14-60

United States Court of Appeals for the Second Circuit

UNITED STATES,

Plaintiff-Appellee,

v.

APPLE INC.,

Defendant-Appellant,

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

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

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Defendants.

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INTRODUCTION

With the district court's endorsement, the monitor has expanded his role to encompass activities that were not authorized by the injunction, would be plainly inappropriate if undertaken by a sitting judge, and which therefore violate Rule 53, due process, and the separation of powers. *See Cobell v. Norton*, 334 F.3d 1128, 1143 (D.C. Cir. 2003). Plaintiffs also acknowledge that both they and the district court have communicated *ex parte* with the monitor, and that the monitor ultimately testified against Apple in opposition to Apple's stay motion. The monitor's conduct exceeds the judicial power conferred upon federal courts by Article III and properly delegated to judicial agents under Rule 53. It also creates a staggering appearance of bias that requires his disqualification.

Plaintiffs' primary response is an array of procedural arguments in an effort to shield the monitor's conduct from any appellate review. But plaintiffs' arguments misconceive the nature of this appeal, which challenges the monitor's *conduct* and the district court's post-judgment authorization of that conduct, not merely the *terms* of his appointment. This Court clearly has jurisdiction to hear appeals arising from a monitor's post-judgment activities that a district court affirms in a post-judgment order. And Apple could not have waived its challenge to the post-judgment implementation of the monitorship by failing to object before

the monitor was even appointed. Plaintiffs' jurisdiction and waiver arguments are therefore meritless.

The monitorship as it has been implemented is far removed from any concept of the judicial power that the framers of the Constitution or the drafters of the Federal Rules of Civil Procedure ever could have imagined. The district court vested the monitor with authority that exceeded the limits imposed by Article III, and the monitor further engaged in conduct that required his disqualification. This Court should reverse.

ARGUMENT

I. Apple's Challenge to the Monitorship Is Properly Presented in This Appeal

Because the D.C. Circuit's decision in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), clearly requires reversal of the district court's decision here, plaintiffs attempt to recast Apple's challenge from the monitorship as it has been implemented to the terms of the injunction. RedBr.25-28, 34-36. But this misconception has no basis in the record, the order on appeal, Apple's notice of appeal, or the arguments as Apple presented them in the opening brief. Apple's challenge is to the implementation of the monitorship, and not simply the terms of the injunction as it was originally ordered. This Court plainly has jurisdiction over the appeal properly construed.

A. Apple Challenges the *Implementation* of the Monitorship, Not Simply the Terms of the Injunction

The record below and Apple's notice of appeal and opening brief confirm that this appeal presents a meticulously preserved challenge to the injunction's unlawful and unconstitutional implementation.

Apple's November 27, 2013 objections stated clearly that "Mr. Bromwich has already exceeded in multiple ways the mandate this Court originally afforded him" and that his "unreasonable investigation to date has been anything but 'judicial.'" Dkt411.1-2; *see also id.* at 9 ("The injunction, … in light of how Mr. Bromwich interprets his authority, goes well beyond any reasonable and limited role of assessing compliance and training policies … and plainly (and wrongly) vests the monitor with wide-ranging, intrusive, and excessive inquisitorial powers of a sort reserved to prosecutors") (citation omitted). The first sentence of Apple's stay motion stated: "The 'external compliance monitor' … is conducting a roving investigation that is interfering with Apple's business operations, risking the public disclosure of privileged and confidential information, and imposing substantial and rapidly escalating costs on Apple that it will never be able to recover if it prevails on its pending appeal of this Court's Final Judgment and the injunction." Dkt417.1. Apple's constitutional and statutory arguments were thus directed at the way in which the injunction "is being interpreted and implemented …." *Id.*

Likewise, in its January 7, 2014 letter asking for the monitor's disqualification and formally objecting to the monitor's conduct, Apple described the monitor's "active collaboration with plaintiffs to broaden the scope of his mandate." Dkt425.1. Apple explained that the monitor had "exceeded his authority under the Final Judgment by asserting non-judicial investigative powers that violate Rule 53 as well as the constitutional separation of powers." Dkt425.2; *see also id.* ("Viewing himself as unconstrained by the federal rules governing discovery and other matters, and acting like an independent prosecutor not a judge, he has repeatedly demanded interviews with Apple's senior executives and board members who have no role in the day-to-day operation of the business unit at issue or in the development of Apple's antitrust compliance policies and training programs").

In its January 16 order overruling Apple's objections, denying Apple's stay motion, and rejecting Apple's plea for disqualification of the monitor, the district court recognized that Apple "focuse[d] entirely on the manner in which the monitorship is being implemented." Dkt437.37; *see also id.* at 37 n.12 (noting that Apple did not argue "that the Injunction itself, separate from the Monitor's implementation of it, violates the separation of powers"). Indeed, because the district court correctly ascertained the nature of Apple's challenge, it devoted *19 pages* to the history of the monitorship's implementation. Dkt437.15-34.

