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

UNITED STATES OF AMERICA Plaintiff, v. APPLE, INC., HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS, L.L.C. VERLAGSGRUPPE GEORG VON HOLTZBRINK PUBLISHERS, LLC d/b/a MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC. and SIMON & SCHUSTER, INC., Defendants.	)	Civil Action No.12-CV-2826 (DLC)

MEMORANDOM IN SUPPORT OF BOB KOHN'S
MOTION TO STAY FINAL JUDGMENT PENDING APPEAL

Table of Contents

Bob Kohn, on his own behalf and through his pro bono attorneys, respectfully submits this memorandum in support of his motion for a stay of execution of judgment pending appeal of the Court's Opinion & Order filed September 6, 2012 for entry of Final Judgment.

INTRODUCTION

Movant submitted to the Department of Justice extensive comments[1] objecting to the proposed Final Judgment and later was granted leave to participate as amicus curiae in these proceedings.[2] With a Final Judgment now entered,[3] Movant has sought leave of this Court to intervene for the sole purpose of seeking appellate review of such entry by the United States Court of Appeal for the Second Circuit. At the same time, Movant moves for stay of execution of the Final Judgment pending appeal.

ARGUMENT

I. WITHOUT A STAY OF EXECUTION OF THE FINAL JUDGMENT, AN APPEAL BECOMES MOOT AND THE CONSEQUENT HARM TO THE PUBLIC BECOMES IRREPARABLE

A. Standard of Review for Stay Pending Appeal in the Second Circuit

In the Second Circuit, the decision whether to stay a proceeding pending an appeal requires consideration of three factors: (1) the likelihood of success on appeal, (2) whether irreparable injury will be sustained absent a stay, and (3) whether a stay will injure the non-appellant or the public. *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007); *Thapa v. Gonzalez*, 460 F.3d 323, 334-35 (2d Cir. 2006); *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002).

[1] Comments of Bob Kohn, ATC-0143 (May 30, 2012).
[2] Opinion & Order re: Amicus Curiae, No. 12-2826 (Docket No. 108) (August 28, 2012).
[3] Opinion & Order re: Final Judgment, No. 12-2826, (Docket No. 113) (September 5, 2012). Actual entry of Final Judgment was imminent at the time of this writing.

These interrelated factors are assessed on a sliding scale, and "more of one excuses less of the other." *Mohammed*, 309 F.3d 334. Thus, "the necessary level of degree of possibility of success will vary according to the court's assessment" of the other factors. *Thapa*, 460 F.3d at 334. Only "some possibility" of success on appeal is sufficient to justify a stay where "the balance of hardships tips decidedly in favor" of the party seeking the stay. Id. at 336.

B. Second Circuit Standard for Stay Pending Appeal is Fully Satisfied Here

The application of these three factors under the present circumstances supports the stay of execution of the Final Judgment pending appeal. While very few consent judgments in Tunney Act cases are overturned in their entirety on appeal, some are at least modified upon appeal, and where an appeal presents an issue of first impression, as this one shall, that reason alone demonstrates a possibility of success. At the same time, consumers of e-books and the public generally will be substantially and irreparably injured in the absence of a stay. Once the Final Judgment takes effect, and the government succeeds in "evaporating" the pro-competitive effects of the Defendants' conduct, the damage to the public will be irreversible. Should the appeal not be successful, the Justice Department can readily extend existing monetary remedies for e-book consumers harmed during the pendency of the appeal. This would not be the case should the appeal result in the rejection of the Final Judgment. Accordingly, the balance of the equities favors maintaining the status quo and Movant respectfully submits that a stay of this proceeding pending appeal should be granted.

1. Appeal Has a Sufficient Possibility of Success on Appeal

The first factor—the likelihood of success on appeal—weighs in favor of a stay pending appeal. The Second Circuit avoided "setting too high a standard" for the "likelihood of success"

factor, because "the trial judge is being asked to assess the likelihood that the ruling just made will be rejected on appeal." *Mohammed*, 309 F.3d at 101.

Movant is likely to prevail on appeal because the Court's ruling conflicts with precedent established by U.S. Supreme Court and the Second Circuit on the subject of literal price fixing and the countervailing competitive virtues that have specifically justified horizontal pricing fixing in connection with the exploitation of copyrighted works of authorship.

