12-4017

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BOB KOHN,

Appellant

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

(*caption continued on next page*)

KOHN'S RESPONSE REQUESTING DENIAL OF UNITED STATES'S MOTION TO DISMISS KOHN'S APPEAL OF THE ORDER DENYING HIS MOTION TO INTERVENE

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v.

VERLAGSGRUPPE GEORG VON HOLTZBRINK GMBH, HOLTZBRINK PUBLISHERS, LLC, DBA MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC. HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS, L.L.C., SIMON & SCHUSTER, INC.,

Defendants-Appellees,

APPLE, INC.,

Defendant.

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INTRODUCTION

Appellant Bob Kohn ("Kohn") is seeking to intervene in what the District Court conceded is "no ordinary Tunney Act proceeding." This appeal involves two *separate* final orders: *first*, the District Court's order denying Kohn's motion for leave to intervene for the purpose of appeal (Order, 10/2/12, No. 12-02826, ECF No. 136) and, only by virtue of a reversal thereof, *second*, the District Court's entry of Final Judgment in the Tunney Act proceeding below (Order, 9/5/12, ECF No. 113). Thus, Kohn immediately seeks review of the District Court's order denying Kohn's motion for leave to intervene. If this Court reverses that order, Kohn will have standing to challenge the District Court's earlier order for entry of the Final Judgment in the Tunney Act proceeding below. No one other than Kohn has sought to intervene and there has been no other appeal of the Final Judgment.

By its Motion the Government seeks to put the cart before the horse. Although it predicates its motion to dismiss on the fact that Kohn, as a non-intervenor, lacks appellate standing to challenge the Final Judgment, it ultimately concedes, on page 5 of its Motion, that Kohn timely noticed "an appeal from the denial of his motion to intervene." In the Second Circuit, it is "settled law that this Court has jurisdiction over an order denying intervention." *MasterCard Int'l Corp. v Visa Int'l Service Ass'n, Inc.*, 471 F.3d 377, 384 (2d Cir. 2006).

Only after this Court resolves the merits of Kohn's challenge to the denial of his intervention—which Kohn unquestionably has standing to appeal and this Court, as shown, has jurisdiction to consider—would the Court then consider whether Kohn has standing to appeal the Final Judgment (and, if so, whether the judgment should be reversed). Thus, the Government's motion to dismiss is premature; indeed, the Government does not cite a single case in which this Court has dismissed an appeal for lack of appellate standing prior to full merits briefing and disposition by a merits panel. The Court therefore should deny the Government's motion to dismiss, which improperly seeks to make Kohn litigate these issues on an expedited basis before considering the merits of the District Court's intervention ruling—the very decision from which Kohn noticed an appeal.

Although, it is not proper to address Kohn's appellate standing to appeal the Final Judgment until this Court has resolved the predicate issue of whether the District Court erred in denying the intervention, because the Government has focused its motion on this unripe standing issue, Kohn nonetheless herein demonstrates that, if he is held to be an intervenor, he *will also* have standing to appeal the order entering the Final Judgment.

In sum, the Government's motion should be denied. If this Court holds that the District Court should have granted Kohn's motion to intervene, it will then have jurisdiction to review the District Court's entry of Final Judgment. Kohn is

prepared to file his Opening Brief, on the merits, on or before the due date of December 14, 2012.

ARGUMENT

I. THE GOVERNMENT'S MOTION SHOULD BE DENIED BECAUSE THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER DENYING KOHN'S MOTION TO INTERVENE

This Court has jurisdiction under 28 U.S.C. §1291. The District Court issued a final order denying Kohn's motion for leave to intervene on October 2, 2012, and Kohn filed a Notice of Appeal that same day.

A. This Court has Jurisdiction of an Appeal of an Order Which Denies Intervention

It is settled law that this Court has jurisdiction of an appeal of an order which denies intervention. *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010); *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 384 (2d Cir. 2006); *Brennan v. NYC Board of Edu*., 260 F.3d 123, 128 (2d Cir. 2001); *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 993 n19 (2d Cir. 1984) (Friendly, J.); *Ionia Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 189 (2d Cir. 1970) (Kaufman, J.).[1]

[1] These decisions are "based on the reasoning that the denial of an opportunity to be heard concludes the matter for all practical purposes for the would-be intervenor." *In re Lehman Brothers Holdings, Inc.*, 697 F.3d 74 (2d Cir. 2012).

