IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
UTAH NEWSPAPER PROJECT	)	
doing business as	)	
Citizens for Two Voices,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2:14-CV-00445
	)	
DESERET NEWS PUBLISHING,	)	
KEARNS-TRIBUNE,	)	
	)	
Defendants.	)	
	)	
_____	)	

BEFORE THE HONORABLE CLARK WADDOUPS

September 8, 2014

Motion to Dismiss

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Salt Lake City, Utah, September 8, 2014

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THE COURT: Good afternoon. We're here in the matter of the Utah Newspaper Project versus Deseret News Publishing and others, case 2:14-CV-445.

Will counsel please state their appearance.

MR. BURBIDGE: Good afternoon, Your Honor. I apologize Karra, ladies first.

MS. PORTER: I just figured plaintiff first. Karra Porter and David Richards for plaintiff, Utah Newspaper Project.

MR. BURBIDGE: Good afternoon, Your Honor. Richard Burbidge, my associate Carolyn LaDuc behind me, to my right William Kolasky, behind him David Litwin from the Hughes Hubbard firm. And David Bralow is in the first row. He is general counsel to Digital First Media. We represent the Kearns Tribune, LLC.

MR. ETCHEVERRY: Your Honor, Ray Etcheverry and David Bennion on behalf of the Deseret News. And also I would like to introduce Mr. Lee Simowitz from Baker Hostetler who also represents Deseret News.

THE COURT: Thank you. We are here on defendants' joint motion to dismiss the complaint with prejudice and related pleadings. The defendants may proceed. I'm not sure which of you intends to speak first. Mr. Burbidge?

MR. BURBIDGE: I will. Thank you, Your Honor. Through the good graces of your clerk, I have asked to hand up a little pamphlet. I have given one to counsel for the plaintiff as well, and I will have to ask the court for special permission to be low tech today. I will refer to slides and they will be on the tabs, and it might be helpful just to move the argument along expeditiously.

Your Honor, there are three reasons that we believe the complaint and the amended complaint fail as a matter of law. And I will deal with those in course. I do not want, however, anything that I say to impair the position of our client with regard to what its -- what its aspirations and what its plans are. We are dealing with a pleading and we're addressing the allegations of those pleadings, and we believe presenting arguments that that pleading, even taken on its face, must be dismissed as a matter of law.

We represent the Kearns-Tribune, LLC. It owns the Tribune newspaper, of course, which is operated under a Joint Operating Agreement with the Deseret News Publishing Corporation. And that JOA, or Joint Operating Agreement, was entered into in 1952. It was grandfathered by the congress with antitrust immunity in 1970 under the Newspaper Preservation Act. Its parent, Digital First Media, operates close to 60 dailies, 100 small newspapers, in addition to the Tribune. It is its goal to preserve each and every one

of them, promote each and every one of them, and make each and every one of them more valuable and viable. It has a $200 million investment in the Kearns-Tribune Newspaper which it does not intend to lose.

It has adopted a new business model, plaintiffs refer to and prefer the old model, we believe, the client believes, it does not promise the future for the newspaper which it must capture. We could debate that for months, years, we could fill the record with opinions of experts presenting different business models. It would be marginally interesting and absolutely a waste of time, time we do not have.

The decisions made by the Tribune to assist it in not only surviving but thriving are decisions beyond the purview of appropriate plaintiff claims under the antitrust laws and they asked the court to second guess business decisions and of all of the things that the antitrust laws were not designed to do. They were never designed to allow government agencies or even community groups, however well intended, to dictate the means and matter by which American industrial business using means honestly industrial would be operated or to put any restriction on innovation, risk-taking vision with regard to those business decisions.

The Kearns-Tribune is confident of its model, it doesn't rely on tying up precious capital and Legacy Assets.

It sees the future in digital content and distribution space and I'm sure Your Honor there is room for debate and no guaranteed success. But frankly how it manages its business and assumes its risk is its business and the extent to which the complaint starts to invade that area it does so improperly.

Slide 1, Tab 1, there are three reasons the complaint fails as a matter of law. The first is that the 2013 amended JOA is exempt from antitrust laws under the Newspaper Preservation Act. The NPA allows JOAs to be freely amended so long as the amendments do not violate the requirements of the statute, and the amendments are duly filed with the Justice Department.

Second, as a matter of law the plaintiffs lack standing. The alleged injury is not concrete and particularized as is required. The plaintiffs concede and the threat and injury is not immediate and thus does not meet the requirement to create antitrust injury and the relief that they seek.

Finally, the plaintiff's antitrust claims are facially defective even absent NPA exemption. The agreement among the joint venture participants as to how to price and sell products are not per se illegal, and the plaintiffs have not alleged a cognizable relevant market.

Turning to the NPA first. The NPA was an attempt by

congress to stem the losses of American newspapers. It came late to that effort after scores of city newspapers had combined operations in the interest of survival. I think the count is approximately 22 that had entered into Joint Operating Agreements by the time that the congress passed the Newspaper Preservation Act.

The Tribune and the Deseret News publishing Corporation were among the early pioneers. They had a JOA in 1952. The purpose there, from our point of view, was to save the Deseret News Corporation as a viable independent voice. That was 18 years before the NPA. When the NPA came in, it did something rather remarkable, broad, and remedial. It grandfathered all of the Joint Operating Agreements that had been entered into before its passage. And it did not require them to pre-file or pre-qualify with the Department of Justice. The statute is broadly drawn, it is remedial in nature, its terms are short, straightforward, crystal clear. It is true that the plaintiffs point to *P-I versus Hearst* and urge that because it is an immunity, an exemption from the antitrust law, that the Act should receive -- the Act should receive narrow construction. What they did not point out to the court is the court's determination in that case that quote, the Act should receive a common sense construction, and the court emphasized reliance on the plain words of the statute declining to find an antitrust

violation. The court closed its analysis by declaring quote, simply put, we will not emasculate the Act in the guise of narrowly construing it. The amendment here, 2013, is before the court. Absent the 2013 Amendment, Your Honor, we are not here. It is the focal point of the complaint and the amended complaint. Neither party contends it is vague or ambiguous and thus its construction is a matter of law for the court. It is a motion to dismiss, but the court can take judicial notice that the amendments were attached to the complaint and also that a few were omitted. I'm sure that was inadvertent. They have been attached to the pleadings which are now at issue and they form the pleadings which to which both parties claim they are at issue.

The motion to dismiss therefore presents two straightforward and purely legal issues under the Newspaper Preservation Act. It doesn't really matter whether you characterize them as an affirmative defense or part of the prima facie case although it is hard to escape that plaintiffs did plead that and, in fact, celebrate the application of the NPA.

What is before the court is the 2013 amendment and the legal questions are these. One, what does the 2013 JOA Amendment agreement provide? And two, does it comply with the requirements set forth in the NPA and the regulations adopted to implement the NPA as respects the amendments?

Turning to Tab 2, which is the Newspaper Preservation Act Section 1802, the term joint -- and I understand the court is familiar with this, I am going to dilate on a few terms that I think would be helpful as we move in the analysis.

The term, quote, Joint Newspaper Operating Arrangement or Agreement, end quote, means any contract, agreement, joint venture, paren, whether or not incorporated, paren, 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 facilities are established or operated. And the joint or unified action is taken or agreed to be taken with respect to any one or more of the following, colon, printed, semicolon, time, method and field of publication, allocation of production facilities, distribution of the -- and I'm paraphrasing, distribution, of course, of the product itself, advertising solicitation for both papers, circulation solicitation for both papers, the business department can be joint and unified and to some extent is under the Newspaper Agency Corporation, and the parties together can establish advertising rates, establishment of circulation rates jointly, and revenue distribution as between them from that joint operation. And it is important that the NPA did not put restrictions concerning the manner

in which those allocations and responsibilities and distributions of revenues could be made. There were no standards, there were no requirements, there was no level or minimum that had to be met in each one of those.

THE COURT: What if they allocated the revenue zero to one newspaper and 100 percent to the other? Would that be an issue?

MR. BURBIDGE: Then Your Honor would have before it, if that occurred, different parties, different agreement, and in order to find a case in controversy, it would have to be more than a fictitious, more than a projected, more than a conjectural conclusion.

THE COURT: You're agreeing that it is not completely without any restraint under the Newspaper Preservation Act as to how they allocate resources or revenues?

MR. BURBIDGE: I do not take that position, Your Honor. What I was pointing out, and I think it is important, that in respect of the agreement before Your Honor which is not reduction to zero, it is important to look and see that the congress did not go to any lengths to determine how those allocations of --

THE COURT: Isn't the plaintiff's allegation that the re-allocation of revenue was so substantial that it substantially lessens competition?

