14-60

United States Court of Appeals for the Second Circuit

UNITED STATES,

Plaintiff-Appellee,

v.

APPLE INC.,

Defendant-Appellant,

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On Appeal from the United States District Court
for the Southern District of New York
No. 12-cv-2826 (DLC)

APPELLANT APPLE INC.'S OPENING BRIEF
(PAGE PROOF)

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HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, DBA MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC., SIMON & SCHUSTER, INC.,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, defendant-appellant Apple Inc. states that it has no parent corporation. To the best of Apple's knowledge and belief, and based on publicly filed disclosures, as of May 15, 2014, no publicly held corporation owns 10% or more of Apple's stock.

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INTRODUCTION

The external compliance monitor the district court imposed on defendant Apple Inc. as part of the final judgment and injunction in this case is unprecedented, unlawful, and unconstitutional. Never before in a civil antitrust case has a monitor been imposed on a defendant over its objection. And the monitor here has been given broad and invasive authority that exceeds the scope of the district court's authority under Rule 53 and violates the constitutional separation of powers and due process. *See Cobell v. Norton*, 334 F.3d 1128, 1141-42 (D.C. Cir. 2003).

Even apart from the impermissibly broad *scope* of the monitorship is the plainly inappropriate *manner* in which the monitorship has been carried out. The monitor engaged in *ex parte* discussions with plaintiffs, and when Apple sought to stay the monitorship during the pendency of this appeal, the monitor coordinated with plaintiffs in their opposition to Apple's motion and filed a declaration on plaintiffs' behalf against Apple. This has occurred even while the state plaintiffs are together with a class of private plaintiffs simultaneously seeking over $800 million in damages from Apple in a related case. Rather than check the monitor's authority, the district court's rulings have only broadened his powers.

Rule 53 and Article III of the United States Constitution place clear limits on the authority that district judges may delegate to special masters or monitors. The

touchstone of those limits is that a monitor may not engage in conduct that would be impermissible for the district court. The monitor's non-judicial activities and collusion with plaintiffs against Apple here are without question beyond the scope of the district court's authority, and thus require reversal.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the United States' Sherman Act claims in No. 14-60 under 15 U.S.C. § 4 and 28 U.S.C. §§ 1331, 1345, and over the plaintiff States' Sherman Act and state-law antitrust claims in No. 14-61 under 28 U.S.C. §§ 1331, 1367(a). The district court denied Apple's stay motion and request for disqualification of the monitor on January 16, 2014. Dkt437. Apple timely appealed on January 16, 2014. Dkt439; No. 12-cv-03394, Dkt407. This Court has jurisdiction over the post-trial orders denying Apple's stay motion and request for disqualification of the monitor under 28 U.S.C. § 1291. *See United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991). Alternatively, this Court may exercise its mandamus jurisdiction. *See* 28 U.S.C. § 1651; *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992).

STATEMENT OF THE ISSUES

1. Whether the monitorship provision of the final judgment, both on its face and as applied, exceeds the district court's authority under Rule 53 and violates the separation of powers and due process.

2. Whether the district court abused its discretion by refusing to disqualify the monitor for communicating *ex parte* with plaintiffs and testifying against Apple in the proceedings below.

STATEMENT OF THE CASE

Plaintiffs' claims under the Sherman Act and congruent state statutes proceeded to trial before Judge Cote in June 2013, and on September 5, 2013, the district court entered its final judgment and injunction in both cases. Dkt374; *see United States v. Apple, Inc.*, 2013 WL 4774755 (S.D.N.Y. Sept. 5, 2013). Apple opposed the injunction including the monitorship provision (Dkt330), objected at numerous points to the way in which the monitorship was being applied (Dkt411; Dkt427), and on December 12, 2013, moved for a stay of the monitorship provision of the injunction pending appeal (Dkt417). On January 7, 2014, Apple also requested that the monitor be disqualified. Dkt425. On January 16, 2014, the district court entered an order denying all of Apple's requested relief and fully sanctioning the monitor's conduct. Dkt437. Apple timely appealed on January 16, 2014. Dkt439.

STATEMENT OF FACTS

Apple entered the retail e-books market in early 2010 by negotiating agency agreements with large e-book publishers that permitted the individual publishers to set the prices at which their e-books would be sold and required that certain books

sold through Apple's iBooks Store be available at a price equal to or lower than the lowest price for which they were sold by any other retailer. Dkt326.11-12. As Apple argued at trial and on appeal from the district court's judgment and injunction, its entry as an e-book retailer marked the beginning, not the end, of competition: Upon Apple's entry, the number of available e-book titles went up substantially; innovation and competition in e-reading hardware and software and digital publishing increased; and the average overall price of e-books fell. DX-721¶¶ 4, 18-20, 30-32; DX-723¶¶30-42; DX-724¶¶49-53; DX-435; Dkt326.156 & n.69. Nonetheless, the district court found Apple *per se* liable under section 1 of the Sherman Act. Dkt326.120.[1]

As Apple explained in its appeal from the district court's determination that Apple violated the Sherman Act, the court's decision was legally incorrect and clearly erroneous. *See* No. 13-3741, Dkt157. However, in *this* appeal, Apple seeks relief from the fundamental flaws in the *remedy* imposed by the district court and applied by the compliance monitor.

1. On July 19, 2013, plaintiffs submitted a proposed injunction that requested, *inter alia*, imposition of an "External Compliance Monitor" who would

[1] The facts of the underlying action are set out in detail in Apple's opening brief in its appeal from the district court's final judgment and injunction. *See* No. 13-3741, Dkt157.

be authorized to "monitor Apple's compliance with the terms of th[e] Final Judgment." Dkt329-1.10. Apple objected to this "plainly punitive," "broad [and] invasive" proposal, observing that it would provide the monitor a "roving mandate to parse *all* of Apple's business conduct," which "flies in the face of law and practice." Dkt330.2, 9-10. The district court nonetheless imposed the monitorship over Apple's objection as part of the final judgment. Dkt356.66:1-10.

