No. 12-4017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOB KOHN,
Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH,
HOLTZBRINCK PUBLISHERS, LLC, DBA MACMILLAN,
THE PENGUIN GROUP, A DIVISION OF PEARSON PLC,
PENGUIN GROUP (USA), INC.,
HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS, L.L.C.,
SIMON & SCHUSTER, INC.,
Defendants-Appellees,

APPLE, INC.,
Defendant.

REPLY OF THE UNITED STATES IN SUPPORT OF MOTION TO DISMISS APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. Kohn's Standing to Appeal The Entry Of The Final Judgment Is Properly Raised By The Government's Motion To Dismiss 3

II. Kohn Lacks Article III Standing To Appeal Entry Of The Final Judgment And Therefore Lacks Standing To Maintain This Appeal. 8

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Cases:

Bridgeport Guardians, Inc. v. Delmonte,
602 F.3d 469 (2d Cir. 2010) 4

Ionian Shipping Co. v. British Law Insurance Co.,
426 F.2d 186 (2d Cir. 1970) 4, 6

Ross v. American Express Co., No. 06-4598,
547 F.3d 137 (2d Cir. 2008) 7

Schulz v. Williams, 44 F.3d 48 (2d Cir. 1994) 1, 2, 5

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 41-42 (1976) 11

United States v. American Cyanamid Co.,
719 F.2d 558 (2d Cir. 1983) 12, 13

Constitution, Statutes, and Rules:

U.S. Const. art. III 4

28 U.S.C. 1291 4

United States Court of Appeals for the Second Circuit
Local Rule 31.2(a)(3) 7

Miscellaneous:

7C Charles A. Wright et al., Federal Practice and Procedure:
Civil § 1923 (3d ed. 2007) 6

INTRODUCTION

In its Motion to Dismiss, the United States explained that Appellant Kohn does not meet the established standards for Article III standing on appeal: a showing of a personal injury, fairly traceable to the challenged action, that is "likely to be redressed by the relief requested." *Schulz v. Williams,* 44 F.3d 48, 52 (2d Cir. 1994). Kohn, the government observed, seeks to appeal to advance his own view of the public interest, based on his speculative predictions about the future conduct of non-party Amazon.

In his response, Kohn does not deny that it is his burden to demonstrate Article III standing to appeal (Mot. 6-7) and that an interest shared generally with the public at large in the proper application of the antitrust laws is insufficient to meet that burden (Mot. 8). Nor does Kohn dispute the government's showing that he lacks standing to raise four of the six issues identified in his List of Issues Proposed to be Raised on Appeal (see Mot. 13-16). The two arguments Kohn offers do not suffice to meet his burden of establishing the Court's jurisdiction over this appeal.

Kohn first contends that it is inappropriate to consider his standing to appeal from the entry of the Final Judgment at this stage because he has appealed from the denial of his motion to intervene for purposes of appeal (Resp. 1-4). He cites cases holding that the Court has jurisdiction over appeals from orders denying intervention (Resp. 3). But the issue here is not whether orders denying intervention are appealable final orders, it is Kohn's Article III standing, a subject not addressed by the cases he cites. To establish that denial of intervention caused an injury "likely to be redressed by the relief requested," *Schulz,* 44 F.3d at 52, Kohn must demonstrate his standing to appeal the Final Judgment, for unless he can appeal the Final Judgment, allowing him to intervene for the purpose of appealing it is meaningless. In any event, Kohn makes clear (Form C, Addendum B, List of Issues Proposed to be Raised on Appeal, ECF No. 16-9) that he is asking the Court to reverse both the denial of intervention and the entry of the Final Judgment in the context of this appeal, and it is entirely appropriate to consider on motion to dismiss whether the Court has jurisdiction to do so.

Second, Kohn argues that he has standing to appeal from the Final Judgment on the basis of injuries not claimed in his district court

pleadings (Resp. 5-15). Kohn predicts that non-party Amazon will engage in a successful predatory strategy that will ultimately reduce competition, harming the defendant publishers and, as a consequence, reducing the revenues of RoyaltyShare, a supplier of services to some of the publishers. Kohn is Chairman, CEO, and a shareholder of RoyaltyShare. But even if RoyaltyShare were the appellant, this asserted injury would not establish standing to appeal from the Final Judgment because it is speculative, depends on the independent conduct of a non-party, and cannot be effectively redressed in such an appeal.

