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

UNITED STATES OF AMERICA,

Plaintiff,

v. 12 CV 2826 (DLC)(MHD)

APPLE, INC., et al,

Defendants.

----------x

New York, N.Y.
May 9, 2014
12:34 p.m.

Before:

HON. MICHAEL H. DOLINGER,

Magistrate Judge

APPEARANCES

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Attorneys for Plaintiff United States
LAWRENCE E. BUTERMAN

NEW YORK STATE DEPARTMENT OF LAW
Attorneys for Plaintiff States
ROBERT HUBBARD

SIMPSON THACHER & BARTLETT LLP
Attorneys for Defendant Apple, Inc.
MATTHEW J. REILLY
SARA Y. RAZI

GIBSON, DUNN & CRUTCHER, LLP
Attorneys for Defendant Apple, Inc.
LAWRENCE ZWEIFACH

ALSO PRESENT:
MICHAEL BROMWICH, Monitor
DOUGLAS VETTER, Apple, Inc.

(In open court)

THE COURT: Please be seated. Greetings, all.

We had a communication I believe earlier this week that there was a desire for a get-together and that was followed by some letters from the Department of Justice, from Simpson Thacher, and from the Bromwich group discussing, along with the company exhibits, discussing some unhappy thoughts that apparently Apple is having with the way the monitor is carrying on his tasks. So in deference to the parties' wish for a conference and so we are here.

First then, just as a housekeeping matter, while I certainly appreciate being gifted not merely with the articulate letters from various parties, but also with the substantial number of exhibits, it would behoove counsel before they go and fax said exhibits to look at my chamber's rule which has some page limits on faxing. We try to be flexible. If a party or other interested person wishes to exceed the limit, then a simple way of dealing with that is to call chambers and ask permission to do so. So, again, this is for future reference.

In any case, I understand that Apple is, in effect, the moving party asking for certain rulings from the Court. And being aware that I've read the papers, I'm more than happy-- if you want to add anything to what you've got.

MR. REILLY: Thank you, your Honor. Matt Reilly,

Simpson Thacher, on behalf of Apple.

So I'd like to address -- and I do appreciate that you read the papers that we submitted and probably the exhibits that were too long, and we apologize for that.

THE COURT: That's quite all right. There's a certain flow to them, a certain rhythm. That's okay.

MR. REILLY: I want to address some of the allegations or statements made in the DOJ letter just to make sure that you hear from us on some of those issues.

So there are several things in there. The first was that Apple has taken its time over the last several months since the final judgment was entered into not complying with the final judgment. Rather than revising and enhancing their antitrust policies and procedures, they have been trying to obstruct or challenge the monitor.

In fact, since the final judgment was entered into, Apple has dedicated hundreds of hours internally and also with outside counsel putting together world-class antitrust training policies and procedures. Mr. Bromwich has seen the rollout plan that will talk about antitrust chapter in an eBook, live training tailored for various groups. It talks about antitrust web page, online antitrust training. All of these have been added or enhanced since the final judgment.

Apple takes its obligations under the final judgment very seriously. There has never been an allegation, even a

sense that Apple has not been doing all this work; that even though the judgment requires comprehensive and effective antitrust training and procedures and compliance, they will have world-class antitrust training and compliance.

It seems every time we exercise our rights to object under the final judgment, which I think is fairly clear in the final judgment, and also was stated by the DOJ appellate attorney in the Second Circuit hearing, that it really ends up getting accused of being obstreperous, of not cooperating, of being obstructionist. It's just not the case.

Mr. Bromwich and a team of two attorneys just came book from Cupertino about two weeks ago, interviewed ten individuals, including Tim Cook, the CEO, Eddie Cue on the executive team. He has now interviewed 22 witnesses. He's received 1,100 pages of documents and an eBook that's not included in that on business conduct.

I've sat through all these interviews and I've read all the materials. Just based solely on me sitting through the interviews and the materials, I now have a full understanding of what antitrust risks Apple faces, how they get their training, what lawyers are embedded in their group, who the antitrust in-house folks are that they can go to on a regular basis and do, what the training looks like, how comprehensive the training is. Everything. After this last visit I had a perfect understanding, I've got all access that Mr. Bromwich

has.

And so really the two issues for you today -- and I know you read the letter. The first is our plan going forward. Shortly after that visit at Cupertino, a three-day visit, it was expressed to us in our meeting that he wanted to interview a lot more people and he wanted to watch some training.

We have agreed under the rollout over the next several months to give him the materials as they finalize, send him a videotape, with two camera angles of it, of iTunes' antitrust training. We'll continue to communicate with him and do that.

Our sense is that so much has been done. This injunction has a very limited scope. The DOJ admitted, said it's very limited in the Court of Appeals. Judge Cote said the injunction should sit lightly on Apple. And to date the amount of money that has been spent, over $700,000 for four and a half months, you cannot fairly say that is financial intimidation as the DOJ did in their letter.

So we are cooperating with them. We will continue to cooperate with the monitor. We need some guidance about what is appropriate. We have the right to object, we're doing that today, and it doesn't mean that we haven't been cooperating fully with the monitor to date.

Let me just say one thing about the report and then I'll sit down because I know you read it. The DOJ has taken the position that we have no right to say what's in the report.

We have no say in what the independent monitor wants to write in their report. That may be true, but the final judgment says exactly what should be in the report. The final judgment says it should set forth the monitor's internal -- assessment of Apple's internal antitrust compliance policies, procedures and training --

THE COURT: You are quoting, by the way, from which paragraph?

