruction about the Bank's knowledge and intent in providing financial services was not supported by the record and

would be impermissibly punitive: "***There has been no showing that withheld evidence would be likely to provide direct evidence of the knowledge and intent of the Bank in providing the financial services at the heart of this case***." A7 at 15 (emphasis added); see also *id*. at 19-20 ("Neither the proposed factual findings nor an adverse inference instruction are warranted with respect to the defendant's knowledge or state of mind").

Judge Pohorelsky also refused to preclude the Bank from offering testimony or evidence that might be subject to cross-examination using withheld evidence. A7 at 20-21. He explained that such a sanction would unfairly "prevent the defendant from offering a broad range of evidence." *Id*. at 20. Finally, he rejected plaintiffs' request for attorney's fees, finding that "defendant's failure to provide court-ordered discovery is substantially justified." *Id*. at 21.

### F. Judge Gershon's Sanctions Order

Plaintiffs appealed. Without holding any hearing, Judge Gershon imposed the very state-of-mind sanctions that Judge Pohorelsky found unwarranted. First, she ruled that plaintiffs were entitled to an adverse inference that the withheld materials "would have demonstrated that defendant acted with a culpable state of mind," that is, the Bank knowingly and purposefully provided financial services to terrorists. A1 at 26. Second, she ruled that the Bank would be *precluded* from introducing *any* evidence of its state of mind "that would find proof or refutation in

the withheld documents." *Id.* at 29. In practice, this sanction guts the Bank's due process right to introduce evidence that a given customer was not generally known to be a terrorist, or that the Bank "had no knowledge a certain Bank customer was a terrorist if it did not produce that person's complete account records." *Id.*

These sanctions—inaccurately characterized by Judge Gershon as not "severe" (A1 at 18 n.11)—are devastating. They all but eliminate plaintiffs' burden of proof on the critical (and hotly contested) mens rea issue at the heart of this case. They also strip away the Bank's ability to mount a full defense using a range of evidence other than the withheld bank records, including the 200,000 records the Bank did produce and voluminous transcripts of Bank witness testimony, even though plaintiffs made "no showing" that any document demonstrates guilty state of mind. A7 at 15. As Lebanon put it, "that decision * * * violates principles of mutual respect for the laws of sovereign nations and puts a commercial enterprise in an untenable position of having to choose between breaking the laws of our Republic where it operates and being subject to severe sanctions." A2.

On October 5, 2010, Judge Gershon denied the Bank's motions for reconsideration and for certification under 28 U.S.C. § 1292(b). A14, A15. The reconsideration order confirms the severity of the sanctions, reiterating that at trial the Bank will be barred "from making evidentiary submissions or arguments in its

defense that the withheld documents *could* disprove." A14 at 4 (emphasis added). The court called its sanctions order "remedial" (*id.*), but the remedy cuts off the Bank's ability to prove its innocent state of mind, the pivotal issue in this litigation. Although the court said it did consider international comity at the sanctions stage (*id.* at 6), the cited passage of the Sanctions Order states that while courts consider hardship at the compulsion stage, they "are not required to consider it anew in reviewing a request for sanctions." A1 at 12. Judge Gershon said the Bank failed to raise a comity objection to the Magistrate Judge's report. The Bank's comity argument, however, focuses on the adverse inference and preclusion ordered by Judge Gershon, not on the balanced sanction recommended by the Magistrate Judge. The Sanctions Order and the Magistrate Judge's Report are in direct conflict on this critical issue. Judge Gershon also dismissed recent Supreme Court comity decisions without discussion and refused to consider letters from Lebanon and the Palestinian National Authority asking the court to reconsider its Sanctions Order in light of the affront to their national interests, as well as a similar letter from Jordan to Secretary of State Clinton that was provided to the court. A2-A4.