Movant, like millions of consumers, has a vital interest in competitive markets for e-books and the e-book readers and systems that support them. That vital interest necessarily includes an interest, not in what the government contends are *low* prices, but rather in *efficient* prices for e-books. The purported public interest in "low" prices was fabricated by the Justice Department with a now discredited citation. See, proposed *Amicus Brief of Bob Kohn* at 23 (Docket No. 97) and *Amicus Brief of Bob Kohn* at 2 (Docket No. 110). As Movant has pointed out to this Court, the government's position on this is contrary to the law of the Second Circuit and the U.S. Supreme Court.

In its Opinion & Order dated September 5, 2012, the Court appeared to base its reply to these arguments primarily upon Movant's comments filed during the 60-day comment period, not his *amicus curiae* brief (Docket No. 110), and not his proposed *amicus curiae* brief (Docket No. 97). Movant, in its proposed *amicus curiae* brief, had set forth arguments which specifically anticipated that the DOJ or the Court would narrowly interpret *Broadcast Music v. CBS*, 441 U.S. 1 (1979), pointing out how the Supreme Court, in *FTC. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986), extended the coverage of *Broadcast Music* beyond *per se* to the *rule of reason*.

Yet, in its Opinion & Order dated September 5, 2012, the Court failed to explain or even cite *Indiana Fed'n of Dentists.* The DOJ, cleverly perhaps, specifically ignored the case, using a subterfuge that would mask the case's importance in extending the high court's views expressed in *Broadcast Music*. See Docket No. 111 at fn 3.

Moreover, the Court failed to address in its Opinion & Order the fact that the literal horizontal price-fixing in *Broadcast Music* was sustained by the need to countervail the strong monopsony in that case, a point made emphatically in Movant's *amicus curiae* brief, and more fully elucidated in his proposed *amicus curiae* brief.

Thus, Defendants conduct, as alleged, constituted a countervailing pro-competitive effect that corrected the market failure existing in the e-book market at the time the alleged conduct took place. That market failure manifested itself in an e-book market dominated by a seller of e-books having 90% market share and a virtual monopsony in the market for acquiring e-book distribution rights. These market failures were brought about, in part, by the predatory (i.e.,, below marginal cost) pricing practices of the monopolist/monopsonist, facts supporting which are in plain view in the Justice Department's Complaint and Competitive Impact Statement.

The case law is replete with precedent demonstrating that horizontal price fixing will be sustained under the rule of reason where there is a "countervailing procompetitive virtue—such as for example, the creation of efficiencies in the operation of a market." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (citing *Broadcast Music v. CBS*, 441 U.S. 1 (1979)).

Movant intends to brief a similar line of cases that show a clear parallel trend in the realm of group boycotts. *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (holding that the *per se* approach only applies if the boycott was "not justified by plausible arguments that [it was] intended to enhance overall efficiency and make markets

more competitive"). The Supreme Court more recently endorsed this same approach, approving the Second Circuit's decision to allow the defendants to justify the boycott before it would apply the *per se* rule. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). See also, *Flash Electronics, Inc. v Universal Music,* 312 F.Supp. 379, 388 (E.D. New York, 2004) (holding "the existence of the procompetitive effect is enough to take this case out of the category of a *per se* unlawful group boycott and into the realm of rule of reason analysis); *Bogan v. Hodgkins*, 166 F.3d 509, 514 (2d Cir. 1999) ("Absent a showing that a presumption of anticompetitive effect is appropriate, we apply the rule of reason").

All of these cases, as applied to the circumstances at hand, point to the probability of success upon appeal. Movant has also cited several important law review articles and economics journals regarding the very trend the Justice Department, and now the District Court, has chosen to ignore without citation, but which Movant hopes will be squarely addressed by the Court of Appeals. See, John Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277 (1978-79); Richard S. Wirtz, *Rethinking Price-Fixing*, 20 INDIANA L. REV. 531, 627 (1987) ("After *Broadcast Music* and *NCAA*, the question is not whether exceptions to the general prohibition against agreements among competitors will be recognized, but rather when. Potentially pro-competitive collaboration among competitors is to be encouraged, within limits, even if it involves agreement on prices" [emphasis added]); R.G. Lipesy & Kevin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956-57).("The distorting effect of overconsumption could be made worse if, in cases of horizontal price fixing, antitrust laws are used to decrease prices"). See also, Christopher R. Leshe, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price Fixing*, 81 CALIFORNIA LAW REV. 243, 270.

