



John Maher @JohnHMaHer Mon Aug 01 01:43:30 +0000 2022

should I livetweet the DOJ-PRH trial?

you're allowed to have an internet connection in the overflow courtroom ■ <https://t.co/xxLiNgsEn7>



witnesses. The second row of the left side will be reserved for members of the media. The remaining seats will be open to the public. There will be an overflow courtroom, Courtroom 24, for additional attendees, in which video of the judge, witnesses, speakers at the lectern, and exhibits will be displayed. The first row in the overflow courtroom's gallery will be reserved for members of the media.

US v Bertelsmann, Day 0: have never ridden business class on the Acela before but can confirm that everyone here will be damned to the same hell as the Enron people

US v Bertelsmann Day 0 (updated): person next to me working on pitch decks for private equity and management consulting firms chewing gum with mouth open and now I want to die

DOJvPRH Day 1: trial is starting in 48 minutes at 333 Constitution Ave NW. I'm at 333 Constitution Ave NE

DOJvPRH Day 1: if you think security lines in airports are aggravating, try going to a federal court

DOJvPRH Day 1: already got an overruled objection. Let's go babyyyy

DOJvPRH Day 1: the government has summoned the ghost of Carolyn Reidy to bolster its monopsony case

DOJvPRH Day 1: gov't says "no court has ever approved a merger on a promise quite like this," that imprints at PRH and S&S will be allowed to bid against each other. "the fact that the defense is even making it implies that this merger is a bad deal for authors."

DOJvPRH Day 1: incredible exchange between PRH lawyer and judge: "They're backlist sales." "They're WHAT sales?" "Books that were published a very long time ago. Or more than a year ago."

PRHvDOJ Day 1: Michael Pietsch takes the stand in a blue tartan jacket wearing no tie and proceeds to explain what printing is. It's gonna be a long three weeks, folks.

PRHvDOJ Day 1: Lots of baseball metaphors—indie publishers are "farm teams," the government is "swinging for the fences" with its argument—which is very funny because most people I know in publishing couldn't tell you what borough the Mets play in.

DOJvPRH Day 1: PRH's legal counsel is officially aware of my tweets. Wow, it really IS the best time to publish since Gutenberg!

DOJvPRH Day 1: government is leading Pietsch into saying, effectively, that the bigger a publisher is, the bigger its backlist and (typically) more stable its annual earnings, which allows it to take bigger financial risks on books—ones many of its competitors can't

DOJvPRH Day 1: government asks if Pietsch expects the merger to affect the amount of advances and here comes PRH counsel! We've got our first bench conference of the trial, everybody. The answer...:

DOJvPRH Day 1: Pietsch: "it's my expectation that having these two extremely, extremely large entities merge will limit high advances in many cases.... The combination of PRH and S&S will blow up one of the major houses and decrease the number of rounds an auction goes through."

DOJvPRH: Pietsch also thinks title counts will decline if PRH acquires S&S. (The exhalation you just heard is the sound of hundreds of book publicists with confidence in their job security changing their opinions about this merger.)

DOJvPRH Day 1: Judge asks Pietsch, who's been on the stand for nearly two hours, "What's HBG?" *Epistemological rationalism has entered the chat.*

DOJvPRH Day 1: 15m break, then the defense gets to ask Michael about how much he would pay for David Foster Wallace's headband at auction

DOJvPRH Day 1: first cross-exam. Petrocelli asks Pietsch for his book sales "batting average." Sports metaphors strike again! Will they strike out? ■Take me out to the bookstore. Take me back to the stacks. Buy me some bestselling manuscripts. I don't care if they ever earn out!

DOJvPRH Day 1: It's getting feisty, pals. Defense: Would you or would you not be concerned about a 5 to 4 merger? Pietsch: "My concern is not about a 5-4 merger. My concern is about creating a publisher that would be so far out of scale with the rest of the business."

DOJvPRH Day 1: Pietsch: "I think you don't understand the logic of offering in an auction." Defense, a couple beats later: "Well, what if it were not an auction?"

DOJvPRH: Judge is asking v sharp questions about title count and its relationship to imprints in response to the defense telling Pietsch that PRH closed 32 imprints after the 2013 merger and opened 32 in the same period. But how many titles did each publish, is the question?

DOJvPRH Day 1: We should get one more witness before court recesses at five, but that examination would continue tomorrow. So far, plaintiff and defendant are both hewing closely to the lines of argument they'd already outlined in pretrial documents. No surprises yet.

DOJvPRH Day 1: Pietsch, looking bushed, steps down. Literary agent Ayesha Pande, the government's next witness, takes the stand. Get ready for a bunch of questions about what being a literary agent means.

DOJvPRH Day 1: Pande explains how standard payout of advances went from thirds to quarters. Says approximately 20% of her authors earn out the advance, which can take 3-4 years to happen, forcing authors to teach, "work in coffee shops," do journalism (poor saps), nonprofits, etc

DOJvPRH Day 1: Government: "Are there any circumstances in which you would prefer to reserve audio rights for your authors?" Pande: "I would always prefer to reserve audio rights for my authors." Has she been able to? Not if the publisher has an audio division!

DOJvPRH Day 1: Seems like the government is trying to dispel the notion that literary agents always have the upper hand in negotiations with publishers, no matter how big, a notion the defense raised in its opening remarks. Will see tomorrow how successful that attempt is.

DOJvPRH Day 1: That's a break for today! See you tomorrow at 9:30. Holler with Qs in the meantime!

DOJvPRH DAY 1 (addendum): this one's getting extra attention so to expand, "farm teams" came from a 2019 due diligence memo by Carolyn Reidy presented to Viacom and CBS execs pre-merger, explaining the publishing ecosystem and hyping S&S's place in it.

<https://twitter.com/JohnHMaher/status/1554154697270988804?t=pzYKMKVK71XFxeAERWbXgA&s=19>

DOJvPRH Day 2: lfgooooo (I absolutely do not have enough coffee in my system for this)

DOJvPRH Day 2: In the day's first testimony, Ayesha Pande says the merger "will limit the choice and number of editors and imprints and publishing houses that would be a good home for my clients," who, "being underrepresented," already find it "more challenging to find homes."

DOJvPRH Day 2: Defense painstakingly asks Pande to discuss, book by book, and referring to the books by number and not name, a list of more than 30 books she sold, all to point out that the PRH-S&S merger would have affected none of their sales.

DOJvPRH Day 2: The moment all the journalists who only came to the court today have been waiting for: [@StephenKing](#) takes the witness stand, so help him god.

DOJvPRH Day 2: "My name is Stephen King. I'm a freelance writer."

DOJvPRH Day 2: Government asks Stephen King for a history of the sales of his books to publishers and it serves, in micro, as a history of consolidation in the business: Doubleday and Viking, both independent at the time, are now imprints of PRH.

DOJvPRH Day 2: The judge is...maybe a little starstruck by Stephen King? She just asked him how *The Gunslinger*, which was published by Donald M. Grant, not a publisher that is now an imprint of the Big Five, did sales-wise. (Admittedly, this is also potentially relevant.)

DOJvPRH Day 2: Paperback publishers get their first mention! cc [@kate_mckean](#)

DOJvPRH Day 2: Stephen King: "Some of the big boys are still around, because they're part of other publishing groups, but a lot of the indies are gone."

DOJvPRH Day 2: The judge really must be riveted, because so far, she's been incredibly punctual about things, but we just blew through the scheduled break.

DOJvPRH Day 2: Going for the kill here. Government: Did you come here on your own? King: Yes. Govt: Why? King: "I came because I think consolidation is bad for competition. That's my understanding of the book business, and I've been around it for 50 years."

DOJvPRH Day 2: Stephen King: "When I started in this business, there were literally hundreds of imprints, and some of them were run by people with extremely idiosyncratic tastes, one might say. Those businesses were either subsumed, one by one, or they were run out of business."

DOJvPRH Day 2: OK, 15-minute break. Cross-exam is next, when the PRH and S&S lawyers take on an author who has made both those companies a whole lot of money.

DOJvPRH Day 2: WHOA. Defense declines to cross-examine Stephen King. Heck of a statement.

DOJvPRH Day 2: And with that...half the courtroom clears to try to get a quote. (Don't worry, I'm not going anywhere.)

DOJvPRH Day 2: The government's next witness is decidedly less exciting, but more pertinent: Dennis Eulau, CFO and COO at S&S.

DOJvPRH Day 2: Our first adverse witness. We're discussing budgets. Can't pretend this part is exciting. So I'll just note that Stephen King ALSO used multiple baseball metaphors and references in his testimony.

DOJvPRH Day 2: We are back at the "farm teams" comparison. It's been a running theme: agents, Big Five reps, King all so far indicate that they see indies as places to start and then from which to move on to the bigger publishers with more money. <https://twitter.com/JohnHMaher/status/1554226484277116928>

DOJvPRH Day 2: The government's working hard to diminish the role of indie publishers in order to indicate the damaging possibilities of the proposed merger, while the defense is positing that all of indie publishing, combined, is actually a counterweight—an ad hoc Big Six.

DOJvPRH Day 2: Discussing backlist vs frontlist, government asks Eulau about return rates (which it notes are higher for frontlist than backlist), implying that a publisher without that backlist has less financial stability and, therefore, ability to compete.

DOJvPRH Day 2: Printing becomes the focus, with the govt asking Eulau if he can think of any other printer in the U.S. that could print books in the capacity S&S needs besides LSC and the printer owned by Bertelsmann. A little background on LSC here:

<https://www.publishersweekly.com/pw/by-topic/industry-news/industry-deals/article/85077-atlas-complete-purchase-of->

DOJvPRH Day 2: Viacom-CBS lawyer employed for the first time in cross-examination, questioning Dennis Eulau, S&S CFO/COO. Making clear Eulau knows nothing about acquiring editorial, auctions, etc. Play is clear here: to paint all prior examination as irrelevant to govt.'s case.

DOJvPRH Day 2: Defense uses Michael Lewis, Jeff Kinney, as example of authors whose huge successes did not prompt them to move to Big Five houses, implying that there is more competition to a potential PRHS&S, more possible homes for big authors, than the govt is acknowledging.

DOJvPRH Day 2: Government calls its next witness, by video: Steve Zacharius of Kensington, from his deposition. At some point, the judge will seal the court for confidentiality, so I'll go dark. (Lunch is in a half hour anyway, thank the heavens.)

