

EXHIBIT A

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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| United States of America, |) | Civil Action |
| |) | No. 1:21-cv-02886-FYP |
| Plaintiff, |) | |
| |) | |
| vs. |) | <u>Pretrial Conference</u> |
| |) | |
| Bertelsmann SE & Co. KGaA, |) | |
| et al. |) | Washington, D.C. |
| |) | July 25, 2022 |
| Defendants. |) | Time: 10:00 a.m. |

**Transcript of Pretrial Conference
Held Before
The Honorable Florence Y. Pan
United States District Judge**

A P P E A R A N C E S

For the United States: **John R. Read**
Ihan Kim
Melvin A. Schwarz, I
Amanda Strick
Robert P. Vance, Jr.
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For the Defendants Bertelsmann SE & Co. KGaA and Penguin Random
House, LLC: **Daniel M. Petrocelli**
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(appearances continued on the next page)

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A P P E A R A N C E S, continued

For the Defendants Bertelsmann SE & Co. KGaA and Penguin Random House, LLC (continued):

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P R O C E E D I N G S

1
2 THE COURTROOM DEPUTY: Your Honor, this is Civil Case
3 No. 21-2886, United States of America v. Bertelsmann SE & Co.,
4 et al.

5 Starting with plaintiff's counsel, please approach the
6 podium and introduce yourselves for the record.

7 MR. READ: Good morning, Your Honor. It's good to
8 see you in person.

9 John Read for the United States. If I can introduce my
10 colleagues. Bobby Vance and Amanda Strick. They will be here
11 today with confidentiality expertise to help you analyze those
12 issues.

13 Than Kim is with me at the table. He'll help me with
14 logistics regarding trial.

15 And then behind me is Mel Schwarz, who will handle the
16 Snyder motion *in limine* argument.

17 THE COURT: Good morning. Thank you.

18 MR. PETROCELLI: Good morning, Your Honor.

19 Daniel Petrocelli for Penguin Random House and
20 Bertelsmann. And with me from O'Melveny are Megan Smith,
21 Abby Rudzin, Dan Cantor, Randy Oppenheimer, Andy Frackman,
22 Drew Breuder, and Jefferson Harwell. I may have missed
23 somebody. Hopefully, I won't the next time.

24 Also, I'd like to introduce some of my clients,
25 Your Honor.

1 THE COURT: Yes.

2 MR. PETROCELLI: We have Markus Dohle, who is the
3 global chief executive of Penguin Random House. We have
4 Anke Steinecke, who's general counsel of Penguin Random House,
5 and we have Matthew Martin, who is deputy general counsel of
6 Penguin Random House.

7 THE COURT: Okay. Good morning.

8 MR. PETROCELLI: Thank you.

9 MR. FISHBEIN: Good morning, Your Honor. Steven
10 Fishbein, Shearman & Sterling. I represent ViacomCBS and Simon
11 & Schuster. And with me from Shearman & Sterling are
12 Ryan Shores, Rachel Mossman, Mike Mitchell, and in the back
13 Daniel Chozick and Noni Nelson.

14 THE COURT: Okay.

15 MR. FISHBEIN: Thank you, Your Honor.

16 THE COURT: Good morning.

17 All right. This is my first in-person hearing since the
18 pandemic. So I'm pleased to be back in the courtroom and ready
19 to get started on this case. I know the parties all have been
20 working extremely hard on this, and I appreciate all your
21 efforts.

22 So today, just some preliminary matters about COVID
23 restrictions. I'm mindful that we're, sort of, undergoing a
24 new COVID surge, and I do want to note that I'm going to
25 require everyone in the courtroom to be wearing an N94 or N95

1 mask going forward. You can -- I want people to keep their
2 masks on at all times. You can take it off when you're
3 speaking, or you can leave it on if you're speaking. It's
4 going to be up to you. But I want to make sure that we're
5 being safe.

6 Also, during the trial, I want to require everyone
7 coming to the courtroom to take a rapid test in the morning
8 before you come. This will be on the honor system, and if
9 you're positive, don't come.

10 I think that we will be having the technology to tune in
11 by Zoom, which we are trying out today with some third party --
12 third-party representatives, who I'm just noticing there are a
13 lot of them here. Good morning to you-all too.

14 And so I want to make sure that we're using best
15 practices to all stay safe during this trial. And I am looking
16 into having an overflow courtroom where there will be a feed,
17 and I want the parties to think about how many lawyers you need
18 to have in the courtroom at any given time. You don't need to
19 answer me today, but I think that we should try to limit that
20 number. And maybe you can meet and confer and tell me how many
21 people we need to have in the courtroom at any given time,
22 assuming that we can have an overflow courtroom so other
23 people, who want to participate, can be there to watch the
24 proceedings.

25 Yes, Mr. Read.

1 MR. READ: If I may on that, Your Honor. With regard
2 to that, Your Honor, I do believe -- I apologize. With regard
3 to that, Your Honor, I do believe that at least for the first
4 couple of days of trial, there will be a lot of media interest
5 and third-party interest, and so an overflow room will probably
6 be necessary to accommodate them as -- at least until the trial
7 gets underway, I think there will be a lot of attendance
8 outside of just counsel.

9 THE COURT: Thank you for telling me that. I think I
10 talked to John Cramer, who's the guy in charge of these things
11 for the courthouse, this morning, and he's working on it.
12 Apparently, there's some other trials going on, which are
13 taking up more than one courtroom, and he's going to get back
14 to me later today. And so, hopefully, we'll have that ability
15 to have an overflow courtroom.

16 Okay. So for today's hearing, I thought that we would
17 start with third-party confidentiality issues, since we have a
18 number of third parties who are interested in that issue and
19 present via Zoom, and then we can move on to motions *in limine*,
20 and then trial procedures and logistics.

21 Is there anything else I should add to that agenda, or
22 does that pretty much cover everything for today?

23 Okay. Hearing no objection -- okay. Wait.

24 Mr. Petrocelli. Yes.

25 MR. PETROCELLI: It's not an objection, Your Honor,

1 but I thought it may be helpful to the Court if I could briefly
2 update you on the status of the confidentiality issues.

3 We -- both sides have been diligently working to
4 de-designate as much as possible. As you can imagine, during
5 the discovery process, pretty much everything was designated
6 confidential and highly confidential by -- by us, by the
7 parties, by third parties; and we made a lot of progress over
8 the last several days in de-designating much of our -- the
9 parties' -- the defendants' information down to the bare
10 minimum. And we've made progress working with the third
11 parties in the order in which the witnesses will be called.

12 So for the first week of witnesses, by way of example,
13 we're -- we're almost in complete agreement with the third
14 parties and their counsel on how to handle the confidential
15 information, essentially limiting it to very specific pieces of
16 information which would not be disclosed publicly; and there
17 are different ways in which we can handle the elicitation of
18 that evidence. By way of example, we could not mention an
19 author's name or an amount of an advance. We can anonymize a
20 lot of the information, and Your Honor will have the benefit of
21 seeing documents unredacted. So you'll have the actual record,
22 but certain things don't need to be spoken out loud.

23 So we received -- the Court received 26 letters.

24 THE COURT: Twenty-eight.

25 MR. PETROCELLI: Yes. And we haven't even been able

1 to digest most of them. So we figured we're just proceeding in
2 sequence, working with the government, working with the third
3 parties, and I think we're making good progress.

4 THE COURT: Okay. I appreciate that. Thank you,
5 Mr. Petrocelli.

6 I had some thoughts about how -- maybe we could adopt
7 some general procedures that would address some of the concerns
8 in the letters.

9 Is there something you wanted to say? I'm sorry. Can
10 you identify yourself again.

11 MR. VANCE: Yes, Your Honor. Bobby Vance for the
12 United States.

13 THE COURT: Okay. Mr. Vance, go ahead.

14 MR. VANCE: We agree that we've made a lot of
15 progress on de-designating the transcripts. On Friday the
16 government had proposed a modification to the process in the
17 pretrial order to try to deal with some of the objections that
18 we've received to the third -- from the third parties. We
19 don't have agreement on that process, but we think it's a good
20 idea.

21 The process would be to provide third parties 72 hours'
22 notice of when their materials would be used with a
23 meet-and-confer requirement, and then the ability of the third
24 parties to appear before the Court the morning their materials
25 would be used. The reason we think this is a good idea is,

1 first, it's not a substitution for all the hard work that's
2 happening now. We agree that we should be working diligently
3 to try to get these issues resolved now.

4 But as you saw, there's a lot of different issues. We
5 think, as we've discussed previously, every confidentiality
6 ruling by the Court is going to resolve ten behind it. So we
7 think a 72-hour process would just force the parties back to
8 the bargaining table to refine their confidentiality positions
9 and, hopefully, reach resolution.

10 We think this is a particularly good idea because, you
11 may have noticed, a lot of the third parties are here simply
12 because of exhibits on defendants' witness list, which are
13 charts created by their expert, Dr. Snyder. It's very possible
14 those exhibits won't be used at trial, but to the extent they
15 are, I'm assuming that most of them will be used with
16 Dr. Snyder on -- during his exam, which will be at the end of
17 trial.

18 So we think by then, we'll have lots of guidance from
19 the Court as to your views on confidentiality, and that will
20 help us resolve a lot of these Snyder charts closer to when
21 they might be used; and we'll, hopefully, appease a lot of the
22 third parties here today.

23 THE COURT: Okay.

24 MR. VANCE: And then, finally, we think this process
25 is responsive to some of the objections to the -- by the third

1 parties, such as Hachette and Bloomsbury, about not being
2 involved in the meet-and-confer process in the pretrial order
3 or having notice as to when their materials will be used. And
4 we think this will create more efficient examinations because
5 it will allow the parties -- the third parties to raise their
6 issues in the morning rather than raise a bunch of
7 confidentiality objections during the examinations.

