

No. S243805

SUPREME COURT
FILED

JUN 08 2018

Jorge Navarrete Clerk

Deputy

Supreme Court
OF THE
State of California

AMANDA FRLEKIN, ET AL.,
Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.,
Defendant and Respondent.

On a Certified Question from the United States
Court of Appeals for the Ninth Circuit
Case No. 15-17382

**Motion to Augment the Record; Memorandum in
Support; Declaration in Support; Proposed
Order [Cal. Rules of Ct., rule 8.155(a)]**

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Attorneys for Plaintiffs, Appellants, and Petitioners

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MOTION TO AUGMENT THE RECORD; MEMORANDUM IN SUPPORT

I. INTRODUCTION

Pursuant to California Rule of Court 8.155(a), Plaintiffs, Appellants and Petitioners Amanda Frlekin et al. (collectively “Appellants”), on behalf of themselves and the certified class, move the Court to augment the record on appeal (“excerpts of record”) with the following documents, all of which were previously filed with the United States District Court for the Northern District of California (“district court”) in this action (Declaration of Kimberly A. Kralowec, below (“Kralowec Decl.”), ¶2):

Exhibit 1 to Kralowec Decl. (pp. 0002-0012): Excerpts from the January 8, 2014 deposition of Carol Monkowski, Vice-President of Retail Strategy and then Senior Director of Field Operations for Defendant-Respondent Apple, Inc. (“Respondent”) (“Monkowski Depo.”), filed February 20, 2014 in the district court (Dkt. No. 145-1).¹ (Ms. Monkowski executed a declaration, which is not part of the excerpts of record, but is attached as Exhibit A to, and the subject of, Apple Inc.’s Motion for Judicial Notice, filed 3/19/18 with its Answer Brief on the Merits (“Answer Brief”) (“Monkowski Declaration”).

Exhibit 2 to Kralowec Decl. (pp. 0014-0022): Monkowski Depo., Exhibit 19, “Loss Prevention” section of Apple’s posted policy and procedure. (Dkt. No. 145-3).

Exhibit 3 to Kralowec Decl. (pp. 0024-0035): Monkowski Depo., Exhibit 22, excerpt from Apple’s CORE employee training facilitator’s guide, concerning “Loss Prevention.” (Dkt. No. 145-3).

¹ The Monkowski Depo. transcript and exhibits (Exhs. 1, 2 & 3 hereto) were filed by Respondent and authenticated in a declaration of Respondent’s counsel, Todd K. Boyer, at SER 52:27-53:1. Docket numbers (“Dkt. No.”) refer to the district court’s docket.

Exhibit 4 to Kralowec Decl. (pp. 0037-0040): Excerpts from reporter's Transcript of Proceedings from May 22, 2014 hearing before the Hon. William H. Alsop of the district court (on Respondent's motion for summary judgment), filed 5/31/14 in the district court (Dkt. No. 167).

Exhibit 5 to Kralowec Decl. (pp. 0042-0047): Excerpts from Plaintiffs' Motion for Rule 23(c)(4) Certification of Particular Issues, filed May 12, 2015 in the district court (Dkt. No. 246-2).

Exhibit 6 to Kralowec Decl. (pp. 0049-0064): Excerpts from reporter's Transcript of Proceedings from July 2, 2015 hearing before the Hon. William H. Alsop of the district court, (on Appellants' Motion for Rule 23(c)(4) Certification of Particular Issues), filed July 9, 2015 in the district court (Dkt. No. 295).

Exhibit 7 to Kralowec Decl. (pp. 0066-0070): Excerpts from Plaintiffs' Second Supplemental Brief Pursuant to Court Order in Support of Motion for Rule 23(c)(4) Certification of Particular Issues, filed July 8, 2015 in the district court (Dkt. No. 291).

Exhibit 8 to Kralowec Decl. (pp. 0072-0074): Excerpts from Joint Statement Regarding Class and Notice and Related Documents, filed July 29, 2015 in the district court (Dkt. No. 305).

For the following reasons, Appellants respectfully ask the Court to grant their motion to augment the excerpts of record herein with each of these exhibits.

II. ARGUMENT

Rule 8.155(a) provides that the reviewing court "may order the record augmented" "at any time" on "motion of a party," with "any document filed or lodged in the superior court" (Cal. R. Ct. 8.155(a)(1)) or "a certified transcript ... of

oral proceedings not designated under rule 8.130” (Cal. R. Ct. R. 8.155(a)(2)).² It is well established that this rule is to be construed liberally. *People v. Brooks*, 26 Cal.3d 471, 484 (1980); *People v. Gaston*, 20 Cal.3d 476, 483 (1978) (construing prior rule 12a).

When Appellants designated documents and transcripts for the excerpts of record, there was no apparent need for the materials Appellants now seek to add by this motion. Kralowec Decl., ¶¶3-4. Appellant’s excerpts of record complied with the Ninth Circuit’s rules, which provide that “excerpts of record shall not include briefs or other memoranda of law filed in the district court unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor” (Circuit Rule 30-1.4), and provide for potential sanctions for over-designation (Circuit Rule 30-2).

The need to augment the record now arises from Respondents’ Answer Brief on the Merits, filed in this Court, including (1) arguments relying on statements in the Monkowski Declaration it has asked the Court to judicially notice, which Respondent did not include in its supplemental excerpts of record and never mentioned in its briefs to the Ninth Circuit; and (2) its discussion of the positions of counsel and certain rulings of the district court in connection with class certification, which did not mention important parts of the record that are essential to a complete understanding of these positions and rulings. Kralowec Decl., ¶3.

This motion is timely, will cause no delay, and demonstrates a compelling need for augmentation.

² Rule 8.155(a) refers to the “superior” court, but as the parties are before this Court on certified questions from the Ninth Circuit, the Rule should logically apply to documents and transcripts filed in the district court.

A. Augmentation to Include the Monkowski Deposition and Exhibits (Exhs. 1, 2 & 3 hereto) Should be Permitted to Refute Statements in the Monkowski Declaration Filed with Respondents' Request for Judicial Notice

While Respondent repeatedly cites the Monkowski Declaration in its Answer Brief,³ Respondent did not include that declaration in its supplemental excerpts of record, and did not rely on it in the Ninth Circuit briefing. Kralowec Decl., ¶3.

Accordingly, Appellants now seek to augment the record with an excerpt from Ms. Monkowski's deposition (Monkowski Depo.), and two exhibits to that deposition. The purpose of these excerpts is to refute the newly-submitted Monkowski Declaration. See Kralowec Decl., ¶2 & Exhs. 1, 2 & 3.

Regardless of whether the Court ultimately considers the substance of that declaration,⁴ in accordance with the liberal construction of Rule 8.155(a), Appellants should nonetheless be permitted to augment the record with Exhibits 1, 2 and 3 to refute Respondent's reframed arguments in its Answer Brief as to what constitutes "work" under the applicable Wage Order. Kralowec Decl., ¶3.

B. Augmentation to Include Excerpts from Transcripts of Hearings (Exhs. 4 & 6 hereto), and Appellants' Briefs and the Parties' Joint Statement (Exhs. 5, 7 & 8 hereto), Should be Permitted to Provide Full Context for the Parties' Positions and the District Court's Rulings on Class Certification

Repeatedly in its Answer Brief, Respondent asserts "facts" regarding Appellants' motion for, and the district court's rulings on, class certification. In

³ Respondent argues in its Answer Brief that a statement in the Monkowski Declaration, that "Apple does not employ individuals in its retail stores for the purpose of submitting to" Checks, is determinative of whether the Checks constitute "work" under the applicable Wage Orders. Answer Brief at 53. Appellants seek to add Exhibits 1, 2 & 3 to refute that statement. Kralowec Decl, ¶3.

⁴ Judicial notice may be granted of the fact that a declaration was filed, but not the truth of the statements made in it. *People v. Woodell*, 17 Cal. 4th 448, 455 (1998).

particular, Respondent cites a non-existent “stipulation” and certain rulings of the district court concerning class members with a “special need” to bring bags to work. *See, e.g.*, Answer Brief at 10-11.

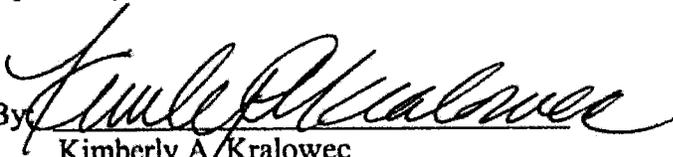
Appellants seek to augment the record with additional pages from the transcripts of two hearings below (heavily cited by Respondent) and eleven pages of excerpts from documents filed in the district court below. Exhs. 4, 5, 6, 7 & 8 hereto. These documents provide the context for the district court’s rulings on which Respondent relies. Kralowec Decl., ¶4. These excerpts will aid the Court in ruling on the certified question because they provide a complete picture of the actual rulings made in the district court.

III. CONCLUSION

For the above reasons, this Court is respectfully asked to grant the motion to augment the record to include the documents attached hereto as Exhs. 1 through 8.

Dated: June 8, 2018

Respectfully submitted,

By 
Kimberly A. Kralowec
KRALOWEC LAW, P.C.

Lee A. Shalov
MCLAUGHLIN & STERN, LLP

Attorneys for Plaintiffs, Appellants, and
Petitioners

DECLARATION OF KIMBERLY A. KRALOWEC IN SUPPORT OF MOTION TO AUGMENT THE RECORD

I, Kimberly A. Kralowec, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am appellate counsel of record for petitioners Amanda Frlekin et al. in the above-

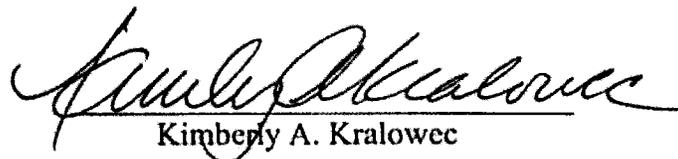
referenced proceeding. I have personal knowledge of the matters stated below, and if called upon to testify, would do so competently as to them.

2. Exhibits 1 through 8 attached hereto are true and correct copies of the documents identified in the list above. Each of these documents was filed in the district court in the proceedings below. The documents are necessary, and augmentation should be granted, for the following reasons.

3. Exhibits 1 through 3 are needed to refute the declaration of Carol Monkowski, of which Apple now seeks judicial notice, and which Apple cites in connection with its arguments concerning the “suffered or permitted to work” test. Apple did not include this declaration in its supplemental excerpts of record in the Ninth Circuit, and the declaration was not cited in Apple’s Ninth Circuit briefing. As a result, Appellants had no occasion to seek to augment the record to include these materials in that court.

4. Exhibits 4 through 8 provide the context needed so that the Court may fully understand, and so that Appellants may fully respond to, Apple’s argument concerning certain positions taken by counsel, and certain rulings of the district court at the class certification stage, regarding “special needs” class members. Apple’s argument to this Court on that point differs in some respects from the argument presented in its Ninth Circuit brief, so there was no need to submit additional pages in that court in order to refute it. Now, Appellants respectfully request that the record be augmented to include sixteen additional hearing transcript pages, of which Apple’s supplemental excerpts of record included only selected portions (SER 26-38), plus eleven more pages of excerpts from the class certification briefing in the district court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 8, 2018 at San Francisco, California.


Kimberly A. Kralowec

No. S243805

Supreme Court
OF THE
State of California

AMANDA FRLEKIN, ET AL.,
Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.,
Defendant and Respondent.