MR. BURBIDGE: There is a -- there is a conclusion

that they fear that the revenue from print, print, sell and circulation reduced to 30 percent would be insufficient, and it's a vague allegation, to sustain an independent editorial and reportorial staff. That is a conclusion. There are no underlying facts by which you could determine the basis for that. But more importantly, Your Honor, if you look at the 2013 JOA in total, what you're looking at is an agreement in which there is a distribution of numerous of the elements of the joint operation that the parties are free to do and in that agreement, complex agreement --

THE COURT: Why aren't those issues of fact to be developed later through discovery?

MR. BURBIDGE: They are not because we concede that the plain language -- from the plain language of the agreement --

THE COURT: The question as to whether or not they're so substantial that they would weaken or lessen the competition.

MR. BURBIDGE: Yeah. I'm going to answer your question two ways, but I need to finish the thought which is that in the -- in the Joint Operating Agreement, the 2013 Amendment, the Kearns-Tribune took over total control and management and ownership of its digital revenues. So there is an exchange occurring here, Your Honor, and we're not -- we're not really in a position to second guess the business

decisions, but basically what the Kearns-Tribune has done here is given up some percentage of the declining print revenue in exchange for complete control and ownership of its digital product and revenue. That is a business decision that it is making. I understand, Your Honor, that if we had an extreme case, for example, let's take the case -- really the circumstance and the only consumer case that has ever made it past motion, *Reilly versus Hearst.* There you have in the agreement, black and white, and in the statements made concerning the nature of the agreement a determination that the paper was going to acquire the other and put it out of business. That is a far cry from invading the area that the congress allowed these folks to negotiate in because we don't have a reduction down to zero, we have an allocation of one type of revenue that is a reduction to 30 percent of all -- all of the print revenue including Deseret News, and then we have complete ownership and control of the digital. Well these folks have made their decision that that is the future. And incidentally, in Paragraph 39 of their complaint, amended complaint, they -- plaintiffs begrudgingly agree that that is probably the future of newspapers. That is probably where you're going to receive newspapers.

The problem with that, Your Honor, is Your Honor would essentially allow folks to come in with a different economic

model and say, judge, we think that the economic model that these folks who own the asset is not one that is going to succeed to our satisfaction and therefore we want to tie up them, their assets, and their operations in a federal court lawsuit by which we contest our model and make a -- you can make a determination on what basis. That is, how would Your Honor figure out which model would or would not fit, which model would or would not succeed. And when you talk about -- when you talk about revenues, much less profits, we have in this day and age, everyone is aware, we have Amazon which is the biggest, one of the biggest if not the biggest retailer in the internet space that doesn't make a profit. So do we say oh, we got to close that down or we have got to take control of that and save the shareholders? No. Because the fact of the matter is their business model is to capture and control more and more of the digital space which is their future. And I grant you, judge, if this were not this case, if for example they put the hypothetical let's say we have the hypothetical case that Your Honor offers up which is all of the revenue was shut off, that might prompt the court to say on that basis we're going to look in. But where the parties have made allocations within the purview of the areas that they can have joint unified action, then I do not believe that the antitrust laws either invite or sanction the court to second guess those business decisions.

It is one thing to say they have an agreement to go out of business, or we can look at the plain terms of the JOA and there is simply no revenue by which it can fund. I get that, of course. But here where we're talking about nuanced business decisions, that is an area where the courts have been cherry to go in, have been weary of the pitfalls. And what keeps -- what then keeps any amendment to a JOA clear of that sort of action? I mean anybody could come in, of course, and make the same kinds of allegations against any JOA. It could determine, for example, that the revenue was reduced to 40 percent or 35 percent. And it could make the argument well, judge, you know, we have -- we have hired this expert, he is -- he or she is a wonderful economist and he or she will come in and testify that that is not sufficient based on the information they have. And let's launch into a full scale lawsuit with this business and interrupt its effort to save itself. That means that the -- that the Newspaper Preservation Act isn't so much a method to save the paper, it is a target on the papers because you would have to -- you would have to justify every amendment you make even though the congress never hinted that that would be one of the things required to have its antitrust immunity.

And let me step back for a second because, and I made a point of this before and I will underscore it, when

congress passed that Act and grandfathered in those 22, and don't hold me to that number it is pretty close, prior Joint Operating Agreements, it did not say and provided that it meets a model, an economic model, that satisfies these standards or that it guarantees its survival for a period of time. It made a blanket grandfather immunity and never required it to pre-file or to demonstrate that it or its economic model would have the promise that it intended it to have.

Looking down, if I may, Your Honor, getting to and I think this is in part answer looking at the provisions of 1803 with regard to the very thing I was talking about, the statute 1803(a) provides, again in blanket terms, 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 2000 -- excuse me, July 24, 1970, and if at the time, if at the time at which the arrangement was first entered into, regardless of ownership or affiliation not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain over calm financially sound publication. Again a proviso, provided that the terms of a renewal or amendment to a Joint Operating Agreement, Arrangements, excuse me, must be filed with the Department of Justice, and that the amendment does not add a newspaper

publication or newspaper publications to that arrangement.

So if we -- if we distilled down what the -- we know -- we know the language of the Joint Operating Agreement. If we distill down the provisions of the statute, then the Newspaper Preservation Act imposes three requirements for an amendment to retain the exemption that it received under the Newspaper Act, the blanket grandfathered exemption.

One, no merger of editorial or reportorial departments and editorial policies remain independent. Two, the amendment does not bring in any additional newspapers. And three, the terms of the amendment to the JOA are filed with the Justice Department. I'll take the first in order.

The defendants cannot merge or combine the editorial or reportorial staffs and their editorial policies are independently determined. The complaint alleges that the 2013 amended JOA is no longer entitled to NPA exemption because it, quote, now contains provisions that expressly or by effect intrude upon the editorial independence of the Tribune. That is a conclusion, a vague conclusion at that. They go on. They assert two basic changes to the 2003 amended JOA that they say intrude on the independence. First, they describe what they call a new provision giving the Deseret News allegedly and they characterize it as a veto power over ownership and they even expand it to management of the Tribune's owner. The fact is that -- that

the Deseret News Corporation has a right to consent to a new joint venture partner under the JOA. They also argue, as the court was referencing, a change in the division of revenues which the plaintiffs speculates in conclusory fashion denies the Tribune of quote, revenue sufficient to finance its essential editorial and news gathering functions. That is print revenue. It does not reference the fact that digital revenue is completely that of the Tribune.

So against those vague allegations, we look at the preamble of the JOA, Tab 5. Here is the preamble to the 2013 Amendment, the one that brings us here and the one to which the plaintiffs direct their ire. Quote, the parties hereto declare and reaffirm, as the principal objective of this agreement, that their joint and several commitment to the survival and success of both the Deseret News and the Salt Lake Tribune has 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 the Joint Operating System.

Slide 6 are provisions, and these are a few of the many provisions that guarantee editorial and reportorial independence. Section 8 of the Agreement, which is

Exhibit 9 to the -- or excuse me, Exhibit D to the amended complaint. Quote, each of the parties hereto retains unto itself complete and exclusive control of its news and editorial departments and policies. Two, there shall be no merger, combination, or amalgamation of editorial and reportorial staffs, and editorial policies shall be independently determined. Next, all expenses of the news and the editorial department of each of the parties hereto, and all other expenses directly attributable to their respective news and editorial departments, shall be paid by the respective parties hereto, and not the NAC, the Newspaper Agency Corporation. Therefore, no agreement with regard to revenue distribution can affect the parties right to determine exclusively its budget with respect to the reportorial and editorial departments. That is left to the province. And any diversion from that would be a clear violation of the agreement.

Plaintiffs say well, Your Honor, everything changed in 2013 because then for the first time did the Deseret News get this veto over a prospective buyer which they then expand to and can control all of the management of the other party. Just one problem the court is now aware of and that is this consent or as they like to say the veto power. That change occurred in 2001 in the JOA that was filed with the Department of Justice. If we look on Tab 7, we see the two

side-by-side. They are word-for-word identical.

In the amended complaint in the pleadings before the court, during the period of time through and including what they thought was the installment of this feature, January 2014, they celebrated the fierce editorial independence and competition between these two papers. So Paragraph 25 of their amended complaint, taken on the face, is referring to the period of time from 1952 through January 2014 when they say this provision went into place. And they celebrated as sort of a Camelot-esque period when these newspapers were competing in a manner that they believe they should have -- they should compete.

Quote, the 1952 JOA did not eliminate all forms of competition between the two newspapers. The owner of -- the owners of the News and Tribune and their editorial operations competed vigorously against each other for readers. They did so in various ways. For example, the News has emphasized coverage of subjects of particular interest to members of the LDS Church. And the -- excuse me and the Tribune and their editorial -- excuse me, I apologize. The Tribune has similarly sought to appeal to readers by characterizing itself as a voice independent of the LDS Church and by emphasizing investigative and other hard news.

