UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

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

MEMORANDUM OF THE UNITED STATES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The United States brings this case under the Clayton and Sherman Antitrust Acts to undo the Daily Gazette Company's (the "Gazette Company"), May 7, 2004, acquisition of its only newspaper rival, the *Charleston Daily Mail*, from defendant MediaNews Group, Inc. ("MediaNews"). The acquisition has given the Gazette Company, which now owns both of Charleston's local daily newspapers, a newspaper monopoly and has empowered it to control, and ultimately to eliminate, the *Daily Mail* in order to increase its own profits.

Until May 7, 2004, the *Charleston Gazette* and the *Daily Mail* – Charleston's only two daily newspapers – were independently owned and published, even though the two newspapers coordinated many of their business activities through the Charleston Newspapers Joint Operating Agreement ("Charleston JOA"). The Gazette Company owned and published the *Charleston Gazette*, and MediaNews owned and published the *Daily Mail*. Because each of the defendants owned its newspaper independent of the JOA, each had separate economic incentives to grow the circulation and otherwise to protect the long-term viability and value of its newspaper, rather than merely maximizing the JOA's joint returns.

These incentives caused defendants to compete head-to-head to attract readers. They competed to generate original news and other content of interest to retain existing readers and attract new readers. They sought to cover the local news with greater depth, breadth and accuracy than the other newspaper, to break stories first, and to offer readers a more attractive mix of news, features, and editorials than the other newspaper. And they strove to hire and retain the highest quality reporters, editors, and photographers, and provide them with the resources they needed to publish a high quality newspaper.

The Gazette Company's acquisition of the *Daily Mail* ended that competition. Having sold its ownership interest, MediaNews no longer has any incentive to grow the *Daily Mail*'s circulation or to otherwise preserve the newspaper's value. The Gazette Company now has the power to dictate all aspects of the *Daily Mail*'s operations, from its circulation to its budget levels. It is poised to implement its plan to shrink the *Daily Mail* out of existence by starving it of crucial resources and cutting its circulation, ultimately leaving Charleston newspaper readers with a single daily newspaper. Indeed, it is likely that the Gazette Company already would have closed the *Daily Mail* had the Department of Justice not begun to investigate the acquisition.

The end of independent daily newspaper competition in Charleston need not be inevitable, as defendants assert. If these transactions are undone, the *Daily Mail* has a future, as indicated by the interest of third parties in owning and publishing that newspaper. Indeed, an offer by another experienced newspaper publisher to buy the *Daily Mail* from MediaNews for $55 million precipitated the Gazette Company's purchase of the *Daily Mail*. That publisher, unlike the Gazette Company, intended to continue the competition with the *Charleston Gazette* to sell newspapers that has benefitted Charleston readers and advertisers for many decades.

The May 2004 acquisition violates the federal antitrust laws. It presents a straightforward violation of Section 7 of the Clayton Act because it combined the only two local daily newspapers in Charleston, substantially lessening competition and creating a monopoly. The acquisition also constitutes an agreement that unreasonably restrains trade in violation of Section 1 of the Sherman Act. And it gives the Gazette Company a monopoly in the market for local daily newspapers in Charleston in violation of Section 2 of the Sherman Act.

The United States has brought this case to ensure that the competitive process – and the

longstanding battle between the owners of the *Charleston Gazette* and the *Daily Mail* to attract readers – determines the future of these two newspapers, rather than the Gazette Company's unilateral profit motives. The facts supporting these violations are well pled in the United States' Complaint, and the commercial competition between the Gazette Company and MediaNews that the United States seeks to restore falls squarely within the ambit of the federal antitrust laws. Commercial competition can be restored by rescinding the Gazette Company's acquisition of the *Daily Mail* and returning the newspapers to independent ownership and control. Restoring competition in this way would remedy the antitrust harm without requiring this Court or the United States to regulate or control the *Daily Mail*'s editorial policies and content, as defendants and *amicus* Newspaper Association of America ("NAA") contend; instead, competition between the newspapers would determine the content of the newspapers, as it had for the past 100 years.

The Newspaper Preservation Act ("NPA") does not immunize defendants' conduct. Congress passed the NPA in 1970 "to preserve the publication" of newspapers in JOAs and to further "the public interest of maintaining" an "independent and competitive" newspaper industry. 15 U.S.C. § 1801. The Act exempts from antitrust liability certain types of joint newspaper operations, so long as there remain two or more newspapers owned or controlled by two or more owners, and the newspapers maintain separate staffs and independent editorial policies. *Id.* §§ 1802-1803. The NPA does not apply to one JOA partner's acquisition of assets that are owned independently of the JOA, as the *Daily Mail* assets were here. Moreover, the Gazette Company now owns and controls both newspapers, meaning that there is no longer a JOA within the plain meaning of the statute – and thus no statutory immunity. In addition, courts have ruled that immunity does not extend to arrangements among JOA participants that are likely

to lead to the elimination of one of the newspapers, because such arrangements contravene the statute's purpose of preserving two independent newspapers.

In claiming the protections of the NPA, the defendants seek to turn the Act on its head. They ask the Court to conclude that the mere formation of their JOA gave them carte blanche to extinguish the *Daily Mail* at any time, and on the terms of their choosing, with complete insulation from antitrust scrutiny. Nothing could be more inconsistent with the applicable statutory framework.

The United States therefore respectfully requests that this Court deny defendants' motion to dismiss.

ALLEGATIONS OF THE COMPLAINT

For over a century, the *Charleston Gazette* and the *Daily Mail* had separate and independent owners that competed with one another to attract readers and advertisers to their respective newspapers. Complaint ¶ 13. In 1958, the two newspaper owners formed a joint operating arrangement to consolidate many of their business operations into one entity, known as Charleston Newspapers. *Id.*[1] The JOA assumed responsibility for printing, distribution, sales of subscriptions and advertising, and circulation of the two newspapers. *Id.* ¶ 14. Although the formation of the Charleston JOA eliminated many of the ways that the owners of the *Charleston Gazette* and the *Daily Mail* competed against each other in pursuit of their separate economic interests, it did not extinguish all commercial competition between them. *Id.* ¶ 2. Because the

[1] The passage of the NPA in 1970 gave then-existing JOAs limited antitrust immunity for certain joint operations, so long as, at the time of the formation of the JOA, not more than one of the newspapers was "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

Gazette Company and MediaNews each retained ownership of its newspaper outside the JOA, each owner continued to have strong economic incentives to increase the value of *its newspaper*, rather than being concerned only about the profits earned by the JOA as a whole. *Id.* ¶¶ 2, 15.

Commercial Competition Between the *Daily Mail* and the *Charleston Gazette*

In the newspaper industry, a newspaper's circulation is an important yardstick for measuring its franchise or sales value. *Id.* ¶ 15. "A newspaper that invests in increasing its quality and its appeal will attract more readers and advertisers, will have a longer lifespan, and will have an increased market value." *Id.* Each owner in the Charleston JOA recognized that the relative value and viability of its newspaper had financial and economic consequences separate and distinct from the value and operations of the JOA as a whole. For example, each newspaper's value and viability could determine whether that newspaper continued to publish at all, and also whether that newspaper would survive as a viable business after the JOA terminated. It also could affect negotiations of the terms to change, renew or end the JOA. *Id.* As a result, each owner understood that it was financially better off if a Charleston area resident chose to subscribe to its newspaper rather than its rival's. Each owner had an incentive to avoid the downward spiral of decreased circulation and advertising that can lead to a newspaper's ultimate demise. *Id.*

Thus, even though the defendants were partners in many aspects of the newspaper business, each owner's incentive to preserve and grow the value of the newspaper it owned led to competitive behavior aimed at *selling more newspapers*. *Id.* As the United States alleges, each paper sought to publish original news and other content that readers would find more attractive than the other paper's content. Each paper tried to cover local news with greater depth and

accuracy than the other paper. Each paper tried to scoop the other paper on the breaking stories of the day. The myriad decisions regarding these news gathering and reporting efforts were made "outside the cooperation authorized by the JOA." *Id.* ¶ 16. This day-to-day competition between the *Charleston Gazette* and the *Daily Mail* had financial consequences for the newspapers' owners, and it also benefitted readers. It gave readers a daily choice between two quality newspapers, each with unique content. *Id.* ¶¶ 15-16.

