

# EXHIBIT 9

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
2 -----x  
3 J.T. COLBY & COMPANY, INC., et al.,  
4  
5 Plaintiffs,  
6 v. 11 CV 4060 (KBF)  
7 APPLE, INC.,  
8 Defendant.  
9 -----x  
10 New York, N.Y.  
February 27, 2012  
1:00 p.m.

11 Before:  
12 HON. KATHERINE B. FORREST  
13 District Judge

14 APPEARANCES  
15  
16 MANATT, PHELPS & PHILLIPS, LLP  
17 Attorneys for Plaintiffs  
18 BY: THOMAS C. MORRISON, ESQ.  
NIRAV SHAH, ESQ.  
19 KIRKLAND & ELLIS LLP  
Attorneys for Defendant  
20 BY: DALE M. CENDALI, ESQ.  
CLAUDIA RAY, ESQ.  
21 BONNIE JARRETT, ESQ.  
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1 (In open court)  
2 THE CLERK: In the matter J.T. Colby & Company, Inc.,  
3 et al. v. Apple, Inc., 11 CV 4060, counsel please state your  
4 names for the record.  
5 MR. MORRISON: Thomas Morrison for the plaintiff. And  
6 I'd like to introduce our client, John Colby.  
7 THE COURT: Good afternoon.  
8 MR. SHAH: Nirav Shah for the plaintiff as well.  
9 THE COURT: Good afternoon.  
10 MS. CENDALI: Hello, your Honor. Dale Cendali,  
11 Kirkland & Ellis, for Apple. With me is my partner Claudia Ray  
12 and our colleague Bonnie Jarrett.  
13 THE COURT: All right. Good afternoon.  
14 We have got a couple of things I think to talk about  
15 today. One is, Mr. Morrison, sort of the issue about counsel  
16 and whether or not you are still going to be counsel, if not,  
17 how that's going to impact things. That then feeds into, I  
18 think, schedule and, as part of that, then ultimately some of  
19 the discovery issues I was going to address, whatever needs to  
20 get addressed today.  
21 MR. MORRISON: If I may address that, your Honor.  
22 THE COURT: Please.  
23 MR. MORRISON: Mr. Colby came to us back in 2010, and  
24 we made an initial attempt to talk settlement with Apple. That  
25 went nowhere. Mr. Colby is basically a sole proprietor of the

1 three corporate plaintiffs who are in this case, and it was  
2 obvious to us Mr. Colby could not afford to litigate with  
3 Apple.  
4 So I spent some time in talking with litigation  
5 funding firms, and we lined up some initial funding for the  
6 case back in early 2011. The basic deal was, the funding firm  
7 put in a sum of money to get the thing started. We were then  
8 required to defer the next substantial amount of our fees,  
9 following which they would resume funding the case.  
10 Those first two things happened: They put in an  
11 initial investment. We have a deferral of fees. That took us  
12 up to the end of 2011. And at that point, when I went to them  
13 and said, we really need you to resume funding, particularly,  
14 we need X amount for our three experts, who were lined up  
15 waiting to go, at that point, they began backing off. And  
16 their position was, they were willing to continue funding  
17 disbursements. They wanted our firm to take it on a  
18 contingency the rest of the way. Our firm policy was, we don't  
19 do contingency cases. I tried to sell the case, but I'm  
20 relatively new at Manatt, I spent my main career at Patterson  
21 Belknap, and so Manatt said, no, we can't do it on a  
22 contingency. And so from about the middle of January to now,  
23 I've been engaged in discussions with several firms to take  
24 over the case on a contingency basis. We're currently talking  
25 with three fairly substantial firms and one smaller firm. One

1 firm is coming in this afternoon. Mr. Colby and I are meeting  
2 with that firm.  
3 The reason it's taking a while is, as you might  
4 imagine, firms that do take cases on a contingency have a very  
5 elaborate process to go through. That's one issue.  
6 The second issue, we have to make sure that the  
7 funding firm is firm in its commitment to fund the  
8 disbursements, because the expert witnesses alone will be quite  
9 substantial. And so the funding firm says, we can't give you a  
10 final yes or no until we know who the firm is going to be.  
11 They don't want to fund a case with a firm that they don't have  
12 confidence in.  
13 So as soon as we can line up the firm to take our  
14 place, we will then go to the funding firm, and they have  
15 indicated a willingness to work out an arrangement to resume  
16 funding, disbursement, expertise, transcripts. All of that  
17 stuff is going to be quite substantially because this is  
18 obviously a substantial case. I would like to tell you that we  
19 think we will have that in place in the next two or three  
20 weeks, but I can't say that with any certainty. I do think it  
21 would be fairer to everyone, certainly to our client and  
22 probably to the Court, to let the new firm negotiate the final  
23 schedule. I think it would be very unfair for us to try to do  
24 that.  
25 So that's why we could not walk into court today with

1 our experts were before they would agree that any of their  
2 documents could go to those experts. I have never seen those  
3 requirements, certainly not in a case where our experts aren't  
4 from the industry.