DOJvPRH Day 2: If you've been following this thread, nothing Zacharius says here is revelatory. Re: author advances post-merger, he expects they will go down. For him to acquire books, though, he believe it'll be "just as difficult."

DOJvPRH Day 2: Public portion of Zacharius testimony ends. We go to lunch early! And they're clearing the courtroom for the closed portion. So see you at...ish?

DOJvPRH Day 2: We're almost back. And if we're hearing from who I think we're hearing from...can I get some ■ in the replies?

DOJvPRH Day 2: The World According to Karp comes to Washington! The U.S. and its "very impressive binder" call Jon Karp to the stand.

DOJvPRH Day 2: Karp on the defensive. Says authors "benefit from competition among all publishers" but is cagey when govt pushes him to specify anything relating to PRH and S&S. Calls head-to-head competition between the two "relatively rare" where total # of deals is concerned.

DOJvPRH Day 2: Karp is looking at the government's "very large binder" of evidence, i.e., book deals. They just cut off our view of court in the overflow room (only place I can be and still tweet) because the sealed list was accidentally shared over the monitors.

DOJvPRH Day 2: They're looking at one big deal, where PRH paid \$8m (■) for a book. Karp: "I believe that the literary agent in this deal was going to negotiate hard regardless of who the bidder was.... It happened to be PRH, but it very easily could have been somebody else."

DOJvPRH Day 2: Karp is being quite saucy and it sure is fun to watch. Nice little gripe about how long the deposition was. Even got a "touché" out of the government. Touché!

DOJvPRH Day 2: Govt keeps pulling out examples of auctions where authors got way more \$\$\$ because PRH and S&S alone were left competing. Karp keeps calling that happenstance. I think at this point we can safely venture a guess of the sorts of examples the defense will raise.

DOJvPRH Day 2: Govt lawyer, after a Karp quip: "I should have guessed you'd have a big vocabulary, as head of a publishing house." Karp: *stops smiling.*

DOJvPRH Day 2: We are not at open hostility yet, but Karp is absolutely pushing this lawyer's buttons. Adding context that clearly isn't wanted by the govt, which admonishes him to wait until cross-exam by the defense. Karp, clipped: "You got it."

DOJvPRH Day 2: Karp is asked if he was "frustrated" that he lost a big book in an auction to PRH. "I found it frustrating until the book came out and it lost a lot of money," Karp says with a smirk, "which kind of proves how you never really know anything."

DOJvPRH Day 2: As best as he can, Karp is parrying the govt's argument that S&S's only real competitors at the top levels are the other Big Five houses: "We compete against a broad range of publishers. At the higher end, those are the

ones that are often there.”

DOJvPRH Day 2: We've got an overruled objection from the defense. And the grilling continues.

DOJvPRH Day 2: Government asks if it's fair to say that Big Five publishers have an advantage in publishing new print books because of their marketing and publicity assets. And boy, is Karp fighting this answer.

DOJvPRH Day 2: "I think that's a prevailing piece of conventional wisdom and I'm not going to disagree," Karp says. "I think a lot of us believe that a good editor, a good publicist, and a good sales rep is enough."

DOJvPRH Day 2: Karp keeps saying that "a lot of people think" Big Five has advantages. The govt asks if that's what Karp thinks. Karp says, "I think that now, but if I was working for a small publisher, I'd think I was just as good."

DOJvPRH Day 2: Karp impeaches himself over his deposition, as per official court records, while trying not to state that he believes Big Five publishers have a market advantage, over a defense objection.

DOJvPRH Day 2: There's quite a bit of Karp's testimony that conflicts with his deposition. We've got another impeachment/party admission.

DOJvPRH Day 2: For those of us not exactly super up on court lingo: https://www.law.cornell.edu/wex/impeachment_of_a_witness

DOJvPRH Day 2: Karp: "You seem to have a lot of examples of me saying things I don't remember."

DOJvPRH Day 2: Quoting from an email from Jon Karp to Jon Irving (OMFG), govt reads (I think I got this right): "Thanks, John. I'm pretty sure the Department of Justice wouldn't allow Penguin Random House to acquire us. That's assuming we still have a Department of Justice."

DOJvPRH Day 2: oh man, I just laughed WAY too loudly in court. thank god I'm in the overflow courtroom.

DOJvPRH Day 2: OK, here we go. The Viacom-CBS corporate lawyer is up to cross-examine Jon Karp.

DOJvPRH Day 2: Karp says "I can't quantify it, but more and more, it seems we are in some variation of a best bids auction," implying more competition recently. Defense asks if the advance level predict whether a book will be successful. Karp: "I wish it did, but it doesn't."

DOJvPRH Day 2: Karp brings up examples to prove prior point: he acquired Seabiscuit for much less than \$250K but it sold millions. In contrast, "a spiritual leader" with "an internet following in the millions" got seven figs and "his following did not follow him into bookstores"

DOJvPRH Day 2: Karp: "You have to work just as hard on every book because you have no idea which one is going to break out." After a few beats, the Judge: "If you pay a lot for a book—like one of these million dollar book—you're not going to market that book harder?"

DOJvPRH Day 2: A little hemming and hawing here! Karp: "We have to market those books quite aggressively." JUDGE: "Not more than your run-of-the-mill books?" Karp admits that there's extra pressure to earn back on books S&S spends lots on, so they do have bigger pub budgets.

DOJvPRH Day 2: Really amazing to see the defense try to make the case, albeit slant, that marketing budget has nothing to do with how much it cost to buy the book/how high the expectations are for it, all to try to deny that books above a certain advance level are a "sub-market."

DOJvPRH Day 2: Asked if he has "heard the term 'Big Five,'" Karp says he doesn't use it: "I think it's parochial and ethnocentric. There are a lot of really good publishers all over the country. I don't think it's all about us."

DOJvPRH Day 2: h/t [@AliaHanna](#) for this point, via DM: "Seabiscuit was published in 1999. Could I ever use a book that old as a comp? Nope, comps are only viable if they are 2-4 years old. A book that came out a generation ago, in a very different publishing landscape? Come on."

DOJvPRH Day 2: Judge: "In the situations where there's...a best bids auction, isn't your bid going to be higher if you perceive that there's more bidders out there?" Karp: "Yes." Judge seems...very sympathetic to the government at this point.

DOJvPRH Day 2: Judge: "You're going to bid higher if there's more competition?" Karp: "When you want it, it doesn't matter how many people are competing against you," but he admits that S&S certainly asks how many parties are bidding and it impacts how high they bid.

DOJvPRH Day 2: Looks like we're concluding today's events with a conversation of S&S's major acquisitions losses to HarperCollins, including—highlight!—when they lost a book by Ben Shapiro to Harper. Both made bids in the seven-figure range.

DOJvPRH Day 2: That's it for today. Whew, it's adult beverage time. See you at 9:30am tomorrow. In the interim, the DMs are open!

DOJvPRH Day 3: Had to drink a whole can of coffee in the foyer of the court. (They don't like liquids here.) Welcome back to the World According to Karp, where he is explaining to the ViacomCBS lawyer what FSG is and why book awards matter.

DOJvPRH Day 3: Oprah Winfrey has entered the **chatt** court documents.

DOJvPRH Day 3: Government is asking Karp about books he's lost to non-Big Five publishers. Neil DeGrasse Tyson and Norton are the example cited.

DOJvPRH Day 3: Another book lost to Norton, this time because of their marketing plan. Karp: "You can really have a good marketing plan or team without a lot of people. Your honor, I was thinking about the question you asked me yesterday—" and the lawyer shuts him up.

DOJvPRH Day 3: The children's books market has FINALLY been mentioned, with the government highlighting that Scholastic is a "regular" competitor with S&S in the children's and YA spaces for books of \$250,000 and above.

DOJvPRH Day 3: Heya, correction here: the DEFENSE is currently cross-examining Karp, not the government. Defense now rolling out examples of books S&S has lost to university presses.

DOJvPRH Day 3: Baseball is BACK, baby! Defense attorney: "Based on your 33 years in publishing and your knowledge of baseball, do you agree with that analogy, that non-Big Five publishers are like farm teams?" Karp: "I don't think it's an apt analogy."

DOJvPRH Day 3: Karp notes that many authors—e.g. Michael Lewis, Mary Roach—stay with non-Big Five and indie publishers, and don't always jump to the big houses at the first chance they get.

DOJvPRH Day 3: Karp calls Spiegel & Grau "among the best publishers of their generation," as the defense pivots to pointing out new publishers that can ostensibly rival the Big Five publishers. The idea is to point out that their "track record" and reputation put them in the mix.

DOJvPRH Day 3: Judge asks if S&G has had any "blockbusters" since they launched; Karp points to Fox and I, a NYT bestseller. BookScan says that book has, to date, sold just above 33,000 copies.

DOJvPRH Day 3: Zando, Astra House also getting a shoutout as "potential competitors" to S&S. The judge asks if they've published any blockbusters. Karp: For Zando: "I'm not sure actually if they've published many books." For Astra: "I'm not sure about their track record."

DOJvPRH Day 3: Now Karp is discussing publishers expanding outside their purviews—Orbit at Hachette, Flatiron's move into new adult both mentioned.

DOJvPRH Day 3: Defense: What does it take to compete? Karp: "All it takes is a publisher with a vision and a couple of good editors. It's basically an investment in talent." Wow, anyone wanna launch a publisher with me? Apparently it won't be too hard to compete with S&S!

DOJvPRH Day 3: Let the record show: "I think Amazon as a publisher of books is underestimated," Karp says.

DOJvPRH Day 3: Karp gets the chance to talk about Colleen Hoover and a hot backlist bestseller. Hoover "has published with both Amazon and S&S, and her Amazon book was on the independent bestseller list. What that says to me is that a Rubicon has been crossed."

DOJvPRH Day 3: Karp argues that Amazon has become a real competitor because, he says, indie booksellers will now stock Amazon titles, as evidenced by Colleen Hoover. There is no discussion about how Hoover's books became bestsellers—i.e., TikTok.

DOJvPRH Day 3: For clarity, he means Amazon has become a competitor to S&S as a publisher; that it is a competitor (to put it lightly) to the book business as a whole is a given.

DOJvPRH Day 3: Defense asks Karp if his opinion on self-publishing as a competitor has changed. Karp calls it "more of a threat than I thought," citing Brandon Sanderson's Kickstarter.

DOJvPRH Day 3: A return to the judge's questions from yesterday about marketing budgets, for clarity. An exchange about "glam budgets" lol. Karp: "The people who ask for these glam budgets tend to be represented by talent agencies.... John Irving isn't asking for a glam budget."

