IN THE UNITED STATES COURT OF APPEALS COURT FOR THE SECOND CIRCUIT

BOB KOHN

Appellant/Intervenor

v.

UNITED STATES OF AMERICA

Appellee/Plaintiff

v.

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

Appellees/Defendants

APPLE, INC.,

Defendant

AFFIDAVIT OF BOB KOHN (CEO, ROYALTYSHARE)

IN SUPPORT OF KOHN'S RESPONSE TO MOTION TO DISMISS

No.12-1407

I, Bob Kohn, declare as follows:

1. I am the Appellant herein. The facts stated in this affidavit are of my own personal knowledge and, if called as a witness, I could and would competently testify to the following.

2. I am the Chairman & CEO of RoyaltyShare, Inc. ("RoyaltyShare"), a venture capital-backed startup company which I co-founded in 2005. Between my shareholdings in, and position as founder, Chairman & CEO, of the company, RoyaltyShare is my most important personal financial asset. RoyaltyShare's success, and particularly the success of its largest customers, directly impacts me personally and financially. My relationship to RoyaltyShare is set forth in the record below in the comment letter I submitted to the Antitrust Division of the Department of Justice ("Government") on May 30, 2012 (ATC-0143), which the Government filed with the District Court on July 23, 2012.

3. RoyaltyShare provides technology solutions and enterprise services to record companies and book publishers. Investors in RoyaltyShare include Trident Capital, Inc. (Palo Alto, CA), Bertelsmann Digital Media Investments (New York, NY), and Plumtree Partners (Dallas, TX).

4. RoyaltyShare's largest client is Sony Music Entertainment for whom we provide royalty processing services, generating tens of thousands of royalty statements to recording artists such as Adelle, Beyonce, Britney Spears, Bruce

Springsteen, Placido Domingo, Rod Stewart, Aerosmith, Barbara Streisand, Bob Dylan, Miles Davis, Tony Bennett, and the Harry Fox Agency. This information was publicly reported by Ed Christman, "RoyaltyShare Takes Over Sony Music's Royalty Processing," *Billboard Magazine* (July 12, 2011). RoyaltyShare also provides digital transaction management and/or royalty processing solutions and services to over 100 independent record labels (including Welk Music Group, Ministry of Sound, CBS Records, Nettwerk, etc.) and several major book publishers.

5. RoyaltyShare's second largest client is Hachette Book Group, Inc. ("Hachette"), one of the settling defendants in this case, a relationship which is also referred to in the record below as part of my comment letter. RoyaltyShare provides Hachette with a critical portion of its digital supply chain for e-books: RoyaltyShare aggregates and ingests e-book revenue transactions from a variety of E-Book Retailers with whom Hachette does business, including Amazon *Kindle* e-book store, Apple *iBookstore*, and Barnes & Noble *Nook* e-book store. We then take these transactions and "clear" or validate them before putting them in a format suitable for ingestion into Hachette's downstream IT accounting systems. This is a crucial part of Hachette's e-book the supply chain which ensures that Hachette is accurately reporting its e-book revenue and accurately paying royalties to its authors derived from those revenues. This was publicly reported by Rachel Deahl,

"Hachette Signs With RoyaltyShare to Manage Backend Digital Sales," *Publishers Weekly* (May 19, 2010).

6. On or about April 1, 2010, Hachette changed its e-book distribution model from retail to agency pricing. As a result, RoyaltyShare was required to develop a new system to help Hachette validate e-book prices contained in the sales reports from its e-retailers. This was publicly announced in "New RoyaltyShare Service Helps Agency Model Publishers Validate eBook Sales Pricing Compliance," PRWeb (November 2, 2010).

7. On July 25, 2012, Hachette and RoyaltyShare announced that a third party validation audit of Hachette's e-book revenue management process confirmed that 100% of Hachette's e-book sales were accurately processed and reported. This was publicly announced by RoyaltyShare and Hachette and reported in "Hachette Audit Confirms that RoyaltyShare Service Ensures 100% Accurate Reporting of Digital Sales," PublishersLunch.com (July 25, 2012), available at https://twitter.com/PublishersLunch/status/228442613936713728.

