No. 15-17382

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMANDA FRLEKIN, TAYLOR KALIN, AARON GREGOROFF, SETH DOWLING and DEBRA SPEICHER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

APPLE, INC.,

Defendant-Appellee.

On Appeal from a Judgment of the United States District Court for the Northern District of California, Hon. William Alsup
No. C 13-03451 WHA (Lead)
No. C 13-04727 WHA (Consolidated)

ANSWER TO REHEARING PETITION

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I. INTRODUCTION

Apple has filed a narrow rehearing petition targeting this Court's determination that Apple waived any "de minimis" defense by not asserting it in opposition to plaintiffs' summary judgment motion below.

For three reasons, the petition should be denied.

First, the petition depends on information stated in documents that Apple did not include in the excerpts of record. Without those materials, which Apple easily could have provided to the Court but did not, the petition cannot be considered, let alone granted. *Second*, the record fully supports the Court's determination that Apple waived the "de minims" defense. The Court's opinion neither "overlooked" nor "misapprehended" anything material to the waiver holding. Fed. R. App. P. 40(a)(2). *Third*, even if the "de minimis" defense had not been waived, it would fail as a matter of law under the California Supreme Court's opinion in *Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018).

Apple has advanced no valid reason to grant rehearing. The petition merely serves to further delay vindication of the class members' right to compensation for all "hours worked." The petition should be denied and the case allowed to proceed to the damages phase without further delay. If the Court is inclined to consider modifying its opinion, the Court should not adopt Apple's proposed wording, which could improperly limit the proceedings on remand (as explained below).

II. REASONS WHY REHEARING SHOULD BE DENIED

The party seeking rehearing bears the burden of demonstrating, "with particularity," that this Court "overlooked or misapprehended" a "point of law or fact" material to its opinion.[1] "A properly drawn petition for rehearing serves a very limited purpose," *Armster v. U.S. District Court*, 806 F.2d 1347, 1356 (9th Cir. 1986), and "is not designed to give the parties a 'second bite at the apple.'" Goelz, *supra*, §11:1. "In practice, rehearing is rarely granted." *Id.*, §11:3.

Apple has not met its burden of establishing that the Court "overlooked or misapprehended" anything. Hence, the petition should be denied.

A. Apple Failed to Provide An Adequate Appellate Record, and Its Arguments Are Unsupported by Appropriate Record Cites

The first problem with Apple's petition (Dkt. 91 (hereafter "Pet."))[2] is that it relies on documents that Apple did not make part of this Court's appellate record. Under the rules, Apple had every opportunity to provide this Court with any and all excerpts of record relevant to its appellate arguments and defenses. *E.g.*, 9th Cir. R. 30-1.7, 20-1.8(b). Yet Apple's petition depends on matters that Apple failed to include in those excerpts, in violation of Circuit Rules 30-1.7 and 30-1.8(b). Apple's petition is replete with citations to district court docket materials outside

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1 Fed. R. App. P. 40(a)(2); *see* Goelz et al., *Federal Ninth Circuit Civil Appellate Practice*, §11:1 (Rutter Group 2020).

2 All references to "Dkt." in this brief are to this Court's appellate docket.

the excerpts, in violation of Circuit Rule 28-2.8. *See*, *e.g.*, Pet. at 3, 4-6, 15. The petition includes not one citation to appellants' four-volume excerpts of record (Dkt. 11-1 to 11-4) or the parties' supplemental excerpts of record (Dkt. 30, 83).[3]

This is not the first time Apple has violated these rules. Apple's supplemental brief, filed in June, suffered from the same deficiencies; the supplemental brief cited and relied primarily on district court materials not included in the excerpts of record. Dkt. 76 at, *e.g.*, 3-6. This was pointed out (Dkt. 82 at 5-6, 8), yet Apple still failed to supply the Court with the materials necessary to establish the validity of Apple's positions, let alone to adjudicate them.

These rule violations heavily burden the Court and should not be condoned. "An incredible amount of time is wasted when members of this court must wade through a voluminous district court record in a complex case" because a party "failed to provide proper excerpts of record." *Dela Rosa v. Scottsdale Mem. Health Sys., Inc.*, 136 F.3d 1241, 1244 (9th Cir. 1998); *see also In re O'Brien*, 312 F.3d 1135, 1137 (9th Cir. 2002) (appellate rules "'were not whimsically created'" but "serve a critical function in that they maximize ever more scarce judicial resources" (quoting *Dela Rosa*, 136 F.3d at 1244)).