The monitor was tasked only with "review[ing] and evaluat[ing] Apple's existing internal antitrust compliance policies and procedures," as well as its new antitrust training program, "as they exist 90 days after his or her appointment." Dkt374.VI.B-C. In performing these tasks, he is authorized to "interview, either informally or on the record, any Apple personnel," and "inspect and copy any documents in the possession, custody, or control of Apple." Dkt374.VI.G. If the monitor discovers evidence that Apple is violating the final judgment or the antitrust laws, he must "promptly provide that information to the United States and the … Plaintiff States." Dkt374.VI.F. The monitor's term is two years, although it may be extended by the district court "*sua sponte* or on application of the United States or any Plaintiff State." Dkt374.VI.A.

2. Under the final judgment, the United States and the plaintiff States (but not Apple) were permitted to recommend monitor candidates to the district court. Dkt374.VI.A. Plaintiffs proposed Michael Bromwich, along with another

candidate, to serve as monitor. Dkt437.14. Apple objected to the appointment of Mr. Bromwich on the grounds that he lacked antitrust experience and that it would unduly increase Apple's expenses to appoint both him and antitrust lawyer Barry Nigro to assist him. Dkt419 ¶ 3. Mr. Bromwich submitted a proposal (which was not disclosed to Apple) regarding how he would approach the monitorship (Dkt424 ¶ 9), and discussed his approach when he interviewed with the court *ex parte* (*id.* ¶ 10; Dkt419-2.20). On October 16, 2013, the district court appointed Mr. Bromwich as monitor and Mr. Nigro as his assistant. Dkt384.

3. The day the monitor was appointed, Apple reached out to him to schedule an introductory meeting with key personnel. Apple explained that it was "committed to working with [the monitor] and developing a best of class antitrust compliance program," and that it hoped its work with the monitor would be "a collaborative effort." Dkt419-1.27.

The monitor, however, immediately embarked on an open-ended and amorphous inquisition that exceeded the scope of his duties under the final judgment as well as the constitutional and other limits on his authority. For example, although the final judgment clearly gave Apple 90 days to revise its compliance policies and draft training programs before the monitor's review (Dkt374.VI.C) and the court had explained that the monitor was to "do[] an assessment … three months from appointment and *begin*[] to engage Apple in a

discussion at that point" (Dkt371.21:6-8 (emphasis added)), the monitor sought to interview members of Apple's executive team and board of directors *immediately* (Dkt430 ¶ 6). Many of these executives, though they occupied important positions at Apple, had little day-to-day involvement with Apple's e-books business or antitrust compliance efforts. Dkt419-1.20; Dkt419-2.8. And when Apple explained that some of the personnel the monitor proposed to interview could not meet with him on his strict timetable, he responded by demanding "detailed copies of their schedules." Dkt419-1.18. Apple arranged a slate of interviews with individuals directly relevant to Apple's antitrust compliance policies (such as Apple's Antitrust Compliance Officer Deena Said), or to its e-book negotiations with publishers (such as Director of iBooks Store Rob McDonald). *E.g.*, Dkt419-1.24. Nonetheless, the monitor persisted in making broad interview demands and pursuing information that fell far outside the scope of his mandate. *E.g.*, *id.* at 20-21.

The monitor then attempted to circumvent Apple's attorneys on multiple occasions in order to contact Apple personnel directly. He wrote a letter directly to Tim Cook, Apple's CEO; he also wrote to Apple's individual directors, explaining that he wanted to "[p]romote" a "relationship between the company liaisons and the monitoring team that is unfiltered through outside counsel," and that he needed to be able to communicate with Apple's directors directly. Dkt419-2.18; Dkt430

¶ 15. He later complained that "the company was using its outside counsel as a shield to prevent interaction between senior management and [his] monitorship team," explaining that the subjects of his other monitorships had "uniformly encouraged [him] to contact them directly in the event that [the monitor or his team] were not getting what [they] needed." Dkt424 ¶¶ 11, 26.[2]

The monitor recognized no limits on the scope of those he is permitted to interview, and did not disclose the full set of individuals he interviewed, what he discussed, what information he disclosed in those interviews, or what he learned. Because all of these interviews have taken place *ex parte* and off the record, Apple has no way of knowing the extent of the monitor's contacts with individuals outside Apple.

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[2] Apple and the monitor also disagreed about the monitor's compensation. After his appointment, the monitor proposed—and plaintiffs approved—hourly rates of $1,100 for himself and $1,025 for Mr. Nigro, plus a 15% "administrative fee" designed to help the monitor's consulting firm "generate profits." Dkt419-3.8, 13, 14. These rates are completely unprecedented and unjustified for a government agent. *See*, *e.g.*, Thomas E. Winging et al., Special Masters' Incidence and Activity, Federal Judicial Center 6-7 (2000) (typical hourly compensation for monitors and special masters in 2000 was only $200); U.S. Gen. Accounting Office, Fees Paid to Private Attorneys, GAO-01-887R (2001) (private attorneys retained by the Department of Justice as litigation consultants in antitrust cases were paid an average of $271 per hour during fiscal year 2000). The parties participated in a mediation that resulted in rates that are somewhat reduced but are still far outside the bounds of what a monitor should be permitted to charge.

4. Even worse than the overbroad, extrajudicial scope of his work was the monitor's collusion with plaintiffs—including *ex parte* discussions culminating in testimony on plaintiffs' behalf against Apple.

Before he was appointed, the monitor met *ex parte* with the district judge. In the monitor's view, this *ex parte*, off-the-record discussion gave him a "distinct advantage" over Apple when interpreting the scope of his mandate, because he had "discussed [his] intentions to get off to a fast start directly with [the district court] during the interviewing process." Dkt419-2.20. After the monitor's appointment, the district court submitted—but then abandoned, in response to Apple's objection—a proposal formalizing the monitor's authorization to meet with the court *ex parte*. Dkt354.