8. Since January, 2011, RoyaltyShare been aggregating and ingesting e-book revenue transactions of three of the defendants in this action, Hachette, Macmillan and Penguin, as well as from a number of other major and independent book publishers, from a variety of e-retailers for the purpose of providing services to the New York Times, Inc. Under RoyaltyShare's service agreement with *New*

York Times, RoyaltyShare compiles e-book revenue data which the *Times's* staff uses to confirm the accuracy of other data they use to compile the *New York Times* e-book "Bestseller Lists." *The New York Times* best seller lists compete with other best seller lists, including those offered by Amazon.com, Inc. RoyaltyShare's relationship with the *Times* was publicly announced by the *New York Times* (see, NY Times's press release at http://phx.corporate-ir.net/phoenix.zhtml?c=105317&p=irol-newsArticle&ID=1495160&highlight= and reported by Julie Bosman, "Times Will Rank Ebook Bestsellers," *New York Times*, November 10, 2010. Since that time, the website of the *New York Times* has included the following statement, "RoyaltyShare, a firm that provides accounting services to publishers, is assisting the Times in its corroboration of e-book sales." See, "About the Best Sellers" at http://www.nytimes.com/best-sellers-books/overview.html.

9. Recently, RoyaltyShare began providing supply chain services to Macmillan, a defendant below, substantially similar to the services RoyaltyShare has been providing to defendant Hachette. RoyaltyShare aggregates and ingests Macmillan's e-book revenue transactions from a variety of E-Book Retailers, including Amazon, Apple, and Barnes & Noble, and we validate such transaction data before putting it in a format suitable for ingestion into Macmillan's downstream systems.

10. The services RoyaltyShare provides to two of the defendant publishers in this case are called "supply chain" services. Since we receive e-book transaction data directly from the E-book Retailers, we are directly integrated into the e-book chain of transactions upon which these publishers rely to operate their businesses. As part of this supply chain, RoyaltyShare manages the flow of e-book transaction data from the e-retailer to the defendant publishers and other publishers. RoyaltyShare's role in the e-book supply chain is depicted in Diagram 1 below.

