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,

v.

APPLE INC.,

Defendant-Appellee.

On Appeal from a Judgment of the
United States District Court for the Northern District of California
Honorable William H. Alsup
No. C 13-03451-WHA (lead)
No. C 13-04727-WHA (consolidated)

APPLE INC.'S PETITION FOR PANEL REHEARING

Julie A. Dunne
DLA PIPER LLP
401 B. Street, Suite 1700
San Diego, CA 92101-4297
(619) 699 2690

Theodore J. Boutrous, Jr.
Joshua S. Lipshutz
Bradley J. Hamburger
Lauren M. Blas
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Defendant-Appellee Apple Inc.

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I. INTRODUCTION

The Court's September 2, 2020 opinion contains a factual mistake that should be corrected. Specifically, the Court concluded that Apple had "forfeited" its argument that there were disputed facts regarding whether time spent by class members undergoing a search is *de minimis* because "Apple failed to raise this argument before the district court in opposing Plaintiffs' motion for summary judgment." Opn. at 11–12. This statement is incorrect. The record shows that Apple did raise and preserve this defense throughout the district court litigation, including in its answers to the various iterations of Plaintiffs' complaints and a pre-certification motion for summary judgment. Further, in their motion for certification, Plaintiffs acknowledged both that Apple had asserted a *de minimis* defense and that the *de minimis* defense raised individualized questions of fact across the class. To that end, they proposed a two-phased trial plan that would first resolve whether time spent participating in checks under Apple's policy constitutes work (the subject of their summary judgment motion), and then would allow Apple to litigate issues of liability as to individual class members, including the *de minimis* defense.

The district court acknowledged Apple's right to litigate the *de minimis* defense when it ordered a two-phased post-certification litigation schedule providing that Apple would be able to litigate its *de minimis* defense in the second phase if it was found in the first phase that checks under Apple's policy constituted work.

Specifically, in its order granting class certification, the district court ruled that class members would have to establish in subsequent proceedings "who actually stood in line and for how long," including "the extent to which, if at all, they stood in line beyond any *de minimis* threshold." Dist.Ct.Dkt. 297 at 12:16-20.

Apple's right to assert its *de minimis* defense has not been mooted by the proceedings on appeal. Plaintiffs did not move for summary judgment on the premise that all time spent in checks was more than *de minimis*, or on the premise that Apple's *de minimis* defense lacked merit. Rather, they moved solely on the question whether "time spent pursuant to Apple's bag-search policy is compensable without regard to any special reason any employee brought a bag to work." Opn. at 11. This Court may have resolved that issue in their favor, but the *de minimis* defense remains very much in play and was in no sense forfeited. Because the opinion overlooked these facts, which are pivotal to the scope of the district court proceedings on remand, the Court should grant panel rehearing under Federal Rule of Appellate Procedure 40 and issue a modified opinion.

II. BACKGROUND

A. Apple Raised the *De Minimis* Defense in Each Answer to Plaintiffs' Complaints

Plaintiffs filed three complaints in this action, and Apple asserted a *de minimis* defense in its answer to each one. In its answer to Plaintiffs' original complaint, which sought wages for time spent participating in bag and technology checks,

Apple asserted, in its fourteenth affirmative defense, that Plaintiffs' claim for wages for time spent participating in checks was barred because any such time was *de minimis*. Dist.Ct.Dkt. 27 at 17:9-12. In its answer to Plaintiffs' first amended complaint, which alleged the same theory of harm, Apple again asserted, in its twelfth affirmative defense, that Plaintiffs' claims for wages for time spent participating in checks was barred because any such time was *de minimis*. Dist.Ct.Dkt. 105 at 23:13-17. And in its answer to Plaintiffs' second amended complaint, which again alleged the same theory of harm, Apple asserted, for a third time, in its tenth affirmative defense, that Plaintiffs' claims for wages for time spent participating in checks was barred because any such time was *de minimis*. Dist.Ct.Dkt. 240 at 13:13-16; *see also* Dist.Ct.Dkt. 242 at 17:20-23 (Plaintiffs' motion for class certification acknowledging Apple raised the *de minimis* defense in its answer to the operative second amended complaint).