On a Certified Question from the United States
Court of Appeals for the Ninth Circuit
Case No. 15-17382

[Proposed]
Order Granting Motion to Augment the Record

Pursuant to Rule of Court 8.155(a), the motion to augment the record of petitioners Amanda Frlekin et al. is hereby granted in full.

Justice

EXHIBIT 1

000001

[Page 1]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMANDA FRELKIN, DEAN PELLE,
ADAM KILKER and BRANDON FISHER
on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

No. 12-cv-3451-WHA

APPLE INC., a California
corporation,

Defendant.

DEPOSITION OF CAROL MONKOWSKI

January 8, 2014

10:09 a.m.

50 West San Fernando Street, 15th Floor
San Jose, California

REPORTED BY:

Tracy Fletcher

CSR No. 11683

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3	Frelkin & Pelle vs. Apple Inc.		
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1 A. Okay.

2 Q. Could an employee accumulate points for not
3 complying with a policy like the bag-check policy?

4 A. No.

5 Q. Thank you. Okay. Have you ever seen any Apple
6 policies that recommend or suggest that managers check
7 coats as well as bags?

8 A. No, I have not.

9 MR. SHALOV: Let's mark as the next numbered
10 exhibit, it appears to be a series of documents. The
11 first page is entitled, "Loss prevention." The Bates
12 numbers are 2662 through 2670.

13 (Plaintiffs' Exhibit 19 was marked)

14 MR. SHALOV:

15 Q. I'm showing you what has been marked as Exhibit
16 19; have you ever seen this document or series of
17 documents before, Ms. Monkowski?

18 A. Yes.

19 Q. What is this document or series of documents?

20 A. This is loss prevention section of policy and
21 procedure from 2006.

22 Q. Did this appear in iCommunicate?

23 A. Yes.

24 Q. Did this appear in RNN?

25 A. Yes. Because -- 2009, yes.

1 Q. Did this appear in RetailMe?

2 A. No.

3 Q. How do we know?

4 A. Because of the versions of policy and when they
5 cut off. 2011 RetailMe was developed, and that's when
6 an update that we have was 2011.

7 Q. Were there procedures and guidelines similar to
8 those that appear in Exhibit 19 incorporated into the
9 policies and procedures that appeared in RetailMe?

10 A. Policies, yes, both, because both appeared --
11 no. The 2011 version was very streamlined, so if I was
12 looking at this, there are certain things that are in
13 there, but there is not a section on internal or
14 external the way it is laid out today. We looked at
15 those.

16 Q. What does that mean, we looked at those? I
17 don't want you to tell me anything you discussed with
18 your lawyer.

19 A. No. No. I was talking about us. I'm sorry.
20 They don't exist this way. There's not -- this section
21 has not been repeated or for some of these categories,
22 like sales floor, products, security, the second page,
23 back room product security no longer exists in the newer
24 version. This is 2006.

25 Q. Okay. Were the guidelines that appear in

1 Exhibit 19 applicable between 2006 and 2010 before
2 RetailMe was implemented?

3 MS. STRAUSS: Objection. Form.

4 THE WITNESS: Yes, possibly.

5 MR. SHALOV:

6 Q. Do you see the section on the first page called
7 "loss prevention"?

8 A. Yes.

9 Q. Did this section or substantially similar
10 language appearing in this section appear in RetailMe?

11 MS. STRAUSS: Objection. Form.

12 THE WITNESS: I mean, to be accurate, I'd have
13 to compare the two together to know exactly what was
14 left out and what isn't. We changed and updated our
15 language and words, so I'm not trying to be difficult.
16 I just don't want to be inaccurate.

17 MR. SHALOV:

18 Q. Let's go to the page bearing Bates number 2669.

19 A. 2669. Yes.

20 Q. About a third of the way down, there's a bullet
21 point that reads as follows: Quote, "Consistently
22 conduct personal property checks. All employees who
23 enter an employee-only area within the store, in parens,
24 such as cashwrap, genius bar, back room office, close
25 paren, are subject to coat, bag, backpack and purse

1 inspection when leaving the store for any reason," close
2 quote. Do you see that?

3 A. I do.

4 Q. Does that refresh your memory that Apple had
5 procedures with regard to not only checking bags and
6 packages but coats?

7 A. It does.

8 MS. STRAUSS: Objection. Form.

9 THE WITNESS: Too fast. It does refresh my
10 memory that that was part of the written policy, but not
11 a practice that I ever saw.

12 MR. SHALOV:

13 Q. Let's flip back to the preceding page, which is
14 2668, under the heading, quote, "internal theft," close
15 quote. Do you see that?

16 A. Yes.

17 Q. Are these directives?

18 MS. STRAUSS: I'm sorry, where are you? You
19 lost me.

20 MR. SHALOV: 2668.

21 THE WITNESS: The page before.

22 MS. STRAUSS: Thank you.

23 MR. SHALOV:

24 Q. Are these directives to retail store managers?

25 A. No.

1 Q. Who are they directives to, if anybody?

2 A. I don't know that they're directives. They are
3 published in the policy for all employees to see.

4 Q. I just want to get my terminology right, Ms.
5 Monkowski, are the items that appear on page 2668
6 policies, procedures or guidelines or something
7 different?

8 A. They are part of the document in 2006 that was
9 called policy and procedure that was posted to all
10 employees, um, a written policy and procedures.

11 Q. And these policies and procedures that appear
12 on this page were available not only to managers but
13 retail store employees as well? That's a bad question.

14 Are these policies and procedures available to
15 all retail store employees?

16 A. Yes.

17 Q. So it would include not only managers but
18 specialists as well?

19 MS. STRAUSS: Objection. Form.

20 THE WITNESS: Yes.

21 MR. SHALOV:

22 Q. And all retail store employees could access the
23 policies and procedures that appear on this page through
24 iCommunicate, correct?

25 MS. STRAUSS: Objection. Form.

1 priority. They do what they do day in and day out. Our
2 focus for that would be back of house team which are
3 inventory people count and keep track of the inventory
4 is the high priority, we're focusing on the theft rate.
5 Not when it comes to these policies. They do not -- we
6 do not believe it contributes either way, so that's why
7 we don't insist or have a way to audit or figure out if
8 they're doing it or not or insist on compliance.

9 Q. Is loss prevention very important to Apple?

10 MS. STRAUSS: Objection. Form.

11 THE WITNESS: I don't know I can answer for
12 Apple. Is it something we talk about every day? No
13 because we don't have high shrink, and we don't have
14 high loss.

15 MR. SHALOV: Let's mark as Exhibit 22, a
16 document entitled, "Loss prevention," Bates numbers 2863
17 through 2874.

18 (Plaintiffs' Exhibit 22 was marked)

19 MR. SHALOV:

20 Q. Showing you what has been marked as Exhibit 22,
21 and I'll ask you if you've ever seen this before, Ms.
22 Monkowski?

23 Before we begin, Ms. Monkowski, I'm going to
24 state for the record that the questions I ask you about
25 Exhibit 22 are going to be in your individual capacity

1 and not as your capacity as a representative of Apple
2 pursuant to the 30(b)(6) deposition notice that was
3 issued to the company, okay?

4 A. Yes.

5 Q. All right. Have you seen this before?

6 A. I believe when it first launched, yes.

7 Q. Can you identify it for the record?

8 A. It is part of official core training.

9 Q. Of whom?

10 A. Of all employees.

11 Q. And do you have an idea when this document or
12 presentation was created? And I say "presentation"
13 because I see a reference to slides, but if I
14 mischaracterize the document, you will tell me.

15 A. Um, yeah. From what I'm reading, I'm not sure
16 if it was 2012.

17 Q. And as best you can tell, is this actually a
18 document or a presentation or both?

19 A. This is a facilitator's guide, which is in the
20 front.

21 Q. What does that mean, a facilitator's guide?

22 A. Who's doing the training would use this guide,
23 so they would be the trainer, uses this guide to
24 facilitate the activities here which appears to be
25 slides. I've now gone through it.

1 STATE OF CALIFORNIA)

)

2 COUNTY OF SAN MATEO)

3

4 I, Tracy Fletcher, Certified Shorthand
5 Reporter, do hereby certify:

6 That prior to being examined, the witness in
7 the foregoing proceedings was by me duly sworn to
8 testify to the truth, the whole truth, and nothing but
9 the truth;

10 That said proceedings were taken before me at
11 the time and place therein set forth, and were taken
12 down by me in shorthand and thereafter transcribed into
13 typewriting under my direction and supervision;

14 I further certify that I am neither counsel
15 for, nor related to, any party to said proceedings,
16 nor in any way interested in the outcome thereof.

17 In witness whereof, I have hereunto subscribed
18 my name.

19

20 Dated: January 9, 2014

21

22

Tracy Fletcher



23

Tracy Fletcher
CSR No. 11683

24

25

EXHIBIT 2

000013

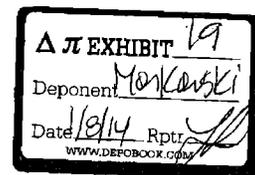
Loss Prevention

Loss—whether it occurs from external theft, internal theft, paperwork mistakes, or inaccurate inventories—is a costly and controllable expense that can dramatically impact your store's profitability.

Each and every employee is responsible for controlling loss in his/her store. This section details some of the ways you can help control loss in your store, and includes the following:

- Controlling external theft through customer service
- Identifying, controlling, and deterring internal theft
- Controlling and handling cash
- Guidelines for alarm systems, keys, and safes

One aspect of controlling loss that is not covered in this chapter is inventory management. Properly managing your inventory is one of the easiest ways to improve your store's profitability. Information on inventory management can be found in the Product/Merchandise Handling section.



Backroom Product Security

Technology products carry a higher price point than other types of products typically sold in stores (such as clothing, books, and kitchen supplies), so securing our products is critical. All stores must observe strict criteria for securing products. There are two levels of backroom product security: Unsecured and Secured. These levels are described below.

Store Managers and/or the Loss Prevention department may, at their discretion, impose additional security or tighter measures if they believe certain products and/or special circumstances warrant it.

Back of house security rules

1. Cages must remain locked at all times.
2. The door to the stockroom must remain closed at all times.
3. The back door to public areas must never be left open and unattended.
4. Keys to cages must never be given to an unauthorized employee.

Security Levels

Unsecured - Level 1

For products in the Unsecured category, use open shelving and peg boards. Level 1 products consist of everything that does not fit into the Level 2 criteria.

Secured - Level 2

Store items in the Secured category in a visible locked cage. Only store management and the Inventory Control Specialist will have keys to locked cages, which must remain locked when not in use. The following list is not all inclusive - it is a guide to the type of product that falls in the Secure level.

1. Internal shrink risk items (determined by the store management team).
2. RTW, Customer Returns, and Demo BOH product that is not ready for sale.
3. Customer units in for service that are not in the Genius Room, including Standard Care.

Authorized key holders

Only the following individuals are authorized to carry keys to cages and the BOH door.

1. Inventory Control Specialist
2. ASM and above

Salesfloor Product Security

Alarmed security cables must be placed on all demo laptops, cameras, camcorders, PDAs, and MP3 players, including iPod, on the salesfloor. Security cables and alarm boxes are available to order from Schwarz (Quick Click: [Schwarz website](#)).

Each store will receive two special Allen wrenches with their cable kits upon store opening. The wrenches must be kept in the key box in the manager's office at all times. If either of these wrenches are lost, notify the Loss Prevention department immediately.