DOJvPRH Day 3: Whole lotta wild stuff going on here lol but it's gonna take a minute, I have to, like, type notes too. BRB.

DOJvPRH Day 3: OK OK OK. Holy moly. Hot dog. We have a break. Here's what's happened:

DOJvPRH Day 3: Defense asks Karp to elaborate on terms he used yesterday when the judge was asking him about marketing, and how often authors use their own funds to bolster their publicity, even when they are published by the Big Five houses.

DOJvPRH Day 3: Karp says many authors of books with big advances hire their own publicists, etc., because they can afford to. He cites Colleen Hoover as an example of an author who "does not take up most of S&S's resources" because "she's the queen of TikTok" and doesn't need to

DOJvPRH Day 3: There is no example, in this conversation, of the sorts of marketing budgets midlist authors receive, or mention of whether they do or do not have to hire their own publicists, or book their own book tours, to get their books adequately publicized/ marketed.

DOJvPRH Day 3: Karp: "We fall in love with books we pay five-figure advances for. Love is supposed to be blind. And we're often wrong...there are famous stories about books publishers pay a lot of money for, and the sales force fell in love with a completely different book."

DOJvPRH Day 3: Karp: "Literary agents frequently ask us to guarantee marketing dollars, and we don't do it. We don't want to be locked into a plan." Judge asks if, however, S&S puts more time into a marketing plan if it knows an auction will be hot. Karp: "Yes."

DOJvPRH Day 3: Defense asks if S&S ever does marketing plans for books below \$250,000. Karp: "If you really love the book, you have to jump through hoops."

DOJvPRH Day 3: Defense returns to The Irving Email. Karp says his quote was taken out of context—that it was meant to be "humorous," pointing out the "irony" of a company he had worked for earlier in his career acquiring the one he now ran, and how fiction editors love irony.

DOJvPRH Day 3: "No plans to decrease advances or title counts when the merger goes through," Karp says. "We believe that the way to continue to grow is to publish more books." If they did try to lower them, "I think that we would face something of a rebellion from our staff."

DOJvPRH Day 3: Why the rebellion should S&S lower advances? "Editors want to have the latitude to sign books they want to sign, and I think the literary agency community would react quite badly to it" as well.

DOJvPRH Day 3: Karp says merger will be "good" for S&S authors, calling PRH's company culture "analogous to what S&S is about" and saying it's a "good corporate citizen." Also says Bertelsman being a "pure play publishing company" is a good thing. A little potshot at Paramount.

DOJvPRH Day 3: Judge asks what percentage of "anticipated bestselling " or competitive books—the books that theoretically made money for S&S in the long run—were acquired at auction. Karp: "I never counted, and I'm trepidatious of saying more than that."

DOJvPRH Day 3: Court back in session. So much for a break lol.

DOJvPRH Day 3: "The idea that any publisher can make a book a bestseller is false," Karp says, and "anybody making that promise would be putting themselves in a very dangerous credibility place." Judge asks if S&S touts their superior marketing plans and dollars to win auctions.

DOJvPRH Day 3: Karp: "After you've had two meetings, when everybody says the same thing in the meeting, you don't believe it." WHEW. Re: publishers taking credit for success, "It's like taking credit for the weather. You can't promise success to the author."

DOJvPRH Day 3: Judge is trying to figure out the correlation between the government's proposed \$250K+ "sub-market" and downstream sales—how many of these books sell enough to actually boost publishers' profits? Karp says they "have not authoritatively studied" that.

DOJvPRH Day 3: Karp notes that across board, advances have risen, saying that when he got into the biz, "\$100K was a lot of money," and now it's "fairly small advance. DOES NOT mention, like...inflation.

DOJvPRH Day 3: "I don't want you to come away from this testimony thinking midlist books are a once-in-a-while thing," Karp says, addressing judge. "They are the core of our business." Late, trying to explain: "Midlist is...a word publishers use that doesn't really mean anything."

DOJvPRH Day 3: Govt is back, asks if Karp would receive a bonus if the merger is consummated. Karp, after saying he never asked for it and that it was a standard part of the contract he signed as CEO: "Yes."

DOJvPRH Day 3: Actual Jon Karp quote: "I'm not a game theorist, but..." Honestly, the man is hilarious. Asked if he has calculated Amazon's market share: "I haven't. I wish somebody would!" Govt isn't taking the bait, but Karp is definitely pushing buttons.

DOJvPRH Day 3: Another attempt to enter portions of Karp's deposition into evidence to impeach Karp's testimony. (At least four succeeded before this!) But: defense objection sustained—Karp's view on Amazon as competitor to S&S has "changed over time," and judge recognizes it.

DOJvPRH Day 3: Another attempt to impeach Karp's testimony. Another objection from the defense. Sustained again.

DOJvPRH Day 3: After a few more rounds with the government, and some clarifying questions from the defense, thus ends the testimony of Jonathan Karp, CEO of Simon & Schuster. Next government witness: Liate Stehlik, via pre-taped deposition.

DOJvPRH Day 3: Asked with whom HarperCollins competes in acquiring books, Stehlik says "usually" their rivals are PRH and S&S, "sometimes" Hachette and Macmillan. We are establishing some size differentials.

DOJvPRH Day 3: Running through examples of mid-size publishers—Abrams, Workman, etc.—Stehlik says, e.g., Norton competes with HarperCollins only in "very specific" categories—"literary fiction, narrative nonfiction"—and "usually" at a lower price point than the Big Five.

DOJvPRH Day 3: I'm anticipating the rest of the day to be a bit quieter. Stehlik's deposition is hitting pretty much the same points as Pietsch's, albeit not from the CEO's seat. And I'm pretty sure next up is an economic expert running through "head-to-head bidding examples."

DOJvPRH Day 3: Early lunch break. Tech issues. See you in an hour.

DOJvPRH Day 3: Can't wait to eat a lunch that does not consist of a burger or something too like it. Anyway, we're back. And while we are, one notable thing from Stehlik: she estimated that about "75%" of her books are acquired at auction, which is higher than previous estimates.

DOJvPRH Day 3: Stehlik calls PRH and S&S her company's "biggest competitors," and "sometimes Hachette."

DOJvPRH Day 3: Government asks, for a book over a \$250K advance, how often do you lose the book to publishers that are not in the Big Five? Stehlik: "Very rarely."

DOJvPRH Day 3: what I wouldn't give for a good pillow.

DOJvPRH Day 3: Stehlik: "Generally, the Big Five tend to have more visibility in stores, more visibility on Amazon, than other, smaller publishers." Why, govt asks? "I don't know, but it happens I think that's why generally, agents prefer to go with bigger publishers."

DOJvPRH Day 3: The government calls Adriana "Anna" Porro to testify. She's a DOJ statistician/research analyst, who was assigned, on this case, to "oversee an accurate summarization" of "the bidding details that were in the documents that I reviewed." <https://t.co/XnlwDftAwE>

DOJvPRH Day 3: Porro did 27 summaries. The binders are back! Time to look through a whooole lot of book deal data. (I have the feeling the titles will be sealed. Sorry.)

DOJvPRH Day 3: Summaries detail around 250 documents from publishers, agents, and other parties, including spreadsheets that included "tens of thousands of observations on multiple tabs of information." Took Porro about "200 hours."

DOJvPRH Day 3: I know you were all waiting with bated breath to learn who won the much-beloved title "PX937B" and for how much. That would be PRH, for \$550,000. (Simon & Schuster apparently bid on the book as well.)

DOJvPRH Day 3: This is the point at which I wish [@TheLincoln](#), publishing's calculator, were here to parse these numbers. Alas, I must soldier along alone. (My beloved [@publisherswkly](#) colleague [@AndrewRichard](#), much more experienced at trial coverage, headed back to NY today too.) <https://t.co/EuxcWRcl3c>

DOJvPRH Day 3: We are moving on to the prequel, PX935B, which may also be the name of a child of Elon Musk.

DOJvPRH Day 3: Porro ran through 27 cases across three years; the defense made sure to point out, in its cross-exam, that each year, "more than 55,000 trade books" are published. The implication: S&S and PRH being primary bidders on these books is not representative.

DOJvPRH Day 3: Worth noting now that journalists are NOT party to ANY of the exhibits, and they are NOT being made available by the court until AFTER the trial. I am told by a veteran court reporter that this is very unusual. (Makes it kinda hard to cover some testimonies.)

DOJvPRH Day 3: Govt's next witness, via deposition tape, is Andrew Solomon, introduced here as an "author," although it's worth noting that he is also a past president of PEN America. Next up is Michael Jacobs, pres and CEO of Abrams, also via deposition tape.

DOJvPRH Day 3:■■■■■■■■■■HEADS UP: The govt and defense agree that tomorrow's court session will begin with testimony from PRH global CEO Markus Dohle■■■■■■■■■■ (PSA: it's "Dole-uh," for those who'd only ever read it, and not heard it aloud, before. I was one of you, once.)

DOJvPRH Day 3: Hard to hear Solomon's testimony—via video played to a courtroom I'm watching via another video while he's wearing a mask—but he notes that he left Knopf because he thought they did an "inadequate" job with his book. Scribner, Dial made highest offers on next book.

DOJvPRH Day 3: Solomon went to Scribner for The Noonday Demon, says he's happy with the job it did for him, and that the "scale of the operation" is one of the reason he picked Scribner to publish his book, anticipating better sales than from a smaller publisher

DOJvPRH Day 3: Michael Jacobs, CEO of Abrams, gives next testimony, via deposition video. A former president of Viking Penguin and executive v-p of S&S. Talk about some interesting experiential context.

DOJvPRH Day 3: Govt asks if Abrams is shut out of auctions. Jacobs: "Well, we didn't get sent...Barack and Michelle Obama's book." Govt: Did Abrams want it? Jacobs: "We weren't asked!" Adds: "It wasn't in our strategic plans." Why? "Not used to paying those kinds of advances."

DOJvPRH Day 3: When agents tell Abrams why they go with them over a publisher that offered more (on the rarer side), the reasons usually are: "books are highly curated," appreciate their books as "physical objects," strength in particular categories, etc.

