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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:

By letter dated April 30, 2013, I respectfully requested that the Court hold a hearing on the Plaintiff's Motion for Entry of Final Judgment regarding the Penguin Settlement and that the Court permit me to participate in oral argument at such hearing. ECF #217. In its reply earlier today (ECF #225), the Government made no objection to my request for such a hearing. In addition, given the nature of the Government's response, I respectfully reiterate such request (and apologize for the redundancy, as I have not yet seen an order granting or denying the request).

The basis of this re-doubled request is the Government's attempt to clarify, with the following italicized language, what it previously meant by "closer to [Amazon's] marginal costs": "*closer to its marginal costs than would have been possible under the agency agreements produced through the conspiracy among Apple and the Publisher Defendants.*"

Besides being on its face mathematically false, such statement appears intended to divert the Court's attention from the point made: the below-marginal cost pricing that is relevant for determining whether post-agency contract pricing harmed the public is Amazon's marginal cost *prior to* agency pricing (i.e., retail model pricing), not Amazon's marginal cost under the settlement agreement.

The italicized language does *nothing* to respond to the contention that e-book price increases occurring after agency pricing benefited the public by correcting the inefficient below-marginal cost pricing which occurred previously under the retail model. At best, the italicized language is a *non sequitur*: If Amazon's marginal cost under the agency agreement is 70% of the publisher's price (e.g., \$10.50 on a book with a publisher's price of \$15.00), then how does the settlement, by allowing discounting at below its marginal cost, allow Amazon to sell e-books at "closer to its marginal cost"? For example, if the settlement allows Amazon to discount that e-book to \$10.00. How is \$10.00 "closer to its marginal cost" of \$10.50 than \$10.50 itself?

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The Government's use of the phrase "closer to its marginal costs" must have been in reference to Amazon's marginal costs *prior to the agency contracts*, not under the agency contracts prior to the settlement. Hence, my suggestion of an admission by the Government that Amazon was selling e-books below marginal cost under the retail model. In any case, whether settlement pricing is "closer" to marginal cost than under agency pricing is beside the point.

What is relevant for this public interest determination is a comparison of pricing before and after the adoption of agency pricing and, specifically, whether, prior to agency pricing, Amazon was selling e-books at below-marginal cost. To this day, the Government has not denied that fact. Not once. Then the Government admitted as much by stating in its recent Response to Comments that Amazon could under the settlement, because of the aggregate limitation, sell "closer to its marginal costs." Now, in its reply to amicus curiae, the Government clumsily attempts to explain away that Freudian slip.

Whether by direct admission or by failure to deny it—and certainly by withholding from the Court and the public determinative documents which have a critical bearing on this pivotal point—the Government has provided the Court with indisputable facts (and a clear presumption) that its conclusions regarding the settlement are not reasonable. Its conclusion that lower prices "likely" to be caused by the settlement is in the public interest was not reasonable, because, as a matter of law, they reversed e-book price increases that benefited the public by eliminating the effect of Amazon's below-marginal cost pricing under the retail model and returning those prices to the efficient levels.

Respectfully submitted,



Bob Kohn

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