That allegation makes completely implausible the

notion that that particular consent provision which is common in joint ventures, probably more the rule than the exception, could somehow lead to a deprivation of editorial independence. It is an abstract notion, but oddly enough the Tenth Circuit addressed the effect of a change in control and editorial independence. It did so in *Salt Lake Tribune Publishing versus AT&T Corporation* in 2003.

And here is what the court said. Looking at not the same change or control, but a change of control barrier and here is the disposition. Quote, the theory that Section 2 of the JOA has undermined the editorial and reporting independence of the Tribune fails for at least two reasons. First, the JOA expressly requires in other provisions of contract that editorial and reporting functions remain independent. Going on, quote, Section 15 of the JOA states that quote, each of the parties hereto, and it is quoting the same language as now that continues to be installed in the JOA, quote, each of the parties hereto shall retain unto itself complete and exclusive control of its news and editorial departments and policies. That section also states that quote, there shall be no merger, combination, or amalgamation of editorial and reporting staffs and editorial policies shall be independently determined. The same language also appears in recitals in Section 9 of the JOA as well, end quote. The case is significant from our point of

view for two reasons. One, it did not find any potential future change of control barrier to influence in any way the editorial policy from, and second, it looked at the express terms of the agreement to make that determination. In other words, it did not say well that could open as a question of fact. What it said is we're going to look at the express terms of the agreement and make that determination in that regard in the express terms guaranteed that that editorial independence will be sustained. I just want to step back for a minute.

So let's understand what is being said here. What they're saying, now there has been no change in control. There is not a planned change in control. There is not an announced change of control, there is not an agreement to have a change of control. So what they're saying is they're coming into court and they're saying, we're celebrating the period of time when this, we didn't know it, when this particular feature was installed up to January 2014. And during that period of time there was vigorous independent editorial competition between the two newspapers. What we're addressing is the possibility that some time in the future there could be an unknown suitor or buyer for the Kearns-Tribune with respect to which the Deseret News Corporation might assert its right to consent and that future abstract unknown possibility somehow is going to

affect editorial independence today? You can't -- you can't be more conjectural. You can't be more hypothetical or remote. It doesn't even come close to expressing the kinds of concrete and particularized harm or immediate threat that is necessary in order for these folks to undertake a challenge to this amendment.

In the *Mahaffey* case, the court underscored plaintiffs have the burden of showing the existence of a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to occur or reoccur. The burden is not satisfied by suggesting that the defendants might injure the plaintiffs at some indefinite time in the future by going into a joint masthead operation under a factual scenario and elements of which are entirely speculative. The alleged threat of antitrust injury strikes us as far too hypothetical to justify entry of a permanent injunction. For the same reason, because this feature has been a part of the JOA since 2001, it is time barred. Case through to review that issue was the *City and County of Honolulu versus Hawaii Newspaper Agency.* There we had a JOA 1962, congress enacted the NPA 1970, 1979 the plaintiffs filed suit to challenge the JOA. Court stated, the plaintiff's opportunity to challenge the defendants eligibility for exemption occurred for the first day the NPA went into effect. So in this instance it would

be when that 2001 amendment to the N -- to the Joint Operating Agreement under the NPA went into effect. The court goes on, since this action was not brought until nine years after the cause of action arose, it is barred by the four-year statute of limitations. Looking at laches said because essentially what they found was because it sounds in law and not equity, laches applies. Overwhelming evidence to see that laches applies but we won't find that because we are finding the case sounds in law.

Now oddly enough the plaintiffs look at the decision of the court on the -- on the directed verdict. The court actually let this case go to this debate on whether there was a failing newspaper originally and they got -- they had flanks of experts and the judge noted all of the evidence and all of the opinions, concluded it was a business judgment and directed the verdict and then said you know what, you know what, I should not have let any of that happen. And what I am ruling as a matter of law based upon the terms of this agreement and when it was entered into, I am ruling as a matter of law the case is barred by the statute of limitations. For the same reason plaintiffs say well this is -- this is a case in equity because we're asking for equitable relief. Well, equitable relief injunctions are simply enforcement to antitrust laws. Just like damage claims are. But it is true it is a laches

instrument and the courts have held, as did *International Telephone and Telegraph versus General Telephone,* Ninth Circuit, 1995, quote, although analogous statutes limitation do not necessarily control, equity will look to the statute of limitations relating to actions at law of like character and usually act or refuse to act in comity with the statutes to the same effect, *Samsung versus Panasonic*. So we have a situation, Your Honor, there has been no merger. By the plain terms it is in fact prohibited by the plain terms, and it is beyond attack because the offending paragraph occurred -- provision occurred in 2001.

Beyond that, they make some vague allegations that with regard to the inadequate revenues, but as I said, Your Honor, that is just second guessing the business strategy. So what they're saying is because you have decided to decrease your print revenue and accept the absolute and complete control of your digital properties, we should be able to bring in the model. And there is just simply nothing in the NPA, and there is nothing in the provisions allowing amendment that allow anyone, including a self-selected organization and members of the community, from trading economic theories. And as I referenced oddly enough in the complaint, now I'll read it, it is on -- excuse me, I misspoke, it was not in their complaint, it was in their opposition papers before Your Honor. Page 39, note

30, here is what the plaintiffs say, as long as we're just throwing out theories. Quote, eventually newspaper web sites will be the likely successor to the traditional printed newspaper. Whether the News and Tribune are eventually forced to disseminate their opinions and ideas online rather than in print will not impact the reportorial or editorial independence, but rather related to the means of dissemination those ideas and opinions gathered. That is the answer to your question that you put which is how in the world would I make a decision. They have admitted that the future is digital, they're on board with that. And they're on board that that may be how you distribute your editorial and reportorial content. Then how are we to jump in here and suggest that because there is a division of print revenues and an exclusive capture of all of the digital that somehow we can second guess that business decision. It is not a decision to go out of business. There is no provision to go out of business. It is simply an adjustment based upon different views, economic views, of what the future hold and nobody has got a crystal ball to that. It would be absolute disaster to come in and trade hypothetical economic theories against what standard. These folks own the asset, they're serious business people. They're not here to waste money. They're here to try to change the model. They're late to the party. New York Times admitted that sometime

ago that they were late to the party and they need to get on board. This notion that it may be the way folks get their opinion, um, it is happening. But in any case, we cited *Christy Sports versus Deer Valley Resort* for this proposition out of the Tenth Circuit. It is one that captures essentially the philosophy that I was articulating on why courts don't go into this. Quote, flexibility for business strategy -- excuse me, they were heralding the wisdom of quote, flexibility for business strategies and it rejected the antitrust claims *Copperweld Corporation versus Independence Tube,* United States Supreme Court, quote, especially in view of increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations and other factors dictated by business judgment without increasing its exposure to antitrust liability. It is not a place the courts go. And I'll get to the three cases that the courts have accepted that challenge and in each case I will demonstrate, Your Honor, there was either an agreement to go out of business, or absolute objective evidence that, in fact, the parties were planning to take one of the -- one of the competitors out of business by agreement.

So the first requirement, no merger of editorial and reportorial staffs. It is met by the plain terms of the JOA

which is -- which they're attacking, and the terms of the NPA which permit free amendment within the strictures. And I understand, Your Honor, you have -- there are limitations. Those extreme cases are fictitious cases and not before us.

Second requirement, it adds no new newspapers. That is uncontroversial. The third requirement is that you file the agreements of amendment. We get that from the amended complaint. Paragraph 10 of the amended complaint, quote, a Tribune reporter was able to obtain a copy of the October 2013 JOA from the Department of Justice files and the fact is that anybody who knows how to use the internet, which excludes me, can find it. So they argue that you don't meet the requirement because you filed the agreement which is what the statute and the regs require, but you have to file any and all ancillary agreements like leases and that sort of thing.

THE COURT: You don't need to spend any time on this issue.

MR. BURBIDGE: Okay.

THE COURT: I got it.

MR. BURBIDGE: Thank you, Your Honor. We then get to, and I am going to -- I am going to confess and I am not being pejorative. I am saying that I have read the amended complaint many number of times. And I am not going to tell the court I fully understand it, but to the extent that I do

understand it, a few other arguments bubbled out that these folks defaulted to especially in the briefing when they -- when they tell us we have misunderstood their complaints. Okay. They are the following: One, defendants should have to prove anew that in 1952, this is during the Eisenhower Administration, our parties met the requirement that one of the two newspapers was not likely to remain financially sound. They're saying we have to prove that anew every time you amend.

THE COURT: Well, I am going to let Ms. Porter address that. It appears to me that it is barred by the statute of limitations.

