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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re Apple iPhone Antitrust Litigation

Case No. 4:11-cv-06714-YGR

DEFENDANT APPLE INC.'S OBJECTION UNDER CIV. L. R. 7-3(D)(1) TO EVIDENCE FILED WITH PLAINTIFFS' CLASS CERTIFICATION REPLY

The Honorable Yvonne Gonzalez Rogers

Date: November 16, 2021
Time: 10:00 a.m.
Courtroom: 1, 4th Floor

Pursuant to Civil Local Rule 7-3(d), Defendant Apple Inc. hereby objects to the Amended Corrections to the Deposition Transcript of Professor Daniel L. McFadden (the "Corrections"), filed as Exhibit 3 in support of Plaintiffs' Reply in Further Support of Motion for Class Certification. *See* Dkt. 556-3. The Corrections are untimely and improper attempts to alter sworn testimony. Apple respectfully requests that they be stricken from the record, and Plaintiffs be prohibited from relying on them.

BACKGROUND

Professor McFadden is the sole expert supporting Plaintiffs' request to certify a class of millions of iOS consumers seeking billions of dollars in damages. On August 3, 2021, Apple deposed Prof. McFadden for more than six hours on the record. *See* Dkt. 477-17 at 7:5, 245:20 (McFadden Dep.). A week later, on August 10, Apple filed its Opposition to Plaintiffs' Motion for Class Certification and a Motion to Exclude Prof. McFadden's opinions under *Daubert*. Apple's filings drew heavily from Prof. McFadden's deposition testimony to explain both why no class could be certified and that Prof. McFadden's opinions concerning classwide impact were unreliable. *See, e.g.*, Dkt. 478 ("Opp.") at 1–2, 7–9, 13–16, 18–21, 23; Dkt. 479 ("*Daubert* Mot.") at 1–5, 7–16, 18–25. Plaintiffs opposed Apple's *Daubert* motion on August 25 (a full four weeks before the stipulated deadline). *See* Dkt. 498. Apple filed a Reply in support of its *Daubert* Motion on September 1. Dkt. 524.

Two days later, on September 3, 2021, Plaintiffs served more than 40 "Corrections" to Prof. McFadden's deposition transcript. *See* Ex. 1 at 1.[1] Although some of these corrections fixed typographical and transcription errors, many others sought to substantively change Prof. McFadden's testimony, including altering "no" answers to "yes," correcting mistaken assertions, and revising testimony that Apple had quoted against Plaintiffs in its papers weeks earlier. *Id.* at 1–2. After Apple objected, Plaintiffs served Amended Corrections purporting to explain the changes, but declined to withdraw them. Ex. 2 at 1. Plaintiffs also refused to confirm that they had submitted the Corrections to the court reporter within 30 days of receiving the final transcript on August 4, 2021. *Id.* at 1 n.1; *see* Brass Decl. ¶ 2.

On October 19, 2021, Plaintiffs filed their Reply in support of class certification, Dkt. 555

[1] Exhibit cites are to the Declaration of Rachel S. Brass ("Brass Decl."), filed concurrently in support of Apple's Objections.

("Reply"), along with a 125-page Reply Report from Prof. McFadden, Dkt. 556-1 ("Reply Report"). Plaintiffs filed the Corrections along with their Reply and cited to and quoted from them in the brief. *See* Reply 5 n.5.

ARGUMENT

Federal Rule of Civil Procedure 30(e) "permits corrections in form or substance of deposition testimony under certain circumstances." *Lee v. The PepBoys-Manny Moe & Jack of Cal.*, 2015 WL 6471186, at *1 (N.D. Cal. Oct. 27, 2015); Fed. R. Civ. P. 30(e)(1). But "[a] deposition is not a take home examination." *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002); *see also, e.g.*, *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 889 (N.D. Cal. 2016) (same). Rule 30 "cannot be interpreted to allow one to alter what was said under oath" because otherwise "one could merely answer questions with no thought at all then return home and plan artful responses." *Garcia*, 299 F.3d at 1242 n.5. The Ninth Circuit has therefore held that "Rule 30(e) is to be used for corrective, and not contradictory, changes." *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005).[2] Deposition testimony may also be amended only "provided that procedural requirements" are met. *Lee*, 2015 WL 6471186, at *1. One such requirement is that corrections be "submitted to the court reporter" within the 30-day period prescribed by Rule 30(e). *Welsh v. R.W. Bradford Transp.*, 231 F.R.D. 297, 301 (N.D. Ill. 2005); *see also Morceli v. Meyers*, 2014 WL 1096714, at *2 (E.D. Cal. Mar. 19, 2014); Fed. R. Civ. P. 30(e)(1). Because the record shows that the Corrections to Prof. McFadden's deposition transcript are both improper and untimely, the Court should strike them in whole or in part, and prohibit Plaintiffs from relying on them further.

A. Professor McFadden's Corrections Improperly Alter Sworn Testimony

Apple objects to Corrections 1, 7, 13, 15–17, 19, 23–25, 28, 32–35, and 39–41[3] because they are not corrections at all, but rather substantive changes that seek to undo unhelpful admissions, con-

[2] Challenges to deposition errata are not limited to so-called "sham" corrections designed to manufacture a material question of fact at summary judgment. *See, e.g.*, *Young v. Cree*, 2019 WL 260853, at *1 (N.D. Cal. Jan. 18, 2019) (noting "the weight of authority" on this point); *Lee*, 2015 WL 6471186, at *1; *Karpenski v. Am. Gen. Life Cos., LLC*, 999 F. Supp. 2d 1218, 1224 (W.D. Wash. 2014).