## REASONS WHY THE WRIT SHOULD ISSUE

There are "three conditions" to issuance of a writ of mandamus: "(1) the party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires; (2) the issuing court, in the exercise of its discretion, must be

satisfied that the writ is appropriate under the circumstances; and (3) the petitioner must demonstrate that the right to issuance of the writ is clear and indisputable." *In re City of New York*, 607 F.3d 923, 932-33 (2d Cir. 2010). All three requirements are met here.

## I. Mandamus Provides The Only Adequate Means To Relief.

Unless this Court assumes jurisdiction of the Bank's collateral order appeal, mandamus is the only means available to review the Sanctions Order. The district court denied petitioner's motion to certify under 28 U.S.C. § 1292(b). And waiting to appeal until a final judgment is entered is simply not a viable option. The district court plans to try the claims in groups with respect to liability, with damages to be determined if and when there is a liability finding, presenting the prospect of a long delay between any liability finding and final judgment. Thus, the Sanctions Order puts the Bank in an impossible position. If it were to succumb to the pressure exerted by the Order and produce the withheld documents, it would face criminal penalties in three different countries for violating local bank confidentiality laws.[1] If the Bank were to stand fast and submit to trying the first group of claims with its hands effectively tied behind its back, it would face the

[1] See *In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) (granting mandamus where "a remedy after final judgment cannot unsay the confidential information that has been revealed"); accord *In re Sealed Case*, 151 F.3d 1059, 1065 (D.C. Cir. 1998).

prospect of being branded a terrorist accomplice by a U.S. jury. The Bank might not survive such a verdict long enough to take an appeal. Customers and correspondent banks are unlikely to be willing to do business with a bank that has been adjudicated a terrorist no matter how baseless and unfair such a determination might be. As a result, a successful appeal following entry of judgment could not begin to repair the damage that would be inflicted on the Bank's reputation and business prospects by an adverse judgment tainted by improper sanctions.

In less dire situations, where banks have been forced to choose between contempt sanctions and violating foreign bank confidentiality laws, courts have not hesitated to grant mandamus. As the Ninth Circuit explained in *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997), "[r]equiring the Banks to choose between being in contempt of court and violating Swiss law clearly constitutes severe prejudice that could not be remedied on direct appeal." Accord *In re Philippine Nat'l Bank*, 397 F.3d 768, 774 (9th Cir. 2005) (granting mandamus where discovery risked "violating Philippine bank secrecy laws" and imposing "severe prejudice that could not be remedied on direct appeal"); *D&H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1446 (10th Cir. 1984) (mandamus granted where compliance with order would be "violation of foreign law" and court could not "ameliorate the consequences" after final judgment).

Delaying appellate review would threaten not only the Bank's interests but also those of the nations whose laws the district court so cavalierly disregarded. As the Palestinian Monetary Authority explained, the financial confidentiality laws are critical to maintaining the stability of the financial system in that troubled area of the world: "the obvious effect [of compelling disclosure], apparent to anyone who is familiar with the actual conditions and circumstances in the Palestine Territories, would be the flight of individual customers from the Palestinian banking system, with the residual impact on the ability of the PMA to regulate that system, including the identification and interdiction of unauthorized or illegal monetary transactions." A4. As the three governments advised the district court after its ruling, to severely sanction the Bank for complying with those laws is both fundamentally unfair and disruptive of U.S. relations in the region.

In extraordinary cases like this one, mandamus serves a vital purpose: forestalling "the development of discovery practices and doctrine that unsettle and undermine" important public interests. *In re County of Erie*, 473 F.3d 413, 417 (2d Cir. 2007); see *In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163 (2d Cir. 2001) (granting mandamus due to "strong public interest in expeditiously deciding the issues presented"). Granting this petition now will guide the district courts on the important and sensitive issues raised in this and other cases. See *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1295 (3d Cir. 1994) (Alito, J.) (in cases

involving the public interest, the problems caused by awaiting a final judgment extend "well beyond the mere expense and inconvenience of litigation").

