

Nos. 13-3741 (L), 13-3857 (CON)

No. 14-60

No.14-61

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

and

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

v.

APPLE, INC.,  
*Defendant-Appellant.*

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

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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).<sup>1</sup> 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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<sup>1</sup> 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.<sup>2</sup> *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

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<sup>2</sup> *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.<sup>3</sup> Any complaint over the specific hourly rate is premature, as that dispute has been referred to a magistrate.<sup>4</sup> 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

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<sup>3</sup> 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](http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf)).

<sup>4</sup> 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. Bannerkraft*

*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

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**For Plaintiff State of New York**

### **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

---

*Attorney*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

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 the transcript 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  
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Antitrust Division  
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Telephone: (202) 532-4753

# **EXHIBIT 1**

1 d890eboa Argument

2 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x

3 STATE OF TEXAS, et al.,  
4 Plaintiff,

4

5 v. 12 CV 3394

5

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

7 -----x

8 UNITED STATES OF AMERICA

9 v. 12 CV 2826

10 APPLE, INC., et al.,  
10 Defendant

11 -----x

12

13 New York, N.Y.  
13 August 9, 2013  
14 3:00 p.m.

14

15 Before:

15

16 HON. DENISE COTE,

16

17 District Judge

17

18 APPEARANCES

18

19 For Plaintiff:

19

20 Mark Ryan  
20 Eric Lipman  
21 Jeff D. Friedman

22

23 For Defendant:

24

24 Orin Snyder  
24 Daniel Floyd

25

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

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

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

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

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

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

25 I have wide discretion in framing an injunction in  
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1 terms that I deem reasonable to prevent wrongful conduct, *ibid.*  
2 at 144, and the *Ford Motor Company*, 405 US at 573.

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

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

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

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

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

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

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



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

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

11 In aiming to restore competition, a Court also is not  
12 limited to the restoration of the status quo anti 405 US at  
13 573.

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

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

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

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

5 Which I don't have before me.

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

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

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

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

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

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

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

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1 essential.

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

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

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

16 A second series of observations.

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

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

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

6 A third set of observations.

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

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

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

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

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

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

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

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

25 Now, Apple strongly objects to any aspect of the

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

5 I'm taking this from your brief.

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

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

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

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

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

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

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

25 MR. SNYDER: Yes, your Honor.

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

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1 here.

2 MR. SNYDER: Yes, your Honor.

3 THE COURT: Do you object to the beginning of  
4 paragraph C, Apple shall apply the same terms and conditions to  
5 the sale or distribution of an eBook apps through Apple's app  
6 store, as Apple applies to all other apps sold or distributed  
7 through Apple's app store?

8 MR. SNYDER: No, your Honor, that is Apple's general  
9 apps policy for all apps developers.

10 THE COURT: Okay. Thank you, that's helpful.

11 MR. SNYDER: May I give the Court information that  
12 might be helpful on C to frame it that was not in our brief?  
13 Or I can submit something in writing in more detail about this.

14 THE COURT: I think I would like to continue with --

15 MR. SNYDER: Sure.

16 THE COURT: -- my questions to you --

17 MR. SNYDER: Yes, your Honor.

18 THE COURT: -- in a moment, Mr. Snyder.

19 I think the debate around 4C, which is allowing eBook  
20 retailers to provide a hyper link to their websites or eBook  
21 store through an eBook apps, without further compensating  
22 Apple, is a debate about whether that is necessary --

23 You can be seated, Mr. Snyder.

24 MR. SNYDER: I'm sorry, your Honor.

25 THE COURT: -- to protect the existence of retail

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1 price competition.

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

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

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

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

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

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

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

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

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

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

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1 store, uniformly, applicable to each and every one of the  
2 850,000 apps in its store, from Amazon's apps, to Zappos.com's  
3 apps, to Kobo's apps. And this includes a policy, universal,  
4 all the 850,000 app developers.

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

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

20 MR. SNYDER: And --

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

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

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

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1           So I am concerned about your statement in page 17 of  
2 your brief that you may move the publisher defendants' apps to  
3 the iBookstore. I'm concerned as to whether or not that is  
4 going to be an end run around any injunction, and create the  
5 opportunity for the reintroduction of an agency agreement to  
6 making it possible for a consumer, seamlessly, to purchase an  
7 eBook from one of the publisher defendants paying Apple a  
8 30 percent commission.

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

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

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

4 MR. SNYDER: We agree, your Honor.

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

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

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

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

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

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

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

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

25 To the extent possible, any injunction against Apple  
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1 should be tailored to prevent the repetition of price fixing  
2 and to encourage price competition. But it should not be  
3 broader or in place longer than necessary since this is a  
4 swiftly-changing world and I want to make sure nothing I do  
5 discourages innovation and dynamic change.

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

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

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

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

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

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

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

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

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

5 THE COURT: Mr. Ryan.

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

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

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

14 MR. GOLDFEIN: Shep Goldfein, for Harper Collins.

15 Can I have two minutes?

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

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

20 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

13 MR. GOLDFEIN: You're welcome.

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

25 I think my statements about no description of any

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

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

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

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

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

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

10 (Recess)

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

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

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

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1 everybody.

2 So thank you all, and I'll see you again in a couple  
3 of weeks.

4 ALL: Thank you.

5 THE CLERK: All rise.

6 (Adjourned)

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# **EXHIBIT 2**



**In The Matter Of:**  
*UNITED STATES OF AMERICA v*  
*APPLE, INC., et al.*

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*August 27, 2013*

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*SOUTHERN DISTRICT REPORTERS*  
*500 PEARL STREET*  
*NEW YORK, NY 10007*  
*212 805-0330*

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1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
2 -----x

3 UNITED STATES OF AMERICA,  
4 Plaintiff,  
5 v. 12 Civ. 2826 (DC)  
6 APPLE, INC., et al.,  
7 Defendants.  
8 -----x

9 August 27, 2013  
2:00 p.m.

10 Before:  
11 HON. DENISE COTE,  
12 District Judge

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19  
20  
21  
22  
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1 (In open court; case called)

2 THE COURT: Welcome, everyone.

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

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

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

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

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1 required me to consider when shaping an injunction. But let me  
2 just start with one I think very apt quote from the Supreme  
3 Court in the DuPont case. "The key to the whole question of an  
4 antitrust remedy is of course the discovery of measures  
5 effective to restore competition. Courts are not authorized in  
6 civil proceedings to punish antitrust violators. And relief  
7 must not be punitive. But courts are authorized, indeed  
8 required, to decree relief effective to redress the violations,  
9 whatever the adverse effects of such a decree on private  
10 interests. That's at 366 U.S. at 326.  
11 So marching through the government's requested  
12 injunction, we start with the most minor of observations. I  
13 don't use a middle initial. So that's on the first page.  
14 So that takes us then, my first changes are to page 6,  
15 section (E)(b). I just want to make sure that Apple's lawyers  
16 are with me. We're on page six.  
17 MR. BOUTROUS: Yes.  
18 THE COURT: Okay. Good.  
19 MR. BOUTROUS: Thank you.  
20 THE COURT: So my question is for the government in  
21 this instance. If I make the following revision is there any  
22 problem with that. So (b) would be revised to read as follows.  
23 "E-book publisher's, past, present or future, wholesale or  
24 retail prices or pricing strategies for E-books, or audio books  
25 sold at other retailers."