DOJvPRH Day 3: Govt: "Are you familiar with the term 'anticipated bestseller'...'expected topseller'?" Jacobs: "I would refer to it as a 'lead title.'" FINALLY someone tells the govt what they should be calling these books Imao

DOJvPRH Day 3: Govt: "anticipated bestseller"— <https://t.co/h2lgEAjRGa>

DOJvPRH Day 3: Post-Jacobs, there was a whole debate over whether a tweet Christy Fletcher responded to in her deposition makes her entire testimony inadmissible. The judge decides it will be. Court closed for last few minutes of Jacobs's testimony. That's it for today!

DOJvPRH Day 3: Tomorrow, we start with Markus Dohle and move on, presumably, to Fletcher, and maybe others. Tomorrow's the last day of the trial this week—convenient for those of you with summer Fridays, not inconvenient to for those of us who, uh, go to press on Friday ■

DOJvPRH Day 3: Just want to point out that I'm not scheduled to be in D.C. next week for the trial—although my editor might change his mind on that!—but I fully expect [@TheBookMaven](https://twitter.com/TheBookMaven/status/1554934594960515073) to ably livetweet in my stead, in spite of her concerns. <https://twitter.com/TheBookMaven/status/1554934594960515073>

DOJvPRH Day 4: Wow, I got six hours of sleep last night instead of four. I call that a victory, if not a legal one. Are you all ready for Markus Dohle to tell a federal judge, under oath, that it's the best time to publish since Gutenberg?

DOJvPRH Day 4: incredibly huge line to get into court today after a long traffic snarl by the Capitol. Markus, don't say anything too important yet!!!

DOJvPRH Day 4: Now that the class of law students is in to make their visit with a judge, I am in court, where Markus Dohle is explaining what all of the groups of PRH are, how many imprints are in each, when they were acquired, and who is in charge of each.

DOJvPRH Day 4: Dohle clarifies that he's here in court representing Bertelsmann, PRH US COO Nihar Malaviya is here representing PRH US (not Madeline McIntosh). All, y'know, formality stuff.

DOJvPRH Day 4: For "more than a decade," there were conversations on the Bertelsmann board about a possible acquisition of S&S. Asked if Bertelsmann discussed whether the market would become an oligopoly, Dohle said: "I remember that being on a slide. I disagree with it."

DOJvPRH Day 4: We have gotten to some documents in German. I hope they read some of it aloud. It's a full courtroom today, btw. Lots more PRH folks it seems, plus a few more members of the media.

DOJvPRH Day 4: This doc was a "high-level, blue sky exercise" detailing possible investments; among them is Simon & Schuster. But the judge interrupts, says she's reading a different doc than the one presented on screen. Govt's John Read: "Maybe we had late-night binder issues."

DOJvPRH Day 4: Binder issues resolved. Now they're talking about a "strategic thrust." Did you all know court could be this ■

DOJvPRH Day 4: The document explicitly addresses that, should PRH acquire S&S, the premise that the U.S. publishing business would become an oligopoly.

DOJvPRH Day 4: Govt: "Would you agree that there are not a lot of midsize publishers left?" Markus: "Not really." He also says he doesn't like the term "Big Five," just like Karp, although he says nothing of "ethnocentricity."

DOJvPRH Day 4: Points to Scholastic as an example. (!!!) Then: "I don't know how to define a midsize publisher." Govt defines it as a publisher worth over 100 million. Dohle: "On top of my head, there is Disney, Amazon, Callisto, Sourcebooks, Readerlink, just to mention a few."

DOJvPRH Day 4: Dohle again says he disagrees with the oligopoly assessment. The govt points out that no one disagreed with it when it was presented on this document (a powerpoint) at the board meeting.

DOJvPRH Day 4: Getting intense here. Will update when it slows.

DOJvPRH Day 4: Dohle: "The reputation of the editors and publishers is more important than the reputation of the publishing house.... Authors select their editors and publishers more than they select their publishing house. That's the reason they often move with their editors."

DOJvPRH Day 4: "Reputation certainly helps." "That resonates with me." Dohle won't say for certain that reputation is an "important aspect" of running a successful publishing house.

DOJvPRH Day 4: If PRH combines with Simon & Schuster, the govt asks, will it "cement" PRH as #1? "It will increase our market share," Dohle says, noting that PRH has "lost a lot of market share" since 2013. Read: So it does cement PRH as #1 in the U.S.? Dohle: "Correct."

DOJvPRH Day 4: Govt asks if launching a publishing business is hard. Dohle: "We do it every year," referring to new imprints, "but I agree it's not easy." Read asks if opening new small presses is hard. Dohle: "If they get lucky... I wouldn't say they certainly make losses."

DOJvPRH Day 4: Govt asks if publishing is a portfolio business, with profitability driven by a small number of books. Dohle: "I call it the Silicon Valley of media. We are angel investors in their ideas and their dreams. That's how I call my editors and publishers: angels."

DOJvPRH Day 4: According to a presentation they're discussing, top 4% of profitable titles drive 60% of the profitability. Dohle says those books are the ones that "cost the least," adding: "It's the books that you don't pay a lot for and become runaway bestsellers."

DOJvPRH Day 4: Govt asks books that sell well are more likely to receive higher advances. Dohle: "There is a correlation." Govt asks if reverse is true. Dohle: "There is a wide range and some big advances flop completely and don't sell well, but—there should be a correlation."

DOJvPRH Day 4: Govt asks if the first days of a new publishing house, when it's "acquiring books, waiting for those books to be written, waiting for those books to be printed," before it can recoup on sales, are difficult, and can last "2-3 years." Dohle agrees.

DOJvPRH Day 4: Dohle: "It needs some incubation, some financing, to build a publishing company. I think that goes across all industries."

DOJvPRH Day 4: Really needed today's break. Whew. Still catching up here but: Govt and Dohle engaged in a fraught exchange over the fate of Spiegel & Grau, which was shuttered at PRH in 2019, before Julie and Cindy went on to reopen under the same name as an indie.

DOJvPRH Day 4: Govt. asks if that was because it wasn't making a profit. Dohle: "Before that, they ran Riverhead for a long time—just for context." He said he "disagreed with the decision" and tried to move the imprint and both Spiegel and Grau into another group, to no avail.

DOJvPRH Day 4: Still on break and I can overhear Dohle on the mic talking about the year 1438. Gutenberg's #1 Fan strikes again.

DOJvPRH Day 4: Dohle admits S&G isn't guaranteed success as an indie. Govt asks if Dohle considers them a competitor? Dohle: "I very much believe in them. Given their reputation as editors and publishers...I'm sure they're going to succeed. And they have good financing, I guess."

DOJvPRH Day 4: Skimming through printing just to try to keep up, but PRH is the only publisher in the U.S. that has a printer in its corporate family. Govt says that's an advantage. Dohle says that it's been a disadvantage of late because they have run out of stock so often.

DOJvPRH Day 4: "I've never seen an author pitch that includes printing," Dohle said wryly, when he is asked if the printing group gives PRH an advantage in attracting authors. Like Karp, he's got a few zingers.

DOJvPRH Day 4: Now we get to promises about imprints. "I made a commitment" to agents and authors that "I would keep the ecosystem of imprints at Simon & Schuster together." Govt: Do you have the ability to combine imprints? Dohle: "That would violate that commitment."

DOJvPRH Day 4: Govt: Have you committed to not closing any imprint should the merger go through? Dohle: "No." Adds: "If we think they cannot become profitable...we bring the backlist and to-be-published frontlist, and hopefully the editors, under the roof of another imprint."

DOJvPRH Day 4: Govt asks if publishing groups can be combined, and of course they can, as with the Crown consolidation with Random House. Dohle, asked about plans for their many children's imprints: "There were discussions about how we organize our children's imprints."

DOJvPRH Day 4: Govt confirms there's no way to legally bind PRH to commitment allowing S&S imprints to compete against PRH imprints after acquisition if they're the only imprints bidding. Dohle: "Unfortunately we could not find a legally binding way" to solidify that commitment.

DOJvPRH Day 4: Govt: If author advances were reduced, would it hurt the diversity of stories being published? Would reduced author income mean fewer authors will be able to make a living writing stories? Dohle says yes, but only if they are "significantly" reduced.

DOJvPRH Day 4: Govt asks Dohle if advances are made in four parts now but used to be in three. Dohle: "I don't recall whether that was our rule," but "some of our big authors get it even in two installments. I don't know whether it changed from thirds to quarters as a rule."

DOJvPRH Day 4: Dohle says profits at PRH have been excellent, but wants to do "much better" with market share: "We lost market share almost the size of Simon & Schuster since the merger." Takeaway: output of books was less, but income was good.

DOJvPRH Day 4: Dohle on Amazon, consistent with what he's said before: "Amazon is our customer. Our largest customer...their most important role is to be a customer." He adds: "I never fight my customers," but "on the publishing side we compete with them."

DOJvPRH Day 4: Colleen Hoover, in case you were wondering, the CEOs who publish you LOVE you.

DOJvPRH Day 4: Dohle asked if he can think of any instance in which he was involved in the acquisition of a book where PRH lost it to Disney, Scholastic, or another non-Big Five publisher with an advance over \$2 million. He cannot.

DOJvPRH Day 4: So here is where the government is going: it's arguing that PRH is throwing more money around right now in order to dominate the market, but that, once it's acquired S&S, it won't need to.

DOJvPRH Day 4: Govt: "After this merger, PRH US will not have as strong a need to grow share?" Dohle: "I don't think it doesn't speak to our performance" that they're paying "almost \$2.2 billion" to "recoup our market share." Yes or no, Read asks. Dohle: "Yes." Witness is passed.

DOJvPRH Day 4: Sorry I'm taking so long, want to take just as diligent notes of the cross-exam. More ASAP. But here's a fun tidbit in the interim. Dohle: "Everything is random in publishing. Success is random. Bestsellers are random. So that is why we are the Random House!"

DOJvPRH Day 4: Some of you are expressing skepticism lol so let me just say that under oath Dohle said that this was, in fact, the actual provenance of the name of the house.

DOJvPRH Day 4: Defense asks what Dohle considers to be the biggest threat to publishing today. He says "all-access," arguing that book sub services will "have a tectonic influence on the revenue of the industry, on author advances, and ultimately on author income," on diversity.

DOJvPRH Day 4: Dohle: "Around 20-25% of heavy readers account for 80% of the revenue of the industry " from consumers. "If the really dedicated readers go all-access, the revenue pool is going to be really small. The retail sector will be gone...authors are going to lose."

