

Feb. 28, 2014

David Kully
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Washington, D.C., 20530

Dear Mr. Kully,

Thank you for your response to our letter regarding new amendments to the Joint Operating Agreement between the owners of The Salt Lake Tribune and the Deseret News. We are pleased to learn that the Antitrust Division is considering the issues we raised in its evaluation of changes to the JOA recently entered into by the New York-based Alden Global Capital and Digital First, owner of The Tribune, and the Mormon Church's Deseret Management Corp., owner of the Deseret News. On behalf of Utah Newspaper Project (www.utahnewspaperproject.org), we are writing you again in hopes of providing more information to aid in that evaluation and perhaps spur enforcement action to prevent further harm to our community from the amended JOA.

Congress enacted the Newspaper Preservation Act in 1970 "in the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States..."¹ Since 1952, The Tribune and the Deseret News have shared production, distribution and advertising operations through their JOA, a cooperation later sanctioned by the act. This partnership, once dubbed "a pinnacle of accommodation," served the community for decades by ensuring viability of two competitive, independent newspapers.² Now, however, the owners of both newspapers are abusing the act's limited antitrust immunity in a way that will deny Utahns the strong and independent journalistic voice of The Salt Lake Tribune. Their conduct violates the Newspaper Preservation Act's mandate for independent newspaper voices, as well as the Sherman and Clayton antitrust acts, by removing competitive incentives and drastically intensifying the media monopoly power of The Church of Jesus Christ of Latter-day Saints in Northern Utah.

We urge the United States Department of Justice and Federal Trade Commission to consider the following arguments: (A) The amended JOA represents an acquisition scheme that will dramatically increase the market reach of Deseret Management Corp. (the business arm of the Mormon Church and owner of Deseret News Publishing Co., KSL television and radio, KSL.com and numerous other media properties) in Northern Utah; (B) The profit split under the amended JOA denies The Tribune revenues sufficient to finance its essential editorial and newsgathering functions; (C) The amended JOA will distort market competition because The Tribune's profits will accrue to its competitor; (D) The amended JOA retains the Deseret News' veto power over any ownership transfer of The Tribune, a power Deseret News Publishing Co. has abused in the past and is likely

¹ 15 U.S.C. § 1801

² O.N. Malmquist, *The First 100 Years: A History of The Salt Lake Tribune 1871-1971*, 402 (1971)

per se violative of antitrust law; and (E) The amended JOA gives the owner of the Deseret News control over both papers' production, advertising and circulation and thus represents an intolerable intrusion into The Tribune's editorial independence.

A. The new JOA represents an acquisition scheme that should be subject to analysis under antitrust law and your agency's Horizontal Merger Guidelines.

The new amendments to the JOA do more than tweak a decades-old contract between Salt Lake City's rival newspapers. They are, in effect, a partial acquisition of The Salt Lake Tribune by Deseret News Publishing Co. that presents a very real likelihood of competitive harm. As such, we submit that they fall outside the Newspaper Preservation Act's limited immunity, which extends only insofar as "there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined."³ Lacking that immunity, the new amendments violate antitrust law, warranting a Section 1 analysis under the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission. The agencies' merger analysis applies to "a firm's partial acquisition of a competitor. The agencies therefore also review acquisitions of minority positions involving competing firms even if minority positions do not necessarily or completely eliminate competition between the parties to the transaction."⁴

Why do we argue that the JOA amendments represent an acquisition scheme? One reason is because the leaders of the Deseret News Publishing Co. have seen it that way as well. More than a dozen years ago, Deseret Management Corp. sought to buy The Tribune outright when the paper was temporarily in the hands of the cable company TCI and later AT&T.⁵ Numerous strategies to acquire control of The Tribune were considered – so many that Deseret News consultant R. Gary Gomm had trouble keeping them straight.⁶ But one approach seemed particularly "ingenious," according to L. Glen Snarr, then-chairman of Deseret News Publishing Co. In a deposition, he testified that "Gary Gomm came up with an ingenious plan, emphasizing initially purchase of points and management control of NAC."⁷ The advantages of such an approach over the outright purchase of The Tribune were that it would minimize chances of federal antitrust scrutiny and prevent outcry by Salt Lake City newspaper readers.⁸

³ 28 C.F.R. § 48.1.

⁴ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 13 (rev. ed 2010).

⁵ Salt Lake Tribune Pub'g Co., LLC, et al., v. AT&T Corp., et al., 2:00CV936ST

⁶ (Gomm Dep. pg. 71 ln.2) Texan Gary Gomm, a consultant for Deseret News Publishing Co., was paid a commission of more than \$1 million for his work during those purchase negotiations.