## II. Mandamus Is Appropriate Under The Circumstances.

Mandamus is warranted to review erroneous discovery orders and sanctions, particularly when such orders infringe principles of international comity.

### A. Mandamus is warranted because the Sanctions Order raises novel and significant legal issues in the discovery context.

"Mandamus has shown prominently in the constellation of appellate devices to review discovery orders," particularly when "important interests are at stake." 16 Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE § 3935.3, at 604-05 (2d ed. 1996 & Supp. 2010). It is "available to protect claims that discovery threatens an irreparable invasion of important privacy interests." *Ibid*. The writ thus facilitates "immediate review of some of the more consequential * * * rulings" and serves as a "useful safety valve[] for promptly correcting serious errors." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 608-09 (2009). Mandamus is particularly appropriate where there is "a novel and significant question of law" and "a legal issue whose resolution will aid in the administration of justice." *City of New York*, 607 F.3d at 939 (granting mandamus to review applicability of privilege to civil discovery of police records).

This Court often has granted mandamus in the discovery context. *E.g.*, *Sims*, 534 F.3d at 129 (compelled disclosure of privileged mental health records); *County*

*of Erie*, 473 F.3d at 417 (disclosures subject to attorney-client privilege); *In re Long Island Lighting Co.*, 129 F.3d 268, 270-71 (2d Cir. 1997) (production order raising novel privilege issue); *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987) (application of attorney-client privilege). In such cases, mandamus "may forestall future error" by providing "guidance for the courts of our Circuit in an important, yet underdeveloped, area of law," as well as by aiding potential litigants in "organizing [their] affairs in the shadow of the law." *City of New York*, 607 F.3d at 942. Other courts of appeals agree. *E.g.*, *EEOC v. Carter Carburetor Div.*, 577 F.2d 43, 48 (8th Cir. 1978) (mandamus issued because "the district court exceeded its judicial power in limiting the evidence" at trial as a discovery sanction).

If the modest single-party interest underlying a privilege claim in an ordinary case is important enough to warrant mandamus, the far more consequential interests underlying financial privacy laws—involving the personal privacy of thousands of customers and the public policy of sovereign governments—are even more so in a gargantuan proceeding such as this one. Mandamus is justified where there is even "some" uncertainty regarding the right to withhold discovery if "the need for clarification is of sufficient importance." *In re County of Erie*, 546 F.3d 222, 224 (2d Cir. 2008). Here, the sharp difference between Judge Gershon and Judge Pohorelsky on appropriate sanctions strongly confirms the need for this Court's guidance.

### B. Mandamus is warranted because the Sanctions Order violates international comity.

The Sanctions Order severely penalizes the Bank for refusing to violate the penal laws of foreign nations. This frontal assault on international comity risks adverse consequences for the United States in a highly sensitive part of the world.

#### 1. The district court erred in imposing onerous sanctions without considering international comity.

International comity requires a district court "to minimize possible conflict between its orders and the law of a foreign state affected by its decision." *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968); see *Doe v. United States*, 487 U.S. 201, 218 n.16 (1988) ("international comity questions [are] implicated by the Government's attempts to overcome protections afforded by the laws of another nation"). The district court defied those principles by imposing unprecedented and outcome-determinative sanctions in this massive case without reference to the compelling foreign interests at stake and by expressly refusing to consider the hardship the Bank faced from its conflicting legal obligations. A1 at 12. Mandamus is justified in these circumstances. See *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (granting mandamus petition based on "the demands of international comity" and overturning discovery orders).

In *Société Internationale v. Rogers*, 357 U.S. 197, 200 (1958), the Supreme Court overturned a sanction for refusing disclosure of bank records that "would

violate Swiss penal laws and consequently might lead to imposition of criminal sanctions." There, as here, the sanction was excessive because the party's "inability [was] fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211. *Rogers* makes clear that a party's "inability to comply because of foreign law" is a "weighty" reason for non-compliance with discovery obligations—one that must be carefully considered in fashioning any remedy. *Id.* at 211-13. Accord *Société Nationale v. U.S. Dist. Ct.*, 482 U.S. 522, 546 (1987) (courts must "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state").

