No. 25-

IN THE

Supreme Court of the United States

LAS VEGAS SUN, INC.,

Petitioner,

v.

SHELDON ADELSON; PATRICK DUMONT; NEWS+MEDIA CAPITAL GROUP, LLC; LAS VEGAS-REVIEW JOURNAL, INC.; AND INTERFACE OPERATIONS, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-1804 (NPA), provides antitrust immunity for "joint operating agreements" (JOAs) between a failing newspaper and a stronger one so communities do not lose competitive and diverse viewpoints. All agree that JOAs predating the NPA do not require Attorney General "prior written consent." The Circuits, however, are now split over whether an amendment to a previously approved, *post*-NPA JOA needs another round of Attorney General signoff to be lawful.

The Circuits to address the issue—the D.C. and Sixth Circuits—have held that additional consent is not required. At most, an unapproved amendment might be subject to antitrust scrutiny, but it is lawful. The Department of Justice's contemporaneous implementing regulations reflect the same statutory interpretation.

In this case, the Ninth Circuit created a circuit split. It is the only court to hold that all amendments to previously approved, post-NPA JOAs require additional consent to be lawful. The Ninth Circuit invalidated the amended JOA between the *Las Vegas Sun* and *Las Vegas Review-Journal* and, on the same reasoning, sua sponte declared unlawful the DOJ's implementing regulations.

The question presented is:

1. Whether, under the NPA, an amendment to a previously approved, post-NPA JOA needs another Attorney General written consent to be lawful or to be entitled to antitrust immunity.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellee below) is the Las Vegas Sun, Inc.

Respondents (defendants-appellants below) are Sheldon Adelson; Patrick Dumont; News+Media Capital Group, LLC; Las Vegas-Review Journal, Inc.; and Interface Operations, LLC.

CORPORATE DISCLOSURE STATEMENT

The Las Vegas Sun, Inc., is a non-governmental, privately held corporate entity that is a wholly owned subsidiary of Greenspun Media Group, LLC. No publicly held company owns 10% or more of Petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Las Vegas Sun, Inc. v. Adelson*, No. 24-2287 (9th Cir.) (published opinion issued on August 4, 2025; order denying petition for panel rehearing and for rehearing en banc issued on September 11, 2025).

- *Las Vegas Sun, Inc. v. Adelson*, No. 2:19-cv-01667-ART-MDC (D. Nev.) (order denying motion to dissolve preliminary injunction issued on March 31, 2024).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

With paper, ink, and press, newspapers have recorded America's story and served a vital role in the functioning of democracy. They are the "papers of record" on which the Nation's history is written. From colonial printers, to the "penny press," to today's broadsheets, reporters have narrated events to inform the public. Editors have driven discourse. Dogged beat-writers have demanded government transparency. And the fourth branch has enforced another check-and-balance on the powerful.

Our country's experience has shown that the First Amendment benefits of a free press are amplified by a vibrant and competitive environment where rival papers vie for readers, scoops, and influence. The Republic and its communities profit from diverse newspaper viewpoints and varied ideological perspectives.

But the newspaper industry is tough. There are enormous barriers to entry, including economies of scale. Over time, as subscriber bases began to shrink, newspapers found it increasingly difficult to cover their costs. Consequently, many daily print newspapers folded.

So, in 1970, Congress enacted the Newspaper Preservation Act (NPA) to provide a life raft for sinking papers and their loyal readers. The NPA confers limited antitrust immunity for joint operating agreements (JOAs) between a failing newspaper and a stronger one. Under a JOA, the two newspapers combine non-editorial operations, like printing and delivery, and share in profits, but they maintain separate editorial and reportorial newsrooms. This allows the two newspapers to benefit

from economies of scale in operations, while maintaining editorial and reportorial competition. As a result, distinct voices and perspectives are preserved in a given market.

The statutory requirements for pre-NPA JOAs are well settled: they do not require Attorney General prior written consent. The Circuits, however, are now divided over whether an amendment to a previously approved, *post*-NPA JOA needs another Attorney General written consent.

According to 15 U.S.C. § 1803(b),"It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, *not already in effect*, except with the prior written consent of the Attorney General of the United States." (Emphasis added.)

Interpreting this statute, the D.C. Circuit, Sixth Circuit, and district court below held that an amendment to a previously approved, post-NPA JOA does not need another consent to be lawful. *Newspaper Guild v. Levi*, 539 F.2d 755 (D.C. Cir. 1976); *News Wkly. Systems, Inc. v. Chattanooga News-Free Press*, 986 F.2d 1422, 1993 WL 47197 (6th Cir. 1993); *Mahaffey v. Detroit Newspaper Agency*, 166 F.3d 1214, 1998 WL 739902 (6th Cir. 1998). These courts hold that, while the lack of Attorney General consent might subject an amended JOA to antitrust scrutiny, it is still lawful.

The Department of Justice's contemporaneous 1974 implementing regulations shared the same statutory interpretation. Those regulations provide that the NPA "does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General.... Joint newspaper operating

arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws." 28 C.F.R. § 48.1. The D.C. Circuit upheld these regulations as consistent with the NPA. *Newspaper Guild*, 539 F.2d 755.

The Ninth Circuit below expressly broke from the earlier decisions and created a fracture among the Circuits. The Ninth Circuit accused the D.C. and Sixth Circuits of a "wholesale disregard of the statutory text" and using a method of interpretation "from a bygone era of statutory construction that inappropriately resort[s] to legislative history in lieu of the statute's text and structure[.]"

The Ninth Circuit found that Section 1803(b)'s phrase "not already in effect" can only refer to JOAs that predate the NPA. It did not credit that previously approved, post-NPA JOAs are also "already in effect" *before* an amendment. The Ninth Circuit interpreted the NPA as requiring all post-NPA JOAs, including amendments, to obtain Attorney General consent.

Because of its conflicting interpretation, the Ninth Circuit became the first appellate court to hold that post-NPA amended JOAs without Attorney General consent are unlawful and lack antitrust immunity.

The Ninth Circuit did not stop there. It also became the first and only Circuit to invalidate the DOJ's NPA implementing regulations, thus creating another conflict with the D.C. Circuit on a different ground. Making matters worse, the Ninth Circuit struck down the regulations even though no party urged it to do so.

This case is exceptionally important to the Nation at large, the newspaper industry, and the *Las Vegas Sun* (*Sun*).[1] The Ninth Circuit's ruling upsets the uniform interpretation of Section 1803(b) and invalidates federal regulations that another Circuit has upheld. The ruling is also antithetical to First Amendment values. It severely restricts an available tool for newspapers to survive and harms readers' access to varied news and editorial perspectives.

The Ninth Circuit's ruling facilitates the potential demise of one of the two daily print newspapers—the *Sun*—in the Nation's 11th most populous county. The *Sun* and the *Las Vegas-Review Journal* (*Review-Journal*)[2] newspapers have been JOA partners since 1989, and the Las Vegas Review-Journal (RJ)[3] has been responsible for printing and delivering both newspapers. After investigating the 1989 JOA, the Attorney General approved it. In 2005, the parties amended it. Consistent with the DOJ regulations, the newspapers submitted the amended JOA to the DOJ. In response, the DOJ sent a "no action" letter and closed its investigation. The DOJ did not bring an enforcement action challenging the amended JOA. And no one suggested Attorney General consent was needed again for the amended JOA to be lawful.

Ten years after the amended JOA, new owners—the Sheldon Adelson family—bought the conservative-leaning

1. The "*Sun*" refers to the daily print newspaper itself. The "Sun" (non-italicized) refers to the *Sun*'s ownership entity.

2. The "*Review-Journal*" refers to the daily print newspaper itself.

3. The term "RJ" refers to defendants-respondents and those who control the *Review-Journal*.

Review-Journal and decided they no longer wanted to print or distribute the more progressive-leaning *Sun* because of the *Sun*'s editorial viewpoints. The Adelsons implemented anticompetitive steps to abuse the joint operation and drive the Sun out of business. For the first time, the RJ asserted that the amended JOA was unlawful because it did not have Attorney General written consent. If successful under the Ninth Circuit's ruling, the RJ will gain a monopoly overnight in Clark County's daily print newspaper market and the *Sun* will be on the brink of disappearing.

The RJ's scheme would not work in the D.C. or Sixth Circuits. The amended JOA unquestionably would be lawful in the Nation's capital or in Cincinnati. Yet the Ninth Circuit has declared the amended JOA invalid in Las Vegas.

This Court should grant review, resolve the split, and reverse the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion is reported at 147 F.4th 1103 and reproduced at App.1a-34a. The district court's opinion and order denying the RJ's motion to dissolve the preliminary injunction is not reported, but is available at 2024 WL 1382842 and reproduced at App.35a-101a.

JURISDICTION

The Ninth Circuit issued its opinion on August 4, 2025, App.1a, and denied a timely petition for panel rehearing or rehearing en banc on September 11, 2025. App.102a-103a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The NPA's relevant provision, 15 U.S.C. § 1803, is reproduced at App.104a-105a.

STATEMENT OF THE CASE

A. The Historical and Legal Framework.

In the early 1900s, sixty percent of newspapers were delivered in cities with two or more competitors. *Newspaper Guild v. Saxbe*, 381 F. Supp. 48, 50 (D. D.C. 1974).[4] But increasing economic difficulties led newspapers to explore ways to share the load. *See id.* Some competing newspapers started entering into JOAs in the 1930s. *Id.* The agreements generally ended any business and price competition between the two papers but each kept its own newsroom, editorial department, and corporate identity, thus preserving news and editorial competition. *See Citizen Pub. Co. v. U.S.*, 394 U.S. 131, 133 (1969). By the 1960s, there were about 22 JOAs between newspapers across the country. *Comm. for an Indep. P-I v. Hearst Corp.*, 704 F.2d 467, 473 (9th Cir. 1983).

Eventually, the DOJ started investigating the potential anticompetitive effects of JOAs and, later, filed an antitrust suit against one in Tucson, Arizona. *Id.* The DOJ's action sparked several bills in Congress to exempt then-existing JOAs from antitrust laws. *Id.*

While those bills meandered through Congress, this Court affirmed in *Citizen Publishing Co.* that the Tucson

4. *rev'd sub nom. Newspaper Guild v. Levi*, 539 F.2d 755 (D.C. Cir. 1976).

JOA violated the Sherman and Clayton Acts. 394 U.S. 131. The Court held that "[t]he restraints on competition with which the present decree deals comport neither with the antitrust laws nor with the First Amendment." *Id.* at 139.

Congress moved quickly to undo the Court's decision. Within two weeks, Congress introduced more legislation to exempt JOAs from antitrust laws. *Comm. for an Indep. P-I*, 704 F.2d at 473. The congressional record shows that the primary goal was to reverse *Citizen Publishing* "by allowing newspapers to enter into a JOA prior to the time the financially troubled newspaper is on its deathbed." *Id.* at 473, 474. Legislators believed that allowing certain joint operations "would serve the best interest of the people of the United States and the first amendment." *Id.* They advanced First Amendment values by salvaging the failing newspaper's independent editorial voice. *Id.*

The NPA was enacted on July 24, 1970. Congress's haste, unfortunately, did not produce its best draftsmanship and there is some residual ambiguity. *Newspaper Guild v. Levi*, 539 F.2d 755, 761 (D.C. Cir. 1976). But Congress's declaration of policy is clear. It states that it is in "the public interest [to] maintain[] a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. § 1801. It is also the Nation's "public policy … to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress *or is hereafter effected in accordance with the provisions of this chapter*." *Id.* (emphasis added).

The NPA cloaks JOAs with antitrust immunity in certain conditions. JOAs entered *before* the NPA's 1970

enactment do not need Attorney General approval. Section 1803(a) reads, in relevant part, "It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement … if at the time at which such arrangement was first entered into … not more than one of the newspaper publications … was likely to remain or become a financially sound publication." Subsection (a) continues with the following proviso: "*Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement."

On the other hand, for "future joint operating arrangements" entered *after* the NPA's enactment, Section 1803(b) states that "[i]t shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, *not already in effect*, except with the prior written consent of the Attorney General of the United States." (Emphasis added.) JOAs "already in effect" do not need another Attorney General stamp of approval. 15 U.S.C. § 1803(b).

Before "granting such approval"—*i.e.*, approval for a JOA "not already in effect"—the Attorney General must determine that no more than one newspaper was on solid footing (not failing) and that approving the JOA "would effectuate the policy and purpose of this chapter." *Id.*

The DOJ issued implementing regulations a short time later. Under the regulations, brand-new JOAs entered after July 24, 1970 must go through a detailed application process, notice-and-comment, and sometimes a hearing

if they desire immunity. 28 C.F.R. § 48.4 ("Application for approval of joint newspaper operating arrangement entered into after July 24, 1970"); *see also id.* §§ 48.6, 48.8, 48.10, 48.13. An assistant attorney general must prepare a report and the Attorney General must publish a written decision with findings, conclusions, and reasons based on the record. *Id.* §§ 48.7, 48.14.

The DOJ's contemporaneous understanding of Section 1803 was that all JOAs do not need Attorney General approval to be lawful. 28 C.F.R. Section 48.1 reflects the statutory language. It states, "[T]he [NPA] does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General." 28 C.F.R. § 48.1. Instead, "[t]he Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so." *Id.* The lack of Attorney General consent does not render the JOA unlawful, but the JOA remains at risk of an antitrust action. *See id.* ("Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws.").

Early Circuit court rulings mirror the DOJ's interpretation of Section 1803 and they upheld the implementing regulations against challenge. *See Newspaper Guild*, 539 F.2d 755.

B. The Attorney General Approves the Original 1989 JOA Between the Sun and RJ.

Since 1950, the *Sun* has been reporting the news and providing a unique liberal editorial perspective to Clark

County, Nevada. *See* App.7a. Over the years, the *Sun* has received many journalism awards and accolades, including a Pulitzer Prize.

Back in the 1980s, however, the paper was on the brink. *Id.* Revenues and circulation were declining and debt was mounting. *Id.* So, in 1989, the Sun and the RJ (then-owned by Donrey of Nevada, Inc.) entered into a JOA to preserve their competing editorial voices for the community. App.6a-8a; App.36a-37a.

Under the 1989 JOA, the newspapers maintained editorial and reportorial autonomy but the Sun gave up its own printing press and publishing infrastructure. App.7a; App.37a. In exchange, the RJ gained complete operational and financial control for the new joint operation. App.7a; App.37a. The RJ became responsible for managing, printing, and operating the non-editorial business functions for both papers. App.7a; App.37a.

The parties also agreed that the RJ would publish the *Review-Journal* as a morning edition, and the *Sun* as the afternoon paper. App.7a. On weekends and holidays, however, both newspapers were delivered as a bundle or joint edition. *Id.* Financially, the papers split profits with the RJ receiving the lion's share. App.7a; App.37a-38a. The 1989 JOA had a 50-year term—set to expire in 2040. App.57a. In the end, the Sun entered the 1989 JOA to keep itself alive but it became functionally dependent on the RJ.

The parties submitted the 1989 JOA to the Attorney General for approval. App.6a-7a. After investigating, the Attorney General concluded that the Sun's dire situation was likely irreversible and it qualified as a "failing

newspaper" under the NPA. App.7a. The Attorney General found that approving the 1989 JOA would serve the NPA's purpose and policy by allowing the *Sun*'s independent editorial voice to survive. App.7a-8a. The Attorney General approved the 1989 JOA in June 1990. App.6a-7a.

C. The Sun and Review-Journal Amend the JOA in 2005.

Fifteen years later, in June 2005, the papers amended the 1989 JOA. App.8a. The Sun and the RJ (owned then by DR Partners) signed an "Amended and Restated Agreement." *Id.*; App.38a. The Amended JOA continued the 50-year term from the 1989 JOA. App.57a. The papers remained editorially and reportorially independent. App.71a-72a. But the papers stopped publishing separately during the week and, instead, started publishing as a bundle every day like they did on weekends or holidays under the 1989 JOA. App.8a; App.38a. The *Sun* became a regular 7-to-10 page insert inside the *Review-Journal*. App.8a; App.38a.

The papers also revised the joint economic structure. They replaced the profits-split with a formula based on EBITDA. App.8a. The Sun had audit and arbitral rights if it questioned the calculations. *Id.* Although the Amended JOA tweaked parts of the 1989 JOA, "the material elements of the 1989 JOA that eliminated price and other non-editorial and non-reportorial competition, elements previously approved by the Attorney General, remain[ed] unchanged." App.59a. And the joint distribution scheme was not new; it merely expanded from weekends, holidays, and special editions. *Id.*

The parties submitted the Amended JOA to the DOJ for vetting. App.8a-9a. The DOJ conducted a multi-year review process and investigation. App.8a-9a; App.57a-59a. It issued civil investigative demands for documents, interrogatories, and depositions. App.9a; App.57a. But, unlike the 1989 JOA approval process for a new JOA, the DOJ did not publish the Amended JOA in the Federal Register, issue a report, or accept public comment. App.59a.

Similarly, the Attorney General did not enter any formal decision for the Amended JOA. App.8a; *see also* 28 C.F.R. § 48.14. Rather, in 2008, the DOJ sent a letter to the parties saying it had "closed its investigation" into the "2005 amendments to the parties' Joint Operating Agreement." App.57a-58a. The letter stated the DOJ's decision "was not based on a conclusion that the 2005 amendments to the parties' [JOA] are protected by the antitrust immunity afforded by the [NPA]." App.9a. "Accordingly," the DOJ explained, "the parties' conduct pursuant to those amendments—and in particular conduct *not integral* to the parties revised arrangements for the joint distribution … the effects of which we reviewed as part of our investigation—remains subject to antitrust scrutiny." CA.9.3-ER-427 (emphasis added); App.9a.

Both parties considered the DOJ's letter as a "no-action letter." App.58a. The DOJ gave no hint that it considered the Amended JOA "unlawful," that conduct which *was integral* to the joint distribution of the newspapers under the revised arrangement was not immune, or that the undisturbed elements of the parties' 1989 combination somehow lost immunity. The DOJ would not have issued the no-action letter or closed its investigation if it suspected an antitrust violation.

D. The RJ Tries to Terminate the Amended JOA and Monopolize the Daily Print Newspaper Market in Clark County.

The newspapers operated under the Amended JOA for 14 years—and through several disputes—without anyone suggesting the Amended JOA was unlawful or needed Attorney General approval.

That is, until the Adelson Family bought the conservative *Review-Journal*. *See* App.40a; App.67a-68a. Immediately after the purchase, the Adelsons explored ways to stop publishing the *Sun*'s competing liberal viewpoints. The RJ hatched a plot to starve the Sun out of business. It began charging certain improper costs against the joint operation, and manipulating the accounting, to artificially lower the Sun's profit share. App.41a-42a; App.67a-68a. The RJ also stopped marketing the *Sun* to tank its brand and reader awareness. App.68a.

The Sun has not received *any* profits payment from the joint operation since 2017, after the Adelsons implemented their scheme. App.67a. The RJ's intentional monetary deprivation has weakened the Sun's ability to journalistically compete and convey its perspectives in the marketplace. App.67a-68a.