DOJvPRH Day 4: sorry lol I'm jumping ahead but defense asking "what are advance reading copies?" is sending me

DOJvPRH Day 4: also worth noting here that both sides often ask really basic questions so as to explain, in-court, to the judge how the publishing business works. however, philosophically, the question "what is an advance reading copy" is, I admit, somewhat compelling

DOJvPRH Day 4: hello. I'm at lunch. let me wolf down a sandwich and fries ONCE AGAIN and then catch up on the cross-exam.

DOJvPRH Day 4: Asked what the mission of PRH is, Dohle: "We want to create the future of books and reading in longform for generations to come. That generations to come is really important for us," adding: "We call our business culture and commerce, in that order."

DOJvPRH Day 4: Dohle discusses roles on nonprofit boards— PEN America, National Book Foundation, AAP, Atlantic Council (<https://www.atlanticcouncil.org/>)—and breaks down Bertelsmann: 81% owned by eponymous foundation (<https://www.bfna.org/>), 19% by eponymous family.

DOJvPRH Day 4: Bertelsmann "encourages us to invest into content," calling it "the only revenue and profit-generating objective of this business," Dohle says. In general, growth—imprints, books, M&A—is encouraged. Bertelsman does not, he adds, enforce a budget on PRH US.

DOJvPRH Day 4: Asked why PRH doesn't print more books with printers owned by Bertelsmann, Dohle called them "not able to fulfill their commitments," reiterates he's been "frustrated" by performance. (Who isn't pissed at printers these days?) Stresses "a multi-vendor strategy."

DOJvPRH Day 4: Dohle says Penguin-Random House merger did not result in reductions "at all," attributing later reductions to "market sources." He notes that genre fiction, especially romance, "switched to self-published stories...away from what we call mass-market paperbacks."

DOJvPRH Day 4: The CEO of the largest trade publisher in North America explains to a federal judge what a mass-market paperback is.

DOJvPRH Day 4: Dohle digs into long death of mass-market: lower prices on e-books result in, around 2014-15, "retailers dedicating less and less shelf space" to them, "especially big box." Penguin, "especially Berkeley/NAL, was overindexed in that business, and we had to adjust."

DOJvPRH Day 4: Defense: Did any imprints close as a result of the merger? Dohle: "No." 32 imprint number mentioned again. Dohle: "I've heard that number...we've also opened almost that exact number of imprints since that merger." Says number at PRH was around 90 then and is now.

DOJvPRH Day 4: Defense asks, "did you make any attempts to reduce author compensation after the merger?" Dohle: "No, not at all." Upstream and downstream get bandied around a whole lot. Dohle roundly denies tracking acquisitions of books by other publishers.

DOJvPRH Day 4: Very exciting time for [@PublishersWkly](#) and [@PublishersLunch](#), which both get mentioned...only for Dohle to say we're both useless in terms of tracking book acquisitions, saying PW publishes "a few deals" and PM is "anecdotal." Feel free to tell to us more, then!!!

DOJvPRH Day 4: On to BookScan, which Dohle says tracks "70-75% of print sales" (PW estimates more like 80-85%) and that's only "50% of the overall market, but a very relevant one." AAP StatShot estimates PRH market share at "15%," he says, and BookScan at "20-21%."

DOJvPRH Day 4: In more greatest time since Gutenberg news (Markus, I tease, but I adore your enthusiasm), Dohle: "What a great market the book market is. It's always growing!" But PRH's growth didn't keep up with market's over past 2 yrs: "We are still in turnaround phase."

DOJvPRH Day 4: There's a whole lot of discussion about charts related to market share here, and once again, it's hard to keep up, because we can't see the exhibits. But here is the point at which the indie publishing world is going to lose its mind wholesale.

DOJvPRH Day 4: Dohle says outside of Big Five except for Scholastic, in 2019, "43%" of the market was "dominated" by other publishers (This means all other pubs, I think.) In 2021, "around 50% of the books sold in America were sold by publishers outside of the Big Five."

DOJvPRH Day 4: Dohle: "The main reason for the industry fragmenting is the shift to online and e-commerce," where, he says 50% of books are sold, which has "leveled the playing field between larger houses and smaller houses." See: <https://www.publishersweekly.com/pw/by-topic/international/Frankfurt-Book-Fair/article/87687-frankfurt-book-fair-2021-1>

DOJvPRH Day 4: Dohle: "All the backlist that has ever existed is now being made available on Amazon," evening the edge between indies and Big Five compared to physical bookstores, where, he concedes, big publishers had more space. This advantages small publishers, he says.

DOJvPRH Day 4: On the above point, Dohle: "They have gained frontlist market share, but also gained backlist market share." And, he says, he infers that they are spending more on contracts. This is to the defense's point that merger wouldn't hurt authors. He adds:

DOJvPRH Day 4: "If you know that 50% of your business is at a maximum return rate of 5%...and...your books are being featured side by side, front and backlist, with other publishers...it makes you financially stronger, and I'm sure you're more willing to invest into contracts."

DOJvPRH Day 4: OK more updates soon, I have to head back up to court.

DOJvPRH Day 4: Heyyy, we picked back up at competitive bidding, which was next on the tweet list, so here we go. "We want to make sure to provide the perfect matches between book idea and editor, and author and imprint. Internal bidding makes that possible," Dohle says.

DOJvPRH Day 4. Why, defense asks, do they even allow it? Dohle: "The foundation of this business is that every book finds the most passionate editor with the largest vision for the book," and that "has a high correlation with the advance the editor wants to pay for the book."

DOJvPRH Day 4: Dohle insists he can't just renege on his commitment to agents to treat editors at an acquired S&S as external bidders. "Taking that commitment away, and treating S&S as an internal bidder, would undo it and violate it."

DOJvPRH Day 4: Defense asks why he can't do it anyway since it's not legally binding? Dohle: "If you grant your partners, which in this case are agents and authors, an additional service...you are practically unable to take it away. It would undermine that trustful relationship."

DOJvPRH Day 4: Judge follows up, asking what Dohle thinks agents and authors could do if he reneged? Dohle doesn't quite answer, instead citing rights publishers "granted" to agents and booksellers before: video rights, returns.

DOJvPRH Day 4: Judge follows up again, noting the other examples Dohle gave are industry-wide examples, whereas PRH's bidding commitment would be unique to PRH. She suggests ("correct me if I'm wrong") that agents wouldn't blacklist PRH if it reneged, as long as their bid won.

DOJvPRH Day 4: After the exchange, defense resumes its attempt to hammer home that books acquired for \$250K and more are not a sub-market of the book business, which is key to the government's argument.

DOJvPRH Day 4: Govt is back, and it's back to—surprise, surprise—hammer against the defense's hammering. Read points out that PRH documents refer to some in-house authors as "key authors," some external authors as "attractive authors" to acquire.

DOJvPRH Day 4: "We don't think it's good for writing and for writers," Dohle says re: Kindle Direct and other models, so PRH's books don't compete in them. But "consumers like these models," says Read. Will S&S's books be pulled from them post-merger? Dohle hasn't decided yet.

DOJvPRH Day 4: Amazon Marketing Services in govt's sights now. Govt asks if PRH pays to have Amazon boost their books' SEO, in order to sell as many as possible there. Dohle: "We are working on instruments and tools, like metadata, like SEO, to sell more books through Amazon."

DOJvPRH Day 4: Govt asks Dohle if, since PRH's market share has not been growing, where all the other Big Fives (and Scholastic) arguably have (which Dohle disputes, if his belief is that PRH's book business was "mismanaged."

DOJvPRH Day 4: Dohle: "Given the fact that we have this market leading sales and distribution service, and the control group...went up, my conclusion is that we haven't been able to acquire and publish enough of the books that our readers want to buy."

DOJvPRH Day 4: Has it, Read said, "been mismanaged?" Dohle: "I take full responsibility for everything that happens in the company," because he's global CEO and was US CEO before McIntosh. "I think we could have been more aggressive, nimble, agile, faster on the content side."

DOJvPRH Day 4: They are discussing Dohle's private texts to some of his direct reports now. Read skips "a couple of lines" in the texts "out of respect," presumably denying the court the opportunity to hear about how many plush Totoros Dohle keeps in his living room.

DOJvPRH Day 4: "We really screwed it on the product-side post merger," one text reads. Govt. asks: "Do you believe there are too many management layers at the company in acquiring books? Dohle: "Yes."

DOJvPRH Day 4: And thus ends the testimony—well, at least the first one—of PRH Global CEO Markus Dohle. Next witness: Brian Tart, president and publisher of Viking.

DOJvPRH Day 4: We are running through a list of acquisitions again. And emails, which, I cannot stress enough, the press cannot see. (I have been told the court is looking into getting us the exhibits, but I haven't heard anything about a timeline on that.)

DOJvPRH Day 4: The judge seems to find the emails very informative, however, with a winking comment as such to the court. I took that comment to mean there was a whole lot of a;lskdfj;lsakjdf;lsakjfd;lskdjf over negotiations.

DOJvPRH Day 4: "Just because another imprint wants to pay more doesn't mean I'm convinced that we should," Tart says, referring to internal bidding, explaining why one PRH imprint might stop bidding against another. Confirms to the judge that he does not have a yearly budget.

DOJvPRH Day 4: After witness passed, defense asks about whether advance dovetails with risk. "A \$2 million advance for Ms. Obama's next book is presumably less risky than a \$2m advance no-name's debut novel, correct?" WHEW. Absolutely vicious.

DOJvPRH Day 4: Defense attorney: "Since you're the first actual acquiring editor we've heard from, what are some of the ways Viking goes about acquiring books?" The knives are OUT.

DOJvPRH Day 4: Tart says negotiations to keep an author can be "tricky," filled with some of his "costliest mistakes," and calls one-on-one negotiations "very difficult." The implication here is that auctions are good for editors too, not just authors, and that PRH supports them.

DOJvPRH Day 4: The redacted stuff still makes me giggle. Tart: "We had great success with Title G."

DOJvPRH Day 4: Better/best and best bids auctions are, Tart says, the most common auctions he enters, if he has to estimate. Does he like best bids, defense asks? "No, I don't like those." What if he just...doesn't...like being an acquiring editor?

DOJvPRH Day 4: Defense: Do you always know what kind of auction you're in? Tart says things change all the time mid-auction—sometimes you think you're in one kind of auction, and then, he says, "the rules will change."

DOJvPRH Day 4: "I think we all accept that the agents are going to try to get the best deals for their authors," Tart said. "I accept that." Tells defense he does not consider the changing of the rules, or lack of knowledge of other bidders, "dishonest," or agents untrustworthy.