Keys to the alarm boxes will be given to each manager in the store. All spare keys must be kept in the key box in the manager's office. If a key is lost, notify the Loss Prevention department immediately. All replacement keys will be ordered through the Loss Prevention department.

Defective Cables

In the event you receive defective cables, contact Se-Kure's Customer Service department at 800 322-2435. You will need to ask for a Return Goods Authorization Number (RGA#); explain what the defect is and list the items that you want to return. Once the RGA# is issued, you may return the merchandise. The RGA# number should be noted on the outside of the package. It will be inspected and credit issued for any defective product that is within warranty (1 year.) Product that is not defective (properly functioning) will be returned to the store.

External Theft

Shoplifting

Unfortunately, shoplifting is a reality and a common occurrence in the retail industry. 40% of all retail shrink is due to external theft. 90% of shoplifters are "professionals." They shoplift in order to pay their bills and feed their families. The other 10% are the "opportunists." If given the opportunity, they will shoplift for the thrill and challenge. The best way to prevent shoplifting is to provide consistently great customer service. For the safety of our employees and our customers, it is Apple's policy to prevent theft through customer service. Under no circumstance are you to make a stop or apprehend a person you believe or suspect to be a shoplifter.

Prevention

To prevent theft, follow the Apple steps of service and

- Acknowledge every customer. If you are helping another customer, a simple smile and eye contact acknowledging new customers lets them know you are aware of their presence. Acknowledging customers with eye contact and a warm welcome is the number one deterrent to external theft. Do not "watch" or "follow" customers you think may have concealed merchandise, but do offer assistance to them.
- Be aware. Look around your store regularly and take note of all customer activity.
- Never turn your back on the front of the store. Always face towards the front door when working with customers. This allows you to give a warm welcome to incoming customers and a fond farewell to departing customers.
- Software theft often occurs by opening a box and removing and concealing the contents of it. The Marketplace section of your store is a "hot spot" and should be covered at all times.
- Know what merchandise is in high demand and/or easily concealed. Pay extra attention to the sections of your store that house this merchandise.
- Stay focused. Your number one priority is customers and customer service. Always.
- Do not leave vendors or other unauthorized persons in the store unattended. At least one manager and one other person must be in the store at all times, except during overnight work, where only one manager must be present with the vendor doing the work.

Concealment

Concealing merchandise is the act of putting merchandise out of sight to prevent it from being found. Be aware of the following common items someone could use to conceal merchandise:

- Shopping bags, especially those that are not from the stores in your area or those that are old, badly wrinkled, or have obvious folds or creases
 - Large/empty purses or bags
 - Unseasonable clothing (for example, heavy coats in warm weather)
 - Jackets or coats carried in a way that conceals an arm or a hand
-
- Strollers/baby carriers
If you observe a customer concealing merchandise, follow these steps:
 - Notify your manager immediately. You and your manager should decide who will approach the customer.
 - When approaching, use a service-oriented, non confrontational statement to allow the customer to return the merchandise without feeling threatened. This approach can also help avoid a scene in your store.
 - Ask open-ended questions that refer to the item.
 - Offer to hold the item at the cashwrap until the customer is finished shopping.

- If possible, refer to the concealed item by name. If the customer knows you are aware that they have concealed an item, they are more likely to return the item. For example, you might say
 - "Photoshop is a great program. Customers tell me they love being able to manipulate their pictures. What do you like about it?"
 - "That iPod is a great way to take your iTunes with you. I'd be happy to hold it at the cashwrap for you while you continue looking around."

When approaching a suspected shoplifter, **never accuse the person of stealing**. Always approach the customer with a smile and a sincere wish to provide customer service. Maintain positive tone and body language with the customer. If the customer objects in any way, calmly explain that you thought you saw the customer making a selection and wanted to help.

Remember, customer service is your job. If you approach suspected shoplifters with this in mind, you will avoid the appearance of discrimination. In most cases, the suspected shoplifter will relinquish the item.

Apprehending Shoplifters

Under no circumstances are you to apprehend a shoplifter. For your own safety, do not chase a suspected shoplifter. If you are certain a shoplifting incident has occurred, keep the customer in view and ask another team member to contact the local police department. If you have a shoplifting problem in your store, call the Loss Prevention department at Campus, who will work with you to create a plan of action.

If you are approached by a police officer and informed that a suspect with your merchandise has been apprehended, immediately call the Loss Prevention department at Campus. Do not sign a complaint unless instructed to do so by Campus.

Documenting Theft or Attempted Theft

When an actual or attempted theft occurs in your store, do not take it personally. The shoplifter has stolen from Apple, not you. Be sure to complete an Incident Report found on iCommunicate (**Quick Click: Policy and Procedure**) and route it appropriately (that is, to your Regional Director, Loss Prevention department, and RFL). The following guidelines should be followed when completing the Incident Report:

- All fields should be complete. If an item does not apply, use N/A (not applicable).
- Complete the report at the time of the incident while the details are fresh in your mind.
- To avoid misunderstandings, do not use abbreviations.
- Describe the incident in a chronological manner.
- Provide only relevant, factual information. Do not include information unrelated to the incident.
- Use the Who, What, Where, When, Why format to complete the report. This will help ensure all necessary information is documented.
- Be specific and clear. Note only the facts. Do not speculate or add opinions to the report.

In addition to completing an Incident Report, notify the local police department. They will complete a Theft of Property report including the product descriptions, serial numbers, and part numbers.

Appearing as a Witness

You may be subpoenaed to testify in a shoplifting case. If this occurs, contact your manager or the Loss Prevention department.

Apple litigation needs to see any subpoenas that are served to/upon Apple Computer, Inc.

If your store receives a subpoena, fax it to 408-974-9316 and forward the original to the Apple Legal department via interoffice mail at MS:81-2SU (include in your Campus mail with this address).

If there are any questions or concerns as to what the subpoena entails, please feel free to contact one of the following individuals directly:

- Anh Nguyen: 408-974-4069
- Carol Jacobsen 408-974-6908
- Adeline Yu: 408-974-9609

If a subpoena is served for an individual employee and the subpoena is unrelated to Apple Computer, Inc. then there is no need to fax it to the Legal Department. Note: Apple Legal is not authorized to accept service on behalf of our employees.

Securing Demo Products

All demo products on the salesfloor, including those in the window displays, must be properly secured with 3M adhesive tape. 3M adhesive tape secures the product to the table or fixture while protecting the exterior of the product. The 3M tape is available to order from Schwarz (Quick Click: [Schwarz website](#)).

Empty Product Boxes

Empty product boxes may be available for high-end software. Place the empty product boxes on the salesfloor in lieu of actual product to avoid external theft. Be sure to place a Demo/Empty Product Box sticker (available from Schwarz, Quick Click: [Schwarz website](#)) over the price label to alert cashiers that the box is in fact empty. When selling the item, retrieve the actual product from the back-of-house for the customer. Do not open product boxes and remove product to create an "empty product box" without Retail Product Merchandising and Store Operations approval and direction.

Internal Theft

While most of our employees are honest, theft by employees is a reality—a reality that can contribute greatly to your store's shrinkage if not deterred and controlled. 45% of all retail shrink is due to internal theft.

Strong communication and strict adherence to policies and procedures are the keys to controlling internal theft in your store.

Defining Internal Theft

Internal theft can occur in a variety of ways, including

- Stealing merchandise from the store or from a customer's product that is being repaired
- Stealing money
- Stealing company assets
- Unauthorized copying of software
- Giving unauthorized discounts to customers or friends
- Processing fraudulent or nonexistent transactions
- Conspiracy or collusion with vendors
- Using a customer's credit card or financing account for personal use

Why Internal Loss Occurs

There are a number of reasons an employee may steal from Apple. The following are some common reasons that an employee may be stealing:

- The employee may feel that Apple owes him or her something extra for all of his/her hard work.
- The employee may be experiencing financial issues and feel that Apple "won't miss one computer" or some cash.
- The employee may be disgruntled due to losing hours, being passed over for a promotion or pay increase, or disagreements with the management team.

Controlling and Deterring Internal Theft

Apple does not tolerate dishonesty at any level. Internal theft should be discussed openly and on a regular basis with all employees. It is your responsibility to contact your manager and/or the Loss Prevention department if you become aware of an internal theft issue or a possible internal theft issue.

To help control and deter internal theft:

- Realize it can happen in your store.
- Post your internal loss prevention tip hotline poster and ensure your employees are aware of it.
- Do not circumvent or take shortcuts regarding policies and procedures. Follow all documented policies and procedures.
- Adhere to all store key policies. Never hand store keys to an unauthorized employee.
- You are never permitted to be in the store alone. A minimum of two people, one of whom must be a member of store management, must be present when you enter and exit the store and at all times while you're in the store, except during an overnight (see page 8-4). Do not leave vendors or other unauthorized persons in the store unattended.
- Purchases made by your friends or relatives must be processed by someone other than you.
- Trash removal must be supervised and inspected by a manager.

- All personal belongings brought into the store must be stored in shift lockers.
- Personal belongings are not to be left in lockers overnight.
- Purse, backpack, book bag, and package inspections must be conducted by a manager every time an employee leaves the store (for example, breaks, lunches, shift changes, and so on). This policy applies to all employees, including management and Campus visitors. All personal technology must be logged on a Personal Technology Card.

Additional ways store management can deter and control internal theft:

- Discuss employee performance on a regular basis.
- Discuss theft and control measures on a regular basis.
- Immediately report all lost or stolen keys.
- Conduct frequent and random reviews of transactions and documents for compliance.
- Monitor the frequency of employee personal phone calls and visitors. Take action as necessary.
- Allow employees to enter and exit only from the front entrance.
- Consistently conduct personal property checks. All employees who enter an employee-only area within the store (such as cashwrap, Genius Bar, backroom, office) are subject to coat, bag, backpack, and purse inspection when leaving the store for any reason. This includes any purchases made in your store and purchases made from other stores. You must inform your manager when leaving the store, even if you do not have any personal packages with you.
- A member of management must physically inspect the trash at the exit door before it is removed from the store.
- Trash must be bagged in clear garbage bags.
- Check in between cardboard boxes and shipments when disposing of trash.
- Do not give store keys to unauthorized employees to remove the trash or to accept shipments and deliveries.
- Managers may never leave employees unsupervised with the back door open.
- Managers should physically walk the store. Check all areas where merchandise could be stashed (such as bathrooms, backroom, high shelves, ceiling tiles, and so on). If stashed merchandise is found, contact your manager right away.

If your personal property is missing, notify your manager and/or the Loss Prevention department. Complete an Incident Report to document the details. Apple will not be responsible for loss of or damage to any personal property.

Confidential Loss Prevention Hotline

Apple does not tolerate dishonesty at any level. It is your responsibility to contact your manager if you become aware of an internal theft issue or a possible internal theft issue. If you feel uncomfortable discussing the issue with your manager or the employee you are reporting is a manager, contact the Confidential Loss Prevention Hotline at 800 241-5689 from any phone.

The hotline is staffed 24 hours a day, seven days a week by trained professionals. You are not obligated to give your name. You will be asked what store you are reporting and any details of the incident. The Loss Prevention department will follow up on all calls within 72 hours.

Shrinkage

Shrinkage is the dollar value of lost product as a percentage of total sales. Shrinkage can occur as a result of external theft of merchandise, internal theft of merchandise, inaccurate paperwork, or incorrectly keyed transactions.

