

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
v.
APPLE, INC., et al.,
Defendants.
Civil Action No. 12-CV-2826 (DLC)
ECF Case

REPLY MEMORANDUM IN SUPPORT OF MOTION BY THE UNITED STATES
FOR ENTRY OF THE PROPOSED PENGUIN FINAL JUDGMENT

After certifying the parties’ completion of all requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or “Tunney Act”), the United States moved this Court on April 18, 2013, for entry of the proposed Final Judgment as to Defendants The Penguin Group, a division of Pearson PLC, and Penguin Group (USA), Inc. (collectively, “Penguin”). Amicus Bob Kohn submitted a five-page memorandum in response to the United States’ motion, drawing on what Mr. Kohn regards to be an “admission” by the United States concerning Amazon’s e-book pricing practices to argue that entry of the proposed Penguin Final Judgment would not be in the public interest. Mr. Kohn’s submission largely repeats the arguments concerning Amazon’s alleged predatory pricing and monopolization he made in connection with the initial Tunney Act proceeding in this case, arguments this Court previously found to be unconvincing. See United States v. Apple, Inc., 889 F. Supp. 2d 623, 642 (S.D.N.Y. 2012) (“[E]ven if Amazon was engaged in predatory pricing, this is no excuse for unlawful price-fixing. Congress ‘has not permitted the age-old cry of ruinous competition and competitive

evils to be a defense to price-fixing conspiracies.”) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)).

Mr. Kohn, however, asserts that the United States admitted in its Response to Comments “that Amazon’s e-book prices as a whole were below marginal cost,” and that this “admission” necessitates a fresh look at these issues. Mr. Kohn’s view, however, rests on a misunderstanding of the United States’ statements. In its Response to Comments, the United States pointed out that the proposed Penguin Final Judgment permits Penguin to enter contracts with Amazon or other e-book retailers under which the total discounting of Penguin’s e-books can be no greater than the aggregate commissions the retailer earns in connection with its sale of Penguin’s e-books. This provision allows Penguin to ensure that the retailer remains margin positive on the sale of its catalog of e-books. A retailer under such an agreement that engaged in price competition would sell e-books at a price that is closer to its marginal costs – “efficient” pricing in Mr. Kohn’s terminology – than would have been possible under the agency agreements produced through the conspiracy among Apple and the Publisher Defendants.¹

Mr. Kohn’s *amicus* submission provides no grounds on which this Court should determine that entry of the proposed Penguin Final Judgment would not be in the public interest.

¹ Mr. Kohn also takes issue with the failure by the United States to respond to his assertion, submitted through his public comment on the proposed Penguin Final Judgment, that this Court applied the incorrect standard of review in its initial Tunney Act proceeding. See *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 630-32 (S.D.N.Y. 2012) (articulating the standard of review). Mr. Kohn asserts that *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), and *United States v. International Business Machines Corporation*, 163 F.3d 737 (2d Cir. 1998), require the Court to apply a more stringent standard. Those cases, however, involved petitions by the parties to terminate consent decrees. See *American Cyanamid*, 719 F.2d at 559; *IBM*, 163 F.3d at 738. Neither evaluated whether a proposed final judgment met the Tunney Act’s requirements.

Dated: May 10, 2013

Respectfully submitted,

s/Mark W. Ryan

Mark W. Ryan
Lawrence E. Buterman
Stephen T. Fairchild
Attorneys for the United States
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 4000
Washington, DC 20530
(202) 532-4753
Mark.W.Ryan@usdoj.gov

CERTIFICATE OF SERVICE

I, Stephen T. Fairchild, hereby certify that on May 10, 2013, I caused a copy of the Reply Memorandum in Support of Motion of the United States for Entry of the Proposed Penguin Final Judgment to be served by the Electronic Case Filing System, which included the individuals listed below.

For Apple:

Daniel S. Floyd
Gibson, Dunn & Crutcher LLP
333 S. Grand Avenue, Suite 4600
Los Angeles, CA 90070
(213) 229-7148
dfloyd@gibsondunn.com

For Macmillan and Verlagsgruppe Georg
Von Holtzbrinck GMBH:

Joel M. Mitnick
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
jmitnick@sidley.com

For Penguin Group (USA) and the Penguin
Group:

Daniel F. McInnis
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue NW
Washington, DC 20036
(202) 887-4000
dmcinnis@akingump.com

For Hachette:

Walter B. Stuart, IV
Freshfields Bruckhaus Deringer LLP
601 Lexington Avenue
New York, NY 10022
(212) 277-4000
walter.stuart@freshfields.com

For HarperCollins:

Paul Madison Eckles
Skadden, Arps, Slate, Meagher & Flom
Four Times Square, 42nd Floor
New York, NY 10036
(212) 735-2578
pmeckles@skadden.com

For Simon & Schuster:

Yehudah Lev Buchweitz
Weil, Gotshal & Manges LLP (NYC)
767 Fifth Avenue, 25th Fl.
New York, NY 10153
(212) 310-8000 x8256
yehudah.buchweitz@weil.com

Additionally, courtesy copies of this Reply Memorandum in Support of Motion of the United States for Entry of the Proposed Penguin Final Judgment have been provided to the following:

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. Gervery
Assistant Attorney General
Antitrust Division
Office of the Attorney General of Texas
300 W. 15th Street
Austin, Texas 78701
(512) 463-1262
gabriel.gervery@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/Stephen T. Fairchild

Stephen T. Fairchild
Attorney for the United States
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 4000
Washington, DC 20530
(202) 532-4925
stephen.fairchild @usdoj.gov