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LAWYERS FOR CIVIL JUSTICE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FEDERAL TRADE COMMISSION, et al.

Plaintiffs,

v.

QUALCOMM INCORPORATED, et al.,

Defendants.

In re Qualcomm Antitrust Litigation

Case No.: 5:17-cv-00220-LHK

Case No.: 5:17-md-02773-LHK

ADMINISTRATIVE MOTION OF LAWYERS FOR CIVIL JUSTICE TO FILE BRIEF AS *AMICUS CURIAE* (LOCAL RULE 7-11)

Hearing Date: February 15, 2018
Hearing Time: 1:30 PM
Courtroom: 8, 4th Floor

THE HONORABLE LUCY H. KOH

I. INTRODUCTION

Lawyers for Civil Justice ("LCJ") respectfully moves for leave to file an *amicus curiae* brief in support of Non-Party Apple Inc.'s Motion for Relief from Magistrate Judge's Nondispositive Pretrial Order Imposing Sanctions. A copy of the proposed brief is attached as Exhibit A to this motion. Apple consents to the filing of this motion and the accompanying amicus brief. Qualcomm does not consent to filing.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

LCJ is a national coalition of corporations, defense bar organizations, and law firms that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules to: (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ has a unique perspective on the rules amendments, having been directly involved in the entire process related to the adoption of the 2015 rules amendments, including participating in the 2010 Duke Conference, submitting empirical evidence in support of changes to the discovery rules and other materials such as White Papers, and participating in all the hearings and Rules Advisory Committee meetings.

III. REASONS WHY THE MOTION SHOULD BE GRANTED

The District Courts have "broad discretion" to accept an amicus curiae submission. *Hoptowit v. Ray*, 682 F. 2d 1237, 1260 (9th Cir. 1982). "District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *NGV Gaming, Ltd. V. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C.2003)). If permitted to file, LCJ will fulfill "the classic role of amicus curiae by assisting in a case of general public interest[] [and]

supplementing the efforts of counsel[.]" *Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982).

LCJ seeks to provide the Court with a broader context to consider the issue of potential sanctions for missing document production deadlines in light of the 2015 amendments to the Federal Rules of Civil procedure and pertinent case law regarding sanctions. LCJ also seeks to provide the Court with a different perspective than those of the parties to the matter regarding the importance of clarity regarding the process and standards for imposing sanctions in civil litigation, especially as they relate to non-parties who are responding to subpoenas *duces tecum*. LCJ and its members have significant familiarity with the Federal Rules, the burdens and costs imposed in civil litigation, and discussions in the past decade regarding the role and propriety of sanctions and other remedies in the context of civil litigation.

IV. CONCLUSION

For the foregoing reasons, LCJ respectfully requests that the Court grant it leave to file the *amicus curiae* brief attached as Exhibit A.

DATED: January 31, 2018

Respectfully submitted,

By Charles R. Ragan
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Attorneys for *Amicus Curiae*
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By /s/ *Alyssa Caridis*
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FEDERAL TRADE COMMISSION, et al. Plaintiffs, v. QUALCOMM INCORPORATED, et al., Defendants. In re Qualcomm Antitrust Litigation	Case No.: 5:17-cv-00220-LHK Case No.: 5:17-md-02773-LHK DECLARATION OF CHARLES R. RAGAN IN SUPPORT OF ADMINISTRATIVE MOTION OF LAWYERS FOR CIVIL JUSTICE TO FILE *AMICUS CURIAE* BRIEF (LOCAL RULE 7-11) Hearing Date: February 15, 2018 Hearing Time: 1:30 PM Courtroom: 8, 4th Floor THE HONORABLE LUCY H. KOH

I, Charles R. Ragan, declare:

1. I am an attorney with Redgrave LLP, which firm has been retained as counsel for Lawyers for Civil Justice ("LCJ") in connection with this matter. I have personal knowledge of each of the facts stated below and if called upon to do so, I could testify competently to them.

2. Attached hereto as Exhibit A is a true and correct copy of LCJ's proposed *amicus curiae* brief in connection with Non-Party Apple Inc.'s Motion for Relief from Magistrate Judge's Non-dispositive Pretrial Order Imposing Sanctions.

3. Counsel for Qualcomm has advised me that Qualcomm does not consent to the filing of this Brief.

4. Counsel for Apple has informed me that Apple consents to the filing of this brief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and was executed on January 31, 2018, in San Francisco, California.

/s/ *Charles C. Ragan*
Charles C. Ragan

ATTESTATION

I, Alyssa Caridis, hereby attest, pursuant to United States District Court, Northern District of California Civil Local Rule 5-1(i)(3), that concurrence to the filing of this document has been obtained from the signatory hereto.