8 So that -- that's our recommended process to the Court
9 in these third-party issues.

10 THE COURT: Thank you. I think that's a good idea,
11 and it has the benefit of addressing issues, sort of, in real
12 time, like, as they arise.

13 Do you have any objection to that approach,
14 Mr. Petrocelli?

15 MR. PETROCELLI: Not in principle.

16 There is one aspect to which we would object, and that
17 is, we are not going to disclose in advance passages of
18 deposition testimony that we might use to cross-examine or
19 impeach a witness. I don't know that that's being suggested.
20 I doubt it, but certainly documents and things of that --

21 THE COURT: Of course.

22 MR. PETROCELLI: And really what we're trying to do
23 is go through the entire deposition transcripts with the third
24 parties and identify what parts they really think are truly
25 confidential, and then we can work around that. But we

1 certainly are not going to affirmatively disclose pieces of
2 testimony that we might use. So that's the process we've been
3 working through.

4 THE COURT: Okay. Of course. And I would not expect
5 you to disclose what you want to use for impeachment on
6 cross-examination.

7 MR. PETROCELLI: Okay. Thank you.

8 THE COURT: But let me ask the parties this: Because
9 as I -- you don't have to stand here, Mr. Petrocelli.

10 As I was looking through the 28 letters that were sent
11 to the Court, it seemed like a lot of the concerns that were
12 being expressed could be dealt with by just implementing some
13 general procedures such as: I understand that there's an
14 Exhibit H to the joint pretrial statement. It's entitled -- I
15 think it was -- Stipulation Regarding Disclosure at Trial of
16 Confidential Information of Non-Parties.

17 And Exhibit H takes pains to protect the identities of
18 authors. It specifically talks about authors. "The Parties
19 will not disclose the identity of an author in public filings
20 or in open court . . . that connects that author's identity
21 to . . . financial details."

22 "Parties [will] use pseudonyms or otherwise mask the
23 identity of the author" when disclosing financial details. And
24 parties will redact trial exhibits shown in court or filed
25 publicly "so that the author's identity cannot be connected to

1 . . . Financial Details."

2 My question to the parties is: Is there any reason why
3 the protections in Exhibit H should not be extended to
4 third-party publishers and to agents? Because that seems to be
5 a lot of what I see in these 28 letters. They just want to be
6 anonymized, and I think that this would go a long way towards
7 addressing their concerns.

8 MR. VANCE: At least to agents, we've made progress
9 on that front and have an agreement with defendants that we
10 will anonymize agent names, unless they're a witness at trial
11 or necessary to a witness examination. But we're in agreement
12 that we can do that for agent names.

13 With respect to publishers, there's, frankly, just a lot
14 of Snyder exhibits, and we're not -- we don't have a firm
15 position yet on how much of it -- it is appropriate to redact
16 yet. It's certainly a procedure that we're open to, but it's
17 hard to commit at this point because there's a lot of --

18 THE COURT: Right.

19 MR. VANCE: -- potential exhibits from the smaller
20 publishers that could go up during the examination.

21 THE COURT: So while I have you here -- and I'll give
22 Mr. Petrocelli a chance too -- my second thought was that it
23 seemed that a lot of the objections from the third parties
24 related to the raw data files of Dr. Snyder. And I'm
25 wondering, does it make sense to seal the raw data files of

1 Dr. Snyder, and would that go a long way towards addressing
2 these issues?

3 MR. VANCE: I don't think that we would have
4 objection to sealing the raw data files. I think that -- and I
5 don't want to speak for Dr. Snyder, but I think certain of the
6 exhibits are aggregate data from the raw data files, so it
7 really doesn't -- the exhibits themselves don't necessarily
8 require keeping them under seal.

9 Part of the issue here is we can't show the third
10 parties, necessarily, the exhibits because they're
11 confidential. So some of them don't -- might not have this
12 objection if they could actually see what the exhibits looked
13 like. But we're not opposed to sealing the raw data files and
14 then taking the individual exhibits on sort of a case-by-case
15 basis to see if we can anonymize them in a way that would
16 satisfy the third parties.

17 THE COURT: Okay. Let me hear from Mr. Petrocelli on
18 that.

19 MR. PETROCELLI: Your Honor, we agree that the raw
20 data files should be sealed.

21 THE COURT: Okay. Thank you.

22 So if we extend Exhibit H to publishers and agents and
23 we seal the raw data files, and then we incorporate the process
24 that the government has suggested to deal with things as they
25 come up on a case-by-case basis, with an understanding that

1 nobody has to reveal information they intend to use for
2 impeachment or on cross-examination -- because that would ruin
3 your impeachment or cross-examination. I wouldn't expect you
4 to do that -- I think that that would go a long way towards
5 addressing these issues.

6 Let me just confirm with the parties. Do we agree on
7 that approach? And then I can ask the third parties.

8 MR. PETROCELLI: If I understand, Your Honor, with
9 respect to the extending of Exhibit H, I think you said it
10 was --

11 THE COURT: Yes.

12 MR. PETROCELLI: -- to publishers; right?

13 THE COURT: Yes.

14 MR. PETROCELLI: That would be in connection with
15 particular acquisitions, so --

16 THE COURT: Yes.

17 MR. PETROCELLI: Okay. Because publisher names are
18 going to be freely discussed.

19 THE COURT: Yes. I mean, I think Exhibit H talks
20 about disclosing identities in connection with financial
21 details, and so it would be in connection with financial
22 details.

23 MR. PETROCELLI: Yes. Okay. That's fine.

24 THE COURT: Okay.

25 MR. VANCE: I do want to clarify the same issue. I

1 mean, the -- the stipulation was designed towards, you know,
2 the book -- individual book acquisition process. So, you know,
3 we're in agreement there.

4 But to the extent there are charts by the experts that
5 has more generalized financial data of these publishers that's
6 not tied to a specific book acquisition -- for example, there
7 might be a chart that says the 70 publishers that produced data
8 spent X amount on anticipated top sellers -- we wouldn't think
9 that that type of information should be under seal.

10 THE COURT: Okay.

11 MR. VANCE: So it's not all --

12 THE COURT: Well, wouldn't that be subject to your
13 process where you --

14 MR. VANCE: Yes.

15 THE COURT: -- would reveal that to the third parties
16 and then they could object, if they want to, about that?

17 MR. VANCE: Yes. Absolutely.

18 THE COURT: Because I would think that aggregated
19 information would not bother them. I could be wrong. But they
20 would have an opportunity to address that.

21 MR. VANCE: Right. So I just want to make clear that
22 the revision to the stipulation -- extending the stipulation
23 would be more in this specific book acquisition process, that
24 it was meant for -- for the authors and agents, and not a
25 general discussion of financial details. Not that we're

1 getting into that granular level with these publishers, but
2 that is the extent of the stipulation.

3 THE COURT: Okay. So I wonder if -- so that
4 everybody is on the same page -- the parties should meet and
5 confer and do a version of Exhibit H that includes publishers
6 and agents, to the extent that everybody agrees, and also
7 outlines the process that you're going to follow to give them
8 notice of each day's exhibits, and notes the caveat that that
9 won't include impeachment information.

10 And maybe you can meet and confer about what to do about
11 impeachment information that includes identifying information.
12 Maybe we can use a Rosetta stone for that. I don't know. But
13 I want the parties to maybe meet and confer and provide this
14 all in writing so that the third parties can all see it.

15 MR. VANCE: We can do that.

16 THE COURT: Okay. Okay. So having said all of that,
17 I just want to suggest to the third-party representatives --
18 and I'll just note, for the record, I see -- let's see -- 21
19 people on the Zoom who I believe are -- are representatives of
20 third parties who have confidentiality interests in this case.
21 I would suggest that you-all wait and see the new written
22 stipulation about how these are going to be handled, and I'm
23 happy to so order that once everybody agrees on what that is.

24 I think that the process that we've discussed today
25 should protect your interests, especially given that you should

1 be given specific notice about confidential information that is
2 proposed to be used on any given day, and have an opportunity
3 to discuss that with the parties and bring it to my attention,
4 if it is not appropriately dealt with from your perspective.

5 And so I would suggest that you look at what they come
6 up with in writing, first, and then you would have an
7 opportunity to raise additional issues with me, but if there's
8 anybody among the third-party representatives who wish to be
9 heard at this time, I'm happy to hear you. You can just raise
10 your hand.

11 Okay. And I see no response. Thank you. So I'll --
12 I'll leave it to you to take a look at what the parties come up
13 with in writing, and you'll have an opportunity to raise
14 additional issues with me. You can always email the chambers,
15 or you can do it through the parties through the process that
16 they've discussed today.

17 Looks like Mr. Mitnick would like to be heard. Go
18 ahead, Mr. Mitnick.

19 MR. MITNICK: Thank you, Your Honor. Joel Mitnick.
20 I represent --

21 THE COURT: I'm sorry. Who do you represent? You
22 cut out.

23 MR. MITNICK: Sorry. I represent Macmillan
24 Publishers, and I am affiliated with Cadwalader, Wickersham &
25 Taft.

1 Just a logistical question, Your Honor. If the Court
2 endorses the 72-hour proposal of the government with counsel
3 making objections to the Court in the morning of the day of
4 testimony, will the Court permit that argument to be made by
5 Zoom, or must counsel attend in Court, which could require
6 multiple trips from wherever counsel happens to be?

7 THE COURT: Okay. I would allow you to do that by
8 Zoom or by telephone.

9 MR. MITNICK: Thank you.

10 THE COURT: Okay. Thank you.

11 Anything else from the third-party representatives on
12 Zoom?

13 Okay. Thank you. I appreciate you being here today,
14 and I will look forward to hearing from you if you have any
15 other concerns. You're all excused. Thank you.