MR. REILLY: VI.C, your Honor, of the ECM's report. I'm sorry, VI.C, as in cat -- I can't do Roman numerals -- "setting forth his or her assessment of Apple's internal antitrust compliance policies, procedures and training. And if appropriate, making recommendations reasonably designed to improve Apple's policies, procedures, and training for ensuring antitrust compliance."

Mr. Bromwich submitted a declaration to Judge Cote that rehashed the dispute-- that talked about the dispute of Apple's corporation for the first couple of months of the monitorship, and the report is supposed to cover these materials.

Half of the report was all basically a rehash of that declaration that he submitted to Judge Cote. He billed for that declaration. He's billing for this portion of the report. We respectfully suggest, your Honor, and claim that the first half of his report that talks about the witness he wants to

talk about, his appointment, Judge Cote's findings from the bench, all that stuff is not consistent with what the final judgment says the report should have.

So we asked-- we objected to the invoice for March and so that's before you today as well as the work plan over the next several months that we would like your guidance on.

Thank you.

THE COURT: Can I ask you one ministerial question?

MR. REILLY: Yes.

THE COURT: I have looked at the invoice.

MR. REILLY: Yes.

THE COURT: And I think-- oh, I'm sorry, I had it now in front of me, the corrected one. Okay. Not a problem.

MR. REILLY: Thank you.

MR. BUTERMAN: Lawrence Buterman for the United States, your Honor, on behalf of the United States and the plaintiff states.

I want to begin by just picking up on something that Mr. Reilly said. When discussing the tasks that Mr. Bromwich has proposed to engage in going forward, Mr. Reilly said "our sense is that these are not the best use of time." "Our sense."

And the reality is, your Honor, that what Mr. Reilly thinks is the best use of Apple's time at this juncture is flatly irrelevant. Apple lost that right. Apple fought hard

to keep a monitor out. And we understand why Apple didn't want a monitor, because it didn't want somebody from the outside to come into the company and work with them to reform their antitrust policies, to reform their training, to do interviews in order to gain an understanding of how the company interacts. They fought hard and they lost.

And now, now that they've lost, your Honor, unfortunately what they're doing is they're using every tool in their arsenal in order to keep Mr. Bromwich from performing his duties. And, frankly, we don't object and we don't use the word "obstructionist" every single time Apple raises an issue.

In fact, I'd like to say that the relationship between the plaintiffs and Mr. Reilly and Mr. Vetter I think over the last couple of months has been very, very productive. It began at the conference before your Honor two months ago. And subsequent to that we had a number of very positive conversations as a result of which agreements were reached, but we have a real problem with what's going on now.

Financial intimidation is when Apple refuses to pay because it doesn't like what's going on. And you can slice it any way you want. Apple doesn't like the first half of the report that Mr. Bromwich put together. Coincidentally that's the half of the report where it relays all of the activities that Apple engaged in over several months, which Judge Cote said back in January were aimed at slowing down, if not

stonewalling, the final judgment process.

Now, the fact that Apple now is embarrassed-- rightly so-- of the conduct that it engaged in in no way means that it doesn't have a place in this formal report here.

Mr. Bromwich's independence is critical here. And Mr. Bromwich put it better than I could. Not Apple, not the Department of Justice, not the plaintiff states, no one has a say into what goes into Mr. Bromwich's report.

Now, frankly, your Honor, I actually hesitate to engage in the substance of whether Mr. Bromwich was correct to put in a statement of facts into his report, which is what we're talking about here. But it's clear that it was totally appropriate for him to do so.

What Mr. Bromwich is tasked to do is to evaluate Apple's antitrust compliance and training protocols and policies. How can the facts surrounding Apple's willingness to work with Mr. Bromwich be irrelevant to that process such that they should be excluded? To the contrary. The fact is that Mr. Bromwich had to put that information in and he had to put it in for a number of reasons, probably most of which was to explain why we are where we are.

In January, when we were before Judge Cote, Mr. Boutrous told Judge Cote that Apple would have its revised antitrust policies done by January 13th.

Your Honor, I don't know the answer. I thought now

that it had been moved to June. However, through Mr. Reilly's letter, I now have some belief that it actually may be later in the summer before those policies are rolled out. The reason for the delay is because Apple has been devoting its time to keeping Mr. Bromwich from doing his job rather than working with Mr. Bromwich.

Now, your Honor, if Apple doesn't want to pay Mr. Reilly 50 percent of his bills because they don't like half of the argument that he makes today, that's their prerogative, but they have no right to say that they're not paying 50 percent of Mr. Bromwich's bills just because they don't like half of the report.

Now, on this issue of these activities that Mr. Reilly in his letter relayed and that he has raised some concerns about, frankly, we're at a little bit of a loss on these. As we pointed out in our letter, these tasks that Mr. Bromwich has indicated he would like to engage in seem to make perfect sense to the United States and to the plaintiff states.

Mr. Bromwich is tasked with working with Apple in order to revise its antitrust training programs. He is asking to see Apple's antitrust training programs. Frankly, if Mr. Bromwich had not made that request, I think that there could be a point where someone would question whether he was doing his job effectively.

And certainly, your Honor, given the history of

documented conduct in this matter and in others, we, frankly, believe that the request to interview the senior executives of the company make complete and utter sense. And, frankly, your Honor, it's specifically provided for in the final judgment itself.

