APPENDICES

PART ONE: THE BEGINNING

PROLOGUE

For three short but endless weeks in August 2022 in the E. Barrett Prettyman Federal Courthouse in Washington, DC, something extraordinary occurred in Courtroom 12. Eight publishing CEOs; four publishers; six literary agents; other executives; and two economics experts took the stand to answer questions about how publishing works. The focus was the market for high-advance "anticipated bestselling books" [ATSB, in the accepted terminology]. But the testimony broadly covered how publishing works and sometimes doesn't work; the competitive landscape among publishers large and small; and the process through which literary agents sell books to publishers, along with some insights into corporate publishing plans for the future.

The point of the proceedings was to determine whether Judge Florence Y. Pan will block Penguin Random House from acquiring Simon & Schuster as a violation of the Clayton Antitrust Act. A verdict is not due until November, and a likely appeal would postpone final adjudication of the matter until well into 2023.

No matter what the outcome, The Trial was the biggest industry event in a decade. For those of us following along, it was exciting and tense and boring and illuminating and hilarious and infuriating and ridiculous. We laughed, we cried, it was much better than *Cats*. For many it has been the summer obsession, mostly riveting, if occasionally unsettling. Ironically it was "Must See TV" that no one outside of a few dozen court-going stalwarts actually saw.

At Publishers Lunch, we covered the day-to-day developments fairly exhaustively, writing about 35,000 words over three weeks, and we shared some relevant trial transcript excerpts as well. But the full record of the proceedings was not publicly available and has likely been read in full by a similarly small audience. Everyone followed the trial, but almost no one knows everything that happened.

So in the great book publishing tradition of preserving and sharing landmark papers and reports, the staff of Publishers Lunch presents this massive compilation of The Trial, supplemented by a revised version of our own daily coverage, along with other key pre- and post-trial documents.

We believe it is important to preserve and share the complete account of What Happened In August. (Or, in this case, nearly complete: Portions of the trial were closed to the public, and some testimony came from taped depositions, which were transcribed ahead of time for the court and not included in the daily, live transcripts. Also, some material, including key bits of data, was either redacted entirely, or shown quickly on hard-to-view slides. The exhibits officially admitted into evidence—about 800 pages worth, across 150 files—were published to the court docket on September 9, right as we were completing this book. (A selection of key exhibits has been appended at the end of this book.) As book people, we all value the significance of the full, narrative record. Plus, the collected testimony and supplementary coverage presented here stands as one of the best books on publishing we have ever read—and, as you will see, one of the longest.

For the sake of readability, we have edited out daily "court business" and smoothed out or even corrected some of the speech informalities. (Some of our favorite changes included substituting "backless" for "backlist"; BookTalk for "BookTok"; and guppies for "GUPPIs.") While the testimony is presented in chronological order, we have organized each person's testimony into individual chapters, regardless of whether they appeared on one or more days.

The testimony and all of the related exhibits and documents was riveting—and revealing—to anyone interested in the business of book publishing. The answers were constrained by the questions being asked and the very nature of an antitrust case, but along the way plenty was revealed.

For all the bluster and amusing quotes, real jobs and real advances and careers are potentially at stake whatever the outcome. (As we learned, there is perhaps 2000 hours of work involved from both the author and the publishers on each and every book, whether anticipated sales are large or modest.)

While we all wait to see exactly what happens to PRH's ambition to acquire S&S, everyone in publishing will be wrestling with what happened those three weeks in Washington. It's important to understand that this was not "publishing on trial" or a "publishing trial" of any kind: This was an antitrust trial. (The DOJ's John Read actually addressed some of this in the beginning of his closing argument.) It sounded like us in publishing, but it wasn't really about us.

Antitrust trials are technical and complicated and have little to do with the nuances of the businesses involved. They are about market definition, market concentration and market constraints, and about

pricing power and econometric models. Most of the witnesses work in publishing, but all of the testimony was defined and constrained by the questions asked. The witnesses were all prepped with key case points in mind, and it's the rare person who can speak naturally when sitting in a courtroom on the witness stand. The government's case relied on reasserting a small number of key points and trying to put words in people's mouths—or take words from the occasional discovery document and give them great import; just as the defense's case was focused on poking holes in those DOJ points and reinforcing a few simple contrary points.

The government brought a very focused case about the small set of authors and deals that win contracts of $250,000 or more every year (or about 1200 projects a year, as we learned). It was the DOJ, not anyone in publishing, that had no regard—in an antitrust case—for the other tens of thousands of authors and books brought to market every year.

