No. _____

In The
Supreme Court of the United States

ALYSSA JONES,

Petitioner,

v.

RIOT HOSPITALITY GROUP, LLC,
n/k/a NOATOZ LLC, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiff appeals, under 28 U.S.C. § 1292(a)(1), the District Court's *sua sponte* Orders in this sexual harassment case that required Plaintiff and her three non-party witnesses to turn over their cell phones to an IT specialist to create exact replica duplication of the contents of each cell phone (cloning), and for global searching of those cell phones after cloning (App. 7-25). After receiving the cell phones, the IT Specialist created numerous spreadsheets (App. 38) containing the entire contents of these cell phones, including the names and phone numbers of the communications between the women who own these cell phones and their husbands, children, boyfriends, business associates and other family members. The District Court ordered those spreadsheets produced to defense counsel.

The Court of Appeals for the Ninth Circuit dismissed this appeal for lack of appellate jurisdiction (App. 1-6). The Ninth Circuit rejected Plaintiff's argument under *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271, 287-288, 108 S.Ct. 1133, 1142-1143 (1988), where this Court held that "orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequence[s]' are appealable under 28 U.S.C. § 1292(a)(1)."

The questions presented are:

1. Whether Orders requiring the turn over of the cell phones themselves for cloning and global

QUESTIONS PRESENTED – Continued

searching are Orders having the practical effect of granting or denying an injunction due to the serious, perhaps irreparable, privacy consequences under this Court's decision in *Riley v. California*, 573 U.S. 373, 378-379, 134 S.Ct. 2473 (2014), regarding the privacy interests in cell phones?

2. Whether this Court's decision in *Riley v. California*, 573 U.S. 373, 378-379, 134 S.Ct. 2473 (2014), regarding the privacy interests in cell phones, precludes the entry of *sua sponte* Orders forcing a civil litigant to turn over her cell phone, and the cell phones of her three co-worker witnesses, for cloning and global searching when no showing at all was required or made to justify the entry of those Orders?

PARTIES TO THE PROCEEDING

Alyssa Jones, petitioner on review, was the Plaintiff below. Her three witnesses ordered by the District Court to produce their cell phones were Chelsea Meyers, Shea Watson and Elle Foster. They were the non-party witness appellants below.

Riot Hospitality Group, LLC, n/k/a Noatoz LLC; RHG Ventures, LLC; 4425 Saddlebag, LLC; 4425 Saddlebag 2, LLC; Milo Companies, LLC; Rooke, LLC; and Ryan Hibbert, individually, the respondents on review, were defendants below.

CORPORATE DISCLOSURE STATEMENT

Appellees Riot Hospitality Group, LLC, RHG Ventures, LLC, 4425 Saddlebag, LLC, 4425 Saddlebag 2, LLC, Rooke, LLC, Ryan Hibbert, and Milo Companies, LLC have made the following disclosures:

Respondents on review have no parent corporation.

No publicly held corporation owns 10% or more of the stock (or other ownership) of respondents on review.

RELATED CASES

Alyssa Jones v. Riot Hospitality Group, et al., Case No.: 2:17-CV-04612 (District of Arizona)

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The U.S. Court of Appeals for the Ninth Circuit, on December 10, 2020, ruled on that motion, as follows: "Appellees' motion to dismiss this appeal for lack of jurisdiction . . . is denied without prejudice to renewing the arguments in the answering brief." Then on February 9, 2022, two days after the case had been set for oral argument, the Ninth Circuit dismissed the appeal in a Memorandum Decision (App. 1-6).

JURISDICTION

Plaintiff, ALYSSA JONES, and the Non-Party Witness-Appellants, ELLE FOSTER, CHELSEA MEYERS, and SHEA WATSON, appealed [Doc. 310] on March 9, 2020, pursuant to, *inter alia*, 28 U.S.C. § 1292(a)(1), from the District Court's March 4, 2020, Order [Doc. 308], which notice of appeal was amended on March 11, 2020 [ER16, Doc. 312]. On March 19, 2020, the Ninth Circuit issued a Show Cause Order regarding appellate jurisdiction. After full briefing on appellate jurisdiction, pursuant to that Show Cause Order, the Ninth Circuit on August 24, 2020, discharged its Show Cause Order and entered a briefing schedule for this appeal. Prior to this Court's August 24, 2020 discharge order, but while this appeal was pending, the District Court entered a modification Order on August 10, 2020, [ER3, Doc. 350], purporting to "clarify" and "modify" its March 4, 2020, Order [ER2, Doc. 308], which Order prompted this March 9, 2020,

appeal in the first place. Plaintiff and the Non-Party Witness-Appellants timely filed, on September 8, 2020, their Notice of Appeal [ER17, Doc. 353] from the District Court's Order of August 10, 2020 [ER3, Doc. 350]. Plaintiff based appellate jurisdiction on 28 U.S.C. § 1292(a)(1), the collateral order doctrine and the case of *Forgay v. Conrad*, 47 U.S. (6 How.) 212, 214, 12 L.Ed.2d 404 (1848).

