Nos. 13-3741 (L), 13-3857 (CON)
No. 14-60
No.14-61

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

STATE OF TEXAS, et. al,
Plaintiffs-Appellees,

v.

APPLE, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(JUDGE DENISE COTE)

OPPOSITION OF PLAINTIFFS-APPELLEES TO APPLE'S EMERGENCY MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

Apple, led by high-level executives and in-house lawyers, orchestrated a conspiracy among publishers to fix e-book prices. The district court found that Apple acted with a "blatant and aggressive disregard" for the law, Ex. 2 at 17:1-2, and that, at trial, its executives were not candid about Apple's conduct, Ex. B at 143 n.66 (160-page liability opinion).[1] Unconvinced that Apple would by itself develop "a commitment to understand and abide by the requirements of the law," Ex. 2. at 19:16-20:4, the court ordered an external monitor to evaluate whether Apple's compliance and training programs are designed to detect and prevent future violations of the antitrust laws.

The court's concerns were well founded. Almost immediately, Apple began to "slow down . . . if not stonewall" the monitor's work. Ex. 3 at 41:20. Apple resisted and delayed the monitor's interview and document requests and complained about the monitor's fees. Although the Injunction set forth a procedure for resolving disputes between Apple and the monitor, Apple did not use it. Instead, months after the Injunction was entered, Apple belatedly asked the district court to stay the monitorship and to disqualify the monitor. In a 64-page opinion, with detailed fact findings that Apple now ignores, the court made clear

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[1] Exhibits A-AAA are attached to the Declaration of Theodore J. Boutrous, Jr., filed with Apple's Emergency Motion to Stay Injunction Pending Appeal ("Mot."). Exhibits 1-3 are attached to the Declaration of Mark W. Ryan, filed with this Opposition.

that Apple had waived its meritless objections to the monitor provision and that the monitor had acted appropriately in the face of continual Apple opposition. *See* Ex. UU.

Apple should fare no better in this Court, where to secure a stay of the monitorship it must make a strong showing that the district court abused its discretion in requiring a monitor. Contrary to Apple's claims, the district court has authority to appoint a monitor to aid it enforcing compliance with its orders and properly exercised that authority here to ensure that Apple develops effective antitrust compliance and training programs. Apple also complains about the monitor's conduct, but Apple's complaints – that the monitor has provided a recitation of relevant facts to the court, has communicated with the parties, and is being paid for his work – demonstrate only that the monitor is trying to do his job. And even if Apple could establish that the monitor had exceeded his authority, the proper relief at most would be disqualification of this particular monitor – not invalidation of the monitor provision itself. Apple's true complaint is that it "does not control the monitorship." Mot. at 11. Of course not – a "monitor" controlled by the party to be monitored is no monitor at all.

Apple also fails to establish irreparable harm from the monitor provision. Apple executives may view the monitor's interviews as inconvenient, but they do

not threaten Apple's ability to manage its business. Nor do the monitor's fees cause Apple irreparable harm warranting a stay.

As the district court observed, although "Apple would prefer to have no monitor . . .[a] monitorship which succeeds in confirming the existence of a genuine and effective antitrust compliance program within Apple[] is in the interest of not only the American public, but also Apple." Ex. UU at 63. The monitor's work should not be delayed further.

BACKGROUND

Through "powerful" and "compelling" evidence, Ex. B at 130, Plaintiffs (the United States and thirty-three States) established at trial that Apple "played a central role in facilitating and executing" a conspiracy among e-book publishers "to eliminate retail price competition in order to raise e-book prices," *id.* at 9. The conspiracy "did not promote competition," as Apple claimed, "but destroyed it." *Id.* at 121. This *per se* unlawful conspiracy was orchestrated by Apple's in-house lawyers and its highest-level executives. Two of those executives, Senior Vice President Eddy Cue and iTunes Director Keith Moerer, and in-house lawyer Kevin Saul testified at trial and were "noteworthy for their lack of credibility." *Id.* at 143 n.66; *see also* 43-44 n.19, 71 n.38, 84 n.47, 90 n.52, 93 n.53.

In light of the district court's findings, Plaintiffs proposed an injunction calling for, among other things, the appointment of an external monitor to ensure Apple's

compliance with all terms of the Injunction and the antitrust laws. Apple objected to any monitor as punitive, unnecessary, and burdensome, but it did not claim that the court lacked authority to impose a monitor or that a monitor would be unconstitutional. Ex. C at 9-13. At an initial remedies hearing, the district court, hoping that Apple would "adopt a vigorous in-house antitrust enforcement program" and eliminate the need for a monitor, Ex. 1 at 66:12-15, directed the parties to meet and confer. They reached no agreement. Plaintiffs filed a revised proposal, which Apple opposed on the same grounds.

At a second hearing, the court stated that the record showed "a blatant and aggressive disregard at Apple for the requirements of the law" and that, despite several opportunities, Apple had not shown that a monitor was unnecessary. Ex. 2 at 17:1-16. But the court designed the Injunction to "rest as lightly as possible on the way Apple runs its business," *id*. at 8:25-9:1, and so it gave the monitor only limited powers. The monitor may not assess compliance with the Injunction or antitrust laws generally, as Plaintiffs proposed. His sole task is to aid the court in evaluating Apple's antitrust compliance and training programs to ensure they are "reasonably designed to detect and prevent violations of antitrust laws." Ex. E § VI.B-D.

To that end, the monitor may inspect documents and request reports on reasonable notice, *id*. § VI.G.2-3, and interview Apple personnel at their

reasonable convenience and with counsel present, *id.* § VI.G.1. He may not investigate or seek out evidence of violations of the Injunction or the antitrust laws, though he is required to provide Plaintiffs with any such evidence he finds. *Id.* § VI.F. And while he may recommend changes to Apple's compliance and training programs that he deems necessary, *id.* § VI.B, he may not direct Apple to adopt them, *id*. § VI.D-E. Apple may object to his recommendations, propose alternatives, and obtain a ruling from the court. *Id*. §VI.E. The Injunction also provides a way for Apple to object to the monitor's actions – first with Plaintiffs and then with the district court. *Id.* § VI.H.

The court entered its Injunction on September 5, 2013. On October 3, 2013, Apple noticed appeals from the Final Judgment in the United States' case (No. 13-3741) and the non-final Order entering the Injunction in the States' case (No. 13-3857), which have been consolidated (the "Injunction Appeals"), but it sought no stay. On October 16, 2013, the court appointed Michael Bromwich, formerly Inspector General of the Justice Department, as monitor and Bernard Nigro, chairman of the Fried, Frank, Harris, Shriver, & Jacobson antitrust practice, to assist him. Ex. G.

Almost immediately following the monitor's appointment, Apple began resisting his efforts to do his job. *See* Ex. UU at 15-29. Apple asserted, based on "a strained and unreasonable reading of the Injunction," *id.* at 45, that the monitor

essentially could not work during the Injunction's first 90 days. To date, Apple has allowed the monitor to conduct only thirteen hours of interviews with eleven people, seven of whom are lawyers, and has provided the monitor with only 303 pages of documents. *Id.* at 29.

Apple skipped the district court's procedures for raising with it concerns regarding the monitor's attempts to carry out his duties. Instead, Apple asked the district court to stay the monitorship, arguing that it was unconstitutional and violated Rule 53, Fed. R. Civ. P., and that the monitor's fees were excessive and irreparably harmed Apple. Ex. H. In support of its motion, Apple filed declarations by its counsel making numerous allegations about the monitor's conduct and character. Mr. Bromwich responded with a declaration detailing for the court his dealings with Apple. In reply, Apple explained that its "objections turn primarily on the way in which the injunction is being implemented, not the terms of the injunction as it was ordered," Ex. GG at 14, and sought to disqualify Mr. Bromwich, arguing that his responsive declaration revealed his bias.

The district court denied Apple's request, expressing "disappoint[ment]" that Apple was "doing its best to slow down . . . if not stonewall the process." Ex. 3 at 41:13-20. Apple had not raised the Rule 53 and constitutional arguments during the lengthy remedy proceedings, but the court nonetheless addressed them in turn, ruling that the monitorship was well within both its inherent authority and its

supplemental Rule 53 authority. Ex. UU at 35-44. And although Apple failed to object properly to the Injunction's fee-setting provisions, the court referred Apple's complaints about the monitor's fees to a magistrate judge for resolution. *Id.* at 49-52. Finally, the court did not disqualify Mr. Bromwich; his declaration was "proper and necessary" for the court to assess Apple's "serious attacks" on his conduct and character, which were in fact meritless. *Id.* at 53-54.

Apple appealed the order denying its disqualification request in the United States' case (No. 14-60) and the States' case (No. 14-61), Exs. ZZ, AAA, (the "Disqualification Appeals"). It has now filed identical motions seeking to stay the Injunction in its various appeals.

ARGUMENT

Apple's identical stay motions in separate appeals from entirely separate orders conflate both the questions presented by these appeals and the remedies available in them. Apple's arguments in support of the monitor's disqualification have nothing to do with the propriety of the Injunction and provide no basis to stay it. Nor can Apple use its appeal of the disqualification order to obtain a stay of the Injunction.

To stay the Injunction, Apple must make a "strong showing" that it is likely to succeed in its appeal of *the Injunction* by demonstrating that the district court abused its discretion in requiring a monitor. *Hilton v. Braunskill*, 481 U.S. 770,

776 (1987). It must also show that it will suffer irreparable harm if the monitorship is not stayed and that a stay is in the public interest. *Id.*

The monitor's actions (but not the Injunction itself) are at issue in the Disqualification Appeals. But even if Apple could establish in those appeals that the monitor behaved improperly, and it cannot, the appropriate remedy would be to disqualify the monitor, not to vacate the Injunction. Thus, a stay of the Injunction is not appropriate.

In any event, the district court did not exceed its authority in ordering an external monitor for Apple or abuse its discretion in declining to disqualify the selected monitor. Nor can Apple establish that it will be irreparably harmed by the monitorship. Finally, the public interest weighs firmly against any delay in the monitor's work.

I. The District Court Did Not Exceed Its Authority Or Abuse Its Discretion By Imposing A Monitor

The Court will not stay the monitorship unless Apple makes a strong showing that the monitor provision of the Injunction will be modified or vacated on appeal. *Hilton*, 481 U.S. at 776. For purposes of this motion, Apple does not contest the district court's determination that it orchestrated a price-fixing conspiracy that destroyed e-book retail price competition. Mot. at 4 ("[T]hat question is for another day."). Nor does Apple dispute here the district court's determinations that Apple's founder and CEO, its executives, and its in-house lawyers were involved

and that some of those individuals gave non-credible testimony in Apple's defense. Apple also does not challenge here the requirement that it develop new antitrust training programs. Instead, four months after the Injunction was entered, Apple claims that the court exceeded its authority by appointing a monitor to evaluate whether Apple's antitrust compliance and training programs are "reasonably designed to detect and prevent violations of the antitrust laws." Ex. E § VI.C. It did not.

A. The Court Properly Exercised Its Inherent Power To Appoint A Monitor

Courts have "inherent power" to "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties," *In re Peterson*, 253 U.S. 300, 312-13 (1920), including special masters or monitors to investigate and enforce compliance with court orders, *see Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 481-82 (1986); *Cobell v. Norton*, 334 F.3d 1128, 1140 (D.C. Cir. 2003). Nothing suggests, nor does Apple assert, that this power is uniquely limited in civil antitrust cases.

Remedies in Sherman Act cases should end the unlawful conduct, prevent its recurrence, and undo its anticompetitive consequences. *See Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 697 (1978). District courts are "clothed with large discretion to fit the decree to the special needs of the individual case." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (internal quotations

omitted). Here the court determined that preventing a recurrence of Apple's anticompetitive conduct required both that Apple develop new antitrust training programs and that a monitor be appointed to ensure its compliance and training programs are designed to detect and prevent antitrust violations. That determination was within the district court's authority and a proper exercise of discretion.

B. Apple's Rule 53 Arguments Are Both Waived And Meritless

Ignoring the district court's inherent equitable authority to appoint a compliance monitor, Apple claims that the court gave the monitor extrajudicial powers in violation of Rule 53. But not once during the remedy proceedings did Apple contest the monitorship on this ground. Ex. UU at 41. It first raised Rule 53 arguments two months after its appeal divested the district court of jurisdiction to amend the Injunction substantively. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (effect of notice of appeal).

Just as "an appellate court will not consider an issue raised for the first time on appeal," *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994), it will not consider an issue first raised after the district court no longer has authority to act on it, *see, e.g.*, *Mick Haig Productions E.K. v. Does 1-670*, 687 F.3d 649, 652 (5th Cir. 2012) (appellant waived arguments raised "for the first time on appeal . . . [or] in his untimely motion in the district court to stay sanctions pending appeal, which

was filed after this appeal was initiated"). There is no reason for this Court to exercise its discretion to consider these waived arguments; Apple could have timely raised them and it "proffer[s] no reason for [its] failure to raise [them] below." *Allianz Insurance Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005).

It would not matter if Apple had timely raised its Rule 53 concerns and if Rule 53 were the sole source of the court's authority, because the Injunction does not violate the Rule. The monitor's authority is narrowly tailored to a limited purpose: evaluating Apple's antitrust compliance and training programs. Although Apple complains that the district court "refus[ed] to limit the [monitor's] inquiry to his circumscribed role," Mot. at 11, the court repeatedly stated that the monitor may only evaluate Apple's antitrust compliance and training programs, Ex. UU at 10-11, Ex. 3 at 44:22-45:6. The monitor has no roving commission to seek out or investigate antitrust or Injunction violations. Ex. E § VI.F. Even if he does happen to uncover evidence of an antitrust violation, he must turn over that evidence to the government – as any agent of the court should. Moreover, the monitor neither adjudicates disputes nor commands Apple to act. Apple may object to recommended changes to its programs, and the court determines what changes, if any, are required. Ex. E § VI.D-E.

Apple characterizes the monitor's document requests and *ex parte* interviews as impermissible "wide-ranging extrajudicial duties." Mot. at 10-11. But a

monitor cannot evaluate compliance with a decree without conducting interviews and reviewing documents. *See, e.g.*, Fed. R. Civ. P. 53 notes (2003 amendment) ("The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system."); *see also Ruiz v. Estelle*, 679 F.2d 1115, 1162 (monitor allowed "unlimited access" to records, confidential interviews, and written reports), *amended in part, vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982).

Here, the monitor's tools, like his mandate, are limited. He must provide reasonable notice before requesting reports and inspecting documents, Ex. E § VI.G.2-3, and he may interview Apple personnel only at their reasonable convenience and with counsel present, *id.* § VI.G.1; *see Ruiz*, 679 F.2d at 1162. The monitor did not "stray[] far from his mandate" by asking a member of Apple's audit committee about compliance issues previously addressed by that committee. Mot. at 11. Such queries are necessary for evaluating whether Apple's compliance and training programs will work *for Apple*. *See* Ex. UU at 46, 55 n.16.

Apple relies on *Cobell*, Mot. at 10-11, but that decision recognized the authority of monitors to "superintend[] compliance with [a] district court's decree," 334 F.3d at 1142-43 (internal citations omitted). Such authority was not

implicated in *Cobell*, where there was no decree to enforce.[2] *Id.* The government objected in *Cobell* because the district court gave the monitor "a license to intrude into the internal affairs" of an executive branch agency. *Id.* No such concerns are implicated by this monitor's limited authority to evaluate Apple's antitrust compliance and training programs.

C. The Monitorship Does Not Violate Separation Of Powers

Seeking to avoid its waiver, Apple argues that the monitor violates the separation of powers by exercising "duties of a nonjudicial nature." Mot. at 12-13 (citing *Morrison v. Olson*, 487 U.S. 654 (1988)). Recasting its Rule 53 argument does not help. While judicial power is certainly limited, it is not so constrained as Apple suggests. Rather, the Supreme Court has explained, it includes powers that would not be "considered typically 'judicial'." *Morrison*, 487 at 682.

Specifically, the power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established. *Ruiz*, 679 F.2d at 1161. "The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 796 (1987). Thus, the Supreme Court has affirmed the appointment of "an administrator to supervise [] compliance with the court's

[2] *United States v. Philip Morris USA Inc.*, Mot. at 10, simply quoted *Cobell* in describing the lower court decision. 566 F.3d 1095, 1149-50 (D.C. Cir. 2009).

orders" with far greater administrative powers than those granted here. *Sheet Metal Workers*, 478 U.S. at 481-82 (affirming administrator with "broad powers to oversee [union's] membership practices" even though it may "substantially interfere with . . . membership operations"); *see also E.E.O.C. v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n*, 532 F.2d 821, 829-30 (2d Cir. 1976) ("[I]t is necessary for a court-appointed administrator to exercise day-to-day oversight of the union's affairs.").

II. The District Court Did Not Abuse Its Discretion In Declining To Disqualify Mr. Bromwich

Apple has not sought an order directing the district court to disqualify Mr. Bromwich, nor could it establish "clearly and indisputably" its right to such relief. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312-13 (2d Cir. 1988). Apple does not challenge the district court's detailed factual findings regarding Mr. Bromwich's actions as clearly erroneous. *See* Ex. UU at 15-29. And the court did not abuse its discretion in holding that Apple's complaints – that Mr. Bromwich provided a recitation of relevant facts to the court, has communicated with the parties, and is being paid for his work – do not require his disqualification.

Apple's disqualification arguments were premised on a misleading account of its interactions with Mr. Bromwich, detailed in multiple declarations from its counsel. *See* Exs. I, J, HH-JJ. Apple objects to Mr. Bromwich's reporting of those

same events to the court, but as the district court observed, the monitor's job is just that: to report to the court. Ex. 3 at 50:9-21. "It would be surprising if a party subject to a monitor could escape the monitorship by launching a cascade of attacks on the monitor and then disqualify the monitor for responding." Ex. UU at 54.

Nor can Apple escape Mr. Bromwich's monitorship by claiming he has "personal knowledge." Mot. at 15. To be sure, personal knowledge can require disqualification under 28 U.S.C. § 455, but only when it is extrajudicial knowledge, not knowledge acquired – as was Mr. Bromwich's – by attending to the task at hand. *SEC v. Razmilovic*, 738 F.3d 14, 29-30 (2d Cir. 2013). Likewise, a bias or prejudice concerning a party does not require disqualification unless it derives from an extrajudicial source or is "so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 547, 551 (1994). Neither situation exists here.

