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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UTAH NEWSPAPER PROJECT, dba CITIZENS FOR TWO VOICES, Plaintiff, v. DESERET NEWS PUBLISHING COMPANY and KEARNS-TRIBUNE, LLC, Defendants.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE** Civil No. 2:14-cv-445 Judge Clark Waddoups

Plaintiff Utah Newspaper Project, dba Citizens For Two Voices, hereby submits its Memorandum in Opposition to Defendants' Joint Motion to Dismiss the Complaint With Prejudice (docket entry no. 29) and Defendants' Renewed Motion to Dismiss (docket entry no. 45, stating as follows:

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CORRECT STANDARD APPLICABLE TO A MOTION TO DISMISS

Before addressing the merits of Defendants' arguments, a few observations should be made about the standard governing motions to dismiss. In the years since *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Tenth Circuit has addressed several times what is—and is not—required under those rulings. It seems useful to summarize key clarifications articulated by the Tenth Circuit, to avoid any implication by Defendants that Plaintiff may be held to higher standards than F.R.Civ.P. 8 requires:

- "Rule 8(a)(2) still lives" under *Iqbal/Twombly*. "There is no indication that the Supreme Court intended a return to the more stringent pre-Rule 8 pleading requirements. . . . Thus, as the Court held in *Erickson v. Pardus*, [551 U.S. 89], which it decided a few weeks after *Twombly*, under Rule 8, 'specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191-1192 (10th Cir. 2012) (citations, quotation marks and ellipses omitted).

- The overriding consideration under Rule 8 remains whether the complaint gives "fair notice" to the defendant, which must take context into account context. *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008) ("We reiterate that context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case."); *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) (nature and specificity of the allegations required to state a plausible claim will vary based on context, requiring the reviewing court to draw on its judicial experience and common sense).

- *Iqbal/Twombly* rejected any claim to a heightened pleading standard under F.R.Civ.P. 8(a), including in antitrust cases. While a complaint must contain some facts (it cannot consist merely of "labels and conclusions and a formulaic recitation of the elements of a cause of action"), it need not include detailed factual allegations, *Brokers' Choice of America, Inc. v. NBC Universal, Inc.*, --- F.3d ----, 2014 WL 3307834 *5 (10th Cir., July 9, 2014), or "technical fact pleading" or "specific facts." *Smith v. United States*, 561 F.3d 1090, 1104 (10th Cir. 2009). *See also S.E.C. v. Shields*, 744 F.3d 633, 641 (10th Cir. 2014) ("Under Rule 8, specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.").[1]

- "The federal rules do not require a plaintiff to provide a factual basis for every allegation." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1173 (10th Cir. 2010). Nor, of course, must a complaint cite the evidentiary support for its allegations. *Brokers' Choice of America*, --- F.3d ---- at *7, n.8.

- The Rule 12(b)(6) standard does not require that a plaintiff establish a *prima facie* case in its complaint. *Khalik*, 671 F.3d at 1192. However, the elements of each alleged cause of action help to determine whether a plaintiff has set forth a plausible claim. *Id.* at 1193 ("while Plaintiff is not required to set forth a *prima facie* case for each element, she is required to set forth plausible claims").

- "Plausibility" under *Twombly/Iqbal* does not require a Court to find the allegations "likely to be true"; rather, "plausibility in this context must refer to the scope of the

[1] As the Tenth Circuit has summarized *Twombly* and *Iqbal*, "While specific facts are not necessary, some facts are." *Khalik*, 671 F.3d at 1193.

allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Smith*, 561 F.3d at 1104.[2]

And, finally:

- Dismissal of a complaint for alleged pleading or wording deficiencies (rather than incurable, substantive defenses) should be without prejudice. *E.g., Robbins*, 519 F.3d at 1253 (remanding with instructions to dismiss without prejudice under Rule 12(b)(6)).

[2] "This is not to say that the factual allegations must themselves be plausible; after all, they are assumed to be true. It is just to say that relief must follow from the facts alleged." *Smith*, 561 F.3d at 1104, quoting *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

ARGUMENT

I. DEFENDANTS HAVE NOT ESTABLISHED AS A MATTER OF LAW THAT THE NEWSPAPER PRESERVATION ACT IMMUNIZES THE OCTOBER 2013 JOA FROM FEDERAL ANTITRUST LAWS.

In their first argument, Defendants ask the Court to grant their motion to dismiss based upon the Newspaper Preservation Act, 15 U.S.C. § 1801, *et seq.* which is not only an affirmative defense but one that is narrowly construed. *United States v. Daily Gazette Co.*, 567 F.Supp. 2d 859, 872 (S.D.W.Va. 2008) (string citing cases concluding that NPA is an affirmative defense which must be "pled and proved by the defendants"); *see also, Committee for Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473 (9th Cir. 1983) (NPA, like other exemptions to antitrust laws, this section is to be narrowly construed).[3]

Defendants face an uphill battle on their affirmative defense for several reasons. First, Defendants must establish, as a matter of law, every statutory element of such defense. *See, e.g., Federal Deposit Insurance Corp. v. Arciero*, 741 F.3d 1111, 1116 (10th Cir. 2013) (defendant raising affirmative defense has the burden of showing that all statutory elements of such defense are met); *Committee for Independent P-I*, 704 F.2d at 479 (ultimate burden of persuasion under the NPA lies with the proponents of the JOA).

This showing must be made while also assuming true all of Plaintiff's factual allegations and reasonable inferences therefrom, and despite the fact that analysis under the NPA involves certain factual components that are not suitable for resolution under Rule 12(b)(6). *Daily Gazette Co.*, 567 F.Supp.2d at 872 (request for dismissal based upon the NPA involved mixed

[3] Defendants' motion seems to rely heavily upon an assumption that a JOA is automatically entitled to NPA immunity, and that Plaintiff somehow has the burden of disproving such immunity. *See, e.g.,* Defts' Mem., pp. 10, 11, 14, 18 (characterizing Plaintiff's claims as seeking to "strip" the October 2013 JOA of "its NPA exemption"). As noted herein, that is incorrect.

questions of fact and law that weigh "in favor of awaiting development of the evidentiary record").

Defendants must also persuade the Court to adopt a construction of a statutory term in the NPA that is both materially different from the construction given it by the agency charged with enforcing the Act, and that defeats its purpose and stated intent.

The Newspaper Preservation Act provides, in pertinent part:

> 15 U.S. Code § 1802 – Definitions
>
> As used in this chapter—
>
> (1) The term "antitrust law" means the Federal Trade Commission Act [15 U.S.C. § 41 et seq.] and each statute defined by section 4 thereof [15 U.S.C. § 44] as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.
>
> (2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: Provided, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.
>
> (3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.
>
> (4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

15 U.S. Code § 1803 - Antitrust exemptions

(a) Joint operating arrangements entered into prior to July 24, 1970

It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: Provided, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) Written consent for future joint operating arrangements

It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Predatory practices not exempt

Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

(Brackets in original.)

Broken down to the elements relevant to the pending motion, in order to claim grandfathered status for an "amendment" to a pre-Act (pre-1970) joint operating agreement, a defendant must show:

1. "[A]t the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication[.]" (15 U.S.C. § 1803(a)).

2. "That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement." (15 U.S.C. § 1803(a).)

3. There must be "no merger, combination, or amalgamation of editorial or reportorial staffs" and "editorial policies" must be "independently determined." 15 U.S.C. §§ 1802(2) and 1803(a).

4. And, finally, there is the inherent requirement to claim immunity for an amendment, *i.e.*, that the change is, in fact, an "amendment."

Defendants have not met their burden on any of these elements, let alone all of them.[4]

[4] Defendants say the Amended Complaint "appears to concede" that the October 2013 JOA complied with certain elements of the Newspaper Preservation Act. (Defts' Mem., p. 10.) That is not correct. Plaintiff did choose to address certain elements of the Act often raised in NPA cases, but the Complaint expressly stated that these were just *some* of the elements. *See* Am.Compl. ¶ 29 ("To receive that immunity, Congress required, *inter alia*, [listing certain elements]").) "Inter alia," of course, means, "among other things." Plaintiff was not required to address all (or any particular) elements of an affirmative defense; the burden remains squarely on Defendants to prove that they qualify for all elements required under such a defense. *See Asebedo v. Kansas State University*, 559 Fed.Appx. 668, 671 (10th Cir.2014), and cases cited.