MR. BURBIDGE: I'm going to go to my next one which is they retreat to this assertion, and it is broad and I'm not sure what it means. Quote, the 2013 amended JOA is so manifestly different from the original JOA that it does not qualify as an amendment. Again, we can look at that amendment on its plain terms and the statutory requirements and then the third one was the intent and effect. So they're saying the intent of this agreement and the effect of this agreement is to shut down the Tribune. I'll deal with each one of those.

The first one is that it is a -- that when you file an amendment it is an entirely new filing. And that is simply not the case. It does not constitute a new JOA. The NPA

freely allows amendments and you are entitled within the constraints of that -- of those provisions to amend that JOA. And I spent some time for a reason, I spent some time looking at the provisions of the Newspaper Preservation Act with regard to the areas in which you could have unified or joint action. And, of course, those are all of the areas that are dealt with in connection with the amended 2013 JOA.

These are the areas in Slide 2, but I am just going to dilate on these for a minute. The parties can have unified action regarding printing time, method, field of publication, allocation of production of facilities, distribution, advertising solicitations, circulation solicitation, business department, establishment of advertising rates, establishment of circulation rates and revenue distribution. Then as we referenced before, the only condition is that you can't add a new party.

And what they say, Your Honor, is well, Your Honor, even though that is what the statute says, we want to visit the robust debate in the senate and the congress wherein various senators in congress persons argued that there should be substantial restrictions on those amendments. By the same token, Your Honor, we can add in, if it is a useful debate, all of the statements included by Senator Jacob that it is -- that you're allowed to freely amend. When we cited legislative debate that was friendly to our position this is

the response we got from the plaintiffs, plaintiffs, excuse me. They cited *Ratzlaf versus United States*, 510 U.S. 135 which states, quote, we do not resort to legislative history to cloud statutory text that is clear. Amen. So as respects the robust debate, they're missing the point. It is not what any person in the senate or congress said, it is that you had a vigorous debate that there should and should be and what came out of the congress and the senate is the will of the congress and the senate and there is only one restriction. So it is no surprise that the only court to address this, the *Mahaffey* court looked at that and ruled in that case that the plaintiffs argued that all amendments must have DOJ approval to which the court responded by, and the argument there, judge, was the same argument. Every time that you file amendments, a new DOJ. Excuse me, a new JOA that you have to get pre-approval with the DOJ and the court said no. In response, the court was emphatic and said that the court declines to find that as a matter of law any unapproved amendment would immediately cause the forfeiture of antitrust immunity for the entire JOA.

First, neither the NPA or any of its regulations set forth a procedure for amending post 1970 JOAs. That is important. It is a saying we are going to underscore. If they wanted to have that as a feature, they would have put it in there because like I say, there was robust debate

about whether you could have amendments at all or what requirements would attend them. Court goes on, plaintiffs suggest that no specific amendment -- amendment procedure exists because amendments to post-1970 JOAs create new JOAs. The court goes on. Had congress intended all amendments to create such sweeping consequences, however, it would have easily included, excuse me, it would have easily included in language to that effect in the statute quote further requiring the parties to the JOA to go through the cumbersome approval process including possible judicial review for every amendment no matter how minor defies common sense. And they argue well there is a negative pregnant. Now maybe, you know, in *Dumb and Dumber* he says, do I have a chance? And she says not one in a million. And he says, I have got a chance. No, that is not what the court said. If you read the -- if you read the decision the court said no, and then in footnote one when it cited the statute, it said quote, pre-1970 JOAs may be amended freely as long as amendments are filed with the Department of Justice. And again, I'm not testing the proposition that there isn't some possibility out there not before us wherein you could do an amendment that would trigger a review by the court that it does not satisfy the requirements of the NPA. This is not such -- this is not such an agreement.

And the other thing, too, when you put in the what

ifs, you don't have a case in controversy before you with respect to any -- in which any of us can have a fair chance to respond because it is not in existence. And it is the kind of thing that the court say, you know, we're not going to issue an advisory opinion on what ifs. Bring the case in controversy to us, we will determine if it is ripe, and then we will make a decision concerning the facts that lie before us because it is injudicious for us to speculate.

Finally, the plaintiffs say well, if we look at the totality of the JOA, we don't have any specific facts, we don't have any information, but if we look at the totality, then there is an agreement for a succession or termination of the Tribune. That is -- that is not what it says, that is diametrically opposed to what one says. So when you use intent and effect, let's tease those apart. What is the intent of the agreement? The intent we can get from the plain language of the agreement and the preamble that I read which I won't read again. But it is the same language that the Tenth Circuit looked at in the *AT&T* case, and discerned the intent of the parties and made the determination as a matter of law it did not run afoul of the NPA. Then they say, well, but we have got this possibility that who knows in the future something may happen. All right. So let's look at that. The first thing that I want to do with regard to these allegations is look at our Slide 10. And this is

-- and these are just a few of the legion of cases, we just picked two. What must the plaintiffs allege to have Article III in antitrust standing as a matter of law. Article III standing, this comes from *Lujan versus Defenders of Wildlife*, plaintiff's alleged injury must be concrete and particularized and actual or imminent not conjectural or hypothetical. To have antitrust standing, plaintiffs must allege threatened injury, quote, of the type that the antitrust laws are designed to prevent and that flows from that which makes defendants' acts unlawful. Okay.

So now that we have got that standard, let's add to it the *Mahaffey*, the Sixth Circuit decision affirming the trial court's determination to throw it out as a matter of law. And the court said that the plaintiffs have the burden of showing the existence of a significant threat of injury from an impending violation of antitrust laws, or from a contemporary violation likely to continue or reoccur, citing *Zenith Radio*, quote, this burden is not satisfied by suggesting that defendants might injure the plaintiffs at some indefinite time in the future by going to a joint masthead operation under a factual scenario the elements of which are entirely speculative.

Let me step back because the *Mahaffey* had before it a situation in which the JOA was amended, Your Honor, and it agreed that they could combine all of the departments and

they could publish under a single masthead if there was a strike. There was a strike. The plaintiffs came in and said we have been harmed. The court said how? I see no antitrust injury. In fact, this amendment to the JOA saved the two newspapers during the strike. They said well but Your Honor, it is still in the JOA? And they could trigger it at any time. And the court said if that happens, come see us. But right now, we are not going to address the purely hypothetical situation that this might occur sometime in the future, and that it might produce harm because what we want to do is actually look at real life situations where we could determine what actually happened, who did it, when did they do it, why did they do it, and what were the implications of what they did.

So as to existing harm, this is what the plaintiffs -- this is the nature of the allegations, this is the best they can do compared to the antitrust injury concrete particularized. In the plaintiff's reply memorandum, there is this vague reference to a subjective feeling that, quote, defendants have already reduced the quality and quantity of output of the product at issue. That is what they're saying. I -- you would -- there is no way to make out what in the world that means other than it's subjective. There is no criteria, there is no standard, it doesn't amount to antitrust injury. But more important, let's analyze it for

just a second. Let's look at editorial output generally. There are three components as we see it, quality, quantity, and independence. The first two are outside antitrust purview. And even if they were not, they are implicated in the protections we have under the First Amendment. So the only, the only element there that the court takes any concern over, expresses any concern over, is the protections of the independent. Because under the NPA you must -- you cannot merge your departments. Here is what the *Miami Herald Tribune versus Tornillo*, the United States Supreme Court 1970 said in that regard. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper and the decisions made as to its limitations on the size and content of the paper and the treatment of public issues and public officials whether fair or unfair constitute the exercise of editorial control and judgment.

It has yet to be demonstrated how government regulations of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.

Then we look at the allegations concerning the prompted -- the petition and motion for preliminary injunction. Turning over to Slide 11, these are the allegations of the amended complaint. Paragraph 38, this

conclusion, the Salt Lake Tribune is in imminent danger of ceasing publication under the terms of the October 2013 JOA. Okay. This is a vague unsupported conclusion of imminent termination. By giving that, they are saying imminent termination. That is what they would have to demonstrate if this went forward. But then when we filed the motion to dismiss, they come back and they interpret their own pleadings and on Page 20 and 21 of their opposition they say the following: They mean defendants but defendants' argument focuses primarily on a characterization of plaintiff's claim as alleging imminent closure, quote closer, end quote, or shuddering of the Tribune. While plaintiff does fear that result, its claims are actually different than defendants characterization. I think that is what they said but in any case here is what they mean. They go on, quote, there is a phenomenon in the newspaper industry known as quote downward spiral. Once a newspaper enters into the spiral, it is virtually impossible to recover, period. Failure occurs perhaps not immediately but inevitably. They go on. Plaintiff's amended complaint alleges that on the express terms of the October 2013 JOA, the Tribune cannot survive long. Well this is not a threat of imminent harm, vague and unsupported, this is a vague unsupported conclusion about possible undefined remote threat of future terminal illness, some time by reason of

the spiral -- downward spiral. Is it defined? No. Is it hypothetical? It is. Is there any definition or are there any precursors articulated by which you might know it is coming? And not only that, they don't claim the Tribune is in a downward spiral, only that it may sometime, for reasons unknown, enter into it in the future.