DOJvPRH Day 4: Defense asks how Viking values a book it's considering acquiring. Tart: "It's as much an art as a science." Defense: "I suppose you often overestimate how well you sell a book." Tart: "Yes."

DOJvPRH Day 4: Defense asks for examples of books Tart feels like he missed out on bidding on. Tart: "We read a manuscript called Where the Crawdads Sing, talked about it, didn't think it was going to be a big book, and didn't even bid on it..." Mentions Marie Kondo too.

DOJvPRH Day 4: Defense asks if those books were "anticipated bestsellers." Tart: "Not to me." Poor Tart feels like a sacrificial lamb in this part of the defense's argument.

DOJvPRH Day 4: Tart cites Grove and Graywolf competitors for literary fiction, Norton and Hay House for nonfiction, outside of the Big Five; within, he says—as pretty much all the government's adverse witnesses have before him—he does not single S&S out as a competitor.

DOJvPRH Day 4: Discussing most profitable books, year by year, Tart says: "Of the most profitable books on my 2020 list, three would have advances in the seven figures, two would have advances of \$150K or below."

DOJvPRH Day 4: About a book Tart thought could sell 200,000 copies, that sold 20,000, and for which he paid \$900,000: "I don't think marketing money can create a success," so he didn't throw more at marketing. Marketing money can amplify success, extend it, but not create it.

DOJvPRH Day 4: Best exchange of the trial so far. Judge Florence Pan: "The P&L is really fake. Am I wrong?" Tart, laughing: "No!"

So ends the first week of U.S. v Bertelsmann et al. Which is great, bc my brain is leaking out of my ears. Thanks for following along with me!

DOJvPRH Day 4: Whether I end up back here next week for a few days, I'm not sure. If I do, I will certainly continue this thread! But regardless, [@TheBookMaven](#) will be here, and she'll be doing her own updates. Give her a follow!

DOJvPRH Court Break update: my boss is sending me back to trial for two more days. See you on Monday! In the meantime, one more story to file then back to NYC for some R&R.

DOJvPRH Court Break update: I slept for eight hours two nights running. now sitting on the Acela next to a baby lawyer who "hopes Biden puts more 29-year-olds on the bench." improvement from the consultant? (yes, of course his dad's a sports journo for WaPo. why do you ask?)

DOJvPRH Day 5: <https://t.co/lmdjrzCvDa>



DOJvPRH Day 5: first positive Covid case of the trial. the defense also asks if they can get another day on the court calendar to finish their arguments. TBD on that, says the judge

DOJvPRH Day 5: Prosecution is back up with Tart again at the stand. Re: The Life-Changing Magic of Tidying Up and Where the Crawdads Sing: "While those books may have gotten away from you, they didn't get away from Penguin Random House, right?"

DOJvPRH Day 5: Judge Florence Pan, to Brian Tart "I've heard that the 'anticipated top-selling' books represent only 2% of the books that are published. I was wondering if you could speak a bit about the other 98%." That is, what does the competition look like "below \$100,000."

DOJvPRH Day 5: Judge: "Is it fair to say that there isn't competition for books like that?" Tart says there's some—in the mid-five figures or higher, maybe one other bidder—but there is a lot of home growing. Judge asks if there's a difference in what those authors expect.

DOJvPRH Day 5: Tart: "They have expectations ambitions, just like others on the list," adding, "We have the same conversations with those authors." Judge: "Do you have more leverage with those authors?" E.g. bonuses, royalties? (Can't wait to see these QTs.)

DOJvPRH Day 5: Tart is now explaining the distinction between marketing and publicity to the court.

DOJvPRH Day 5: Defense: "Who does Viking most often lose to?" Tart: "It's a wide range of imprints around publishing," adding: "My feeling is, we lose most often to other Penguin Random House imprints."

DOJvPRH Day 5: Prosecution currently running through emails between Tart and members of other divisions at Penguin Random House suggesting that imprints do, on occasion, coordinate bids. Email: "The agent followed the rules, but PRH is now the main driver of value here."

DOJvPRH Day 5: Don Weisberg, CEO of Macmillan Publishers, takes the stand.

DOJvPRH Day 5: They're gonna bifurcate the testimony, because there are some Macmillan numbers that are redacted, so at some point today, it'll be a sealed court.

DOJvPRH Day 5: Govt asks Weisberg about his time at Random House as COO. Weisberg: "I left without a job." Added: "I had most of the functions a COO has without human resources and legal."

DOJvPRH Day 5: Weisberg distinguishes for the court the difference between "work," "book," and "title."

DOJvPRH Day 5: I'm learning so much about pronunciation at this trial. It's Jon Yay-ged, not Jon Yeah-ged. Who knew? (Someone knew.)

DOJvPRH Day 5: Govt (my paraphrase): Why is publishing LIKE this? Weisberg: "Some of it's business, some of it's history. It's a business of gambling.... It's a business of passion."

DOJvPRH Day 5: Govt: What are the consequences of a book not succeeding? Weisberg: "The consequences are all over the place," depending on what part of the business you're talking about. "It's psyche, it's emotions, it's P&L. When you fail, everybody feels it."

DOJvPRH Day 5: Weisberg, speaking to the changing face of book biz publicity in the internet era: "This is a business of one-to-one, word-to-mouth. It's never been any different, it's just that the devices have changed."

DOJvPRH Day 5: Weisberg on books with high advances that don't make it: "We're a certain-sized company. This is a business of risk. If you make enough big bets and they fail, you have a problem, so we try to make sure we make the right bets."

DOJvPRH Day 5: Weisberg on what happens if a book with a big advance doesn't work out: "If you fail on your big bets, that means others are going to have to work to offset that."

DOJvPRH Day 5: Weisberg on big books bought for smaller advances, and how not every success gets a larger advance: "We may buy a book for less money, but because everybody in the house reads it and loves it, it becomes a big book. It's not always defined by the same criteria."

DOJvPRH Day 5: We are yet again talking about Brandon Sanderson's Kickstarter, to investigate whether it stands as proof that self-publishing is a major competitor to the Big Five.

DOJvPRH Day 5: Weisberg on whether Sanderson will ever have the opportunity to publish books with Macmillan in the future. "Yes. As much as he wants."

DOJvPRH Day 5: Weisberg says PRH is the #1 competitor for Macmillan (shocker). Re: market share, "we look at BookScan...more casually than most." Market share is "not necessarily an arbiter of success for us." Interesting counterpoint to Dohle's insistence on market share.

DOJvPRH Day 5: Talking about dropping from fourth to fifth in the Big Five, Weisberg said Hachette "had an incredible year last year," especially due to acquiring Workman. "Macmillan's philosophy is organic growth, whereas most of our competition's is making acquisitions."

DOJvPRH Day 5: Ah, good ol' key performance indicators. The Key Performance Indicators is, to crib a joke format from [@MarcSollinger](#), the name of my middle school ska band.

DOJvPRH Day 5: Weisberg: "Less competition is going to change the dynamic—two of the major players becoming one. The prices, the advances, the type of competition at the auctions. I think it'll have impact across the board," and guesses advance levels will go down longterm.

DOJvPRH Day 5: Weisberg: "If I'm an agent, and there's one player that's bigger than everybody else...you'll have to change your behavior to deal with that." Testifies that he believes it'll make it harder for Macmillan to acquire books, but that's based on "gut," not experience.

DOJvPRH Day 5: ViacomCBS lawyer is up for cross-exam, buttering Weisberg up in order to take him down. "You have some of the finest imprints in the business, is that correct?" and "How many Nobel Prizes have authors from FSG won? Would it surprise you if I said it was 25?"

DOJvPRH Day 5: Defense notes all of Flatiron's NYT bestsellers as well, and Oprah Winfrey's imprint. Quotes a press release saying Macmillan's successes are "nothing short of spectacular." It's teeing up an argument that Macmillan would still rival proposed PRH-S&S.

DOJvPRH Day 5: Defense is trying to get Weisberg to admit that Scholastic is a competitor, and Amazon "have the resources, if they want to, to acquire high-level books." Those of you following along from last week should recognize this tactic.

DOJvPRH Day 5: Weisberg, getting a bit feisty about defense's questions on whether self-published authors with a broad audience command significant advances should they come to a traditional publisher such as Macmillan: "Define a broad audience."

DOJvPRH Day 5: Brandon Sanderson, the defense attorneys love you almost as much as Karp and Pietsch love Colleen Hoover!

DOJvPRH Day 5: Defense asks if Weisberg believes advances will go down "across the board" regardless of whether it's an auction or exclusive negotiation. Weisberg conflicts with his deposition. Second instance of defense impeaching

Weisberg's testimony today, successfully.

DOJvPRH Day 5: Govt back up—last exchange with Weisberg before court is sealed and I go dark for more than my usual hour lunch. Looks like we're moving quickly today. I imagine we'll even get to start the testimony of DOJ's economic expert, Nicholas Hill.

DOJvPRH Day 5: Weisberg, on Amazon as a publisher: "For a moment in time in 2019, they seemed like they were going to aggressively pursue competition with publishing. They backed off that, or seemingly backed off."

DOJvPRH Day 5: Judge is asking Weisberg, now, about "the other 98%" of books, and not the "2%" the government is focusing on in this case, with auctions of \$250,000. Weisberg: "The differences is primarily at the financial level. We're at auctions every day."

DOJvPRH Day 5: Weisberg, re: acquiring books above \$250,000 vs. at lower levels, and strategies across multiple categories. "It's a different business."

DOJvPRH Day 5: Judge: "Is it any less competitive for the other 98%?" Weisberg: "No.... I don't think there's any editor you'll ever meet that doesn't want to find that future star."

DOJvPRH Day 5: Weisberg, disagreeing with Karp! "\$100,000 to 500,000 is a large advance." That doesn't, however, always go to "celebrities," he concedes. First-time authors get them too.

DOJvPRH Day 5: Judge asks Weisberg if "Sometimes an auction will end with us paying more for a book than we think might benefit us at the time, if they think down the road that author might be special. Adds: "Every auction is different."

DOJvPRH Day 5: Weisberg: "The whole concept of a P&L is an interesting concept." And with that, court is sealed. Back in session at two. <https://t.co/4swh2o1ceo>

DOJvPRH Day 5: Welcome Back. Nicholas Hill is up to testify as a government witness. He's an economic expert. Here's his info: <https://www.bateswhite.com/people-Nicholas-Hill.html>.