On March 19, 2020, the Clerk of the Ninth Circuit issued a Clerk's Order raising an issue, namely, whether this appeal was only a non-final appeal from a mere discovery order. That Clerk's Order stated in relevant part that:

> "Filed clerk order (Deputy Clerk: LCC): A review of the record suggests that this court may lack jurisdiction over the appeal because the order challenged in the appeal may not be final or appealable. See 28 U.S.C. §§ 1291, 1292(a)(1); Gon v. First State Ins. Co., 871 F.2d 863, 865-66 (9th Cir. 1989) (orders that regulate the course litigation, such as discovery orders, are not immediately appealable as injunctions); see also Bank of Am. v. Nat'l Mortg. Equity Corp., 857 F.2d 1238, 1240 (9th Cir. 1988) (order compelling discovery, whether issued against party or non-party to proceedings, is not immediately appealable by party); David v. Hooker, Ltd., 560 F.2d 412, 415-16 (9th Cir. 1977) (order compelling discovery issued against non-party is not appealable by non-party, immediately or otherwise). Within 21 days after the date of this order, appellant shall move for voluntary dismissal of the

> appeal or show cause why it should not be dismissed for lack of jurisdiction. . . ."

After full briefing on appellate jurisdiction and discussion by all parties of the above-cited cases, pursuant to that Show Cause Order, the Ninth Circuit on August 24, 2020, in an Order filed by Judges Silverman, McKeown and Bress, discharged the Show Cause Order.

Thereafter, Defendants filed a Motion to Dismiss the Appeal for lack of appellate jurisdiction. On December 10, 2020, the Ninth Circuit ruled on that motion, as follows: "Appellees' motion to dismiss this appeal for lack of jurisdiction (Docket Entry No. [36]) is denied without prejudice to renewing the arguments in the answering brief." On February 9, 2022, the Ninth Circuit issued its Memorandum Decision () dismissing the appeal two days after the scheduled oral argument in that Court was deemed unnecessary.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1292(a)(1) provides that:

> "courts of appeals shall have jurisdiction of appeals from: [i]nterlocutory orders of the district courts of the United States . . . , or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . . ."

INTRODUCTION

Plaintiff, ALYSSA JONES, filed, *inter alia*, a Title VII, 42 U.S.C. § 2000, *et seq.* ("Title VII") federal sexual harassment and common law tort case against various defendants regarding her employment as a cocktail waitress at the El Hefe' bar in Old Town Scottsdale, Arizona. Plaintiffs pleaded claims [Doc. 1] for sexual harassment, retaliation, sexual battery and intentional infliction of emotional distress. Those claims were reiterated along with a wrongful termination/constructive discharge claim in the Fourth Amended Complaint [Doc. 99]. The three non-party witnesses are former co-workers of Plaintiff at El Hefe' bar.

Plaintiff alleged that the cocktail waitresses serving expensive champagne and wine at the El Hefe' bar were expected to recruit high-roller customers outside the bar, by whatever means were needed, including sex with those customers, so that such customers would come into the bar and consume fancy liquor there. Defendants' main witnesses, the owner Ryan Hibbert, and the El Hefe' manager, Eric Sanchez, denied under oath that El Hefe' imposed on its cocktail waitresses a sex for liquor work environment. Plaintiff therefore requested their text messages and emails to prove the scheme and to impeach their testimony, requests the District Court denied. Indeed, in the face of a demonstrated factual dispute on the most material issue in the case, that cocktail waitresses were forced to supply sex in exchange for high-roller customers buying expensive champagne, wine and liquor, the District Court

denied Plaintiff text message and email evidence from the male owner and male manager of the El Hefe bar on that issue. In open court the District Court stated that Plaintiff already had enough evidence that Defendant Hibbert himself had sex with several cocktail waitresses at El Hefe, which of course did not go to the issue whether El Hefe imposed on the cocktail waitresses a sex for liquor scheme with the retail customers of El Hefe. And Plaintiff was seeking the text messages and emails regarding that sex for liquor scheme, not just those regarding defendant Hibbert's sex life.