16 MR. MITNICK: Thank you, Your Honor.

17 THE COURT: Okay. So let's move on -- oh, I should,
18 I think, for the record, do a *Hubbard* analysis, because I think
19 what I'm contemplating doing will involve sealing the raw data
20 files, as well as potentially redacting or sealing identifying
21 information in the record. So I think, for the record, I do
22 need to perform a *Hubbard* analysis and do an on-the-record
23 weighing of the different considerations at issue.

24 So the relevant factors do weigh in favor of sealing
25 evidence that reveals confidential business information of

1 third parties to these proceedings. I'm referring to
2 information that relates to amounts offered, committed, or paid
3 in connection with the book contract or any specific financial
4 details of an actual book contract or actual auction for a book
5 contract. I think it's appropriate to seal evidence that
6 reveals the identities of the parties involving -- involved in
7 any such transaction.

8 So the relevant legal standard is as follows: The
9 starting point in considering whether to seal court records is
10 a strong presumption in favor of public access to judicial
11 proceedings. The presumption recognizes that the right of
12 public access is a fundamental element of the rule of law,
13 important to maintaining the integrity and legitimacy of an
14 independent judicial branch.

15 Although the presumption is a strong one, it is not
16 absolute, and it may be outweighed in certain cases by
17 competing interests. And this is especially true where court
18 files might become a vehicle for improper purposes, such as
19 where court files serve as sources of business information that
20 might harm a litigant's competitive standing. That's *Nixon v.*
21 *Warner Commc'ns, Inc.*, 435 U.S. 589 at 597-98 (1978).

22 So the decision to access is left to the discretion of
23 the trial court, but the D.C. Circuit established a six-factor
24 test in *United States v. Hubbard*, which is at 650 F.2d, 293
25 (D.C. Cir. 1980).

1 And that test requires the Court to weigh the following
2 factors: First, the need for public access to the documents at
3 issue; second, the extent of previous public access to the
4 documents; third, the fact that someone has objected to
5 disclosure and the identity of that person; fourth, the
6 strength of any property and privacy interests asserted; fifth,
7 the possibility of prejudice to those opposing disclosure; and
8 sixth, the purposes for which the documents were introduced
9 during the judicial proceedings.

10 As for the first *Hubbard* factor, the Court can discern
11 no need for the public to access the specific details of any
12 particular book contract or at least the identities of the
13 parties involved in any given transaction. As a result, the
14 requests to anonymize or otherwise protect the confidential
15 information of third parties to this case do not gravely impact
16 the public's access to the overall lawsuit, nor does the
17 decision to seal certain evidence that reveals confidential
18 information adversely affect the public's right to public
19 access.

20 The second *Hubbard* factor looks to whether, when, and
21 under what conditions the public has already had access to the
22 records. The information at issue here has never been made
23 publicly available. To the contrary, the information at issue
24 is routinely kept secret to avoid competitive injury.

25 The third *Hubbard* factor concerns whether anyone objects

1 and the identity of the objectors, and that weighs strongly in
2 favor of sealing the information because there are numerous
3 third parties who have expressed their concerns and objections
4 to the Court. This is not their case, and they have provided
5 the information to the parties with the understanding that it
6 would remain confidential.

7 The fourth and fifth *Hubbard* factor is concerning the
8 strength of the interests and possibility of prejudice are
9 often considered together, and they also weigh in favor of
10 limiting access under these circumstances. The third parties
11 assert a strong interest in maintaining the confidentiality of
12 competitively sensitive and granular information about their
13 bids, offers, and contracts, and they note they will be
14 prejudiced by the disclosure of such information.

15 And, notably, whereas here, a third-party's interest in
16 the confidentiality of its proprietary information is at stake,
17 "Courts commonly permit redaction of that kind of information."
18 That's *MetLife*, 865 F.3d at 671.

19 And, finally, the sixth *Hubbard* factor considers the
20 purpose for which the document is to be introduced. Here the
21 evidence at issue will be introduced to assess the relevant
22 market at issue and the alleged anticompetitive effects of the
23 proposed merger. The details of each book contract, however,
24 including the identity of the parties to each transaction, will
25 not be significant in the Court's decision-making. That's in

1 the Court's view. All the relevant factors weigh in favor of
2 sealing the confidential business information of third parties
3 to this action, to the extent that it reveals the identities of
4 authors, publishers, and agents involved in individual
5 contracts, negotiations, or auctions.

6 Does anybody want anything in addition on my *Hubbard*
7 factor analysis? The parties are shaking their heads.

8 Okay. So thank you.

9 Let's move on, then, to motions *in limine*. So I issued
10 a minute order on Friday to let the parties know that I was
11 planning to rule on these without oral argument, except for
12 one, and so I would propose just to roll through the five that
13 I'm going to rule on now, and then we'll address the one that I
14 do want to hear some argument on.

15 The first is ECF No. 95. This is the government's
16 motion *in limine* to preclude evidence of Penguin Random House's
17 announced bidding policy.

18 I may be referring to Penguin Random House as PRH and
19 Simon & Schuster as S&S as I make these rulings.

20 In September of 2021, amid competitive concerns
21 regarding Penguin Random House's acquisition of Simon &
22 Schuster, PRH CEO Markus Dohle announced that PRH imprints and
23 legacy Simon & Schuster imprints will be allowed to bid against
24 one another for the purchase of books if the merger is
25 consummated. That's the announced bidding policy. PRH

1 currently lets its imprints bid against one another until the
2 PRH imprints are the only remaining bidders, at which point
3 they stop bidding against each other. But the new announced
4 policy would let them continue bidding, even after they're the
5 only remaining bidders.

6 The government argues that evidence of PRH's announced
7 bidding policy should be excluded as irrelevant and
8 inadmissible because it's a unilateral, unenforceable promise
9 that does not align with profit-maximizing incentives. The
10 government argues that the cases cited by defendants to admit
11 evidence of its bidding policy involve enforceable or bilateral
12 agreements. But the Court has reviewed the cases, and some of
13 them do involve courts, including the District Court for the
14 District of Columbia, considering unenforceable or unilateral
15 agreements on their merits. So the Court does not think that
16 there's a blanket rule against admitting this type of evidence.

17 And so it comes down to relevance. The Court concludes
18 that the unenforceability of the bidding policy goes to weight
19 and not admissibility. It, potentially, has some relevance,
20 and it will, therefore, deny the government's motion to exclude
21 evidence on the announced bidding policy.

22 Number 2, ECF No. 96. That's government's motion *in*
23 *limine* to exclude the expert testimony from Jennifer Rudolph
24 Walsh.

25 Jennifer Rudolph Walsh is an experienced literary agent

1 who's an expert witness for defendants. In her report, she
2 criticizes the assumptions made by Dr. Hill in his expert
3 report for the government, claiming that they do not reflect
4 real conditions in the industry. In addition, she makes
5 various predictions about the effects of the merger, such as
6 that it will have no impact on author advances, the overall
7 health of the industry, or the number of unique books published
8 each year.

9 The government argues in its motion to exclude
10 Ms. Walsh's expert testimony that she is not qualified to
11 criticize Dr. Hill's economic analysis and should not be
12 allowed to provide conclusions about the merger's impact
13 because she's not an economist, has only worked as an agent,
14 and provides no methodologies or references to the record to
15 support her ultimate conclusions.

16 In their opposition, the defendants argue that Ms. Walsh
17 is qualified as an expert because agents oversee and direct the
18 book acquisition process. She personally has sold or
19 supervised book sales at all advance levels -- including
20 thousands for 250,000 or more -- and she's not providing her
21 own economic analysis but, rather, showing that the premise
22 underlying Dr. Hill's economic analysis do not align with
23 actual industry practices.

24 In its reply the government argues that Ms. Walsh's
25 testimony should be limited to her experience and knowledge of

1 the industry as a fact witness rather than as an expert about
2 legal or economic matters that she's not qualified to discuss.

3 The following are some portions of Ms. Walsh's report
4 that the government argues she is not qualified to testify
5 about. First, "It is my opinion informed by my 30 years of
6 experience as a top literary agent, that the merger will not
7 adversely impact competition in the acquisition of books by
8 publishers." That's Exhibit B, the Walsh report at page 3,
9 paragraph 8.

10 Second, she says, "It is my opinion that the merger will
11 not result in fewer books being published. In my experience,
12 writers write books even if they receive a lower advance than
13 they had hoped or even if there is no publisher for that book.
14 Writing is a creative outlet for authors, and a decrease in the
15 number of publishers in the market will not impact their
16 output." That's the Walsh report at 36, paragraph 124.

17 And the third example is, "If all of the five -- Big 5
18 publishers closed their doors tomorrow, writers will still
19 write, readers will still read, and the absence of a competitor
20 or competition will have no adverse impact on the industry."
21 That's the Walsh report at page 37, paragraph 125.

22 Federal Rule of Evidence 702 regarding the testimony of
23 expert witnesses provides, quote, a witness who is qualified as
24 an expert by knowledge, skill, experience, training, or
25 education may testify in the form of an opinion or otherwise

1 if: (a) the expert's scientific, technical, or other
2 specialized knowledge will help the trier of fact to understand
3 the evidence or to determine a fact in issue; (b) the testimony
4 is based on sufficient facts or data; (c) the testimony is the
5 product of reliable principles and methods; and (d) the expert
6 has reliably applied the principles and methods to the facts of
7 the case.

8 The inquiry under 702 is flexible, ultimately concerning
9 the evidentiary relevance and reliability of the principles
10 that underlie a proposed submission. That's from *Daubert v.*
11 *Merrell Dow Pharmaceuticals*, 509 U.S. 579 at 595 (1993). The
12 relevant factors in the Court's gatekeeping function under
13 *Daubert*, "depend on the nature of the issue, the expert's
14 particular expertise, and the subject of her testimony." And
15 that's *Daubert* at 151.