At first, the Sun thought the RJ's new owners were simply breaching the Amended JOA's terms so the Sun filed a state court action based on state law grounds. App.41a. The parties went to arbitration and the Sun won. *See id.*

Unbeknownst to the Sun, however, Respondents had more sinister motives. After losing in arbitration, the

RJ counterclaimed in the state court action seeking to terminate the Amended JOA based on alleged breaches. App.9a. Later, the RJ argued for the first time that the Amended JOA was not "amended" after all. CA.9.2-SER-460-461. The RJ contended the "Amended and Restated" JOA was really a "new" JOA that required Attorney General approval to be lawful. *Id.* at 461. Even though they stepped into the shoes of the *Review-Journal*'s prior owners, App.81a, the Adelsons feigned that they were unaware when they bought the paper that the Amended JOA did not have Attorney General consent. *See* App.10a. They sought to terminate the Amended JOA and to immediately stop printing the *Sun*. App.9a.

Since the Sun has sacrificed its own publishing capability, Clark County readers would have immediately lost the *Sun*'s competing editorial voice and the RJ would have given itself a monopoly in the daily print newspaper market overnight.

E. The RJ Stipulates to a Federal Court Injunction Before Trying to Dissolve it.

With the RJ's anticompetitive motives finally exposed, the Sun sued in federal court to continue the *Sun*'s publication. App.9a-10a. The Sun invoked federal question jurisdiction and generally alleged that the RJ's efforts to terminate the Amended JOA sought to monopolize in violation of the Sherman Act. App.10a.

The Sun planned to seek a preliminary injunction but the RJ stipulated to maintain the status quo pending a final judicial decision. *Id.* Under the stipulation and order, the

RJ agreed to "continue to perform under" the Amended JOA and to "refrain from taking any non-judicial steps to terminate" the Amended JOA until "after the entry of final judgment by a court of competent jurisdiction permitting such termination." *Id.*

After years-long discovery, the parties cross-moved for summary judgment. App.11a. Each side sought judgment as a matter of law on the RJ's assertion that the Amended JOA was unlawful and unenforceable under the NPA for lack of Attorney General consent. *Id.* The RJ also moved to dissolve the stipulated injunction for the same reason. *Id.*

F. The District Court Agrees with the Sun and Other Circuit Courts that an Amended JOA Does Not Require Written Attorney General Consent.

The district court granted summary judgment to the Sun, denied the RJ's cross-motion, and refused to dissolve the injunction. App.11a; *see also* App.35a-101a. The district court recognized that the central issue was "whether the [NPA] required the Attorney General to sign the 2005 JOA." App.52a.

The district court held that "the text and structure of the NPA [and] case law" show "there is no signature requirement for amended JOAs[.]" *Id.* "A plain reading of the NPA," the district court observed, "indicates that signatures are not required for amendments to existing JOAs." App.53a. The district court concluded that only "new" JOAs require written approval because they are not "already in effect" under Section 1803(b). App.56a. "Only new JOAs, those 'not already in effect,' require 'prior

written consent of the Attorney General.'" *Id.* (quoting 15 U.S.C. § 1803(b)).

The district court concluded that the Amended JOA's text and history show that it was an amended JOA, not a new JOA. App.57a. As a result, the district court was unsurprised that the Amended JOA did not have Attorney General consent. The Amended JOA's missing Attorney General approval was "not a defect, but rather consistent with its being an amended JOA." App.58a.

The district court's decision relied on—and tracked—the D.C. and Sixth Circuit opinions holding that an amended JOA does not require written Attorney General approval to be lawful. App.56a-57a; App.60a. Like the district court, those Circuits have held that missing Attorney General consent may expose parties to antitrust liability but does not render the JOA invalid, unlawful, or unenforceable. App.60a.

The district court noted that "[t]he RJ has not identified any courts that have reached an alternative conclusion." App.57a.

G. The Ninth Circuit Deviates from the D.C. and Sixth Circuits, and Invalidates Federal NPA Regulations.

The RJ appealed the district court's denial of its motion to dissolve the stipulated injunction. App.12a. The RJ relied on Section 1803(b) and maintained the position that the Amended JOA was unlawful without Attorney General approval. App.16a. Respondents did not ask the Court to invalidate any DOJ regulation.

The Ninth Circuit reversed. It openly split from the D.C. and Sixth Circuits to become the first court to hold that all amended JOAs need Attorney General prior written consent. App.1a-34a. Even though the Ninth Circuit conceded some ambiguity exists, App.23a-24a; App.28a-29a, it impugned the D.C. and Sixth Circuits of a "wholesale disregard of the statutory text" and using a method of interpretation "from a bygone era of statutory construction that inappropriately resort[s] to legislative history in lieu of the statute's text and structure[.]" App.20a-21a (cleaned up).

The Ninth Circuit maligned its sister courts and the district court, saying they were unable "to point to any statutory language that would support their view that the effect of § 4(b) is not to *require* the prior approval of the Attorney General but merely to deny the antitrust exemption[.]" App.20a.

The Ninth Circuit labeled "as contrary to statutory language" the district court's reading that Subsection (b) "reaches only *new* JOAs and does not apply to *amended* JOAs." App.26a (cleaned up).

The Ninth Circuit also held that the phrase "'not already in effect' is unmistakably a reference to JOAs that predate the enactment of the NPA." App.26a. It brushed aside textual clues pointing the other direction. App.30a n.5. And it found no need to consider legislative history or contemporaneous agency interpretations to resolve ambiguities. *See* App.17a-22a; App.33a. Instead, the court announced that "a JOA adopted before the NPA is one that is 'already in effect,' and a JOA entered into

after the NPA, even if it amends a prior JOA, is one that is 'not already in effect.'" App.26a.

In the Ninth Circuit's view—contrary to other courts and the DOJ's regulations—the Amended JOA does not merely miss out on antitrust immunity. App.17a-20a. Rather, the Amended JOA is entirely unlawful without the Attorney General's signature. App.18a.

At bottom, the Ninth Circuit concluded that, "[b]y its terms, § 4(b) applies to *all* post-NPA JOAs, including amended post-NPA JOAs." App.33a (emphasis added). "As we have explained," the court continued, "§ 4(b)'s flat prohibition on any post-NPA JOA without Attorney General approval is broad enough to include, by its plain terms, both brand-new post-NPA JOAs *and* amended post-NPA JOAs." App.30a. Since the Amended JOA "was 'not already in effect' when the NPA was enacted," and lacks Attorney General consent, it is unlawful and unenforceable. App.33a.

On the same rationale, in one paragraph, the Ninth Circuit sua sponte held the DOJ's 1974 implementing regulations unlawful as directly contrary to statutory language. App.21a-22a. The Ninth's Circuit's terse analysis does not specify the precise "implementing regulations" it voided.

The Sun sought panel rehearing or rehearing en banc but was denied on September 11, 2025. App.102a-103a. The Ninth Circuit stayed the mandate and the Sun has timely filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Creates a Circuit Split.

1. The Ninth Circuit openly split from the D.C. and Sixth Circuits on this important issue of antitrust law with First Amendment implications. *See* S. Ct. R. 10(a). The D.C. Circuit was the first appellate court to squarely address the statute at issue here. In *Newspaper Guild v. Levi*, 539 F.2d 755 (D.C. Cir. 1976), the D.C. Circuit asked: "Does section 4(b) of the [NPA] make it unlawful to enter a joint newspaper operating agreement without the prior approval of the Attorney General, or does it rather require prior approval only for parties seeking an antitrust exemption for such an agreement?"

The D.C. Circuit was reviewing a district court decision that considered the text, surveyed the legislative history, and decided that, without Attorney General approval, a JOA was per se illegal rather than simply subject to antitrust laws. *Saxbe*, 381 F. Supp. at 50. The *Newspaper Guild* district court, like the Ninth Circuit here, invalidated the DOJ's implementing regulations as contrary to the statute. *Id*. at 53.

On appeal, the D.C. Circuit reversed with a 2-to-1 vote. The majority started with the text. It invoked the non-controversial statutory maxim that sections "should not be read in isolation from the context of the whole Act, and that … we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy." *Newspaper Guild*, 539 F.2d at 757-58 (internal quotations omitted).

The D.C. Circuit found the text murky. It lamented Congress's swift action "with less than the desired degree of precision," where a more "[c]areful draftsmanship would have undoubtedly produced a provision whose language *less ambiguously* indicates the intended result." *Id.* at 761 (emphasis added). The statutory ambiguity therefore "alert[ed] the court to the need for delving more deeply into the congressional purpose." *Id.* Accordingly, as customary, the court considered legislative history. The court's use of legislative history was, in its words, "contextual." *Id.*

From its own review of the text and legislative history, the D.C. Circuit determined that the district court's interpretation of Subsection (b) was not "compelled *either* by the language of the statute *or* its underlying legislative history." *Id.* at 758 (emphasis added). The court could not locate anything "indicating that it is unlawful to proceed without the Attorney General's written consent." *Id.* at 760. The court thought it strange that the district court's ruling would deem unlawful even those JOAs that did not have anticompetitive effects simply because they lacked Attorney General authorization. *Id.* at 759-60. The NPA's purpose was the opposite: to immunize agreements that would have been unlawful under antitrust laws; not to render unlawful agreements that would have been lawful under antitrust laws beforehand. *Id.* at 760-61.

As a result, the D.C. Circuit held, under Subsection (b), "to have the benefit of an antitrust exemption, prior written consent is required; but simply to put a joint operating arrangement into effect, consent is not required, though absent approval the arrangement remains fully subject to the antitrust laws." *Id.* at 760.

Over 15 years later, the Sixth Circuit adopted the same interpretation. In *News Weekly Systems, Inc. v. Chattanooga News-Free Press*, 986 F.2d 1422, 1993 WL 47197, at *2 (6th Cir. 1993), the Sixth Circuit, too, held that Attorney General consent is not needed to effectuate a post-NPA JOA: consent is only needed to immunize the JOA from full antitrust scrutiny. The court found there was "no case law, *statutory language*, or legislative history that would even arguably justify" the opposite result. *Id.* (emphasis added). The court considered the opposing position—the Ninth Circuit's position here—as frivolous. *Id.* at *3. The Sixth Circuit located no "single authority in support of [other] arguments[.]" *Id.*

Then, in *Mahaffey v. Detroit Newspaper Agency*, 166 F.3d 1214, 1998 WL 739902, at *1-2 (6th Cir. 1998), the Sixth Circuit affirmed a lower court's holding that a post-NPA JOA that is later amended is not unlawful for lack of Attorney General approval. There, as here, the papers amended their post-NPA JOA and submitted it to the DOJ; however, the Attorney General did not formally approve it. *Id.* at *1. Nor did the agency move against it. *Id.*

As with the RJ, the *Mahaffey* plaintiffs argued that "newspapers seeking to amend a post-1970 joint operating agreement were required to obtain approval from the Attorney General for the entire amended agreement, including the parts that had already received approval." *Id.* at *2. They contended that the amendments "created a new JOA and that Defendants were required once more to go through the JOA approval process." *Id.* (quotations omitted). "Any unapproved amendment to the JOA," the plaintiffs asserted, "strips the entire JOA of antitrust immunity and requires the parties to the agreement to start over." *Id.* (quotations omitted).

The Sixth Circuit disagreed. It rejected "the notion that failure to seek and obtain approval of the amendment stripped even the original joint operating agreement of antitrust immunity." *Id.* at *2. The Sixth Circuit affirmed the district court's conclusion that a JOA does not lose its antitrust immunity by merely filing an amendment. *Mahaffey v. Detroit Newspaper Agency*, 969 F. Supp. 446, 448 (E.D. Mich. 1997). "At most, Defendants might lose antitrust immunity for the actions taken in implementing the amendment[.]" *Id.* Even so, it would defy common sense to "requir[e] the parties to a JOA to go through the cumbersome approval process (including possible judicial review) for every amendment, no matter how minor[.]" *Id.*

2. The Ninth Circuit below decreed that these earlier Circuits were wrong and split away. It expressly called out the D.C. and Sixth Circuit decisions in *Newspaper Guild*, *News Weekly*, and *Mahaffey*. App.17a; App.20a-22a; App.33a n.7. The Ninth Circuit rejected *Newspaper Guild*—and the Sixth Circuit's case law relying on it—"as squarely foreclosed by the plain language of the statute." App.17a.

Although (as shown above) the D.C. and Sixth Circuits started with the text, the Ninth Circuit criticized them as showing a "wholesale disregard of the statutory text" and using a method of interpretation "from a bygone era of statutory construction that inappropriately resort[s] to legislative history in lieu of the statute's text and structure[.]" App.20a-21a (cleaned up).

Yet after peeking at the text—like the other courts—the Ninth Circuit acknowledged the NPA was ambiguous but without using the label. The Ninth Circuit noted

that the NPA was poorly drafted and used phrases with "no discernible rhyme or reason." App.23a-24a; *see also* App.28a (acknowledging subsection could be read two ways).

When a statute is ambiguous, courts are supposed to look for other hints about statutory meaning, including legislative history even if the congressional record is not the *only* clue or the *dispositive* proof. *See Delaware v. Pennsylvania*, 598 U.S. 115, 138-39 (2023) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text.") (internal quotations omitted); *see also United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because … only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

Congress's slipshod drafting should have led the Ninth Circuit to at least consider legislative history and other indicators.[5] But, despite Section 1803's ambiguities, and the contradictory Circuit holdings, the Ninth Circuit declared the language "clear and unequivocal." App.18a.

After relegating the D.C. and Sixth Circuits' interpretive methods to the dust bin, the Ninth Circuit

5. The Ninth Circuit previously held that "the [NPA] should receive a commonsense construction," as gleaned from its text, context, and purpose. *See Committee for an Independent P-I*, 704 F.2d at 478, 480-82.

split from them and became the first appellate court to hold "§ 4(b) applies to *all* post-NPA JOAs, including amended post-NPA JOAs." App.33a (emphasis added); *see also* App.30a ("§ 4(b)'s flat prohibition on any post-NPA JOA without Attorney General approval is broad enough to include, by its plain terms, both brand-new post-NPA JOAs *and* amended post-NPA JOAs.").

The Ninth Circuit stands alone in its holding that an amendment to a previously approved, post-NPA JOA is both unlawful *and* lacking in antitrust immunity. Two other Circuits have held that JOAs, including subsequently amended JOAs, without Attorney General consent are lawful even if they might lack antitrust immunity.

3. The Ninth Circuit erred by deviating from the other Circuits. The D.C. and Sixth Circuits correctly saw that Section 1803(b) is, at least, unclear about whether an amendment to a previously approved, post-NPA JOA needs a second approval to be lawful—let alone to be immune from antitrust laws. The uncertainty primarily stems from the clause "not already in effect."

The Ninth Circuit simply assumed that "not already in effect" referenced the NPA's effective date rather than a previously approved, post-NPA JOA that was "already in effect." App.26a. Without analysis, the court announced that "§ 4(b)'s exclusion of JOAs 'already in effect' *is unmistakably* a reference to JOAs that predate the enactment of the NPA[.]" *Id.* (emphasis added).

To be sure, as the Ninth Circuit found, "a JOA adopted before the NPA is one that is 'already in effect[.]'" *Id.* But it is not obvious that a previously approved, post-NPA JOA

is not also "already in effect" *before* an amendment. Such JOAs can reasonably be considered "already in effect."

Indeed, while not controlling, the statutory headings may indicate the meaning of ambiguous text. *United States v. Quality Stores, Inc.*, 572 U.S. 141, 150 (2014) ("Captions, of course, can be a useful aid in resolving a statutory text's ambiguity.") (internal quotations omitted); *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947) (stating that headings are tools available to resolve doubts or ambiguities in words or phrases).

Subsection (a)'s heading says that it applies to JOAs "entered into prior to July 24, 1970." On the other hand, Subsection (b)'s heading says that it applies to "future joint operating arrangements," *i.e.*, after July 24, 1970. The "not already in effect" phrase is found in Subsection (b), which indicates that JOAs approved in the "future"—*after* July 24, 1970—will be considered "already in effect."

The Ninth Circuit buried the headings' significance in a footnote. App.30a-31a n.5. It minimized their value as "editorial additions … entitled to no weight." App.31a n.5. Instead, the Ninth Circuit fixated on how Congress could have written the statute differently if the other Circuits were right. App.18a-19a, 30a. This Court gives little credit to these kinds of "Congress would have" or "Congress could have" conjectures. *See Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 658-59 (2020) ("Here, again, Congress could have written the law differently [by rewording or rephrasing]…. But, once again, that is not the law we have."). The Ninth Circuit, of course, did not consider that Congress "could have" been clearer in its direction too.

The Ninth Circuit used its conflicting public policy opinions to override the other Circuits. Setting aside that public policy has little role if the statute is as clear as the Ninth Circuit surmised, the Ninth Circuit thought "the district court's narrow construction of § 4(b) would seemingly create an odd gap in the statute in which amendments to *post*-NPA JOAs—no matter how significant—would not be subject to *any* limitations or requirements at all." App.27a. In contrast, courts in the Sixth Circuit thought interpretations like the Ninth Circuit's would lead to the odd outcome that "the parties to a JOA [need] to go through the cumbersome approval process (including possible judicial review) for every amendment, no matter how minor[.]" *Mahaffey*, 969 F. Supp. at 448.

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All of this shows that the "already in effect" phrase in Subsection (b) is ambiguous because it can be understood in two or more reasonable but conflicting ways. *See Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (defining ambiguity). The phrase can be reasonably understood as a reference to pre-NPA JOAs or to previously approved, post-NPA JOAs that were "already in effect" before amendment. As a result, Subsection (b) is ambiguous and the Ninth Circuit should have considered statutory context, legislative history, and other indicators to lift the fog like the D.C. and Sixth Circuits properly did.

The D.C. and Sixth Circuits resolved the ambiguity one way and the Ninth Circuit went a different direction. This Court should grant certiorari to settle the conflicting positions between the Circuits over the interpretation of Section 1803(b).

B. The Question Presented is Important.

Through the NPA, Congress expressed the national policy "of maintaining a newspaper press ... competitive in all parts of the United States" and "to preserve the publication of newspapers in any city, community, or metropolitan area." 15 U.S.C. § 1801. Even though JOAs are an endangered species, the Ninth Circuit's decision undermines this policy and potentially hastens the opposite. The Ninth Circuit's restrictive approach to JOA amendments also reduces the attractiveness of future JOAs to other newspapers in need.

Since 1989, the Sun has been operationally dependent on the RJ to deliver the Sun's competing viewpoint to readers. Because of the JOA with the RJ, the Sun now lacks the infrastructure necessary to print and distribute itself. The Sun surrendered those capabilities in exchange for the combined operation. The Ninth Circuit's idiosyncratic and egregiously wrong decision pulls the rug out from under the Sun. The decision here once again puts the Sun back on the brink of failure and in danger of losing its voice. Meanwhile, the RJ is on the precipice of gaining a monopoly.

Nevadans are in danger of losing their ability to read the *Sun* and learn the competing editorial viewpoints that are critical to an informed democracy, impinging First Amendment values. *See Comm. for an Indep. P-I*, 704 F.2d at 474 (Congress "believed that authorizing certain joint action between newspapers would serve the best interest of the people of the United States and the first amendment."). "The [public] interest is served by preserving the independent editorial voice of the newspaper in financial distress." *Id.*

Clark County, and Nevadans broadly, will be irreparably harmed if the *Sun* is shuttered along with "the concomitant loss of independent editorial and reportorial voices," as well as the "loss of … jobs and the loss of competition … creators of news, editorial, and entertainment content." *See Hawaii ex rel. Anzai v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241, 1244-45 (D. Haw. 1999).[6]

The Ninth Circuit's decision has ramifications outside Nevada too. In creating a circuit split, the Ninth Circuit generically invalidated an unknown number of the DOJ NPA regulations "endorsed" in the D.C. Circuit's *Newspaper Guild* opinion. App.21a. The Ninth Circuit perfunctorily declared "the reading of § 4(b) reflected in the DOJ regulations and endorsed in *Newspaper Guild* is directly contrary to the statutory language and must be rejected." App.22a. The court did not specify the precise regulation(s) it was "reject[ing]." *Id.* The newspaper industry is left guessing which regulations still apply and which do not.

