No. 12-4017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOB KOHN,
Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

APPLE, INC.,
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.

MOTION OF THE UNITED STATES TO DISMISS APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

Rules:

INTRODUCTION

The United States respectfully requests that the Court dismiss this appeal because it does not present a case or controversy. Appellant Bob Kohn sought unsuccessfully to intervene in this government antitrust case for the purpose of appealing from the entry of the Final Judgment. Kohn disagrees with the government's decision to bring the case and the district court's decision to enter the Final Judgment. But the Final Judgment does not bind Kohn, and he does not identify any personal interest affected by it that is distinct from the interest of the public at large in the proper application of the antitrust laws. Kohn lacks standing to pursue this appeal; therefore, the Court lacks jurisdiction.

STATEMENT

This appeal arose out of a proceeding under the Tunney Act, section 5(b)-(h) of the Clayton Act as amended, codified at 15 U.S.C. 16(b)-(h), which establishes procedures applicable to judicial entry of consent judgments in antitrust cases brought by the United States. On April 11, 2012, the United States filed a complaint alleging price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. 1, by six defendants — five publishers of electronic books ("e-books") and a retail seller of e-

books.[1] At the same time, the United States filed a proposed Final Judgment applicable to three of the defendant publishers that had agreed to settle the suit (the "settling defendants"). Filing of the proposed Final Judgment and related documents initiated a Tunney Act proceeding to determine whether entry of that proposed judgment "is in the public interest." 15 U.S.C. 16(e)(1). In the course of that proceeding, Bob Kohn filed a 55-page single-spaced comment on the proposed Final Judgment, Letter from Bob Kohn to John R. Read, Chief, Litigation III Section, Antitrust Division (May 30, 2012), *available at* http://www.justice.gov/atr/cases/apple/comments/atc-0143.pdf, and an amicus brief, in the form of a comic strip, opposing the government's motion to enter the proposed Final Judgment, Brief of Bob Kohn as *Amicus Curiae*, Sept. 4, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 110.

The district court granted the government's motion to enter the proposed Final Judgment on September 5, 2012, and the judgment was entered on September 6. In a 45-page opinion, the district court

---

[1] The complaint alleged that "the defendants conspired to raise, fix, and stabilize the retail price for newly-released and bestselling trade e-books, to end retail price competition among trade e-books retailers, and to limit retail price competition among the Publisher Defendants . . . ." Op. at 4, Sept. 5, 2012, ECF No. 16-6 (9/5/12 Op.).

explained in detail its conclusion that entry of the decree was in the public interest. Op., Sept. 5, 2012, ECF No. 16-6 (9/5/12 Op.). The court's opinion specifically addressed, and rejected, Kohn's arguments that the government should not be seeking to enjoin the challenged conduct because any price fixing by the defendants was a legally justified response to allegedly predatory pricing at retail by non-party Amazon.com, and because any increase in the retail price of e-books resulting from such price fixing was beneficial to consumers. *Id.* at 36-41. The court also considered the requirement, Fed. R. Civ. P. 54(b), that a decree applying only to the settling defendants could be entered before trial "only if the court expressly determines that there is no just reason for delay." 9/5/12 Op. at 44.

On September 7, 2012, Kohn moved to intervene for purposes of appeal, pursuant to Fed. R. Civ. P. 24(b) (permissive intervention). Kohn Mot. to Intervene, Sept. 7, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 114. He also moved to stay the judgment pending appeal. Kohn Mot. to Stay Final J. Pending Appeal, Sept. 7, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 115. The court denied Kohn's motion to stay, and it ordered briefing on his motion to intervene. Order, Sept. 10, 2012, No.

12-02826 (S.D.N.Y.), ECF No. 121. The United States filed an opposition to Kohn's motion to intervene, U.S. Mem. In Opp'n Mot. to Intervene, Sept. 17, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 127, as did the settling defendants, Defs.' Mem. In Opp'n Mot. to Intervene, Sept. 17, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 128, and Kohn filed a reply, Kohn Am. Reply Mem. in Supp. Mot. to Intervene, Sept. 17, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 132.