16 If the witness is, "relying solely or primarily on
17 experience, then the witness must explain how that experience
18 leads to the conclusions reached, why that experience is a
19 sufficient basis for the opinion, and how that experience is
20 reliably applied to the facts."

21 That's *Rothe Dev., Inc., v. Dep't of Def.*, 107 F. Supp.
22 3d 183 (D.D.C. 2015). And that's quoting the Federal Rule of
23 Evidence 702's advisory committee note from 2000.

24 "The trial court's gatekeeping function requires more
25 than simply taking the expert's word for it. The more

1 subjective and controversial the expert's inquiry, the more
2 likely the testimony should be excluded as unreliable." That's
3 *Twin Cities Bakery Workers Health & Welfare Fund v. Biovail*
4 *Corp.*, 2005 WL 3675999 at 4. That's D.C. District Court,
5 March 31st of 2005.

6 So the Court finds that Ms. Walsh is qualified to
7 testify as an expert about industry practices. Through such
8 testimony, she may challenge the factual premises underlying
9 Dr. Hill's model and its resulting conclusions. The following
10 cases support this proposition: In *SR Int'l Bus. Ins. Co. v.*
11 *World Trade Ctr. Props., LLC*. That's 467 F.3d 107 at 132 to
12 134 (2d Circuit 2006). An expert was qualified based on
13 31 years of experience in the insurance industry to testify
14 about customs and practices in the insurance industry.

15 In *FTC v. Whole Foods Mkt., Inc.* -- that's 502 F. Supp.
16 2d 1 at 13 (D.D.C. 2007), expert testimony was upheld about the
17 industry, more generally, that did not discuss the facts of the
18 particular case because the state of the industry itself was an
19 important factor in that case. That case was reversed on other
20 grounds at 533 F.3d 869 (D.C. Cir. 2008).

21 In *Bazarian Int'l Fin. Assocs., LLC v. Desarrollos*
22 *Aerohotelco, C.A.*, 315 F.3d 101 at D.D.C. (2018), an expert's
23 reliance on his extensive experience in the industry was
24 sufficient to support opinions about industry, customs, and
25 standards.

1 So I think all of these cases support the idea that
2 Ms. Walsh can testify about industry, customs, and standards
3 and, thereby, indirectly challenge the conclusions of Dr. Hill
4 based -- because his assumptions do not match industry reality.

5 None of the cases cited by defendants, however, supports
6 allowing Ms. Walsh to testify about more technical areas such
7 as relevant markets, the competitive effects of the merger, or
8 predicting what will happen because of this merger.

9 So the Court finds that Ms. Walsh is not qualified to
10 testify about relevant markets or to opine about the
11 competitive effects of the merger. That conclusion is
12 supported by two cases that were cited by the government,
13 *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 214 F. Supp. 2d 530
14 at 538. That's from the District of Maryland in 2002. In that
15 case the District of Maryland held that a proffered expert
16 witness was not qualified to opine on the relevant market
17 because he lacked training or experience in antitrust or
18 economic analysis. The Court reasoned that general business
19 experience unrelated to antitrust economics does not render a
20 witness qualified to offer an opinion on complicated antitrust
21 issues such as defining relevant markets.

22 And also a second case, *Va. Vermiculite Ltd. v. W.R.*
23 *Grace & Co.-Conn.* That's 98 F. Supp. 2d 729 at 740, Western
24 District of Virginia from 2000. In this case, the court
25 declined to qualify a witness as expert in antitrust economics

1 given his lack of antitrust experience and training. In this
2 case, the Court found that a proffered expert witness was not
3 qualified to conduct antitrust analysis because "He lacked a
4 clear understanding of basic economic principles."

5 So in sum, the Court will grant in part and deny in part
6 the government's motion to preclude Ms. Walsh from testifying
7 as an expert. Ms. Walsh may testify as an expert about
8 industry practices, but she may not offer opinions about
9 relevant markets or the likely competitive effects of the
10 merger.

11 Third motion, ECF No. 98. This is defendants' motion
12 *in limine* to strike belated expert opinion applying GUPPI
13 analysis. The initial expert report by the government's
14 expert, Dr. Hill, offered an opinion on the impact of the
15 merger using a second score auction model. We'll call that
16 SSA. The rebuttal by the defendants' expert, Dr. Snyder,
17 criticized the applicability of the SSA model to the publishing
18 industry, and the reply by Dr. Hill reaffirmed the validity of
19 the SSA model by, in part, offering an alternative GUPPI model
20 that arrived at results similar to those reached by the SSA
21 model.

22 The defendants argue that Dr. Hill's use of the GUPPI
23 model and the reply should be excluded as new evidence provided
24 for the first time in a reply. They argue that it is
25 unreasonably delayed and prejudicial because it should have

1 been included in the initial expert report. Defendants contend
2 that the reply should be limited to the SSA model, as it was
3 the only methodology employed in the initial expert report and
4 the only methodology criticized in the defendants' rebuttal.
5 The defendants also claim that the GUPPI model's late inclusion
6 in the June 23rd reply did not give them enough time to produce
7 a written report countering it given the August 1st trial date.

8 The government disagrees with defendants on the
9 allowable scope of analysis in a reply. They argue that a
10 reply can include any material, including new methodologies of
11 analysis that is on the same subject matter raised by the other
12 party and that is used to contradict the other parties'
13 assertions. Because the GUPPI model is used to confirm the
14 validity of the SSA model that Snyder targets in the rebuttal,
15 the government argues that it concerns the same subject matter
16 and is, thus, properly included in the reply.

17 The government further argues that defendants were able
18 to depose Hill a week before he submitted his reply; that
19 defendants were aware of the existence and workings of the
20 GUPPI model because it was developed by their own economists
21 during the precomplaint investigation; and that the defendants
22 could have used all the time they've spent arguing to exclude
23 the GUPPI model on having Dr. Snyder prepare a written
24 rebuttal. Defendants received the reply on June 23rd for an
25 August 1st trial date, and defendants note in their motion to

1 strike on page 5, that, "GUPPI is the easiest factor to measure
2 simply and quickly."

3 The case law reviewed by the Court supports the
4 government's position that Dr. Hill's reliance on a new
5 methodology in his reply was permissible under the
6 circumstances. Those cases include: *Little v. Washington*
7 *Metro. Area Transit Auth.*, 249 F. Supp. 3d 394 at 416. That's
8 D.D.C. (2017). In a discrimination suit, the plaintiffs in
9 that case had an expert, Dr. Farber, who submitted an initial
10 expert report with statistical modeling to show discrimination.
11 This was attacked by defendant's expert in her rebuttal report,
12 but the defense expert did not propose her own model.

13 In reply, the plaintiffs not only had a new methodology,
14 but a whole new expert to employ that new methodology,
15 Dr. Siskin, in order to support the initial report. The Court
16 allowed this over objection stating, "District courts routinely
17 permit new experts for rebuttal purposes and permit rebuttal
18 experts to use new methodologies to rebut the opinions of the
19 opposing expert." And that case cited *South Carolina v.*
20 *United States*, No. 12-203, 2012 WL 11922224 at page 2, which is
21 D.D.C., August 15th, 2012. And also *Scott v. Chipotle Mexican*
22 *Grill, Inc.*, 315 F.R.D. 33. That's Southern District of
23 New York (2016). And that case also permitted the use of a new
24 expert and new methodology in rebuttal.

25 The following additional cases stand for the same

1 proposition of allowing new methodologies, analyses, and
2 evidence to be used in an expert's reply: *United States v.*
3 *Philip Morris, USA Inc.*, 2022 Westlaw 1101730, D.D.C.,
4 April 13th, 2022. And *Allstate Ins. Co. v. Shah*, 2021 WL
5 4555177. That's District of Nevada, October 5th of 2021.

6 So moving on to the next motion, ECF No. 99. This is
7 government's motion *in limine* to exclude use of
8 printing-related evidence. I'm sorry. Defendants' motion
9 *in limine* to exclude use of printing-related evidence.
10 Defendants move to preclude evidence of the printing
11 capabilities of Bertelsmann and printing market conditions
12 generally because the government did not disclose certain
13 information in its possession regarding a prior transaction in
14 that industry; the proposed merger of Quad/Graphics, Inc. and
15 LSC Communications, Inc., in 2019. The government says that
16 printing capabilities are undeniably relevant in this case and
17 that it produced all evidence about printing that it gathered
18 to the defendants.

19 The government contends that the alleged dispute is
20 about information in an unrelated antitrust case which the
21 government could not produce due to statutory constraints and a
22 protective order in the other case.

23 The government asserts that it met and conferred with
24 defendants about this evidence and told defendants to seek the
25 information from others who are not so constrained, and the

1 government further notes that defendants never made a motion to
2 compel production of the evidence in question; so the evidence
3 should not be excluded for an alleged discovery violation.

4 The defendants erroneously rely on Rule 37(c) of the
5 Federal Rules of Civil Procedures which provides that if a
6 party fails to provide information or identify a witness as
7 required by Rule 26(a) or (e), the party is not allowed to use
8 that information or witness, unless the failure was
9 substantially justified or is harmless. That rule, in this
10 Court's view, is not applicable because the government is not
11 trying to admit the information it failed to disclose, and this
12 is not information that was provided or not provided under
13 Rule 26(a) or (e). Rather, the defendants are complaining of
14 an alleged failure to provide information that they requested
15 during discovery. That's under Rule 34. And so the defendants
16 should have made a motion to compel discovery under Rule
17 37(a) (3) when they did not receive the information that they
18 now deem to be important.

