

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 2:07-0329
v.	)	
	)	Judge Copenhaver
	)	
DAILY GAZETTE COMPANY,	)	Magistrate Judge Stanley
	)	
and	)	
	)	
MEDIANEWS GROUP, INC.,	)	
	)	
Defendants.	)	
	)	

**COMPETITIVE IMPACT STATEMENT**

Plaintiff United States of America (“United States”), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I.**

**NATURE AND PURPOSE OF THE PROCEEDING**

The United States brought this lawsuit against Daily Gazette Company (“Gazette Company”) and MediaNews Group, Inc. (“MediaNews”) on May 22, 2007, challenging a series of agreements entered into by the defendants on May 7, 2004 (the “May 2004 transactions”). The Complaint alleges that these transactions violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, by consolidating ownership

and control of the only two local daily newspapers in Charleston, West Virginia, under Gazette Company and eliminating competition between them.

On January 20, 2010, the United States filed a proposed Final Judgment, which is described in more detail below. The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

## II.

### **DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION**

#### *A. The Defendants*

Defendant Gazette Company is a privately-held corporation based in Charleston, West Virginia. It has for many years owned and operated the *Charleston Gazette* (“*Gazette*”), a local daily newspaper founded in 1873 and circulated throughout a large portion of the State of West Virginia. MediaNews, now known as Affiliated Media, Inc., is a privately-held corporation with its principal place of business in Denver, Colorado. It owns and publishes over 50 daily newspapers in various markets throughout the United States. In 1998, MediaNews acquired the *Charleston Daily Mail* (“*Daily Mail*”), a local daily newspaper in Charleston, West Virginia, founded in 1880.

#### *B. The Pre-2004 Joint Operating Arrangement*

For many years after their founding, the *Gazette* and *Daily Mail* operated completely independently. In 1958, the then-owners of the two newspapers entered into a joint operating

agreement. The agreement created a partnership, which for most of its existence went by the name Charleston Newspapers. Charleston Newspapers was responsible for printing, distribution, and advertising and subscription sales for both newspapers. Each newspaper owner held a 50% interest in the venture and all profits, losses, and capital costs were shared equally. At no time, however, did the owners combine their news operations, which continued to operate independently. In addition, each newspaper remained separately owned outside the joint venture. Each owner retained exclusive rights to the use of the names of their respective newspapers, and all goodwill, subscriber lists, subscriber relationships, and other intangible assets associated with their newspapers.

The two owners of Charleston Newspapers had an equal say in the management of the venture, and they jointly appointed a general manager who was responsible to both owners. Each owner appointed half of the representatives to a management committee that approved all significant decisions, including annual budgets and advertising and subscription rates. Each owner separately hired and supervised a publisher for its respective newspaper. The publishers oversaw the day-to-day business and news operations of each newspaper and reported directly to their respective newspaper's owner. The publishers exerted a substantial amount of control over the general manager and other employees of Charleston Newspapers and had the ability to block Charleston Newspapers from taking actions of which they disapproved.

In 1970, Congress enacted the Newspaper Preservation Act ("NPA"), 15 U.S.C. § 1801, *et seq.*, which provided qualifying joint operating arrangements then in effect with limited antitrust immunity for certain specified business activities, as long as they continued to meet the requirements set forth in the NPA. Among these requirements was that the newspapers in a joint

operating arrangement remain separately owned or controlled, that they maintain separate newsroom staffs, and that their editorial policies be “independently determined.” 15 U.S.C. § 1802(2). Since 1970, Charleston Newspapers has held itself out as a qualifying newspaper joint operating arrangement and has claimed the antitrust immunity conferred by the NPA.

Despite the formation of Charleston Newspapers, the two newspapers remained vigorous competitors for readers. Each newspaper sought to capture readers by breaking stories first, finding stories that the other newspaper did not have, covering local news with greater depth and accuracy, and offering the most attractive mix of news, features, editorials, and other content. The *Gazette* and the *Daily Mail* sought to make their products more appealing by introducing new features, increasing the quantity of coverage, redesigning the appearance of their newspapers, competing to hire the best newsroom talent available, and taking numerous other steps to gain a competitive edge. Reporters and editors from each newspaper monitored the other on a daily basis and reacted directly to news coverage appearing in the competing newspaper.