Rather than strike down the regulations, the court should have given them more weight in the analysis. "[T]he contemporary and consistent views of a coordinate branch of government can provide evidence of the law's meaning." *Bondi v. VanDerStok*, 604 U.S. 458, 481 (2025). The DOJ issued its notice of proposed rulemaking a year after the NPA's enactment. *Newspaper Guild*, 539 F.2d at 757 (citing 36 Fed. Reg. 20435 (1971)). The proposed regulation stating that the NPA does not require written consent for all JOAs became effective as an interim regulation in

6. *aff'd sub nom. State of Hawaii v. Gannett Pac. Corp.*, 203 F.3d 832 (9th Cir. 1999).

1974. This has been the uninterrupted interpretation of the DOJ and courts ever since.

The regulation(s) is therefore strong evidence of the original meaning of the statute—the meaning given by the D.C. and Sixth Circuits, the district court, the Sun, and, for decades, the RJ. While the Ninth Circuit might not have been required to completely defer to the DOJ's interpretation, it gave the DOJ's longstanding interpretation short shrift.

The Ninth Circuit invalidated an untold number of NPA regulations even though the D.C. Circuit had upheld them years ago. This Court's review is justified when a circuit court wipes 50-year-old regulation(s) off the books. *See* S. Ct. R. 10(c).

C. This Case Presents a Clean Vehicle.

This case is an ideal vehicle to address this important antitrust issue with First Amendment overtones. The question presented has been preserved and raised cleanly. It has been sharpened through many rounds of briefing in the courts below. The district court denied the RJ's motion to dissolve the injunction "solely on the ground that the JOA did not violate the NPA." App.15a. The RJ appealed "rely[ing] on § 4 (b) of the NPA[.]" App.16a. And the Ninth Circuit reached the merits of the issue. The court thoroughly analyzed the statutory provisions and relevant decisions—even if incorrectly.

The Ninth Circuit's decision is published and expressly rejects the D.C. Circuit's published decision on which the Sixth Circuit relied. Thus, precedents in three Circuits will remain in conflict unless this Court grants review.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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December 10, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2287
D.C. No. 2:19-cv-01667-ART-MDC

LAS VEGAS SUN, INC.,

Plaintiff-Appellee,

v.

SHELDON ADELSON; PATRICK DUMONT;
NEWS+MEDIA CAPITAL GROUP, LLC;
LAS VEGAS REVIEW-JOURNAL, INC.
INTERFACE OPERATIONS, LLC d/b/a ADFAM,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Nevada
Anne R. Traum, District Judge, Presiding

Argued and Submitted December 5, 2024
San Francisco, California

Filed August 4, 2025

Before: Daniel P. Collins, Lawrence VanDyke, and
Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Collins

Appendix A

OPINION

COLLINS, Circuit Judge:

In 1990, the U.S. Attorney General approved a 1989 joint operating arrangement ("JOA") between the owners of the *Las Vegas Review-Journal* and the *Las Vegas Sun*, pursuant to the Newspaper Preservation Act ("NPA" or "the Act"). 15 U.S.C. § 1801 *et seq.* The NPA seeks to preserve otherwise failing newspapers by granting them an exemption from the antitrust laws allowing them, with the Attorney General's "prior written consent," to combine publishing operations with another newspaper while preserving the independence of the respective newspapers' "editorial [and] reportorial staffs." *Id.* §§ 1802(2), 1803(b). In the absence of such advance approval, however, the NPA generally provides that such JOAs are "unlawful." *Id.* § 1803(b).

In 2005, the parties to the 1989 JOA submitted an amended JOA to the U.S. Department of Justice, but they neither sought nor obtained written approval from the Attorney General. When the new owners of the *Las Vegas Review-Journal* later sought in 2019 to terminate the 2005 JOA on state-law grounds, the owner of the *Las Vegas Sun* brought this suit against those owners and several affiliated persons, alleging that Defendants' efforts to terminate the 2005 JOA violated the antitrust laws. Although the parties initially stipulated to an order requiring them to continue to perform under the 2005 JOA pending the litigation, Defendants later moved to dissolve that injunctive order on the ground that the 2005

JOA was unlawful and unenforceable because it had not been approved by the Attorney General under the NPA. The district court denied Defendants' motion to dissolve the injunction, concluding that the Attorney General's approval was not required by the NPA. Defendants have timely appealed that order pursuant to 28 U.S.C. § 1292(a)(1). We reverse.

I

We begin by providing a brief overview of the relevant statutory background, which provides important context for the ensuing discussion of the factual and procedural history of this case.

A

In *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), the Supreme Court affirmed a decree invalidating, under §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act, a JOA between two Tucson, Arizona newspapers, as well as the subsequent merger of the two newspaper companies. *Id.* at 134-35. The Tucson JOA was one of nearly two dozen such arrangements throughout the United States. *Committee for an Indep. P-I v. Hearst Corp.*, 704 F.2d 467, 473 (9th Cir. 1983). The Tucson JOA, like those in other jurisdictions, was ostensibly an effort to maintain editorial diversity by allowing an otherwise failing newspaper to preserve its "own news and editorial department," while "end[ing] any business or commercial competition between the two papers." *Citizen Publ'g*, 394 U.S. at 133-34. But the Supreme Court held that, in the

Government's enforcement action against the Tucson JOA, the district court correctly concluded that the defendants had failed to satisfy the requirements of the so-called "'failing company' defense—a judicially created doctrine." *Id.* at 136. Specifically, the Court agreed that there was no showing that the assertedly failing newspaper was "then on the verge of going out of business" or that, if that newspaper was to be sold, its cross-town rival was "the only available purchaser." *Id.* at 137-38 (citation omitted).

Congress promptly responded to *Citizen Publishing* by enacting the NPA, *see* Pub. L. No. 91-353, 84 Stat. 466 (1970), which has been classified as Chapter 43 of the unenacted Title 15 of the United States Code. *See* 15 U.S.C. § 1801 *et seq.* The declared policy of the Act is to "maintain[] a newspaper press" that is "editorially and reportorially independent and competitive in all parts of the United States" by "preserv[ing] the publication of newspapers" in any area "where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions" of the NPA. *Id.* § 1801. The Act seeks to accomplish this goal by creating a limited express exemption from the antitrust laws for certain existing and future newspaper JOAs.

Specifically, § 4(a) of the Act generally exempts then-existing newspaper JOAs from certain antitrust laws—including the provisions at issue in *Citizen Publishing*—if, at the time the JOA "was first entered into, . . . not more than one of the newspaper publications involved in the performance of such arrangement was likely to

remain or become a financially sound publication." 15 U.S.C. § 1803(a). This requirement to show only that the weaker newspaper was likely to remain financially unsound was intended to be a less stringent standard than *Citizen Publishing*, which we have described as essentially requiring a showing that "the financially troubled newspaper [was] on its deathbed." *Committee for an Indep. P-I*, 704 F.2d at 474.

For JOAs entered into after the Act's passage, § 4(b) of the Act grants a comparable antitrust exemption, if the parties obtain "the prior written consent of the Attorney General of the United States." 15 U.S.C. § 1803(b). That consent may be granted, under the Act, if the Attorney General determines (1) that the weaker newspaper is a "failing newspaper," *i.e.*, that it "is in probable danger of financial failure," *id.* § 1802(5); *see also id.* § 1803(b); and (2) "that approval of such arrangement would effectuate the policy and purpose" of the NPA, *id.* § 1803(b). Although this, too, was intended to be a less stringent standard than *Citizen Publishing*, we have held that it is nonetheless stricter than the "financially sound standard" applicable to then-existing JOAs under § 4(a). *Committee for an Indep. P-I*, 704 F.2d at 477; *see also id.* at 480 (holding that the "probable danger" standard requires a showing that, if "analyzed as a free-standing entity," the "failing newspaper" would probably "be closed and an editorial voice lost"). Section 4(b) states, however, that, in the absence of the Attorney General's "prior written consent," it "shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect." 15 U.S.C. § 1803(b).

With respect to pre-NPA JOAs that are amended or renewed after the enactment of the NPA, the statute provides that the "terms" of any such renewed or amended JOA "must be filed with the Department of Justice" and that no such amendment may "add a newspaper publication or newspaper publications to such arrangement." 15 U.S.C. § 1803(a).

Several years after the NPA's passage, the U.S. Department of Justice ("DOJ") promulgated regulations implementing the Act, and those regulations remain in effect today in substantially unchanged form. *See* 28 C.F.R. § 48.1 *et seq.* Even though the statute explicitly states that it "shall be unlawful" to enter into or enforce a post-NPA JOA "except with the prior written consent of the Attorney General," 15 U.S.C. § 1803(b), the DOJ's regulations took the position that post-NPA JOAs were not *required* by the Act to obtain the prior approval of the Attorney General, *see* 28 C.F.R. § 48.1. Rather, the regulations opine that the NPA merely "provide[s] a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so." *Id.* The regulations adopting that construction were upheld, by a divided vote, in *Newspaper Guild v. Levi*, 539 F.2d 755, 755-56 (D.C. Cir. 1976).

B

In June 1990, Attorney General Dick Thornburgh approved a 1989 JOA between the owner of the *Las Vegas Review-Journal* (then Donrey of Nevada, Inc. ("Donrey")) and the owner of the *Las Vegas Sun* (*i.e.*, Las Vegas Sun,

Inc. ("LVSI")). In his written opinion explaining his approval, Attorney General Thornburgh briefly sketched the history of the two papers. The newspaper now known as the *Las Vegas Review-Journal* began publication in 1909 and "was the only daily newspaper serving the area" until the *Las Vegas Sun* was introduced in 1950. Both papers continued publication for many years, but by the late 1980s, the *Sun* was in substantial financial trouble. The *Sun* had "lost money every year since 1981"; its advertising revenues had declined "every year since 1982, without exception"; and it had total debts of $11 million. In addition, the *Sun*'s circulation had dropped "considerably." Attorney General Thornburgh concluded that "the *Sun*'s losses are, in all likelihood, irreversible," and that the *Sun* therefore had "been shown to be a 'failing newspaper' within the meaning of the NPA."

Attorney General Thornburgh also found that approval of the terms of the proposed JOA "would effectuate the policy and purpose" of the NPA. 15 U.S.C. § 1803(b). Under the JOA, the "business operations of the two newspapers" would be combined, "while preserving the newspapers' editorial and reportorial independence." The *Review-Journal*'s owner (*i.e.*, Donrey) would "take responsibility for the management, printing, and other commercial functions of the newspapers," with the *Review-Journal* publishing a morning edition, the *Sun* publishing an afternoon edition, and both papers publishing a "joint edition on Saturdays, Sundays, and holidays." The parties agreed that 90% of the "profits from operations" would be allocated to the *Review-Journal* and 10% to the *Sun*. After reviewing these and other details of the JOA, Attorney

General Thornburgh concluded that "there appears to be no feasible alternative to the JOA that would preserve the *Sun* in operation" and that, by allowing the *Sun*'s independent editorial voice to survive, "the JOA would serve the statutory goal of maintaining an independent and competitive newspaper press."

Over the years, various disputes emerged over the proper application of the JOA, and the owners of the newspapers (who were then, respectively, "DR Partners," as successor to Donrey, and LVSI) ultimately sought to resolve these disputes by negotiating and executing an "Amended and Restated" JOA on June 10, 2005. Under the terms of the 2005 JOA, the *Sun* would cease publication as an afternoon paper and would instead be distributed as a six-to-ten-page freestanding insert to the *Review-Journal*. The prior JOA's profit-sharing split was replaced by a more complex formula based on earnings before interest, taxes, depreciation, and amortization ("EBITDA"). LVSI was entitled to request an annual audit of the relevant EBITDA calculations, and in the event of a dispute, the issue would be resolved by arbitration.

DR Partners and LVSI did not seek the Attorney General's approval of the amended JOA. Instead, in June 2005, they delivered the amended JOA to the DOJ, together with a cover letter stating that the JOA was being submitted under "28 CFR § 48.16," which is the regulation that applies to amendment of *pre*-NPA JOAs. *See* 28 C.F.R. § 48.16 (providing for the filing of JOAs amending "the terms of an existing arrangement"); *id.* § 48.2(d) (defining "existing arrangement" to mean "any

joint newspaper operating arrangement entered into before July 24, 1970"); *see also* 15 U.S.C. § 1803(a).

The DOJ promptly initiated an investigation into the 2005 JOA, sending a civil investigative demand to DR Partners in August 2005. The DOJ ultimately sent a letter to the parties in April 2008 stating that it was closing its investigation without having taken any action. According to the letter, the DOJ's decision "was not based on a conclusion that the 2005 amendments to the parties' Joint Operating Agreement are protected by the antitrust immunity afforded by the Newspaper Preservation Act" and that the 2005 JOA therefore "remains subject to antitrust scrutiny."

C

Over the ensuing years, disputes continued to arise among the parties to the 2005 JOA, leading to various lawsuits and arbitration proceedings. One such suit was brought in 2018 by LVSI in Nevada state court against the current owner of the *Review-Journal*, the Las Vegas Review-Journal, Inc. ("LVRJI") and its parent company, News+Media Capital Group, LLC ("NMCG"). In August 2019, LVRJI and NMCG sought and obtained leave in that case to file an amended answer in which they asserted breach-of-contract counterclaims against LVSI and also sought a declaration that they could terminate the 2005 JOA for the alleged breach.

In response to this counterclaim, LVSI filed this action in federal court against LVRJI, NMCG, and two of the

officers and owners of NMCG, Sheldon Adelson and his son-in-law Patrick Dumont.[1] LVSI alleged, *inter alia*, that LVRJI's efforts to terminate the 2005 JOA amounted to an attempt to monopolize the Las Vegas newspaper market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. A few days later, LVSI informed Defendants that it was planning to seek a preliminary injunction against the termination of the 2005 JOA, and it asked whether Defendants would be willing to avoid the need for such a motion by instead agreeing to a joint stipulation to maintain the status quo. The parties ultimately agreed to do so, while simultaneously preserving their respective rights and arguments. Under the terms of the stipulation and proposed order, LVRJI agreed to "continue to perform under the 2005 JOA," and Defendants agreed to "refrain from taking any non-judicial steps to terminate the 2005 JOA until after the entry of final judgment by a court of competent jurisdiction permitting such termination." The district court entered the stipulated order on October 9, 2019.

At some point prior to the filing of LVSI's federal lawsuit, Defendants became aware of the DOJ's April 2008 letter indicating that the DOJ did not consider the 2005 JOA to be protected by the special immunity granted by the NPA. In late October 2019, LVRJI and NMCG

1. The complaint was later amended to add, as an additional defendant, Interface Operations, LLC, which was alleged to be an Adelson-family-controlled entity through which the family members controlled the affairs of LVRJI. The respective defendants who were parties to the action at any given time are collectively referred to as "Defendants."

moved to dismiss LVSI's federal complaint on the grounds, *inter alia*, that the 2005 JOA never received the requisite approval; that it was therefore unlawful under the NPA; and that LVSI's claims that it would be an antitrust violation to abrogate that agreement necessarily failed as a result. In its order partially denying the motion to dismiss, the district court declined to resolve this issue. Noting that the complaint specifically alleged that the DOJ had "permitted" the 2005 JOA, the court viewed the motion to dismiss as an improper effort to go outside the pleadings to dispute this factual allegation.

After several years of discovery, the parties filed cross-motions for summary judgment in May 2023. In particular, both sides sought summary judgment with respect to Defendants' assertion that the 2005 JOA was unlawful under the NPA and unenforceable. Defendants filed a further motion arguing that, for the same reason, the stipulated preliminary injunction requiring them to continue to perform under the 2005 JOA should be dissolved.

In March 2024, the district court granted summary judgment to LVSI on the issue of the enforceability of the 2005 JOA, concluding that the agreement was not invalid merely because it had not been approved by the Attorney General. On that same ground, the court also denied Defendants' motion to dissolve the stipulated preliminary injunction.

II

Defendants appealed the denial of their motion to dissolve the stipulated preliminary injunction, asserting that the appeal was authorized under 28 U.S.C. § 1292(a)(1). LVSI disputes that contention, and alternatively asserts that Defendants lack standing to take the appeal. We conclude that we have jurisdiction over Defendants' appeal.

Under 28 U.S.C. § 1292(a)(1), we have jurisdiction to review, *inter alia*, "[i]nterlocutory orders . . . refusing to dissolve or modify injunctions." Here, there can be no doubt that the October 2019 stipulated order was an injunction: on its face, the order was entered by agreement of the parties "[i]n lieu of litigating" LVSI's anticipated "motion for preliminary injunction," and the order provisionally granted the exact relief that that motion would have sought, namely, an order "to prevent the termination of the 2005 JOA and to maintain the status quo through the pendency of this dispute." The order, however, explicitly clarified that Defendants could take *judicial* steps to terminate the 2005 JOA and that, in all events, both sides reserved their respective "rights [and] arguments" notwithstanding the stipulation agreeing to the order.

After Defendants' initial effort to raise the enforceability of the 2005 JOA at the pleading stage was rebuffed by the district court on the ground that it contradicted the complaint's allegations, Defendants subsequently re-raised the issue after substantial

discovery was completed. They did so, *inter alia*, by filing a motion explicitly requesting that the October 2019 stipulated preliminary injunction be dissolved on the ground that, in light of the relevant facts, the 2005 JOA was unlawful and unenforceable. The district court then expressly denied Defendants' "motion to dissolve preliminary injunction" in March 2024 on the sole ground that, based on the undisputed facts, the 2005 JOA was enforceable.

Because the district court's March 2024 order explicitly denied an express request to dissolve an injunctive order, Defendants' appeal of that denial "falls squarely within the language of section 1292(a)(1)," and we therefore have jurisdiction over this appeal without the need for any further showing. *Natural Res. Def. Council v. County of Los Angeles*, 840 F.3d 1098, 1101 (9th Cir. 2016) (citation omitted). Consequently, LVSI is wrong in contending that our jurisdiction here depends upon the sort of further showing that is required when an order sought to be appealed under § 1292(a)(1) does not explicitly deny an injunction but "only has the *practical effect* of denying an injunction." *Id.* (emphasis added) (simplified). In the latter circumstance, the appellant must make the further showing that the order will "have serious, perhaps irreparable consequences" that can only be redressed by an immediate appeal. *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1097 (9th Cir. 2008) (citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981)). But our caselaw has squarely held "that *Carson*'s 'requirement of irreparable injury' does *not* apply to 'appeals from the *direct denial* of a request for an injunction,'" but only

to non-injunctive orders that are claimed to have the "'practical effect' of denying an injunction." *Natural Res. Def. Council*, 840 F.3d at 1101 (emphasis added) (citations omitted); *see also Paige v. State of California*, 102 F.3d 1035, 1038 (9th Cir. 1996) (holding that, where a party has appealed "from the specific grant of a request for an injunction," "*Carson* is simply irrelevant, and we have jurisdiction over the [party's] appeal under § 1292 even though the [party] has not alleged irreparable harm"); *Shee Atika v. Sealaska Corp.*, 39 F.3d 247, 249 (9th Cir. 1994) (holding that *Carson* does not apply "to appeals from orders specifically denying injunctions"); *United States v. Phillip Morris USA Inc.*, 840 F.3d 844, 849 (D.C. Cir. 2016) (holding that § 1292(a) jurisdiction exists, without any showing of irreparable harm under *Carson*, "where the district court order 'clearly grants or denies a specific request for injunctive relief,' *such as a request to dissolve an injunction*" (emphasis added) (citation omitted)).