And the last thing I'll say, we appreciate the effort that Mr. Reilly, Ms. Razi, the Simpson firm and Mr. Vetter have put towards working with the monitor in recent months. We're very disappointed at this set of events, but we were pleased with the work that they had done.

However, your Honor, let's not get ahead of ourselves. There's been seven months that this monitorship has been in place. There have been a total of, I believe, 22 people interviewed in those seven months and Apple has produced to the monitor a sum total of 1,100 pages of documents.

We at the United States, at the Department of Justice, we choose our words carefully and we don't use words like "frivolous" unless there's a real reason to use them. And in our letter we note that these objections are frivolous. Your Honor, we stand by that.

And, frankly, at this juncture we agree with Mr. Reilly that there needs to be some guidance from this Court because, frankly, it is the only thing that we believe will get Apple to start complying with the monitorship, to get back to complying with the monitorship.

And because of that, we ask, your Honor, that Apple be ordered to pay its bills in its entirety, to pay them at once. And we've made a request for costs given the nature of the objections that Apple has raised and the total lack of merit that we see in them.

Thank you.

THE COURT: Thank you.

MR. REILLY: Thank you, your Honor.

MR. BROMWICH: I'd like to be heard at some point, your Honor, if I can. I'm happy to go after Mr. Reilly.

THE COURT: Let's exhaust the arguments of the main combatants.

MR. REILLY: It still seems to be the plaintiffs' position that Apple has no say in what the monitor does, people he interviews, documents he receives. We're following strictly the language in the final judgment; that the monitor must act diligently, reasonably, in a cost-effective manner and we have a right to object. And the final judgment also says precisely what should be covered in the final report. And the first half of his report did not pertain and was not relevant to the language in there.

DOJ's position or plaintiffs' position seems to be just pay it, don't object, always say yes, you have no rights there. And the rights that we're talking about for Apple are clearly delineated in the final judgment and were expressed at

the Second Circuit oral argument saying that the monitor can make no demands if Apple disagrees a request, it may object first to the plaintiffs and then to the district court. It's the district court who ultimately determines what documents, if any, are turned over and what interviews, if any, may go forward.

THE COURT: By the way, you were reading from what?

MR. REILLY: It's from the Second Circuit argument on February 4, 2013, page 26-27, last four lines, first four lines.

THE COURT: Whose dep prose were you reading?

MR. REILLY: It was the Department of Justice, appellate attorney Ms. Tessier. That came from the DOJ and we're exercising our right here, your Honor. We have a right, Apple has a right, for the monitor to act diligently, reasonably and cost-effective.

And the 1,100 pages to me is a very impressive amount of papers that pertain to antitrust training compliance. This isn't a toxic oil spill liability case where you expect millions of pages of documents. I don't know any company -- and I do a lot of work with companies on antitrust training compliance -- who has many more materials than that.

The last point is Mr. Buterman is claiming that the delay in the rollout of this world-class antitrust training and compliance program is because of our disputes with the monitor.

It's just not true. They've done a lot of live training already. They're revising materials. They gave draft materials to Mr. Bromwich and his team in March. He gave comments and recommendations. They took on all of those recommendations. They're rolling it out to online training live training. It just takes a lot of time.

They have literally dedicated, as I said, hundreds of internal hours and some Simpson Thacher efforts to develop these world-class programs. Even though the judgment only requires they be comprehensive and objective, these are world class. Mr. Bromwich has had 22 interviews with two board members, three executive team members, several businesspeople.

At some point under diligently, reasonably cost-effective, with this roll-up online in full speed over the next couple of months, we just don't see the need. We don't see the need. We don't think it's reasonable, cost-effective and diligent to have more interviews now going forward. We'll give him the materials. He's not going to be on the shelf for months. We will communicate with him. He can look at the videotape of the live training.

It's just that at some point Apple is exercising their right to say it's not reasonable, diligent and cost-effective and that's why we're here today. It's not personal. It's not frivolous. Apple feels strongly about this. I believe based on the language in the final judgment, they have the right

position here.

THE COURT: Thank you.

MR. BUTERMAN: Your Honor, just a quick last couple of words.

Apple certainly has the right to object and we've never in any way suggested that Apple doesn't have the right to object under the terms of the final judgment consistent with the procedures set forth by the district court. What Apple doesn't have a right to do is to use its threats of nonpayment and its checkbook as a means for accomplishing what it can't do and what it couldn't do in the court.

It has repeatedly raised these type of objections to the scope. They've been dealt with by the district court and they were resolved by the district court. Frankly, we believe that we had resolved them with Apple about a month and a half ago, so we were very surprised to see this letter of May 5th.

Now, the other thing that Apple can't do, and we found very troubling -- and it hasn't been talked about very much today, but it's certainly present in Apple's letter -- is that Apple cannot tell Mr. Bromwich I'm going to pay you 50 percent for your report and, by the way, if you spend any time, a minute of your time, trying to fight me on that, I'm not paying for that either.

It creates a vicious cycle here, your Honor. And we're going to be back here again regardless of the outcome

because Mr. Bromwich has spent time. He's come up to New York for purposes of this hearing. And so Apple can't tell Mr. Bromwich, This is what we want to do, this is what we want you to do, and then effectively try to muzzle him from objecting.

Now, the last point, your Honor, going back to what Mr. Reilly said about the activities, I'd just point out that Mr. Reilly did not say, nor could he say, that any of the activities that he's raised in his letter-- interviews with the board members, interviews with other employees at Apple, review of training programs, review of orientations for new employees, and reviews of certain activities of the antitrust compliance officer-- he can't say that any of those are outside the scope.