ARGUMENT

I. Kohn's Standing to Appeal The Entry Of The Final Judgment Is Properly Raised By The Government's Motion To Dismiss

Kohn offers three reasons in support of his contention that the Court should not consider his standing to appeal from the entry of the Final Judgment in ruling on the government's motion to dismiss. None has merit.

a. Kohn argues that the Court has jurisdiction to hear his appeal because "[i]t is settled law that this Court has jurisdiction of an appeal of an order which denies intervention." Resp. 3. This argument, which

takes advantage of jurisdiction's many meanings, confuses a statutory grant of appellate jurisdiction, 28 U.S.C. 1291 (the regional courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts"), with the Court's power to decide a matter consistent with Article III's limits on the jurisdiction of the federal courts, U.S. Const. art. III. The government has not questioned whether the denial of Kohn's motion to intervene was an appealable final order.[1] Our point is that Article III standing is required in all judicial proceedings. Mot. 6.

Kohn cites five cases to support the proposition that "this Court has jurisdiction of an appeal of an order which denies intervention" (Resp. 3), but they address only whether a denial of intervention is an appealable order. All five involved attempted intervention to participate in on-going district court matters, over which the district court had jurisdiction without regard to the would-be intervenor's standing.

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[1] We recognize that this Court has sometimes merely assumed denials of intervention to be appealable final orders prior to determining whether the denial was erroneous. *Compare, e.g.*, *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 189 (2d Cir. 1970) (assuming appealability), *with Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010) (asserting such orders are appealable as final orders). For our purposes here, the distinction does not matter.

Reversal of the denial of intervention thus offered the prospect of relief—participation in the on-going proceeding.

None of the cases Kohn cites suggests that there is an automatic right to appeal the denial of intervention for the purpose of appeal without regard to whether the appellate court would have jurisdiction over the merits appeal. If Kohn lacks standing to appeal from the entry of the Final Judgment, reversing the denial of intervention for the purpose of appeal is pointless. As the government explained in its Motion to Dismiss (Mot. 7-8 & n.3), Kohn therefore lacks Article III standing to appeal from the denial of intervention for the purpose of appeal unless he has standing to appeal from the entry of the Final Judgment. *See Schulz,* 44 F.3d at 52.

b. Kohn contends (Resp. 4, argument heading I.B.) that the Court is required to examine the merits of his motion for intervention separately before considering its jurisdiction to review the entry of the Final Judgment. Because Kohn's standing to maintain this appeal depends on whether he would have standing to appeal the Final Judgment if intervention were granted, this contention amounts to asserting that

the Court must decide the merits of this appeal before deciding whether it is justiciable under Article III.

Kohn provides neither argument nor authority for this proposition. He quotes (Resp. 4) an opinion of this Court that criticizes the "traditional view" that "the appellate court can reverse if the trial court has erroneously denied intervention of right or if it has abused its discretion in denying permissive intervention, but that its order is not appealable, and the appeal must be dismissed, if the trial court properly denied the application for intervention." 7C Charles A. Wright et al., Federal Practice and Procedure: Civil § 1923, at 634 (3d ed. 2007). Kohn's quotation from this Court notes that following this view would "require the court to examine the merits of the motion for intervention before it can consider whether it has jurisdiction." *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 189 (2d Cir. 1970). *See also* note 1 *supra*. "[J]urisdiction" in that quotation has to do with whether the order appealed is an appealable final order, and not with the appellant's

standing to maintain the appeal.[2] It provides no support for Kohn's argument.

c. Kohn suggests that deciding the jurisdictional question on a motion to dismiss would improperly "depriv[e] the appellant of the right to file a considered Opening Brief," Resp. 4, in which he would address jurisdiction, the merits of the denial of intervention, and the merits of the order entering the Final Judgment, *id.* at 5. But there is nothing improper about raising the question of the Court's jurisdiction in a motion to dismiss.

This Court's rules clearly contemplate the filing of dispositive motions prior to merits briefing. Indeed, the rule governing briefing schedules explicitly provides for deferring the entire briefing schedule until after the Court has ruled on any dispositive motions. Local Rule 31.2(a)(3) ("The filing of a dispositive motion . . . tolls the time periods set forth in this rule until the motion is determined . . . .").[3] This

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[2] *Ionian* concerned intervention as of right, but its point applies to permissive intervention as well.