5 THE COURT: I myself in private practice asked for,  
6 received, and also had denied that very same requirement. It  
7 false under the category You can try that. But I think that it  
8 is, except under the most unusual circumstances, where there  
9 are trade secrets involved, it is not something which typically  
10 is necessary.

11 Ms. Cendali, do you think it's still necessary to have  
12 this? I mean, is there a particular reason why a particular  
13 kind of expert would have a problem here?

14 MS. CENDALI: Well, we don't know. They never told us  
15 what types of experts that they want or what material would be  
16 shown to them. But Apple is sued all the time. We can easily  
17 have experts, perhaps, on both sides of these different issues.  
18 Like a lot of companies in technology, we don't want them, even  
19 though they're not supposed to use anything, to try to cleanse  
20 their minds from things, from other matters. So we're  
21 concerned that, hence, the need for the prior disclosure, which  
22 is, in my experience, very common when it's a technology  
23 company in particular, so that if there is an issue, we can  
24 decide early on, electively, whether there's an issue with  
25 regard to that expert. It should be an expert.

1 THE COURT: Well, how much technology is going to  
2 actually be --

3 MR. MORRISON: This is not -- I'm going to meet with  
4 her and tell her the nature of the three experts. There are  
5 not technology experts. This is not a technology case.

6 THE COURT: Who's the nature of the three experts?

7 MR. MORRISON: One is a trademark expert because there  
8 are a lot of PTO documents that need to be looked at and  
9 explained to the jury. The second is a damages expert. It  
10 will be someone from a consulting firm. And the third is a  
11 marketing expert, who would also, if we do any consumer  
12 surveys, that expert would do the surveys. So that person  
13 would be looking perhaps at Apple marketing documents, most of  
14 which are going to be public.

15 THE COURT: OK. So the trademark expert, just so that  
16 you know, the only thing that they would be allowed to testify  
17 to in front of the jurors would be practices and procedures.  
18 They wouldn't be able to go through and do whether or not there  
19 has been fraud on the Trademark Office or anything like that.

20 MR. MORRISON: But we do need someone to walk through  
21 what was filed.

22 THE COURT: That would be Mr. Colby, whoever filed, as  
23 posed to some sort of expert who would do sort of a  
24 walk-through. But at any event, a trademark expert, that  
25 strikes me as not an expert that anybody at Apple is going to

1 care about.

2 MS. CENDALI: That's probably true.

3 THE COURT: Damages. For that can implicate some of  
4 this highly sensitive financial information. Who knows. But  
5 that also strikes me as something that can be dealt with.

6 MS. CENDALI: Well, we don't see any reason why --  
7 this is a reciprocal thing, to show, pre-disclose our damages  
8 counter-expert to their damages counter-expert.

9 THE COURT: Well, I -- the only one that I have to say  
10 that really sort of gives me any pause in terms of the  
11 long-term implications of what could be the potential marketing  
12 experts where there could be some marketing issues. I don't  
13 know. I don't know what the nature is, what you're going to be  
14 disclosing, but I didn't find particularly moving that the  
15 damages expert would really been someone from Compass Lexecon  
16 or whoever it's going to be opining on the Apple damages. That  
17 would be something which should be earth-shattering. You know,  
18 you guys, why don't we do this. You both obviously feel very  
19 strongly about it. I don't think the disclosure of the names  
20 is something that I would want to require except under the most  
21 unusual circumstances. However, I'd like you to make your best  
22 argument as to why a particular -- why for damages and for the  
23 marketing. And that may require you folks to have a  
24 conversation about the nature of the kind of testimony you  
25 folks are going to have, the kinds of documents you end up

1 showing them or not. If it's marketing and it's going to be a  
2 survey and it's going to be likelihood of consumer confusion  
3 based upon somebody who will look at the ipicturebooks from  
4 before and/or will do a consumer study and down the road -- and  
5 will also look at, sort of, iBooks and do a consumer study,  
6 that, I think, is not going to be an issue. If they're going  
7 to be looking at internal marketing plans or something of this  
8 sort, that is potentially -- I don't know. They can make their  
9 argument.

10 MS. CENDALI: That makes sense, because we're just  
11 hearing this for the first time. We can probably do more in  
12 the meet-and-confer process to see if there is an issue, in  
13 light of your Honor's guidance.

14 THE COURT: All right. Now, we've got discovery  
15 closing on June 15. And let me go to sort of the next issue,  
16 which is some of the discovery issues that you folks had raised  
17 before. I don't feel any need to walk through them right now  
18 unless they are still live. But if they are still live, then  
19 let's put them to rest. If, Mr. Morrison, they cannot be put  
20 to rest right now, then we'll, you know, maybe you can tell me  
21 why.

22 MR. MORRISON: Yes. From our standpoint there were  
23 two major ones that I don't think have been put to rest and  
24 will eventually require your intervention. The single most  
25 significant one -- and this impacts the initial discovery -- is