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1 MR. BUTERMAN: Lawrence Buterman, your Honor.  
2 Just a question of clarification. The intention is to  
3 strike the term "print books"?  
4 THE COURT: Essentially, yes.  
5 MR. BUTERMAN: That's acceptable to the government,  
6 your Honor.  
7 THE COURT: Going to the bottom of that page don't  
8 worry. At the end of this whole process -- I'm going to try to  
9 make as much progress as we can through the whole document.  
10 And if you haven't had a chance to speak to an issue of  
11 importance because I haven't specifically given you that  
12 opportunity, at the end, when you see the good and the bad of  
13 all the calls I've made here from your point of view, I will  
14 give you an opportunity to be heard. And if it would be  
15 helpful we'll take a short break at that point so you can  
16 consult with each other to decide whether you actually want to  
17 open any doors to further discussion.  
18 Bottom of that page. Section (F). I'm going to read  
19 (F) as it would be in its revised version.  
20 "Apple shall not enter into or maintain any agreement  
21 with an E-book publisher where such agreement likely will  
22 increase, fix, or set the price at which other E-book retailer  
23 can acquire or sell E-books."  
24 Again, this removes reference to movies and television  
25 shows and apps. It's focused on E-books.

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1 Next paragraph.  
2 Nothing in this Section III (F) prohibits Apple from  
3 entering into or maintaining an agreement with an E-book  
4 publisher, merely specifying prices that Apple must pay for  
5 E-books or for the E-books.  
6 Going to IV. I have a question for the government  
7 here with respect to section (A). IV(A). We're now on page  
8 seven.  
9 There's this lurking question of whether Apple needs  
10 to terminate or modify any agency agreement it currently has  
11 with the publisher defendant since the consent decrees with  
12 publisher defendants have already required certain changes to  
13 be made. So, there's a question of why must contracts be  
14 renegotiated right now at this time?  
15 Mr. Buterman.  
16 MR. BUTERMAN: Thank you, your Honor.  
17 The government's position is that we do not have a  
18 concern whether the contracts are terminated as opposed to  
19 modified. So if it's easier to have the contracts modified,  
20 that's fine. But something does need -- our position is that  
21 something does need to happen to the contracts in light of the  
22 fact that the relief that we are asking for with these  
23 agreements is different and the terms would be different than  
24 in the consent -- the consent decrees that were entered into  
25 with the publisher defendants.

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1 THE COURT: Including at least the term of the  
2 agreement?  
3 MR. BUTERMAN: That's correct, your Honor.  
4 THE COURT: So, this is the proposed change to Section  
5 (A). On the effective date of this judgment, Apple shall  
6 modify any agency agreement with the publisher defendant to  
7 comply with III(C) above.  
8 Now, this takes us to one of the principal disputes  
9 between the parties. And that begins with subsection (b) here  
10 on page seven. And that has to do with whether or not I  
11 regulate the app store as requested by the government. Let me  
12 give you some thoughts about that.  
13 Apple's description of the way its app store  
14 functioned and functions was not accurate on August 9. It  
15 changed its policy in 2011 and it has different policies for  
16 the purchase of physical products and at least some digital  
17 products. The plaintiff's subsequent submission has gone a  
18 long way toward clarifying all of that.  
19 Now, there are many questions that could be asked  
20 about Apple's app store policies. But I don't believe it would  
21 be a fruitful use of our time this afternoon to do so. This is  
22 because I am not inclined to require Apple to allow E-book  
23 retailers to provide a hyperlink in their E-book apps that  
24 would permit users of Apple devices to buy E books through the  
25 app. I want this injunction to rest as lightly as possible on

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1 the way Apple runs its business. I want Apple to have the  
 2 flexibility to innovate, but at the same time I want to try to  
 3 prevent a repetition of illegal conduct like that shown with  
 4 overwhelming evidence at this trial.  
 5 There is one open issue, however, that I need Apple to  
 6 address. I want reassurance, again, from Apple that it will  
 7 not try to circumvent the dictates of any injunction by  
 8 allowing E book publishers to use an app in the iBookstore to  
 9 sell their books directly to consumers. As we discussed at our  
 10 last conference, I am concerned by the reference in Apple's  
 11 brief that it may permit the publishers in essence to  
 12 reintroduce agency agreements through the use of such an app.  
 13 My hope is that the injunction will be finalized next  
 14 week. And I want Apple to commit to me by that time that it  
 15 will never contend that the injunction in its final form will  
 16 permit it to change its app policy to allow publishers to do  
 17 that -- well never, during the terms of the injunction. The  
 18 injunction will end at some point. And if it cannot make that  
 19 commitment to me, then we need a provision specifically  
 20 addressed to that risk.  
 21 That said, I think that the app store provisions in  
 22 the proposed injunction are unnecessary for many consumers.  
 23 The plaintiffs argue that the provisions will make it easier  
 24 for consumers to compare prices. But, consumers can use  
 25 Safari, as I described last time, on the Apple devices to shop

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1 in the Kindle bookstore and wirelessly deliver those E books to  
 2 their Kindle app on the apple devices. For that same reason,  
 3 this provision doesn't significantly add to the competition  
 4 between Amazon and Apple. Amazon is, to say the least, an  
 5 established and successful competitor of the iBookstore. Most  
 6 consumers would understand that all that is necessary to  
 7 compare prices is to take this one extra step. As David Carnoy  
 8 of CNET observed in the article attached as Exhibit 8 to the  
 9 government's submission, that extra step is not the end of the  
 10 world.  
 11 I expect that the major beneficiaries of the  
 12 requirement that the government seeks would be smaller  
 13 retailers who are less well known. This would introduce more  
 14 retail competition, but only for a two-year period. Apple  
 15 would be able to change its policies at the end of the two year  
 16 period as it did in 2011, will bean it down, as described in  
 17 Exhibit 11 to the government's submission, and others like  
 18 them, make the investment to develop an e bookstore or e reader  
 19 for Apple devices when Apple can shutdown the functionality  
 20 mandated in this provision of the injunction in just two years.  
 21 That leaves the smaller but established firms, like Kobo, as  
 22 the principal beneficiaries of this proposed term of the  
 23 injunction.  
 24 Apple vehemently objects to this provision. That  
 25 vehemence is not surprising. The app store was only an

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1 incidental part of this trial and Apple wants as little  
 2 interference with its business as possible. And, as the record  
 3 at trial amply demonstrated, while Apple is a fierce  
 4 competitor, it does not want to engage in retail price  
 5 competition.  
 6 On balance, I do not have sufficient confidence that  
 7 the benefits of this two-year dictated change in Apple's  
 8 current business practices will outweigh the disturbance it may  
 9 cause in the management of Apple's app store. I do not feel  
 10 that the record before me permits me to make a reliable  
 11 judgment about the impact of this change in policy.  
 12 With that, the following changes would occur. I would  
 13 strike section (B) from section IV. We're on page seven. So,  
 14 the paragraph that begins, "For any E-book app," would be  
 15 stricken.  
 16 Going to section (C), the last half of that provision  
 17 would be stricken, beginning with the phrase, "except that,"  
 18 for two years after the effective date.  
 19 Now if you could go to page 16 of Apple's Exhibit B.  
 20 You will see in Exhibit B at page 16 -- and that's part of  
 21 IV(C). There is an insert that Apple requests be made. The  
 22 insert reads as follows. "This provision does not prevent  
 23 Apple from changing its app store terms and conditions and  
 24 applying them in a reasonable manner that does not discriminate  
 25 against E book apps for competitive reasons or from introducing