The monitor has also met with the Department of Justice and State plaintiffs *ex parte* in order to coordinate opposition to Apple in the district court. In support of plaintiffs' opposition to Apple's stay motion, the monitor filed a declaration—testimony *against Apple*—that disputed facts and evidence in Apple's submissions. Dkt424. For example, the monitor disagreed with Apple's characterizations of his proposal to meet Apple's general counsel "at the federal courthouse" during trial in an unrelated case, as well as its supposed "claims" that the monitor "intended to deprive Apple [personnel] of their right to have counsel present during interviews." Dkt424.7 n.5, 11 n.9. And he complained that "I have never before had a request

for a meeting or interview in a monitoring assignment rejected or even deferred." Dkt424.4. Neither the monitor nor plaintiffs have disputed that the monitor's declaration was prepared along with plaintiffs in a joint effort to oppose Apple's motion for a stay. *Compare* Dkt427.4 (asserting that monitor "surely collaborated and discussed his declaration *ex parte* with plaintiffs before filing it") *and* No. 14-60, Dkt10.11 (monitor "has had and continues to have *ex parte* discussions with plaintiffs and Apple"), *with* No. 14-60, Dkt25.15 (plaintiffs' opposition admitting that "Plaintiffs have had conversations with Mr. Bromwich" and never denying that plaintiffs and the monitor collaborated on the monitor's declaration).

From the outset, the monitor billed Apple an extraordinary amount that bore no relation to his completion of appointed tasks. In his first two weeks—before he embarked on *any* evaluation of Apple's antitrust compliance policies and training programs—the monitor billed Apple nearly $140,000. Dkt419-3 at 14. If the monitor were to continue billing at that pace for his entire two-year term, he would ultimately bill Apple roughly $7 million for work that was supposed to focus "narrowly" (No. 14-60, Dkt63.2) on the terms of Apple's revised compliance and training programs.

5. On January 7, 2014, Apple formally requested disqualification of the monitor. Dkt425. That same day, counsel for Apple filed a declaration with

Apple's reply in support of its stay motion pointing out numerous inaccurate or misleading statements in the monitor's declaration. Dkt430 ¶¶ 2-3, 5-6, 8, 13.

On January 16, the district court issued a 64-page opinion denying Apple any relief. The district court relied heavily on the monitor's testimony in ruling against Apple. Dkt437. The opinion constructively modified the injunction to endorse the monitor's wide-ranging, investigative activities, including his *ex parte* communications with plaintiffs. Indeed, Apple expressly argued to the district court that the monitor's *ex parte* discussions and "active collaboration" with plaintiffs were "plainly inappropriate" activities that required his disqualification. Dkt425.1-2; Dkt427.4. The court rejected Apple's argument, concluding that the monitor's conduct in submitting his declaration was "proper and necessary." Dkt437.53. With respect to Apple's stay motion, the court concluded that Apple was not likely to succeed on the merits of its challenge and was not being irreparably harmed.

6. Apple has objected repeatedly to the monitorship, the monitor's dramatic expansion of his role, and his inappropriate discussions and cooperation with plaintiffs.

Apple clearly objected to the terms of the monitorship provision in its opposition to plaintiffs' proposed injunction, arguing that the proposed

monitorship was "wholly unjustified by law or fact" and went "far beyond any 'logical nexus' with the alleged violation." Dkt330.3.

Apple objected to the scope of the monitorship at its first meeting with the monitor on October 22, 2013. Dkt430 ¶ 2; *see also* Dkt419-1.2-5; Dkt419-3.21-22. Apple filed objections again on November 27, 2013, arguing that the monitor had "already exceeded [his mandate] in multiple ways" and that his "unreasonable investigation to date ha[d] been anything but 'judicial,'" in violation of Rule 53, the separation of powers, and due process. Dkt411.1-2; *see also id.* at 2 ("it is unconstitutional for Apple to be investigated by an individual whose personal financial interest is for as broad and lengthy an investigation as possible").

Apple objected to the monitorship again on December 12, 2013, in its stay motion. Dkt417. It argued that "[t]he injunction, especially as it is being interpreted … by [the monitor] as the Court's agent, is flatly unconstitutional," because it "far exceeds what is permitted under Rule 53," "violates the separation of powers," and "deprives Apple of its right to a 'disinterested prosecutor.'" *Id.* at 1, 9, 14.

Apple objected yet again on January 7, 2014, in both its reply brief (which reincorporated arguments made in its motion) and in a letter to the district court that also sought disqualification of the monitor based on his filing a declaration against Apple. Dkt425; Dkt427; No. 14-60, Dkt25, Ex. 3 at 21:15-17. Apple

included detailed objections to the monitor's most recent conduct, which included "[h]is submission of a lengthy declaration" testifying about "disputed evidentiary facts in support of plaintiffs' opposition to Apple's motion for a stay"—behavior that was "grossly inappropriate" for a judicial officer. Dkt427.3-4, 7.

At the hearing on Apple's stay motion and request for disqualification of the monitor, Apple argued that the monitor was "conducting a nonjudicial, inquisitorial, roaming investigation" that violated "the final judgment … Rule 53 and the Constitution." Dkt441.3:12-16. It argued that although the monitor was "supposed to be serving as a judicial officer," instead he was "acting like an agent of the prosecution," an "agent of the plaintiffs and a witness against Apple." *Id.* at 4:2-7.

7. After the district court denied Apple's stay motion, Apple sought a stay from this Court. No. 14-60, Dkt10; No. 14-61, Dkt5.

At oral argument before this Court on Apple's motion, plaintiffs' counsel conceded that although the monitor had "the power and authority to review and evaluate [Apple's] compliance policies," he lacked the power to "review and evaluate [its] compliance with [its] compliance policies." 2/4/14 Arg. Tr. at 29:2-9.[3] Plaintiffs also conceded that the monitor's supposed power to interview "any"

[3] The monitor's role thus differs dramatically from that of a compliance monitor appointed as part of a consent decree or non-prosecution agreement and whose

Apple employee and review "any" document in the company's possession was limited to interview and document requests related to his narrow, enumerated tasks. *Id.* at 27:6-10.