After that ruling, Defense counsel orally requested in open court additional text messages from Plaintiff and her three co-worker witnesses for "impeachment." Plaintiff and her witnesses had already produced tens of thousands of text message documents. But Defense counsel's justification for asking for more text messages from Plaintiff and her three witnesses was only that *these four women had discussed this case before and after their depositions* in the case. No claim of inconsistency or credibility regarding such discussions was made by Defendants. No balancing of interests occurred as to whether a generalized request for "impeachment" evidence overcame the privacy interest in four cell phones. Yet the District Court, based on Defense counsel's oral request for this alleged "impeachment evidence," then imposed, via a *sua sponte* March 4th mandatory injunctive order, without any defense motion being filed and litigated, and without any findings and application of standards, a draconian seizure

of the four cell phones possessed by Plaintiff and her three witnesses, which seizure was announced following an informal telephonic discovery conference. That *sua sponte* March 4th mandatory injunctive order occurred without any notice that the District Court was even considering entering such an Order against Plaintiff and her non-party witnesses. Defendants made no showing at all to obtain this drastic relief, because they filed no motion seeking such relief, and the District Court made no findings and applied no standards in its March 4th Order mandatory preliminary injunction.

While the District Court's orders talk about producing "documents" containing text messages between Plaintiff and her three fact witnesses, those orders commanded *the turn over and delivery of the four cell phones themselves* of Plaintiff and her three fact witnesses to an IT Specialist who proceeded to catalogue and inventory the entire contents of the cell phones. The IT Specialist then made Excel spreadsheets containing details, including names and phone numbers, of the cell phone communications between the owners of the cell phones and their husbands, boyfriends, business associates and family members (App. 38).

It was the compelled turn over and delivery of these cell phones for IT forensic examination that led to the creation of spreadsheets detailing the lives of Plaintiff and her fact witnesses. That is why this is not merely a discovery dispute over the production of documents. What it is really is a dispute about the privacy interests in cell phones, and the circumstances under

which a Court can dispossess by court order the Plaintiff and her non-party witnesses of their cell phones in a civil case because the Defendants want to know what the text messages between Plaintiff and her fact witnesses say about this case. Put another way, Defense counsel's asserted reason for the compelled production of cell phones, to obtain "impeachment" material, was not sufficient to engage in this forced turn over, search and inventory of cell phones. The District Court then authorized the IT Specialist to give those spreadsheets to Defense counsel. So what actually happened pursuant to the District Court's orders [ER 2, 3] was the invasion of privacy run amok. This is not a mere discovery dispute.

The legal context of this invasion of privacy is very important in this era of sexual harassment and employment discrimination against women. Plaintiff's sexual harassment and employment discrimination case is based on the treatment of female cocktail waitresses serving expensive champagne and wine in Defendants' bar in Old Town Scottsdale, Arizona. Plaintiff alleges in this case [Doc. 99, 284-285, 292], that the cocktail waitresses serving such expensive champagne and wine at the El Hefe' bar were expected to recruit high-roller customers from outside the bar, by whatever means were needed, including sex with those customers, so that such customers would patronize the bar and consume such liquor when they arrived at the bar. Defendants' witnesses, the owner, Ryan Hibbert, and the El Hefe' manager, Eric Sanchez, denied under

oath that El Hefe' imposed and imposes on its cocktail waitresses a sex for liquor work environment.

When Plaintiff requested the production of the text messages of the owner and manager of the bar, each of whom had produced no text messages on the sex for liquor scheme, the District Court denied Plaintiff's request *sua sponte* on proportionality grounds [ER 10, Transcript, 1/31/20, at pp. 27, 34–35]. Yet those men had denied in their depositions that such a sex for liquor scheme existed. It turned out, therefore, that a search for evidence regarding that sex for liquor scheme was not proportional even though the male owner and male manager of the Bar in question denied everything, but a search of the entire cell phones of the four women involved in this case for "impeachment" evidence was proportional.

In a Title VII sexual harassment case, the female Plaintiff and her three female witnesses, who also worked as cocktail waitresses, have been forced by court order to deliver their cell phones for forensic examination and global searching to find generalized, non-substantive impeachment, on pains of contempt and sanctions, while the male employers and managers who perpetrated the alleged sex for liquor scheme at issue in this case have not been required to do the same thing, and have not even been required to produce a paper version of their text messages. In Plaintiff's view, what has occurred is adding insult on top of injury, by following up sexual harassment and employment discrimination in the work place with

discrimination against a female Plaintiff and her female fact witnesses in litigation.

STATEMENT OF THE CASE

On March 4, 2020, the District Court entered a written Order [ER2, Doc. 308], without Defendants having filed a written motion seeking the relief entered. The District Court ordered:

> " . . . that by close of business on **March 11, 2020** the Plaintiff will have provided the applicable cell phones of: (1) Plaintiff, (2) Elle Foster, (3) Chelsea Meyers, and (4) Shea Watson to an agreed upon third party forensic search specialist ("Specialist")."