Although the two newspaper owners were in a business partnership, they retained independent economic incentives. Each owner had the incentive to maximize the value of its own newspaper assets, which at all times remained under separate ownership outside the joint operating arrangement. This incentive existed for several reasons. First, each owner had an interest in preserving the value of its newspaper assets in case it wished to sell them in the future (either during the term of the joint operating arrangement or after its expiration). If an owner allowed its newspaper’s circulation numbers and product quality to deteriorate, the effect would be to shorten that newspaper’s life span, damage the value of its franchise, and deter potential buyers. Second, each owner wanted its respective newspaper to contribute to

the success of Charleston Newspapers in order to maintain a strong bargaining position when the joint operating contract was renegotiated. Renegotiations of newspaper joint operating contracts occur on a regular basis, often driven by capital investments or other major strategic decisions, and frequently involve changes to the distribution of profit shares or other key contract terms. Owning a declining paper might result in a reduced share of the profits or other unfavorable terms for that owner. Third, the owners had conflicting interests regarding the termination or renewal of the joint operating arrangement. The *Daily Mail*, as the smaller-circulation newspaper in the afternoon position, wanted to maintain a high enough share of circulation credibly to threaten to continue competing when the joint operating arrangement ended, and to justify extending the termination date of the agreement so that it could continue to share in the profits of the venture. The *Gazette*, as the larger-circulation newspaper in the morning position, had the incentive to increase its circulation share to accelerate the demise of the *Daily Mail* and become the sole survivor in the market as soon as possible. Finally, if the joint operating arrangement were to terminate, the governing contract specified that the jointly-owned property would be divided to allow the owners to resume their status as independent competitors. The possibility that such competition could resume provided each owner with an incentive to keep its newspaper strong and maximize the value of its intellectual property.

The newspaper owners acted on these incentives in their management of Charleston Newspapers. For example, each owner actively sought to protect and increase the circulation of its respective newspaper rather than seeking solely to achieve the most profitable combined circulation. Each owner insisted that Charleston Newspapers treat both newspapers equally with

respect to circulation sales and promotion efforts and regularly monitored Charleston Newspapers to ensure that managers were not favoring one paper over the other. Each owner pushed to expand home delivery routes into new areas and to increase the level of discounting to boost circulation for its respective newspaper. Each owner insisted that any new discount or promotional incentive launched for the other's newspaper be applied to its newspaper as well. This quest for additional circulation, and the policy of treating the two newspapers equally in circulation sales efforts, led to newspaper subscribers receiving higher levels of discounts than they would likely have received had Charleston Newspapers been controlled by one owner. In addition, each owner sought to maintain a large news staff, a substantial newsroom budget, and generous newshole (the amount of newspaper space devoted to news content as opposed to advertising) to allow it to better compete with the other newspaper for readership. Each owner also insisted on retaining the power to set its newsroom's staffing and compensation levels. This competitive drive led the owners to spend far more on the newsrooms in Charleston than newspaper owners in comparably-sized newspaper markets typically do.

Each owner took affirmative steps to preserve its competitive position and the long-term value of its assets. Each regularly blocked certain proposals that would have saved money for Charleston Newspapers because one owner believed that the proposal would provide the rival newspaper with a competitive advantage. Moreover, although each owner had the power to make cuts to its own newspaper's staff, newshole, budget, subscription discounts, or circulation area without obtaining the approval of the other owner, neither owner did so -- even when such cuts clearly would have increased the profits of the venture -- out of concern over being at a competitive disadvantage to the other newspaper. Neither owner was willing to sacrifice the

value of its assets unless the other owner did the same. These actions taken by the owners in pursuit of their separate economic interests prevented Charleston Newspaper from achieving monopoly levels of output or profits.

In short, the competition between the *Gazette* and the *Daily Mail* benefitted readers by giving them a choice between two high-quality local newspapers with unique content at lower prices than would have prevailed if there had been one newspaper owner in this market. Advertisers likewise benefitted by having access to two unique sets of readers at prices that were lower than in comparable single-owner markets.