19 Rule 37(a) (3) provides that a party seeking discovery
20 may move for an order compelling an answer, designation,
21 production, or inspection. This motion may be made if a party
22 fails to produce documents as requested under Rule 34.

23 Here, the defendants have not demonstrated how the
24 information about the Quad/Graphics and LSC merger is relevant
25 or why the proposed sanction is proportional or appropriate.

1 In any event, the Court concludes that the defendants may not
2 seek the severe sanction they propose based on an alleged
3 discovery violation that they do not properly litigate.

4 Because defendants never moved to compel the production of the
5 evidence at issue, they're not entitled to ask for sanctions.
6 And so the defendants' motion to exclude evidence of
7 printing-related evidence is denied.

8 Okay. ECF No. 102 is a sealed motion. The sealed
9 motion is granted. The ruling -- this ruling follows from the
10 reasoning and ruling from my previous sealed order, which is
11 ECF No. 84. Also, the government's theory of relevance is
12 weak, and the evidence at issue is, thus, substantially more
13 prejudicial than probative under Rule 403. So that motion is
14 granted.

15 Okay. So that covers all the motions *in limine*, other
16 than the one regarding Dr. Snyder's testimony. Does anyone
17 want to state anything, for the record, regarding my rulings on
18 the first five motions *in limine*? Okay. Both parties are
19 saying no. Thank you.

20 So let's move on to Dr. Snyder's testimony about
21 efficiencies. I'm not sure what's the best way to proceed
22 here. I have some specific questions, but I guess we have time
23 to entertain a little bit of general argument before I get
24 there. So would you like to present your argument?

25 MR. SCHWARZ: Good morning, Your Honor. Mel Schwarz

1 for the United States. May it please the Court.

2 Defendants' economic expert, Dr. Snyder, has two parts
3 to his testimony, one of the economic parts, which we're not
4 addressing today, and the other are the efficiencies portions,
5 which we are.

6 THE COURT: Yes.

7 MR. SCHWARZ: We put aside today the government's
8 view that there is a serious question about whether or not an
9 efficiencies defense exists at all in this case and that --
10 Your Honor is probably familiar with the *United States v.*
11 *Anthem*, in the D.C. Circuit -- and that's a question for
12 another day that we hope we don't have to come to, but we may.

13 THE COURT: Okay.

14 MR. SCHWARZ: And this is particularly an issue with
15 respect to the fact that this is a dominant number one position
16 in the publishing industry seeking to buy another major
17 competitor, where there's an even more serious question whether
18 efficiencies are relevant at all. But let's move on from that.
19 I didn't want to forego that issue.

20 There are three problems with Dr. Snyder's testimony.
21 The one -- and the most important part, I think, in terms of
22 getting your -- easiest to get our arms around, is Dr. Snyder
23 admits in -- twice in his report -- there's no question about
24 it. We're just going to put up the *H&R Block* decision. So
25 it's nothing terribly controversial, but I wanted to refer to

1 it, make it easier to see, and easier for me to read, frankly.
2 But without -- without getting -- before I get to that, for one
3 second, Your Honor, the -- I wanted to note that he admits that
4 he does not verify any -- any -- of the quantification of any
5 of these things. And that, Your Honor, is fatal -- fatality,
6 if you will, number one, as judge chief -- now Chief Judge --
7 then Judge Howell -- said in *H&R Block*. After quoting --

8 THE REPORTER: Hold on. Hold on, Mr. Schwarz. Do
9 you mind using -- do you mind using the mic?

10 MR. SCHWARZ: In other words, a cognizable efficiency
11 claim must represent a type of cost saving that could not be
12 achieved without the merger, and the estimate of the predicted
13 saving must be reasonably verified by an independent party.

14 THE COURT: Yes.

15 MR. SCHWARZ: That, in particular, has been followed
16 by three other judges in three other antitrust cases in this
17 court, Your Honor: Judge Bates, Judge Mehta, and Judge
18 Chutkan. And the cases that we've cited -- I won't go through
19 them all. But that is -- that is totally established law,
20 quite familiar to defendants before this case arose.

21 There's a reason for this. First of all, because of --
22 the efficiencies defense is so questionable to begin with, we
23 need to be sure what we're doing. And you -- as Judge Howell
24 says -- Chief Judge Howell -- we need to -- we can't rely
25 merely on management; because at the end of the day, if we did,

1 Your Honor would be having a boatload of cases here in which
2 they will come up with the numbers they need to justify their
3 merger. So we need an independent expert who doesn't have a
4 stake in the venture to discuss that.

5 Even in those cases, Your Honor, there is -- there's
6 no -- nothing in this district that I know of, and literally
7 anywhere, where anybody approves an otherwise anticompetitive
8 merger because of even verifiable efficiencies.

9 All right. Secondly -- the second problem is that
10 there -- he -- the model that he -- Dr. Snyder relies on, which
11 he cleverly calls an efficiencies model, which no one else ever
12 before his -- that has ever called that the efficiencies model.
13 The parties -- the people who wrote it called it an investment
14 model. But it was dated November 2020; presented to the
15 Bertelsmann board as the justification for the price being
16 paid. That has been updated many times by PRH -- if I may call
17 them PRH -- itself; and even by the lawyers in this case, in
18 submissions before this case started, to the DOJ. None of
19 that -- none of that is included in his report. It is
20 completely outdated and unreliable.

21 The third problem, Your Honor, is that Dr. Snyder comes
22 up with a ratio, which I won't get into the specifics of,
23 because I think there's some confidentiality issue, but it's a
24 ratio of advances to net revenues. It's a ratio that, to our
25 knowledge, has no basis in economics. And Dr. Snyder certainly

1 couldn't come up with any citations of anything like that. And
2 it makes no sense, just as a matter of simple economics. The
3 price of an input has its own competitive issues, has nothing
4 to do with the net revenues of a company, which has all sorts
5 of other factors related to it.

6 So -- but he -- he says for three years, there's a
7 stable ratio there and that explains why -- and, again, I won't
8 repeat the number, but a substantial portion of the cost
9 savings calculated by an internal person would thereby get you
10 to a significant efficiencies number that would be passed on.

11 THE COURT: To others.

12 MR. SCHWARZ: To others. Well, let's -- we'll come
13 back to others, because that's another problem, Your Honor.

14 THE COURT: Okay.

15 MR. SCHWARZ: And -- so that ratio is not stable
16 after the merger of Penguin Random House in 2013. It starts to
17 go down. It's flat for the three years Dr. Snyder
18 cherry-picks. And then it goes down again. So, in fact, it's
19 a lot lower than it was. The point being, it's not stable.

20 So I think we've largely covered going back, then, to
21 each of these three problems. We've covered number one. I
22 think it's fairly simple and straightforward. The merger
23 guidelines call for verification. The defendants' response
24 seems to be something like, well, as long as somebody can
25 verify them. It's not the government. I think they're saying

1 Your Honor has to do it. That's exactly what every judge in
2 this district has rejected. No, I need somebody independent to
3 verify, explain it. And even then, it's a very difficult and
4 onerous thing to do.

5 THE COURT: Well, the word is verifiable.

6 MR. SCHWARZ: The verified [sic] is verifiable.
7 Although, as Your Honor can see, the -- there is an interesting
8 semantic question, but I view it as it's able to be verified,
9 and the question is by whom.

10 THE COURT: Yes.

11 MR. SCHWARZ: And every judge who's faced that issue
12 in this district has said it has to be an independent party.
13 It's the defendants' burden to prove. Obviously, the
14 government did not accept those efficiencies. We wouldn't be
15 here if we did, and that leaves it between Your Honor and some
16 witnesses.

17 THE COURT: Yes.

18 MR. SCHWARZ: And I -- I point you to Chief Judge
19 Howell's view of this, again, adopted by everyone else who's
20 looked at it.

21 THE COURT: I understand.

22 MR. SCHWARZ: That's not enough.

23 THE COURT: So I do think that the government's
24 arguments have some force here, which is why this is the motion
25 that I wanted to hear some oral argument on.

1 But there is the issue of whether I should rule on this
2 now or wait to actually hear the testimony from the experts;
3 and it seems that perhaps it would be more prudent given that
4 this is kind of a big ruling to hear the testimony of the
5 experts before deciding this. And what is your response to
6 that?

7 MR. SCHWARZ: Indeed, that was going to be my last
8 point. So I'll get to it right now.

9 The answer is, Your Honor, defendants have caused the
10 government and this Court to operate on what we consider to be
11 a quite expedited time schedule. We also have a chess clock
12 now where we have 38 hours to present our case and bear the
13 burden of proof.

14 We know where this is going to end up. I mean, perhaps
15 I'm overstating it, but I think the path is clear. There is
16 no -- I'm not dealing in disputed facts here. Everything I've
17 told Your Honor is based on an undisputed fact. There --
18 Dr. Snyder testified in his deposition, as well as in his
19 report, that he didn't verify any of the numbers here. That is
20 the end of the story, as far as we're concerned, as to his
21 testimony.

22 So is Your Honor going to hear what probably is -- I'm
23 just guesstimating, you're going to have to hear Dr. Snyder's
24 testimony about this, the cross-examination of that; I believe
25 two of the PRH's witnesses; then our rebuttal expert. We're

1 going to spend a significant chunk of time on this case. And
2 then Your Honor is going to have to spend a significant number
3 of -- amount of time, unless you just want to deal with it this
4 way, dealing with efficiencies, which are not going to make
5 this case, Your Honor.

6 I don't think there's any question about that. It's not
7 going to make this case happen. There is just not enough
8 evidence. So it's time to -- to cut it off now so that we can
9 focus on what is really going to matter in this case, which
10 Your Honor has limited time to deal with after we're done.

11 THE COURT: Thank you.

12 So my thought in response to what you just said is that
13 we could, when we get to this part of the trial, require the
14 defendants to focus, first, on the issue of verification, and
15 we could make a ruling based on that before we get into the
16 rest of it.