Shrinkage is a controllable expense for which every employee must accept responsibility.

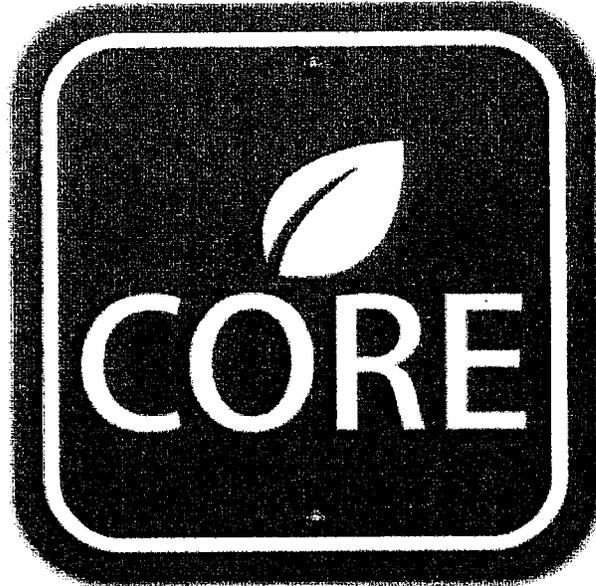
Shrinkage results are communicated bi-weekly via iCommunicate (Quick Click: **Inventory & BOH**).

Managers must communicate their store's current shrinkage results and goals to every employee using the inventory poster and verbal communication.

Any store with a shrinkage greater than .60 percent must, with the assistance of your Regional Director and the Loss Prevention department, put together a formal plan for reducing the store's shrinkage. For details on the Inventory Action Plan process, refer iCommunicate: Inventory & BOH.

EXHIBIT 3

000023



Loss Prevention

Facilitator Guide

September 2012



APL-FRLEKIN_00002863

000024



Core Day 9 Facilitator Guide

Version 4.3.3

September 2012

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APL-FRLEKIN_00002864

000025

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Introduction (10 min.)	4
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How to React (5 min.)	9
Activity: Understanding Loss Prevention (15 min.)	10
Evaluations (15 min.)	11

Loss Prevention (35 min.)

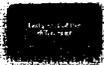
Introduction (10 min.)

Learning Goal

Participants can articulate the importance of loss prevention and identify ways to prevent loss in our stores.



Advance to slide: "Loss Prevention"



Advance to slide: "Can you spot the difference?"

Transition

"Now I'll show you two photos side by side. Let's see if you can spot the difference between them."



Advance to slide: Split image of store

Allow one minute for participants to observe the photo.



Advance to slide: Split image of store with the answer circled



Advance to slide: "The Fine Details"

Key Points

- Noticing the fine details in our busy stores is very important:
 - ▶ Our stores are very busy and can become very crowded.
 - ▶ During both busy and slow times, we need to be aware of the details that can help prevent loss.
 - ▶ In this example, some display products have disappeared.



Advance to slide: "What actions would you take?"

Discussion

- Ask participants: "What would you do?"

Transition

"We must protect our stores from many different kinds of loss."



Advance to build: "Kinds of loss"

Key Points

- Three kinds of loss affect our stores: external theft, internal theft, and processing errors.
 - ▶ External theft: loss of products from theft by people who do not work for Apple
 - ▶ Internal theft: loss of products from theft by store employees
 - ▶ Processing errors: inventory variances created by not using store systems correctly or by not following procedures correctly.



Advance to slide: "Importance of Loss Prevention"

- Loss prevention is very important:
 - ▶ Loss prevention is a team effort to protect the company's products, assets, and brand.
 - ▶ Theft can be due to our customers, third-party vendors, and employees.
 - ▶ Loss can come from inaccurately performing standard procedures.
 - ▶ These losses affect our store's performance as a whole, and affect how all of the team members are rated on their annual reviews.
 - ▶ Loss prevention affects the business in key ways: headcount and payroll, store supplies and resources, and business growth opportunities.



Advance to slide: "External Loss"

- External loss includes burglaries, shipping loss, and shoplifting:
 - ▶ Shoplifters are skilled and increasingly mobile.
 - ▶ Professional shoplifters shoplift for profit and consider it a business. They often work in teams and will target several stores in multiple cities.
 - ▶ Amateurs shoplift products for personal use. They are less organized than professionals, but they are equally challenging.
 - ▶ Shoplifters may use several different methods, including grabbing products or demo units and running out of the store. The most common form of shoplifting is concealment, or hiding products to prevent detection.



Advance to slide: "Internal Loss"

- Internal loss includes any way an Apple employee causes a loss to the store, its staff, or customers. Here are some examples of internal loss:
 - ▶ Stealing merchandise, money, or company assets
 - ▶ Passing merchandise to others
 - ▶ Unauthorized copying or downloading of software
 - ▶ Giving unauthorized discounts to others
 - ▶ Processing fraudulent or non-existent transactions
 - ▶ Conspiracy or collusion with vendors
 - ▶ Using a customer's credit card or financing account for personal use
 - ▶ Removing demo products from the store
 - ▶ Falsifying inventory counts
 - ▶ Unauthorized copying of data from a customer's device

Preventing Store Loss (5 min.)

Learning Goals

Participants can identify the key ways to prevent store loss.

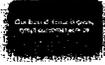
Key Points

- Part of a great customer service experience is feeling noticed and acknowledged by the store employees. Being noticed is the last thing that a thief wants.
- How can we ensure that all of our customers feel acknowledged?



Advance to slide: "Preventing Store Loss"

- ▶ Greet all of the customers who enter our stores.
- ▶ Make great eye contact.
- ▶ Give amazing customer service to all of the customers in our store.



Advance to slide: "Our best defense..."

- Our best defense against external theft is giving great customer service.
- Loss can also come from inaccurately performing standard procedures.
 - ▶ Check and double-check the work you do.
 - ▶ Always ask for help if you are unsure about something that you need to do.
 - ▶ Never be afraid to speak up if you are unsure about a specific process.



Advance to slide: "Warning Signs"

- Stay aware of these possible warning signs of external theft:
 - ▶ People who are browsing and don't want help, but who keep watching where store staff are
 - ▶ Groups of people who block visibility to an area
 - ▶ Purses or bags that look empty
 - ▶ Clothing that is bulky or unsuitable for current weather
 - ▶ Arms or hands that are covered with jackets or coats
 - ▶ Strollers and baby carriers that can be used to hide products

- Most customers come to browse and shop, not to steal.
- Even when you see a potential warning sign, always assume positive intent.



Advance to slide: "Great Customer Service"

- Great customer service can prevent loss.
- What are some of the things you can do to provide great customer service and prevent loss?
 - ▶ Acknowledge every customer with a greeting or smile.
 - ▶ Stand so that you can see from the front to the back of the store by turning your head side to side.
 - ▶ Stay in your assigned zone.
 - ▶ Avoid standing in a group with other staff.
 - ▶ Watch for areas with concentrations of customers and no Apple employees.
 - ▶ Ask a manager to perform a bag check whenever you exit the store.
 - ▶ Use only the designated employee entrance.
 - ▶ Never process purchases for friends or family. Know the guidelines about how to use your personal discount.



Advance to slide: "How to react"

How to React (5 min.)

Learning Goals

Participants can identify the best ways to react in loss prevention situations.

Key Points

- Golden rule: Report any suspicious activity to the manager on duty and to the loss-prevention hotline as soon as possible.
- To protect yourself and the store, inform your manager as soon as you can if you think you may have made a processing or operational error.
- Check and double-check the work that you do.
- Never be afraid to ask a manager if you are unsure about a specific process.
- For your own safety, never accuse, chase, or try to catch a customer whom you suspect of stealing.
- Talk to your manager about others whom you think might be violating business conduct practices.



Advance to slide "Activity: Understanding Loss Prevention"

Activity: Understanding Loss Prevention (15 min.)

Learning Goal

Participants identify how to react in a potential loss prevention situation.

Preparation

Prepare photos for this activity on each Mentor iPad.

Time

Activity: 15 min.

Participant Groups

One group of participants per table

Required Materials

One iPad per table

Instructions

- Ask Mentors to show the pair of photos that have one slight difference:
 - Ask the group to point out the differences between the two photos.
 - After one minute, or if no one can find the difference, show a photo with the answer.
- After you reveal the answer, ask the group to answer the following questions:
 - What are some possible explanations for what you see?
 - How would you react to this situation?
 - What could prevent this situation from happening?
- Mentor: Ensure that participants articulate the need for attention to detail in our stores.
 - Explain that we should assume positive intent but remain alert to possible loss prevention situations.

EXHIBIT 4

000036

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE WILLIAM H. ALSUP

AMANDA FRLEKIN,)
)
 Plaintiff,)
)
 VS.) No. C 13-3451 WHA
) related case
 APPLE, INC.) No. C 13-4727 WHA
)
 Defendant.) May 22, 2014
) 8:00 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR
Official Reporter - US District Court
Computerized Transcription By Eclipse

Debra L. Pas, CSR, CRR, RMR, RPR
Official Reporter - U.S. District Court - San Francisco, California
(415) 431-1477

1 **MS. DUNNE:** It always depends, your Honor, on which
2 choices each one of those individuals make.

3 **THE COURT:** Of course, put it in your terms. 19 out
4 of 20 chose, made an election to bring those items, one of
5 those items that needed to be checked; is that right?

6 **MS. DUNNE:** At that store on that date?

7 **THE COURT:** Yes.

8 **MS. DUNNE:** Yes.

9 **THE COURT:** All right. So could somebody draw from
10 this conclusion that maybe it's not so easy to leave those
11 things behind and that it's -- yes, it's a necessity of life.
12 Just because 1 out of 20 can get along without it, I don't
13 know.

14 **MS. DUNNE:** Your Honor, on this record the undisputed
15 facts confirm people can get along without it. They did. Our
16 plaintiffs did. They came without personal Apple technology --

17 **THE COURT:** Let me give you have another
18 hypothetical. Let's say that you've got a disabled person and
19 the disabled person has to bring this bag that has oxygen or
20 something in it. And you -- so they -- they have to go through
21 the check line every day. Then you say to them -- they say: I
22 want to be paid for that. You say: No, it's your voluntary
23 act.

24 I assume you would agree in that case since it's
25 essentially for them to have their medicine or whatever they

1 have got in that bag, that that would be compensable.

2 **MS. DUNNE:** I do not agree, your Honor.

3 **THE COURT:** All right. You don't agree with that.

4 **MS. DUNNE:** Okay. So, again, you look at the
5 regulations --

6 **THE COURT:** But if they don't have it, they die or
7 they have to go to the hospital.

8 **MS. DUNNE:** And I appreciate that. It's a personal
9 need. It's not -- what's dictating it? Is the law dictating
10 it? No. Is the employer requiring it? No. Does the nature
11 of the work require it? No. Does the employee's personal
12 health conditional require it? Yes. And that's the
13 difference, your Honor.

14 Pay obligations can't vary based on -- well, this employee
15 has a disability and so they get paid more money for doing the
16 exact same thing that this person that has no disability
17 requirement and they don't get paid for it.

18 The law doesn't turn on personal situation, personal
19 needs. The law turns on: Does the law require it? Does the
20 employer require it? Does the nature of the work require it?

21 **THE COURT:** All right. I need to -- I've got to
22 bring this to an end, but I want to hear something about the
23 other case we haven't talked about yet.

