UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE INC., *et al.*, Defendants.	12 Civ. 2826 (DLC)

THE STATE OF TEXAS, THE STATE OF CONNECTICUT, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA) INC., *et al.*, Defendants.	12 Civ. 03394 (DLC)

REPLY DECLARATION OF THEODORE J. BOUTROUS, JR.

I, THEODORE J. BOUTROUS, JR., pursuant to 28 U.S.C. § 1746, declare:

1. I am an attorney duly licensed to practice law in the State of California. I have been given permission to appear before the United States District Court for the Southern District of New York *pro hac vice*. I am a partner at Gibson, Dunn & Crutcher LLP and am one of the attorneys representing Apple Inc. in the above-captioned matter. I respectfully submit this declaration in support of the Reply in Support of Defendant Apple Inc.'s Motion by Order to Show Cause For a Stay of the Injunction filed on January 7, 2014. I have personal knowledge of the matters stated herein and, if called upon to do so, could and would competently testify thereto.

2. In his declaration, the external compliance monitor appointed by this Court, Michael Bromwich, makes a number of factual assertions that are inaccurate or incomplete. For example, he misstates what occurred during the October 22 introductory meeting in New York with Mr. Bromwich and his team. Bromwich Decl. ¶¶ 13-16. At that meeting, Kyle Andeer from Apple, lawyers from Simpson Thatcher, and I made clear that we want to work with Mr. Bromwich and his team to collaborate and ensure that Apple's compliance and training programs are state of the art. But we were all extremely surprised when Mr. Bromwich indicated that he wanted immediate interviews with everyone on Apple's executive team and Board of Directors, beginning the week of November 18. We were even more surprised when he expressed his intent to interview these individuals multiple times throughout his monitorship, irrespective of their connection to this case or Apple's antitrust programs and policies. Mr. Andeer immediately objected that the timing of the requests was premature given that Apple was still putting its new compliance and training programs in place in advance of the January 14 deadline. He also questioned why

it would be appropriate for Mr. Bromwich to interview individuals with no connection to the issues in the case, such as Apple's lead designer Jony Ive. When Mr. Bromwich requested documents from Apple at that same meeting, we raised the need to protect privileged material. Mr. Bromwich responded by making clear he was going to seek privileged material, and stated his view that producing such information to him would not constitute a waiver of privilege because he was acting as an arm of the court, and he suggested that we undertake legal research on the issue. Although we indicated we would take his various requests and proposals under consideration, none of us indicated that we agreed with Mr. Bromwich's interpretation of his mandate, his proposed plan for operating as monitor, or his views on any of the legal issues that we discussed.

3. Contrary to Mr. Bromwich's suggestion (Bromwich Decl. ¶ 25), my October 31, 2013 letter on behalf of Apple to Mr. Bromwich echoed the objections raised during the October 22 meeting. *See* Dkt. 419, Ex. A. Apple explained in the letter that his request "to begin interviewing Apple's entire board and its executive team, as well as additional senior executives on November 18 is premature, not authorized by the Final Judgment, and would not only be disruptive to Apple's business operations but also directly contrary to Judge Cote's intent." *Id.* at 2. Apple explained that "[i]t makes no sense . . . to schedule those interviews before Apple has completed its internal assessment and developed its new antitrust program." *Id.* at 3.

4. After Apple sent its October 31 letter to Mr. Bromwich and forwarded it to plaintiffs to put them on notice of our objections, Apple met and conferred with plaintiffs on November 4. During this call, I asked if the Justice Department had approved the fee arrangement proposed by Mr. Bromwich. Lawrence Buterman said they had reviewed it.

When asked again whether they had actually approved it, he stated that they had. Mr. Buterman agreed with Apple that the Final Judgment focused on the compliance policies and practices that would exist 90 days after Mr. Bromwich's appointment. And he expressed sympathy for Apple's position that there was no need to commence these interviews immediately and certainly no need to complete them all the week of November 18. He suggested a staggered interview schedule as a compromise. I reiterated that Apple wanted to create state of the art compliance programs and policies, and stated that I would reach out to Mr. Bromwich to discuss Apple's objections.