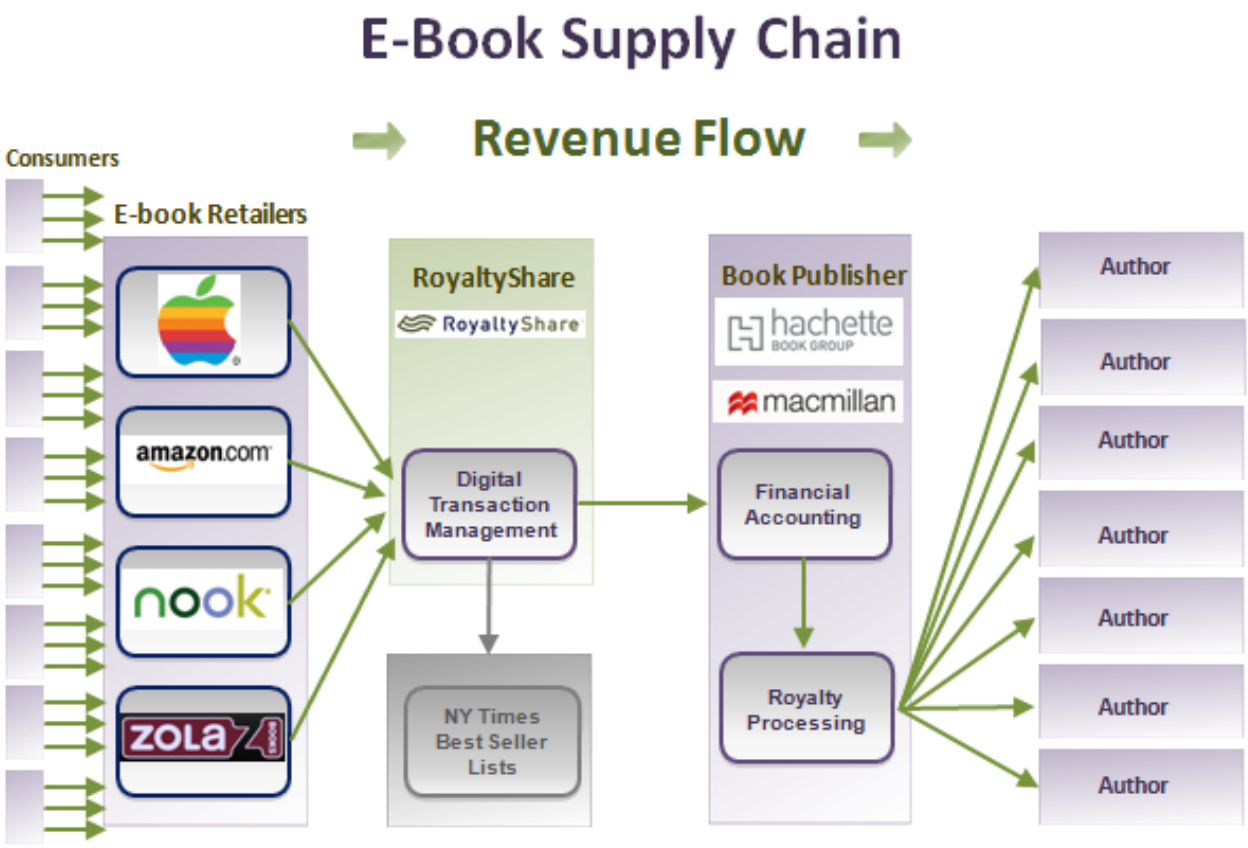

Diagram 1

11. In September, 2012, shortly after the District Court entered the Final Judgment, Hachette notified RoyaltyShare that, as a result of the Final Judgment, it would require RoyaltyShare to modify and enhance its systems to specifically enable Hachette to monitor compliance with the terms of the Final Judgment. RoyaltyShare has already spent a significant number of hours of software development resources, without additional compensation from Hachette, to develop detailed technical specifications for these modifications.

12. The nature of RoyaltyShare's revenues is dependent upon the specific kind of services we provide to the client. RoyaltyShare may provide full or partial solutions to our clients, such as digital transaction management, e-book price validation, and/or royalty processing services, either through the use of our proprietary web-based software platforms designed for such purposes, or through our service center staffed with royalty, metadata, audit response, and other professionals who provide personal services.

13. With respect to some clients who use our software platforms, RoyaltyShare's revenues are based on a percentage of digital music or e-book revenue received or the number of sound recordings or e-books published by our clients, or both. In some cases, rather than a percentage of revenues, we receive a specific number of cents per e-book transaction. 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.

14. As a result of its integration within its clients' e-book supply chain, RoyaltyShare's business is directly impacted by events which affect our clients, including pro-competitive and anti-competitive actions that have an impact upon their businesses. Thus, the Final Judgment, and the *anticompetitive effects* which it is alleged to have, directly and financially impacts RoyaltyShare and me personally.

15. The District Court, in its order entering the Final Judgment, found as "undisputed" that Amazon had achieved a "90 percent monopoly" of the U.S. trade e-book market. Thus, Amazon represented 90% of U.S. e-book revenues of the defendant publishers, giving it undisputed 90% monopsony power over the publishers from whom it sources e-books. (It was also reported that Amazon represented about 25% of the defendant publishers' printed book revenues).

16. The extent to an E-book Retailer such as Amazon can wield its monopsony power to the economic disadvantage of one of RoyaltyShare's customers, big or small, is a direct function of the competitiveness of the trade e-book market and the relative market power of the E-book Retailers through whom our publisher clients sell e-books.

17. Should, for example, Amazon wield its monopsony power to stop selling the e-books of one or more of RoyaltyShare's publisher clients by removing their "buy" buttons from the Amazon website not only would our customer lose revenue, but RoyaltyShare would lose revenue, and perhaps a significant customer. The alleged anti-competitive effects of the Final Judgment which make this threat more likely is not conjectural or hypothetical. The Government's own Complaint alleges (at paragraph 80) that when, in January, 2010, Macmillan, a defendant publisher in the action below, presented Amazon with a proposal for an e-book distribution contract to replace its existing one, Amazon reacted by promptly deleting the "buy" buttons in the Amazon online store for all of Macmillan's books (e-books, as well as printed books). At that time Amazon removed the buy buttons from Macmillan's books, Amazon had 90% percent share of the U.S. trade e-books market and 25% of the printed book market. This gave them the palpable monopsony power that allowed them to retaliate against Macmillan, the sixth largest publisher in the United States, simply because Macmillan made a business proposal that Amazon didn't like. As a result, 90% of Macmillan's e-book revenues and 25% of its printed book revenues vanished in an instant.

