

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 FILE AN OVERSIZED BRIEF
AND
KOHN'S MOTION TO STRIKE UNITED STATES'S REPLY BRIEF
AS UNTIMELY FILED**

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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 the Tunney Act proceeding below for the sole purpose of appealing the District Court’s order entering the Final Judgment.¹ But first, Kohn must appeal the District Court’s order denying Kohn’s motion for leave to intervene for the purpose of appeal.²

On November 13, 2012, the Government filed a Motion to Dismiss Kohn’s appeal of both such orders.³ On November 26, 2012, Kohn filed a timely response to the Government’s Motion to Dismiss.⁴ On December 3, 2012, the Government filed a Reply in the form of an oversized brief, which exceeded the page limit set forth in FRAP 27 by 50 percent—without first without first having sought leave of this Court in accordance with FRAP 27 and Local Rule 27.1.⁵

On December 4, 2012, this Court served the Government with a Notice of Defective Filing, pointing out the above defects and giving the Government until December 6, 2012 to cure them.⁶ The Court’s notice clearly states:

¹ *United States v. Apple, Inc. et. al.*, No. 1:12-cv-2826-DLC, Docket (S.D.N.Y.) (hereinafter, “12-02826-ECF”) No. 113 (Entry Order, 9/5/12).

² 12-02826-ECF No. 136 (Denial Order, 10/2/12).

³ *Kohn v. United States*, No. 1:12-cv-4017, Docket (Second Circuit) (hereinafter, “12-4017-ECF”) No. 34 (Motion to Dismiss, 11/13/12).

⁴ 12-4017-ECF No. 45 (Response, 11/26/12).

⁵ 12-4017-ECF No. 51 (Defective Reply, 12/3/12).

⁶ 12-4017-ECF No. 54 (Notice of Defective Filing, 12/4/12).

Please cure the defect(s) and resubmit the document, with the required copies if necessary, no later than 12/06/2012. The resubmitted documents, if compliant with FRAP and the Local Rules, will be deemed timely filed.

On December 5, 2012, the Government chose to ignore the Court's courtesy. Instead of filing a Reply brief in compliance with the page limit required by FRAP 27, it chose to file its Motion for Leave to File an Oversized Reply.⁷ The filing of such motion did not cure the defect in the Reply brief.⁸

ARGUMENT

I. THE GOVERNMENT'S MOTION FOR LEAVE TO FILE AN OVERSIZED REPLY SHOULD BE DENIED

The Government did not cure the defect by December 6, 2012 as this Court ordered it to do. Rather, the Government *again* filed an oversized brief, but added a belated request for leave to file such an oversized brief. That motion should be denied as untimely. If the Government wished to file an oversized brief, the proper course was to motion for leave to do so before its reply was first due rather than unilaterally filing an oversized brief. This Court's order required the Government to correct the defective brief; it did not invite the Government to make an out-of-time request for leave. Accordingly, the Government's motion should be denied.

⁷ 12-4017-ECF No. 55 (Motion for Oversized Reply, 12/5/12) (the T-1080 form of which indicates opposing counsel's opposition and intention to file a Response).

⁸ 12-4017-ECF No. 57 (Cured Defective Reply, 12/6/12) purports to cure the Government's failure to file a motion for leave to file an oversized brief, but did not cure the defective Reply itself.

II. THE GOVERNMENT'S REPLY BRIEF SHOULD BE STRIKEN

The Government had an opportunity to cure its defective Reply by re-filing a version that fell within the rule's 10-page limit by December 6, 2012. The Notice of Defective Filing made it clear to the Government what the consequences would be for failing to cure the defects by the deadline established:

Failure to cure the defect(s) by the date set forth above will result in the document being stricken.

In the event the Government shall not have filed a cured Reply brief that complies with the page limit requirement by the deadline, and the Court does not strike the Government's defective and uncured Reply on its own accord, Kohn hereby moves to strike the Government's Reply brief.

III. THE GOVERNMENT'S REQUEST FOR AN OVERSIZED BRIEF ILLUSTRATES KOHN'S POINT: THE ISSUES RAISED BY THE GOVERNMENT'S MOTION TO DISMISS KOHN'S APPEAL IS PROPERLY REVIEWED AFTER FULL BRIEFING ON THE MERITS OF KOHN'S APPEAL

While it may appear to have been easy for the Government to cure its defective filing by reducing the size of its Reply brief by 5 pages, the fact that the Government chose instead to attempt to file an oversized brief suggests the issues raised by the Government's Motion to Dismiss are far more appropriately reviewed by a panel upon a full briefing by the parties to decide the merits of Kohn's appeal.

As Kohn stated in his Response, the Government's Motion to Dismiss improperly seeks to make Kohn litigate the important issues of his standing to appeal the Final Judgment on an expedited basis before considering the merits of the District Court's order denying his intervention—the very decision from which Kohn noticed an appeal—and which Kohn has unquestionable standing to appeal.

Kohn urges the utmost judicial consideration of the factual allegations supporting his standing to appeal the Final Judgment. The standing issue should be decided with the full record before the Court. Kohn respectfully requests that the Court merely do what it has done in many other cases involving a denial of leave to intervene, whereas the Government is asking this Court to do something unprecedented. Accordingly, 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.

DATED: December 6, 2012

Respectfully submitted,



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Pro Bono Counsel to Bob Kohn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December, 2012, a true and correct copy of the foregoing Appellant's 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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