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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 QUALCOMM INCORPORATED,

12 Plaintiff,

13 v.

14 BROADCOM CORPORATION,

15 Defendant.

16 AND RELATED COUNTERCLAIMS.
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Case No. 05-cv1958-B (BLM)

**OBJECTIONS BY RESPONDING
ATTORNEY LEE PATCH TO
SANCTIONS ORDER OF
MAGISTRATE JUDGE AND REQUEST
FOR RECONSIDERATION BY
DISTRICT COURT**

1 Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b),
2 responding attorney Lee Patch (the “Responding Attorney”) hereby respectfully objects to the
3 Magistrate Judge’s Order Granting In Part And Denying In Part Defendant’s Motion For
4 Sanctions And Sanctioning Qualcomm, Incorporated And Individual Lawyers dated January 7,
5 2008 (the “Sanctions Order”) and requests reconsideration by the District Court of the Sanctions
6 Order based upon the objections discussed below.

7 The Responding Attorney appreciates that the Magistrate Judge has spent considerable
8 time and effort in preparing her Sanctions Order in this difficult case. He also recognizes that the
9 case involves complex and troubling issues, many of which the Court was unable to address fully
10 due to the limited record before it. In particular, due to Qualcomm’s invocation of the attorney-
11 client privilege, Qualcomm’s former attorneys have been unable to provide exculpatory evidence
12 that directly bears on the issues addressed in the Sanctions Order.

13 Pursuant to Rule 72(a) and 28 U.S.C. § 636(b), the Responding Attorney objects to, and
14 seeks reconsideration of, the Sanctions Order as follows:

15 1. The Magistrate Judge lacked jurisdiction to issue the August 13, 2007 Order To
16 Show Cause Why Sanctions Should Not Be Imposed (the “OSC”) (D.N. 599) *sua sponte* or
17 otherwise against the Responding Attorney in connection with the District Court’s referral to the
18 Magistrate Judge of Broadcom’s sanctions motion against Qualcomm. The Magistrate Judge
19 lacked jurisdiction under the District Court’s referral of the sanctions motion against Qualcomm,
20 under Rule 72 of the Federal Rules of Civil Procedure, S.D. Cal. Local Rule 72.1(b), 28 U.S.C.
21 § 636, or otherwise to impose sanctions against the Responding Attorney.

22 2. The Sanctions Order is contrary to law and exceeds the Magistrate Judge’s
23 jurisdiction because it extends beyond the scope of the discovery issue referred to the Magistrate
24 Judge by the District Court. Footnote 5 on page 18 of the Sanctions Order acknowledges that
25 “The court is limited in its review and analysis of the debacle that occurred in this litigation
26 because Judge Brewster only referred the discovery violation to this court.” Despite stating that
27 the District Court did not refer to the Magistrate Judge any issue concerning sanctions unrelated
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1 to discovery violations, and despite acknowledging the limits of the Magistrate Judge’s review,
2 analysis, and conclusions, the Sanctions Order nevertheless reviews and evaluates non-discovery
3 matters which are outside of the scope of the referral to the Magistrate Judge. Sanctions Order at
4 pages 29-31.

5 3. The OSC violated the Responding Attorney’s due process rights in that it failed to
6 provide notice as to the provision(s) of law under which the Court was considering sanctioning
7 the Responding Attorney. See discussion of notice requirements in Individual Day Casebeer
8 Attorneys’ Response To August 13, 2007 Order To Show Cause (the “Attorneys’ Brief in
9 Response to OSC”) (D.N. 673) at 22.

10 4. The Court acknowledges, in footnote 9 on page 26 of the Sanctions Order, that the
11 discovery rules do not adequately address the Responding Attorney’s purported misconduct in
12 this case. This acknowledgement confirms the absence of fair notice to the Responding
13 Attorney. If the Federal Rules of Civil Procedure authorizing imposition of sanctions for
14 discovery abuse do not address the Responding Attorney’s conduct in this case, the OSC was
15 contrary to law and violated due process in that it did not advise the Responding Attorney in
16 advance as to the precise standard that would be applied in evaluating his conduct. Instead, the
17 OSC gave an incorrect impression that the focus of the inquiry was whether the Responding
18 Attorney “violated this Court’s discovery and/or scheduling orders,” which were not cited by the
19 Sanctions Order as a basis for imposing sanctions. Announcement and application of new rules
20 or new interpretations of old rules in a Sanctions Order is contrary to law and violated
21 Responding Attorney’s right to due process.