On February 10, this Court denied Apple's stay motion, but it expressly conditioned its ruling on its interpretation of the final judgment that "narrowly" circumscribed the scope of the monitor's powers and responsibilities. No. 14-60, Dkt63.2. According to the motions panel, and based on plaintiffs' concessions, the sole permissible purposes of the monitorship are to ensure "'that [Apple] ha[s] an anti-trust compliance program in place'" and that Apple's "'employees[,] particularly[] senior executives and board members are being instructed on what those compliance policies mean and how they work.'" *Id.* Thus, the Court held that the monitor's authority extended only to "assess[ing] the appropriateness of the compliance programs adopted by Apple and the means used to communicate those programs to its personnel." *Id.* The monitor is "empowered to demand only documents relevant to his authorized responsibility ... and to interview Apple directors, officers and employees only on subjects relevant to that responsibility." *Id.*

"primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement." Craig S. Morford, *Memorandum Re: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* 2 (Mar. 7, 2008), available at http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

This Court adopted these "substantial restrictions" (2/4/14 Arg. Tr. at 36:17), and "t[ook] counsel's statement as a formal representation that appellees also accept that interpretation, and that the monitor will conduct his activities within the bounds of that order, absent further action by the district court or by the panel that will in due course hear the merits of the appeal." No. 14-60, Dkt63.2. This Court thereby rejected the broad mandate that the monitor had claimed and that led to Apple's stay application, and made clear that the monitor's tasks are very narrow and straightforward.

Despite this Court's order interpreting the scope of the monitorship, the district court has still refused to limit the scope of the monitor's inquiry. In fact, the district court's only reference to this Court's interpretation of the scope of the monitorship has been to chide Apple for insisting that "the Monitor's document request[s be] 'consistent with the scope of [the Monitor's] mandate as interpreted by the Second Circuit.'" Dkt447.2.

SUMMARY OF ARGUMENT

I. The monitorship violates Rule 53, the constitutional separation of powers, and due process because it invests in the monitor authority that is extrajudicial and therefore could not properly be exercised by the district court.

A. Where a monitor is given quasi-inquisitorial powers over the objection of the party being monitored, his appointment "overreach[es] '[t]he judicial Power'

actually granted to federal courts by Article III of the Constitution of the United States." *Cobell v. Norton*, 334 F.3d 1128, 1141 (D.C. Cir. 2003). The monitor here claims authority to interview any of Apple's employees and demand to review any of its documents, to engage in *ex parte* discussions with plaintiffs, and to coordinate with plaintiffs on and submit a declaration opposing Apple's stay motion in the district court. No judge could ethically perform these activities, and the district court therefore could not authorize its agent to do so.

B. Because the monitor has a financial interest in the scope and duration of the monitorship, and has taken extraordinary actions to defend the monitorship that are consistent with that interest, his continued service denies Apple its due process right to a disinterested prosecutor. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987).

II. Even if the monitorship imposed by the final judgment could be upheld, the monitor here must be disqualified, because he has engaged in *ex parte* discussions with plaintiffs (Apple's litigation adversaries) and submitted a declaration in support of plaintiffs—all of which was sanctioned by the district court—thereby creating an appearance of impropriety and testifying to "disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(a), (b)(1).

STANDARD OF REVIEW

This Court reviews constitutional challenges and questions of law *de novo*. *Wang v. Holder*, 583 F.3d 86, 90 (2d Cir. 2009). It reviews a district court's decision on a disqualification motion for abuse of discretion. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). A district court abuses its discretion when its "decision rests on an error of law." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

ARGUMENT

The monitorship the district court imposed exceeds the court's authority under Rule 53 and violates the separation of powers and due process. The monitor engaged in *ex parte* discussions with plaintiffs, and ultimately testified against Apple in a sworn declaration opposing Apple's motion—all of which the district court authorized, but which should have immediately disqualified the monitor from further service. The monitorship here is unprecedented, beyond the scope of the court's authority, and unconstitutional. This Court should vacate section VI of the injunction, or at the very least order that the monitor be disqualified.

I. The Monitorship Violates Rule 53, the Separation of Powers, and Due Process, Both on Its Face and as Applied

A district court may empower a monitor to exercise only that authority that the court itself may exercise. *Cobell v. Norton*, 334 F.3d 1128, 1141-42 (D.C. Cir. 2003). Any broader activity by a monitor violates Rule 53 and the separation of

powers. Flouting these principles, the monitor in this case has demanded unbounded, irrelevant interviews with senior Apple leaders and has had *ex parte* contacts with the plaintiffs in this action. The monitorship, particularly as it has been applied, thus violates Rule 53, the separation of powers, and due process.

A. The Monitor's Extrajudicial Functions and *Ex Parte* Discussions with Plaintiffs Violate Rule 53 and the Separation of Powers

The monitor's extrajudicial, quasi-inquisitorial activities and *ex parte* contacts and collaboration with the Department of Justice and plaintiff States' Attorneys General would be plainly inappropriate if conducted by a district court. Because the monitor is undisputedly an agent of the district court, these activities violate Rule 53 and the separation of powers.

1. Federal Rule of Civil Procedure 53, which governs the appointment of special masters and compliance monitors, strictly limits monitors to performing functions that could be permissibly performed by a court. According to the rule, "a court may appoint a master *only* to: (A) perform duties consented to by the parties; (B) hold trial proceedings or make recommended findings of fact [under certain circumstances]; or (C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1) (emphasis added). As a result, a master or monitor appointed pursuant to Rule 53 could be given authority "to convene and to regulate hearings, to rule on the admissibility of evidence, to subpoena and swear

witnesses, and to hold non-cooperating witnesses in contempt." *Benjamin v. Fraser*, 343 F.3d 35, 45 (2d Cir. 2003), *overruled on other grounds by Caiozzo v. Koreman*, 581 F.3d 63 (2d Cir. 2009).[4]

This limitation is required by the constitutional separation of powers. Under Article III, a federal court may not perform "executive or administrative duties of a nonjudicial nature" (*Morrison v. Olson*, 487 U.S. 654, 677 (1988) (citation and internal quotation marks omitted)), including the quintessentially executive responsibility to "'take Care that the Laws be faithfully executed'" (*Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (quoting U.S. Const. art. II, § 3)). These precepts bind with equal force an "agent" of the court like the monitor here. Dkt437.54; Dkt441.45:7-8 ("The monitor works for me"). Because a monitor is a "judicial officer" (*Cobell*, 334 F.3d at 1139), he may "aid judges" only "in the performance of specific *judicial duties*" (*La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957)

[4] The district court has acknowledged that its appointment of the monitor was made pursuant to Rule 53. *See* Dkt410.1; Dkt437.39-40. The court, however, also asserted that Rule 53 was merely a "supplement, and not a substitute, to a court's inherent authority to appoint a monitor." Dkt437.40. This view is directly contradicted in *Cobell*, which held that a "district court does not have inherent power to appoint a monitor" with investigatory duties "over a party's substantial objection." 334 F.3d at 1141. And in any event, the fundamental limitations imposed by Rule 53—for example, that a master or monitor perform work that could be performed by a judge, or that the master or monitor be objective—track the constitutional separation of powers and must apply to the exercise of any purported inherent power to "'appoint an agent.'" Dkt437.40 (quoting *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982)).

