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)

BRIEF OF *AMICUS CURIAE* BOB KOHN
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. With the Court's permission, Kohn respectfully submits the following comments on the Government's Proposed Schedule for Penguin Tunney Act Review ("Proposed Schedule"), filed on January 3, 2013 pursuant to the Court's order dated December 19, 2013. In summary, Kohn contends that the Court must reject the Government's proposed date for filing the public comments as not in compliance with the Tunney Act, unless the Court first rules that the Ninth Circuit's interpretation of Section 16(b) of the Act is incorrect.

II. THE GOVERNMENT FAILED TO COMPLY WITH THE STATUTORY DEADLINE IN THE TUNNEY ACT

By letter to this Court dated July 9, 2012, a copy of which is attached as Exhibit A, Kohn contended that the Government failed to comply with the statutory requirements of the Tunney Act in connection with the Tunney Act review of the Government's settlement with Hachette, HarperCollins, and Simon & Schuster. The basis for this contention was the plain wording of Section 16(b) of the Act and the Ninth Circuit's holding in *United States v. Bechtel Corp*., 648 F.2d 660 (9th Cir. 1981).

The Tunney Act provides for a 60-day period within which the public is invited to provide comments to the proposed settlement. 15 U.S.C. 16(b). Section 16(b) states,

> Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. [emphasis added].

By letter to the Court dated June 7, 2012, which was endorsed by the Court on June 11, 2012 (ECF 60, attached as Exhibit B), the Government stated that such 60-day period would

close on June 25, 2012. The Government subsequently filed the public comments and its response to those comments on July 23, 2012, nearly one month passed the deadline.

In *Bechtel*, the Government argued that the Act's 60-day period is a minimum time for public comment between publication and entry of a proposed consent decree. Rejecting that argument, the Ninth Circuit held,

> The government's interpretation of section 16(b) ignores the plain language of the statute. Not only public comments, but also the United States's responses are to be filed within the sixty day period.
>
> *Bechtel* 648 F. 2d at 664.[1]

In its letter to the Court of July 11, 2012, in reply to Kohn's letter of July 9, 2012, the Government contended:

> Section 16(d) of the Act itself specifically permits the United States to seek additional time to consider comments. The United States did precisely that during the April 18, 2012 conference, noting that it would need a minimum of one month following the end of the comment period to get its submission (including the comments) compiled and filed with the Court. The Court granted our request for additional time to prepare and file our submission, and we are aware of no authority that the Court could not do so.

Regardless of whether *Bechtel* is correct about Section 16(b), the Government appears to have misread Section 16(d). If the Government required more time to file and publish the comments, the statute provides a way: under Section 16(d), the Court may grant "such additional time as the United States may request" to extend "the 60-day period as specified in subsection (b)." In other words, the Government's only statutory right to request more time under Section 16(d) is to delay the expiration of the public comment period itself—by, for example, extending

[1] *Bechtel* suggests that the Government might be allowed "some additional time" to prepare and file its *responses* to the comments. Id. This is because of the particular wording of Section 16(d)(2), which states, "*At the close of* the period during which comments may be received, the United States shall file with the district court and cause to be published in the Federal Register *a response to such comments*." [emphasis added]. But, even if the Court has discretion to grant the Government additional time to file its *responses* to the comments, this discretion does not apply to the actual *public comments* themselves. The filing of the comments with the Court, and making them available to the public, within the 60-day period is a clear statutory requirement of Section 16(b).

the 60-day comment period to 90 days. While the Court may grant the Government's leave to extend the 60-day comment period, the Court has no authority to extend the time within which *Congress* has required the Government to file and publish the comments and their response. To do so would be to rewrite the statute.

Kohn was not present at the April 18, 2012 conference to which the Government referred in its letter of July 11, and the docket does not reflect any motion or request being filed by the United States. But if, in fact, the Court "granted" on April 18, 2012 the Government's request to extend the comment period under Section 16(d), then the Government reversed itself in its letter to the Court dated June 11, 2012 wherein the Government specifically stated that the comment period would expire on June 25, 2012. Since the Court, in fact, granted the relief requested in that letter, the comment period expired at midnight, June 25, 2012—just as the government requested. By filing and publishing the comments nearly a month after the statutory date, the Government was not in compliance with the plain language of the Tunney Act.