22 5. The OSC and Sanctions Order further violated the Responding Attorney’s due
23 process rights because the OSC described the Court’s inquiry as being whether the Responding
24 Attorney violated “discovery and/or scheduling orders” – orders that cannot properly be the basis
25 for the sanctions levied because, as the Sanctions Order itself acknowledges, no such orders have
26 been identified as having been violated by the Responding Attorney.

1 6. The OSC and Sanctions Order further violated the Responding Attorney’s due
2 process rights because, although the OSC described the Court’s inquiry as being whether the
3 Responding Attorney violated “discovery and/or scheduling orders,” the Sanctions Order is
4 predicated upon other alleged misconduct by the Responding Attorney, not on any violation by
5 the Responding Attorney of a discovery order or scheduling order. This mismatch between the
6 notice in the OSC and the Sanctions Order violates the Responding Attorney’s due process
7 rights. See Attorneys’ Brief in Response to OSC at 22.

8 7. The Sanctions Order further violated the Responding Attorney’s due process
9 rights because the Magistrate Judge reiterated at both the September 28, 2007, hearing on the
10 Motion For An Order Determining That The Federal Common Law Self-Defense Exception To
11 Disclosing Privileged And/Or Confidential Information Applies, and the October 12, 2007
12 hearing on the OSC that the Court’s inquiry concerned whether there was discovery misconduct.
13 See Transcript of Sept. 28, 2007, Hearing on Motion For An Order Determining That The
14 Federal Common Law Self-Defense Exception To Disclosing Privileged And/Or Confidential
15 Information Applies (the “Transcript of Self-Defense Hearing”) at 12:11 (“ultimately, it’s a
16 discovery dispute”); 19:22 (“It’s a discovery dispute in an ongoing case.”); 20:9-12; 27:17-19;
17 51:8-13; Transcript of Oct. 12, 2007 Hearing on OSC (the “Transcript of OSC Hearing”) at 3:1-

18 8. Yet the Sanctions Order is predicated upon other alleged misconduct by the Responding
19 Attorney, not on any violation by the Responding Attorney of a discovery order or scheduling
20 order. See generally Individual Day Casebeer Attorneys’ Conditional Joinder in Heller
21 Attorneys’ Motion re Self-Defense Exception to the Attorney-Client Privilege (D.N. 635-637)
22 and Attorneys’ Brief in Response to OSC at 16-21, incorporated herein by reference.

23 8. The September 28, 2007 Order Denying Motion For An Order Determining That
24 The Federal Common Law Self-Defense Exception To Disclosing Privileged And/Or
25 Confidential Information Applies (the “Self-Defense Order”) (D.N. 669) was contrary to law. In
26 re Nat’l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig., 120 F.R.D. 687 (C.D. Cal
27 1988); Application of Friend, 411 F. Supp 776 (S.D.N.Y. 1975). As a result, the Responding
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1 Attorney was prevented from introducing exculpatory evidence, and his due process rights were
2 violated. The Self-Defense Order was contrary to law in failing to dissolve the OSC as to the
3 Responding Attorney after the Court found that the self-defense exception did not apply.

4 9. The Responding Attorney, and several of the other individual attorneys named in
5 the OSC, proffered supplemental declarations containing privileged communications, first at the
6 September 28, 2007 hearing on the application of the self-defense exception to the attorney-
7 client privilege and again at the October 12, 2007 hearing on the OSC. See, e.g., Transcript of
8 OSC Hearing (D.N. 712) at 9:10-17; 23:16-20; 28:12-15; 93:2-8. The Court acted contrary to
9 law in not authorizing the submission of the Responding Attorney's supplemental declaration
10 and those submitted by other individual attorneys, which contained exculpatory privileged
11 communications between Qualcomm and those attorneys.