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[3] Even when ER cites could have been provided, the petition cites the district court docket instead. *E.g.*, Pet. at 7 (citing district court's class certification order, which is in the appellate record at ER 544-58). This violates Circuit Rule 28-2.8 and creates unnecessary work for the Court, requiring it to "ferret out" the relevant pages. *Mitchel v. General Elec. Co.*, 689 F.2d 877, 878 (9th Cir. 1982).

The deficiencies are ample reason to summarily deny Apple's petition. *O'Brien*, 312 F.3d at 1137 (refusing to consider appellate arguments due to party's "failure to present a sufficient record"); *United States v. Rewald*, 889 F.2d 836, 861 n.24 (9th Cir. 1989) ("declin[ing] to consider the merits" of arguments based on "matters that are not in the record on appeal"); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1414 (9th Cir. 1986) (party failed to include relevant documents in appellate record, so argument not considered); Circuit Advisory Comm. Note to 9th Cir. R. 28-2.8 ("Sanctions may be imposed for failure to comply with this rule, particularly with respect to record references." (citing *Mitchel*, 689 F.2d 877)).

B. Apple Has Shown No Error in this Court's Conclusion that Apple Waived the "De Minimis" Defense

Apple's petition challenges this Court's holding that "Apple failed to raise [the 'de minimis'] argument before the district court in opposing Plaintiffs' motion for summary judgment; the argument is therefore forfeited." *Frlekin v. Apple, Inc.*, 973 F.3d 947, 2020 WL 5225699, *4 (9th Cir. 2020) ("*Frlekin III*"). However, the holding is correct and fully supported by the appellate record. The record shows that Apple's opposition made no mention of any "de minimis" defense. ER 71-79 (portions of Apple's opposition); ASER 632-57 (remaining portions of Apple's opposition). Accordingly, the defense is waived, as the Court correctly concluded.

Apple claims that the "de minimis" defense was mentioned in earlier-filed

documents *other than* Apple's opposition to plaintiffs' motion. Pet. at 2-4, 6. But even if Apple had provided those documents to the Court in its excerpts of record and properly cited them, that would not cure the deficiencies in Apple's opposition to plaintiffs' motion. Apple was well aware of the potential "de minimis" defense (*see* ER 554:18-19), yet elected not to include the defense in its opposition, when it listed the reasons why the search time was supposedly non-compensable under California law. ER 72:15-77:28 (arguments A through E in Apple's opposition); *see* ASER 641:20-653:22. If "de minimis" were another reason, as Apple now contends (Pet. at 15), Apple should have, and easily could have, listed that reason among the others and presented briefing and argument on it below.

As explained by a respected commentator, "[a] partial opposition to a summary judgment motion may imply an abandonment of some … defenses." Phillips et al., *Federal Civil Procedure Before Trial, California and Ninth Circuit Edition*, §14:331.5 (Rutter Group 2020) (citing *Jackson v. Federal Express*, 766 F.3d 189, 195-96 (2d Cir. 2014)). Certainly, a defendant may state an affirmative defense in its answer, or in other earlier filings, and later decide not to pursue the defense. That is what happened here.

The conclusion that Apple knowingly waived the "de minimis" defense is further reinforced by Apple's failure to mention it in Apple's main merits brief in this Court or to include all the documents relevant to the defense in its excerpts of

record. Dkt. 29, 30. Apple easily could have done both—if Apple considered the defense important or wished to preserve or pursue it any further.[4]

Well-established waiver principles fully support the Court's conclusion that Apple "forfeited" the "de minimis" argument. For example, in *Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955 (9th Cir. 2020), cited in *Frlekin III*, the Court held that an argument in opposition to a summary judgment motion was waived because it was "not rais[ed]" "'sufficiently for the trial court to rule on.'" *Id.* at 966 (quoting *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989)). Similarly, in *Loomis v. Cornish*, 836 F.3d 991 (9th Cir. 2016), this Court expressly held that arguments not raised in opposition to summary judgment below "were waived" below. *Id.* at 997; *see also Samica Enters LLC v. Mail Boxes Etc., Inc.*, 460 Fed.Appx. 664, 666 (9th Cir. 2011) ("Arguments not raised in opposition to summary judgment or in the opening brief before this court are waived."). Apple did not raise the "de minimis" defense "sufficiently for the trial court to rule on" in its opposition below, so the defense is waived. *Davidson*, 968 F.3d at 966.

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[4] It is unsurprising that Apple would choose not to pursue the defense in this Court. The main "evidence" Apple now mentions to support the defense is an expert report (Pet. at 9-10 (quoting brief discussing this report)), but the report was seriously flawed for reasons explained in plaintiffs' motion to strike, filed below (ER 21:17-24 (referencing this motion and denying it as "moot")). One problem with the report (among many others explained in plaintiffs' motion) is it purports to address only the "wait time," not the actual search time itself. Even Apple concedes this. Pet. at 9; Dkt. 76 at 5. Because of that problem, the report captured at most only a fraction of the compensable "hours worked."

