UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC d/b/a MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC., and SIMON & SCHUSTER, INC., Defendants.	)	Civil Action No. 12-CV-2826 (DLC)

SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR ENTRY OF FINAL JUDGMENT

The United States of America respectfully submits this supplemental reply memorandum in order to address the *amicus* submissions of the Authors Guild and Mr. Bob Kohn.

I. THE AUTHORS GUILD

The Authors Guild opposes entry of the proposed Final Judgment because it believes that the settlement will result in a return to low-cost pricing for e-books that "will drive trade out of traditional bookstores and into the proprietary world of the Kindle." The Authors Guild (Docket No. 101-1) at 2. The Authors Guild suggests that this result is "destructive" because traditional booksellers serve as "critical showrooms for work done by new or lesser-known authors and for entire categories of books, such as children's picture books." *Id.* at 2-3. This essentially is the same argument the Authors Guild made in its public comment. *See* The Authors Guild (ATC-0214) at 1-2.

The Authors Guild's concern that Amazon's e-book discounting will harm print book distribution is nothing new. As set forth in the Complaint, it was the publishers' fears of the effect that Amazon's low prices would have on their traditional business model that motivated the publishers' price-fixing conspiracy. *See* Compl. (Docket No. 1) ¶ 4. But just as fear of competition is not a defense to price fixing, *see* U.S. Response (Docket No. 81) at 22-23; U.S. Reply (Docket No. 105) at 1-2, it also has no place in determining whether a government consent decree is in the "public interest." To hold otherwise would allow Tunney Act proceedings to be a vehicle for inhibiting the very conduct that the antitrust laws are meant to encourage, and thereby "turn the Sherman Act on its head." *Wallace v. Int'l Bus. Machs. Corp.*, 467 F.3d 1104, 1107 (7th Cir. 2006) ("[T]he goal of antitrust law is to use rivalry to keep prices low for consumers' benefit.").

The cases cited by the Authors Guild do not suggest a different result. In both *Microsoft* and *SBC Communications*, courts declined to make any changes to government decrees, despite third-party speculations about anticompetitive conduct in other markets. In *Microsoft*, the court flatly rejected *amici* concerns that the decree was insufficient because it failed to end other practices that *amici* — not the government — concluded were anticompetitive. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1455, 1459 (D.C. Cir. 1995). And in *SBC Communications*, the court, relying on *Microsoft*, made clear that it "cannot reject the proposed settlements merely because the government failed to address antitrust issues not raised in its complaints."[1] *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 17 (D.D.C. 2007). In short, the Authors Guild offers no authority for its insistence that the Court undertake an assessment of the entire "literary marketplace" before it determines that undoing the effects of price collusion in the sale of e-books is in the public interest.

II. BOB KOHN

Mr. Kohn's submission (Docket No. 110) is largely focused on (1) criticizing the merits of the United States' Complaint and (2) expressing frustration with the Court's Order that *amicus* filings be limited to five pages. Mr. Kohn's assertion that "if the government's conclusions are not reasonable, the Court cannot hold the settlement to be in the public interest," Kohn at 5, is just his way of saying the United States has to prove its case before it can settle it. But it is well

[1] The Authors Guild alternatively suggests that the Court can consider the effects of the settlement on the entire literary market because "the limited nature of the complaint makes a mockery of judicial power." Authors Guild at 3 (quoting *SBC Commc'ns*, 489 F. Supp. 2d at 13). But the "mockery standard" applies only where a complaint and proposed settlement are gerrymandered beyond reason, *e.g.*, focused on the impact of a violation on "a single household residence, but none other in the entire country." *SBC Commc'ns*, 489 F. Supp. 2d at 13. That obviously is not the case here.

established that the United States "need not prove its underlying allegations in a Tunney Act proceeding." *SBC Commc'ns*, 489 F. Supp. 2d at 20; *see also* U.S. Response at 6-8. Mr. Kohn's view of the world "would fatally undermine the practice of settling cases and would violate the intent of the Tunney Act."[2] *SBC Commc'ns*, 489 F. Supp. 2d at 20.

CONCLUSION

For the reasons set forth in this Memorandum, the United States' Reply, and the United States' Response to Comments, the United States respectfully requests that the Court enter the proposed Final Judgment without further hearing.

[2] Mr. Kohn is well wide of the mark in asserting that *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) stands for the proposition that horizontal price fixing is permitted where there is a countervailing pro-competitive virtue. *See* Kohn at 2. *Indiana Federation of Dentists* addressed whether an agreement among dentists not to submit x-rays to insurers was subject to Rule of Reason analysis. 476 U.S. at 457-58. The Court held that while the agreement was not horizontal conduct subject to *per se* condemnation, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 459 (citation omitted). Here, the claim is horizontal price-fixing, which the Supreme Court has "consistently and without deviation" viewed as unlawful *per se* under the Sherman Act, such that "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

Dated: September 5, 2012

Respectfully submitted,

/s/ Mark W. Ryan

Mark W. Ryan
Stephanie A. Fleming
Lawrence E. Buterman
Laura B. Collins
United States Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 4000
Washington, DC 20530
(202) 532-4753
Mark.W.Ryan@usdoj.gov

Attorneys for Plaintiff United States of America

CERTIFICATE OF SERVICE

I, Lawrence Edward Buterman, hereby certify that on September 5, 2012, I caused a copy of the Supplemental Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment to be served by the Electronic Case Filing System on all parties to this action. Copies also were served electronically on the following individuals:

Jan Friedman Levien (Constantine)
jconstantine@authorsguild.org
Paul D. Aiken
paiken@authorsguild.org

The Authors Guild, Inc.
31 East 32nd Street, 7th Floor
New York, NY 10016-5509

Bob Kohn
140 E. 28th Street
New York, NY 10016
(408) 602-5646
bob@bobkohn.com

Additionally, courtesy copies were provided electronically to the following individuals:

For the State of Connecticut:
W. Joseph Nielsen
Assistant Attorney General
Antitrust Division
Office of the Attorney General
55 Elm Street
Hartford, CT 06106
(860) 808-5040
Joseph.Nielsen@ct.gov

For the State of Texas:
Gabriel R. Gervey
Assistant Attorney General
Antitrust Division
Office of the Attorney General of Texas
300 W. 15th Street
Austin, TX 78701
(512) 463-1262
gabriel.gervey@oag.state.tx.us

For the Private Plaintiffs:
Jeff D. Friedman
Hagens Berman
715 Hearst Ave., Suite 202
Berkeley, CA 94710
(510) 725-3000
jefff@hbsslaw.com

/s/ Lawrence Edward Buterman
Lawrence Edward Buterman
United States Department of Justice
450 Fifth Street, N.W., Suite 4000
Washington, DC 20530
(202) 532-4575
lawrence.buterman@usdoj.gov
Attorney for Plaintiff United States of America