12 10. The handicap that the Self-Defense Order imposed upon the Responding Attorney
13 was exacerbated when, on October 3, 2007, four Qualcomm employees submitted declarations
14 that the Sanctions Order characterizes as "self-serving and misleading." (D.N. 681, 683, 684,
15 688); see Sanctions Order at 24 n.7. Individual attorneys, including Responding Attorney,
16 objected to these declarations on due process grounds on October 5, 2007. (D.N. 704). In
17 response to the individual attorneys' objection, which was reiterated at the October 12, 2007
18 hearing, the Court indicated that it would consider disregarding the four Qualcomm declarations
19 in connection with its analysis whether to sanction Responding Attorneys, and ultimately took
20 the matter under submission. Transcript of OSC Hearing at 28:221-23; 42:11-14; 46:18-23. The
21 Sanctions Order states a commitment not to consider the four Qualcomm declarations in
22 evaluating the conduct of the Responding Attorney. Sanctions Order at 24 n.7.

23 11. Despite this commitment, the Sanctions Order refers to and/or quotes these same
24 four Qualcomm declarations at least 12 times, including statements by Qualcomm declarant
25 Glathe which falsely allocate certain responsibilities to outside counsel and blame outside
26 counsel for the discovery failures. Sanctions Order at 21 n.6. After discrediting these statements
27 by Glathe, the Sanctions Order nevertheless seems to accept them as true, when in fact they, like
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1 much of the rest of the four Qualcomm declarations, are (as the Court found) “self-serving and
2 misleading.” See offer of proof in Transcript of OSC Hearing at 13:18-14:22.

3 12. Moreover, even if the Court had stricken and never referred to the Qualcomm
4 Declarations, the Responding Attorney’s due process rights were nevertheless violated by the
5 imposition of sanctions because Qualcomm’s assertion of the attorney-client privilege effectively
6 stifled the Responding Attorney from presenting exculpatory evidence, because the self-defense
7 exception motion was denied (see D.N. 634, 635, 637, 669), and because the Court did not find
8 that submission of the employee declarations by Qualcomm waived the attorney-client privilege.
9 See Transcript of OSC Hearing at 6:5-9:17. See, e.g., McDermott Will & Emery v. Superior
10 Court, 83 Cal. App. 4th 378, 385 (2000); Solin v. O’Melveny & Myers, 89 Cal. App. 4th 451,
11 466 (2001); see also discussion of due process issues and authorities in Attorneys’ Brief in
12 Response to OSC at 16-20.

13 13. Without the introduction of this privileged information, the record is necessarily
14 incomplete as to the following: the Responding Attorney’s knowledge; what Qualcomm told the
15 Responding Attorney about its involvement or lack of involvement in the JVT; what Qualcomm
16 told the Responding Attorney about what inquiries had been made by Qualcomm concerning the
17 collection of information and documents; what inquiries the Responding Attorney made of
18 Qualcomm concerning its involvement in the JVT and the collection of information and
19 documents related to the JVT, and Qualcomm’s responses to any such inquiries; how any such
20 previous communications between Qualcomm and the Responding Attorney and/or other
21 individual attorneys informed and/or influenced subsequent decisions, including decisions to
22 make certain statements, take certain positions, and make (or not make) additional inquiries;
23 what was either represented or done by Qualcomm to cause the Responding Attorney to believe
24 that he had made a reasonable inquiry and/or search and that Qualcomm had made or would
25 make a reasonable inquiry and/or search; the Responding Attorney’s intentions, insofar as such
26 intentions were informed by privileged communications; and the reasonableness of any of the
27 Responding Attorney’s beliefs or conclusions, insofar as such beliefs or conclusions were
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1 informed by privileged communications. Because the attorney-client privilege prevents
2 Responding Attorney from having an opportunity to be fully heard on those subjects, any
3 conclusions drawn by the Court as to any of those subjects is a violation of the Responding
4 Attorney's due process rights, and therefore contrary to law. Further, such conclusions as are set
5 forth in the Sanctions Order on these subjects are clearly erroneous.