/s/ *Alyssa Caridis*
Alyssa Caridis

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In re Qualcomm Antitrust Litigation

Case No.: 5:17-cv-00220-LHK

Case No.: 5:17-md-02773-LHK

[PROPOSED] ORDER GRANTING ADMINISTRATIVE MOTION OF LAWYERS FOR CIVIL JUSTICE TO FILE BRIEF AS *AMICUS CURIAE* (LOCAL RULE 7-11)

Hearing Date: February 15, 2018
Hearing Time: 1:30 PM
Courtroom: 8, 4th Floor

THE HONORABLE LUCY H. KOH

[PROPOSED] ORDER

On January 31, 2018, Lawyers for Civil Justice filed an administrative motion for leave to file an *amicus curiae* brief in Support of Non-Party Apple's Motion for Relief from Magistrate Judge's Nondispostive Pretrial Order Imposing Sanctions. Having considered the papers and pleadings on file, the Court hereby GRANTS the administrative motion and ORDERS the *amicus curiae* brief filed.

IT IS SO ORDERED.

Dated: _____

_____
Honorable Lucy H. Koh
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FEDERAL TRADE COMMISSION, et al. Plaintiffs, v. QUALCOMM INCORPORATED, et al., Defendants. In re Qualcomm Antitrust Litigation	Case No.: 5:17-cv-00220-LHK Case No.: 5:17-md-02773-LHK BRIEF OF LAWYERS FOR CIVIL JUSTICE AS AMICUS CURIAE RE: NON-PARTY APPLE INC.'S MOTION FOR RELIEF FROM MAGISTRATE JUDGE'S NONDISPOSITIVE PRETRIAL ORDER IMPOSING SANCTIONS Hearing Date: February 15, 2018 Hearing Time: 1:30 PM Courtroom: 8, 4th Floor THE HONORABLE LUCY H. KOH

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I. INTEREST OF *AMICUS CURIAE*

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, defense bar organizations, and law firms that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in reforming federal civil rules to: (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ has a unique perspective on the rules amendments, having been directly involved in the entire process related to the adoption of the 2015 rules amendments, including: participating in the 2010 Duke Conference, submitting empirical evidence in support of changes to the discovery rules and other materials such as White Papers, and participating in all the hearings and Rules Advisory Committee meetings.[1]

No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or other person or entity -- other than LCJ or its counsel -- contributed money that was intended to fund preparing or submitting the brief.

With respect to the two entities of record on this particular motion (i.e., Apple Inc. and Qualcomm Incorporated), Apple consents to the filing of this brief while Qualcomm does not.

[1] *E.g.*, Lawyers for Civil Justice ("LCJ"), *Supp. Public Comment to Advisory Comm. on Civil Rules, An Imperative to Act: The Public Comments Demonstrate the Need to Reform the Discovery Rules to Achieve a Meaningful Reduction in the Costs & Burden of Discovery* (Feb. 3, 2014); LCJ, *Comment to Comm. on Rules of Practice & Procedure, In Support of Proposed Rule 37(e) & the Duke Package of Amends*. (May 22, 2014); LCJ, *et al*., *White Paper, Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure* (May 2, 2010) (submitted to Duke Conf.).

II. INTRODUCTION

The Magistrate Judge's Sanctions Order is contrary to law and sound public policy.[2]

Sanctioning parties for missing document production deadlines is a rare occurrence and rightfully so -- the law has long recognized that judicial sanctions are tools that should be used sparingly to address misconduct and imposed only under the aegis of the applicable law and due process -- and even then only imposed to the least extent necessary to address the conduct at issue. The notion of imposing sanctions on *non-parties* for missing document production deadlines is extraordinarily rare, especially in light of the specific and mandatory protections and processes set forth in Federal Rule of Civil Procedure 45. Moreover, the United States Supreme Court in the last three years has emphasized the limited role for sanctions -- even in the most egregious circumstances (such as evidence destruction or substantive misrepresentations to the court *by parties*) -- through its promulgation of the 2015 Amendments to the Federal Rules of Civil Procedure and its 2017 decision in *Goodyear Tire & Rubber Company v. Haeger*, __ U.S. __, 137 S.Ct. 1178, 197 L.Ed.2d 585 (2017).

The Sanctions Order here is completely out of step with settled law and public policy as the sanction was imposed without adequate notice, without request, without any demonstration of prejudice, without need, without findings and, respectfully, without proper legal justification. To compound the impact of publicly castigating non-party Apple for a missed deadline, the

[2] The sanction here at issue was ordered during a hearing on December 20, 2017, and memorialized in a written Order on December 20, 2017 Discovery Dispute Hearing, dated December 21, 2017 (hereafter the "Sanctions Order"). [*See* Dkt. 421.] The applicable standard for review of the Sanctions Order is whether it is clearly erroneous or contrary to law. 28 U.S.C. § 636(a); FED. R. CIV. P. 72(a); *see* Local R. 72-2. For all purposes relevant to this Brief, all docket entries in question were filed in both the FTC and MDL matters. This Brief cites only the docket numbers from the FTC matter.

widely-reported sanctions order creates an impression that courts can, should, and will impose significant monetary fines anytime a court agrees with a party, that another entity (party or not) has not met the deadlines in a court order. This result sets a dangerous precedent that has two equally serious and negative (and highly likely) consequences: (1) parties will be incentivized to bring more discovery disputes to the court seeking retributive sanctions; and (2) the outcome of discovery disputes and production problems will become less predictable. Both consequences are bad public policy and neither should be encouraged.

