U.S. Department of Justice

Antitrust Division

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January 10, 2014

The Honorable Denise Cote
United States District Judge, S.D.N.Y.
Daniel P. Moynihan U.S. Courthouse
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:

We write in response to Apple's letter of January 7.[1]

Regrettably, it is now clear that Apple has chosen a campaign of character assassination over a culture of compliance. Apple could have been spending the past months working with the External Compliance Monitor with the ultimate goal of reforming its policies and training, and in the process change its corporate tone to one that reflects a commitment to abiding by the requirements of the antitrust laws. Instead, Apple has focused on personally attacking Mr. Bromwich, and thwarting him from performing even the most basic of his court-ordered functions.

When Apple chose to seek a stay of the section of the Final Judgment authorizing the imposition of an External Compliance Monitor, it premised its filing on arguments that Mr. Bromwich was engaging in improper activities that were interfering with Apple's business operations and causing irreparable harm to the company. (Apple even claimed that Mr. Bromwich's requests for one-hour interviews with key executives and board members would result in a loss of market share for Apple and a decrease in company innovation.) In support of its motion, Apple publicly filed approximately 19 exhibits, many of which were written communications between Mr. Bromwich and Apple's attorneys. Apple's papers were littered with factual inaccuracies and gross exaggerations regarding its interactions with Mr. Bromwich.

[1] The Court's December 2 Order requires that Apple seek to resolve with Plaintiffs any issues Apple has concerning the External Compliance Monitor before raising those issues with the Court. Contrary to the assertion in Apple's letter, prior to making the instant application, Apple did not satisfy that requirement. On January 3, 2014, Apple, for the first time, wrote Plaintiffs calling to have Mr. Bromwich disqualified. Plaintiffs responded on January 7, indicating that while we disagreed with Apple's analysis, we would be happy to discuss the matter with them in detail at their convenience. (Ex. 1.) Rather than accept Plaintiffs' offer and engage in any dialogue with Plaintiffs in an attempt to resolve the matter, Apple petitioned the Court.

Mr. Bromwich's declaration was a direct response to Apple's filing. In it, he referenced many of the same documents that Apple provided the Court, and presented the Court with the full story—so that the Court could have a complete and accurate record when making its decision on Apple's motion. Mr. Bromwich was the non-Apple person best situated to comment on the validity of Apple's statements to the Court. In Apple's view of the world, the fact that Mr. Bromwich did not sit silent and let Apple's misrepresentations lay unchallenged makes him biased and subject to disqualification. In reality, Mr. Bromwich would not have been performing his basic duties as a court officer if he allowed Apple's revisionist history to go unchecked.

As this Court found, Apple, led by its most senior executives and lawyers, engaged in a blatant price-fixing scheme that harmed millions of consumers (including its own customers) by hundreds of millions of dollars. An External Compliance Monitor was appointed because Apple, after being adjudicated a price fixer, failed to show that it had taken the lessons of the litigation seriously, and could reform its antitrust policies and practices on its own. Accordingly, while it is unfortunate, it is not shocking that Apple disagrees with the Monitor—who understands what is needed to create a culture of compliance at Apple. But if a monitor's expression of disagreement with a company (or its behavior) makes him biased, then a monitor could serve no purpose other than as a rubber stamp.

Plaintiffs have worked diligently to try to resolve Apple's articulated objections. But it is now apparent that Apple has no interest in resolving anything unless the resolution involves expunging the requirement of a monitor from the Final Judgment. For example, both Mr. Bromwich and the United States have reached out to Apple to discuss the fee dispute. (Exs. 2, 3.) Mr. Bromwich has even openly expressed a willingness to adjust his rates and fee structure in order to resolve the matter. But Apple, despite continuing to publicly malign Mr. Bromwich over his fees, has refused to respond to any of the many requests to negotiate. Similarly, Mr. Bromwich has never sought and is not seeking to interview Apple personnel unrepresented by counsel. The Final Judgment, the Court, Plaintiffs and Mr. Bromwich all have made clear that Apple personnel can have lawyers present at interviews. Nonetheless, Apple persists in peppering its papers with claims of "*ex parte*" communications and objections that Mr. Bromwich "continues to press for direct access to individuals without counsel present."[2]

Mr. Bromwich has not expanded his mandate and there is absolutely no evidence that he is biased. Mr. Bromwich is focused on working with Apple to ensure that its antitrust compliance policies, procedures and training are reformed so that Apple executives and lawyers will never again engage in anticompetitive conduct. Apple simply does not want any monitor whatsoever, and manufacturing these baseless objections is the only way it apparently believes it can achieve that result. But if Apple were to cease obstructing Mr. Bromwich from performing his responsibilities, we are confident he would assist Apple in reaching the goals this Court articulated when it decided a monitor was necessary.