The most that Mr. Reilly can say is, Well, collectively we don't think that this is the way that we should go. And I still go back to what I said, your Honor. That's a decision that has to be left to Mr. Bromwich. If Mr. Reilly and Apple has a specific objection to a specific interview because it's outside the scope, they can raise that kind of objection. But, frankly, this sort of blanket "We don't want him to do anything more," that's been dealt with already, it's been rejected, and it should be rejected again.

Thank you.

THE COURT: Okay. Mr. Bromwich.

MR. BROMWICH: Thank you, your Honor. It's good to see you, but truthfully it's not good to be here. We shouldn't be here. We really shouldn't. The right that Apple has to object is under VI.H of the final judgment and it states "any objection by Apple to actions by the external compliance monitor."

We're here in large part not because Apple objects to the fact that we wrote the report. We're commanded specifically to write that report and subsequent reports by the final judgment. They're objecting to our discretionary decisions about what to put in the report. There can be nothing more chilling to someone in my position to have the contents of a report challenged and for payment to be declined because the monitored entity isn't happy with what's in the report.

The fact is that that report was the first time that with our own voice we were able to recount the events that explained what happened during the early months of monitorship.

Mr. Reilly has suggested that was repetitive of some of the things in the declaration, but we weren't parties to the litigation. We did not appear before Judge Cote. We did not appear before the Second Circuit. We were not parties to the litigation. And, indeed, one of Mr. Zweifch's partners in the Second Circuit suggested the appropriate place to lay out the

facts, some of which were in the declaration, was in a report to be filed with the Court.

So that's what we did here. We laid out what we thought was the framework for our work -- which Mr. Reilly has objected to -- the circumstances of beginning our work, the specific things that we accomplished, and then the many obstacles that we faced.

We think that we would have been omitting a significant part of what happened the first few months if we had failed to do that, if we had pretended it away, or if we had minimized it. The fact is that we were only able to offer in about half of the report a substantive review of the antitrust compliance program of Apple because in the face of a Court order which required them to turn over documents by February 26th, we scrambled to get on top of those materials in a time frame that was, frankly, unfair to us. We had to master the materials in a very brief period of time when Apple and the plaintiffs knew that we were determined to file the report, as dictated by the final judgment, no later than April 14th, 2014.

And so it could have been a report that contained nothing except the accounts of the obstacles we faced. And we worked extraordinarily hard to make sure that we had substantive things to say and that a very substantial portion of the report contained those substantive comments and

analysis.

So I don't want to suggest to you that things are all bad. We have had a honeymoon. I hope the honeymoon is not over, but I'm very troubled about the objections to our invoice in particular. Again, in bold letters and italics, the size of the bills are emphasized.

Well, the invoice for March was a large invoice because we were trying to do two very significant and central things: Number one, to master Apple's antitrust compliance program and understand it in order to comment on it substantively in our report; and, number two, we had to write the report, which we have no choice but to do. So that's the reason the invoice was so large.

Now, when I hear complaints about the size of our overall invoices to date, I hear what Apple has to say, but I think it's important for you to know that conservatively at least 25 percent of the fees that we have billed to date have been incurred because of needless skirmishing, responding to needless objections and dealing with challenges to our work that, frankly, should not have been made.

So if Apple wants the bills to go down and stay down, my advice is that they cooperate with us a little more, fight with us a little less, and challenge us a little less. Not to take away their right to object, but I think things would go far more smoothly and things would be handled far more

inexpensively if they were a little bit more careful about the challenges they made.

Finally, on the point of our future activities, we shouldn't be here on that. Those are not ripe for you to decide. We had a single meeting on May 1st where Mr. Reilly had mentioned in a phone call two days earlier that he wanted to come to you to ask for guidance on what should be the scope of our activities going forward.

I suggested that we have an in-person meeting. We had an in-person meeting which has now been characterized as a formal meet-and-confer. It was part of the normal give-and-take between a monitor entity and monitor. I provided my thoughts about what we would like to do next, what I thought was appropriate to do over the next several months, and the next thing I know there are objections filed with respect to future plans that have not been finalized.

Your Honor, we shouldn't be here. We should be able to resolve these disagreements by ourselves. But I do want to say I have a very small staff. I've got three other people working with me, all three of whom are affiliated with other institutions and have other work to do. And the threat of nonpayment is a strong deterrent for me getting them to continue to assist me.

I am not suggesting that that's the goal; I am suggesting that that's the result.

THE COURT: By the way, is there any understanding as to the time frame from the service of an invoice to when payment is due?

MR. BROMWICH: I don't recall. I think it's 30 days, but I'm not sure.

THE COURT: Okay.

MR. BROMWICH: Mr. Reilly, do you know?

MR. REILLY: I do not.

THE COURT: Okay.

MR. BROMWICH: Do you have any other questions, your Honor?

THE COURT: Not at this point.

MR. BROMWICH: Thank you.

MR. REILLY: May I, your Honor?

THE COURT: By all means.

MR. REILLY: When we received Mr. Bromwich's e-mail on Thursday, the whole sense of an independent monitor, as he said, I agree with everything in the plaintiff's letter and of course took an adversarial position against Apple. And of course the plaintiffs and I --

THE COURT: It's a little hard to point the proverbial bony finger of indignation at the monitor for responding to what can only be described as fairly strenuous-- whether justified or not-- accusations about him. That seems, contextually speaking, a little bit unfair to tax him with

taking what you refer to as an adversarial position.