The court affirmed the monitor's authority to conduct interviews and seek information having nothing whatsoever to do with Apple's antitrust compliance and training programs. The court also defended the monitor's submission of a declaration—sworn testimony in an adversarial proceeding—*on behalf of plaintiffs* and against Apple as somehow "proper and necessary." Dkt437.53. The court thus gave its blessing to the monitor's interpretation of his mandate and sanctioned his entire course of conduct.

Recognizing that the monitor and the court had substantially expanded the scope of the monitorship, Apple immediately appealed. The notice of appeal stated that Apple sought review of "the [District] Court's *modifications* to the Plaintiff United States' Final Judgment." Dkt439.1 (emphasis added). And Apple's opening brief confirmed that it is asking this Court to undo the district court's "constructive[] modifi[cation of] the injunction," which "endorse[d] the monitor's wide-ranging, investigative activities, including his *ex parte* communications with plaintiffs." BlueBr.11. Consistent with its briefing in the district court, Apple's opening brief focused on the unconstitutional manner in which the monitorship has been implemented. *See, e.g.*, BlueBr.18 ("The monitorship, particularly as it has been applied, thus violates Rule 53, the separation of powers, and due process"), 26 ("The monitor's overly expansive view and implementation of his mandate, along with his *ex parte* contacts with

plaintiffs and testimony against Apple below, also violate Rule 53 and the separation of powers and warrant reversal"), 30 ("By refusing to enforce *any* limitation on the monitor's power, the district court licensed the monitor to pursue precisely the unbounded, quasi-inquisitorial, quasi-prosecutorial investigation that was rejected in *Cobell*") (citation and quotation marks omitted), 32 ("[T]he monitorship imposed on Apple, especially as it is being implemented by the monitor with the green light from the district court, far exceeds the limits of Rule 53 and the separation of powers. Because the monitorship provision of the injunction has been applied in an invalid and unconstitutional manner, that provision should be vacated."); *see also id*. at 16, 28, 29, 30 n.8. Apple could not have been more clear.

In light of the plain language in the notice of appeal, and the opening brief's focus on the infirmities of the injunction *as implemented*, plaintiffs' assertions that "[m]ost of Apple's brief … challenges the Injunction itself" (RedBr.25) and that "Apple has not presented an 'as-applied' challenge to the Injunction" (RedBr.27) are bizarre and clearly incorrect.

B. Plaintiffs' Jurisdiction and Waiver Arguments Are Meritless

Plaintiffs have no basis for challenging this Court's jurisdiction or claiming that Apple waived any of its challenges to the implementation of the monitorship.

This Court has jurisdiction over Apple's appeal under 28 U.S.C. § 1291 because the district court's January 16 decision overruling Apple's objections, denying its stay motion, and refusing to disqualify the monitor is a substantive post-judgment order. *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991). Plaintiffs acknowledge that section 1291 confers jurisdiction over substantive post-judgment orders, but claim that "the denial of a stay pending appeal is not an appealable order." RedBr.26 (citation and internal quotation marks omitted). That may be true, but it is irrelevant here, as Apple is not asking the Court to reverse the district court's denial of a stay. Rather, Apple is asking this Court to set aside the district court's constructive modification of section VI of the final judgment. *See supra* p. 5. The January 16 order is appealable *both* as a "substantive post-judgment order[]" under section 1291 (*Yonkers*, 946 F.2d at 183), *and* as an order "modifying [an] injunction[]" under 28 U.S.C. § 1292(a)(1).

It is immaterial that the court modified the injunction in an order rejecting Apple's recusal request and denying its motion for a stay. An "obvious misinterpretation of the terms of an injunction constitutes a modification within the meaning of § 1292(a)(1)." *Scipar, Inc. v. Simses*, 354 F. App'x 560, 562 (2d Cir. 2009); *see also Jones-El v. Berge*, 374 F.3d 541, 544 (7th Cir. 2004) ("Even though an interlocutory order may not explicitly grant an injunction, if its consequences may cause a party irreparable harm, then it likely substantially

altered the legal relationship of the parties and immediate appealability is appropriate"). Accordingly, because the district court's January 16 order "misconstrued the injunctive mandate," the court "'modif[ied]' th[e] injunction within the meaning of section 1292(a)(1)" when it denied Apple's motions, and this Court has jurisdiction to review that order. *United States v. O'Rourke*, 943 F.2d 180, 186 (2d Cir. 1991).[1]

Plaintiffs also contend that Apple waived its Rule 53 and due process challenges by "fail[ing] to raise them in the Liability/Injunction Appeal" (RedBr.35), but plaintiffs nowhere even contend that Apple waived its challenge to the monitor's unconstitutional *implementation* of the injunction. Nor could they.