6 14. More specifically, the Responding Attorney's substantive due process rights have
7 been violated by the imposition of sanctions because he was prevented by Qualcomm's assertion
8 of the attorney-client privilege from submitting evidence that would show that the Responding
9 Attorney acted reasonably (and without recklessness, improper purpose or intentional bad faith)
10 in reliance on representations and assurances given to him by Qualcomm and/or individual
11 attorneys based upon privileged communications with Qualcomm. In particular, he has been
12 deprived of an opportunity to present "the totality of the circumstances" (see Sanction Order at
13 page 14), including by introducing evidence showing (a) what inquiries he and other individual
14 attorneys made of Qualcomm, (b) what responses were given by Qualcomm, (c) who made the
15 responses, (d) what alternative search methods Qualcomm said it would use to locate the
16 documents, (e) whether similar search methods had been used successfully in the past by
17 Qualcomm, (f) the extent of Qualcomm's representations concerning its use of and/or reliance on
18 centralized sources for certain categories of documents, including standards-related documents,
19 and (h) why, based upon his communications with Qualcomm employees and other individual
20 attorneys who had privileged communications with Qualcomm, the Responding Attorney
21 believed he had conducted a reasonable inquiry.

22 15. The Sanctions Order is clearly erroneous and contrary to law in that it refers to
23 and relies upon the Order on Remedy for Finding of Waiver (the "Waiver Order") as a basis for
24 sanctioning the Responding Attorney despite the facts that he was not a party to the case and did
25 not have an opportunity to present evidence and arguments on his own behalf in those
26 proceedings. See Attorneys' Brief in Response to OSC at 21, incorporated herein by reference.

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1 16. The Sanctions Order is contrary to law and violates the Responding Attorney’s
2 due process rights because it does not identify and/or correctly apply any established legal
3 doctrine that authorizes the imposition of sanctions.

4 17. The Sanctions Order is contrary to law and violates the Responding Attorney’s
5 due process rights because it does not identify and/or correctly apply the proper standard of proof
6 associated with its factual findings.

7 18. The Sanctions Order is contrary to law and violates the Responding Attorney’s
8 due process rights because it does not contain adequate individual findings and individual
9 analyses as to Responding Attorney and each attorney named to support the sanctions imposed,
10 notwithstanding that the sanctions imposed are individual in nature.

11 19. To the extent that the Sanctions Order purports to impose sanctions on the
12 Responding Attorneys under Rule 37, it is contrary to law. As the Sanctions Order points out,
13 Rule 37(a) applies only if a motion to compel has been filed, and Rule 37(b) authorizes sanctions
14 only if a party fails to comply with a discovery order, neither of which occurred here. Similarly,
15 under Rule 37(c), liability can be imposed only on a party, not on an attorney, for failure to
16 comply with discovery obligations. See Attorneys’ Brief in Response to OSC at 22-26,
17 incorporated herein by reference.

18 20. To the extent that the Sanctions Order purports to impose sanctions on the
19 Responding Attorneys under Rule 26(g), those sanctions are clearly erroneous and contrary to
20 law. As the Sanctions Order notes at page 26, footnote 9, “Rule 26(g) only imposes liability
21 upon the attorney who signed the discovery request or response.” The Sanctions Order goes on
22 to state that, “Under a strict interpretation of these rules, the only attorney who would be
23 responsible for the discovery failures is Kevin Leung because he signed the false discovery
24 responses.” It is therefore contrary to law to impose Rule 26(g) sanctions on any Responding
25 Attorney who did not sign a discovery request or response. See Attorneys’ Brief in Response to
26 OSC at 26-29, incorporated herein by reference.

1 21. As the Sanctions Order notes at page 14, “[W]hat is reasonable is a matter for the
2 court to decide on the totality of the circumstances,” citing the Advisory Committee Notes. The
3 Responding Attorney has been deprived of due process because he has not had an opportunity to
4 introduce evidence “on the totality of the circumstances.” As the Court recognized (see quote
5 above), Rule 26(g) sanctions are not available against non-signatories. The reasonableness of an
6 attorney’s efforts cannot be judged by hindsight or the mere failure to produce information or
7 documents that were available to the client; and the attorney is entitled to rely on assertions by
8 the client and communications with other counsel as long as reliance is appropriate under the
9 circumstances. See discussion of Rule 26(g) in Attorneys’ Brief in Response to OSC at 27-28.