*C. The May 2004 Transactions*

At the end of 2003, MediaNews arranged to sell the *Daily Mail* and its 50% interest in Charleston Newspapers to an experienced newspaper operator for \$55 million. At the time, Charleston Newspapers was earning substantial profits, and the *Daily Mail* was financially healthy and stable. The joint operating arrangement between MediaNews and Gazette Company allowed each partner the right of first refusal to match any third-party offer to buy one of the newspapers. Rather than allow the new buyer to take over the *Daily Mail* and continue the competition that had prevailed for decades, Gazette Company decided to exercise its right of first refusal and gain control of both newspapers.

Several months earlier, anticipating that the opportunity to exercise its right of first refusal might arise, Gazette Company began contacting lenders to secure the necessary financing. As the Complaint alleges, during this time Gazette Company developed a plan to shut down the *Daily Mail* and become the publisher of the sole remaining newspaper in Charleston. Gazette Company created a series of business plans, financial projections, and other documents showing

that it would cease publishing the *Daily Mail* by no later than the end of 2007. The plans called for the rapid reduction of the *Daily Mail*'s circulation and its newsroom staff and budget until, in 2007, the newspaper would no longer be economically viable. At that point, Gazette Company believed it would be able to justify the closure of the *Daily Mail* under the NPA to the Department of Justice. In short, Gazette Company planned to deliberately transform a financially healthy and stable *Daily Mail* into a failing newspaper and close it far earlier than the market would otherwise have dictated. According to its internal projections, Gazette Company calculated that it would be better off financially by closing the *Daily Mail* as soon as possible. By switching a critical mass of *Daily Mail* readers to the *Gazette*, advertising revenues would hold steady and the savings from disbanding the *Daily Mail* would allow Gazette Company to increase its profit margins substantially. These planning documents were provided to lenders and were the foundation upon which Gazette Company secured financing for the May 2004 transactions. None of Gazette Company's pre-transaction business plans contemplated the continued publication of the *Daily Mail* beyond 2007.

On May 7, 2004, Gazette Company and MediaNews entered into a series of transactions that merged their economic interests and gave Gazette Company ownership and control over both newspapers. In exchange for approximately \$55 million, MediaNews transferred ownership of the *Daily Mail* assets and its 50% interest in Charleston Newspapers to subsidiaries of the Gazette Company. Under this new arrangement, Gazette Company retained 100% of the profits generated by both newspapers. MediaNews no longer shared in the profits or losses of the business and had no further obligation to contribute to capital costs. MediaNews had no representatives on the management committee of the venture and no right to vote on any matter.

Gazette Company was given sole discretion to manage Charleston Newspapers. It had the unilateral authority to establish the annual budgets, determine the staffing levels, and approve all the hiring and firing decisions for both newspapers. The 2004 agreements also gave Gazette Company the express right to terminate publication of the *Daily Mail* without the approval of MediaNews (a right that Gazette Company had specifically bargained for in negotiations). The Defendants attempted to satisfy the NPA's requirement of separately-controlled newsrooms by arranging to pay MediaNews a flat fee of \$200,000 per year to provide "management and supervision" services to the newsroom of the *Daily Mail*. May 7, 2004 Joint Operating Agreement § V (J)(4). The fee was adjusted annually for inflation but did not vary based on how well or how poorly the newspaper performed. Despite the payment of the fee, however, MediaNews employees did not exercise management control over the *Daily Mail* after May 2004. In reality, the Complaint alleges that Gazette Company controlled both newspapers.

*D. Post-Transaction Conduct*

Almost immediately after the transactions closed, Gazette Company began to take steps to implement its plans to close the *Daily Mail*. As alleged in the Complaint, Gazette Company stopped soliciting new subscribers for the *Daily Mail*, stopped offering promotions and discounts to new *Daily Mail* subscribers, cut dozens of *Daily Mail* home delivery and single copy routes (and refused to accept new subscriptions on many routes that remained), attempted to convert numerous *Daily Mail* readers to the *Gazette*, and took other steps with the goal of reducing the *Daily Mail*'s circulation.