[3] *See, e.g.*, *Ross v. American Express Co.*, No. 06-4598, 547 F.3d 137 (2d Cir. 2008), Docket entries 10/17/06 (scheduling order #1), 10/20/06 (motion to dismiss filed), 11/6/06 (order vacating scheduling order;

sensible rule avoids wasting litigant and judicial resources on preparing and considering briefs addressing issues that the Court lacks jurisdiction to decide. And a litigant who has no standing to maintain an appeal has no "right" to file an Opening Brief.

II. Kohn Lacks Article III Standing To Appeal Entry Of The Final Judgment And Therefore Lacks Standing To Maintain This Appeal.

Kohn's Response does not dispute the government's contention that the harms he alleged in district court are insufficient to afford him standing to appeal from the entry of the Final Judgment. Rather, Kohn now asserts additional claims of injury. But those claims are also insufficient to meet the three part standard for appellate standing.

a. Kohn supported his motion to intervene by explaining that he "is directly affected by the Final Judgment, having purchased e-books before and after the effect of the agency model, not unlike millions of other consumers of e-books," Kohn Mem. in Supp. Mot. to Intervene at 5, Sept. 7, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 115. In this Court, however, Kohn claims "a direct, personal financial interest in the

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further scheduling order to be entered following any order not fully dismissing appeal), 2/13/07 (order denying motion to dismiss), 3/1/07 (scheduling order #2), 4/23/07 (appellant's opening brief filed).

outcome of this appeal" based on his position as "Chairman & CEO of RoyaltyShare, Inc.," a firm that provides services to book publishers (including two defendants in this case) and to the New York Times. Resp. 13. Kohn is also a RoyaltyShare shareholder. Kohn Aff. ¶ 2. Kohn asserts that "RoyaltyShare's revenues vary in direct proportion with the e-book revenue of its clients or the number of e-books published by its clients, or both." Resp. 15. Thus, he claims, "the Final Judgment . . .directly and financially impacts RoyaltyShare." *Id.*

But RoyaltyShare is not the appellant here; Kohn is.[4] Any impact of the Final Judgment on Kohn through his position as Chairman, CEO,

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[4] Kohn stated in his comments on the proposed Final Judgment submitted to the government, "the views expressed in these comments do not necessarily reflect the views of any of my current or past employers or any clients or customers of those employers. I have drafted this response without legal or other professional assistance of any kind." Letter from Bob Kohn to John R. Read, Chief, Litigation III Section, Antitrust Division 15 (May 30, 2012), *available at* http://www.justice.gov/atr/cases/apple/comments/atc-0143.pdf. Kohn now explains that submission of comments, as well as his other actions including seeking intervention, was done "with the knowledge and approval of RoyaltyShare's senior managers" who had concluded that proposed decree provisions would have "negative impacts upon a relevant market that directly impacts RoyaltyShare's business." RoyaltyShare also concluded that Kohn "would be the person best-situated to bring to the attention of the Justice Department and the District Court" their concerns. Kohn Aff. ¶ 36.

and shareholder would be entirely derivative of any impact on RoyaltyShare. Moreover, the effect on Kohn would depend on the nature of his compensation arrangements and the extent to which any effect on RoyaltyShare affected the value of Kohn's shares.

b. Even RoyaltyShare would not have standing to appeal entry of the Final Judgment. First, assuming, as Kohn asserts, RoyaltyShare's revenues vary directly with its clients' revenues or the number of e-books they sell, it is a matter of pure conjecture whether the Final Judgment would lead to a decline in the revenues of RoyaltyShare's publisher clients. In the absence of agency arrangements, publishers would set wholesale prices for e-books, and retail sellers would set the prices consumers pay, which would in turn affect the number of e-books sold. Publishers' revenues could go up or down depending on their decisions.[5]

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[5]The speculative nature of the alleged harms is also made clear by the frequent use of "could" and similar indications of conjecture about future conduct in the scenarios sketched in Kohn's Affidavit. *See, e.g.,* Kohn Aff. ¶¶ 30 (non-party Amazon "could use below marginal cost pricing"; Amazon "could recoup its losses"; missteps by a publisher "could be construed as 'retaliation'"), 32 (Final Judgment "enables