On August 10, 2020, the District Court, again *sua sponte*, and without the presentation of any new facts, decided [ER3, Doc. 350] to clarify or modify its prior March 4th Order, even though this interlocutory appeal had been pending since March 9, 2020 [Doc. 310]. Defendants had brought an April 1, 2020, Motion for Sanctions [Doc. 323] seeking to hold Plaintiff and her counsel in contempt for not complying with the March 4th Order. The District Court took the Defendants' Motion for Sanctions under advisement but concluded that "some clarification and amendment of the March 4 Order is warranted before contempt or other sanctions are appropriate." [ER3, Doc. 350, at ER0037]. The August 10th Order essentially reiterates the prior March 4th Order, but purports to clarify or modify the

scope of the communications to be produced from the phones and makes other changes discussed herein. The August 10th Order claimed that it was giving the current appealing parties "an opportunity to comply . . . " [ER3, Doc. 350, at ER0037].

The District Court's August 10th Order, after this appeal was already pending, expanded what was required to be produced to include not just matters relevant to the case, but matters showing the involvement of these three women in the case [ER 3]. That made the designation of "relevant" documents more difficult after Plaintiff's counsel received the output of the Specialist. The reason being that documents relating to plaintiff's claims are not the same as documents relating to the "witnesses' involvement in this action." A good example is the text message where these women asked each other what to wear to their depositions. Surely that does not relate to plaintiff's claims, but it could be argued that text relates to the "witnesses' involvement in this action." Plaintiff's designations to the IT Specialist had to be way broader than what is relevant to the claims in this case or what is "discoverable" under the District Court's March 4th Order.

Plaintiff delivered her cell phone to the IT Specialist on August 17, 2020, for forensic examination. The process contemplated by the Specialist was told to Plaintiff's counsel: the IT Specialist would copy or image the phone and submit the messages and materials from the three cell phones to Plaintiff's counsel via computer software with check boxes. The Watson and Meyers cell phones had been delivered to the Specialist

on or around September 7, 2020 [Doc. 377-2]. The Specialist's software showed that the Plaintiff's cell phone generated search hits in **39,463** pieces of evidence. The Specialist's software showed that the Watson cell phone generated search hits in **32,376** pieces of evidence. And the Specialist's software showed that the Meyers cell phone generated search hits in **6.745** pieces of evidence. The total pieces of evidence to be reviewed by Plaintiff and her counsel therefore added up to **78,584** [Doc. 371-3-6; 391-9]**,** and Plaintiff then had to check the boxes for those items as either relevant, not relevant or privileged.

During the September 22, 2020, hearing before the District Court, the IT Specialist, Mr. Kuchta, informed that Court that he had submitted the results of his forensic examination of Plaintiff's phone on August 31st [Doc. 375-376](09/22/20, transcript at p.17). When the District Court asked how many documents were responsive to the search results on the phone, Mr. Kuchta initially said he did not have the specific number. Then he said 1000 and 50 hits [Doc. 375-376](Transcript at p.18). As it turned out, he was about 38,000 pieces short just as to the Plaintiff's phone. It is apparent that the nature and scope of this project was grossly underestimated and Plaintiff was put in an almost impossible situation to review in the time frames the District Court had ordered based upon the assumption that the Court had received accurate information from the Defendants and their hand-picked Specialist.

The problem then became that the District Court's orders speak in terms of what Plaintiff should and

must produce, but the production, in the view of the Specialist, was going to come from his firm. The District Court's orders required Plaintiff to produce documents, although it was the Specialist who intended to produce the relevant, not relevant and privileged spreadsheets himself, after confirmation from Plaintiff that those materials were correct. There were no documents to produce other than those spreadsheets.

On December 3, 2020, Plaintiff's counsel and his staff had a 33-minute virtual meeting and training with the Specialist and his staff. During that meeting, the Specialist confirmed the foregoing procedure he contemplated, and also confirmed that he would provide .pdf files to Plaintiff's counsel of the documents to be produced [Doc. 333, Ex. A]. Plaintiff was supposed to designate the messages and materials from the phones by checking software boxes as either relevant, not relevant or privileged, in the proprietary software used and furnished by the Specialist. Plaintiff did that and submitted those designations on a thumb drive to the Specialist on December 10, 2020. On December 10, 2020, after receiving the designations from Plaintiff's counsel, the Specialist emailed [Doc. 333, Ex. A] Plaintiff's counsel and informed counsel that:

> " . . . we will provide the lists and the relevant documents to you first for a final review and approval."

But on December 15, 2020, Defense counsel informed Plaintiff's counsel and the Specialist via email that providing Plaintiff's counsel with .pdf files

of what should be produced would, according to Defense counsel, violate the ESI Stipulation [Doc. 333, Ex. B]. But nothing in that Stipulation prohibits Plaintiff's counsel from receiving .pdf files of the text messages from the Specialist for purposes of review and preparation of privilege and relevance logs and compliance with the District Court's orders. On December 15, 2020, the Specialist sent the spreadsheets to Plaintiff's counsel, which consisted of these voluminous spreadsheets with the extensive data discussed herein. No .pdf documents were sent by the Specialist to Plaintiff's counsel. Plaintiff's counsel was supposed to review such materials and confirm their accuracy from the message column in the spreadsheets. But it only took Defense counsel two days, until December 17, 2020, to accuse Plaintiff's counsel of "stalling," and to ask to contact the District Court to obtain the relief the District Court granted Defense counsel in allowing the filing of Defendants' Second Motion for Sanctions.

