14-60

United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellee-Respondent,

v.

APPLE INC.,

Appellant-Movant.

On Appeal from the United States District Court
for the Southern District of New York
Nos. 12-02826 & 12-03394 (DLC)

REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL

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INTRODUCTION

The monitorship the district court imposed on Apple is unprecedented, impermissible, and unconstitutional. The court authorized the monitor to exercise authority that is not "judicial"; to engage in *ex parte* discussions with plaintiffs, even while the state plaintiffs are seeking hundreds of millions of dollars from Apple in another proceeding; to incur significant and unrecoverable fees that Apple is supposed to pay; and to interview anyone at Apple and demand any Apple documents. The monitor, for his part, has abandoned any semblance of objectivity.

Plaintiffs fail to demonstrate why a stay should not be granted pending appeal to allow this Court the opportunity to address all these issues on the merits, as well as the underlying antitrust liability issues, and to afford Apple a remedy if it prevails. They have no answer to Apple's separation-of-powers, due-process, and other challenges to the monitor's roving authority or his lack of impartiality. And their waiver arguments regarding this ongoing injury are baseless.

Absent a stay, Apple will effectively be unable to obtain *any* relief on appeal, because *as plaintiffs nowhere dispute*, "but for the grant of [a stay], there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). Accordingly, this Court should stay the monitorship while Apple's appeals are heard.

ARGUMENT

I. Apple Is Likely to Succeed on the Merits

1. Plaintiffs do not dispute that the only authority the district court could constitutionally delegate to the monitor is the performance of "'judicial duties.'" Opp. 9 (quoting *In re Peterson*, 253 U.S. 300, 312–13 (1920)). Indeed, the "auditor" appointed in *In re Peterson* simply held preliminary hearings to "simplify[] the issues" in a complex contract action before it was submitted to the jury (253 U.S. at 304)—a traditional judicial function.

But plaintiffs do not even argue that a *court* could demand repeated interviews with Apple's entire executive team and Board without the other party present, ask probing questions about topics such as the company's general compliance issues, send letters to corporate officers expressing its views about the company, and turn over evidence of any conduct it thinks might be unlawful to the plaintiffs. Plaintiffs ignore all the record evidence of the monitor's stated objective, recently sanctioned by the district court, to "crawl into [the] company," and persuade Apple to "take down barriers" to his access so he can explore the company's "tone" and "culture." Ex. JJ ¶ 15; Ex. DD at 1; Ex. EE ¶ 16. These are not "judicial duties" or a narrow review of Apple's compliance and training programs, as the district court initially ordered, but an intrusive, disproportionate investigation beyond the scope of the court's authority. Accordingly, the monitorship the court has imposed ex-

ceeds its authority under Rule 53 and violates the separation of powers.

This is precisely what the court held in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), reversing a monitor's authority to "engage in *ex parte* communications" and demand "access to any ... offices or employees to gather information," especially where the defendant was required "to pay his hourly fees and expenses." *Id.* at 1141. Such a broad grant of powers exceeded the court's inherent authority and went "far beyond the practice that has grown up under Rule 53." *Id*. at 1143. It was not simply the monitor's "'license to intrude into the internal affairs' of an executive branch agency" (Opp. 13 (quoting *Cobell*, 334 F.3d at 1142–43)) that warranted reversal, but the monitor's "quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system" (*Cobell*, 334 F.3d at 1142).[1]

In *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 482 (1986), the monitor's mandate was strictly limited to ensuring compliance with a specific aspect of the court's order; the monitor was not authorized to conduct an amorphous and intrusive investigation. Likewise, in *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), the court appointed a special master with indisputably *judicial* powers, based on the court's assumption that the master, as "the court's agent, … can and should perform his duties *objectively*." *Id.* at 1161–62 (emphasis

[1] This Court will review these legal and constitutional issues *de novo*. *United States v. Hester*, 589 F.3d 86, 90 (2d Cir. 2009).

added). Indeed, the court *struck down* as unconstitutional a provision allowing the monitor to submit reports to the district court without a hearing. *Id*. at 1162–63.

2. Even if the monitorship here were permissible, the monitor should have been disqualified because, as even plaintiffs' authorities recognize, monitors—as judicial agents—must act "objectively." *Ruiz*, 679 F.2d at 1162. Here, the monitor's *ex parte* discussions with plaintiffs, expansive efforts to interview Apple personnel, letters to Apple's CEO and Board expressing negative views about the company based on extrajudicial information, unprecedented and excessive fees, *and testimony against Apple* in these proceedings show that he is not objective.