LVSI alternatively contends that, even if there is statutory jurisdiction under § 1292(a)(1), Defendants lack standing to appeal the March 2024 order because they have not been "aggrieved" by it. This argument is somewhat difficult to fathom, because Defendants are self-evidently aggrieved by an order that, they contend, unlawfully compels them to maintain a relationship with the *Sun* that they no longer want. *See*, *e.g.*, *ACF Indus. Inc. v. California State Bd. of Equalization*, 42 F.3d 1286, 1288-89 (9th Cir. 1994) (exercising jurisdiction over a defendant's appeal from an order denying a motion to modify a stipulated preliminary injunction). So far as we can discern from LVSI's brief, the argument

that Defendants have not been aggrieved is merely a repackaging of LVSI's contention that Defendants are not suffering any *irreparable* injury from the court's order. We reject this effort to evade our above-described precedent holding that irreparable injury need not be shown when, as here, an explicit request to dissolve an injunction is denied.

Accordingly, we conclude that we have jurisdiction to review the district court's order denying Defendants' motion to dissolve the stipulated preliminary injunction.

III

In declining to dissolve its injunction requiring Defendants to continue carrying out the 2005 JOA, the district court relied solely on the ground that the JOA did not violate the NPA and that Defendants were wrong in contending otherwise. We turn, then, to whether the JOA was lawful and enforceable under the NPA, which is a legal question that we review de novo. *See United States v. Hughes*, 113 F.4th 1158, 1161 (9th Cir. 2024).[2]

2. LVSI argues that we should not reach this issue but should instead affirm on the alternative ground that Defendants failed to show "a significant change in facts or law" that would "warrant[] revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). We reject this contention. As we have explained, the stipulated preliminary injunction here expressly reserved the parties' respective "rights [and] arguments" concerning the validity of the 2005 JOA, and it also explicitly recognized Defendants' right to seek judicial termination of the JOA. Accordingly, this is not a situation in which the existing injunctive order was based on a judicial resolution of a disputed

In challenging the 2005 JOA, Defendants rely on § 4(b) of the NPA, which provides, in relevant part, that "[i]t shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States." 15 U.S.C. § 1803(b). Here it is both undisputed and indisputable that the Attorney General did not provide "prior written consent" approving the 2005 JOA. Accordingly, if the 2005 JOA counts as "[1] a joint operating arrangement, [2] not already in effect," then, under the plain language of § 4(b), "[i]t shall be unlawful" for the parties "to enter into, perform, or enforce" that JOA. *Id.* We therefore must consider whether the 2005 JOA meets the two above-noted criteria necessary to trigger § 4(b)'s operative rule that the specified agreements are "unlawful." Before doing so, however, we first address a threshold issue concerning the scope of that rule.

A

The district court held (and LVSI agrees) that, even assuming *arguendo* that the 2005 JOA counted as a

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issue, thereby requiring the party seeking dissolution to make a threshold showing that this already-resolved issue should be revisited. On the contrary, the stipulated order here effectively *deferred* resolution of the JOA's validity until a later date. After Defendants' first attempt to raise that issue at the pleading stage was rejected by the district court, both sides then reasonably waited until after the completion of discovery to seek a ruling on that unresolved issue. Under these circumstances, Defendants were not required to make any further showing of a change in the facts or the law before requesting that the district court dissolve the injunction based on a resolution of this deferred issue.

"joint operating arrangement, not already in effect," that agreement still "would be enforceable without the Attorney General's signature." The lack of Attorney General approval, the district court concluded, merely meant that the parties lacked any antitrust exemption under the NPA and were therefore "expose[d] . . . to antitrust liability," but it did "not invalidate the JOA or render [it] unlawful or unenforceable." The district court noted that this reading of § 4(b) was upheld in 1976 by a divided panel of the D.C. Circuit in *Newspaper Guild*, which rejected a challenge to the DOJ's 1974 implementing regulations expressly adopting that view. 539 F.2d at 760-61; *see also News Weekly Sys., Inc. v. Chattanooga News-Free Press*, 1993 WL 47197, at *2 (6th Cir. 1993) (adopting *Newspaper Guild*'s interpretation of § 4(b) without conducting any independent analysis). We reject this reading as squarely foreclosed by the plain language of the statute.

As always, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (citation omitted). Here, as noted, the relevant language of § 4(b) states that "[i]t *shall be unlawful* for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, *except* with the prior written consent of the Attorney General of the United States." 15 U.S.C. § 1803(b) (emphasis added). Accordingly, when an agreement is covered by § 4(b) (*i.e.*, it is a "joint operating arrangement, not already in effect"), and it lacks the

"prior written consent of the Attorney General," the result expressly decreed by the statute is that it is "*unlawful*" to "enter into, perform, or enforce" that agreement. *Id.* (emphasis added). This language is clear and unequivocal: § 4(b) declares such an unapproved agreement to be unlawful to enter into and unenforceable.

This plain-language reading is further confirmed by comparing the wording of § 4(b) with that of § 4(a). As noted earlier, § 4(a) addresses JOAs "entered into prior to the effective date of this Act," Pub. L. No. 91-353, § 4(a), 84 Stat. at 467, while § 4(b) generally addresses post-NPA JOAs. *See supra* at 7-8; *see also infra* section III(B)(2). In sharp contrast to § 4(b), the language of § 4(a) notably *avoids* declaring anything to be "unlawful." Instead, § 4(a) states that "[i]t shall *not be unlawful* under any antitrust law for any person to perform, enforce, renew, or amend" any pre-NPA JOA if, at the time the JOA "was first entered into," the weaker newspaper was likely to remain financially unsound. 15 U.S.C. § 1803(a) (emphasis added). Congress could easily have used the same verbal formulation in § 4(b) and declared that "it shall not be unlawful under any antitrust law" to "enter into, perform, or enforce" a JOA that has received the "prior written consent of the Attorney General." Had Congress done so, that would have produced the reading adopted by the district court: under that phrasing, which simply declares that approved JOAs are "not . . . unlawful under any antitrust law," the lack of such prior approval would simply mean that this *exemption* from the antitrust laws would not apply. But Congress did not replicate in § 4(b) the phrasing used in § 4(a).

Instead, Congress affirmatively declared that it "shall be unlawful" to "enter into, perform, or enforce" a post-NPA JOA without prior approval. *Id.* § 1803(b). Moreover, the language of § 4(b) does not make that unlawfulness depend upon the applicability of any pre-existing antitrust law, but instead declares such unapproved agreements to be unlawful *simpliciter*.[3] The district court's reading of § 4(b) improperly fails to give any effect to these striking

3. We note, however, that, when the Attorney General *grants* prior approval to a JOA under § 4(b), the result is not merely an exemption from § 4(b)'s prohibition, but also an exemption from the relevant "antitrust law[s]" described in the NPA. Because § 4(b) declares post-NPA JOAs to be "unlawful" "*except*" when the Attorney General has granted prior written approval under the *new* standards set forth in the NPA, the scope of the unlawfulness that is thereby removed by the Attorney General's approval must be understood as *also* extending to the antitrust laws that have been effectively displaced by the NPA's standards. (It would make no sense to read § 4(b) as requiring the Attorney General to grant approval based on standards that explicitly differ from those otherwise applicable under *Citizen Publishing* only to then subject such approved agreements to *Citizen Publishing*.) Accordingly, the scope of the *exemption* granted by Attorney General approval under § 4(b) should be read *in pari materia* with the scope of the exemption granted under § 4(a) and therefore must be understood as likewise extending to the "antitrust law[s]" described in § 3(1) of the Act. *See* 15 U.S.C. § 1802(1) (defining "antitrust law," for purposes of the NPA, as meaning specified antitrust statutes "and such statutes and any other Acts in pari materia" to those specified antitrust statutes); *see also Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 745 (9th Cir. 1996) (stating that approval from the Attorney General under § 4(b) yields the "same immunity" as under § 4(a)). Notably, such "other Acts in pari materia" would include the prohibition in § 4(b) of the NPA itself.

differences in language between the two provisions. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (citation omitted)).

Indeed, neither the district court nor the panel majority in *Newspaper Guild* were able to point to any statutory language that would support their view that the effect of § 4(b) is not to *require* the prior approval of the Attorney General but merely to deny the antitrust exemption that would follow from obtaining that approval. On the contrary, the D.C. Circuit majority candidly conceded that "[a] rigidly literal reading of section 4(b) undeniably provides support" for the view—adopted by the district court in *Newspaper Guild*—that "all joint newspaper operating arrangements not in effect on July 24, 1970, must obtain the Attorney General's consent before they may be put into effect." 539 F.2d at 757 (quoting *Newspaper Guild v. Saxbe*, 381 F. Supp. 48, 53 (D.D.C. 1974)). But the majority rejected "rigid reliance upon the literal text of the statute" in favor of "delving more deeply into the congressional purpose" as reflected in the NPA's "[l]egislative history." *Id.* at 761. After extensively reviewing that legislative history, as reflected in the various committee reports and floor statements, the majority held that the plain-language reading of § 4(b) was, in its view, "at odds with the 'object and policy' of the Congress." *Id.* (citation omitted). *Newspaper Guild*'s wholesale disregard of the statutory text is a

"relic from a 'bygone era of statutory construction'" that "inappropriately resort[ed] to legislative history" in lieu of "the statute's text and structure," and its "casual disregard of the rules of statutory interpretation" is flatly contrary to current Supreme Court authority. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436-37 (2019) (citation omitted); *see also Newspaper Guild*, 539 F.2d at 761 (Tamm, J., dissenting) (explaining that the majority's reading of § 4(b) reflected a "patent disregard of the plain and unambiguous language of [the] statute"). Where, as here, "a careful examination of the ordinary meaning and structure of the law itself . . . yields a clear answer, judges must stop," and they should not use legislative history "to 'muddy' the meaning of 'clear statutory language.'" *Food Mktg.*, 588 U.S. at 436 (citation omitted).

LVSI also notes that the view of § 4(b) endorsed in *Newspaper Guild* has been enshrined in the DOJ's implementing regulations since 1974. But after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), we no longer give deference to "'permissible' agency interpretations of the statutes those agencies administer," *id.* at 378. Thus, even assuming *arguendo* that the DOJ's construction of § 4(b) would have been given controlling deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *but cf. Newspaper Guild*, 539 F.2d at 761 (Tamm, J., dissenting) (arguing that, "[a]though great deference is due an interpretation of a statute by the agency or department charged with its enforcement," the DOJ regulation's reading of § 4(b) was contrary to the "plain and unambiguous language" of the NPA), that no longer

matters, because "*Chevron* [has been] overruled." *Loper Bright*, 603 U.S. at 412. We instead "must exercise [our] independent judgment" as to the meaning of the NPA, *id.*, and for the reasons we have explained, we conclude that the reading of § 4(b) reflected in the DOJ regulations and endorsed in *Newspaper Guild* is directly contrary to the statutory language and must be rejected.[4]

B

It follows from what we have said thus far that, if the 2005 JOA counts as "[1] a joint operating arrangement, [2] not already in effect," then, under the plain language of § 4(b), that JOA would be unlawful and unenforceable. We next address whether those two respective requirements have been met.

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4. *Newspaper Guild* also expressed the concern that, under a literal reading of § 4(b), "a joint operating agreement between two *healthy, non-competitive* newspapers" would be unlawful without the Attorney General's approval, but that approval could not be given under § 4(b) because neither would qualify as a "failing newspaper." 539 F.2d at 759 (emphasis added). This concern is misplaced. The NPA's expressly declared purpose is "to preserve the publication of newspapers *in any city, community, or metropolitan area*" where JOAs already exist or are "hereafter effected" under the NPA. 15 U.S.C. § 1801 (emphasis added). Moreover, the immunity granted by § 4(b) is an immunity from specific antitrust laws, which presumes, of course, that the relevant newspapers both operate in the same relevant market. Accordingly, it seems clear, in context, that the JOAs covered by § 4(b) are only those involving otherwise competing newspapers.

Appendix A

1

As LVSI notes, the phrase "joint operating arrangement" in § 4(b) does not exactly align with the wording of the phrase that is expressly defined in NPA § 3(2), namely, "joint *newspaper* operating arrangement." 15 U.S.C. § 1802(2) (emphasis added). But an examination of the statute as a whole confirms that the two phrases are used interchangeably throughout and that the use of one versus the other in any given instance is of no significance. The phrase "joint newspaper operating arrangement" is used exactly five times in the text of the statute (including in the definitional section in § 3(2)), while the phrase "joint operating arrangement" appears four times, and a third phrase—"joint operating agreement"—appears once. *See id.* §§ 1801, 1802(2), 1803(a)-(c), 1804(a)-(b). Notably, there are two sections in which *both* of the relevant phrases are used, and in each of these sections, the two phrases self-evidently mean the same thing. Thus, for example, § 4(a) establishes a general rule that certain pre-NPA "joint *newspaper* operating arrangement[s]" are exempt from specified antitrust laws, while § 4(a)'s *proviso* to that rule imposes certain additional requirements that apply to any amendment to a "joint operating arrangement." *Id.* § 1803(a) (emphasis added). Likewise, § 5(a) provides that, if any pre-NPA "joint operating arrangement" is the subject of a "final judgment" holding it "unlawful under any antitrust law" in "any action brought by the United States," "any party to such final judgment may reinstitute *said* joint *newspaper* operating arrangement to the extent permissible" under § 4(a). *Id.* § 1804(a) (emphasis added). Given that there is no discernible rhyme or reason as to

which phrase is used in any given instance, and there are two instances that affirmatively confirm that the phrases are interchangeable, we conclude that the two phrases must be given the same meaning.

Consequently, we apply § 3(2)'s definition of a "joint newspaper operating arrangement" in determining whether the 2005 JOA counts as a "joint operating arrangement" for purposes of § 4(b). Section 3(2)'s definition, in its entirety, is as follows:

> The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

15 U.S.C. § 1802(2).

Here, the 2005 JOA is plainly a "contract, agreement, . . . or other arrangement," and it was indisputably "entered into by two or more newspaper owners for the publication of two or more newspaper publications." *Id.* LVSI contends, however, that the 2005 JOA does not meet the further statutory requirement that the agreement be one "pursuant to which [1] joint or common production facilities are *established or operated* and [2] joint or unified action is taken or agreed to be taken with respect to" certain enumerated publishing activities. *Id.* (emphasis added). LVSI does not contest that the second subclause is satisfied here, given that the 2005 JOA, on its face, establishes new terms for taking "joint or unified action" with respect to several of the enumerated publishing activities. However, according to LVSI, the first subclause is not met: the 2005 JOA "cannot be the agreement 'pursuant to which joint or common production facilities are established or operated,' as that was already done in the original JOA." But even assuming *arguendo* that it was the original JOA, and not the 2005 JOA, that "*established*" the "joint or common production facilities," it nonetheless remains true that, after the 2005 JOA, those facilities are thereafter "*operated*" "pursuant" to that amended agreement. 15 U.S.C. § 1802(2) (emphasis added). And because the relevant clause requires only that the facilities be "established *or* operated" pursuant to the agreement, *id.* (emphasis added), that clause's requirement is satisfied here. *See United States v. Woods*, 571 U.S. 31, 45-46 (2013) (noting that the "ordinary use" of "the conjunction 'or'" is "almost always disjunctive" and signifies that the "items are alternatives").

Moreover, the parties do not dispute that § 3(2)'s proviso is satisfied here. Under the 2005 JOA, "there is no merger, combination, or amalgamation of editorial or reportorial staffs," and the "editorial policies" of the two papers are "independently determined." 15 U.S.C. § 1802(2). The 2005 JOA expressly states that each newspaper will maintain its own "staff of news and editorial employees," and it contains additional provisions preserving "the news and editorial independence and autonomy" of both papers.

Because the 2005 JOA meets all of the elements of the definition of a "joint newspaper operating arrangement" in § 3(2), we conclude that it is a "joint operating arrangement" within the meaning of § 4(b).

2

We next consider whether the 2005 JOA counts as a joint operating arrangement that is "not already in effect." 15 U.S.C. § 1803(b).

The district court held that, by limiting its applicability to JOAs "not already in effect," § 4(b) reaches "[o]nly *new* JOAs" and does not apply to *amended* JOAs. We reject this reading as contrary to the statutory language. As we have already indicated, § 4(b)'s exclusion of JOAs "already in effect" is unmistakably a reference to JOAs that predate the enactment of the NPA: a JOA adopted before the NPA is one that is "already in effect," and a JOA entered into after the NPA, even if it amends a prior JOA, is one that is "not already in effect." That conclusion

is reinforced by § 4(a), which expressly grants a limited antitrust exemption to JOAs "entered into prior to the effective date" of the NPA, which was July 24, 1970. Pub. L. No. 91-353, § 4(a), 84 Stat. at 467; *see also* 15 U.S.C. § 1803(a). By expressly excluding JOAs "already in effect" from its otherwise flat prohibition on performing or enforcing any JOA without the Attorney General's consent, § 4(b) thus avoids a conflict with § 4(a)'s special rules for pre-NPA JOAs. 15 U.S.C. § 1803(b). Likewise, by including a special rule for amendments of pre-NPA JOAs, § 4(a) confirms that they are not governed by § 4(b). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (applying the canon that "a more limited, specific authorization" may be construed as an exception to a more "general authorization" in the same statute). And, unlike § 4(a), § 4(b) has no analogous express carve-out for amended JOAs.

Furthermore, the district court's narrow construction of § 4(b) would seemingly create an odd gap in the statute in which amendments to *post*-NPA JOAs—no matter how significant—would not be subject to *any* limitations or requirements at all. The district court sought to fill this gap by engrafting onto post-NPA JOA amendments certain provisions of § 4(a) that govern *pre*-NPA JOA amendments. Specifically, the district court held that all amended JOAs—whether they are amendments of pre-NPA JOAs or of post-NPA JOAs—are covered by a proviso concerning amendments that is contained in § 4(a). The full text of § 4(a), including this proviso, is as follows:

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

Pub. L. No. 91-353, § 4(a), 84 Stat. at 467, 15 U.S.C. § 1803(a). Although the language of the proviso, read in isolation, could be construed as reaching any amendment to any JOA, including a post-NPA JOA, there are several textual reasons why that reading must be rejected.

As an initial matter, it is a well-established canon of construction that "a proviso usually is construed to apply to the provision or clause immediately preceding it." *Pacificorp. v. Bonneville Power Admin.*, 856 F.2d 94, 97 (9th Cir. 1988) (quoting 2A Sutherland on Statutes and Statutory Construction § 47.33, at p.245 (4th ed. 1984)); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 154 (2012) (stating that, under the "proviso canon," a "proviso

conditions the principal matter that it qualifies—almost always the matter immediately preceding"). Under this canon, the proviso in § 4(a) should be construed as applying only to the matter that precedes it, namely, § 4(a)'s rules about *pre*-NPA JOAs. Section 4(b) contains no comparable proviso limiting its sweep, and nothing in the language or placement of § 4(a)'s proviso suggests that it applies to § 4(b).