Trial by tweet is an incomplete way for the broader community to experience and assess what happened these past three weeks, and publishing will be reckoning with some of the soundbites for some time to come. (A simple example is the reference to non-big-five publishers as "farm teams." The line comes from a long memo the late Carolyn Reidy wrote to her boss at CBS as the company was preparing to merge back with Viacom, in a document designed to make her business sound as a good as possible. It was introduced before the trial—in fact, it was quoted in the DOJ's original complaint. The publishing executives asked about that remark at trial rejected both the term and the idea it represented, as did Viacom's attorney Stephen Fishbein in his closing on Friday.) But we were left with a fulsome supply of pull-quotes and slights without context—and authors, and agents, and staff and trading partners will all need context and care in the days to come. This book is intended to help provide that context.

SETTING THE SCENE

Before the trial began on August 1, we compared the must-follow proceedings to the closely-watched January 6 hearings that had recently wound down for recess just four-tenths of a mile away. In our day-to-day coverage, we dubbed the trial A3 for brevity (August/Antitrust; three weeks of trial)—and suggested it could be viewed by many in publishing in a similar vein as J6: A laborious investigation culminates with a public airing of findings that few expect to alter the course of the events, no matter what they might hope for or believe is just. Just like J6, however, we predicted, the case made at A3 will matter for putting things on the record, and it just may surprise us all. Indeed, by the third week of the trial, within the courtroom Judge Florence Pan appeared to be aligning herself with many of the prosecution's key arguments.

Also like J6, as we predicted, A3 did indeed include a few surprise witnesses, some redacted material, taped depositions played in court, and some odd or embarrassing stories and quotes that will not bear on the actual outcome but will still be hard to forget.

Monopsowhat?

Back in those innocent days of July, 2022, most people in publishing (and the world at large) were pretty unfamiliar with monopsony, which is the formal basis of the Department of Justice's case.

In their original complaint, the DOJ alleged that allowing PRH to acquire S&S "would likely result in substantial harm to authors" by "leaving hundreds of authors with fewer alternatives and less leverage." They suggested that the combined company would be a monopsonist: "A hypothetical monopsonist of anticipated top-selling books would profitably reduce advances paid to authors of anticipated top-selling books by a small but significant, non-transitory amount."

So what is monopsony? Simply put, monopsony is a market dominated by a single buyer—whereas monopoly is a market dominated by a single seller. As this document from the FTC puts it, "A 'monopsony' is a single (or dominant) buyer dealing with multiple sellers. In important respects, monopsony is the mirror image of monopoly." A monopolist "forces up the market price for what it sells by restricting the amount it produces" while a monopsonist "forces down the market price for what it buys by restricting the amount it buys."

There are very few controlling monopsony cases or precedents that would guide the court in a case like this. But the case against PRH is more than just a standard merger challenge, as evidenced by Attorney General Merrick Garland making the announcement of the action last November. The Biden Administration has proclaimed a more aggressive position that concentration in general is hurting the American economy and installed more pro-active regulators with both Lina Khan as chair of the FTC and Jonathan Kanter as leader of the DOJ's Antitrust Division.

And in the White House's 2022 economic report, a full chapter (No. 5) focuses on the lack of competition in labor markets in particular as a key focus for remedy: "Increased enforcement of antitrust laws would also alleviate labor market monopsony and therefore its negative effects on wages, equality, and race- and gender-based pay gaps. . . . It can also be used to block mergers that would concentrate labor markets excessively and to penalize large employers that use illegal methods to obtain or maintain labor monopsonies. Though some of these uses of antitrust law have been rare until recently, the Executive Order on Promoting Competition calls for agencies to make greater use of antitrust law to promote competition in labor markets. For example, the DOJ and the FTC have begun the process for revising the merger guidelines, and have called for public comment on labor market implications. . . . These and other polices can begin relieving the historical burdens on disadvantaged groups of workers, helping to reduce inequality and bolster economic output and growth."

So this is no ordinary case for the DOJ, but rather what they hope will be a signature case in paving the way for more monopsony-based actions that look to preserve competition for workers (rather than the previous focus on worrying solely about prices to consumers).

For some more background on monopsony and the judicial standards to be applied, a friend pointed us to this journal article by University of Tennessee College of Law distinguished professor Maurice E. Stucke, "Looking at the Monopsony in the Mirror." As he notes in the introduction, "Despite the increasing interest in monopsony and buyer power, relatively few cases have actually been brought. Given the relatively few antitrust cases, the legal standards for monopsony claims are less developed than