DOJvPRH Day 5: Oh great, the man is a very fast talker. Gonna be hard to quote him directly here. Big takeaway, though: his studies confirmed that the proposed merger would significantly decrease competition among "anticipated topsellers" and, as a result, hurt authors.

DOJvPRH Day 5: Hill: "I think self-publishing is too distant" to include as a "reasonable substitute" for a publisher acquiring "anticipated topsellers." Cites horizontal merger guidelines, saying principal of "targeted customers" applies to sellers here as a subset of the market

DOJvPRH Day 5: Oh, it's going to be an afternoon full of economic jargon and charts I can't see.

DOJvPRH Day 5: Hill doesn't believe "arbitrage" is available in this market. Oxford definition: "simultaneous buying and selling of securities, currency, or commodities in different markets or in derivative forms in order to take advantage of differing prices for the same asset"

DOJvPRH Day 5: Hill defined a market under a subset of authors to define this merger because the preferences for these books and "the competitive conditions they face" are different from those for other books, both on marketing side and supply side.

DOJvPRH Day 5: Hill points to Stephen King's testimony as illustrative of the distinction in markets, citing how he brings some of his more out-there horror books, for instance, to indie publishers and not the Big Five, knowing they better know the (smaller) market for them.

DOJvPRH Day 5: Hill: "Advances, as I believe you've heard, your honor, are correlated with expected sales."

DOJvPRH Day 5: Hill cites Publishers Marketplace guidelines, and how publishers "use \$250,000 as an internal threshold" (he didn't name which), as informing his reasoning to distinguish books acquired at that price or above as being part of a different market.

DOJvPRH Day 5: Hill, showing a chart, lays out the government's big argument with his findings: for "anticipated topsellers," non-Big Five companies acquire about 10% of the titles; for all all other books, non-Big Five acquire 45%.

DOJvPRH Day 5: Hill, pointing to another chart I can't see: "You can see that the marketing spent for anticipated topsellers is more than the marketing spent for non-anticipated topsellers."

DOJvPRH Day 5: Hill: "I think there's a reasonable basis for using this particular cutoff," despite defense calling it "arbitrary." Industry "does think of \$250K as a cutoff." Cutoffs differ by publisher, but PM "does use this particular cutoff. The parties use this cutoff."

DOJvPRH Day 5: Hill, explains the "hypothetical monopsonist test" he used to determine his conclusion that a PRH-S&S merger would result in a monopoly; takes into account all other traditional publishers but "does not include self-publishing."

DOJvPRH Day 5: Hill says that his test concludes that, if PRH-S&S merged and became the monopsonist of this market, authors leaving them to go to other publishers in the traditional trade book market, and not for self-publishing, would not affect their dominances of the market.

DOJvPRH Day 5: Or at least I think so? IDK lol damn I wish I'd taken an economics class.

DOJvPRH Day 5: OK a lil explanation. Hill on the "diversion ratio": if one publisher were to lower advances and authors left, the diversion ratio would measure what percentage of those authors would switch to another trade publisher, or to self-publishing.

DOJvPRH Day 5: A question Hill asks in this model is, if PRH lowered advances, would authors leave for self-publishers in high enough numbers that self-publishing could be considered part of the market?

DOJvPRH Day 5: OK, lots of numbers, very heady, burying my head and just trying to keep up for a while.

DOJvPRH Day 5: Hill's market share analysis, looking at all "anticipated bestsellers" in the market from January to 2019 to June 2021, puts the combined share of PRH and S&S at 49% (PRH's 37%, S&S's 12%).

DOJvPRH Day 5: Market concentration calculation: Hill measures post-merger Herfindahl-Hirschman Index for the market for "anticipated bestsellers," finds PRH's for books \$250K and above go from 2,220 to 3,111. Here's some unpacking of what the HHI is: <https://www.justice.gov/atr/horizontal-merger-guidelines-0>.

DOJvPRH Day 5: "Are the parties seeing themselves as competing with one another at a high level?" Hill says yes, provides number of emails justifying the conclusion, including Karp's email about losing a "fourth beauty contest" (remember the "pulchritude" quip?) to PRH in a week.

DOJvPRH Day 5: Govt asks Hill to call back to example used earlier in trial, in which Hachette dropped out of an auction at \$650,000; PRH, S&S compete with each other up to \$825,000. "There are many more examples in my reports," and is "consistent with quantitative evidence."

DOJvPRH Day 5: Hill continues to point to emails from editors guessing on how high other parties might bid as evidence that publishers know that more competitive parties means better terms for authors.

DOJvPRH Day5: An afternoon bogged down with numbers, but the gist from the government we already know. Now Hill is explaining—very gently, I might add—why he believes the defense's expert witness economist, Edward Snyder is "useful, as part of the overall picture," but "flawed."

DOJvPRH Day 5: Snyder "gathered bidding records from agencies," "looking for instances in which there was a bidding record." Hill says "there are times when his sample is not representative." Compares it to a study on height of American men using basketball players as a sample.

DOJvPRH Day 5: Hill says advance depends on second-highest bidder, saying authors will be harmed by merger when PRH, S&S are top two bidders. "If you eliminate one of the parties, the second highest bidder leaves the market, and the price is set by the third highest bidder."

DOJvPRH Day 5: Hill calculated variable profit margin for publishers using title-level P&L data, predicting revenue per title and costs. Model predicted a decrease in advances for all PRH authors to be 4%, and 11% for S&S—that would be \$45K per book at PRH, \$105K at S&S.

DOJvPRH Day 5: For clarity, that's if production costs are assessed as both fixed and variable. This is the point at which I note that I studied poetry and medieval and Renaissance history in college.

DOJvPRH Day 5: We are discussing another model, the "multi-round bidding GUPPI model." I did not know guppies could bid. Anyway, here is some info about GUPPI. This model also finds harm, obviously. I also cannot see the numbers on [this](#) [chart](#).

<https://media.crai.com/sites/default/files/publications/Economic-Tools%20for-Evaluating-Competitive-Harm-in-Horizont>

DOJvPRH Day 5: Judge: "Can I ask a question? Not being a PhD in economics, I don't really understand these models." Preach. "I wonder if the dispute between these parties is really more about the inputs than about the methodologies." Hill says there's dispute about both.

DOJvPRH Day 5: Here's something clear even for me: summarizing primary conclusions on unilateral effects, Hills says he believes all his assessments are "consistent with the conclusion that the transaction will substantially reduce unilateral competition."

DOJvPRH Day 5: Everything is numbers. The universe is so large. My brain is so small. We are nothing but little coughs into the void. The numbers could mean anything. Possibility is endless. What is reality? The house is random. The penguin is named Simon.

DOJvPRH Day 5: Hill, referring to e-book price fixing, says "there's some history here of coordination among the publishers." Notes it was in a different market, but "that ability to reach an agreement, I think, raises the chance that there's a susceptibility to coordination."

DOJvPRH Day 5: The prosecution still has 40 minutes of questions for Hill at some point tomorrow. In addition, HarperCollins CEO Brian Murray will take the stand. We are breaking for the day. My brain, meanwhile, is broken forever.

DOJvPRH Day 5 (addendum): <https://t.co/9jh9CuQL1a>



DOJvPRH Day 6: my final day in court. here's a summary of what's happened so far over at [@PublishersWkly](https://twitter.com/PublishersWkly): <http://pw-ne.ws/fd6b2>

DOJvPRH Day 6: a final day of walking past this bonkers courthouse art <https://t.co/2z4IXSmeLU>





DOJvPRH Day 6: the last (I think??) day with the prosecution in the driver's seat starts with HarperCollins CEO Brian Murray on the witness stand. a blessed break from all the numbers.

DOJvPRH Day 6: "It takes about 2,000 hours for every book" to come together, says Murray, in terms of "time and overhead of our own employees, how much time they spend taking a book to market."

DOJvPRH Day 6: Govt: Is there a publisher that HarperCollins competes with most? Murray: "That would be Penguin Random House." After them? "Simon & Schuster." Are Hachette and Macmillan also competitors? "Yes." Why rank them this way? "Penguin Random House is very large."

DOJvPRH Day 6: Murray: PRH is "maybe three times larger, a little more, than HarperCollins, so they're very active in all the bidding." Says multiple editors, imprints at PRH are often involved. They're always there." "Simon and Schuster, I've found them to be very aggressive."

DOJvPRH Day 6: Judge asks by what measure PRH is three times bigger. Murray says, "I think if you look at market share," and adds that "I've been told by our booksellers as well" that PRH is 3 to 3.5x larger than HC.

DOJvPRH Day 6: Judge: "What about Simon & Schuster?" Murray: "Depends on the year. Sometimes they're a little bigger, sometimes we're a little bigger. We're a very similar size."

DOJvPRH Day 6: What do you need to sell books at a higher price point, where Murray would have to approve deals? "The size of a publisher's backlist is critical to a publisher's stability, and your ability to take these big risks with new authors. It's almost like an annuity."

DOJvPRH Day 6: Murray, on having a sales force: “You want to be able to penetrate the entire American market...to get your book on bestseller lists,” connecting with booksellers nationwide. If you don’t have your own sales force, “a book becomes one of thousands in the bag.”

DOJvPRH Day 6: Murray, on printing: “Being able to respond quickly and replace inventory when there’s tremendous interest in a book is very, very important.” That means having good relationships with your printers, and influence with them.

DOJvPRH Day 6: Murray said News Corp’s bid for S&S was “not close” to beating out Bertelsmann’s bid, the size of which “shocked” Murray. Compared it to M&A activity in the book business over the past few years, said it was “far outside that range.”

DOJvPRH Day 6: Murray, on News Corp’s bid for S&S: “We’ve probably done five or so acquisitions” over the past few years, “and we tend to be very disciplined in our financial model. We could not find a way to have a return at that price.” (The price in question: \$2.17 billion.)

DOJvPRH Day 6? ViacomCBS lawyer cross-examines Murray, who says Harper is still interested in acquiring S&S if PRH merger is blocked. Is 5-to-4 consolidation itself anti-competitive? “No.” Does Murray believe a merger between Harper and S&S would result in lower advances? “No.”

DOJvPRH Day 6: Murray tells defense attorney that his assessment of PRH’s trade business as “three times” bigger than HarperCollins does not include its Christian book business, or Harlequin; it DOES include HMH trade.

DOJvPRH Day 6: FWIW here, defense is grilling him over an internal chart that DOES include both under it; Murray says that document doesn’t reflect general discussions in-house, especially in Christian, where Bibles are such a big part of the business.