Apple could not have known of—much less objected to—the monitor's decision to engage in "an open-ended and amorphous inquisition that exceeded the scope of his duties under the final judgment" (BlueBr.6) before the monitor was even appointed. Nor could Apple have foreseen that the same district court that

[1] Moreover, although it is unnecessary given the Court's clear jurisdiction under sections 1291 and 1292, the Court could exercise its mandamus jurisdiction—as the D.C. Circuit did in *Brooks* and *Cobell*—to correct the district court's unwarranted expansion of the monitorship. *See In re Brooks*, 383 F.3d 1036, 1046 (D.C. Cir. 2004) (granting mandamus petition and excluding reports of special master due to *ex parte* contacts); *Cobell*, 334 F.3d at 1139 (district court's "order[] appointing [the monitor] … and the order denying the Department's motion to revoke [monitor's] appointment … present an appropriate occasion for mandamus").

expressed a desire to have the injunction "rest as lightly as possible" on Apple (Dkt371.8:25-9:1) would later rebuke Apple for resisting the monitor's onerous requests for documents and interviews unrelated to the evaluation of Apple's not-yet-finalized compliance program. Because Apple clearly could not have raised its Rule 53 or due process arguments regarding the monitor's conduct until *after* the monitor was appointed, there is no merit to plaintiffs' assertion that Apple is trying to litigate arguments that it supposedly "waived in its Liability/Injunction appeal." RedBr.27.[2]

To preserve its arguments for appellate review, Apple was obligated only to raise them first in the district court. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Apple did so in its November 27 objections, in connection with its stay motion, and in its request to disqualify the monitor. *See, e.g.*, Dkt417.1, 9, 14. Apple reiterated this claim at oral argument below, explaining that the monitor was "conducting a nonjudicial, inquisitorial, roaming investigation" that violated "the final judgment …[,] Rule 53 and the Constitution." Dkt441.3:12-16.

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[2] Although not relevant to this appeal, plaintiffs' contention (RedBr.25) that Apple waived its facial challenge to the injunction is false. Plaintiffs cite *Zhang v. Gonzales*, 426 F.3d 540 (2d Cir. 2005), but the appellant there "devote[d] only a single conclusory sentence" to the argument. *Id.* at 545 n.7. By contrast, Apple devoted a separate section of its brief to the injunction's constitutional and procedural defects and set forth the legal bases for its argument. *See* No. 13-3741, Dkt157.62-63; *see also* Dkt331.3, 9-13 (objecting to the monitorship). Apple in no way "abandoned" its challenge to the terms of the monitorship.

Plaintiffs' contention that Apple "never used the Injunction's procedures to raise with the court its objections to the monitor's attempts to carry out his duties" (RedBr.14) and has not "request[ed] a new monitor" (RedBr.49) is completely belied by the record. Apple attempted to resolve its differences directly with the monitor repeatedly in the months following his appointment. Dkt437.15-29. When these attempts failed, Apple filed extensive objections to the monitor's conduct on November 27, 2013. Dkt411. The court's refusal to rein in the monitor's abusive and unconstitutional conduct prompted Apple to move for a stay of the monitorship on December 13, 2013. Dkt416; Dkt417. When the monitor filed a declaration in support of plaintiffs' opposition to Apple's motion, Apple filed a letter on January 7, 2014, listing additional objections to the monitor's conduct and seeking his disqualification. Dkt425. Apple has diligently used the mechanism provided for in the injunction; the district court has simply refused to grant Apple its requested relief.

II. The Monitor's Undisputed *Ex Parte* Discussions with the Court and Plaintiffs, Culminating in His Testimony Against Apple, Require Reversal

Plaintiffs acknowledge that both they and the district court have communicated *ex parte* with the monitor. This alone is reason for reversal, because as an "agent of the court" (RedBr.29), the monitor is not permitted to communicate with either the court or one of the parties *ex parte*, and he certainly

may not testify against the party he was appointed to monitor. It is unimaginable that a sitting district judge would engage in the conduct at issue here. And because, as plaintiffs acknowledge (RedBr.28), the monitor is subject to the same ethical rules that bind the court (*e.g.*, Fed. R. Civ. P. 53(a)(2); Code of Conduct for U.S. Judges, Canon 3(B)(2) ("A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge")), his *ex parte* contacts with plaintiffs are clearly grounds for his disqualification (28 U.S.C. § 455(a), (b)(1); Code of Conduct for U.S. Judges, Canon 3(A)(4) ("a judge should not initiate, permit, or consider *ex parte* communications")). This sort of *ex parte* communication by an officer of the court "is more than an irregularity in practice; it is a vital defect." *Morgan v. United States*, 304 U.S. 1, 22 (1938).