The Government had an opportunity to seek more time, but it didn't. If it did, then it reversed itself with the Court's blessing. But it can't have it both ways: that is, ask the Court to cut off the public's right to submit comments on June 25, 2012 and then file and publish the comments at its own convenience.[2]

There appears to be no applicable Second Circuit precedent regarding the consequences of technical noncompliance with the Act. *Bechtel* did not—as the Government suggested in its letter of July 11, 2012—excuse the Government from failure to comply with the Tunney Act. It only held that such violation did not warrant the termination of an *existing* consent decree,

[2] The "efficiency" argument the Government made in its letter of July 11, 2012 should have been addressed not to the Court—nor to any single member of the public for whom the Tunney Act was passed to benefit—but to Congress who passed the law. Over thirty years ago, the Ninth Circuit in *Bechtel* admonished the Government on their responsibility to comply with the plain wording of the Tunney Act. If the Government has found the Act to be flawed, it certainly had ample opportunity to seek its amendment.

because there was no showing under those circumstances that the noncompliance went to the essence of such decree or that parties or the public were prejudiced by the delay where the decree had already been entered. Id at 664.

II. PROPOSED SCHEDULE CONTEMPATES THE GOVERNMENT'S NON-COMPLIANCE WITH THE TUNNEY ACT

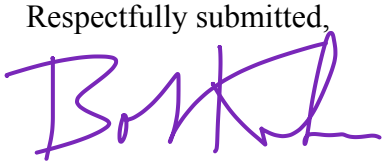
In its Proposed Schedule (ECF 160), the Government states that, assuming it completes its publication requirements by January 4, 2013, the public comment period will end on or about March 5, 2013. Assuming those dates, Kohn contends that the statutory deadline for filing the public comments would be midnight, March 5, 2013. Since the Government states it will file the public comments and its response to those comments by "no later than April 5, 2013," it is suggesting to the Court and to the public, in advance, that it may file the public comments one month after the statutory deadline.

III. CONCLUSION

It is respectfully submitted that the Court should either (i) rule on whether the conclusion reached in *Bechtel* (as to the statutory deadline under Section 16(b)) is correct or (ii) reject the Government's proposed date for filing the public comments as not in compliance with the Tunney Act.

Dated: January 7, 2013

Respectfully submitted,



BOB KOHN
California Bar No. 100793
140 E. 28th St.
New York, NY 10016
Tel. +1.408.602.5646
Fax. +1.831.309.7222
eMail: bob@bobkohn.com

/s/ Steven Brower

By: _____

STEVEN BROWER [PRO HAC]
California Bar No. 93568
BUCHALTER NEMER
18400 Von Karman Ave., Suite 800
Irvine, California 92612-0514
Tel: +1.714.549.5150
Fax: +1.949.224.6410
Email: sbrower@buchalter.com

Pro Bono Counsel to Bob Kohn

Exhibit A

Bob Kohn
140 E. 28th St.
New York, NY 10016
bob@bobkohn.com

July 9, 2012

Honorable Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

Re: *United States, et. al. v. Apple, Inc., et. al.*, Case No. 12-CIV-2826 (DLC)

Dear Judge Cote:

The Department of Justice has failed to comply with the statutory requirements of the Tunney Act in the above-captioned case. For the reasons set forth below, I am writing to request that the Court order the government to promptly comply with the statutory filing and publication deadlines.

On May 30, 2012, I timely submitted comments within the 60-day period as specified in the Tunney Act. 15 U.S.C. Sec. 16(b) and (d). Section 16(b) states, "Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period." Section 16(d)(2) states, At the close of the period during which comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments."