At the same time, Gazette Company took several other actions that damaged the quantity and quality of content available to *Daily Mail* readers: it allowed almost half of the *Daily Mail*

newsroom staff to leave during 2004 and forbade the editor from hiring replacements; it cut the *Daily Mail*'s budget substantially in both 2004 and 2005 (while increasing the *Gazette*'s); it ended the *Daily Mail*'s Saturday edition; and it transferred several of the best *Daily Mail* reporters to the *Gazette*. *Gazette* Company also directed the *Daily Mail* to end its second daily edition, which contained late-breaking news and was viewed by the newspaper's staff as important to maintaining the quality and competitiveness of the paper. As a result of these actions, the quantity and quality of original local content created by the *Daily Mail* staff fell steadily through the end of 2004. Original local content is considered by both Defendants to be the most important and valuable content produced by these newspapers. Due to the loss of staff, the remaining *Daily Mail* reporters were required to take on extra coverage areas, other coverage areas were dropped, several sections per week were cut from the paper, and more work was farmed out to stringers who were not full-time journalists. The *Daily Mail* staff was forced to fill space by doing things that they considered to be departures from the paper's prior standards of quality, such as reprinting stories verbatim from the *Gazette* without doing any new reporting, and running more non-local wire service stories.

Due to these actions by *Gazette* Company, the circulation of the *Daily Mail* fell from 35,076 in February 2004 to 23,985 in January 2005. Moreover, the *Daily Mail* became a less vigorous competitor to the *Gazette* and its readers got less for their money. Had the Department of Justice investigation not interrupted *Gazette* Company's plans in late 2004, the situation would likely have continued to deteriorate as more resources were shifted away from the *Daily Mail* in preparation for its closure in 2007.

*E. The Competitive Effects of the Alleged Violation*

The Complaint alleges that the relevant product market is local daily newspapers and the relevant geographic market is Kanawha and Putnam counties in West Virginia. The local daily newspaper market is two-sided: publishers sell newspapers to readers and simultaneously sell access to those readers to advertisers. With respect to readers, the two Charleston daily newspapers are a relevant market because, among other reasons, Charleston Newspapers has the ability to impose small but significant, non-transitory price increases on readers without losing so much business to other media as to make the increases unprofitable, and these newspapers have unique attributes (such as original, in-depth local news, local editorials and opinion, local display and classified advertising, and other features) that are not replicated by other local media. With respect to advertisers, the two Charleston daily newspapers are a relevant market because, among other reasons, Charleston Newspapers has the ability to impose small but significant, non-transitory price increases on its advertisers without losing so much business to other media as to make the increases unprofitable, and advertising in these newspapers has unique characteristics and a unique audience that cannot be replicated by other local media in Charleston.

The Complaint alleged that the May 2004 transactions extinguished the independent competitive incentives that existed under the prior joint operating arrangement. As a result of the transactions and the conduct described above, readers were harmed by a reduction in the amount and quality of original content generated by the *Daily Mail*, the lessening of competition between the *Daily Mail* and the *Gazette*, the elimination of the discounts that had been available prior to May 2004, and the reduction in the distribution area of the *Daily Mail*, meaning that many readers no longer had access to their preferred newspaper. Had the Gazette Company succeeded

in its plan to close the *Daily Mail*, readers would have been deprived of a choice of local daily newspapers and would likely have paid higher prices for a newspaper with less content and lower quality. Likewise, advertisers were harmed because the circulation and household penetration of the *Daily Mail* fell as prices rose, rendering the newspaper a less effective means of advertising in the Charleston area.

### III.

#### **EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

The Final Judgment requires the Defendants to enter into a new contractual relationship that will supersede the existing arrangement that the United States challenged. The Defendants' new arrangement consists of five contracts: a Limited Partnership Agreement, a Joint Operating Agreement, a revised Operating Agreement of Daily Gazette Holding Company, a Put/Call Agreement, and a Warrant Agreement, all of which are attached to and made a part of the Final Judgment. The Final Judgment prohibits the Defendants from amending or terminating these contracts, or entering into any subsequent contracts relating to the publication of newspapers in Charleston, without the consent of the United States.