MR. REILLY: That letter by Mr. Bromwich supported every position of the plaintiffs, active plaintiffs. And it's an adversarial proceeding; hopefully respectful, but adversarial. We view that letter as being adversarial. Whether you requested it -- or if you could hear from him today, which you did, in a sense, of course, that cost a lot of money, I'm sure, when we see the invoice.

That's a real vicious cycle that Mr. Buterman mentioned. It's like if we don't say yes to everything, even though we have the rights under the final judgment for diligent, reasonable and cost-effective work, what happens is then he spends time because we objected to something, it increases the bills, and that is a vicious cycle.

I understand why he says it's important for Judge Cote to -- to read her own words, statements from the bench, read stuff from her own findings, talk about some of the disputes from Apple. That was fully briefed in an affidavit in detail, even in Mr. Bromwich's affidavit, and Apple paid for that.

The report in the final judgment has to be limited to what Judge Cote put out there: Antitrust training and compliance, the evaluation of that. And the whole half of the report, that cost Apple a lot of money, that the Court already knew, that was redundant, it's just not reasonable, diligent or cost-effective.

And Apple has cooperated a lot with the monitor, has paid a lot of money to the monitor. To say that we have to object less, we object when we think it's right to object. And that's what we've done and, unfortunately, we're going to continue to do so. We do want guidance from this Court, but Apple cannot be in a position from an injunction that it's supposed to rest lightly with a very limited role and just say take it. You can object, but it's going to increase the costs, so object less. We object when we think it's reasonable and fair.

MR. ZWEIFACH: Your Honor, may I be heard very briefly? I'm not going to retread what you've heard already. I just want to respond to one point we've heard today.

Mr. Buterman mentioned that the issue of the scope of the monitorship was resolved by the district court. We've been talking about the determinations the district court made with regard to the scope of the work, the monitor, and the final judgment.

There's an important piece of the equation that's missing that I think is critical to determining not only what's appropriate for Mr. Bromwich to have done in the past, but in addition in determining what would be appropriate in the future. And that is the very, very substantial narrowing that the Second Circuit ordered of the scope of the monitorship in connection with the application for a stay. That application

for a stay of the monitorship was denied. Apple did not achieve the relief that it sought in terms of the stay, but what it did achieve were some major concessions by counsel for the government.

And on that score what we'd like to do, your Honor, is provide to you a copy of the oral argument before the Second Circuit so you could see some of the statements made by counsel for the government during the course of that argument in response to very pointed questions from the panel of the Second Circuit.

It became clear during that argument that this monitorship is not a compliance monitorship of the type that we see negotiated on a regular basis by the government and in private parties when they're negotiating a nonprosecution agreement, for example.

This is not a monitorship where the job of the monitor is to determine whether there is compliance with a company's compliance policies. The monitor in this case is not supposed to be making fact determinations as to whether Apple is complying with its own compliance policies.

What became clear during oral argument and the Second Circuit's ruling is that the scope of the monitorship here is very narrow: Number one, to make sure that Apple puts in place an appropriate and effective compliance plan, number one; and, number two, to make sure that there is training that has taken

place, make sure that the compliance plan and its policies are effectively communicated to employees.

Now, if you'll look at the letter that the government submitted, I'm talking about the May 7th letter, I'd like to direct the Court's attention to page 3 of that letter for a moment. In page 3, under Section B, it's entitled "Apple's inchoate objections to the monitor's 'work plan.'" The third paragraph begins to discuss certain scope issues. If you read up from about five lines from the bottom, there's a sentence that begins "while Apple..." and this addresses Apple's objection to repeated interviews of senior executives and Board members.

And I'd like to read that because Mr. Buterman said earlier that the government chooses its words carefully, so I think we ought to focus on those words. "While Apple may wish that its most senior executives and Board members be shielded from interviews that address antitrust compliance and training at Apple, plaintiffs submit such interviews are crucial because of both: Number one, Judge Cote's finding that 'Apple's lawyers and its highest-level executives' evinced 'a blatant and aggressive disregard' for the requirements of the law in connection with the e-books conspiracy; and, two, recent public reports noting that senior executives at Apple engaged in other *per se* antitrust violations, such as entering into employee nonsolicitation agreements."

Your Honor, this type of statement, of a suggestion of the type of interviews and the type of issues that the monitor should be focusing on, fall into the category of what we have argued in our brief on appeal of being inherently factual investigative work by the compliance monitor that cannot, in our view, reasonably be related to the task that the monitor is supposed to engage in as narrowed by the Second Circuit.

The brief that we filed before the Second Circuit-- and I'd be happy to provide you with a copy if you're interested-- challenges the appointment of the monitorship because it's outside the bounds of Rule 53 or the Rules of Civil Procedure, it violates separation of powers and the due process clause. And, in addition, because of the fact that Judge Cote, we believe, abused her discretion in denying our application to remove the monitor in this case.

But one of the core objections and arguments that we make in that brief is that although the work of the monitor is labeled by the government and the monitor himself to all be related to making sure an effective compliance plan is put in place, there's an endless amount of, in effect, fact-finding being engaged in at Apple.

And the citation to "other *per se* antitrust violations, such as entering into employee nonsolicitation agreements" I think begins to raise a red flag that what the government believes the monitor should be doing -- and the

monitor apparently believes he should be doing too, because he says he completely agrees with everything in the government's letter -- is that this is a fact-finding mission all under the --

THE COURT: Well, obviously.