Apple also claims that Mr. Bromwich had improper *ex parte* conversations with the parties and that his declaration was based on "extrajudicial information" gleaned from Plaintiffs, Apple, and the court. Mot. at 16. As the Injunction contemplates, Plaintiffs have had conversations with Mr. Bromwich, including a pre-appointment interview and fee discussions. Ex. E § VI.A, I. Apple did not object to those Injunction provisions. Ex. UU at 12, Ex. 3 at 33:10-15. The only

ex parte communication Mr. Bromwich has had with the Court was his pre-appointment interview, also provided for in the Injunction and to which Apple did not object. Ex. UU at 15, 55-56. Moreover, Apple cannot identify any "extrajudicial information" the monitor obtained during these discussions or explain how they have biased the monitor against it. Mot. at 16.

There is also no merit to Apple's recycled *Cobell* argument. *Cobell* involves improper conduct by a monitor/master, but it is not like this case. The *Cobell* monitor was not helping a court supervise implementation of a court order; it was interfering with a government agency without benefit of an injunction. 334 F.3d at 1143-44. After obtaining access to the agency's internal deliberations regarding the lawsuit, the monitor was designated a Special Master and charged with adjudicating discovery disputes. *Id*. at 1136-1137. The monitor here, by contrast, only helps ensure compliance with certain provisions of the Injunction. He has no adjudicatory function, no access to Apple's internal case deliberations, and no responsibility in the ongoing damages case. He cannot command Apple even regarding its compliance and training programs; only the court can.

Finally, Apple argues that Mr. Bromwich must be disqualified because of his fees, although it did not object to the Injunction's fee-setting provisions. Ex. UU at 58. Court-appointed monitors and special masters, however, generally bill for their

time.[3] Any complaint over the specific hourly rate is premature, as that dispute has been referred to a magistrate.[4] Moreover, Mr. Bromwich cannot, as Apple speculates, "prolong the term of the monitorship as long as possible." Mot at 17. The Injunction sets the monitor's term and includes a remedy if he fails to act "diligently or in a cost-effective manner." Ex. E § VI.A, J.

III. Apple Has Not Shown Irreparable Harm Absent Relief

Four months after the Injunction was entered, Apple claims it will be irreparably harmed by that Injunction because: (1) the monitor's interviews are "interfering with Apple's ability to manage its business," Mot. at 18; and (2) Apple must pay the monitor. As the court explained, these claimed injuries are "at least somewhat of Apple's own making" as it has refused to use the Injunction's procedures for resolving conflicts with the monitor. Ex. UU at 58 (internal quotation marks omitted). Moreover, Apple's claims of irreparable harm do not justify immediate relief.

First, Apple has not identified any harm from the monitor's past interviews. The monitor has deferred to Apple's scheduling requests, Exs. S at 4, EE ¶ 16, conducting only thirteen hours of interviews, of which only two were with a senior

[3] Special masters' compensation is typically their "standard hourly rate" in addition to costs and expenses. Thomas E. Willging et al., *Special Masters' Incidence and Activity*, Federal Judicial Center, 42 (2000) (available at www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf).

[4] Apple offered to pay the monitor $800 an hour, Ex. MM at 1, but ignored Plaintiffs' invitation to discuss the fees further, Ex. 3 at 31-36.

executive (Apple's general counsel) or a board member. Exs. EE ¶ 54, UU at 60-61. Apple cannot credibly claim that these interviews caused Apple "'los[t] business opportunities,'" "loss of goodwill," or "harm to [its] reputation." Mot. at 20 (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004)).

Nor does Apple identify any specific harm that will result from future interview requests. If Apple believes a particular interview or series of interviews will cause harm, it may seek relief through the procedures in the Injunction. Ex. UU at 61-62, Ex. E at § VI.H. Apple has not shown that these procedures are insufficient to prevent harm during the appeal. The district court, after all, "is sensitive to the need not to interfere unnecessarily with Apple's business," Ex. UU at 61, making Apple's prediction that "the monitor will no doubt push for an even broader investigation," Mot. at 19, particularly improbable. Apple's speculations are no grounds for a stay. *See, e.g, Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005).

Apple also claims that it will be irreparably harmed by the payment of any monitor fees – no matter how reasonable – because they are unrecoverable upon appellate victory. But payment of a monitor's fees is not the kind of harm a stay is supposed to prevent. *See, e.g., Freedom Holdings*, 408 F.3d at 114-15 (declining to enjoin state law because "ordinary compliance costs are typically insufficient to constitute irreparable harm"); *see also Renegotiation Board v. Bannercraft*

Clothing Co., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). Of course, fees so large that they threaten Apple's solvency might warrant relief, but Apple makes no such claim.

IV. Further Delay Of The Monitor's Work Is Not In The Public Interest

The district court found that "Apple was engaged in a serious price-fixing conspiracy. The highest levels of the company, its founder, its CEO, its lawyers were involved." Ex. 3 at 43:18-20. While the Injunction's remaining provisions aim to restore lost competition, the district court found that Apple cannot be trusted, on its own, to develop antitrust compliance and training programs that will effectively prevent and detect future violations of the law. Thus, a monitor is needed to achieve the district court's laudable goal: "that the American taxpayer will never again have to pay for the [government] to investigate Apple for antitrust violations, and that the American consumer will never again be victimized by Apple's antitrust violations." Ex. 3 at 45:8-12.

CONCLUSION

The Court should deny Apple's motions.

Respectfully submitted.

January 24, 2014

/s/ Finnuala K. Tessier

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CERTIFICATE OF SERVICE

I, Finnuala K. Tessier, hereby certify that on January 24, 2014, I electronically filed the foregoing Opposition of Plaintiffs-Appellees to Apple's Emergency Motion for a Stay Pending Appeal with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent three copies to the Clerk of the Court by Federal Express.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 24, 2014

/s/ Finnuala K. Tessier
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, and STATE OF TEXAS, et al. Plaintiffs-Appellees, - v. - APPLE, INC., Defendant-Appellant.	DECLARATION IN SUPPORT OF OPPOSITION OF PLAINTIFFS-APPELLEES TO APPLE'S EMERGENCY MOTION FOR A STAY PENDING APPEAL Nos. 13-3741 (L), 13-3857 (CON) No. 14-60 No. 14-61

I, MARK W. RYAN, pursuant to 28 U.S.C. § 1746 declare:

1. I am an Attorney in the Antitrust Division of the U.S. Department of Justice. I respectfully submit this declaration in support of the Opposition of the Plaintiffs-Appellees to Apple's Emergency Motion to Stay the Injunction Pending Appeal filed on January 24, 2014. I have personal knowledge of the matters stated herein and, if called upon to do so, could and would competently testify thereto.

2. Attached hereto as Exhibit 1 is a true and correct copy of relevant portions of the transcript from the hearing on equitable relief held before the Honorable Denise Cote on August 9, 2013.

3. Attached hereto as Exhibit 2 is a true and correct copy of thetranscript from the hearing on equitable relief held before the Honorable Denise Cote on August 27, 2013.

4. Attached hereto as Exhibit 3 is a true and correct copy of the transcript from the hearing on Apple's Motion to Show Cause for a Stay of the Injunction Pending Appeal held before the Honorable Denise Cote on January 13, 2014.

I declare under penalties of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

January 24, 2014

MARK W. RYAN
Director of Litigation
U.S. Department of Justice
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EXHIBIT 1

d890eboa Argument

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF TEXAS, et al.,
Plaintiff,

v. 12 CV 3394

PENGUIN (USA) INC., et al,
Defendant.

UNITED STATES OF AMERICA
v. 12 CV 2826
APPLE, INC., et al.,
Defendant

New York, N.Y.
August 9, 2013
3:00 p.m.

Before:

HON. DENISE COTE,

District Judge

APPEARANCES

For Plaintiff:

Mark Ryan
Eric Lipman
Jeff D. Friedman

For Defendant:
Orin Snyder
Daniel Floyd

that that will be tee'd up after a meet-and-confer process in late August or early September for me to give everybody an opportunity to be heard again if that's necessary. So then we'll have any summary judgment motions due January 24th, opposition February 14th, replies on February 28th.

And we'll wait. I'll reflect on a schedule with respect to submission of a pretrial order. Whatever I choose as the pretrial order date, that's the date on which motions in limine will be due, as well.

I think that we should fold in the issue of collateral estoppel with our summary judgment practice. And I assume that's the right time to do it. So, I'm not going to set a separate schedule for collateral estoppel. I'm going to assume that is done at the time of summary judgment practice.

Good. And thank you. And those are the only dates that I'm going to set right now.

Let's turn to the very important issue about the injunctive relief.

Let me start with a statement of the standard, obviously Rule 65(d) sets out the standard. And as a result, an injunction must be both specific and definite enough to apprise those who will be subject to its terms of its scope and of the scope of the conduct that is being proscribed. City of New York, 645 F.3d at 143.

I have wide discretion in framing an injunction in

terms that I deem reasonable to prevent wrongful conduct, ibid. at 144, and the Ford Motor Company, 405 US at 573.

Nonetheless, the relief a Court imposes must be no broader than necessary to cure the effects of the harm of the violation. The City of New York 645 F.3d at 144.

Injunctive relief should, therefore, be narrowly tailored to fit specific legal violations and molded to the necessities of the particular case. It may not enjoin all possible breaches of the law, ibid.

The purpose of relief in an antitrust case is to cure the ill effects of the illegal conduct, and to assure the public freedom from its continuance. United States against Glaxo 410 US at 64.

Thus, the remedy must include appropriate restraints on a party's future activities, both to avoid a recurrence of the violation and to eliminate its consequences. National Society 435 US at 697.

It must also be effective to restore competition. Ford, 405 US at 573.

To prevent a recurrence of a violation, a Court is not limited to imposing a simple proscription against the precise conduct previously pursued. National Society 435 US at 698.

Indeed, it may impose relief that represents a reasonable method of eliminating the consequences of illegal conduct, Ibid.

In this way a Court has broad power to restrain acts which are the same type or class as unlawful acts which the Court has found to have been committed, or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's past conduct. Zenith Radio, 395 US at 132.

As the Supreme Court has instructed, where the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads, to that end, be left open, and that only the worn one be closed. National society 435 US at 698.

In aiming to restore competition, a Court also is not limited to the restoration of the status quo anti 405 US at 573.

Instead, the key is that relief be directed to that which is necessary to protect the public from further and competitive conduct, and to address any competitive harm. F. Hoffman LaRoche 542 US at 170.

In addition, it is well settled that once the government has successfully bourne the considerable burden of establishing a violation of law, all doubt as to the remedy are to be resolved in its favor. United States against Dupont, 366 US, at 334, Hoffman LaRoche 542 US at 170.

It perhaps is also important to add the following observation from United States against Oregon, 343 US, at 333. When defendants are shown to have entered into a conspiracy

violative of antitrust laws, Courts will not assume that it has been abandoned without clear proof. It is the duty of the Courts to beware of efforts to defeat injunctive relief by protestations of repentance or reform --

Which I don't have before me.

-- especially when abandonment seems time to anticipate suit or there is a probability of resumption.

Now, I thank you all for your submissions about the scope of injunctive relief. I don't think I'm in a position to decide on the final scope of the injunction this afternoon.

I want to share some thoughts with you, and some ideas, and some reactions to what I have read. And then I would like you to meet and confer next week. And for us to meet the following week.

I'm hoping that the issues of dispute will be narrowed. I'm hoping I will have a more fulsome response from Apple on some issues I'm going to describe here.

Among the things that I learned at the trial were that the big six publishers, now five, do not compete with each other on price.

I also learned that Amazon strongly prefers to control retail pricing.

I also learned that to be successful as an eBooks store it is important to have all of the big six, now five, participating. Apple, in particular, believes this to be

essential.

I learned that the publisher defendants want to raise eBook prices significantly from their 2009 price point to protect a business model that was developed before the digital age.

I learned, as well, that the publishing business is changing rapidly and significantly, in large part because of the digital age and the creation of eBooks. There was some evidence at trial that certain publishers have come to understand that they should embrace this change and be flexible and creative.

I also learned, and believe strongly, that none of us can foresee the future, and that change in the digital world is happening fast, and that this is true in the eBook business as well.

A second series of observations.

The trial demonstrated that Apple and the publisher defendants colluded with each other to violate the antitrust laws. I have written extensively on that in my opinion. But it's important to underscore some of these issues in connection with the injunction. They colluded to strip Amazon of control over retail prices. They colluded to eliminate retail price competition. They colluded to raise eBook prices.

They used several different means. These included, agency agreements with an MFM. Apple used its app store to

pressure Random House to adopt an agency agreement. And the publisher defendants made essentially simultaneously demands on Amazon. And because they were simultaneous, those demands were effective in coercing Amazon's capitulation to their demands that it execute agency agreements.

A third set of observations.

The publisher defendants' and Apple's joint opposition to the injunctive relief requested here by the government reflects, I believe, a continuing, and a seriously continuing danger of collusion.

As the government has expressed, and this Court has written, there is nothing inherently illegal or wrong with an agency agreement. The proper use and the misuse of an agency agreement is, I believe, a very context-;specific inquiry. Apple objects to the bar on an agency agreement running beyond two years, or even as a term of an injunction in light of the consent decrees. The publisher defendants submitted a joint opposition to the bar on the agency agreement in the injunction as an improper amendment of their consent decrees.

It's a question in my mind whether the agency model, with a return of price control to the publisher defendants, would happen in a truly competitive world. But if it does happen, it should happen as a result of negotiations between a publisher and a retailer, free of both illegal collusion and government interference. I think my goal in shaping an

injunction is to get us to a world where there can be such independent negotiations.

The only conclusion I can draw from the record created at trial, and the parties' positions before me, is that they still want to collectively force an agency model on Amazon and to raise eBook prices. At the very least, an injunction has to guard against this very real risk of collusion to eliminate price competition.

Again, we are addressing an industry in which the largest book publishers do not engage in price competition with each other. And if there is no retail price competition, there will be no price competition among their books.

There was a reference in Apple's submission to it considering moving an eBook apps to the iBookstore. I have some questions about what that might entail. And this leads me to my fourth series of observations.

Apple asserted that there was no evidence admitted at trial that showed that the conspiracy involved the app store. That is not precisely true. Indeed, Mr. Cue's own direct testimony at trial addressed that issue, as do PX518 and 519. And this is the efforts that Apple made to coerce Random House to adopt its agency agreement and enter the iBookstore, through denial of access to the app store, in the certain instance referred to by Mr. Cue and in those documents.

Now, Apple strongly objects to any aspect of the

injunction touching upon its app store. But there are certain principles with which it does not seem to take issue. They are that all eBook retailer apps that are compliant with its policies may be offered in the app store.

I'm taking this from your brief.

And that consumers can download eBooks purchased through another website onto Apple devices without charge.

So, I would like to ask Apple's counsel to turn to Section 4 of the proposed amendment that is entitled Required Conduct. I know that it objects to a passage in subsection C that begins with the phrase "except that" In the third line.

Do you see where I'm pointing, Mr. Snyder?

MR. SNYDER: I'm looking now, your Honor. Yes, your Honor.

THE COURT: So my question is, putting aside for the moment the material in subsection C that follows the phrase "except that," does Apple have any other objection to any other component of Roman Numeral IV?

MR. SNYDER: Meaning the first the verbiage starting from, "apple shall" up until the word "store," your Honor? In other words the first three lines up to words "except" in subsection (c).

THE COURT: Let's go to page 6. Do you see where Roman Numeral IV starts?

MR. SNYDER: Yes, your Honor.

THE COURT: Do you object to paragraph A. I take it you do.
MR. SNYDER: Yes, your Honor.
THE COURT: That's not really an app store issue.
Do you object to paragraph B?
MR. SNYDER: Yes, your Honor, we do. That for 10 years we can't change the terms or conditions with respect to --
THE COURT: Okay page 6, the bottom, Roman Numeral IV, B.
MR. SNYDER: We object to IV B, your Honor.
THE COURT: For any eBook apps that any person offered to consumers through Apple's eBooks store as of July 10, 2013, Apple shall continue to permit such person to offer that eBook apps, or updates to that eBook apps on the same terms and conditions between Apple and such person or on terms and conditions that are more favorable to such person.
You object to that?
MR. SNYDER: Yes your Honor. It precludes us from making general changes in the policies with respect to all of the other 850,000 apps developers. So, it simply --
THE COURT: Thank you. I have your statement.
MR. SNYDER: Yes.
THE COURT: Turning to C.
I am just trying to figure out what is in dispute

here.
MR. SNYDER: Yes, your Honor.
THE COURT: Do you object to the beginning of paragraph C, Apple shall apply the same terms and conditions to the sale or distribution of an eBook apps through Apple's app store, as Apple applies to all other apps sold or distributed through Apple's app store?
MR. SNYDER: No, your Honor, that is Apple's general apps policy for all apps developers.
THE COURT: Okay. Thank you, that's helpful.
MR. SNYDER: May I give the Court information that might be helpful on C to frame it that was not in our brief? Or I can submit something in writing in more detail about this.
THE COURT: I think I would like to continue with --
MR. SNYDER: Sure.
THE COURT: -- my questions to you --
MR. SNYDER: Yes, your Honor.
THE COURT: -- in a moment, Mr. Snyder.
I think the debate around 4C, which is allowing eBook retailers to provide a hyper link to their websites or eBook store through an eBook apps, without further compensating Apple, is a debate about whether that is necessary --
You can be seated, Mr. Snyder.
MR. SNYDER: I'm sorry, your Honor.
THE COURT: -- to protect the existence of retail

price competition.

As of now, as I understand it, a reader can use an iPad, hold an iPad in his hand, use the iPad to go to the internet, go -- let me use Amazon as an example. Go to the Amazon site. Purchase an eBook at Kindle eBookstore, with no payment going to Apple, and have that eBook wirelessly sent to the iPad, and opened on the iPad, in the iPad's Kindle apps, all at no -- without Apple receiving a penny.

On the other hand, as I understand it -- and Kobos' submission today was very helpful and informative -- Apple does not allow a reader to purchase an eBook -- and, again, I'll use Amazon as an example -- through a Kindle app directly. Or at least does not allow it to do so without the payment of the 30 percent commission for such sales that Apple believes is customary in its app store. Kobo's submission indicates that Apple adopted this policy in 2011. If I understand it's submission correctly.

MR. SNYDER: It's highly misleading, the submission, your Honor. Apple adopted -- if I can be heard, your Honor, because the submission from a competitor basically wanting to not pay a commission, we think, you know, was highly misleading to this Court. If I can be heard on this, I think I can be very helpful to the Court on this.