In addition, prior to May 2004, Charleston Newspapers was an equal partnership between the owner of the *Charleston Gazette* and the owner of the *Daily Mail*. *Id.* ¶ 14. As partners, each had an equal say in significant decisions relating to the operations of the JOA, including setting both newspapers' budgets, subscription and advertising rates, and determining both newspapers' promotional and circulation strategies. *Id.* The JOA's structure ensured that one partner could not unilaterally take steps to reduce the other paper's value, deny it the resources it needed to compete, or terminate its publication.

The Gazette Company Moves to Extinguish the *Daily Mail*

In late 2003, the then-owner of the *Daily Mail*, defendant MediaNews, negotiated to sell both the *Daily Mail* and its ownership interest in the Charleston JOA to a third-party who published newspapers elsewhere in the State of West Virginia. *Id.* ¶ 18. At that time, the *Daily Mail* was a financially viable daily newspaper. It had been consistently profitable and was in no danger of failing. *Id.* ¶ 17. The prospective buyer offered to pay $55 million for the *Daily Mail* and MediaNews' share of the JOA. *Id.* ¶ 18. However, before the deal could be consummated, the Gazette Company matched that offer, seeking to prevent a new owner from continuing the competition from the *Daily Mail*. *Id.* ¶ 19.

On May 7, 2004, the Gazette Company acquired from MediaNews the assets of the *Daily Mail*, including the masthead, website, subscriber lists, intellectual property, goodwill and all other intangible assets, as well as MediaNews' 50% share of Charleston Newspapers. This acquisition consolidated, for the first time, ownership and control of the two papers in a single owner. *Id.* ¶ 20. The acquisition and the new contractual arrangement that gave the Gazette Company control over Charleston Newspapers are the basis of this lawsuit. Instead of being an owner, MediaNews became a contractor for the Gazette Company. Today, MediaNews receives an annual fixed fee, purportedly to perform "management and supervision services," regardless of the *Daily Mail*'s quality or circulation levels. *Id.* ¶ 12.[2] The May 7, 2004 agreements also gave the Gazette Company the unilateral right not only "to take immediate and deliberate steps" to decrease the *Daily Mail*'s circulation, but the unfettered power to terminate publication of the *Daily Mail* whenever it saw fit to do so. *Id.* ¶¶ 20, 22.

Before it entered into the May 7 agreements, the Gazette Company developed a plan to use its new control to terminate publication of the *Daily Mail*. *Id.* ¶ 19. The plan called for a rapid reduction in the *Daily Mail*'s circulation to a level where it no longer would be viable as a daily newspaper. The Gazette Company believed it could then argue to the Department of Justice that termination of the Charleston JOA would be immune from antitrust scrutiny because the *Daily Mail* was a "failing company." *Id.*

After the defendants consummated the May 7, 2004 agreements, the Gazette Company immediately began to implement its plan to shut down the *Daily Mail*. *Id.* ¶ 22. Among other

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[2] The Complaint alleges that the May 7 contract in reality is a mere a fig leaf for MediaNews' complete abandonment of control over the *Daily Mail* to the Gazette Company. Compl. ¶¶ 3, 12, 20.

actions, the Gazette Company, through its newly acquired control of the JOA, stopped all promotions and discounts for the *Daily Mail*; it stopped soliciting new readers for the *Daily Mail*; it attempted to convert *Daily Mail* subscribers to the *Charleston Gazette*; it substantially cut the *Daily Mail*'s newsroom budget; and it dramatically cut the size of the *Daily Mail*'s newsroom staff. *Id.* Not surprisingly, the *Daily Mail*'s circulation dropped precipitously from about 35,000 before the May 7, 2004 agreements to about 24,000, while the *Charleston Gazette*'s circulation increased, peaking at over 52,000. *Id.* ¶ 23. The drop in *Daily Mail* circulation matched the projection that the Gazette Company made in its plan to shut down the *Daily Mail* by 2007. It was only after the Gazette Company learned that the Department of Justice had begun to investigate the May 2004 agreements that it took steps to limit further damage to the *Daily Mail*. *Id.*

STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the factual allegations of a complaint. At this point, the Court accepts as true all the factual allegations of the complaint and draws all reasonable factual inferences in the light most favorable to the plaintiff. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002); *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). A motion to dismiss is not a proper vehicle to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992).

Federal Rule of Civil Procedure 8(a)(2) "requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of

what the . . . claim is and the grounds upon which it rests." *Twombly,* 127 S. Ct. at 1964 (citations omitted). The factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* at 1965. It suffices if the complaint expressly alleges facts that, if assumed to be true, establish a legally cognizable right of action. *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 145 n.8 (4th Cir. 1990) ("so long as a plaintiff colorably states facts which, if proven, would entitle him to relief, the motion to dismiss should not be granted.") (quoting *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982)). If, however, the alleged facts, taken as true, do not definitively establish that right of action, they must at least provide "plausible grounds to infer" that a claim exists. *Twombly,* 127 S. Ct. at 1965.[3]

Where, as here, the complaint relies on express factual allegations that, without the need to make further inferences, establish a right to relief, the *Twombly* "plausible grounds to infer" standard does not come into play, and a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (citation omitted). This standard is not unique to antitrust cases. *Twombly* was an antitrust case, but – contrary to defendants' assertion that the Supreme Court required "heightened" scrutiny of antitrust pleadings (Def. Br. at 11-12) – the Court neither "appl[ied] any heightened pleading standard" nor "require[d] heightened fact pleading of specifics." 127 S.Ct. at 1973 & n.14.

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[3] Thus, for example, if a complaint alleging an agreement among competitors in violation of Section 1 of the Sherman Act does not contain "any independent allegation of actual agreement among the defendants," (*id.* at 1970) and instead alleges as a mere "legal conclusion[]" that such an agreement exists, as the *Twombly* complaint did (*id.*), the complaint must allege facts providing a "plausible grounds to infer an agreement." *Id.* at 1965.

ARGUMENT

The United States' Complaint properly alleges facts giving rise to claims under Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The defendants violated these statutes by ending commercial competition and creating a monopoly in the market for local daily newspapers in the Charleston area. The United States seeks to restore the competitive dynamic that drove the owners to attract readers with quality newspapers, rather than leave all such decisions to a monopolist. Defendants make two main arguments about why the antitrust laws do not apply here. They argue first that, as a matter of law, they do not compete commercially with each other. Second, they argue that their conduct is immune under the Newspaper Preservation Act. Defendants are wrong on both points.

I. THE COMPLAINT PROPERLY ALLEGES CLAIMS UNDER THE CLAYTON AND SHERMAN ACTS

The gravamen of the Complaint is that the acquisition of the *Daily Mail* by the owners of the *Charleston Gazette*, and the related restructuring of the Charleston Newspapers venture, ended commercial competition between the newspapers and created a monopoly in the Charleston daily newspaper market. Those agreements 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.

Section 7 of the Clayton Act prohibits any person from acquiring "the whole or any part of the assets of another person" where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 "creates a relatively expansive definition of antitrust liability" such that a plaintiff must prove only that a transaction's effect *may* substantially reduce competition or tend to create a monopoly.

California v. American Stores Co. 495 U.S. 271, 284 (1990); *Brown Shoe Co. v. United States* 370 U.S. 294, 323 (1962) (concern of Section 7 is with "probabilities, not certainties"). Under Section 1 of the Sherman Act, a plaintiff must allege "(1) a contract, combination or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002). Section 2 of the Sherman Act requires that a plaintiff allege (1) that the defendant possesses monopoly power in the relevant market; and (2) that the defendant willfully acquired or maintained that power. *Cavalier Tel., LLC v. Verizon Va., Inc.*, 330 F.3d 176, 183 (4th Cir. 2003). Under all three causes of action, the Fourth Circuit has treated allegations of relevant product and geographic markets as necessary elements. *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 73 Fed. Appx. 576, 582 (4th Cir. 2003).