DOJvPRH Day 6: Murray, like Weisberg, is squirrely with the ViacomCBS defense attorney, and his flat tone seems to be a bit more successful in pestering him. The number of times “I don’t know” has been said? Also irking him!

DOJvPRH Day 6: Murray tries very hard to wiggle out of an impeachment over inconsistent testimony—in deposition, he says he’ll keep bidding aggressively after the merger should it happen, in his testimony he hedges—but it’s sustained.

DOJvPRH Day 6: Thinking right now for a second about the MBAish “it’s like an annuity” answer and chuckling a little to myself at the distinct personalities of all these CEOs, each of which has each gotten the spotlight over the past week. Real bummer to not hear from Madeline.

DOJvPRH Day 6: To that point: when Christy Fletcher testifies today, she will be the third person who is not a cis white man to testify during this entire trial, after Ayesha Pande and Liate Stehlik. We’ll have been in court, in total, for 36 hours as of the end of the day today.

DOJvPRH Day 6: For clarity, that’s the third person FROM PUBLISHING. We also had a woman govt analyst testify. Anyway, enough attempts to contextualize lol but I think the point here is fairly clear: more Big Five CEOs have testified in this trial than women.

DOJvPRH Day 6: Been a lot of the same questions to Murray as to the rest of the CEOs, albeit a few more about distribution. Here’s a new one: asked about whether there are sometimes good reasons for one bidder (PRH) to offer more for M&A than another (Harper), he says yes.

DOJvPRH Day 6: Defense asks, rhetorically, if the Bible is a backlist title. Judge giggles. Murray proceeds to explain how the Bible can actually be a frontlist title. Judge calls the morning recess lol

DOJvPRH Day 6: Question from Judge Pan: Why would you publicize that you’re going to spend more on books, as Harper did during the pandemic? Why wouldn’t you just go into more auctions, spend more, win more books?

DOJvPRH Day 6: Murray: “We felt that with the pie of what consumers were spending growing that much, it was a terrific time to be expanding organically. There was no better time to make a statement like that to send a message to all the agents in the industry.”

DOJvPRH Day 6: Judge: If the overall advance spending went down in the industry, how would it affect Harper’s budget? “It’s so hard to say.” Budgets are almost “title by title” for the next year, Murray says—VERY specific. (This stands in contrast to Tart’s testimony.)

DOJvPRH Day 6: Murray: for the year after next fiscal, budgets are vague. Doesn’t know if he’d have excess money “a quarter or two after a possible merger.” HC is not getting real-time reports back, and the financial success of the company is “often up to two or three books.”

DOJvPRH Day 6: Murray "Auctions are going fast and furious." Fun little quote. We're headed into a closed session now.

DOJvPRH Day 6: We're back. Oh no. The economist is back.

DOJvPRH Day 6: Govt lawyer: "May we approach with the binders?" Judge: "There are new binders?" Govt lawyer says no. Judge: "Good. You scared me there for a minute." I'm still scared, your honor.

DOJvPRH Day 6: Hill says ability to manage risk, plus reputation and breadth of marketing and distribution, makes difference in "anticipated topseller market." He quotes Dohle: "By publishing a lot of titles, you can manage your risk, because you are not dependent on a few."

DOJvPRH Day 6: Hill concludes that the likelihood of small publishers expanding to mitigate some of the effects of the merger is "low." Their collective market share over time is "small," and "that market share hasn't changed."

DOJvPRH Day 6: Hill says that, "however you cut the advance levels, the share of the non-Big Five publishers is 10% or less." On another note, apparently it's **#NationalBookLoversDay?**

DOJvPRH Day 6: Hill says "Amazon's attempted entry into publishing" is "useful to understanding some of the barriers to entry" to the trade book biz given Amazon's success as an organization more broadly.

DOJvPRH Day 6: Hill says he doesn't think it's likely that the other Big Five will "have the incentive to expand in response to the anticompetitive effect" of the PRH-S&S merger. Cites Pietsch, Murray testimonies: "They're unlikely to have incentive to bid more aggressively."

DOJvPRH Day 6: Hill says he believes the defense's economist's argument is that entry and expansion into the market for anticipated topsellers is "easy." Hill says there is no significant evidence of that.

DOJvPRH Day 6: Govt economist: "Agents feature in many different markets, your honor, and they don't have a magic wand." Yes, they know their advantages and they know how to leverage them, but "if there's significant reduction in competition, they can't fix that."

DOJvPRH Day 6: He's arguing this point further. I'm going to lunch.

DOJvPRH Day 6: Just kidding. I stayed for his summary: "My conclusion is that the transaction is likely to significantly reduce competition in the market for anticipated topsellers," and that a reduction of competition is likely to hurt authors. OK NOW lunch.

DOJvPRH Day 6: I'm late back from lunch. I confess it. It's because I had a feeling I knew what was coming. And I did: The defense is going, example by example, through Hill's data points to try to disprove his argument.

DOJvPRH Day 6: Astra House is, as per Hill, one of the defense's economic expert's four examples of houses that have "successfully broken through" into the "anticipated topseller market." I suppose the others would be Spiegel & Grau, Zando, and Zibby?

DOJvPRH Day 6: The Judge has asked whether Hill is the right witness for the defense attorney to be interrogating, since he is not a publisher. The defense attorney says he's getting to the point. Right now, the point is that Astra has bought some books for \$250,000 or more.

DOJvPRH Day 6: The Judge again reminds the attorney that Hill is not a publishing industry expert. "I don't understand why you keep asking him questions like this."

DOJvPRH Day 6: Hill: "I would say it's more challenging for the non-Big Five to service that segment" above \$250K, arguing evidence shows that Big Five most frequently acquire these books and that the industry, by and large, believes Big Five are best suited to serve those books.

DOJvPRH Day 6: Hill: "If they were just bigger and bought more books, non-anticipated bestsellers I would expect to look more similar. What I take away from this is, we see authors of anticipated bestsellers systematically choosing differently than non-anticipated bestsellers."

DOJvPRH Day 6: In response to the above, the Judge: "Or is it just the case that the biggest ones have the most money?"

DOJvPRH Day 6: Oh, look! **@PublishersWkly** article cited in the defense's cross-examination. (They're trying to use it to categorize Disney as a competitor.) The article in question: <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/86108-disney-launches-an-adult-i>

DOJvPRH Day 6: Defense is arguing that all non-Big Five houses in the U.S. are as big as S&S and, thus, comprise a Big Six. Hill disagrees. "They're not one firm. If you were to merge them into one firm and calculate an HHI...the

concentration in the market would go up."

DOJvPRH Day 6: All the other publishers in the country outside of the Big Five, Hill says, "win collectively as often [as a Big Five publisher], but individually they win significantly less often." Defense is now asking him hypotheticals about if he was an editor in an auction.

DOJvPRH Day 6: Defense asks Hill what he would think about going up against S&S if he were a PRH editor in an auction. Hill: "If I was Penguin Random House, I'd be thinking about how often I'd lost to Simon & Schuster in the past."

DOJvPRH Day 6: Defense gives some numbers: over past three years, 30 pubs have purchased books in the proposed anticipated bestseller market; third largest advance in that time was paid out by a non-Big Five publisher; 47% of the time, PRH and S&S didn't bid against each other.

DOJvPRH Day 6: Defense is using Snyder's study, data on acquisitions he derived from agencies, as distinct from Hill's data, argue that PRH loses more to HarperCollins than to S&S. Hill agrees the data say that. He also thinks the data is incomplete, and the conclusion incorrect.

DOJvPRH Day 6: Defense is aiming to prove that Hill's "second score auction model" only shows harm in cases when PRH and S&S are the top two bidders. Hill says yes, but the model analyzes past data and predicts harm to authors across auctions above \$250K in aggregate.

DOJvPRH Day 6: To my prior point about PRH US CEO Madeline McIntosh not testifying yet, the defense, according to a rep, intends to call her when they take over.

DOJvPRH Day 6: Judge Pan, attempting to understand Hill's model, applies the second-score auction" format to EVERY acquisition. Hill says that it's fair to say it does, and that it then extrapolates the results in aggregate.

DOJvPRH Day 6: I don't do economics. I do enjambments. I don't know if this model is accurate or inaccurate, or more or less accurate than the model Snyder will produce later. I do know each side employing each model wants that model to help it win. Also: https://en.wikipedia.org/wiki/Lies,_damned_lies,_and_statistics

DOJvPRH Day 6: Judge asks why, if bilateral negotiations are more common in the business, why he didn't build a model based on them? Hill says he tried, and a "first-price auction" model, and an "omnibus" model, and could not solve those models without more data.

DOJvPRH Day 6: We are onto the defense working to discredit Hill's GUPPI findings now, but FWIW, at this point, I'm not so sure the judge is convinced by the way Hill chose to build his model.

DOJvPRH Day 6: Herein comes the part of the trial where GUPPI is said so many times in a row hallucinatory fish start to float around the courtroom. "You did not use the GUPPIs?" "Did you consider using the GUPPIs?"

DOJvPRH Day 6: I have the feeling that we're not going to get to Christy Fletcher's deposition today. We're still deep in the weeds of the defense's cross-examination of Hill's testimony. Ending with real "not with a bang but a whimper" energy here.

DOJvPRH Day 6: If only the last afternoon I'll livetweet had been more exciting. But it's been a wild ride! Some updates, before I wrap. Last govt witness testifies tomorrow, then defense takes over. We're basically on time. Closing arguments next Friday? Maybe following Monday?

DOJvPRH Day 6: For more info, check out the case page: <https://www.justice.gov/atr/case/us-v-bertelsmann-se-co-kga-et-al>. And [@PublishersWkly](#) will obviously continue covering. [@TheBookMaven](#) will be at court the rest of the week. And all our updates will go here: <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/90032-doj-v-prh-all-our-coverage>.

DOJvPRH Day 6: After this week, I'm not sure how [@PublishersWkly](#) will cover, because my mind, body, and spirit all go on vacation on Friday for three weeks, and my twitter probably will too. In the meantime, DM or email me—[jmaher AT publishersweekly DOT com](mailto:jmaher@publishersweekly.com)—with qs, thoughts, etc

DOJvPRH Day 6: Defense: "Let's talk about the outputs of both models." Nicholas Hill: "Sure!" Me: NOPE. One last story to file, one last train to take, and I'm out of here. Thanks for following along with me.