⁷ (Snarr Dep. pg 72 ln. 6) NAC is the Newspaper Agency Corp., the joint operation tasked with handling advertising, production, circulation and distribution of the newspapers.

⁸ Id.

The Deseret News' owners ultimately decided to help broker the purchase of The Tribune by MediaNews Group's Dean Singleton, a potential JOA partner deemed more agreeable to them than the Utah family that had owned the newspaper for a century.⁹ But MediaNews' subsequent bankruptcy left The Tribune in the hands of Alden Global Capital, a New York hedge fund credited with pioneering "vulture investing."¹⁰ Last fall, Deseret News Publishing Co., was in a position to carry out its "ingenious" and complicated plan to control The Tribune's print publication and mine its revenues through the amended JOA.¹¹

Of course, as partners in a JOA authorized under the Newspaper Preservation Act, the owners of The Tribune and the Deseret News enjoy limited immunity from federal antitrust law.¹² But that immunity is not absolute. The Department of Justice itself takes the position that nothing in the letter of the law or the congressional history suggests that lawmakers intended to grant antitrust immunity for the acquisition of one JOA partner's newspaper by the other JOA partner. "Indeed, that would be directly contrary to Congress' goal of ensuring independent and competitive editorial and reportorial voices," according to Carl Shapiro, deputy assistant attorney general for economics in the Justice Department's Antitrust Division.¹³

Dilution of The Tribune's independent editorial voice in the short term, and possible removal of its voice in the long term will result in a Salt Lake media market that is overwhelmingly dominated by properties owned by the Mormon Church. Already, the

⁹ Paper Chase: How The Tribune slipped away from a family and why the D-News took advantage, The Salt Lake Tribune, June, 9, 2002; A1, and Lucinda Fleeson, The Battle of Salt Lake, American Journalism Review, March 2001.

Supra, Note 5, U.S. District Court Judge Ted Stewart called the case arising from The Tribune's sale "a Gordian knot," so convoluted was this contract dispute between the McCarthy family and AT&T, MediaNews and intervenor Deseret News Publishing Co. Prelude to that dispute was the 1997 merger between The Tribune and the cable company TCI, in which The Tribune was an early investor and major stockholder. The deal included a management agreement keeping The Tribune's editorial staff in place and an option giving the heirs the right to buy back the newspaper at fair market value in five years. Lacking in the deal, however, was the blessing of Deseret News Publishing Co., which the LDS Church contended was required under Section 2 of the 1982 JOA. AT&T would later acquire TCI, and The Tribune along with it. Working closely with officers of Deseret News Publishing Co., AT&T sold the paper to MediaNews Group in January 2001. Litigation ensued. Judge Stewart ultimately cut the Gordian knot, ruling that the Deseret News' rights under Section 2 were valid, as were the McCartheys' rights under the buyback option. The case sputtered to settlement in 2007 when the McCartheys declined to exercise their option to buy the paper after an appraisal put the price at \$355.5 million -- \$155.5 million more than Singleton's MediaNews Group had paid just a few years earlier.

¹⁰ Rick Edmonds, Who is investor Randall Smith and why is he buying up newspaper companies? Poynter.org, July 27, 2011

¹¹ 2013 JOA §§ 2.01, 4, 10

¹² Title 15 U.S.C. § 1803(a) allowing amendments to an existing JOA.

¹³ Carl Shapiro, Deputy Assistant Attorney General for Economics Division, before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives, *A New Age for Newspapers: Diversity of Voices, Competition and the Internet*, (April 21, 2009)

church's Deseret Management Corp. owns a dominant television station, KSL (a grandfathered-in media cross-ownership); it owns the dominant radio station, KSL broadcast on 1160 AM and 102.7 FM; it owns FM100 – KSFI; and Arrow 103.3 – KRSP in Salt Lake; it operates through Brigham Young University, the public broadcast stations KBYU and KBYU-FM; and it owns, of course, the Deseret News. In addition to that heavy concentration of traditional media holdings, the church owns KSL.com, among the most heavily trafficked online operations in the nation.¹⁴ According to Scarborough Research, which measures audience engagement across media platforms, KSL Television, radio and KSL.com reached 42.5 percent of Utah's adult population from August 2011 to July 2012.¹⁵ Such a concentration of media power will only intensify in Northern Utah with the weakening of The Tribune through the JOA amendments.¹⁶

We urge the Justice Department and Federal Trade Commission to apply the Clayton and Sherman acts, as well as their Horizontal Merger Guidelines, in an analysis of this acquisition scheme. Such an inquiry would show that the newly amended JOA will have the effect of lessening competition and tending to create a monopoly that will harm the public interest.¹⁷ That anticompetitive effect will be evident soon, as the new amendments went into effect Jan. 1, 2014, and The Tribune's journalists are now expected to perform their essential – and expensive -- newsgathering function with 48 percent less funding.