Setting aside the Sanctions Order is imperative to avoid the creation of a "sanctions game" atmosphere, whereby counsel will seize on any missed deadline as an opportunity to strike at another party (or non-party) to impose significant financial or other penalties.[3]

III. ARGUMENT[4]

Although Rule 45 should govern the setting aside of the Sanctions Order (see point III. B., below), the Court's decision in this high-profile case inevitably will be understood by other courts and parties in the broader context of developing standards for discovery sanctions, so it is important to begin with that context.

---

[3] This is not an imagined threat as in this very matter Qualcomm, emboldened by the Sanctions Order, is now seeking similar "per day" monetary sanctions against five more non-parties (the "Contract Manufacturers" or "CMs") because of the alleged failure to meet production deadlines. [Dkt. 485] ("Because further encouragement will incentivize the CMs to timely complete their document productions, Qualcomm petitions the Court to order meaningful sanctions on each CM until they complete document production from the original 27 custodians, which should run retroactively to the date of noncompliance with the Court's Order.").

[4] Key facts that Amicus believes are pertinent to the law and policy issues presented to the Court are set forth in Appendix A.

A. Even As To Parties, Discovery Sanctions Are Appropriate Only In Narrow and Exceptional Circumstances

Discovery sanctions, even in extreme cases involving parties, are to be imposed sparingly and must be narrowly tailored. In particular, such sanctions may be imposed only if there was deliberate misconduct or prejudice caused to other litigants. And in all events, whatever sanctions are imposed should be only what is necessary to accomplish its intended purpose. The Sanctions Order contravenes both of those principles.

1. Discovery sanctions should be issued only to address deliberate misconduct or to remedy prejudice to other litigants

The Federal Rules of Civil Procedure recently underwent significant amendment clarifying (among other things) that, even in the extreme case where a party destroys Electronically Stored Information ("ESI"), discovery sanctions are only appropriate in narrow and exceptional circumstances. *See* FED. R. CIV. P. 37(e). Under the new rule, a party that loses ESI irretrievably may only be sanctioned if the loss causes prejudice to another party or was undertaken "with the intent to deprive another party of the information's use in the litigation." *Id.* Said otherwise, absent a finding of deliberate misconduct or prejudice -- even when a party outright destroys evidence -- no sanction may issue. *See* 2015 Advisory Committee Note to Rule 37(e).[5] (Of course, as the commentary to the amendment notes, just because a court is *authorized* to issue a sanction when other parties are prejudiced does not necessarily mean that it

[5] The Manual for Complex Litigation is to the same effect. It notes that sanctions are generally disfavored and should only be imposed as a last resort. *See* Manual for Complex Litigation § 10.151 General Principles (emphasis added); *see also* 8B Fed. Prac. & Proc. Civ. § 2284, *Discretion of District Court in Imposing Sanctions* (3d ed. Apr. 2017).

should do so. *See* 2015 Advisory Committee Note to Rule 37(e). Even in such circumstances, the commentary emphasizes, the Rule "does not require the court" to issue sanctions. *Id.*

That amendment reflects a considered judgment by the Supreme Court and the Rules Committee that reining in sanctions is critical to stemming the tide of spiraling discovery costs. Both the plaintiffs' and defense bars had repeatedly expressed their views that civil litigation in general, and discovery in particular, "takes too long and costs too much."[6] The amendments to Rule 37 recognized that problem was caused, in part, by excessive motion practice for discovery sanctions fueled by disparate standards for awarding sanctions in the several circuit courts.[7] When parties fear that even an innocent mistake, a good faith effort that comes up short, or a minor violation of a technical discovery ruling will be met with stiff, punitive sanctions, they are led to over-preserve, over-collect, over-produce, and over-spend. That drives up discovery costs, with little benefit to show for it, and is inconsistent with Rule 1's admonition that civil litigation should be "just, speedy, and inexpensive." FED. R. CIV. P. 1. To remedy that problem, Rule 37(e) imposes substantial limitations on the ability of a court to impose any remedy for the loss of ESI, much less "sanctions," even in the very worst cases.[8]

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[6] Hon. David G. Campbell, *New Rules, New Opportunities*, 99 Judicature 19, 20-21 (2015) (explaining that view was shared by the American College of Trial Lawyers, the American Bar Association's Litigation Section, and the National Employment Lawyers Association); *see also* Inst. for the Advancement of the Am. Legal Syst., Civil Litig. *Survey of Chief Legal Officers & Gen. Counsel Belonging to the Assoc. of Corp. Counsel* at 27 (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Civil_Litigation_Survey2010.pdf (finding that 70% of chief legal officers and general counsel believe that litigants overuse discovery).

[7] *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 542 (D. Md. 2010).