24 **MR. SHALOV:** Your Honor, if I could, just one point.

25 **THE COURT:** Thirty seconds.

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Wednesday, May 28, 2014

*Debra L. Pas, CSR, CRR, RMR, RPR
Official Reporter - U.S. District Court - San Francisco, California
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000040

EXHIBIT 5

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Attorneys for Plaintiffs and the Putative California Class

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

APPLE INC., a California corporation,

Defendant.

No. C 13-03451 WHA (lead)
No. C 13-04727 WHA (consolidated)

**PLAINTIFFS' MOTION FOR RULE
23(c)(4) CERTIFICATION OF
PARTICULAR ISSUES**

Date: July 2, 2015
Time: 8:00 a.m.
Judge: Hon. William Alsup
Ctrm: 8, 19th Floor

1 Counsel a list identifying the contact information for all members of the Class. Accordingly, the
2 Class is readily identifiable and ascertainable.³³

3 **B. The Numerosity Requirement Is Satisfied**

4 For purposes of Federal Rule 23(a)(1), “courts generally find that the numerosity factor is
5 satisfied if the class comprises 40 or more members.” *In re Facebook Inc., PPC Advertising Litig.*,
6 282 F.R.D. 446, 452 (N.D.Cal. 2012). Here, according to the class list produced by Apple, there
7 were 12,426 Apple Employees from July 25, 2009 through September 17, 2014. *See* Shalov Dec.
8 ¶ 4. Moreover, based on: (i) Defendant’s acknowledgement that every California Store conducted
9 Checks (Ex. 55 [Response to Interrogatory No. 9, Exhibits A, B]); (ii) the Manager Declarations
10 admitting that multiple Apple Employees went through Checks (*see* Ex. 56); and (iii) the
11 Employee Declarations confirming that multiple Apple Employees went through Checks (*id.*), a
12 fair inference can be drawn that hundreds -- if not thousands -- of Apple Employees went through
13 Checks during the Class Period. Thus, the numerosity requirement is satisfied.

14 **C. The Commonality Requirement Is Satisfied**

15 “[F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do.” *Wal-Mart*
16 *Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011). The common contention “must be of such a
17 nature that it is capable of classwide resolution -- which means that determination of its truth or
18 falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
19 *Id.* at 2551.

20 **1. The Legal Framework For Plaintiffs’ Claims And Apple’s Defenses**

21 The claims asserted in Plaintiffs’ Consolidated Complaint arise under the California Labor
22 Code, relevant Wage Orders of the Industrial Welfare Commission (“IWC”), and California’s
23

24
25 ³³ The fact that some Apple Employees did not go through Checks -- and, thus, may not be able to recover --
26 does not undermine a finding of ascertainability. *See, e.g., Akaosugi v. Benihana National Corp.*, 282 F.R.D. 241, 255
27 (N.D. Cal. March 30, 2012) (“Defendant further contends that the class may include individuals who did not forfeit
28 vacation pay upon termination. This is not a basis to deny certification.”); *Lilly v. Jamba Juice Co.*, 2014 WL
4652283 at *3 (N.D. Cal., Sept. 18, 2014); *Mateo v. M/S Kiso*, 805 F.Supp. 761, 773 (N.D. Cal. 1992) (“[w]hen
rejecting class certification based on overbreadth ... the problem lies in the court’s ability to ascertain the class, not
whether the putative class members have [each] been aggrieved.”)

1 Unfair Competition Law.³⁴ Whether time is compensable under these statutes and Wage Orders is
2 determined by the level of control exerted by the employer over the employee. *See Morillion v.*
3 *Royal Packing Co.*, 22 Cal.4th 575, 586 (2000). In this case, Plaintiffs contend that when Apple
4 Employees wait for and undergo Checks pursuant to Apple’s uniform policy, “they are under the
5 control of their employer.” *Cervantez, supra*, 253 F.R.D. at 571. As such, that time should be
6 compensable under IWC Wage Order No. 4, which defines “hours worked” as “the time during
7 which an employee is subject to the control of an employer, and includes all the time the employee
8 is suffered or permitted to work, whether or not required to do so.” *Id.* In addition to showing
9 “control,” a plaintiff must demonstrate that (1) he or she performed work while under the
10 employer’s control, for which (2) he or she did not receive compensation, and of which (3) the
11 employer was aware or should have been aware. *Ortiz v. CVS Caremark*, 2013 WL 6236743 at *9
12 (N.D. Cal., Dec. 2, 2013)

13 Apple has also interposed a number of affirmative defenses that raise factual and legal
14 questions applicable to every Class member. Specifically, Apple’s Second Affirmative Defense is
15 premised on “the applicable statute(s) of limitations, including but not limited to, California Code
16 of Civil Procedure sections 338, 340(a-b) and Business and Professions Code section 17208. *See*
17 *Answer* (Dkt. No. 240) pg. 11. In addition, Apple’s Fifth Affirmative Defense is premised on its
18 assertion that the “actions taken in connection with Plaintiffs’ and/or the putative class members’
19 compensation were done in good faith and in conformity with and reliance upon written
20 administrative regulations...” *Id.* pg. 12. Further, Apple’s Tenth Affirmative Defense is premised
21 on its assertion that “[s]ome or all of the hours worked by Plaintiffs and/or the members of the
22 putative class and claimed as unpaid were *de minimis* and do not qualify as compensable hours
23 worked under the California Labor Code and/or any other law.” *Id.*

24
25
26 _____
27 ³⁴ Specifically, Plaintiffs allege that Apple violated California Labor Code sections 201, 202, 203, 204, 226,
28 226.7, 510, 512, 1194, 1194.2, 1198, and 2698 et seq., as well as Business & Professions Code section 17200, *et seq.*
and IWC Wage Order No. 4.

1 **2. Common Factual and Legal Questions**

2 Based on these claims and defenses, Plaintiffs seek certification under Federal Rule
3 23(c)(4) of sixteen common questions during Phase One of the litigation that will “resolve an issue
4 that is central to the validity” of the claims of Apple Employees who participate in Phase Two.
5 Specifically: (1) Did Apple have a written policy regarding Checks that applied to Apple
6 Employees at California Stores during the Class Period?; (2) If so, what were the requirements of
7 the policy?; (3) What did Apple tell Apple Employees about how and when the policy should be
8 enforced?; (4) Did Apple give senior-level employees discretion to enforce the Policy, and, if so,
9 under what circumstances? (5) Did Apple conduct Checks of Apple Employees at California
10 Stores pursuant to the policy?; (6) If so, did Apple management know -- or should Apple
11 management have known -- that Apple Employees went through Checks at California Stores
12 during the Class Period?; (7) Did Apple management act in “good faith” and “in conformity with
13 and reliance upon” written administrative orders and other regulations in adopting and enforcing
14 the Check policy?; (8) Did Apple have a policy of compensating Apple Employees who went
15 through Checks at California Stores during the Class Period?; (9) If so, what was the nature of the
16 compensation policy?; (10) If not, how, if at all, were Apple Employees instructed to obtain
17 compensation for Checks?; (11) Did Apple have the technological ability to record the time taken
18 for Apple Employees to go through Checks?; (12) If so, in what time increments did Apple have
19 the technological ability to record the time taken for Apple Employees to go through Checks?; (13)
20 Were Apple Employees who went through Checks subject to Apple’s “control” for purposes of
21 imposing liability under California law?; (14) Does the *de minimis* doctrine apply to Checks?; (15)
22 If so, what is the durational scope of the doctrine, if any, as it applies to Checks?; and (16) When
23 did Plaintiffs’ and Class members’ claims accrue for purposes of Apple’s statute of limitations
24 defense?

25 The resolution of these common questions during Phase One of the litigation will have a
26 direct bearing on the claims of Apple Employees who participate in Phase Two of the litigation.
27 Specifically, Questions One, Two, Three, Four and Thirteen address the question of Apple’s
28 liability for Checks conducted of Apple Employees at California Stores pursuant to a company-

1 wide policy (the “Common Policy Questions.”)³⁵ Questions Five and Six address Apple’s
2 knowledge -- or constructive knowledge -- that Checks were occurring at California Stores during
3 the Class Period (the “Common Knowledge Questions.”)³⁶ Questions, Eight, Nine and Ten
4 address issues of compensation and the damages Apple Employees can secure during Phase Two
5 of the litigation (the “Common Damages Questions.”) And Questions Eleven, Fourteen, Fifteen
6 and Sixteen address Apple’s affirmative defenses based on its purported “good faith” conduct, the
7 statute of limitations and the *de minimis* doctrine (the “Common Defense Questions.”)³⁷

8 There will also be common testimonial and documentary proof regarding these questions
9 during Phase One of the litigation. Specifically:

- 10 • **Proof of the Common Policy Questions** will be based on: (i) the testimony of one
11 or more of the named Plaintiffs; (ii) the testimony of Carol Monkowski
12 (“Monkowski”), Apple Senior Director of Field Operations; Paul Benjamin
13 (“Benjamin”), Apple’s Director of Loss Prevention; Denise Young-Smith
14 (“Smith”), Apple Vice-President of Worldwide Human Resources; and Steve Cano
15 (“Cano”), Apple Vice-President of Integrated Customer Experience; (iii) Apple
16 corporate documents describing the Check Policy; (iv) Apple corporate documents
17 discussing enforcement of the Check Policy; (v) Apple declarations discussing the
18 purported discretion of Apple Employees to enforce the Check Policy; and (vi)
19 internal Apple e-mails discussing the requirements of the Check Policy.
- **Proof of the Common Knowledge Questions** will be based on: (i) the testimony of
Monkowski, Benjamin, Smith and Cano; (ii) e-mails to and from Chief Executive
Officer Timothy Cook and other Apple executives regarding Checks conducted of

20 ³⁵ Questions about an employer’s policies and liability for those policies are common questions for purposes of
21 Federal Rule 23. *See, e.g., Garvey v. Kmart Corp.*, 2012 WL 2945473 at *4 (N.D. Cal. July 18, 2012) (“The common
22 issue is whether Kmart’s policy of not providing seats to its cashiers in the Tulare store violates Section 14 because the
23 nature of a Kmart cashier’s work reasonably permits the use of seats.”); *Cervantez v. Celestica Corp.*, 253 F.R.D. 562,
572 (C.D. Cal. July 30, 2008) (“Plaintiffs have thus established at least one question of law common to all members of
the security line class; whether time spent in the security line at the end of a shift is compensable under the California
Labor Code.”)

24 ³⁶ Questions about an employer’s knowledge or constructive knowledge regarding wage practices are common
25 questions for purposes of Federal Rule 23. *See, e.g., Jimenez v. Allstate Insurance Co.*, 2012 WL 1366052 at *20
(C.D. Cal. Apr. 18, 2012) (“With respect to whether Defendant had actual or constructive knowledge of the unpaid
overtime, the question of constructive knowledge is amenable to class treatment.”)

26 ³⁷ Questions regarding the *de minimis* doctrine are common questions for purposes of Federal Rule 23. *Otsuka*
27 *v. Polo Ralph Lauren Corp.*, 2010 WL 366653 at *6 (N.D. Cal., Jan. 25, 2010) (“[E]ven if defendants are correct that
28 federal *de minimis* standards apply to plaintiffs’ California claims, application of those standards will still require
resolution of a number of significant common questions. . .”) Likewise, a statute of limitations defense raises questions
that are common to all members of a class. *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 486 (C.D. Cal.
2012) (“Plaintiffs’ arguments to rebut Defendant’s Statute of Limitations defense raise common questions of law and
fact that are susceptible to common proof.”)