On October 2, 2012, the district court issued a Memorandum Opinion and Order denying Kohn's motion to intervene. The court noted that "Kohn's legal theories are not 'claims or defenses' that share a common question of law or fact with the claims and defenses of the parties, as envisioned by Rule 24(b)," Op. at 5, Oct. 2, 2012, ECF No. 16-5 (10/2/12 Op.), but rather are arguments that Kohn believes the defendants could make in their defense. *Id.* at 6. Kohn did "not suggest that his individual rights will be impaired in any way if he is not permitted to intervene." *Id.* at 5 (citing *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring)). [2] The court explained that

[2] The court noted that "Kohn describes himself as a 'consumer of digital goods, author of a treatise on copyright, and founder and CEO of

granting intervention would "prejudice the adjudication of the rights of the parties to the Final Judgment," *id.* at 6 (citing Fed. R. Civ. P. 24(b)(3) (requiring court to consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.")); that Kohn had been "given a full opportunity to express his personal views on the Government's theory of the case and the state of competition in the e-books market" through the public comment process and his amicus brief, *id.* at 7; and that courts "deny permissive intervention for those who seek merely to advance their own view as to what might be preferable for the public," *id.* (citing *Buckeye Coal & Ry. v. Hocking Valley Ry.*, 269 U.S. 42, 49 (1925) (the United States "must alone speak for the public interest")).

Kohn timely noticed an appeal from the denial of his motion to intervene for purposes of appeal. ECF No. 16-3.

---

technology companies directly involved in the digital distribution of music and e-books.'" 10/2/12 Op. at 3. The court further noted that "Kohn argues that he is 'as well-situated as any consumer' to demonstrate that the Final Judgment is not in the public interest." *Id.*

ARGUMENT

The Court Lacks Jurisdiction To Hear This Appeal Because It Presents No Case Or Controversy

A. An Appeal Presents A Case Or Controversy Only If There Is An Appellant With Standing

This Court may consider only cases and controversies. U.S. Const. art. III; *see also*, *e.g., Diamond v. Charles*, 476 U.S. 54, 61 (1986). Mere disagreement or dispute does not satisfy Article III's requirement. Rather, standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Standing to pursue a claim is required at every stage of the proceedings, including appellate review, *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004). Although an intervenor may sometimes "ride piggyback" on the standing of others, *Diamond*, 476 U.S. at 64, an intervenor without standing cannot maintain an appeal in the absence of any appellant with standing. *Id.*

B. Kohn Lacks Standing To Appeal From The Entry Of The Final Judgment.

"It is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper

party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotations omitted). Thus, Kohn must allege "facts essential to show jurisdiction. If [he] fai[ls] to make the necessary allegations, [he has] no standing." *Id.* (internal quotations omitted). In this case, in order to meet his burden of establishing standing to appeal from the denial of intervention, Kohn must also establish his standing to appeal from the entry of the Final Judgment, because there would be no point to intervention for the purpose of appeal unless he could pursue an appeal.[3]

The requirements for standing on appeal are well established. "To maintain standing to appeal, an intervenor [1] must have suffered an injury in fact [2] that is fairly traceable to the challenged action and [3]

---

[3] Litigants lack standing to pursue pointless orders in a federal court. As discussed below, pp. 7-8, 12-13 *infra*, one element of standing is the likelihood that a favorable decision would provide redress of an injury. *Defenders of Wildlife,* 504 U.S. at 560-61. *Cf. In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 195-97 (2d Cir. 2000) (dismissing appeal of denial of motion to intervene in district court proceedings because appellant organization did not establish standing with respect to those proceedings); *Backus v. Town of Charlotte*, 75 F. App'x 820 (2d Cir. 2003) (dismissing appeal of denial of motion to intervene in district court proceedings because, following parties' settlement below, appellants asserted interest was insufficient to establish standing and court therefore lacked jurisdiction to consider appeal) (summary order).

that is likely to be redressed by the relief requested." *Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). *See also Defenders of Wildlife,* 504 U.S. at 560-61. Kohn satisfies none of these requirements.

1. Kohn Has Suffered No Cognizable Injury In Fact.

"To suffer a judicially cognizable 'injury in fact' an intervenor must have a 'direct stake in the outcome of a litigation' rather than 'a mere interest in the problem.'" *Schulz,* 44 F.3d at 52 (quoting *Diamond*, 476 U.S. at 66-67). "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). A qualifying interest must be "a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560 (citations and internal quotations omitted). The requirement of injury in fact imposes a particularly heavy burden on a would-be appellant who, like Kohn, was not a party to the judgment he seeks to challenge and is not bound or restricted by it. *Cf. Tachiona*, 386 F.3d at 211 (noting that "parties [not bound by the judgment] normally will not

have sustained a 'legal injury, actual or threatened,' as a result of the judgment.").