The Tenth Circuit applied that rule where a party declined to produce documents because doing so would put it "in violation of Canadian law and subject to criminal sanctions." *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 994 (10th Cir. 1977). The court held that comity must weigh heavily in the sanctions analysis: "though a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign court, still the fact of foreign illegality may prevent the imposition of sanctions for subsequent disobedience to the discovery order." *Id.* at 997. The court overturned the sanction, which—like those here—did not adequately account for comity interests. *Id.* at 999. See also

*Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1232 (Fed. Cir. 1996) (vacating sanctions as inconsistent with international comity where foreign party's compliance with discovery order would risk criminal penalties).

**2. The Sanctions Order violates international comity.**

The outcome-determinative sanctions imposed here—which effectively deprive the Bank of its day in court—cannot survive a proper comity analysis.

*First*, the district court overlooked the extent to which its order frustrates and subverts the interests of foreign nations. The Bank is headquartered and licensed in Jordan, and the documents at issue are in Jordan, Lebanon, and the Palestinian Territories. The penal laws barring the Bank from producing those documents are longstanding measures protecting personal privacy, not blocking laws aimed at a particular lawsuit. There can be no question that "producing the requested information would affect important substantive policies or interests" of the affected nations. *Restatement (Third) of the Foreign Relations Law of the United States* § 442 cmt c. (1987) A foreign nation's statements on these subjects are "conclusive." *United States v. Pink*, 315 U.S. 203, 220 (1942). As the Tenth Circuit held with respect to sanctions imposed in *Westinghouse*, the district court "erred in failing to consider [Canada's] legitimate interest in the disclosure of these documents." 563 F.2d at 999; see *Reinsurance Co. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) ("Given the scope of its protective

laws and the strict penalties it imposes for any violation, Romania places a high price on this secrecy"). Mandamus is required to correct the very same error here.

*Second*, the Sanctions Order gives short shrift to the undisputed fact that nonproduction resulted entirely from the Bank's compliance with foreign criminal law. Fear of foreign prosecution constitutes a "weighty excuse" for nonproduction. *Rogers*, 357 U.S. at 211. This Court therefore has admonished courts to "empathize with the party or witness subject to the jurisdiction of two sovereigns and confronted with conflicting commands." *First Nat'l City Bank*, 396 F.2d at 901. The district court turned these warnings on their head by treating unwillingness to violate foreign law as "recalcitrance" tantamount to bad faith. A1 at 14, 20. Comity does not permit such "significant sanctions" (*id*. at 14) for obedience to the laws of one's foreign domicile. Such rulings touch "sharply on national nerves." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

### 3. The Sanctions Order's disregard for international comity conflicts with recent precedents of the Supreme Court.

Judge Gershon's refusal to take comity into account in fashioning sanctions clashes with the Supreme Court's recent insistence on avoiding conflicts between U.S. and foreign law. Such conflicts are especially provocative where, as here, they result from *extraterritorial* applications of U.S. law.

In *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), Justice Scalia wrote separately to emphasize the need to avoid conflict between U.S. and

foreign law. Invoking comity—"the respect sovereign nations afford each other by limiting the reach of their laws"—Justice Scalia urged courts to "take[] account of foreign regulatory interests" before applying U.S. law to activity occurring abroad. *Id*. at 817-18. Otherwise, he warned, U.S. law would come into "sharp and unnecessary conflict with the legitimate interests of other countries." *Id*. at 820.

The Court adopted Justice Scalia's comity views in *Empagran*, 542 U.S. at 164-171, holding that U.S. antitrust laws should not be extended to foreign-market activity even though those laws have extraterritorial reach. The Court considered the views of affected foreign governments and stressed the importance of judicial restraint in ensuring that "the potentially conflicting laws of different nations work together in harmony." *Id*. at 164-68. *Empagran* requires a clear justification for any application of U.S. law that creates "a serious risk of interference" with a foreign nation's regulation of its own affairs. *Id*. at 165. The Court condemned such judicial interference as "an act of legal imperialism." *Id*. at 169.