1. Defendants have not established as a matter of law the "failing business" element.

To claim the limited antitrust immunity for an "amended" Joint Operating Agreement, a defendant must show that, "at the time at which such arrangement was first entered into . . . not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

This is an unambiguous statutory requirement for a claim of immunity; the Court is not free to disregard it or even question the wisdom of its inclusion by Congress. *See Zuni Public School Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 93 (2007) (if statutory language is unambiguous, that ends the court's analysis); *see also Bay Guardian Co. v. Chronicle Pub. Co.*, 340 F.Supp. 76, 80 (N.D. Cal. 1972) ("The Act quite specifically provides various qualifications on its effectiveness. Thus in order to qualify for the antitrust exemption the participating newspapers must prove that at least one of them was a 'failing newspaper.'")[5]; *City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 559 F.Supp. 1021 (D. Haw. 1983) (finding that, based upon evidence presented, one newspaper had been in serious financial trouble when the original 1962 JOA was formulated, and therefore newspaper owners were entitled to seek NPA immunity)[6]; *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1288

[5] *See also Bay Guardian Co. v Chronicle Publishing Co.*, 344 F.Supp. 1155, 1157 (N.D. Calif. 1972) ("the terms of the Act provide that it is to apply to daily newspapers, no more than one of which 'was likely to remain or become a financially sound publication' (§ 1803(a)). The Court offers no opinion at this time whether the defendant newspapers will be able to prove at the time of trial that they came within that definition when they began joint operations.")

[6] In the *Honolulu* case, the district court suggested that the "failing business" element could be met if the JOA participants proved that they had a good faith belief that one newspaper was failing. *See* 559 F.Supp. at 1027, 1032. While deemed sufficient, a good faith belief appears to conflict with the unambiguous requirement of the Act itself. It is largely *dictum* in any event, as

(D.C. Cir. 1989) ("A pre-statute JOA is not unlawful if at the time at which such arrangement was entered into, not more than one of the newspapers involved was 'likely to remain or become a financially sound publication.'").[7]

Ignoring the fact that the "failing business" component is actually an element of *its own affirmative defense*, Defendants say that Plaintiff's "challenge to the 1952 JOA is too late and should not be entertained." (Defts.' Mem., pp. 12-13.) Defendants have it backwards: It is the October 2013 JOA, which went into effect January 2014 and is ongoing, that is being challenged. It is *Defendants* who are seeking to forestall that challenge by grandfathering the current JOA into an immunity provided by the NPA for certain pre-1970 JOAs. Defendants are obviously entitled to assert such a defense – but only if they meet all statutory elements required to gain the immunity.[8]

Defendants also suggest – without citation to any authority – that they should be excused from meeting the clear statutory requirement because the JOA under which they seek protection

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the Court found sufficient evidence after a full trial that the newspaper was failing: "The evidence shows here without substantial conflict that the Advertiser had been in serious financial trouble for many years, in that it was not making a reasonable profit for a newspaper publishing company. In 1960-61, it suffered severe financial losses." *Id.* at 1032.

[7] Defendants make a brief suggestion that a stated belief by Plaintiff that the *Deseret News* was "struggling" when the original JOA was entered might satisfy Defendants' burden of proof on this element. (*See* Defts' Mem., p. 12.) There is, of course, a difference between a business "struggling" and a business *failing*, the latter of which is what Defendants must prove under the NPA.

[8] Defendants suggest that Plaintiff's claims in this case are barred by "the four-year statute of limitations applicable to antitrust claims generally," citing 15 U.S.C. § 15b. Defts' Mem., pp. 12-13. That assertion is baseless; the four-year limitation applies only to claims for *damages* brought under 15 U.S.C. §§ 15, 15a, and 15c. *See* § 15b. Plaintiff asserts no such claims. *See* Am.Compl., pp. 29-30 (seeking only declaratory and injunctive relief).

was executed in 1952. (*See* Defts.' Mem., pp. 12-13.) Again, though, it is Defendants' choice to assert a statutory defense; they can hardly complain about being required to meet the language of the statute upon which they rely. Neither parties nor courts have the authority to simply disregard unambiguous Congressional directives.[9]

2. Defendants have not established, and cannot establish, as a matter of law that they filed all amendments and terms of such amendments with the Department of Justice, as required to claim immunity.

In its Amended Complaint, Plaintiff pointed out that "[n]ot all of the terms associated with the October 2013 JOA are publicly available. For example, several leases referenced in the October 2013 JOA were not filed with the Department of Justice." Am.Compl. ¶ 35 n. 4. This fact, which must be assumed true (and is true), in itself precludes a claim for immunity for the October 2013 JOA.

As noted above, to claim an immunity under the Newspaper Preservation Act, a defendant must prove that "the terms of a renewal or amendment to a joint operating arrangement [were] filed with the Department of Justice[.]" 15 U.S.C. § 1803(a); *see also* 48 C.F.R. §§ 48.1, 48.16 (regulations implementing NPA; all "terms" of an amendment, and all "agreement[s] . . . of amendment," must be filed with the DOJ).[10]

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[9] Any newspaper owner operating under a JOA has been on notice of the requirements that would be required to exempt the JOA (or an amended version) from antitrust laws under the NPA, which has not changed throughout the life of the JOA(s) at issue here. Congress did not automatically grandfather in all pre-1970 JOAs. Indeed, even when the NPA expressly "reinstated" pre-1970 JOAs that had been declared illegal, it did so only "to the extent permissible under section 1803(a) of this title." 15 U.S.C. § 1804(a).

[10] A "Joint Operating Agreement" itself is not limited to formal documents labeled as such, but expressly includes "*any contract*, *agreement*, joint venture (whether or not incorporated), *or other arrangement* entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are

Although it is Defendants' burden to prove compliance and not Plaintiff's burden to allege non-compliance, the Amended Complaint does reflect such non-compliance. The October 2013 JOA references specific terms that have not been publicly filed with the DOJ as required, including, for example, the leases and alleged purchase of Kearns-Tribune assets (equipment). *See* Am.Compl. ¶ 35 and exh. B thereto §§ 4 and 7. Additionally, the Amended Complaint alleges that a large cash payment was made by Defendant Deseret News Publishing Company to Kearns-Tribune, LLC as part of the October 2013 changes. *Id.*, ¶ 35. The terms of that cash payment (the existence of which must be assumed true), have likewise not been filed with the DOJ. *Id.*, ¶¶ 6, 8, 10, 30, 35 (copy of October 2013 JOA was obtained from the DOJ, and did not include the cash payment, leases, etc.).[11]

Compliance with Section 1803(a) is not a difficult task; had Defendants filed with the DOJ all of the terms and documents required, this element would not be at issue. But they did not, and it is.

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established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution . . . .") 15 U.S.C. § 1802(2) (emphases added).

[11] The size of the cash payment matters. As the United States Supreme Court recently recognized, a large payment from one competitor to another may support an inference that the payment was not for some reasonable business purpose, such as avoidance of cost, but instead for an anticompetitive purpose, such as paying a competitor not to compete. *F.T.C. v. Actavis, Inc.*, 570 U.S. ----, 133 S.Ct. 2223, 2235 (2013) ("The rationale behind a payment of this size cannot in every case be supported by traditional settlement considerations. The payment may instead provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market.") and at 2237 (noting that "large and unjustified" payment can bring with it the risk of "significant anticompetitive effects").

3. Defendants have not proved that the October 2013 JOA complies with the NPA's requirement that there be "no merger, combination, or amalgamation of editorial or reportorial staffs" (between participants) and that "editorial policies" be "independently determined." 15 U.S.C. §§ 1802(2) and 1803(a).

