UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF ROSEVILLE EMPLOYEES' RETIREMENT SYSTEM,

Plaintiff,

v.

APPLE INC., et al.,

Defendants.

Case No. 19-cv-02033-YGR (JCS)

**ORDER RE DOCKET NOS. 372 AND 374**

Re: Dkt. Nos. 372, 374



## I. INTRODUCTION

This Order addresses the parties' ongoing dispute relating to Defendants' withholding of documents on the basis of attorney-client privilege. There are two parts to the dispute. First, the district judge has instructed the undersigned to reconsider the question of whether Defendants should be compelled to re-review for privilege *all* of the documents they have withheld as attorney-client privileged because of the Supreme Court's dismissal of the writ of certiorari in *In re Grand Jury*, 143 S. Ct. 543 (2023), despite the fact that the parties had already narrowed the scope of their discovery dispute to a subset of withheld documents. Dkt. no. 372. Second, Plaintiff continues to challenge the withholding of 55 documents, winnowed down from over 500 disputed documents through the parties' meet and confer efforts, that Apple contends it has properly withheld based on the Court's August 3, 2022 discovery order (dkt. no. 272) ("August 3 Order"). The parties have briefed the first issue and supplied a joint discovery letter addressing the second issue. The Court held a hearing on both issues on August 18, 2023. The Court's rulings are set forth below.

## II. WHETHER RULE 26 OBLIGATES APPLE TO RE-REVIEW ALL WITHHELD DOCUMENTS

### A. Background

This dispute relates to 1,630 documents that Apple designated as privileged in connection with its original review of the documents and refuses to produce. Motion at 1; Black Decl., Ex. 1 (excerpt of February 23, 2022 privilege log listing documents that are the subject of this dispute). During the briefing that led up to the Court's August 3 Order, Apple represented to Plaintiffs and to the Court that in conducting its initial privilege review it applied *In re Grand Jury*'s "the primary purpose" test. *See, e.g.*, dkt. no. 233 at 3-4 (citing *In re Grand Jury* and asserting "[p]rivilege applies if 'the primary or predominate purpose of the communication is to seek legal advice or assistance'"); dkt. no. 248 at 2, 6-7, 10, 12 (claiming the disputed documents were created or sent "primarily for a legal purpose").

It was not until after the Court issued its August 3 Order – and after the parties had narrowed the documents in dispute through meet and confer efforts to 232 documents – that Apple made clear that as to documents with both legal and business purposes it had *not*, in fact, applied "the primary purpose" test set forth in *In re Grand Jury* when it conducted its original document review but instead, had applied a different test, asking whether seeking legal advice was "*a* primary purpose" of the communication. *See* dkt. no. 276 (Defendants' Motion for Relief from Pretrial Order of Magistrate Judge) at 2.[1] In challenging the August 3 Order, Apple insisted that it had applied the correct test and that the undersigned had erred in following the test in *In re Grand Jury*. The district judge found, however, that Apple's approach did not comport with the law in the Ninth Circuit:

> [D]efendants argue that Judge Spero erred by applying "the" primary purpose test for determining if documents with multiple purposes are privileged rather than the more expansive "a" primary purpose test, as articulated by the D.C. Circuit *in In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014)). The Ninth Circuit in *In re Grand Jury* affirmed "that the primary-purpose test governs in assessing attorney-client privilege for dual-purpose communications" and "left open" whether the more expansive "a primary purpose" test articulated by the D.C. Circuit in *Kellogg* should ever be applied. *In*

[1] At oral argument, Apple conceded that it did not disclose this fact to Plaintiff when the parties

> *re Grand Jury*, 23 F.4th 1088, 1090 (9th Cir. 2021). *Kellogg* is not the standard in the Ninth Circuit and it was not clearly erroneous for Judge Spero not to apply it.

Dkt. no. 302 (September 12, 2022 Order).

Apple continued to assert that the correct test was the D.C. Circuit's "more expansive 'a primary purpose' test" in its motion to certify the September 12, 2022 order for interlocutory appeal. Dkt. no. 304 at 2. The district court denied that motion but stayed production, first pending resolution of Apple's petition for writ of mandamus filed in the Ninth Circuit and then pending the Supreme Court's review of *In re Grand Jury*, as to which it had granted certiorari. Dkt. nos. 317, 335. When the Supreme Court' dismissed *In re Grand Jury* in January 2023, leaving the standards articulated in that case in place, Defendants went forward with production as to the documents that were at issue in the August 3 Order. They maintained, though, that they were not required to re-review the remaining documents on their privilege log because the parties had already narrowed the dispute through their meet-and-confer efforts. *See* dkt. no. 348 (March 7, 2023 joint discovery letter). The undersigned agreed, denying Plaintiff's request that Apple be compelled to re-review all of the remaining documents on the privilege log based on the parties' previous agreements narrowing the documents in dispute. Dkt. no. 349 (March 8, 2023 Order).