The DOJ has missed both of the foregoing statutory deadlines. In *United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir. 1981), the government argued that the Act's 60-day period is a minimum time for public comment between publication and entry of a proposed consent decree. See, *Bechtel* 648 F. 2d at 664. Rejecting that argument, the 9th Circuit held,

> The government's interpretation of section 16(b) ignores the plain language of the statute. Not only public comments, but also the United States's responses are to be filed within the sixty day period.

Bechtel suggests that the government might be allowed "some additional time" to prepare and file its responses to the comments. Id. But, even if Court believes it has discretion to grant such relief, this does not apply to the actual public comments themselves. The filing of the comments with the Court, and making them available to the public, within the 60-day period is a clear statutory requirement of Section 16(b).

As of today, the government is 14 days late in filing and publishing the comments. The Court has already granted the DOJ relief, permitting it to file the comments "via digital files submitted on physical media" and publish them via posting "on the Antitrust Division website." Court's Order dated June 11, 2012.[1] If the

[1] One of the grounds the DOJ offered for its relief from physical printing of the comments was that it "will ensure that the United States can meet the Court's July 27, 2012 deadline." The Case Management Order filed by the Court on April 23, 2012 states, "The

government required more time to file and publish the comments, the statute provides a way: under Section 16(d), the court may grant "such additional time as the United States may request" to extend the 60-day comment period. But the government never made such request. On the contrary, the DOJ has stated the comment period would expire on June 25, 201. DOJ letter & Order filed June 11. At midnight on that date, the comment period, in fact, expired.

The Court's recent Scheduling Order postponed the July 27 deadline for the government's motion for entry of a proposed final judgment until August 3. Because the government appears to have interpreted the April 23 Case Management Order as revision of the Tunney Act—by moving out the deadline Congress imposed upon it, from June 25 to the DOJ's self-imposed July 27 deadline—I am concerned the DOJ plans to do the same with respect to the Court's June 25 scheduling order—in effect, extending the statutory deadline, for publishing both the comments and its response, to August 3, 2012. If the DOJ is allowed to pull this off, the rights of interested parties would be prejudiced by being forced to consider of hundreds of pages of comments, together with the DOJ's response, within the span of just eight business days. The legislative history of the Tunney Act makes it clear that "Congress was concerned with allowing sufficient time" for consideration of the comments and responses. *Bechtel*, 648 F.2d at 664.

The statutory deadline for publishing the public comments was June 25; the DOJ has been in noncompliance for 14 days. Having been granted relief from the physical printing requirement, the DOJ has no excuse for not publishing the public comments on the Antitrust Division's website immediately. Also due on June 25 was the DOJ's response to the comments. Because the DOJ is already 14 days in noncompliance, it should not be unreasonable to order the DOJ to publish its response posthaste.

For the foregoing reasons, I respectfully ask the Court to order the DOJ to publish the comments by Friday, July 13 and to publish their response to the comments by July 27 (a full 7 days prior to the date its motion for entry of judgment is due). In addition, the Court should order such other relief as would befit the Justice Department's flagrant noncompliance with federal law.

The DOJ has told the Court that it has received hundreds of pages of hundreds of comments. The public had a statutory right to see those comments 14 days ago. When a member of the public fails to meet the statutory deadline for submitting comments under the Tunney Act, there are consequences: participation by matter of right becomes participation at the Court's reasonable discretion. There should be no less serious consequences when the government fails to meet its statutory deadlines. The government should not with impunity be allowed to test those consequences.

Respectfully submitted,

Bob Kohn

Government shall file any motion with respect to a proposed final judgment by July 27." The Court-ordered deadline for the government's filing its motion should not be confused with the 60-day deadlines established by Congress under Section 16(b) and (d)(2) for the filing and publishing of the public comments and the government response. Nor can the Court's order of June 11 be construed as extending either such deadline. The DOJ never requested such extensions and the Court has no discretion to grant the government an extension to the deadline established by Congress to file and publish the comments under Section 16(b)). As noted herein, the Tunney Act provides a means for the DOJ to buy additional time, but the DOJ declined to invoke it.