10 22. To the extent that the Sanctions Order imposes sanctions pursuant to Rule 11, it is
11 contrary to law and contradicts the statement in footnote 5 on page 18 of the Sanctions Order that
12 “Rule 11 does ‘not apply to disclosures and discovery requests, responses, objections, and
13 motions.’” See Attorneys’ Brief in Response to OSC at 34-35, incorporated herein by reference.

14 23. To the extent that the Sanctions Order imposes liability pursuant to the Court’s
15 inherent power, it is clearly erroneous, contrary to law and violates due process. As noted above,
16 the OSC did not give adequate notice that the Court was considering sanctions under its inherent
17 power or the precise basis for its proposed exercise of those extraordinary powers. Similarly, in
18 contrast with the Court’s references at the OSC Hearing to Rule 26(g) and Rule 37 as possible
19 bases for sanctions against the Responding Attorneys, inherent power as a basis for sanctions
20 was not mentioned during the OSC Hearing. See Attorneys’ Brief in Response to OSC at 29-33,
21 incorporated herein by reference.

22 24. In addition, to the extent that the Sanctions Order purports to have imposed
23 sanctions pursuant to the Court’s inherent power using the formulation set forth in Fink v.
24 Gomez, 239 F.3d 989 at 993-994 (9th Cir. 2001) (“an attorney’s reckless misstatements of law
25 and fact, when coupled with an improper purpose ... are sanctionable under the court’s inherent
26 power”), which is cited in footnote 9 at page 26 of the Sanctions Order, due process precludes
27 any finding that the Responding Attorney’s conduct and/or statements were reckless, and also

1 precludes any finding that the Responding Attorney had an improper purpose. Due to
2 Qualcomm’s invocation of the attorney-client privilege, the Court candidly acknowledges that it
3 “does not have access to all of the information necessary to reach an informed decision regarding
4 the actual knowledge of the attorneys.” Sanctions Order at 25 n.8. Determinations of both
5 recklessness and purpose depend on an informed assessment of the attorneys’ knowledge, which
6 the Court was unable to make.

7 25. The statement in the Sanctions Order, at page 26 footnote 9, that “the federal rules
8 impose a duty of good faith and reasonable inquiry on all attorneys involved in litigation who
9 rely on discovery responses executed by another attorney” is contrary to law and violates due
10 process by relying upon new law or a new interpretation of existing law as the basis for imposing
11 sanctions. Moreover, the due process limitations imposed by the attorney-client privilege
12 prevent any analysis of the reasonableness of Responding Attorney’s inquiries; by definition,
13 such inquiries comprise the very communications the Responding Attorney is prevented from
14 disclosing, and the reasonableness of any such inquiries can be assessed only by revealing
15 privileged communications.

16 26. To the extent the Sanctions Order engages in hindsight analysis and/or denies
17 Responding Attorney the entitlement to rely on his client’s representations (both private
18 communications and sworn deposition and trial testimony) or co-counsel’s statements made on
19 the record after what they believe to be a reasonable investigation and analysis, it is clearly
20 erroneous and contrary to law.

21 27. Additionally, to the extent that the Sanctions Order relied upon “the totality of the
22 circumstances” to determine that the Responding Attorneys did not make a reasonable inquiry, it
23 violates due process because Qualcomm’s assertion of the attorney-client privilege has prevented
24 the Responding Attorney from introducing evidence that would actually show the “totality of the
25 circumstances.”

26 28. To the extent that the Sanctions Order relied upon a finding that the Responding
27 Attorney or his co-counsel accepted Qualcomm’s “unsubstantiated answers” regarding the
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1 document search that was performed, it violates due process because Qualcomm's assertion of
2 the attorney-client privilege has prevented the Responding Attorney from introducing evidence
3 that would actually show what he or other individual attorneys asked or did to substantiate the
4 answers provided by Qualcomm.

5 29. To the extent that the Sanctions Order relied upon what the Responding Attorney
6 "knew or should have known" to determine that the Responding Attorney did not make a
7 reasonable inquiry, it violates due process because Qualcomm's assertion of the attorney-client
8 privilege has prevented the Responding Attorney from introducing evidence that would actually
9 show what he knew or believed and when he knew it.