(B) The profit split under the new JOA denies The Tribune revenues sufficient to provide its newsgathering “product” to the Salt Lake market.

The amended JOA also violates the Newspaper Preservation Act by denying The Tribune the revenue necessary to deliver an editorial product that is distinct and independent of the Deseret News' offering. Indeed, the JOA's profit distribution seems designed to weaken The Tribune's editorial voice in contravention of the Newspaper Preservation Act's intent to maintain newspaper competitiveness.¹⁸

The terms of the amended JOA now give the Deseret News 70 percent of the revenues of the two newspapers even though The Tribune accounts for more than 60 percent of the print circulation in the core advertising market.¹⁹ Under terms of the previous JOA, 58 percent of revenues were accorded to The Tribune. This new arrangement runs counter to

¹⁴ <http://deseretdigital.com/content/view/8>

¹⁵ Matthew Brown, Utah Media Landscape a Story of Three Screens, Deseret News, (March 23, 2013) available at <http://www.deseretnews.com/article/865576586/Utah-media-landscape-a-story-of-three-screens.html?pg=all>

¹⁶ 23 F.C.C.R.2038-39 (2006) Quadrennial Regulatory Review

¹⁷ 15 U.S.C. § 7

¹⁸ 15 U.S.C. § 1801

¹⁹ Alliance for Audited Media, Audit Report, The Salt Lake Tribune and Deseret News, 12 months ended Sept. 30, 2012.

the Newspaper Preservation Act's policy and purpose of ensuring the viability of two competing newspapers in a single market. One method of achieving this policy goal is for the parties to structure the JOA in a way that assures both newspapers sufficient revenues to finance their editorial and news functions.²⁰

The JOA's rearrangement of profit points is unjustified by the newspapers' circulation figures, as The Tribune remains the dominant newspaper in the target market. The "Designated Market" and "Retail Trading Zone" circulation of The Tribune is 91,399 on Sunday and 67,135 on weekdays, accounting for 61 percent of the two newspapers' Northern Utah readers, according to the Alliance for Audited Media. Meanwhile, the Deseret News lost circulation in the core market area and retail trading zone as it shifted its focus away from traditional newsgathering toward a more church-oriented, values-based product.²¹ Now the Deseret News circulates not only locally, but also to LDS Church members nationally -- far beyond the newspapers' "Designated Market" that most advertisers seek to reach.²²

The shift away from traditional newsgathering by the Deseret News, coupled with the financial hobbling of The Tribune under the new JOA amendments, will leave Northern Utah residents without a news medium capable of what author Clay Shirky has called "society's heavy journalistic lifting."²³ After a large layoff at The Tribune last fall, Brigham Young University journalism Prof. Joel Campbell pointed out that "people who live outside the Beehive State may not be aware of The Tribune's central role in politics and public policy here, but the paper is the state's most important news organization for hard-hitting coverage and civic engagement." Campbell, a former Deseret News staffer, added: "Compared to The Tribune, the News spends far fewer resources on local, state, and federal government reporting, with more coverage of issues like religious liberty, marriage, and the evils of pornography."²⁴

The exact amount paid by the Church of Jesus Christ of Latter-day Saints to Alden Global Capital for the "profit points" under the amended JOA is unknown. But the effect of that lost revenue on The Tribune is not hard to anticipate. Concurrent with the signing of the amended JOA last October was the layoff of 19 journalists at The Tribune. (Since The Tribune fell into the hands of the New York hedge fund, some 40 percent of its staff

²⁰ In the Matter of: Application by the E.W. Scripps Company and MediaNews Group, Inc. For Approval Of A Joint Operating Arrangement Pursuant To The Newspaper Preservation Act, 15 U.S.C. §§1801-1804 Public File No: 44-03-24-15

²¹ In 2010, the Deseret News laid off half its staff as it shifted toward a values-based product that included contributions of non-journalists. See Paul Beebe, Dramatic Change in Direction at D-News, The Salt Lake Tribune (Sept. 1, 2010), available at <http://www.sltrib.com/sltrib/money/50194792-79/news-deseret-tribune-willes.html.csp>

²² See 2013 JOA § 9

²³ Clay Shirky, Newspapers and Thinking the Unthinkable (March 13, 2009), available at <http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable/>

²⁴ Joel Campbell, Utah journalism gets a jolt, Columbia Journalism Review (Sept. 27, 2013)

has been eliminated.) With a 48 percent reduction in revenue from its print edition, The Tribune will likely continue to cut staff and dilute its coverage of our community.