As the Department of Justice told the D.C. Circuit in *Cobell*: "A judicial officer has improper personal knowledge of the facts [under 28 U.S.C. § 455(b)] when he obtains information *ex parte*." Appellants' Br., *Cobell*, 334 F.3d 1128 (No. 02-5374), 2003 WL 25585726. And there can be no question that a monitor that not only communicates *ex parte* with the opposing party, but also *testifies* against the monitored party, loses any semblance of "impartiality" as required by 28 U.S.C. § 455(a). The monitor here should be disqualified under both prongs of the statute. *See In re Brooks*, 383 F.3d 1036, 1046 (D.C. Cir. 2004).

Plaintiffs argue that the monitor's *ex parte* communications with the district judge were limited to "a pre-appointment interview" and should be overlooked. RedBr.46. But plaintiffs do not contest that the monitor explicitly relied on statements purportedly made to him by the district judge, *ex parte* and off the record, to support his expansion of the scope of the monitorship and the monitor's authority. *See* Dkt419-2 ("We have the distinct advantage of having discussed our intentions to get off to a fast start directly with [the district judge]"). The monitor's reliance on *ex parte*, undocumented conversations to enlarge his powers made it impossible for Apple to "know where authority [was] lodged," which is exactly why "such communications" should ordinarily be prohibited. Fed. R. Civ. P. 53 advisory committee's note.

As to plaintiffs' own acknowledged *ex parte* discussions with the monitor, their response is limited to one unadorned admission: "[T]he Monitor also had conversations with Plaintiffs, including a pre-appointment interview and fee discussions, in which Apple did not participate." RedBr.30 (citation omitted). Plaintiffs do not even attempt to justify their *ex parte* communications with the monitor in connection with their opposition to Apple's stay motion, including their submission of the monitor's testimony (obtained *ex parte*) in support of their opposition.

The monitor's coordination with plaintiffs in drafting his declaration was plainly not, as plaintiffs suggest, "part of the performance of his prescribed duty" under the injunction. RedBr.30 (quoting *Yonkers*, 946 F.2d at 184) (internal quotation mark omitted). The injunction does not authorize any *ex parte* communications, much less substantive communications about the case and strategy for opposing relief Apple was seeking. Indeed, plaintiffs' claim is belied by the fact that the district court proposed an amendment to the injunction that would have permitted *ex parte* discussion with the monitor (Dkt410), but then withdrew the amendment in response to Apple's objection (Dkt413.2). That plaintiffs now claim these functions were permitted under the injunction only demonstrates the improper expansion of the monitor's power.

As to the declaration the monitor filed against Apple, affirmatively testifying against Apple in support of plaintiffs' opposition, plaintiffs' response is to downplay the significance of the declaration using euphemisms. According to plaintiffs, the declaration was just a "report to the district court on [the monitor's] interactions with Apple," and the fact that the declaration was testimony against Apple filed by plaintiffs was just a matter of the "filing mechanism." RedBr.29.

Plaintiffs grossly misstate the character of the monitor's declaration. As plaintiffs do not dispute, the monitor's declaration was drafted in coordination with plaintiffs in support of their joint effort to successfully oppose Apple's stay motion.

BlueBr.9-10. It was filed by a Department of Justice lawyer to accompany plaintiffs' opposition to Apple's motion. Dkt424. Plaintiffs' opposition (filed *before* the declaration) cited the declaration extensively. *See* Dkt423. The declaration included factual critiques of statements made by Apple's witnesses, commentary on Apple's conduct relative to the monitor's previous assignments, and new accounts of the monitor's conversations with Apple's counsel. *E.g.*, Dkt424¶¶11, 30, 49, 55. On every disputed issue, the district court rejected Apple's evidence, embraced the monitor's testimony, and sided with plaintiffs. *See, e.g.*, Dkt437.44-57, 60-62.

There is no getting around the fact that the monitor testified for plaintiffs in an adversarial proceeding against Apple, taking sides against the entity he was supposed to monitor as an agent of the court, thereby forfeiting any semblance of impartiality.

The monitor's actions to prevent a stay of the monitorship (and therefore his revenue stream) on what he has admitted is a profit-seeking enterprise (Dkt419-3.8) also destroy any appearance of impartiality. It is facially true that the monitor is "compensated for his time, not the content of his recommendations" (RedBr.47), and Apple does not, as plaintiffs claim (RedBr.47), simply challenge the fact that the monitor is paid by the hour. But once the monitor acted affirmatively to

prevent a stay of the monitorship, he crossed the line from an impartial agent of the court to an interested advocate.