B. The Court Must Examine the Merits of the Motion for Intervention *Before* Considering Whether It Has Jurisdiction to Review the Entry of the Final Judgment

This Court has recognized "to follow this approach in each instance, will require the court to examine the merits of the motion for intervention before it can consider whether it has jurisdiction." *Ionia Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 189 (2d Cir. 1970) (opinion by Kaufman, J.).

The Government fails to cite a single Second Circuit case where a denial of a motion to intervene was dismissed upon a motion thereby "short circuiting" a pending appeal, effectively depriving the appellant of the right to file a considered Opening Brief and forcing decision based upon a 10-day opposition. Even in *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), cited by the Government on pages of 6 and 8 of its motion, the Court's consideration of standing was after full briefing and argument. The same is true of *In re Holocaust Victim Assets Litigation*, 225 F.3d 191 (2d Cir. 2000), which the Government cites on pages 7 and 9 of its motion. In that case, the Court ultimately dismissed the appeal for lack of standing, but again only after briefing and oral argument.

Accordingly, the Government's motion should be denied.

II. IF THIS COURT HOLDS THAT THE DISTRICT COURT SHOULD HAVE GRANTED KOHN'S MOTION TO INTERVENE, IT WILL THEN HAVE JURISDICTION TO REVIEW THE DISTRICT COURT'S ENTRY OF FINAL JUDGMENT

Given that this Court has jurisdiction over the Kohn's appeal of the order denying his intervention, Kohn should have the right to file a considered Opening Brief (just as the parties in *all* the cases relied on by the Government have done) to challenge the District Court's order denying his motion to intervene and its order entering the Final Judgment (addressing any issue of Kohn's standing to appeal such order). This Court will thereupon have an opportunity in reviewing Kohn's appeal to consider the record and Kohn's standing to appeal the Final Judgment, rather than having to address these issues in the expedited posture of a motion.

Nonetheless, because the Government's motion (improperly) focuses on the merits of Kohn's standing to appeal the Final Judgment, Kohn shows below that as an intervenor, he will have standing because Kohn has met every requirement to support such standing. Thus, after reversing the denial of Kohn's motion to intervene, this Court will have jurisdiction to hear Kohn's appeal of the Final Judgment under Article III. U.S. Const. art. III.

A. This Court May Review all Materials in the Record to Assess Standing

The Court may review all materials in the record to assess standing, including affidavits in support of standing. *Schulz v. Williams*, 44 F.3d 48, 61 n4

(2d Cir. 1994) (citing *Warth v. Selden*, 422 U.S. 490, 501-02 (1975). It was within the District Court's power to allow or require Kohn to supply by affidavit or otherwise, further particularized allegations of fact deemed supportive of his standing. *Warth* at 501-02. But, *neither the Government nor the District Court raised the issue of standing below*.[2] Had the parties or the District Court raised the issue, then Kohn would have submitted affidavits specifically to meet his burden of establishing the elements of standing. See, *Schulz* at 61 n4. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

This Court may "at this stage" consider the record, together with the attached affidavit which particularizes the allegations of fact in the record supporting Kohn's standing to appeal the Final Judgment ("Kohn Affidavit"). Schulz at n4 ("In the absence of such documents [i.e., 'affidavits specifically to meet their burden of establishing the elements of standing'] at this stage, we look first at the evidence presented at trial"). See also, *Warth,* 422 U.S. 490, 501-2. A court of appeals has the power to "supplement the record to add material not presented to the district court." 16A Wright & Miller, et. al., *Federal Practice and Procedure* § 3956.4 (Sept., 2012) (compiling a list of reasons for granting

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[2] The District Court never questioned Kohn's standing to appeal, only his qualifications for intervention under Rule 24. 10/2/12 Order (ECF No. 136). When the District Court questioned a party's standing to appeal the Final Judgment, it was quite explicit, as when it reserved judgment on whether defendant Apple had such standing. 9/5/12 Order at 44 (ECF No. 113) ("Even if Apple has standing to pursue an appeal, an issue which this Opinion does not decide…").

permission to supplement the record on appeal, including the filing of affidavits with the Court of Appeals for the purpose of determining appellate jurisdiction).

