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COMMENTARY

DOJ Sues to Block Acquisition of Top Publishing Rivals.

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On November 2, 2021, the U.S. Department of Justice (“DOJ”) brought an antitrust lawsuit against the world’s largest publisher, Penguin Random House, LLC, seeking to block the company from acquiring one of its main rivals, Simon & Schuster, Inc.¹

The DOJ’s complaint alleges that “[t]he merger would give Penguin Random House outsized influence over who and what is published, and how much authors are paid for their work.”² Additionally, the DOJ argues that the merger would grant Penguin Random House control of nearly half of the market for acquiring the publishing rights of the anticipated top-selling books.³ Thus, the DOJ believes the merger of the first and fourth largest publishing houses would be anticompetitive, – ultimately harming American authors and consumers.⁴

The proposed acquisition was first announced in November of 2020 by the publishing houses’ parent companies, Bertelsmann and ViacomCBS.⁵ The deal was said to be worth approximately \$2.18 billion.⁶ Penguin Random House’s merger with Simon & Schuster follows

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¹ Press Release, Dep’t of Just., Justice Department Sues to Block Penguin Random House’s Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>.

² Complaint at 2, United States v. Bertelsmann SE & Co. KGaA, No. 1:2021cv02886 (D.D.C. Nov. 2, 2021).

³ *Id.* at 4. See also Hamza Shaban, *DOJ Sues to Block Penguin Random House’s Acquisition of Rival Publisher Simon & Schuster*, THE WASHINGTON POST (Nov. 2, 2021, 4:56 PM), <https://www.washingtonpost.com/business/2021/11/02/penguin-random-house-simon-schuster-justice-department>.

⁴ *Supra* note 2, at 2-3.

⁵ *Id.* at 9.

⁶ *Id.*

the trend of consolidation in the publishing industry.⁷ Penguin and Random House themselves recently merged in 2013.⁸

Currently, the “Big Five” publishers dominate the publishing industry. The “Big Five” include The Hachette Group, Harper Collins, MacMillan, Penguin Random House, and Simon & Schuster.⁹ These corporations compete amongst each other to acquire publishing rights from authors and are often the best option for authors publishing anticipated top-selling books. This is due to the “Big Five’s” ability to offer “high advances and extensive marketing and editorial support,” which smaller publishing houses cannot afford.¹⁰

As members of the “Big Five,” Penguin Random House and Simon & Schuster have immense control over the publishing industry. Penguin Random House publishes over 70,000 digital and 15,000 print titles annually¹¹ and earned over \$2.4 billion in U.S. publishing revenues last year.¹² While Simon & Schuster own “over 30 U.S. imprints across three publishing groups and publishes over 1,000 new titles annually.”¹³

The DOJ’s complaint further alleges that the proposed merger eliminates competition and solidifies Penguin Random House’s control over the industry. This is because Penguin Random House and Simon & Schuster compete against each other to acquire manuscripts and are often the final bidders in auctions for the publishing rights.¹⁴ With the acquisition of Simon & Schuster, the DOJ stresses that the merger would eliminate necessary competition resulting in lower advances for authors and less variety of books for consumers.¹⁵

In response to the DOJ’s complaint, the two publishing houses issued a joint statement.¹⁶ The statement noted that the publishing houses intend to fight the lawsuit.¹⁷ They also claimed that the acquisition “is a pro-consumer, pro author, and pro-book seller transaction.”¹⁸ Further arguing that the merger would not change the publishing industry’s competitive environment because they “compete with many other publishers including large trade publishers, newer entrants like Amazon, and a range of mid-size publishers”¹⁹ The publishing houses have also publicly

⁷ *US Just. Dep’t Suing to Block Penguin Purchase of Simon & Schuster*, THE GUARDIAN (Nov. 2, 2021, 1:46 PM), <https://www.theguardian.com/books/2021/nov/02/penguin-simon-schuster-justice-department-sues>.

⁸ *Id.*

⁹ Carl T. Bogus, *Books and Olive Oil: Why Antitrust Must Deal with Consolidated Corporate Power*, 52 U. MICH. J.L. REFORM 265, 272-73 (2019).

¹⁰ Dep’t of Just., *supra* note 2, at 3.

¹¹ Penguin Random House, <https://www.penguinrandomhouse.com/imprints/> (last visited Nov. 9, 2021), <https://www.prnewswire.com/news-releases/penguin-random-house-and-simon--schuster-to-fight-department-of-justices-decision-to-file-suit-to-block-pro-consumer-pro-author-and-pro-book-seller-transaction-301414651.html>.

¹² Dep’t of Just., *supra* note 2, at 8.

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ Dep’t of Just., *supra* note 1, at 3.

¹⁶ Press Release, Penguin Random House and Simon & Schuster to Fight Dept’ of Just.’s Decision to File Suit to Block Pro-Consumer, Pro-Author and Pro-Book Seller Transaction (Nov. 2, 2021).

¹⁷ *Id.*

¹⁸ *Supra* note 2, at 6.

¹⁹ *Id.*

suggested that the merger is necessary to be a counterweight to Amazon.²⁰ However, Penguin Random House's Global CEO had admitted that the company seeks to become an "exceptional partner" to Amazon through the merger.²¹

Lastly, the antitrust lawsuit against Penguin Random House seeking to block the acquisition of Simon & Schuster illustrates the Biden Administration's aims to stop corporate consolidation.²² In July of this year, President Biden signed an executive order which focused on promoting competition.²³ Since the executive order, the federal government has blocked a series of corporate deals, including the consolidation of American Airlines and JetBlue.²⁴ This DOJ suit is another indication of the Biden Administration's more aggressive antitrust enforcement.²⁵

²⁰ Mason Bissada, *Just. Dep't Sues to Block Penguin Random House Acquisition of Simon & Schuster*, FORBES (Nov. 2, 2021, 3:17 PM), <https://www.forbes.com/sites/masonbissada/2021/11/02/justice-department-sues-to-block-penguin-random-house-acquisition-of-simon--schuster/?sh=1ad1eeac1c54>.

²¹ *Supra* note 2, at 6.

²² Siri Bulusu, *Penguin, Simon & Schuster Deal Triggers Author Risk Probe at DOJ*, BLOOMBERG LAW (Nov. 5, 2021, 9:10 AM), https://www.bloomberglaw.com/bloomberglawnews/antitrust/X6S3IMH4000000?bna_news_filter=antitrust#jcite.

²³ Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

²⁴ Elizabeth A. Harris et. al., *Just. Dept' Sues Penguin Random House Over Simon & Schuster Deal*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/books/penguin-random-house-simon-schuster-merger-lawsuit.html>.

²⁵ David McLaughlin, *U.S. Sues Block Penguin Deal for Simon Schuster*, BLOOMBERG LAW (Nov. 2, 2021, 10:54 AM), https://www.bloomberglaw.com/bloomberglawnews/antitrust/XDM3EGRK000000?bna_news_filter=antitrust#jcite.