The amendments to the JOA come as The Tribune, like all other mainstream media in the Internet age, grapples with the collapse of the traditional advertising/subscription revenue model. A 2012 Pew Research Center study reveals that while digital ad revenue has grown 19 percent, “the bad news is that print ad sales, which still account for 92 percent of the overall ad revenue of the papers that provided data, fell by an average of 9 percent.”²⁵ The many efforts under way by both the Deseret News and The Tribune to serve their readers via the Internet are to be applauded and supported. But the fact remains that it is the print operation that funds the newsgathering -- the “product” so essential to the news-consuming public. It is not denial, but logic, to argue that The Tribune’s traditional print revenues should be retained and protected as long as they are financing the news product – whether that product is delivered digitally or on the doorstep. Not only are print advertising revenues and subscriptions financing the assembly of the news product for now, they can serve as the venture capital for the new business model all mainstream media continue to seek. John Paton, chief executive officer of Digital First Media (which manages more than 150 publications, including The Tribune, for Alden), acknowledged as much in a recent address to the Online Publishers Association in Miami: “Whatever life there is in print — and, of course, there is some and it must be preserved just as it must also be used to fuel our investments in our digital future,”²⁶

The mortgaging of The Tribune’s future profits might be defensible if the millions paid for those profit points stayed in Utah to fund the paper’s transition to a new media model. Instead, the rumored \$17 million to \$24 million the Deseret News’ owners paid to Alden Global Capital flowed out of state for use at the New York corporate level.²⁷ Thus, the JOA amendments deny The Tribune current revenues to fund current newsgathering, but also future revenues from a not-yet-fully-developed digital newsgathering business model. Those millions were not re-invested at The Tribune to engineer grand new digital initiatives: No computers have been purchased; virtually no training provided; no coherent digital strategy articulated.²⁸ “Print is dying much faster than anyone anticipated,” Paton said at that Miami meeting. Back in Salt Lake City, Tribune

²⁵ The Search for a new business model, March 5, 2012, Pew Research Center Project for Excellence in Journalism. See also <http://www.poynter.org/latest-news/business-news/the-biz-blog/240669/even-as-digital-grows-more-than-half-of-reported-newspaper-audience-is-print-only/>

²⁶ John Paton, Now What? Remarks before the Online Publishers Association (Jan. 23, 2014) available at <http://jxpaton.wordpress.com/2014/01/23/now-what/>

²⁷ For insight into the company’s practices, see Michael Wolff, The Journal Register debacle: why Chapter 11 comes before 'digital first' The Guardian (Sept. 10, 2012) available at <http://www.theguardian.com/commentisfree/2012/sep/10/journal-register-chapter-11-digital-first>

²⁸ <http://www.talkingnewmedia.com/2013/12/17/medianews-group-and-21st-century-media-get-merged-into-digital-first-media/>

journalists grouse that print is dying “much faster” because the hedge fund is killing it, aided and abetted by The Tribune’s JOA partner.²⁹

(C) The new JOA will distort the market because The Tribune’s profits will accrue to its competitor.

A wide range of market distortions likely will result due to the dramatic shifting of Tribune profits to the Deseret News. A primary incentive is removed when employees and operators of a business recognize that their efforts benefit not their own enterprise and customers, but the competitor’s enterprise down the street. Moreover, the customers may resent their dollars going not to their preferred enterprise, but to the competitor down the street. And such an arrangement blunts market dynamism in another fundamental way: What rational market player would buy a property whose profits flow disproportionately to the competition? (Not that said competition would permit such a sale in the first place: See Part D below.)

Congress allowed for amendments to JOAs, recognizing they may be necessary for business efficiency. Here, however, the JOA partners have amended their contract in a way that will endanger, not preserve, a community’s newspaper business. The Justice Department itself has argued that “The NPA is not a shield for whatever agreement the parties style as an amendment to a JOA.”³⁰ The case of *Hawaii v. Gannett Pacific Corp.* involved an agreement to close a newspaper, whereas the amendments here merely debilitate a newspaper. But both cases involve harm of an “irreparable nature” and “considerable impact on the public interest.”³¹

The lopsided revenue split under the newly amended JOA is strikingly inequitable in light of The Tribune’s long history of support for the Deseret News. The two Salt Lake dailies already had a Joint Operating Agreement in place when Congress was debating the Newspaper Preservation Act in the 1960s. That JOA was adopted in 1952 after a bruising circulation war between the News and The Tribune caused “substantial annual financial losses” to Deseret Management Corp. The Deseret News’ owners would not admit outright that they had lost that war, but George Nelson wrote in a letter submitted to the Senate’s Subcommittee for Antitrust and Monopoly that “it was apparent that such losses could not be continued.”³² The church then entered into a joint operating agreement with The Tribune, receiving then and henceforth a percentage of profit higher

²⁹ The newly amended JOA spins off The Tribune’s online operation, appropriately, as the Newspaper Preservation Act applies to publications “produced on newsprint paper...in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.” 28 C.F.R. ss 48.2 The paper has brought in a sales staff (whose operation, tellingly, is allegedly at least partially funded out of The Tribune’s print budget) to increase online revenues. But even a more muscular sltrib.com will not be entering a level playing field with KSL.com – backed up as it is with the Mormon Church’s massive media market concentration.