The law is also clear that the defense is "forfeited" for purposes of appeal. As this Court noted in *Davidson*, "'we routinely "prevent[] parties from sandbagging their opponents [and the district court] with new arguments on appeal."'" *Davidson*, 968 F.3d at 966 (quoting *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (alterations in original)); *see also USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994) (if "party opposing … summary judgment" fails to "inform the trial judge of the reasons" to deny the motion, that party "cannot raise such reasons on appeal").[5]

Citing the district court's class certification order, Apple contends that the district court previously ruled that Apple could raise the "de minimis" defense in a so-called "second phase" of the litigation. Pet. at 6-8, 12. This, however, is incorrect. All the district court said is that "how long" the class members spent undergoing searches would be adjudicated later. ER 555:16-17. Nothing in the order states that Apple was absolved from having to continue to assert the defense at all relevant stages of the case, nor did the district court say that the defense may never be abandoned or waived by Apple through failure to assert it when required by law to do so, such as in opposition to plaintiffs' summary judgment motion. It

[5] *Accord BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000) (party "abandoned the argument" by not raising it in opposition to summary judgment below); *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 615 n.1 (9th Cir. 1990) (refusing to consider argument that party "failed to raise" "in response" to summary judgment motion below).

was incumbent upon Apple to continue to assert the defense whenever Apple believed it applied, whether on liability or damages. Apple failed to do this.

Finally, Apple contends that *plaintiffs* were required to raise and address Apple's "de minimis" defense in their moving papers. Pet. at 8-9, 12. But Apple cites no authority to support that contention. As directed by the district court, plaintiffs sought summary judgment on the basis that *all* search time is compensable. ER 81:9-13. If Apple believed *some* search time was not compensable as a matter of law because certain searches were "de minimis," it was up to Apple to raise that argument as a reason to deny the motion. While Apple raised a lengthy list of other, similar arguments, Apple chose not to raise "de minimis" as a defense. ER 72-77; ASER 641-53. Had Apple done so, the matter could have been addressed in the briefing in this Court, and guidance also could have been sought in the California Supreme Court proceeding. In sum, this Court correctly held the defense was "forfeited." *Frlekin III*, 2020 WL 5225699 at *4.

Apple has consistently argued that if a "de minimis" defense applies, then some class members supposedly have "no viable claim against Apple whatsoever." Pet. at 15. Put another way, Apple asserts that "de minimis" is a defense to *liability*, not merely a matter of damages.[6] *See also* Dkt. 76 at 5 (characterizing "de minimis" as a "liability" defense). Apple's position underscores why Apple

[6] Plaintiffs do not concede that this is correct under California law.

was required to assert the defense in opposition to plaintiffs' summary judgment motion—which was directed to Apple's *liability* to the class and whether all time spent pursuant to Apple's search policy was legally compensable.

C. Under *Troester*, "De Minimis" Is Not a Viable Defense in Any Event

Even if Apple could establish, through a proper appellate record and appropriate citations to that record, that the "de minimis" defense has not been waived, the undisputed facts demonstrate that the defense is inapplicable to this case as a matter of law under the California Supreme Court's opinion in *Troester*.

As the Supreme Court held in *Troester*, the "de minimis" defense (to the extent it even exists under California law (*see* 5 Cal.5th at 843)) "is not applicable to … regularly reoccurring activities," including activities required by the employer "on a regular basis or as a regular feature of the job." *Id.* at 847, 848. This Court has already recognized that Apple's mandatory written search policy governs all employees and "applies day in and day out." *Frlekin v. Apple, Inc.*, 870 F.3d 867, 870, 873 (9th Cir. 2017) ("*Frlekin I*"). The search time, even if brief in duration, is not the type of sporadic or "irregular" activity the "de minimis" defense is meant to embrace. *Troester*, 5 Cal.5th at 848; *see also Rodriguez v. Nike Retail Servs., Inc.*, 928 F.3d 810, 818 (9th Cir. 2019) (defense inapplicable when employees spend "measurable amounts" of time "'on a regular basis or as a regular feature of the job'" (quoting *Troester*)). For this reason alone, the "de

minimis" defense is inapplicable as a matter of law.