(emphasis added, citation and internal quotation marks omitted); *see also Reed v. Rhodes*, 691 F.2d 266, 269 (6th Cir. 1982) (special masters act "in a quasi-judicial capacity")).

To be sure, *where parties consent to a monitor*, the monitorship "should be construed basically as [a] contract[]." *Juan F. v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994) (citation and internal quotation marks omitted). Indeed, parties may even agree to terms that would otherwise violate the defendant's constitutional rights. *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 146 (2d Cir. 2011).

In contrast, compliance monitorships arising out of litigated antitrust cases are extremely rare. Indeed, Apple knows of only one such case—*United States v. AU Optronics Corp.*, No. 3:09-00110 (N.D. Cal. Oct. 2, 2012)—a *criminal* case involving allegations of naked price fixing with no conceivable pro-competitive effects. No. 3:09-00110, Dkt976 at 1-7, 17-18. There the defendant's alleged "standard operating procedure ha[d] been collusion," it "had never known any other way of doing business [or] operated lawfully," and the company had "no antitrust compliance program whatsoever." No. 3:09-00110, Dkt948 at 53-54. To the extent monitorships can ever even arguably be imposed by a federal court, they should be reserved for only these very worst antitrust violators. They should not be imposed in a civil antitrust case such as this one that concerns only a six-week course of conduct during which Apple, "an esteemed company" (Dkt326.158),

entered into a nascent and rapidly evolving e-books market, which the district court acknowledged "encouraged innovation and competition" and "was extremely beneficial to consumers and competition" (Dkt326.156 & n.69).

Even when properly appointed, a monitor imposed without the consent of the party to be monitored may perform only "specific *judicial duties*" (*La Buy*, 352 U.S. at 256 (emphasis added, internal quotation marks omitted))—duties that would otherwise be performed by "an available district judge or magistrate judge." Fed. R. Civ. P. 53(a)(1). Put differently, when "a party has for a nonfrivolous reason denied its consent" to a monitorship, "the district court must confine itself (and its agents) to its accustomed judicial role." *Cobell*, 334 F.3d at 1142; *see also id.* at 1141 (district court lacks the "inherent power to appoint a monitor" with extensive investigatory duties "without the consent of the party to be monitored").

In *Cobell*, the district court concluded that the Department of the Interior had breached its fiduciary duties to a class of beneficiaries, and appointed a monitor to "monitor and review all of the Interior [Department's] trust reform activities and file written reports of his findings with the Court." *Id.* at 1133 (internal quotation marks omitted). Although the court initially appointed the monitor with the consent of the Interior Department, it later reappointed him even though the agency "effectively withheld its consent" to the reappointment. *Id.* at 1141.

On appeal, the Department of Justice successfully argued that the reappointment violated the separation of powers. It noted that the district court had granted the monitor broad access to "any Interior offices or employees to gather information necessary or proper to fulfill his duties, and allowed him to make and receive *ex parte* communications." Appellants' Br., *Cobell*, 334 F.3d 1128 (No. 02-5374), 2003 WL 25585726 (internal quotation marks omitted). But according to the Justice Department, the "district court ha[d] no authority to require [the Interior Department] to accept a 'Monitor' with far-ranging investigative powers and to require it to pay for his services," and the monitor's *ex parte* contacts with agency officials and appearance of partiality required his recusal. *Id.*

The D.C. Circuit embraced the Justice Department's separation of powers argument, and struck down the monitorship. Although the court was "aware of the practice of … appointing a special master pursuant to Rule 53 to supervise implementation of a court order," it concluded that the district court's actions went "far beyond the practice that has grown up around Rule 53." *Cobell*, 334 F.3d at 1142. While previous monitors had been required "not to consider matters that [went] beyond superintending compliance with the district court's" "specific and detailed decree[s]," the monitor in *Cobell* was authorized to review the Interior Department's "trust reform activities," including "any ... matter [the monitor] deem[ed] pertinent to trust reform." *Id.* at 1143 (internal quotation marks omitted).

This "license to intrude into the internal affairs of the Department" was "simply … not permissible" under an "adversarial system of justice" or the "constitutional system of separated powers." *Id.* It was "surely impermissible to invest the Court Monitor with wide-ranging extrajudicial duties"—instead of "resolving disputes brought to him by the parties," the monitor "became something of a party himself." *Id.* at 1142. This "investigative, quasi-inquisitorial, quasi-prosecutorial role … is unknown to our adversarial legal system." *Id.*[5]

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[5] There is a growing concern among commentators that even consensual monitorships raise concerns about efficacy and cost and the processes by which monitors are appointed. *See*, *e.g.*, Steven M. Davidoff, *In Corporate Monitor, a Well-Paying Job but Unknown Results*, N.Y. Times, Apr. 16, 2014, at B7 (describing compliance monitoring as "one of the biggest growth industries around" and a "profit center for former prosecutors" but questioning whether "the public is getting something" as a result of monitors' appointments); Christopher M. Matthews, *Eye on the Monitors—Apple's Protest Puts Spotlight on Thorn in Corporate Sides*, Wall St. J., Jan. 21, 2014, at B5 (noting that "[m]onitors routinely cost companies millions of dollars" and that "critics … say monitors have an incentive to drag out and expand the scope of their work to bill more hours"); Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. Cal. Interdisc. L.J. 163, 178 (2009); Vikramaditya Khanna and Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 Mich. L. Rev. 1713, 1742-43 (2007) (noting that "monitoring arrangements are becoming more common and their powers are expanding" and warning that monitors may "become like czars—people with considerable, but largely unfettered, power"); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 Brook. J. Corp. Fin. & Com. L. 89, 103 (2006) ("The danger of a de facto expansion of power is inherent in the use of a Corporate Monitor"). These concerns take on much greater force when the monitor is judicially imposed over a company's objection—a new and troubling development.