Kohn's district court filings in support of his motion to intervene do not claim any judicially cognizable injury to Kohn.[4] Kohn asserts that he (along with all other consumers of e-books) has paid or will pay lower prices as a result of the entry of the Final Judgment. *See* Kohn Mem. in Supp. Mot. to Intervene at 4, Sept. 7, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 115; *see also* Letter from Bob Kohn to the Honorable Denise L. Cote at 1, 2, Sept. 12, 2012, No. 12-02826 (S.D.N.Y.), ECF No. 122 (Kohn 9/12/12 Letter). But paying lower, rather than higher, prices does not in itself constitute an injury; there is no legally protected interest in paying higher prices. Indeed, the antitrust laws do not afford a cause of action even for charging prices that are intentionally below cost if the seller has no reasonable prospect of recouping its investment in the low prices, because "unsuccessful predation is in general a boon to

---

[4] Although the Court ordinarily "look[s] to appellants' sample complaint, submitted in support of their motion to intervene, as the source for [its] inquiry concerning the standing of individual appellants," *Holocaust Victim Assets Litig.*, 225 F.3d at 195, Kohn submitted no "pleading that sets out the claim or defense for which intervention is sought," Fed. R. Civ. P. 24(c). The Court appropriately considers other sources of information. *Schulz*, 44 F.3d at 53 n.4.

consumers." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). Absent a likelihood of recoupment, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced." *Id.*

Kohn asserts that, as a result of the Final Judgment, non-party Amazon will be able to, and likely will, engage in successful predation that will eventually result in higher prices and loss of competition in the market for "e-books system[s]." 9/5/12 Op. at 37-38. But this is a theory of harm to the public generally, rather than a "concrete and particularized," *Defenders of Wildlife,* 504 U.S. at 560, harm to Kohn.

Moreover, the generalized harm to the public that Kohn predicts does not meet the requirement that the injury be "actual or imminent, not conjectural or hypothetical," *id.* at 560 (citations and internal quotations omitted). It is a matter of conjecture whether Amazon will have the ability to engage in predatory pricing with a reasonable prospect of ultimately recouping its investment in low prices by raising prices to a higher level than would prevail in the absence of the Final Judgment, and, if so, whether it will choose to pursue such a strategy. The likelihood of any such outcome depends on, among other things,

decisions by non-party Amazon, e-book publishers, manufacturers of e-book readers, and the consuming public. It is plainly not imminent in the relevant sense of "*certainly* impending." *Id.* at 565 n.2. (citation omitted).

In short, there may be an actual or imminent prospect of lower prices resulting from the Final Judgment, but low prices benefit consumers, and do not without more constitute an injury to Kohn or consumers generally. Kohn's conjecture that low prices will form part of a successful predatory strategy by Amazon, leading ultimately to lessened competition and higher market prices, does not meet the requirement of injury in fact because it is speculative and because it would not in any event constitute particularized injury to Kohn.

2. Kohn's Alleged Harms Are Not Fairly Traceable To Entry Of The Final Judgment.

Kohn's predictions that Amazon will engage in successful predation, leading to lessened competition and higher market prices, describe "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. 26, 41-42 (1976), and not injury fairly traceable to the Final Judgment. Even if, as Kohn contends, the Final Judgment removed an

obstacle to predatory pricing by Amazon, the harms he predicts would not occur in the absence of an independent decision by non-party Amazon to engage in predatory conduct forbidden by the federal antitrust laws. The harm Kohn predicts, therefore, would be fairly traceable to Amazon's hypothetical course of action, and not to entry of the Final Judgment.

3. Reversal Of The Order Entering The Final Judgment Likely Would Not Redress Kohn's Alleged Harms

Even if Kohn's conjectures about higher market prices and diminished competition resulting from predatory conduct by Amazon were sufficient to establish the requisite particularized and imminent injury, Kohn has not shown that such injury would be "likely to be redressed by the relief requested," *Schulz,* 44 F.3d at 52. Kohn is seeking to appeal from the entry of the Final Judgment, and the relief available in such an appeal would be limited to reversal of that order. 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.[5] Indeed, Kohn himself appears to have conceded this point, arguing that:

> In effect, should the [district court] not stay execution of the Final Judgment pending appeal, Movant will forever effectively lose his ability to appeal for relief from the Final Judgment.