17 MR. SCHWARZ: Well, that would -- that would
18 certainly be preferred to anything more broad than that.
19 I -- I would say it doesn't save us from having to prepare for
20 the entire cross-examination.

21 By the way, it may also deal -- help -- not help us deal
22 with -- unless it comes -- they come later. There are --
23 there's Mr. Sansigre, the author of the model on which
24 Dr. Snyder is basing his testimony. I believe he may come
25 first, if I remember right. And then there's a Mr. Malaviya,

1 who is the COO of PRH, and I -- I suspect he's going to talk
2 about this issue as well.

3 If they come first, we will have to cross-examine them
4 on that issue as well. I don't know if Your Honor wants to
5 hear all that; that -- that will come first.

6 THE COURT: To be honest, like, I don't think the
7 record is very clear about how Mr. Sansigre did this. I know
8 your theory is that he kind of pulled it out of his head, but
9 there is a -- and notably, I think, that the response from
10 Dr. Snyder is kind of vague. It was, you know, about exactly
11 where these numbers came from, and I'm kind of interested in
12 that. And the record doesn't reflect it in the reports. Your
13 position is probably if it's not in the reports, they should
14 lose this motion.

15 MR. SCHWARZ: Yes.

16 THE COURT: But I hesitate to make such a
17 consequential ruling without hearing some evidence.

18 MR. SCHWARZ: Could -- Your Honor, could we deal at
19 least with the verification issue before Mr. Sansigre
20 testifies, or -- or do you -- I don't know if you want to hear
21 him first. I mean, that will be the other question, in my
22 mind.

23 THE COURT: I'm sorry. So what are you proposing;
24 that Dr. Snyder should testify about verification before
25 Sansigre testifies about what the numbers are?

1 MR. SCHWARZ: Yes, Your Honor. Maybe we can do it --
2 I don't know. I don't know which way -- if Your Honor is
3 interested in Mr. Sansigre, let's do him first.

4 THE COURT: Okay. Let me hear from defendants.

5 MR. SCHWARZ: Okay.

6 THE COURT: Thank you.

7 MR. FRACKMAN: Good morning, Your Honor. Andrew
8 Frackman for defendants.

9 THE COURT: Good morning, Mr. Frackman.

10 MR. FRACKMAN: Pleasure to be here. Pleasure to be
11 in person.

12 THE COURT: Yes.

13 MR. FRACKMAN: I don't agree with anything that
14 Mr. Schwarz said, as the Court might expect. He cites and the
15 government cites no case where a court on a *Daubert* motion
16 excluded the defendants' proffer of efficiencies evidence. All
17 of these cases -- *H&R Block* -- was -- were on the merits --
18 *Cisco* -- on the merits after a full trial, after all the
19 evidence was heard, Point 1.

20 Point 2, the Court correctly corrected Mr. Schwarz. The
21 test is not that it -- the efficiencies claimed have to be
22 verified. They have to be verifiable. That is what the
23 Department of Justice itself says. That is what all of the
24 cases say.

25 And why is that? It's because when you're in court, as

1 we are now, we're not before the department -- we have to
2 prove -- we have to present evidence of the reliability of the
3 efficiencies we claim. They have -- we have to present
4 evidence that they're merger specific; that they're not
5 fantasy. Those are evidentiary issues that the Court has to
6 make findings on. The department is no longer making findings
7 on this. The Court has to make a finding with respect to the
8 substantiation of any efficiencies claimed.

9 THE COURT: But do you agree that it's your burden to
10 substantiate?

11 MR. FRACKMAN: It's our burden to present evidence.
12 I should say that efficiencies -- we can dispute the cases are,
13 I would say, not totally clear with respect to whether
14 efficiencies can be a separate defense. But they all -- in
15 this district, they all say the same thing; that they are
16 relevant to the evaluation of the government's claim of
17 competitive effects, which the government always has the burden
18 of proof on.

19 We, of course -- if we're claiming that -- that
20 offsetting efficiencies exist, that we have to present the
21 evidence, that that evidence has to be persuasive. We have to
22 meet -- we have to show that those efficiencies are more likely
23 than not or reasonably likely to occur.

24 THE COURT: Thank you. But if it's your burden to
25 substantiate and to show that it's verifiable, doesn't that

1 imply that you have to show that it's verifiable, which --

2 MR. FRACKMAN: Yes.

3 THE COURT: What Mr. Schwarz said was verified by
4 who.

5 MR. FRACKMAN: Yes. So that --

6 THE COURT: What's your view of that? You think I
7 have to verify this --

8 MR. FRACKMAN: That is a --

9 THE COURT: -- or who has to do this?

10 MR. FRACKMAN: Sorry. I didn't mean to interrupt,
11 Your Honor.

12 That is a very fair question, and I think it's
13 worthwhile. If I could take a couple of minutes to provide a
14 little bit of context as to how this evidence is, in fact,
15 going to come in at trial because -- and we take our share of
16 the blame on this. The briefing was not crystal clear on what
17 is actually going to happen next week or the week after when
18 we're in court. So if I could take a couple of minutes, I
19 think it will be helpful to the Court.

20 At the outset, of course, we will show there's no harm,
21 there's no competitive harm, resulting from the transaction.
22 That's long before we get to efficiencies. We're going to
23 contest the relevant market. We're going to contest Dr. Hill's
24 estimate of harm.

25 But in addition, we are going to present evidence of

1 efficiencies flowing from the transaction. And as the Court
2 can assume, reasonably assume, from a \$2.2 billion acquisition,
3 there are some efficiencies. We certainly believe the evidence
4 will show there are substantial efficiencies. The starting
5 place for efficiencies evidence is not Professor Snyder. It's
6 the testimony of the Penguin Random House executives who spent
7 hundreds of hours analyzing the proposed acquisition and
8 developing a rigorous and robust model that projects the
9 efficiencies flowing from the acquisition.

10 Mr. Sansigre is the principal author of that model.
11 This is not some fly-by-night effort. Mr. Sansigre has
12 analyzed over 200 M&A transactions, over a hundred in the
13 publishing industry, and has brought to this model, this
14 projection of the efficiencies, the learning of two-dozen
15 publishing acquisitions that he led the analysis of and that
16 Penguin Random House has closed in the last few years.

17 In every one of those cases, he used a model similar to
18 this one. In every one of those cases, Penguin -- well, with
19 the exception of perhaps one -- Penguin Random House ultimately
20 outperformed the projections in the model. This is a proven,
21 established, real-world model. And, actually, the guidelines
22 say that the actual work, business work, is more reliable, more
23 persuasive than something done just for litigation.

24 THE COURT: Let me ask --

25 MR. FRACKMAN: That goes to weight. That goes to

1 credibility.

2 THE COURT: Let me ask you about this, Mr. Frackman,
3 because what it appears happened is that Mr. Sansigre, who does
4 have experience in mergers and looked at prior mergers to see
5 what kind of efficiencies happened in the past, just based on
6 his experience in looking at this, came up with numbers. And
7 on the one hand, he's somebody with expertise and did look at
8 some prior transactions. So these numbers are not completely
9 random.

10 MR. FRACKMAN: They're certainly not.

11 THE COURT: But at the same time, they are his
12 subjective thoughts as to what the efficiencies might be, and
13 you kind of try to dress it up and say, well, he ran it by
14 Mr. Dohle and other people, you know. But at the end of the
15 day, they're hard-coded percentages that he just assigned to
16 different categories.

17 That seems to be what the government is saying. And in
18 my review of your expert's report and your briefing, I don't
19 see you denying that. I see you, instead, trying to say, but
20 it's okay because he was experienced. And I don't know how
21 that's verifiable -- verified or verifiable, if it's just --
22 came out of his head.

23 MR. FRACKMAN: So the Court will hear from
24 Mr. Sansigre. The Court will see his model in action. The
25 Court will also hear from Mr. Malaviya who provides

1 confirmation and input for some of the numbers that are used in
2 the model. The Court will hear how the experience of the prior
3 transactions, including the 2013 acquisition of Penguin by
4 Random House -- or merger with Random House, informs the
5 accuracy of the assumptions underlying the model.

6 That is, we submit, the best evidence of the likely
7 efficiencies flowing from the transaction, and sufficient for
8 the Court to make findings as to whether they are reliable and
9 reasonable and that the claimed output of that model, the
10 efficiencies, are reasonably -- are -- are -- that we've
11 satisfied whatever burden we might have to show that those
12 results are more likely than not. They are not all hard-coded
13 numbers that Mr. Sansigre made up. But, more importantly, the
14 Court needs to hear from Mr. Sansigre to make that evaluation.

15 So that's --

16 THE COURT: One other question for you, Mr. Frackman.
17 And I'm sorry to interrupt you.

18 MR. FRACKMAN: Yes.

19 THE COURT: Ms. Hammer includes a chart in her expert
20 report. It was at page 33 of her expert report, which shows
21 the November 2020 projected efficiencies, and then, like, two
22 other iterations of the same model, and the numbers are
23 sometimes wildly different. Doesn't that render this
24 unreliable under Rule 702?

25 MR. FRACKMAN: So, of course, that also goes to

1 weight and reliability. It's not -- it's not something that
2 the Court can evaluate today, but I will make a little proffer
3 of what the evidence is going to show on this score.