18. This was not the first time Amazon wielded its monopsony power in this specific way. As the Author's Guild alleged in its comment letter to the Government dated June 25, 2012 (ATC-0214), in January, 2008, Amazon removed

the buy buttons from more than 1,000 self-published printed books and threatened that these books would be permanently removed from the Amazon website unless the books were published via Amazon's own BookSurge print-on-demand service. Later that year, as the Author's Guild also alleges in its comment letter, that Amazon exercised what the *New York Times* called its "nuclear option" of removing the buy buttons of book publishers. This was reported by Doreen Caravajal, "Small Publishers Feel Power of Amazon's Buy Button," *New York Times* (June 16, 2008). Earlier this year, when Amazon refused to renew its agreement to publish e-books of publishers distributed by IPG, which serves as a distributor for hundreds of independent book publishers, Amazon refused to renew its agreement with IPG unless they and the publishers they represent agreed to terms more favorable to Amazon. While they were negotiating, Amazon again exercised its nuclear option, pulling the buy buttons from its Kindle store for over 5,000 e-books published by those independent book publishers. The titles remained banned from Amazon until the dispute was settled three months later. This was reported by Michael Cader, "Amazon Removes Kindle Version of IPG Books After Distributor Declines to Change Selling Terms," *PublishersLunch.com* (February 22, 2012) and "Standoff Ends: IPG and Amazon Agree to Terms on eBooks and Titles Restored," *PublishersLunch.com* (May 25, 2012). Each of these

incidents is also alleged in my memorandum supporting my motion for leave to participate as amicus curiae, which is on the record below at ECF No. 97 at 18-20.

19. As I also mention in such memorandum, nine of the largest independent book publishers in the United States submitted a comment letter to the Government (ATC-0727) explaining in their view why the proposed settlement would adversely impact competition in the market for trade e-books. In that letter, they also allege that none of them have ever "been successful in establishing agency pricing relationships with Amazon." This, in my view, is a clear indication of the inferior bargaining leverage these publishers have with Amazon.

20. In November, 2007, Amazon launched its *Kindle* text reader device and web-based platform to support the sale and delivery of e-books. At that time, book publishers sold e-books to Amazon and other e-book retailers under the "retail" pricing model. Under the "retail" model, which is also described in the Government's Competitive Impact statement, publishers sold copies of each title to retailers for a discount (usually 50%) off the price printed on the physical edition of the book (i.e., the "list price"). Retailers, as owners of the books, were then free to determine the prices at which the books would be sold to consumers.

21. As the Government also recognized, Amazon lowered the price of newly released and bestselling e-books to "$9.99-or-less," quoting from paragraph 30 of Government's Complaint in this case. Thus, for example, an e-book with a

list price of $26.00 would be sold by the publisher to Amazon for $13.00, and Amazon would re-sell that copy to a consumer for $9.99 or less. Amazon's marginal cost for each e-book it sold was at least equal to the price it paid to the publisher. There is no difficulty measuring Amazon's incremental cost for each additional e-book: Amazon must pay a wholesale price to the publisher—in this example, $13.00—for each additional e-book it buys, whether it buys one e-book or a million e-books. By selling these e-books for "$9.99-or-less," Amazon thus sold each e-book significantly below its marginal cost. In doing so, Amazon was absorbing a marginal loss of about 23%, or over $3.00 per unit, in this example. Amazon's conduct was not in the nature of promotion or a loss leader. Amazon was doing this consistently for every new trade e-book released by the defendant publishers and other publishers, from the time it launched the Kindle.

22. As a direct result of its below marginal cost pricing, Amazon achieved a 90 percent share of the trade e-book market. (The District Court, in its order entering the Final Judgment, found as "undisputed" that Amazon had achieved a "90 percent monopoly" of the trade e-book market). It was my belief that not only did Amazon's 90 percent share put it in a position to raise its prices high enough to recoup its losses after driving out its competitors, but that Amazon was intentionally engaging in below marginal cost pricing for the very purpose of driving competitors out of the e-book market and keeping new entrants away from

the market. A new entrant in this market could not effectively compete in a market in which it would be forced to have a negative gross margin on every single e-book it sold.