The district court erred in rejecting Apple's objections to the monitorship by suggesting that the monitorship in *Cobell* "raised serious separation of powers concerns" only because the monitored entity was an executive agency. Dkt437.43. Although it is true that the court in *Cobell* evinced concern about "the propriety of a federal court authorizing its agent to interfere with the affairs of another branch of the federal government," the court expressly "[p]ut[] aside th[at] question" to reach its Rule 53 and separation of powers holding: "When a *party* has for a nonfrivolous reason denied its consent" to a monitorship, "the district court must confine itself (and its agents) to its accustomed judicial role." 334 F.3d at 1142 (emphasis added). The integrity of "our adversarial legal system" demands that courts limit themselves to judicial tasks where their extrajudicial activities would trammel the rights of *any* defendant, not just a governmental one. *Id.* at 1143. Indeed, courts following *Cobell* have denied requests for a monitor vested with "impermissibly broad powers" to investigate a *private* company. *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1149-50 (D.C. Cir. 2009).

The district court also relied on *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), and *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986), but neither case even considered, much less weighed and rejected, a constitutional challenge to a grant of investigatory powers to a monitor.

Ruiz involved systematic and pervasive constitutional violations in a state prison system. In light of the prison system's "record of intransigence toward previous court orders" and "failure to acknowledge even completely evident constitutional violations," the district court gave the special master the authority to "conduct confidential interviews with [the defendant's] staff" and "to require written reports" from staff members. *Ruiz*, 679 F.2d at 1160, 1162 (internal quotation marks omitted). However, the district court's order "[did] not make clear that, in conducting investigations and hearings, the special master … [was] not to consider matters that go beyond superintending compliance with the district court's decree." *Id.* The Fifth Circuit *reversed* due to this failure to limit the scope of the granted investigatory powers: Absent a clear delineation of the scope of his powers, the special master might become "an inmate advocate or a roving federal district court." *Id.*; *see also id.* at 1163 (requiring modification of order to ensure special master did "not have the authority to hear matters that should appropriately be the subject of separate judicial proceedings"). The Fifth Circuit also *reversed* because the special master's power to submit reports "based on his own observations and investigation in the absence of a formal hearing before him" violated due process. *Id.* at 1162-63.

Sheet Metal Workers is even less supportive of the monitor's broad investigation here, because the role of the "administrator" appointed in that case

was *adjudicatory*. *See* Pet'r's Br., *Sheet Metal Workers*, 478 U.S. 421 (1986) (No. 84-1656), 1985 WL 670081, at *12 (administrator drafted affirmative action program, adjudicated back pay awards and disqualification and contempt proceedings, and approved journeyman tests and composition of apprentice classes). The union argued that imposition of the administrator amounted to an "unwarranted denial of the union's right to self-government" and impermissibly delegated the judicial power to decide legal questions. *Id.* at *41. But because the administrator performed judicial functions, the union's argument was fundamentally distinct from the defects in the monitorship imposed here.

2. The monitor here has been given exactly the "investigative, quasi-inquisitorial, quasi-prosecutorial" authority that *Cobell* flatly forbade. 334 F.3d at 1142. The monitor's overly expansive view and implementation of his mandate, along with his *ex parte* contacts with plaintiffs and testimony against Apple below, also violate Rule 53 and the separation of powers and warrant reversal. *See Samnorwood Indep. Sch. Dist. v. Tex. Educ. Agency*, 533 F.3d 258, 267-69 (5th Cir. 2008) (considering as-applied challenge to district court injunction); *McKusick v. City of Melbourne*, 96 F.3d 478, 489 (11th Cir. 1996) (same).[6]

[6] The district court concluded that Apple had waived its objections to "the terms of the Injunction as ordered." Dkt437.41. That is wrong—Apple has repeatedly raised the precise arguments it advances here. *See supra* pp. 11-15. Moreover, as plaintiffs have acknowledged, "[a] separation of powers claim

The district court granted the monitor authority in connection with his responsibilities under the final judgment to "interview, either informally or on the record, *any* Apple personnel," and to "inspect and copy *any* documents in the possession, custody, or control of Apple." Dkt374.VI.G (emphases added). And if the monitor's investigation yields "evidence that suggests … that Apple is violating or has violated this Final Judgment or the antitrust laws," the monitor must "promptly provide that information to the United States and the Representative Plaintiff States" (Dkt374.VI.F)—even though the States are presently Apple's adversaries in a related case seeking along with a class of plaintiffs over $800 million in treble damages.[7]

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cannot be waived." Dkt423.16 n.6 (citing *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986)).

[7] The district court's subsequent rulings only broadened the monitorship's scope. For example, the district court *sua sponte* proposed amendments to the final judgment that would have permitted the monitor to provide "*ex parte* oral briefings" to the court at his own "discretion." Dkt410. (The court ultimately withdrew these proposed amendments in response to Apple's objection. Dkt413.) Although the court had said initially that the monitor was to "do[] an assessment … three months from appointment and *begin*[] to engage Apple in a discussion at that point" (Dkt371.21:6-8 (emphasis added)), in ruling on Apple's stay motion, the district court determined that the monitor had actually been *required* to begin an amorphous background investigation immediately after his appointment (*see* Dkt437.45-46). The court further determined that the monitor was authorized to interview "'any' Apple personnel" and "inspect and copy 'any' documents." *Id.* at 13 (quoting Dkt374.VI.G). In fact, the district court has *never* determined that any action taken by the monitor was outside the scope of his purported mandate.

