U.S. Department of Justice

Antitrust Division

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December 13, 2013

The Honorable Denise L. Cote
United States District Judge, S.D.N.Y.
Daniel P. Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Apple, Inc., et al., No. 12-cv-2826 (DLC)
State of Texas v. Penguin Group (USA), Inc., No. 12-cv-3394 (DLC)

Dear Judge Cote:

Despite proclaiming to this Court its intention to be a "model citizen," Apple recently has engaged in a systematic and untoward campaign to publicly malign the External Compliance Monitor and prevent him from carrying out his responsibilities. The United States and Plaintiff States have reviewed Apple's filings, and have spoken on multiple occasions with both Apple and Mr. Bromwich concerning Apple's objections. Based on our review, Mr. Bromwich's actions to date have been wholly within the scope of his authority under the Final Judgment, and at all times appropriate and consistent with his impeccable reputation.

At the moment, there are no ripe disputes regarding the External Compliance Monitor for the Court to consider. Apple's concerns, as articulated in recent conversations, revolve chiefly around the fact that the Monitor was seeking to conduct certain interviews during the first 90 days of his appointment, as well as the fees he is charging for his services. Consistent with the Court's direction in its December 2 Order, the United States and Plaintiff States spoke with Apple on Monday, December 9 regarding its objections. During that conversation, Apple refused to articulate how it wanted the External Compliance Monitor to proceed moving forward, and what resolution it wanted on the fee dispute. Instead, Apple repeatedly stated that it had broader "constitutional" and other concerns with the trial and the imposition of a monitor. Nonetheless, Plaintiffs informed Apple that they planned to speak with Mr. Bromwich in an attempt to reach a workable compromise. On December 10, Mr. Bromwich reached out to Apple to address its concerns. In his email to Apple, Mr. Bromwich suggested that further interviews could take place after the 90-day period elapsed and Apple's new antitrust policies were in effect. Mr. Bromwich also requested the opportunity to discuss with Apple and resolve the fee dispute. Remarkably, Apple has not responded to Mr. Bromwich's email (or even brought it to the Court's attention), but instead filed the instant proposed Order to Show Cause.

At the heart of Apple's current filing lay its arguments that the Court should not have imposed the External Compliance Monitor in the first place because it had no authority to do so. Those arguments are wholly without merit. Moreover, if Apple intended to raise them at all, Plaintiffs submit Apple should have done so prior to the entry of the Final Judgment. Apple did not. Nor did Apple raise its current objections when it was negotiating the terms of the Final Judgment, or arguing before the Court against the imposition of an External Compliance Monitor. This Court should not give any weight to these arguments.

Apple's counsel now seeks to resurrect its arguments (and avoid potential claims of waiver) by casting them as constitutional challenges and proffering them to this Court within the context of analyzing its likelihood of succeeding in having this Court's injunction reversed on appeal. (Apple first sought unsuccessfully to raise these untimely arguments in connection with objecting to the Court's ministerial November 20 Order.) In apparent violation of the Court's procedures, Apple filed its papers without meeting and conferring with Plaintiffs regarding its intention to seek a stay.

As part of Apple's attempt to avoid claims of waiver, Apple's primary current argument regarding "success on the merits" is that the Court lacked jurisdiction to modify the injunction during Apple's appeal. The problem with Apple's argument is that the Court never did so. The November 20 Order on which Apple bases its argument addressed the October 16 Order appointing the External Compliance Monitor—not the September 5 Final Judgment. And the reality is that the November 20 Order did not modify anything. Apple claims that paragraph 3 of the Order, which allows the Monitor to communicate with a party or a party's agent *ex parte*, granted Mr. Bromwich the authority to deprive Apple of the right to counsel in interviews. As Plaintiffs have informed Apple now on numerous occasions, neither Plaintiffs nor Mr. Bromwich read paragraph 3 that way. Mr. Bromwich has never requested that Apple's executives not have counsel at interviews, and our understanding is that Mr. Bromwich has zero intention of ever doing so. At this point, Apple's misreading appears to be nothing more than strategic.

Plaintiffs respectfully submit that Apple has not presented a clear and specific showing of good and sufficient reasons why it should be permitted to depart from the Court's customary procedures for motions. Accordingly, Apple's proposed Order to Show Cause should be denied. And, because Apple has not presented any legitimate arguments as to why its motion will be successful on the merits, Plaintiffs submit Apple's application for a stay can be denied summarily. Nonetheless, should the Court be inclined to set a briefing schedule on Apple's motion, Plaintiffs will respond in full at the appropriate time.

Respectfully Submitted,

/s/ Lawrence E. Buterman
Lawrence E. Buterman

Copy: Apple's Counsel