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1 new categories of apps with different terms and conditions  
 2 without applying those terms and conditions to E book apps."  
 3 That would be inserted at the bottom of page seven.  
 4 Going to the top of page eight, section (D). This  
 5 would read as follows. "Apple shall furnish to the United  
 6 States and the representative plaintiff states within ten  
 7 business days of receiving such information any information  
 8 that reasonably suggests to Apple that any E book publisher has  
 9 impermissibly coordinated or is impermissibly coordinating on  
 10 the terms on which it supplies or offers its content to Apple  
 11 or to any other person."  
 12 I think I'm reading slowly enough but if anyone wants  
 13 me to repeat please just let me know.  
 14 Let's go to the next section, antitrust compliance.  
 15 That's section V(C). This talks about training. It  
 16 has the phrase that the training should last at least four  
 17 hours. Apple suggests that we substitute the word  
 18 "appropriate." I think we could consider substituting the word  
 19 "memorable," but I have a different phrase in mind. It's the  
 20 phrase "comprehensive and effective."  
 21 Now, this, again -- and I'll make comments about this  
 22 later. I'm not wedded to any particular language. If counsel  
 23 come up with -- particularly if you all agree on better  
 24 language, I'm very open to considering it.  
 25 Now there's one other thing that I want to adhere --

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1 before I move to that. So I would strike "at least four hours  
2 of" and substitute "comprehensive and effective." So the  
3 phrase would read, "Ensuring that each person identified in  
4 Sections V(A) and V(B) of this final judgment receives  
5 comprehensive and effective training annually," etc. So this  
6 injunction proposes that this training be given to people who  
7 are involved in the Apple iBookstore. I think it should be  
8 broader. I'll explain why in more detail later.  
9 I've stricken a lot of the language that refers to  
10 other kinds of content other than E-books. But I think the  
11 antitrust training should be for employees involved not just in  
12 E-book content distribution but in all content distribution.  
13 I'm envisioning anyone in Mr. Cue's group, Mr. Cue and those  
14 above him and below him who are involved in negotiating content  
15 licenses.  
16 So, my proposal is that we insert in some way in this  
17 section that this training also be offered to each of Apple's  
18 officers and directors engaged in whole or in part in  
19 activities relating to the supply of content (e.g. books,  
20 music, other audio, movies, television shows, or apps).  
21 Let's go to page ten. Top of the page, second line.  
22 The line begins with the word "judgment." It should read,  
23 "Judgment or violations of the antitrust laws."  
24 Under Section (I) there are two subparagraphs, one and  
25 two. I would strike one.

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1 With respect to paragraph two, I have a question for  
2 the government. It now reads, "Employees or representatives of  
3 two or more E-book publishers."  
4 Why shouldn't it read, "Employees or representatives  
5 of E-book publisher defendants"?  
6 MR. BUTERMAN: Lawrence Buterman, your Honor.  
7 The provision here is intended to force Apple to log  
8 any type of communication that could raise the antenna. We  
9 believe that limiting it to a publisher defendant is too narrow  
10 in this circumstance. And we don't believe that there should  
11 be very many of these types of conversations going on so that  
12 logging them isn't any particular burden on Apple.  
13 THE COURT: What is the phrase "two or more" doing  
14 there?  
15 MR. BUTERMAN: In other words, your Honor, the if  
16 Apple is speaking directly with an E book publisher, we don't  
17 have any problem with that. But if Apple is speaking to two at  
18 the same time, that's what's problematic.  
19 THE COURT: I didn't understand that. So in a single  
20 conversation, you're having a single conversation with  
21 representatives of two different publishers?  
22 MR. BUTERMAN: Yes, your Honor. That's what the  
23 provision is intended to require logging of.  
24 THE COURT: Yes. I agree with you. That should be  
25 rare. Because you've excluded privileged or public

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1 communications from the log. So if you're, for instance,  
2 addressing a conference or something, you're not logging that.  
3 It's a public communication. So this would be a private dinner  
4 meeting with two or more or a conference call with two or more  
5 in the same conversation?  
6 MR. BUTERMAN: Yes, your Honor.  
7 THE COURT: Okay.  
8 MR. BUTERMAN: And that's why we wanted it broader  
9 than just the publisher defendants.  
10 THE COURT: With that explanation, I have to say  
11 well, I'll let you think about whether or not it needs to be  
12 revised. But I will leave it as it is for now.  
13 That takes us to a second issue that is hotly  
14 contested by the parties and that is the employment of an  
15 external compliance monitor.  
16 "The power of federal courts to appoint special  
17 masters to monitor compliance with their remedial orders is  
18 well established." City of New York against Mickalis, 645 F.3d  
19 at 145. District courts have been afforded "broad discretion  
20 to frame equitable remedies so long as the relief granted is  
21 commensurate with the scope of the infraction," Todaro v. Ward,  
22 565 F.2d at 54, note 7, and so long as it is "tailored to cure  
23 the violation." E.E.O.C. v. Local 638, 81 F.3d at 1181. In  
24 particular, external monitors have been found to be appropriate  
25 where consensual methods of implementation of remedial orders

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1 appear "unreliable," United States against Yonkers, 29 F.3d at  
2 44, or where "a party has proved resistant or intransigent" to  
3 effecting the desired results of a complex decree.  
4 An external monitor's duties, however, must not be  
5 overbroad. The purpose of any monitor "is to aid judges in the  
6 performance of specific judicial duties, not to displace the  
7 court." Mickalis, 645 F.3d at 145. Thus, a monitor may be  
8 appointed to "report on a defendant's compliance with the  
9 court's decree and help implement that decree." United States  
10 against Philip Morris, 566 F.3d at 1149 50. But a Court may  
11 not invest a monitor with "wide ranging extrajudicial duties,"  
12 such as the "authority to direct a defendant to take or to  
13 refrain from taking any specific action to achieve compliance  
14 with the court's order," and the authority "to adjudicate  
15 violations of the order as a roving federal district court."  
16 Ibid. Of course, an external monitor vested with the limited  
17 authority to monitor compliance with the court's order poses a  
18 lesser threat of intrusion than one vested with authority to  
19 implement a court's order. Yonkers 29 F.3d at 44.  
20 Since "sweeping delegations of power" to a monitor may  
21 violate Rule 65(d), Mickalis 645 F.3d at 145, a court must be  
22 sure to "frame its orders so that those who must obey them will  
23 know what the court intends to forbid." Any significant  
24 decision by the monitor must be subject to "careful review" by  
25 the court. Ibid.