And even if somehow we could figure out what a downward spiral was and what the circumstances are, we would wait until all of that occurred and then the court could have real live witnesses, actual documents, real evidence in front of it, it could determine what has occurred, it could characterize it itself and it could determine what if any legal remedy or equitable remedy applies. And frankly, even if we could figure out what one was and even if sometime in the future it occurs, I will be here and I will be arguing first that this is not the province of antitrust complaints. You do not test one another's economic models. You cannot do that because the courts have said look, if you are employing means honestly industrious, you get to chose how you do business, you take the risk, because if you fail in this, we will not be there to make any reparations. If you folks go digital and it turns out that that is not the future as both the plaintiffs and defendants project, there is no remedy for us. That is -- that is something that the defendants take on as their risk because it owns the assets.

Okay. So they say that is not really what we mean, there is no imminent harm, certainly no particularized or concrete harm. I want to just for a second just take a minute, only three cases in American jurisprudence that anybody can find allowed a claim to get past motion practice. *Reilly versus Hearst.* In that case, this is Northern District of California, 2000, plaintiff challenged plans by Hearst which was the owner of the San Francisco Examiner to acquire the San Francisco Chronicle, terminate its JOA which said exactly what it was going to do and close the Examiner. That is the only consumer complaint that was allowed to go forward and that was based upon an express agreement we're going to close one down. The Hawaii Attorney General took on *Gannett* in *Hawaii versus Gannett Pacific*, 1999, and the attorney general sued to prevent the termination of the JOA where the parties had publicly announced plans to stop publishing one of the two newspapers. Contrast that with the preamble to the JOA in 2013.

And finally, the United States government brought a claim against the Daily Gazette. This is West Virginia, 2008. And they sought to prevent the acquisition of the entire economic interests of the Charleston Daily Mail by the Charleston Daily Gazette. And they allege based upon specific facts and actions, including the following, Gazette

had stopped all promotions and discounts for the Daily Mail. Stopped soliciting new readers for the Daily Mail. Stopped delivering the Daily Mail to thousands of customers. Tried to convert Daily Mail home subscribers to Gannett subscriptions. Stopped publishing the Saturday edition. Allowed half of the Daily Mail reporters to leave without permitting replacements. And contrast that with the vague allegations of potential possible harm in the future by some downward spiral or the subjective notion that gee, we might see a diminishment in the quantity or quality of the news and reporting. It simply doesn't get you there.

I'm through judge. I am going to leave for -- on the briefs the arguments with regard to the per se -- the argument that they failed to -- the allegation to per se fail as a matter on law because it not a per se violation. I'll be happy to answer any questions. But I want to leave with -- and I do this just as a moment of personal privilege because it is one of my favorite quotes over my career in antitrust laws. It is Justice Marshall, *United States versus Topco*, and it seemed apt. And we didn't cite it and I apologize and Your Honor can just strike it from your memory bank, 1972. Antitrust laws in general, and the Sherman Act in particular, are the magna carte of free enterprise. They are as important to the preservation of economic freedom or our free enterprise system as the Bill

of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete, to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might permit greater competition in a more important sector of the economy. That is what is at issue here, Your Honor. We have made the business decision, it is -- a lot is at stake, there is no guarantee, folks are confident, but the model of this paper going forward is to embrace full on, not exclusively but full on the digital space and the distribution of the content with respect to which it thinks it has an advantage of the current digital output. And that is the future of the Tribune and it should not be foreclosed because the 2013 Amendment as all of the others comply with the -- with the NPA and the rules with respect to amendments. Unless the court has other questions, I will sit down.

THE COURT: Thank you. Ms. Porter?

MS. PORTER: Thank you, Your Honor. My favorite quote would not be nearly so erudite as Mr. Burbidge's and can't be said in open court. So I will just go straight into

responding to the points raised by the defendant, primarily the points raised today, but also one or two things that were mentioned in the reply memorandum some of which were raised for the first time. And as the court can tell from both the briefing and today's argument, the defendants' principal argument is the affirmative defense the Newspaper Preservation Act. I think we all know that defendants that believe that they have a really strong standing argument don't start it on Page 19 of their motion. So I will also track their -- their approach and start with the Newspaper Preservation Act.

Now, the defendants don't like it but they don't dispute that the NPA is an affirmative defense. They also don't like the fact that we actually address some of its elements because we knew that that is what they were going to raise. But the fact is they have an obligation in pursuing a motion to dismiss to establish all elements of an affirmative defense. And when the affirmative defense is based on the wording of the statute, they have to meet all of the elements of that statute.

And I know the court has expressed some skepticism about some of those elements, but I'm going to address each of them. First, and I am just doing this in the order that they're presented in the statute, first is the issue of what we believe is an unambiguous statutory requirement that

defendants show that as of 1952 not more than one of the publications --

THE COURT: How do we even get to that? You really are not suggesting that we go back to 1952 and look at whether or not the purposes for entering into the Joint Operating Agreement at that time met the requirements passed in 1970 for the Act? You're not really suggesting that, are you?

MS. PORTER: Well, you know, congress said it in the statute, Your Honor, so I realize that is a long period of time.

THE COURT: If someone had a claim, weren't they required to at least raise that within four years of 1970?

MS. PORTER: No, that four-year statute only applies to damages and they have now acknowledged that that is the case. So there is no four-year statute of limitations that governs our claim. That is why they raised for the first time in their reply memo an attempt to argue laches because the four-year statute does not apply.

But, again, the reason and I -- I will -- I won't dwell on this because I understand the court's concerns, but congress did say this, and they said it in 1970 and here is the thing have you to keep in mind. It is kind of like a preservation obligation that someone has. Any JOA in 1970 that intended to rely on the Newspaper Preservation Act to

claim an immunity or exemption later knew as of 1970 what it had to have, what it had to be prepared to prove, because it said it right in the statute. One thing that I think we heard that may have been misstatement on the defendants part was that the 1970 statute grandfathered in all existing JOAs. That is not true. We quoted the language specifically in our memorandum. The 1970 Act only grandfathered those in that met the qualifications of Section 1803. So they have been on notice literally since the statute was put into effect that if they wanted to maintain their JOA, and if they intended to use the statute as an affirmative defense, they needed to be prepared and hang on to their documents. At that point, we're only talking about an 18-year gap and the reason I say that is that it was a 20-year gap in the Hawaii case and the court still took evidence on that issue.

Let me move onto the second item and it is just my luck that the order of the statute happened to start with the two that the court specifically wanted me to address. And that would -- the second one is with respect to the filing of the terms. Now both of us have, you know, they say that well we artfully used ellipses, they have actually artfully used ellipses as well. The fact is neither of us like each others ellipses and we have provided to the court the actual language. But I can tell you, for example, one

example of an ellipse that the defendants used that makes a material difference in the case, it is on Page 16 of their reply memorandum. And in that, on that page, the defendants said that the, with respect to terms, the NPA requires only that quote, the terms of a renewal or amendment ellipse must be filed with the Department of Justice. What they actually left out was the intervening four words which was a reference to a Joint Operating Agreement that is a defined term under the statute. So when they eliminated that in their ellipse, they eliminated a defined term which is very broad. Joint Operating Agreement is not limited to something labeled a Joint Operating Agreement, but instead, as we have quoted, it includes any, this is from direct quote from the statute, any contract, agreement, joint venture, whether or not incorporated, or other arrangement entered into by two or more newspaper owners and then the rest of it is as quoted by Mr. Burbidge. So just simply by self-identifying something as a JOA, or labelling it a JOA, does not mean that those are the only terms you have to disclose.

THE COURT: You said that the JOA is a defined term, how is it defined?

MS. PORTER: I just -- I just quoted it, I'm sorry. Um, wait. JOA --

THE COURT: I think it is the language that you just

read and how do you get from that language that it includes the attachments?