[8] That principle -- that discovery sanctions are appropriate only in rare cases, and even then must be no greater than strictly necessary to ameliorate the harm to other litigants -- is not limited to the Rule 37(e) context. Indeed, a cardinal principle of discovery of electronic information is reasonableness, not perfection. *See* 2015 Advisory Committee Note to Rule 37(e). It follows *a*

2. Discovery sanctions should use the least severe means necessary to accomplish the intended purpose

No less important, the Supreme Court has emphasized -- through the Federal Rules and its case law -- that even when sanctions are appropriate, they must be no more severe than is necessary to accomplish their intended purpose. Rule 37 states explicitly, for instance, that even where a party's destruction of ESI causes prejudice to another party, the court "may order measures no greater than necessary to cure the prejudice." FED. R. CIV. P. 37(e). Likewise, the Supreme Court has recently confirmed that a court's inherent authority to sanction discovery abuse through the award of attorneys' fees is subject to similar restrictions. In *Goodyear*, the Court explained that while courts have inherent power "to fashion an appropriate sanction for conduct which abuses the judicial process" -- including for discovery misconduct -- that sanction must be "compensatory rather than punitive in nature." 137 S.Ct. at 1182. That is, the sanction must "go no further than to redress the wronged party 'for losses sustained;' it may not impose an additional amount as punishment for the sanctioned party's misbehavior." *Id*. *Id* at 1186.

The Manual for Complex Litigation is in accord, emphasizing that "sanctions should be a last resort."[9] Manual for Complex Litigation (Fourth), §10.151, *General Principles* (Federal

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fortiori that, if sanctions are carefully circumscribed even in the most egregious case of evidence destruction, so too must they be limited (and perhaps, even more so) in less extreme cases involving run-of-the-mill discovery failures, such as missed deadlines or incomplete productions. Indeed, the same motivations that spurred Rule 37(e)'s amendment -- reducing costs by eliminating overzealous sanctions that cause wasteful over-discovery -- apply with full force in all discovery contexts.

[9] Notably, while the language in the current Manual predates the 2015 Amendments by eleven years, as noted in the text above and in n.20, the Manual reflects an emphasis similar to the 2015 Amendments on the limited use of sanctions and the mandate that any deliberation of sanctions should be accompanied by appropriate considerations of due process, prejudice, and need. The substantial evidence developed in the intervening decade regarding the need for reasonableness,

Judicial Center 2004). "Sanctions," the Manual explains, "can be disruptive, costly, and may create personal antagonism inimical to an atmosphere of cooperation." *Id.* § 10.151. Accordingly, even in the rare instances when sanctions are necessary, courts must take care to impose "the least severe sanction adequate to accomplish the intended purpose." *Id.* at § 10.153, *Considerations in Imposing*; § 10.154, *Types*.

3. The Sanctions Order comports with neither of those principles

Here, the Magistrate Judge found neither deliberate misconduct nor prejudice before issuing sanctions. Nor does it appear from the available record that he could have done so. Apple reported and Qualcomm does not contest that Apple initially had 115 document review attorneys assigned to the matter, but ultimately expanded that team to a total of 500 document review attorneys (and in the process exhausted the capabilities of two entire review centers of its vendor). Apple proposed using technology tools (technology assisted review, or ("TAR")) to accelerate the process of determining relevance to speed production of relevant documents. Moreover, before the sanction was announced, Qualcomm presented no quantifiable evidence of prejudice caused by Apple's inability to meet the deadline for completing production, and Qualcomm's January 26, 2018 response [Dkt. 516] is completely silent as to any alleged prejudice from the late productions by Apple. Finally, there was no finding that the sanction chosen was the least necessary to accomplish the apparent case management need identified by the Magistrate Judge.

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proportionality, and limitations on sanctions for the loss of electronically stored information in civil discovery reinforces to the need to exercise significant restraint before imposing discovery sanctions of any type on parties or non-parties. *See also* 8B Fed. Prac. & Proc. Civ. § 2284, (noting that with respect to sanctions, "the district court has the right, if not the duty, to temper justice with understanding.")

To be sure, courts have authority to ensure adherence to their orders, including those setting deadlines. A court may, for instance, order a party to ameliorate any prejudice its conduct has caused to other parties. Or, in more extreme cases, and assuming the requisite due process procedures are employed, it may hold a party in contempt, *see infra*. But a $25,000 per day sanction[10] -- ordered at least in part retroactively -- for simply missing a deadline (especially where there is no finding of misconduct, no finding of prejudice, and no assessment of the actual need for the sanction) is too blunt an instrument, especially where a non-party appears to have made good-faith efforts to comply with a subpoena and incurred what cannot be denied to be significant expense.

B. As To Non-Parties, the Standard For Discovery Sanctions Is Even Higher

A necessary evil of litigation is that sometimes non-parties are required by subpoenas to provide "involuntary assistance to the court." *See* 1991 Advisory Committee Note to Rule 45(a). As an accommodation to that imposition now triggered by private attorneys (rather than the court itself), the Federal Rules require special care be accorded the non-parties to shield them from undue burden or significant expense. 1991 Advisory Committee Note to Rule 45, Purposes of Revision, regarding [then] Rule 45(c). In particular, the Rule guarantees non-parties (1) certain procedural protections before they can be sanctioned for discovery conduct; and (2) protection against discovery burdens that impose "significant expense." Fed. R. Civ. P. 45(d)(1), 45(d)(2)(B)(ii), and 45(g). The Sanctions Order here failed to account for either of those important protections.

[10] Rule 45(g) does not provide for greater or lesser protections based upon the size or wealth of a non-party.