<p>D8r9usaa Page 17</p> <p>1 The record at trial demonstrated a blatant and 2 aggressive disregard at Apple for the requirements of the law. 3 Apple executives used their considerable skills to orchestrate 4 a price-fixing scheme that significantly raised the prices of 5 E books. This conduct included Apple lawyers and its highest 6 level executives.</p> <p>7 Apple has been given several opportunities to 8 demonstrate to this Court that it has taken the lessons of this 9 litigation seriously. I am disappointed to say that it has not 10 taken advantage of those opportunities. I invited and expected 11 a detailed and persuasive presentation of the steps Apple was 12 committed to take to ensure that the government need never 13 again expend its resources to bring Apple into court for 14 violations of the country's antitrust laws. Apple's August 19 15 letter to the government is its most detailed response in this 16 regard and it is inadequate.</p> <p>17 I have been reluctant to appoint a monitor for several 18 reasons. But I believe based on the record before me now that 19 I should. I believe that a monitor with a carefully defined 20 role can help ensure that competition is restored and 21 preserved.</p> <p>22 That said, I am giving the monitor a somewhat 23 different function than that proposed by the plaintiffs. The 24 monitor will not be charged with assessing Apple's compliance 25 generally with the terms of the final judgment. This could be</p>	<p>D8r9usaa Page 19</p> <p>1 employee's position and the situations that employee is likely 2 to encounter. There will, therefore, need to be more than one 3 training module.</p> <p>4 The training should apply to all of Apple's content 5 businesses. The evidence at trial was that the negotiations 6 with content providers are centralized, that the problems that 7 arose in the context of E-books may arise in other content 8 areas. Apple will be hard pressed to explain why an antitrust 9 training program shouldn't be created for this entire line of 10 its business.</p> <p>11 I am hopeful that Apple will bring its culture of 12 excellence and exceptionalism to this task. I am hopeful that 13 it will devote its considerable resources and creativity to 14 construct a training program that will be a model for American 15 business.</p> <p>16 But, even if it chooses not to create a model program, 17 it must create a meaningful training program, one that is 18 comprehensive and effective. To ensure that it does so, I will 19 use a monitor. If there is any disagreement, the ultimate 20 judgment of whether Apple has complied with the terms of the 21 injunction will rest with me.</p> <p>22 Apple could, of course, think of this training and any 23 improvements to its policies and procedures as mere window 24 dressing, the price it must pay to appear to comply with the 25 injunction. I trust, however, that it will make a sincere</p>
<p>D8r9usaa Page 18</p> <p>1 a very expensive and intrusive undertaking. The monitor will, 2 however, have two other important tasks, one envisioned by the 3 proposed injunction and a new one. The monitor will evaluate 4 Apple's internal antitrust compliance policies and procedures 5 and additionally -- and this is the new provision -- will 6 evaluate Apple's antitrust training program.</p> <p>7 I want to address the issue of training separately. 8 Neither Mr. Cue nor Mr. Saul, his assigned in-house counsel, 9 could remember any training on antitrust issues. They are 10 responsible, with others in Mr. Cue's section, with negotiating 11 the content licenses for Apple's business. They and those on 12 their teams need to understand what the law requires and how to 13 conform their business practices to the law. Not everyone will 14 need four hours of training. It's length is not critical. 15 It's clarity and effectiveness are.</p> <p>16 For some employees I could imagine a very effective 17 half hour program. Every hour of these employees is important 18 to their productivity and I do not want them to have to spend 19 more time than is necessary to educate them on how to do their 20 jobs in a way that complies with the law.</p> <p>21 What is important is not the number of minutes but the 22 quality of any time devoted to training. The training needs to 23 make an impression, to be memorable, and to be helpful to an 24 employee who wants to succeed for Apple but to do so within the 25 bounds of the law. The training needs to be tailored to each</p>	<p>D8r9usaa Page 20</p> <p>1 commitment to reform its culture. I believe that it is in 2 Apple's long term interest to make these reforms and change its 3 culture to one that includes a commitment to understand and 4 abide by the requirements of the law. I have tried to fashion 5 an injunction that intrudes as little as possible on its 6 business, on its ability to compete and adapt. It is my hope 7 that the terms of this injunction will protect consumers, 8 encourage lawful competition, and avoid a recurrence so that 9 taxpayers will never have to pay again for a government 10 enforcement action. And with that explanation, let us go to 11 the terms of section five.</p> <p>12 I'm sorry. We're in Section VI, subsection (A). 13 Insert as a second sentence, "The appointment shall be for a 14 period of two years provided that the Court may sua sponte or 15 on application of the United States or any plaintiff state 16 extend the appointment by one or more one-year periods." 17 Going to subsection (B). Let me read it as it would 18 be revised. "The external compliance monitor shall have the 19 power and authority to review and evaluate Apple's internal 20 antitrust compliance policies and procedures and the training 21 program required by..." and then a reference to the inserted 22 section above "...and to recommend to Apple changes to address 23 any perceived deficiencies in those policies, procedures, and 24 training." 25 Now, that takes us to subsection (C). I don't think</p>

<p>D8r9usaa Page 21</p> <p>1 that the external compliance monitor should conduct a review or 2 assessment of the current policies. I would expect that Apple 3 would revise its current policy substantially and procedures 4 and create an effective training program. That will require 5 some time. So, I think this should be revised to have the 6 external compliance monitor doing an assessment in three months 7 from appointment and beginning to engage Apple in a discussion 8 at that point. And we need to revise this section to add a 9 parallel provision that would apply to the training program as 10 well. 11 That takes us to section (E) at the bottom of page 12 eleven. I would strike the first -- essentially the first 13 three lines. And begin with the sentence, "If Apple objects to 14 any recommendation, it shall propose in writing to the external 15 compliance monitor, the United States, and the representative 16 plaintiff states, within 30 days after it receives the report, 17 an alternative policy, procedure or system designed to achieve 18 the same objective or purpose. If Apple and the external 19 compliance monitor fail after good faith discussions to agree 20 on an alternative policy or procedure within 30 days of Apple's 21 objections to a recommendation, Apple shall, after consultation 22 with the United States and the representative plaintiff states, 23 apply to this court within 14 days for relief." 24 Strike subparagraph (F). 25 That takes us to page 13 subsection (J), second line.</p>	<p>D8r9usaa Page 23</p> <p>1 (Recess) 2 THE COURT: I should have put on the record at the 3 beginning of the proceeding the documents that I received since 4 we last met. I think, though, that all of them have been 5 placed on our ECF system except for a couple which we received 6 today. I received August 27 letter from Weil, Gotshal on 7 behalf of Simon &amp; Schuster; from Scadden, Arps on behalf of 8 Penguin Random House. Just those two additional ones to place 9 on ECF. We will do so promptly. 10 Does the government wish to be heard? 11 MR. BUTERMAN: Yes, your Honor. 12 Lawrence Buterman, your Honor. 13 Understanding the Court's ruling there are just a few 14 provisions that we would like to raise at this time. If it's 15 possible, we would like an opportunity to just review the 16 transcript to make sure that we've gotten all the language down 17 correctly, to confer with Apple, and see if we can make -- 18 reach other agreements on other language. 19 THE COURT: Good. 20 MR. BUTERMAN: With respect to looking at our 21 proposed injunction on page six, and that would be Section 22 III(E)(b). 23 THE COURT: B as in boy? 24 MR. BUTERMAN: B as in boy, your Honor. 25 Our understanding is that the Court added to the end</p>
<p>D8r9usaa Page 22</p> <p>1 Strike the phrase "consultants, accountants, attorneys, or 2 other." 3 That takes us to the signature line where there is 4 that offending middle initial. 5 So, I think it would be important for counsel to have 6 time to look at all of this, to talk with each other, hopefully 7 give me a revised proposed injunction, preserving all of the 8 objections they've all made before and requests they've all 9 made before but understanding that this is my ruling on the 10 merits of those issues, agreement on the language. Obviously 11 if you have continued disagreement on language, you would feel 12 free to present that too. 13 I think you need to read through this all carefully to 14 make sure it's coherent and complete. And I think you should 15 in particular feel free to revise further the section on the 16 monitor. Because, as you can tell, I've reshaped that 17 position. And you need to reflect on the two tasks the monitor 18 would now have, which are -- one is the same but one is a 19 replacement for one of the requests the government had made. 20 I think what we should do is take a break, give you a 21 chance to consult among yourselves, and then come back. If you 22 wish to be heard about any aspect of this now, fine. But I 23 would like to sign this document next week. So that's my 24 timetable. 25 Shall we say ten minutes.</p>	<p>D8r9usaa Page 24</p> <p>1 of section (b) the words "by any other retailer." 2 THE COURT: "Sold at other retailers." 3 MR. BUTERMAN: "Sold at other retailers," excuse me, 4 your Honor. 5 The plaintiff's position is that Apple should not be 6 communicating that type of information amongst publishers 7 regardless of where the materials are sold. 8 THE COURT: Hold on one second. Let me make sure I 9 have the context. 10 So you think it would be inappropriate for Apple to 11 share with an E-book publisher the prices that other E-book 12 publishers are selling their books in the iBookstore? 13 MR. BUTERMAN: Your Honor, we believe that it would be 14 inappropriate for Apple to be sharing with one E book publisher 15 the other E book publisher's future pricing provisions. That's 16 what we were trying to get at, their pricing strategies. 17 Obviously once the information becomes publicly 18 available, we don't have a concern with it. But until that 19 point, a conversation between publisher -- a conversation 20 between Apple and publisher A where Apple tells -- or the 21 publisher tells Apple that it intends to price this book at a 22 certain price and then Apple communicating that to publisher B, 23 we would have a problem with that. 24 THE COURT: I guess the problem is that this sentence 25 as drafted includes the phrase "retail prices or pricing</p>

