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4 UNITED STATES DISTRICT COURT
5 SOUTHERN DISTRICT OF CALIFORNIA
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7 IN RE: QUALCOMM LITIGATION

Case No.: 17cv108-GPC-MDD

8 **ORDER ON JOINT MOTION FOR**
9 **DETERMINATION OF**
10 **DISCOVERY DISPUTE RE:**
11 **APPLE'S CLAWBACK OF 34**
12 **DOCUMENTS**

13 **[ECF Nos. 455, 546]**

14 Before the Court are two joint motions for determination of a discovery
15 dispute regarding Apple's efforts to clawback several documents they assert
16 were disclosed in error. Apple maintains that these documents are "classic
17 attorney-client privileged and work product material." (*Id.* at 18). In the
18 first motion, Qualcomm argues that the documents are not subject to
19 attorney-client or work product protections and request that the eight
20 documents attached to the motion for in camera review, along with an
21 additional twenty-six documents, be ordered produced. (ECF No 455 at 4-5).
22 The second joint motion presents an additional six documents for which
23 Apple has claimed either attorney-client privilege or work product protection.

24 **LEGAL STANDARD**

25 As a general matter, "[p]arties may obtain discovery regarding any
26 nonprivileged matter that is relevant to any party's claim or defense and
27 proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). If information

1 is inadvertently produced in discovery that is subject to a claim of privilege or
2 protection, the claiming party may notify the receiving party of the claim and
3 its basis. Fed. R. Civ. P. 26(b)(5)(B). The receiving party “must promptly
4 return, sequester, or destroy the specified information ... must not use or
5 disclose the information until the claim is resolved; ... and may promptly
6 present the information to the court under seal for a determination of the
7 claim. *Id.*

8 DISCUSSION

9 As a threshold matter, the Court must determine whether Apple has
10 waived its claim of privilege.

11 The party seeking to clawback documents must establish that its
12 inadvertent disclosure of the documents should not constitute a waiver.
13 According to Federal Rule of Evidence 502(b), “When the disclosure is made
14 in a federal proceeding ... the disclosure does not operate as a waiver ... if: (1)
15 the disclosure is inadvertent; (2) the holder of the privilege or protection took
16 reasonable steps to prevent disclosure; and (3) the holder promptly took
17 reasonable steps to rectify the error, including (if applicable) following
18 Federal Rule of Civil Procedure 26(b)(5)(B).” Fed. R. Evid. 502(b). The party
19 seeking to clawback the documents has the burden of proving that they meet
20 the requirements of Federal Rule of Evidence 502(b). See *Callan v. Christian*
21 *Audigier, Inc.*, 263 F.R.D. 564, 565-66 (C.D. Cal. 2009). “[I]nadvertence’ of
22 disclosure does not as a matter of law prevent the occurrence of waiver.” *Weil*
23 *v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

24 Here, Apple is silent as to whether it took any “reasonable steps to
25 prevent disclosure” of privileged information and does not identify any
26 precautions it took to prevent such disclosure. Apple provides no information
27 about the initial inadvertent production or its discovery thereof. See Fed. R.

1 Evid. 502 Advisory Comm. Notes (describing factors a court may consider in
2 evaluating whether an inadvertent disclosure waives privilege or protection,
3 including “the reasonableness of precautions taken” and “the number of
4 documents to be reviewed and the time constraints for production.”). In the
5 absence of any information at all about Apple’s efforts to identify and protect
6 privileged materials, Apple has not demonstrated that it took reasonable
7 steps in order to prevent inadvertent disclosure.

8 Further, Apple does not provide any information as to its promptness in
9 requesting the clawback of these documents. Rather, Qualcomm notes that,
10 at the time of filing the first Joint Motion, Apple had sought to clawback
11 approximately 1,340 documents. Apple, with whom the burden rests, does
12 not provide the court with a timeline for their inadvertent disclosures or any
13 efforts to rectify their error.

14 The failure to meet their burden with respect to the requirements of
15 Federal Rule of Evidence 502(b) is fatal to Apple’s efforts to clawback these
16 documents. As such, the Court will not conduct an in camera review and will
17 order the forty documents referenced in both Joint Motions produced.

18 CONCLUSION

19 Accordingly, the Court **ORDERS** the forty clawed back documents
20 produced. The Court further **ORDERS** that the parties file public copies of
21 both joint motions within one week of this order, redacting only information
22 subject to privilege and work product protections.

23 **IT IS SO ORDERED.**

24 Dated: October 2, 2018



25 Hon. Mitchell D. Dembin
26 United States Magistrate Judge
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