The Newspaper Preservation Act requires, as a condition of the exemption granted from antitrust laws, that there be "no merger, combination, or amalgamation of editorial or reportorial staffs" and that "editorial policies be independently determined." 15 U.S.C. § 1802(2) (defining qualified joint operating agreement).[12]

Plaintiff's Amended Complaint alleges (and thus it must be assumed true) that the editorial policy of a newspaper is determined by, or at least subject to being determined by, the newspaper's owner. *See* Am.Compl. ¶ 39(c)(i). Not only is this allegation obvious, but in defining eligible JOAs, the Newspaper Preservation Act itself includes within the definition of "newspaper owner" "any person who *owns or controls* directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications." 15 U.S.C. § 1802(3) (emphasis added).

Although a complaint is not required to include evidentiary support for factual allegations, *Brokers' Choice of America*, at *7, n.8, the Amended Complaint provides some specific factual examples of this concept. *See* Am.Compl., ¶ 39(c)(i) (incident in which the *Tribune*'s owner overrode the newspaper's editorial board on a presidential endorsement, and

[12] Plaintiff does not have to show that the veto power vitiates editorial independence; rather, Defendants have to show that the JOA ensures editorial independence between the two newspapers, because that is part of the threshold definition of a qualifying joint operating agreement. *See* 15 U.S.C. § 1802(b) ("The term 'joint newspaper operating arrangement' means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners . . . .; *Provided, that there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined*.") (Emphasis added.)

showing dramatically different editorial positions on Judge Robert J. Shelby's (District Judge for the United States District Court for the District of Utah) gay marriage ruling).

The October 2013 JOA contains a provision that purports to give the owner of the *Deseret News* an unconditional, unrestricted veto power over the identity of any new owner of *The Salt Lake Tribune*, and the same veto power over any potential investor who would be entitled to "participate in management." *See* Am.Compl. ¶ 39(b) and exh. B thereto, § 10.[13]

These provisions, on their face, prevent Defendants from establishing as a matter of law the complete editorial independence that must be proved to exempt a joint operating agreement from antitrust liability. In that sense, the provisions are similar to a right of first refusal, which is inherently "suspect" under antitrust laws and the Newspaper Preservation Act. *See Reilly v. Hearst Corp.*, 107 F.Supp.2d 1192, 1195, 1199 (N.D. Cal. 2000) (legality of provisions "restricting the sale of a JOA publication," such as a "right of first refusal and the right to prevent a sale . . . to a publisher within sixty miles of San Francisco," is "suspect").

With respect to whether editorial policies are independently determined, a right to grant or withhold consent to a new owner of the competing newspaper is more damaging to such independence than is a right of first refusal. A right of first refusal cannot be exercised without merging the two ownerships and thus killing the JOA. Its exercise is necessarily public and thus

[13] Similarly, the October 2013 JOA prohibits assignment or delegation of "any of the rights or obligations" of either participant "without the written consent of the other." *See* Am.Compl. Exh. B, § 21. This clause purports to give either owner an unrestricted veto over the transfer of any of the rights or obligations of either party under the JOA, which could include, by its wording, the right to publish a newspaper. Section 2.01 of the October 2013 JOA also provides that each party's share of NAC stock is inalienable. *See id.*, ¶ 39(c)(i), Exh. B § 2.01. This provision thus purports to give each owner the right to approve or veto sale of the other party's interest in the JOA; it is an absolute prohibition and contains no provision that consent may be given or withheld, reasonably or not.

may draw antitrust (and other) challenge, both from public agencies and private individuals. *See, e.g., United States of America v. Daily Gazette Company*, et al., United States District Court Southern District of West Virginia, 2:07-cv-00329 (Department of Justice alleging that newspaper's exercise of right of first refusal over purchase of competitor violated antitrust law); *Gannett Pacific Corp.*, *supra*.

In contrast, a right of one publisher to grant or withhold consent to the sale of, or investment in, the other newspaper will be exercised, typically, within the framework of an existing joint operating agreement, and without significant cost to the exercising party. It may be exercised any number of times over the entire course of the agreement. Its exercise typically will be secret, further reducing the cost to the exercising party. Moreover, while a right of first refusal is a narrow right, enabling the right-holder to choose just one party – itself – as the new owner, a right of consent can cover any number of potential purchasers. The fact that the owner of the Deseret News can veto any attempted sale is a chilling factor to prospective purchasers.

A right of consent thus gives the right-holding publisher a continuing, silent power to determine who may purchase, or manage, the other newspaper. Such rights are inconsistent with the Newspaper Preservation Act's requirement that editorial policies be independently determined. An editorial voice is not independent from a voice that effectively selected it. Defendants cannot meet this element, particularly on a 12(b)(6) motion.

Defendants argue that these veto powers were first added in 2001, and that Plaintiff does not take issue with how the *Tribune*'s owner(s) have exercised their editorial powers. (*See* Defts.' Mem., pp. 15-16). That suggestion misses the mark. First, Plaintiff's Amended Complaint points out that the newspapers recently underwent changes in their ownership and

management, including the purchase of the Tribune by an out-of-state hedge fund. Am.Compl. ¶¶ 5-6. That renders largely immaterial any prior conduct. Second, the NPA neither requires, nor does Plaintiff desire, to criticize any particular exercise of editorial power or assertion of editorial viewpoint. The NPA expressly requires that editorial policies be "independently determined" for a JOA to qualify, which is inherently impossible when one newspaper's owner can dictate the ownership and management of its competitor. At a minimum, Defendants have not established this element as a matter of law under Rule 12(b)(6).

Plaintiff's position on this point is supported by the Tenth Circuit's opinion in *Salt Lake Tribune Publishing Company, LLC v. AT&T Corp.*, 320 F.3d 1081 (10th Cir. 2003). Although that case involved different issues and a different JOA, some of the Tenth Circuit's rationale is informative here. In the *Tribune* case, the Tenth Circuit concluded that, under a 1982 joint operating agreement, Deseret could not prevent the sale of the *Tribune* to any particular purchaser, because there was no provision by which it could prevent the sale of the *Tribune*'s owner, Kearns-Tribune. *Id.* at 1094. The lack of such power was an important consideration in the court's conclusion that the 1982 JOA did not violate the NPA's requirement of editorial independence. *Id.*

4. The October 2013 JOA is so manifestly different from the original JOA that it does not qualify as an "amendment."

The Newspaper Preservation Act allows "amendments" to pre-Act JOAs to be grandfathered in. *See* 15 U.S.C. § 1803. "Amendment" is not defined in the Act. The Department of Justice has consistently interpreted the term with the stated views of the NPA's sponsor, *i.e.*, "changes that might take place in the course of ordinary business operations":

> Congress implicitly recognized, when it debated the scope of amendments of pre-1970 JOAs, that a transaction of this sort [de facto termination] would not qualify for immunity, and that such amendments would be limited to ordinary operational matters. Rep. Kastenmeier, floor manager of the bill, rejected the notion that the term "amend" gave JOA newspapers a "carte blanche" to take any action they desired. Specifically, he stated that the provision allowing pre-1970 JOAs to amend their agreements was limited to ordinary "operational reasons":
>
> Newspapers do amend their agreements sometimes on an annual basis for the purpose of labor contracts and for many other operational reasons . . . . Accordingly, we specifically included the word "amend" to refer to changes that might take place in the course of ordinary business operations.

Exh. A hereto (United States' Memorandum in Opposition to Motion to Dismiss, *United States of America v. Daily Gazette Company*, supra, pp. 29-30, *quoting* 116 Cong. Rec. 23173-74 (1970) (statement of Rep. Kastenmeier, responding to statement of Rep. Jacobs) (brackets in original); *see also id.*, pp. 30-31 ("Defendants' expansive reading of the term 'amend' in Section 1803(a) would obliterate any limits on what JOA newspapers could do and still receive immunity. In effect, they want the Court to interpret the word 'amend' to nullify every other provision of the Act.").[14]

The interpretive views of the Newspaper Preservation Act by the Department of Justice, the agency charged with implementing the Act, "warrant respect." *See Olmstead v. L.C.*, 527 U.S. 581, 597-598 and n.9 (1999) (interpretation of statute by DOJ; "views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir. 1989), *aff'd by equally divided court*, 493 U.S. 38

[14] *See also*, Brief Amicus Curiae of the United States of America in Support of Appellee State of Hawaii and Affirmance, *State of Hawaii v. Gannett Pacific Corp., et al.*, No. 99-17201, U. S. Court of Appeals for the Ninth Circuit, November 3, 1999, pp. 17-18. As evidenced by the citations, the DOJ's position on this issue has been consistent and not case-specific.