Second, and for similar reasons, the alleged harms to RoyaltyShare would not be fairly traceable to entry of the Final Judgment. Like the harms Kohn alleged in district court, they would constitute "injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 41-42 (1976). At the heart of Kohn's claims is his speculative theory that non-party Amazon will engage in a campaign of successful predation. Moreover, between the Final Judgment and RoyaltyShare's accounts receivable are multiple pathways with numerous decision points – the pricing decisions of publishers, the pricing decisions of retailers, the purchasing decisions of e-book consumers, the contract negotiations between publishers and retailers, and the contract negotiations between RoyaltyShare and its clients. *See also* note 5 *supra* (listing hypothetical actions by third parties that could influence RoyaltyShare revenues, per Kohn Aff.)

Amazon to resume selling e-books at below their marginal cost"; increased Amazon market share becomes "more likely"), 34 (publishers "could" offer lower prices to a particular retailer than to others), 35 (publishes "could . . . circumvent their agreements with the e-retailers").

Third, relief in an appeal of entry of the Final Judgment is limited to reversal of the order entering that judgment and for that reason likely would not redress these new alleged harms. As explained in the government's Motion at 12-13:

> Neither this Court, nor the district court on remand, would be able to order non-party Amazon to do, or refrain from doing, anything. Nor would vacating the Final Judgment require the settling publishers to reinstate contracts with Apple that they had lawfully terminated or to terminate or enter into any other contract for the purpose of affecting Amazon's conduct.

c. RoyaltyShare's circumstances are wholly unlike those of intervenor/appellant Melamine Chemicals Inc. ("MCI") in *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), on which Kohn relies, Resp. 12. In that case, Cyanamid sought to terminate an old consent decree entered when Cyanamid was the sole domestic producer of melamine for sale in the domestic merchant market. 719 F.2d at 560. A decree provision ("Part XI") required Cyanamid to buy large quantities of melamine in the merchant market. *Id.* at 561. By the time Cyanamid sought termination, MCI was the sole beneficiary of the purchase requirement, *id.* at 562. MCI successfully sought to intervene, claiming that it had entered the melamine business in reliance on Part

XI, Cyanamid was one of its largest customers, "and Cyanamid had informed MCI that if the decree were terminated, Cyanamid would no longer purchase melamine from MCI." *Id.* at 561. The district court found that abrupt termination of Part XI would "have an adverse impact on MCI of a serious nature." *Id.* at 562. When the decree was abruptly terminated, MCI appealed.

MCI clearly met the standard for Article III standing to appeal. There was nothing speculative about MCI's injury; nor was there any doubt that it was directly traceable to the order terminating the decree. And it was clear that the appellate court could offer redress by reversing that order, thereby reinstating Cyanamid's obligation to purchase melamine. Indeed, in these circumstances, the court of appeals did not even discuss the question of MCI's Article III standing to appeal.[6]

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[6] Kohn contends that "the Second Circuit had jurisdiction because intervenor's claims were 'directly related to the ultimate questions' in the case – i.e., the anticompetitive effect of terminating the decree." Resp. 12, *quoting Cyanamid*, 719 F.2d at 563. But the cited page makes clear that this was the reason the district court granted permissive intervention; nothing in the opinion directly addresses Article III jurisdiction. Moreover, MCI claimed that it would be driven from the market, with a resulting anticompetitive effect from its disappearance,

d. Because even RoyaltyShare would not have standing to appeal entry of the Final Judgment, a fortiori Kohn lacks that standing. His alleged harms are derivative of any harm to RoyaltyShare and thus even more conjectural, less clearly traceable to the entry of the Final Judgment, and equally unlikely to be redressed through this appeal. And because Kohn lacks Article III standing to appeal the entry of the Final Judgment, a decision on the merits of his appeal from the denial of intervention for purposes of appeal would amount to an advisory opinion.

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not that the anticompetitive effect of the termination would drive it from the market.

CONCLUSION

Because Kohn's appeal presents no case or controversy, the Court should dismiss it.

Respectfully submitted.

/s/David Seidman

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December 3, 2012

CERTIFICATE OF SERVICE

I, David Seidman, hereby certify that on December 3, 2012, I electronically filed the foregoing Reply Of The United States In Support Of Motion to Dismiss Appeal with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System.

I certify that parties to this appeal are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

December 3, 2012 /s/David Seidman
Attorney