

Defendants.

Civil Action No. 12-CV-2826 (DLC)

<sup>1</sup> Mr. Kohn also filed a motion seeking a stay, which was denied by this Court on September 10, 2012.

more for his own amusement than to assist the Court in its Tunney Act analysis, his motion to intervene fails on the merits.

Mr. Kohn does not meet the federal standard for permissive intervention in that he has neither “a claim [n]or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1).<sup>2</sup> His only stated interest is as a member of the public who disagrees with the United States’ decision to bring this case, disapproves of any settlement, and is dismayed with the defenses offered by Apple and the non-settling publishers. Clearly, Mr. Kohn believes he knows what is best for the industry and e-book consumers and he wants the Court and the parties to adopt his world view. That is not a sufficient reason for granting him party status. “Intervention is not an avenue for advancing the competing agendas of non-parties to a settlement . . . .” *S.E.C. v. Bear, Stearns & Co.*, No. 03 Civ. 2937 WHP, 2003 WL 22000340, at \*2 (S.D.N.Y. Aug. 25, 2003). Rather, intervention “is a procedural device that attempts to accommodate two competing policies: efficiently administering legal disputes by resolving all related issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand.” *U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994).

Granting intervenor status to Mr. Kohn (who acknowledges his actual interest in the case is no different than that of millions of other e-book consumers) will only serve to complicate the litigation and risk delaying its resolution. His motion should be denied.

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<sup>2</sup> Mr. Kohn does not argue that he is entitled to intervene as a matter of right pursuant to Rule 24(a).

**I. MR. KOHN DOES NOT HAVE A CLAIM OR DEFENSE THAT SHARES WITH THE MAIN ACTION A COMMON QUESTION OF LAW OR FACT**

Under Rule 24(b)(1), a “court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” For purposes of permissive intervention, “an interest in the outcome of litigation is not itself a ‘claim or defense.’” *Stauffer v. Brooks Bros., Inc.*, No. 08-CV-10369 (SHS), 2009 WL 1675397, at \*4 (S.D.N.Y. June 15, 2009), *rev’d on other grounds*, 619 F.3d 1321 (Fed. Cir. 2010). Rather, “[t]he words ‘claim or defense’ manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.” *Diamond v. Charles*, 476 U.S. 54, 76 (1986) (O’Connor, J., concurring).

Mr. Kohn does not have any claim or defense that shares with the action common questions of law or fact for purposes of Rule 24(b).<sup>3</sup> Mr. Kohn, of course, is not alleged to have participated in the conspiracy or otherwise to have engaged in any activities that form bases for the claims in the Complaint. His only interest is as a member of the public who seeks to “present the same defenses that the Defendants presented or are available to the Defendants to present.” Intervention Mem. (Docket No. 115) at 10-11. The fact that Mr. Kohn enumerates in his papers the allegations of the Complaint that he disagrees with and the affirmative defenses that he would press as a defendant, *see* Intervention Mem. at 11-14, establishes merely that Mr. Kohn is

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<sup>3</sup> Nowhere in his motion papers does Mr. Kohn suggest that he has a claim against any defendant, which is unsurprising given that the crux of his efforts to date is to support the Defendants’ price-fixing scheme.

sympathetic to the Defendants and believes that he sees winning arguments they are overlooking.<sup>4</sup>

Because Mr. Kohn “asserts no actual, present interest that would permit him to . . . be sued by [the parties to this case], or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation,” *Diamond*, 476 U.S. at 77, his intervention is not authorized under Rule 24(b), and should be denied.<sup>5</sup>

## II. INTERVENTION WILL UNDULY DELAY THE ADJUDICATION OF THE RIGHTS OF THE ORIGINAL PARTIES

Under Rule 24(b)(3), in exercising its discretion whether to grant permissive intervention, “the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Here, Mr. Kohn’s intervention would cause undue delay in this matter. Indeed, delay is an explicit purpose behind his motion. While Mr. Kohn states that he is seeking “leave to intervene for the sole purpose of appeal,” Intervention Mem. at 1, he has also filed a motion seeking to stay the Final Judgment pending his anticipated appeal. As this Court noted in rejecting Apple’s argument that entry of the Final Judgment should be delayed, “the Government alleges substantial ongoing harm as a result of Settling Defendants’ illegal activity”

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<sup>4</sup> Mr. Kohn’s belief that he, “like millions of other consumers, has a direct pecuniary interest in whether the proposed Final Judgment takes effect,” Intervention Mem. at 14, is not the same as sharing a defense for purposes of Rule 24(b)(1)(B). See, e.g., *U.S. v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1221 (N.D.N.Y. 1978).