(1989) (deference granted Attorney General's application of NPA requirements). More important, the DOJ's interpretation is reasonable. The "amendments" at issue here have nothing to do with ordinary business operations like printing or distributing newspapers. *See* 15 U.S.C. § 1802(2) (listing business activities covered by a qualifying JOA).

The original 1952 JOA emphasized equality between the competitors. Neither party had control over the NAC. Revenues were allocated roughly in proportion to circulation. The JOA did not authorize the NAC to stop printing either newspaper. The JOA did not give either participant a say – let alone a veto – over ownership of its competitor. *See* Am.Compl., ¶ 39(b). All of those critical provisions are dramatically different in the October 2013 JOA. Deseret News Publishing Company now has control over the NAC. Revenue split has shifted to 70% (*News*) – 30% (*Tribune*), grossly disproportional to circulation. The NAC is now authorized to stop printing the *Tribune* (and only the *Tribune* – there is no authority to stop printing the *News*). And the *Deseret News's* owner has veto power over not just purchasers of its competitor, but even minority investors if they are allowed to have any role in management (again unilateral; the *Tribune* has no corresponding authority). *See* Am.Compl., ¶ 39(b).

In spirit, letter, and effect, this is a materially different Joint Operating Agreement than the 1952 JOA that was (*arguendo*) grandfathered in by the 1970 statute. Under the Newspaper Preservation Act, therefore, the October 2013 JOA offers no immunity because it has not been submitted to the Department of Justice for preapproval. 15 U.S.C. § 1803(b).

In their motion to dismiss, Defendants argue that there is other legislative history that could support a different interpretation, and that Congress chose not to require preapproval of all amendments. (*See* Defts.' Mem., pp. 12-14.) (Even the history cited by Defendants, however,

appears to contemplate amendments as a means of "streamlin[ing]" operations in a normal business sense, *id.*, p. 14, which cannot be claimed for the type of changes at issue here, particularly given the allegation that the changes are either part of, or will result in, the termination of one participant's newspaper.) In any event, parties' competing views would not render the DOJ's longstanding interpretation wrong or unreasonable – especially when NPA immunity, like other antitrust immunities, must be narrowly construed. *Committee for Independent P-I*, 704 F.2d at 473, and authority cited.

Defendants cite *Mahaffey v. Detroit Newspaper Agency*, 969 F.Supp. 446 (E.D. Mich. 1997) to suggest that no amendment ever requires preapproval of the DOJ, but that case actually supports Plaintiff's position. (*See* Defts.' Mem., p. 14.) The court in *Mahaffey* simply ruled that not "all" amendments must be pre-approved – in other words, some do. *See id.* at 448 n. 1 (declining to find that "*any* unapproved amendment" forfeits immunity for an entire JOA; "had Congress intended *all* amendments to create such sweeping consequence . . . it could easily have included language to that effect in the statute"; requiring participants to go through cumbersome review process "for *every* amendment, no matter how minor, defies common sense.") (Emphases added.)

Plaintiff is not arguing that "all amendments" must be preapproved, or that "minor" amendments (like the one in *Mahaffey*, which addressed only publication schedules in the event of a strike) must be preapproved by the DOJ. Plaintiff is arguing that the October 2013 JOA is so materially different from the 1952 JOA that it does require preapproval.[15]

[15] Any suggestion that the October 2013 JOA reflects an accumulation of amendments over 62 years would be impermissible on its face: "Amendments" under the NPA are defined with reference to the *original* JOA. *See* 15 U.S.C. § 1803 (a), 28 C.F.R. §§ 48.1, 48.2(d), and 48.16

Additionally and separately, no matter how they are labeled, changes to a joint operating agreement that have the intent or effect of terminating the JOA, or of ending publication of one participant, do not qualify as "amendments" under the Newspaper Preservation Act. *See, e.g.*, *Reilly*, *supra*, 107 F.Supp.2d at 1192 ("Although inartful drafting of the NPA [Newspaper Preservation Act] leaves open the argument that termination of a JOA is exempt from antitrust scrutiny as an amendment to the agreement, the defendants here, quite sensibly, have not advanced this argument.").

This interpretation is, again, consistent with that of the enforcing agency. *See* Exh. A hereto, pp. 35-36 ("The limited antitrust immunity that the NPA provides does not extend to an agreement having the aim or effect of closing a JOA newspaper, even if the parties seek to camouflage their agreement as an 'amendment' to a lawful JOA agreement. . . . Actions taken to bring about the closure of one of the newspapers or the termination of the JOA fall outside the express language of the NPA's exemptions. Calling such actions amendments, as defendants do here, does not save them from antitrust scrutiny.")

In sum, Defendants have not met their burden of establishing as a matter of law, all of the elements of their affirmative defense, and dismissal based upon NPA immunity must be denied.[16]

(addressing process for submitting terms and agreements of "amendment of existing joint newspaper operating arrangements," and defining "existing" arrangements as "any joint newspaper operating agreement entered into before July 24, 1970").

[16] Defendants also raise a First Amendment argument in relation to application of antitrust laws their JOA (which is the result of failing to establish an NPA defense). *See* Defts' Mem., pp. 17-18 and 25. Similar First Amendment arguments have consistently been rejected, as neither antitrust laws, nor Plaintiff, seek to dictate content. *See* pp. 32-33, *infra*.

II. PLAINTIFF HAS SUFFICIENTLY PLED ARTICLE III AND ANTITRUST STANDING.

1. Plaintiff has sufficiently alleged that its members sustained an injury in fact.

Defendants argue that Plaintiff lacks Article III standing to bring this lawsuit based upon the incorrect assertion that Plaintiff (or more, specifically, none of its members) has not suffered an injury in fact. (Defts.' Mem., pp. 19-26.)[17]

Defendants' argument is not correct for several reasons. First, their argument focuses primarily on a characterization of Plaintiff's claim as alleging imminent "closure" or shuttering of the *Tribune*. *E.g.,* Defts.' Mem., p. 20, 23, 24. While Plaintiff does fear that result, its claims are actually different from Defendants' characterization in at least two respects. First, Plaintiff also alleges that other anticompetitive effects have already occurred, such as diminished consumer choice and output. *See* pp. 29-33, *infra*. Second, Plaintiff has actually alleged something different regarding the *Tribune*'s fate than Defendants' characterization; *see* p. 40, *infra*.

[17] "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and Controversies.'" *Susan B. Anthony List v. Driehaus*, 573 U. S. ----, 134 S.Ct. 2334 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* at 2341. To establish Article III standing, "A plaintiff must show (1) an injury in fact," (2) a sufficient 'causal connection between the injury and conduct complained of,' and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* (internal quotation marks and brackets omitted). The injury-in-fact requirement "helps to insure that the plaintiff has a personal stake in the outcome of the controversy." *Id.* Article III standing and ripeness "boil down to the same question." *Id.* at 2341 n.5. The harm need not have occurred yet; an allegation of future injury may suffice if the threatened injury is certainly impending, or if there is a substantial risk that the harm will occur. *Id.* at 2341.

A. Existing harm.

Plaintiff alleges illegal, anticompetitive actions by Defendants that have already reduced the quality and quantity of output of the product at issue. *See* Am.Compl., ¶¶ 19, 50 52. That allegation in itself establishes not only the threatened invasion of a protected interest (which would satisfy Article III), but an existing invasion. *See Cargill, Inc v Monfort of Colorado, Inc*., 479 U.S. 104, 109-113, 107 S. Ct. 484 (1986) (in antitrust cases, relevant injury is injury to competition).