Exhibit B

U.S. Department of Justice

Antitrust Division

Mark W. Ryan
Direct Dial: (202) 532-4753
e-mail: mark.w.ryan@usdoj.gov

950 Pennsylvania Avenue, NW
Suite 3109
Washington, DC 20530

July 11, 2012

BY ELECTRONIC MAIL

The Honorable Denise L. Cote
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: *U.S. v. Apple, Inc., et al*, No. 12-cv-2826 (DLC)

Dear Judge Cote:

The United States respectfully submits this response to Mr. Kohn's July 9, 2012 letter.

To begin with, the United States fully intends to publish all of the more than 800 comments it has received relating to the proposed consent judgment pending before Your Honor. We are working expeditiously to do so. Consistent with the Court's June 11, 2012 Order, the comments will be posted on the Antitrust Division's website rather than printed in the *Federal Register*. Simultaneous with the posting of the comments, the United States will post its detailed response to the comments, provide copies of the comments and response to the Court, and publish the response in the *Federal Register* with directions to the website where the comments may be viewed. Approximately two weeks later, on or before the August 3, 2012, the United States will move the Court to enter the proposed judgment. The Court has established a briefing schedule for the defendants to respond to the motion and for the United States to file a subsequent reply memorandum.

This timetable is consistent with the purposes of the Tunney Act and results in no conceivable harm to Mr. Kohn or any other member of the public, or to any actual party to the proceedings. Mr. Kohn's request for entry of his Proposed Order should therefore be denied.

Mr. Kohn's suggestion that publication must occur on the last day of the comment period makes no sense and would interfere with a complete and orderly publication and consideration of all public comments. This is because it is typical for many comments to arrive at the very end or just after the expiration of the comment period. That is what happened here. As many as half of the over 800 comments sent to the United States arrived within a few days of or after the comment deadline. It would serve no purpose to require the United States to publish comments,

much less its response to comments, without affording the United States time to read and evaluate all comments. Section 16(d) of the Act itself specifically permits the United States to seek additional time to consider comments. The United States did precisely that during the April 18, 2012 conference, noting that it would need a minimum of one month following the end of the comment period to get its submission (including the comments) compiled and filed with the Court. The Court granted our request for additional time to prepare and file our submission, and we are aware of no authority that the Court could not do so. Mr. Kohn's reliance on *U.S. v. Bechtel*, 648 F.2d 660 (9th Cir. 1981), is misplaced for several reasons, including among others, that the court there observed the government had not sought court permission for an extension and that there was a delay of over a year between the expiration of the comment period and the motion for entry of the consent decree. And even then the court rejected a claim by a party to the decree that there was any prejudice from the delay. *Id.* at 664. Mr. Kohn, of course, is not a party here and his suggestion of prejudice is wholly implausible.

Nor is it even possible, as Mr. Kohn would like, for the United States immediately to publish all comments online. Rather, the United States must first render all comments into common readable electronic files and then, under the Rehabilitation Act Amendments of 1998, 29 U.S.C. § 794d, ensure that all those materials are accessible to the disabled. (For instance, under the Amendments, any graphic image, including pictures and stylized script of the type common in letterhead, must be individually described.) Only once those comments have been properly processed can the United States electronically publish them, seek *Federal Register* publication of the web address where the comments can be found, and move to enter the proposed judgment. For efficiency purposes, the United States consistently has published both the comments received and its response simultaneously. The United States is not aware of any instance in which a court has required the United States to publish the comments received in advance of the response.

Respectfully Submitted,

/s/ Mark W. Ryan

Mark W. Ryan

cc: Provided electronically to Mr. Bob Kohn, as well as all parties in this action.

Exhibit C

Bob Kohn
140 E. 28th St.
New York, NY 10016
bob@bobkohn.com

July 11, 2012

Honorable Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

Re: *United States, et. al. v. Apple, Inc., et. al.*, Case No. 12-CIV-2826 (DLC)

Dear Judge Cote:

I am in receipt of the Department of Justice's response to my letter of July 9, 2012, and I am writing to respond to a few points.