5. Mr. Bromwich mischaracterizes the discussion my partner Daniel Swanson and I had with him on November 6. Far from conceding that Mr. Bromwich was entitled to commence an immediate investigation as he suggests (Bromwich Decl. ¶ 30), I reiterated Apple's objections, including that there was no need to interview Apple's top executives and Board of Directors at this time. Throughout the call, however, I was conciliatory, attempting to find a path that would avoid conflict with the monitor and ensure the monitorship ran smoothly and as anticipated under the Final Judgment. I did say that Apple was not taking the position that he could do no work until January 14, but emphasized that any work he did needed to be tethered to the narrow mandate afforded him by the Final Judgment. In that regard, I informed Mr. Bromwich that Apple was willing to set up some initial interviews to provide him with background information that would facilitate his assessment to commence after January 14; I made clear that the week of November 18 would be difficult for scheduling reasons, but that perhaps the week after might work. I also told Mr. Bromwich that Apple was willing to work on a confidentiality agreement, that we needed to ensure that privileged information was not disclosed to him,

and that, based on our call, I thought we would be able to work out an agreement that was acceptable to all. With respect to Mr. Bromwich's fee proposal, I reiterated Apple's objections from the October 31 letter. When discussing his 15% administrative fee, I noted that Apple and I had never heard of such a fee being charged in this context and I tried to lighten the mood by stating, "Why didn't I think of that?" When I asked the basis for this fee, Mr. Bromwich admitted that its purpose was to generate profits for his company. He explained his view that law firms earn profits through fees billed by their associates, but because the Bromwich Group is not a law firm and has no associates, the fee was necessary to make up these revenues. I jokingly said that, as fellow lawyers, we are probably more sympathetic to his fee request than Apple, but I emphasized that his rates and fees were unreasonable and not appropriate for an agent of the Court. I expressed Apple's concern with the potential for a runaway monitor with an unlimited budget. Mr. Bromwich said that, other than possibly abiding by some of Apple's expense guidelines, he was not willing to discuss or back down on any other aspect of his compensation structure.

6. Despite its good-faith and legitimate concerns, Apple nonetheless sought to accommodate Mr. Bromwich's scheduling demands. In his discussion of my November 7, 2013 email (Bromwich Decl. ¶ 32), Mr. Bromwich ignores that I agreed to arrange interviews with nine high-level business and legal executives if Mr. Bromwich was willing to wait until the week of December 2. Dkt. 419, Ex. B. Despite the offer, Mr. Bromwich continued to demand interviews with Apple's top executives, as well as three members of Apple's Board of Directors—including Al Gore—who happen to live in or frequently visit Northern California. *Id.* Most of the executives and Board members Mr. Bromwich sought to interview are not even relevant to the issues in this case. By contrast, Apple's

proposed interviewees included key individuals in the relevant business unit and those involved in rolling out Apple's enhanced compliance and training efforts. Nevertheless, because Apple could not produce its entire slate of directors and board members on a few weeks' notice, in an email dated November 9, 2013, Mr. Bromwich accused Apple of not taking its obligations and Mr. Bromwich's responsibilities seriously. *Id.* He then demanded that Apple "[b]e prepared to support any representations concerning [the] availability [of the individuals he wanted to interview] with *detailed copies of their schedules for that entire week.*" *Id.* He said he "was not prepared to drag things out any longer" than the week of November 18. *Id.*

7. Surprised and disappointed that Mr. Bromwich was not willing to embark on a productive and collaborative path, I explained to him in an email dated November 11, 2013 that his "demands and approach [were] unreasonable, unnecessary and unwarranted, and [went] well beyond the scope of the Final Judgment and Judge Cote's guidance." *Id.* I explained that the Final Judgment was clear "regarding the timing and scope of [his] review and the need to avoid unduly intruding on Apple's business operations." *Id.* His continued demands were "not in the spirit of our efforts and offer to host [him] at Apple headquarters for a full slate of interviews and provide other information well in advance of the date on which [his] review of the new compliance and training programs is to commence under the Final Judgment (January 14)." *Id.* Later that day, Mr. Bromwich reasserted his demand for a "slate of interviews and meetings next week" in an email to me. Dkt. 419, Ex. E.