B. Apple Raised the *De Minimis* Defense in Its Pre-Certification Motion for Summary Judgment

Before Plaintiffs moved for class certification, Apple moved for summary judgment as to each named plaintiff. Dist.Ct.Dkt. 156. In that motion, Apple argued that even if time spent in checks constitutes "hours worked," Apple was entitled to summary judgment because the undisputed facts showed that any time they spent in checks was *de minimis*. *Id.* at 22:5–25:7 ("[I]f the Court holds the time at issue constitutes 'hours worked,' summary judgment should still be granted because such

time is *de minimis*."). The district court denied Apple's motion, concluding that triable issues of fact existed on the threshold issue whether time spent in checks was compensable work, but did not issue a ruling either way on whether the time was *de minimis*. Dist.Ct.Dkt. 166.

C. Plaintiffs' Motion for Certification Proposed a Trial Plan to Accommodate Apple's *De Minimis* Defense and Other Individualized Issues

On May 11, 2015, Plaintiffs filed a motion for certification of particular issues pursuant to Federal Rule of Civil Procedure 23(c)(4). Dist.Ct.Dkt. 242. In that motion, Plaintiffs acknowledged that there were disputed facts regarding several aspects of the ultimate liability question, including whether checks lasted more than a *de minimis* amount of time:

> The record also suggests, however, that there is "inconsistency" and "randomness" regarding the Checks, words Apple has intoned throughout the litigation. For example: (i) not every Apple Employee brings a bag or Apple product to work every day; (ii) not every Apple Employee goes through a Check each time he or she exits a California Store; (iii) there are times when some California Stores do not conduct checks; and (iv) *the Checks sometimes take less than a minute in duration and sometime more*. Thus, while there are many common questions applicable to every Apple Employee regarding the Check policy, there are also individual questions about when and how often Apple Employees go through Checks.

Id. at 1:23–2:6 (emphasis added).

Plaintiffs admitted in this motion that the parties disputed whether the time spent in checks was *de minimis*, noting that Plaintiffs' witnesses claimed checks

lasted 10-15 minutes, while Apple managers claimed the checks lasted mere seconds. *Id*. at 9:11–10:5. Recognizing the numerous individualized questions of fact raised by Plaintiffs' claim, Plaintiffs asked the district court to grant certification pursuant to a two-phase trial plan. For "Phase One," Plaintiffs suggested the district court could resolve what they perceived to be "overarching" common issues, including: "(i) the existence and terms of Apple's Check policy; (ii) Apple's liability for subjecting Apple Employees to Checks at California Stores; (iii) Apple management's actual or constructive knowledge that Apple Employees go through Checks without getting paid; and (iv) the application and scope of Apple's *de minimis* defense regarding the Checks." *Id.* at 2:17-21.

Plaintiffs went on to ask the district court to approve a "Phase Two" trial plan in the event Plaintiffs prevailed at Phase One. In Phase Two, Plaintiffs asked the district court to appoint special masters to resolve individual claims (if any), for time spent in checks. *Id*. at 2:21-27. Again, among the individual issues to be resolved in their proposed "Phase Two" of the trial plan was Apple's *de minimis* defense: "Should the Court find that waiting times of less than one minute are *de minimis* as a matter of law [in Phase One], *that holding can apply to the individual claim process contemplated under Phase Two of the litigation*." *Id*. at 24:1-3 (emphasis added). Moreover, Plaintiffs specifically acknowledged that Phase Two of their proposed trial plan was necessary to preserve Apple's right to due process. *Id*. at 3:1-4 ("Apple

will retain its due process rights to contest the individual claims of Apple Employees who wish to participate in Phase Two of the litigation."); *see also id*. at 2:24-27 ("It is during this second phase that Apple can raise the 'individual' issues it has highlighted throughout this proceeding, including that some California Stores have 'break rooms' and some do not; some stores have security guards that perform Checks and some do not; and some Apple Employees have bags and go through Checks and some do not.").

As Plaintiffs predicted, Apple did raise the *de minimis* defense in opposition to Plaintiffs' class certification motion. Dist.Ct.Dkt. 255 at 7:12–8:3, 11:13-23, 20:9–22:21. In their reply, Plaintiffs argued their two-phased trial plan satisfactorily preserved Apple's right to litigate its *de minimis* defense:

> Apple's most pressing fear appears to be a finding of liability as to Apple Employees who did not go through Checks. . . . In fact, this is precisely the outcome Plaintiffs' Trial Plan is designed to prevent and which Apple should resoundingly endorse; *to wit*, a procedure that contemplates the imposition of liability only as to Apple Employees who went through Checks for longer than a *de minimis* period of time.