As Justice White stated at the outset of the Court's opinion in *Broadcast Music*:

> We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "in dealing with performing rights in the music industry we confront conditions both in copyright law and antitrust law which are sui generis." (emphasis added)

Broadcast Music, at 14 (quoting, *CBS v. ASCAP*, 562 F.2d 130, 132 (2d Cir. 1977)). The observations by the U.S. Supreme Court and the Second Circuit in that case mirrors the challenges confronted by the courts in the present proceeding. In dealing with the licensing of digital rights in the book industry, the Court of Appeals for the Second Circuit will once again be confronted with conditions both in copyright law and antitrust law which are *sui generis*.

Where, as here, an appeal "presents an issue of first impression" over which the "Court of Appeals may disagree" with this Court, "that reason alone" demonstrates a possibility of success." *Jock v. Sterling Jewelers, Inc.* 738 F.Supp. 2d 445, 446 (S.D.N.Y 2010) (Rakoff, J).

2. Absent a Stay, E-Book Consumers and the Public Generally Will Suffer Irreparable Harm

A failure to enter a stay of execution of the Final Judgment pending appeal will irreparably harm e-book consumers and the public generally. In the penultimate paragraph of its Opinion & Order, the Court states:

> "[T]he government alleges substantial ongoing harm as a result of the Settling Defendants' illegal activity. E-books consumers should not be forced to wait until after until after the June 2013 trial to experience the significant benefits of the decree."

The entire purpose of the appeal of this case is to ask the Court of Appeals to rule, in accordance with *Keyspan*, that the factual foundation of the government's decisions were such that its conclusions about the proposed remedy were unreasonable. **That is, consumers could never, as a matter of law, have been harmed by the Defendants' conduct.**

The Court is in no better position than the government or Movant to determine whether the effect of the Final Judgment—which has a stated intent of reversing the effects of Defendants' conduct—will be harmful to consumers of e-books and the public generally. The judicious thing to do under these circumstances is to preserve the status quo pending the appeal of the very question that will determine the fate of consumer welfare.

In effect, should the 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. The Second Circuit has found irreparable harm where, absent a stay pending appeal, the appellant stood to lose its ability to appeal. See, *Country Squire Assocs., L.P. v. Rochester Community Sav. Bank*, 203 B.R. 182, 183 (2d Cir. BAP 1996) (holding that the prospect of a mooted appeal if stay were denied "would be the 'quintessential form of prejudice.'"); *In re Advanced Mining Sys., Inc*. 173 B.R. 467, 468-69 (S.D.N.Y. 1994) (finding irreparable injury where, absent a stay, the distribution of assets to creditors would moot any appeal and thus quintessentially prejudice appellants).

Movant respectfully submits that the issues to be raised on its appeal constitute serious and credible applications of U.S. Supreme Court and Second Circuit that must not be ignored if the public interest is to be secured. Where the issues raised are important, "their presentation to the Court of Appeals should not be foreclosed by this Court." *United States v. Thomson Corp.*, 1997-1 Trade Cas. (CCH) ¶71,735, 1997 U.S. Dist. LEXIS 1893 at *15 (D.C.C. February 27, 1997).

3. Because Staying the Final Judgment Would Not Harm Either Plaintiffs Nor Defendants, the Balance of Equities Favors a Stay

Being that the government had already expressed its preference for the Court's entry of the Final Judgment without a hearing, the DOJ would no doubt prefer to dispense with an appeal

of the judgment, too. Apart from the prospect of a reversal of the entry of judgment, the DOJ can hardly complain that an appeal would constitute any cognizable harm to the government. An appeal will not cause the government to direct resources from other cases, because it will need to continue prosecuting its case against the non-settling defendants. By the same token an appeal will in no way impede the government's continued prosecution of its case against the non-settling defendants.

