**U.S. Department of Justice**

Antitrust Division

*Lawrence E. Buterman*
*Direct Dial: (202) 532-4575*
*Fax: (202) 616-8544*
*e-mail: lawrence.buterman@usdoj.gov*

*Liberty Square Building*
*450 5th Street, NW*
*Suite 4000*
*Washington, DC 20530*

SDF 4/15/13

April 15, 2013

BY EMAIL

The Honorable Denise L. Cote
United States District Judge
Daniel P. Moynihan U.S. Courthouse
New York, NY 10007-1312

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

Dear Judge Cote:

We write in response to Apple's April 12 letter. To begin, the United States does not have, and has never ever had, any objection to the submission in this case of affidavits constituting direct testimony, or to any other aspect of the Court's June 25, 2012 Order regarding the April 26, 2013 pre-trial submissions. Under FRCP 16 and FRE 611, courts have wide latitude in determining how evidence will be managed pre-trial and admitted at trial, and, as we explained to Apple, the procedures set forth by the Court here are entirely consistent with the way bench trials typically are conducted—especially in the antitrust context. To be clear, if the United States had any concerns regarding the June 25, 2012 Order it would have raised them with the Court months ago, and not waited until days before the parties' submissions were due and largely drafted.

The Court's June 25 Order expressly calls for the parties to exchange at the time the Pretrial Order is filed, *inter alia*, "[t]hose portions of depositions that are being offered as substantive evidence, along with a one-page synopsis (with transcript citations) of such testimony for each deposition." The Order also calls for the parties to "provide the Court with two (2) courtesy copies of all these documents at the time they are served." That is what we plan to do. Apple's position, however, is that the United States should not provide the Court with any copies of certain unspecified deposition designations and interrogatory responses on April 26 that Apple believes may ultimately prove inadmissible at trial, as doing so might somehow bias the Court in connection with creating a draft opinion.

As an initial matter, it is clear that the Court may review the parties' April 26 submissions, regardless of whether they may contain some ultimately inadmissible testimony, without risk that the Court will be prejudiced. As the Supreme Court has noted, "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346-47 (1981) (per curiam); *see also DeFelice v. Am. Int'l Life Assurance Co. of N.Y.*, 112 F.3d 61, 67 (2d Cir. 1997) ("[W]e have confidence in the trial court's

ability to consider only such evidence as is proper under the Rules"). That Apple believes the deposition testimony here may be harmful to its defense does not call into question that well-established principle. Indeed, the entire notion that the Court will be inappropriately biased by reading pre-trial testimony of intended trial witnesses makes little sense—as at trial, and before the Court renders any decision, the witnesses will either have to adopt their prior harmful statements or be impeached by them.

Regardless, the United States submits that Apple's argument is based on the faulty premise that the parties are providing the April 26 submissions to the Court so they can be entered into the record at this time. However, nothing in the Court's Order suggests that the evidence provided on April 26 will be admitted into the record prior to the beginning of the June 3 trial. Rather, we understand that the submissions, consistent with FRCP 16 and FRE 611, are being provided to the Court essentially as proffers of what is anticipated will be established at trial—in order to assist the Court in preparing for trial, making trial as efficient as possible, and preparing its post-trial written opinion. *See* Individual Practices in Civil Cases 5.B.iv. (calling for the pre-trial submission of detailed proposed findings of fact "including citations to the proffered trial testimony and exhibits, as there may be no opportunity for post-trial submissions"). In that regard, the United States notes that it would be incongruous (and not particularly useful to the Court) if Defendants were permitted to provide the Court with affidavits from witnesses and reference those affidavits in their proposed findings of fact, while Plaintiffs were at the same time prohibited from directing the Court to statements in depositions by those same individuals that provide context for or even contradict the affidavits. *See* 8A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2142 (3d ed. 2012) ("A deposition is at least as good as an affidavit and should be usable whenever an affidavit would be permissible, even though the conditions of the rule on use of a deposition at trial are not satisfied.").

In any event, disputes regarding the admissibility of deposition testimony are not yet ripe. Rule 32 deals with the admission *at trial* of deposition testimony in lieu of live testimony, and again, the United States is not moving any evidence into the record at this time. As this Court has noted in rejecting a pretrial motion to limit objections under Rule 32, "[o]nly when there is an offer of the depositions and the defendants make specific objections to that offer will the issue be appropriately defined for resolution by this Court. It is unclear which, if any, of the proposed deponents may be available for trial . . . or what the nature of any objections to the deposition testimony may be." *New Pac. Overseas Grp. (USA) Inc. v. Excal Int'l Dev. Corp.*, No. 99 Civ. 2436 (DLC), 1999 WL 820560 (S.D.N.Y. Oct. 13, 1999); *see also In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571(RJH)(HPB), 2009 WL 1904569, at *8 (S.D.N.Y. July 1, 2009) ("The Court agrees with plaintiffs that exclusion of the designations at issue is premature. It would not be appropriate to exclude designations for 55 deponents without even reading them, and whether or not a witness is unavailable within the definition of Rule 32 is an issue for trial.").[1] The admissibility of the deposition designations (and any interrogatory responses) should be based on which witnesses are available at trial and the purposes for which the evidence ultimately is offered at trial.[2]

[1] Unfortunately, witness availability is not always certain. In this case alone, multiple scheduled depositions, including two CEO depositions, were postponed at the last minute due to witness illnesses.

[2] Indeed, Apple cannot dispute that the deposition testimony it is concerned about may be used at trial to impeach witnesses, and may, depending on the circumstances, constitute non-hearsay under FRE 801(d).

Respectfully submitted,

/s/ Lawrence E. Buterman
Lawrence E. Buterman

Copy: All counsel