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Motion to Intervene in Government's E-Book Case to Appeal Partial Settlement Rejected

Jeffrey May (Wolters Kluwer) · Wednesday, October 3rd, 2012

The federal district court in New York City yesterday denied a "consumer's" motion to intervene in the Justice Department's action against Apple, Inc. and five publishers for allegedly conspiring to fix prices for electronic books or "e-books." The motion was filed by Bob Kohn for the purpose of appealing from a September 6 final judgment ((CCH) 2012-2 Trade Cases ¶78,042), resolving the government's antitrust allegations against three of the five publishers.

Kohn describes himself as a "consumer of digital goods, author of a treatise on copyright, and founder and CEO of technology companies directly involved in the digital distribution of music and e-books," the court explained. He gained a great deal of attention recently when he submitted an *amicus* filing concerning the proposed final judgment in comic form. Kohn also filed a 55-page Tunney Act comment regarding the final judgment.

In finding the final judgment with defendants Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. to be in the public interest ((CCH) 2012-2 Trade Cases ¶78,041), the court considered Kohn's arguments and rejected them. In its opposition to Kohn's motion to intervene, the government argued that Kohn was merely restating concerns already rejected by the court.

The court agreed. "Through these two avenues, [Kohn] was 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."

In its opposition to Kohn's motion to intervene, the government also questioned whether "Kohn's *amicus* filing was a frolic meant more for his own amusement than to assist the Court in its Tunney Act analysis."

The court concluded that it was not necessary for Kohn to intervene in the case. Kohn's expressed interest in the action was as a "consumer of e-books and e-book systems" who fears that the final judgment may result in consumers paying less "efficient" prices for e-books or that it may stifle competition in what Kohn terms the e-books systems market. He suggested that the settlement could allow e-book retailer Amazon to use its monopoly power to raise e-book prices in the future.

The court was satisfied that the defendants in the case–all represented by sophisticated counsel–were "fully capable of framing their own defenses." In fact, Apple had represented that it

would appeal the final judgment, and Kohn could apply to the appellate court to appear as amicus in that forum.

The October 2, 2012, decision in *U.S. v. Apple, Inc.*, 12 Civ. 2826 (DLC), will appear at **(CCH) 2012-2 Trade Cases ¶78,074**.

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