Kohn Mem. in Supp. Mot. to Stay Final J. Pending Appeal at 7, Sept. 7, 2012, No.12-02826 (S.D.N.Y.), ECF No. 117. *See also* Kohn 9/12/2012 Letter at 2 (once the settling publishers terminate their agreements with Apple, "any subsequent stay by the Court of Appeals may become equitably moot."). Accordingly, the speculative harm Kohn alleges could not be redressed in an appeal from the Final Judgment.

4. Kohn's List Of Issues Proposed To Be Raised On Appeal Adds Nothing To His Standing To Appeal

Kohn's List of Issues Proposed to be Raised on Appeal, ECF No. 16-9, includes four issues in addition to whether the district court

---

[5] Where the "existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' . . . it becomes the burden of the [party whose standing is at issue] to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562 (internal citations omitted). Kohn has adduced no such facts.

improperly denied his intervention motion and whether the Final Judgment is in the public interest. Those additional issues, however, do not strengthen his claim to standing to pursue an appeal from the entry of the Final Judgment.

Kohn seeks to raise the question whether a substantially different decree would be in the public interest. This is simply a request for an advisory opinion. The Final Judgment is a consent decree, agreed to by the United States and the settling defendants and entered by the district court prior to trial upon a finding that it is in the public interest. The parties have not agreed to Kohn's proposed decree, which was not even presented in the district court. Even if Kohn had proposed it, the court would have had no authority to enter it without the parties' consent. Whether the district court could properly have entered such a decree if the parties had proposed it is a purely hypothetical inquiry, and Kohn has no legally protected interest in obtaining an answer.

The other three issues Kohn seeks to raise on appeal involve compliance with the procedural requirements of the Tunney Act. Kohn claims that the United States failed to disclose determinative documents; that the district court improperly failed to exercise its

authority to gather information by various means "as the court may deem appropriate," 15 U.S.C. 16(f)(1),(3); and that the United States failed to publish certain materials within what Kohn claims to be a statutory deadline. But even assuming, contrary to fact, that Kohn has raised serious questions about compliance with the statutory requirements, he has no greater interest than anyone else in such compliance. Kohn has not suggested that he has a particularized need for information that was allegedly withheld.[6] An "interest shared

---

[6] *Compare United States v. Bleznak*, 153 F.3d 16, 17 (2d Cir. 1998) (intervenors seeking information were plaintiffs in antitrust litigation involving defendants in the Tunney Act proceedings); *Massachusetts Sch. of Law v. United States*, 118 F.3d 776, 778 (D.C. Cir. 1997) (similar); *and United States v. The Thomson Corp.*, 1997 WL 90992 (D.D.C. 1997) (intervenor had "sufficiently demonstrated that it will suffer actual, concrete, particularized injury traceable to the entry of the Final Judgment, both substantive and procedural; it therefore has standing" to appeal entry of Final Judgment), *aff'd*, *HyperLaw, Inc. v. United States*, 159 F.3d 636 (D.C. Cir. 1998) (Table), *with United States v. Mountain Health Care, P.A.*, 96 F. App'x 140 (4th Cir. 2004) (per curiam) (dismissing appeal by individual permitted to intervene by district court and who challenged government compliance with Tunney Act but not terms of the final judgment, because, although granted intevenor status below, he had "not shown he has suffered an invasion of a legally protected interest that is both concrete and particularized, rather than an interest shared by the public at large . . . [and a]ccordingly, he cannot establish that he has standing to bring this appeal.") .

generally with the public at large in the proper application of the Constitution and laws will not do" for standing. *Arizonans for Official English*, 520 U.S. at 64.

CONCLUSION

Because Kohn lacks standing to maintain the appeal, there is no case or controversy before the Court, and the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

/s/David Seidman

Joseph F. Wayland
Acting Assistant Attorney General

Lawrence E. Buterman
Daniel McCuaig
Stephanie A. Fleming
A*ttorneys*
U.S. Department of Justice
Antitrust Division

Catherine G. O'Sullivan
David Seidman
Finnuala K. Tessier
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001
(202) 514-4510

November 13, 2012

CERTIFICATE OF SERVICE

I, David Seidman, hereby certify that on November 13, 2012, I electronically filed the foregoing Motion of the United States 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.

November 13, 2012

/s/David Seidman
Attorney