These comity principles are so important that the Court recently—and unanimously—construed U.S. securities laws to have no extraterritorial application to prevent even *potential* conflict with foreign law. *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869 (2010). The Court found no justification for applying U.S. law "incompatibly with the applicable laws of other countries." *Id*. at 2885. Stressing that foreign law often "differs from ours," including on "what discovery

is available in litigation," *Morrison* heeded the warnings of foreign governments about "interference with foreign securities regulation." *Id*. at 2885-86.

Comity requires special vigilance to avoid interference with the Executive Branch's foreign affairs authority. The "potential implications for the foreign relations of the United States * * * should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). *Sosa* mandates "great caution" because "many *attempts by federal courts to craft remedies*" in the international arena "would raise risks of adverse foreign policy consequences." *Id*. at 727-28 (emphasis added).

That admonition applies directly here—where no such caution was exercised. The United States' efforts to conduct foreign policy (including counter-terrorism operations and peace negotiations) in a uniquely sensitive region should not be undermined by ad hoc rulings in discovery disputes that severely punish compliance with laws of our government's allies and diplomatic partners. That is "legal imperialism" of the worst kind, condemned in *Empagran*, 542 U.S. at 169. See *Estate of Amergi*, 611 F.3d 1350, 1364 (11th Cir. 2010) ("politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East" require judicial restraint so as not to "undermine American objectives in the region"). The potential for international antagonism is all the greater given that this

litigation is brought by "private plaintiffs," who "often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *Empagran*, 542 U.S. at 171.

The United States must speak with "one voice" on foreign policy, a principle irreconcilable with allowing individual trial judges to override penal laws of foreign nations which they deem dispensable. *Munaf v. Geren*, 553 U.S. 674, 702 (2008). The Sanctions Order cannot be reconciled with that "one voice" principle. *E.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U. S. 363, 376 (2000). Just as "American antitrust laws do not regulate the competitive conditions of other nations' economies" (*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986)), U.S. discovery rules should not be stretched to regulate other jurisdictions' financial privacy policies. As the Solicitor General and State Department put it in the United States' amicus brief in *Matsushita*,

> sovereign compulsion *** should be available as a defense when the conduct at issue was in fact compelled by a foreign government, for it is in such cases that the imposition of liability by American courts is likely to touch most sharply on foreign concerns, and thus pose the greatest difficulties for the conduct of our foreign relations.

Brief for the U.S. as Amicus Curiae at 8, *Matsushita*, 475 U.S. 574 (No. 83-2004), 1985 WL 669667. The Sanction Order's interference with U.S. foreign relations, the province of the political branches, cries out for mandamus review. See *Ex*

*Parte Peru*, 318 U.S. 578, 586-87 (1943) (mandamus appropriate in case involving "the dignity and rights of a friendly sovereign state" and Executive Branch's "conduct of foreign affairs"); *Whiteman v. Dorotheum GmbH*, 431 F.3d 57, 60 (2d Cir. 2005) (Holocaust-related claims against Austria dismissed, as requested in mandamus petition, in deference to "foreign policy interests of the United States").

## III. The Bank's Right To The Writ is Clear And Indisputable.

Mandamus is available when an order amounts to "a clear abuse of discretion" or "otherwise works a manifest injustice." *Mohawk*, 130 S. Ct. at 607; accord *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). A court abuses its discretion if it bases its ruling on "an erroneous view of the law," makes "a clearly erroneous assessment of the evidence," or "renders a decision that cannot be located within the range of permissible decisions." *City of New York*, 607 F.3d at 943. Applying these standards, the writ should issue.

