

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GREE, INC.,  
Plaintiff,  
v.  
SUPERCELL OY,  
Defendant.

Case No. [21-mc-80069-TSH](#)

**ORDER GRANTING MOTION FOR  
ORDER TO SHOW CAUSE**

**I. INTRODUCTION**

GREE, Inc. moves this Court for an order pursuant to Federal Rule of Civil Procedure 45(g) for non-party Discord, Inc. to show cause why it should not be held in civil contempt for failing to obey the subpoena served upon it on March 5, 2021. ECF No. 1. For the reasons explained below, the Court **ORDERS** Discord to appear before this Court on April 29, 2021 at 10:00 a.m. to show cause why it should not be held in civil contempt for failure to obey the subpoena.

**II. BACKGROUND**

The litigation giving rise to this motion is a patent litigation matter pending in the United States District Court for the Eastern District of Texas, *Gree, Inc. v. Supercell Oy*, No. 2:20-cv-00113-JRG-RSP, filed on April 21, 2020. In that case, GREE accuses the Clash Royale game of Supercell Oy of infringing U.S. Patent Nos. 10,549,187, 10,610,771, and 10,625,149. Fact discovery in the underlying litigation is set to close on April 2, 2021. Mot. at 1. According to GREE, it identified comments posted on Discord’s social media platform relevant to issues in the underlying litigation as they relate to users experience with and consideration of specifically accused features. *Id.*; Boothe Decl., Ex. B (representative sampling of such comments).



1 the subpoena, according to procedures set forth in Rule 45. If the recipient fails or refuses to  
2 respond to the subpoena, the proponent may first try to negotiate compliance, as by offering to  
3 meet and confer, but ultimately, if the recipient fails to comply without adequate excuse, the  
4 recipient is in contempt of court, and the proponent must file an application for an order to show  
5 cause why a contempt citation should not issue. *See Alcalde v. NAC Real Est. Invs. &*  
6 *Assignments, Inc.*, 580 F. Supp. 2d 969, 971 (C.D. Cal. 2008). “[W]hen a non-party does not  
7 comply with a subpoena and does not appear for deposition, the most appropriate procedural step  
8 is to file an application for an order to show cause, not a motion to compel.” *Martinez v. City of*  
9 *Pittsburg*, 2012 WL 699462, at \*4 (N.D. Cal. Mar. 1, 2012).

10 **IV. DISCUSSION**

11 Here, the subpoenas sought compliance in this District, where Discord’s principal place of  
12 business is located, yet Discord has failed to respond. Boothe Decl., Ex. A. The subpoenas  
13 contained all required information (such as the time and place of the deposition) and service of the  
14 subpoenas was properly made on Discord’s agent for service of process. Boothe Decl., Ex. C. As  
15 such, the Court turns to the consequences of Discord’s non-compliance.

16 “Subpoenas issued by attorneys are issued on behalf of the court and thus are treated as  
17 orders of the court.” *Martinez*, 2012 WL 699462, at \*2 (citing *U.S. S.E.C. v. Hyatt*, 621 F.3d 687,  
18 693 (7th Cir. 2010); *Higginbotham v. KCS Int’l, Inc.*, 202 F.R.D. 444, 455 (D. Md. 2001). A  
19 contempt charge against a nonparty may be criminal or civil in nature. *See Falstaff Brewing Corp.*  
20 *v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983). Criminal contempt is punitive, and it is  
21 designed to punish the affront to the court. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S.  
22 418, 441 (1911); *see also In re Sequoia Auto Brokers LTD., Inc.*, 827 F.2d 1281, 1283 n. 1 (9th  
23 Cir.1987). Thus, it may include fines payable to the court and it also may include jail time. 18  
24 U.S.C. § 401.