[2] Apple neglects to mention that Mr. Bromwich has not conducted or sought to conduct any interviews of Apple personnel whatsoever in several weeks. Indeed, Mr. Bromwich has had only limited interactions with Apple's lawyers since Apple filed its motion to stay.

Respectfully Submitted,

/s/ Lawrence E. Buterman
Lawrence E. Buterman

EXHIBIT 1

Buterman, Lawrence

From: Buterman, Lawrence
Sent: Tuesday, January 07, 2014 8:56 AM
To: 'Richman, Cynthia'; Lipman, Eric; Gervey, Gabriel; eric.stock@ag.ny.gov; Robert.Hubbard@ag.ny.gov; joseph.nielsen@ct.gov; Gary.Becker@ct.gov; Ryan, Mark W.
Cc: Boutrous Jr., Theodore J.; Swanson, Daniel G.; Evanson, Blaine H.
Subject: RE: U.S. v. Apple et al.

Ted, Dan and Cindy,

We hope you had a nice new year.

We are in receipt of your letter from Friday. Please note that while we disagree with your analysis, we would be happy to discuss the matter with you in detail either when you are in town next week or over the phone at a mutually-convenient time. Just let us know your preference.

Regards,

Larry

From: Richman, Cynthia [mailto:CRichman@gibsondunn.com]
Sent: Friday, January 03, 2014 3:18 PM
To: Buterman, Lawrence; Lipman, Eric; Gervey, Gabriel; eric.stock@ag.ny.gov; Robert.Hubbard@ag.ny.gov; joseph.nielsen@ct.gov; Gary.Becker@ct.gov
Cc: Boutrous Jr., Theodore J.; Swanson, Daniel G.; Evanson, Blaine H.
Subject: U.S. v. Apple et al.

Please see the attached letter from Ted Boutrous.

Best,
Cindy

Cynthia E. Richman

GIBSON DUNN

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EXHIBIT 2

[redacted]

From: Michael R. Bromwich <michael.bromwich@bromwichgroup.com>
Sent: Tuesday, December 10, 2013 1:30 PM
To: Matt Reilly
Cc: barry.nigro@friedfrank.com; maria.cirincione@friedfrank.com; Carroll, Sarah
Subject: Apple

Dear Matt,

Thanks for your assistance in setting up the interviews we conducted last week. I thought they were constructive and very helpful in providing some of the necessary background to our work. They will serve as part of a strong foundation for the additional work we will be doing. We also very much appreciate the introduction to Deena Said and look forward to working with her.

In looking ahead to the next several weeks, I wanted to get the company's and your views on a schedule for the remainder of December and January that is most efficient and productive. The holiday season begins soon and will extend through the end of the year, and we are well aware that Apple's revised antitrust policies and procedures are due to be completed on January 14.

Please provide a proposal for when it would be convenient for us to schedule our next trip to Cupertino to conduct additional interviews; it may make sense to do so after January 14, but I wanted to give you the option of having some of them take place before that time. Whether or not you elect to have us conduct additional interviews between now and January 14, I suggest that we spend the some time between now and then focusing on some of the outstanding document issues we have discussed. If Apple wants, we are available to meet either in Washington or Cupertino before the 14th, and we certainly are amenable to discussing with you any issues or concerns Apple is encountering as it finalizes its antitrust policies.

Also, please advise the company that I would welcome the chance to discuss the fee-related issues at its earliest convenience to try to put those issues behind us.

Best regards.

MRB

EXHIBIT 3

U.S. Department of Justice

Antitrust Division

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December 24, 2013

Noreen Krall, Esq.
Vice President, Chief Litigation Counsel
Apple Inc.
1 Infinite Loop
Cupertino, CA 95014

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 Ms. Krall:

Thank you for your letter of December 17, 2013. As you know, Plaintiffs have thoroughly reviewed all of Apple's filings regarding the External Compliance Monitor, and have spoken at length with both Apple and Mr. Bromwich concerning all issues that Apple has raised. In our December 13 letter to the Court, we expressed generally our conclusions concerning Apple's objections. While we disagree with Apple regarding the legitimacy of the objections it has made, please know that that in no way affects our commitment to ensuring that the terms of the Final Judgment are abided by in all respects by all parties, and that Apple and the External Compliance Monitor work cooperatively going forward. The remainder of this letter responds to the specific issues identified in your December 17 letter.