23. On January 27, 2010, Apple announced the iPad. Shortly thereafter, I learned that Apple and several of the major book publishers each entered agreements with Apple under which the publishers would make their e-books available for distribution to consumers under what is known as, the "agency model." The agency model was patterned after the structure employed by Apple in re-selling copyrighted software applications ("Apps") made available through the iPhone App Store. Instead of purchasing e-books at a wholesale price, Apple and other e-book retailers would sell e-books at prices set by the publishers and pay the publishers of 70% of the revenues.

24. Under the agency model, the e-retailers became agents of the book publishers, selling e-books at prices set by the book publishers. Thus, under the agency model, e-book price competition occurs between the book publishers instead of between e-retailers. E-retailers would start competing on the quality and price of their services provided to consumers while book publishers would compete upon the quality and price of their e-books.

25. I believe that, by allowing e-retailers to compete based upon the quality of its product and services, consumers will be better off. Meanwhile,

consumers still benefit from price competition, because publishers are completely left free to compete on the price of its e-books. Indeed, the District Court later found, as the Government recognized, that the agency model is not "intrinsically unlawful." In fact, in my view, it was better than just legal: it was a boon to competition.

26. The Final Judgment has had an adverse anti-competitive impact upon the trade e-book market business, the business of RoyaltyShare's largest customers, and RoyaltyShare's business, which impact will continue as long as the Final Judgment in its current form remains in effect.

27. RoyaltyShare has been directly and adversely affected by what the settling defendants have been required to do in compliance with the terms of the Final Judgment. Under Section IV of the Final Judgment, these publishers must "take each step required under the agreement to cause the agreement to be terminated and not renewed or extended." Thus, agency agreements that had been in place between Hachette, HarperCollins, and Simon & Schuster, respectively, with e-retailers such as Amazon, Apple, Barnes & Noble and others, were terminated and replaced. As a direct result of the Final Judgment, these agency agreements, which contained provisions that made the trade e-book market more competitive, were replaced with agreements that made such market less competitive.

28. When the settling publishers signed new agreements with the e-retailers, those agreements were subject to restrictions contained in Section V of the Final Judgment. Under Section V, the settling publishers are prohibited from exercising two of the most essential pro-competitive features of the agency model: the prohibition for a period of two years against the publisher's ability to restrict e-retailers from selling e-books at below marginal cost and the prohibition for a period of five years against the publisher's ability to enforce a "Price MFN," a term defined in the Final Judgment. These prohibitions affect the publishers' respective agreements with every E-book Retailer, including Amazon. Each of them is anti-competitive and each injures the business of RoyaltyShare.

29. The prohibition against the publisher's ability to restrict Amazon and other E-book Retailers from selling below marginal cost reverses the pro-competitive impact of the agency model. Competitors in the e-book market who compete by providing better services to consumers could not effectively compete in a market in which it would be forced to suffer a negative gross margin on each of the e-books it sells.

30. The conduct permitted in Section VI of the Final Judgment, limiting Amazon's below cost pricing to an aggregate amount of total commissions paid to publishers, does nothing to protect competitors from Amazon's selling below marginal cost. Because the total dollar amount of Amazon's 30% commission over

the course of a year is so much higher than that of its smaller rivals, it could use below marginal cost pricing across such a wide swath of e-books and for such an extended period of time, to put rivals out of business well before it had to raise prices to recoup its losses or comply with its agreements with the publishers. Moreover, once Amazon starts to recoup its losses by setting monopoly prices, the provision would not protect surviving rivals from Amazon's short term use of below marginal cost pricing to discipline them for undercutting the monopoly price. In such a case, Amazon could recoup its losses once the disciplinary period is over or the competitor is out of business. With its "90 percent monopoly" of the trade e-book market, Amazon has enough market power to set higher than competitive prices, and then sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices. Finally, there are real practical difficulties with this provision. For example, the Final Judgment does not provide for a means to review and enforce the annual aggregate dollar value of the permitted discounts. If the publishers are the only means of enforcing the provision, and if publishers are not accurate in their monitoring the totals of Amazon's below marginal cost pricing against Amazon's total annual commissions, or if a publisher or its accounting methods somehow "restricts, limits, or impedes" Amazon's discounting, then any misstep by a publisher against Amazon could be construed as "retaliation" against Amazon in violation of Section

V.D. of the Final Judgment. For all practical purposes, the Final Judgment, by permitting Amazon to resume below marginal cost pricing of e-books, guts the agency model of its essential pro-competitive purpose.