The Complaint satisfies all of these elements. With respect to the Clayton Act claim, the Complaint alleges that the Gazette Company acquired assets from MediaNews (including the *Daily Mail* newspaper and MediaNews' 50% share of Charleston Newspapers) and that this acquisition has lessened competition substantially and created a monopoly in the local daily newspaper market in Charleston. The acquisition lessened competition by eliminating the "economic incentives" for each owner "to increase the attractiveness of its newspaper," by giving the Gazette Company control of all the assets needed to produce the *Daily Mail*, by reducing the output of newspapers, and by increasing prices to readers and advertisers. *See* Compl. ¶¶ 3-4, 6, 24-31. With respect to Sherman Act Section 1, the Complaint alleges that the defendants entered into a series of contracts on May 7, 2004, that unreasonably restrained trade in local daily newspapers in Charleston by eliminating the economic incentives for the defendants to compete and giving the Gazette Company the power to control and, ultimately, shut down the *Daily Mail*.

See id. ¶¶ 4, 6, 24-31, 39. Finally, the Complaint states a Sherman Act Section 2 violation by alleging that the Gazette Company, as a result of the May 2004 acquisition, possesses "substantial monopoly power in the sale of local daily newspapers in the Charleston area," and that it willfully acquired that power through the acquisition of the *Daily Mail*, its only competitor in the relevant market. *See id.* ¶¶ 6, 20, 24-31; *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 61 (1st Cir. 2002) (merger to monopoly is a cognizable Section 2 claim).

II. THE FEDERAL ANTITRUST LAWS PROTECT THE COMMERCIAL COMPETITION EXTINGUISHED BY THE DEFENDANTS' CONDUCT

The federal antitrust laws protect the commercial competition that the defendants engaged in prior to May 2004. That competition manifested itself in efforts by both defendants to make their respective newspapers attractive to readers, so as to generate sales of subscriptions and advertising. Long ago the Supreme Court made clear that the antitrust laws apply with full force to the business of publishing newspapers, which constitutes "trade or commerce" within the scope of the Sherman Act. *United States v. Associated Press*, 326 U.S. 1 (1945). The Court explained:

> Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. . . . All are alike covered by the Sherman Act.

Id. at 7. Therefore, "restraints on trade in news" that are "designed in the interest of preventing competition," "fall within the ban of the Sherman Act." *Id.* at 18-19 (citation omitted).

The competition between these two newspaper owners to improve their products in order to generate more sales to readers was commercial competition that the antitrust laws protect. In *Community Publishers, Inc. v. Donrey Corp.*,[4] the court enjoined a transaction that would have

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[4] 892 F. Supp. 1146, 1158-59 (W.D. Ark. 1995), *aff'd*, 139 F.3d 1180 (8th Cir. 1998). Although the transaction at issue in *Donrey* was between non-JOA newspapers that competed on

harmed the same sort of competition between daily newspapers. The *Donrey* court observed that the newspapers covered the same stories, had bureaus in the same cities, and "exhibit[ed] an ongoing concern over who scoops whom which is largely motivated by circulation concerns." *Id.* at 1159. The newspapers took "competitive actions and reactions . . . in direct response to each other," such as expanding police and sports coverage, using more color printing to "compete more effectively," and producing "features and special interest sections" to "compete for readers." *Id.* To preserve the newspapers' competition to "take readers away" from each other in order to increase the "circulation and value" of their respective newspapers, the court ordered the rescission of their merger. *Id.* at 1170, 1173-79. This is the type of competition alleged in the Complaint – competition that continued to exist until extinguished by the May 2004 acquisition. Compl. ¶¶ 2, 16.

Courts have long affirmed that the antitrust laws protect competition on non-price factors, such as quality and service levels, with no less vigor than they protect competition on prices. *See, e.g., Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911) (one of the "evils" of monopoly is "the danger of deterioration in quality of the monopolized article"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (a "refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement" violates the Sherman Act); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also *better goods and services.*") (emphasis added); *United*

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both price and non-price factors, the court's discussion of the nature of non-price competition between newspapers is directly relevant here.

States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (plaintiff may prove anticompetitive effect by showing a "reduction of output, increase in price, or deterioration in quality of goods or services"); *United States v. Visa USA, Inc.*, 163 F. Supp. 2d 322, 406 (S.D.N.Y. 2001) (non-price restraints on competition "affect consumer welfare in ways similar to those of price restraints"), *aff'd*, 344 F.3d 229 (2d Cir. 2003).

Defendants do not appear to contest that newspapers outside of JOAs compete to generate sales by making their publications attractive to readers and advertisers, and that the antitrust laws apply to the non-price means by which they engage in such competition. They also concede that "[t]he participants in a JOA, of course, have economic incentives to make both newspapers as appealing as possible to readers and advertisers. . . ." Def. Br. at 28. They argue, however, that "what each participant owns is the right to receive a percentage of the profits of the JOA enterprise, an asset whose value depends on the success of the entire business entity – both newspapers jointly – not either one or the other of the newspapers individually." *Id.* at 28. Based on this premise, they assert that the only competition that existed prior to May 2004 was "editorial competition" – or competition in "thoughts and ideas" – that is beyond the reach of the antitrust laws because it does not involve any "commerce." *Id.* at 30.

Defendants are wrong. Notwithstanding that, prior to May 2004, defendants performed many of their commercial newspaper operations within the JOA, the ownership of each newspaper remained independent and *outside* the JOA. Each defendant thus received a negotiated share of the JOA's profits, and *also* could reap economic returns by preserving and enhancing the value of its own, separate newspaper. The latter interest gave each defendant an economic incentive to use its control over the publication of its newspaper (along with its influence over

JOA decision-making) to increase the *sales of its own newspaper – i.e.,* to compete with the other JOA newspaper – even if such sales came at the expense of the other newspaper. Thus, each owner had incentives to compete that went beyond merely maximizing the collective financial returns of the joint venture. Competition between business entities to generate sales is "trade or commerce" within the meaning of the antitrust laws. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 & n.15 (1940) (Sherman Act was enacted to prevent "suppression of competition in the marketing of goods and services"); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787-88 (1975) ("the exchange of . . . a service for money is 'commerce' in the most common usage of that word"); *Dedication and Everlasting Love to Animals v. Humane Soc'y*, 50 F.3d 710, 712 (9th Cir. 1995) (the Supreme Court has described "commerce" under the Sherman Act "in terms of the purchase, sale and exchange of commodities") (citation omitted).

The Complaint lays out this commercial competition in detail: Prior to May 7, 2004, the Gazette Company and MediaNews each independently owned their respective newspapers. Compl. ¶¶ 2, 14. As an owner, each wanted to maintain and grow the value of its newspaper – even if that occurred because readers migrated to its paper from the other. As alleged in the Complaint, the value of each newspaper was not solely a function of the stream of profits that came out of the JOA, but also was determined by its attractiveness to readers and its circulation figures. *Id.* ¶¶ 2, 15. Among other things, a newspaper with more readers than its rival has a stronger negotiating position within this JOA structure, better long-term prospects for survival, and is worth more to any prospective purchasers. *Id.* Accordingly, if the *Daily Mail* had significantly fewer readers, it would not have been worth $55 million to the third-party newspaper publisher that offered to buy the paper in December 2003. Moreover, with smaller readership, the

Daily Mail would have been a weaker partner in the JOA, and its long-term survival would have been more at risk. In short, it would have been a less valuable asset. That is why MediaNews, when it owned the *Daily Mail*, competed to produce a newspaper that Charleston's citizens preferred; it had economic incentives to maximize the value of its wholly-owned asset, the *Daily Mail*. *Id.*

Because each owner had an "independent economic incentive to increase the value of its respective newspaper ownership interest by attracting readers to that newspaper," (*id.* ¶ 15), the owners competed for readers in a myriad of ways, including the timeliness, accuracy and depth of their reporting; the breadth and quantity of their news and information; the appeal of their mix of news, features, and opinion; and all of the other things that would lead a reader to choose one newspaper over another. *Id.* ¶ 16. The competition for readers – and thus sales – continued *even though* the JOA allowed the Gazette Company and MediaNews to set prices jointly and to pool and share their profits. *Id.* ¶ 15.