The fact that an alleged injury to competition causes injury to consumers is why consumers are the preferred plaintiffs in antitrust suits. *See, e.g., Reilly, supra,* 107 F.Supp.2d at 1211 (antitrust claims involving newspapers under Sherman Act §§ 1 and 2 and Clayton Act § 7); *B-S Steel of Kansas, Inc. v. Texas Industries*, Inc., 439 F.3d 653, 667 (10th Cir. 2006), citing *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) ("Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury" (Sherman Act §§ 1 and 2)); *Nelson v. Monroe Reg'1 Med. Ctr.*, 925 F.2d 1555, 1562-65, 1568 (7th Cir. 1991) (consumers accorded standing under Clayton Act § 7).

More specifically, subscribers and other consumers of a newspaper have standing to challenge alleged antitrust violations under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. *Reilly, supra*, 107 F. Supp. 2d at 1194-95 ("as a consumer of newspaper news, features and opinions, [the plaintiff] is entitled to attempt to prove that the challenged transactions caused injury to competition for readers among economically viable newspapers").

Stated differently, an existing injury to competition is an invasion of a consumer's legally protected interests in lawful competition under federal antitrust laws, which is all that is required under Article III. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) (Article III requires "an invasion of a legally protected interest").

B. Future harm.

There is a phenomenon in the newspaper industry known as the "downward spiral." Once a newspaper enters the spiral, it is virtually impossible to recover. Failure occurs, perhaps not immediately, but inevitably. *See, e.g.,* "Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages?", 1984 *BYU Law Rev.* 123, 130 (explaining "economic phenomenon" of downward spiral and that "[o]nce this spiral begins, it is rarely reversed"). In that sense, the downward spiral is analogous to a patient contracting a terminal illness: The amount of time it might take for the illness to exact its toll may vary, but the conclusion itself is foregone.

This is an important point, because Plaintiff's Amended Complaint alleges that, under the express terms of the October 2013 JOA – which, among other things, cuts the *Tribune*'s revenue stream in half – the *Tribune* cannot survive long-term. In other words, the *Tribune* will enter the downward spiral automatically. Am.Compl. ¶¶ 7, 12, 36, 50.

In response, Defendants largely ignore this aspect of the October 2013 JOA, and instead simply allege that the Amended Complaint "includes no facts to show[] that there are any plans to close down the *Tribune* or that it is likely to cease publishing at any time in the foreseeable future." (Defts.' Mem., p. 20.) That assertion fails to afford Plaintiff the reasonable inferences to which it is entitled under Rule 12(b)(6). Intent can be pled generally, *see* F.R.Civ.P. 8(a) and

9(b), but Plaintiff's Amended Complaint also identifies specific facts from which, in their totality, a jury could infer such "plans" or intent. *See, e.g.,* Am.Compl., ¶¶ 36(a)-(k), 32-37 (*e.g.*, secrecy of negotiations and concerns by a whistleblower; addition of previously non-existent authority by NAC to modify Tribune printing frequency and circulation area, and to stop publishing the *Tribune*; Defendants' attempts to downplay actual terms of the October 2013 JOA by mischaracterizing them). *See also* p. 11, *supra* (large cash payment to competitor may be "strong evidence" of anticompetitive purpose).

Defendants' motion also sidesteps Plaintiff's allegations that, regardless of whether putting the *Tribune* into a downward spiral is the intent of the new JOA, it is the *effect*, which is sufficient in itself to grant relief under several of the antitrust provisions cited in Plaintiff's Amended Complaint. (Standing, of course, is not based upon a defendant's denial of liability, or even a court's prediction of who might ultimately win. It requires only the invasion of a legally protected interest, as Plaintiff alleges here.)[18]

While Plaintiff also alleges that its existing injury will continue and escalate, the likelihood of additional future injury does not erase the injury from existing violations of antitrust laws, and Defendants cite no authority otherwise. *See also Reilly*, *supra*, 107 F.Supp.2d

[18] Defendants make various references to their "business judgment" and similar concepts. Of course, so-called business judgment does not excuse violations of antitrust laws. The business judgment rule can limit *personal* antitrust liability (in non-*per se* cases), *see Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), and Gregory Walker, "Personal Liability of Corporate Officers in Private Actions under the Sherman Act: Murphy Tugboat in Distress," 1987 FORDHAM LAW REV. 909. At this point, however, no individual officers or directors have been named as defendants in this case, and the alleged "judgment" of Mr. Paton and others is irrelevant.

at 1194-1195, and *Reilly v. Medianews Group, Inc.*, 2007 U.S. Dist. LEXIS 29419, *2-*3) (addressing standing issues in newspaper antitrust cases).[19]

2. Plaintiff has sufficiently alleged a cognizable antitrust injury.

Defendants next argue that competition between the *News* and *Tribune* ended when the initial JOA was entered into, and that the NAC has always had authority to control the *Tribune*. Defendants' contention that the NAC has always had the authority to control the Tribune is false. *See* pp. 16-20, *supra*, and Am.Compl. ¶¶ 39(b) (summarizing changes to JOA in NAC's authority regarding the Tribune, and in the change of the NAC's board from equal representation to Deseret majority).

So is Defendants' first contention, which not only ignores Plaintiff's factual allegations, but is incorrect on its face.

As alleged in the Amended Complaint, and as evidenced by the original JOA itself, the JOA in this case did not extinguish all commercial competition between the parties. Notwithstanding that they were partners in the JOA, the defendants continued to own their own newspapers and thus retained independent and meaningful economic incentives to compete with one another to attract readers to those papers, rather than solely to maximize the jointly-shared profits of the venture as a whole. *See* Am.Compl., ¶¶ 1, 25, 27.

[19] The Court need not (and may not) determine whether the plaintiff will ultimately succeed, only that its claims are arguable or colorable. *E.g., Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334 (2014) (plaintiff had Article III standing where its intended future conduct was "arguably" proscribed by challenged statute).

3. Nothing in the NPA provides that the formation of a JOA extinguishes all commercial competition between the owners of JOA newspapers.

Defendants also argue that the elimination of competition under a JOA is recognized by the Newspaper Preservation Act. (Defts.' Mem., pp. 12-13). But neither the NPA nor its legislative history provides any support for the Defendants' assertion that the formation of a JOA necessarily extinguishes all commercial competition between the parties. To be sure, the statute does allow the parties to combine certain delineated functions of their newspapers, including the pricing of subscriptions and advertising—subject to various conditions and limitations—without fear of antitrust attack. It does not, however, make mandatory any particular amount of "joint or unified action." See 15 U.S.C. § 1802(2).

Rather, the NPA merely provides that JOA newspaper owners may take "joint or unified action . . . with respect to any one or more" of the listed functions.[20] 15 U.S.C. § 1802(2). Because the NPA contemplates that there are areas where owners may choose not to coordinate and instead continue to compete with one another, neither the Act nor its legislative history supports Defendants' assertion that all competition between them was, as a matter of law, extinguished when they formed a JOA.

Indeed, the statute, by its own terms, requires owners to maintain separate and competing news operations. It expressly provides that (a) each newspaper must be separately owned or controlled and (b) there can be "no merger, combination, or amalgamation of editorial or reportorial staffs." 15 U.S.C. §§ 1802(2) & (3). These limitations are integral to the Act's

[20] Those functions include: "printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution." 15 U.S.C. § 1802(2).

purpose of "maintaining a newspaper press editorially and reportorially independent and competitive." 15 U.S.C. § 1801.

Apparently recognizing that the plain language of the NPA does not support their argument that the formation of a JOA inherently extinguishes all commercial competition between JOA newspapers, Defendants resort to a selective reading of the NPA's legislative history. (Defs' Mem. at 12). As a threshold matter, where the basic structure and text of the NPA so clearly establish that JOAs do not necessarily extinguish all economic competition, no amount of contrary statements by legislators or other parties commenting on proposed legislation could establish the proposition that the NPA achieves that result as a matter of law. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear").[21]

Moreover, the various statements quoted by Defendants do not support their sweeping conclusion. Comments by members of Congress distinguishing the "business aspects" of a newspaper from the "editorial and reportorial functions" do not address the commercial competition at issue in this case, which encompasses efforts by the newspaper owners to make their newspapers attractive to readers, and thereby generate sales, through such means as the depth, breadth and timeliness of the reporting and the attractiveness of the mix of news, features

[21] That former Assistant Attorneys General and the Chairman of the Federal Trade Commission criticized the proposed legislation before Congress passed the NPA is equally irrelevant. As the Supreme Court has explained, "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Bryan v. United States*, 524 U.S. 184, 196 (1998) (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)). Since the enactment of the NPA, the Justice Department has consistently taken the position that the antitrust laws apply to protect the competition between JOA newspapers.

and information presented by the papers. Referring to such activities as "editorial and reportorial" does not nullify the commercial nature of such competition.