31. After Amazon's adoption of the agency model, which eliminated Amazon's ability to sell e-books below its marginal costs, Amazon's market share in trade e-books dropped to 60%. I believe that such drop was a direct result of Amazon's adoption of the agency model. Such drop reduced Amazon's monopoly and monopsony power by one-third and made the trade e-book market more competitive. This pro-competitive impact made it less likely for Amazon to exercise its power to eliminate the revenues of one of our customers and in turn injure RoyaltyShare's business.

32. By prohibiting the settling publishers from exercising the most essential pro-competitive feature of the agency model, the Final Judgment makes the trade e-book market less competitive. Specifically, Section V of the Final Judgment by its terms enables Amazon to resume selling e-books at below their marginal cost. Competitors of Amazon and new entrants to the market will be less able to compete on the level and quality of services to consumers, because they will be forced to suffer a negative gross margin on each e-book it sells. The Final Judgment thereby reverses the pro-competitive benefit of the agency model, making it more likely that Amazon will increase its market share. With its market

share headed back into the direction of 90%, Amazon will be more able to directly threaten RoyaltyShare's business by taking action that is injurious to the e-book revenue flow of RoyaltyShare's largest customers. Accordingly, the Final Judgment's restriction on the settling defendants' use of agency pricing is anti-competitive and directly injures in RoyaltyShare and Kohn's interest in the company. Reversal of the District Court's order entering the Final Judgment, or the removal of its anti-competitive restrictions on the settling defendants' agency agreements, would directly redress this injury.

33. In addition, the 5-year prohibition in Section V of the Final Judgment against the publisher's ability to "enter into any agreement with an E-book Retailer relating to the Sales of E-books that contains a 'Price MFN'" independently guts the agency model of its essential pro-competitive purpose.

34. In my comment letter to the Justice Department dated May 30, 2012, I articulated the essential purpose of the most favored nation provision contained in the publishers' agency agreements with E-book Retailers. As stated in paragraph 65 the Complaint in this action, the MFN required each publisher to guarantee that it would lower the retail price of each e-book in the e-retailer's store "to match the lowest price offered by any other retailer, even if the Publisher did not control the other retailer's ultimate consumer price." This pro-competitive provision protected each E-book Retailer, including Amazon, from potentially anti-competitive

practices by the publishers. For example, without the Price MFN provision, a publisher, on its own or in conspiracy with an E-book Retailer, could lower the price of some or all e-books offered through a particular E-book Retailer to the competitive disadvantage of all other E-book Retailers. Or, the publisher could offer to sell its e-books to one of the E-book Retailers *under the retail model*, effectively allowing such retailer to sell at below marginal cost, giving it an unfair advantage over their competitors. Without the Price MFN, the publishers would thus have the power to determine which E-book Retailer would succeed and which would fail.

35. Without the Price MFN provision, the publishers' could also circumvent their agreements with the e-retailers by establishing their own E-book Retailer, selling their e-books directly to consumers, separately or together. By charging consumers, through that vehicle, lower prices than its charges consumers through other E-book Retailers, the publishers could give themselves a competitive advantage over all other E-book Retailers. Under this scenario, a large portion of the aggregate agency commission generated through its own e-retailer vehicle could be used to support below market prices, allowing the publishers to quickly drive rival E-book Retailer out of business. The Complaint alleged facts to the effect that three of the publisher defendants already established a joint venture, which could be used for such a purpose. By allowing publishers to drive rival E-

book Retailers out of business, the Final Judgment's prohibition on Price MFNs will have an anti-competitive impact upon the market for trade e-books for a period of five years. The injury to RoyaltyShare is clear and immanent. With fewer E-book Retailers, the need for digital transaction services is reduced. Accordingly, the Final Judgment's prohibition against the Price MFN provision is anti-competitive and directly injures in RoyaltyShare and Kohn's interest in the company. Reversal of the District Court's order entering the Final Judgment, or the removal of its anti-competitive provisions, would directly redress this injury by eliminating the prohibition on Price MFNs.