The issue of the text messages arose at the January 10, 2020, hearing [ER9; Transcript, 1/10/20, at pp. ER0065-ER0092]. Defendants' counsel stated at that hearing his premise for seeking text messages from non-party witnesses:

> "We asked each one of the three witnesses, their fact witnesses, which are now all represented by the same law firm. We asked each one of them: Did you communicate with the plaintiff? Did you communicate via – via direct message, via text message? It became quite apparent that there are ongoing

> ***communications*** with Chelsea Meyers, the plaintiff, Elle Foster, ***about this case***, at least via text messages."

Transcript, 1/10/20, at ER0067 (emphasis added).

At ER0071 of the 1/10/20 transcript the District Court directed the parties to brief the issue. Defendants' counsel said at ER0072 that they "would like these communications that haven't been produced to us too for impeachment purposes . . . that is really the only relief . . . we were planning to request." When asked by this Court if Defendants wanted any more discovery, Defense counsel also stated on page 12 that: "I don't want to continue discovery. All I want – all the Defendants want, Your Honor, is merely to have these documents produced." On questioning from the District Court at ER0075 of the 1/10/20 transcript, Defense counsel admitted these text messages "primarily" involve "impeachment evidence." On ER9, at ER0092, Defense counsel repeated that: "I just want the documents for in the event we get to trial for impeachment purposes . . . " Even though the Court offered both parties at that point the opportunity to "brief" their discovery issues, ***Defendants chose not to file their own written discovery motion***. So how could the Plaintiff been found to violate any court order when Defendants chose not to bring a discovery motion? Plaintiff's counsel said he would produce the text messages or Instagram group chats between Plaintiff and the three non-party witnesses that were about this case. Defense counsel, as quoted above, said one or more of the witnesses had testified that they

may have discussed this case among themselves, and Plaintiff's counsel said he would produce those messages. In so agreeing Plaintiff was referring to what Defense counsel had said: communications which were "***about this case***."

The District Court held another hearing in open court on January 31, 2020, on the sealed Motion for Sanctions filed by Plaintiff [Doc. 285]. Defendants did not file a motion to compel or any other discovery motion for that hearing. Defense counsel admitted on the record that they had ghosted or made images of the cell phones of Defendant Hibbert and El Hefe manager Eric Sanchez. For the first time in this case, after the close of discovery, Defense counsel informed the District Court and Plaintiff's counsel that they had only searched the images of those cell phones with search terms, and had not scrutinized them in accordance will all of Plaintiff's production requests. And also for the first time in this case, at the direction of the Court in open court on January 31st, Defense counsel handed those search terms to Plaintiff's counsel. Defense counsel on ER10, at ER0115 of the transcript then informed the District Court and Plaintiff's counsel for the first time that the tendered search terms had been used to respond to all of Plaintiff's document requests, not just the search of the cell phones [ER10; Transcript, 1/31/20, at ER0113-116]. The District Court decided not to allow Plaintiff to search the ghosted image of Hibbert's cell phone at p. 27 of the hearing transcript, although no order was entered to that effect on Plaintiff's Motion for Sanctions. The District Court

ruled, *sua sponte*, that such discovery from Hibbert and Defendants would not be proportional at this stage of the case [ER10, Transcript, 1/31/20, at ER0133-135].

At the end of the January 31st hearing on Plaintiff's Motion for Sanctions, Defense counsel, without having filed a written discovery motion, and after choosing not to file such a discovery motion, orally requested the text messages or chat messages between Plaintiff and her three non-party witnesses [ER10, 1/31/20, at ER0154-165]. Defense counsel, at ER0155 of the hearing transcript, misrepresented that Plaintiff's counsel had agreed to produce "all communications relative to the witnesses that he is going to produce in this action . . . " As shown above, Plaintiff's counsel agreed to produce messages "***about this case***." Defense counsel continued on at ER0160 of the transcript, to orally request these text messages and chat messages. It became clear at ER0165 of the transcript that Defense counsel wanted to get "recent text messages," not messages going back to the start of the case. The District Court then ruled, without finding, or even suggesting, that Plaintiff or her counsel did anything wrong:

> "THE COURT: To the extent you have such documents, [plaintiff's counsel], you will produce them."

The written Order entered on January 31, 2020, did not limit the production to the "recent text messages" sought by Defendants' counsel. Rather, it said in relevant part:

> "**IT IS FURTHER ORDERED** that Plaintiff shall have ten (10) days from the date of this Order in which to disclose the remaining documents demonstrating communications between Plaintiff and others regarding her claims."