Moreover, there are additional textual clues that further confirm that § 4(a)'s proviso applies only to the pre-NPA JOAs covered by § 4(a) and not to the post-NPA JOAs covered by § 4(b). In particular, there are two notable relevant differences in the language used in § 4(a) and § 4(b). First, as we have already noted, § 4(b) is phrased as a *prohibition* that declares unapproved post-NPA JOAs to "be unlawful," while § 4(a) is not similarly worded: § 4(a) instead says that "[i]t shall *not be unlawful* under any antitrust law" to take certain specified actions concerning pre-NPA JOAs. 15 U.S.C. § 1803(a)-(b) (emphasis added); *see also supra* at 19-21. Second, as we have also noted, § 4(a) expressly addresses amendments, whereas § 4(b) does not. *Compare* 15 U.S.C. § 1803(a) (stating that "[i]t shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or *amend*" any pre-NPA JOA (emphasis added)), *with id.* § 1803(b) (stating that "[i]t shall be unlawful for any person to enter into, perform, or enforce" a post-NPA JOA without the Attorney General's approval). Taken in context, these two differences in language between § 4(a) and § 4(b) are clearly interrelated, and they confirm that § 4(a)'s proviso should be construed as applying only to § 4(a).

As we have explained, § 4(b)'s flat prohibition on any post-NPA JOA without Attorney General approval is broad enough to include, by its plain terms, both brand-new post-NPA JOAs *and* amended post-NPA JOAs. Because § 4(b)'s language is already broad enough to cover amendments, it is understandable that § 4(b) makes no specific reference to amended JOAs. By contrast, § 4(a)'s use of authorizing language, rather than prohibitory language, would *not* reach amended pre-NPA JOAs unless they are specifically mentioned. That is, if § 4(a) merely used the same relevant verbs as § 4(b)—namely, "perform" and "enforce"—§ 4(a) would *not* cover amendments: if § 4(a) had only provided that "[i]t shall *not be unlawful*" to "perform" or "enforce" a "joint newspaper operating arrangement entered into prior to July 24, 1970," § 4(a)'s antitrust-exemption rule would apply only to *unamended* JOAs. It is therefore unsurprising that § 4(a) adds an explicit affirmative antitrust exemption for "renew[ing] or amend[ing]" pre-NPA JOAs, which Congress then expressly conditioned by adding a proviso limiting the types of "renewal[s] or amendment[s]" that are allowed and imposing a reporting requirement concerning such renewals or amendments. The district court overlooked these carefully nuanced and interrelated differences in language between § 4(a) and § 4(b) by instead taking the language of § 4(a)'s proviso out of context and treating it as a freestanding, across-the-board rule that applies equally to *both* § 4(a) and § 4(b).[5]

5. We do not rely, however, on Defendants' argument that the scope of § 4(a) is confirmed by the temporally limited heading assigned to that section when it was classified as § 1803(a) of Title 15 of the United States Code. *See* 15 U.S.C. § 1803(a) (adding the

LVSI alternatively argues that § 4(b) cannot reasonably be read to apply to amendments to post-NPA JOAs, because amendments inherently cannot satisfy § 4(b)'s approval requirements. Section 4(b) states that, in order to approve a post-NPA JOA, the Attorney General must "determine [1] that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and [2] that approval of such arrangement would effectuate the policy and purpose" of the NPA. 15 U.S.C. § 1803(b). LVSI contends that, once an initial JOA is approved, the first of these two requirements can never be satisfied, because the previously troubled newspaper will then no longer be a "failing newspaper." This argument is meritless.

The NPA states that, in addressing whether the weaker newspaper is a "failing newspaper," the Attorney General must determine whether that newspaper "is in probable danger of financial failure" "*regardless* of its ownership or affiliations." 15 U.S.C. § 1802(5) (emphasis added). As we have held, the latter clause "means simply that the ailing newspaper should be analyzed *as a free-standing entity*, as if it were not owned by a corporate

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following heading to § 1803(a): "Joint operating arrangements entered into prior to July 24, 1970"). Title 15 has never been enacted as positive law, and so the headings added to it "are merely editorial additions made by [the] congressional office" that "by statute has the task of assembling the United States Code, 'including those titles which are not yet enacted into positive law.'" *United States v. Ehmer*, 87 F.4th 1073, 1112 (9th Cir. 2023) (quoting 2 U.S.C. § 285b(3)). As such, these headings "are entitled to no weight." *Id.*

parent." *Committee for an Indep. P-I*, 704 F.2d at 480 (emphasis added). Thus, in the case of an amended JOA, the question for the Attorney General would be whether, apart from the JOA, the weaker newspaper "is in probable danger of financial failure" if considered as a freestanding entity. 15 U.S.C. § 1802(5). If nothing has changed to suggest that the weaker paper could *now* survive as a freestanding entity, then this requirement will easily be met and the question will be simply whether the amended JOA "would effectuate the policy and purpose" of the NPA. *Id.* § 1803(b). Contrary to what LVSI contends, the statutory standard is thus readily applicable in the context of amended JOAs.[6]

The district court alternatively suggested that an amended post-NPA JOA *would* count as a JOA "not already in effect" only if the amended JOA constituted a "novation" of the prior JOA under the applicable state law. The district court held that this rule did not apply here, however, because the 2005 JOA did not amount to a novation under Nevada law. We need not address the parties' dispute over the latter point, because we conclude that the 2005 JOA is covered by § 4(b) even if it is not a novation. Nothing in the text of the NPA supports engrafting a "novation" limitation onto § 4(b), and we lack the authority "to add words to the law to produce what is

6. LVSI also asserts that the review process for JOAs under the relevant regulations is too cumbersome to be applied to amended JOAs. Even assuming that this were true, it would not be an argument for ignoring the plain text of the statute; it would instead be an argument for revising the regulatory procedures to better conform to the text. *Cf. Loper Bright*, 603 U.S. at 412.

thought to be a desirable result." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). By its terms, § 4(b) applies to all post-NPA JOAs, including amended post-NPA JOAs.[7]

We therefore conclude that, because the 2005 JOA is a "joint newspaper operating arrangement" as described in § 3(2) and was "not already in effect" when the NPA was enacted, it is covered by § 4(b) and required the "prior written consent of the Attorney General." 15 U.S.C. § 1803(b).

IV

For the foregoing reasons, we conclude that, because it did not receive the required "prior written consent of the Attorney General," the 2005 JOA is unlawful and unenforceable. 15 U.S.C. § 1803(b). The district court erred in reaching a contrary conclusion and in denying on that basis Defendants' motion to dissolve the stipulated

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7. LVSI contends that, in *Mahaffey v. Detroit Newspaper Agency*, 1998 WL 739902 (6th Cir. 1998), the Sixth Circuit adopted its view that amendments of post-NPA JOAs are not covered by § 4(b)'s approval requirement. That is wrong. In *Mahaffey*, the Sixth Circuit rejected the view that the "failure to seek and obtain approval" of the amended post-NPA JOA in that case "stripped even the *original* joint operating agreement of antitrust immunity." *Id.* at *2 (emphasis added). As to whether the parties to the JOA in *Mahaffey* had immunity for "implementation of any unapproved amendment," the Sixth Circuit expressly declined to decide that issue, because it concluded that the private plaintiffs lacked standing to assert the antitrust claims that were based on those amendments. *Id.*

preliminary injunction. We therefore reverse the district court's order denying that motion, and we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED MARCH 31, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:19-cv-01667-ART-MDC

LAS VEGAS SUN, INC.,

Plaintiff,

v.

SHELDON ADELSON, *et al.*,

Defendants.

LAS VEGAS REVIEW-JOURNAL, INC.,

Counter Claimant,

v.

LAS VEGAS SUN, INC., *et al.*,

Counter Defendants.

Filed March 31, 2024

Appendix B

ORDER

This is an antitrust action between media companies. Plaintiff Las Vegas Sun, Inc. brings this action against Defendants Sheldon Adelson, Patrick Dumont, News+Media Capital Group LLC, and Las Vegas Review-Journal, Inc. Las Vegas Review Journal, Inc. brings counterclaims against Las Vegas Sun, Inc., Brian Greenspun, and Greenspun Media Group, LLC.

Before the Court are the parties' cross-motions for summary judgment (ECF Nos. 829, 843), the RJ's motions to dissolve preliminary injunction (ECF Nos. 852, 915), the RJ's motion to dismiss (ECF No. 632), and several evidentiary (ECF Nos. 751, 772, 819, 867, 897) and procedural (ECF Nos. 922, 923, 925, 946) motions.

I. BACKGROUND

This is an antitrust action with breach of contract counterclaims. The material facts are largely undisputed.

A. The 1989 JOA

On June 12, 1989, Donrey of Nevada, Inc., which at the time published the Las Vegas Review-Journal ("the RJ") newspaper, and the Las Vegas Sun, Inc., which publishes the Las Vegas Sun ("the Sun") newspaper, entered a joint operating arrangement (the "1989 JOA"). ((ECF No. 837-2); *see also* ECF No. 40 ("Martini Decl.") at 53 ¶ 3 (authenticating the 1989 JOA).)

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The 1989 JOA included the following key provisions:

The Sun agreed to dispose of its publishing infrastructure. (ECF No. 837-2 at 10 (§ 3.3), 14-15 (§ 5.1).)

The RJ was to print the Sun, though the RJ and Sun were sold and distributed separately, save for joint publications on weekends and holidays. (*Id.* at 14-15 (§ 5.1).)

The RJ, operating through a separate entity referred to in the JOA as the "Agency," was responsible for, among other things, handling the production, circulation, and print advertising functions for both newspapers. (*Id.* at 14-15 (§ 5.1), 6 (Art. 2).)

With respect to each newspaper's editorial expenses, the "Review-Journal shall establish an allocation for Review-Journal news and editorial expenses, and the allocation for, news and editorial expenses for the Sun shall be equal to sixty-five percent (65%) of the Review-Journal allocation, subject to a minimum of Two Million Two Hundred Fifty Thousand Dollars ($2,250,000) per fiscal year,. . . ." (*Id.* at 34 (App. A § A.1).)

With respect to each newspaper's promotional activities expenses, "the Review-Journal shall establish for each fiscal year after the Effective Date a budget for promotional activities of the Review-Journal and the Sun and at least forty percent (40%) of each total budget shall be allocated to the Sun." (*Id.* (App. A § A.3).)

The parties also agreed to share in the operation's operating profit, with the RJ receiving 90% and the Sun receiving 10%. (*Id.* at 20 (§ 6.4), 44 (App. D).)

B. The 2005 JOA

In June 2005, the Sun and the RJ's owner at that time, Stephens Group, Inc. ("Stephens"), executed an "Amended and Restated Agreement" (the "2005 JOA"). (ECF No. 837-6; *see also* ECF No. 40 at 53 ¶ 6 (authenticating the 2005 JOA).)

Under the 2005 JOA, the print *RJ* newspaper and the print *Sun* newspaper are no longer sold and distributed separately. (ECF No. 837-6 at 15 (App. A § A.3).)

Instead, the two papers are distributed together in a bundle. The 2005 JOA limits the print *Sun*'s page count to "an open front page with the Las Vegas Sun flag and seven (7) additional editorial pages" on weekdays; "an open front page with the Las Vegas Sun flag and nine (9) additional editorial pages" for the Sunday edition, and for Saturday and holiday editions, "an open front page with the Las Vegas Sun flag and five (5) additional editorial pages. . . ." (*Id.* at 14 (App. A § A.2(a)-(c)).)

Instead of the percentage split set forth in the 1989 JOA, the 2005 JOA provides that the Sun shall receive an annual payment based on profits, if any, which is to be determined by a formula tied to a contractual earnings, before interest, taxes, depreciation and amortization

("EBITDA") calculation that includes earnings from the RJ newspaper. (*Id.* at 22-25 (App. D).)

In place of the of the allocations for news and editorial expenses set forth in the 1989 JOA, the 2005 JOA states: "[t]he Review-Journal and the Sun shall each bear their own respective editorial costs and shall establish whatever budgets each deems appropriate." (*Id.* at 3 (§ 4.2).) Only those promotional costs that include both the Sun and the RJ in equal prominence can be charged against the joint operation. (*Id.* at 5 (§ 5.1.4); ECF No. 838 at 6-7.)

Despite their separate promotional budgets, the RJ is required to "use commercially reasonable efforts to promote the Newspapers" and to "maximize the circulation of the Newspapers." (ECF No. 837-6 at 5 (§§ 5.1.3, 5.1.4).) This requires mentioning the Sun equally with the RJ's promotional activities to ensure the Sun's brand remains as visible as the RJ. (*Id.*)

Under the 2005 JOA, the RJ is granted the power to "determine the rates for, solicit and sell all advertising space in the Newspapers." (*Id.* at 4-5 (§ 5.1).) It is also granted the power to "control, supervise, manage and perform all operations involved in managing and operating under this Restated Agreement" and to "determine circulation rates" of the joint product. (*Id.* § 5.1.)

The 2005 JOA also requires parties "to preserve high standards of newspaper quality throughout the term of this Restated Agreement consistent with United States metropolitan daily newspapers." (*Id.* § 5.2)

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The 2005 JOA includes several Non-Liability Provisions, including one on "Force Majeure." (ECF No. 837-6 at 7 (§ 8.2).)

The 2005 JOA describes three grounds for termination of the agreement: expiration of the "Stated Duration," "Bankruptcy or Default," and "Change of Controlling Interest." (ECF No. 837-6 at 7 (Art. 9).)

Among the Miscellaneous provisions are those identifying how each party can use their content on various non-print media platforms, including their respective websites operations (*id.* at 10 (§ 10.6)), and releasing the parties from "any claims related to the conduct or operation of lvrj.com, reviewjournal.com, lasvegasnewspapers.com . . . [and those] related to the operation of lasvegassun.com or lasvegasnewspapers.com." (*Id.* at 11-12 (§ 10.13).)

C. Arbitration and Purchase of the RJ

In 2014, the Sun filed suit in state court against the RJ alleging that the RJ was violating the 2005 JOA by charging its editorial and promotional costs against the joint operation. (ECF Nos. 126 at 9-10, 181-3 ¶ 5.) The parties were ordered to arbitrate but settled the dispute before an award was issued. (ECF No. 181-3 ¶ 8.) The RJ experienced two ownership changes during that arbitration, which ultimately resulted in Defendants' ownership and operation of the RJ as of December 10, 2015. (*Id.*)

In April 2018, the Sun filed a new complaint in state court alleging the RJ breached the 2005 JOA by "illegally charg[ing] the Review-Journal's individual editorial costs against the joint operation," "improperly charg[ing] the Review-Journal's unilateral promotional activities against the joint operation," and refusing to allow the Sun to conduct an audit. (ECF No. 40-10 at 18, 20-22.) The Sun also brought a claim for tortious breach of the implied covenant of good faith and fair dealing and sought punitive damages. (*Id.* at 34-35.) The state court compelled arbitration, which resulted in a Final Arbitration Award in 2019. (ECF No. 837-8.)

D. The Present Litigation

The Sun filed this action against the RJ in September 2019. In its First Amended Complaint, which is the operative complaint, the Sun alleges claims under Section 2 of the Sherman Act (Claims 1, 2, and 3 for Monopolization, Attempted Monopolization, and Conspiracy to Monopolize), Section 7 of the Clayton Act (Claim 4), Nevada's Unfair Trade Practices Act (Claim 5), and Section 1 of the Sherman Act (Claim 6).

The RJ asserts counterclaims under Section 2 of the Sherman Act (Claims 1 and 2 for Monopolization and Attempted Monopolization), Section 1 of the Sherman Act (Claim 3), and Nevada common law (Claims 5, 6, and 7 for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Tortious Interference with Contractual Relations). It also asserts 26 affirmative defenses. At issue in this order are its second, fourth,

sixth, fourteenth, and twenty-fourth affirmative defenses, which argue, respectively, that the 2005 JOA is invalid and that the RJ is entitled to terminate its obligations under the 2005 JOA because of the Sun's material breach, the JOA's force majeure clause, the Sun's "conduct," and the common law doctrines of commercial frustration and frustration of purpose.

II. ANALYSIS

A. RJ's Motion to Dismiss

The RJ moves to dismiss or strike the Sun's Claims 3, 4, and 6 on two different grounds (ECF No. 632), both related to Judge Navarro's earlier dismissal of the Sun's Sherman § 2 conspiracy claim and its Clayton § 7 claim. (ECF No. 243.) The Court dismissed the Sun's Sherman § 2 conspiracy claim under the *Copperweld* doctrine, which provides that a parent company and its wholly owned subsidiary cannot commit Sherman Act conspiracy violations among themselves. (*Id.* at 19 (citing *Copperweld Corp. v. Indep. Tube. Corp.*, 467 U.S. 752, 771-73 (1984)).). Dismissal was required because the Sun had not alleged that the defendants were economically distinct from each other. (*Id.*)

Although it was given leave to timely amend both claims (ECF No. 243 at 23), the Sun instead, many months later, filed a new, Third Amended Complaint, which again included the same claims under Sherman § 2 (Claim 3) and Clayton § 7 (Claim 4). The Sun did not cure the dismissed claims but instead repleaded them

"for appellate preservation purposes." (ECF No. 628 at 4 n.6.) The Sun also added a new Sherman § 1 conspiracy (Claim 6) claim against a new party: Adfam. The Sun alleges that Adfam is an alter ego of its co-defendants, or alternatively, that it is "an entity sufficiently separate and distinct as an economic unit from [its co-defendants] such that they operate as separate decision-makers." (ECF No. 621 at ¶ 18.)

The RJ moves to strike the Sun's repleaded Sherman § 2 and Clayton § 7 claims (Claims 3 and 4) as immaterial and impertinent under Fed. R. Civ. P. 12(f) and moves to dismiss Adfam (Claim 6) based on the *Copperweld* doctrine. The Court grants the RJ's motion as to Claims 3 and 4 and denies it as to Claim 6.

1. Preserving Claims for Appellate Review (Claims 3 and 4)

The RJ argues that the Sun's Claims 3 and 4, which it repleaded "for appellate preservation purposes only" (ECF No. 628 at 4 n.6.), are unnecessary, confusing, and prejudicial and should be stricken under Fed. R. Civ. P. 12(f). The Court may strike "any redundant, immaterial, impertinent, or scandalous matter in any pleading." Fed. R. Civ. P. 12(f); 5C WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1382 (3d ed.). "Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pled." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (internal quotation marks and citations omitted). "Impertinent matter consists of statements that do not pertain, and

are not necessary, to the issues in question." *Id.* If it is unnecessary for the Sun to reassert Claims 3 and 4 in order to preserve them for appeal, those claims are both immaterial and impertinent.

The Sun is not required to replead Claims 3 and 4 in order to preserve them for appellate review. A plaintiff is not required to replead claims that have been dismissed with leave to amend to include certain additional allegations if the plaintiff is either unwilling or unable to include those allegations. *Vien-Phuong Thi Ho v. ReconTrust Company, NA*, 858 F.3d 568, 577 (9th Cir. 2017); *see also Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that a plaintiff is not required to replead claims that have been dismissed without leave to amend). Here the Sun's failure to reassert its claims within the given time period demonstrates that it was either unwilling or unable to replead those claims. Thus, the Sun's claims are preserved without need to replead them in its Amended Complaint.

Because Claims 3 and 4 serve no purpose beyond preservation for appellate review, they are immaterial and impertinent. The Court strikes those claims from the Amended Complaint pursuant to Rule 12(f).