MR. ZWEIFACH: Pardon?

THE COURT: Obviously the monitorship involves fact-finding. It couldn't be otherwise. The monitor is tasked with determining the nature and propriety of the compliance program and the training program that Apple develops.

So I'm not sure what your point is unless you're suggesting that somehow the monitor has already strayed into or maybe is about to stray into impermissible territory which, as I understand it from what the Second Circuit said, would be a determination as to whether Apple now is complying with the antitrust laws as distinguished from those two other subjects.

But the fact that there's fact-finding is perfectly inevitable given the fact you have a monitor. The monitor is there to do more than write legal briefs. He's supposed to determine facts.

MR. ZWEIFACH: Well, it all depends on what we mean by fact-finding. If we mean by fact-finding that there's a determination made as to whether an effective compliance plan is being put in place and whether the provisions seem appropriate for the businesses that Apple has, fine, we agree

with that.

If what we mean here is that there should be a determination, for example, as to -- by the monitor as to whether, in fact, anyone at Apple was involved in employee nonsolicitation agreements, whether that might be a risk that Apple is facing and, therefore, the compliance plan has to be changed to cover that risk, we say that under the label and under the rubric --

THE COURT: Has anyone proposed that a compliance plan-- which I take it is not finalized-- should be changed to encompass noncompete agreements--

MR. ZWEIFACH: Your Honor --

THE COURT: -- or are we just kind of making this up as we go along here?

MR. ZWEIFACH: We're not making anything up as we're going along. One of our problems is that because of the fact that in our view the work plan and the work that the monitor is supposed to be doing to determine whether Apple's compliance plan is ultimately going to be effective has all been left up in the air. If there's anything inchoate, it's the work plan to determine whether there's going to be an effective compliance plan and whether there's appropriate training being given to employees.

THE COURT: I thought Apple's objection, as reflected in its letter to me, was not that it's all up in the air, but

that the monitor has indicated an intention to interview everyone under the sun and you think it's too broad.

MR. ZWEIFACH: Yes, and Mr. Reilly will address that. My point is simply there's also a scope issue. And there's a scope issue that we've objected to, we continue to object to, and in our view --

THE COURT: What is the scope issue?

MR. ZWEIFACH: The scope issue is having an open-ended investigation, in our view, where there are numerous interviews taking place, where there are no parameters set as to whether the interviews are tied in to the immediate task of the monitors, and Mr.--

THE COURT: I'm sorry, but you have an order, which you happily cited from the Second Circuit, confirming the scope and limits of the monitor's responsibility. What more do you want? And I should add I didn't detect anything of this sort in your letter to the Court, but now that you're raising it, what is it you want?

MR. ZWEIFACH: We want the monitor and his activities to remain within the scope of the final judgment as narrowed by the Second Circuit.

THE COURT: Has anyone suggested otherwise?

MR. ZWEIFACH: Certainly, your Honor, the letter --

THE COURT: I mean, you have an order from the Second Circuit. What more do you want from the Court?

MR. ZWEIFACH: Well, your Honor, as Mr. Reilly said, we need some guidance. What we don't want to do is continue to come back every time there's an interview and we think an interview is going to stray or we think there's an additional interview that's taking place where we think it's either superfluous or aimed at what we think is a factual investigation where, if findings are made, they have to be reported by the plaintiffs, our adversaries in this case.

So what we want is to make sure that we don't have to keep coming in and raise objections on a sporadic basis every time we have a disagreement as to the scope of the work that the monitors engage in.

And I'll let Mr. Reilly take it from there.

MR. REILLY: Good afternoon, your Honor.

THE COURT: Again, hi.

MR. REILLY: You're right, the letter came under my name, your Honor, not under Gibson and we're not going to rehash. We've already gone through it. But the March invoice in the meeting for an hour last week where it was expressed that he intends before the next report is due to interview every board member, every executive team member, many more businesspeople in the iTunes business and elsewhere, talk to people around the help line, watch a new employee orientation, it's that's what's before you today. We need that guidance of what we think has been an extraordinary amount of work.

Twenty-two employees before the training is fully rode out, including the top person in the company, is an amazing amount of work. It's a lot of work.

As I said, I sat through all of it and I have a really good understanding of exactly what Apple is doing, what their training looks like, whether it's effective, what issues businesspeople face, who they go to when there's a question, who they goes to when there's an antitrust issue.

THE COURT: By the way, roughly how long have these interviews been, since you had to sit through them all?

MR. REILLY: Last time each one was an hour and a half. I think there are nine hour-and-a-half interviews, one hour with Mr. Cook, and then two meetings: One with the new antitrust compliance officer for about an hour and one with Mr. Vetter for about an hour. That's a rough estimate.

THE COURT: Okay. So these are not like all-day affairs or multi-day affairs.

MR. REILLY: No, no. Not at all.

THE COURT: Okay. Good.

MR. REILLY: But I think every question that Mr. Bromwich had at those interviews were answered.

THE COURT: Good.

MR. REILLY: At least recently I've never cut an interview short.

THE COURT: Okay.

MR. REILLY: Your Honor, may I be heard?

THE COURT: Anything else?

MR. REILLY: I apologize.

THE COURT: No need to apologize. You're doing your job.

MR. REILLY: Thank you.