Nor will an appeal harm or prejudice the rights of any of the Defendants. On the contrary, should the appeal result in reversal of entry of the Final Judgment, the parties will have benefited from the guidance provided by the Court of Appeal on the issues raised by Movant.

II. CONSIDERING THE PUBLIC INTEREST IN THE BALANCE, A STAY IS ESPECIALLY FAVORED

Movant has already addressed the fact that consumer welfare hangs in the balance of this appeal. Staying the effect of the Final Judgment pending appeal is necessary to maintain the status quo, so that consumers do not become victims of the Final Judgment.

In the parallel litigation with the plaintiff States, the settling parties have apparently found a way to compensate consumers based on the assumption that Defendants' alleged conduct was harmful to consumers. If the Justice Department and the District Court is wrong, and the Final Judgment is held to be an instrument of wrong to the public, no such means of compensating consumers would be available.

Specifically, if the government is right and Movant is wrong, then some consumers of e-books will be paying per few percent more for some e-books that would otherwise had been sold at a lower price. Since the digital environments in which e-books are sold can actually count those e-books and track who they are sold to, when they sold, and at what price, the government

has a readily available precise way of calculating the harm to the respective consumers and can implement a precise way to compensate such consumers for the precise harm.

But the reverse is not true. If Movant is right, and the government is wrong, than consumers will pay below marginal cost for some e-books—a result which is harmful to consumer welfare. Should the entry of Final Judgment be reversed, there would be no way to get that money back from consumers who underpaid for the e-books.

Moreover, we know for a fact—which has not been disputed by the government—that since the advent of the agency model, Amazon's market share has dropped from 90% to approximately 60%. While the government believes this fact is irrelevant to the factual foundation of their conclusion regarding the Final Judgment, it is a consumer benefit that cannot be disputed.

Yet, if a stay is not ordered, that Amazon may resume its below marginal cost discounting of e-books, an undisputed, stated objective of the Final Judgment. Whether the likelihood of Amazon being able to increase its market share, discourage new entrants, and drive current competitors from the e-book business is high or low is not the point. Should, as a result of the Final Judgment, Amazon's market share return to 90%, the harm to consumers would be extremely difficult for the government to reverse, short of the filing of a successful antitrust action against Amazon for predatory pricing—an action, ironically, which would ask the Courts to require Amazon to raise its e-book prices. It is also a remedy, as the government knows from its experience with Microsoft, that is extremely costly, time-consuming, and virtually ineffective as a means of providing relief to consumers.

Accordingly, a stay would unequivocally be in the public interest. This is particularly true when the appeal implicates federal public policy as expressed in the antitrust laws. *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988).

By contrast, there is no particular interest in whether the government can enter the judgment as quickly as it might like.

Finally, it is important to note in this context that Defendants alleged conduct was a one-time event—move from retail to agency model. The government has not alleged and is not now contending that the Defendants are continuing to engage in collusive activity. There is no collusive activity occurring that needs to be enjoined at the present time.

CONCLUSION

Without a stay of entry of the Final Judgment, an appeal of the Judgment on the grounds stated above will become moot. Stay of entry is essential to "ensure that the Final Judgment is properly tested in the appellate crucible." *United States v. Thomson Corp.*, *supra*. Moreover, the Court should grant the stay because Movant has demonstrated some possibility of success on a substantial "issue of first impression" over which the "Court of Appeals may disagree" with this Court. *Thapa*, 460 F.3d at 336; *Jock*, 738 F.Supp.2d at 446.

For all these reasons, the Court should grant this motion and stay the execution of the Final Judgment pending the appeal of the Court's Order dated September 6, 2012.

Dated: September 7, 2012

Respectfully submitted,

BOB KOHN
California Bar No. 100793
140 E. 28th St.
New York, NY 10016
Tel. +1.408.602.5646; Fax. +1.831.309.7222
eMail: bob@bobkohn.com

/s/ Steven Brower
By: _____
STEVEN BROWER [PRO HAC]
California Bar No. 93568
BUCHALTER NEMER
18400 Von Karman Ave., Suite 800
Irvine, California 92612-0514
Tel: +1.714.549.5150
Fax: +1.949.224.6410
Email: sbrower@buchalter.com

Pro Bono Counsel to Bob Kohn