

**IN THE 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)
 HOLTZBRINK 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)

**MEMORANDUM IN SUPPORT OF MOTION OF *AMICUS CURIAE* BOB KOHN
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
REGARDING THE GOVERNMENT’S PROPOSED SCHEDULE
FOR PENGUIN TUNNEY ACT REVIEW**

I. INTRODUCTION

By Order dated August 28, 2012 (12-CV-2826 ECF 108), this Court, pursuant to 15 U.S.C. §16(f)(3), granted leave to Bob Kohn to participate as *amicus curiae* in this action and to submit a 5-page *amicus curiae* response to the DOJ's Tunney Act filings. Kohn, now requests leave to file an *amicus curiae* brief for the sole purpose of replying to the Proposed Schedule for Penguin Tunney Act Review ("Proposed Schedule"), filed on January 3, 2013 pursuant to the Court's order dated December 19, 2013. Kohn's proposed 4-page *amicus curiae* brief is attached to the accompanying motion. Kohn respectfully submits that comments by *amicus curiae* would be helpful to the Court in evaluating the Proposed Schedule.

II. THE TUNNEY ACT SPECIFICALLY EMPOWERS A DISTRICT COURT TO AUTHORIZE THE APPEARANCE OF *AMICUS CURIAE*

Section 16(f)(3) of the Tunney Act specifically empowers the Court, in connection with its public interest determination under Section 16(e), to "authorize full or limited participation in proceedings before the court by interested persons or agencies, including *amicus curiae*." See, Order, 12-cv-02826-DLC, ECF 108 at 3.

III. KOHN SEEKS TO DRAW ATTENTION TO LAW THAT MAY OTHERWISE ESCAPE THE COURT'S CONSIDERATION

The classic role of *amicus curiae* is to assist the court "in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co, Inc. v. Comm'r of Labor and Industry*, 694 F.2d 203, 204 (9th Cir. 1982).

By letter to the Court dated July 9, 2012, Kohn contended that the Department of Justice had failed to comply with the statutory requirements of the Tunney Act by not filing with the Court and publishing in the Federal Register either the public comments it received pursuant to

the Act, nor the Government's response to such comments, by the statutory deadline set forth in Section 15 U.S.C. § 16(b). The Government replied to that letter by letter dated July 9, 2012. ECF 80. Kohn responded to such reply by letter to the Court dated July 11, 2012.

The Court has not since explicitly addressed the question of whether the Government met its statutory deadline. No order was issued in response to Kohn's letters, and the Court's Order dated September 5, 2012, regarding entry of the Final Judgment as to the first three Settling Defendants, makes no reference to this issue.

It remains Kohn's position that that the Government failed to meet the deadline set forth in the Tunney Act when it filed its public comments and response to those comments on July 23 2012, nearly a month late. Kohn shall contend in his proposed amicus curiae brief that, in its Proposed Schedule, the Government contemplates that it will again fail to meet the statutory deadline.

Kohn has spoken with counsel for defendants Apple, Macmillan and Penguin and each has expressed to Kohn that its client has no position on Kohn's filing of an amicus brief on this issue. Kohn has left a message with the Department of Justice regarding his intention to file this motion. Last year, in connection with Kohn's motion for leave to participate as amicus curiae, the DOJ stated to Kohn, "Our position is that we are not going to consent to the filing of any *amicus* briefs." Given the importance of this matter, Kohn is hopeful that the DOJ will not wish to object to Kohn's desire for a ruling on the matter that is the subject of his proposed amicus brief.

The statutory deadline under 15 U.S.C. § 16(b) is the subject of settled law in the Ninth Circuit, but no decision in this district or the Second Circuit has surfaced that would provide direct authority on this subject, apart from the plain language of the statute.

Kohn respectfully submits that the Court grant Kohn's motion to file a 4-page *amicus curiae* brief on this subject, because it appears none of the parties will be raising the issue of the Government's technical compliance with the statutory deadline, there appears to be no clear law on the matter in the courts within the Second Circuit; and failure of the Government to comply with the plain language of the Tunney Act, the sole existence of which is to encourage public participation in the antitrust consent decree process, should not become a routine matter.

III. CONCLUSION

To assist the Court in its determination of whether the Proposed Schedule complies with the Tunney Act, *amicus curiae* Kohn respectfully requests leave of Court to file the accompanying *amicus curiae* brief.

Dated: January 7, 2013

Respectfully submitted,



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