The new contracts address the competitive concerns resulting from the May 2004 transactions by, among other things, implementing several important changes to the governance provisions of the Defendants' arrangement. MediaNews will be given the right to appoint two of the five seats on the Board of Managers overseeing the Limited Partnership. Currently, MediaNews does not have the right to name any board members. MediaNews' board representatives will have the right to vote on all matters coming before the board. Most matters will be subject to approval by a majority vote; however, the annual newsroom budgets for the

*Daily Mail* and the *Gazette* must each be approved by a super-majority of four votes. This requirement will provide MediaNews with the ability to protect the *Daily Mail*'s budget and negotiate for the resources it needs to compete effectively with the *Gazette*. Under the 2004 arrangement, the *Daily Mail* budget was unilaterally determined by Gazette Company and its appointed manager at Charleston Newspapers, and could be changed at any time.

The Final Judgment guarantees that the content of the *Daily Mail* will be independently determined solely by MediaNews and the staff of the *Daily Mail*. Likewise, the content of the *Gazette* must be independently determined by the Gazette Company and *Gazette* staff. The Final Judgment forbids either Defendant from taking any action to influence the content of the other's newspaper. It also prohibits the Defendants from entering into any agreement that would limit the editorial independence of the two newspapers.

Currently, the Gazette Company (through its control of Charleston Newspapers) determines the size of the *Daily Mail* newsroom and must approve any hiring and firing decisions. To further re-establish the independence of the *Daily Mail*, the revised contracts provide that MediaNews will have sole authority to determine the identity of the *Daily Mail* newsroom employees and how much they are paid. The *Daily Mail* will have no fewer than 32 newsroom positions in the first year of the agreement, and thereafter MediaNews will set the size of the newsroom at whatever level it sees fit, provided that if total employee expense exceeds the annual budgeted amount set by the Limited Partnership board, MediaNews must pay the excess cost. These changes to the contracts are designed to prevent the recurrence of the events of 2004, described above.

The Final Judgment also prohibits the Defendants from discriminating against the *Daily*

*Mail* in performing any activities related to circulation sales or advertising sales. Among other things, this provision would prohibit the type of conduct alleged in the Complaint, whereby Charleston Newspapers discontinued efforts to solicit new *Daily Mail* subscribers and ceased offering discounts to new *Daily Mail* subscribers, while continuing these activities for the *Gazette*. The revised contracts contain several other protections for the *Daily Mail*, including that (1) the amount of space devoted to news content (newshole) and the availability of color will be budgeted at the same level for both newspapers; (2) the press deadlines, delivery targets, number of editions and days of publication for the *Daily Mail* will not be changed without the approval of MediaNews; and (3) the primary circulation area of the *Daily Mail* as of August 1, 2009 will not be reduced without the approval of MediaNews. Under the 2004 arrangement, Gazette Company had the unilateral power to make changes in any of these areas.

To enhance the competitiveness of the *Daily Mail* and remedy past practices, the Final Judgment contains a remedial provision that calls for the Defendants to offer subscriptions to the *Daily Mail* at no less than 50% off the regular price. This offer must be available for a period of at least six months and must be made available only to *Daily Mail* subscribers. Thereafter, Charleston Newspapers must make the same promotional offers available for potential subscribers of both newspapers, unless MediaNews approves a deviation. The purpose of the special offer is to remedy, to the extent possible, the effects of Gazette Company's actions that the Complaint alleged were intended to undermine the circulation of the *Daily Mail*.

The Final Judgment contains several provisions to prevent the unjustified termination of publication of the *Daily Mail*. The 2004 contracts gave Gazette Company the unilateral authority to cease publishing the *Daily Mail*. The Final Judgment provides that the *Daily Mail* must

continue publishing as a daily newspaper (defined in the Final Judgment as a print publication which is published no fewer than five days per week) unless it is determined to be a failing firm under antitrust law, as applied to newspaper joint operating agreements, and the United States has given its prior written approval. The Defendants may not deliberately hasten the failure of the *Daily Mail*: under the Final Judgment, the Defendants may not take any action with the intent to cause the *Daily Mail* to become a failing newspaper. Unless it receives approval from the United States, the Defendants may not establish a termination date for the *Daily Mail*.