B. This Court May Review Supplemental Materials Filed During the Pendency of Appeal to Determine the Court's Jurisdiction under Article III

The Second Circuit has specifically permitted the United States to supplement the record with documents not in the record after the opposing party raised an issue for the first time on appeal. *United States v. Aulet*, 618 F.2d 182, 186-87 (2d Cir. 1980) (allowing supplementation of record on appeal even with material that was not presented to the district court). Some courts state that supplementing the record on appeal constitutes an exercise of the "inherent equitable power" of the Court of Appeals. See, 16A Wright & Miller, et. al., *Federal Practice and Procedure* § 3956.4 (Sept., 2012).

At least two Circuit Courts of Appeal, in three decisions, have specifically permitted a party to supplement the record on appeal *with affidavits to support their Article III standing*.[3] In *Thomas More Law Center v. Obama*, 651 F.3d 529, 536 (6th Cir. 2011), on appeal from a district court decision upholding a provision in the Patient Protection and Affordable Care Act, the government moved to dismiss the appeal after learning that a plaintiff had obtained medical insurance.

[3] The Federal Rules of Appellate Procedure permit the filing of affidavits on appeal, particularly in response to a motion filed by an opposing party. Fed. R. App. P. 27(a)(3)(A).

The Sixth Circuit permitted two other plaintiffs to file, on appeal, affidavits showing that they had standing to challenge the provision. See, 16A Wright & Miller, et. al., *Federal Practice and Procedure* § 3956.4, at n29.

In *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006), after the U.S. Forest Service challenged appellant's standing *for the first time* on appeal, the Court considered affidavits filed by appellant with its reply brief, together with its motion for leave to file such affidavits. The Court held that it had the power to do so, because the additional material would be dispositive of pending issues and doing so was in the interests of justice and judicial economy. Id. at 1170-71.

In *Cabalceta v. Standard Fruit Co*., 883 F.2d 1553, 1555 (11th Cir. 1989), the Eleventh Circuit held that supplementation was appropriate in considering the court's jurisdiction. The court specifically considered (1) whether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issue and (2) whether remand of the case to the district court for consideration of the additional material would be contrary to both the interests of justice and the efficient use of judicial resources. The court concluded that, in determining the existence of jurisdiction, "a consideration of all relevant information is necessary to make an informed and final decision. In the interests of judicial economy, supplementation is necessary for a final disposition of this issue

and to avoid remand on all issues." Id. See also, *CSX Transportation, Inc. v. Garden City*, 235 F.3d 1325, 1331 (11th Cir. 2000) (exercising its inherent inequitable power to allow supplementation of the appellate record with documents not reviewed by the district court. "While we rarely exercise our authority to enlarge the appellate record, the Supreme Court has reminded the appellate courts that:

> '[T]he rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.'"

quoting *Hormel v Helvering*, 313 U.S. 552, 721 (1941)).

Should this Court reverse the District Court's denial of Kohn's motion to intervene, Kohn will contend that, to the extent the record below is deemed insufficient, the further particulars alleged in the attached Kohn Affidavit would establish beyond any doubt the resolution of his standing to challenge the decree. Kohn will file a motion to supplement the record with the Kohn Affidavit at the time he files his Opening Brief, if necessary.[4]

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[4] That is, unless the Government withdraws its challenge to Court's jurisdiction or, in the interests of judicial economy, this Court otherwise exercises its own authority to supplement the record with the Kohn Affidavit. See, *Aulet*, 618 F.2d 182, 186-87. To that latter end, if necessary,