<p>D8r9usaa Page 25</p> <p>1 strategies," and it also includes the phrase "past, present or 2 future." 3 So I think it's pretty easy to see why it would be 4 useful to have an injunction that governs broadly the 5 discussion of one publisher's pricing strategies with another, 6 whether those strategies are past, present, or future in 7 orientation. But when it comes to a discussion of retail 8 prices, the ban is probably one that should be restricted to 9 future prices. Past or present prices are probably known in 10 the marketplace. 11 MR. BUTERMAN: Your Honor, if I may. The carve-out 12 that follows, subsection (d), was intended by plaintiffs to 13 address that issue precisely. 14 THE COURT: I see. All of this is subject to hearing 15 from Apple as well. But I'll strike the phrase "sold at other 16 retailers." 17 MR. BUTERMAN: Thank you, your Honor. 18 THE COURT: Anything else? 19 MR. BUTERMAN: Yes, your Honor. 20 The next issue that I'd like to just quickly raise is 21 on page eight, section (B) subsection (a) in antitrust 22 compliance. 23 Your Honor, the position that the plaintiffs took -- 24 and I apologize because this might be a punctuation problem 25 here that caused this -- is that each of Apple's officers and</p>	<p>D8r9usaa Page 27</p> <p>1 about dividing up the digital world between Amazon and Apple, 2 that Apple was contemplating. That said, I'm making my 3 judgments here based on what I learned through this trial. And 4 one of the things I learned is that Amazon, I learned, is a 5 fierce competitor with Apple and Apple with Amazon. Should 6 they decide to divide up the digital world, I think we'll -- we 7 will know that, that is, the American public. So I'm trying to 8 think about, as I've indicated, where the real risks are and to 9 minimize the burdens on Apple. 10 MR. BUTERMAN: Your Honor, if I may. It isn't just 11 Amazon. And certainly we understand the relationship between 12 Amazon and Apple. But there are other retailers, Barnes &amp; 13 Noble, for example, or some of the smaller retailers. These 14 are conversations that may be appropriate under certain 15 specific circumstances. They may not be. 16 But what certainly the Department of Justice has found 17 is that this logging provision is a very good measure in 18 causing the companies that are subject to it to take a pause 19 and decide whether they should be engaging in this type of 20 communication. And ultimately, your Honor, what we are hoping 21 for is to make sure that Apple never again engages in price 22 fixing in the E-book industry. We believe that this is a 23 modest provision that would help ensure that Apple will not 24 engage in inappropriate conversations with its competitors that 25 could lead to price fixing.</p>
<p>D8r9usaa Page 26</p> <p>1 directors should be required to undergo the antitrust training 2 and compliance provisions that are set forth throughout. 3 And in addition to that, each of Apple's employees who 4 is engaged in whole or in part in activities relating to the 5 iBookstore. That was what the provision was intended. 6 We do believe that it's important that all of Apple's 7 officers and directors take this training, given the way that 8 the company operates, how much those individuals shape the 9 company and the way that it proceeds in its business dealings. 10 THE COURT: There was no objection to that. I'm 11 looking at Exhibit A. And that, of course, would make the 12 addition that I proposed for the officers and directors engaged 13 in the supply of other content unnecessary. So I will strike 14 my addition. I'm going to add a comma after the word 15 "directors" in subsection (A). 16 MR. BUTERMAN: Thank you, your Honor. 17 Your Honor, the last issue that we just wanted to 18 bring to the Court's attention is on page ten. And it is the 19 (I) one. That is with respect again to the logging. 20 Your Honor had stricken provision (1). We believe 21 that the number of conversations that Apple should be having 22 with other retailers such as Barnes &amp; Noble or Amazon should be 23 few and that it is appropriate for Apple to have to log those 24 communications. 25 THE COURT: Well, I'm remembering the one suggestion</p>	<p>D8r9usaa Page 28</p> <p>1 THE COURT: I'll hear from Apple about why it objected 2 to that provision. 3 MR. BUTERMAN: Your Honor, with that, and 4 understanding the Court's rulings, that's all we have at this 5 time. We will certainly go back and look at the order for 6 further detail after this conference. 7 THE COURT: Thank you. 8 MR. BUTERMAN: Thank you, your Honor. 9 MR. SNYDER: Your Honor, may it please the Court. I'm 10 going to have my partner, Mr. Boutrous, address the Court. 11 THE COURT: Thank you. 12 MR. BOUTROUS: Thank you. 13 Thank you, your Honor. 14 Good afternoon. Why don't I start with that last 15 provision that Mr. Buterman was referencing, Section V(I). We 16 think that the Court's changes make a lot of sense because as 17 the Court pointed out this wasn't this case, there were some 18 the reference you made was in the record. But Apple has all 19 sorts of conversations with retailers about other things, 20 ordinary business, like the app store and apps. And it would 21 be burdensome, cumbersome. And it's beyond the issues in this 22 case. So we would urge the Court to stick with the Court's 23 recommendation to delete that section, section (2), from that 24 provision. It just will be cumbersome, burdensome, interfere 25 with the business. And we understand and appreciate the</p>