8. Despite Mr. Bromwich's continued demands, we had a cordial telephone call later that evening, the details of which Mr. Bromwich glosses over in his declaration.

Bromwich Decl. ¶ 36. In that call, Mr. Bromwich proposed that Apple indicate which individuals, even if there were only two, would be available for interviews the week of November 18. Based on Apple's response, Mr. Bromwich said he would determine whether it made sense for him to make the trip to California that week or instead make the trip sometime later in the near future. I told him that I would check with Apple to see who would be available.

9. In an email the next day, I explained to Mr. Bromwich that Apple was willing to make available on November 18 for interviews its Chief Compliance Officer and Head of Global Security (Tom Moyer), and Associate General Counsel, Corporate Law (Gene Levoff). Dkt. 419, Ex. F. I again urged Mr. Bromwich to postpose the meetings until the week of December 2 or December 9 so that he could interview others, including Bruce Sewell (Apple's General Counsel) and Deena Said (the new Antitrust Compliance Officer). *Id.* I explained that this approach would "be more efficient and effective in getting you the information you seek and in working together to ensure that the company has comprehensive and effective antitrust compliance and training programs." *Id.*

10. Mr. Bromwich "accept[ed]" via email Apple's offer for interviews with only Messrs. Moyer and Levoff the week of November 18. *Id.* But even though Apple's offer was to provide only those two individuals for interviews that week, in the same email Mr. Bromwich immediately sought more interviews during his trip. *Id.* And when he learned that Apple General Counsel Bruce Sewell was attending the important *Apple v. Samsung* trial during the week of November 18, Mr. Bromwich proposed to "stop by the courthouse and meet him." Dkt. 419, Ex. H. Mr. Bromwich also again sought to interview the new Antitrust Compliance Officer, even though the day of the interviews was literally

her first day on the job. *Id.*

11. Matthew Reilly, one of Apple's outside attorneys from Simpson Thatcher working with the company to revise its antitrust compliance and training programs, wrote a letter to Mr. Bromwich on November 22, 2013, explaining once again how "incredibly disruptive" Mr. Bromwich's requests had become. Dkt. 419, Ex. I. Apple reminded Mr. Bromwich that the "reason for th[e] three-month window is of course to provide Apple and its counsel with time to develop new, comprehensive antitrust training and compliance materials in accordance with the Final Judgment, without hampering Apple's business." *Id.* And Apple tried to persuade Mr. Bromwich that his "continual requests for additional interviews and other information before January 14, 2014[] affirmatively hamper Apple's efforts to develop a new antitrust training and compliance program as efficiently and effectively as possible within the deadline set by Judge Cote." *Id.* Nevertheless, "[i]n the spirit of cooperation," Apple proposed a schedule for eleven additional interviews to take place between December 4 and 6. *Id.*

12. Apple objected on the record to the Final Judgment before it was issued (Dkt. 331 at 9-13), and it objected to Mr. Bromwich's appointment (Dkt. 419 ¶ 3). Apple has also promptly raised objections to Mr. Bromwich's conduct since his appointment. Apple raised objections with Mr. Bromwich at the October 22, 2013 meeting, as well as in my October 31, 2013 letter, my November 11, 2013 email, and the November 22, 2013 letter from Mr. Reilly. Apple forwarded the October 31 letter to plaintiffs, putting it on notice of Apple's objections. It also discussed these objections with plaintiffs in teleconferences on November 4 and December 9. Apple further discussed its objections with plaintiffs in a letter dated December 6, 2013 (Dkt. 419 Ex. Q), as well as in letters

dated December 21, 2013 and January 3, 2014. True and correct copies of these letters are attached hereto as Exhibits A and B, respectively. Notwithstanding Apple's repeated objections and the plaintiffs' expressions of sympathy for our position, the Justice Department dragged its feet in the meet and confer process and took no real action. In a December 17, 2013 letter from Noreen Krall to plaintiffs, Apple also made concrete proposals for moving forward in the event a stay is not granted, including regarding fees and costs, staffing, and how the monitorship should proceed. A true and correct copy of this letter is attached hereto as Exhibit C. Plaintiffs rejected these proposals in a letter to Ms. Krall dated December 24, 2013, a true and correct copy of which is attached hereto as Exhibit D.