C. Allegations to Support Standing Are to Be Liberally Construed

In its review of standing, both the trial and reviewing courts must accept as true all material allegations in favor of the complaining party. See, *Warth* at 501 (citing *Jenkens v. McKeithen*, 395 U.S. 411, 421-22 (1969) (allegations made to support standing should be "liberally construed" in favor of the complaining party).[5]

Facts supporting Kohn's standing are not limited by those mentioned by the Government in its Motion, which overlooks facts in the record below supporting Kohn's personal and financial stake in the outcome of this appeal, which are further particularized by the Kohn Affidavit. That Kohn repeatedly described himself in the proceeding below as a "consumer" or "author," vigorously contending that the Final Judgment is not in the *public interest*—which is the only basis for challenging the Final Judgment—does not "contradict or undermine" other facts supporting his personal and financial stake in the outcome of this appeal. See, *Schulz* at 61 n4.

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this Court may consider this Response as including and constituting a motion by Kohn to supplement the record with the Kohn Affidavit.

[5] "At the pleading stage, general factual allegations of injury resulting from the defendants conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Build'g & Construct'n Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) (citing, *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

D. Kohn Has Standing to Appeal Entry of the Final Judgment

Kohn has suffered (1) an injury in fact, (2) that is fairly traceable to the challenged action and (3) that is likely to be redressed by the relief requested. *Schultz*, 44 F.3d 48, 52. To suffer a judicially cognizable "injury in fact" an intervenor must have a "direct stake in the outcome" of the challenged action. *Schultz*, 44 F.3d 48, 52 (citing *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986)). Here, the challenged action is the District Court's entry of the Final Judgment under 15 U.S.C. §16 (the "Tunney Act").[6] See, *Tachiona,* 386 F.3d 205, 211 (standing at the appellate stage concerns injury caused by the *judgment*, not injury caused by the underlying facts).

"Although the determination of an injury may not always be simple, standing to appeal is recognized if the appellant can show an adverse effect of the judgment, and denied if no adverse effect can be shown." *Ass'n of Banks in Insurance, Inc. v. Duryee*, 270 F.3d 397, 403 (6th Cir. 2001) (quoting 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: § 3902 (2d ed.1992)). Threatened injury is sufficient to confer standing. *Duryee* at

[6] Arguably, since the Tunney Act specifically requires the Court to make a determination that the proposed decree is in the *public interest*, virtually any member of the public, such as a consumer who buys e-books or an author who creates them, who sufficiently alleges an injury in fact that is fairly traceable to the challenged action and this is likely to be redressed by the relief requested—all of which Kohn alleged in the record in addition to his direct financial stake in reversing the anticompetitive and other harmful effects of the Final Judgment—would have standing to challenge the District Court's public interest determination under Article III.