Plaintiffs sought relief from the Court's March 8, 2023 Order, arguing before the district judge that Apple was obligated to conduct a new review of the documents on the privilege log under Rule 26(e) of the Federal Rules of Civil Procedure once the Supreme Court dismissed *In re Grand Jury*. The district court granted relief as to that ruling, returning the issue to the undersigned for "further consideration and guidance on how his decision intersects with defendants' Rule 26 obligations." Dkt. no. 372 (June 30, 2023 Order) at 4.

In the Motion, Plaintiff asserts Apple should be compelled to re-review the remaining documents on its privilege log (other than the 232 documents addressed in the Court's August 3 Order) and produce those that are non-privileged because: 1) Apple does not dispute that in conducting its initial review it applied a more expansive test than the one required under *In re Grand Jury*, which is the applicable standard; 2) it has represented that "most or all of the

documents it continues to withhold have at least some business purpose and thus would be subject to the 'the primary-purpose test[;]'" and 3) "based on the descriptions of the withheld documents on Apple's privilege log, and informed by the documents already turned over, there is strong evidence indicating that Apple continues to improperly withhold non-privileged documents." Motion at 2.

Plaintiff makes several arguments in support of its assertion that if Apple re-reviewed the documents under the correct standard some would have to be produced. First, Plaintiff argues that "Apple continues to withhold documents concerning the same business processes that the Court found did not justify Apple's blanket withholding of all related communications, such as the critical 'Q&A' process related to Apple's earnings preannouncement." *Id.* at 7.

Second, "Apple did not review the 'family' documents (*i.e.*, attachments or parent emails) to non-privileged documents if they were not listed among the 232 challenged documents, despite this clear indicator of potential error." *Id.* Plaintiff notes that "Apple refuses to review the parent email to the extremely relevant 'Q&A' draft Plaintiff submitted as supplemental evidence in opposition to Defendants' motion for summary judgment." *Id.*

Third, "hundreds of documents remain on Apple's log that are described in the same or similar manner as now-produced, non-privileged documents." *Id.* at 8. As one example, Plaintiff points to "978 still-withheld documents [that] purportedly 'reflect[] legal advice from in-house counsel'– [which is] the same inaccurate description of dual-purpose documents as 58 non-privileged documents now produced." *Id.*

Fourth, Plaintiff asserts that "Apple has not carried through the results of the initial challenge to the remainder of the documents withheld." *Id.* "Thus, Apple has produced certain instances of documents (or portions thereof) that it continues to withhold in similar or related documents." *Id.*

Finally, Plaintiff notes that documents that remain on the privilege log include "more than 500 documents [that] are dated within the Class Period" and "91 reference [to] 'Interview prep' [that] may be related to the highly-relevant January 2, 2019 interview Cook gave to CNBC about Apple's $9 billion revenue miss and its causes, or the Company's end of quarter conference call

just 27 days after the end of the Class Period." *Id.* at 10.

Apple counters that Plaintiff's reliance on Rule 26(e) to "undo the parties' prior agreement" is improper, especially at this stage of the case, when the discovery cut-off has passed and a trial date has been set. Opposition at 1, 3-5. It further contends that even if the parties had not narrowed their dispute, Rule 26(e) would not impose a duty on Apple to revisit its entire privilege log because Rule 26(e) "does not impose a duty to check the accuracy of prior responses" and only "prevents knowing concealment by a party or attorney" where the party has "actual knowledge" that its responses are incorrect or incomplete. *Id.* at 5 (citing Fed. R. Civ. P. 26, Advisory Committee's Notes to 1970 Amendments). There is no such "actual knowledge" here, Apple asserts, as Plaintiff only contends it is "likely" that re-review would result in additional document production. *Id.* at 6. In fact, Apple argues, Plaintiff overstates the evidence that re-review would result in production of additional documents. *Id.* at 6-9.

**B. Discussion**

**1. Legal Standards**

Under Rule 26(e), "[a] party who has made a disclosure under Rule 26(a) – or who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). The 1970 Advisory Committee notes explain that under this provision, there is a duty to supplement when "a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect"; it "does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney."

**2. Whether Rule 26(e) Imposes a Duty to Supplement**

Apple contends this provision does not require it to re-review the documents on its privilege log because it does not have "actual knowledge" that any of its privilege determinations were incorrect or that if it were to re-review the documents it would find that any specific withheld document is non-privileged. The Court finds no authority that supports this reading of

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