Which is that the basic argument is that to restore competition that Apple has to be prevented from, they say,

discriminating against rival eBook apps like Kobo's and, therefore, they want an exception to having to pay a commission on any hyperlink from their sight, from the Apple apps to their site. And there are a couple of arguments, your Honor.

THE COURT: Well, why don't you start with the facts.

MR. SNYDER: I'm going to give your Honor the facts.

THE COURT: Okay. In terms of, factually, have I described it correctly how it works?

MR. SNYDER: Yes. Except the suggestion that we somehow changed our apps policy to discriminate against eRetailers, is absurd. What happened was, and the evidence showed, that Apple's policies -- there was no evidence, because the first point is, and this is why we think this is actually egregious for them have to included this in their proposal, they had, your Honor, a proposed finding of fact on this very issue relating to the app store's supposed discriminatory treatment of eBook retailer apps. They did not admit any evidence that they cite in support of their proposed findings because we objected to it, and they withdrew the evidence, was never submitted to this Court. So now they want a remedy for assertions made, proposed findings of fact, that they did not deem sufficient to try to proffer evidence in support of.

And so, A, there is no evidence in this record of that. And, B, there is no finding, obviously. But more importantly, your Honor, Apple's policies that regulate the app

store, uniformly, applicable to each and every one of the 850,000 apps in its store, from Amazon's apps, to Zappos.com's apps, to Kobo's apps. And this includes a policy, universal, all the 850,000 app developers.

I think it is important to know that the app store is a critical engine of this American economy in terms of how many billions of dollars it pays out to app developers and the role it plays in employment, and in our economy. And what they want to do is regulate our app policy to make a special exception for eRetailers. And, the in app purchase rule, which uniformly applies across the board, Apple gets a 30 percent commission for purchasers of all electronic goods across the board. There was no special discriminatory change made to punish eRetailers which make up an infinitesimal amount of Apple's app revenue, much less total revenue, so --

THE COURT: Mr. Snyder, I have no desire to regulate the app store. What I'm trying to do here is to fashion as narrow a remedy as possible to create, restore, promote, price competition in eBooks.

MR. SNYDER: And --

THE COURT: So, I need to understand, factually, how these things work.

MR. SNYDER: So the consumer can go to the Safari browser, as your Honor said --

THE COURT: So if I got it right, I got it right.

So I am concerned about your statement in page 17 of your brief that you may move the publisher defendants' apps to the iBookstore. I'm concerned as to whether or not that is going to be an end run around any injunction, and create the opportunity for the reintroduction of an agency agreement to making it possible for a consumer, seamlessly, to purchase an eBook from one of the publisher defendants paying Apple a 30 percent commission.

MR. SNYDER: Oh, I understand, your Honor.

No, your Honor. Your Honor, what we did is, in arguing why a 10 year, what we said regulation of our app policies, giving an exception to eRetailers, would be improper, were among other reasons that we might seek, over time, to change our policies. And this was a what if, a possibility. There is no, as I understand it, plan or design to do that. We're just saying that there are a myriad of outcomes, because no one knows the future, of what might happen in 2020, or 2018, or 2021 in the eBook ecosystem. But we're not suggesting here that there is a plan to end run around anything. And if that was the impression given to the Court, then it was wholly inadvertent and unintended. Our view is that if there is a hyperlink in Amazon.com, to a particular book, we get from a defendant publisher, we get 30 percent. The same way if there is a hyperlink to buy shoes, we get 30 percent across the board.

THE COURT: Well, let me say that any injunction I think has to make sure that the app store is not used as an engine of retaliation.

MR. SNYDER: We agree, your Honor.

THE COURT: And it is not used to do an end run around an injunction. It's not used as a back doorway for introduction of an agency agreement, de facto agency agreement, as imagined by the discussion on page 17.

If we can adequately protect price competition without touching, in any way, Apple's flexibility in its management of the app store, that would be my preference. I do not assume -- I know I don't know how Apple will innovate through the app store in the future. I know I don't know that. I could imagine that even Apple doesn't fully appreciate how the app store might evolve in the coming years. My preference would be that no injunction would limit innovation in the app store. But, at the same time, that there be full price competition in the eBook market. And so if counsel can formulate an injunction that permits that, I expect that that would be satisfactory to me.

Let me get to another issue. We do need an injunction here. There was blatant price fixing. There was structural collusion by the publisher defendants. All of the defendants, and other players, were absolutely willing to play hard ball with each other. This was a rough and tumble game played for

high stakes by one and all. And the consumer suffered significantly from the price increases and the lack of competition at any level.

None of the publisher defendants -- and this is true for Apple, as well -- have expressed any remorse over their actions, made any public statements admitting wrongdoing, undertaken any voluntary program to prevent a recurrence. They are, in a word, unrepentant.

Mr. Sergeant, in two statements in December and February to certain constituencies of importance to him authors, illustrators, and agents, made statements that underscore this point. He drew a distinction between real books and eBooks. He asserted that MacMillan did no wrong. He explains that the settlements of the publisher defendants means that retailers will be able, quote, "To discount MacMillan eBooks for a limited time."

He conveys his disappointment in the discounting but comforts his audience with a message that, quote, "This round will shortly be over."

Now, this injunction is a remedy imposed upon Apple and not the publisher defendants. But it would be reckless for me to ignore the industry in which Apple is operating, and the ease with which it will be able to find partners willing to eliminate price competition and to raise eBook prices.

To the extent possible, any injunction against Apple

should be tailored to prevent the repetition of price fixing and to encourage price competition. But it should not be broader or in place longer than necessary since this is a swiftly-changing world and I want to make sure nothing I do discourages innovation and dynamic change.

So I have a proposal I want the parties to consider.

I'm thinking in terms of an injunction that would place no restrictions on -- using the language that DOJ has proposed -- that Apple wouldn't enter into any agreements that restricted its ability to set retail prices for five -- terms, with six to eight month intervals, the first term ending in two years, and assign each of the publisher defendants to one of those terms, so there would be separate intervals for contract renegotiation between Apple and each of the publisher defendants.

The first would be up for renegotiation roughly two years from now; the second two years; and six or eight months thereafter; the third another six or eight months thereafter, the fourth another six or eight months thereafter, and then the last, after another similar interval.

This means that there would be no one point in time when Apple would be renegotiating with all of the publisher defendants at once. And no one point in time when the publisher defendants could be assured that it was taking the same bargaining position as its peers vis-a-vis Apple.

Let's talk about the external compliance monitor. Apple vehemently objects to this. I would have appreciated a presentation by Apple that a monitor is unnecessary. At this point, it has made no such showing. There is no admission of wrongdoing. There is no contrition. There is no showing of any awareness of illegality or the danger of collusion by publisher defendants to raise eBook prices. There is no showing of institutional reforms to ensure that its executives will never engage again in such willful and blatant violations of the law.

My preference would be to appoint no external compliance monitor. I would prefer that Apple adopt a vigorous in-house antitrust enforcement program and convince the plaintiffs, and this Court, that there is no need for a monitor. All I have on page 10 of Apple's submission is a very cryptic reference to the fact that it enhanced some compliance program, it adopted at some point during this litigation.

I don't want to do more than necessary here. I want to protect the market, protect the consumer, encourage price competition and, if possible, at the same time, allow this market to develop and change and prosper in ways we all can't imagine today. And that goes for Apple as well.

So that's my goal. And I want to thank you all for your first round of efforts at thinking about an injunction. I may be wrong, maybe there is nothing to be accomplished by a

further meet and confer, and perhaps maybe I should ask you, both, is there anything to be accomplished from further reflection on my comments, and a further opportunity to talk with each other, or not?

THE COURT: Mr. Ryan.

MR. RYAN: Mark Ryan, your Honor. Yes, your Honor, both, in both respects.

We, and others at the Justice Department, would like to reflect on your Honor's comments, and then we would like to sit down with Apple on the schedule that your Honor suggested, meeting next week, and we'll be back here in two weeks.

THE COURT: Mr. Snyder -- I'm sorry someone else has stood up.

MR.GOLDFEIN: Shep Goldfein, for Harper Collins.

Can I have two minutes?

THE COURT: Can I have Mr. Snyder's reaction to my comments first?

MR. SNYDER: Yes, your Honor. We would be pleased to participate in that process.

THE COURT: Thank you.

MR. GOLDFEIN: What I wanted to say was I believe we would like to be included in that process. Because with all due respect, your Honor, our consent decrees that have been previously entered by the Court, contain very lengthy antitrust compliance programs, and compliance provisions. Your Honor

suggested that we had not undertaken anything in order to protect the market for the restoration of competition.

THE COURT: I don't believe I said that, sir.

MR. GOLDFEIN: Well, I apologize if I misheard. But the publishers, we -- we filed a joint brief only for the convenience of the Court. We didn't file a joint brief because we were colluding with each other.

The Noerr-Pennington doctrine, in fact, suggested we should file a joint brief if we have a common position with the Court.

So I don't think there was anything unusual in the filing of a joint brief. And I don't think, with respect, your Honor, that we, from day one, showed contrition in this case by coming into the Court from the very first conference, when we appeared and said we were in the settlement mode. That we were -- that we were prepared to negotiate settlements. We negotiated clearly for near a year with the Justice Department for the resolution of this matter. And entered into consent decrees that clearly contemplated the cooling off period that your Honor noted in the opinion. And that contemplated that we would be free to go to a model, whatever we could negotiate, unilaterally, unilaterally, not collusively, with any eRetailer as to terms and conditions of sale of books. Whether it be on agency model, or on a reseller model, or any other model. That's what we bargained for, specifically, with the five year

limit with the government. And we negotiated long and hard. We didn't want two years, we wanted much shorter. We settled with the government on two years. And the government came back and said they didn't want to regulate, there was innovation and the market is rapidly changing. And that the two years was justified as a cooling-off period. We agreed and your Honor agreed when you approved and entered the opinion approving of our consent decrees.

I want the record, your Honor, to be clear that -- that with all due respect -- I know you have sat through a lengthy trial and I appreciate that, but I don't think it is -- I don't think it is correct to say that the -- that at least for Harper Collins, I'll speak for Harper Collins. I can't on this issue address something from MacMillan. We stepped up to the plate from day one in this case. And we stepped up to plate and we settled this case. We settled with 49 states and six attorneys general. We spent a lot of money. We also settled with Minnesota with the Minnesota class with Mr. Berman. So we have acknowledged our responsibility. We have stepped up in terms of our customers, ultimately, or indirect customers. And we tried to do the right thing, your Honor. And from day one, we didn't we didn't stand here and say we were not prepared to resolve the matter. It's routine, in any settlement agreement, for a whole host of reasons, including some tax law reasons that you don't admit liability. But I

think our actions speak louder than words for how we have performed and stepped up to the plate here in order to -- and bargained over what the relationships should be moving forward in a free market. In a free market where the marketplace will determine. I mean there is an assumption, with respect, your Honor, that you're assuming. You are assuming that we have the bargaining power one on one with Amazon or with Apple in terms of what those terms and conditions of resale, or the sale of books are gonna be. I think that's a big assumption. Because those are huge retailers with tremendous bargaining power.

THE COURT: I'm very aware of that. Counsel, thank you.

MR. GOLDFEIN: You're welcome.

THE COURT: And, yes, I'm aware that two, and one could say three of the publisher defendants entered early settlements and, over the months that followed, the two additional ones did. I'm aware of the fact that the publisher defendants' consent decrees included a compliance program. I'm not aware of any statement of contrition by any of the publishers' statements, or admission of wrongdoing. I didn't find the submission of the joint brief a problem. Indeed, I appreciated the fact that if they had a unified position that it be submitted to me once, not five times, so I thank you for that.

I think my statements about no description of any

compliance program, in-house antitrust enforcement program, was a reference solely to Apple. And page 10 of their brief. I'm aware of the consent provision which imposes upon the publisher defendants on certain obligations in that regard.

And I am very aware that a publisher defendant may not, depending on the circumstances, have bargaining power vis-a-vis some of the significant retailers. They are not alone in that position. I expect lots of American business would be able the testify to that fact. Nonetheless, my focus is on making sure we don't have collusive illegal activity again in the marketplace with respect to eBooks. It's all I'm focused on.

Well, I don't want to simplify it. I'm trying to be focused on everything that I should under the standards that I articulated before, but that's my core focus, is to create a narrowly tailored injunction that will promote price competition and prevent collusive behavior in eBook pricing. And negotiation of eBook agreements.

Okay, I think what I would like to do then, since both -- and I don't want the publisher defendants to be involved in these negotiations, certainly not now. This is an injunction that is going to be imposed on Apple, not on the publisher defendants. I'm not blind to the impact it will have on the publisher defendants. And the publisher defendants will certainly have an opportunity to be heard on any proposed

injunction. But I think the first round of discussions here should be just between the parties who went to trial. I'm conscious of the fact this is August. I would love it if we could reschedule a conference on the injunction for the week of August 19th, but why don't you, Mr. Ryan and Mr. Snyder, and your teams, consult with each other briefly and tell me what week I should be looking at for a conference schedule.

We'll go off the record here just to talk with each other briefly.

(Recess)

MR. SNYDER: Would it be all right if we got back to the Court by noon tomorrow. Because there has been a lot of -- I need to talk to my client and review schedules.

THE COURT: Why don't I get a letter from counsel, hopefully, it will be a joint application, by the close of business on Monday with respect to a proposed schedule for when we would reconvene on the injunction, and when I get written submissions from you with respect to that conference. And I would like at least two business days between the submissions and the conference, so I have a chance to read and reflect.

I want to thank you all for your submissions. I know how important these issues are to every participant here. And that there is a loss have lot of passion behind some presentations. And that's appropriate. And it's helpful for me to hear, even, to know that these issues are important to

everybody.
So thank you all, and I'll see you again in a couple of weeks.
ALL: Thank you.
THE CLERK: All rise.
(Adjourned)

EXHIBIT 2

In The Matter Of:

UNITED STATES OF AMERICA v

APPLE, INC., et al.

August 27, 2013

SOUTHERN DISTRICT REPORTERS

500 PEARL STREET

NEW YORK, NY 10007

212 805-0330

Original File d8r9usaa.txt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

v. 12 Civ. 2826 (DC)

APPLE, INC., et al.,

Defendants.

----------x

August 27, 2013
2:00 p.m.

Before:

HON. DENISE COTE,

District Judge

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(In open court; case called)

THE COURT: Welcome, everyone.

Counsel, we have some issues to resolve with respect to some of the critical terms of the injunction. I want to thank you so much for the submissions you've made to me. They've been very helpful. I expect to get through all those issues this afternoon. My goal is that we be down to tweaking formulations and I'd sign it next week.

And let me tell you what I have done in terms of a markup of a draft. I have the government's proposed injunction, which I have marked up. And that's the document that I'm going to be reviewing with you. In marking it up, I have relied to a great extent on the two red lined versions that Apple gave me of this document. I found Apple's submissions very helpful; helped focus me on where there were real disputes about substance and where there were disputes about language.

So if you have before you those three documents, I think it will help in marching through the issues. Again, it's the government's proposal and what Apple submitted as Exhibit A and Exhibit B. Give you all a moment.

While you're pulling that together, let me just make one observation and that is that the whole purpose of this injunction, I gave you sort of a recitation of my standards at our meeting last time generally, what I thought the law

required me to consider when shaping an injunction. But let me just start with one I think very apt quote from the Supreme Court in the DuPont case. "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators. And relief must not be punitive. But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effects of such a decree on private interests. That's at 366 U.S. at 326.

So marching through the government's requested injunction, we start with the most minor of observations. I don't use a middle initial. So that's on the first page.

So that takes us then, my first changes are to page 6, section (E)(b). I just want to make sure that Apple's lawyers are with me. We're on page six.

MR. BOUTROUS: Yes.

THE COURT: Okay. Good.

MR. BOUTROUS: Thank you.

THE COURT: So my question is for the government in this instance. If I make the following revision is there any problem with that. So (b) would be revised to read as follows. "E-book publisher's, past, present or future, wholesale or retail prices or pricing strategies for E-books, or audio books sold at other retailers."

MR. BUTERMAN: Lawrence Buterman, your Honor.

Just a question of clarification. The intention is to strike the term "print books"?

THE COURT: Essentially, yes.

MR. BUTERMAN: That's acceptable to the government, your Honor.

THE COURT: Going to the bottom of that page don't worry. At the end of this whole process -- I'm going to try to make as much progress as we can through the whole document. And if you haven't had a chance to speak to an issue of importance because I haven't specifically given you that opportunity, at the end, when you see the good and the bad of all the calls I've made here from your point of view, I will give you an opportunity to be heard. And if it would be helpful we'll take a short break at that point so you can consult with each other to decide whether you actually want to open any doors to further discussion.

Bottom of that page. Section (F). I'm going to read (F) as it would be in its revised version.

"Apple shall not enter into or maintain any agreement with an E-book publisher where such agreement likely will increase, fix, or set the price at which other E-book retailer can acquire or sell E-books."

Again, this removes reference to movies and television shows and apps. It's focused on E-books.

Next paragraph.

Nothing in this Section III (F) prohibits Apple from entering into or maintaining an agreement with an E-book publisher, merely specifying prices that Apple must pay for E-books or for the E-books.

Going to IV. I have a question for the government here with respect to section (A). IV(A). We're now on page seven.

There's this lurking question of whether Apple needs to terminate or modify any agency agreement it currently has with the publisher defendant since the consent decrees with publisher defendants have already required certain changes to be made. So, there's a question of why must contracts be renegotiated right now at this time?

Mr. Buterman.

MR. BUTERMAN: Thank you, your Honor.

The government's position is that we do not have a concern whether the contracts are terminated as opposed to modified. So if it's easier to have the contracts modified, that's fine. But something does need -- our position is that something does need to happen to the contracts in light of the fact that the relief that we are asking for with these agreements is different and the terms would be different than in the consent -- the consent decrees that were entered into with the publisher defendants.

THE COURT: Including at least the term of the agreement?

MR. BUTERMAN: That's correct, your Honor.

THE COURT: So, this is the proposed change to Section (A). On the effective date of this judgment, Apple shall modify any agency agreement with the publisher defendant to comply with III(C) above.

Now, this takes us to one of the principal disputes between the parties. And that begins with subsection (b) here on page seven. And that has to do with whether or not I regulate the app store as requested by the government. Let me give you some thoughts about that.

Apple's description of the way its app store functioned and functions was not accurate on August 9. It changed its policy in 2011 and it has different policies for the purchase of physical products and at least some digital products. The plaintiff's subsequent submission has gone a long way toward clarifying all of that.