2. Failure to State a Sherman § 1 Conspiracy Claim (Claim 6)

In order to show that that the claim against Adfam is not barred by the *Copperweld* doctrine, the Sun must allege facts to establish that it was economically distinct

from any other defendant. *See Copperweld Corp.*, 467 U.S. at 771-73. *Copperweld* provides that officers or employees of a single firm cannot commit Sherman Act conspiracy with that firm when they are pursuing the firm's interests. *Id.* at 771.

According to the Sun, Adfam is a small company whose sole purpose "is to benefit and promote the business and personal interests of the Adelson family." (ECF No. 621 at ¶9.) The Sun alleges that Adfam is an alter-ego of its co-defendants, in which case, its actions can be ascribed to all parties for purposes of the Sun's monopolization and attempted monopolization claims (Claims 1 and 2). The Sun alternatively alleges that Adfam is "an entity sufficiently separate and distinct as an economic unit from [its co-defendants] such that they operate as separate decision-makers" (in which case, it is a unique entity capable of conspiring with its co-defendants). (ECF No. 621 at ¶ 18.) The Sun's new claim (Claim 6) alleges a conspiracy to violate Sherman § 1, which prohibits the formation of contracts in restraint of trade. (ECF No. 621 at ¶¶ 187-94.) The Sun brings this claim against all defendants, including Adfam. (ECF No. 621 at ¶¶ 187-94.)

The RJ argues that the Sun's Claim 6 should be dismissed under the *Copperweld* doctrine because the Sun has made a conclusory and legally insufficient allegation that Adfam and its co-defendants are distinct entities capable of conspiring with one another in restraint of trade, and even if that allegation is not conclusory, the Sun has failed to allege an agreement to restrain trade.

Appendix B

a. *Copperweld* and Defendants' "Unity of Interest"

Because the Court agrees that *Copperweld* applies to Claim 6, *see Copperweld*, 467 U.S. at 771 (*Copperweld* applies to conspiracies to violate Sherman § 1), the issue is whether the Sun has alleged that Adfam and its co-defendants are separate economic entities with distinct interests. The Sun has properly alleged this point.

To state a claim under Fed. R. Civ. P. 8, the Sun must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a motion to dismiss under Rule 12(b)(6), such as this one, the Court must accept as true all well-pleaded factual allegations, *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009), but it need not accept allegations "that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Sprewell v. Golden State Warriors*, 226 F.3d 979, 988 (9th Cir. 2001). Furthermore, a party may pursue relief "in the alternative," and it may plead contradictory facts in order to do so. *See FT Travel-New York, LLC v. Your Travel Ctr., Inc.*, 112 F. Supp. 3d 1063, 1073 (C.D. Cal. 2015); Fed. R. Civ. P. 8(d)(2).

The Sun's Amended Complaint states a claim for antitrust conspiracy that is plausible on its face. In addition to alleging each other element of Sherman § 1 conspiracy, the Sun alleges Adfam is "an entity sufficiently separate and distinct as an economic unit from [its co-defendants] such that they operate as separate decision-makers." (ECF No. 621 at ¶ 18.) The existence of decision-

making independence is ultimately a question of fact that cannot easily be resolved at the motion to dismiss stage. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 n.5 (9th Cir. 1980) (reversing the district court's order dismissing plaintiffs' Sherman § 1 claim and holding that the question of whether defendant corporations are distinct economic entities could not be resolved at the motion to dismiss stage); *In re Pearson Indus., Inc.*, 147 B.R. 914, 918 (Bankr. C.D. Ill. 1992) (holding that the question of whether the defendants "operated as a single economic unit" raises "intensely factual questions which cannot be decided" at the summary judgment stage).

Further, the Sun's allegations are not conclusory. The Sun makes factual claims to support its allegation that Defendants are distinct under *Copperweld.* For example, the Sun alleges that Adfam's business mission is to provide professional services "to support the Adelson family and members' personal and business interests." (ECF No. 621 at ¶ 15.) Read in a light most favorable to the Sun, the Amended Complaint alleges that Adfam's mission could diverge or conflict with its co-Defendants because it does not share a "complete unity of interest" with each of its co-Defendants. This is sufficient at the motion to dismiss stage.

b. Agreement to Restrain Trade

The Sun has also alleged an agreement between Defendants sufficient to sustain its Sherman § 1 conspiracy claim. To state a claim for conspiracy under Sherman § 1, a plaintiff must allege "a contract, combination or conspiracy

among two or more persons or distinct business entities . . . by which the persons or entities intend to harm or restrain trade or commerce. . . ." *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 45 (9th Cir. 2022). An agreement in restraint of trade may be "tacit or express," but allegations of tacit agreement "must allege something more than conduct merely consistent with agreement." *In re DRAM*, 28 F.4th at 46 (quoting *Twombly*, 550 U.S. at 553). When alleging a tacit agreement, plaintiffs must also allege "certain plus factors" which "elevate allegations of parallel conduct to plausibly suggest the existence of a conspiracy." *Id.* These "plus factors" are often "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *Id.* at 47.

The Sun alleges a tacit agreement, not an explicit one. While the Sun argues that Defendants' agreement to buy the RJ constitutes an explicit agreement, they fail to indicate what aspect of that agreement, if executed, would constitute a restraint of trade. *See Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 63 (1911) (Sherman § 1 covers only agreements which are "restraint[s] of trade within the intendment of the act."). There is nothing inherently anticompetitive about buying a newspaper. The Sun suggests that the agreement to buy the RJ was really an agreement to buy the RJ *and* restrain trade through anticompetitive managerial practices, but it points to no allegations sufficient to support this conclusion. Because the Sun can assert only a tacit agreement to restrain trade, it must allege parallel conduct and "plus factors."

The Sun has pled several "plus factors" sufficient to state a claim for conspiracy under *DRAM*. The Sun alleges that Adfam acted solely in the interests of the RJ to further its anticompetitive scheme by (1) allowing its longtime CFO, Steven O'Conner, to serve as the RJ's only corporate officer and News+Media's sole manager (ECF No. 621 at ¶ 17); (2) advising the Adelson family on its purchase of the RJ (*Id.* at ¶¶ 63-64); (3) participating in the illicit redesign of the Newspapers' shared front page (*Id.* at 146); and (4) involving itself in the RJ's finances, including by weighing in on the RJ's financial and operational decisions, reviewing and overseeing the RJ's funding requests to Adelson and Dumont, performing monthly accounting "control checks" on the RJ, and drafting annual "going concern" letters to the RJ's outside auditing firm (*Id.*).

These "plus factors," if true, constitute parallel behavior that is inconsistent with Adfam unilaterally seeking its own self-interest. The Court therefore denies the RJ's motion to dismiss the Sun's Sherman § 1 conspiracy claim (Claim 6).

B. MOTIONS FOR SUMMARY JUDGMENT AND OTHER MOTIONS

In addressing the parties' cross-motions for summary judgment (ECF Nos. 829, 843), the Court's analyzes the issues in the following order: (1) whether the 2005 JOA is enforceable; (2) whether the Sun has suffered an antitrust injury sufficient to bring its Sherman Act claims; (3) whether arguments related to the RJ's intent to breach the

2005 JOA, the Sun's damages flowing from the RJ's breach of the promotional activities and expenses provision of the 2005 JOA, and the RJ's ability to charge editorial and promotional expenses against the joint operation, are precluded by the 2019 Arbitration, and whether the Sun may seek treble damages on the award it received in the 2019 Arbitration; (4) whether the RJ is barred from bringing its Sherman § 1 claim as a complete participant in the 2005 JOA; (5) whether the Sun has monopoly power sufficient to support the RJ's Sherman § 2 claims; (6) whether the RJ's counterclaims based in Nevada common law survive summary judgment; and (7) whether the RJ may terminate the 2005 JOA pursuant to the force majeure clause or because of frustration of purpose.

1. Legal Standard

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). This means that if the evidence, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact, the court can grant summary judgment in favor of the moving party. In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp.*

Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249-50.

2. JOA Enforceability

The question before the Court is whether the Newspaper Preservation Act ("NPA"), 15 U.S.C. §§ 1801-04a, required the Attorney General to sign the 2005 JOA. The RJ argues that 2005 is unenforceable because it was not signed by the Attorney General. The RJ argues the NPA's signature requirement applies to amended JOAs or, alternatively, that the 2005 JOA is a novation, making it a new JOA not an amended JOA. Both arguments fail because there is no signature requirement for amended JOAs and the 2005 JOA is clearly an amended JOA not a new JOA. These conclusions are supported by the text and structure of NPA, case law, and the text and history of the 2005 JOA.

A JOA is a contract between newspapers to consolidate operations. *See Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1287-88 (D.C. Cir. 1989). Typically, a JOA involves one of the newspapers selling off its printing equipment and other assets in order to reduce costs. *Id.* Papers enter JOAs in order to preserve editorial competition in their region, rather than let a failing paper go out of business and expose the surviving paper to antitrust liability.

Appendix B

The NPA was enacted in 1970. Congress passed the NPA in response to a Supreme Court decision limiting the circumstances in which newspapers could legally enter JOAs. *See Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). The NPA expands access to JOAs in order to "maintain[] a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. § 1801. To that end, the NPA provides limited antitrust immunity for parties to JOAs that comply with the NPA's provisions; such immunity is important because without it, the parties to a JOA could violate antitrust laws. *Michigan Citizens for an Independent Press*, 868 F.2d at 1287 ("The [NPA] creates an exemption to the antitrust laws that permits a joint newspaper operation agreement between two newspapers. . . .").

A plain reading of the NPA indicates that signatures are not required for amendments to existing JOAs. *See Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself."). The provisions regarding JOA review are contained in §§ 1803(a) and (b), which are reprinted below in their entirety:

> (a) Joint Operating Arrangements Entered Into Prior To July 24, 1970 It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered

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

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

[Section (c) omitted]

15. U.S.C. § 1803 (emphasis added).

Appendix B

The NPA specifies three levels of review for different kinds of JOAs—none, some, and "prior written consent of the Attorney General." The level of review depends on the kind of JOA. The NPA identifies three kinds of JOAs: pre-1970 JOAs, amended JOAs, and new JOAs "not already in effect." For the first category, which are JOAs entered into before July 24, 1970, no review is required. Section 1803(a) states that pre-1970 JOAs are "not unlawful" provided certain criteria are met. 15 U.S.C. § 1803(a). For amended JOAs, the second category, some review is required. Section 1803(a) provides that a renewed or amended JOA can not add another newspaper and "*must be filed with the Department of Justice.*" *Id.* (emphasis added). The third category is new JOAs, which require "prior written consent." These are governed by § 1803(b) which provides that "[i]t shall be unlawful" to enter a JOA "not already in effect, except with the prior written consent of the Attorney General of the United States." 15 U.S.C. § 1803(b).

These different levels of review for JOAs are calibrated to the NPA's stated purpose of preserving newspapers and guarding against antitrust violations. 15 U.S.C. § 1803(b) ensures thorough vetting of new JOAs when they are first established. 15 U.S.C. § 1803(b) (requiring that any new JOA "effectuates the policy and purpose" of the NPA). Section 1803(a) provides for no review of pre-1970 JOAs if not more than one of the papers "was likely to remain or become a financially sound publication." Amended JOAs must "not add a newspaper publication or newspaper publications to such arrangement," signaling that such a change might be regarded as a new JOA and

trigger more scrutiny. 15 U.S.C. § 1803(a). Additionally, § 1803(c) provides that parties to a JOA are not exempt from antitrust liability for any anti-competitive predatory conduct flowing from the JOA. 15 U.S.C. § 1803(c).

Only new JOAs, those "not already in effect," require "prior written consent of the Attorney General." 15 U.S.C. § 1803(b). Neither pre-1970 nor amended JOAs require such "prior written consent." Section1803(a) is the only portion of the NPA that explicitly mentions amendments and makes plain that amended JOAs must be filed with the DOJ. *See* 15 U.S.C. § 1803(a) ("the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice"). That the amendment language is found in §1803(a), which applies to pre-1970 JOAs, does not mean that a different process applies for amendment to JOAs entered into after 1970. This is because the signature requirement in §1803(b) only applies to JOA's "not already in effect." 15 U.S.C. § 1803(b). It would contravene the statute for the Court to impose the Attorney General signature requirement ("prior written consent") on amended JOAs when the NPA only imposes the signature requirement on new JOAs and specified a lesser requirement (filing with DOJ) for amended JOAs.

Courts have recognized that an amended JOA does not require prior written consent of the Attorney General. *See Mahaffey v. Detroit Newspaper Agency*, 969 F. Supp. 446, 448 (E. D. Mich. 1997) (holding amended JOA did not require prior written consent of the Attorney General) *aff'd by Mahaffey v. Detroit Newspaper Agency*, 166 F.3d 1214, 1998 WL 739902 (6th Cir. 1998); *Hawaii ex*

rel. Anzai v. Gannett Pacific Corp., 99 F. Supp. 2d 1241, 1251 (D. Haw. 1999) (stating the NPA expressly permits amendment of a pre-1970 JOA by filing the amendment with the Department of Justice). The RJ has not identified any courts that have reached an alternative conclusion.

The text and history of the 2005 JOA clearly show that it is an amended JOA, not a new JOA, that did not require the signature of the Attorney General. As a preliminary matter, the Attorney General signed the 1989 JOA when it was a new JOA, as required by § 1803(b). (ECF No. 846-2.) The 2005 JOA is titled "Amended and Restated Agreement" and is referred to throughout the agreement as "Restated Agreement." *Id.* The 2005 JOA continued the fifty-year term contained in the 1989 JOA, which was tethered to the Attorney General's approval of the agreement on June 1, 1990. (ECF Nos. 837-2, 837-4, 837-6.) The 2005 JOA was subject to a multi-year review process by the DOJ. This is consistent with the requirement in § 1803(a) that amended JOAs "must be filed with the Department of Justice." 15 U.S.C. § 1803(a). As part of that review, the DOJ issued Civil Investigative Demands to both parties for documents, interrogatory responses, and depositions. (*See*, *e.g.*, ECF Nos. 838-5, 838-6, 838-7, 838-8 at 11, 838-4 at 10, 838-9 at 6.) The DOJ inquired into whether the RJ had the means to "unilaterally terminate the amended JOA" and whether the RJ could control the Sun's editorial content. (ECF No. 838-10 at 3; *see* ECF No. 838-5 at 6 (CID Nos. 4(a) and (b)).) At the end of its investigation, the DOJ issued a letter to both parties informing them that it had "closed its investigation" into the "2005 amendments to the parties Joint Operating

Agreement." (ECF No. 831-13.) Mark Hinueber, former in-house counsel to the owner of the RJ at the time it entered the 2005 JOA, testified that the DOJ's letter was "a no-action letter" and that the NPA "has no mechanism to approve an amended JOA." (ECF No. 838-8 at 11.) In sum, the parties pursued the DOJ review process for amended JOAs consistent with § 1803(a), not the "prior written consent of the Attorney General" process for new JOAs under § 1803(b). The fact that the 2005 JOA was not signed by the Attorney General is not a defect, but rather consistent with its being an amended JOA.

The RJ's argument that the 2005 JOA was a novation lacks record support. A novation occurs when parties expressly terminate an existing contract and enter a new contract that materially changes their rights and obligations. *See United Fire Ins. Co v. McClelland*, 780 P.3d 193, 195-96 (Nev. 1989). The intent of all parties to cause a novation must be clear. *Id.* (citing *Pink v. Busch*, 691 P.2d 456, 460 (Nev. 1984)). Consent to novation may be implied from the circumstances of the transaction and by the subsequent conduct of the parties, *id.* (citing *Sans Souci v. Div. of Fla. Land Sales*, 448 So. 2d 1116, 1121 (Fla. Dist. Ct. App. 1984)), and lack of novation can be determined as a matter of law if no reasonable person could conclude that a novation existed, *id.* (citing *Herb Hill Ins., Inc. v. Radtke*, 380 N.W. 2d 651, 654 (N.D. 1986)).

Here, the Court finds no triable issues of fact on the issue of novation. The parties' intention to amend the 1989 JOA is evident from the face of the 2005 JOA. The 2005 JOA is titled "Amended and Restated Agreement." (ECF

NO. 837-6 at 2.) It tracks the structure and language of the 1989 JOA. (*Id.*) It continues the original term of the 1989 JOA. (*Id.* at 3.) While the 2005 JOA includes changes to the profit-sharing scheme and the distribution of the newspapers, the material elements of the 1989 JOA that eliminated price and other non-editorial and non-reportorial competition, elements previously approved by the Attorney General, remain unchanged. Indeed, the 1989 JOA included a joint distribution scheme on Saturdays, Sundays, holidays, and special editions, so even the joint distribution scheme is not new to the 2005 JOA.

Moreover, correspondence between the parties and the DOJ show that the parties intended to amend the 1989 JOA. The RJ's counsel Gordon Lang represented to the DOJ in the submission of the 2005 JOA that the parties "have amended the JOA, and filed the Amended Restated Agreement with the Assistant Attorney General for Administration." (ECF No. 837-11.) Unlike the process for the approval of the 1989 JOA, the DOJ did not publish the 2005 JOA in the Federal Register, issue any report, accept public comment, or hold a hearing on whether the 2005 JOA should be allowed to proceed. (ECF No. 837-1 at ¶6.)

The evidence supporting the parties' intent to amend is not adequately rebutted by the RJ's reference to provisions in the 2005 JOA expressly terminating the 1989 JOA on the "Transition Date" and releasing all claims and obligations arising under the 1989 JOA. The Court finds that even viewing the RJ's evidence in the light most favorable to the RJ, it does not create triable issues of

fact pertaining to novation. The Court therefore grants summary judgment to the Sun on this issue.

Even if it were a novation, the 2005 JOA would be enforceable without the Attorney General's signature. *See Newspaper Guild v. Levi*, 539 F.2d 755, 759-60 (D.C. Cir. 1976) (holding JOA was valid without the Attorney General's signature); *News Weekly Systems, Inc. v. Chattanooga News-Free Press*, 986 F.2d 1422, 1993 WL 47197, at *2 (6th Cir. 1993) (rejecting as "devoid of merit" the plaintiff's argument "that any joint agreement not approved by the Attorney General is per se illegal"). Courts recognize that absence of the Attorney General's signature may expose the parties to antitrust liability but does not invalidate the JOA or render is unlawful or unenforceable. *See Newspaper Guild*, 986 F.2d at 760.

Because the Court finds that the 2005 JOA is enforceable, it denies the RJ's motion for summary judgment on this ground. For the same reason, the RJ's motion to dissolve preliminary injunction and motion to expedite resolution of that motion (ECF Nos. 853, 915) are both denied, and the Sun's motion for summary judgment on the RJ's second affirmative defense (ECF No. 836 at 23) is granted.

Because the 2005 JOA is enforceable, Lawrence J. Aldrich's opinions as to (1) the meaning of the NPA or related regulations and whether DOJ has legal authority to approve "Amended and Restated" JOAs; (2) the DOJ's practices in and around 2008 with respect to newspaper JOAs, including "Amended and Restated" JOAs; and (3)

the intent, motive, of state of mind of the DOJ or any lawyers working for the DOJ, will no longer assist the trier of fact in understanding the evidence before it or determining a fact at issue. (*See* ECF No. 838-1 at 4-5). The RJ's motion to exclude that testimony (ECF No. 868) is granted pursuant to Fed. R. Evid. 702.