MS. PORTER: Well, because it is any. It includes any arrangement and that arrangement means that if part of -- well you know what, I can actually give you a concrete example from the wording of the 2013 JOA itself. Because Your Honor, and both sides have this as an exhibit, but it happens to be Exhibit E to the defendants' motion. And if we went to Page 2 of the 2013 JOA, it says, let's see one, two, three, fourth full paragraph down, now, therefore, in consideration of the mutual promises, covenants and agreements hereinafter set forth, the parties, based upon mutual trust and confidence in each other, agree to and hereby amend, renew, and restate in its entirety the amended 2006 JOA to read as follows. And then there is some text. Now notice that it says that that document on its face claims that the consideration that is being exchanged is set forth hereinafter. But we know that is not true because one of our allegations which not only is -- has to be considered undisputed basis of this motion but has just been admitted in the PI documents, is that the consideration for this, a large chunk of it, was a very large cash payment. That is undisputed. And yet that is not set forth in here and that is one of the most material terms to a JOA. I mean what is usually one of the first things listed when you're saying is

there a contract or not? Price. Was price agreed on? Here the price is not set forth in the document that the defendants chose to file with the JOA. And when we're talking something we have alleged to be beyond or more than $15,000,000.00, it matters a lot to know what those terms are, what the price actually bought because the U.S. Supreme Court itself has recognized that a very large unexplained payment can be strong evidence of anti-competitive activity.

So just going on the language of the statute itself, and the language of the October 2013 JOA itself, to rely on the NPA they had to at least disclose the consideration which is millions of dollars. And frankly, Your Honor, they needed to disclose the other agreements that were specifically identified but not explained as being part of the consideration. It is pretty -- it would clearly, I think, be a complete circumvention of the statute. What if you just had an amendment that says we hereby amend it for these -- in these ways, and we're not going to tell anyone what we're exchanging to do that. That is not what is contemplated. Remember that the public has a significant interest in this. The reason that you have to file those terms with the DOJ and have them available if people find out about them is because the public has an interest in what is really going on when somebody is claiming an exemption to antitrust laws. And so it is -- we strongly believe that

they have not met the filing of the terms element as required under the NPA.

Now, the third element, and I thought it was interesting on this one because this is where the defendants stopped quoting the statute and started summarizing the statute, but we have quoted the exact wording of the statute in the pleadings. But in short, the JOA, I'll paraphrase too since the defendants have been, has to ensure a couple of things. One, no merger or amalgamation of editorial staffs, and also has to ensure by its own terms, that is the way the statute reads, a separation of editorial policies.

Now, what we have been told on that is we have been told a couple of things. We have heard primarily but look at the terms of the agreement. We said we weren't doing anything wrong. We said we were going to have independent -- or editorial independence. Well, Your Honor, it is not very often that defendants, particularly sophisticated ones, will come out and put in their document well, we're not complying with the statute. The court has to look beyond the wording of the 2013 and look at the actual implementation and other provisions of the 2013 JOA.

For example, both sides have pointed you to the Tenth Circuit case in 2003. And different JOA, the older one, different issues dealt with Utah law primarily and things like that. But the court did address briefly the issue of

editorial independence. And the defendants say well look, the Tenth Circuit pointed to the language where they said we are going to be independent. And then what the defendants skip over is the next thing that the court pointed out which was under this old version of the JOA, there is no ability by the Deseret News to prevent a purchase of Kearns-Tribune. And they specifically emphasize that in the opinion. While we now know that they -- after the issue had already come before the court, then they slipped in that provision. But the 2003 ruling was dealing with the 1982 JOA, not the 2001. We have also heard and seen in the previous briefing that the -- hey this thing has been in place since 2001 so what is your problem? Obviously we have pled a couple of facts that actually relate directly to that issue. First, we have pointed out that there has been a recent change in ownership including to an entity that is not local, has no ties, has no incentive to maintain the two competing newspapers. And that received apparently an extremely large cash payment for unknown and undisclosed reasons in conjunction with this JOA.

We also pointed out, now granted we had to allege this upon information and belief because it is literally impossible for the plaintiffs to confirm this without discovery, but we did allege that the veto power was exercised recently with respect to a particular purchaser.

Now, I will admit that -- that to confirm that we would have to have the documents that are exclusively within the defendants' possession, but we have alleged that and we have even named the buyer that we believe was subjected to the veto power.

One thing I should point out, Your Honor, is that the veto power is actually quite broad. It applies not only to vetoing a prospective owner of the Tribune, but also to any minority investor who wants to participate in management. And so it is an extremely broad and intrusive provision. We have explained at some length in our memorandum why a provision like this is so insidious. And the defendants say well, it hasn't been exercised, it won't be exercised. Well, you know, I'm sorry we're allowed to explore that. And I keep coming back to this same thought. If it is not going to be exercised, hasn't been exercised, then strike it. If you guys are willing to do that and of course we offered that in the PI filings and we got radio silence on that.

So it does remain a threat. We believe it has been exercised recently. Inherently it discourages some purchasers who would have reason to believe that the Deseret News owner would veto them. So in essence it has changed and facts have changed and it is just simply illegal and we're asking for prospective injunction.

We also have -- oh, one thing I think that is important. I don't really believe that the defendants deny that the identity of an owner is directly controlling and related to and intrusive on the setting of a newspapers policies. I don't -- I didn't see that in the briefing, I don't think I heard that today. Their only issue is really well it has been in there a while, you don't know how many times we have exercised it. So I think on its face, because remember we're here to construe the face of the statute, and the face of the JOA and some of these provisions, I think you can tell from the terms of the JOA that it does not meet the editorial independence requirement for the NPA's affirmative defense.

And we have also -- and of course just as with defense counsel I am not waiving any arguments we have set forth in our briefs, I'm trying to respond to the key ones that the defendants have focused on. We have also heard argument today about the fourth requirement in order to claim NPA immunity, and that is the threshold requirement that the changes be an amendment. And what we have heard is well the statute supposedly only limits amendments in one way and that is that they cannot add a newspaper. But what that does is it skips over a step because the first question is, is it an amendment to begin with. If in fact it is either intended or has the effect of terminating, prematurely

terminating a JOA or ending the publication of one newspaper, it is not an amendment. I believe that the -- that counsel acknowledged that even today. There are amendments that are subject to scrutiny. We have alleged throughout our complaint both that that is the intent and the inevitable effect. I was a little bit mystified when defendants tried to suggest in their briefing and today that we had only concentrated on just imminent closer. We did include those allegations because they're obviously relevant to our preliminary injunction, but we also referenced numerous times the lack of long term sustainability. Paragraph 36 subsections A and B were as one example in which we talked about it is that the Tribune is no longer self-sustaining and that where we said that the terms of the new JOA deny the Tribune adequate revenue to publish the newspaper long term. We also point out how the website is not sustaining or self-sustaining.

We point out in Subsection E of Paragraph 36, that the terms are so unfavorable as to prevent profitable publishing. We referenced quite a few times the effect of the provisions. We have got subsection D on Page 21, we have Paragraph 62, Paragraph 65. Any way, we have argued both intent and effect, and we have argued -- and we laid out quite a lot of, we thought, pretty good circumstantial evidence of intent.

Now as the court knows, we were actually entitled under the rules to plead intent generally. But, you know, we tried to give as much notice of what we were looking at as we could and we came up with about two pages of things that make this whole transaction quite suspicious in the plaintiffs' view. I won't reiterate those but they include the secrecy, what we view as the mischaracterization of what the JOA does. I mean they act like the JOA is the -- is the only way they can handle their digital. We attached their digital agreement from three years earlier. So, you know, that kind of went away.

Anyway, so we have quite a lot, I think, far more than is required under the rules to show an intent to eliminate competition. We even point out that that is the only way that the Deseret News would ever get its paid circulation up. And I emphasize the word paid for a reason because they have been trying for 50 years and can't do it. And we pointed to some language in the agreement that why is it in there? Why does it very coyly say in the agreement that special promotions can be given to the Deseret News or potential Deseret News subscribers if decreases in spending in the newsroom of the Tribune have changed market demand. Well that is a coy way of saying, you know, we'll stop spending as much money on the Tribune and now we can really pump up the Deseret News.

Like I said, we laid it out for about two pages. So the intent is there by itself, and we don't have to show intent we can allege sufficiently effect. And I also believe that we have done that.

We think it is imminent. We have pled that. This hemorrhaging is no longer self-sustaining whereas it was profitable. We also alleged long term. Now counsel says we didn't use the word downward spiral in the complaint, you know, but magic words have never been required in a complaint. We specifically addressed multiple places the long term as a form of alternative pleading, the long term effect that this huge cut has. And that is one thing that we really have to keep in mind here is what this does. And in essence, the way this JOA operates is that the Tribune's owner sold over one half of the Tribune's assets to Deseret. The Tribune's owner then agreed to a nearly 50 percent revenue cut. We have alleged that they did so in exchange for a cash payment, a very large cash payment, that has not been disclosed. Which was then spent not on the Tribune. So in other words, our allegations are directly that the Tribune itself received approximately a one half cut in revenue for nothing. Now, the question on standing is do those facts allow a reasonable inference that this change is going to impact competition. And I would analogize it, I'm not sure how, but if they're saying well, they nicked an

artery but the patient is still alive, or it is the administration of a slow acting poison, it is set in motion and impact is inevitable. But we have also alleged an existing reduction in quantity of the product. In other words, quantity of what is being produced.