Now, there are many questions that could be asked about Apple's app store policies. But I don't believe it would be a fruitful use of our time this afternoon to do so. This is because I am not inclined to require Apple to allow E-book retailers to provide a hyperlink in their E-book apps that would permit users of Apple devices to buy E books through the app. I want this injunction to rest as lightly as possible on

the way Apple runs its business. I want Apple to have the flexibility to innovate, but at the same time I want to try to prevent a repetition of illegal conduct like that shown with overwhelming evidence at this trial.

There is one open issue, however, that I need Apple to address. I want reassurance, again, from Apple that it will not try to circumvent the dictates of any injunction by allowing E book publishers to use an app in the iBookstore to sell their books directly to consumers. As we discussed at our last conference, I am concerned by the reference in Apple's brief that it may permit the publishers in essence to reintroduce agency agreements through the use of such an app.

My hope is that the injunction will be finalized next week. And I want Apple to commit to me by that time that it will never contend that the injunction in its final form will permit it to change its app policy to allow publishers to do that -- well never, during the terms of the injunction. The injunction will end at some point. And if it cannot make that commitment to me, then we need a provision specifically addressed to that risk.

That said, I think that the app store provisions in the proposed injunction are unnecessary for many consumers. The plaintiffs argue that the provisions will make it easier for consumers to compare prices. But, consumers can use Safari, as I described last time, on the Apple devices to shop

in the Kindle bookstore and wirelessly deliver those E books to their Kindle app on the apple devices. For that same reason, this provision doesn't significantly add to the competition between Amazon and Apple. Amazon is, to say the least, an established and successful competitor of the iBookstore. Most consumers would understand that all that is necessary to compare prices is to take this one extra step. As David Carnoy of CNET observed in the article attached as Exhibit 8 to the government's submission, that extra step is not the end of the world.

I expect that the major beneficiaries of the requirement that the government seeks would be smaller retailers who are less well known. This would introduce more retail competition, but only for a two-year period. Apple would be able to change its policies at the end of the two year period as it did in 2011, will bean it down, as described in Exhibit 11 to the government's submission, and others like them, make the investment to develop an e bookstore or e reader for Apple devices when Apple can shutdown the functionality mandated in this provision of the injunction in just two years. That leaves the smaller but established firms, like Kobo, as the principal beneficiaries of this proposed term of the injunction.

Apple vehemently objects to this provision. That vehemence is not surprising. The app store was only an

incidental part of this trial and Apple wants as little interference with its business as possible. And, as the record at trial amply demonstrated, while Apple is a fierce competitor, it does not want to engage in retail price competition.

On balance, I do not have sufficient confidence that the benefits of this two-year dictated change in Apple's current business practices will outweigh the disturbance it may cause in the management of Apple's app store. I do not feel that the record before me permits me to make a reliable judgment about the impact of this change in policy.

With that, the following changes would occur. I would strike section (B) from section IV. We're on page seven. So, the paragraph that begins, "For any E-book app," would be stricken.

Going to section (C), the last half of that provision would be stricken, beginning with the phrase, "except that," for two years after the effective date.

Now if you could go to page 16 of Apple's Exhibit B. You will see in Exhibit B at page 16 -- and that's part of IV(C). There is an insert that Apple requests be made. The insert reads as follows. "This provision does not prevent Apple from changing its app store terms and conditions and applying them in a reasonable manner that does not discriminate against E book apps for competitive reasons or from introducing

new categories of apps with different terms and conditions without applying those terms and conditions to E book apps."

That would be inserted at the bottom of page seven.

Going to the top of page eight, section (D). This would read as follows. "Apple shall furnish to the United States and the representative plaintiff states within ten business days of receiving such information any information that reasonably suggests to Apple that any E book publisher has impermissibly coordinated or is impermissibly coordinating on the terms on which it supplies or offers its content to Apple or to any other person."

I think I'm reading slowly enough but if anyone wants me to repeat please just let me know.

Let's go to the next section, antitrust compliance.

That's section V(C). This talks about training. It has the phrase that the training should last at least four hours. Apple suggests that we substitute the word "appropriate." I think we could consider substituting the word "memorable," but I have a different phrase in mind. It's the phrase "comprehensive and effective."

Now, this, again -- and I'll make comments about this later. I'm not wedded to any particular language. If counsel come up with -- particularly if you all agree on better language, I'm very open to considering it.

Now there's one other thing that I want to adhere --

before I move to that. So I would strike "at least four hours of" and substitute "comprehensive and effective." So the phrase would read, "Ensuring that each person identified in Sections V(A) and V(B) of this final judgment receives comprehensive and effective training annually," etc. So this injunction proposes that this training be given to people who are involved in the Apple iBookstore. I think it should be broader. I'll explain why in more detail later.

I've stricken a lot of the language that refers to other kinds of content other than E-books. But I think the antitrust training should be for employees involved not just in E-book content distribution but in all content distribution. I'm envisioning anyone in Mr. Cue's group, Mr. Cue and those above him and below him who are involved in negotiating content licenses.

So, my proposal is that we insert in some way in this section that this training also be offered to each of Apple's officers and directors engaged in whole or in part in activities relating to the supply of content (e.g. books, music, other audio, movies, television shows, or apps).

Let's go to page ten. Top of the page, second line. The line begins with the word "judgment." It should read, "Judgment or violations of the antitrust laws."

Under Section (I) there are two subparagraphs, one and two. I would strike one.

With respect to paragraph two, I have a question for the government. It now reads, "Employees or representatives of two or more E-book publishers."

Why shouldn't it read, "Employees or representatives of E-book publisher defendants"?

MR. BUTERMAN: Lawrence Buterman, your Honor.

The provision here is intended to force Apple to log any type of communication that could raise the antenna. We believe that limiting it to a publisher defendant is too narrow in this circumstance. And we don't believe that there should be very many of these types of conversations going on so that logging them isn't any particular burden on Apple.

THE COURT: What is the phrase "two or more" doing there?

MR. BUTERMAN: In other words, your Honor, the if Apple is speaking directly with an E book publisher, we don't have any problem with that. But if Apple is speaking to two at the same time, that's what's problematic.

THE COURT: I didn't understand that. So in a single conversation, you're having a single conversation with representatives of two different publishers?

MR. BUTERMAN: Yes, your Honor. That's what the provision is intended to require logging of.

THE COURT: Yes. I agree with you. That should be rare. Because you've excluded privileged or public

communications from the log. So if you're, for instance, addressing a conference or something, you're not logging that. It's a public communication. So this would be a private dinner meeting with two or more or a conference call with two or more in the same conversation?

MR. BUTERMAN: Yes, your Honor.

THE COURT: Okay.

MR. BUTERMAN: And that's why we wanted it broader than just the publisher defendants.

THE COURT: With that explanation, I have to say well, I'll let you think about whether or not it needs to be revised. But I will leave it as it is for now.

That takes us to a second issue that is hotly contested by the parties and that is the employment of an external compliance monitor.

"The power of federal courts to appoint special masters to monitor compliance with their remedial orders is well established." City of New York against Mickalis, 645 F.3d at 145. District courts have been afforded "broad discretion to frame equitable remedies so long as the relief granted is commensurate with the scope of the infraction," Todaro v. Ward, 565 F.2d at 54, note 7, and so long as it is "tailored to cure the violation." E.E.O.C. v. Local 638, 81 F.3d at 1181. In particular, external monitors have been found to be appropriate where consensual methods of implementation of remedial orders

appear "unreliable," United States against Yonkers, 29 F.3d at 44, or where "a party has proved resistant or intransigent" to effecting the desired results of a complex decree.

An external monitor's duties, however, must not be overbroad. The purpose of any monitor "is to aid judges in the performance of specific judicial duties, not to displace the court." Mickalis, 645 F.3d at 145. Thus, a monitor may be appointed to "report on a defendant's compliance with the court's decree and help implement that decree." United States against Philip Morris, 566 F.3d at 1149 50. But a Court may not invest a monitor with "wide ranging extrajudicial duties," such as the "authority to direct a defendant to take or to refrain from taking any specific action to achieve compliance with the court's order," and the authority "to adjudicate violations of the order as a roving federal district court." Ibid. Of course, an external monitor vested with the limited authority to monitor compliance with the court's order poses a lesser threat of intrusion than one vested with authority to implement a court's order. Yonkers 29 F.3d at 44.

Since "sweeping delegations of power" to a monitor may violate Rule 65(d), Mickalis 645 F.3d at 145, a court must be sure to "frame its orders so that those who must obey them will know what the court intends to forbid." Any significant decision by the monitor must be subject to "careful review" by the court. Ibid.

The record at trial demonstrated a blatant and aggressive disregard at Apple for the requirements of the law. Apple executives used their considerable skills to orchestrate a price-fixing scheme that significantly raised the prices of E books. This conduct included Apple lawyers and its highest level executives.

Apple has been given several opportunities to demonstrate to this Court that it has taken the lessons of this litigation seriously. I am disappointed to say that it has not taken advantage of those opportunities. I invited and expected a detailed and persuasive presentation of the steps Apple was committed to take to ensure that the government need never again expend its resources to bring Apple into court for violations of the country's antitrust laws. Apple's August 19 letter to the government is its most detailed response in this regard and it is inadequate.

I have been reluctant to appoint a monitor for several reasons. But I believe based on the record before me now that I should. I believe that a monitor with a carefully defined role can help ensure that competition is restored and preserved.

That said, I am giving the monitor a somewhat different function than that proposed by the plaintiffs. The monitor will not be charged with assessing Apple's compliance generally with the terms of the final judgment. This could be

a very expensive and intrusive undertaking. The monitor will, however, have two other important tasks, one envisioned by the proposed injunction and a new one. The monitor will evaluate Apple's internal antitrust compliance policies and procedures and additionally -- and this is the new provision -- will evaluate Apple's antitrust training program.

I want to address the issue of training separately. Neither Mr. Cue nor Mr. Saul, his assigned in-house counsel, could remember any training on antitrust issues. They are responsible, with others in Mr. Cue's section, with negotiating the content licenses for Apple's business. They and those on their teams need to understand what the law requires and how to conform their business practices to the law. Not everyone will need four hours of training. It's length is not critical. It's clarity and effectiveness are.

For some employees I could imagine a very effective half hour program. Every hour of these employees is important to their productivity and I do not want them to have to spend more time than is necessary to educate them on how to do their jobs in a way that complies with the law.

What is important is not the number of minutes but the quality of any time devoted to training. The training needs to make an impression, to be memorable, and to be helpful to an employee who wants to succeed for Apple but to do so within the bounds of the law. The training needs to be tailored to each

employee's position and the situations that employee is likely to encounter. There will, therefore, need to be more than one training module.

The training should apply to all of Apple's content businesses. The evidence at trial was that the negotiations with content providers are centralized, that the problems that arose in the context of E-books may arise in other content areas. Apple will be hard pressed to explain why an antitrust training program shouldn't be created for this entire line of its business.

I am hopeful that Apple will bring its culture of excellence and exceptionalism to this task. I am hopeful that it will devote its considerable resources and creativity to construct a training program that will be a model for American business.

But, even if it chooses not to create a model program, it must create a meaningful training program, one that is comprehensive and effective. To ensure that it does so, I will use a monitor. If there is any disagreement, the ultimate judgment of whether Apple has complied with the terms of the injunction will rest with me.

Apple could, of course, think of this training and any improvements to its policies and procedures as mere window dressing, the price it must pay to appear to comply with the injunction. I trust, however, that it will make a sincere

commitment to reform its culture. I believe that it is in Apple's long term interest to make these reforms and change its culture to one that includes a commitment to understand and abide by the requirements of the law. I have tried to fashion an injunction that intrudes as little as possible on its business, on its ability to compete and adapt. It is my hope that the terms of this injunction will protect consumers, encourage lawful competition, and avoid a recurrence so that taxpayers will never have to pay again for a government enforcement action. And with that explanation, let us go to the terms of section five.

I'm sorry. We're in Section VI, subsection (A). Insert as a second sentence, "The appointment shall be for a period of two years provided that the Court may sua sponte or on application of the United States or any plaintiff state extend the appointment by one or more one-year periods."

Going to subsection (B). Let me read it as it would be revised. "The external compliance monitor shall have the power and authority to review and evaluate Apple's internal antitrust compliance policies and procedures and the training program required by..." and then a reference to the inserted section above "...and to recommend to Apple changes to address any perceived deficiencies in those policies, procedures, and training."

Now, that takes us to subsection (C). I don't think

that the external compliance monitor should conduct a review or assessment of the current policies. I would expect that Apple would revise its current policy substantially and procedures and create an effective training program. That will require some time. So, I think this should be revised to have the external compliance monitor doing an assessment in three months from appointment and beginning to engage Apple in a discussion at that point. And we need to revise this section to add a parallel provision that would apply to the training program as well.

That takes us to section (E) at the bottom of page eleven. I would strike the first -- essentially the first three lines. And begin with the sentence, "If Apple objects to any recommendation, it shall propose in writing to the external compliance monitor, the United States, and the representative plaintiff states, within 30 days after it receives the report, an alternative policy, procedure or system designed to achieve the same objective or purpose. If Apple and the external compliance monitor fail after good faith discussions to agree on an alternative policy or procedure within 30 days of Apple's objections to a recommendation, Apple shall, after consultation with the United States and the representative plaintiff states, apply to this court within 14 days for relief."

Strike subparagraph (F).

That takes us to page 13 subsection (J), second line.

Strike the phrase "consultants, accountants, attorneys, or other."

That takes us to the signature line where there is that offending middle initial.

So, I think it would be important for counsel to have time to look at all of this, to talk with each other, hopefully give me a revised proposed injunction, preserving all of the objections they've all made before and requests they've all made before but understanding that this is my ruling on the merits of those issues, agreement on the language. Obviously if you have continued disagreement on language, you would feel free to present that too.

I think you need to read through this all carefully to make sure it's coherent and complete. And I think you should in particular feel free to revise further the section on the monitor. Because, as you can tell, I've reshaped that position. And you need to reflect on the two tasks the monitor would now have, which are -- one is the same but one is a replacement for one of the requests the government had made.

I think what we should do is take a break, give you a chance to consult among yourselves, and then come back. If you wish to be heard about any aspect of this now, fine. But I would like to sign this document next week. So that's my timetable.

Shall we say ten minutes.

(Recess)

THE COURT: I should have put on the record at the beginning of the proceeding the documents that I received since we last met. I think, though, that all of them have been placed on our ECF system except for a couple which we received today. I received August 27 letter from Weil, Gotshal on behalf of Simon & Schuster; from Scadden, Arps on behalf of Penguin Random House. Just those two additional ones to place on ECF. We will do so promptly.

Does the government wish to be heard?

MR. BUTERMAN: Yes, your Honor.

Lawrence Buterman, your Honor.

Understanding the Court's ruling there are just a few provisions that we would like to raise at this time. If it's possible, we would like an opportunity to just review the transcript to make sure that we've gotten all the language down correctly, to confer with Apple, and see if we can make -- reach other agreements on other language.

THE COURT: Good.

MR. BUTERMAN: With respect to looking at our proposed injunction on page six, and that would be Section III(E)(b).

THE COURT: B as in boy?

MR. BUTERMAN: B as in boy, your Honor.

Our understanding is that the Court added to the end

of section (b) the words "by any other retailer."

THE COURT: "Sold at other retailers."

MR. BUTERMAN: "Sold at other retailers," excuse me, your Honor.

The plaintiff's position is that Apple should not be communicating that type of information amongst publishers regardless of where the materials are sold.

THE COURT: Hold on one second. Let me make sure I have the context.

So you think it would be inappropriate for Apple to share with an E-book publisher the prices that other E-book publishers are selling their books in the iBookstore?

MR. BUTERMAN: Your Honor, we believe that it would be inappropriate for Apple to be sharing with one E book publisher the other E book publisher's future pricing provisions. That's what we were trying to get at, their pricing strategies.

Obviously once the information becomes publicly available, we don't have a concern with it. But until that point, a conversation between publisher -- a conversation between Apple and publisher A where Apple tells -- or the publisher tells Apple that it intends to price this book at a certain price and then Apple communicating that to publisher B, we would have a problem with that.

THE COURT: I guess the problem is that this sentence as drafted includes the phrase "retail prices or pricing

strategies," and it also includes the phrase "past, present or future."

So I think it's pretty easy to see why it would be useful to have an injunction that governs broadly the discussion of one publisher's pricing strategies with another, whether those strategies are past, present, or future in orientation. But when it comes to a discussion of retail prices, the ban is probably one that should be restricted to future prices. Past or present prices are probably known in the marketplace.

MR. BUTERMAN: Your Honor, if I may. The carve-out that follows, subsection (d), was intended by plaintiffs to address that issue precisely.

THE COURT: I see. All of this is subject to hearing from Apple as well. But I'll strike the phrase "sold at other retailers."

MR. BUTERMAN: Thank you, your Honor.

THE COURT: Anything else?

MR. BUTERMAN: Yes, your Honor.

The next issue that I'd like to just quickly raise is on page eight, section (B) subsection (a) in antitrust compliance.

Your Honor, the position that the plaintiffs took -- and I apologize because this might be a punctuation problem here that caused this -- is that each of Apple's officers and

directors should be required to undergo the antitrust training and compliance provisions that are set forth throughout.

And in addition to that, each of Apple's employees who is engaged in whole or in part in activities relating to the iBookstore. That was what the provision was intended.

We do believe that it's important that all of Apple's officers and directors take this training, given the way that the company operates, how much those individuals shape the company and the way that it proceeds in its business dealings.

THE COURT: There was no objection to that. I'm looking at Exhibit A. And that, of course, would make the addition that I proposed for the officers and directors engaged in the supply of other content unnecessary. So I will strike my addition. I'm going to add a comma after the word "directors" in subsection (A).

MR. BUTERMAN: Thank you, your Honor.

Your Honor, the last issue that we just wanted to bring to the Court's attention is on page ten. And it is the (I) one. That is with respect again to the logging.

Your Honor had stricken provision (1). We believe that the number of conversations that Apple should be having with other retailers such as Barnes & Noble or Amazon should be few and that it is appropriate for Apple to have to log those communications.

THE COURT: Well, I'm remembering the one suggestion

about dividing up the digital world between Amazon and Apple, that Apple was contemplating. That said, I'm making my judgments here based on what I learned through this trial. And one of the things I learned is that Amazon, I learned, is a fierce competitor with Apple and Apple with Amazon. Should they decide to divide up the digital world, I think we'll -- we will know that, that is, the American public. So I'm trying to think about, as I've indicated, where the real risks are and to minimize the burdens on Apple.

