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16
17 **UNITED STATES DISTRICT COURT**

18 **CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**

19 MASIMO CORPORATION,
a Delaware corporation; and
20 CERCACOR LABORATORIES, INC.,
a Delaware corporation,

21 Plaintiffs,

22 v.

23 APPLE INC.,
24 a California corporation,

25 Defendant.
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27
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CASE NO. 8:20-cv-00048-JVS (JDEx)

**APPLE’S RESPONSE TO
PLAINTIFFS’ OBJECTION TO
APPLE’S THIRD AMENDED
WITNESS LIST**

Trial: Apr. 4, 2023

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1 Plaintiffs’ “objection” to Apple’s inclusion of its CEO Tim Cook on its Third
2 Amended Witness List is unfounded. Having repeatedly insisted on Mr. Cook’s
3 deposition before the Special Master and this Court and prevailed, Plaintiffs should not
4 be permitted to bar the jury from hearing Mr. Cook’s testimony on the exact subjects
5 on which they insisted he had relevant information. While Plaintiffs are wrong that
6 Apple must show “good cause” to add Mr. Cook based on a Joint Pretrial Order that
7 has not yet entered, Apple could easily meet that standard.

8 **First**, at the outset, **Plaintiffs** included Mr. Cook **on their own witness list** as a
9 witness whom they would call by deposition. On February 22, however, after Apple
10 served its counter-designations for Mr. Cook’s deposition, Plaintiffs served a First
11 Amended Witness List that removed Mr. Cook. The reason for Plaintiffs’ removal of
12 Mr. Cook from their witness list is clear: Plaintiffs do not wish the jury to hear Mr.
13 Cook’s deposition testimony with Apple’s counter-designations included. Indeed,
14 Plaintiffs admitted as much at the pretrial conference. *See* March 13, 2023 Hrg. Tr.
15 (Plaintiffs’ counsel complaining of redirect questions at Mr. Cook’s deposition and
16 stating: “Now that we are not calling Mr. Cook or designating his testimony, I don’t
17 think it’s fair for them to now bring him live.”).

18 After Plaintiffs removed Mr. Cook from their witness list, Apple promptly
19 began to investigate Mr. Cook’s availability to testify live and notified Plaintiffs and
20 the Court at the Pretrial Conference of its intent to add Mr. Cook as a may-call witness.
21 As the Court suggested, Apple asked Plaintiffs after the Pretrial Conference whether
22 they would permit Mr. Cook to be treated as an unavailable witness so his deposition
23 could be played to the jury in lieu of calling him live. Thus far, Plaintiffs have refused.

24 **Second**, Plaintiffs have made clear that they intend to suggest to the jury that
25 Apple pursued what they cast as a nefarious strategy of “smart recruiting” as an
26 alternative to acquiring or partnering with Masimo. At the Pretrial Conference,
27 Plaintiffs referred to “smart recruiting” five times, demonstrating how they intend to
28 falsely suggest something inappropriate about this phrase and that it somehow supports

1 their claims of trade secret misappropriation. (See 3/3/23 Hrg. Tr. at 8 (referring to
2 “Apple’s plan to engage in smart recruiting as an alternative to partnering with
3 Masimo or acquiring Masimo”); 11 (referring to “evidence that relates to what
4 [Plaintiffs] assert was Apple’s plan for smart recruiting”; “Apple’s plan for smart
5 recruiting”; and “plan of smart recruiting”), 15 (Plaintiffs’ counsel alleging “Apple
6 itself said they were engaging in smart recruiting as an alternative to a business deal”).
7 The phrase “smart recruiting” appears only in a single e-mail authored by Mr. Cook.
8 Plaintiffs should not be permitted to misrepresent the facts around this e-mail. If
9 Plaintiffs continue to refuse to waive the unavailability rule and mispresent the facts
10 around “smart recruiting,” then Apple would try to bring Mr. Cook for trial so that he
11 can explain, among other things, the truth about the e-mail on which Plaintiffs
12 apparently intend to focus their case. Plaintiffs repeatedly insisted that Mr. Cook had
13 relevant evidence, including this e-mail, and that Plaintiffs would be prejudiced if they
14 could not present his testimony at trial. See, e.g., Dkt. 977 (“Because of Cook’s
15 involvement, many key documents that Masimo will use at trial were sent to Cook,
16 came from Cook, or discuss Cook. If Cook does not testify, the jury will likely
17 question why Masimo failed to present any testimony from Cook. Masimo should not
18 have to risk the jury inferring that Masimo either failed to pursue Cook’s testimony or
19 that such testimony would have been unfavorable to Masimo.”). Now that they have
20 his deposition testimony, Plaintiffs have no well-founded basis to do an about-face.

21 **Third**, there is no issue of unfair surprise or prejudice to Plaintiffs. At the
22 pretrial conference, Apple explicitly and directly raised the issue of potentially calling
23 Mr. Cook, and Apple has since informed Plaintiffs that if he is called as a live witness,
24 Mr. Cook’s testimony will fall within the scope of the topics on which the Court and
25 the Special Master permitted Plaintiffs to depose Mr. Cook. Plaintiffs accordingly had
26 a full and fair opportunity to depose Mr. Cook on the topics on which he will testify at
27 trial—and the only “prejudice” is that he can provide the facts on issues for which
28 Plaintiffs would prefer to suggest a false narrative to the jury.

1 Dated: March 27, 2023

Respectfully submitted,

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4 /s/ Mark D. Selwyn

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