403. See, *Schulz*, 44 F.3d 48, 52 ("actual or imminent, not conjectural or hypothetical").

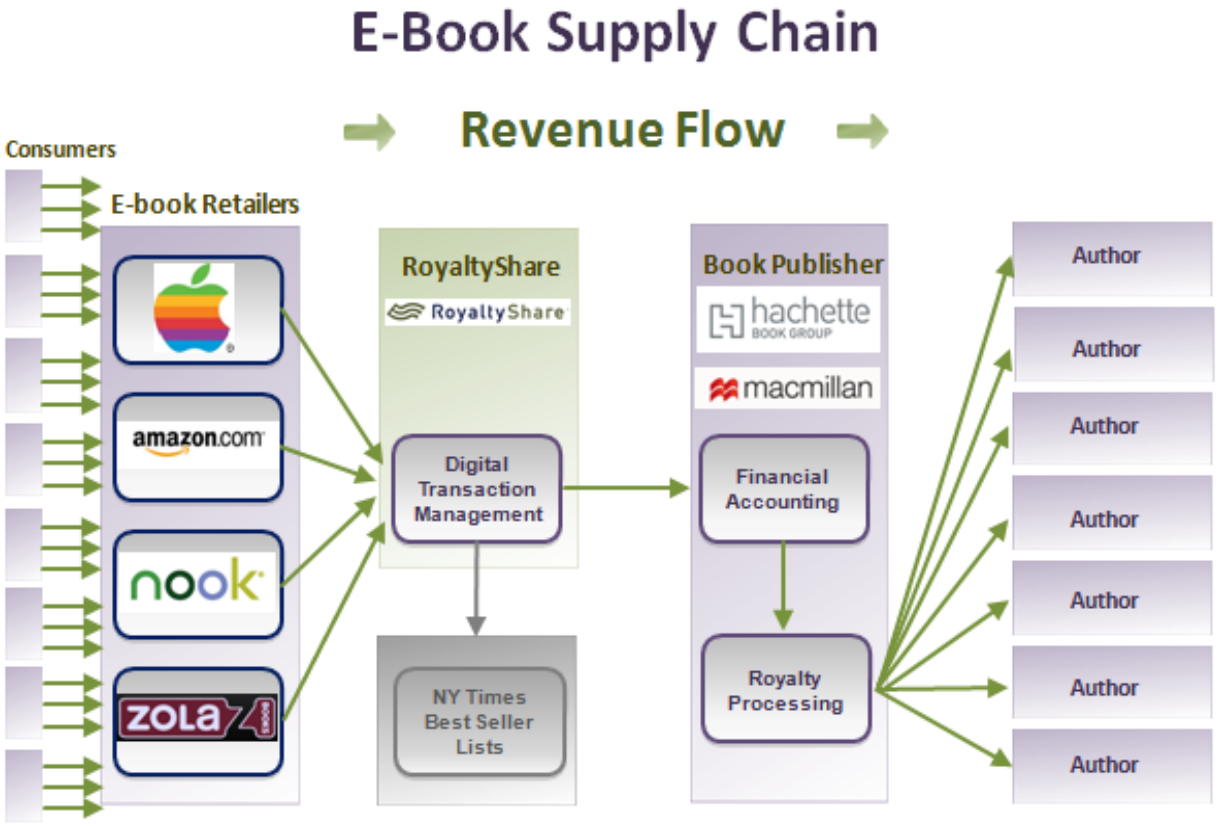
Thus, in *United States v. American Cyanimid Co*., 719 F.2d 558, 563 (2d Cir. 1984), the Court permitted intervention to appeal termination of an antitrust consent decree where the intervenor claimed such termination would have an "anticompetitive effect" upon the relevant market. As the District Court in that case found, intervenor did not have "any vested rights" in the subject consent decree (*United States v. American Cyanimid Co*., 556 F.Supp. 357, 361 (S.D.N.Y. 1982)), yet the Second Circuit had jurisdiction because intervenor's claims were "directly related to the ultimate questions" in the case—i.e., the anticompetitive effect of terminating the decree. *American Cyanimid*, 719 F.2d 558, 563. In other words, while the intervenor did not have any direct personal or pecuniary interest in the decree, it did have a stake in the alleged *anticompetitive effect* of the District Court's termination of the decree.

Certainly, he who is "likely to be financially" injured "may be a reliable private attorney general to litigate the issues of the public interest." *Ass'n of Data Processing Service Org's v. Camp*, 397 U.S. 150 (1970). This should be especially true in Tunney Act cases when the real, public Attorney General has contractually agreed *not* to appeal—one which involves the review of the District Court's determination of whether such contract is in *public interest.*

The record reflects that Kohn has alleged a direct, personal financial interest in the outcome of this appeal, not just "a mere interest in the problem." It reflects that Kohn is Chairman & CEO of RoyaltyShare, Inc., and that RoyaltyShare "provides technology solutions and enterprise services" to book publishers, "*including one of the Settling Defendants*." Comments of Kohn, 5/30/12, ATC-0143 at 14 [emphasis added]. Such comments were filed with the District Court and are part of the record. 15 U.S.C. §16(b). Now, two of RoyaltyShare's largest customers are defendants in this case—Hachette Book Group, Inc., a settling defendant, and Holtzbrink Publishers, LLC, DBA Macmillan, a non-settling defendant. Kohn Aff. at 3-5. "RoyaltyShare also provides services to the New York Times under which the Times accesses data that RoyaltyShare compiles, which the Times uses to verify the accuracy of data used to compile the New York Times Best Seller List for e-books." Comments of Kohn at 14. The services it provides to the *Times* involves RoyaltyShare's access to e-book revenue data of three of the defendants in this action (Hachette, Macmillan, and Penguin), as well as other prominent publishers, data which RoyaltyShare receives directly from each of the top e-book retailers. Kohn Aff. at 4-5.