[3] To aid the Court's review, Apple has attached a copy of Professor McFadden's Corrections to this brief with numbered rows corresponding to each Correction. *See* App'x A.

tradict Prof. McFadden's sworn testimony, or otherwise significantly alter its meaning. Notably, several Corrections appear designed to mitigate testimony that Apple relied upon in opposing class certification and moving to exclude Prof. McFadden's opinions under *Daubert*. Plaintiffs are not shy about this fact; they admit in their Reply that Prof. McFadden "corrected his testimony" on market definition after Apple highlighted its inconsistency with Supreme Court precedent. *See* Reply at 5 n.5 (citing Correction 7); *see* Opp. at 7. Other changes are similar attempts to rehabilitate Prof. McFadden's admission that he relied on mere "commonsense judgment" to arrive at his but-for commission. *Compare Daubert* Mot. at 1 (quoting Prof. McFadden to argue that he "did not apply scientific rigor or economic expertise to model the but-for world, instead choosing to rely on mere 'commonsense judgment'"), *with* Correction 15 ("Well, I think it's largely common sense assessment of observed economic characteristics." (correction underlined)). And three Corrections seek to rewrite Prof. McFadden's repeated concession—featured prominently in Apple's opposition papers—that it would be "challenging, if not impossible" and "beyond the bounds of practicality" to link an individual class member's accounts and calculate their net injury. *Compare* Opp. at 22–23 (quoting McFadden Dep. 227:4–228:12), *with* Correction 39 ("I think that is beyond the bounds of practicality. However, Apple might be able to validate the lists of Apple IDs submitted by individual claimants from the class."); *see also* Corrections 40–41. That much of Prof. McFadden's sworn testimony was unhelpful to Plaintiffs' case does not give them license to rewrite it—much less after Apple has used it against them. *Cf. Hambleton Bros.*, 397 F.3d at 1225 (striking "seemingly tactical" deposition errata which lacked "a legitimate purpose"); *MGA Entm't, Inc. v. Nat'l Prods. Ltd.*, 2012 WL 12886204, at *2 (C.D. Cal. Apr. 12, 2012) (the purposes of deposition testimony "are disserved by allowing deponents to answer questions at a deposition with no thought at all and later to craft answers that better serve the deponent's cause" (internal quotation marks omitted)). Corrections 7, 15, and 39–41 should be stricken on that basis alone.

These Corrections and others are also improper "because they appear to substantively change or contradict [Prof. McFadden's] original testimony." *Teleshuttle Techs. LLC v. Microsoft Corp.*, 2005 WL 3259992, at *2–3 (N.D. Cal. Nov. 29, 2005). At least five Corrections either expressly or effectively change a "no" answer to a "yes" or vice versa, *see* Correction 1 (changing "I don't think so" to

"yes"); Correction 17 (changing "in Equation 8, the answer is 'no'" to "in Equation 8, the answer is 'yes'"); *see also* Corrections 13, 19, 35—the "paradigmatic example" of "contradictory changes" that "Rule 30(e) does not permit." *Lee*, 2015 WL 6471186, at *1–2; *see also Young*, 2019 WL 260853, at *3 (striking deposition errata that "chang[ed] [the deponent's] answer to nearly the opposite of what he said").

Plaintiffs and Prof. McFadden offer still other Corrections to purportedly address "misstatements" (Corrections 1, 16, 17, 19, 24, 34, 35); provide "clarifications" to "supplement" his original testimony (Corrections 7, 15, 16, 23, 25, 28, 32, 33, 39–41); rectify "an honest mistake" (Correction 34), "an inadvertent mischaracterization of what [his] model does" (Correction 35), and an "[in]consisten[cy]" between his testimony and his benchmark analysis (Correction 16); and correct errors from having "to conduct mathematical calculations in his head" (Corrections 13, 17, 19). *See* Ex. 2 at 2–3 (explaining purported amendments). None of these are permissible grounds for revising sworn testimony. *See Lee*, 2015 WL 6471186, at *2 (rejecting attempt to provide, through errata, "mere clarification[s] that more accurately reflect[ed] the truth"); *Teleshuttle Techs.*, 2005 WL 3259992, at *2–3 (striking 45 changes that, among other things, added new answers, limited or qualified testimony, and rendered testimony more vague); *Lewis v. The CCPOA Benefit Trust Fund*, 2010 WL 3398521, at *3 (N.D. Cal. Aug. 27, 2010) (rejecting errata that "so altered the prior testimony as to amount to a fundamental change"). "It may well be that [Prof. McFadden's] answers at his deposition were incorrect"—and, indeed, it seems many were—"but Plaintiffs' counsel had the opportunity . . . during [his] deposition to question [Prof. McFadden] about any of the questions that [Apple's] counsel asked." *Lee*, 2015 WL 6471186, at *2. They declined to do so. Dkt. 477-17 at 245:14. Professor McFadden is "not an unsophisticated witness," but a Nobel-Prize winning econometrician and experienced testifying expert, who has "submitted extensive declarations in the course of this litigation." *Lewis*, 2010 WL 3398521, at *4 (rejecting Rule 30(b)(6) deponent's attempt to "correct honest mistakes" through errata); *see* Reply Report at 141–42 (listing Prof. McFadden's nine expert witness engagements since 2017). Plaintiffs must live with his testimony—whether accurate, helpful, or otherwise.

B. The Court Should Strike the Corrections as Untimely

Even if Prof. McFadden's deposition transcript Corrections were proper (and they are not), the

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