1. Rule 45 Guarantees Non-Parties Important Procedural Protections Before a Discovery Sanction May Issue

Rule 45(g) provides that the exclusive remedy for a non-party's noncompliance with a subpoena and any related order is contempt -- a sanction that may be imposed only if several procedural safeguards are satisfied. *See, e.g.*, *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 (9th Cir. 1983); *In re Pham*, No. CC-17-1000-LSTa, 2017 WL 5148452 at *7 (B.A.P. 9th Cir. Nov. 6, 2017); *Molina v. City of Visalia*, No. 1:13-cv-01991-LJO-SAB, 2015 WL 5193584 at *2 (E.D. Cal. Sept. 4, 2015). As an initial matter, due process requires that before being held in contempt, whether civil or criminal, a non-party be afforded a "meaningful opportunity to be heard." *See Molina*, 2015 WL 5193584 at *2 (citing *Securities & Exchange Comm'n v. Hyatt*, 621 F.3d 687, 697 (7th Cir. 2010)).[11] Additionally, Rule 45(g) requires that before holding a non-party in contempt, the court must provide that entity with the opportunity to demonstrate that there was an "adequate excuse" for its non-compliance. And the contempt procedures themselves contain a similar protection, requiring the court to consider "whether [the subpoenaed person] had performed 'all reasonable steps within their power to ensure compliance' with the court's orders" before imposing the sanction. *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992). Still more, if the contempt sanction is punitive, rather than ameliorative, the Supreme Court has held that "a court would need to provide procedural guarantees applicable in criminal case, such as a 'beyond a reasonable doubt'

[11] *See also Bagwell*, 512 U.S. at 827 (criminal); *Pennwalt Corp.*, 708 F.2d at 492 (civil); 9A Wright & Miller, Fed. Prac. & Proc. Civ. § 2465, *Contempt* (3d ed.) ("Due process does require that any civil contemnor be given certain basic due process protections *before being subject to any sanction*: adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner.") (emphasis added).

standard of proof." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994).

Here, the sanction was imposed without any of these procedural protections. There was no motion by Qualcomm to hold Apple in contempt.[12] There was no order to show cause issued by the Court. Rather, the Court *sua sponte* raised the issue of sanctions at a hearing that commenced at 10:16 a.m. on December 20, 2017, and pronounced the $25,000 per day sanction from the bench less than three hours later (and after a recess to handle some criminal matters) and stated that it would apply retroactively (*See* Dec. 20, 2017, Hrg. Tr., cover and pp. 25, 59-60). The sanction was then incorporated into one paragraph in a written order the following day. [Dkt. 421.] Although the Court noted Apple's good faith efforts during the hearing, it nonetheless believed it was important to "send a message"[13] by sanctioning Apple for missing the court-set deadline for substantial completion of its production.[14]

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[12] In its papers filed before the discovery conference, Qualcomm wrote that it "reserves its rights to seek appropriate sanctions in light of the additional burdens to be imposed on Qualcomm." [Dkt. 404.] The record also reflects that once the issue of sanctions was raised, counsel for Qualcomm seized upon the notion and suggested a $1,000,000 per day fine. Dec. 20, 2017 Hrg. Tr. p. 53: 7-13, 24 13-22.

[13] Dec. 20, 2017 Hrg. Tr. p. 60.

[14] The cases cited by Qualcomm [Dkt. 516] to support *post hoc* the Magistrate Judge's actions are not compelling. In *Poly-Med, Inc. v. Novus Scientific*, No. 17-CV-649-DMS-WVG, 2017 WL 2291942 (S.D. Cal. May 25, 2017), the court noted that the only basis to sanction the non-party subpoena recipient was contempt under Rule 45(g) and the court then invoked the "show cause" procedures (rather than issuing a sanction as the first step as was done here). *LifeScan Scotland, Ltd. v. Shasta Technologies, LLC*, No. 11-CV-04494-WHO, 2013 WL 4604746, at *7 (N.D. Cal. Aug. 28, 2013) involved potential sanctions against a party (not a non-party) for violating a Rule 26 Protective Order, which led to a "show cause" order (rather than an immediate sanction as was imposed here). In *Gucci America, Inc. v. Li*, No. 10-CV-4974 (RJS), 2015 WL 7758872 (S.D.N.Y. Nov. 30, 2015), the court was faced with a non-party (Bank of China) that made clear to the court in writing that it did not intend to comply and offered "no basis for its non-compliance." In that circumstance, which is much different than Apple's, the

With due respect to the undeniable frustrations that can accompany missed production deadlines, Rule 45 -- and due process -- do not allow the kind of sanction at issue here to be imposed on a non-party without far more procedural protections than were afforded.[15] These protections governing the consideration and imposition of sanctions against non-parties is critical to the orderly functioning of civil discovery and, without those protections, a flood of sanctions motion practice will emerge.

2. Rule 45 Guarantees That Non-Parties Will Be Shielded From Discovery Burdens That Impose "Significant Expense"

Whereas the Federal Rules provide that a party may only be asked to shoulder discovery burdens "proportional to the needs of the case," FED. R. CIV. P. 26(b), they recognize that non-parties, whose participation in the case is involuntary, must be afforded even greater protection: Under Rule 45, a non-party is shielded from discovery burdens that impose "significant expense." Indeed, Rule 45 requires both the parties and the court to safeguard that protection. The issuing party or attorney is obligated to "take reasonable steps" to avoid imposing excessive burdens on the non-party (Fed. R. Civ. P 45(d)(1)). And, the court must exercise supervision to

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court had "little difficulty concluding that [Bank of China]'s conduct satisfies the civil contempt standard." *Id.* at *2.