In the event that Charleston Newspapers is permitted to cease publication of the *Daily Mail*, the Final Judgment requires that ownership of all of the intellectual property associated with that newspaper (such as its masthead, copyrights, trademarks, subscriber and advertiser lists, Internet URL, and archives) must, after satisfaction of any current, outstanding creditors, be transferred back to MediaNews at no cost to MediaNews and free of any liens or other encumbrances. This transfer requirement would also be triggered if the Defendants end their Limited Partnership or Joint Operating agreements. Prior to the closure of the *Daily Mail*, Gazette Company must obtain an appraisal of the fair market value of the newspaper's intellectual property. To the extent the appraisal determines that the assets may be freely disposed of by Gazette Company under the terms of Section 7.8 of the credit agreement with United Bank (or the equivalent provision of any future credit agreement), Gazette Company must transfer the intellectual property to MediaNews.<sup>1</sup> If the transfer cannot be accomplished due to

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<sup>1</sup> Section 7.8 of the United Bank agreement provides:

**Sale of Stock and Assets.** No Credit Party shall sell, transfer, convey, assign or otherwise dispose of any of its properties or other assets, including the Stock of any of its Subsidiaries (whether in a public or a private offering or otherwise) or

any outstanding security interest or lien, Gazette Company must use its good faith efforts to obtain a release of the assets by the creditors. Once the intellectual property has been transferred, it may not be reacquired by Gazette Company. These portions of the Final Judgment are intended to prevent Gazette Company from retaining ownership of the *Daily Mail* intellectual property in the event that MediaNews wishes to continue publishing the newspaper independently of Charleston Newspapers, or if a third-party wishes to acquire these assets from MediaNews in order to compete against Gazette Company. Under the 2004 contracts, Gazette Company could retain the *Daily Mail* intellectual property upon the termination of the Joint Operating Agreement or the Limited Partnership Agreement unless MediaNews paid Gazette Company to get it back and assumed certain associated liabilities. If MediaNews did not want to buy back the intellectual property, it would remain under the permanent ownership of Gazette Company. If MediaNews did elect to buy back the intellectual property, Gazette Company held a right of first refusal to purchase it from MediaNews for 10 years after the end of the Joint Operating Agreement or the Limited Partnership Agreement, which limited the ability of third-parties to acquire the intellectual property to compete against Gazette Company. These provisions of the 2004 contracts have been removed from the new contractual arrangement.

The Defendants' revised contracts will put in place several new financial incentives that are intended to spur them to compete for readers and enhance the quality of their newspapers.

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any of its Accounts, other than (a) the sale of Inventory in the ordinary course of business; (b) the sale or other disposition by a Credit Party of property that is obsolete or no longer used or useful in such Credit Party's business and having a book value, not exceeding \$100,000 in the aggregate in any Fiscal Year; and (c) the sale or other disposition of other property having a book value not exceeding \$100,000 in the aggregate in any Fiscal Year.

First, as discussed above, if the *Daily Mail* ceases publishing, the Limited Partnership ends, or the Joint Operating Agreement ends, the *Daily Mail* intellectual property will, subject to satisfaction of current security interests, transfer to MediaNews at no cost. MediaNews would then be free to use or sell these assets as it sees fit. The 2004 contracts imposed several conditions that substantially decreased the likelihood that MediaNews would ever own the *Daily Mail* intellectual property again. Under the revised contracts, the increased likelihood that MediaNews will receive these assets provides MediaNews with an ongoing incentive to increase their value.