Plaintiff produced on February 21st the text and chat messages ordered by the District Court to be produced [ER12]. But that did not satisfy Defense counsel, who demanded that Plaintiff's counsel produce ***all*** text and chat messages from and between Plaintiff and her three non-party witnesses for the past two years, whether or not such messages were "regarding" Plaintiff's claims [ER12]. Plaintiff objected to such an open-ended production as contrary to the January 31st Order of the District Court. That led to the Defendant seeking the telephonic hearing that resulted in the District Court's March 4th Order [ER11, 13, 14]. Although that informal telephonic hearing is not on the record, the District Court, for reasons that were not explained, ordered the production and search of the four cell phones themselves. No finding was made that Plaintiff's production did not comply with the prior Orders of the District Court.

Double Standard in Document Production

In response to defendants' requests, over the course of discovery, ***Plaintiff produced a total of 51,588 text messages between herself, her managers and co-workers***. In turn, Plaintiff served her requests for production on Defendant Hibbert, and

Corporate Defendants requesting various communications on May 2, 2019. [Doc. 285, Ex.4,5]. Specifically, Plaintiff requested Mr. Hibbert to produce communications by and between Mr. Hibbert and El Hefe customers, employees, co-owners, and other non-parties. (*Id.*; RFP No. 1-2). Similarly, Plaintiff requested Corporate Defendants to produce communications with employees, third-parties, and customers of El Hefe. (Ex.4, RFP No.13-15). Just like Defendants, Plaintiff limited those requests to relevant communications. *Id*. ***Plaintiff did not receive a single text message in response to her requests, either from Mr. Hibbert or Corporate Defendants***. Defendants claimed that no responsive documents existed based on Defense counsel's assessment of relevancy. [Doc. 285, Ex. 6-7).

So Plaintiff got none of the text messages sought from the Defendant owner and his managers at El Hefe pursuant to Plaintiff's written Motion for Sanctions. Yet Defendants, based on an oral request at the very end of the January 31st hearing on Plaintiff's Motion for Sanctions, obtained an Order on March 4th requiring Plaintiff to turn over and dispossess herself and her three non-party witnesses of their cell phones so the Defendants could have the cell phones searched for just about everything that occurs in their lives. This violated the privacy principles set forth in the *Riley* case.

REASONS FOR GRANTING THE PETITION

I. THE PRIVACY INTERESTS IN CELL PHONES RECOGNIZED IN RILEY V. CALIFORNIA SHOULD BE APPLIED IN CIVIL CASES.

The Ninth Circuit rejected Plaintiff's contentions that these Orders were injunction Orders or Orders that had the practical effect of injunctions. The Ninth Circuit ignored the obvious: Plaintiff did not seek or agree to the entry of these injunctive orders (App. 7-36). These Orders were entered *sua sponte* by the District Court after an oral request by defense counsel to obtain text messages for "impeachment" purposes. The District Court then went even beyond that oral request and required the turn over of the cell phones themselves for cloning and searching. Yet the Ninth Circuit refused to characterize the Orders as injunctions under Ninth Circuit authority because, in its view, an Order to qualify as an injunction needed to be "designed to accord or protect some or all of the substantive relief sought by a complaint in more than temporary fashion." (App. 4) Of course an oral defense request for "impeachment" is only the defendants' attempt to gather defense evidence to defeat the claim of the complainant. Such a request was not designed to help the Plaintiff protect some or all of the relief she sought.

Plaintiff had argued in the Ninth Circuit and in the District Court that the March 4th *sua sponte* Order (App, 7-9) was a mandatory injunction because it "orders a responsible party to 'take action.'" *Garcia v.*

Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015) (*en banc*). In order to comply with that Order, Plaintiff was required obtain from three non-party witnesses the physical possession of their cell phones, and then take those cell phones belonging to Plaintiff's former co-workers to a third-party vendor and deliver them, along with her own cell phone, to that vendor for purposes of cloning those cell phones and searching the contents of all four cell phones. Mandatory dispossession by court order of a cell phone is a mandatory injunction.

Mandatory injunctions are "particularly disfavored." *Marlyn Nutraceuticals Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-879 (9th Cir. 2009). Mandatory preliminary injunctions are subject to a heightened standard. *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1161 (9th Cir. 2011). In order for a mandatory injunction to be entered it must be established " . . . that the law and facts clearly favor [its] position, not simply that [a party] is likely to succeed." *Garcia*, 786 F.3d at 740. Additionally, it must be shown that "extreme or very serious damage' will result "and [mandatory injunctions] are not issued in doubtful cases." *Marlyn, id*. *See Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d 1165, 1173 (9th Cir. 2015) (quoting *Marlyn*, 571 F.3d at 879 *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160-61 (9th Cir. 2011). But, as argued above, defendants and the District Court established nothing to authorize this relief.