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1 Court's desire not to go farther than necessary to achieve the  
 2 objectives in this case.  
 3 I would urge the Court -- you put your finger on a  
 4 point we had made regarding section III(E)(b) which is the  
 5 provision that included the language about communications  
 6 regarding pricing. And that provision, that's the one --  
 7 THE COURT: We're on page 6?  
 8 MR. BOUTROUS: Yes. Thank you. On page six.  
 9 Because it's very confusing to talk about  
 10 communications concerning past, present, or future prices. And  
 11 we had suggested in our version that it be limited to future  
 12 prices. And so I think the court's suggestion with  
 13 Mr. Buterman I think makes sense. That was, in fact, one of  
 14 our suggestions. I do think that that would be a good change.  
 15 And, again, I guess I should preface all of this with  
 16 we're reserving all our objections. But I think the Court is  
 17 right, that it's strange to suggest there should be limits on  
 18 communications regarding past activity.  
 19 THE COURT: Well, not if it's strategies. The problem  
 20 is I think with subsection (b) is it's doing a lot of different  
 21 work. There's probably very little reason to discuss another  
 22 publisher's strategies, be that past present or future. But --  
 23 MR. BOUTROUS: Your Honor, I had the same thought when  
 24 I was reviewing this, making our suggestions. But I think (a)  
 25 covers that, business or strategies. So it restricts

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1 communications. But pretty broad language. Business plans or  
 2 strategies. And just seems cumbersome and confusing to suggest  
 3 past, present prices, particularly with that other provision,  
 4 the allows publication, the current prices.  
 5 THE COURT: Well I can see that there are a couple  
 6 different ways one could rewrite (a) and (b) so that it's clear  
 7 that the discussion of pricing strategies or wholesale prices  
 8 is not appropriate, whether those strategies or wholesale  
 9 prices were past, present, or future.  
 10 But with respect to retail prices, I think the ban is  
 11 only with respect to future retail prices which is really an  
 12 aspect of pricing strategy. You would think that past and  
 13 present retail prices are publicly available information and  
 14 encompassed by the carve-out in subsection -- the paragraph  
 15 that completes section (E).  
 16 So I think there is no disagreement here with respect  
 17 to the ultimate merits of the issue. I can see different ways  
 18 to revise it. I'll leave it to the parties to make a joint  
 19 hopefully recommendation to me on that point.  
 20 MR. BOUTROUS: Thank you, your Honor.  
 21 The other -- I just really had a couple of other  
 22 points I wanted to address. Still on page six. This would be  
 23 section III. It's really (F) and (G) but let me focus on (G)  
 24 which is the provision that says, "Apple shall not enter into  
 25 or maintain any agreement with any other E book retailer where

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1 such agreement likely will increase, fix, stabilize or set the  
 2 prices or establish other terms on which Apple or other E book  
 3 retailer sells E-books to consumers."  
 4 We had objected to both sections (F) and (G). The  
 5 Court made changes in (F) that resolve some of our issues with  
 6 respect to other content. But the language about "agreements  
 7 that likely will increase prices." We understand what the  
 8 government's getting at here. We're not looking for a way to  
 9 fix prices here. But the notion that an "agreement that likely  
 10 will increase prices" really starts to get into a very hard  
 11 to a vague area that a company the company could enter  
 12 into an agreement, perfectly lawful agreement with a supplier  
 13 and there's a potential that because of the agreement, again  
 14 assuming everything is lawful, that that could cause prices to  
 15 go up. The Supreme Court in the Legend case and other cases  
 16 has made clear that the fact that prices go up isn't  
 17 necessarily anticompetitive. So it was that "likely to  
 18 increase." And that's in both (F) and (G).  
 19 So we would ask the Court to -- strike at least that  
 20 language, the "likely to increase language." It's just very  
 21 hard to know what's going to cause others in the market, other  
 22 retailers to increase their prices. And if it were some  
 23 agreement that Apple entered into, this would subject Apple  
 24 potentially to a claim for contempt for violating the  
 25 injunction.

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1 THE COURT: So I think you read into the record the  
 2 substance of section (G).  
 3 MR. BOUTROUS: Yes.  
 4 THE COURT: So let's focus on that.  
 5 MR. BOUTROUS: Sure.  
 6 THE COURT: I understand there's parallel language in  
 7 (F). But let's take (G) first.  
 8 So this applies to Apple's agreements with other  
 9 E-book retailers which will likely increase the prices that  
 10 that other E book retailer sets for E books sold to consumers.  
 11 MR. BOUTROUS: That's the way I read it, your Honor.  
 12 It seemed very hard for Apple to know necessarily or be held  
 13 responsible. If a perfectly lawful agreement is entered into  
 14 and the other retailer increases prices, then theoretically  
 15 Apple could be deemed to have violated this provision. That  
 16 was what concerned us.  
 17 THE COURT: Can you give me an example of a lawful  
 18 agreement that would likely have this effect, a lawful  
 19 agreement you have with another E-book retailer.  
 20 MR. BOUTROUS: I wouldn't want to speculate, your  
 21 Honor. Here, of course, this case was about the relationship  
 22 with the E-book publishers. And I'm a new entrant into the  
 23 case so I've been studying the record here. And I wouldn't  
 24 want to speculate -- that's really I think one of the problems  
 25 here; that it's requiring really a future look of what types of

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1 agreements might be entered into. And I think with an  
 2 injunction where there's going to be potential contempt for  
 3 violating it and it's an area that was really not -- clearly  
 4 wasn't the center of the case, the relationship between Apple  
 5 and the E retailers and agreements that would have that effect.  
 6 That's why we felt that this provision we urged the Court to  
 7 strike it and would urge the Court to either strike it or  
 8 modify it.  
 9 THE COURT: There are layers upon layers in this case.  
 10 From Apple's perspective, one of its principal goals was the  
 11 elimination of all retail price competition. And it was happy  
 12 if a result of that was, and the price the consumer had to pay  
 13 for that, was an increase in prices.  
 14 Now, the particular mechanism through which it  
 15 achieved for itself the elimination of retail price competition  
 16 was through a mechanism and series of agreements with  
 17 publishers, but that it had the effect on another E-book  
 18 retailer, in fact, other E-book retailers, first Amazon and  
 19 then others.  
 20 So, I'm not -- I don't agree that subsection (G) isn't  
 21 implicated by this case. If you could give me an example of a  
 22 lawful agreement that you think Apple is likely to enter with  
 23 other E-book retailers that would be likely to increase the  
 24 prices for E books, retail prices for E books but that would be  
 25 lawful, I'd be happy to -- I can't think of one. But if you

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1 can, I'd be happy to hear your argument on this.  
 2 MR. BOUTROUS: Your Honor, if I can consider that,  
 3 maybe in consultation with the government, when we look at the  
 4 Court's new language, we can evaluate -- I'm just always  
 5 hesitant to start speculating about business practices.  
 6 Again, this particular provision just jumped out  
 7 because it was the retail industry.  
 8 And I know the Court made the findings it did. And I  
 9 should say we believe we have strong arguments on appeal.  
 10 We're going to challenge some of these findings.  
 11 But I did want to make clear, your Honor, we really  
 12 did do our best to address the concerns of the Court in  
 13 responding to the injunction. There were a couple of other  
 14 provisions that we had proposed. Really just one other that I  
 15 would draw the Court's attention to. The final -- the  
 16 government is the party that put your middle initial in the --  
 17 let me be clear on that, number one -- but I have one other  
 18 comment on the last page.  
 19 We had suggested in our last revision, your Honor, a  
 20 provision that would make -- the good cause requirement to  
 21 extend the injunction. That's consistent with the Microsoft  
 22 injunction that the government agreed to in that case. Rather  
 23 than this potential extension the way the government has done  
 24 it. And would ask the Court to consider something along those  
 25 lines. But would be consistent with earlier practice. And