1 Apple Employees; (iii) written complaints about Checks addressed to Apple
2 management; and (iv) Apple's pleadings, responses to interrogatories and responses
3 to requests for admissions.

- 4 • **Proof of the Common Damages Questions** will be based on: (i) the testimony of
5 Monkowski; and (ii) Apple corporate documents describing Apple's compensation
6 policies for Apple Employees; and
- 7 • **Proof of the Common Defense Questions** will be based on: (i) the testimony of
8 Julie Schmitz (describing the technologies available to Apple employees to record
9 time); (ii) the Declarations of Apple employees, including Margaret Kam, Brandon
10 Ernst and Josh Attwood (describing the use of hand-held devices for Apple
11 employees to record time); (iii) the testimony, if accepted, of Apple's proposed
12 "expert," Dr. Randolph Hall; (iv) Apple corporate documents describing the
13 technologies and procedures available for Apple employees to record time; and (v)
14 the testimony of Monkowski, Benjamin, Smith, Cano and other Apple corporate
15 representatives designated by Apple.

16 In light of the common questions and proof in this case, the commonality requirement is
17 readily satisfied. As described above, there are multiple questions that apply to every Apple
18 Employee who went through a Check at a California Store during the Class Period. Moreover, the
19 answers to these questions are clearly "apt to drive the resolution of the litigation" (*Dukes*, 131
20 S.Ct. at 2551) because Apple's Check policy, knowledge of the policy, liability for the policy and
21 defenses to the policy will be addressed and resolved in a single proceeding for all members of the
22 Class, which is precisely the efficiency Federal Rule 23 is designed to achieve.³⁸

23 **D. The Typicality Requirement Is Satisfied**

24 For purposes of Federal Rule 23(a)(3), typicality ensures that "the interests of the named
25 representatives align with the interests of the class." *Wolin v. Jaguar Land Rover N. Am. LLC*, 617
26 F.3d 1168 (9th Cir. 2010) "The test of typicality "is whether others members have the same or
27 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs,
28 and whether other class members have been injured by the same conduct.'" *Hanon v.*
Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted)

³⁸ See *Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611, 625 (S.D. Cal. 2014) (The Court finds the questions of whether the Alleged Policy existed, was enforced on a companywide basis, and resulted in Costco's control over employees satisfied the commonality requirement.)

EXHIBIT 6

1 to that?

2 **MS. DUNNE:** I'll pass it up.

3 **THE COURT:** And were there any of the named plaintiffs
4 in that category?

5 Interrogatory 19, there was an objection, but then without
6 waving the objection, it says plaintiffs -- which plaintiff was
7 this that was answering?

8 **MS. DUNNE:** This is plaintiff Kalin.

9 **THE COURT:** So plaintiff Kalin responds that he
10 recalls observing employees who clearly had medical conditions
11 that could have required them to bring medications and medical
12 equipment to work, and could have sought certain
13 accommodations.

14 "Without waiving his own right to privacy, plaintiff
15 himself sometimes may have carried medications in his bag
16 including other co-workers did the same in their purses and
17 backpacks."

18 **MS. DUNNE:** And Your Honor, with respect to those
19 responses in and of themselves, you can hear that it's not
20 responding to the question, which was "Which employees were
21 required by the necessities of life to bring a bag?"

22 Now, Mr. Kalin didn't say because of a medical need, I
23 brought necessities -- I brought medication in my bag.

24 **MR. SHALOV:** May I be heard, Your Honor?

25 **THE COURT:** Just a minute. Let me finish with

1 it's an admission that this class is not ascertainable.

2 Your Honor, we'd like to refer also to that hypothetical
3 you posed at summary judgment that perhaps certain people were
4 disabled and required by the disability to bring a bag. And so
5 we have for that the responses of plaintiff Speicher to pass
6 out.

7 **THE COURT:** Plaintiff Speicher? I didn't -- I don't
8 see that name anywhere. That's not one of the named
9 plaintiffs.

10 **MS. DUNNE:** Actually, Your Honor, through the
11 consolidated complaint, unless I'm mistaken or she somehow has
12 been withdrawn, remember that the action started as Frlekin and
13 Pelle, Kilker and Fisher, and then Kalin. With the FLSA claims
14 going away, we lost Pelle, Fisher and Kilker. And then when
15 the plaintiffs filed their consolidated Kalin and Frlekin
16 complaint, we had some of the people who had formerly been
17 opt-in plaintiffs become named plaintiffs.

18 **THE COURT:** All right.

19 **MS. DUNNE:** And that includes Gregoroff, Dowling and
20 Speicher.

21 **THE COURT:** All right. So what's your point on
22 Speicher?

23 **MS. DUNNE:** So with respect to interrogatories 19 and
24 20 and 21, we asked her to identify which employees were
25 required by a disability to bring a bag to an Apple retail

1 **THE COURT:** All right. Let the other side respond.

2 So I want to summarize what Ms. Dunne is saying as I
3 understand it. So you -- and this has been a problem in other
4 cases, and I've denied certification in other cases. And I'm
5 going to just start by explaining my philosophy, which I
6 believe is the law, especially the law in the Supreme Court and
7 I believe in the court of appeals, and that is you have to have
8 a trial plan whereby the entire class can have their rights
9 adjudicated. It's not enough to have a representative get on
10 the stand and give their individual case; that just proves
11 their individual case, and it doesn't translate to the entire
12 class without -- you need some method to show that other people
13 had the identical problem. And I want to say it doesn't have
14 to be identical, you could have slight variations within the
15 class. I believe that has to be allowed for. But, you do have
16 to have a method of proof that would -- so, for example, in a
17 securities class action, you have the prospectus that applied
18 to everyone; you have the presumption of reliance, that applies
19 to everyone; and then truly damages come down to how many
20 shares they had when they bought, so it's manageable, it's
21 doable. And the class action device in securities cases has
22 been a magnificent thing for trying to keep the markets honest
23 in America. So the securities cases are good examples of how
24 it works.

25 But, coming to this case, part of the liability is that

1 did they have to have -- did they have feminine hygiene
2 products in their purse? Did they have a medical necessity
3 that required them to bring medicine, not just that they had
4 medicine on them, but was it a necessity to have it at work? I
5 don't see how you're going to prove that on a class-wide basis.
6 It's going to vary from individual to individual. That's what
7 was Ms. Dunne is saying, and she's pointing out that I had
8 forgotten that I had said something kind of like that in the
9 summary judgment order.

10 So, now I'm going to be quiet and let you -- I want to say
11 I think it's a serious problem, and I want to hear what your
12 answer is to it.

13 **MR. SHALOV:** Very well, Your Honor. I'm prepared to
14 answer all your questions in-depth.

15 All right. So we're here on a motion for class
16 certification. We didn't ask for certification under Federal
17 Rule 23(b)(3). That's all of Ms. Dunne's cases. That's the
18 Macy's case, the Nordstrom case, where the defendants in those
19 cases try to adjudicate all their claims in one case on a
20 class-wide basis. They try to prove liability. They try to
21 prove damages in one single proceeding.

22 **THE COURT:** Well, you got my rule book. Did I give
23 that to you?

24 **MS. DUNNE:** I do.

25 **THE COURT:** May I see my rule book back?

1 That's the penultimate question. It applies to everybody. If
2 you went through a check, is that check compensable?

3 The ruling on the summary judgment was simply a ruling
4 denying a summary judgment motion, finding that there were
5 questions of fact. I don't think that you found, Your Honor,
6 as a matter of law, particularly since that was in an FLSA
7 context, which we don't have anymore, we have California
8 statutes here where the issue is control, it's not the FLSA
9 standards -- we don't think that you were finding as a matter
10 of law in every situation that only if you bring feminine
11 hygiene products or medication that that's the only way that a
12 claim is compensable.

13 And what's interesting is that Ms. Dunne handed you up the
14 opinion, and here's the key language from the opinion, Your
15 Honor, where you said on page 8, line 4: "No decision is on
16 point," that it doesn't provide a crisper scenario. "To be of
17 more assistance to our court of appeals, it would be better to
18 hold a trial."

19 **THE COURT:** Where did I say that?

20 **MR. SHALOV:** You said that line 6 on page 8. And
21 that's the point, Your Honor, that's what this is about. We're
22 asking the Court under 23(c)(4) to certify the common question
23 that applies to every single class member. If you find that
24 going through a check is compensable, it applies to everybody.
25 If you find that going through a check is not compensable, it

1 So the first step is that you have to determine whether the
2 checks are compensable, and so you made an observation --

3 **THE COURT:** Me, the jury, or --

4 **MR. SHALOV:** You. In the summary judgment motion,
5 your ruling was, well, perhaps people are required to bring the
6 necessities of life, and therefore they were required to bring
7 bags.

8 I think that we're going to be able to show you, when we
9 get to the trial, and we concentrate only on California law,
10 not the FLSA claim, that's not part of this case anymore -- but
11 under California law these necessities of life are not
12 relevant. Somebody gets into a bag check, they are under
13 control of the employer whether or not it's required. That's
14 the law of the Wage Order. The Wage Order is very clear. It
15 says if you're under the control of the employer, whether or
16 not required, that's compensable. And I think we're going to
17 be able to show you at the trial, assuming we get there, that
18 that of itself establishes compensability. You don't even get
19 to the necessities of life.

20 **THE COURT:** That's an interesting point.

21 **MR. SHALOV:** Yes, Your Honor.

22 **THE COURT:** I didn't realize that you had under
23 California law some -- that's like a showstopper. Show me that
24 authority that says --

25 **MR. SHALOV:** It's IWC, Wage Order 4.

1 **THE COURT:** It says if you go through a bag check
2 machine, there's control?

3 **MR. SHALOV:** No.

4 **THE COURT:** What does it say?

5 **MR. SHALOV:** No, it doesn't say that, Your Honor. It
6 says that any time an employee is subject -- that's the
7 language, the general language for purposes of determining
8 compensability. Any time an employee is subject to the control
9 of the employer, then the employer has to pay the wages to that
10 employee, whether or not required. That's the language of the
11 statute. It comes right out of the statute. It's not specific
12 to bag checks. Although recently there was a motion to
13 dismiss - I forgot the name of the case, Your Honor, I can find
14 it for you - where the same issue arose, and the Court found
15 that this was potentially compensable under California law,
16 this same scenario.

17 **THE COURT:** All right. And that would be the only
18 theory that you go to the jury on is -- that's a matter of law,
19 isn't it?

20 **MR. SHALOV:** It would be a matter of law, yes.

21 **THE COURT:** I could decide that on summary judgment.

22 **MR. SHALOV:** Well, we had a summary judgment ruling,
23 Your Honor.

24 **THE COURT:** No, I thought you said that was FLSA.

25 **MR. SHALOV:** Right. You examined -- you examined this

1 issue of compensability in the context you referred both to the
2 FLSA requirements, but also to the California statute as well,
3 so it wasn't clear in your ruling about whether you would
4 actually examine the control feature of the Wage Order. And so
5 I think what Your Honor was saying that possibly, you know,
6 people are required to bring bags, and so they put necessities
7 of life in there, and therefore under those circumstances it's
8 compensable. But I don't believe that you were saying that I
9 find that as a matter of law -- in fact, you said that this was
10 a novel question, and that what you wanted is a trial, which
11 we're asking for here, a trial to make that decision: In what
12 circumstances is somebody entitled to compensation when they go
13 through a check? And I think what we'll be able to show you is
14 necessities don't really matter, okay. Any time you have to be
15 in line and look for a manager, you can't do anything else,
16 okay. You have to go through this process, and you're subject
17 to the employer's control, whether or not that's required,
18 that's the language. And so therefore there -- the bag checks
19 are compensable, and we think the trial will establish that.