4 The 2020 -- November 2020 model, which was a result of
5 hundreds of hours of work by Mr. Sansigre and his team, after
6 consultation with Simon & Schuster, the input of the due
7 diligence process, was the -- was vetted by Bertelsmann before
8 Bertelsmann approved the merger. So it isn't just
9 Mr. Sansigre. It's Mr. Sansigre, plus review and vetting by a
10 separate -- actually, two separate teams at Bertelsmann; the
11 Bertelsmann M&A team --

12 THE COURT: That doesn't make it verifiable, though.

13 MR. FRACKMAN: Well, I'm getting to that.

14 THE COURT: Okay.

15 MR. FRACKMAN: I'm going to go the back way. Okay?

16 THE COURT: Okay.

17 MR. FRACKMAN: So it is a live model; that is, if
18 information changes over time, you can put that -- some of that
19 information into this massive Excel spreadsheet that the Court
20 will see, and it changes some of the output of that Excel
21 spreadsheet.

22 That was done from time to time. It was done in
23 June 2021. It was done again in January 2022. Which are the
24 two subsequent -- I won't -- iterations. They were not
25 official versions of the model. They were just iterations that

1 were done at that particular point in time. If we did it
2 today, it could be a little bit different than Mr. Sansigre
3 did.

4 There's a question as to which one is the best to use,
5 maybe. That's something we can argue about. We believe that
6 the November 2021, which was vetted by Bertelsmann and which
7 was the basis of the approval and the purchase -- the
8 transaction price, is the most reliable, and that's why
9 Professor Snyder also looked to that one.

10 THE COURT: Why is it more reliable than things that
11 happened with more information later?

12 MR. FRACKMAN: Yeah. That's a perfectly -- that's a
13 perfectly fair question. The bottom-line is the differences
14 between the total efficiencies in the official model -- the
15 official efficiency model in 2020 and the subsequent iterations
16 are immaterial to the total claimed efficiencies. And even
17 if --

18 THE COURT: I understand that. I know this is a
19 point of contention between the parties because the horizontal
20 merger guidelines say you have to look at each efficiency, if
21 you can't just compare the bottom-line and say they're similar,
22 whether significant differences --

23 MR. FRACKMAN: I don't think the Court, after hearing
24 Mr. Sansigre explain the differences, will conclude that they
25 are significant with respect to the ultimate finding that the

1 Court has to make.

2 THE COURT: The question is whether it's the ultimate
3 finding that's relevant for each individual efficiency, and I
4 read the horizontal merger guidelines to seem to require
5 looking at each efficiency separately.

6 MR. FRACKMAN: It -- it may be, Your Honor, that the
7 government, when it does its internal review at the Department
8 of Justice, approaches it that way. I don't think that is
9 necessarily the way a court will review it, but even if the
10 Court were to approach it on an item-by-item basis, there will
11 be more than sufficient efficiencies in this case to make --
12 reliable efficiencies for the Court to make the finding that --
13 that we have the burden of.

14 I should point out, why is the -- why is the Department
15 of Justice so fixated on what is really almost a summary
16 judgment motion, a legal motion at this point in time? It's
17 because their claim -- once you get past their contrived
18 limited market, once you get past Mr. -- Dr. Hill's model, only
19 shows \$29 million of harm to authors. Our efficiencies dwarfs
20 that, severalfold, both in an absolute sense and in the part
21 that Professor Snyder will testify flows through to the authors
22 themselves.

23 So they recognize -- in most cases, although
24 efficiencies is often referred to in mergers, it's a sideshow
25 because the claimed competitive harm is enormous. The

1 efficiencies are small. It doesn't offset.

2 But here, this is -- this is a very unusual case. The
3 claimed harm is minuscule, \$29 million a year. The claimed
4 efficiencies are very huge. Even if the Court were to make
5 findings that not all of those claimed efficiencies -- that we
6 haven't met our burden with respect to all of those claimed
7 efficiencies, there are more than sufficient efficiencies --
8 sufficient efficiencies for the Court to find that will
9 outweigh the \$29 million a year of alleged harm.

10 This is just so inappropriate for a *Daubert* motion
11 without hearing from the witnesses. And their big gripe is
12 that, I think -- Mr. Schwarz said it again this morning -- that
13 Professor Snyder did not verify the numbers. That is not --
14 the law does not require that. They have to be verifiable. He
15 did review the model. He will opine that the approach taken by
16 Mr. Sansigre is a reasonable one that is consistent with
17 normative M&A analysis, normative economic principles. It's
18 not something made up by some junior analyst.

19 THE COURT: So who's supposed to do the verifying, in
20 your view?

21 MR. FRACKMAN: Who's supposed to?

22 THE COURT: Do the verifying.

23 MR. FRACKMAN: The Court has to find that the
24 alleged -- we've met our burden on the alleged efficiencies;
25 that they're reasonable; that they're reasonably likely to

1 occur -- or more likely to occur than not; that they're merger
2 specific and they don't --

3 THE COURT: Then who does the verifying? Because I'm
4 focused on that element of the overall analysis.

5 MR. FRACKMAN: It's like a damages claim, Your Honor.

6 THE COURT: I'm supposed to be verifying?

7 MR. FRACKMAN: The Court --

8 THE COURT: With no expert having done the verifying,
9 I'm supposed to do it?

10 MR. FRACKMAN: Well, so what are we actually talking
11 about? You will hear -- the Court will hear from the witness
12 who did the analytical work. They will cross-examine
13 Mr. Sansigre. Ms. Hammer will criticize Mr. Sansigre. The
14 Court will be able to make a reasoned judgment as to whether
15 taking all of that evidence into account, it is more likely
16 than not that the efficiencies that Mr. Sansigre has projected
17 will occur. It sounds --

18 THE COURT: That's a different issue than --

19 MR. FRACKMAN: -- daunting -- it -- excuse me?

20 THE COURT: What you're describing is different from
21 verifying the actual numbers, which seems to be what the
22 horizontal merger guidelines and the case law contemplates,
23 verifying, verifiable. You're saying that it has to be
24 verifiable. But if you have the burden, why is it that I have
25 to figure -- verify this? Why isn't it that you didn't have an

1 expert do so? Why didn't Dr. Snyder verify this? I guess
2 that's the question. Why didn't he?

3 MR. FRACKMAN: One approach could be to have had an
4 expert come in and try to redo Mr. Sansigre's efficiencies
5 model. That is --

6 THE COURT: Just verify it, which is what the law
7 requires.

8 MR. FRACKMAN: He does verify it in the sense that he
9 approves the methodology. He approves the approach. He says
10 it's reasonable. He says it's consistent with economic
11 normative analyses.

12 THE COURT: He does it on a very general broad-brush
13 basis, but not looking closely at the numbers.

14 MR. FRACKMAN: He does not do it on a line-by-line
15 basis. There's no dispute about that. There's no case that
16 says that's required.

17 THE COURT: Well, the horizontal merger guidelines,
18 you have to look at each efficiency and determine whether it's
19 verifiable. And I guess I'm open to that, but I'm a little put
20 off by the idea that I'm the one who's supposed to be verifying
21 here when I don't have expertise in this.

22 MR. FRACKMAN: Your Honor, I think the Court, when it
23 hears the evidence, will see the common sense of many of the
24 alleged efficiencies. Let me just give a few examples.

25 THE COURT: You know what? Let's not do that. Let's

1 talk about -- so I'm inclined not to rule as I'm sitting here
2 right now on this because I think it's a consequential issue,
3 and I don't have the time, I think, to give it the sort of
4 consideration that it deserves.

5 However, I am interested in how we can shape the
6 presentation of this evidence to, first, address verifiability,
7 verification, and potentially not need to get into additional
8 testimony about efficiencies, if you can't meet that threshold.
9 And maybe that's something that the parties can meet and confer
10 on.

11 But like I -- I'm sensitive to the positions of each
12 side. The government is saying, well, we don't want to waste a
13 lot of our time on our chess clock dealing with something that
14 we are obviously going to win. We can use our time to present
15 our case in other ways; and you saying, well, you need to hear
16 the testimony of the witnesses before you rule on this, like
17 don't do it on a cold record.

18 I will say that my review of the expert reports and the
19 evidence on this leaves me a little skeptical about what you're
20 telling me. But I am willing to hear the testimony from
21 Dr. Snyder and Mr. Sansigre to figure out if this is
22 verifiable. And I'm still interested in, like, who's supposed
23 to do the verifying. I'm not convinced that it should be me,
24 but I'm willing to hear more on that.

25 I think you should have more time to present this, but I

1 do want to do it in a way that's efficient and cognizant of the
2 idea that if you can't get past this one hurdle, I don't think
3 we need to get into the rest of this because I think it will
4 burn a lot of trial time if we go through the entire
5 efficiencies analysis and the ratio and all of that stuff.

6 MR. FRACKMAN: Well, the pass-through analysis is
7 something completely different.

8 THE COURT: I know. And we don't even need to get
9 there, if you're not verified; right?

10 MR. FRACKMAN: Well, Your Honor --

11 THE COURT: If your data is not verifiable.

12 MR. FRACKMAN: Yeah. I would like to say a couple of
13 things on that point. First of all, they can cite no case
14 where the Court has refused to let the parties, the defendants,
15 present efficiencies evidence, regardless of the ultimate
16 finding as to whether it was --

17 THE COURT: Mr. Frackman, I just said I'm going to
18 let you present efficiencies evidence. So why are you arguing
19 that?

20 MR. FRACKMAN: So I'm just saying, the second point
21 is, this is -- this question of what the standard is, whether
22 it's verifiable or who has to verify it, it's basically a legal
23 argument that they are making in a case where the parties
24 stipulated and the pretrial order says there are going to be no
25 dispositive motions. This is something that --

1 THE COURT: This is not a dispositive motion.

2 MR. FRACKMAN: Well...

3 THE COURT: You're losing me here, Mr. Frackman.

4 This is not a dispositive motion.

5 MR. FRACKMAN: Whether or not the --

6 THE COURT: Here's what I see. This is how I look at
7 this. Put very simply, they're saying that the inputs in this
8 analysis are junky.