### A. The District Court erroneously imposed sanctions of unprecedented severity in violation of international comity.

As shown above, the district court's failure to respect the law of foreign governments cannot be squared with *Rogers*, *Westinghouse*, and recent pronouncements from the Supreme Court. In its needless severity and heedless disregard of the foreign interests at stake, the Sanctions Order runs afoul of this Court's admonition to minimize conflict between U.S. and foreign law:

> [E]ach nation should make an effort to minimize the potential conflict flowing from their joint concern with the prescribed behavior. Where, as here, the burden of resolution ultimately falls upon the federal courts, the difficulties are manifold because the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs.

*First Nat'l City Bank*, 396 F.2d at 901. The Sanctions Order infringes that legal principle and works a "manifest injustice." *City of New York* , 607 F.3d at 943.

### B. The Sanctions Order violates the Bank's due process rights.

The Sanctions Order also violates due process and makes this massive case into little more than a show trial. The state-of-mind sanctions twist the fact-finding process by cutting off evidence that the Bank lacked guilty knowledge or intent, and by foreclosing the Bank from arguing "that it had no knowledge a certain Bank customer was a terrorist if it did not produce that person's complete account records." A1 at 29, 32. Those sanctions eviscerate the Bank's defenses on the central issue of knowledge and intent—of decisive importance here given Judge Gershon's elimination of traditional but-for and proximate cause requirements in prior rulings on motions to dismiss—and render the Bank's years of effort futile.

Due process forbids the imposition of such harsh sanctions where the circumstances do not support a presumption that failure to produce amounts to an admission of guilt. A century ago, the Supreme Court explained that adverse inferences or presumptions are proper only where refusal to produce evidence is

"an admission of the want of merit in the asserted defense." *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909). *Insurance Corp. v. Compagnie de Bauxites*, 456 U.S. 694, 706 (1982), confirms that due process is denied if "the behavior of the defendant will not support the *Hammond Packing* presumption."

It is precisely in a case like this that an adverse inference or preclusion order violates due process. Failure to produce results from external legal compulsion, not the Bank's "own conduct" (*Rogers*, 357 U.S. at 211). As this Court has explained:

> Where the party makes good faith efforts to comply, and is thwarted by circumstances beyond his control, for example, a foreign criminal statute prohibiting disclosure of the documents at issue, an order dismissing the complaint would deprive the party of a property interest without due process of law.

*Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979).

Judge Gershon remarked that her sanctions are not "severe." A1 at 18 n.11. But a preclusion sanction—effectively gagging the defendant before the jury—is "harsh" and generally "disfavored," justifiable only by "flagrant bad faith and callous disregard of the Federal Rules of Civil Procedure." *Am. Stock Exch. v. Mopex*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002); see *New Pac. Overseas Group v. Excal Int'l Dev. Corp.*, 2000 WL 377513, at *6 (S.D.N.Y. Apr. 12, 2000) ("preclusion" orders "are severe sanctions"); *Teleglobe Commc'ns Corp. v. BCE, Inc.*, 392 B.R. 561, 579 (Bankr. D. Del. 2008) (same). The sweeping preclusion

and state-of-mind sanctions are particularly unfair when there is no reason to infer that any bank records show guilty knowledge of any terrorist act. A7 at 15.

As the Magistrate Judge found, the Bank conscientiously obtained "permission to produce substantial quantities of documents otherwise prohibited from disclosure." A7 at 7. Having made every effort, and spent huge sums, to comply with all discovery orders without subjecting itself to criminal penalties, the Bank cannot constitutionally be deprived of "an opportunity to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).[2]

### C. Judge Gershon's decision to impose harsh sanctions is a clear abuse of discretion that rests on false factual assumptions.

Judge Gershon relied on factual assumptions demonstrably at odds with the record to try to justify the harsh sanctions rejected by the Magistrate Judge. These errors only confirm that she committed a patent abuse of discretion.