The District Court specifically noted that Kohn described himself as "founder and CEO of technology companies *directly involved in the digital*

distribution of music and e-books." 10/2/12 Order at 3 [emphasis added].[7] As particularized in the Kohn Affidavit, because RoyaltyShare receives e-book transaction data *directly* from the E-book Retailers—such as Amazon, Apple and Barnes & Noble—on behalf of its book publisher clients, including defendants Hachette and Macmillan, RoyaltyShare is directly integrated into the e-book chain of revenue transactions upon which these publishers rely to operate their businesses. Kohn Aff. at 6-8. This information was publicly available to Government throughout this proceeding. Id.



[7] The District Court had earlier referred to Kohn specifically as, "RoyaltyShare, Inc. Chairman & CEO Bob Kohn." 9/5/12 Order at 20. The Government had done the same. Response to Public Comments, 7/23/12, 12-02826, ECF No. 81 at 44 (referring to Kohn as "Bob Kohn, CEO of RoyaltyShare").

RoyaltyShare's revenues vary in direct proportion with the e-book revenue of its clients or the number of e-books published by its clients, or both. For example, for every *dollar* that settling defendant Hachette loses in e-book revenue as a result of an alleged anti-competitive provision in the Final Judgment, RoyaltyShare loses an *easily quantifiable* amount of money. As a result of its integration within its clients' e-book supply chain, the Final Judgment, and the *anticompetitive effects* which it is alleged to have, directly and financially impacts RoyaltyShare and Kohn. See, *American Cyanimid*, 719 F.2d 558, 563.

Kohn Affidavit further particularizes how Kohn and his business is directly injured by the Final Judgment, not only by its anti-competitive effects, but even including direct financial injury which has occurred since the Final Judgment took effect.

CONCLUSION

It is settled law in this Circuit that this Court has jurisdiction to review an order denying intervention. This Court has recognized that in each instance it must review the merits of the motion for intervention before it can consider whether it has jurisdiction to review the challenged action. It is respectfully submitted that, because the Government has not, and cannot, challenge Kohn's standing to appeal the District Court's final order denying his motion to intervene, the Government's motion to dismiss should be denied.

FINAL NOTE

"[A]ppellate review is central to our judicial system."

-- District Judge Sotomayor, allowing intervention for appeal purposes in *Dow Jones & Co. v. United States Depart. of Justice*, 161 F.R.D. 247, 253; 1995 U.S. Dist. LEXIS 2262 (1995) (quoted in *Red River Holdings, LLC v. United States*, No. 09-185 C (Fed. Cl. 2009).

As the District Court acknowledged, this is "no ordinary Tunney Act proceeding." 9/5/12 Order at 21. The Tunney Act was enacted by Congress to shine light on the antitrust decree process and increase the scrutiny applied by the judiciary to consent decrees. To that end, Congress specifically *encouraged* public participation, including by means of intervention. 15 U.S.C. §16(b)-(f). Because the *parties* to a consent decree *will rarely, if ever,* appeal a district court decision approving a proposed settlement, intervention is typically the only vehicle for subjecting approved decrees to the kind of rigorous judicial review contemplated by the Act.

Unfortunately, not only will the parties rarely appeal, these consent decrees are rarely appealed even by direct competitors or other qualified intervenors who have a substantial financial interest in the outcome of the appeal. This is because the typical characteristic of Tunney Act cases—unlike suits by organizations to challenge or defend controversial statutes or potential environmental hazards—is that there is nearly always the presence of monopoly power that, in many cases,

has a palpable effect upon business decision-making, including the decision whether to challenge a proposed consent decree.