The May 2004 acquisition extinguished the longstanding competition between the owners of the *Charleston Gazette* and the *Daily Mail* by consolidating ownership and control of both newspapers in the Gazette Company. After May 2004, the Charleston JOA no longer had two independent owners to ensure that each paper would continue to compete for readers and remain viable. Instead, the Gazette Company acted as one would expect a monopolist to act, by moving to close down the *Daily Mail* to increase its profits.

This therefore is not a case about a loss of competition in "thoughts and ideas." *See* Def. Br. at 32-34. Nor is this a case about charitable, religious or political activities, or internal organizational by-laws that are unrelated to commercial competition, as defendants suggest. *See*

cases cited *id.*[5] Rather, this case is about two separate newspaper publishers who, until May 2004, each had incentives to increase the value of its own newspaper through increased sales (*i.e.*, commerce), and their agreements ending that competition. It is a case about the loss of incentives to publish the *Daily Mail* to attract as many readers as possible, even if those readers switched from its rival, the *Charleston Gazette*. The May 2004 agreements eliminated this commercial competition.

Given the commercial character of the competition extinguished by the defendants' conduct, it is plain that adjudicating the United States' claims here will not require the Court to make "value judgments about newspaper content that are perilous under the First Amendment." Def. Br. at 34. The editorial content of these newspapers – the messages the publishers choose to convey – is irrelevant to the application of the antitrust laws in this case. In this lawsuit, the United States is interested only in the preservation of competition – *i.e.*, the defendants' incentives and ability to compete for readers via whatever means they each separately might choose.[6] To be sure, the government will seek to demonstrate the adverse effects of ceding control of both

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[5] The courts in those cases made clear that the defendants were "not involved in business." *Nat'l Org. For Women v. Scheidler*, 968 F.2d 612, 621 (7th Cir. 1992). *See also Smith v. Nat'l Collegiate Athletic Ass'n.*, 139 F.3d 180, 185 (3d Cir. 1998) (defendant was not engaged in "business activities" or seeking "commercial advantage" for itself); *Bronx Legal Servs. v. Legal Servs.*, 2003 WL 145558, *4 (S.D.N.Y. Jan. 17, 2003) (defendants did not engage in "business or commercial transaction[s]").

[6] In contrast to *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), a case that the NAA cites in its *amicus* brief, the United States here is not seeking to compel either newspaper to publish any particular viewpoint or content, or to meddle in their internal "editorial affairs." Rather, the Complaint simply seeks to restore the competition that existed between the owners of the *Daily Mail* and the *Charleston Gazette* prior to Gazette Company's acquisition of the *Daily Mail*, and to continue what those owners had been doing for decades: publishing newspapers "with whatever editorial and reportorial content they deem appropriate." *Hawaii v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241, 1252-53 (D. Haw.), *aff'd*, 203 F.3d 832 (9th Cir. 1999).

newspapers to the Gazette Company – including reduced efforts to sell *Daily Mail* newspapers, reduced resources available to the *Daily Mail* to produce an attractive newspaper, and most importantly the planned elimination of the *Daily Mail* altogether – but the Court will not be called upon to make any "value judgments" about the editorial content of the *Daily Mail* or the *Charleston Gazette* before or after the May 2004 agreements.

Not surprisingly, the courts have consistently rejected efforts to use the First Amendment to shield newspapers from the application of the antitrust laws to their commercial competition. As the Supreme Court explained in *Associated Press*:

> The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

326 U.S. at 7, 20. *See also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139-40 (1969); *Hawaii v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241, 1252-53 (D. Haw.) (rejecting argument that First Amendment immunizes JOA newspaper transaction from antitrust scrutiny), *aff'd*, 203 F.3d 832 (9th Cir. 1999).

III. THE FORMATION OF THE CHARLESTON JOA DID NOT EXTINGUISH ALL COMPETITION BETWEEN THE NEWSPAPERS

Once it is understood that, as the Complaint alleges in detail, the defendants were engaged in commercial competition with one another prior to May 2004, defendants' remaining arguments about the lack of any competition between them fall away. Relying on *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), defendants argue that they were partners in a "fully integrated joint venture,"

making any re-ordering of their partnership interest a "competitive non-event." Def. Br. at 13-14. Defendants also rely on various legislative materials relating to the enactment of the NPA to establish that all commercial competition between two newspapers is extinguished whenever a newspaper JOA is formed. *Id.* at 23-24. Both arguments fail because, as alleged in the Complaint, *the JOA in this case* did not extinguish all commercial competition between the parties. Notwithstanding that they were partners in the JOA, the defendants continued to own their own newspapers and thus retained independent and meaningful economic incentives to compete with one another to attract readers to those papers, rather than solely to maximize the jointly-shared profits of the venture as a whole.

A. *Dagher* Does Not Establish that the 1958 JOA Extinguished All Competition Between the Newspapers

Defendants contend that the Supreme Court's decision in *Dagher* "controls" here and requires this Court to dismiss the Complaint. Def. Br. at 17, 20. But *Dagher*'s facts are fundamentally different from the facts alleged here.[7] In *Dagher*, Texaco and Shell formed a joint venture entity – known as Equilon – that consolidated the entirety of both companies' assets and operations in the refining and marketing of gasoline in the western United States. All of Texaco's and Shell's gasoline refining and marketing assets were transferred to Equilon, and neither company retained any assets with which to compete in the wholesale or retail sale of gasoline in

[7] The specific legal issue in *Dagher* also is inapposite here. In *Dagher*, the Supreme Court held that it is not *per se* illegal price fixing under Section 1 of the Sherman Act for a joint venture to set the prices of its own products. 547 U.S. at 3. Here, the United States does not challenge the Charleston JOA's joint, internal pricing decisions relating to subscription and advertising rates of the *Daily Mail* and *Charleston Gazette*. Rather, the United States challenges under Section 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act, an acquisition of assets previously held outside the JOA and the establishment of a new arrangement that gave the Gazette Company ownership and control of both daily newspapers in Charleston.

the relevant geographic market. 547 U.S. at 4. By the terms of the Equilon joint venture agreement, therefore, "Texaco and Shell did not compete with one another in the relevant market . . . ." *Id.* at 5. *See also id.* at 4 (the joint venture "end[ed] competition between the two companies in the domestic refining and marketing of gasoline"); *id.* at 6 (Texaco and Shell participated in the market only "as investors, not competitors"). As a result, it was easy for the Court to conclude that Equilon's internal actions in setting the price for the gasoline that Equilon itself produced and sold could not constitute *per se* unlawful price-fixing as a matter of law. *See id.* at 7-8 ("the business practice being challenged involves the core activity of the joint venture itself – namely, the pricing of the very goods produced and sold by Equilon").