Plaintiff and the three non-party witnesses were not given notice and the opportunity to respond under the appropriate standards cited above because this Court, *sua sponte*, entered mandatory injunctive relief in an informal telephonic discovery conference without Defendants seeking such relief in a written motion and without Plaintiff and the non-party witnesses being given the opportunity to respond before such drastic relief was entered. The District Court had previously ordered Plaintiff to produce documents and text messages found in these cell phones [Doc. 296], which is a very different order in kind and degree from a mandatory injunction ordering Plaintiff and three non-party witnesses to produce the cell phones themselves to be searched in their entirety [Ex. A]. The entry of this Court's *sua sponte* mandatory injunction was and is a violation of due process of law on these facts because Plaintiff and the three non-party witnesses did not receive notice and an opportunity to be heard on the standards for the issuance of a mandatory injunction that would and did dispossess them of their cell phones. *DeLong v. Hennessey*, 912 F.2d 1144, 1147-1148 (9th Cir. 1990); *See also*, *Armstrong v. Brown*, 768 F.3d 975, 979–80 (9th Cir. 2014).

On the second prong, namely, whether these Orders had the practical effect of granting injunctions, this Court also held in *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271, 287-288, 108 S.Ct. 1133, 1142-1143 (1988), that:

> "Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over

> orders that grant or deny injunctions ***and orders that have the practical effect of granting or denying injunctions and have "'serious, perhaps irreparable, consequence.'"*** *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981), quoting *Baltimore Contractors, Inc. v. Bodinger, supra*, 348 U.S., at 181, 75 S.Ct., at 252. ***Both types of orders are immediately appealable as interlocutory injunction appeals under 28 U.S.C. § 1292(a)(1)***."

485 U.S. at 287-288, 108 S.Ct. at 1142-1143 (emphasis added).

Plaintiff also argued below that these Orders (App. 7-36) had the "practical effect" of granting an injunction. The Ninth Circuit rejected this argument on serious and irreparable harm grounds, treating these Orders as only temporarily dispossessing Plaintiff and her witnesses of their cell phones (App. 4-5). But there were and are serious consequences of these Orders, which in effect seized cell phones for cloning and global search purposes. The cloned versions of the cell phones and the numerous spreadsheets cataloguing and itemizing the contents of the cell phones, remain with defense counsel and an IT tech vendor. Thus the invasion of privacy involved in forcing Plaintiff and her three non-party witnesses to turn over their cell phones to a third-party tech vendor for cloning and pervasive searching was serious based on this Court's reasoning and holding in *Riley v. California*, 573 U.S. 373, 378-379, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). In *Riley*,

this Court dealt with the search of a cell phone. This Court affirmed the suppression of the cell phone search, based upon the unique characteristics and functions of and in a cell phone. The Court created a new search rule for cell phones due to the privacy accorded to them:

> "These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. . . .
>
> Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
>
> One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy.. . . . Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or

every book or article they have read – nor would they have any reason to attempt to do so. . . .

Cell phones couple that capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on. . . . We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several

> months, as would routinely be kept on a phone. . . .
>
> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "*the privacies of life* . . . "

573 U.S. 373, 378-379, 385-402, 134 S.Ct. 2473, 2480-2481, 2484-2495 (emphasis added).

The privacy accorded to cell phones in *Riley* has been applied to civil cases in the 9th Circuit. *Patel v. Facebook, Inc*., 932 F.3d 1264, 1273 (9th Cir. 2019); *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1227 (9th Cir. 2019). And it should be applied here. *Riley* compels the conclusion that an Order that enjoins, or has the practical effect of enjoining, a Plaintiff and three of her non-party witnesses to turn over possession of their cell phones for a massive search is appealable. The fact that this could be raised later in the case does not negate what has occurred. Every injunction could potentially be raised later in the case.

Plaintiff and the other appellants were hampered in March of 2020, and continue to be hampered, by the District Court's rule that a party cannot file a motion without that Court's permission. Plaintiff previously raised objections to the District Court's rule that a party had to ask the District Judge in a telephonic conference call for leave to file a discovery motion, and cited *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987) (With some inapplicable exceptions, " . . . a court has no power to prevent a

party from filing pleadings, motions or appeals authorized by the Federal Rules of Civil Procedure."); *Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1008 (11th Cir. 1992) ("District courts are not required to adopt local rules, but they must not circumvent the Federal Rules of Civil Procedure by implementing local rules or procedures which do not afford parties rights that they are accorded under the Federal Rules."); *Coady v. Aguadilla Terminal Inc.*, 456 F.2d 677, 678 (1st Cir.1972) ("[A] local rule cannot be applied if it is contrary to a federal statute or rule.") (citing *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)).