This is because the monitor can bill Apple for his time only if the monitorship persists. And a ruling staying the monitorship pending resolution of Apple's appeals would have deprived the monitor of his profits if the district court's liability finding is reversed. This scenario is especially improper here, where the judge has hand-picked a private lawyer over Apple's objection to do work billing Apple at private-sector rates with no budget or limits on expenditures. As Apple explained in the opening brief, even consensual monitorships have drawn sharp criticism due to their cost and the process for appointing monitors. BlueBr.23 n.5. These concerns are aggravated severely in situations like the present where the court imposes a monitorship over the party's objection, and compels the party to fund an inquisition with the court's imprimatur. The scenario the monitor and the district court have created, in which an agent of the court is negotiating his billing rates, arguing for expanding the scope of his work, and serving as the key witness for the prosecution in opposing a stay of his efforts, unquestionably creates at least the appearance of improper self-interest and bias.

In short, because the monitor collaborated with plaintiffs to oppose Apple's request to stay the monitorship and submitted a detailed declaration disputing the factual showing made by Apple's counsel and witnesses, he was no longer acting

impartially. Apple need not make the near-impossible showing that the monitor's financial interest actually motivated his testimony against Apple in opposition to a stay; "even the appearance of partiality" requires recusal (*Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citation and internal quotation marks omitted); *see* 28 U.S.C. § 455(a); *Brooks*, 383 F.3d at 1046), and disqualification under the Due Process Clause "do[es] not require proof of actual bias" (*Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009)).

Like the district court, plaintiffs seek to justify the monitor's testimony against Apple by arguing that it was somehow necessary to respond to Apple's testimony in support of its motion. RedBr.29. This is a problem the monitor created himself by acting in an extrajudicial matter, interviewing witnesses *ex parte* and off the record—the very reason the monitorship is unlawful. Had there been an objective and transparent record of proceedings, no cause would have existed for the monitor to offer any view of the matter. And in any event, disagreement with Apple's testimony did not somehow authorize the monitor to testify for the opposing party. *See, e.g.*, *Lister v. Comm'rs Court*, 566 F.2d 490, 493 (5th Cir. 1978) ("Having served as a witness for one side in the case," monitor was "accordingly disqualified"). The judicial role is fundamentally impartial (*see Caperton*, 556 U.S. at 889), and it was unlawful and unconstitutional for the monitor to collaborate with plaintiffs and support their opposition, even if he

disagreed with Apple's arguments and testimony. "[T]he appropriate course would have been simply to refuse to accept any *ex parte* communications." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995).

Moreover, there were numerous methods available to the monitor to report to the court without affirmatively supporting plaintiffs and testifying against Apple. The monitor could have given his own neutral version of the facts in a report directly to the district court without collaborating with Apple's litigation adversaries, or he could have waited for the district court to request such a report. BlueBr.36-37. Plaintiffs offer no reason why the only option for the monitor was to collaborate with plaintiffs and testify on behalf of plaintiffs in support of their opposition to Apple's motion.

III. The Monitor's Expansion of the Monitorship Violates Rule 53 and the Separation of Powers

Plaintiffs agree that the monitor is an "agent of the court" (RedBr.29), and nowhere suggest that a monitor may be vested with authority beyond the limits of Article III or Rule 53. This acknowledgment compels reversal here, because the monitor has engaged in activities that far exceed the proper role of a district court. *See Cobell v. Norton*, 334 F.3d 1128, 1143 (D.C. Cir. 2003).

A. The Monitor's Conduct Exceeds the Permissible Scope of Judicial Activity

Plaintiffs dedicate most of their brief to defending the terms of the injunction as written, but they ignore the actual scope of the monitor's investigation, which was fully endorsed by the district court. Because the monitor's *actual conduct* included "wide-ranging extrajudicial" activities that made him "something like a party himself," the monitorship, as applied, violates Rule 53 and the separation of powers. *Cobell*, 334 F.3d at 1142.

Plaintiffs point out that the terms of the injunction limit the monitor's conduct to "evaluat[ing] only Apple's antitrust training and compliance policies and procedures," rather than its "compliance with the antitrust laws" or "the Injunction generally." RedBr.43. And they distinguish this supposedly circumscribed power from that wielded by the monitor in *Cobell*, noting that in *Cobell* the monitor had the authority to "'monitor and review'" all of the defendant's "'trust reform activities,'" including "'any ... matter [he] deem[ed] pertinent to trust reform.'" RedBr.43 (quoting *Cobell*, 334 F.3d at 1143).