Now the defendants, again, they like to focus more on the quality part but we have specifically referenced content and quantity several places in our complaint. And they say well, you didn't identify the exact reductions and, you know, that is true, we pointed out that the product is lesser. I mean if I can use an analogy it is like let's say I used to pay 2.89 for a gallon of milk, and I am now paying 2.89 for a gallon container that is about two-thirds full. It really is a price increase in disguise when that happens.

But, you know, I will say this. This is the one area where I think that the defendants do not really take the position that if we had listed the exact quantity, exact content that so far has been reduced or eliminated, I think even they would say well, okay, you have got standing. So I will just impress upon the court that if it is necessary for us to delineate, and I don't think it is, under Rule 8, but if it is necessary to delineate, this is one instance in which a chance to amend I think would be -- would resolve everyone's concerns.

Again, I don't think we have to go -- I don't think we

have to list this, I don't think we have to say in the complaint well they have eliminated, okay, they no longer have a business beat, they no longer run local editorials on Monday, they no longer print national columnists. I mean frankly I have a list here that the defendants would not be surprised by anything that if we were to be able to amend if the court finds it necessary, because frankly, several of these examples were included in the PI filings with the declarations. And so it is a matter of this would easily be remedial if even required to go into that kind of detail and I really don't think that we are. Quantity is quantifiable by definition.

So in short, we have listed, with respect to standing, we have alleged three different types of injury. One, is the current injury in which the quantity of the product that is being provided has been already reduced. And that is the one I have said we could supplement if we needed to. Second, we argued imminent closure, or we have argued imminent downward spiral, meaning that it cannot survive long term. We have very specifically identified the reasons for that. How many people or businesses could take a 50 percent revenue hit with nothing to show for it because whatever cash payments there was went somewhere else and survive. I mean the allegations in themselves I think not only permit a reasonable inference, but are kind of obvious.

I mean they're dumb versus dumber. It is a duh. You take this kind of hit and our allegation is that they can't survive it makes a lot of sense. It is certainly plausible.

Now, we have briefed other issues and that I think a lot of it we can submit on the briefing, Your Honor. I want to see whether there were any other issues that were raised today with respect to the two main arguments I think they're making mostly NPA and a little bit of standing.

THE COURT: One other principal arguments that you have not addressed yet is that on the face of the Amended Joint Operating Agreement it is simply a business judgment, and it is not the business of the courts under the antitrust laws to second guess business judgments. How do you respond to that argument?

MS. PORTER: Well, the problem with that argument is that antitrust laws, particularly especially Section 1 of the Sherman Act, you know, they can -- you can say that about literally every violation of antitrust law. Under section one, for example, you have to have an agreement between two entities, two competitors. Well that means that those competitors exercise their judgment to enter into that agreement. That agreement can still be and is illegal. It may be a brilliant exercise of judgment by Deseret to try to put the Tribune out of business and to pay them off to go away, but that is illegal because it is the consumers that

have to be protected by antitrust laws. I mean what we heard was really just an assume -- assume we exercise our judgment in a way that is legal, Your Honor. Well, I'm sorry you can't do that because we have alleged facts that certainly put at issue whether it was legal. Business judgment is irrelevant. They could have accidently entered into an agreement and as long as it didn't -- wasn't anti-competitive they would be fine. Or if they intentionally enter into one that is illegal and anti-competitive, that is not a defense.

THE COURT: Tell me the best facts that you have pled in the complaint from which an inference can or must be drawn that the 2013 Amendment will result in a lessening of competition?

MS. PORTER: Okay. Well, first we did allege that it already currently has in the form of reduction of quantity of output. We cited -- in our memo we cited case law for that so we have cited specifically.

THE COURT: Tell me how you think that impacts competition?

MS. PORTER: Well, because I -- virtually every court to address the issue including the Tenth Circuit has recognized that reduction of quantity of output and actually reduction of quality of output and reduction of consumer choice are all actionable injuries under antitrust laws. So

I think that is directly on point.

And then with respect to the future, or the future or ongoing, I would go back to the actual terms that we have laid out which are the terms of the JOA itself which cuts the income by 50 percent for nothing, because remember the money was spent somewhere else, and our specific allegations that it denies sufficient revenue to publish long term and to perform news gathering functions and renders it impossible to continue long term publication of the Tribune. I mean it is -- it is an economic fact. I mean certainly something that we have alleged. I don't believe that the rules require that we wait until the Tribune has gone under, has died, and then file a lawsuit saying well, it happened. What would be the point of that? We're, you know, we're here to try to prevent anti-competition. You don't have to wait until one competitor has completely died.

THE COURT: What are the requirements to support an allegation to support that the injury is imminent and threatened?

MS. PORTER: Basically I think there has to be a likelihood or substantial likelihood with respect to future. I think that is something that the Supreme Court said.

THE COURT: And your facts to support that are -- are that basically the revenue stream?

MS. PORTER: The revenue stream in exchange for

nothing. Yes, a 50 percent pay cut with no added money coming in.

THE COURT: Any other facts that you have pled that you believe support the fact that the threat of failure or lessening of competition is imminent?

MS. PORTER: Well, I think we have specifically alleged that the Tribune is hemorrhaging and is not currently self-sustaining, both the print and the website. That is a specific fact and that specifically relates to --

THE COURT: How did you allege that? Which page was that in your complaint?

MS. PORTER: We allege that in Paragraph 36 Sub A.

THE COURT: Okay. That is the one in which you have got a long list of various --

MS. PORTER: Well, it is a long list, but I tried to keep it short.

THE COURT: Well, I am not criticizing you.

MS. PORTER: Yes.

THE COURT: Just pointing out that is what it is.

MS. PORTER: It is -- well there is A but each of these is specific.

THE COURT: That is a pretty conclusory pleading that they are -- consists of a proffer where it is now hemorrhaging and no longer self-sustaining. What facts support that that you have pled?

MS. PORTER: It comes down to -- it really does come down to the reduction of the income and the revenue. I don't know how we could be more specific. Self-sustaining is a very specific factual allegation. I mean I could write something that says it is now expending more than it is bringing in, but that is the definition of not self-sustaining.

THE COURT: What I am asking for is where are the facts that say they are now spending more than they're bringing in?

MS. PORTER: Well, that is the fact that we have alleged.

THE COURT: They're hemorrhaging. I mean is there any concrete evidence that in fact their revenues were X percent in one year and now they have dropped to Y percent?

MS. PORTER: Well, Your Honor, if we were here on a summary judgment, you know, I would be prepared to talk about evidence. But you see the problem that we're in is that that information is exclusively within the possession of the defendant. We cannot have it. I think we have relied on, I think, pretty strong circumstantial evidence, massive layoffs, reductions of quantity of output. If you look at all of that, I think considering the difficulties that usually present a citizen's group or an outsider trying to challenge an antitrust provision, we have had pretty

specific stuff compared to this generic allegation. I would just refer the court really to -- I mean I can also refer it to a number of other -- I have already kind of listed some of the --

THE COURT: I have got the gist. I have read your complaint very carefully.

MS. PORTER: Okay. And again, I would just -- I would indicate that if it comes down to a pleading sufficiency, you know, we need different words or we need to state them differently. The typical remedy for that would be without prejudice, dismissal without prejudice if that is the situation. Because we can try to tie and make these more specific. But truly under Rule 8, we are entitled to have the facts that we have stated be assumed true, be construed in such a way as to allow reasonable inferences. And I think that that is what we have got there.

And if I may just address a couple of other points that were raised today that I just want to reiterate. The NPA, we have to recall, you know, the issue about an amendment, we heard that there is -- it should be a common sense construction. We heard that today. I would point out that we also have to have a narrow construction and I would also point out that our interpretation of the word amendment, which is not defined, is actually the same interpretation that has been given for over 15 or 20 years

by the enforcing agency, the Department of Justice. And Your Honor, the case that we cited in our memorandum talking about the deference or the respect that is owed to the DOJ's interpretation was, in fact, a litigation case. The DOJ has put forth these interpretations in the context of litigation and the U.S. Supreme Court said that interpretation is still entitled to respect.

So we're only asking you to interpret an undefined term in a way consistent with the enforcing agency and in a way that is consistent with the obligation to narrowly construe the provisions, and it also fits with the -- with the purpose of the statute.

Both sides have cited legislative history so that one is a draw. But our interpretation we think makes sense and is supported by what we have heard today which is an admission, I believe, and one that has to be made. Not everything labeled an amendment escapes scrutiny.