[15] Not only did the Magistrate Judge fail to follow the Rule 45(g) contempt procedures (*see also* 28 U.S.C. § 636(e) (limiting the authority of magistrate judges to exercise contempt authority, and requiring detailed certifications of fact to be made to the district court)), but the Magistrate Judge also ruled in a manner indicating that he was proceeding under Rule 37 to impose sanctions on Apple. For example, the Sanctions Order cited Judge Grewal's April 23, 2012 decision in *Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846 at Dkt. 880 (N.D. Cal. Apr. 23, 2012) [Dkt. 250 at p. 3]. But that decision involved *parties* to the litigation, not a Rule 45 subpoenaed person, and was decided on a record where there had been a motion brought under Rule 37. *See also* Dkt. 315 (threatening to sanction Apple in these proceedings under Rule 37). Rule 37 applies to a party, not to non-parties like Apple (unless the subpoena was also for a deposition, which these subpoenas were not).

ensure that the non-party is protected "from significant expense resulting from compliance." FED. R. CIV. P. 45 (d)(2)(B)(ii); *see* 2006 Advisory Committee Note to Rule 45. Thus, the proportionality standard that ordinarily acts to shield parties from overly burdensome discovery obligations applies with even more force to non-parties. *See* Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under the New Federal Rule of Civil Procedure 26*, 9 Fed. Cts. L. Rev. 19, 57-58 (2015) (section entitled "Respect that non-parties have greater protections from discovery and that burdens on non-parties will impact the proportionality analysis.").

Of course, a court's responsibility to shield non-parties from significant expenses will sometimes come into conflict with its obligation to adjudicate disputes in a timely and efficient manner -- and in such cases the court must strike an appropriate balance. Here, however, the Magistrate Judge's approach to non-party Apple's production challenges pursued the latter goal at the expense of the former. The Sanctions Order appears to have placed an inordinate emphasis on meeting the original deadline for its own sake -- which was set by order dated October 15, 2017 [Dkt 223 summarizing decisions made and deadlines set at hearing on October 11, 2017], even before the order resolving the dispute about search terms [Dkt 239, dated October 18, 2017] and before TAR was effectively ruled out of bounds [Dkt. 327.]. If this Court wants to consider contempt sanctions against Apple, a remand for the Magistrate Judge to issue a show cause order and a full evidentiary hearing should follow, which would then lead to a certification of findings to the District Court to then consider and rule upon the issue. And, of course, in the course of such proceedings, the non-party (Apple) would be able to put on evidence regarding the issues pertinent to a charge of contempt.

C. Producing Entities Are In the Best Position to Determine the Means and Methods of Document Production

It is well-established that the person or entity responding to discovery requests is entitled to choose, at least in the first instance, the methods by which it will meet its production obligations. And for good reason. As the most recent version of *The Sedona Principles* recognizes, "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." The Sedona Conference®, *The Sedona Principles, Third Edition*, 19 SEDONA CONF. J. 1, 118 (forthcoming 2018).[16] Said otherwise, responding parties have superior knowledge about the information in their possession, and hence are in the best position to determine how to review, process, and produce those documents efficiently in line with Rule 1's objectives. *See* Fed. R. Civ. P. 1. Accordingly, especially in light of the Rules' renewed focus on streamlining discovery, courts are reaching a growing consensus that the responding party must be permitted to complete its obligations using the procedures, methodologies, and technologies it deems appropriate.[17] Of course, if there is specific evidence that the responding

[16] Available at https://thesedonaconference.org/publication/The%20Sedona20Principles. The "Sedona Principles and the related Sedona commentaries are the leading authorities on electronic document retrieval and production." *Matrix Partners VIII, LLP v. Natural Resource Recover, Inc.*, Civil Action No. 08-547, 2009 WL 10677430, at *5 n. 3 (E.D. Tex. June 5, 2009); *Kleppinger v. Texas Dept. of Transportation*, No. L-10-1242013 WL 12137773, at * 3 (S.D. Tex. Jan. 24, 2013) ("Rule 26 provides very little guidance on discovery of ESI, and courts have used the ESI discovery principles published by the Sedona Conference as a guide in resolving ESI discovery disputes.").

[17] This is in part because several courts have recognized that they lack the training and expertise to evaluate the effectiveness of search methodologies. *See, e.g.*, *United States v. O'Keefe*, 537 F.Supp.2d 14, 24 (D.D.C. 2008) ("Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. Given this complexity, for lawyers and judges to

party's chosen methodology has led to a material failure to meet its obligations, the court may step in.[18] But such circumstances are rare. Accordingly, the general rule (absent special circumstances)[19] is that "neither a requesting party nor the court should prescribe or detail the steps that a responding party must take to meet its discovery obligations." *The Sedona Principles, Third Edition* , Cmt. 6.b., at 123.