1. Scope of Monitor's Responsibilities

In your letter, you state that "Mr. Bromwich must refrain from *further* efforts to expand his mandate beyond the sharply delineated tasks set forth in the Final Judgment." (Emphasis added). However, as noted in our December 13 letter to Judge Cote, the United States and Plaintiff States are unaware of *any* instance in which Mr. Bromwich has acted outside the scope of his authority under the Final Judgment—and your December 17 letter does not identify any.

The Final Judgment explicitly provides that Mr. Bromwich may, in connection with the exercise of his responsibilities under Section VI of the Final Judgment, "interview, either informally or on the record, *any* Apple personnel." FJ § VI.G.1 (emphasis added). While we understand that Apple's complaints center on Mr. Bromwich's requests to interview Apple senior executives and Board members, such interviews are standard practice in a monitor

assignment. Here, given that the Court determined that "Apple lawyers and its highest level executives" orchestrated a price-fixing scheme and exhibited "a blatant and aggressive disregard [] for the requirements of the law," Aug. 27, 2013 Tr. at 17:1-6, interviews with Apple's senior executives and Board members are not only appropriate under the Final Judgment, but are critical. That said, our understanding is that to date, Mr. Bromwich has interviewed only one Apple senior executive, General Counsel Bruce Sewell, and one Apple Board member, the Chair of Apple's Audit and Finance Committee, Dr. Ronald Sugar. Neither during those interviews, nor during any other interviews, has Apple objected to any question posed by Mr. Bromwich as veering outside the scope of his responsibilities.[1]

Turning to Apple's proposed schedule and procedures for Mr. Bromwich to adhere to, I think we all agree that Apple and Mr. Bromwich should work together to minimize future disputes. We believe that opening a line of communication on matters such as scheduling and confidentiality could prove beneficial. However, many of Apple's proposals go well beyond creating a dialogue, and in effect would operate to neuter the monitorship. An External Compliance Monitor was appointed by the Court because Apple failed to demonstrate that it was committed to taking steps on its own to ensure that the government need never again expend its resources to bring Apple into court for violations of the country's antitrust laws. *See, e.g.*, Aug. 27, 2013 Tr. at 17:7-16. As such, it is both inappropriate and likely ineffective for Apple to act as a gatekeeper—preventing Mr. Bromwich from seeking interviews or conducting his work unless he receives advance approval from Apple. Mr. Bromwich must have the flexibility to carry out his responsibilities, consistent with the Final Judgment, in the manner that he deems most appropriate. Of course, in the event Mr. Bromwich seeks to engage in specific actions that Apple believes are outside the scope of his permitted activities, we request that, consistent with Section VI.H of the Final Judgment, you notify us at once.

2. Timing of Monitor's Assignment

The appointment of the External Compliance Monitor is for a period of two years, with the possibility of one or more one-year extensions. FJ § VI.A. Nowhere in the Final Judgment does the Court provide that the Monitor must wait 90 days before beginning his work—nor would it make any sense for him to do so. Section VI.C. of the Final Judgment only clarifies that Mr. Bromwich is to review Apple's policies, procedures and training programs as they exist 90

[1] Your letter also states that "Mr. Bromwich must cease his requests for *ex parte* access to Apple Board members and executives." For reasons unknown, Apple continues to argue that this Court's orders permit Mr. Bromwich to speak with Apple executives without counsel present—even though Plaintiffs, Mr. Bromwich and the Court have all been steadfast in making clear that is not what the Final Judgment says. *See* FJ § VI.G.1 (the External Compliance Monitor may "interview, either informally or on the record, any Apple personnel, who may have counsel present."). You were on the December 13 teleconference where the Court specifically stated that it had not authorized, and was not authorizing, Mr. Bromwich to speak to Apple executives without counsel present, and you received the Court's Order that same day that explicitly stated that the Court was not using the term *ex-parte* to mean "uncounseled." Dec. 13, 2013 Order (Dkt. No. 416). And, to our knowledge Mr. Bromwich has never requested or sought to deprive Apple of counsel at any interview.

days after his appointment. FJ § VI.C. Mr. Bromwich's work to date has been undertaken in order to allow him to properly make his assessments, and is wholly appropriate.[2]

Notwithstanding, Mr. Bromwich has proposed to Apple that the next round of interviews with its personnel not take place until after Apple's revised policies, procedures and training are in place. While that offer moots the bulk of Apple's current objection, we expect that, consistent with Section VI.G, Apple will assist Mr. Bromwich in the performance of his duties by timely responding to all of his scheduling requests and requests for information and documents.