3. Antitrust Injury

"The antitrust laws do not provide a remedy to every party injured by unlawful economic conduct. . . . [A]ntitrust laws are only intended to preserve competition for the benefit of consumers." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999). A plaintiff may only pursue an antitrust action if it can show "'*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (emphasis in original) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Antitrust injury is an essential requirement to each of the Sun's claims under the Sherman Act. *Id.*

The Ninth Circuit has identified four requirements for antitrust injury: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc.*, 190 F.3d at 1055. There is an additional fifth requirement: "that 'the injured party be a participant in the same market as the alleged malefactors,' meaning

'the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market.'" *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (quoting *Glen Holly Entm't, Inc. v. Tektronix*, Inc., 343 F.3d 1000, 1008 (9th Cir. 2003)).

Before analyzing antitrust injury, the Court must define the relevant market. *See Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) ("A threshold step in any antitrust case is to accurately define the relevant market.") Relevant market refers to "the area of effective competition." *Id.* (quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018)). Generally, "[t]he process of defining the relevant market is a factual inquiry for the jury." *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993). But here, for the purposes of its summary judgment motion, the RJ does not contest the Sun's market definition as it is pled. The Sun's complaint alleges that the "sale of local daily newspapers is a distinct relevant product market and line of commerce within the meaning of Section 2 of the Sherman Act and Section 7 of the Clayton Act." (ECF No. 621 at ¶ 44.) The Sun's complaint also alleges that the relevant geographic market is Clark County, Nevada. The Court therefore adopts the relevant market the Sun alleges in its complaint, the sale of local daily newspapers in Clark County, Nevada, for the purposes of deciding this motion.

Appendix B

a. Unlawful Conduct

Turning to the elements of antitrust injury, the Court begins by analyzing whether there are genuine issues of material fact concerning whether the RJ acted unlawfully under antitrust laws. "Without a violation of the antitrust laws, there can be no antitrust injury." *Am. Ad Mgmt., Inc.*, 190 F.3d at 1055. This inquiry requires a showing that there was some "competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield Co*, 495 U.S. at 344 (emphasis in original). Thus, to show unlawful conduct in the context of an antitrust claim, the Sun must show that there was competition in the relevant market and that the RJ's alleged conduct reduced competition.

i. Competition in the Relevant Market

The Sun argues that editorial and reportorial competition amongst newspapers is economic competition under antitrust laws. The RJ contends that editorial and reportorial competition, or competition for readers' attention, is not commercial competition. According to the RJ, because the RJ and the Sun are sold together in a bundle, they do not compete economically for sales, which means there is no competition in the relevant market.

The RJ supports its argument that antitrust laws only apply to commercial competition with citations to cases that do not deal with competition between newspapers. *See Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002), *aff'd on other grounds sub nom. Toscano*

v. Pro. Golfers Ass'n, 258 F.3d 978, 985 (9th Cir. 2001) (sports contests are not competition under the Sherman Act); *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 983 (D.C. Cir. 2017) (political competition is not competition under the Sherman Act). The Sun points to authority analyzing competition in the context of newspapers to support its argument that editorial and reportorial competition is economic competition under antitrust laws. *See United States v. Daily Gazette Co.*, 567 F. Supp. 2d 859 (S.D. W. Va. 2008); *Hawaii ex rel. Anzai v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241 (D. Haw. 1999). The Court is persuaded by the Sun's argument.

The holding in *Daily Gazette* directly contradicts the RJ's argument. In that case, the defendants made the same argument the RJ makes here, saying "editorial competition is not commercial in nature and, hence, is beyond the reach of antitrust laws." *Daily Gazette Co.*, 567 F. Supp. 2d at 870. Defendants also argued that "[e]ditorial competition for readers' attention, which is all that the complaint alleges, cannot have financial consequences for the JOA parties" because all revenue is collected into a common fund and distributed to the parties according to the terms of the JOA, just like in this case. *Id.* The court in *Daily Gazette* rejected these arguments, identifying at least "two competitive and economic incentives in pursuing particular editorial and news-gathering efforts that attract readers, subscribers, and advertisers to its own newspaper, namely, (1) increasing its value, particularly in the eyes of potential acquisitors, and (2) enhancing its bargaining position when the JOA is up for re-negotiation or termination." *Id.*

Essentially, the court held that editorial competition plays a role in "valuing newspapers as a going concern and for saleability purposes." *Id.* Thus, editorial competition is commercial competition in the newspaper context.

There are two distinctions between *Daily Gazette* and this case, namely that the two newspapers in *Daily Gazette* were distributed separately and had separate subscriber bases and that the court's decision was denying a motion to dismiss, not a motion for summary judgment. But the court's holding is still instructive despite these distinctions. Editorial competition for readers' attention, even in the context of jointly distributed papers, has economic effects on the newspapers. Here, the Sun's expert opined on the Sun's economic incentives in the ways identified in *Daily Gazette*, in addition to other ways, including increasing traffic to the Newspapers' digital operations outside of the JOA, and promoting their principal owners' economic or business interests more broadly. The Court finds that editorial competition for readers' attention in the relevant market can be the basis for an antitrust claim in the newspaper context.

To show editorial competition, the Sun must further show that the Sun and the RJ are reasonably interchangeable products that may be substituted for each other in the relevant market. The RJ argues this is impossible because the products are not economic substitutes, meaning one product cannot take away sales from the other because they are sold as a bundle. The Sun argues that the products compete within the bundle for

readers' attention and can be substituted for one another by the buyer of the bundle.

The outer boundaries of a product market are determined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Interchangeability of use "may be determined by examining such practical indicia" as (1) "industry or public recognition of the market as a separate economic entity," (2) "the product's peculiar characteristics and uses," (3) "unique production facilities," (4) "distinct customers," (5) "distinct prices," (6) "sensitivity to price changes," and (7) "specialized vendors." *Brown Shoe*, 370 U.S. at 325-28.

The Sun has marshaled evidence in the record weighing in its favor on all the listed indicia except sensitivity to price changes, demonstrating that both the RJ and the Sun exist within the relevant market. (ECF No. 871 at 39-42.) The Sun concedes that there is no price elasticity between the two newspapers because they are not priced separately, but points to evidence in the record establishing a lack of price sensitivity between the newspaper bundle and other media. (*Id.*) With six of the indicia clearly weighing in the Sun's favor, a reasonable juror could conclude that the Sun and the RJ compete in the same market for readers' attention, even though they are sold in a bundle. The totality of the evidence presents triable issues of fact on whether the RJ and the Sun compete for readers' attention in the relevant market.

ii. Reduction in Competition

The next question is whether there are triable issues of fact on whether the RJ's alleged conduct reduced competition for readers' attention in the relevant market. The RJ contends that because there is no direct evidence showing the Sun lost readers as a result of the alleged reduction in editorial competition for readers' attention, the Sun has failed to show a reduction in competition. The RJ points to statements in the Sun's antitrust economist expert report admitting that there is a lack of evidence of readership shifting between the Sun and the RJ. (ECF No. 845 at 34.)

The Sun points to findings its antitrust economist expert, Dr. Michael Katz, made concerning the effect the RJ's alleged conduct had on the Sun, competition in the market, and consumers. (ECF No. 871 at 18-19.) Specifically, Dr. Katz opined that the RJ's accounting abuses, failure to maximize profits, failure to promote the Sun, and the RJ's prosecution of its counterclaims as "sham" litigation all harm "competition by weakening the Sun's ability and incentives to compete with the Review-Journal—thus lessening the competitive pressures on the Review-Journal, to the detriment of consumers." (ECF No. 875-1 at 14.) Dr. Katz observed that, due to alleged accounting abuses by the RJ, the Sun has not been paid a profit payment from the joint operation since 2017, which weakens the Sun's ability to compete with the RJ and threatens to drive the Sun out of business. (*Id.*) He opined that the RJ's alleged failure to maximize profits artificially reduces payments due to the Sun, weaking

the Sun's ability to compete. (*Id.* at 15.) He opined that the RJ's alleged failure to promote the Sun diminished the Sun's appearance, hindering the Sun's ability to communicate with consumers and potential readers about its newspaper, thereby reducing consumer knowledge of the Sun and undermining its ability to compete. (*Id.* at 15-16.) Specifically, he opined that this alleged conduct "has weakened editorial and reportorial competition between the *Review-Journal* and the *Sun*, both directly—because it collectively reduces consumers' knowledge of the Sun and its brand—and indirectly—because the Sun's owners have less incentive to invest in a newspaper that obtains less readership and attention." (*Id.* at 16.) Finally, Dr. Katz opined that the RJ's pursuit of its counterclaims, assuming they are found to be objectively baseless, harms competition "by both imposing large litigation costs on the Sun and by creating uncertainty that further raises the Sun's costs, . . . [and] weakens the Sun's ability to compete with the Review-Journal—regardless of which party prevails in the litigation." (*Id.* at 17.)

The totality of the evidence presents triable issues of fact on whether the RJ's alleged conduct reduces editorial competition for reader's attention in the relevant market. Therefore, the Sun has satisfied the first prong of the Ninth Circuit test for antitrust injury, marshaling triable issues of fact on the issue of whether the RJ's alleged conduct is unlawful under antitrust laws.

b. Injury to the Sun

Next, the Sun must show that the RJ's unlawful conduct caused it to suffer injury. "A plaintiff must also allege some credible injury caused by the unlawful conduct. There can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct." *Am. Ad Mgmt., Inc.*, 190 F.3d at 1056. The RJ does not argue that the Sun stands to gain from its alleged conduct. Instead, the RJ argues that the Sun has failed to show any injury from the Sun's alleged conduct, both because the record lacks any evidence showing the Sun lost readers due to the RJ's actions and because the Sun's complaints about having less money due to the RJ's alleged breach of the 2005 JOA are simply contract damages, not damages flowing from a reduction in competition.

The Sun contends that the RJ's anticompetitive conduct has weakened the Sun's ability to compete, resulting in harm to the Sun, competition in the relevant market, and consumers. The Sun's argument is supported by Dr. Katz's report analyzing the effect of the RJ's alleged conduct on the Sun, competition, and consumers. The Court also finds that the RJ's alleged failure to promote the Sun harms competition and decreases the Sun's value "as a going concern and for saleability purposes." *Daily Gazette Co.*, 567 F. Supp. 2d at 870. This is a harm that Dr. Katz opined on in his expert report (ECF No. 875-1 at 39-42), and it is a harm caused by the RJ's alleged anticompetitive conduct. The Court therefore finds triable issues of fact on the issue of whether the RJ's allegedly unlawful conduct caused injury to the Sun.

c. The Injury Flows from that Which Makes the Conduct Unlawful

Next, the Sun must show that the claimed injury flows from that which makes the RJ's alleged conduct anticompetitive and unlawful. "It is not enough that the plaintiff's claimed injury flows from the unlawful conduct. An antitrust injury must 'flow[] from that which makes defendants' acts unlawful.'" *Am. Ad Mgmt., Inc.*, 190 F.3d at 1056 (quoting *Brunswick Corp.*, 429 U.S. at 489). In *Brunswick*, the Supreme Court held that a plaintiff failed to show antitrust injury when its claimed injury was the additional profit it would have earned had its competitors been allowed to fold. *Brunswick*, 429 U.S. at 479-81, 487-89. The defendant's potential to monopolize the market by buying out the competitors would injure the plaintiff in the same way as any rescue of the plaintiff's competitors. *Id.* at 487. The Supreme Court held that the defendant's actions actually preserved competition, and that the plaintiff could not recover damages related to profits it would have realized had competition been reduced. *Id.* at 488. The plaintiff in *Brunswick* failed to establish antitrust injury because its alleged injury did not flow from the monopolistic actions taken by the defendant.

Here, the facts are distinguishable from those in *Brunswick*. There, the defendant's purchase of the plaintiff's competitors was not in itself unlawful but was only potentially unlawful because of the defendant's size. Here, the RJ's alleged anticompetitive conduct is itself potentially unlawful because it reduces editorial competition in the relevant market and harms consumers.

The Sun's claimed injury is harm to its ability to compete and decreased visibility, which hurts its value. This claimed injury flows directly from the RJ's alleged unlawful conduct. Thus, the Court finds triable issues of fact on the issue of whether the Sun's claimed injury flows from that which makes the RJ's alleged conduct unlawful.

d. The Injury Is the Type the Antitrust Laws Were Intended to Prevent

Next, the Sun must show that its claimed injury is the type the antitrust laws were intended to prevent. "Finally, the plaintiff's injury must be 'of the type the antitrust laws were intended to prevent.' The Supreme Court has made clear that injuries which result from *increased* competition or lower (but non-predatory) prices are not encompassed by the antitrust laws." *Am. Ad Mgmt., Inc.*, 190 F.3d at 1057 (citing *Atl. Richfield Co.*, 495 U.S. at 337-40) (emphasis in original). No party has argued that the Sun's claimed injury was the result of increased competition or lower, non-predatory prices. The Sun's claimed injury, especially as it pertains to its reduced ability to compete, is exactly the type of injury the antitrust laws were intended to prevent. The Court therefore finds triable issues of fact on the issue of whether the Sun's injury is the type the antitrust laws were intended to prevent.

e. The Sun Is a Participant in the Relevant Market

Finally, the Sun must show that it is a participant in the relevant product market. The stated purpose of the

2005 JOA is to preserve "editorially and reportorially independent and competitive newspapers in Las Vegas and its environs." (ECF No. 837-6.) The Sun supplies content to the RJ "for publication in the Sun," not in the RJ. (*Id.*) The Sun has full editorial independence, and the RJ must publish the Sun so long as the Sun complies with production requirements. (*Id.*) Given the parties' treatment of the Sun in the 2005 JOA, the Court finds that the Sun is a separate and independent newspaper product distributed in the newspaper bundle. The Court further finds that the Sun editorially competes with the RJ for readers' attention in the relevant market. The Sun is therefore a "competitor of the alleged violator in the restrained market," *Somers*, 729 F.3d at 963, meaning the Sun is a participant in the relevant market. The court therefore finds triable issues of fact on the issues of whether the Sun is a participant in the relevant market.

The Sun has satisfied its burden of production as to each of requirements of antitrust injury and presented triable issues of fact on each element. The Court therefore denies the RJ's motion for summary judgment on the issue of antitrust injury.

4. Preclusion and Treble Damages

The parties each argue that certain aspects of the Arbitrator's 2019 decision (ECF No. 837-8) should have a preclusive effect on issues presented in the cross motions for summary judgment. The preclusive effect of a former adjudication is generally referred to as *res judicata. Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1988).

Res judicata "includes two distinct types of preclusion, claim preclusion and issue preclusion."[1] *Id.* "The doctrine of issue preclusion prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." *Id.* at 322 (quoting *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979)). Federal law requires "federal courts to apply the *res judicata* rules of a particular state to judgments issued by courts of that state." *Robi*, 838 F.2d at 322 (citing *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 519, (1986)); 28 U.S.C. § 1738.

In Nevada, four elements must be met for issue preclusion to apply:

> "'(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation'; and (4) the issue was actually and necessarily litigated."

Five Star Cap. Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008) (alteration in original) (quoting *Univ. of Nev. v. Tarkanian*, 879 P.2d 1180, 1191 (Nev. 1994).

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1. Neither party argues that claim preclusion applies to any cause of action in this case.

The Sun says that the Arbitrator's findings preclude the RJ from arguing that the 2005 JOA permits it to charge its editorial and independent promotional costs against the joint operation. The RJ does not contest the Sun's argument for issue preclusion. The Court will therefore grant summary judgment to the Sun on its Second Affirmative Defense and preclude the RJ from arguing that it may charge its editorial and independent promotional costs against the joint operation under the 2005 JOA.

The RJ's issue preclusion argument is contested. The RJ first argues that the Arbitrator's findings preclude the Sun from relitigating the RJ's intent to breach the JOA. On this point, the Sun concedes that the Arbitrator issued a ruling on the merits and that the parties in the 2019 Arbitration and this action are in privity, satisfying two of the elements. The Sun argues that the intent required for its monopoly claims is not identical to the intent issues raised in the 2019 Arbitration and that the RJ's intent to harm competition was not necessarily and actually litigated. The Court agrees with the Sun.

For an issue to be identical and therefore appropriate for issue preclusion, it must involve "the same ultimate issue previously decided in the prior case." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 917 (Nev. 2014). Raising "a new legal or factual argument" that involves the same ultimate issue will not prevent the application of issue preclusion. *Id.* at 916. Issue preclusion may apply "even though the causes of action are substantially different, if the same fact issue is presented." *Clark v. Clark*, 389 P.2d 69, 71 (Nev. 1964).

Here, the Court is satisfied that the intent issue raised in the Sun's monopoly claims does not involve the same ultimate issue decided in the 2019 Arbitration. The intent the parties are litigating in this action is distinct from the intent litigated in the 2019 Arbitration. The Sun's claims in this action are based in § 2 of the Sherman Act and have two essential elements: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (applying these elements to attempt to monopolize under § 2 of the Sherman Act).

In the 2019 Arbitration, intent was relevant to the Sun's cause of action for tortious breach and its request for punitive damages. In the Final Award, the Arbitrator mentioned the RJ's intent to breach only once, in a section denying the Sun's claim for tortious breach:

> The tortious breach claim requires that the Review-Journal's actions in connection with the JOA be more than an inaction or breach but rather rise (or perhaps fall) to the level of an intent to breach the implied covenant of good faith and fair dealing. While the Review-Journal appears to have dragged its feet and otherwise been less than easy to work with, it is possible that [the Sun] may not always have been easy to deal with either. The weight of the

> evidence indicates that the level of conduct of the Review-Journal does not qualify for tortious breach and the (seventh) claim is denied in its entirety.

(ECF No. 837-8 at 11.) The Arbitrator made no specific findings on intent to breach for the purposes of a punitive damages award. Thus, the only finding with any potential preclusive effect is the Arbitrator's finding on tortious breach.

In Nevada, a claim for tortious breach requires a showing that one party "deliberately countervene[d] the intention and spirit of the contract" and that "a special element of reliance or fiduciary duty was present." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 808 P.2d 919, 922-23 (Nev. 1991). The Sun's claim required a showing that the RJ intended to breach the covenant of good faith and fair dealing in the 2005 JOA, and the Arbitrator found that the evidence did not support such a showing.

The Sun's Sherman Act claims require a showing that the RJ "willfully" acquired or maintained monopoly power. *Kodak Co.*, 504 U.S. at 481. The Sun's alleges that the RJ has "the specific intent to achieve monopoly power" and that it "abused and maintained market power" by exploiting its "powers and responsibilities under the 2005 JOA to deprive the Sun of its Annual Profit Payments," "reducing the visibility of the Sun to consumers in contravention of their obligations under the JOA," and "threatening to terminate the JOA." (ECF No. 621 at 39.) While there are overlapping factual issues present

in this matter and the 2019 Arbitration related to the RJ's conduct under the 2005 JOA, the intent litigated in the 2019 Arbitration is not identical to the intent being currently litigated in this case. Here, the Sun must show that the RJ intended to acquire or maintain monopoly power through its conduct. Nothing in the Arbitration Final Award addresses this issue. The Arbitrator's conclusion that the RJ did not intentionally breach the implied covenant of good faith and fair dealing in the 2005 JOA does not preclude further litigation on whether the RJ intended to monopolize the market through its conduct. In short, the intent issue the parties litigated in the 2019 Arbitration does not involve the same ultimate issue the parties are litigating here. Because the RJ has failed to show that the intent issue decided in the 2019 Arbitration is identical to the intent issue presented in this case, the Court denies the RJ's motion for summary judgment on this issue.