20 But let's just say, Your Honor, that you continue to hold,
21 after the trial, that necessities of life are required. Well,
22 that's the ruling that's going to apply to all class members.

23 **THE COURT:** Well, all right. Let me -- some of this
24 is coming back to me.

25 **MR. SHALOV:** Very well.

1 here. Because we're not asking you to certify individual
2 questions. We're not saying that you should individually
3 adjudicate the claims of individual class members. That's not
4 what we're asking. We're saying certify limited common
5 questions: Are the bad checks compensable? Did defendants
6 know? Did defendants sit idly by? And does it have
7 affirmative defenses like de minimus?

8 **THE COURT:** But how could the defendants not know?
9 That's not a good question, is it? Of course they know there's
10 a check. They've got the policy. Why is that a common
11 question?

12 **MR. SHALOV:** Well, to the extent that Apple says that
13 it wasn't aware people were going through checks, that's their
14 argument, but that's an element of my claim.

15 So if I could just read to you, Your Honor, because this
16 is really a very, very important case for the Court to review.
17 It's the *Allstate* case, *Jimenez*, because this is really right
18 on point in what we're asking you to do here. And this was a
19 Ninth Circuit case, and I might have given you the cite before,
20 but I'll give it to you again, it's 765 F.3d 1161, and that's
21 *Jimenez -v- Allstate*, 2014, Ninth Circuit upholding a class
22 certification -- granting a class certification which the
23 Supreme Court just denied cert. of. And this is a really
24 important case, because that's an overtime, off-the-clock case.
25 It's exactly like our case. I mean, not bag checks, but it's

1 a hearing, they can do that if that's what they want. That's
2 their right.

3 **THE COURT:** It would have to be a jury trial, wouldn't
4 it?

5 **MR. SHALOV:** I'm sorry?

6 **THE COURT:** Wouldn't that have to be a jury trial?

7 **MR. SHALOV:** I don't think so. Well, Your Honor, we
8 could do it here, frankly. We don't know how many people who
9 are going to want to participate in this second process. It
10 could be 50, it could be 200. If it becomes unmanageable, then
11 there are other procedures, as the Ninth Circuit has found, as
12 other courts have found, to deal with these types of issues.

13 If the Court doesn't believe, if we apply for it, that a
14 special master is appropriate, we can determine some other way,
15 subject to due process - Apple's rights have got to be
16 protected - but subject to due process, and figure out another
17 way to deal with how these people get compensated. But I don't
18 think, respectfully, that the answer is up or down here. You
19 either get certification or you miss, you lose, and you go home
20 and you stood in line for hours and hours and you didn't get
21 paid and you're out of luck, which is effectively what Apple is
22 asking you to do.

23 Thank you, Your Honor.

24 **THE COURT:** Okay. I want to leave you for a second
25 here. Now you've got me thinking about a different problem.

1 Now, you know that if I were to certify the one issue, the
2 up-or-down issue, then that's the only issue that gets -- if
3 you were to try to settle the case, you cannot settle
4 uncertified issues. I won't allow that. In other words, if
5 the certified issue is X, you cannot -- then Apple will always
6 want a ruling in all kinds of other problems and say we will
7 settle, but we will only settle if they also give up other
8 issues, wage-and-hour claims. And I would reject that, and I
9 would say no, your only work was to represent the class on this
10 one issue and not on other issues, and that issue is an
11 up-or-down issue.

12 So let's say you settle for \$1 million and then it comes
13 time to divide up that settlement and some people in the class
14 would say well, look, I have necessities of life. I want more.
15 Other people say I didn't have any necessities of life, but I
16 still want more. It would be kind of a mess there.

17 **MR. SHALOV:** I don't think that would impact --

18 **THE COURT:** So how do you answer that problem? It's a
19 plan of allocation problem.

20 **MR. SHALOV:** Two things, Your Honor. First of all,
21 whether a person brought necessities of life, assuming that you
22 found that that was the appropriate way to compensate that,
23 people would have no bearing on the compensation that they
24 would receive. The issue is not what they put in their bags.
25 The issue is did they go through a check, and for how long, and

1 how much they are entitled to. So what they put in a bag
2 really doesn't have any bearing on that.

3 **THE COURT:** You're right, that's the theory on which
4 relief would be granted.

5 **MR. SHALOV:** And the other point I wanted to make,
6 Your Honor, is, as I've said before, and I just want to be
7 clear on this, we're not asking you just to certify the one
8 issue on liability, because there are other common issues here
9 that make perfectly -- perfect sense.

10 **THE COURT:** Like what?

11 **MR. SHALOV:** To the extent Apple is rejecting this
12 notion, is the knowledge aspect of liability satisfied here?
13 There are three things that you have to show on an
14 off-the-clock claim in order to get liability. One is, is
15 there a practice, and is that compensable? That's the first
16 issue. The second element is did the defendant know or should
17 the defendant have known that these checks were -- you know,
18 these checks were happening, and they were not compensated.
19 And the third issue is the defendants allowed these checks to
20 go by without compensating people. It's called sitting idly
21 by. So these three common questions plus their affirmative
22 defenses are common questions.

23 **THE COURT:** Well, what would be an affirmative
24 defense?

25 **MR. SHALOV:** They've raised the de minimus defense,

1 would send out a notice, people can opt out, and everyone else
2 is bound, and they would be forever locked into even a loss and
3 could not relitigate that.

4 **MR. SHALOV:** That's correct, Your Honor.

5 **MS. DUNNE:** And so is it clear, Your Honor, then that
6 they are not going to be arguing that employees were required
7 to bring a bag by a necessity of life, that they're not going
8 to claim it was --

9 **THE COURT:** That would be irrelevant under the theory
10 of liability. It would be across the board, up or down, yes or
11 no. Necessities of life don't matter. Now, if that's going to
12 change -- they're saying no over there.

13 **MR. SHALOV:** We're saying no, your Honor.

14 **THE COURT:** So I --

15 **MR. SHALOV:** Your Honor, we think that's the law, and
16 we think we can prove at trial that that's the law.

17 **MS. DUNNE:** I'm sorry, Your Honor. So if that's the
18 case, how does the first notice get worded so that putative
19 class members' due process rights --

20 **THE COURT:** Well, what you would say is -- the notice
21 would have to say something like here's the issue that's being
22 litigated on an across the board, up or down, and we're not
23 litigating it on the necessities of life. If you feel like you
24 have a better case on necessities of life, maybe you should opt
25 out.

1 I'm making this up as I go. But we would have to tell
2 them that the case is being litigated on a broad, across the
3 board, up or down, win or lose -- you know, what's the word I'm
4 looking for -- sweepstakes basis, and that there will be some
5 members of the class who conceivably might feel they have a
6 stronger case, and, if so, they have to consult their own
7 lawyer or opt out or consider opting out.

8 **MS. DUNNE:** Would that mean then, Your Honor, that
9 their statute of limitations is not tolled as to the other
10 theories, necessities of life, while this case is pending?

11 **THE COURT:** I don't know. See, you're asking me all
12 these questions.

13 **MS. DUNNE:** That are critical.

14 **THE COURT:** I don't know. Maybe they are.

15 **MR. SHALOV:** Your Honor, we could address this at the
16 notice phase.

17 **MS. DUNNE:** To argue process --

18 **THE COURT:** I don't know the answer. Maybe at some
19 point this -- I can't answer that. I understand the issue.
20 It's a good issue.

21 **MS. DUNNE:** Because at that point even then if we
22 don't stop tolling their statute of limitations, Apple's due
23 process rights are violated, because there's these claims that
24 are in the background might resurrect, might not, but the
25 statute is being tolled. It's going to be a big --

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Monday, July 6, 2015

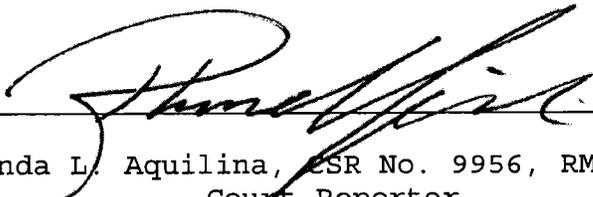

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EXHIBIT 7

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13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

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

20 Plaintiffs,

21 v.

22 APPLE INC., a California corporation,

23 Defendant.

No. C 13-03451 WHA (lead)

No. C 13-04727 WHA (consolidated)

**PLAINTIFFS' SECOND
SUPPLEMENTAL BRIEF
PURSUANT TO COURT ORDER
(DKT. 290) IN SUPPORT OF
MOTION FOR RULE 23(c)(4)
CERTIFICATION OF PARTICULAR
ISSUES**

1 the class are fully protected by providing a detailed and clear notice to the class and giving them
2 an opportunity to opt out. *See* Plaintiffs’ July 7 Brief at 3-4. If class members believe they have
3 a better remedy for their claims than is being offered by this case, then they will be free to opt out
4 and pursue those remedies in a separate action. If they elect to remain in the class by not opting
5 out, then they will be bound by the judgment regarding the issues certified. *See Hanlon, supra*,
6 150 F.3d at 1025 (“Adequate notice is critical to court approval of a class settlement under Rule
7 23(e). In this case, the notice provided to the absent class members provided each member with
8 the opportunity to opt-out and individually pursue any state law remedies that might provide a
9 better opportunity for recovery.”)

10 **III. APPLE’S ARGUMENT THAT IT IS NOT POSSIBLE TO ADJUDICATE**
11 **PLAINTIFFS’ CLAIMS ON AN ALL-OR-NOTHING BASIS MISSTATES**
12 **THE LAW GOVERNING PLAINTIFFS’ CLAIMS.**

13 Apple argues that “[i]t is not possible to adjudicate Plaintiffs’ bag check claim on an ‘all-
14 or-nothing’ basis because [...] the reason why a putative class member brought a bag (if any) is
15 central to the question of liability under California law.” Apple’s Brief at 4. In support of this
16 argument, Apple leans on the Court’s order denying Apple’s motion for summary judgment. *See*
17 Apple’s Brief at 5. However, in addressing Plaintiffs’ nationwide FLSA claims in the context of
18 that motion, the Court did not decide that “the reason why a putative class member brought a bag
19 (if any) is central to the question of liability under California law[.]” as Apple suggests. Rather,
20 the Court recognized that “California state labor laws [...] look to employer control to determine
21 whether an activity is compensable.” Order Denying Summary Judgment (Dkt. 166) at 4, citing
22 *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 578–85 (2000). Apple’s contrary assertion

23 Apple says that “Plaintiffs state that their bag check theory rests on allegations that
24 employees carried bags to transport for a wide range of reasons[.]” Apple’s Brief at 5. That is
25 also incorrect. Instead, Plaintiffs’ Motion for Rule 23(c)(4) Certification of Particular Issues
26 (Dkt. 268-1) (“Motion”) says that the basis of their claims is whether Apple employees in
27 California are subject to Apple’s control while they wait for and undergo mandatory bag checks,
28

1 and, that therefore such time should be considered “hours worked” under the applicable Wage
 2 Order. *See* Motion at 17 (“Whether time is compensable under these statutes and Wage Orders is
 3 determined by the level of control exerted by the employer over the employee.”; “Plaintiffs
 4 contend that when Apple Employees wait for and undergo Checks pursuant to Apple’s uniform
 5 policy, they are under the control of their employer.”; “As such, that time should be compensable
 6 under IWC Wage Order No. 4, which defines ‘hours worked’ as ‘the time during which an
 7 employee is subject to the control of an employer, and includes all the time the employee is
 8 suffered or permitted to work, whether or not required to do so.’”) (internal citations and
 9 quotation marks omitted).