3. Financial Issues

Mr. Bromwich is permitted to hire any persons reasonably necessary to fulfill his responsibilities. FJ § VI.I. Those individuals and Mr. Bromwich serve "at the cost and expense of Apple, on such terms and conditions as the United States, after consultation with the Representative Plaintiff States, approves." *Id.* Those compensation terms are required to be reasonable and customary and commensurate with the individuals' experience and responsibilities. *Id.* Nowhere does the Final Judgment provide that Apple shall have any role in setting the compensation terms of Mr. Bromwich and his team, or in approving his expenses.

Nonetheless, we understand that Apple has objected to the financial terms of Mr. Bromwich's engagement, and has proposed significantly reduced terms based on "a detailed analysis of billing rates for law firms doing work for Apple and the nature of the tasks to be performed by Mr. Bromwich and his team."[3] Respectfully, we do not believe that the rates Apple is able to negotiate with outside counsel it chooses to hire is the appropriate metric to use here. As noted above, Mr. Bromwich does not work for Apple—he is serving as a Court-appointed monitor to ensure that Apple's compliance policies and training are sufficient to prevent Apple from orchestrating another massive and costly price-fixing scheme. Mr. Bromwich is one of the most highly regarded and experienced monitors in the country, and the terms of the Final Judgment require that his compensation reflect both his experience and the critical responsibility he has been entrusted with.

We firmly believe that a compromise acceptable to both Apple and Mr. Bromwich can be reached on the fee issue. Mr. Bromwich has informed Apple that he is willing to engage in those discussions, and we reached out to Apple's counsel last week to inquire whether Apple similarly was inclined. Once we receive Apple's response, we will proceed accordingly.

Regardless of the outcome of the fee dispute, we do not believe it is productive or logical to set a cap on total fees for the External Monitor's 2014 and 2015 work. As you know, a sizeable portion of the fees billed so far have been incurred because Mr. Bromwich has had to devote significant time to engaging in dialogues unreasonably extended by Apple over basic

[2] At no point prior to its letter did Apple assert that Mr. Bromwich needed to wait 90 days before commencing any work. Indeed, during the meet-and-confer-process Apple specifically stated that it believed Mr. Bromwich should be performing various monitor functions in his first 90 days.

[3] We have not been provided any analysis by Apple of the rates its counsel charge, or any of the data underlying that analysis.

scheduling issues and responding to baseless objections by the company. Neither Mr. Bromwich nor Plaintiffs expected that Apple would seek to impede his ability to perform his tasks, and certainly no one could properly budget for such obstructions. Apple can minimize the bills of the External Compliance Monitor by working with Mr. Bromwich, rather than continuing in the adversarial posture it has operated under so far.[4]

* * *

While we recognize that Apple would prefer that there be no External Compliance Monitor, the reality is that Mr. Bromwich has been appointed to perform that function, and that his appointment provides Apple with a genuine opportunity to "change its culture to one that includes a commitment to understand and abide by the requirements of the law." Aug. 27, 2013 Tr. at 20:1-4. We hope that, moving forward, Apple will conduct itself as a model for antitrust compliance, and are confident that Mr. Bromwich and his team can assist in those efforts. We remain dedicated to assisting in resolving any and all disagreements Apple may have with the process as it is carried out, and gladly accept your request to meet in Washington, D.C., the week of January 14 to discuss these matters in person. In the interim, we hope you and your colleagues have happy holidays.

Sincerely,

/s/ Lawrence E. Buterman
Lawrence E. Buterman

[4] For the same reasons, we believe that requiring Mr. Bromwich to submit workplans and budgets is of limited utility. As noted above, however, we do believe that increased communication between Mr. Bromwich and Apple is important, and welcome those types of discussions when possible. We also believe that there is benefit in the External Compliance Monitor providing Apple with billing that contains some reasonable level of detail, and are hopeful that Apple and Mr. Bromwich can come to an agreement on that matter.