But this retreat to the terms of the injunction ignores the nature of Apple's appeal, which, as discussed above (*supra* pp. 3-6) does not challenge only the injunction's terms, but rather the monitorship as applied and the district court's January 16, 2014 order, which expanded the scope of what the monitor is permitted to do. As Apple explained repeatedly in the opening brief, the monitor "t[ook] on

functions never authorized in the final judgment that clearly contravene his authority (or the district court's) under the separation of powers and Rule 53." BlueBr.33; *see also supra* pp. 3-6, 13-16. On the monitor's *conduct*, affirmed by the district court, plaintiffs have very little to say.

The monitor from the date of his appointment began demanding repeated, high-level interviews with Apple personnel that had little or nothing to do with the company's antitrust compliance and training policies and programs. Dkt417.3. He asked the subjects of his interviews to discuss purported antitrust "problems" that bear no relation to e-books or this litigation, and announced his intention to "crawl into [the] company" and "take down barriers" to his access. Dkt430¶¶15, 16. Under the district court's construction of the injunction, the monitor can seek information from third parties without ever notifying Apple. *See* BlueBr.37. Plaintiffs do not argue that a district judge could engage in this sort of an investigation, and that silence is dispositive here.

Plaintiffs' response misstates key facts about the monitor's investigation. Their assertion that Apple "did not identify any specific 'irrelevant' interview" (RedBr.39-40) before the district court is false. Apple has repeatedly objected to the monitor's blanket demands to interview the entire board and executive team, including former Vice President Al Gore, who is a director but who has no direct involvement in the company's antitrust compliance practices, and Sir Jonathan Ive,

Apple's lead designer. *See* Dkt417.3; No. 14-60, Dkt10.5-6. Moreover, the district court has explicitly confirmed that the monitor—not Apple or the court—is authorized to determine and demand the materials that he needs. *See* Dkt447.2 (Apple may not "withhold a document requested by the Monitor on the ground that ... [the] request is not 'consistent with the scope of [the Monitor's] mandate"). Plaintiffs' assertion that the monitor may only "request" documents and interviews is thus misleading: Even if the monitor must phrase his demands as "requests," the district court has *ordered* Apple to comply with them.

As plaintiffs do not dispute, the monitor has repeatedly sought interviews having nothing whatsoever to do with reporting on Apple's antitrust compliance policy and training program. Dkt417.17. Apple was not obligated to present the monitor with its compliance and training programs until 90 days after the monitor's appointment (Dkt374¶VI.C), but the monitor "pressed for immediate interviews with the very top executives at the company, such as CEO Tim Cook" (Dkt417.3). These requests were "premature, not authorized by the Final Judgment, … disruptive to Apple's business operations [and] directly contrary to Judge Cote's intent." Dkt417.3 (internal quotation marks omitted). Plaintiffs' response is again to simply recite the terms of the injunction, which specify that the "Monitor may only request interviews and documents 'in connection with the exercise of his … responsibilities.'" RedBr.39 (quoting Dkt374¶VI.G). But that

restriction is meaningless when implemented by a monitor who—with the district court's approval—views his "responsibilities" to include "crawl[ing] into [the] company" to evaluate Apple's "tone" and "culture." BlueBr.28 (internal quotation marks omitted).

Pursuant to the district court's order, the monitor has sole effective control over the scope of the monitorship because much of his activity is kept secret from Apple. Plaintiffs nowhere respond to Apple's argument that the monitor has conducted interviews with third parties or suggest that he is prevented from obtaining documents or other information from entities other than Apple. *See* BlueBr.28-29. Plaintiffs say that the monitor may "interview Apple personnel only … with counsel present" (RedBr.39), but that applies only to the *Apple* witnesses the monitor interviews. Apple does not know what other interviews are taking place, and therefore does not have counsel present, cannot object to the scope of the questioning, and has no way of knowing what evidence is being gathered against it or provided to plaintiffs.

Plaintiffs respond that "if Apple believed that the monitor could obtain otherwise unavailable information from a third party to share with the court ... Apple could have asked the district court to compel disclosure of such information." RedBr.46. But Apple does not know what "otherwise unavailable information from a third party" the monitor has sought or whether that information

falls within the permissible scope of the monitor's investigation. And plaintiffs ignore the fundamental problem with the monitor's conduct: Because the monitor is an "agent" of the court (RedBr.29), it is manifestly inappropriate for him to gather and obtain information without Apple's complete knowledge of what he has obtained. It would be beyond the pale for a judge to acquire or rely on—let alone seek out—secret evidence that is never made available to one of the parties before it. But that is precisely what the monitor has done here.

