

March 11, 2013

3/15/13

VIA ELECTRONIC MAIL

The Honorable Denise L. Cote  
United States District Court for the Southern District of New York  
500 Pearl Street, Room 1610  
New York, NY 10007-1312

DSF  
3/15/13

Re: United States v. Apple Inc., et al., No. 12-CV-2826 (DLC)

Dear Judge Cote:

On behalf of Apple, we respectfully oppose the government's motion to compel the deposition of Timothy Cook, Apple's CEO, and cross-move for a protective order pursuant to Fed. R. Civ. P. 26(c).<sup>1</sup>

The government ignores the applicable legal standard, which "disfavor[s]" apex executive depositions where (i) the executive has no unique personal knowledge of relevant facts, *e.g.*, *Alliance Indus., Inc. v. Longyear Hldg., Inc.*, 2010 WL 4323071, at \*4 (S.D.N.Y. 2010); *Treppel v. Biovail Corp.*, 2006 WL 468314, at \* 2 (S.D.N.Y. 2006), (ii) lower-level executives can provide the same information, *e.g.*, *id.* at \*2, or (iii) the party seeking discovery has not exhausted alternative information sources, *e.g.*, *Diesel Props S.r.L. v. Greystone Bus. Credit II LLC*, 2008 WL 5099957, at \*1 (S.D.N.Y. 2008). Under this standard, the government fails to meet its burden.

The government speculates that Mr. Cook is "likely" to possess relevant information about: (1) "Apple's decision to enter the e-books market and its related strategies" and (2) his "private e-books conversations" with Mr. Jobs.<sup>2</sup> In his attached declaration, Mr. Cook attests that he has no unique knowledge about Apple's decision to enter the e-books market and recalls no relevant "private conversations" with Mr. Jobs. *See* Ex. A.

The substantial record confirms this point. The Complaint does not reference Mr. Cook. None of the 29 witnesses deposed to date testified that Mr. Cook played any role in relevant events. And no publisher witness even mentioned Mr. Cook at his or her deposition.

<sup>1</sup> Rule 26(c) provides that the Court may, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Under Rule 26(b)(2), the Court must limit discovery if it determines that the discovery is unreasonably cumulative, duplicative, or burdensome. Fed. R. Civ. P. 26(b)(2)(C).

<sup>2</sup> The government mischaracterizes Apple's February 20, 2013 statement to the Court about Mr. Jobs. *Compare* DOJ Ltr. at 2 (claiming Apple stated that "Mr. Jobs played no meaningful role in the alleged price fixing at issue") *with* Apple Feb. 20 Ltr. at 1 ("Mr. Jobs himself was not significantly involved in the negotiation of Apple's agency agreements.") (emphasis added).

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Apple also has produced over 3.6 million pages of documents; the publisher defendants nearly 5 million pages. But the government's exhibits—a handful of e-mails and snippet from a single deposition—only underscore Mr. Cook's tangential role as an outsider to the issues in dispute in this case. *See* DOJ Ltr., Exs. A-F.

On this record, the government fails to show that Mr. Cook has unique personal knowledge about the terms of the agency agreements at issue, Apple's entry into the e-books business, or Apple's negotiations with any publisher defendant, let alone that Mr. Cook had "private conversations" with Mr. Jobs about these subjects.

Mr. Cook's deposition also would be cumulative and duplicative. In all, the government will depose eleven Apple executives.<sup>3</sup> The Apple witnesses have provided or will provide the testimony that the government seeks, and the government has not even exhausted these alternative information sources. Indeed, on March 12 and 13, the government will depose Eddy Cue, the senior Apple executive who reported directly to and communicated regularly with Mr. Jobs about the day-to-day development of the iBookstore. Two days later, it will depose a member of Mr. Jobs' executive team, former mobile software SVP Scott Forstall. And, as the Court will recall, the government deposed Apple's chief marketing officer Phil Schiller (over Apple's objection) last December. Mr. Schiller testified that other than Mr. Jobs and Mr. Cue, no members of Apple's executive team—which included Mr. Cook—were present in the sole context in which he recalled discussing the iBookstore: marketing meetings. *See* Ex. C (Schiller Dep. Tr.) at 319-20. The government should not be permitted to depose Apple's current CEO on a fishing expedition for what would be, at best, cumulative testimony.

Because Mr. Cook's deposition would only "threaten disruption of [Apple's] business" and "serve as a potent tool for harassment," *Consol. Rail Corp. v. Primary Indus. Corp.*, 1993 WL 364471, at \*1 (S.D.N.Y. 1993), we respectfully request an order denying the government's motion to compel and prohibiting Mr. Cook's deposition.<sup>4</sup>

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<sup>3</sup> Of the nine Apple employees the government has deposed, it failed to even ask eight whether Mr. Cook was involved in Apple's e-books business. The remaining witness, Kevin Saul, testified that, from his vantage point as lead attorney in Apple's e-books negotiations, Mr. Cook (1) had no relevant conversations with Mr. Saul, Steve Jobs, or Eddy Cue, and (2) had no input in any iBookstore decision prior to or during its launch. *See* Ex. B (Saul Dep. Tr.) at 204-06.

<sup>4</sup> As his declaration attests, Mr. Cook runs a company that employs 75,000 people around the world. The government's proposed "accommodations" will not alleviate the substantial burden on Mr. Cook and Apple. In the event that Your Honor orders Mr. Cook's deposition to proceed, however, Apple respectfully requests that the deposition be limited to two hours.

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Respectfully submitted,

A handwritten signature in cursive script that reads "Orin Snyder /ced".

Orin Snyder