³⁰ Amicus brief, *State of Hawaii v. Gannett Pacific Corp.* 99 F. Supp. 2d @ 1253 (1999)

³¹ *Id.* at 1253.

³² Malmquist, *supra* note 2 at 376.

than its share of circulation. For The Tribune, it was a worthwhile investment. Jack Gallivan, Tribune publisher from 1960 to 1983, lobbied strenuously for the Newspaper Preservation Act, arguing “The Tribune and the Deseret News have been traditional balancing factors in our particular society for nearly a century and it seems obvious that the public interest is best served when they continue to be.”³³

The nearly 50 percent reduction in revenues brought about by the new JOA amendments could lead to a number of market harms, including delivery of a lower-quality product to consumers at a higher price. Because The Tribune’s business is the delivery of information essential to healthy democracy, other possible market distortions may be more profound. As the American Antitrust Institute states, “society’s political and cultural health is fostered by numerous, independent media, and excessive media concentration may threaten the public’s access to important information or viewpoints.”³⁴ It is worth noting that the entity in possession of that media concentration is also the largest private employer in Utah, the largest private landowner in Utah, and whose members overwhelmingly dominate all branches of government here.³⁵

When the Church of Jesus Christ of Latter-day Saints last sought to take over The Tribune in the late 1990s, Gomm’s “ingenious” proposal included buying profit points and production control as merely the first step. The final phase included taking over the paper entirely.³⁶ One wonders if the 2013 purchase of profit points and production control are also part of a multi-phase effort to acquire The Tribune in its entirety and then subsume it. The more likely scenario is that owners of the Deseret News are simply waiting for The Tribune to fail – a nearly inevitable outcome under the new revenue split. The Department of Justice likely will not challenge the merger or closure of a newspaper in a JOA if it can be shown that circulation has shrunk to the point where the paper is not economically viable and no buyer can be found.³⁷ Here, however, The Tribune (as distinct from its owner) is the more financially viable newspaper in the market – and has been since before the creation of the 1952 JOA. It is, perversely, the amended JOA itself that threatens to send The Tribune into a downward spiral.³⁸

³³ Id. at P. 408

³⁴ <http://www.antitrustinstitute.org/industries/technology-and-communications>

³⁵ See generally Peggy Fletcher Stack, Church Confirms Hiring Freeze, The Salt Lake Tribune (Jan. 8, 2009) available at http://www.sltrib.com/lids/ci_11399338 The religious dichotomy between The Tribune and the Church-owned operations are thus: The mission statement of the Deseret News, KSL, and the other LSD media is to spread the gospel, versus The Tribune’s promise in its first edition on April 15, 1871, was to “oppose all ecclesiastical interference in civil or legislative matters.” See <http://www.utahnewspaperproject.org/timeline>

³⁶ Salt Lake Tribune Pub’g Co., LLC, et al., v. AT&T Corp., et al., 2:00CV936ST Please see attached exhibit II-103 “DNPC/KT JOA Amendments and Transaction Strategy.”

³⁷ Christine A. Varney, Assistant Attorney Gen., U.S. Dep’t of Justice, Dynamic Competition in the Newspaper Industry, Address Before The Newspaper Association of America, 22-23 (March 21, 2011)

³⁸ A downward spiral occurs when a newspaper’s declining circulation and lessening advertising revenue feed off one another, eventually forcing it to close. See Committee for an Independent P-I v. The Hearst Corp., 704 F. 2d 467, 471(9th Cir)

In light of the Deseret News owners' conduct in the past, it is plausible that their new agreement with the New York owners of The Tribune is not an amended JOA, but as the Justice Department argued in *United States v. Daily Gazette*, "a new, and illegal, agreement" that should not be immunized from antitrust law. "...[N]othing in the NPA suggests antitrust immunity was intended for a joint operating arrangement partner to acquire the other partner's newspaper without antitrust effect."³⁹

The antitrust immunity granted through the Newspaper Preservation Act has been interpreted to be a narrow one. "It is well settled that exemptions from the antitrust laws are to be narrowly construed."⁴⁰ Here, the parties have amended the JOA in a way that will deny The Tribune millions of dollars of its own profit needed to perform its expensive newsgathering function.⁴¹ By doing so, the new contract is antithetical to congressional intent in passage of the Newspaper Preservation Act and thus should not be immunized from antitrust law.

