

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA )  
v. Plaintiff ) Civil Action No. 12-CV-2826 (DLC)  
APPLE, INC., ET AL )  
Defendants )  
\_\_\_\_\_)

**MOTION OF BOB KOHN  
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE**

Movant Bob Kohn, through his *pro bono* counsel, pursuant to 15 U.S.C. Sec. 16(f)(3), hereby moves for leave to participate as *amicus curiae* for the sole purpose of replying to (a) the Department of Justice's 55-page response to those comments published in the Federal Register on June 23, 2012 ("DOJ Response") and subsequent motion for entry of the proposed Final Judgment filed on August 3, 2012 ("DOJ Motion") and (b) a few of the arguments presented in several of the 868 public comments filed during the 60-day comment period.

Bob Kohn also moves, pursuant to 15 U.S.C. §16(f)(3), that the Court order the United States to file with the Court all documents and other materials collected and/or reviewed by the United States in connection with its investigation and review of data from Amazon and others in support of the government's statement in the DOJ Response, and as alleged in the Complaint (at ¶30), that "Amazon's e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles."

The grounds for this motion are more fully set forth in the accompanying Memorandum of Points and Authorities. In summary, Movant's comments would be helpful to the Court in evaluating the DOJ Responses and DOJ Motion in connection with its public interest determination in this matter. Rather than repeat arguments made in Movant's Comments (ATC-0143), May 30, 2012), the proposed amicus brief is entirely focused on *replying* to the DOJ Response. Specifically, such reply is necessary (a) to correct potentially misleading statements of law contained in the DOJ Response, (b) to draw attention to law that none of the parties to this action have addressed, and (c) to show how the DOJ Response actually helped demonstrate the unreasonableness of the government's conclusions regarding the proposed Final Judgment. Although other interested parties may seek to participate as *amicus curiae*, Movant believes that he is uniquely suited to assist the Court in connection with certain specific factors underlying the government's conclusions about the reasonableness of the proposed Final Judgment.

In addition, as stated in the Memorandum supporting this motion, the DOJ applied the wrong law of predatory pricing such that the DOJ's conclusions about the remedy cannot be reasonable. In the Second Circuit, below marginal cost pricing is presumed illegal. To overcome the presumption, and to test the reasonableness of the government's conclusion, the Court must consider the materials and data reviewed by the DOJ in its stated investigation of Amazon's pricing policies.

Movant has approached each of the Defendants in this action and none have expressed objection to Movant's participation as *amicus curiae*. In addition, on July 30, 2012, Movant approached the DOJ to inquire whether it would so object. The DOJ replied the next day saying, "Our position is that we are not going to consent to the filing of any *amicus* briefs." Given the

importance of this matter, Movant is hopeful that the DOJ will not wish to object to a strong voice raising some fundamental concerns.

In preparing the proposed *amicus* brief, Movant has been mindful of the *Individual Practices in Civil Cases* promulgated by this Court on August 23, 2011. In particular, Section 3.B. thereof states that, unless prior permission has been granted, “memoranda of law in support and opposition to motions are limited to 25 pages.” The length of the attached proposed *amicus curiae* brief is 25 pages.

However, Movant seeks permission from the Court to add to the brief an additional twelve pages, attached as an Appendix to the Memorandum in Support of this Motion. The arguments set forth in the additional pages also reply to the DOJ Response and, for good reason, have not heretofore been addressed in Movant’s Comments. These arguments were impossible to provide during the comment period, because they build directly upon the third party public comments, the DOJ Response to such comments, and the responsive arguments set forth in the first 25 pages of the *amicus* brief. Should the Court grant permission to add such additional material, Movant would submit a replacement version of the proposed *amicus curiae* brief that contains the additional pages, together with a consolidated Table of Contents and Table of Authorities, updated to reflect the additional material.

WHEREFORE, this motion should be granted and Movant should be authorized to file, pursuant to 15 U.S.C. §16(f)(3), the proposed brief *amicus curiae* accompanying this motion (including the additional pages referenced above), and should be invited to participate in oral argument at any hearing the Court may conduct to determine whether the proposed Final Judgment is in the public interest.

AND WHEREFORE, pursuant to 15 U.S.C. §16(f)(3), that the United States should be ordered to file with the Court all documents and other materials collected and/or reviewed by the United States in connection with its investigation and review of data from Amazon and others in support of the government's statement in the DOJ Response (at 21-22), and as alleged in the Complaint (at ¶30), that "Amazon's e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles."

A form of proposed Order is attached.

In addition, pursuant to the Section 3.E of the Court's *Individual Practices in Civil Cases*, Movant has submitted to the Court a letter requesting a hearing on Plaintiff's Motion for Entry of Final Judgment where *amicus curiae* may present oral argument in response to the DOJ Motion.

Dated: August 13, 2012

Respectfully submitted,

/s/ Bob Kohn

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*Pro Bono Counsel to Bob Kohn  
(Pro Hac Vice Pending)*