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BY ELECTRONIC MAIL

August 13, 2012

Honorable Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

Re: *United States v. Apple, Inc., et. al.*, Case No. 12-CV-2826 (DLC)

Dear Judge Cote:

I have filed today, through *pro bono* counsel, a Motion to Participate as *Amicus Curiae* in the above-referenced matter.

Pursuant to Local Civil Rule 6.1(c), and this Court's *Individual Practices in Civil Cases* (Revised: August 23, 2011) at §3.E. ("Oral Argument on Motions"), I respectfully request that the Court hold a hearing on the Plaintiff's Motion for Entry of Final Judgment and that the Court permit me to participate in oral argument at any such hearing to address issues that have been raised by the Justice Department's response to the public comments.

During the period in which the public was invited to participate in this proceeding, the Justice Department has received 868 public comments, 92 percent of which expressed opposition to the settlement. Yet, the Justice Department has requested the Court enter the proposed Final Judgment "without further hearing." DOJ's Memorandum at 5 (August 3, 2012).

Because the question in this Tunney Act proceeding is whether the proposed Final Judgment is in the public interest, it would be perverse if this decision were made without a public hearing. The Act itself contemplates that the Court may entertain "full or limited participation in proceedings before the court by interested person or agencies, including appearance amicus curiae."

For the DOJ to suggest (as it has in its Memorandum at 4-5) that a public hearing would "threaten to interfere with orderly discovery in the ongoing litigation" is to suggest that the entire Tunney Act proceeding has been an unwanted interference.

The Justice Department seems to regard the Tunney Act "as a sort of crazy relative up in the attic. It's someone you can't get rid of—Congress, after all, has legislated—but it's not something that you go out of your way to showcase." Quoting former Chief of the Antitrust Bureau of the State of New York, Jay Himes, *Judicial Review of Justice Department Consent Decrees: Is the Tunney Act Glass Half-Empty or Half-Full?* at 9 (February 28, 2007).

The Justice Department should be reminded that the proposed settlement is "not merely a contract between two parties." Id. This proceeding requires a congressionally-mandated judicial act and the Tunney Act was specifically intended to welcome public participation.

The government's discomfort with a public hearing, and the possibility that it might be required to respond to difficult questions, is not a matter of public concern. By the same token, the Court's public interest determination is of great public concern and, since none of the parties will be opposing the settlement, qualified *amicus* should not be turned away.

Respectfully submitted,

/s/ Bob Kohn

Bob Kohn

cc: Provided by email to the Plaintiff, as well as Defendants in this action.