MR. BUTERMAN: Your Honor, if I may. It isn't just Amazon. And certainly we understand the relationship between Amazon and Apple. But there are other retailers, Barnes & Noble, for example, or some of the smaller retailers. These are conversations that may be appropriate under certain specific circumstances. They may not be.

But what certainly the Department of Justice has found is that this logging provision is a very good measure in causing the companies that are subject to it to take a pause and decide whether they should be engaging in this type of communication. And ultimately, your Honor, what we are hoping for is to make sure that Apple never again engages in price fixing in the E-book industry. We believe that this is a modest provision that would help ensure that Apple will not engage in inappropriate conversations with its competitors that could lead to price fixing.

THE COURT: I'll hear from Apple about why it objected to that provision.

MR. BUTERMAN: Your Honor, with that, and understanding the Court's rulings, that's all we have at this time. We will certainly go back and look at the order for further detail after this conference.

THE COURT: Thank you.

MR. BUTERMAN: Thank you, your Honor.

MR. SNYDER: Your Honor, may it please the Court. I'm going to have my partner, Mr. Boutrous, address the Court.

THE COURT: Thank you.

MR. BOUTROUS: Thank you.

Thank you, your Honor.

Good afternoon. Why don't I start with that last provision that Mr. Buterman was referencing, Section V(I). We think that the Court's changes make a lot of sense because as the Court pointed out this wasn't this case, there were some the reference you made was in the record. But Apple has all sorts of conversations with retailers about other things, ordinary business, like the app store and apps. And it would be burdensome, cumbersome. And it's beyond the issues in this case. So we would urge the Court to stick with the Court's recommendation to delete that section, section (2), from that provision. It just will be cumbersome, burdensome, interfere with the business. And we understand and appreciate the

Court's desire not to go farther than necessary to achieve the objectives in this case.

I would urge the Court -- you put your finger on a point we had made regarding section III(E)(b) which is the provision that included the language about communications regarding pricing. And that provision, that's the one --

THE COURT: We're on page 6?

MR. BOUTROUS: Yes. Thank you. On page six.

Because it's very confusing to talk about communications concerning past, present, or future prices. And we had suggested in our version that it be limited to future prices. And so I think the court's suggestion with Mr. Buterman I think makes sense. That was, in fact, one of our suggestions. I do think that that would be a good change.

And, again, I guess I should preface all of this with we're reserving all our objections. But I think the Court is right, that it's strange to suggest there should be limits on communications regarding past activity.

THE COURT: Well, not if it's strategies. The problem is I think with subsection (b) is it's doing a lot of different work. There's probably very little reason to discuss another publisher's strategies, be that past present or future. But --

MR. BOUTROUS: Your Honor, I had the same thought when I was reviewing this, making our suggestions. But I think (a) covers that, business or strategies. So it restricts

communications. But pretty broad language. Business plans or strategies. And just seems cumbersome and confusing to suggest past, present prices, particularly with that other provision, the allows publication, the current prices.

THE COURT: Well I can see that there are a couple different ways one could rewrite (a) and (b) so that it's clear that the discussion of pricing strategies or wholesale prices is not appropriate, whether those strategies or wholesale prices were past, present, or future.

But with respect to retail prices, I think the ban is only with respect to future retail prices which is really an aspect of pricing strategy. You would think that past and present retail prices are publicly available information and encompassed by the carve-out in subsection -- the paragraph that completes section (E).

So I think there is no disagreement here with respect to the ultimate merits of the issue. I can see different ways to revise it. I'll leave it to the parties to make a joint hopefully recommendation to me on that point.

MR. BOUTROUS: Thank you, your Honor.

The other -- I just really had a couple of other points I wanted to address. Still on page six. This would be section III. It's really (F) and (G) but let me focus on (G) which is the provision that says, "Apple shall not enter into or maintain any agreement with any other E book retailer where

such agreement likely will increase, fix, stabilize or set the prices or establish other terms on which Apple or other E book retailer sells E-books to consumers."

We had objected to both sections (F) and (G). The Court made changes in (F) that resolve some of our issues with respect to other content. But the language about "agreements that likely will increase prices." We understand what the government's getting at here. We're not looking for a way to fix prices here. But the notion that an "agreement that likely will increase prices" really starts to get into a very hard to a vague area that a company the company could enter into an agreement, perfectly lawful agreement with a supplier and there's a potential that because of the agreement, again assuming everything is lawful, that that could cause prices to go up. The Supreme Court in the Legend case and other cases has made clear that the fact that prices go up isn't necessarily anticompetitive. So it was that "likely to increase." And that's in both (F) and (G).

So we would ask the Court to -- strike at least that language, the "likely to increase language." It's just very hard to know what's going to cause others in the market, other retailers to increase their prices. And if it were some agreement that Apple entered into, this would subject Apple potentially to a claim for contempt for violating the injunction.

THE COURT: So I think you read into the record the substance of section (G).

MR. BOUTROUS: Yes.

THE COURT: So let's focus on that.

MR. BOUTROUS: Sure.

THE COURT: I understand there's parallel language in (F). But let's take (G) first.

So this applies to Apple's agreements with other E-book retailers which will likely increase the prices that that other E book retailer sets for E books sold to consumers.

MR. BOUTROUS: That's the way I read it, your Honor. It seemed very hard for Apple to know necessarily or be held responsible. If a perfectly lawful agreement is entered into and the other retailer increases prices, then theoretically Apple could be deemed to have violated this provision. That was what concerned us.

THE COURT: Can you give me an example of a lawful agreement that would likely have this effect, a lawful agreement you have with another E-book retailer.

MR. BOUTROUS: I wouldn't want to speculate, your Honor. Here, of course, this case was about the relationship with the E-book publishers. And I'm a new entrant into the case so I've been studying the record here. And I wouldn't want to speculate -- that's really I think one of the problems here; that it's requiring really a future look of what types of

agreements might be entered into. And I think with an injunction where there's going to be potential contempt for violating it and it's an area that was really not -- clearly wasn't the center of the case, the relationship between Apple and the E retailers and agreements that would have that effect. That's why we felt that this provision we urged the Court to strike it and would urge the Court to either strike it or modify it.

THE COURT: There are layers upon layers in this case. From Apple's perspective, one of its principal goals was the elimination of all retail price competition. And it was happy if a result of that was, and the price the consumer had to pay for that, was an increase in prices.

Now, the particular mechanism through which it achieved for itself the elimination of retail price competition was through a mechanism and series of agreements with publishers, but that it had the effect on another E-book retailer, in fact, other E-book retailers, first Amazon and then others.

So, I'm not -- I don't agree that subsection (G) isn't implicated by this case. If you could give me an example of a lawful agreement that you think Apple is likely to enter with other E-book retailers that would be likely to increase the prices for E books, retail prices for E books but that would be lawful, I'd be happy to -- I can't think of one. But if you

can, I'd be happy to hear your argument on this.

MR. BOUTROUS: Your Honor, if I can consider that, maybe in consultation with the government, when we look at the Court's new language, we can evaluate -- I'm just always hesitant to start speculating about business practices.

Again, this particular provision just jumped out because it was the retail industry.

And I know the Court made the findings it did. And I should say we believe we have strong arguments on appeal. We're going to challenge some of these findings.

But I did want to make clear, your Honor, we really did do our best to address the concerns of the Court in responding to the injunction. There were a couple of other provisions that we had proposed. Really just one other that I would draw the Court's attention to. The final -- the government is the party that put your middle initial in the -- let me be clear on that, number one -- but I have one other comment on the last page.

We had suggested in our last revision, your Honor, a provision that would make -- the good cause requirement to extend the injunction. That's consistent with the Microsoft injunction that the government agreed to in that case. Rather than this potential extension the way the government has done it. And would ask the Court to consider something along those lines. But would be consistent with earlier practice. And

it's sensible. Gives the court flexibility. We're going to try to be a model citizen if this injunction remains in place; that you won't have to ever extend it, there won't be good cause.

But we would ask the Court to take another look at Section VII(C) and that would be in Exhibit B to our filing on Monday.

THE COURT: Your request in that exhibit is to add the following, which is broader than good cause.

"Unless this Court grants an extension for good cause only, based on the showing of systemic and material violations."

So are you revising your request now to just say "Unless this Court grants an extension for good cause"?

MR. BOUTROUS: I was intending to offer up the suggestion we made before. But as a fallback position, the good cause requirement and deleting the last clause that begins, "provided that any time prior to expiration."

THE COURT: So right now the language is that an extension may occur, "If necessary to ensure effective relief," which is probably in some circumstances at least a higher standard than good cause. It's necessity, "If necessary to ensure effective relief."

So, would you like me to strike that phrase and insert instead "for good cause shown"?

MR. BOUTROUS: We had proposed doing that. Let me just see if there's a way -- let me see if there's a way to combine the two, your Honor, so we have them both.

In terms of -- I guess what the Court is saying that good cause could either be viewed as the same as necessary to ensure effective relief.

The part we were concerned about was the, in particular, was the "provided that," it has this extension language in there, and it would just automatically occur.

So one could delete the clause that begins "provided" all the way down to "one-year periods" and leave in "if necessary to ensure effective relief."

That would, I think, achieve the objectives. It would give the court flexibility to ensure the injunction had been complied with. And at the same time wouldn't create this open-ended situation.

And, again, this is I think -- our proposal is consistent with what the government has done in the past.

THE COURT: So, this is something for the parties to discuss, on page 16, replacing the phrase, "If necessary to ensure effective relief" with the phrase "for good cause" but leaving the remainder of the paragraph the same.

Now I personally think Apple would prefer "If necessary to ensure effective relief" but I leave it to the parties to discuss.

MR. BOUTROUS: Thank you, your Honor. We'll take a look at it with your statements in mind.

Going back to the antitrust compliance section and this question of officers and directors. We thought your -- one, there's going to be training of the senior executives and the board of directors -- we had interpreted directors here to mean the board of directors.

If I heard Mr. Buterman, it sounded like he was suggesting throughout the company employees who have nothing to do with negotiating contracts, people in manufacture and design. So he's nodding his head. Maybe that's another one we can talk about the language on it to clarify.

But it started to sound like it might have been a much broader mandate. And we thought that the Court's suggestion made sense, for purposes of the injunction, to limit it to the relevant -- those involved in content. I've got the language of the Court right here somewhere.

THE COURT: Apple made no objection on its Exhibit A to the language in paragraph A. So, I just note that.

Again counsel will discuss these issues with each other.

MR. BOUTROUS: We will, your Honor.

I think those were the only other -- the only additions. Again, I appreciate the Court saying all our prior objections are preserved. I won't repeat all of those.

Appreciate the chance to address these other issues.

I think that's all we need to cover today.

The other thing is we will follow up with the representation concerning no end run around point promptly.

THE COURT: Good.

I think it's probably a representation that can't be made until we have the final language because it would be hard to say we're not ever going to take a position that this injunction does or doesn't do the following.

MR. BOUTROUS: I can vow that we won't do any end running but we'll see the exact language we'll make sure that whatever we represent is absolutely accurate, your Honor. Thank you.

THE COURT: Anyone else wish to be heard?

Thank you all.

Mr. Buterman, could we expect a submission by next Wednesday?

MR. BUTERMAN: Yes, your Honor.

THE COURT: Thank you.

One other thing. Please be seated.

I would like the parties to contact Judge Wood again and arrange to see her in either September or October.

MR. BUTERMAN: Lawrence Buterman, your Honor. Does that apply to the government or is that related to --

THE COURT: It applies to the government.

MR. BUTERMAN: Okay.

THE COURT: Well, no. You're right. It's only about damages at this point. So it's the States and Apple. Though, you know, those are the necessary parties. It may be helpful -- and the class. It may be helpful to have the government there as well, I don't know, in some kind of universal resolution. That I'm not going to speak to.

Thanks.

(Adjourned)

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v. 12 Civ. 2826 (DLC)

APPLE, INC., et al.,

Defendants.

----------x

STATE OF TEXAS, et al.,

Plaintiffs,

v. 12 Civ. 3394 (DLC)

PENGUIN (USA) INC., et al.,

Defendants.

----------x

New York, N.Y.
January 13, 2014
1:55 p.m.

Before:

HON. DENISE COTE,

District Judge

APPEARANCES

UNITED STATES DEPARTMENT OF JUSTICE
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Attorneys for Defendant Apple
BY: THEODORE BOUTROUS
CYNTHIA E. RICHMAN

(In open court)
(Case called)
THE COURT: Welcome, everyone.
This is a conference held as a result of a motion for a stay of the monitorship made by Apple and as well I expect we'll address issues raised in a January 7 letter submitted by Mr. Boutrous with respect to the monitorship.
Why don't I begin by giving you an opportunity to be heard, Mr. Boutrous.
MR. BOUTROUS: Thank you very much, your Honor.
May it please the Court, the external compliance monitor appointed by the Court, Mr. Bromwich, is conducting a nonjudicial, inquisitorial, roaming investigation that is interfering with Apple's business operations, violating the final judgment issued by this Court, violating Rule 53 and the Constitution.
THE COURT: I'm sorry. Can you slow down here a little bit. Thanks.
MR. BOUTROUS: Sure.
THE COURT: Nonjudicial, inquisitorial --
MR. BOUTROUS: Roaming investigation that is interfering with Apple's business operations, violating the final judgment, violating Rule 53 and the Constitution. His activities are imposing substantial and rapidly escalating costs on Apple that Apple will not be able to recover even if

it prevails in its appeal to the Second Circuit.

He is acting like an agent of the prosecution and an agent of the plaintiffs and a witness against Apple, shown most recently by his filing of a declaration in this court against Apple in connection with Apple's stay motion. In that matter he's become an open adversary to Apple, when he is supposed to be serving as a judicial officer.

Your Honor, I think the key thing here, my overarching point is Mr. Bromwich is supposed to be your agent, he's supposed to be you, he's supposed to be fair and objective and acting as an arm of the Court. He's acting like our adversary. He's acting like a prosecutor. He's acting like a witness for the plaintiffs.

We believe that a stay should be granted while we appeal because we meet all the standards for a stay. Maybe I will start with the stay issues, and then I can come back to the objections. They are interrelated obviously on our merits claim, if that's OK with the Court.

THE COURT: I mean, some and some aren't interrelated, but that's just fine. Go ahead.

MR. BOUTROUS: Thank you, your Honor.

With respect to our the stay, we meet ail of the standards. We have a substantial likelihood of success on the merits in our challenge to the monitorship. Apple will be irreparably harmed absent a stay and the public interest will

be served and certainly won't be harmed by a stay.

With respect to the issue of success on the merits, and this goes to our objections as well, your Honor, we object and ask the Court to disqualify Mr. Bromwich, in particular because he filed this declaration. Again, your Honor, he's supposed to be -- the only authority this Court has is to appoint someone to act as a judicial officer, as an assistant to this Court.

It is just as though this Court or this Court's clerk filed a declaration against Apple in a contested matter based on his knowledge that he acquired in an extrajudicial capacity. It's information he acquired in e-mails, ex parte e-mails -- and I'm using ex parte with the Court in the way that the plaintiffs have used it.

THE COURT: That is its customary meaning.

MR. BOUTROUS: I mean, the other meaning is customary as well, but for purposes of this, your Honor, I am focusing on communicating with one party as opposed to the other party, without the other party present. That is the quintessential opposite of judicial functions.

This Court does not have ex parte conversations with the Department of Justice or with Apple. The judicial record is what's put before the Court in court, briefs, arguments, and evidence. So Mr. Bromwich has filed a declaration, 17 single-spaced pages, on contested factual issues in this

proceeding. As the Court is aware, he is governed by Section 455 of 28 U.S.C., which applies to judges, and requires disqualification where a judge has personal knowledge of facts that are in dispute in a proceeding.

That's what this is. Mr. Bromwich has come in as the lead witness in a contested proceeding based on his personal knowledge that he acquired not sitting in a courtroom, not reading briefs, not reading witness statements, but through his ex parte communications with Apple, with Apple lawyers, with Apple executives, with the plaintiffs, with the Justice Department.

Your Honor, I know, I'm sure pored through the papers, but just to give you an example, we have objected --

THE COURT: Mr. Boutrous, I can assure you I have read every page of your submissions and the government's submissions.

MR. BOUTROUS: I have no doubt, your Honor.

The point I wanted to emphasize, though, that I think is another particularly egregious situation, when we have objected regarding the scope of the injunction and the monitorship based on what the final judgment says and what this Court said on the record several times during the August 27 hearing, Mr. Bromwich has quickly pointed out that he had ex parte conversations with the Court before he was appointed as part of the interview process and discussions with the Justice

Department. And in those conversations he claims that both this Court and the plaintiffs somehow authorized a broader mandate, where he would immediately launch into this inquisitorial pseudo-prosecutorial activity where he's demanding interviews with the top executives of the company long before the breathing-space period the Court had created, the 90-day period, had even begun.

He is making demands without regard to relevance, without regard to any of the rules that would govern the taking of evidence in a courtroom. Immediately he began demanding interviews with the board of directors, including Al Gore. He seems to have a fixation on interviewing Al Gore without regard to whether Al Gore has any connection to the specifics in this case.

THE COURT: If I remember correctly, there was a single reference to Al Gore in the context of a mention of three members of the board who Mr. Bromwich understood live or frequently visited the area near Apple's headquarters, and he was suggesting for purposes of convenience that on his trip to those headquarters, since he wanted to introduce himself to board members, make himself available for any questions and otherwise share information with them, that it might be convenient to talk with them on that occasion. Is there another reference to Mr. Gore?

MR. BOUTROUS: Yes, your Honor. Mr. Bromwich referred

to Mr. Gore several times both in initial conversations we had with him and in connection with our discussions about interviews following up on that, in letters, in the e-mails. I don't want to get off to that point.

The point is, your Honor, convenience. What connection -- remember the Court said it wanted to rest lightly to Apple's operation with this monitorship. In the interview with Dr. Sugar -- I want to add here, we have been trying to cooperate and trying to work in a collaborative way with Mr. Bromwich, and also simply because we are revising and enhancing the compliance program. Apple has complied with every provision of the injunction.

It has hired its antitrust compliance officer, and it's been working hard. But frankly, your Honor, Mr. Bromwich has been an impediment to focusing on what the Court wanted Apple to do, which is to focus on this 90 day period on revising its procedures.

So there was no reason for him to be seeking to interview. He wanted to interview, not just stop in and say hello, he wanted to interview every member of the board of directors, he wanted to interview every member of the team. He demanded it be November 18. And when I said that was a bad week he said -- and this goes goes to the bias issue, your Honor -- he declared that it appeared Apple didn't take him or the final judgment seriously and he demanded the schedules for

each and every executive and board member who we were saying it would be difficult to have them.