Second, concurrently with the settlement, MediaNews will receive a warrant entitling it to purchase Class B shares representing 20% of the equity in Charleston Newspapers Holdings Limited Partnership. Depending upon the future performance of the *Daily Mail*, the amount of equity MediaNews is eligible to purchase may be adjusted up or down. For each annual gain of 1% or more in *Daily Mail* circulation market share vis-a-vis the *Gazette*, MediaNews would be entitled to purchase an additional 1% of equity. Conversely, for each annual decline of 1% or more, the amount of equity MediaNews is entitled to purchase would decrease by 1%. The exercise price is the appraised value of a Class B share as of the date of the warrant's issuance. The warrant can be exercised during a three year window starting on the fifth anniversary of its issuance. MediaNews will be allowed to purchase any amount of equity it desires, up to the maximum permitted by the warrant. Thereafter, it is permitted to sell its shares to third parties (except for a publisher of a competing newspaper in Charleston with a circulation market share above 5%). Class B shareholders are eligible to receive dividends that may be distributed by the Limited Partnership. The warrant will once again provide MediaNews a financial stake in the

success of both the *Daily Mail* and the newspapers' joint venture.

Should the *Daily Mail* cease publishing at any time after the conversion of the warrant, Gazette Company must repurchase all of the outstanding Class B shares. This mandatory repurchase requirement is necessary to avoid providing the owner(s) of the Class B shares a financial incentive to terminate publication of the *Daily Mail*.

Third, the revised Limited Partnership Agreement creates a further financial incentive by basing the size of the annual *Daily Mail* management fee paid to MediaNews on the performance of the paper. Under the 2004 arrangement, MediaNews received a fixed management fee that did not vary based on the performance of the *Daily Mail*. The new Limited Partnership Agreement provides for a variable fee that can adjust upwards or downwards by as much as \$25,000 depending on the annual changes in the *Daily Mail*'s circulation. The adjustment in the fee is subject to a floor of \$225,000 per year.

A fourth financial incentive consists of cash bonuses paid to the Circulation Director of Charleston Newspapers and the publisher of the *Daily Mail* for increases in *Daily Mail* circulation in a given six-month period.

#### IV.

#### **REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS**

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act,

15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V.

**PROCEDURES AVAILABLE FOR MODIFICATION  
OF THE PROPOSED FINAL JUDGMENT**

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

John R. Read  
Chief, Litigation III Section  
Antitrust Division  
United States Department of Justice

450 Fifth Street, NW, Suite 4000  
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

**VI.**

**ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT**

At several points during the litigation, the United States received from Defendants proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals and suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, proceeding with the full trial on the merits against Defendants that was scheduled to commence on April 20, 2010. The United States is satisfied, however, that the prohibitions and requirements contained in the proposed Final Judgment will adequately address the competitive concerns regarding the unique local daily newspaper market in Charleston, and will avoid the delay, risks, and costs of further litigation.

**VII.**

**STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT**

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment “is in the public interest.” 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the

statute as amended in 2004, is required to consider:

- (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).<sup>2</sup>

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988)

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<sup>2</sup> The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

(citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is “*within the reaches of the public interest.*” More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).<sup>3</sup> In determining whether a proposed settlement is in the public interest, a district court “must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.” *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be “deferential to the government's predictions as to the effect of the proposed remedies”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

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<sup>3</sup> Cf. *BNS*, 858 F.2d at 464 (holding that the court's “ultimate authority under the [APPA] is limited to approving or disapproving the consent decree”); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to “look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass”). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so consonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States “need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” *SBC Commc’ns*, 489 F. Supp. 2d at 17.

Moreover, the court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459. Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As the United States District Court for the District of Columbia recently confirmed in *SBC Communications*, courts “cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.” *SBC Commc’ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court’s “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F. Supp. 2d at 11.<sup>4</sup>

## VIII.

### **DETERMINATIVE DOCUMENTS**

Other than the contracts that are attached as Exhibit A to the Final Judgment and incorporated therein, there are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

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<sup>4</sup> See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (“Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.”); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).

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Dated: January 20, 2010

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION

UNITED STATES OF AMERICA, )  
Plaintiff, )  
v. ) Civil Action No. 2:07-0329  
DAILY GAZETTE COMPANY, ) Magistrate Judge Stanley  
and )  
MEDIANEWS GROUP, INC. )  
Defendants. )

## **CERTIFICATE OF SERVICE**

I hereby certify that on January 20, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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