(D) The new JOA amendments retain language granting the Deseret News' veto power over any ownership transfer of The Tribune, a power the Deseret News has abused in the past, and is likely per se violative of antitrust law.

Section 10 of the Joint Operating Agreement, "Ownership of K-T, LLC" (the Tribune) states "the parties confirm that this Agreement creates a special relationship between them that must be honored and preserved. It is therefore agreed that the present ownership of K-T, LLC (i.e., one hundred percent owned by MediaNews Group, Inc.) shall not be changed without written consent of DNPC, which shall not be unreasonably withheld."⁴² Under the Newspaper Preservation Act, the editorial policies of the parties must be "independently determined."⁴³ The signatories to that agreement may profess a commitment to editorial independence, but editorial policies of a newspaper operation put in place, or remaining in place, due to the beneficence of the other JOA partner cannot be "independent." Therefore, an amendment granting such a right violates the Newspaper Preservation Act and, absent the act's immunity, violates antitrust laws.⁴⁴

The language in Section 10 was added to the JOA in the midst of the protracted legal battle over the Deseret News Publishing Co.'s failed attempt to buy The Tribune and the subsequent purchase by MediaNews Group's Dean Singleton. The McCarthey family,

³⁹ *U.S. v. Daily Gazette Co.*, 567 F. Supp.2d 859, Dist.Court, SD West Virginia (2008)

⁴⁰ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979)

⁴¹ 15 U.S.C. § 1803(a).

⁴² 2013 JOA . § 10. Also see 2013 JOA § 2

⁴³ 15 U.S.C. § 1802 (2)

⁴⁴ See Statement of Stephen R. Barnett, Salt Lake Tribune Pub'g Co., LLC, et al., v. AT&T Corp., et al., 2:00CV936ST

owner of The Tribune for more than 100 years, had waged a “war of hate against us,” Snarr wrote in 1999 to LDS Church President Thomas S. Monson, then first counselor in the governing First Presidency.⁴⁵ The circumstances surrounding the insertion of Section 10 into the JOA demonstrate that the intent and the effect of that veto power are to influence and control the editorial voice of the Tribune. It thus subverts the Newspaper Preservation Act’s goal of preserving independent and competitive newspaper voices. Even before Section 10 was added to the JOA, Deseret Management Corp. interpreted Section 2 of the 1982 JOA as granting it power to determine ownership of The Tribune. Indeed, it conducted something of a job interview of MediaNews Group’s Singleton before giving its blessing to his purchase of the newspaper in 2000.⁴⁶

Language of Section 10 requires that The Tribune receive Deseret News Publishing Co. consent for any sale, but such consent “shall not be *unreasonably* withheld.” (Emphasis added.) It is unknown how often the LDS Church withheld consent to a prospective buyer because, unlike a right of first refusal, the veto power can be wielded secretly and often.⁴⁷ However, upon information and belief, Deseret News Publishing Corp. has used that power at least once. At some point in 2013, Dean Singleton and Utah philanthropist Jon Huntsman Sr. approached Alden Global Capital with an offer to buy The Tribune. They were rebuffed. Instead, the hedge fund accepted an alternative offer from the Deseret News Publishing Co., receiving millions of dollars for the profit points and control of NAC. Owners of the Deseret News and Tribune consummated that deal without public pronouncements or fanfare. But acting on a tip, Tribune reporters obtained a copy of the amended JOA from the Justice Department.⁴⁸ Those journalists did what Tribune reporters so often do: They ferreted out information and reported upon it first, providing once again the foundation for the dissemination of news that radiates throughout Utah’s news-media landscape.

Deseret News Publishing Co. allegedly used its veto power to prevent an ownership change of The Tribune that would have spared the newspaper the fate of a 48 percent reduction in its revenue, and would have prevented the other changes to the JOA that raise antitrust concerns. Such conduct suggests an “unreasonableness” on the part of Deseret News Publishing Co. in the exercise of a JOA clause that is likely unlawful anyway as it is contrary to the “public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States...”⁴⁹

⁴⁵ Paper Chase: How The Tribune slipped away from a family and why the D-News took advantage, The Salt Lake Tribune, June, 9, 2002; A1

⁴⁶ See July 3, 2000, letter from Glen Snarr to Dean Singleton, Salt Lake Tribune Pub'g Co., LLC, et al., v. AT&T Corp., et al., 2:00CV936ST

⁴⁷ See Barnett Statement, Salt Lake Tribune Pub'g Co., LLC, et al., v. AT&T Corp., et al., 2:00CV936ST

⁴⁸ A copy of the news tip mailing is available at <http://www.utahnewspaperproject.org/content/Developments>