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1 it's sensible. Gives the court flexibility. We're going to  
 2 try to be a model citizen if this injunction remains in place;  
 3 that you won't have to ever extend it, there won't be good  
 4 cause.  
 5 But we would ask the Court to take another look at  
 6 Section VII(C) and that would be in Exhibit B to our filing on  
 7 Monday.  
 8 THE COURT: Your request in that exhibit is to add the  
 9 following, which is broader than good cause.  
 10 "Unless this Court grants an extension for good cause  
 11 only, based on the showing of systemic and material  
 12 violations."  
 13 So are you revising your request now to just say  
 14 "Unless this Court grants an extension for good cause"?  
 15 MR. BOUTROUS: I was intending to offer up the  
 16 suggestion we made before. But as a fallback position, the  
 17 good cause requirement and deleting the last clause that  
 18 begins, "provided that any time prior to expiration."  
 19 THE COURT: So right now the language is that an  
 20 extension may occur, "If necessary to ensure effective relief,"  
 21 which is probably in some circumstances at least a higher  
 22 standard than good cause. It's necessity, "If necessary to  
 23 ensure effective relief."  
 24 So, would you like me to strike that phrase and insert  
 25 instead "for good cause shown"?

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1 MR. BOUTROUS: We had proposed doing that. Let me  
 2 just see if there's a way -- let me see if there's a way to  
 3 combine the two, your Honor, so we have them both.  
 4 In terms of -- I guess what the Court is saying that  
 5 good cause could either be viewed as the same as necessary to  
 6 ensure effective relief.  
 7 The part we were concerned about was the, in  
 8 particular, was the "provided that," it has this extension  
 9 language in there, and it would just automatically occur.  
 10 So one could delete the clause that begins "provided"  
 11 all the way down to "one-year periods" and leave in "if  
 12 necessary to ensure effective relief."  
 13 That would, I think, achieve the objectives. It would  
 14 give the court flexibility to ensure the injunction had been  
 15 complied with. And at the same time wouldn't create this  
 16 open-ended situation.  
 17 And, again, this is I think -- our proposal is  
 18 consistent with what the government has done in the past.  
 19 THE COURT: So, this is something for the parties to  
 20 discuss, on page 16, replacing the phrase, "If necessary to  
 21 ensure effective relief" with the phrase "for good cause" but  
 22 leaving the remainder of the paragraph the same.  
 23 Now I personally think Apple would prefer "If  
 24 necessary to ensure effective relief" but I leave it to the  
 25 parties to discuss.

D8r9usaa Page 37

1 MR. BOUTROUS: Thank you, your Honor. We'll take a  
2 look at it with your statements in mind.  
3 Going back to the antitrust compliance section and  
4 this question of officers and directors. We thought your --  
5 one, there's going to be training of the senior executives and  
6 the board of directors -- we had interpreted directors here to  
7 mean the board of directors.  
8 If I heard Mr. Buterman, it sounded like he was  
9 suggesting throughout the company employees who have nothing to  
10 do with negotiating contracts, people in manufacture and  
11 design. So he's nodding his head. Maybe that's another one we  
12 can talk about the language on it to clarify.  
13 But it started to sound like it might have been a much  
14 broader mandate. And we thought that the Court's suggestion  
15 made sense, for purposes of the injunction, to limit it to the  
16 relevant -- those involved in content. I've got the language  
17 of the Court right here somewhere.  
18 THE COURT: Apple made no objection on its Exhibit A  
19 to the language in paragraph A. So, I just note that.  
20 Again counsel will discuss these issues with each  
21 other.  
22 MR. BOUTROUS: We will, your Honor.  
23 I think those were the only other -- the only  
24 additions. Again, I appreciate the Court saying all our prior  
25 objections are preserved. I won't repeat all of those.

D8r9usaa Page 38

1 Appreciate the chance to address these other issues.  
2 I think that's all we need to cover today.  
3 The other thing is we will follow up with the  
4 representation concerning no end run around point promptly.  
5 THE COURT: Good.  
6 I think it's probably a representation that can't be  
7 made until we have the final language because it would be hard  
8 to say we're not ever going to take a position that this  
9 injunction does or doesn't do the following.  
10 MR. BOUTROUS: I can vow that we won't do any end  
11 running but we'll see the exact language we'll make sure that  
12 whatever we represent is absolutely accurate, your Honor.  
13 Thank you.  
14 THE COURT: Anyone else wish to be heard?  
15 Thank you all.  
16 Mr. Buterman, could we expect a submission by next  
17 Wednesday?  
18 MR. BUTERMAN: Yes, your Honor.  
19 THE COURT: Thank you.  
20 One other thing. Please be seated.  
21 I would like the parties to contact Judge Wood again  
22 and arrange to see her in either September or October.  
23 MR. BUTERMAN: Lawrence Buterman, your Honor. Does  
24 that apply to the government or is that related to --  
25 THE COURT: It applies to the government.

D8r9usaa Page 39

1 MR. BUTERMAN: Okay.  
2 THE COURT: Well, no. You're right. It's only about  
3 damages at this point. So it's the States and Apple. Though,  
4 you know, those are the necessary parties. It may be  
5 helpful -- and the class. It may be helpful to have the  
6 government there as well, I don't know, in some kind of  
7 universal resolution. That I'm not going to speak to.  
8 Thanks.  
9 (Adjourned)  
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# **EXHIBIT 3**

Eldnappl Argument

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

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

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Argument

APPEARANCES

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CYNTHIA E. RICHMAN

Eldnappl Argument

1 (In open court)

2 (Case called)

3 THE COURT: Welcome, everyone.

4 This is a conference held as a result of a motion for  
5 a stay of the monitorship made by Apple and as well I expect  
6 we'll address issues raised in a January 7 letter submitted by  
7 Mr. Boutrous with respect to the monitorship.

8 Why don't I begin by giving you an opportunity to be  
9 heard, Mr. Boutrous.

10 MR. BOUTROUS: Thank you very much, your Honor.

11 May it please the Court, the external compliance  
12 monitor appointed by the Court, Mr. Bromwich, is conducting a  
13 nonjudicial, inquisitorial, roaming investigation that is  
14 interfering with Apple's business operations, violating the  
15 final judgment issued by this Court, violating Rule 53 and the  
16 Constitution.

17 THE COURT: I'm sorry. Can you slow down here a  
18 little bit. Thanks.

19 MR. BOUTROUS: Sure.

20 THE COURT: Nonjudicial, inquisitorial --

21 MR. BOUTROUS: Roaming investigation that is  
22 interfering with Apple's business operations, violating the  
23 final judgment, violating Rule 53 and the Constitution. His  
24 activities are imposing substantial and rapidly escalating  
25 costs on Apple that Apple will not be able to recover even if

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1 it prevails in its appeal to the Second Circuit.

