

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 12-CV-2826 (DLC)
)	
v.)	
)	ECF Case
APPLE, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	

**REPLY MEMORANDUM IN SUPPORT OF MOTION BY THE UNITED STATES
FOR ENTRY OF THE PROPOSED PENGUIN FINAL JUDGMENT**

After certifying the parties’ completion of all requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or “Tunney Act”), the United States moved this Court on April 18, 2013, for entry of the proposed Final Judgment as to Defendants The Penguin Group, a division of Pearson PLC, and Penguin Group (USA), Inc. (collectively, “Penguin”). *Amicus* Bob Kohn submitted a five-page memorandum in response to the United States’ motion, drawing on what Mr. Kohn regards to be an “admission” by the United States concerning Amazon’s e-book pricing practices to argue that entry of the proposed Penguin Final Judgment would not be in the public interest. Mr. Kohn’s submission largely repeats the arguments concerning Amazon’s alleged predatory pricing and monopolization he made in connection with the initial Tunney Act proceeding in this case, arguments this Court previously found to be unconvincing. *See United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 642 (S.D.N.Y. 2012) (“[E]ven if Amazon *was* engaged in predatory pricing, this is no excuse for unlawful price-fixing. Congress ‘has not permitted the age-old cry of ruinous competition and competitive

evils to be a defense to price-fixing conspiracies.”) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)).

Mr. Kohn, however, asserts that the United States admitted in its Response to Comments “that Amazon’s e-book prices as a whole were below marginal cost,” and that this “admission” necessitates a fresh look at these issues. Mr. Kohn’s view, however, rests on a misunderstanding of the United States’ statements. In its Response to Comments, the United States pointed out that the proposed Penguin Final Judgment permits Penguin to enter contracts with Amazon or other e-book retailers under which the total discounting of Penguin’s e-books can be no greater than the aggregate commissions the retailer earns in connection with its sale of Penguin’s e-books. This provision allows Penguin to ensure that the retailer remains margin positive on the sale of its catalog of e-books. A retailer under such an agreement that engaged in price competition would sell e-books at a price that is closer to its marginal costs – “efficient” pricing in Mr. Kohn’s terminology – than would have been possible under the agency agreements produced through the conspiracy among Apple and the Publisher Defendants.¹

Mr. Kohn’s *amicus* submission provides no grounds on which this Court should determine that entry of the proposed Penguin Final Judgment would not be in the public interest.

¹ Mr. Kohn also takes issue with the failure by the United States to respond to his assertion, submitted through his public comment on the proposed Penguin Final Judgment, that this Court applied the incorrect standard of review in its initial Tunney Act proceeding. See *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 630-32 (S.D.N.Y. 2012) (articulating the standard of review). Mr. Kohn asserts that *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), and *United States v. International Business Machines Corporation*, 163 F.3d 737 (2d Cir. 1998), require the Court to apply a more stringent standard. Those cases, however, involved petitions by the parties to terminate consent decrees. See *American Cyanamid*, 719 F.2d at 559; *IBM*, 163 F.3d at 738. Neither evaluated whether a proposed final judgment met the Tunney Act’s requirements.

CERTIFICATE OF SERVICE

I, Stephen T. Fairchild, hereby certify that on May 10, 2013, I caused a copy of the Reply Memorandum in Support of Motion of the United States for Entry of the Proposed Penguin Final Judgment to be served by the Electronic Case Filing System, which included the individuals listed below.

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Additionally, courtesy copies of this Reply Memorandum in Support of Motion of the United States for Entry of the Proposed Penguin Final Judgment have been provided to the following:

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