25 GREE asks for the Court to hold Discord in civil contempt. Mot. at 4. “Civil contempt is  
26 characterized by the Court’s desire to compel obedience with a court order, or to compensate the  
27 contemnor’s adversary for the injuries which result from the non-compliance.” *Martinez*, 2012  
28 WL 699462, at \*3 (citing *Falstaff Brewing Corp.*, 702 F.2d at 778). A district court has wide

1 latitude in determining whether there has been a contemptuous defiance of one of its orders. *Stone*  
2 *v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992), *as amended on denial of reh'g*  
3 (Aug. 25, 1992). “A civil contempt order must be accompanied by a ‘purge’ condition, meaning,  
4 it must give the contemnor an opportunity to comply with the order before payment of the fine or  
5 other sanction becomes due.” *Martinez*, 2012 WL 699462, at \*3 (citing *De Parcq v. U.S. Dist. Ct.*  
6 *for S. Dist. of Iowa*, 235 F.2d 692, 699 (8th Cir. 1956) (“[C]ivil contempt is conditional in nature  
7 and can be terminated if the contemnor purges himself of the contempt.”)). In imposing civil  
8 contempt sanctions, the court must impose the least possible sanction to coerce the contemnor to  
9 comply with the order. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992)  
10 (“Generally, the minimum sanction necessary to obtain compliance is to be imposed.”) (citing  
11 *Spallone v. United States*, 493 U.S. 265, 280 (1990)). Where the purpose of the contempt order is  
12 to ensure a party’s compliance, the court must “consider the character and magnitude of the harm  
13 threatened by continued contumacy, and the probable effectiveness of any suggested sanction in  
14 bringing about the result desired.” *Bademyan v. Receivable Mgmt Servs. Corp.*, 2009 WL 605789,  
15 at \*3 (C.D.Cal. Mar. 9, 2009) (citing *Whittaker*, 953 F.2d at 516).

16 To establish civil contempt, GREE must show by clear and convincing evidence that  
17 Discord violated a specific order of the court. *See F.T.C. v. Affordable Media*, 179 F.3d 1228,  
18 1239 (9th Cir. 1999). If GREE meets that burden, Discord must then show that it took every  
19 reasonable step to comply with the subpoena and to articulate reasons why compliance was not  
20 possible. *See Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983). A court may consider a  
21 history of noncompliance and a failure to comply despite the pendency of a contempt motion. *See*  
22 *Stone*, 968 F.2d at 856-57. If an alleged contemnor’s actions were taken in good faith or based on  
23 a reasonable interpretation, it should not be held in contempt. *Id.*

24 As discussed above, GREE has shown that Discord violated a specific and definite order of  
25 the Court by failing to comply with the subpoenas. The Court thus grants GREE’s motion for an  
26 order to show cause. *See Martinez*, 2012 WL 699462, at \*3 (employing this procedure); *Prescott*  
27 *v. Cty. of Stanislaus*, 2012 WL 10617, at \*4 (E.D. Cal. Jan. 3, 2012) (same); *Rodriguez v. Cty. of*  
28 *Stanislaus*, 2010 WL 3733843, at \*6 (Sep. 16, 2010) (proper procedure is issuing the order to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

show cause).

**V. CONCLUSION AND ORDER TO SHOW CAUSE**

Based on the analysis above, the Court **GRANTS** GREE’s motion and **ORDERS** Discord, Inc. to show cause why it should be held in contempt for its failure to comply with the subpoena. Discord shall file a declaration by April 15, 2021, and the Court shall conduct a hearing on April 29, 2021 at 10:00 a.m. by Zoom video conference. The webinar link and instructions are located at <https://cand.uscourts.gov/judges/hixson-thomas-s-tsh/>. Should Discord arrange with GREE to provide the requested documents and a witness to authenticate them prior to April 15, 2021, the parties shall notify the Court immediately, and the April 15 show cause hearing will be vacated.

GREE shall serve this order upon Discord and e-file proof of service by April 5, 2021.

**IT IS SO ORDERED.**

Dated: April 1, 2021

  
THOMAS S. HIXSON  
United States Magistrate Judge