Defendants assert that the material facts of this case are indistinguishable from those in *Dagher* because the formation of the Charleston JOA in 1958, just like the formation of the joint venture in *Dagher*, eliminated all competition between the parties to the JOA. As already discussed, however, the Complaint alleges just the opposite: the formation of the Charleston JOA did *not* eliminate all commercial competition between the owners of the *Charleston Gazette* and the *Daily Mail*. *See* Compl. ¶¶ 2, 15-16. Unlike in *Dagher*, the Charleston JOA was not a fully-integrated joint venture because the owners of the *Charleston Gazette* and the *Daily Mail* did not transfer to the JOA all of the assets relating to the publication of those two newspapers. Each company retained, outside the JOA, separate and independent ownership of their respective newspapers. And each owner independently retained all decisionmaking authority with respect to the content of its newspaper.[8] In other words, each owner retained the "entrepreneurial interest"

[8] Judge Fernandez's dissenting opinion in the Ninth Circuit, which reached the same result as the Supreme Court, distinguished a newspaper JOA from the Equilon joint venture on this point. In the JOA, "each [newspaper] remained in the same business in the same area, and

to maximize the value of its respective newspaper by improving the quality of that newspaper to gain more readers. *See Fraser*, 284 F.3d. at 57 ("the existence of distinct entrepreneurial interests possessed by separate legal entities" suggests that the participants in a sports league are not necessarily a single economic entity for antitrust purposes).[9]

It is these distinct economic interests based on separate ownership of the newspapers outside the JOA that the United States alleges were extinguished on May 7, 2004, when the Gazette Company acquired the *Daily Mail*. The United States' antitrust claims thus relate to an acquisition that affected competition arising from assets *not integrated* into the JOA. Defendants' reliance on *Dagher*, therefore, adds nothing of substance to their argument that the competition preserved by their 1958 JOA agreement is not "competition" protected by the antitrust laws.[10]

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retained the production of the true product – news and editorials – in its own hands." *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1126-27 (9th Cir. 2004) (Fernandez, J., dissenting), *rev'd*, 547 U.S. 1 (2006).

[9] It is well understood that joint venture participants, including JOA newspapers, may cooperate in some aspects of their business, but retain ownership of other assets with which they compete. *See, e.g., Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 599-600 (7th Cir. 1996) (professional basketball league not a single entity under the antitrust laws for all purposes); *Hawaii*, 99 F.Supp. 2d at 1249; *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148-49 (9th Cir. 2003). The fact that the Charleston JOA controlled some operations of the two newspapers does not mean that the antitrust laws fail to protect the competition that remained. *See id.* The *amicus* brief of the NAA ignores this line of cases in incorrectly asserting that mergers by companies who have "cooperative relationships" can never harm competition. NAA Br. at 6.

[10] The cases cited by *amicus* NAA are similarly inapposite. In *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975), the banks shared *de facto* common ownership and control, and the United States agreed with the defendants that there was no present or past competition between them. *Id.* at 92-93, 100, 121. In contrast, the Complaint here alleges that the newspapers were separately owned and controlled prior to 2004 and that they competed "vigorously." Compl. ¶¶ 2, 16. In *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986), the Blue Cross/Blue Shield defendants, unlike the newspapers here, were "jointly controlled" and "acted as one company" for decades, and had never offered competing

B. Nothing in the NPA Provides that the Formation of a JOA Extinguishes All Commercial Competition Between the Owners of JOA Newspapers

Neither the Newspaper Preservation Act nor its legislative history provides any support for the defendants' assertion that the formation of a JOA necessarily extinguishes all commercial competition between the parties. To be sure, as defendants point out, the statute does allow the parties to combine certain of the operational functions of their newspapers, including the pricing of subscriptions and advertising – subject to various conditions and limitations – without fear of antitrust attack. It does not, however, make mandatory any particular amount of "joint or unified action." Rather, the NPA merely provides that JOA newspaper owners may take "joint or unified action . . . with respect to any *one or more*" of the listed functions.[11] 15 U.S.C. §1802(2) (emphasis added). Because the NPA contemplates that there are areas where owners may choose not to coordinate and instead continue to compete with one another, neither the Act nor its legislative history supports defendants' assertion that all competition between them was, as a matter of law, extinguished when they formed a JOA.

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

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products to consumers. *Id.* at 1337.

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

purpose of "maintaining a newspaper press editorially and reportorially independent and competitive." 15 U.S.C. § 1801. NPA immunity is thus inapplicable to transactions, like those at issue here, that completely merge two newspapers. Charleston Newspapers comported with these limitations until May 2004 and, as alleged in the Complaint, the pre-2004 structure of the JOA ensured that it *did not* extinguish all commercial competition between the Gazette Company and MediaNews. *See* pages 4-6, above.

Defendants highlight the inconsistency between their argument and the NPA's purpose when they contend that the owners could have gone so far as to agree to "close the Mail and publish only the Gazette" because the Charleston JOA is a single economic entity. Def. Br. at 18. That contention is tantamount to an assertion that the limits of the NPA are a nullity. According to defendants' logic, two newspapers could form a JOA today and then "amend" their arrangement tomorrow so as to cease publication of one of the newspapers without subjecting their actions to antitrust scrutiny. Such a result would contradict the purpose and policy of the NPA, which is to preserve rather than eliminate independent newspapers. Indeed, as discussed below, courts have rejected this reading of the Act.

Recognizing that the plain language of the NPA does not support their argument that the formation of any particular JOA inherently, as a matter of law, extinguishes all commercial competition between JOA newspapers, defendants resort to a selective reading of the NPA's legislative history. Def. Br. at 24-27. As a threshold matter, where the basic structure and text of the NPA so clearly establish that JOAs *do not* necessarily extinguish all economic competition, no amount of contrary statements by legislators or other parties commenting on proposed legislation could establish the proposition that the NPA achieves that result as a matter of law. *Ratzlaf v.*

United States, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear").[12]

Moreover, the various statements quoted by defendants do not support their sweeping conclusion. Comments by members of Congress distinguishing the "business aspects" of a newspaper from the "editorial and reportorial functions" do not address the commercial competition at issue in this case – which, as discussed above (at pages 14-16), encompasses efforts by the newspaper owners to make their newspapers attractive to readers, and thereby generate sales, through such means as the depth, breadth and timeliness of the reporting and the attractiveness of the mix of news, features and information presented by the papers. Referring to such activities as "editorial and reportorial" does not nullify the commercial nature of such competition.

Finally, in quoting from the legislative history, defendants ignore many statements by members of Congress expressing the view – consistent with the text and structure of the Act – that the purpose of the NPA is to preserve competition of the sort the antitrust laws protect – *i.e.*, commercial competition – rather than to extinguish such competition entirely. For example, the lead House sponsor asserted that the NPA "proposes to keep competition between newspapers

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

alive. This is surely in keeping with the intent and purpose of the antitrust law." [13]

C. Case Law Holds that Cognizable Competition Exists Between the Owners of JOA Newspapers

Every court that has considered whether legally-cognizable competition continues to exist after the formation of a newspaper JOA has concluded that it does. In *Hawaii v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241 (D. Haw.), *aff'd*, 203 F.3d 832 (9th Cir. 1999), the owners of Honolulu's two daily newspapers, the *Advertiser* and the *Star-Bulletin*, agreed to terminate their long-standing JOA, and the owner of the *Star-Bulletin* announced its intention to cease publishing the paper. The State of Hawaii challenged the agreement as a violation of the Sherman Act and the court enjoined it. In reaching its decision, the court rejected the argument that there could be no antitrust violation because there is no "economic competition" between newspapers in a JOA. 99 F. Supp. 2d at 1249-50. Much like the defendants here, the *Hawaii* defendants claimed that the only competition between JOA newspapers was "editorial and reportorial" competition, and that such competition did not qualify as "trade or commerce" for purposes of the antitrust laws. *Id.* The court recognized that the *Advertiser* and *Star-Bulletin* operated "to some extent as a single

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[13] 116 Cong. Rec. at 23144 (1970) (Remarks of Rep. Matsunaga) [Attachment A]. *See also id.* at 1790 (Remarks of Sen. Fong) ("the effect of [the NPA] is to promote vital competition, instead of monopoly. [It] is thoroughly consistent with the purpose of the antitrust laws.") [Attachment B]; *id.* at 23167 (Remarks of Rep. Murphy) ("The Newspaper Preservation Act is truly consistent with the intent and purposes of the antitrust laws – the preservation of competition where it otherwise could not exist.") [Attachment C]; *id.* at 23173 (Remarks of Rep. Boggs) ("I believe that this bill is in concert with the spirit and purpose of the antitrust laws, specifically, to foster and encourage competition.") [Attachment D]; *id.* at 23149 (Remarks of Rep. Albert) ("[T]he purpose of our antitrust laws is to preserve competition. That is the identical purpose, as I understand it, of this legislation.) [Attachment E]. Other members noted that the NPA would allow the elimination of only *part* of the commercial competition between the parties. *See, e.g., id.* at 23161 (Remarks of Rep. Lloyd) ("if only one newspaper survives, the monopoly will not be partial, *as would be the case under [the NPA]*, it will be total.") (emphasis added) [Attachment F].