That is not judicial activity, your Honor. That is not a judicial function. And I think it's part of the overall situation we find ourselves in. The Justice Department, plaintiff states, Mr. Bromwich, are very confused about the power that a Court-imposed monitor -- as opposed to a monitor who has been agreed to by the parties where it is a contract, a consent decree -- can wield. As we have shown with the D.C. circuit's decision in Cobell, where the Court was not simply, as the plaintiffs like to say, focused on the fact that it was the Executive Branch being monitored, but the Justice Department, the U.S. Justice Department cogently argued to the D.C. Circuit that giving a monitor investigatory and inquisitorial powers over a party -- and this is what the D.C. Circuit held -- over a party goes beyond the judicial function and it is not permitted if there is an objection.

We objected to this monitorship. It was imposed over our objection. And the Justice Department also objected that it was improper to make the monitored party pay for the monitor, and they were objecting there where the monitor was being paid $250 an hour. That was the Justice Department's argument, and they won. The D.C. Circuit held that that was an improper monitorship.

This is much worse because we have the monitor filing

a declaration against the party, and in the Cobell case, your Honor, the D.C. Circuit also disqualified the monitor because he had acquired information in ex parte discussions with the Department of the Interior employees and the Department of the Interior as a party and gathered information and formed views about the Department of the Interior and then expressed them and tried to tell the Department of the Interior what to do.

What Mr. Bromwich did here is the same -- worse. He put in a declaration. He has personal knowledge. It is a clear, flat reason for disqualifying him. But, in addition to that, he wrote letters to the board of directors of the company. He wrote a letter to Tim Cook the CEO. Imagine, your Honor, again, he is supposed to be your surrogate. Imagine if this Court went back in chambers and fired off a letter to the board of directors of Apple expressing your views and your determinations about Apple based on e-mails with me.

Clearly that would be improper, and this court would never do that. But that's what Mr. Bromwich has been doing. If the Court looks at the correspondence, that is not appropriate behavior for a judicial officer. In part I think it stems from confusion by the states and the Department of Justice and Mr. Bromwich about the scope of his authority.

He is limited, as the D.C. Circuit put it, to exercising judicial functions. He's gone way beyond that. It violates the separation of powers. It violates Rule 53. There

is no authority in Article III or any other provision of law that allows a Court to appoint someone who will investigate, who will interview, who will roam the halls of a party, going through the buffet line at the company's headquarters and interviewing people on demand.

That is not something that any rule or statute or constitutional provision allows. That is what he, Mr. Bromwich, thinks he is allowed to do. So we believe, your Honor, either with this Court in terms of disqualifying Mr. Bromwich or in the Second Circuit we have extremely strong probability of success on the merits.

With respect to the irreparable harm standard, your Honor, just going back to the Cobell decision, the D.C. Circuit said and I quote, this is at page 1139.

THE COURT: Excuse me just one second.

Are you in the December 10 opinion, December 10, 2004?

MR. BOUTROUS: Let me just pull that up here, your Honor. The D.C. Circuit, the cite is 334 F.3d --

THE COURT: I'm sorry. I am at 392 F.3d. So you are citing something else?

MR. BOUTROUS: Yes. This is 334 F.3d 1128. It's the 2003 opinion.

THE COURT: Different opinion than I have before me. Thank you.

MR. BOUTROUS: In this opinion, where the Court

disqualified the monitor, it was viewing whether a mandamus was appropriate where irreparable harm is the standard, the Court said, "When the relief sought is recusal or to disqualify a judicial officer, the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable."

And I think that's true here, that if we don't have a stay, then -- and the Court does not agree with us on the recusal issue -- then Apple would be subjected to monitorship by someone who Apple strongly believes should be disqualified.

So that's one form of irreparable harm.

The other form, your Honor, is you can't turn back the clock. Everything that's already happened while Apple believes it has strong arguments on appeal of the merits of this Court's ruling and on this monitorship, as the Court remembers, we objected to any kind of monitor. We didn't think it was necessary, we didn't think it was lawful, we think it violates the separation of powers.

THE COURT: No, I don't think actually you made some of those arguments back then. But I understand you have separate arguments about them not being waivable. But anyway the record is what the record is.

MR. BOUTROUS: And my only point, your Honor, is that we made those arguments. We were going up on appeal on the underlying findings and the monitorship. If we win and we

don't have a stay, in the meantime we will have had to pay potentially millions of dollars to Mr. Bromwich without any ability to recover the money if we prevail.

That's not just cost of compliance. That's funding Mr. Bromwich and the intrusion on the company. I think your Honor will appreciate when you tell executives and business people or anybody we are going to have this guy who is an arm of the Court come in, he's going to interview you about the case that was before Judge Cote, he's going to ask you all these questions, that is not something you take lightly. You prepare for it.

It causes everybody, if you are taking it seriously, which Apple does, it causes the folks who are going to be interviewed to think hard about the situation, and it is disruptive. It takes hours to prepare and think through the issues.

This isn't some, as they say, an occasional one-hour get-together. This is an interview from the Court officer wielding what plaintiffs says he can wield, which is investigatory power. If he discovers what he thinks is wrongdoing, he must under the final judgment report it to our litigation adversaries, the Department of Justice, plus the plaintiffs, who as the Court knows, the plaintiff states, who are also plaintiffs seeking nearly a billion dollars in the class action.

That is a treacherous area. We gave the Court a couple of examples of the types of questions Mr. Bromwich has been asking about things unrelated to antitrust: what were the most serious compliance issues the companies has faced, he asked Dr. Sugar the head of the audit committee, when you took over. I mean, that is, you know, it is remarkable. That was the type of questions. He asked similar questions to other people.

This isn't some, you know, get-acquainted coffee. This is Mr. Bromwich coming in -- and I have sat through some of the interviews, your Honor -- a very serious, former prosecutor who now is viewing himself as having some form of investigatory prosecutorial authority when he is supposed to be a judicial officer.

On the irreparable harm point, your Honor, if we win, we can't get that back. We cannot return to the position we would have been in. The Brenntag, decision, your Honor, which we cite from the Second Circuit talked about one test for irreparable harm, and that is but for the grant of equitable relief there is a substantial chance that, upon final resolution of the action, the parties cannot be returned to the positions they previously held.

We can't go back. If we win, likely, hopefully, the monitorship would already be over. But the damage, the harm would have been done, the intrusion would have occurred, the

disruption would have occurred, and potentially millions of dollars will have been spent.

The Supreme Court in the Nken v. Holder case made the point that a stay is also meant, as a matter of comity, to protect the jurisdiction of the appellate court, so the appellate court can give effective relief. There is a strong chance that if we don't get a stay we won't be able to get effective appellate relief and an appellate remedy in the Second Circuit because everything will have occurred by the time the Second Circuit rules.

THE COURT: I'm sorry. Was that case cited in your papers?

MR. BOUTROUS: It was. Nken v. Holder. It's a Supreme Court decision on the standards for granting a stay.

Then, your Honor, just back to the funding issues, as the Court knows, we have objected on several grounds to Mr. Bromwich's fee demands.

First, on the one hand, Mr. Bromwich and the government have pointed to fees that private attorneys who are hired by a client who voluntarily wants them to work for them, and they have said, well, his fees are reasonable in light of that. This 15 percent administrative fee on those hourly rates we have argued are not, given these circumstances and given Apple's practices.

But the bigger point, your Honor, is when this Court

takes its majesty and appoints a private citizen to work with the Court against the will of a litigant that is not supposed to be some profit-making enterprise.

I had several conversations with Mr. Bromwich, and this is in my declaration and in some of our letters, where he said, well, he needed to make a profit and he needed to add a 15 percent markum on $1100 an hour so he would make a profit.

That is inappropriate, your Honor. To have a litigant have to fund the pseudo-prosecutor who is investigating him, and the Justice Department and the plaintiff states are adversaries in this case, and the plaintiff states in a class action where they are seeking to collect hundreds of millions of dollars, they are the ones who approve what we have to pay the Court-imposed monitor? That violates Rule 53, it violates the separation of powers, it's improper in multiple respects.

As we point out, your Honor, Mr. Bromwich resists entirely the notion of any limits and giving Apple any sense of what he's doing, any kind of budget, any kind of identification of his tasks.

I think we cited some of the independent counsel cases, where the complaint was independent counsel would have an unlimited budget and broad mandates and they could go on and on forever. But this is worse because we have to pay for it. In the independent counsel, the subjects of the investigation didn't have to pay for the independent counsels. So that's

just manifestly unfair, it is offensive, and it creates at least the appearance of a personal incentive by Mr. Bromwich to try to investigate as long as he can on issues that have nothing to do with the case. And the Young case that we cite, your Honor, the Louis Vuitton case, talks about how a prosecutor or someone performing those sorts of functions must be disinterested as a judicial officer must be disinterested.

But Mr. Bromwich on both, if we view him as a judicial officer or someone performing a prosecutorial function, has at least an apparent personal interest in an expansive investigation that goes on for years and years and years.

Everything I have seen, your Honor, the notion that he needed to immediately interview the top executive, including people who designed the products, the board -- and he made very clear this was just going to be round one. He was going to do this again and again. This wasn't just a onetime thing. He made clear he was going to come back and do that again, interview again, that this was just the beginning.

Your Honor, it's completely inconsistent with what this Court said in open court and I think the approach the Court outlined.

I want to make very clear, your Honor, we, Apple and its legal team, inside and outside, its executives we set out when we got the Court's final judgment to do everything the Court said: Hired an antitrust compliance officer, began

immediately revising, revamping the antitrust compliance and training policies.

Your Honor, we didn't seek a stay, because we thought we are going to revise these policies and procedures. We said to Mr. Bromwich, give us some ideas. We are going to do this anyway. We will work with you. I said this, the Apple lawyers said it. Let's work together on this, not one idea, not one suggestion, not one specific. Look at his declaration, your Honor. I know you have already looked at it. He doesn't say, I suggested to Apple they do this, they do that. He has the lawyers from Fried Frank involved. Not a peep. That was the whole purpose that this Court set forth in terms of the injunction.

THE COURT: No, no, no, no. We can go back to the wording, and we will, of the injunction. But, no, Apple was given 90 days for it to revise its practices and procedures and training program. And thereafter the monitor would have an opportunity to comment and Apple to consider the comments and hopefully a period of consultation thereafter.

MR. BOUTROUS: Exactly.

THE COURT: And I understand, and I am very grateful, that Apple has hired two Simpson Thacher lawyers to help it in this process of revising its procedures and creating an appropriate training program. But I just want to make sure that we are on the same page as to sort of the timetable in the

injunction.

MR. BOUTROUS: We are totally on the same page, your Honor, because that was one of our complaints. We said to Mr. Bromwich, We are going to be doing this for the next 90 days. Your Honor, as I recall, you sua sponte suggested this 90-day period. I'm pretty sure we thought it was an excellent idea.

THE COURT: Yes. And I did not want to assume that Apple wanted to rely on the current state of its practices and procedures. I wanted to give it an opportunity, if it wanted to improve or alter them in any way, to be able to do that. But I think we have to separate that, and I know you are a very sophisticated and thoughtful attorney. So that is a separate issue of when the monitorship began.

MR. BOUTROUS: Going back to where I sort of went off, we proactively, notwithstanding that, did say to -- this was the only point I was making to Mr. Bromwich and the Fried Frank lawyers, here's what we are doing. In the meantime, while we are doing this, if you have any ideas, let us know. But we took the position and we objected from day one -- maybe I will just close and turn it over to the plaintiffs for a moment -- but with this: That we objected from day one. This notion that we somehow waived our objections, we had objected repeatedly to Mr. Bromwich's fees. He said they were nonnegotiable. We objected to him beginning before the 90-day

period because we said that was an inconsistent with the Court's judgment and with what the Court said in open court.

He said, Well, I talked to Judge Cote before I was appointed, I talked to the Justice Department, and I made clear to them that I was going to start interviewing people right away.

So he was using -- what could be worse? He was using conversations with the Court and our adversaries to trump what we learned in open court and from the final judgment. We objected in person on October 22 to his proposal for interviewing these people.

We raised questions about attorney-client privilege issues. We had not seen his fee proposal. When he sent his fee proposal, we objected. We made a proposal in response to try to work things out. October 31 I sent a letter to Mr. Bromwich laying out our view that he was going beyond the scope of the judgment, that his fee structure was not permissible, that the timing was inappropriate, all of those things.

We kept made sure the Justice Department and the plaintiffs at all points pursuant to the final judgment had that information. When we filed our objections on November 27, we again alerted them that those were our objections pursuant to the final judgment. When the Court issued its order on December 2 saying it wasn't clear we had objected, we objected

again. So we have objected over and over and over to all of the things we're asking the Court to focus on both in our objections by January 7 letter and in connection with our stay motion.

As the Court pointed out, as the government admits -- the Court didn't say this, but the government admits, the plaintiffs admit that our separation of powers arguments are not waivable. Frankly, your Honor, as you defined the monitorship originally in the final judgment, since Apple was going to be revising and enhancing its procedures and the Court's narrow tailoring of the monitorship, it seemed like there was a way that that could proceed that would not have raised these separation of powers problems and issues. But it quickly became clear that that was not the case.

So, for all these reasons, your Honor, we ask that the Court sustain our objections in my January 7 letter to the Court, and disqualify Mr. Bromwich. I think it is a clear case for disqualification. It would set a terrible precedent for this to be the way the first court-imposed monitor in a civil antitrust case, as far as we can tell, ever, if this is how it operates.

Then we ask the Court to stay the monitorship so that we can appeal and not have these intrusions, and that will not harm the public interest at all. We are following the injunction. We are doing what the Court said we needed to do,

and in the meantime we are only asking for a stay of that provision.

We believe, respectfully, your Honor, we are going to prevail on appeal. If we don't, then the monitor, a new monitor can review the policies of the company and do what the Court said should be done in the final judgment at that point. That would be consistent with the public interest and with the Court's injunction, and we ask the Court to grant us our relief.

Thank you.

THE COURT: Thank you, Mr. Boutrous.

MR. BOUTROUS: Lawrence Buterman, your Honor.

Respectfully, there is a lot of conflation that's going on here. And the issue that I want to address first is the stay issue. Now, Apple initially based its stay arguments on the likelihood of success on the merits claims based on a misreading of the Court's orders.

When the Court clarified those orders, Apple shifted, and we saw a new set of arguments appear. And it was unclear to us whether Apple was challenging the Court's authority to appoint a monitor or whether Apple was challenging the way that the monitor has acted.

Now, it seems clear both from what Mr. Boutrous just said as well as from Apple's reply brief at page 14 that Apple's now saying that its objections and its basis for the

stay turns primarily on the way in which the injunction is being implemented, not the terms of the injunction as it was ordered.

Your Honor, that very statement is the death knell to their argument for a stay. The reason that it's the death knell to the argument for the stay is because this Court in the final judgment as well as in its subsequent orders has made clear that there are methods for Apple to raise any objections that it has with respect to how Mr. Bromwich is conducting his monitorship. If there is a method available for Apple to address how Mr. Bromwich, or to seek relief from how Mr. Bromwich is conducting his monitorship then, by definition, your Honor, there is no irreparable harm here.

Now, at the same time we now see that Apple has brought this argument that Mr. Bromwich should be disqualified because he submitted a declaration.

Putting aside that issue for a moment, we would note that whether or not Mr. Bromwich should be disqualified certainly doesn't impact the stay issue. Again, there is a procedure in place here for the Court to deal with the issue of disqualification. If the Court chooses to entertain Apple's arguments, and as we pointed out in our papers, your Honor, while Mr. Boutrous is correct that Apple has raised a number of objections to us, and we've worked diligently to try to resolve some of these issues with Apple, our position is that the

disqualification issue first appeared in a January 3 letter that Apple sent to us.

We responded by telling them that we disagreed with them, but that we would like to discuss the matter with them, that we would be happy to discuss the matter with them. As unfortunately has become practice, Apple did not respond to that request, but instead filed their letter to the Court seeking Mr. Bromwich's disqualification.

Now, with respect to Apple disqualification arguments, we have laid this out in our papers, both in our letter to the Court as well as in our surreply brief. Mr. Boutrous submitted a declaration in conjunction with Apple's stay motion. In that, in his papers, Mr. Boutrous referred to lots of documents. He copied e-mails between himself and Mr. Bromwich, between Mr. Bromwich and other attorneys and presented a narrative to this Court which unfortunately wasn't a complete and accurate narrative.

Mr. Boutrous did this in the context of arguing that Mr. Bromwich should not be allowed to continue his job. Mr. Boutrous did this in the context of arguing that Mr. Bromwich was failing to do his job properly.

All that Mr. Bromwich did when he submitted his declaration was tell the Court the other side of the story, so that if this Court were going to rule on whether Mr. Bromwich's actions required a stay, well, then the Court would have the

full and complete record in order to do so. Respectfully, your Honor, we do not believe that there is anything remarkable at all about Mr. Bromwich filing this declaration.

What's come out of this entire process, and we have heard a little bit about it from Mr. Boutrous today is about, when he talks about what Apple has done since the final judgment has been entered, how Apple has hired lawyers from Simpson, how Apple has gone about revising its policies, it's very clear that Apple has a vision of how this final judgment and the monitorship should operate. Its vision seems to involve that the lawyers will put together compliance programs and training and they will implement those compliance programs and training, but that the executives will be spared from any burden of having to deal with the consequences of the lawsuit.

We find that particularly troubling, your Honor, given what this Court found both at trial and then in this Court's statements when the Court decided to impose a monitor, the fact that the conspiracy here involved Apple's in-house attorneys and its most senior executives, one of whom testified at the trial.

What is clear is that Apple's vision of what this monitor should be doing doesn't include having the monitor telling it how to do everything. I go back to the Court's initial August conference, where the Court indicated that the Court was reluctant to appoint a monitor in this matter, but

that ultimately the Court decided that Apple had not shown that it could be trusted on its own to reform its policies and procedures and create a culture of compliance. That was the reason why the monitor was put into place here.

So what this all comes down to is not the fact that Mr. Bromwich is conducting any sort of roving investigation, despite the rhetoric, because Apple can't point to any investigation that Mr. Bromwich has conducted. What Apple was talking about are 13 interviews, most of which Apple recommended to Mr. Bromwich that he conduct, most of which were lawyers.