Dist.Ct.Dkt. 271 at 12:1-12 (underlining in original).

D. The District Court Reserved the *De Minimis* Defense for Post-Certification Proceedings

The district court "largely" granted Plaintiffs' motion (Dist.Ct.Dkt. 297 at 1:19-20), and approved the proposed two-phased approach to further litigation. More specifically, citing Plaintiffs' counsel's declaration, the district court

acknowledged the conflicting evidence regarding the amount of time employees spent participating in bag checks. *Id*. at 4:22-25 ("Employee estimates of the duration of the whole process, including both searches and wait times, range from five minutes to up to twenty minutes per search, with the extremes occurring during busy periods such as product launches or holiday seasons. By contrast, managers estimate wait times at only a few seconds (*e.g.*, Shalov Decl., Exhs. 6, 33).").

The district court suggested there was an aspect of the *de minimis* defense that potentially could be adjudicated on a class-wide basis, namely, the threshold below which time spent in checks would be deemed *de minimis*. *Id*. at 11:18–12:3 ("[I]f the time is compensable at all, an across-the-board rule, such as sixty seconds, might wind up being the *de minimis* threshold. This issue as well will be litigated on a class-wide basis.").

After considering Apple's arguments regarding the individualized nature of the *de minimis* defense, however, the district court ruled that Apple would be allowed to litigate whether class members exceeded a *de minimis* threshold in a second phase of the post-certification litigation:

> *In the event that Apple loses on the merits*, it will be necessary, as Apple points out, to litigate the issue of who actually stood in line and for how long. *This would be pursuant to a claims process, after yet another class notice, wherein class members would certify under oath the extent to which, if at all, they stood in line beyond any de minimis threshold. Claimants would, of course, be subject to cross-examination and counter-proof offered by Apple*.

Id. at 12:16-20 (emphasis added); *see also id.* at 12:22–13:1 ("[T]he Court is prepared, if the Seventh Amendment so requires, to give Apple its day in court before a jury, trying contested claims before one or more juries.").

Importantly, in granting class certification, the district court held that the limited "generic" question of whether "time spent *pursuant to Apple's bag-search policy* is compensable without regard to any special reason any employee brought a bag to work" was susceptible to class-wide adjudication. *Id.* at 14:9-12 (emphasis added). The district court invited both parties to file a motion for summary judgment regarding only as to this limited issue, and it is the resolution of those motions that is before this Court. *Id.* at 14:14-15 ("Both sides shall have a second opportunity to move for summary judgment on the generic issue.").

E. Plaintiffs' Cross-Motion for Summary Judgment Did Not Address Apple's *De Minimis* Defense

In accordance with the district court's order, Plaintiffs moved for summary judgment only as to the limited issue of "whether 'time spent *pursuant to Apple's bag-search policy* is compensable without regard to any special reason any employee brought a bag to work' (*see* Dkt. 297 at 14)." Dist.Ct.Dkt. 319 at 2:9-11 (emphasis added, ECF pagination). In their brief, Plaintiffs argued only that time spent in checks under the terms of Apple's bag check policy constituted work under both the "control" test and the "suffered or permitted to work" test. *See generally* Dist.Ct.Dkt. 319. Plaintiffs did not move for summary judgment on the premise that

all class members spent more than a *de minimis* amount of time in bag checks. Nor did Plaintiffs move for summary judgment on the premise that Apple's *de minimis* affirmative defense lacked merit. Plaintiffs merely referenced in the "Factual Background" of their motion the (non-material) fact that, "[i]n addition to the time spent in the actual Check, Apple Employees wait for Checks to be conducted." *Id.* at 2:10-11. Plaintiffs did not introduce evidence about how much time was spent in checks or that the time was more than *de minimis*, and in the context of this motion regarding whether time spent in checks "pursuant to Apple's policy" was work, Apple's policy did not speak to how much time would be spent in checks. Indeed, the phrase "*de minimis*" does not appear anywhere in Plaintiffs' motion for summary judgment.