economic entity under the JOA." *Id.* Nevertheless, the court held that "this case falls within the definition of trade or commerce" in the Sherman Act. *Id.* It held that the challenged agreement would cause cognizable antitrust harm because it eliminated the ongoing competition between the newspapers to attract readers and advertisers. *Id.*

Similarly, in *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192 (N.D. Cal. 2000), the plaintiff brought an antitrust action to challenge an agreement between the two publishers of the major daily newspapers in San Francisco, who had operated in a JOA for over thirty years. The publisher of the San Francisco *Examiner* agreed to acquire the San Francisco *Chronicle* with the "stated intention . . . to cease production of the *Examiner*" at some future point. *Id.* at 1195. Like the pre-May 2004 Charleston JOA, the owners of the *Examiner* and *Chronicle* each owned equal shares in the San Francisco JOA. The San Francisco JOA was responsible for the printing, distribution, and sales of both papers, but each paper had "separate editorial products." *Id.* at 1196. The court held that, under the statutory framework of the NPA, "the elimination of a newspaper represents a cognizable injury to interests protected by the antitrust laws." *Id.* at 1195. Thus, the plaintiff's claim that the "challenged transactions cause injury to competition for readers among economically viable newspapers" stated a type of harm cognizable under the antitrust laws. *Id.* The court further held that parties to a JOA may merge and cease competing with each other only if one newspaper meets the "failing company" standard set forth in *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969).[14] Notwithstanding the fact that the two papers had operated

[14] The failing company doctrine is an affirmative defense to a merger or acquisition that otherwise would violate the antitrust laws. *Citizen Publ'g*, 394 U.S. at 136. The defense has two main components: (1) the acquired firm's resources must be so depleted and its prospects for rehabilitation so remote that "it faced the grave probability of business failure;" and (2) the acquiring firm must be the "only available purchaser." *Id.* at 136-38. When these two conditions

for decades in a JOA formed pursuant to the NPA, the court treated the proposed combination of the two JOA newspapers as a court would treat the proposed merger of any other firms that had been engaging in commercial competition in the marketplace.[15]

Longstanding Department of Justice practice is consistent with the view that JOA newspapers engage in commercial competition worthy of antitrust protection. The Antitrust Division has consistently taken the position that in order to terminate a JOA, or to cease publishing a JOA newspaper, the newspaper owners must meet the same "failing company" standard that would be applicable in evaluating an otherwise anticompetitive merger among competitors in any other industry. To meet that standard, the publishers must show that the resources of the newspaper to be abandoned are so depleted and its prospects for rehabilitation are so remote that it faces the probability of business failure and that there are no prospective purchasers. This test was endorsed by the court in *Reilly*, 107 F. Supp. 2d at 1202-03 (holding that the test "provide[s] the proper framework for analysis" of JOAs). Were it true that the formation of a JOA inherently extinguished all commercial competition between the participants, there would be no point in applying such a test to determine whether the antitrust laws permit a *further* reduction in competition.

IV. THE NEWSPAPER PRESERVATION ACT DOES NOT IMMUNIZE DEFENDANTS' CONDUCT

The Gazette Company's purchase of the *Daily Mail* from its former JOA partner is not

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are met, "the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 507 (1974).

[15] *See also Reilly v. MediaNews Group, Inc.*, 2007 WL 1068202, *2-3 (N.D. Cal. April 10, 2007) (agreeing with the NPA analysis of the court in *Reilly v. Hearst Corp.*, *supra*).

shielded from antitrust scrutiny by the NPA, as defendants contend. It is well-established that statutory exemptions and immunities from the antitrust laws must be construed narrowly. *See, e.g., Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 126 (1982); *United States v. Gosselin World Wide Moving N.V.*, 411 F.3d 502, 511 (4th Cir. 2005) (rejecting claim of immunity from antitrust laws in view of "the maxim that exceptions to the antitrust laws should be construed narrowly").[16]

Nothing in the language of the NPA would allow one JOA partner's acquisition of the other partner's newspaper to be exempt. Additionally, because the Gazette Company now solely owns and controls both newspapers, there is no joint operating arrangement as defined by the statute; therefore, the agreements creating this new structure cannot qualify for NPA immunity. Finally, the case law makes clear that agreements designed to lead to the closure of a JOA newspaper are not immune.

A. The Gazette Company's Acquisition of the *Daily Mail* is Not Exempt from the Antitrust Laws Under the Plain Language of the NPA

The NPA expressly states that antitrust immunity shall not apply to any JOA or party thereto "[e]xcept as provided in this chapter . . . ." 15 U.S.C. § 1803(c). For a JOA formed prior to the NPA's enactment,[17] like Charleston Newspapers, the only activities expressly immunized

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[16] One of the Senate sponsors of the NPA emphasized the narrow scope of the exemption, stating that the statute "is a limited exemption and all activities other than the exempt act of combining for the specifically designated purpose would be subject to the antitrust laws. All activities beyond those specifically approved by the bill would continue to be subject to the full force and effect of the antitrust laws." 116 Cong. Rec. 1789 (1970) (Statement of Senator Fong) [Attachment B].

[17] The NPA distinguishes between JOAs formed prior to its enactment in 1970 and those established afterward. For example, the Attorney General must pre-approve post-1970 JOAs and parties to those JOAs may "enter into, perform, or enforce" them. 15 U.S.C. § 1803(b). Parties

by NPA are those to "perform, enforce, renew, or amend" a JOA. 15 U.S.C. § 1803(a). Nothing in the text or the legislative history of the NPA even remotely suggests that Congress intended to immunize the acquisition of a JOA partner's newspaper. Nevertheless, defendants argue that the Gazette Company's acquisition of the *Daily Mail* from MediaNews was nothing more than an amendment to their JOA.[18]

Neither the plain meaning of the word "amend" nor the legislative history of the NPA supports defendants' argument. An "amendment" to a JOA necessarily entails modifications to the arrangements respecting the operations of two or more newspapers within the scope of what Congress has defined to be a JOA. It cannot under any tortured logic or reading cover one partner's outright acquisition of the other's newspaper – an event that has the practical effect of ending the joint arrangement. Here, the acquisition by the Gazette Company of the *Daily Mail*, an asset not owned by the Charleston JOA, cannot be an amendment of the JOA contract to which the NPA grants immunity. The fact that the Gazette Company chose to maintain the legal entity that had previously operated the defendants' separate newspapers, Charleston Newspapers, does not transform the acquisition into an "amendment" of the JOA; indeed, there is nothing "joint" about that entity, since MediaNews no longer has any interest in Charleston Newspapers.

Congress implicitly recognized, when it debated the scope of amendments of pre-1970 JOAs, that a transaction of this sort would not qualify for immunity, and that such amendments would be limited to ordinary operational matters. Rep. Kastenmeier, floor manager of the bill,

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to pre-1970 JOAs may "perform, enforce, renew, or amend" their JOAs. 15 U.S.C. § 1803(a).

[18] Defendants do not contend that the acquisition constitutes performing, enforcing, or renewing a JOA.

rejected the notion that the term "amend" gave JOA newspapers a "carte blanche" to take any action they desired. Specifically, he stated that the provision allowing pre-1970 JOAs to amend their agreements was limited to ordinary "operational reasons":

> Newspapers do amend their agreements sometimes on an annual basis for the purpose of labor contracts and for many other *operational reasons* . . . . Accordingly, we specifically included the word "amend" to refer to changes that might take place *in the course of ordinary business operations*.[19]

The Gazette Company's acquisition of the *Daily Mail* had nothing to do with ordinary business operations like printing or distributing newspapers. *See also* 15 U.S.C. § 1802(2) (listing business activities of JOAs). Instead, the acquisition ended the parties' partnership by placing both newspapers under the control and ownership of the Gazette Company. Compl. ¶¶ 4, 21. *See Reilly*, 107 F. Supp. 2d at 1203 ("The very nature of such a transaction [the merger of two JOA newspapers] makes clear that the parties are not seeking to avail themselves of the NPA's antitrust exemptions.").