MR. BUTERMAN: Mr. Zweifch's argument -- which in many respects conflicted with things that Mr. Reilly said -- highlights a very important problem that we are facing here, which is that Apple has two very capable law firms working for it on this matter and it's playing one side against the other. Sometimes it's a good cop/bad cop, but sometimes it's like what just happened here, which is Mr. Zweifach, to my knowledge, did not participate in the interviews. I know Mr. Reilly and his firm did. He's talking about Mr. Bromwich and making suggestions that Mr. Bromwich went outside the scope during those interviews.

Now, we, the Department of Justice, have never heard a complaint from Mr. Reilly or Simpson or any attorney that ever attended any single interview that Mr. Bromwich has asked a question that's gone outside the scope of the final judgment. And so we don't know where that comes from.

Now, with respect to the issue of the scope of the final judgment as narrowed by the Second Circuit, to use Mr. Zweifch's words, your Honor, we think that the order from

the Second Circuit speaks for itself. And we think that for these purposes it's actually -- what took place in the Second Circuit is largely irrelevant because, again, the enumerated tasks that we're here to discuss -- speaking to executives, reviewing antitrust training, something that Mr. Zweifach said was squarely within the scope of the judgment -- well, those are the tasks that Mr. Bromwich has proposed to do.

And what I haven't heard from Mr. Zweifach, Mr. Reilly or anyone, is a suggestion that somehow the Second Circuit's decision impacts in any way the enumerated tasks that Mr. Bromwich intends to engage in.

Now, the last point that I want to address is Mr. Zweifch's reference to page 3 of our letter. Your Honor, in no way-- I mean -- I'll address it. In no way was anybody suggesting -- and I don't think it's even a fair reading of this letter and that paragraph to suggest that Mr. Bromwich is engaged in some sort of fact-finding mission with respect to nonsolicitation agreements. Mr. Zweifach is aware that the facts regarding Apple's senior executive's involvement in the nonsolicitation agreements has already been dealt with and established.

All that we were saying in the letter is that you have to recognize the way that this company operates and how its senior executives have operated when analyzing how the company moving forward is going to reform its antitrust training and

compliance policies and programs. In no way are we suggesting that Mr. Bromwich should engage in any type of work relating to nonsolicitation agreements. And certainly, your Honor, there is absolutely no suggestion that Mr. Bromwich has ever touched upon any of those matters.

Thank you.

MR. REILLY: We almost got through this hearing, your Honor, without the DOJ talking about the conduct of the senior executives. The nonsolicitation agreement, the DOJ settled that with Apple almost four years ago. Almost four years ago they settled that and it's coming in a letter to you a couple of days ago.

Apple is an ethical company. I've worked with a lot of companies. From the top down, they do business the right way. I was hoping to get through this appearance without a reference to the blatant disregard for the antitrust laws. So I just wanted that to be stated in the record, that Apple is a very ethical company and does business the right way. A company of that size that has allegations against them -- every company does -- in no way does it reflect on the integrity of any of the officials or top officials of the board.

And I just want to mention one thing. The quoting from Judge Cote in the nonsolicitation thing, that's the problem that we have. We're looking at the four corners of the final judgment. Mr. Bromwich in the first meeting we had said

I'm following the four corners of the final judgment. By talking about statements made and findings by Judge Cote, settlements made with DOJ four years ago or recent press because of our litigation, because of things like that, that we read the final judgment differently, we can do more, we can interview the entire board, the entire executive team. It's not appropriate. He should be limited to the final judgment, the four corners, rather than looking at findings of Judge Cote and settlements from the DOJ four years ago.

MR. ZWEIFACH: Just one point, your Honor. I just have to respond to something Mr. Buterman said. I'm sorry.

THE COURT: The irrepressible impulse. Go right ahead.

MR. ZWEIFACH: This is not the first time we've heard a theme from the government that there are two law firms involved with Apple in this case, they're going off in different directions. The first time Mr. Buterman raised that I think is, again, on page 3, in footnote 2, of his letter, where he begins to talk about Apple's appellate brief and says "It is important to note that Apple's brief contains several material misrepresentations of the facts surrounding the interactions with the monitor that Simpson Thacher attorneys -- who have been dealing with Mr. Bromwich and plaintiffs on these issues -- know to be inaccurate. That the appellate brief was written by another law firm does not excuse such behavior."

Your Honor, first of all, it's interesting that Mr. Buterman has raised the issue of misrepresentations without telling us what they are or without asking your Honor to rule on it. I'm not sure why that would be done. But so that there's no claim that we made concessions here today, let me just say that we stand by the statements we made in our brief and Simpson Thacher stands by them too.

THE COURT: Okay. I will take judicial notice of the fact that Apple has a world-class set of attorneys representing it and I have every reason to believe they are utterly ethical and believe in everything they have said in their briefs.

Anything else?

MR. BUTERMAN: Yes, your Honor, just a couple of points. Simpson Thacher, of course, didn't sign that brief. And we will respond in due course when our response is due in the Second Circuit.

THE COURT: I get the impression we have started to wander a little bit off the reservation here in terms of what's in front of us today.

MR. BUTERMAN: Yes, your Honor, and I just have to make two small clarifications and then I'll sit down and be done.

Obviously, as Mr. Reilly said, Mr. Reilly hoped that the words "blatant disregard," that we'd get through a hearing without hearing it. Obviously that came from Mr. Zweifach, who

raised the issue. The Department of Justice was done speaking and would not have addressed it had Mr. Zweifach not done that.

I'll also note that Mr. Reilly's objection to the United States quoting from language from Judge Cote is ironic given the fact that just earlier Mr. Reilly was quoting from the Second Circuit.