In its opposition to Plaintiffs' motion for summary judgment, Apple specifically disputed Plaintiffs' assertion that class members waited for checks, and submitted evidence that the entire check process lasted mere seconds:

> Plaintiffs assert that "[i]n addition to the time spent in the actual Check, Apple employees wait for Checks to be conducted." (Pl. Mot., 2:10-11.) This assertion is disputed. Even if an employee left with a bag or a personal Apple device and a check occurred, Dr. Hall's analysis of checks conducted at the San Francisco store, for instance, showed that the average wait time for a check was between zero and .97 seconds. (Ex. Q, at p. 16.)
>
> Dr. Hall's findings are supported by substantial evidence, including the testimony of Apple's witnesses (both management and non-management employees) and the deposition testimony of Plaintiffs' witnesses (as opposed to their declarations), which confirm that the

> check process generally lasted seconds. (E.g., Ex. J-22, ¶ 13 ("When I did have checks done, the bag and technology check process took together about 15 seconds or less."); Ex. J-16, ¶ 10 ("The longest time, in total, including all waiting and check time, that I've ever experienced in a bag check is about 30 seconds. This (30 seconds' duration) would be exceedingly rare."); Ex. J-7, ¶ 11 ("The bag check process usually takes about 10 seconds or less."); Ex. J-13, ¶ 6 (longest wait was "about one minute."), ¶ 7 ("The bag check itself takes at most 15-20 seconds."); Ex. V, at p. 88:17-22 (stating at least 50% of the time a bag check lasted only 30 seconds).

Dist.Ct.Dkt. 325 at 8:22–9:10 (underlining in original).

III. REASONS FOR GRANTING PANEL REHEARING AND MODIFYING THE OPINION

Panel rehearing should be granted when "[a] material point of fact or law was overlooked." *Adamson v. Port of Billingham*, 907 F.3d 1122, 1136 (9th Cir. 2018) (citing Fed. R. App. P. 40 & 9th Cir. Rule 40-1). Apple respectfully submits that the opinion "overlooked" a "material point of fact or law" in stating that Apple forfeited its *de minimis* defense by purportedly not raising it before the district court in opposing Plaintiffs' motion for summary judgment. Opn. at 11–12. Apple has repeatedly put this defense at issue throughout the litigation, and was not obligated to re-raise it in opposition to Plaintiffs' motion for summary judgment, which was narrowly focused on the threshold "Phase One" question of whether time spent in checks constituted "hours worked" under California law and did not implicate the *de minimis* issue. Now that time spent participating in checks under Apple's policy has been deemed to constitute "hours worked," whether the time spent in checks was

de minimis is a material, unresolved issue that goes to whether Apple is liable or not to any particular class member. The Rules Enabling Act and due process require that Apple be permitted to raise its *de minimis* defense before the district court before class members are awarded any compensation.

A. Apple Did Not Waive Its *De Minimis* Defense

As noted above, the district court held that the narrow question of whether time spent participating in checks "pursuant to Apple's bag-search policy" constitutes work was susceptible to class-wide adjudication. Dist.Ct.Dkt. 297 at 14:9-12. Accordingly, it invited the parties to file motions for summary judgment regarding this "generic" issue only (*id.* at 14:14-15), and declared that "the extent to which, if at all, [class members] stood in line beyond any *de minimis* threshold" could be adjudicated during a second phase of any post-certification proceedings. *Id*. at 12:16-20. This Court's opinion similarly confirms that the only issue being decided at summary judgment is this same "generic" issue. Opn. at 11 ("Plaintiffs' motion for summary judgment had . . . sought a ruling solely on what the district court characterized as the 'main issue of compensability': whether 'time spent pursuant to Apple's bag-search policy is compensable without regard to any special reason any employee brought a bag to work.'").

Although the district court suggested that the threshold below which time spent in checks would be deemed *de minimis* potentially could be adjudicated on a

class-wide basis (Dist.Ct.Dkt. 297 at 11:18–12:3), Plaintiffs did *not* seek summary judgment on the premise that all time spent in checks exceeded some (as-yet undefined) *de minimis* amount. Nor did they move for summary judgment on the premise that Apple's *de minimis* defense failed as a matter of undisputed fact or law. Nor has any court ruled, implicitly or explicitly, that because time spent in these checks constituted "hours worked," it necessarily exceeded some *de minimis* threshold. In short, because Plaintiffs' motion for summary judgment did not raise the issue whether the time spent in checks was *de minimis*, and because the district court had expressly ruled in its certification order that Apple's *de minimis* defense would be litigated in a second phase of post-certification litigation "if Apple loses on the merits," there was no reason for Apple to argue the defense in opposition to that motion.