Finally, in quoting from the legislative history, Defendants ignore many statements by members of Congress expressing the view — consistent with the text and structure of the Act — that the purpose of the NPA is to preserve competition of the sort the antitrust laws protect — i.e., commercial competition — rather than to extinguish such competition entirely. For example, the lead House sponsor asserted that the NPA "proposes to keep competition between newspapers alive. This is surely in keeping with the intent and purpose of the antitrust law."[22]

4. Case law holds that cognizable competition exists between the owners of JOA newspapers.

Every court that has considered whether legally-cognizable competition continues to exist after the formation of a newspaper JOA has concluded that it does. In *Hawaii v. Gannett Pac. Corp*., 99 F. Supp. 2d 1241 (D. Haw.), aff'd, 203 F.3d 832 (9th Cir. 1999), the owners of Honolulu's two daily newspapers, the Advertiser and the Star-Bulletin, agreed to terminate their long-standing JOA, and the owner of the Star-Bulletin announced its intention to cease publishing the paper. The State of Hawaii challenged the agreement as a violation of the

[22] 116 Cong. Rec. at 23144 (1970) (Remarks of Rep. Matsunaga). *See also id.* at 1790 (Remarks of Sen. Fong) ("the effect of [the NPA] is to promote vital competition, instead of monopoly. [It] is thoroughly consistent with the purpose of the antitrust laws."); *id.* at 23167 (Remarks of Rep. Murphy) ("The Newspaper Preservation Act is truly consistent with the intent and purposes of the antitrust laws — the preservation of competition where it otherwise could not exist."); *id.* at 23173 (Remarks of Rep. Boggs) ("I believe that this bill is in concert with the spirit and purpose of the antitrust laws, specifically, to foster and encourage competition."); *id.* at 23149 (Remarks of Rep. Albert) ("[T]he purpose of our antitrust laws is to preserve competition. That is the identical purpose, as I understand it, of this legislation.). Other members noted that the NPA would allow the elimination of only part of the commercial competition between the parties. *See, e.g., id.* at 23161 (Remarks of Rep. Lloyd) ("if only one newspaper survives, the monopoly will not be partial, as would be the case under [the NPA], it will be total.") (emphasis added).

Sherman Act and the court enjoined it. In reaching its decision, the court rejected the argument that there could be no antitrust violation because there is no "economic competition" between newspapers in a JOA. 99 F. Supp. 2d at 1249-50.

Much like Defendants here, the Hawaii defendants claimed that the only competition between JOA newspapers was "editorial and reportorial" competition, and that such competition did not qualify as "trade or commerce" for purposes of the antitrust laws. *Id.* The court recognized that the Advertiser and Star-Bulletin operated "to some extent as a single economic entity under the JOA." *Id.* Nevertheless, the court held that "this case falls within the definition of trade or commerce" in the Sherman Act. *Id.* It held that the challenged agreement would cause cognizable antitrust harm because it eliminated the ongoing competition between the newspapers to attract readers and advertisers. *Id.*

Similarly, in *Reilly v. Hearst Corp*., *supra*, 107 F. Supp. 2d 1192, the plaintiff brought an antitrust action to challenge an agreement between the two publishers of the major daily newspapers in San Francisco, who had operated in a JOA for over thirty years. The publisher of the San Francisco Examiner agreed to acquire the San Francisco Chronicle with the "stated intention . . . to cease production of the Examiner" at some future point. *Id.* at 1195. Like 1952 JOA, the owners of the Examiner and Chronicle each owned equal shares in the San Francisco JOA. The San Francisco JOA was responsible for the printing, distribution, and sales of both papers, but each paper had "separate editorial products." *Id.* at 1196. The court held that, under the statutory framework of the NPA, "the elimination of a newspaper represents a cognizable injury to interests protected by the antitrust laws." *Id.* at 1195.

Consequently, Plaintiff's claim that the "challenged transactions cause injury to competition for readers among economically viable newspapers" states a type of harm cognizable under the antitrust laws. *Id.*

A. Antitrust injury.

Defendants' next argument in support of their motion to dismiss is that Plaintiff "fails to allege a cognizable antitrust injury." (Defts.' Mem., p. 20.) In so arguing, Defendants acknowledge that Plaintiff alleges both a reduction in consumer choice, and in reduced quantity and quality of output. *Id.*, p. 23. While Defendants characterize these as "questionable theories" of anticompetitive harm," they are widely accepted forms of harm.

Courts have long recognized that consumer choice is a protectable interest, and that when restraints of trade impair consumer choice, consumers have standing to seek redress. *Full Draw Productions v. Easton Sports, Inc*., 182 F.3d 745, 754 (10th Cir. 1999) (recognizing reduction in commercial choice as cognizable harm to consumers); Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, 3576 (2d ed. 2000) ("Antitrust law addresses distribution restraints in order to protect consumers from the higher prices or diminished choices that can sometimes result from limiting intrabrand competition.") (Emphasis added.); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("[A]n agreement limiting consumer choice by impeding the 'ordinary give and take of the marketplace,' … cannot be sustained under the Rule of Reason."); *Glen Holly Entertainment v. Tektronix*, 352 F.3d at 374 ("One form of antitrust injury is [c]oercive activity that prevents its victims from making free choices between market alternatives."); *Amarel v. Connell*, 102 F.3d 1494, 1509 (9th Cir. 1996); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania*, 815 F.2d 270, 275 (3d

Cir. 1987) ("[A]n agreement limiting consumer choice by impeding the 'ordinary give and take of the marketplace' . . cannot be sustained under the Rule of Reason."); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002); *United States v. Microsoft Corp.*, 253 F.3d 34, 58-78 (D.C. Cir. 2001) (practices deemed unlawful because of non-price effects on competition, including limiting consumer choice); *Doctor's Hosp. of Jefferson County, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997) ("Another way to explain the standing inquiry is that it is ensures that the plaintiff's demand for relief ultimately serves the purposes of antitrust law to increase consumer choice, lower prices and assist competition, not competitors."); Stucke & Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 1 (2001), p. 261; Averitt & Uncle, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 1 (2007), p. 175.

Defendants' motion to dismiss does not ask the Court to reject these theories of antitrust law. Instead, Defendants' motion is limited to urging the Court to simply ignore all of Plaintiff's allegations regarding the existing and threatened effect of the October 2013 JOA on output and consumer choice. (*See* Defts.' Mem., pp. 23-25) (asking Court to ignore all allegations in the Amended Complaint as just "conjecture," "speculation," "rumor," and "innuendo").

Defendants' request is not permissible on a motion to dismiss. Factual allegations must be assumed true under Rule 12(b)(6). They need only give fair notice of what is claimed; they need not identify evidentiary support, include specifics or subsidiary factual allegations, or otherwise meet technical fact pleading requirements. *See* Introduction, pp. 1-3. Allegations of the chronology, intent, and effect of the October 2013 JOA, while inconvenient to Defendants'

motion, are not "conclusory"; they give Defendants notice of exactly what Plaintiff is complaining about.

Defendants suggest that Plaintiff has not (yet) incurred injury because the *Tribune* has continued to publish a newspaper seven days a week. (Defts.' Mem., p. 19.) That is irrelevant to a claim of diminished output (quality or quantity), such as a reduction in quality, quantity, and availability of news, advertising, and editorial and other content of a newspaper.

On this point, it must be remembered that Plaintiff seeks only declaratory and injunctive relief, not damages. The standing requirements under Section 16 to obtain injunctive relief are different from and less stringent than those under Section 4 applicable to damage claims. *Cargill*, 479 U.S. at 112; *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972). To obtain injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, a plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 10, 130 (1969).