Defendants' expansive reading of the term "amend" in Section 1803(a) would obliterate any limits on what JOA newspapers could do and still receive immunity.[20] In effect, they want the Court to interpret the word "amend" to nullify every other provision of the Act. The defendants

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[19] 116 Cong. Rec. 23173-74 (1970) (statement of Rep. Kastenmeier, responding to statement of Rep. Jacobs) (emphasis added) [Attachment D].

[20] In stark contrast to the position defendants now take, a representative of the *Charleston Gazette* and the *Daily Mail* asserted in testimony to Congress that the scope of permissible amendments under 1803(a) was limited to those activities for which "joint or unified action" may be taken under the Act. *The Newspaper Preservation Act: Hearings before Antitrust Subcomm. of the House of Representatives Comm. on the Judiciary on H.R. 279*, at 92 (1969) (Testimony of Morris J. Levin). He went on to state that amendments contrary to the purpose and policy of the Act would be subject to attack by the Department of Justice. *Id.* at 195 (letter from Morris J. Levin to Chairman Emanuel Celler, Oct. 14, 1969) [Attachment G].

would have the Court adopt a position that turns the Newspaper Preservation Act on its head: that a statute enacted to preserve competing newspapers actually immunizes from antitrust scrutiny an acquisition that ends the competition between those same newspapers. *See, e.g., United States v. Locke*, 471 U.S. 84, 93 (1985) ("we will not allow a literal reading of a statute to produce a result demonstrably at odds with the intentions of its drafters . . . .") (internal citations omitted).

Defendants cite only one case to support the proposition that no limits exist to the term "amend" in Section 1803(a), *Mahaffey v. Detroit Newspaper Agency*, 969 F. Supp. 446 (E.D. Mich. 1997). Def. Br. at 39. That case, however, is inapposite. *Mahaffey* addresses amendments to a *post-1970* JOA, which is governed by the different statutory language of 15 U.S.C. § 1803(b) that does not contain any provision for amendments at all; the court's passing comment on pre-1970 JOAs is merely dicta. 969 F. Supp. at 448 n.1. Moreover, the court did not consider "amendments" that addressed the outright transfer of a JOA newspaper from one owner to the other, or that were designed to terminate one of the JOA newspapers.

Accepting defendants' argument that such an acquisition is immune from antitrust scrutiny would be contrary to the very public interest Congress declared it was protecting when it enacted the NPA: an interest in maintaining "independent and competitive" newspapers. 15 U.S.C. § 1801. Therefore, the May 2004 acquisition is fully subject to the antitrust laws.

B. The Defendants' Arrangement No Longer Meets the Newspaper Preservation Act's Definition of a Joint Operating Arrangement and, as a Result, Defendants Have No Immunity

To qualify for immunity, a JOA must involve joint or united action by "two or more newspaper owners" for the publication of two or more newspapers. 15 U.S.C. § 1802(2). The Act defines "newspaper owner" as "any person who owns or controls . . . one or more newspaper

publications." 15 U.S.C. § 1802(3). Defendants appear to concede that MediaNews no longer owns the *Daily Mail*. *See* Def. Br. at 37-38. Nevertheless, they assert that MediaNews still "controls" the *Daily Mail*, despite the Complaint's allegations that the May 2004 agreements "consolidat[ed] the two papers under the ownership and control of the Gazette Company . . . ." Compl. ¶ 4. *See also id.* ¶¶ 12, 20, 31, 39.

In determining the existence of "control," courts have looked at a wide variety of facts, such as possession of voting stock, voting rights, or veto rights;[21] the ability "to commit the financial or real property assets or working resources of an entity;"[22] the ability to "make all decisions affecting the business;"[23] and the ability to set budgets and salaries.[24]

The Complaint alleges with clarity that the Gazette Company has control under these indicia, whereas MediaNews does not. As alleged, the Gazette Company "acquired all of the assets" of the *Daily Mail*, has "ultimate control over the budgets, management, and news gathering and reporting of both newspapers," and indeed has complete discretion to decide whether the *Daily Mail* will be published at all. Compl. ¶ 3. *See also id.* ¶ 11 (the Gazette Company "owns all the assets and controls all the business operations of Charleston

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[21] *See Gould v. Rueffenacht*, 471 U.S. 701, 705 (1985).

[22] *Nat'l Mining Ass'n v. United States Dep't of Interior*, 177 F.3d 1, 7 (D.C. Cir. 1999).

[23] *City of Ottumwa v. Surface Trans. Bd.*, 153 F.3d 879, 885 (8th Cir. 1998); *Gould*, 471 U.S. at 705.

[24] *Weyburn Broad. Ltd. P'ship v. FCC*, 984 F.2d 1220, 1233 (D.C. Cir. 1993) ("It is well known that one of the most powerful and effective methods of control of any business . . . is the control of its finances.") (citation omitted); *Nat'l Mining Ass'n*, 177 F.3d at 7 ("The hand that holds all the purse strings presumably controls the dependent entity.") (quoting *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1214 (1st Cir. 1993)).

Newspapers"); ¶ 12 ("the news and editorial assets and resources of the Charleston *Daily Mail* are under the ownership and control of the Gazette Company"); ¶ 20 (the Gazette Company acquired "control of the Charleston *Daily Mail*'s assets" and has "unfettered discretion to set the news and editorial budget for the Charleston *Daily Mail*" and the "sole power to terminate publication" of the *Daily Mail*).

Defendants point to a contract attached to their motion to argue that the Gazette Company gave MediaNews a contractual right to exercise control over the *Daily Mail*. Def. Br. at 37-38. In reality, however, the Gazette Company acquired full control over the *Daily Mail* and its operations. As alleged in the Complaint, the defendants structured the purchase of the *Daily Mail* so as to "preserve[] the appearance that the Charleston *Daily Mail* was still being published by MediaNews," while vesting real control in the Gazette Company. *Id.* ¶ 20. Defendants' attempt to disguise the acquisition by arguing that control over the paper still resides with MediaNews should be rejected for several reasons.

First, defendants' contention that MediaNews still contractually controls the *Daily Mail* is contradicted by the statute. The term control must be read in light of the statute's stated goal of maintaining "independent and competitive" newspapers. 15 U.S.C. § 1801. If control over a newspaper means anything, it necessarily includes the ability to control the newspaper's budget, the hiring and firing of the editorial and reportorial staffs, and the power to protect the newspaper's ability to compete. In this case, however, the Gazette Company has the power to cut the *Daily Mail*'s budget to zero, fire all of its reporters, or cease publishing the paper entirely. Indeed, as the Complaint alleges, the Gazette Company already had begun to exercise that control by substantially cutting the *Daily Mail*'s newsroom budget and staff size. Compl. ¶ 22. As

alleged in the Complaint, since the acquisition, MediaNews has had no ability to counteract those measures. With no right to have input into any business decisions affecting the *Daily Mail*, MediaNews cannot and does not control the newspaper.

Second, the legislative history confirms that Congress meant "control" of a newspaper to mean "separate corporate control," not just the existence of two newsrooms under a single owner. The Senate Judiciary Committee report recommending passage of the Newspaper Preservation Act explained that "[t]he Committee believes that this bill is necessary to prevent communities with newspapers having editorial voices *under separate corporate control* from losing one of the established editorial voices." S. Rep. No. 91-535, at 3 (1969) (emphasis added) [Attachment H].