- According to the court, the Bank did not produce "internal Bank communications relating to the Saudi Committee." A1 at 17. In fact, the Bank produced *every* Saudi Committee payment instruction and *all* internal documents relating to the Committee. A16 at 25-26; A17. It is undisputed that the only documents not produced were personal

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[2] See *Scherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 139 (2d Cir. 2007) (vacating sanction where disclosing documents would subject party "to criminal sanctions under Russian law"); *Cochran*, 102 F.3d at 1232 (vacating sanctions where disclosure would violate foreign law; "Rule 37 is not a legal requirement to do the impossible"); *Serra Chevrolet, Inc. v. General Motors Corp.*, 446 F.3d 1137, 1150 (11th Cir. 2006) (sanctions striking defenses violated due process).

customer records that the Committee has no authority to disclose without customer consent.

- The court labeled Saudi Committee records showing payments to relatives of terrorists "direct evidence of the Bank's facilitation of terrorist activity." A1 at 24. That amounts to a judicial declaration that the Committee, a creation of the Saudi government, was a state sponsor of terrorism. But the U.S. government has deemed the Committee a legitimate humanitarian program. A18 at 0019-20; A19 at 4. The court's condemnation of a charity created by a key U.S. ally confirms that it is on a collision course with the Executive Branch.

- The court suggested that the Bank's letters to LSIC were "calculated to fail" because one letter included language denying plaintiffs' allegations and asserted that the U.S. court had "provided for respecting confidentiality laws." A1 at 18. In fact, as the Magistrate Judge found, these general statements were "not inaccurate." A7 at 8-9. The district court's pejorative characterization is particularly untenable given that other requests by the Bank to LSIC were successful, and none of the other unsuccessful waiver request letters included the supposedly objectionable language.

- According to the court, "defendant never intended to produce certain documents." A1 at 20. In fact, as the Magistrate Judge expressly found, the Bank made substantial and costly efforts to produce all requested documents, including petitioning foreign authorities, litigating in Jordan, and sending letters rogatory. The Magistrate Judge described the Bank's non-production as "substantially justified" (A7 at 21) and squarely rejected plaintiffs' charge that the Bank "dragged its feet" (A20).

- The court saw no privacy impediment to production because the Bank previously produced documents to the DOJ and OCC. A1 at 19. But those responses to formal and confidential Executive Branch requests do not override the Bank's privacy obligations in civil litigation. As Jordan has explained (A3), its "continued commitment to providing such assistance to other nations for law enforcement or national security purposes" does not evince "any general intention by the Kingdom to relieve a financial institution operating in Jordan of its obligations to comply with Jordanian banking laws concerning the confidentiality of customer accounts."

In short, Judge Gershon's rationales for her unprecedented order both offend international comity principles and override rulings by the Magistrate Judge. Unlike Judge Gershon, Judge Pohorelsky carefully supervised discovery, received 27 submissions, and held 13 hearings on the Bank's efforts to produce records subject to privacy laws. Judge Gershon *did not conduct a single hearing on these matters*. See *Bell Atl. v. Twombly*, 550 U.S. 544, 559 n.6 (2007) ("the hope of effective judicial supervision is slim" where district judges lack information concerning "sprawling, costly, and hugely time-consuming" discovery).

Judge Gershon's ruling provides a blue-print for future discovery abuse: based on this precedent, plaintiffs suing banks in other nations with financial privacy laws are free to demand documents they know cannot be produced, and then claim sanctions that effectively direct a verdict against the defendant—even in cases claiming enormous damages. Federal discovery rules were never intended to countenance such extraordinary injustice.

## CONCLUSION

Petitioners respectfully request this Court to grant the petition, authorize full briefing on the merits, and issue a writ of mandamus.

Dated: November 4, 2010 Respectfully submitted.

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## CERTIFICATE OF SERVICE

The undersigned certifies that, on November 4, 2010, he served the foregoing Petition for Writ of Mandamus, as well as the Appendix thereto, on the following:

By UPS Overnight Express

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