Likewise, Section 7 of the Clayton Act, 15 U.S.C. § 18, allows injunctive relief against mergers whose anticompetitive effects have not yet eventuated, provided the result of the combination "may be substantially to lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 317, 323 (1962); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963); *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

To the extent that Defendants suggest antitrust laws cannot protect "quality" of output of a newspaper due to the First Amendment (Defts.' Mem., pp. 25-26), that argument is inconsistent with the Supreme Court's own pronouncements. In *Associated Press v. United*

States, 326 U.S. 1 (1945), the Supreme Court made clear that "The antitrust laws apply to private restraints that impede the free flow of information in the marketplace of ideas." Stucke & Grunes, *supra*, p. 261 (*citing Associated Press*). There, the Supreme Court held that the Associated Press had violated the antitrust laws through bylaws restricting its members from selling news to non-members and allowing members to block non-member competitors from membership. In a concurring opinion, Justice Frankfurter commented that the Associated Press

> …has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Trust and understanding are not wares like peanuts or potatoes. And so, the incidents of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.

326 U.S. at 27-28.

In the majority opinion, Justice Black found that holding Associated Press to account under the antitrust laws to be reinforced by, not contrary to, the policies of the First Amendment. "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary," the court wrote. 326 U.S. at 20; *see also United States v. AT&T*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff'd sub. nom., Maryland v. United States*, 460 U.S. 1001 (1983) (applying antitrust laws to AT&T because its power to restrain the dissemination of news and information in the marketplace of ideas; "As the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws.").

Antitrust laws, and Plaintiff's complaint, do not purport to dictate what a newspaper says, only that competition by a newspaper's owner be lawful. *See Hawaii v. Gannett Pac. Corp.*, 99 F.Supp.2d 1241, 1252-53 (D. Hawaii 1999) (rejecting Defendants' First Amendment defense to antitrust suit involving JOA; "the Court [by granting an injunction] is not compelling Defendants to publish any particular viewpoint"); *see also Committee for Independent P-I*, 704 F.2d at 483 ("It is obvious that the Newspaper Preservation Act's antitrust exemption will not affect the *content* of speech of these smaller newspapers. The Act is an economic regulation which has the intent of promoting and aiding the press.") (Emphasis in original; finding no First Amendment implications in NPA case).

III. PLAINTIFF HAS SUFFICIENTLY STATED ITS CLAIMS FOR RELIEF.

The final argument in Defendants' motion to dismiss is that they are entitled to dismissal of the Complaint on the basis of a supposed failure on the merits of the claims for relief. As shown below, Plaintiff has adequately pleaded its claims for relief.

1. Count I of the Amended Complaint states a claim for relief because the October 2013 JOA is *per se* illegal.

Per se illegality of the October 2013 JOA (absent NPA exemption) has already been established by the United States Supreme Court. In 1964, the Department of Justice began an investigation into a joint operating agreement between two newspaper owners in Tucson, Arizona. Among other things, the Tucson agreement pooled profits, allocated markets, and fixed prices of advertising and subscriptions. In 1965, the DOJ filed suit, alleging that the agreement violated federal antitrust laws. The Supreme Court agreed. In *Citizen Publishing Co. v. United States*, 394 U.S. 131, 22 L.Ed.2d 148, 89 S.Ct. 927 (1969), the court held that the newspapers'

joint operating agreement violated Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act.[23]

The October 2013 JOA contains provisions similar to those held illegal in *Citizen Publishing*. For example, it fixes prices of advertising and subscriptions for both newspapers. It pools profits between the two competitors. It voluntarily restricts competition beyond designated markets without its competitor's consent. *See* Am. Compl., ¶¶ 28, 39.

Thus, Defendants' arguments are disposed of by the United States Supreme Court decision in *Citizen Publishing Company, Inc. v. United States*, 394 U.S. 131 (1969). Defendants attempt to distinguish the case by claiming that it came down during a more pro-government era, and that Congress enacted the Newspaper Preservation Act in response to it. (Defts.' Mem., p. 29.)[24]

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[23] Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 respectively, and Section 7 of the Clayton Act, 15 U.S.C. § 18, provide in pertinent part:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.' (Section 1)
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. (Section 2)
>
> No person engaged in Commerce . . . shall acquire . . . the whole or any part of the stock. . . and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . . (Section 7)

[24] Interestingly, however, Congress did not seek to overturn the *Citizen Publishing* case; it simply relaxed one of the requirements that the Supreme Court had imposed on JOA participants to qualify for a failing business exemption. *See* 15 U.S.C. § 1804(a) (allowing reinstatement of invalidated JOAs, but only if they met new failing business standard).

The inconvenient fact remains, however, that the Supreme Court has issued a controlling ruling under the same antitrust laws on a very similar joint operating agreement between two newspapers. Defendants essentially argue that this Supreme Court case has been overruled, citing a non-newspaper case, *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

This same argument has been tried – and rejected – before. In *Daily Gazette*, *supra*, the defendant newspaper owners argued that *Dagher* controlled the case and required dismissal of the complaint. The Department of Justice disagreed, pointing out that, unlike the parties in *Dagher*, a JOA between newspapers does not transfer to the JOA all of the assets relating to the publication of those newspapers. Each company retains, outside the JOA, separate and independent ownership of its respective newspaper, and is supposed to independently retain all decision-making authority with respect to the content of its newspaper. Stated differently, unlike in *Dagher*, the participants in a newspaper JOA have – under the statute and JOA itself – non-integrated economic interests based on their separate ownership of the newspapers outside the JOA.[25]

The *Daily Gazette* court rejected the defendants' attempt to dismiss the suit based on *Dagher*. "The proper characterization of the joint venture here would appear to require a fact specific undertaking," the court concluded. 567 F.Supp.2d at 867. "The skeletal JOAs and [related] transactions aside, the degree of integration is a fact-based one that will be aided by discovery." *Id.* (citations omitted). Moreover, "*Dagher* dealt with a rather fungible product,

[25] The dissenting judge in the underlying Ninth Circuit *Dagher* case, whose view later prevailed in the Supreme Court, noted this important distinction between newspaper JOAs and the type of joint venture at issue in that case. *See Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1126-27 (9th Cir. 2000) (Fernandez, J., dissenting), rev'd, 547 U.S. 1 (2006).

gasoline," the court noted. "It would seem of comparatively little moment to allow the unification of two branded products seemingly so inseparable in nature. The similar unification of newspaper brands, or elimination of one daily in favor of the other, appears to present concerns not contemplated by *Dagher*." *Id.* at 868, citing *Reilly*, *supra*, 107 F.Supp.2d at 1195, and Stucke & Grunes, *supra*, p. 271 n. 105a.[26]

Unlike in *Dagher*, the 1952 JOA was not a fully-integrated joint venture because the owners of the papers did not transfer to the JOA all of the assets relating to the publication of those two newspapers. Each company retained, outside the JOA, separate and independent ownership of their respective newspapers. And each owner independently retained all decisionmaking authority with respect to the content of its newspaper. In other words, each owner retained the "entrepreneurial interest" to maximize the value of its respective newspaper by improving the quality of that newspaper to gain more readers. *See Fraser v. Major Leaguer*, 284 F.3d. 47, 57 ("the existence of distinct entrepreneurial interests possessed by separate legal entities" suggests that the participants in a sports league are not necessarily a single economic entity for antitrust purposes).[27] The Supreme Court's precedent in *Citizen Publishing* demands a finding of per se illegality.[28]

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[26] The allegations of Plaintiff's Complaint would also support a claim under the "rule of reason" or "quick look" standards. For example, the complaint alleges price fixing, limitation of competition, market allocation, and intent to secretly reduce or eliminate competition between the only two daily newspapers in the Salt Lake Valley. *See* Am.Compl., ¶¶ 28, 36, 39.