The House Judiciary Committee reached a similar conclusion, emphasizing that the NPA would apply only when two newspapers were controlled by two separate owners. In its Report, the Committee equated communities in which two daily newspapers were owned by a single entity – akin to Charleston after the 2004 transaction – with communities that had only one newspaper "controlled by a single owner." H.R. Rep. No. 99-1193, *reprinted in* 1970 U.S.C.C.A.N. 3547, 3548 (1970). As the NPA's House sponsor elaborated in floor debate, the Act did not apply to situations, such as existed in Atlanta, where a single company owned both newspapers, because "the bill does not pertain to fully merged newspapers." Rather its application required "separate and independent ownerships." 116 Cong. Rec. 23145 (1970) (Remarks of Rep. Matsunaga) [Attachment A]. Likewise, Representative Udall distinguished between the Tucson JOA (to which the Act applied) and the situation in Phoenix, where there was a "total monopoly – two newspapers owned by the same publisher" (to which the Act did not apply). *Id.* at 23164 [Attachment C]. This history shows that both the Senate and House viewed

separate *corporate* control as the touchstone under the Act, not merely the existence of two editorial departments under the ownership of a single corporation.

In any event, defendants' assertions that the contract they attach to their motion vests control of the *Daily Mail* in the hands of MediaNews raises a factual issue that cannot be resolved on a motion to dismiss. Courts analyzing the term "control" under other federal statutes have held that "[t]he existence of control is an issue of fact to be determined by the circumstances of each case." *City of Ottumwa*, 153 F.3d at 885 (applying Interstate Commerce Act). *Accord, Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145-46 (1939) ("ascertaining 'control' of one company by another" under the FCC Act is an "issue of fact"); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 41 (1st Cir. 2002) ("control is a question of fact that will not ordinarily be resolved summarily at the pleading stage") (citation omitted).

C. Immunity Does Not Extend to Agreements that Lead to the Elimination of One of the JOA Newspapers, Even if They are Styled an "Amendment" to the JOA

The limited antitrust immunity that the NPA provides does not extend to an agreement having the aim or effect of closing a JOA newspaper, even if the parties seek to camouflage their agreement as an "amendment" to a lawful JOA agreement. The NPA's plain language, its legislative history, and case law interpreting the Act all reject the blank check authority that the defendants claim allowed them to enter into an amendment that results in the elimination of one of the JOA newspapers. Def. Br. at 40.

As noted above, NPA immunity is narrow and attaches only to certain limited activities, such as printing and distribution. 15 U.S.C. §§ 1801, 1802(2). Actions taken to bring about the closure of one of the newspapers or the termination of the JOA fall outside the express language

of the NPA's exemptions. Calling such actions amendments, as defendants do here, does not save them from antitrust scrutiny. As discussed above, Congress made clear that the term "amend" in § 1803(a) of the NPA is limited only to "changes that might take place in the course of ordinary business operations." 116 Cong. Rec. 23173-74 (1970) (statement of Rep. Kastenmeier) [Attachment D]. But, as the Complaint alleges, the May 2004 agreements had nothing to do with ordinary JOA business operations. Compl. ¶¶ 19-20. The Gazette Company's goal here was to end the competition from the *Daily Mail* and terminate the JOA, not to continue ordinary business operations. *Id.* The Senate Judiciary Committee Report on the NPA spoke to this very issue when it explained that "if the agreement would result in the suspension of the only morning or afternoon newspaper then it is not exempted." S. Rep. No. 91-535, at 5 (1969) (describing the scope of Section 1803(a)) [Attachment H].

Every court examining the scope of immunity granted to a JOA formed before the NPA's enactment has agreed that the Act does not immunize agreements effectively terminating a JOA or causing a JOA newspaper to cease publishing. *Hawaii*, 99 F. Supp. 2d at 1248-52; *Reilly*, 107 F. Supp. 2d at 1203.

In the *Hawaii* case, the newspaper owners made the same argument defendants do here – that the NPA immunized their agreement terminating the JOA because the Act expressly authorized parties to "amend" pre-1970 JOAs. 99 F. Supp. 2d at 1251. The court rejected that argument and instead focused upon the effects of the agreement. *Id.* at 1244, 1251-52. The court refused, in its words, to "close its eyes to the practical effect of the agreement," which would have been closure of the *Star-Bulletin*. *Id.* at 1251. Looking to the NPA's stated purpose to preserve the publication of JOA newspapers (15 U.S.C. § 1801), the court held that "these actions receive

antitrust exemption only so long as they are taken to preserve the independent editorial and reportorial voices of competing newspapers." *Id.* at 1249. Further, the court found that the agreement between the parties "contravene[d] the stated purpose of the Newspaper Preservation Act because it will lead to the shutdown of the *Star-Bulletin* thirteen years sooner than otherwise would have occurred . . . GPC [the owner of the competing newspaper] *will, in effect, have bought out its only competitor* . . . ." *Id.* at 1249 (emphasis added).

The court in *Reilly* reached a similar conclusion – transactions having the effect of terminating JOAs are subject to "ordinary antitrust scrutiny." 107 F. Supp. 2d at 1203. The court examined whether the parties to a pre-1970 JOA could terminate the arrangement in circumstances where the termination could, but would not necessarily, result in the closing of a JOA newspaper. The court found that parties to a transaction, the effect of which is to terminate a JOA, "are not seeking to avail themselves of the [Act's] antitrust exemptions." *Id.* at 1203.[25]

The May 2004 agreements, and their effects as alleged in the Complaint, are identical to those in *Hawaii* and *Reilly* in three key respects. First, the May 2004 agreements, like the agreements in *Hawaii* and *Reilly*, ended the existing JOA. Compl. ¶ 21. Second, the Gazette Company, as the *Hawaii* court put it, "bought out its only competitor." *Hawaii*, 99 F. Supp. 2d at 1249; Compl. ¶¶ 3-4, 19-20, 35. Third, and most importantly, just as the transactions in *Hawaii* would have resulted in *Star-Bulletin* closing, the agreements at issue here were part of a plan to

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[25] The court emphasized that the NPA would not immunize such an alteration to a JOA: "Although inartful drafting of the [Act] leaves open the argument that termination of a JOA is exempt from antitrust scrutiny as an amendment to the agreement, the defendants here, *quite sensibly*, have not advanced this argument." *Id.* at 1203 (emphasis added).

shut down the *Daily Mail*.[26] Compl. ¶¶ 1, 5, 20-23.

Therefore, the Gazette Company's May 7, 2004 acquisition of the *Daily Mail*, which had as its ultimate objective the closure of that newspaper, is not exempted from antitrust scrutiny by the limited exemptions in the NPA.

CONCLUSION

The United States' Complaint alleges that the acquisition of the *Daily Mail* by the owners of the *Charleston Gazette*, and the related restructuring of Charleston Newspapers, ended competition between the newspapers and created a monopoly in the Charleston daily newspaper market in violation of the Clayton and Sherman Acts. Defendants' arguments that the antitrust laws do not apply to newspaper JOAs or their anticompetitive conduct are wrong, and do not justify or immunize their violations of the Clayton and Sherman Acts.

Contrary to defendants' assertions, the end of independent daily newspaper competition in Charleston need not be inevitable. The United States is pursuing this case to ensure that the competitive process determines the future of the two newspapers, rather than the Gazette Company's unilateral profit motive. If the Gazette Company's acquisition of the *Daily Mail* is rescinded, the *Daily Mail* will be able to resume its former role as an independent and vigorous competitor to the *Charleston Gazette*. Restoring the independent ownership and control of the *Daily Mail* will not require this Court to judge or regulate the editorial policies or content of the

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[26] Although Defendants dispute whether there was a plan to terminate publication of the *Daily Mail*, Def. Br. at 40, the United States's allegations that there was such a plan and that the Gazette Company started to implement it (by, for example, stopping *Daily Mail* promotions and discounts, stopping the solicitation of new subscriptions, and cutting the *Daily Mail*'s newsroom budget and staff substantially) must be accepted as true for purposes of this motion. Compl. ¶¶ 19, 22.

Daily Mail.

For the foregoing reasons, the United States respectfully requests that this Court deny defendants' motion to dismiss.

Respectfully submitted,

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October 5, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

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

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2007, 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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