Nonetheless, Apple did make clear in its opposition to Plaintiffs' motion for summary judgment that the amount of time spent in checks was disputed, and introduced expert evidence, as well as declarations, showing that the check process took mere seconds. Dist.Ct.Dkt. 325 at 8:22–9:10. Further, Apple had raised the *de minimis* defense in every answer and repeatedly asserted it throughout the proceedings. Indeed, based on the trial plan proposed in Plaintiffs' motion for certification of particular issues and based on the district court's certification order,

it was established that if Plaintiffs' motion for summary judgment were granted, Apple would be able to litigate the *de minimis* defense in individual proceedings.

This is thus not a case like *Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955 (9th Cir. 2020), cited in the opinion at page 12. In that case, the parties filed a stipulation requesting an extension of the 90-day deadline for the plaintiff to file her motion for class certification. In that stipulation, the plaintiff stated she needed additional time to complete discovery relevant to her motion for class certification. The district court denied the parties' request to extend the 90-day deadline. When the plaintiff later filed her motion for class certification, she simultaneously submitted a joint motion requesting permission to supplement her certification motion with additional, recently completed discovery, which the court granted. *Id*. at 961. But in her motion for class certification, her supplemental motion and her reply brief, the plaintiff did not contend that she hadn't been afforded sufficient time to complete all discovery necessary to support her motion. *Id*. at 961–62. Thus, when the plaintiff tried to argue on appeal that she was had not been afforded adequate discovery with respect to class certification, this Court concluded she had waived the argument, because she had not raised it "sufficiently for the trial court to rule on." *Id*. at 965, 966.

By contrast, here, Apple repeatedly raised the *de minimis* defense throughout the district court proceedings, including through a pre-certification motion for

summary judgment. Indeed, Apple had sufficiently raised it such that the district court specifically stated that Apple would be permitted to assert the *de minimis* defense in a second phase of post-certification proceedings, including as part of a claims process involving individual class members. Dist.Ct.Dkt. 166 at 12. As set forth above, Plaintiffs specifically acknowledged the individualized issues raised by Apple's *de minimis* defense in their motion for certification and therefore asked the district court to table the defense until Phase Two of their proposed trial plan: if/when time spent in checks was deemed "hours worked," then Apple would be permitted to litigate its *de minimis* defense. In granting Plaintiffs' certification motion, and the district court endorsed the proposed two-phased, post-certification procedure and confirmed Apple would be permitted to assert the *de minimis* defense "[i]n the event Apple loses on the merits." Further, as explained above, Plaintiffs' motion for summary judgment did not raise the *de minimis* defense, and Apple can hardly be faulted for not responding to an argument that Plaintiffs did not raise themselves and that was expressly reserved by the district court for a subsequent stage of the case. In light of the full context and history of this case, there is no basis to find any waiver of Apple's *de minimis* defense.

B. The Issue Is Material Because the Rules Enabling Act and Due Process Require That Apple Be Permitted to Litigate Its *De Minimis* Defense

Apple respectfully seeks rehearing on this issue and a modest modification of the opinion because this is an important issue that is material to this case. Class members who experienced checks that only took a *de minimis* amount of time have not just a lower amount of recoverable damages, but no viable claim against Apple whatsoever. Failing to provide Apple with an opportunity to show why it is not liable to those class members—in a remedy phase or otherwise—would violate the Rules Enabling Act and basic principles of due process. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 35 (2014). Further, if such uninjured persons were permitted to receive awards of damages upon remand, Article III would be violated, too. *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020).

As noted above, Plaintiffs have already conceded that Apple has a "due process right[]" to litigate how the check policy actually worked and was applied to members of the class (*see, e.g.*, Dist.Ct.Dkt. 242 at 3, 24–25), and contemplated that Apple could raise issues relating to the length of the checks in any "Phase Two" proceeding. *Id*. at 24:1-3 ("Should the Court find that waiting times of less than one minute are *de minimis* as a matter of law, that holding can apply to the individual claim process contemplated under Phase Two of the litigation."). The district court

similarly ruled that, at Phase Two, "it will be necessary . . . to litigate the issue of who actually stood in line and for how long," through a "claims process . . . wherein class members would certify under oath the extent to which, if at all, they stood in line beyond any *de minimis* threshold," where claims "would, of course, be subject to cross-examination and counter-proof offered by Apple." Dist.Ct.Dkt. 297 at 12:16-20. Plaintiffs never challenged this aspect of the certification order, and thus, Apple has not previously been afforded the right to defend that aspect of the order.