⁴⁹ 15 U.S. Code § 1801

According to the late legal scholar Stephen R. Barnett, rights contained in both sections 2 and 10 of the 2001 JOA were so problematic that the signatories initially removed them at the direction of the Justice Department. And yet, language granting Deseret News Publishing Co. veto power mysteriously reappeared in the 2001 amended JOA, as well as the 2013 amended JOA.⁵⁰ The Justice Department is not alone in considering such clauses threatening to the Newspaper Preservation Act's mandate of editorial independence. In *Reilly v. Hearst Corp.*, U.S. District Court Judge Vaughn R. Walker wrote that provisions restricting the sale of a JOA property, such as a right of first refusal or right to prevent a sale, are suspect legally.⁵¹ Section 10 granting the Mormon Church's veto power over the transfer has caused market harm in the past and poses an ongoing harm by preventing a sale of the paper in the future, in violation of antitrust law.

(E) The new JOA gives the owner of the Deseret News control over both newspapers' production, advertising and circulation operation and, coupled with the other 2013 amendments, represents an intolerable intrusion into The Tribune's editorial independence.

From 1952 to 2013, the makeup of the joint operation charged with producing The Tribune and Deseret News remained fundamentally unchanged: two members from the Deseret News and two members from The Tribune. The two newspapers operated amicably under that arrangement for 50 years, with deadlocks a rare occurrence. In fact, the board governing Newspaper Agency Corp. deadlocked only once, according to Dominic Welch, Tribune publisher from 1994 to 2001. The Tribune's representatives wanted to convert the delivery fleet to natural gas; Deseret News representatives preferred diesel.⁵² But by the late 1990s, the partnership between the Deseret News and The Tribune had degenerated into what the American Journalism Review called "the JOA from hell."⁵³ The Deseret News was desperate – understandably – to move to morning publication; both newspapers wrangled over the cost of doing so. It was more than a business dispute, however, that drove the two partners to war. The Tribune covered matters related to the Mormon Church in a way that LDS leaders found less than respectful.⁵⁴

⁵⁰ See Barnett Statement, supra Note 47, 15-20

⁵¹ *Reilly v. Hearst Corp.*, 107 F. Supp. 2d, 1192 (N.D. Cal. 2000),

⁵² (Welch Dep. pg. ln.), *Salt Lake Tribune Pub'g Co., LLC, et al., v. AT&T Corp., et al.*, 2:00CV936ST

⁵³ Supra, note 9

⁵⁴ Id. Journalists at The Salt Lake Tribune – a large number who are themselves LDS -- face the sensitive task of covering the state's most powerful institution while dealing respectfully with church members. "When joining The Tribune as a reporter Jan. 30, 1962, I received the then-standard instruction -- that Tribune policy proscribed news stories deliberately calculated to needlessly demean the Church of Jesus Christ of Latter-day Saints, its theology, its members or institutions," says Harry E. Fuller, Jr., editorial page editor until 1990 "Additionally, the admonition included that this did not prevent reporting of events which might include criticism of LDS actions, members or officials if that arose in legitimate, normal news-making developments and in such instances, every attempt should be made to obtain an LDS response or clarification." Available at <http://www.utahnewspaperproject.org/>

Once The Tribune was in safely in the hands of Dean Singleton in 2001 (though the corporate identity of the paper remained “Kearns-Tribune”), Deseret News Publishing Co. accepted a continuation of the four-member board makeup in the newly amended JOA. That agreement with Singleton also included a provision allowing the Deseret News to move immediately to morning circulation. But the switch to morning did not result in an uptick in circulation for the church-owned publication. Both newspapers lost circulation - - as have all newspapers through the Internet revolution and the “Great Recession” -- but the stubborn 60 percent/40 percent circulation split persisted in the core market.

By 2013, the Deseret News’ owners were able to buy control of Newspaper Agency Corp. and complete the first prong of Gary Gomm’s plan. Section 2.02 of the newly amended JOA states the “Management Committee shall consist of five (5) persons who shall be elected at each annual meeting of the Members.... Three members (3) of the five-member Management Committee shall be elected and appointed by DNPC, and one of these three members shall be designated by DNPC as Chairman of the Management Committee, and the other two members of the Management Committee shall be elected and appointed by K-T, LLC.” At least one K-T member must vote for such “reserved matters” as “suspending or ceasing to publish The Salt Lake Tribune.”⁵⁵

The newly amended JOA contains reassuring language declaring a commitment to “the survival and success of both the Deseret News and The Salt Lake Tribune as independent editorial voices, with the ultimate goal for each newspaper of achieving optimal household penetration and maximizing the circulation of each newspaper, while allowing both newspapers to reap the financial benefits and economies from the able management of a joint operating system.”⁵⁶ Such a “commitment” to “independent editorial voices,” should be examined in the context of a JOA that serves to weaken The Tribune’s voice. Such a “commitment” should be examined in light of the Deseret News Publishing Co.’s years-long effort to gain control of The Salt Lake Tribune, either by outright purchase or through a scheme to acquire NAC control and profit points. Antitrust scrutiny involves a fact-intensive study of suspect conduct to determine potential harm to consumers and competition.⁵⁷ Such an examination here would show that the new JOA amendments, implemented in our heavily concentrated media market, certainly raise anticompetitive concerns.⁵⁸ But the greatest market harm will be to our community’s marketplace of ideas.