In the second paragraph of the letter, the government suggests it is "working expeditiously" to publish the more than 800 comments it received during the 60-day comment period. Then, the government states, "Simultaneous with the posting of the comments, the United States will post its detailed response to the comments." The next sentence continues, "Approximately two weeks later, on or before August 3, 2012, the United States will move the Court to enter the proposed judgment."

If I am reading the letter correctly, the DOJ has just promised the Court and the public that it will post the comments and the government response on the Antitrust Division's website on or before July 20, 2012. If this is the case, it is consistent with my original request and acceptable. I respectfully ask that the Court to so order the government to do so.

As to the defenses raised in the balance of the DOJ's letter, I respectfully submit that the DOJ's conduct continues to be in violation of the plain language of the Tunney Act. In the fourth paragraph of the DOJ's letter, the government states that "Section 16(d) of the Act itself specifically permits the United States to seek additional time to consider comments." This is half true. As I pointed out my letter of July 9,

> If the government required more time to file and publish the comments, the statute provides a way: under Section 16(d), the court may grant "such additional time as the United States may request" to extend the 60-day comment period. (emphasis in the original letter).

In other words, the government's only statutory right to request more time under Section 16(d) was to delay "the 60-day period as specified in subsection (b)"—that is, the 60-day comment period itself. While the government can request leave to extend such period, the government cannot ask for, and the Court cannot grant, leave to extend the time within which Congress has required the government to file and publish the comments and their response.

As stated in *Bechtel*, "Not only public comments, but also the United States's responses are to be filed within the sixty day period." *United States v. Bechtel Corp.*, 648 F.2d 660, 664 (9th Cir. 1981). Under *Bechtel*, all the Court can properly do is rule on the consequences of the government's violation of federal law. (*Bechtel* did not, as the DOJ suggests, excuse the government from violation of the Tunney Act. It only held that such violation did not warrant the upending of the consent decree in that case).

I was not present at the April 18, 2012 conference to which the DOJ refers, and the docket does not reflect any motion or request being filed by the United States. If the Court, in fact, granted on April 18, 2012 the government's request to extend the comment period under Section 16(d), then the DOJ reversed itself in its letter to the Court dated June 11. In that letter the DOJ specifically stated the comment period would expire on June 25, 2012. Since the Court, in fact, granted the relief requested in that letter, the comment period expired at midnight, June 25, 2012—just as the government requested.

The government's "efficiency" argument (including its frustrations with posting 800 comment letters to a website) should be addressed not to the Court—nor to any single member of the public for whom the Tunney Act was passed to benefit—but to Congress who passed the law (and to the 9th Circuit who, over 30 years ago, admonished the government on their responsibilities under the law. If the DOJ finds the law flawed, it certainly has had ample time to seek its amendment).

The government had an opportunity to seek more time, but it didn't. It can't have it both ways: that is, ask the court to cut off the public's right to submit comments on June 25, and then file and publish the comments at its own convenience on its own schedule.

The DOJ suggests in its letter that there will be "no conceivable harm to Mr. Kohn or any other member of the public, or to any actual party to the proceeding" and that my suggestion of prejudice is "wholly implausible." As the government noted, I am not a party to the action, nor can I speak for any of the actual parties, but under the circumstances the government should not be the last to speak about whether the public has been prejudiced by the government's delay. I do intend to request leave from the Court to file a brief amicus curiae in this action for the sole purpose of replying to the comments and the government's response.

The government is now more than two weeks late in meeting its statutory obligation to the public. Even if it delivers as promised, the government will be nearly a month late. Under these circumstances, I respectfully repeat my request for some consequence to the government's failure to meet its statutory deadline or to use the means it had available to them under the Tunney Act to publish the comments on a timely basis.

Respectfully submitted,

Bob Kohn

cc: Provided by email to the Plaintiff, as well as the Defendants in this action.