IV. CONCLUSION

Because the opinion "overlooks" a "material" "point of fact or law," Apple requests that the Court grant panel rehearing and either excising the paragraph altogether or modifying the following paragraph at pages 11-12 by adding the bolded language and removing the stricken language:

> Apple also argues that there are disputed facts regarding whether time spent by class members undergoing a search is *de minimis*. **Although this argument does not bear on the question whether Plaintiffs are entitled to summary judgment on the legal issue of whether time spent pursuant to Apple's bag-search policy is "hours worked," Apple may raise this argument during the subsequent individual proceedings on remand**. ~~Apple failed to raise this argument before the district court in opposing Plaintiffs' motion for summary judgment; the argument is therefore forfeited. *Davidson v. O'Reilly Auto Enters., LLC*, F.3d , 2020 WL 4433118, at *7 (9th Cir. Aug. 3, 2020).~~

Dated: September 17, 2020

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous, Jr.
Joshua S. Lipshutz
Bradley J. Hamburger
Lauren M. Blas
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213-229-7000
Email: tboutrous@gibsondunn.com

Julie A. Dunne
DLA PIPER LLP (US)
401 B Street, Ste. 1700
San Diego, CA 92101-4297
Telephone: 619-699-2690

Counsel for Defendant-Appellee Apple Inc.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Petition for Rehearing is proportionately spaced, has a typeface of 14 points, and contains 4,068 words, excluding the portions excepted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count feature of Microsoft Word used to generate this brief.

s/ *Theodore J. Boutrous, Jr.*
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I certify that I electronically filed this Petition for Panel Rehearing with the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system on September 17, 2020, and that service will be made on counsel of record for all parties to this case through the Court's CM/ECF system.

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMANDA FRLEKIN; TAYLOR KALIN; AARON GREGOROFF; SETH DOWLING; DEBRA SPEICHER, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants*, v. APPLE, INC., a California corporation, *Defendant-Appellee.*	No. 15-17382 D.C. Nos. 3:13-cv-03451-WHA 3:13-cv-03775-WHA 3:13-cv-04727-WHA OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted July 11, 2017
Submission Withdrawn August 16, 2017
Resubmitted August 26, 2020
San Francisco, California

Filed September 2, 2020

Before: Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Consuelo B. Marshall,* District Judge.

Opinion by Judge Marshall

SUMMARY**

Labor Law

The panel reversed the district court's grant of summary judgment in favor of defendant Apple, Inc., in a wage-and-hour class action brought by employees who sought compensation under California law for time spent waiting for and undergoing exit searches.

Upon the panel's certification of a question of California law, the California Supreme Court concluded that time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees was compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order 7.

The panel reversed the district court's grant of Apple's motion for summary judgment and remanded with instructions to (1) grant plaintiffs' motion for summary

* The Honorable Consuelo B. Marshall, United States District Judge for the Central District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

judgment on the issue of whether time spent by class members waiting for and undergoing exit searches pursuant to Apple's "Employee Package and Bag Searches" policy is compensable as "hours worked" under California law, and (2) determine the remedy to be afforded to individual class members.

COUNSEL

Kimberly A. Kralowec (argued) and Kathleen S. Rogers, The Kralowec Law Group, San Francisco, California; Lee S. Shalov and Brett R. Gallaway, McLaughlin & Stern LLP, New York, New York; for Plaintiffs-Appellants.

Julie A. Dunne (argued), Littler Mendelson P.C., San Diego, California; Richard H. Rahm, Littler Mendelson P.C., San Francisco, California; Theodore J. Boutrous Jr., Joshua S. Lipshutz, Bradley J. Hamburger, and Lauren M. Blas, Gibson Dunn & Crutcher LLP, Los Angeles, California; for Defendant-Appellee.

Michael D. Singer and Janine R. Menhennet, Cohelan Khoury & Singer, San Diego, California, for Amicus Curiae California Employment Lawyers Association.

OPINION

MARSHALL, District Judge:

Plaintiffs Amanda Frlekin, Taylor Kalin, Aaron Gregoroff, Seth Dowling, and Debra Speicher brought this wage-and-hour class action on behalf of current and former non-exempt employees who have worked in Defendant

Apple, Inc.'s retail stores in California since July 25, 2009. Plaintiffs seek compensation for time spent waiting for and undergoing exit searches pursuant to Apple's "Employee Package and Bag Searches" policy (the "Policy"), which states:

> **Employee Package and Bag Searches**
>
> All personal packages and bags must be checked by a manager or security before leaving the store.
>
> **General Overview**
>
> All employees, including managers and Market Support employees, are subject to personal package and bag searches. Personal technology must be verified against your Personal Technology Card (see section in this document) during all bag searches.
>
> Failure to comply with this policy may lead to disciplinary action, up to and including termination.
>
> **Do**
>
> - Find a manager or member of the security team (where applicable) to search your bags and packages before leaving the store.