[27] It is well understood that joint venture participants, including JOA newspapers, may cooperate in some aspects of their business, but retain ownership of other assets with which they compete. *See, e.g., Chicago Profl Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 599-600 (7th Cir. 1996) (professional basketball league not a single entity under the antitrust laws for all purposes); *Hawaii*, 99 F.Supp. 2d at 1249; *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148-

2. Count II of the Amended Complaint states a claim for relief because it sufficiently alleges that Defendant Deseret is monopolizing or attempting to monopolize the market in violation of Section 2 of the Sherman Act.

Defendants argue that Plaintiff's claims fail because, according to Defendants, there was no existing "competition" between the newspapers, and Plaintiff has not adequately alleged the relevant product market. The former argument has been addressed above, pp. 25-29.

In support, Defendants argue that Plaintiff cannot prove the actual product market because, say Defendants, Salt Lake City residents are "unlikely to view their choices of news content as limited to two daily papers." (Def. Mem. at 33.) That assertion requires the Court to ignore Plaintiff's factual allegations to the contrary, which is improper on a motion to dismiss. Moreover, one need look no further than the Newspaper Preservation Act itself for the definition of both the relevant geographic and product markets at issue in this case. As seen in the plain language of the NPA, the relevant product market at issue consists of newspapers, and newspapers only. At the time the Act was enacted, television and radio were already in existence. Recognizing the importance of newspapers to society, however, Congress enacted the NPA to protect the viability and continuing existence of newspapers.

Importantly, the NPA has never been amended to extend its unique antitrust protections to any other industry, including, but not limited to, television, radio, or the internet.

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49 (9th Cir. 2003). The fact that the 1952 JOA controlled some operations of the two newspapers does not mean that the antitrust laws fail to protect the competition that remained. *See id.*

[28] Defendants also cite a Tenth Circuit case, *SCFC ILC, Inc. v. Visa USA, Inc*., 36 F.3d 958 (10th Cir. 1994), which neither involved newspapers nor mentioned (let alone rejected) *Citizen Publishing*. It is inapplicable for the same reasons as *Dagher*.

Moreover, Defendants' unsupported assumption about the role that newspapers continue to play in the Salt Lake Valley is unrealistic. Defendants ask the Court to assume that there are numerous other substitutes for the traditional daily local newspapers in this valley, and thus the product market cannot encompass newspapers only. (Defendants do not challenge the geographic definition, Salt Lake Valley.) But changing methods and means of dissemination of ideas and opinions is separate and distinct from the creation, reporting, and editing of those ideas and opinions, the latter of which the NPA is aimed at protecting. Tellingly, Defendants do not establish where, for example, consumers would get daily news reporting via the internet if the source of such news – daily newspapers – did not produce it. Nor is television news comparable; by its nature, TV news cannot—and does not try to—cover news stories in depth.

Focused on the dissemination of ideas, rather than their creation, Defendants argue that Salt Lake City residents are "unlikely to view their choices of news and other content as limited to just the two daily newspapers." (Defts.' Mem. p. 30). However, "in most communities, the number one online local news source is the local newspaper, an indication that despite their financial problems, newspaper newsrooms are still adept at providing news." *See* Federal Communications Commission's Working Group on Information Needs of Communities entitled "The Information Needs of Communities: The changing media landscape in a broadband age" ("FCC Report") at 12-13, available at www.fcc.gov/infoneedsreport.

Consistent with this, the relevant news, editorial and reportorial market in Salt Lake City are the *News* and *Tribune* newsrooms. Defendants do not establish that there are other news gathering and distribution enterprises in this Valley that are remotely equivalent. To be full and

complete, a news medium is required to originate content, not simply recycle it, aggregate it or link to it.[29]

Nor do Defendants suggest that any internet-only enterprise exists in Utah with a meaningful reportorial staff capable of substituting for a daily newspaper. Bloggers opining from their bedrooms or someone offering a comment or two on a web site and linking to a newspaper story does not constitute news gathering. Markets are not simply defined by consumption and distribution -- there must be a producer of a product in any market. In Salt Lake City there are only two daily producers of substantial news product -- the News and the Tribune.[30] Moreover, while it is likely that newspaper websites may someday replace the printed newspaper, that day has not yet arrived. Newspaper websites are not profitable by themselves, and instead require the use of revenues generated by their printed counterparts. *See* Am.Compl. p. 23 n. 17.

In summary, the relevant product market is alleged in the Amended Complaint, defined in the Newspaper Preservation Act, and Defendants argument is without merit.

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[29] *See also* FCC Report at Executive Summary on pages 5-7, the Overview on pages 8-31, and Chapters 1, 3-4, 21-22, 25 and 35. Even strong advocates for digital media have recognized this issue: "One function that's hard to replace is the kind of reporting that comes from someone going down to city hall again today just in case. There are some in my tribe who think the web will solve that problem on its own, but that's ridiculous." FCC Report at 24 (quoting Cay Shirky, a "highly respected advocate for digital media").

[30] Eventually, newspaper websites will be the likely successor to the traditional printed newspaper, whether the News and the Tribune are eventually forced to disseminate their opinions and ideas online rather than in print will not impact their reportorial or editorial independence, but rather relates to the means of disseminating those ideas and opinions gathered. In other words, it will still be vital that the Salt Lake City community continue to have two distinct newsrooms investigating and reporting on local issues, each offering distinct and independent editorial and reportorial voices.

3. Count III of the Amended Complaint states a claim for relief because it sufficiently alleges that Defendant Deseret acquired assets from Kearns-Tribune in a manner that reduces or eliminates competition.

As their final argument, Defendants spend two pages arguing that Plaintiff fails to state a claim under Count III, Section 7 of the Clayton Act. Defendants do not deny that Deseret acquired "assets" of Kearns-Tribune (the full extent of which is not yet known), *see* Am. Compl. ¶ 35; rather, they deny that the effect of such acquisition "may be substantially to lessen competition or to tend to create a monopoly." (Defts.' Mem., p. 35.) On this point, Defendants largely restate earlier arguments (*e.g.*, that no "competition" has existed since the original JOA); Plaintiff incorporates its responses thereto.

Defendants then attempt to recharacterize Plaintiff's actual allegations into a supposed claim involving potential future competition by potential future (unknown) competitors. (Defts.' Mem., pp. 35-36). That is not what Plaintiff alleges – which Defendants do have the grace to admit. (*Id.,* p. 35 (acknowledging that Plaintiff has not said what Defendants say Plaintiff is saying). Plaintiff is not talking about some unknown competitor who might or might not enter the market later; it alleges 1) lessening of competition between two *existing* competitors, the *Deseret News* and *The Salt Lake Tribune*, and 2) tending to create a monopoly in the *News* upon the *Tribune*'s termination. Those allegations expressly state a claim under Section 7.

Finally, Defendants suggest that Plaintiff is required to allege various things about the *Tribune*'s future, *e.g.,* what its status would have been if the JOA expired in 2010, arguing that, in order for there to be competition, the JOA would have to have ended in 2020. (Defts.' Mem., p. 36). This is a retread of Defendants' contention that there is no competition under a JOA, which has been debunked above. Defendants also make various references to its alleged "digital

strategy enabled by the 2013 Amended JOA," suggesting that Plaintiff should have to plead around that. *Id.*

As alleged in Plaintiff's Amended Complaint, one piece of evidence from which a jury could infer certain intentions is Defendants' incorrect public characterization of the 2013 Amended JOA, and this is one example: Defendants' so-called "digital strategy" was not "enabled" by the October 2013 JOA; Kearns-Tribune has had complete ability to control its digital future since at least 2011, through a separate agreement. *See* Am.Compl., ¶ 36.k., exh. E (internet advertising agreement).[31] In any event, Defendants cite no authority that a plaintiff must plead those types of facts under Section 7.

CONCLUSION

Based upon the foregoing, Plaintiff Citizens for Two Voices respectfully requests this Honorable Court deny Defendants' motion to dismiss.

DATED this 4th day of August, 2014.

CHRISTENSEN & JENSEN, P.C.

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[31] The addition of this agreement and a related document as exhibits was one of the few, mostly technical changes made by Plaintiff to the original Complaint.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2014, a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE** was delivered via the court's electronic filing system to the following:

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