13. Mr. Bromwich's and plaintiffs' suggestions that he has not sought to contact Apple's personnel directly (Bromwich Decl. ¶ 27; Opp. 10 n.3) is wrong. First, as he admits in his declaration (Bromwich Decl. ¶¶ 26-27), Mr. Bromwich sent a letter directly to CEO Tim Cook on November 1. *See* Dkt. 419, Ex. M. Mr. Cook received that letter via Federal Express on November 4. The content of that letter demonstrates Mr. Bromwich's concern that Apple's lawyers were getting in the way of his work and that he was trying to contact Apple personnel directly to bypass outside counsel. *See* Dkt. 419, Ex. M. Second, Mr. Bromwich wrote a letter to the Board of Directors dated November 22, 2013 (Dkt. 419, Ex. J), which his colleague Maria Cirincione emailed to Noreen Krall. A true and correct copy of the email exchange between Ms. Cirincione and Ms. Krall is attached hereto as Exhibit E. Ms. Cirincione asked Ms. Krall to email the letter to the Board of Directors, but she also indicated she would be mailing hardcopies to them directly. *See* Ex. E. When Ms. Krall told Ms. Cirincione that "hardcopies to their business

addresses are not necessary or customary in our communications with board members," Ms. Cirincione responded, "Thank you." *Id.* While it appears that Ms. Cirincione did not ultimately send the hardcopies, the letter constituted an explicit effort to "promote" a "relationship between the company liaisons and the monitoring team that is unfiltered through outside counsel," and it inappropriately solicited responses from directors without aid of Apple's counsel. Dkt. 419, Ex. J. Finally, Mr. Bromwich also pressed several times for direct communications with the new Antitrust Compliance Officer that Apple appointed pursuant to the Final Judgment.

14. On December 5, 2013, Mr. Bromwich interviewed Dr. Ron Sugar, Chairman of Apple's Audit and Finance Committee. Dr. Sugar is the former president and CEO of Northrop Grumman, and he also currently chairs Chevron's Audit Committee and serves on Amgen's Compliance Committee. Dr. Sugar had to travel from Southern California to Sunnyvale specifically for this interview, which took the bulk of his day, at great inconvenience to himself and to the detriment of his other business obligations. I attended Dr. Sugar's interview. Mr. Bromwich did not even mention Apple until about fifteen minutes into the interview. He seemed to run out of questions, and he finished early, before the one-hour time allotment ended.

15. During his interview, Dr. Sugar noted that there is no ambiguity in the mind of the Board as to the current situation—there is a judgment, and although Apple is appealing that judgment, Apple needed to and would comply with it. Dr. Sugar explained that Apple would like to have the best compliance program possible, and also said it would be helpful to know what, in Mr. Bromwich's view, "good" antitrust compliance programs and policies will mean two years from now. Mr. Bromwich provided generic responses

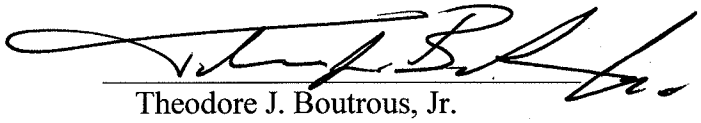
about training, but then used the question as a springboard to describe his authority in broad terms. He said he "will need to crawl into a company" to perform his duties as monitor and expressed his view that Apple needed to "take down barriers" to his access. He also noted that he needed direct contact with the principals and that this was his first monitorship that has involved outside counsel. He emphasized that he needed to be able to pick up the phone and call Dr. Sugar directly.

16. During the same December 5 interview with Dr. Sugar, Mr. Bromwich asked questions that extended beyond the subject matter of this litigation. For example, he asked Dr. Sugar what were the most significant compliance problems at the time Dr. Sugar joined Apple's Audit Committee. I objected on the basis that this questioning went beyond Mr. Bromwich's mandate, and I cautioned Dr. Sugar to avoid revealing privileged information in any answer.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

Dated: January 7, 2014

Respectfully submitted,



Theodore J. Boutrous, Jr.