Do Not

- Do not leave the store prior to having your personal package or back [sic] searched by a member of management or the security team (where applicable).

- Do not have personal packages shipped to the store. In the event that a personal package is in the store, for any reason, a member of management or security (where applicable) must search that package prior to it leaving the store premises.

Apple also provides guidelines to Apple store managers and security team members conducting the searches pursuant to the Policy, which state:

> All Apple employees, including Campus employees, are subject to personal pack age [sic] checks upon exiting the store for any reason (break, lunch, end of shift). I t [sic] is the employee's responsibility to ensure all personal packages are checked b y [sic] the manager-on-duty prior to exiting the store.
>
> When checking employee packages, follow these guidelines:
>
> - Ask the employee to open every bag, brief case, back pack, purse, etc.
>
> - Ask the employee to remove any type of item that Apple may sell. Be sure

to verify the serial number of the employee's personal technology against the personal technology log.

- Visually inspect the inside of the bag and view its contents. Be sure to ask the employee to unzip zippers and compartments so you can inspect the entire co ntents [sic] of the bag. If there are bags within a bag, such as a cosmetics case, be sure to ask the employee to open these bags as well.

- At no time should you remove any items inside the bag or touch the employee's personal belongings. If something looks questionable, ask the employee to move or remove items from the bag so that the bag check can be completed.

- In the event that a questionable item is found, ask the employee to remove t he [sic] item from the bag. Apple will reserve the right to hold onto the questioned i tem [sic] until it can be verified as employee owned. (This will make the employee mor e [sic] aware to log in all items at start of shift).

- If item cannot be verified by [the manager on duty], contact Loss Prevention . . . .

Employees estimate that the time spent waiting for and undergoing an exit search pursuant to the Policy typically ranges from five to twenty minutes, depending on the manager or security guard's availability. Some employees reported waiting up to forty-five minutes to undergo an exit search. Employees receive no compensation for the time spent waiting for and undergoing exit searches, because they must clock out before undergoing a search pursuant to the Policy.

On July 16, 2015, the district court certified a class defined as "all Apple California non-exempt employees who were subject to the bag-search policy from July 25, 2009, to the present." Because of concerns that individual issues regarding the different reasons why employees brought bags to work, "ranging from personal convenience to necessity," would predominate in a class-wide adjudication, the district court (with Plaintiffs' consent) made clear in its certification order that "bag searches" would "be adjudicated as compensable or not based on the most common scenario, that is, an employee who voluntarily brought a bag to work purely for personal convenience." Therefore, the certified class did not include employees who were required to bring a bag or iPhone to work because of special needs (such as medication or a disability accommodation).

The parties filed cross-motions for summary judgment on the issue of liability. On November 7, 2015, the district court granted Apple's motion and denied Plaintiffs' motion. The district court ruled that time spent by class members waiting for and undergoing exit searches pursuant to the Policy is not compensable as "hours worked" under California law because such time was neither "subject to the control" of the employer nor time during which class

members were "suffered or permitted to work." Plaintiffs timely appealed.

We certified to the California Supreme Court the following question of state law:

> Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7?

Frlekin v. Apple, Inc., 870 F.3d 867, 869 (9th Cir. 2017). The California Supreme Court granted our request to decide the following question of California law, as reformulated by the California Supreme Court (*see* Cal. Rules of Court, rule 8.548(f)(5)):

> Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of Wage Order 7?

Frlekin v. Apple Inc., 457 P.3d 526, 529 (Cal. 2020). The California Supreme Court concluded the answer to the question certified, as reformulated, is yes. *Id.*

Following the California Supreme Court's decision, the parties filed supplemental briefs addressing whether there

are factual disputes that would preclude summary judgment for Plaintiffs on remand.[1]

I.

We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review a district court's order granting summary judgment *de novo*. *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1277 (9th Cir. 2017). "A grant of summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). The evidence is viewed "in the light most favorable to the non-moving party." *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc).

III.