This case provides a textbook illustration of why that principle is so important. As the entity in possession of the requested documents, Apple was in the best position to determine which search strings were more likely to produce relevant documents, and which were likely to turn up extraneous material. The Court sided with Qualcomm, however, and Apple was required to use Qualcomm's search strings. The effect of this ruling was an undeniable increase in Apple's discovery expense. Later, Apple suggested that it would use TAR as a means to meet the discovery deadline, but Qualcomm objected, and Apple was forced to use a "brute force" manual approach to responsiveness determinations that ended up employing 500 lawyers.

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dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread."); *William A. Gross Const. Assoc., Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (concluding same).

[18] *See, e.g., Hyles v. New York City*, 10 Civ. 3119, 2016 WL 4077114 at *3 (S.D.N.Y. Aug. 1, 2016); *Kleen Prods., LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012); *cf, e.g., In re Ford Motor Co*, 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating order for discovery of certain databases where no finding of "some non-compliance with discovery rules by Ford"); *Koninklijke Philips N.V. v. Hunt Control Sys., Inc.*, No. 11-cv-03684, 2014 WL 1494517, at *4 (D.N.J. Apr. 16, 2014) (moving party failed to show that production has been "materially deficient"); *Freedman v. Weatherford Int'l*, No. 12 Civ. 2121, 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014) (request for "discovery on discovery" denied for failure in absence of factual basis to find original production deficient).

[19] For example, where a party demonstrates a complete lack of awareness about how to fulfill basic ediscovery obligations. *See e.g., Procaps S.A. v. Patheon Inc*, No. 12-24356-CIV, 2014 WL 800468 (S.D. Fla. Feb. 28, 2014).

In short, the court's resolution of discovery disputes (search terms and TAR) in the requesting party's (Qualcomm's) favor resulted in substantial changes to the landscape after Apple had suggested the "substantial completion" date of December 15, 2017. Had these two disputes been resolved in favor of the producing entity (Apple), it is more likely that the substantial completion deadline would have been met and a sanction would never have been contemplated. At a minimum, Apple should have the opportunity to be heard on such matters if the issue is remanded for any contempt proceedings, so this Court would have the benefit of an adequate record on the points.

IV. CONCLUSION

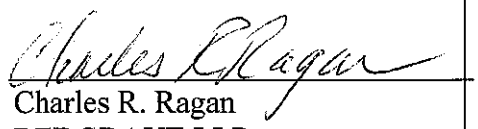
Managing complex litigation is a challenge for District Judges and Magistrate Judges, and sanctions are a tool available to courts.[20] The imposition of sanctions, however, should be used judiciously -- when necessary to curb misconduct or to curb actual harm or prejudice, and then only to the extent necessary to achieve those objectives. More important to this matter, when the target of the sanctions is a non-party, sanctions may only issue when Rule 45's specific procedural protections are observed, and after care is taken to avoid imposing significant expense

[20] For example, the Manual for Complex Litigation includes a discussion of measures available to courts, including the power to issue a contempt order under its inherent authority, statute, or rule, provided that the court indicate clearly whether the contempt is civil or criminal, as the procedure and possible penalties will depend on that determination and the nature and timing of the contemptuous act. *See* Manual for Complex Litigation § 10.154 n.45 (citing 18 U.S.C. §§ 3691, 3692, 3693 and noting that since there is no federal rule for civil contempt, a court should follow the procedures of Federal Rule of Criminal Procedure 42 to the extent applicable). Fed. R. Crim. P. 42(a) requires notice in open court, in an order to show cause, or in an arrest warrant, and that the notice state the time and place for trial, allowing the defendant a reasonable time to prepare a defense and state essential facts. The 2013 Benchbook for U.S. District Judges (Federal Judicial Center, 6th ed. 2013) sets forth procedures to follow for civil contempt, including notice and opportunity to prepare a defense, and also that the hearing is to be by way of live testimony and not by way of affidavit.

on the non-party. If an order of a Court, no matter how well-intentioned, does not abide by those requirements of the law, it must be set aside. As demonstrated above, the Sanctions Order is such an order and it should be set aside.

DATED: January 31, 2018

Respectfully submitted,

By 
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APPENDIX A: KEY FACTS

The Docket entries relevant to the subpoenas to Apple are voluminous, but the facts pertinent to this submission can be stated briefly:

1. Apple and Qualcomm agree that Qualcomm served four subpoenas on non-party Apple -- two each in the FTC action and in the multidistrict litigation -- on respectively May 18, 2017 and June 1, 2017. [Dkt. 166-2, 166-3, Dkt. 517.]

2. Qualcomm has reported that between then and August 11, 2017, counsel for the companies met and conferred by telephone some nine times. [Dkt. 167, n. 2.] Apple does not dispute this representation.

3. While they agreed on many issues, counsel were unable to agree on a few issues, which were then presented to the Magistrate Judge, who, following a hearing, ruled that Apple's proposed discovery responses would be sufficient, even crediting the companies and counsel for their cooperative work in reducing the issues presented to the Court. [Dkt. 192 (minute entry).]

