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 12 Attorneys for Plaintiff and
 Counterclaim-Defendant APPLE INC.

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 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

17
 18 APPLE INC., a California corporation,
 19 Plaintiff,
 20 v.
 21 SAMSUNG ELECTRONICS CO., LTD., a
 Korean business entity; SAMSUNG
 22 ELECTRONICS AMERICA, INC., a New York
 corporation; SAMSUNG
 23 TELECOMMUNICATIONS AMERICA, LLC, a
 Delaware limited liability company,
 24 Defendants.
 25

Case No. 11-cv-01846-LHK (PSG)

**APPLE'S SUR-REPLY TO
 SAMSUNG'S MOTION FOR
 DE NOVO DETERMINATION OF
 DISPOSITIVE MATTER
 REFERRED TO MAGISTRATE
 JUDGE, IN THE ALTERNATIVE,
 MOTION FOR RELIEF FROM
 NONDISPOSITIVE PRETRIAL
 ORDER OF MAGISTRATE
 JUDGE**

1 Samsung has wisely abandoned its original argument for *de novo* review, as Judge
2 Grewal’s Order is plainly not a “dispositive motion.” (*See* Dkt. No. 1392 (Mot.) at 2.) But
3 equally unavailing is Samsung’s new theory that Judge Grewal lacks inherent power to impose
4 sanctions because he is not an Article III judge. (*See* Dkt. No. 1579 (Reply) at 7.) This theory
5 relies on a clear misreading of Ninth Circuit law and on an unpublished Fourth Circuit case that is
6 distinguishable on its facts. Judge Grewal’s Order is reviewable only for clear error, and he made
7 none.¹

8 Samsung’s lead case for the proposition that Judge Grewal lacks inherent power to impose
9 sanctions is *Rainbow Magazine, Inc. v. Unified Capital Corp.*, 77 F.3d 278 (9th Cir. 1996). But
10 *Rainbow Magazine* held that Article I bankruptcy court judges *do* have inherent power to issue
11 sanctions. *Id.* at 284. There, the Ninth Circuit relied on *Chambers v. NASCO, Inc.*, 501 U.S. 32,
12 43 (1991), which “recognizes that courts created by Congress have inherent powers, unless
13 Congress intentionally restricts those powers,” *Rainbow Magazine*, 77 F.3d at 284. “[A]bsent
14 congressional restriction, inherent powers exist within a court as part of the nature of the
15 institution,” *Rainbow Magazine*, 77 F.3d at 285.

16 Section 636 of the Federal Magistrates Act confers a magistrate judge’s powers.
17 28 U.S.C. § 636. Nothing in Section 636 “abrogate[s] or restrict[s] the inherent power to
18 sanction.” *Rainbow Magazine*, 77 F.3d at 285. Consistent with magistrate judges’ retention of
19 inherent power, the portion of Section 636 that concerns magistrate judges’ civil contempt
20 authority provides that the section “shall not be construed to limit the authority of a magistrate
21 judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the
22 Federal Rules of Criminal Procedure.” 28 U.S.C. § 636(e)(4). As in *Rainbow Magazine*,
23 Section 636(e)(4) “impliedly recognize[s] that [magistrate judges] have the inherent power to

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25 ¹ Although this Sur-Reply addresses only the standard of review, Apple disagrees with
26 many other statements in Samsung’s Reply, including any suggestion that Apple’s August 2010
27 presentation to Samsung was limited to utility patents or that Samsung’s litigation-hold notice in
28 August went only to lower-level engineers. (*See, e.g.*, PX52 (August 2010 presentation); Dkt.
No. 128 (Lutton Decl., filed under seal) ¶¶ 2-4; Dkt. No. 1047-2 (Reply) at 4 and Dkt. No. 895-1
(Mot.) at 4-5 (Samsung repeatedly represents that August litigation-hold notice went to lead
designer Minhyouk Lee and apex witness Won Pyo Hong).)

1 sanction that *Chambers* recognized exists within Article III courts.” *Rainbow Magazine*, 77 F.3d
2 at 284.

3 Samsung relies on *National Labor Relations Board v. A-Plus Roofing, Inc.* for the
4 proposition that “federal magistrates are creatures of statute, and so is their jurisdiction,” 39 F.3d
5 1410, 1415 (9th Cir. 1994) (Dkt. No. 1579 at 2). But that principle does not limit the inherent
6 power to sanction. Even as to courts “created by act of Congress, . . . we do not lightly assume
7 that Congress has intended to depart from established principles such as the scope of a court’s
8 inherent power.” *Chambers*, 501 U.S. at 47 (citation omitted). Moreover, *A-Plus Roofing* did not
9 address a magistrate judge’s power to issue sanctions in *civil* actions; it addressed whether a
10 magistrate judge has authority to initiate and preside over *criminal* contempt proceedings.
11 *National Labor*, 39 F.3d at 1415-1417.

12 Finally, Samsung relies heavily on *Reddick v. White*, an unreported per curiam decision
13 from the Fourth Circuit holding that a magistrate judge’s order denying sanctions against a non-
14 party was subject to *de novo* review. 456 F. App’x 191 (4th Cir. 2011). That decision is readily
15 distinguishable, as the magistrate judge’s order was “dispositive” of the only claim against the
16 non-party, an individual who had made threatening statements against one of the lawyers while
17 the litigation was pending. *Id.* at 193. The underlying litigation settled before the magistrate
18 judge’s order issued. *Id.* Here, Judge Grewal’s order granting an adverse inference instruction
19 issued against a *party*, before conclusion of this case, consistent with a proper exercise of his
20 inherent power to issue sanctions. *Reddick* is thus inapposite.

21 Accordingly, *de novo* review is neither necessary nor permitted. The Court should review
22 for clear error, and Judge Grewal’s order granting an adverse inference jury instruction for
23 Samsung’s spoliation of evidence should be affirmed.

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MORRISON & FOERSTER LLP

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Michael A. Jacobs

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APPLE INC.