Plaintiffs do not deny that the monitor has obtained personal knowledge of the dispute; they assert only that this knowledge was not "extrajudicial" because it was acquired through "attending to the task at hand" and was "'part of the performance of his prescribed duty.'" *Id.* (quoting *Yonkers*, 946 F.2d at 184). But *ex parte* communications are by definition "extrajudicial," because information received *ex parte* "can be neither accurately stated nor fully tested." *In re Edgar*, 93 F.3d 256, 259 (7th Cir. 1996). The Department of Justice made this precise argument in *Cobell*. Appellants' Br., *Cobell*, 334 F.3d 1128 (No. 02-5374), 2003 WL 25585726. The monitor's *ex parte* communications with plaintiffs and the district court, or secret and unreported interviews with third parties, are not part of his legitimate "task at hand" or "prescribed duty," and his acquisition of information in the course of those extrajudicial activities requires his disqualification. *See* 28 U.S.C. § 455(b)(1) (disqualification mandatory where

judge has "personal knowledge of disputed evidentiary facts concerning the proceeding").

Moreover, plaintiffs are wrong that "the Monitor has not demonstrated a settled opinion about what Apple should and should not do to comply with the Injunction." RedBr.32 (citation and internal quotation marks omitted). In fact, his declaration was riddled with just such opinions—for example, he made clear his expectation that Apple would start scheduling meetings with him "within days or at most two weeks" of his appointment, and that the "best way to address" purported fears about the monitor's role was to "have [the monitor] speak with the people who are most fearful." Dkt424¶16. The monitor openly acknowledged that his approach to Apple was motivated by his conviction that the company and its leaders had violated the law, notwithstanding that Apple's merits appeal was pending in this Court. Dkt424¶17. And when Apple challenged the monitor's demand for interviews with Apple executives, the monitor pointed to his *ex parte* communications with the district judge as the basis for his expansive view of the monitorship. Dkt419-2.20.

In short, the monitor has expanded his role and conducted exactly the "wide-ranging, extrajudicial" investigation that *Cobell* flatly forbade. 334 F.3d at 1142. Plaintiffs' attempts to downplay the undisputed facts surrounding the monitorship

cannot obscure the fact that the monitor has acted—with the district court's blessing—in ways that would be patently inappropriate for a district judge.

B. Plaintiffs' Distortions of the Caselaw Do Not Support the Monitor's Conduct

Plaintiffs' attempts to distinguish *Cobell* and distort the other caselaw cannot overcome the established principle that the monitor, as an agent of the district court, may not act in ways that are forbidden to the court.

1. The D.C. Circuit's decision in *Cobell* is directly on point here and compels reversal. Plaintiffs' attempt to distinguish *Cobell* rests on a misinterpretation of the *Cobell* opinion that the court itself explicitly rejected.

Cobell held unanimously that it was "impermissible" for the district court to "invest the Court Monitor with wide-ranging extrajudicial duties" over the objection of the monitored party. 334 F.3d at 1142. Just like the monitor here, the monitor in *Cobell*, "instead of resolving disputes brought to him by the parties, ... became something like a party himself." *Id.* But this "investigative, quasi-inquisitorial, quasi-prosecutorial role" is "unknown to our adversarial legal system": Absent consent of the parties, "the district court must confine itself (and its agents) to its accustomed judicial role." *Id.*

Plaintiffs ignore *Cobell*'s holding and its clear reasoning, and argue that the *only* basis for the D.C. Circuit's decision was that the monitorship intruded on the

affairs of the executive branch—a concern that "Apple, a private company," supposedly cannot raise. RedBr.42.

This reading of *Cobell* is simply wrong. The *Cobell* court acknowledged that special considerations may arise when a "federal court authoriz[es] its agent to interfere with the affairs of another branch of the federal government," but "[p]utting aside" that question, it based its separation of powers holding on the fact that the monitor had impermissibly engaged in extrajudicial conduct. 334 F.3d at 1142.

Plaintiffs claim that the *Cobell* court actually "put aside" the distinction between a monitorship that intrudes on a state, rather than federal, agency (RedBr.51), but a simple reading of the paragraph they (selectively) quote reveals this interpretation to be baseless. The court opened that paragraph by reference to "the practice of a federal district court appointing a special master pursuant to Rule 53 to supervise implementation of a court order, especially"—but not exclusively—"a remedial order requiring major structural reform of a state institution." *Cobell*, 334 F.3d at 1142. And regardless of any special factors affecting "the propriety of a federal court authorizing its agent to interfere with the affairs of another branch of the federal government," the court held that the extrajudicial, investigative monitorship in the case before it went "far beyond the practice that has grown up under Rule 53." *Id.* The court thus explicitly

recognized that its analysis applied to monitorships generally and did not depend on the fact that the monitored entity was a federal agency.