The problem is not, as plaintiffs claim (Opp. 15), simply that the monitor responded to Apple's objections. Rather, it is that he coordinated a response with plaintiffs, and used it to cast aspersions on Apple. The monitor is supposed be a neutral judicial officer, not a witness or "'advocate' for the plaintiffs." *Cobell*, 334 F.3d at 1143 (citation omitted). He had other options: He might have asked the district court to be heard or scheduled a hearing and conferred with both parties about how to proceed. Instead, he conferred only with plaintiffs and filed a declaration on their behalf contesting facts based on his personal knowledge acquired outside the adversarial process. The court then heavily relied on that declaration—testimony from its surrogate—in ruling against Apple. Ex. UU at 15–29, 53–54.

Plaintiffs fault Apple for not "identify[ing] any 'extrajudicial information'

the monitor obtained during the[] discussions" plaintiffs acknowledge they have had with the monitor *ex parte*. Opp. 15–16. But that is precisely the problem. Apple does not know how many times the monitor has conferred, *ex parte* and off the record, with plaintiffs; Apple does not know what they discussed; and Apple was not permitted to respond to or correct any misstatements. Moreover, *everything* to which the monitor testified was "extrajudicial," because even if it was "acquired … by attending to the task at hand" (Opp. 15 (citing *SEC v. Razmilovic*, 738 F.3d 14, 29–30 (2d Cir. 2013)), the "task at hand" *was* "extrajudicial." Unlike the "judicial rulings" of the district court in *Razmilovic* (738 F.3d at 29), the interviews the monitor has been conducting are not part of the judicial role.

3. Finally, plaintiffs' focus on the district court's underlying liability finding (Opp. 1, 3, 19) just begs the question: The whole point of Apple's stay request is that because Apple is likely to prevail on appeal—including on the merits of the price-fixing findings—it should not suffer irreparable injury while its appeal is pending. The agency agreements plaintiffs challenge enabled Apple's *entry* into a market dominated by a monopolist, and led to *increased* output of e-books and an overall *decrease* in the price of trade e-books—the hallmarks of competition. The district court found that the actual provisions of the agreements were not themselves unlawful. Ex. B at 132. The court also found that "having the creativity and commitment of Apple invested in the enhancement of a product like the iBookstore

is extremely beneficial to consumers and competition" (*id.*at 156 n.69), and did *not* find that "Apple itself desired higher e-book prices than those offered at Amazon" (*id*. at 151 n.68). As Apple will demonstrate in its soon-to-be-filed opening brief on the merits in Case No. 13-3741, its entry into the e-books market marked the *beginning*, not the *end* of competition and did not violate the antitrust laws.

II. Apple Has Preserved All of Its Arguments on Appeal

Apple from the very beginning opposed the monitorship on the grounds that it was "plainly punitive" and provided a "roving mandate to parse all of Apple's business conduct," which "flies in the face of law and practice." Ex. C at 9–10. The court imposed the monitor over Apple's objection, recognizing that the parties "preserv[ed] all of the objections they've all made before …." Pls. Ex. 2 at 22:7–9.

Apple objected to the scope of the monitorship at the first meeting with the monitor on October 22. Ex. JJ ¶ 22; *see also* Exs. K, BB. Plaintiffs fault Apple for not having asserted Rule 53 in objecting to the monitorship initially (Opp. at 10–11), but neither plaintiffs nor the district court relied on or even cited Rule 53 as a basis for the court's authority. The first time Rule 53 was mentioned was in the district court's November 21 order proposing amendments to the injunction (Ex. BBB at 1); and in its November 27 response, Apple argued that Rule 53 could not support the monitorship (Ex. VV at 5–10). And as plaintiffs conceded below (Ex. DD at 16 n.6) but ignore on appeal, Apple's separation-of-powers challenges can-

not be waived. *See CFTC v. Schor*, 478 U.S. 833, 850–51 (1986).

In its November 27 objections to the proposed amendments, Apple argued that the monitor had "already exceeded in multiple ways" his mandate and that his "unreasonable investigation to date ha[d] been anything but 'judicial,'" which violated Rule 53, due process, and the separation of powers. *See* Ex. VV at 1–2; *see also id.* at 2 (it is "unconstitutional for Apple to be investigated by an individual whose personal financial interest is for as broad and lengthy an investigation as possible"). The district court did not enter the proposed amendments, but it ignored Apple's remaining objections.