This Court's recent analysis in *Rodriguez* provides a second, independent reason why the "de minimis" defense does not apply. Attempting to avoid liability, the *Rodriguez* defendant argued that under California law, as construed in *Troester*, any time less than 60 seconds is automatically "de minimis." *Rodriguez*, 928 F.3d at 817. This Court flatly rejected that argument, explaining that it was directly opposed to the Supreme Court's holdings and reasoning in *Troester*:

> Not only would this interpretation read far too much into *Troester*'s passing mention of "minutes," but it would also clash with *Troester*'s reasoning, which emphasized the requirement under California labor laws that "employee[s] must be paid for *all* hours worked or *any* work beyond eight hours a day." 235 Cal.Rptr.3d 820, 421 P.3d at 1120 (quotations and alteration omitted).

Id. at 817 (emphasis added) (quoting *Troester*, 5 Cal.5th at 840). The Court drove the point home by saying: "We doubt that *Troester* would have been decided differently if the closing tasks at issue had taken only 59 seconds per day." *Id.*

Parroting this argument, Apple contends (without proper appellate record support or citations) that the searches are "de minimis" because they usually take less than 60 seconds. Pet. at 9-10. But *Rodriguez* already considered and rejected that argument. Moreover, the argument conflicts with *Troester*'s favorable citation of *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429 (2000). *Linder* was "a class action suit involving a *4 cents* per gallon surcharge on gasoline customers," which *Troester*

cited as a prime example of a case in which a "de minimis" defense would have "little value." *Troester*, 5 Cal.5th at 846 (emphasis added). Four cents per gallon is equivalent to less than 15 seconds of search time per day (at a minimum wage of $15 per hour)—well below the 60-second threshold that *Rodriguez* refused to adopt. 928 F.3d at 817. As *Troester* holds, to protect employees, California wage law "is indeed concerned with 'small things,'" including "small amounts of time" other than "split-second absurdities." *Troester*, 5 Cal.5th at 844, 845-46, 847.

Even crediting Apple's unsupported assertions that the searches, on average, took about 30 seconds (Pet. at 9-10),[7] that time is worth 12.5 cents of unpaid time per day (at $15 per hour). That is *three times greater* than the amount at issue in *Linder*, the exemplar case cited in *Troester*. 5 Cal.5th at 846. It amounts to $31.25 in unpaid wages per year for a full-time employee. *Troester* held that $102.67 in unpaid wages over a 17-month period—that is, $72.47 per year—was "enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares," and was "not de minimis at all to many ordinary people who work for hourly wages."

[7] Plaintiffs do not concede that the searches were as short as Apple claims. "Employees estimate that the time [usually] ranges from 5 to 20 minutes." *Frlekin III*, 2020 WL 5225699 at *2. This amount of time is necessary not only due to wait times to find an available manager or security guard, but also because Apple required the managers and guards to perform a multi-step procedure to conduct the bag and device searches. *Id.*; *see also Frlekin v. Apple Inc.*, 8 Cal.5th 1038, 1044 (2020) ("*Frlekin II*") (describing the search procedure). It is difficult to imagine that this procedure could be completed in as few seconds as Apple claims.

5 Cal.5th at 847. The amounts at issue in this case, even accepting Apple's characterizations, do not involve "split-second absurdities," and they are simply not "trifling," "minute" or "brief" enough to be deemed "de minimis" under California law. *Rodriguez*, 928 F.3d at 818; *Troester*, 5 Cal.5th at 845, 848.

Finally, *Troester* held that the "de minimis" defense does not apply when "technological advances … enable employees to track and register their work time via smartphones, tablets, or other devices," such as the iPhone. *Troester*, 5 Cal.5th at 846. It is undisputed that Apple, "one of the world's largest global technology companies" (ER 560:17-18), had this capability. *See*, *e.g.*, ER 454:22-23 (employees clocked in and out "using a handheld EasyPay device (which at the time was an iPod touch with software applications, such as employee time management)").[8] It is up to the employer to "devise alternatives that would permit the tracking of small amounts of regularly occurring work time," such as by having the employees clock out on their phones *after* the searches have been completed. *Troester*, 5 Cal.5th at 848.[9] Apple could and should have implemented its

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[8] Many employee time management and tracking apps can be found in Apple's own App Store. https://www.apple.com/app-store/ The devices used to run these apps are "practical necessities of modern life" that people "compulsively carry … with them all the time." *Frlekin II*, 8 Cal.5th at 1055 (citations omitted).

[9] If that were truly impracticable (which it was not for Apple, a leading "global technology company"), employees may be compensated using "reasonabl[e] estimate[s]" of the work time, such as through "surveys," "time studies," or by other means. 5 Cal.5th at 848; *Accord Rodriguez*, 928 F.3d at 817.