So that's all I have to say, your Honor.

MR. REILLY: I don't have any objection to any quotes in court. I just don't want quotes outside of the final judgment dictating the interpretation of the final judgment.

THE COURT: Okay. Anything else?

MR. BUTERMAN: Fortunately, no, your Honor.

MR. REILLY: No, your Honor.

MR. BROMWICH: No, your Honor, unless you have questions.

THE COURT: Let me just briefly touch on a couple of the issues that have been raised both by the letters and today in oral argument.

Before doing so, I'd just note, with interest if not puzzlement, that the impulse that lawyers here have to edit each other's work, Apple would like to edit the monitor's report. They'd also like to edit the Department of Justice letter. The Department of Justice apparently would like to edit the Apple appellate brief. Enough.

First of all, with respect to the scope of the

monitor's task as we have discussed today, that is adequately defined by the Second Circuit's order. I have had nothing presented to me either in the letters or in any other form suggesting that the monitor has deviated from his defined task as specified by the Second Circuit.

With respect to the March invoice, et cetera, that is the fees charged by the monitor to Apple for that which was done in the month of March, to the extent that Apple wants to object, it is of course -- as I think everyone has conceded -- Apple's right to object. And there is a procedure that it must go through, including conferring with the Department of Justice and then coming to the Court to voice whatever objections it may have.

That right is essentially untrammeled except to the extent it may be cabined by the requirements of Rule 11 of the Federal Rules of Civil Procedure and case law addressing the obligations of counsel not to present frivolous or groundless arguments or to make arguments for an improper purpose.

As far as the validity or merits of Apple's argument, obviously when it makes objection, that objection will be passed upon by the Court.

In this instance, to the extent that Apple is criticizing the monitor and saying it shouldn't have to pay for the time spent on at least part of the report, I find that objection to be utterly and completely groundless.

The report is an appropriate document. It is necessary for the monitor to be able to set forth the context for the substance that he presents. And whatever went on procedurally and otherwise that led to, shall we say, at least some delays in the monitor being able to grapple with the substance of what Apple was proposing to do in compliance with the judgment, that has to be and is appropriately explained in the report.

Apple's request insofar as it's premised on this objection, its request not to have to pay the full invoice is emphatically denied.

I note there was another argument proffered by Apple -- although it has not been mentioned today, but it appears in one part of their letter -- suggesting that there is some inadequacy in the time records of the monitor. I've reviewed the time records. They are entirely appropriate. They are detailed; they are specific. They leave no doubt that the time that has been spent by the monitor and his staff has been appropriately spent in dealing with whatever the tasks were that had to be done during that month.

With respect to Apple's request that the Court in some way limit what the monitor is going to do going forward, number one, to the extent that there is an absence of specifics, other than a comment made today that there should be no more interviews, it seems to me, first of all, we have absolutely no

record on which to deem that to be an appropriate request.

Number two, inherent in a monitorship of this sort is some fairly broad discretion on the part of the monitor in conducting the inquiries that he has been assigned by the Court. Indeed, I note a comment made by Apple's counsel that he wishes that Apple were not put in a position to have to continually run to the Court.

The short answer is Apple does not have to continually run to the Court. It is apparent that the monitor must be able as his investigation proceeds-- and, yes, there will be fact-finding inevitably-- to determine step by step what additional information he requires and how best to achieve and obtain that information. Obviously he should work, and necessarily has to work, in consultation with Apple since Apple will, in large measure or complete measure be the source of that information.

It is certainly true, as Judge Cote indicated in one of her orders, that the monitorship is designed to not impose undue burdens on Apple's ability to conduct its business, but the conducting of interviews, including numerous interviews, whether they span an hour or an hour and a half, two hours or even longer, can hardly be said to demonstrate any failure by the monitor to comply with that general point.

The comment-- which, again, has been invoked by Apple several times-- about using a light touch is a reflection of

the fact that the monitor's scope of responsibilities is limited, and specifically limited so that it does not include an investigation of whether Apple is now complying with the antitrust laws. But to the extent that the monitor has very specific tasks to perform and specific issues to deal with, he must be given some fairly broad discretion in deciding how to proceed.

As I said before, obviously Apple has a right under the judgment and orders of the Court to object where it deems it appropriate to object. And we will deal -- if there are future objections, we will deal with them properly and appropriately once they've been vetted also by the Department of Justice.

Another matter again relating to fees, which may be necessary to deal with at this point so as to avoid future disagreements, there is a suggestion in Apple's letter to the Court that it ought not be the case that if the monitor gets into a disagreement with Apple, including over fees, that the monitor should be able to bill for the time spent in resolving those disputes.

The short answer to that is the monitor is appropriately compensated where the monitor takes a position in a dispute of that sort that has at least some colorable basis. Indeed, if you want an analogy, the courts, including the Second Circuit, have long said that in the context of the

statutory fees awards, the party that seeks the fees is usually entitled to fees, as the cliche goes, fees on fees; that is, fees expended in an effort to obtain the underlying award fees.

So that, at least, is a clarification that you could at least now put into your plans as you decide what you want to do on Apple's end in terms of objections and the like.

Let me just go through my notes briefly to see if there are any other matters that we need deal with at this time.

(Pause)

THE COURT: I think we've covered what I've had to say.

Are there any other issues we need to deal with at this time?

MR. REILLY: I don't have any, your Honor.

MR. BUTERMAN: Not that we're aware of, your Honor.

THE COURT: Okay. Thank you, all.

(Adjourned)