⁵⁵ 2013 JOA § 2.02 (s)

⁵⁶ *Id.* at 2

⁵⁷ See *United States v. Daily Gazette Co.* and *Reilly v. Hearst Corp.*, *supra*, notes 39, 51 (noting “the Sherman Act and Clayton Act should be read bearing in mind the legislative purposes that prompted enactment of the NPA; namely, encouragement of multiple sources of newspaper news, features and opinion.... Under this statutory framework, the elimination of a newspaper represents a cognizable injury to interests protected by the antitrust laws....”); Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 *Antitrust L.J.* 249, 271 n. 105 (2001) See also *Merger Guidelines*, *supra* note 4.

⁵⁸ The circumstances surrounding the amending of the 2013 JOA suggest an awareness by the parties that they were acting contrary to the public interest. The newspapers’ owners attempted to keep the new terms private. See <http://www.utahnewspaperproject.org/content/Developments>

Conclusion:

It is a sad irony that The Tribune cannot use its own independent voice to battle these threats to its future. After all, one of the parties abusing the Newspaper Preservation Act is its own out-of-state owner. Further, the complicated nature of the transaction – its “ingeniousness” – prevents news consumers in Northern Utah from understanding the implications. Thus, it is incumbent upon federal regulators to take action before the market harms caused by the new amendments are irreversible.⁵⁹

Deseret News Publishing Co. also bought The Tribune’s share of the printing press last fall, concurrent with the signing of the newly amended JOA. Alden Global Capital and its operator Digital First Media are engaged in the selloff of such “legacy” assets in many markets where they have a newspaper. In San Jose, Calif., for example, the company last October sold the Mercury-News’ 35.7-acre campus, including its 312,000-square-foot main building.⁶⁰ Such sales are not surprising as the New York hedge fund seeks to stanch losses from its unhappy investment in newspapers.⁶¹ But in Salt Lake, the company has sold off more than just a “legacy” asset; it has sold off The Tribune’s future.

Salt Lake City is among a small handful of markets still with a JOA. Even the Tucson Citizen, whose challenged joint operation led to the passage of the Newspaper Preservation Act in 1970, is no longer printed.⁶² It can be safely asserted that the antitrust exemption granted by the act has not been effective in “preserving” newspapers in the midst of the Internet revolution. But as it slips into obsolescence, the law should not be used to endanger a newspaper, especially one that serves as an essential counterweight in a media market completely overloaded by a single powerful institution.

“It is not the province of the antitrust laws or the Antitrust Division to protect or preserve existing market structures, to anoint new business models, or to pick winners and losers,” Christine Varney, former Assistant Attorney General, Antitrust Division, told newspaper publishers in 2011. “Rather, the antitrust laws and the Antitrust Division serve to ensure that parties do not use illegal means to disrupt the competitive process as it works itself out.”⁶³ It is understandable, in the midst of the current newspaper industry turmoil, that

⁵⁹ Hawaii v. Gannett Pacific Corp., supra, note 30. See also State of Arizona v. Gannett Co., Inc., et al, No. 4:09-CV-0281-TUC-RCC.

⁶⁰ San Jose Mercury News Building Sold, (Oct.31, 2013)
http://www.mercurynews.com/business/ci_24430331/san-jose-mercury-news-building-sold

⁶¹ Wolff, supra note 27

⁶² Salt Lake City; York, Pa.; and Charleston, W.Va., are apparently the sole remaining newspaper markets with JOAs. Charleston remains a two-newspaper town thanks to intervention by the Justice Department’s Antitrust Division.

⁶³ Page 4, “Dynamic Competition in the Newspaper Industry, Remarks as Prepared for The Newspaper Association of America, March 21, 2011.

regulators are inclined to take a wait-and-see approach. If such an approach is taken in Salt Lake City, where these illegal JOA amendments threaten an indispensable journalistic voice, the Justice Department may not be picking a winner. But it is certainly picking a loser.

Thank you for your consideration.

Sincerely,

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cc: William Baer, Assistant Attorney General, Antitrust Division
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