10 Contrary to Apple’s assertion (*see* Apple’s Brief at 6:10-12), certifying the liability issue
 11 of whether Apple’s bag check policy violates California’s control test for all class members,
 12 regardless of the reasons why they brought a bag to work, will allow the Court to conclusively
 13 determine the central issue in this case. Indeed, as many courts in California have held, “courts’
 14 discomfort with individualized liability issues is assuaged in large part where the plaintiff points
 15 to a specific company-wide policy or practice that allegedly gives rise to consistent liability.”
 16 *Kurihara v. Best Buy Co.*, No. C 06-01884 MHP, 2007 WL 2501698, at *10 (N.D. Cal. Aug. 30,
 17 2007); *see also In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526,
 18 534 (N.D. Cal. 2012), citing *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1033
 19 (2012); *Vedachalam v. Tata Consultancy Servs., Ltd.*, No. 06-0963, 2012 WL 1110004, at *12-
 20 *13 (N.D. Cal. April 2, 2012); and *In re Taco Bell Wage & Hour Actions*, No. 07-1314, 2012
 21 WL 5932833, at *6 (E.D. Cal. Nov. 27, 2012). Win or lose, the answer to the central liability
 22 question in this case will be applicable to all class members who are given notice of class
 23 certification and an opportunity to opt-out.

24 **IV. APPLE’S ARGUMENT THAT PLAINTIFFS ARE NOT ADEQUATE**
 25 **REPRESENTATIVES FOR THE ABSENT CLASS MEMBERS ON THE**
 26 **ISSUES THEY SEEK TO CERTIFY MISREPRESENTS PLAINTIFFS’**
 27 **CLAIMS AND FACTS IN THE RECORD, AND APPLE CITES NO SUPPORT.**

27 Apple argues that Plaintiffs are inadequate representatives because the “‘all-or-nothing’
 28 approach diminishes the claims of absent class members who may assert Apple required them to

1 bring a bag to work, by lumping them together with Plaintiffs and the other absent class members
2 who chose to bring a bag for personal convenience.” Apple’s Brief at 6. However, Apple offers
3 no evidence or authority to support its nonsensical contention that Plaintiffs “cannot adequately
4 represent the interests of putative class members who may have a ‘better’ claim based on a theory
5 more specific that bag checks, ipso facto, are unlawful.” *Id.* at 7. Plaintiffs simply are not
6 seeking to represent any class members in order to claim that “bag checks, ipso facto, are
7 unlawful.” Regardless of whether such class members exist, their hypothetical claims will not be
8 precluded because they are not encompassed by Plaintiffs’ proposed issues class. Plaintiffs are
9 not claiming that it is unlawful for Apple to require and/or prohibit employees from bringing
10 bags; only that if Apple requires employees to go through bag checks, then it must pay for that
11 time. Therefore, even if a theory that “bag checks, ipso facto, are unlawful” is, hypothetically, a
12 “better” theory under the law (which Plaintiffs do not believe it is), a judgment in this case would
13 not preclude that theory.

14 Apple goes on to argue that “Plaintiffs are not adequate to represent the interests of absent
15 class members who worked at other stores because of store-by-store variations.” Apple’s Brief at
16 7. This argument confuses the issue that Plaintiffs are asking the Court to certify. The liability
17 determination of whether time spent waiting for and undergoing bag checks is compensable is
18 uniform for all California employees, no matter the stores in which they worked. Apple’s
19 concern that some employees went through bag checks at stores with security guards and some
20 went through checks with store managers does not raise an adequacy issue. If anything, it raises
21 a damages question about how much time employees spent going through checks.

22 Apple speculates about hypothetical claims class members might have that are not
23 represented by the all-or-nothing class. *See* Apple’s Brief at 4 (describing scenarios such as a
24 “class member who carries moustache wax in his bag to sell when his shift is over” and “the
25 hypothetical putative class member with a medical necessity that he claims requires him to use a
26 bag to transport medical equipment that he must have with him at all times”) (emphasis added).
27 Put simply, these are not the claims asserted by Plaintiffs; they are not in the case. For the
28

1 purposes of class certification of the liability issues here, it does not matter why a class member
2 brought a bag or what was in any particular bag.

3 **V. THE ALL-OR-NOTHING APPROACH DOES NOT AFFECT APPLE'S**
4 **RIGHTS TO DUE PROCESS.**

5 Finally, Apple argues that the all-or-nothing approach will interfere with its due process
6 right to litigate the “merits of the claim, if any, of each individual who asserts that bringing a bag
7 necessary for whatever reason,” and any “theory that absent class members are subject to a check
8 regardless of whether they have a bag[.]” Apple’s Brief at 8-10. However, if the Court certifies
9 the liability issues based on the control theory proposed by Plaintiffs, Apple’s concerns become
10 moot. That is, Apple will have the same opportunity as Plaintiffs to present its arguments
11 regarding the legality of its bag check policy under California law. Additionally, using the
12 phased liability/damages approach, Apple will have an opportunity to present individual defenses
13 to damages, providing further due process protection.

14 This case is very similar to *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir.
15 2014), *cert. denied*, No. 14-910, 2015 WL 355696 (U.S. June 15, 2015), in which the Ninth
16 Circuit affirmed the District Court’s order granting class certification of California-law off-the-
17 clock claims. There the Court of Appeals approved of a phased approach to liability and
18 damages, and stated that “[t]his split preserved both [defendant’s] due process right to present
19 individualized defenses to damages claims and the plaintiffs’ ability to pursue class certification
20 on liability issues based on the common questions of whether [defendant’s] practices or informal
21 policies violated California labor law.” *Id.*

22 **VI. CONCLUSION**

23 Therefore, because Plaintiffs are adequate representatives and using the all-or-nothing
24 approach recommended by the Court comports with Due Process in conjunction with notice and
25 an opportunity to opt out, Plaintiffs request that the Court grant class certification.

26 ///

27 ///

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EXHIBIT 8

1 [COUNSEL LISTED ON FOLLOWING PAGE]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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AMANDA FRLEKIN, *et al.*,

Lead Case No. C 13-03451 WHA;
Consolidated Case No. C 13-3775-WHA

12

Plaintiffs,

**JOINT STATEMENT REGARDING
CLASS NOTICE AND RELATED
DOCUMENTS**

13

v.

14

APPLE INC.,

15

Defendant.

Judge: William H. Alsup
Courtroom: 8

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1 Per the Court's July 16, 2015 Order, Plaintiffs and Apple Inc. met and conferred regarding
2 the form of the Class Notice (and related documents) and a plan for the dissemination of the Class
3 Notice and a timeline for opting out and intervening. Attached hereto are the following documents:

4 Attachment A: the Class Notice (with disputed provisions highlighted in yellow);

5 Attachment B: the Summary Class Notice (with disputed provisions highlighted in yellow);

6 Attachment C: the Exclusion Form; and

7 Attachment D: the Joint Dissemination Plan and Timeline (with disputed provisions
8 highlighted in yellow).

9 Although the parties were able to largely reach agreement on the documents and timeline,
10 there are three issues upon which the parties were not able to reach agreement. The parties'
11 positions regarding the three outstanding issues are addressed below:

12 **I. ISSUE NO. 1**

13 The disputed language is:

14 Class Notice, p. 1: THE CLASS WILL LITIGATE THIS CASE EXCLUSIVELY ON THE
15 THEORY THAT ALL CLASS MEMBERS VOLUNTARILY CHOSE TO BRING BAGS
16 AND/OR PERSONAL APPLE TECHNOLOGY TO WORK PURELY FOR PERSONAL
17 CONVENIENCE.

18 Class Notice, p. 4: Importantly, you will be bound by the limitation that Plaintiffs will litigate
19 this case exclusively on the theory that all class members, including you, voluntarily chose to
20 bring bags and/or personal Apple technology to work purely for personal convenience only.

21 Summary Notice, p. 1: . . . you will be bound by the terms of the Class limitation that this
22 Action will be litigated exclusively on the theory that all class members voluntarily chose to
23 bring bags and/or personal Apple technology to work purely for personal convenience.

24 **A. Plaintiffs' Position**

25 Plaintiffs do not agree to this language as it mischaracterizes the evidence and the theory on
26 which the action will be litigated. As the Court observed in the Order, "it is true, as Apple asserts,
27 that employees brought bags to work for many different reasons, ranging from personal convenience
28 to necessity." See Order at 9. Thus, the language proposed by Apple -- i.e., that "all class members

1 voluntarily chose to bring bags and/or personal apple technology work purely for personal
2 convenience" (emphasis added) -- is not accurate and is not the theory on which the case will be
3 tried. Rather, the action will be tried on a theory that class members should be compensated under
4 California law whenever they bring a bag or Apple product to work, regardless of the reason why
5 they to do. This the "generic theory" the Court referenced in the Order (not that everyone brings
6 bags and Apple products to work only for personal convenience) and the notice contains bold-faced
7 language reciting this theory the parties have agreed to.

8 **B. Apple's Position**

9 The Court's Order expressly states: "To be specific, the class notice would advise that the
10 case will be litigated on a class-wide basis, in which bag searches will be adjudicated as
11 compensable or not based on the most common scenario, that is, an employee who voluntarily
12 brought a bag to work purely for personal convenience." (Order, 10:22-25 (emphasis added).)

13 Thus, the Court's Order requires language advising the class members that the case will be litigated
14 exclusively on the theory that all class members voluntarily chose to bring bags and/or personal
15 Apple technology to work purely for personal convenience. And, as stated in the Order, "Plaintiffs'
16 counsel said that they were willing to litigate the issue of Apple's 'control' on a class-wide basis
17 subject to that limitation." (Order, 10:3-5.) Moreover, what constitutes "work" under California
18 law is dictated by what an employer requires an employee to do. Apple did not require employees to
19 bring bags or personal Apple technology to work. Therefore, Apple did not require employees to
20 participate in bag checks. Plaintiffs may not litigate the issue of "control" by examining the
21 circumstances of the checks alone, without examining why an employee brought a bag in the first
22 place. Absent Plaintiffs' agreement to litigate the class claim exclusively on the theory that all class
23 members voluntarily chose to bring bags and/or personal Apple technology to work purely for
24 personal convenience, there is no class-wide method to resolve this *prima facie* element of Plaintiffs'
25 case.

26 **II. ISSUE NO. 2**

27 The disputed language is:

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by KRALOWEC LAW, P.C., located at 44 Montgomery Street, Suite 1210, San Francisco, California 94104, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. **REPLY BRIEF ON THE MERITS;**
2. **MOTION TO AUGMENT THE RECORD; MEMORANDUM IN SUPPORT; DECLARATION IN SUPPORT; PROPOSED ORDER; and**
3. **PROOF OF SERVICE.**

- **By Mail:** I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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Executed this 8th day of June, 2018 in San Francisco, California.

Gary M. Gray 