4. During the next five weeks, counsel continued to discuss the requests, and Apple agreed to search custodial files for 45 custodians, seeking to respond to 60 document requests. [Dkt. 208.]

5. Qualcomm contends that Apple "dragged its feet" in terms of collecting documents and negotiating the scope of review. [Dkt. 516.]

6. In early October 2017, the dispute regarding the manner in which Apple would search for and retrieve relevant information became ripe for judicial attention. Apple argued that Qualcomm's proposed terms were overbroad and would return a dramatically greater number of documents than Apple's proposed terms, thereby increasing the burden on Apple and impacting

the time and resources necessary to complete production. [Dkt. 212.] Qualcomm sought to have a production deadline established and to also resolve the search term dispute. [Dkt. 516.]

7. On October 11, 2017, the Court ordered the companies to confer further about search terms and for Apple to substantially complete its production by December 15, 2017 (and submit a privilege log by December 29, 2017) -- even though the scope of the effort required had not been determined. [Dkt. 142.] Qualcomm notes that the substantial completion date was suggested by Apple. [Dkt. 516.]

8. Following additional submissions, the Court set additional interim deadlines and rejected Apple's proposal on search terms, stating that it "[was] not persuaded by Apple's belated assertions of burden," and ordered Apple to use Qualcomm's proposed search strings. [Dkt. 239, p. 2.]

9. In early November, Apple reported that it had incorporated into its review process a Technology Assisted Review ("TAR") component to prioritize documents likely to be responsive and which it could produce without manual review subject to clawback provisions in place. [Dkt. 269; Dkt. 287.] The parties agree Apple previously had not raised the potential use of TAR to meet the production deadline. [Dkt. 516.] Qualcomm objected to Apple's TAR proposal, but the Court ruled that Apple could use TAR *provided* that Apple satisfied Qualcomm and the Court that the results were accurate, and that Apple was transparent about the process used. Qualcomm rejected Apple's use of TAR. [Dkts. 287, 315, 327.] Qualcomm defends its refusal to allow introduction of TAR because it would be used as "another means to exclude

documents from production." [Dkt. 516.] Apple was thus left to complete a human review of documents "hits" by Qualcomm's search strings.[21]

10. Apple subsequently reported that Qualcomm's search strings had hit on over 12 million documents and that, between November 3 and December 15, 2017, Apple had increased the number of document review attorneys in stages from 115 to 500 [Dkts. 269, 289, 318, 366, 403.].

11. Qualcomm contends that Apple cannot use the unavailability of TAR as a shield to its late productions because Apple should not have been surprised by the volume of documents subject to review, Apple was "slow" to expand its document review team, and the Court had entered an agreed upon Federal Rule of Evidence 502(d) Order (entered on November 30, 2017) regarding the non-waiver of privileges in connection with productions. [Dkt. 516.]

12. In a joint December 15, 2017 status report, Apple stated that it believed it had substantially completed its review of documents, and would continue to produce those still in review. [Dkt. 404, at p. 5.] Qualcomm disagreed, noting that while Apple had produced 2.6 million documents (a total of 16.5 million pages), there were still 1.3 million documents hit by search terms on which only an "initial review" had been done. [*Id.*, at 1.] Qualcomm asked the Court to order Apple to produce immediately -- without review (but subject to the Rule 502(d)

[21] In its ruling about the potential use of TAR, the Court stated that it "[was] not convinced by Apple's assertion that the task at hand is impossible and there is nothing more it can do to comply with its discovery obligations." [Dkt. 315.] Judge Cousins also noted his "concern [about] the timing of this kind of new approach" and said "it's particularly unfair because I ordered a certain timeline and methodology of production, and so Qualcomm is really being disadvantaged by this change." [Nov. 15, 2017 Hrg. Tr. 3:18-19, 22-23; 12:5-7.] The Court also warned that if the TAR-assisted review was not as accurate and timely as what the Court had ordered, it would impose appropriate sanctions under Rule 37. [*Id.*])

order) -- the remaining documents, and reserved its right to seek additional sanctions, but did not then seek any.

13. At a hearing on December 20, 2017, the court *sua sponte* raised the possibility of a per-day financial sanction for Apple's failing to complete production by December 15, 2017. [Dec. 20, 2017, Hrg. Tr., at 23.] In response, Qualcomm suggested a "round number" of $1 million a day [*Id.*, at 24-25, 53]; Apple countered that there was no "spur" that would move things along faster at that point, as they had "maxed out" two review centers employing 500 document review attorneys to review and produce 16.5 million pages in a compressed period. *Id.*, at 53-54.

14. The Court settled on a sanction of $25,000.00 per day (retroactively to December 16, 2017), recognizing that it might not change the bottom line for Apple, but "to send a message that there is a consequence for failure to meet the Court's deadlines … and it will be something for other third parties in this case to observe that they, too, need to comply with the Court's deadlines." [*Id.*, at 60; Dkt. 421.]

15. Nine days later, on December 29, 2017, Apple reported that it had produced 3.2 million documents (a total of 23.9 million pages). [Dkt. 431.]

16. Qualcomm reports that additional document productions have occurred in January of 2018 as a result of privilege claim withdrawals (or "downgrades"). [Dkt. 517.]