A leading witness, testifying in support of Senator Tunney's bill, was Circuit Court Judge J. Skelly Wright who said, in approving a consent decree, "the Justice Department attorneys may overlook certain issues, ignore certain concerns, or misunderstand certain facts."[8] At the same time, he cautioned, companies involved in antitrust matters often "wield great influence and economic power. They can often bring significant pressure to bear on Government, and even on the courts, in connection with the handling of decrees."[9]

In its order entering the Final Judgment, the District Court found as an undisputed fact that Amazon had a "90 percent monopoly" in the trade e-book market. 9/5/12 Order at 34-35.[10] Paragraph 80 of the Government's own Complaint dramatically illustrates what can happen in a market beset with the presence of 90% monopoly power. When defendant Macmillan presented Amazon with a proposal for an e-book distribution contract to replace its existing one, Amazon

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[8] 1973 Senate Hearings at 145-6, reprinted in 9 *Federal Antitrust History* 6592 ("occasionally [they] make mistakes").

[9] 1973 Senate Hearings at 147, reprinted in 9 *Federal Antitrust History* 6593. See also, 119 Cong. Rec. 3449, 3451 (Feb. 6, 1973) (statement of Sen. Tunney) ("[p]ut simply, the bigger the company, the greater the leverage it has in Washington"). Disclosures in the wake of the Watergate scandal suggested that Nixon administration officials may have settled a merger case against IT&T in exchange for funding the Republican National Convention. Note, "The ITT Dividend: Reform of Justice Consent Decree Procedures," 73 Colum.L. Rev. 594, 603-06 (1973).

[10] Amazon also reportedly sells 25% of all printed trade books in the United States.

exercised what has been described as its "nuclear option": the online retail giant promptly deleted the "buy" buttons in the Amazon online store for all of Macmillan's books (e-books, as well as printed books). As a result, 90% of Macmillan's e-book revenues and 25% of its printed book revenues vanished in an instant. The sixth largest book publisher in the United States was brought to its knees.[11]

This kind of conduct affects everyone in the e-book supply chain. For example, had Amazon continued its single-handed boycott of Macmillan's books a while longer Macmillan would have been unable to solicit new manuscripts from authors and would have ceased publishing new books, effectively putting it out of business. Driving Macmillan out of business would have meant one less publisher to bid on the acquisition of authors' manuscripts. Over time, authors would receive less money for the licensing of their copyrighted works—the recognition of which involves one of the Constitutionally-enumerated powers of Congress calculated to promote the Writings of authors for the purpose of enhancing the *public interest*. U.S. Const. art. I, sec. 8.

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[11] This was not the first time that Amazon exercised its 90% monopsony power in this specific way to improve the commercial terms of its agreements with book publishers and authors. Amazon also used this option on several separate occasions against independent book publishers (including an incident earlier this year) and representatives of unpublished authors. See, Kohn's Motion for Leave to Participate as Amicus Curiae, Aug. 13, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 97 at 18-20; Kohn Affidavit at 9-11.

Fear of retaliation by large system providers with 90 percent market power is not new. See, *United States v. Microsoft*, 56 F.3d 1448, 1463-64 (D.C. Cir.1995) (criticizing a district court's decision to grant competitors, fearing retaliation from Microsoft, leave to participate as *amicus curiae* on an anonymous basis).[12] More than twenty-five years later, with Amazon threatening to monopolize the market for e-books (e.g., Kindle), Apple the market for music (e.g. iTunes), and Google the market for audiovisual works (e.g., YouTube), the economic consequence of the resolution of an intervenor's standing in Tunney Act cases challenges the public interest in ways even more profound and far-reaching than that of the Final Judgment underlying this appeal.

Kohn thus urges the utmost judicial consideration of the factual allegations supporting his standing to appeal the Final Judgment. Certainly, this Court should reject the Government's attempt to resolve these important issues on an expedited basis prior to a full merits briefing and disposition by a merits panel.

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[12] In 1995, Kohn was Sr. Vice President & General Counsel of Borland International, Inc., one of the anonymous competitors on behalf of whom the *amicus curiae* brief was filed.

DATED: November 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of November, 2012, a true and correct copy of the foregoing Appellants Response Brief was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

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