California Industrial Welfare Commission Wage Order No. 7 provides: "Every employer shall pay to each employee

[1] Plaintiffs request that we take judicial notice of the following records of the California Supreme Court: (1) Answer Brief on the Merits filed March 19, 2018 (relevant excerpt); (2) Defendant and Respondent Apple Inc.'s Petition for Rehearing filed Feb. 28, 2020 (relevant excerpt); (3) Answer to Petition for Rehearing filed March 9, 2020 (relevant excerpt); (4) Order Denying Rehearing filed May 13, 2020; and (5) Letter from the Supreme Court of California filed May 14, 2020. Plaintiffs' Motion for Judicial Notice is granted because these documents are court filings in the California Supreme Court proceeding regarding the question we certified. *See* Fed. R. Evid. 201(d); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (observing that the court "may take judicial notice of court filings and other matters of public record").

. . . not less than the applicable minimum wage for all hours worked in the payroll period . . . ." Cal. Code Regs. tit. 8, § 11070(4)(B). The Wage Order further provides: "'Hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." *Id.* § 11070(2)(G). The California Supreme Court has explained that the two parts of the definition—"time during which an employee is subject to the control of an employer" and "time the employee is suffered or permitted to work, whether or not required to do so"—establish "independent factors, each of which defines whether certain time spent is compensable as 'hours worked.'" *Morillion v. Royal Packing Co.*, 995 P.2d 139, 143 (Cal. 2000).

In answering the question certified, as reformulated, the California Supreme Court held that Apple's employees "are subject to Apple's control while awaiting, and during, Apple's exit searches," and therefore Apple "must compensate those employees . . . for the time spent waiting for and undergoing" the exit searches pursuant to the Policy. *Frlekin*, 457 P.3d at 538. The California Supreme Court reasoned: "Apple's exit searches are required as a practical matter, occur at the workplace, involve a significant degree of control, are imposed primarily for Apple's benefit, and are enforced through threat of discipline. Thus, according to the 'hours worked' control clause, plaintiffs 'must be paid.'" *Id.*[2]

[2] The California Supreme Court declined to consider whether the time spent waiting for and undergoing exit searches pursuant to the Policy is compensable under the "suffered or permitted to work" clause. *Frlekin*, 457 P.3d at 538.

The district court had held to the contrary in granting summary judgment to Apple. Accordingly, the court erred in granting summary judgment to Apple.

Plaintiffs' motion for summary judgment had similarly sought a ruling solely on what the district court characterized as the "main issue of compensability": whether "time spent pursuant to Apple's bag-search policy is compensable without regard to any special reason any employee brought a bag to work." The California Supreme Court's holding is equally dispositive of that motion and, therefore, Plaintiffs are entitled to summary judgment on the main issue of compensability.

In its supplemental briefing, Apple contends that disputed, material facts preclude summary judgment in favor of Plaintiffs because some class members "did not bring bags or devices to work," "were never required to participate in checks," or "worked in stores with remote break rooms where they stored their belongings," and because it is disputed whether the Policy was enforced through discipline. Those purported disputed facts pertain solely to individual remedies, not to the main legal question as to class-wide relief. As Apple itself recognized in opposing summary judgment, those purported disputed facts are irrelevant to whether time spent by class members waiting for and undergoing exit searches pursuant to the Policy is compensable as "hours worked" under California law. On remand, the district court shall resolve any relevant factual disputes as part of its ordinary determination of individual remedies, such as by requiring sworn claim forms.

Apple also argues that there are disputed facts regarding whether time spent by class members undergoing a search is *de minimis*. Apple failed to raise this argument before the district court in opposing Plaintiffs' motion for summary

judgment; the argument is therefore forfeited. *Davidson v. O'Reilly Auto Enters., LLC*, — F.3d —, 2020 WL 4433118, at *7 (9th Cir. Aug. 3, 2020).

Because no material facts are in dispute as to whether time spent by class members waiting for and undergoing exit searches pursuant to the Policy is compensable as "hours worked" under California law, Plaintiffs are entitled to summary judgment on that legal question.

IV.

We reverse the district court's grant of Apple's motion for summary judgment and denial of Plaintiffs' motion for summary judgment, and we remand for further proceedings with instructions to (1) grant Plaintiffs' motion for summary judgment on the issue of whether time spent by class members waiting for and undergoing exit searches pursuant to the Policy is compensable as "hours worked" under California law, and (2) determine the remedy to be afforded to individual class members.

REVERSED and REMANDED with instructions.