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

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

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

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

21 MR. BOUTROUS: Thank you, your Honor.

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

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

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

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

15 THE COURT: That is its customary meaning.

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

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

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1 proceeding. As the Court is aware, he is governed by Section  
2 455 of 28 U.S.C., which applies to judges, and requires  
3 disqualification where a judge has personal knowledge of facts  
4 that are in dispute in a proceeding.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 This is much worse because we have the monitor filing  
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1 a declaration against the party, and in the Cobell case, your  
2 Honor, the D.C. Circuit also disqualified the monitor because  
3 he had acquired information in ex parte discussions with the  
4 Department of the Interior employees and the Department of the  
5 Interior as a party and gathered information and formed views  
6 about the Department of the Interior and then expressed them  
7 and tried to tell the Department of the Interior what to do.

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

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

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

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

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

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

15 THE COURT: Excuse me just one second.

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

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

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

21 MR. BOUTROUS: Yes. This is 334 F.3d 1128. It's the  
22 2003 opinion.

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

25 MR. BOUTROUS: In this opinion, where the Court

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

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

11 So that's one form of irreparable harm.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 I had several conversations with Mr. Bromwich, and  
5 this is in my declaration and in some of our letters, where he  
6 said, well, he needed to make a profit and he needed to add a  
7 15 percent markum on \$1100 an hour so he would make a profit.

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

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

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

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

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

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

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

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

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1 immediately revising, revamping the antitrust compliance and  
2 training policies.

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

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

20 MR. BOUTROUS: Exactly.

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

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1 injunction.

2 MR. BOUTROUS: We are totally on the same page, your  
3 Honor, because that was one of our complaints. We said to  
4 Mr. Bromwich, We are going to be doing this for the next 90  
5 days. Your Honor, as I recall, you sua sponte suggested this  
6 90-day period. I'm pretty sure we thought it was an excellent  
7 idea.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Thank you.

11 THE COURT: Thank you, Mr. Boutrous.

12 MR. BOUTROUS: Lawrence Buterman, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 As an initial matter, there's clearly a disagreement  
11 here as to what Mr. Bromwich was permitted to do during those  
12 90 days. We have had discussions about that, Apple and the  
13 United States.

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

19 So what Mr. Bromwich has been doing during the first  
20 90 days is doing what he believes is appropriate as somebody  
21 who has a lifetime of experience in monitoring companies and  
22 engaging in these kinds of activities.

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

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

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

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

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

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1 conducting his job.

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

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

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

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

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

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

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

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

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

4 Unfortunately, your Honor, Apple hasn't responded to  
5 those requests. It hasn't responded to many requests. The  
6 United States on multiple occasions has reached out to Apple to  
7 try to engage in the kinds of conversations contemplated by the  
8 Court's order in December as well as what we understand Section  
9 6 of the final judgment to require, to see if we can reach  
10 resolution. Every time we do, we get no response.

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

16 THE COURT: Thank you.

17 MR. BUTERMAN: Thank you.

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

20 MR. BOUTROUS: May I, your Honor?

21 THE COURT: Yes.

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

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

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

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

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

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

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

25 MR. BOUTROUS: Yes.

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1 THE COURT: Thank you.

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

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

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

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

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

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

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

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

5 THE COURT: That's the December 17 letter.

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

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

10 MR. BOUTROUS: Yes.

11 THE COURT: OK.

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

13 THE COURT: Excuse me one second.

14 MR. BOUTROUS: Yes.

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

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

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1 THE COURT: No, I'm referring to government's December  
2 24 letter, which was a response to the December 17 letter.

3 So did you respond to the December 24 letter?

4 MR. BOUTROUS: No, your Honor.

5 THE COURT: OK. Just for clarity.

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

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

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

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

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

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

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

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1 your comments in that light.

2 MR. BOUTROUS: Thank you, your Honor.

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

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

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

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1 past.

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

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

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

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

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

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

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

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

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

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

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

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

14 THE COURT: Thanks so much.

15 MR. BOUTROUS: Thank you.

16 THE COURT: I appreciate that.

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

19 THE COURT: Yes.

20 MR. BUTERMAN: Thank you, your Honor.

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

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

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

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

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

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

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

9 THE COURT: Thank you very much.

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

12 (Recess)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 He has to understand enough about Apple and its

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

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

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1           So I would like to take a page from Secretary  
2 Clinton's playbook and just press a restart button. We've lost  
3 90 days. It can't be retrieved. What happened happened. But  
4 now I know, now I know, that at least parts of Apple are --  
5 well, parts of Apple have been resistant to the monitor  
6 performing his duties. In pressing the restart button, I am  
7 hopeful that you, Mr. Boutrous, that every attorney working  
8 with you, that Mr. Arquit, that Mr. Reilly, that in-house  
9 counsel for Apple, that Apple's board, that everyone at Apple  
10 will understand, one, that they have to comply with the law,  
11 which includes the terms of the injunction.

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

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

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

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

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

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1 monitor, and said that those objections must be conveyed in  
2 writing to the United States and the plaintiff states within  
3 ten calendar days of the action giving rise to the objection.  
4 And Apple has submitted to me certain letters it has provided  
5 to the Department of Justice in that regard. And I issued an  
6 order which said, whether or not you made a timely objection,  
7 you certainly must do so in the future but I'll hear any  
8 objections you have as of now. I want this process to work.  
9 Again, I believe, you know, if Apple could get its  
10 head around it, I think it is actually in its interest that it  
11 work.

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

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

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

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

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

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

6 THE COURT: Certainly, Mr. Boutrous.

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

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

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

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

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

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1 thing. We brought the objections to your Honor on November  
2 27th, our objections that included our objections to the  
3 proposed amendment. But we raised these issues. The direct  
4 communications to the board, the letter to the board of  
5 directors, that was all in our objections. And we didn't sit  
6 on our hands, your Honor. And I don't think it's correct to  
7 suggest that we hoarded our objections and didn't tell anyone  
8 about them. We told the plaintiffs and we filed them in detail  
9 on November 27. And the Court then said it was pulling back  
10 the amendment or at least one of the amendments, and it wasn't  
11 clear that we had raised the objection earlier, so I think the  
12 November 27th objections could not have been clearer that we  
13 were objecting to all of his behavior. And we also alerted the  
14 plaintiffs and the Justice Department to them as well.

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

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

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

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

17 THE COURT: August?

18 MR. BOUTROUS: August 27.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. BUTERMAN: Your Honor, may I just address one  
7 point? The agreement that the plaintiffs and Mr. Boutrous  
8 reached was not for a week. It was to give Apple if it wanted  
9 24 to 48 hours to seek an emergency stay in the Second Circuit.  
10 That was the agreement. We discussed it on the phone.  
11 Mr. Boutrous was there, Ms. Richman was there on this call on  
12 the phone --

13 MR. BOUTROUS: I'm not suggesting --

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

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

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

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1 my opinion.

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

4 THE COURT: I hope to do it promptly.

5 MR. BOUTROUS: Thank you, your Honor.

6 THE COURT: That is my goal.

7 Give me one more minute, please.

8 (Pause)

9 THE COURT: Thank you all.

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