For all the talk of declining market share -- I believe there was a reference to sitting in a line in a buffet which I had never heard before -- there's been one interview of one executive, the head of the audit committee, and there's been -- excuse me, one board member, the head of the audit committee, and there's been one interview of the general counsel of the company. Respectfully, that is not something that is going to go about and cause the decline of Apple's market share or its loss of innovation. We just don't see that.

Given everything that took place in this case at trial, we, the plaintiffs, are concerned with what Apple is saying, because when Apple tells the Court that we are doing everything, but we don't want Mr. Bromwich, what they are

really saying is that they don't want anyone checking their work. That's what the monitor needs to be doing at this point.

I would like to just quickly address some of the various points that counsel raised earlier, and I apologize if they are a bit scattered.

One point that needs to be made clear is a large portion of what Apple has complained about to date deals with the fact that the monitor engaged in activities during the first 90 days of the engagement.

As an initial matter, there's clearly a disagreement here as to what Mr. Bromwich was permitted to do during those 90 days. We have had discussions about that, Apple and the United States.

Apple certainly was not taking the position that Mr. Bromwich was not permitted to interview people during the first 90 days. Indeed, it wouldn't make sense for Mr. Bromwich to have been appointed on day one if he had to sit on his hands for the first 90 days.

So what Mr. Bromwich has been doing during the first 90 days is doing what he believes is appropriate as somebody who has a lifetime of experience in monitoring companies and engaging in these kinds of activities.

He was doing what he believes is appropriate in order to get a baseline, to understand what level of commitment the company has towards compliance. Because ultimately

Mr. Bromwich's job is to assess how Apple has reformed its training and its compliance procedures.

The fact that Apple doesn't agree with Mr. Bromwich as to the proper way for him to conduct his job is unfortunate, but it's not remarkable, given that the Court felt that there was a need to impose a monitor here to make sure that Apple reformed its compliance and training programs and that it couldn't be left on its own to do that.

But with respect to the 90 days, your Honor, the 90 days are over tomorrow. So to the extent that Apple is claiming that there is some sort of irreparable harm from the fact that Mr. Bromwich has engaged in interviews or is engaging in interviews, seeks to speak to board members or senior executives during the first 90 days, that argument carries no weight considering that tomorrow that is over.

Come back to the argument that Apple's made repeatedly today when it talks about investigations and Mr. Bromwich conducting investigations. Even assuming that Apple's argument regarding disinterested prosecutor are not waived, the key to their argument is that Mr. Bromwich is engaging in some sort of improper, I believe the word that was used was a roving investigation. But Apple has not come forward and suggested, they have not pointed to any investigation that Mr. Bromwich has conducted. Rather, all that is going on here is Mr. Bromwich is interviewing senior executives as part of

conducting his job.

One thing that is important here, counsel mentioned a couple of times about confusion that justice has, confusion that the plaintiff states have, the confusion that Mr. Bromwich has over the scope of Mr. Bromwich's appointment, your Honor.

There is no confusion whatsoever. Mr. Bromwich, the United States, the plaintiff states are all fully aware of the limited scope of Mr. Bromwich's mandate. Mr. Bromwich has never sought to increase that mandate.

Again, what Apple doesn't like and why Apple says that he has is simply because he's engaging in activities that they would rather he not do, that is, speak to Apple's board and its senior executives, the people who set the tone at the company.

Your Honor, in our papers we spoke at length about Cobell. To the extent that Apple is still maintaining its separation of powers arguments, we believe it's very clear that the monitorship that was at issue in Cobell is very, very different from the one that is at issue here. I would direct the Court's attention to 334 F.3d at 1143, where the Cobell Court discusses the role that the monitor, the special master in Ruiz had and where the monitor was found to be appropriate. And contrast that with the monitor in Cobell, and one of the key parts which the Court says which highlights the problems with the monitor in Cobell is the fact that that monitor was ordered to monitor and review all of defendant's trust reform

activity, including the defendant's trust reform progress and any other matter that the monitor deemed pertinent to trust reform.

It is a very, very different mandate than what this Court gave Mr. Bromwich. Mr. Bromwich does not have the ability to engage in activities or to investigate any activities, let alone activities outside the scope of Apple's antitrust compliance practices and policies and training. And Mr. Bromwich has no authority to tell Apple to do anything. Rather, Mr. Bromwich can make recommendations to this Court. And so looking at Ruiz and looking at Cobell, we believe that the differences are fairly plain here.

With respect to the fees, your Honor -- and I will just address this very, very briefly -- on multiple occasions now the United States has reached out to Apple and has indicated that Mr. Bromwich would like to sit down and work out the fee dispute.

We have personally offered to help the parties reach agreement, to help Mr. Bromwich and Apple reach agreement in that matter. We have indicated to Apple and Mr. Bromwich has indicated to Apple that he is willing to adjust his fees, both his fee structure and his hourly rates, in order to put this issue to bed, because, your Honor, the reality here is that Mr. Bromwich is not an adversary of Apple's. Just because Apple has sought to treat Mr. Bromwich as an adversary to Apple

does not make him so. Mr. Bromwich is set on working with the company in order to help the company achieve the goals that this Court set forth when this Court appointed a monitor.

Unfortunately, your Honor, Apple hasn't responded to those requests. It hasn't responded to many requests. The United States on multiple occasions has reached out to Apple to try to engage in the kinds of conversations contemplated by the Court's order in December as well as what we understand Section 6 of the final judgment to require, to see if we can reach resolution. Every time we do, we get no response.

At this juncture it just seems as if Apple is more interested in having the issues available to it than it is in actually resolving the issues and getting towards a culture of compliance. Your Honor, at this point I would be happy to answer any other questions that the Court has.

THE COURT: Thank you.

MR. BUTERMAN: Thank you.

THE COURT: Mr. Boutrous, you are standing. Did you want to briefly be heard?

MR. BOUTROUS: May I, your Honor?

THE COURT: Yes.

MR. BOUTROUS: I will be brief. Let me start with the last point.

I think if the Court looks at the meet-and-confer discussions, we have sought at every turn to work with the

Justice Department and the plaintiffs and Mr. Bromwich on these issues. This notion that we haven't responded, Exhibit C to my declaration on the reply brief was the last communication on fees. It was from Ms. Kroll from Apple. It laid out a specific proposal on fees. This was after Mr. Bromwich for the first time in December said he was willing to finally talk.

His first position to your Honor was this is nonnegotiable. That's in his declaration. But Exhibit C to my reply declaration, Mr. Bromwich in his declaration, he finally responded. He basically said that is unacceptable. He keeps comparing it to all of his other monitorships and says that's not acceptable. So we put proposals on the table from day one. And Mr. Bromwich said, Hey, I don't work for you. I only answer to your adversaries while I investigate.

THE COURT: Ooh, ooh, ooh. I appreciate that this is oral argument and counsel are passionate here and committed to zealously representing their clients. But I actually have read the documents. So, counsel, let's try to be a little more careful.

MR. BOUTROUS: Let me rephrase that. He said only the Justice Department and the plaintiff states have the ability to approve my fees.

THE COURT: And that I think comes out of the language in the injunction.

MR. BOUTROUS: Yes.

THE COURT: Thank you.

MR. BOUTROUS: That Apple had no right to negotiate fees. So that was their position.

THE COURT: That is from the language of the injunction.

MR. BOUTROUS: And we think as this has played out it is inappropriate, and we object to it, your Honor.

THE COURT: You didn't object at the time to that language. You had many opportunities to help frame the language. No objection was ever made to me with respect to that provision or indeed any of the other specific language in section or article 6, and I was presented with this final form with a representation that the parties, both Apple and the government, had approved the form of the injunction with respect to the specific language.

MR. BOUTROUS: Not the content, your Honor. We objected to the entire monitorship.

THE COURT: Of course. Separate issue. You preserved your objection to the monitorship. Absolutely. I am just talking about the specific language and fee-setting provisions. Apple made no request for any alternative mechanism. We will address that in a moment. But I just want to make sure we are careful here.

MR. BOUTROUS: Certainly, your Honor. We had no idea that Mr. Bromwich would say -- that he would make a proposal

like he did, a take-it-or-leave-it proposal along the lines he did. My only point, getting back up here on rebuttal, is Apple made a very specific proposal in Exhibit C to my reply declaration.

THE COURT: That's the December 17 letter.

MR. BOUTROUS: Yes. And Mr. Buterman did respond and basically said we will talk about it.

THE COURT: That's the December 24 letter from the Department of Justice?

MR. BOUTROUS: Yes.

THE COURT: OK.

MR. BOUTROUS: Your Honor, on the fee issue.

THE COURT: Excuse me one second.

MR. BOUTROUS: Yes.

THE COURT: So on page 3 in the government's letter of December it says, "We firmly believe that a compromise acceptable to both Apple and Mr. Bromwich can be reached on the fee issue. Mr. Bromwich has informed Apple that he is willing to engage in those discussions, and we reached out to Apple's counsel last week to inquire whether Apple similarly was inclined. Once we receive Apple's response, we will proceed accordingly."

MR. BOUTROUS: And Apple submitted a letter that detailed its response on December 17 that laid out a very specific proposal.

THE COURT: No, I'm referring to government's December 24 letter, which was a response to the December 17 letter.

So did you respond to the December 24 letter?

MR. BOUTROUS: No, your Honor.

THE COURT: OK. Just for clarity.

MR. BOUTROUS: Exactly. We made a proposal, and their response was basically make another proposal.

THE COURT: No. I think it was let's -- in essence, as lawyers would say, or as this Court would say it, let's meet and confer and try to resolve this.

MR. BOUTROUS: Your Honor, we have been doing that since October. That is our point, that it's been the Justice Department that's been stringing this along. But let me pull back for a second, your Honor. When the Court said --

THE COURT: Mr. Boutrous, just because you say it, doesn't make it so.

MR. BOUTROUS: I think the record supports it, your Honor. I am not just saying it. It is in the record.

THE COURT: Mr. Boutrous, I am very anxious to hear what you have to say, and that's why I read with care your submissions, including each of the e-mails that you submitted and that were submitted in response to present the complete record.

I don't want to interrupt you, but I would ask you, again, I am familiar with the record, so I will be listening to

your comments in that light.

MR. BOUTROUS: Thank you, your Honor.

Let me wrap up on the fee issue and then I will hit a couple of points and sit down. But the bigger picture, your Honor, when the Court said in its injunction that the fees need to be reasonable and customary given the responsibilities, we had no idea that the proposal was going to be anything like what it was. We tried to work through it, but we preserved all of our objections. That's really the only point I wanted to make. It is offensive to the process of a special master or a judicial officer to have the special master making clear they need to generate profits. So we object to that entire process and how it's being implemented.

On this question of whether Mr. Bromwich is conducting an investigation, your Honor, he demanded -- we weren't just saying we wanted to let him interview people. He demanded to interview all of the members of the board and all of the executives. We then tried to cooperate, in fact after I talked with Mr. Buterman about it, trying to at least move the process forward to allow him to talk to people who might be useful to him in his actual task.

But he certainly was conducting an investigation. As I said, I sat through some of the interviews including the one with Dr. Sugar where he was asking broad questions about unrelated compliance issues that Apple may have had in the

past.

He's acting like an investigator. He's demanding interviews and making very clear in the letter to the board and his communications with me that he's very angry if we, Apple, don't do exactly what he wants on his timetable.

So everything he's done has looked more like an investigation and an inquisition than the objective activities of a monitor or someone exercising a judicial function.

On this 90-day point, your Honor, we absolutely did object that the interview shouldn't happen before the 90-day period. My October 31 letter, which is Exhibit A on my declaration, makes that clear. We then tried to move things along to try to to be collaborative because we are revising these provisions.

On the disqualification issue, your Honor, yes, I submitted a declaration. I am an advocate for a party to the case. I am not the judge's adjunct. I am not a judicial officer.

There is no question, Mr. Buterman cited no case today, there is no case -- we cited some cases that made clear that if a judge or a judicial officer serves as a witness, they have to be disqualified. There is no case, your Honor, there's no support, section 455 says that if the judge or judicial officer has personal knowledge of contested facts they must be disqualified. And your Honor, if it is not an appearance of

partiality to file a declaration on disputed facts against a party, nothing is. That's the most blatant example of an appearance of partiality one could ever imagine.

Mr. Buterman laid it out quite nicely. He said I put forth some facts, and then the judicial officer to set the record straight, i.e., to dispute the facts, put his declaration in. That, your Honor, just can't work. I think the Court -- I mean it is untenable. So we would ask the Court to disqualify Mr. Bromwich and stay this monitorship.

Your Honor, our motion for a stay, we request the Court grant all of our objections and stay this monitorship. That is our position.

I think the record before the Court, the Reilly declaration, the Andeer declaration, the Levoff declaration, my declaration, that is the record before the Court in terms of what we are actually doing, what Apple is doing to comply with the injunction. There is nothing on the other side, the Justice Department and the plaintiffs have never suggested that he weren't complying with the injunction. They have objected to how we respond to Mr. Bromwich's improper inquiries and activities.

So, your Honor, I think I have hit everything else. Mr. Buterman didn't add much to what they said in their brief. But I guess I will end with this. He did mention that Mr. Bromwich was doing what he thinks he needs to do to gauge

the tone and the culture, and Mr. Bromwich says this in his declaration.

That's not what the Court's final judgment tells him he's supposed to do. He's not supposed to be roving, gauging of the tone and culture of Apple. That's the antithesis of what this Court said it intended, that it was going to rest as lightly as possible on the company and that it was going to allow it to continue to innovate instead of, he wants to crawl inside the company, break down barriers to access, and gauge the tone and culture and other amorphous notions like that rather than stick to the provisions of the injunction. And that's what we think has been one of the major problems here, your Honor.

THE COURT: Thanks so much.

MR. BOUTROUS: Thank you.

THE COURT: I appreciate that.

MR. BUTERMAN: Your Honor, may I just have one moment to clear up one issue?

THE COURT: Yes.

MR. BUTERMAN: Thank you, your Honor.

I just want to deal with this one point. The notion that the United States or the plaintiff states have in any way stonewalled Apple with respect to its objections and raising these issues is blatantly offensive. The sheer number of hours that I personally have spent speaking with Ms. Richman on the

phone about these issues, that we have spoken to Mr. Boutrous about them, the fact that we have been diligent beyond belief responding to each and every objection that Apple has raised, and there is no evidence whatsoever that we in any way have done anything other than complying with our obligations under the final judgment and the Court's order.

Your Honor, I would also like to just quickly point out that in our paper from December 30, our memorandum in opposition, at footnote 12, we also noted that Mr. Bromwich, we have contacted Apple and relayed that Mr. Bromwich was willing to adjust the current fee structure and hourly rates and that the United States would like to work with Apple to resolve the matter. As we say in that footnote, to date aApple has not indicated an interest in engaging in those discussions. That frankly, your Honor, remains true to this day. Thank you.

THE COURT: Mr. Boutrous, did you want to say anything simply in response to Mr. Buterman's most recent comments?

MR. BOUTROUS: Yes, your Honor, just briefly.

We have all had a lot of conversations and generally we have tried to work towards solutions. So it is true we have had a lot of discussions. But Mr. Buterman was suggesting Apple has been nonresponsive. We keep responding, and then they keep saying, well, the objections, we need to meet and confer, and lo and behold it's January 14 tomorrow. Now we are arguing that a lot of arguments are moot.

MR. BOUTROUS: And on this fee issue, again, I would just finish with, we made a proposal. We have made many proposals. We've gotten nowhere. And then lo and behold, December, finally now they're saying we're the nonresponsive one. Your Honor, I urge the Court to look at this whole situation and do what's fair and just under the circumstances. And that is to disqualify Mr. Bromwich and stay the monitorship. Thank you.

THE COURT: Thank you very much.

So I'm going to take a brief recess, I think recess for, on that clock, till about ten after. See you, counsel.

(Recess)

THE COURT: Mr. Boutrous, it's hard for me to convey how disappointed I am that we find ourselves at this point. I think it's extraordinarily sad. One of the reasons it's been so interesting for me to read the submissions that the parties have provided in connection with this motion to stay is because I had no idea that all of this was going on, that the monitor was making all these requests and Apple was doing its best to slow down the process, if not stonewall the process.

So for me to read these e-mails, read these affidavits and declarations, to read your briefs has been a very difficult process in a way. The injunction was designed to give the parties a process if they were having problems to bring them promptly before the Court. We'll review the injunction's terms

in a moment, and I want to come back to the process. But throughout my supervision of this litigation, I have tried to make myself available to the parties, have made myself repeatedly available to the parties. As you know, the mantra is, if you have a problem, meet and confer and if it's unresolved write me a letter no longer than two pages and I'll get you on the phone. And we followed that process over and over again. So why, during these months, when the monitor is trying to learn what he needs to learn so that he can perform his function under the injunction, and Apple has complaints about this or that, why none of that was brought to my attention is a very difficult situation for me to confront.

Of course it's now moot. The past 90-day period, the period when the monitor could be expected to want to get the documents he needs and conduct the interviews he needs so that he would be in a position, on the 90th day, to look at whatever Apple submitted to him as its revised, improved new procedures and training program and practices, so that he could efficiently and effectively, and hopefully in a way to Apple helpfully, comment on it and give Apple the benefit of his best advice and counsel so that Apple could have the kind of program put in place that's required by Article VI, of course that process has been delayed now. And that time is past.

So we have to begin from where we are today. And that's going to be my vision, that I'm going to try to outline

for the parties a vision of how they should act going forward, which will hopefully make this entire process a successful one for Apple. That's certainly my hope.

But let me make this clear. Apple does not control the monitorship. The injunction controls the monitorship. And if Apple has a problem with anything that the monitor wants to do, then there is, and believe me there will be, a process in place for those complaints to be raised and addressed by the Court, giving everyone a full opportunity to be heard.

Let's be clear here. The monitor conducted, I think, 13 hours of interviews with 11 people. I think he got 303 pages of documents from Apple's outside counsel. Most of the people interviewed were identified by Apple, and they were lawyers. I think there was one board member, head of a committee interview, and one Apple executive, both interviews limited to an hour.

So let's just, you know, start at first principles here. Apple was engaged in a serious price-fixing conspiracy. The highest levels of the company, its founder, its CEO, its lawyers were involved. It had an enormous impact on consumer prices for e-books. The very charts and graphs put in by Apple's experts at trial showed the immediate and significant price rise from the publishers' e-books, or for the publishers' e-books.

I didn't want to put a monitor in place. I gave Apple

an extraordinary number of opportunities in the context of this case to show me that it didn't need an external monitor. Apple did not make that showing. I think, Mr. Boutrous, you were here, I think the August 27th court appearance, when I gave the parties yet another opportunity to be heard on the injunction. So I know you're well acquainted with that record.