<sup>5</sup> Moreover, Mr. Kohn has failed to comply with Rule 24(c)’s requirement that he file a pleading setting out the claims or defenses for which intervention is sought. He confusingly states that “[t]hese claims or defenses concerning questions of law or fact in common with the main action are specifically set forth in the accompanying draft pleading submitted pursuant to Rule 24 (c).” Intervention Mem. at 14. But as later admitted on page 17 of his papers, he has filed no such pleading.

and “E-books consumers should not be forced to wait . . . to experience the significant anticipated benefits of the decree.” Op. & Order (Docket No. 113) at 45.

### **III. MR. KOHN’S INTERVENTION WILL NOT AID THE COURT**

Even if Mr. Kohn could meet the requirements for permissive intervention, the United States submits that his motion should nonetheless be denied because he has failed to “establish that [his] participation would aid the court.” *Mass. Sch. of Law v. U.S.*, 118 F.3d 776, 783 (D.C. Cir. 1997). In that regard, the cases he cites make clear that “[a] private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the government is not vigorously and faithfully representing the public interest.” *Id.* (quoting *U.S. v. LTV Corp.*, 746 F.2d 51, 54 n.7 (D.C. Cir. 1984)). Here, Mr. Kohn points to nothing that might meet that stringent standard. In fact, he admits that his appeal will not “hinge upon [] whether the Department of Justice has ‘vigorously and faithfully’ represented the interest of consumers.” Intervention Mem. at 3. This concession alone warrants denial of his motion.

The reality is that Mr. Kohn seeks to appeal in order to challenge the “factual foundation upon which the government used to identify the alleged ‘harms.’” *Id.* In other words, Mr. Kohn wishes to rehash his argument that Defendants’ price-fixing conspiracy was not unlawful, and the United States’ contrary assertion calls into question whether the settlements are in the public interest.<sup>6</sup> *Id.* at 3-4. But it is well established that members of the public “are not entitled to intervene simply to advance their own ideas of what the public interest requires. In federal

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<sup>6</sup> As the United States previously has noted, this simply is Mr. Kohn’s way of saying that the United States cannot settle a case until it proves its case — a position that runs afoul of the well-established dictate that the United States “need not prove its underlying allegations in a Tunney Act proceeding.” See *U.S. v. SBC Commc’ns, Inc.*, 489 F. Supp. 2d 1, 20 (D.D.C. 2007); see also U.S. Response at 6-8. As we have noted, Mr. Kohn’s view of the world “would fatally undermine the practice of settling cases and would violate the intent of the Tunney Act.” *SBC Commc’ns*, 489 F. Supp. 2d at 20.

antitrust litigation, it is the United States, not private parties, which ‘must alone speak for the public interest.’” *U.S. v. G. Heileman Brewing Co.*, 563 F. Supp. 642, 648 (D. Del. 1983) (quoting *Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co.*, 269 U.S. 42, 49 (1925)). “Any disagreement with the wisdom of the United States’ decision concerning the adequacy of proposed relief does not indicate inadequate representation of the public interest.” *Id.* For these reasons, courts have consistently denied intervention to private parties who seek to intervene to argue that the proper terms for an antitrust settlement should differ from those reached by the United States. *See, e.g., U.S. v. Int’l Tel. & Tel. Corp.*, 349 F. Supp. 22 (D. Conn. 1972); *U.S. v. Auto. Mfrs. Ass’n*, 307 F. Supp. 617 (C.D. Cal. 1969); *U.S. v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Cal. 1967). The United States respectfully submits that the result here should be no different.

### **CONCLUSION**

In the absence of a showing of bad faith or malfeasance by the United States leading to the Final Judgment (a showing Mr. Kohn has not even attempted to make), “it is inappropriate for a court through third-party intervention to force upon the United States the trial of an antitrust case it has already settled.” *G. Heileman Brewing Co.*, 563 F. Supp. at 650 (citing *U.S. v. Stroh Brewery Co.*, No. 82-1059, 1982 WL 1861 (D.D.C. June 4, 1982)). Accordingly, and for all the reasons set forth in this Memorandum, the United States respectfully requests that the Court deny Mr. Kohn’s motion for intervention.

Dated: September 17, 2012

Respectfully submitted,

/s/ Lawrence E. Buterman

Mark W. Ryan

Lawrence E. Buterman

Stephen T. Fairchild

United States Department of Justice

Antitrust Division

450 Fifth Street, N.W., Suite 4000

Washington, DC 20530

(202) 532-4753

Mark.W.Ryan@usdoj.gov

*Attorneys for Plaintiff United States of America*

CERTIFICATE OF SERVICE

I, Stephen T. Fairchild, hereby certify that on September 17, 2012, I caused a copy of the Opposition of the United States to Motion by Bob Kohn for Leave to Intervene to be served by the Electronic Case Filing System on all parties to this action.

/s/ Stephen T. Fairchild

Stephen T. Fairchild

United States Department of Justice

Antitrust Division

450 Fifth Street, N.W., Suite 4000

Washington, DC 20530

(202) 532-4925

stephen.fairchild@usdoj.gov

*Attorney for Plaintiff United States of America*