10 30. In stating that "It is inconceivable that these talented, well-educated and
11 experienced lawyers failed to discover through their interactions with Qualcomm any facts or
12 issues that caused (or should have caused) them to question the sufficiency of Qualcomm's
13 document search and production" (Sanctions Order at 24-25), the Court has engaged in a
14 speculative analysis which violates due process. The Responding Attorney has been unable to
15 present to the Court the substance of his "interactions with Qualcomm." Likewise, the Sanctions
16 Order discusses "warning flags" and what the Responding Attorney knew or should have
17 suspected regarding the adequacy of Qualcomm's search. These conclusions can only be proper
18 if reached after the Responding Attorney has had a full and fair opportunity to present evidence
19 on what he and his co-counsel asked, what they were told, who told them, and what they were
20 told was actually done by Qualcomm to search for documents, all of which Qualcomm's
21 assertion of the attorney-client privilege has prevented the Responding Attorney from
22 introducing into the record to show context. As stated in the Sanctions Order, at page 25,
23 footnote 8, "[T]he fact remains that the court does not have access to all of the information
24 necessary to reach an informed decision regarding the actual knowledge of the attorneys." The
25 Sanctions Order recognizes this deficiency in the record as a bar that prevents awarding
26 sanctions under one of the Court's four scenarios – due process also precludes the award of
27 sanctions under any of the other three scenarios as well.

1 31. To the extent that the Sanctions Order imposes sanctions upon the Responding
2 Attorney for relying, during trial, upon the analysis and judgments of other lawyers on the
3 Qualcomm trial team who were far more familiar with discovery in the case, as to whether to
4 produce the documents found on Raveendran’s computer, it is contrary to law. Moreover, the
5 OSC provided no notice to the Responding Attorney that the manner in which various
6 responsibilities were assigned to team members would be an issue under consideration for
7 sanctions.

8 32. The Court’s findings are also clearly erroneous and contrary to law in that the
9 Responding Attorney had a legitimate and good faith basis, based in part upon privileged
10 communications, for concluding that the 21 emails found on Raveendran’s computer were not
11 required to be produced. Further, it is clearly erroneous and contrary to law to find, with the
12 benefit of hindsight, that the discovery of these emails, which were from a JVT ad hoc
13 committee but which Raveendran testified were unsolicited and unread, and which did not relate
14 to setting the H.264 standard, nonetheless should have led the Responding Attorney to (1) realize
15 that Qualcomm had participated in the standards setting activities of JVT during the formation of
16 H.264, and (2) conduct a “comprehensive document search” in the middle of trial.

17 33. It is clearly erroneous and contrary to law to hold that the Responding Attorney
18 cannot rely on the existing record at trial, and has an ongoing duty of inquiry that, taken to its
19 logical conclusion, would require each attorney to separately and independently verify every fact
20 every time each such fact is addressed.

21 34. The materiality findings in the Sanctions Order are incorrectly based on, and
22 based on an incorrect reading of, Rambus Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1102-05
23 (Fed. Cir. 2003), regarding the circumstances giving rise to a duty to disclose intellectual
24 property to a standards body.

25 35. To the extent that sanctions are based upon the statement in footnote 13 on page
26 31 of the Sanctions Order that several declarations state or imply that senior lawyers failed to
27 review or comment on pleadings prepared by junior lawyers and sent to them prior to filing, the
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1 finding is clearly erroneous, contrary to law, and outside the scope of the referral to the
2 Magistrate Judge, and the Sanctions Order violates the due process rights of the Responding
3 Attorneys. The OSC provided no notice to the Responding Attorneys that this was an issue
4 under consideration for sanctions, or that they needed to make a record of which pleadings they
5 reviewed or commented on and why.

6 36. It is clearly erroneous, contrary to law, and outside the scope of the referral to the
7 Magistrate Judge to hold that the Responding Attorney engaged in sanctionable conduct by
8 relying on the existing evidentiary record at trial.

9 37. It is clearly erroneous, contrary to law, and outside the scope of the referral to the
10 Magistrate Judge to impose discovery sanctions upon an attorney for arguing to a Court or jury
11 about what the facts in evidence prove or fail to prove.

12 The Responding Attorney reserves the right to adopt and incorporate by reference any
13 other applicable objections filed by other attorneys in response to the Sanctions Order.

14
15 DATED: January 22, 2008

16 **KERR & WAGSTAFFE LLP**

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