The fundamental problem with plaintiffs' argument is that it rests on a conception of the separation of powers concerned only with *encroachment* by one branch of government on another branch, rather than a single branch's *aggrandizement* of its authority beyond its constitutional limits. The constitutional separation of powers seeks to "assure, as nearly as possible, that each Branch of government w[ill] confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Accordingly, whether or not the judiciary's interpretation of its authority "encroaches" on the executive or the legislature, judicial action violates the separation of powers if it exceeds the scope of Article III. *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (the "concern of encroachment *and aggrandizement* … has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power'") (emphasis added) (quoting *Chadha*, 462 U.S. at 951); *Muskrat v. United States*, 219 U.S. 346, 355 (1911) ("The power conferred on [federal courts] is exclusively judicial, and [they] cannot be required or authorized to exercise any other") (internal quotation marks omitted); *see, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 590 (1949).

The *expansion* of the monitor's authority beyond the limits of Article III was the basis for the *Cobell* court's decision, and it applies squarely here.

Moreover, in *United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009), the D.C. Circuit explicitly recognized that *Cobell* "held that the district court lacked authority to appoint a monitor charged with 'wide-ranging extrajudicial duties'" and applied that principle to affirm the district court's refusal to appoint a monitor to investigate a *private company*. *Id*. at 1149-50. Contrary to plaintiffs' assertion (RedBr.53), the *Philip Morris* court's application of *Cobell* to the facts before it confirms that the monitorship of a private company implicates the separation of powers.

Plaintiffs' other attempts to distinguish *Cobell* also fail. Plaintiffs argue that the "government's objection to the monitorship" in *Cobell* "was not based on Rule 53." RedBr.42. But the court specifically identified Rule 53 as a reason for reversal—because the monitorship extended "far beyond the practice that has grown up under Rule 53." *Cobell*, 334 F.3d at 1142. Plaintiffs also claim that the monitor in *Cobell* had much broader powers than the monitor here, because he was authorized to monitor and review trust reform activities and could largely determine the scope of his own authority. But as discussed above (*supra* pp. 3-6, 13-16, 19-23), this is really no distinction at all: Although the monitorship's scope was defined narrowly in the injunction, the monitor, with the support of the district

court, has expanded the scope of his authority and gutted the limits initially imposed by the court.

Cobell reflects a core principle that plaintiffs do not dispute, and which compels reversal here: Where a monitor is appointed over a party's objection, the monitor may not engage in extrajudicial conduct that could not be engaged in by the district court. Because the monitor's conduct here would be plainly inappropriate if undertaken by a district judge, the monitorship violates Rule 53 and the separation of powers. *Cobell*, 334 F.3d at 1142; *see also La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957); *Reed v. Rhodes*, 691 F.2d 266, 269 (6th Cir. 1982).

2. Plaintiffs' supposedly competing authorities—the Fifth Circuit's decision in *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part on reh'g*, 688 F.2d 266 (5th Cir. 1982), and the Supreme Court's decision in *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421 (1986)—do not even address the separation of powers and Rule 53 arguments Apple makes here, and in fact support Apple.

Plaintiffs admit that "*Ruiz* does not address the federal separation of powers." RedBr.52. Nor did the court in *Ruiz* consider the argument that Rule 53 independently bars a court from delegating power to its agent that the court itself does not possess; the only Rule 53 arguments raised there turned on the

"exceptional condition" requirement of former Rule 53(b), which is not at issue in this case. 679 F.2d at 1160-61. In fact, *Ruiz* was concerned that the master exercised *too much* judicial authority (as opposed to *extrajudicial* authority) by "convert[ing] the remedial process into a surrogate forum for new § 1983 actions" and becoming "a roving federal district court." *Id.* at 1162.

On the master's exercise of judicial power, the Fifth Circuit's decision only supports Apple. The Court held that the special master could *not* submit reports to the district court that were "based upon his own observations and investigations in the absence of a formal hearing before him." *Ruiz*, 679 F.2d at 1162-63. As plaintiffs acknowledge (RedBr.40-41), the Fifth Circuit circumscribed an overbroad grant of powers to the monitor, imposing a real limitation on the monitorship's scope and emphasizing the importance of conducting hearings on the record (*see Ruiz*, 679 F. 2d at 1162-63).

Plaintiffs' discussion of *Sheet Metal Workers* suffers from a similar defect. The Supreme Court in that case did not consider an argument that the monitor's investigative conduct exceeded the bounds of the judicial power. The sole objection to the administrator appointed to oversee the membership activities of the labor union in that case was that he "unjustifiabl[y] interfere[d] with [the union's] statutory right to self-governance." *Sheet Metal Workers*, 478 U.S. at 481-82. The case is inapposite here.

Plaintiffs have pointed to no authority considering and rejecting a separation of powers or Rule 53 argument based on a special master's or monitor's performance of extrajudicial functions that could not legitimately be performed by a district judge. *Cobell* is the only appellate case to consider such a challenge—and it resolved the issue decisively in favor of Apple's position here.

CONCLUSION

This Court should reverse and order the district court to vacate the monitorship.

Respectfully submitted this 28th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 6,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

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