36. Shortly after this action was filed in April, 2012, I began participating in the process established by the Tunney Act that invites public participation in the District Court's public interest determination, including submitting a comment letter objecting to the settlement, filing amicus briefs, and filing a motion to intervene in this case for the purpose of appealing the Final Judgment. These actions were taken with the knowledge and approval of RoyaltyShare's senior managers, including its Chief Operating Officer and President of Technology Solutions. RoyaltyShare's management came to the conclusion that the substantive provisions of the proposed Final Judgment would have anticompetitive and other negative impacts upon a relevant market that directly impacts RoyaltyShare's business and the businesses of our largest customers. RoyaltyShare's management

believed that an intervention should be sought to redress its injuries and concluded that I would be the person best-situated to bring to the attention of the Justice Department and the District Court the anticompetitive impact of the Final Judgment. If the Final Judgment was to be challenged on appeal, the basis for such challenge *must not* be that its entry was against RoyaltyShare's interest, which it certainly was, but that the Final Judgment was not in the *public interest*. It was to address the *public interest* that my comments, amicus brief, and intervention for this appeal have been directed. In fact, the Government in its response public comments (ECF No. 81 at 18) repeatedly dismissed the arguments of objectors who had a financial stake in the impact of the Final Judgment precisely because "the third parties that the Court is directed to consider under the Tunney Act are the consumers of e-books." Had the Government or District Court raised the issue of my standing, I would have submitted an affidavit alleging the additional facts I herein allege to particularize and support the elements of my standing to appeal the Final Judgment.

37. I have served as an advisor and/or investor in several high tech companies over the last 20 years. Most recently, I have become an advisor to and shareholder in Zola Books, Inc. Zola Books is an e-retailer of e-books and is a direct competitor to the Amazon Kindle, Barnes & Noble and Apple iBookstore.

38. On September 4, 2012, I filed an *amicus curiae* brief after having received leave of the District Court to do so. The next day, I met with Joseph Regal, the CEO of Zola Books, Inc., a new venture which had been preparing to launch an e-retail business to compete with Amazon, Apple and Barnes & Noble in the sale of e-books to consumers. Mr. Regal had submitted a comment letter to the Government (ATV-0679) which explained how the agency model removed what had been a significant obstacle to his entering the e-book market. No longer forced to lose money on every single e-book sold, a new entrant like Zola Books could get a foothold in the market based on the quality of its product and services. He also explained how the Final Judgment would make it more difficult for him to compete in the e-book market. We discussed the government's lawsuit against the publishers and Apple and the impact the proposed Final Judgment would have on his business. I told Mr. Regal that if the District Court enters the Final Judgment, I was thinking about filing a motion to intervene for the purposes of appeal. Mr. Regal encouraged me to do so and that Zola Books would fully support such an action. Mr. Regal then expressed his interest in engaging me to provide Zola Books with advice on business strategy and financing. I expressed my interest in helping Zola Books in any way I could. Soon thereafter we memorialized a consulting agreement and I made a personal investment in Zola Books.

39. The day after our meeting, September 6, 2012, the District Court announced its decision to enter the Final Judgment and entered the judgment later that day. On September 7, 2012, I filed a motion to intervene for the sole purpose of seeking appellate review of the Final Judgment.

40. The outcome of this appeal is also of direct concern to me as an author of, and owner of copyrights in, two books, one of which is published in e-book form by a wholly-owned subsidiary of one of the settling defendants, HarperCollins. The e-book is available for sale in the Amazon Kindle e-book store and other e-retailers. Under my agreement with HarperCollins, I receive a royalty of 20% of revenues that HarperCollins receives from E-book Retailers like Amazon on sales of the e-book edition. Thus, the pricing terms on which such e-book is sold by the publisher will directly impact the royalties I earn. If the Final Judgment has the anti-competitive impact that I have alleged it has, it will increase Amazon's monopsony power in the trade e-book market. With such monopsony power, Amazon will be more likely able to lower the price it pays to HarperCollins for the e-books it re-sells, including mine. This will directly lower the royalties I will earn on the e-book which HarperCollins has the exclusive right to resell and I would therefore suffer an injury in fact directly traceable to the Final Judgment. This injury would be fully redressed by the elimination of the anti-competitive provisions of the Final Judgment that I have alleged.