9 MR. FRACKMAN: Are?

10 THE COURT: They're junky. They're not verifiable.
11 There's somebody sitting at his desk pulling numbers out of his
12 head. He's very experienced, but he's pulling numbers out of
13 his head. That's not verifiable, it's not verified, and it's
14 not reliable under Rule 702.

15 And you're saying, listen to the evidence first before
16 you decide that. But the reason this particular motion gave me
17 pause is when I look at your briefing and I look at
18 Dr. Snyder's report, nobody is saying, oh, no, that's not what
19 happened. I think that is what happened; that Mr. Sansigre
20 pulled these numbers out of his head based on a lot of
21 experience and taking into account prior merger transactions
22 and efficiencies from those transactions, but not applying that
23 information in a systematic or data-driven way. Okay?

24 And so the reason this gave me pause is because just
25 looking at the Rule 702 standards and seeing that the

1 horizontal merger guidelines require verifiable -- whether you
2 called it verified or verifiable -- I don't know that this
3 meets the test.

4 MR. FRACKMAN: Well, I think --

5 THE COURT: So I'm entertaining the motion because I
6 think it -- it's potentially meritorious; but given that this
7 is a bench trial and we have more, I guess, leeway in terms of
8 *Daubert* motions and things of this nature, I think I should
9 hear some of this testimony. So now I'm just at, is there a
10 way to efficiently present this so that we don't have to hear
11 evidence if I don't need to get there, because we can't even
12 get past verifiable. And you don't need to answer me now. I'm
13 thinking maybe the parties should meet and confer on that.

14 MR. FRACKMAN: We're happy to consider it. I think
15 the Court will hear Mr. Sansigre, and the observations of the
16 Court, based on the papers, will be changed by Mr. Sansigre's
17 testimony. These are not casual numbers pulled out of a hat.
18 They're not made up. They're grounded in fact, experience,
19 analysis, the due diligence documents. Mr. Sansigre needs to
20 testify in order for the Court to be able to evaluate that.

21 THE COURT: Okay.

22 MR. FRACKMAN: I don't see any way around that.

23 THE COURT: That's fine. Let's make sure that we
24 present the evidence in a way that I can address this issue
25 first without having to get into other things that we might not

1 need to get into if this is dispositive of this particular
2 analysis.

3 MR. FRACKMAN: Mr. Sansigre will go before
4 Professor Snyder, for whatever that's worth.

5 THE COURT: Okay. That's fine. Thank you.

6 MR. SCHWARZ: Your Honor, if you give me one minute
7 to correct a couple items that have been said here. I will not
8 take long.

9 THE COURT: Okay.

10 MR. SCHWARZ: You clearly understand the issue.

11 In the merger guidelines, we talk about verifiable all
12 the time. It says -- and I think it's the -- one, two,
13 three -- fifth paragraph of -- of Section 10. Cognitive
14 efficiencies are merger-specific efficiencies that have been
15 verified and do not arise from anticompetitive reduction in
16 output, et cetera.

17 So it's not just -- that's not the only word here.
18 Somebody needs to verify these items, and I would also note,
19 Your Honor, some of these cases, not -- McKinsey was involved
20 in assisting -- I believe it was one of the health -- the
21 insur- -- I can't remember if it's *Aetna* or *Anthem*, but one of
22 the two district court trials. The court rejected, even with
23 McKinsey adding things to the analysis, and required a further
24 independent analysis.

25 THE COURT: No, I understand that.

1 MR. SCHWARZ: And, likewise, it's -- the reason why
2 we're here is because we know that -- based on -- I'm not
3 making this up. It's four decisions by four courts in this
4 district that an independent analysis is required.
5 Mr. Sansigre is not independent, can't supply. And no one else
6 is doing it here. Dr. Snyder, I will give him credit for this,
7 he twice says it in the first report, sections -- paragraph 17
8 and 61 -- that he did not verify any of these numbers.

9 THE COURT: Okay.

10 MR. SCHWARZ: It should be the end of this
11 efficiencies defense, as far as we're concerned.

12 THE COURT: No, I understand that, but I want to
13 hear --

14 MR. SCHWARZ: And beyond that, I just want to --
15 don't want it left it unsaid that this \$29 million number is --
16 gets into Your Honor's head as our number. That is not an
17 accurate statement of all the damage that will be done to this
18 market.

19 THE COURT: Okay.

20 MR. SCHWARZ: With that, I'll sit down. Thank you
21 very much.

22 THE COURT: So I'm going to deny the motion to
23 preclude the efficiencies evidence with the understanding that
24 the parties are going to meet and confer on whether there's a
25 way to efficiently present evidence of the efficiencies

1 analysis that allows me to, first, resolve the issue of whether
2 it's verified or verifiable. And with the understanding if I
3 find it's not, we don't need to get into all the rest of the
4 testimony on this issue because that will save us some time.

5 All right. So I think that takes care of the motions *in*
6 *limine*. Anything else in the motions *in limine* before we move
7 on?

8 Okay. Now let's talk about trial logistics and
9 procedures. I had a look at the parties' joint pretrial
10 statement, and I just had some questions and thoughts to share.

11 So I take the bench promptly, and we're going to start
12 promptly at 9:30 during the trial. We'll try to take a break
13 after about an hour and a half. There will be a midmorning
14 break and midafternoon break. After about an hour and a half,
15 hour and 45 minutes, we'll take a break. We'll take a lunch
16 break around 12:45 or 1:00 for an hour. In the afternoon
17 we'll, again, sit for an hour and a half, 45 minutes, take a
18 break. And we'll end by 5:00 each day.

19 When you prepare your opening statements, you can assume
20 that I've read your pretrial statements. So you don't need to
21 get into all the detail.

22 And I want to ask the parties about closing arguments,
23 because I notice in your pretrial statement you don't want that
24 on the chess clock. So what are the parties considering with
25 respect to closing arguments, how long that's going to take,

1 and why is it not on the chess clock?

2 MR. READ: Your Honor, we did not put it on the chess
3 clock because we need the 38 hours to get our case in. But we
4 think we can do the closing -- I haven't talked with Dan
5 Petrocelli about this -- with an hour each side or an hour and
6 a half each side. So I don't think it'll be a long amount of
7 time.

8 THE COURT: Okay.

9 MR. READ: Our thought had been the closing argument
10 would be the 19th, that Friday, but I just wanted to clarify
11 that with you, what your expectation was.

12 THE COURT: I'd have to take a look at the calendar,
13 but you want to do it on the Friday, the 19th?

14 MR. READ: Yeah. That had been our thought.

15 THE COURT: Okay. There's the issue of the timing
16 post-trial briefing that was proposed, and I'm going to adopt
17 that. I thank the parties for cutting down the time. So I'll
18 adopt the post-trial briefing schedule. That was in the joint
19 pretrial statement. So proposed findings filed 12 days after
20 the end of trial, no later than August 31st. Objections, seven
21 days after that, and no later than September 7th.

22 Okay. All right. Any other trial logistics or
23 procedural issues that the parties want to discuss?

24 MR. PETROCELLI: Not from us, Your Honor.

25 THE COURT: Thank you.

1 MR. READ: I will just note, both sides have agreed
2 to drop a few witnesses that are in the pretrial statement. I
3 don't know if Your Honor wants to keep track of that, but it
4 will be a slightly shorter list than what Your Honor has.

5 THE COURT: Are you going to file an amended list, or
6 do you want to just tell me on the record?

7 MR. READ: Let me grab it and tell you.

8 THE COURT: Okay.

9 MR. READ: I apologize, Your Honor. I should have
10 had this handy.

11 THE COURT: That's okay.

12 MR. READ: On the defendants' side, they will drop
13 Joy Harris, who's currently a will-call. That's No. 7 on their
14 side. They will drop Chris Parris-Lamb, No. 9 on their side.
15 The 14th witness on their side, Jon Anderson, they've agreed to
16 drop. And the 15th witness on their list, William Thomas, they
17 have agreed to drop.

18 We have agreed to drop No. 7, William Thomas; No. 13 on
19 our list, Wendy Wolf; No. 16 on our list, Kent Wolf; No. 17 on
20 our list, Katherine McKean Landon. We have also agreed not to
21 play the deposition of Alex Berkett, No. 3 on our list. They
22 plan to call him live.

23 I think those are what we've agreed to as we are trying
24 to streamline. As we get closer to trial, we may further
25 streamline.

1 THE COURT: I appreciate any streamlining.

2 All right. Anything else we need to address before we
3 adjourn?

4 MR. PETROCELLI: Your Honor, I'm told we may need an
5 order from the Court to permit us to have internet access in
6 here. Does the Court permit that?

7 THE COURT: Of course. Yes.

8 MR. PETROCELLI: So we --

9 THE COURT: Is that really required?

10 MS. SMITH: Yes. Your Honor, Megan Smith.

11 To use laptops in your courtroom, right now the
12 district's rule says laptops cannot be used inside the
13 courtroom. So if Your Honor could rule we can use our laptops
14 so we can connect.

15 THE COURT: Yes. Absolutely. You may. And if I
16 need to sign a proposed order, just send it to me.

17 MR. PETROCELLI: Thank you, Your Honor. And thank
18 you very much for all the time you've put in today.

19 THE COURT: No. Absolutely.

20 All right. So if there's nothing further, I thank the
21 parties for their presentations this morning, and parties are
22 excused.

23 (Proceedings were concluded at 11:33 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Diplomate Reporter,
Certified Realtime Reporter, do hereby certify that the above
and foregoing constitutes a true and accurate transcript of my
stenograph notes and is a full, true, and complete transcript
of the proceedings to the best of my ability.

Dated this 25th day of July, 2022.

/s/ Nancy J. Meyer
Nancy J. Meyer
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
333 Constitution Avenue Northwest
Washington, D.C. 20001

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