Unfortunately, that informal telephonic call-in procedure led to the March 4, 2020, telephonic hearing, without briefing, and produced the March 4, 2020, *sua sponte* Order in question. Had Defendants been required to file a written motion to obtain the relief granted on March 4th, rather than merely sending self-serving emails to chambers, Plaintiff would have had the opportunity to file written objections and legal argument prior to the District Court making such an injunctive order.

That is also why there was no transcript of the March 4, 2020, telephonic hearing on the record, which led to the District Court, for reasons that were not explained, entering the *sua sponte* order requiring the production and search of the four cell phones themselves. [ER 2] No finding was made in the order that Plaintiff's prior production did not comply with the January 31st Order of the District Court, although Defendants' Brief suggests that prior rulings were

discussed in that off-the-record telephonic conference. But no transcript of that hearing is obtainable. Because the District Court mandated that the parties first seek a telephonic conference to resolve discovery disputes before filing a motion, and that a party may file a motion only with leave of the District Court [Doc. 62, ¶ 6(a)], the Court did not give notice of, nor permit briefing and a hearing, before entering the March 4th telephonic, *sua sponte*, Order that purported to dispossess Plaintiff and her three non-party witnesses of their cell phones.[1]

After the forensic examination of their cell phones, Plaintiff and her witnesses were furnished thumb drives, which when loaded in a laptop permitted each search hit to be marked as: relevant, irrelevant or privileged. Plaintiff's counsel and his staff checked one of the three boxes for each search hit. But the content of the text messages checked by Plaintiff and her

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[1] For example, Plaintiff was not permitted to brief whether the discovery request was disproportionate under Rule 26(b), Fed. R. Civ. P. *See also Hardy v. UPS Ground Freight Inc.*, No. 3:17-cv-30162-MGM, 2019 WL 3290346, *2 (D. Mass. July 22, 2019) ("When determining whether to grant a motion to compel the forensic imaging of a cell phone or other electronic device, courts have considered whether the examination will reveal information that is relevant to the claims and defenses in the pending matter and whether such an examination is proportional to the needs to the case given the cell phone owner's compelling privacy interests in the contents of his or her cell phone."). Further, a party need not provide discovery of electronic stored information that is not "reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). These issues should have been explored through briefing and a recorded hearing, not an informal telephonic conference for which there is no record.

witnesses as "relevant" in the proprietary software furnished by the Specialist is displayed in one column of the spreadsheet, along with the phone and data for each such text message. Plaintiff's counsel was furnished in December a spreadsheet for each phone which had a long list of all three categories on one spreadsheet: relevant, irrelevant and privileged.

No individual text message "documents" were provided from the Specialist's forensic examination to Plaintiff's counsel, only spreadsheets, because Defense counsel and the IT Specialist refused to give Plaintiff's counsel the actual documents ordered by the District Court to be provided to Mr. Nathanson. Plaintiff's counsel did specifically ask to receive such "documents" [Doc 333, Ex. A]. The IT "Specialist" initially assured Plaintiff's counsel that he would receive .pdf versions of the relevant text messages. *Id*. But ***Defense counsel then told the Specialist that .pdf files were not allowed*** [Doc 333, Ex. B], so Plaintiff only received spreadsheets from the Specialist's proprietary software that contained in one column of the "relevant" spreadsheet the content of each text message. That "message" column though was left blank in the irrelevant and privileged portion of the one long continuous spreadsheet produced to Plaintiff's counsel. No "documents" ordered by the District Court to be given to Plaintiff's counsel were in fact given to Plaintiff's counsel for review, creation of privilege logs and production of the rest of the actual documents. So Plaintiff's counsel was left with producing the Specialist's spreadsheets, or not producing them.

The volume of material actually generated by the IT Specialist's forensic examination amounted to over 70,000 pieces of evidence. When Plaintiff and her witnesses saw these spreadsheets, they did not believe that it was the job of the IT Specialist to document their lives in spreadsheet form. The Specialist made it clear that he intended to produce these multiple spreadsheets to Defendants after Plaintiff and her witnesses confirmed that the text portion of the text messages, the actual words of each message, previously designated as relevant, were indeed relevant. The problem was and is that the Specialist was not just going to produce the text portion of the text messages. Each message also had copious detail about the message and the people involved in addition to the text portion of relevant text messages. Defendants' search terms swept in thousands of messages between persons other than Plaintiff and her three fact witnesses. This whole IT project took on the life it did because of the District Court's forced delivery of the cell phones.

CONCLUSION

For each and all of the foregoing reasons, Plaintiff, ALYSSA JONES, and the Non-Party Witness-Appellants, ELLE FOSTER, CHELSEA MEYERS, and SHEA WATSON, request this Court to grant the Petition for Certiorari and to reverse and vacate the District Court's March 4, 2020, Order, and the District Court's

August 10, 2020, Order, and to remand this cause consistent with the reversal.

Respectfully submitted,

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