"available time tracking tools" to record and pay for all search time, which Apple knew was "regularly reoccurring," "day in and day out," in its own stores pursuant to its own mandatory written policy. *Id.* at 848; *Frlekin I*, 870 F.3d at 873.

For any or all of these three independent reasons, even if Apple had not waived the "de minimis" defense, it would fail on the merits under *Troester*.

D. Apple's Proposed Re-Wording of the Court's Opinion Should Not Be Adopted

If the Court is inclined to alter its opinion, the wording Apple proposes is inappropriate and should not be adopted. Apple asks the Court to state that the subsequent proceedings on remand shall be limited to "*individual* proceedings." Pet. at 16 (emphasis added). Apple appears to intend to argue that non-"individual" methods of proof, such as representative testimony, expert testimony based on averages or estimates, or other accepted methods of aggregate classwide proof are precluded, and that only "individual" proceedings should be allowed.

To include such a statement in any amended opinion would contravene *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), in which the United States Supreme Court endorsed the use of representative and sampling evidence in wage and hour class actions, especially when an employer "violated [its] statutory

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Apple does not dispute that the search time can be estimated through such means; to the contrary, Apple claims its expert has already done exactly that. Pet. at 9-10; Dkt. 76 at 5. But estimates should not be necessary; Apple should have tracked the time every day, as it was worked, using the technology at its disposal.

duty to keep proper records," as Apple did here.[10] *Id.* at 1046-49. In *Ridgeway v. Wal-Mart Inc.*, 946 F.3d 1066 (9th Cir. 2020), this Court applied *Tyson Foods* and affirmed a $54 million classwide judgment established using "representative evidence," holding: "All that is required is enough representative evidence to draw a reasonable inference about unpaid hours worked." *Id.* at 1086-89 (citing *Tyson Foods*, 136 S. Ct. at 1046-49). Along the same lines, *Troester* held that employee time, if the employer fails to track and record it, may be "reasonably estimate[d]" using "surveys," "time studies," or other forms of aggregate or representative evidence. *Troester*, 5 Cal.5th at 848, *quoted in Rodriguez*, 928 F.3d at 817.

Under these decisions, the law is clear that evidence of "hours worked" need not be "individual" for each class member, as proposed by Apple's suggested rewording of the Court's opinion. That wording should not be used.

In granting class certification, the district court did say that "[d]amages will be proven via an old-fashioned claims process" and "litigated one-by-one." ER 556:14-15, 556:24-25. However, that was five years ago, before *Tyson Foods*, *Ridgeway* and *Troester* had been decided. On remand, plaintiffs intend to ask the

[10] Apple violated California law by not keeping records of all search time, which the California Supreme Court held are "hours worked." Lab. Code §1174(d); 8 Cal. Code Regs. §11070, ¶7(A)(5). The district court has already recognized that Apple may be subject to adverse evidentiary presumptions at the damages phase because "the absence of good records to document the compensable time involved [is] Apple's fault." ER 556:1-2.

district court to apply those decisions and revisit the propriety and efficiency of using representative and/or aggregate forms of proof in this case, as expressly approved in *Tyson Foods* and *Ridgeway* and as contemplated by *Troester*.

This Court suggested that the district court, on remand, might consider options "such as" "requiring sworn claim forms" (*Frlekin III*, 2020 WL 5225699 at *4), but the Court did not mandate such proof, and plaintiffs respectfully submit that under *Tyson Foods*, *Ridgeway*, and *Troester*, that is but one of many possible alternative ways to proceed. Other means of proof might turn out to be more appropriate or efficient from a judicial economy standpoint. Moreover, the district court has yet to consider the full impact of Apple's failure to record all "hours worked," as required by California law. *See supra* footnote 10 (citing record and authorities). Evidentiary presumptions against Apple may impact how the damages proof should best proceed. The Court is respectfully asked to decline Apple's invitation to put language in its opinion that might preclude any of the accepted methods of proof in class action litigation.

III. CONCLUSION

For the reasons stated above, Apple has not met its burden of establishing that it is entitled to rehearing on any point addressed in the Court's opinion. The Court is respectfully asked to deny Apple's rehearing petition.

Dated: October 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that, pursuant to this Court's order dated May 28, 2020 (Dkt. 75) and Circuit Rule 40-1(a), this brief does not exceed 15 pages, and contains 3,976 words according to the software used to generate the brief, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface with 14 point, Times New Roman font.

/s/ Kimberly A. Kralowec
Kimberly A. Kralowec

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 9, 2020.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 9, 2020

/s/ Kimberly A. Kralowec
Kimberly A. Kralowec