The monitor has made clear almost from the date of his appointment that he means to "crawl into [the] company," "take down barriers" to his access, and evaluate Apple's "tone" and "culture." Dkt430 ¶ 15; Dkt423.1; Dkt424 ¶ 55. Between October 16, 2013 (when the monitor was appointed), and January 16, 2014 (when the district court entered a temporary stay, which the Second Circuit extended into February), the monitor did not offer any suggestions or guidance regarding Apple's antitrust training programs. In fact, he made no progress toward fulfilling his tasks enumerated in the final judgment. Rather, he spent this time demanding and conducting interviews with (at a minimum) Apple personnel. Because all of this conduct preceded the time when the district court had said the monitor's work was supposed to "begin[]" (Dkt371.21:6-8), all of the monitor's work during the first three months of his appointment exceeded his mandate. The monitor's conduct bespeaks a purpose to monitor Apple's "compliance with [its] compliance policies," which this Court already rejected (2/4/14 Arg. Tr. at 29:2-9).

Additionally, the monitor has never provided Apple with a complete list of the individuals he has interviewed or the subject matter of his discussions. It would be wholly improper for the district judge herself, following a bench trial and while still presiding over the case and a related case involving the same issues and some of the same parties seeking nearly a billion dollars in damages, to embark on such *ex parte* interviews. It is therefore also improper for the court's agent to do so.

There is nothing in the final judgment that prevents the monitor from doing so here, without even informing Apple of basic facts about whom (apart from Apple personnel) he has contacted or what he has discussed. This is the essence of extrajudicial activity and it must be stopped.

3. The monitor's significant *ex parte* contact with plaintiffs also renders the monitorship improper and unconstitutional.

The monitor has undoubtedly engaged in numerous *ex parte* communications with plaintiffs, culminating in his declaration supporting plaintiffs' opposition to Apple's stay motion. The district court in denying Apple any relief expressly authorized the monitor's declaration and failed to check his *ex parte* discussions with plaintiffs. Dkt437.53-54. These contacts are particularly troubling given that the plaintiff States are currently seeking (together with a plaintiff class) over $800 million in damages from Apple in a related damages trial. 11-md-02293, Dkt527.4. Put differently, Apple continues to be investigated by a judicial officer who is supposed to be impartial but who met secretly and off the record with the plaintiffs in that action, who is *required* to disclose to plaintiffs any information that the monitor construes as suggesting an antitrust violation (and not

prohibited from sharing any other information), and who, as far as Apple can discern, may even be acting at the direction of the plaintiffs.[8]

4. By refusing to enforce *any* limitation on the monitor's power, the district court licensed the monitor to pursue precisely the unbounded, "quasi-inquisitorial, quasi-prosecutorial" investigation that was rejected in *Cobell*. 334 F.3d at 1142. The monitor in *Cobell* "acted as an internal investigator," who was authorized to "engage in *ex parte* communications" and "report to the district court," and who "in fact engaged in numerous *ex parte* communications with officials of Interior." *Id.* at 1141, 1144. The Interior Department was obligated to "'facilitate and assist' the Monitor" and "'provide [him] with access to any … offices or employees to gather information.'" *Id.* at 1141.

The court in *Cobell* made clear that "agents" of a district court are confined to performing the court's "accustomed judicial role"—a court may not delegate to its agent power that it may not itself constitutionally exercise. 334 F.3d at 1142. It

[8] Apple, for its part, has not treated the monitor as an adversary. Instead, it consistently treated him as an officer of the court, and immediately after his appointment reached out to the monitor to express the company's interest in making a "collaborative effort" and establishing an "open and honest dialogue" with the monitor. Dkt419-1.27; *id.* at 4-5. The monitor, however, has acted as Apple's adversary by offering testimony against the company, disregarding the limits on his mandate, and performing non-judicial functions that are flatly barred by Rule 53 and the separation of powers.

is striking to imagine the impropriety if the monitor's duties here were performed by a district judge.

A district judge could not demand and conduct *ex parte* interviews with employees and officers of a party, let alone divulge information from those interviews in secret conferences with the party's adversary. *See* Code of Conduct for U.S. Judges, Canon 3(A)(4) ("a judge should not initiate, permit, or consider *ex parte* communications"); *id.* Canon 3(B)(2) ("A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge"); *see also*, *e.g.*, *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1266-67 (9th Cir. 2001) (district judge's *ex parte* site visit "improperly exposed him to factual evidence not part of the record"). A judge could not coordinate with a party to support its opposition to a substantive motion, or testify to disputed facts in a proceeding over which he or she was presiding. *See* 28 U.S.C. § 455(a); Code of Conduct for U.S. Judges, Canon 2(A); *see also infra*, Section II. It is unthinkable that one party—but no other—could be given authority to evaluate the "diligen[ce]" of a judge presiding over a matter, or the sole power to recommend removal. Dkt374.VI.[9]

[9] Moreover, as discussed below, if a judge discovered that he or she had a personal financial interest in an ongoing proceeding, like the monitor does here,

In short, the monitorship imposed on Apple, especially as it is being implemented by the monitor with the green light from the district court, far exceeds the limits of Rule 53 and the separation of powers. Because the monitorship provision of the injunction has been applied in an invalid and unconstitutional manner, that provision should be vacated. *See Samnorwood*, 533 F.3d at 267-69 (considering as-applied challenge to district court injunction).

B. The Monitorship Violates Apple's Due Process Right to a Disinterested Prosecutor

Neither Rule 53 nor the Constitution authorizes the district court to appoint a monitor with investigatory or quasi-prosecutorial powers. But even if the district court did have such authority, due process would still guarantee Apple the right to a "disinterested prosecutor" without a "personal interest, financial or otherwise" in the litigation. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987) (citation omitted). A prosecutor has the "unique responsibility to serve the public, rather than a private client"—or the prosecutor himself. *Id.* at 815 (Blackmun, J., concurring). "When a government attorney" (or quasi-prosecutorial monitor) "has a personal interest in the litigation, the neutrality so essential to the [judicial]

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the judge would be unambiguously barred from participating in that proceeding. 28 U.S.C. § 455(b)(4); Code of Conduct for U.S. Judges, Canon 3(C)(1)(c); *see infra*, Section I.B.

system is violated" and the defendant is deprived of due process. *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 746 (1985).