41. In my view, the Final Judgment is having an undue or unlawful anti-competitive impact upon the market for trade e-books and a harmful impact upon e-book consumers and the public generally.

42. For the reasons explained above, the competitiveness of the trade e-book market is also of direct financial concern to me. My interest in the subject of this litigation encompasses, among other things, my direct ownership interests in RoyaltyShare, Zola Books, and the copyright in the e-book published by one of the settling defendants. Two of RoyaltyShare's largest customers are defendants in this action and the Final Judgment has already had a direct impact upon RoyaltyShare's business. All of Zola Books' e-book suppliers or licensors, including all five publisher defendants are directly affected by the Final Judgment and the contracts that Zola Books was negotiating with and entered into with the settling defendants were all directly impacted by the Final Judgment, because the terms of those contracts are governed by the terms of the Final Judgment.

43. I am the co-author of *Kohn On Music Licensing* (Wolters Kluwer, 4th Ed. 2010), an 1,800 word treatise on the business and legal aspects of the music business, which follows earlier editions published in 1992, 1996, and 2002. The book has been cited by the U.S. Supreme Court in *Eldred v. Ashcroft*, 57 U.S. 186 at n21 (2003); the Second Circuit Court of Appeals in *Woods v. Bourne*, 60 F.3d 978 (2d Cir. 1995) and *Boosey & Hawkes v. Buena Vista Home Video*, 145 F.3d

481 (2d Cir. 1988); the Sixth Circuit in *Bridgeport Music v. Dimension Films*, 410 F.3d 792 at f18 (6th Cir. 2005); and the Southern District of New York in *Fred Ahlert Music Corp. v. Warner/Chappell Music*, 958 F.Supp. 170 (S.D.N.Y. 1997).

44. I have testified as an expert before the District Court in *In Re Application of AOL, RealNetworks and Yahoo!* (related to *United States v. ASCAP), 559 F.Supp.2d 332* (S.D.N.Y. 2008) (a rate hearing in which I provided testimony to the late District Judge William C. Conner on how music is transmitted and marketed on the Internet).

45. During the course of my 30-year career–working for entertainment, computer software, and internet companies–I have had responsibility and oversight for several high profile antitrust matters. These matters directly concerned the intersections between copyright and antitrust law as they relate to the public interest in promoting innovation and competition. Each case, like the one before this Court, involved the adoption by consumers of technology products and copyrighted works, which operated in conjunction with each other, in a market prone to attempted monopolization by dominant systems providers.

46. I have testified before both the Department of Justice and the Federal Trade Commission on these matters. Transcripts of such testimony are available at Robert H. Kohn*, Hearings of the Federal Trade Commission on the Changing Nature of Competition* (panel on "*Networks, Standards, Foreclosure, Strategic*

Conduct") http://www.ftc.gov/opp/global/bobkohn.shtm (Washington, D.C., November 29, 1995) (cited in, *Antitrust for High Tech Companies* (Prepared Remarks of Susan DeSanti, Director of Policy Planning, Federal Trade Commission) http://www.ftc.gov/speeches/other/desanti1.shtm (San Francisco, February 2, 1996); and Robert H. Kohn, *DOJ/FTC Joint Hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy"* http://www.ftc.gov/opa/2002/02/ipsecond.shtm (Berkeley, California, February 27, 2002).

47. I am licensed to practice law in California and am a member in good standing of the State Bar of California. For three years during the 1990's, I taught Corporate Law at Monterey College of Law, Monterey, California.

48. The Final Judgment not only directly injures my personal financial interests, but others who are directly part of the e-book supply chain, such as booksellers, e-retailers, independent book publishers, literary agents, published and unpublished authors, and ultimately consumers and the public generally, whose interest the Tunney Act was intended to protect.

49. I believe that my direct financial interest in the outcome of this appeal is sufficient to support my standing to appeal the Final Judgment in this case and that I am well-situated to demonstrate that entry of the Final Judgment was contrary to the dictates of the Tunney Act in that it was not in the public interest.

This affidavit was signed on the date below in the city of New York, New York. I declare the foregoing under the penalty of perjury pursuant to 28 U.S.C. S 1746.

Dated: November 26, 2012

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Bob Kohn
Chairman & CEO, RoyaltyShare, Inc.