I believe the appointment of the monitor, the wisdom of that decision has already borne proof. Because of that decision, Apple has retained the services of outside counsel at Simpson Thacher, Mr. Reilly and Mr. Arquit, to help design the programs that Article VI imposed upon Apple.

I understand from Apple's submission that in the past weeks it has been hard at work at revising and improving its practices and policies and training procedures. I think it would be important to look at the terms of the injunction in Article VI, because that's my bible. And it's clear from the submissions that the monitor has made, Mr. Bromwich has made to Apple, he considers this his bible too, quotes from it extensively and repeatedly in his written communication.

And, again, while Apple objected to the appointment of a monitor, it did not object to any word or phrase or component of Article VI as enacted. I narrowed and revised Article VI in a number of ways. I removed some of the proposed tasks the monitor was to perform. I shortened the period of time. It went from ten years to five years. And I imposed a two-year

term. It has never been my desire to interfere with Apple's business operations, and I've made that clear repeatedly. But it is my desire that Apple have effective practices and policies and a training program such that it will never again engage in a violation of the antitrust laws. And that's what the monitor has been appointed to help me ensure.

The monitor works for me. The monitor is to assist me. The goal is that the American taxpayer will never again have to pay for the Department of Justice or the attorney generals of the states to investigate Apple for antitrust violations, and that the American consumer will never again be victimized by Apple's antitrust violations. And so I narrowly tailored the monitorship so that Apple could put in place policies and procedures and a training program to achieve that goal. And I hope you have the injunction in front of you and Article VI.

But in paragraph B, the monitor has the power and authority to review and evaluate Apple's antitrust compliance policies and procedures and the training program. I don't know how one evaluates it without understanding the context in which those programs are going to be functioning.

In terms of practices and policies and training programs, it's not one size fits all. This is to be an effective program within Apple.

He has to understand enough about Apple and its

business and these practice, policies, and training programs in order to recommend to Apple changes to address any perceived deficiencies in those policies, procedures, and training. And looking at paragraph C, these policies and procedures, which are antitrust compliance policies and procedures, have to be reasonably designed to detect and prevent violations of the antitrust law, within Apple, within its business. They have to be comprehensive and effective within Apple, within its business.

And let's turn to paragraph G. Apple is required to assist the monitor. It shall take no action to interfere with, or to impede the monitor in the accomplishment of his responsibilities. And the monitor may, on reasonable notice to Apple, interview any Apple personnel, without restraint or interference by Apple. Again, no objection by Apple at the time this injunction was entered, to that provision, to that language, to any word or phrase in Section G. The monitor has the right to inspect and copy any documents in the possession, custody, or control of Apple. The monitor made a request for documents on October 22nd, repeated that request in writing on October 29th. Weeks later, he was given 303 pages and, as far as I know, nothing further. I know of no, from my review of everything given to me, I know of no specific objection to anything he asked to see. They just didn't give it to him. You didn't give it to him.

So I would like to take a page from Secretary Clinton's playbook and just press a restart button. We've lost 90 days. It can't be retrieved. What happened happened. But now I know, now I know, that at least parts of Apple are -- well, parts of Apple have been resistent to the monitor performing his duties. In pressing the restart button, I am hopeful that you, Mr. Boutrous, that every attorney working with you, that Mr. Arquit, that Mr. Reilly, that in-house counsel for Apple, that Apple's board, that everyone at Apple will understand, one, that they have to comply with the law, which includes the terms of the injunction.

And this is a hope, not a requirement, but it is my hope that Apple would come to see that it is in its interest to comply, it self-interest, not just its obligation to comply under the law, but its very deep self-interest. I can't believe that Apple considers this to have been of benefit to it, to be the subject of an antitrust lawsuit brought by the Department of Justice and the states of these United States. I would hope that Apple would want to reform itself, its practice, policies, procedures, and training programs to make sure, or at least to reduce the likelihood of that ever happening again. That would be, in my view, Apple's long-term interest and of course the long-term interest of the American public.

Now, Apple is not in a position to define for the

monitor the scope of the monitor's duties or how the monitor carries out those duties. The injunction is the path we shall all follow. And if the monitor ever imposes upon Apple in a way that is inappropriate or difficult or intrusive, there will be a process. And there has been a process in place and there will be a process in place so that Apple can be heard, because, again, I intend no disruption of Apple's business and have tried to craft an injunction that can rest as lightly upon it as possible and yet achieve the very legitimate ends of this injunction.

So I am hopeful that Apple will show it is serious about cooperating with the monitor going forward, assisting him so he can perform his function, and not interfere with that. I expect the Department of Justice to be responsive to any complaints that Apple might have or requests -- it doesn't have to be a compliant -- a request or a discussion, and to work in cooperation and collaboration with the monitor and Apple to resolve outstanding issues, and to do so promptly. I expect the monitor to adhere to the terms of his mandate in Article VI, and also to work collaboratively and cooperatively with Apple and the Department of Justice so that his responsibilities can be performed effectively and efficiently and promptly.

Let's talk about a process. In Section 8, we set up a mechanism for Apple to make an objection to any actions by the

monitor, and said that those objections must be conveyed in writing to the United States and the plaintiff states within ten calendar days of the action giving rise to the objection. And Apple has submitted to me certain letters it has provided to the Department of Justice in that regard. And I issued an order which said, whether or not you made a timely objection, you certainly must do so in the future but I'll hear any objections you have as of now. I want this process to work.

Again, I believe, you know, if Apple could get its head around it, I think it is actually in its interest that it work.

So if someone has a problem, be it the monitor or the Department of Justice or, more importantly, Apple, you can't hoard the problems, you can't sit on them and, you know, put them in your secret cache of problems. You're required to convey your objections promptly, and then to engage in a meet-and-confer process with the other parties. Here let's use Apple as an example. Apple must engage in a meet-and-confer process with a monitor and the Department of Justice to try to resolve those problems. But let us say that that meet-and-confer process does not resolve the problem. You must write me a letter, no longer than two pages, and promptly bring that problem to my attention. So you have to meet and confer promptly with respect to your effort to resolve the problem. You can't just send a letter with an objection. You have to

meet and confer and try to resolve it. And if you can't resolve it and it isn't resolved or somebody is not meeting and conferring with you, then write me a letter no longer than two pages, tell me you have the objection and the other side isn't meeting and conferring, or you've met and conferred and you can't resolve it. But I never want to be confronted with the situation I face today, which is that problems were brewing for weeks, indeed months, and I was not on notice of them.

Let me go to some of the specific objections here. It was not improper for Mr. Bromwich to submit that declaration. It was essential for me to understand what's happened here. I'm being asked to make judgments, very serious judgments, about past events. He is acting for the Court, pursuant to the injunction's terms. He has a right to advise me of what has happened, what he has done, what has been said to him. I have agreed that I will not take those communications ex parte, that is, that all his communications with me will be shared with Apple and the Department of Justice. But he has a right to speak to me. Indeed he has a duty to speak to me. And he was certainly required to respond to the very serious allegations that had been made against him by Apple.

Mr. Bromwich has, as far as I can see from this record, sent two letters. One, I believe, was -- excuse me one second. You'll correct me if I'm wrong. I think it was to Mr. Cook and Mr. Sewell. And the second letter was to the

board, each member of the board. He sent those letters to counsel asking counsel to convey them. Counsel have been present.

MR. BOUTROUS: Your Honor, you said I could correct you.

THE COURT: Certainly, Mr. Boutrous.

MR. BOUTROUS: Actually, the Sewell and Cook letter, he sent simultaneously both directly to them, to Mr. Cook and Mr. Sewell, the CEO of the company, and copied and asked to us send it to them. So he did communicate directly with them, sent the letter directly to them.

THE COURT: At the time as he was giving you a copy of those communications.

MR. BOUTROUS: Correct. Which doesn't make it proper.

THE COURT: Well, we can talk about that. If you have an objection to that, there is a process. You discuss it with the monitor. He agrees that in the future he will only send letters through you and with no cc's to the recipient directly. You know. Fair point for discussion. You will reach agreement with the monitor or not. If you don't reach agreement with the monitor, you will have a discussion with DOJ. They will either reach agreement with you and the monitor or not. If they don't, if that process doesn't reach agreement, you may bring the objection to me.

MR. BOUTROUS: Your Honor, I do want to correct one

thing. We brought the objections to your Honor on November 27th, our objections that included our objections to the proposed amendment. But we raised these issues. The direct communications to the board, the letter to the board of directors, that was all in our objections. And we didn't sit on our hands, your Honor. And I don't think it's correct to suggest that we hoarded our objections and didn't tell anyone about them. We told the plaintiffs and we filed them in detail on November 27. And the Court then said it was pulling back the amendment or at least one of the amendments, and it wasn't clear that we had raised the objection earlier, so I think the November 27th objections could not have been clearer that we were objecting to all of his behavior. And we also alerted the plaintiffs and the Justice Department to them as well.

THE COURT: So, Mr. Boutrous, I don't think that's inconsistent with anything that I recited here in terms of the history. I did acknowledge that you had made written objections. What I'm talking about is a different kind of process, where you don't just make a written objection, but you have a meet-and-confer process, and if that is insufficient to resolve the issue, then you write me promptly so I can address the issue promptly.

MR. BOUTROUS: And, your Honor, just -- I really feel strongly about this, because we did try to do that. I sent Exhibit A to my declaration, October 31, I sent objection, it's

in a letter to Mr. Bromwich, and I sent copies to the plaintiff. And then we tried and meet and confer, and we tried to work it out. And I would object again. For the Court to say we are being resistent, the record before this Court does not show that. We were trying to work and cooperate and collaborate, and we weren't sitting back hiding our objections. We were doing exactly what the Court is suggesting we should have done, while preserving our objections.

So I don't want the Court to think that we were being resistent or recalcitrant. The declarations before this Court, from us, show what we've been doing and what was said at these meetings to Mr. Bromwich by Mr. Andeer and all of us, that we wanted to have a great compliance program, irrespective of this Court's ruling. And we want that to work. And I had said this to the Court on October 27th. We want to be a model on compliance, irrespective of --

THE COURT: August?

MR. BOUTROUS: August 27.

And your Honor, I would add to it, since the Court raised the issue, this is a situation where we are appealing. We hear what the Court said. The Court ruled. The Court made up its mind about what happened. We're appealing. So it's a different situation. But that doesn't mean the company is not taking lessons from what happened, because you are right; nobody wants to have lawsuits and antitrust lawsuits, and Apple

wants to comply with the law. So I don't want to leave here without you hearing that from me. And at the same time, we have been doing everything we can to preserve our objections. We brought them to you on November 27. And laid them out in detail -- the interview, the -- the whole situation. It was on record, not just to the plaintiffs but to this Court. And they are serious issues. But we raised them with the Court. And then we kept trying to work it out with the other side.

THE COURT: OK. Well, the record is what the record is. I read each of the e-mails and letters. And I think that it can be in an overview kind of way described as a series of efforts by Apple to prevent members of the board and executives at Apple from being interviewed by the monitor. And Apple took different tacks in that effort and raised different objections and used different strategies. And ultimately, it was fairly successful. But if that was Apple's purpose -- well, let me just say, what I want to do again is make a distinction between what happened, which I had no opportunity to try to mediate or rule upon for the parties because I was not aware of these disputes, I want to differentiate that past from the time now going forward. I don't want things to fester. I don't want problems to be unaddressed and unresolved. I want the parties to be diligent about their objections, their meet-and-confer process, and their access to this Court to resolve any disputes, because I want the monitorship to succeed for Apple.

It is in Apple's interest that it succeed. And I want it to succeed.

So let's turn to this issue of the fees. At its heart, and I know there are a lot of details around this, but Mr. Bromwich decided a fee of $1100 and Apple asked that the fee be reduced to $800 per hour, which is a $300 spread. Now, in the injunction -- and I'm now in Section 6, paragraph I -- the cost of paying the monitor's fee is a cost that is borne by Apple. The terms and conditions of the retention of the monitor are subject to approval by the United States after consultation with the representative plaintiff's case. There is nothing in the injunction that gives Apple a voice in the rate of payment of the monitor. There was no objection to this by Apple at the time, no request that the injunction language be changed so that it would have a voice. The standard to be applied with respect to the compensation of the monitor and those persons hired to assist the monitor is set forth as follows: "It shall be on reasonable and customary terms commensurate with the individual's experience and responsibilities and consistent with reasonable expense guidelines."

Now, the Department of Justice in its submissions to me has described Mr. Bromwich as one of the most highly regarded and experienced monitors in the country. It approved his fee scale and package. And I have to say, in some ways,

not really surprising to me. I've been on the bench a little over 19 years and one of the tasks I have is, on occasion, approving requests for payment of attorney's fees. And you get to see a wide variety of submissions in this regard and hourly rates of different kinds of firms. And to just put this in context, I'm going to share with counsel something that came to my attention today, a National Law Journal article, its annual billing survey, and the title is "$1,000 Per Hour Isn't Rare Anymore." This is a survey that it does of the 350 largest firms by attorney head count in the country. And it highlights, at the beginning of the article, the ten firms with the posted highest partner billing rates. And, Mr. Boutrous, I hope you're not surprised, but your firm is the first listed, with a rate of $1800 an hour as the highest single partner's billing rate. Now, that's obviously not the average Gibson Dunn -- and there is no average Gibson Dunn partner -- but the average Gibson Dunn per-hour billing rate is $980 an hour, and Gibson Dunn assured the National Law Journal that its standard rates are in line with its peers. So the average partner's billing rate as far as Gibson Dunn is concerned is $980 an hour.

And it indicates further that 20 percent of the firms have at least one partner charging over $1,000 an hour. It listed New York and D.C. average partner rates as $882 and $748 an hour. Now, there's a lot more discussed here in this

article. But let us just say that -- this really isn't going to surprise anyone in this country, at least anyone in the legal profession -- that lawyers get paid a lot of money. Now, the Department of Justice has offered to work with Apple and Mr. Bromwich to find a compromise so that this fee issue can be taken off the table. And I'm going to refer you to the magistrate judge -- Magistrate Judge Dolinger has agreed to meet with the parties, he has immediate availability -- so we can resolve this fee dispute and put it behind us.

Now, I'm not asking you, Mr. Boutrous, to put your customary and average hourly rate on the table here, but I would like you to share it with the magistrate judge. And I would like you to share as well with the magistrate judge the customary hourly billing rates for Mr. Reilly and Mr. Arquit, who were retained by Apple for the very project that Mr. Bromwich is undertaking as a monitor. I'm not saying these are the only benchmarks. They are just some benchmarks. And you should feel free in those discussions to share with Magistrate Judge Dolinger any other benchmarks you believe are appropriate.

So this is the process we're going to follow. And if you're unable to resolve the dispute, I'll be happy to hear from the parties, and give you a full opportunity to be heard on the issue.

MR. BOUTROUS: Your Honor, since you invoked my firm,

if I could just address this briefly, two or three points. First of all, the rates that companies and clients consensually pay their lawyers to do work for them is really not an appropriate benchmark at all. It's completely different. We object to this whole process and I object to the Court's suggestion. It's ironic that in a case about pricing information, the Court wants us to reveal sensitive pricing information. But we'll put that aside. That you're suggesting that it's the same thing, where the Court is imposing a monitor, who is not going to give legal advice, but is acting as the Court's agent, is the same as when, in a competitive marketplace, clients can pick their lawyers and pay what the market will bear, that's not a fair comparison. As the Court says, he is working for you. He is your agent. When the Court says "reasonable and customary" in the judgment, we didn't think it meant reasonable and customary what private lawyers were going to be charging to their clients.

And we have a right to object to the fees. We objected to this entire monitorship. Our objections are preserved. The Court is suggesting waiver here simply because we met and conferred on the form of the judgment. We objected to this monitorship. I don't think that's at all appropriate. And the billing rates of a private firm with their private clients are one thing. It's completely different when we're talking about this Court imposing Mr. Bromwich and the Fried

Frank firm on Apple to investigate it. That's improper. We had no possible understanding that's what the Court contemplated when it issued the injunction. And I just have -- I want to make very clear, we object on that.

And we also worked out an agreement. We're going to seek a stay in the Second Circuit of the monitorship. And part of our agreement with the plaintiffs was that if the Court denied our stay motion, which I'm taking it the Court is doing, just picking up the signal that the Court is going to deny our stay motion, we're going to seek to stay. And the agreement was that they would give us time to get our initial request on file with the Second Circuit, a temporary stay.

So I'm going to ask the Court now to allow us to have a week from today to file our motion with the Second Circuit to get that on. Because this is irreparable harm. It violates the separation of powers. It violates due process. It's inconsistent with this Court's final judgment and everything that led up to it.

And I respectfully disagree with the way the Court is recounting the history of how we ended up with that final judgment. We're being punished for trying to work with the Court to help it with the administrative details of putting the final judgment in. We made it very clear we objected to this. It's not authorized. And I just can't leave that on the record, the Court suggesting somehow we endorsed the notion

that we would be at the will of the Department of Justice and plaintiffs on these fees when we had no voice in it.

And so I'm objecting to that. We're going to be seeking a stay. And we would ask for a week to file our stay application in the Second Circuit.

MR. BUTERMAN: Your Honor, may I just address one point? The agreement that the plaintiffs and Mr. Boutrous reached was not for a week. It was to give Apple if it wanted 24 to 48 hours to seek an emergency stay in the Second Circuit. That was the agreement. We discussed it on the phone. Mr. Boutrous was there, Ms. Richman was there on this call on the phone --

MR. BOUTROUS: I'm not suggesting --

MR. BUTERMAN: -- when that took place. So under no circumstances did we agree that there be any stay for that duration. And Mr. Bromwich certainly did not agree to hold off any further, in terms of performing his actions.

MR. BOUTROUS: And I didn't mean to suggest that they agreed on a time frame. They did agree to a temporary stay. I was requesting, respectfully, a week for to us get our papers on file with the Second Circuit.

THE COURT: OK. Well, I am going to deny the stay request. I am going to file an opinion with my reasons and analysis. And I will grant you 48 hours from the filing of that opinion, a stay of the monitorship for 48 hours following

my opinion.

MR. BOUTROUS: Thank you, your Honor. Any sense of when you might issue the opinion?

THE COURT: I hope to do it promptly.

MR. BOUTROUS: Thank you, your Honor.

THE COURT: That is my goal.

Give me one more minute, please.

(Pause)

THE COURT: Thank you all.

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