And if I may, I'm just checking to see, Your Honor, if there were any other points that haven't been already addressed.

Actually, there is one with respect to the veto power. The challenges made is how can there be a significant risk of impending current violation. As I have indicated, we have alleged that it was exercised recently upon our belief, but we have also explained why the nature of a veto power

itself creates that significant risk. Because among other things it can be exercised in secret, it can be done at little or no cost to the exercising party because no one will find out about it unless there is a lawsuit like this. And all it takes is just a flick of the pen, no. And so that is addressed in our memorandum the way that is more insidious than even a right of first refusal.

I would address, Your Honor, if I may, the issue of laches. That is an another affirmative defense. Laches requires the court to consider a number of equitable factors. I mean for example, they're asking you to assume that they didn't keep the paperwork that was required by the 1970 statute. How do you just assume that? You know, that is at least something where normally the defendant would be expected to introduce the elements of laches which includes prejudice and things like that. And again, it is not something that can be assumed, and particularly not when it is raised for the first time in a reply memo on a motion to dismiss. I have to reject procedurally on that.

What we have heard quite a bit about, and I will end with this, is a number of statements that just say that the court should just not interfere with the people's business models. First of all, to the extent we're hearing all these statements about $200 million invested, they have, you know, they're doing all this and all that. Well, that is

obviously not proper to bring up on a motion to dismiss. We wanted a hearing on our preliminary injunction and then we could have -- we could have explored the statements that are quite easy to just throw out there without backing them up. But more important, if a business model violates antitrust laws then yes, it is the court's -- within the court's authority and within the court's obligation to protect consumers from that unlawful business model. So you can't just throw the words business model out there and say, you know, leave us alone.

I think that the rest of the arguments have been addressed quite extensively in the briefing, so unless the court has any further questions, I'll submit it.

THE COURT: Thank you. Let's hear from Mr. Burbidge. It would be helpful to me if you would start with the defense of laches which as was pointed out was only raised in the reply brief and traditionally is fact intensive, and must be judged on a well-developed record.

MR. BURBIDGE: I'm sorry, the last part, Your Honor.

THE COURT: Must be judged on a well-developed record which we don't have here.

MR. BURBIDGE: On the issue of -- on the issues of laches, Your Honor, with regard to 62 years, that is simply not credible that that -- that anything in the NPA contemplated that anyone would have to go back. And let's

take that just as statutory construction. Let's move off laches for just a second. If the court had any concern for -- or if congress had any concern for that, they would have put in a provision provided however that in each amendment you go back and prove up that in 1952 or 1936, and the only -- and the only courts to review that have said as a matter of law it is too late. And counsel says, well, Your Honor, they took evidence. Not really, not on that issue. The fact is the court took evidence and then made a determination it had erred, and then it went back and as a matter of law determined that it was late. It didn't -- it didn't make it on a fully developed record. It actually determined that directed verdict should be given and it shouldn't have gone there in the first place. But with regard to the 62 years, congress didn't even hint that they wanted anybody to go back there. And as respects the 2013, 2001 suggestion, so feature goes in in 2001 they celebrate that there was vibrant -- this is the complaint, vibrant competition for those -- for those periods. That is enough for the court to say look, you have made an allegation. We now know that in 2001 that same feature came into effect and you in your own pleading have celebrated the editorial independence during that period of time. You're too late. On the basis of your own allegations you have made that -- you have made that suggestion. You have made that showing,

I should say.

I want to just say, and I'll be very, very brief, Your Honor, with regard to the 2013 Amendment, what they are really saying but have never pled is it is not an authentic agreement. That what these folks, these established pillars of this community, entered into an agreement and the terms are publicly available. And somehow counsel is saying well but, Your Honor, that may not be what they really agreed to. Well, where is your allegations of fraud? Where is your evidence? Where is your factual allegations that this is not the authentic agreement and there is really some secret deal somewhere else? Obviously, it doesn't exist, they don't think it exists, and they never pled that it exists. But the fact of the matter is that they keep suggesting well but judge, you can go by the express terms as the Tenth Circuit did in the *AT&T* case, you have got to look behind them. Well if that is the case, judge, agreements are worthless because any litigant could come by there and say yeah, Your Honor, we had an agreement but, who knows, maybe it is not really what they meant and so I get to look behind it.

Those are not the allegations that get you there. And I just am going to quote from the Iqbal case. And here is the operative language that I think informs the court. Acknowledging that parallel conduct was consistent with an

unlawful agreement, the court nevertheless, and there it is finding that the parallel conduct was consistent with the allegations of an unlawful agreement not under the NPA, the court nevertheless concluded that it did not plausibly suggest and elicit accord because it was not only compatible with but indeed was more likely explained by lawful unchoreographed free-market behavior. Well here we have an agreement entered into. This is one of the many, many amendments that have been made to the JOA established in 1952, it is not of a different character, it involves the same kind of allegations, I mean they even allege in their own pleadings that there was a period of time when the Tribune allowed its solicitors to get bonuses for soliciting for the Deseret News in order to increase its -- its circulation. Those are the kinds of things that you get to do under an NPA. They just don't like that in this instance, that the Tribune made a command decision to sell an interest in Legacy Assets and take its future to the digital space.

That is interesting, but it goes to business judgment. And as to the final element of standing that they suggest that they qualify under, they say well, Your Honor, our members have subjectively determined that the paper is smaller and the quality has gone down. Those are not antitrust injuries. Those are protected by the First

Amendment. We don't agree, we strenuously disagree, and we bristle when counsel gets up and says that you gave up revenue in the print for zero because she ignores the fact that we got all of the digital properties. That is our property and we have full control over it and that is -- that is the future. But more importantly as I referenced in the -- in the decision by the Supreme Court *Miami Herald versus Tornillo*, it answers this question. With regard to quality and quantity, a newspaper is more than a passive receptacle or conduit for news, comment or advertising. The choice of materials that go into a newspaper and the decisions as to limitations on size, content of the paper and treatment of public issues and public officials whether fair or not constitute the exercise of editorial control and judgment. It is yet to be demonstrated that --

THE COURT: You need to slow down, Mr. Burbidge, unless I'm going to allow my court reporter to take you out behind the shed afterwards.

MR. BURBIDGE: It is not going to be a surprise to you that that is not the first time that I have been scolded and I apologize.

THE COURT: Not even the first time before me that you have been scolded.

MR. BURBIDGE: I apologize. All right. Are we okay? You forgive me? So we're square, all right. And when I'm

quoting I should be extra careful.

THE COURT: Yes.

MR. BURBIDGE: It has yet to be demonstrated how a governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of free press as they have evolved or evolved to this time. There is going to be changes made. The plaintiffs consisting of some ex-employees and ex-editors don't like the change. There is displacement. That is not the province of the antitrust laws or this court. There are no concrete allegations of immediate and imminent harm. The allegations of existing harm are purely subjective. There is no way in which the court could entertain those as antitrust issues, they implicate the First Amendment. This complaint should be dismissed, the amended complaint should be dismissed on the merits. Thank you.

THE COURT: Thank you. I am going to take a recess for a few moments. I may be able to rule, I may not be able to rule, but we will be in recess for about 15 minutes.

MR. BURBIDGE: Thank you, judge.

(Recess.)

THE COURT: The court has reviewed each of the memoranda and I have read the critical cases that have been cited by the parties, some of them several times to be careful in my analysis.

I believe that the arguments that the defense has made are very powerful arguments and very strong arguments. However, at this stage of the proceeding, the court is required to use caution and to draw all inferences most favorable to the plaintiff. It is the exceptional case of this type that should be decided on a motion to dismiss and denying the plaintiffs the opportunity to develop facts. On that basis, I am going to deny the motion to dismiss.

With respect to the laches motion, I was inclined to find that going back to the 1952 and 1970 adoption should be barred. However, given the fact that the laches argument was first raised in the reply brief, and more importantly the laches is an equitable argument that requires careful development of facts, I believe that I must reserve ruling on that for another day.

I will tell you, however, that unless there are strong pervasive facts to support an argument that the court should allow discovery back into the 1952 and 1970 periods, I would be very inclined to find that laches would bar going forward on those part of the claims.

So the motion to dismiss is denied. We will proceed on the regular schedule in terms of establishing a briefing or a scheduling order and other things in normal litigation.

Any questions before we recess?

MS. PORTER: No, Your Honor. Will the court prepare

an order or do you want somebody to prepare --

THE COURT: I will enter the order. Thank you. We will be in recess.

MR. BURBIDGE: Thank you, Your Honor.

MS. PORTER: Thank you, Your Honor.

(Whereupon, the hearing concluded at 4:08 p.m.)

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name and affixed my seal this 15th day of September, 2014.

_____

Laura W. Robinson

RPR, FCRR, CSR, CP