The lucrative nature of the monitor's engagement gives him a significant and impermissible incentive to expand the scope of his investigation and extend the term of his monitorship as far as possible, in violation of due process. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (due process requires recusal where interest in litigation would "offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true") (citation, alterations, and internal quotation marks omitted). "Obviously this arrangement gives [the monitor] an interest extraneous to his official function" to assess Apple's compliance policies and training programs. *Clancy*, 39 Cal. 3d at 747-48. Indeed, he has already taken on functions never authorized in the final judgment that clearly contravene his authority (or the district court's) under the separation of powers and Rule 53. And although the monitorship is initially limited to two years, the monitor has every incentive to induce the court to extend it for "one or more one-year periods" as contemplated by the final judgment. Dkt374.VI.A. This arrangement undeniably creates "the potential for [the monitor's] private interest to influence the discharge of [his] public duty." *Young*, 481 U.S. at 805 (emphasis omitted).

The monitor's decision to work with plaintiffs to oppose Apple's motion for a stay also underscores his personal incentive to extend the monitorship. The monitor is not authorized to defend the propriety of the monitorship itself in judicial proceedings—if anyone is to advocate for the propriety of the district court's remedy, it should be the plaintiffs who sought the remedy in the first place. And even if the monitor has not actually allowed his official conduct to be swayed by "irrelevant or impermissible factors," he has undeniably created an "*appearance* of impropriety" that violates the "requirement of a disinterested prosecutor." *Young*, 481 U.S. at 808, 811; *see also Caperton*, 556 U.S. at 879 ("'possible,'" rather than actual, "'temptation'" sufficient to require recusal under the Due Process Clause).

Apple has a right to know that the court's agent appointed as monitor is acting in the public interest, rather than for his own private benefit. The monitorship imposed by the district court disregards this right by creating improper incentives for the monitor to extend the scope and duration of the monitorship regardless of where the public interest lies.

II. The District Court Abused Its Discretion in Refusing to Disqualify the Monitor

The monitor has actively communicated *ex parte* with Apple's litigation adversaries, has assisted them in opposing relief sought by Apple, has billed Apple nearly $140,000 for just his first two weeks of work, and continues to take an

overly expansive view of his mandate. As a result, even if a monitor could conceivably be imposed on Apple, Mr. Bromwich should have been disqualified.

Rule 53 requires that a monitor disqualify himself under any circumstances in which a judge would be disqualified. Fed. R. Civ. P. 53(a)(2). He must do so if his impartiality "might reasonably be questioned," if he "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," or if he has a "financial interest" in the proceeding. 28 U.S.C. § 455(a), (b)(1), (b)(4). Actual bias is not necessary: "[E]ven the appearance of partiality" requires recusal. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citation omitted); *see also Caperton*, 556 U.S. at 878.

The purpose of section 455—"to promote public confidence in the integrity of the judicial process"—is undermined even if a "judge [or monitor] was not conscious of the circumstances creating the appearance of impropriety." *Liljeberg*, 486 U.S. at 858, 860. And where a judge (or monitor) has a "financial interest in a case" that is more than "remote and insubstantial," the need for disqualification rises to a constitutional level. *Caperton*, 556 U.S. at 879 (citation omitted). Moreover, "[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal." *In re Reassignment of Cases*, 736 F.3d 118, 124 (2d Cir. 2013) (citation and internal quotation marks omitted).

The monitor's testimony in support of plaintiffs' opposition to Apple's stay motion undoubtedly requires his disqualification. Dkt424. After coordinating with plaintiffs *ex parte*, the monitor submitted a 97-paragraph declaration setting out his "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). Almost all of the monitor's declaration drew on his extensive *ex parte* contacts with the district court, the plaintiffs, and Apple.

Moreover, as a witness for plaintiffs in this case, the monitor lacks the impartiality required by Rule 53. *See*, *e.g.*, *Lister v. Comm'rs Court*, 566 F.2d 490, 493 (5th Cir. 1978) ("Having served as a witness for one side in the case," monitor was "accordingly disqualified"). His support for plaintiffs' litigation position amounts to a "personal bias or prejudice concerning a party," and his declaration draws on "personal knowledge of disputed evidentiary facts" requiring disqualification. 28 U.S.C. § 455(b)(1). The monitor's financial incentive in the monitorship also creates an unmistakable appearance of partiality. 28 U.S.C. § 455(a), (b)(4).

It is no answer that the district court needed to "hear from the Monitor" in order to "evaluate the truth and understand the context of … assertions" made by Apple. Dkt437.53. Even if that were so, the proper course for a judicial officer would be to seek permission to file a report with the court, on the record and after hearing from both sides. Indeed, the reason there was no objective record was the

monitor's decision—explicitly endorsed by the district court—to proceed *ex parte*. But the monitor's one-sided testimony, prepared with plaintiffs and filed on their behalf, made him an "'advocate' for the plaintiffs," and precludes him from serving as an agent of an Article III court. *Cobell*, 334 F.3d at 1143 (quoting *Ruiz*, 679 F.2d at 1162).

The monitor accumulated personal knowledge of disputed facts in his innumerable *ex parte* contacts with Apple and the plaintiffs. Apple has *no way of knowing* what information the monitor has received from his contacts with plaintiffs or any other interviews that the monitor has not disclosed. His program of inquisitorial interviews and collusive conferences would be entirely inappropriate if undertaken by a sitting judge, and the same rules apply to the court's agent.

In *Cobell*, the court reversed the appointment of a monitor who had a "settled opinion about what the [defendant] should and should not do … to comply with the order of the district court," an opinion based "in part upon *ex parte* communications received in his extra-judicial capacity." 334 F.3d at 1144. Here, the monitor's *ex parte* communications with the district court and the parties are far more problematic, because the monitor testified about them against the entity being monitored. The district court should have disqualified the monitor, and its failure to do so requires reversal.

CONCLUSION

The portion of the district court's injunction creating the External Compliance Monitorship (Dkt374.VI) should be vacated. In the alternative, Mr. Bromwich should be disqualified and a new monitor appointed with a command not to engage in any *ex parte* conversations with plaintiffs or the district court.

Respectfully submitted this 15th day of May, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 8,886 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

/s/ Theodore J. Boutrous, Jr.