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

Apple objected yet again on January 7, 2014, in both its reply brief and in a letter to the district court, and also sought disqualification of the monitor based on his filing a declaration against Apple. Exs. FF, GG; Pls.' Ex. 3 at 21:15–17. Apple included detailed objections to the monitor's most recent conduct, which included "[h]is submission of a lengthy declaration" testifying about "disputed evidentiary facts in support of plaintiffs' opposition to Apple's motion for a stay"—

behavior that was "grossly inappropriate" for a judicial officer. Ex. GG at 3–4, 7.

Apple did not "skip[] the district court's procedures" for objecting. Opp. 6. On the contrary, Apple notified plaintiffs of its objections repeatedly, beginning on October 31. *See* Exs. H, FF, VV. The court's statement that "none of [the monitor's actions or Apple's complaints] was brought to [its] attention" for "months" (Pls.' Ex. 3 at 42:8–12), is incorrect; Apple filed detailed objections with the Court beginning in November (*see* Exs. H, BB, FF, VV). Apple has also met and conferred extensively with plaintiffs and the monitor (*e.g.*, Ex. JJ ¶ 12; Ex. HH ¶¶ 4–7) and has offered detailed proposals to salvage the monitorship (Ex. MM). Despite all of these efforts, the court erected a new series of arbitrary procedural hurdles to resolution of Apple's objections, not found in the injunction, which will further insulate the monitor's conduct from scrutiny. Pl.'s Ex. 3 at 49:12-50:8. These growing procedural hurdles further justify a stay, as they will prevent Apple from obtaining relief from the monitorship and will aggravate the irreparable injury.

Finally, unlike a simple monetary judgment, Apple's appeal is from both the terms of the injunction and how it has been applied by the district court and monitor. *See*, *e.g.*, *McKusick v. City of Melbourne*, 96 F.3d 478, 486–87 (11th Cir. 1996); *Samnorwood Indep. Sch. Dist. v. Tex. Educ. Agency*, 533 F.3d 258, 264 (5th Cir. 2008). When it entered the injunction, the court sought to assuage Apple's concerns by explaining that the injunction was "to rest as lightly as possible on the

way Apple runs its business." Pl.'s Ex. 2 at 8:25–9:1. But the district court's 64-page January 16 opinion fully endorsing the monitor's intrusive mandate and non-judicial activities going forward, and overruling all of Apple's objections on the merits, makes clear that the monitorship is anything but "light[]." Plaintiffs' argument that Apple should have foreseen that the monitor would claim authority to interview all of Apple's executives and Board members multiple times, charge over $1,100 per hour with an unlimited budget,[2] and testify on behalf of plaintiffs against Apple in this case is groundless.

III. Apple Will Suffer Irreparable Harm Absent a Stay

Plaintiffs contend that "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." Opp. 7. That is false: The district court's disqualification ruling is appealable (*see United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991)), and while the appeal is pending, Apple will be irreparably harmed by the injunction's monitorship provision. *See Cobell*, 334 F.3d at 1139 ("the injury suffered by a party required to complete judicial proceedings overseen by" an officer who one party seeks to disqualify "is by its nature irreparable").

The time that Apple personnel—including executives and Board members—

[2] Plaintiffs' authorities indicate that a "typical rate" for a monitor is "$200 per hour." Thomas E. Willging et al., *Special Masters' Incidence and Activity*, Federal Judicial Center, 6-7 (2000).

spend preparing for and participating in interviews with the monitor is unrecoverable, as are the excessive fees Apple is required to pay the monitor for its investigation. The district court's recent decision overruling Apple's objections makes the likelihood of future harm even greater, as the court fully endorsed the monitor's broad view of his mandate. Apple should not be required to suffer irreparable intrusions and disruptions and unrecoverable costs while its appeals are pending.

IV. The Public Interest Warrants a Stay

Plaintiffs do not articulate any public interest that the monitor is necessary to protect. The district court found that "Apple is one of America's most admired, dynamic, and successful technology companies." Ex. B at 26. And Apple is fully committed to compliance with the antitrust laws and the Final Judgment. As a result, the agreements at issue have been renegotiated. Ex. II ¶ 3. Apple hired a new antitrust compliance officer and has expended substantial resources to enhance and strengthen its antitrust compliance programs and train its employees on the requirements of the Final Judgment. Ex. HH ¶¶ 2–3. The only provision that Apple seeks to stay is the monitorship, and plaintiffs identify no public interest that would be harmed by staying the monitorship while Apple's appeals are heard.

CONCLUSION

The Court should stay section VI of the injunction pending Apple's appeals.

Dated: January 31, 2014 /s/ Theodore J. Boutrous, Jr.

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