Next, the RJ argues that the Sun is precluded from relitigating its failure to prove damages flowing from the RJ's breach of the promotional activities and expenses provision of the 2005 JOA. Here, the Court agrees with the RJ. In the Arbitration, the Sun sought damages for the RJ's breach of contract "related to additional promotional activities expenses seeking . . . damages for the period from December 11, 2015 through March 31, 2018." (ECF No. 837-8 at 3.) While the Arbitrator concluded that the RJ breached this provision, the Arbitrator also found that a "crucial element of a breach of contract action is the proof of damages beyond speculation" and that there "was not enough evidence presented in this matter to make

a definitive damages calculation of wrongfully charged additional promotional activities expenses by the RJ." (*Id.* at 6.) The Arbitrator speculated that the audit awarded to the Sun could determine damages with specificity, but the Final Award concluded that the Sun did not present sufficient evidence of damages on this breach of contract claim. (*Id.*) The Court therefore finds that the Sun is precluded from arguing for damages stemming from this breach during the period of time from December 11, 2015 through March 31, 2018 and grants summary judgment to the RJ on this issue.

Finally, the RJ contends that because it fully satisfied the state court judgment stemming from the Final Arbitration Award, the principle of double recovery bars the Sun from seeking further compensatory damages related to accounting for editorial and promotional expenses from December 11, 2015 through March 31, 2018. Thus, the RJ argues, because the Sun is not entitled to any further compensatory damages for the RJ's breach of the 2005 JOA during the Arbitration timeframe, the Sun cannot seek treble damages based on that same conduct, as it does in this antitrust action. The Sun argues that trebling of damages should happen before subtracting the sum the RJ already paid, and that the remaining figure is the proper damage award in an antitrust suit. The Sun's argument is better supported by this circuit's precedent.

In *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), the Ninth Circuit addressed a sufficiently analogous scenario where a prior settlement from one defendant offset a jury verdict of treble damages for antitrust

violations against other defendants. "Irrespective of the nature of the cause of action, a plaintiff is entitled to one full satisfaction of his claim . . . such satisfaction would not be achieved by the award of any sum, which added to the settlement sum, did not total [three times the jury's award]." *Id.* at 398. Thus, "[a]ny other method [of calculating damages] would have resulted in plaintiffs' receiving less than the whole to which they were entitled." *Id.* Thus, when deciding when to credit prior payments against a treble damage award, "to ensure that plaintiffs receive complete satisfaction of their claims, settlement payments should be deducted from the award . . . *after* actual damages are trebled." *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1151 (C.D. Cal. 1986) (emphasis in original). Based on clear precedent from the Ninth Circuit, the Court concludes that the RJ's prior payment satisfying the judgment stemming from the 2019 Arbitration should be deducted from any actual damages awarded at trial after the award is trebled. The Court therefore denies the RJ's request for summary judgment on this issue.

5. Complete Participation

The Sun seeks summary judgment on the RJ's Sherman § 1 claim (Counter Claim 3) because it is barred by the NPA and the doctrine of complete participation. Because the Court finds that the RJ is a complete participant in the 2005 JOA, it declines to reach whether the NPA is also a bar.

Appendix B

As stated, Sherman § 1 prohibits agreements in restraint of trade. 15 U.S.C. § 1. The RJ alleges that the 2005 JOA is a *per se* violation of Sherman § 1 because it is a horizontal agreement to fix prices. (ECF No. 861 at 37 (quoting ECF No. 296 ¶ 147)); *Ohio v. American Express Co.*, 585 U.S. 529, 540-41 (2018) ("horizontal restraints . . . qualify as unreasonable *per se*."). In response, the Sun raises the "complete participant" defense (sometimes called "complete involvement" defense), which bars a "complete participant" in the challenged agreement from bringing a claim under Sherman § 1. *THI-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 995 (9th Cir. 1980).

A "complete participant" is an entity that has "actively support[ed] the entire restrictive program . . . participating in its formulation and encouraging its continuation." *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 278 (9th Cir. 1976) (quoting *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968)). A plaintiff's "complete participation" is determined by the facts, including (1) whether it was present at the agreement's formation, (2) whether it entered a restrictive contract after an "arm's length bargaining process," and (3) the degree to which it was coerced into the anti-competitive agreement. *See THI-Hawaii*, 627 F.2d at 995-96; *Javelin Corp.*, 546 F.2d at 277, 279 (finding the plaintiff was not coerced when its own lack of capital motivated it to enter an anticompetitive agreement that existed years before the plaintiff joined); *Perma Life Mufflers*, 392 U.S. at 138-40 (finding no coercion when a group of small franchisees that had merely agreed to terms set by

their more powerful multinational franchisor). While a defendant's complete participation is generally a question of fact, *Javelin Corp.*, 546 F.2d at 279, summary judgment is appropriate where the undisputed facts clearly support a finding of complete participation, *THI-Hawaii*, 627 F.2d at 995-96.

The undisputed facts show that the RJ Defendants are complete participants in the 2005 JOA because they agreed upon acquiring the RJ to step into the shoes of the JOA's original parties, without coercion. Defendants adopted the JOA pursuant to an "arm's length bargaining process," free from coercion, in which they and the Sun were the only parties. *THI-Hawaii*, 627 F.2d at 996. Both sides agree that Defendants performed extensive background research into the effects and implications of the JOA, with the help of experts who were members of the legal team that drafted the 2005 JOA. (ECF Nos. 839-1 at 11, 58; 839-4 at 4; 906-14 at 7.) They were neither forced into the agreement by a need for capital nor overpowered by the Sun's stronger bargaining position. *See Javelin Corp.*, 546 F.2d at 277, 279; *Perma Life Mufflers*, 392 U.S. at 138-40; *see also THI-Hawaii*, 627 F.2d at 995-96 (finding no coercion even when a court order had helped to push parties into the challenged agreement).

As successors in interest to the 2005 JOA, Defendants stepped into the shoes of their predecessors, as if they had been present at the JOA's formation. Restatement (Second) of Contracts § 328(2) (1981) ("the acceptance by an assignee of . . . an assignment operates as a promise to the assignor to perform the assignor's unperformed

duties. . . ."); *In re Boyajian*, 564 F.3d 1088, 1091 (9th Cir. 2009) ("under general principles of assignment law an assignee steps into the shoes of the assignor"). The 2005 JOA expressly binds "successors and assigns." (ECF No. 837-6 at 11 (2005 JOA § 10.9) ("[t]his Restated Agreement shall be binding upon and shall inure to the benefit of each of the parties hereto and their permitted successors and assigns.").) The RJ is therefore a complete participant in the 2005 JOA and thus barred from bringing its Sherman § 1 Counterclaim. Accordingly, the Court grants summary judgment in favor of the Sun on the RJ's Sherman § 1 Counterclaim.

6. Monopoly Power

The Sun seeks summary judgment on the RJ's Sherman § 2 claims (Counterclaims 1 and 2) because it lacks monopoly power in the relevant market. The Court grants the Sun's motion because the facts cannot support a conclusion that the Sun has monopoly power.

To bring a claim under Sherman § 2, a plaintiff must show that the defendant has monopoly power in the relevant market. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (monopoly power required for monopolization claim); *Rebel Oil Co., Inc. v. Atlantic Richfield, Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (monopoly power required for attempted monopolization claim). "Monopoly power is the power to control prices or exclude competition in a given market." *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993) (quoting *United States v. E.I. duPont de Nemours &*

Co., 351 U.S. 377, 391 (1956)). The question of whether a defendant "possesses monopoly power is essentially one of fact," *L.A. Land Co.*, 6 F.3d at 1425, that can be shown through direct or indirect evidence, *Atlantic Richfield*, 51 F.3d at 1434. Expert testimony is helpful to demonstrate the existence of monopoly power, but it is not required. *See Forro Precision, Inc. v. Int'l Bus. Machs. Corp.*, 673 F.2d 1045, 1058-59 (9th Cir. 1982); *contra Am. Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569, 1579 (11th Cir. 1985) (stating that a showing of monopoly power cannot be based upon lay opinion testimony).

The RJ attempts to show the Sun's monopoly power by reducing its own editorial quality. (ECF No. 861 at 51.) To show this, the RJ must show that the Sun's alleged reduction in editorial quality was an "injurious exercise of market power" that detrimentally affected the market. An injurious exercise of market power could include restricting its own output or artificially lowering prices, which caused the sort of injury that could be inflicted by an entity with market power. *Atlantic Richfield*, 51 F.3d at 1434 ("If the plaintiff puts forth evidence of restricted output and supracompetetive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power."). The injurious effect of the defendant's exercise of monopoly power must be "market-wide." *Id.* ("A predator has sufficient market power when, by restricting its own output, it can restrict marketwide output. . . ."); *L.A. Land Co.*, 6 F.3d at 1425 ("Monopoly power is the ability to control prices and exclude competition *in a given market.*") (emphasis added). It is not enough for a plaintiff

to show that a defendant reduced the quality of its goods unilaterally, without showing an effect on its competitors' goods. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3rd Cir. 2007) ("If a firm can profitably raise prices without causing competing firms to expand output and drive down prices, that firm has monopoly power.").

According to the RJ, the Sun undertook an "injurious exercise of market power" by purposefully reducing its own editorial quality, thereby reducing the quality of the combined Sun/RJ newspaper. (ECF No. 861 at 51-52.) It is possible to show an injurious exercise of market power through a reduction in the quality of goods, rather than a reduction in prices. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) ("[d]irect evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or *decreased quality* in the relevant market.") (emphasis added); *Atlantic Richfield*, 51 F.3d at 1433 ("[A]n act is deemed anticompetitive under the Sherman act only when it harms both allocative efficiency and raises the price of goods above competitive levels or *diminishes their quality.*") (emphasis added).

Even if the RJ could show the *Sun* reduced its editorial quality, it has not offered evidence showing that had an injurious effect on the market sufficient to demonstrate monopoly power. Here, the market is two papers: the *Sun* and the *RJ*. (ECF No. 871 at ¶ 43.) The RJ offers facts showing that the Sun's actions reduced the quality of the *Sun*. (*See*, *e.g.*, ECF No. 863-1 at 14-23, 27-37, 40-44.) But the RJ does not demonstrate that the quality of the *RJ*

was negatively affected by the Sun's actions. In fact, the RJ asserts that its own quality has improved or at least remained stable in recent years. (ECF Nos. 862-18 at 9:13-19, 10:11-23; 862-16 at 3:6-24, 6:7-25; 862-19 at 5:20-6:5.) These facts cannot support a finding that the Sun has monopoly power in the relevant market.

The Court therefore grants the Sun's motion for summary judgment on the RJ's Sherman § 2 counterclaims (Counterclaims 1 and 2).

7. The RJ's Remaining Counterclaims

The RJ's bring three additional counterclaims based in Nevada common law: 1) breach of contract against all counterclaim Defendants; 2) breach of the implied covenant of good faith and fair dealing against all counterclaim Defendants; and 3) tortious interference with contractual relations against Brian Greenspun.

In Nevada, "the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 408 (1865)).

To establish a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must prove: (1) the existence of a contract between the parties; (2) that defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the

contract; and (3) the plaintiff's justified expectations under the contract were denied. *See Shaw v. CitiMortgage, Inc.*, 201 F. Supp. 3d 1222, 1251 (D. Nev. 2016) (citing *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995)). A party breaches the implied covenants of good faith and fair dealing by engaging in conduct that "deliberately countervenes the intention and spirit of the contract." *Id.* (quoting *Hilton Hotels Corp., v. Butch Lewis Prod. Inc.*, 808 P.2d 919, 923-24 (Nev. 1991)).

Finally, in a claim for tortious, or intentional, interference with contractual relations, "a plaintiff must establish: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003).

Given the Court's finding that the 2005 JOA is valid and enforceable, the first element of all of these claims is established as a matter of law. The Sun argues it is entitled to summary judgment on these claims because the RJ's allegations regarding breach are impermissible challenges to the Sun's content prohibited by the terms of the 2005 JOA, the NPA, and the First Amendment. The Sun also argues that the RJ has failed to establish any damages flowing from any alleged breach.

The RJ alleges that the Sun breached two provisions of the 2005 JOA by allegedly engaging in a course of conduct to deteriorate the printed *Sun*'s quality and divert

readers to the LasVegasSun.com website that includes: 1) intentionally withholding original and/or breaking local news content from the printed *Sun* newspaper and publishing that content on LasVegasSun.com instead; 2) filling the printed *Sun* with dated, recycled content such a days-old wire-service articles and stories that appeared on the LasVegasSun.com website days earlier; and 3) telling readers in an advertisement published in the newspaper bundle to not subscribe to the newspaper bundle and to instead subscribe to the LasVegasSun.com website. According to the RJ, this alleged conduct breached two provisions of the 2005 JOA: 1) the agreement to "preserve high standards of newspaper quality throughout the term of this Restated Agreement consistent with United States metropolitan daily newspapers" (ECF No. 837-6 at 6 (§ 5.2) ("Quality Provision")); and 2) the agreement to "take all corporate action necessary to carry out and effectuate the intent, purposes and provisions of this Restated Agreement, and to cooperate with the other party in every reasonable way that will promote successful and lawful operation under this Restated Agreement for both parties" (*Id.* (§ 5.3) ("Cooperation Provision")).

The Sun does not argue that the Quality Provision or the Cooperation Provision are unenforceable; it contends that neither can apply to the editorial decisions the Sun makes about the content it places in the printed *Sun*. According to the Sun, if either did, it would violate the First Amendment, the NPA, and the 2005 JOA. Specifically, the Sun says that the Quality Provision, when read in concert with the entirety of the 2005 JOA, "ensures that the Sun is creating a newspaper that facially comports with what

consumers recognize as a newspaper." (ECF No. 836 at 41.) The Sun contends that because the RJ's allegations all involve challenges to its editorial decisions about content, they fall short of establishing breach.

The RJ argues that the Quality Provision relates to more than just the appearance of the printed *Sun*; according to the RJ, it sets forth an objective standard for quality that can be applied to the content in the printed *Sun* without encroaching on the Sun's editorial independence.

The parties' arguments concerning the meaning of the Quality Provision raise the issue of ambiguity. In interpreting a contract, "the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself. A contract is ambiguous when it is subject to more than one reasonable interpretation. . . . The parties' intentions regarding a contractual provision present a question of fact." *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (2007) (internal quotation marks and citations omitted).

Here, the Court finds that there is more than one reasonable interpretation of the Quality Provision. On one hand, the 2005 JOA states that "[p]reservation of the news and editorial independence and autonomy of both the Review-Journal and the Sun is of the essence of this Restated Agreement." (ECF No. 830-6 at 6 (§ 5.2).) Article 4 also includes extensive instructions concerning the nature of the copy the Sun must deliver to the RJ for

publication. (*Id.* at 3-4.) Taking the contract as a whole, a plausible reading of the Quality Provision is that it applies to the appearance of the *Sun*, not its content.

But the RJ's reading is equally plausible. Specifically, the term "quality" plausibly applies to the content of the printed *Sun*, and the standard laid out in the Quality Provision can be read as an objective standard that does not encroach on the Sun's editorial independence. The Court therefore finds that the Quality Provision is ambiguous.

As outlined above, the goal of contractual interpretation is to ascertain the intent of the parties. When a contractual term is ambiguous, the parties' intentions regarding the ambiguous term ordinarily present a question of fact. *Anvui, LLC*, 163 P.3d at 407. "Parol evidence is admissible for the purpose of ascertaining the true intentions and agreement of the parties when the written instrument is ambiguous." *State ex rel. List v. Courtesy Motors*, 590 P.2d 163, 165 (1979). Here, the issue of the parties' intent as it relates to the meaning of the Quality Provision requires submission to a jury.

The RJ, in rebutting the Sun's motion for summary judgment on its breach counterclaims, has pointed to substantial evidence in the record tending to support its reading of the Quality Provision. For example, the RJ points to a declaration from Michael Ferguson, who was Vice President and Chief Operating Officer of Stephens at the time the JOA was renegotiated and was involved in the negotiations of the 2005 JOA. Mr.

Ferguson's declaration explains that the quality provision was extremely important to Stephens during the 2005 JOA negotiations. (ECF No. 862-4 at ¶ 8.) According to Mr. Ferguson, Stephens proposed the language in the Quality Provision requiring that the papers "preserve high standards of newspaper quality . . . consistent with United States metropolitan daily newspapers" because it was concerned that the printed *Sun's* quality might deteriorate and therefore wanted assurance that, despite being converted to an insert, the Sun would continue to operate as a quality newspaper and would continue to be a legitimate second source of news coverage of Clark County. (ECF No. 862-4 at ¶ 7.) Mr. Ferguson further states that the parties understood the quality provision to be an objective standard based on peer metropolitan city newspapers as a benchmark. (ECF No. 862-4 at ¶ 6.) A redlined portion of the 2005 JOA submitted by the RJ shows that the "consistent with United States metropolitan daily newspapers" language was added by the RJ to the 2005 JOA. (ECF No. 862-26.)

Given this evidence, the Court finds that the RJ has met its burden to survive summary judgment and leaves the question of the parties' intent as to the meaning of the Quality Provision to the jury, specifically whether it applies to only the printed *Sun*'s appearance or to the quality of its content. The Court does find, however, that the Quality Provision cannot interfere with the Sun's editorial independence in any way to be read consistently with the entirety of the 2005 JOA. This means the Quality Provision cannot apply to "the exercise of editorial control and judgment." *Miami Herald Pub. Co. v. Tornillo*,

418 U.S. 241, 258 (1974) (suggesting that the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair" all relate to editorial control and judgment). The Quality Provision, then, if it does apply to the Sun's content, must do so without regard for choices that fall within editorial control and judgment.

The Court further finds that the First Amendment does not prohibit the application of the Quality Provision or Cooperation Provision so long as neither interferes with the Sun's editorial independence. "The Supreme Court has recognized that constitutional rights may ordinarily be waived if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent." *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) (citing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187 (1972). In *Davies*, the Ninth Circuit found that an individual's constitutional right to run for elected office could be validly waived in a settlement agreement. *Id.* at 1395 (concluding the waiver was knowing but deciding to not enforce the waiver on other grounds). In *Leonard v. Clark*, the Ninth Circuit upheld a provision in a collective bargaining agreement limiting the First Amendment expression of a labor union. 12 F.3d 885, 892 (9th Cir. 1994).

Given this authority, the Court finds that the Sun can waive its First Amendment expression in the 2005 JOA. Even if the Court adopted the Sun's interpretation of the Quality Provision and found that it only applied to

the printed *Sun*'s appearance, that would entail a waiver of the Sun's First Amendment rights to print anything it wanted, regardless of appearance. Thus, under any interpretation of the 2005 JOA, the Sun has waived its First Amendment rights. Because the Sun has not argued that its waiver was not voluntary, knowing, or intelligent, the Court finds the waiver was valid.

But "even if a party is found to have validly waived a constitutional right, we will not enforce the waiver if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 890. Here, the public policy for a free and independent press is not harmed by the enforcement of a Quality Provision or Cooperation Provision that does not encroach on the Sun's editorial independence, as the terms of the 2005 JOA requires. Even taking into account the First Amendment's extensive protection provided to the press, so long as the Quality Provision is interpreted as an objective quality standard, it will not impermissibly control the viewpoints the Sun promotes or the news it covers. The Cooperation Provision also cannot encroach upon the Sun's editorial independence under the terms of the 2005 JOA. Thus, the right the Sun waived in the 2005 JOA does not harm the public policy for a free and independent press. The Court therefore finds that the First Amendment does not prevent application of either the Quality Provision or Cooperation Provision, so long as neither encroaches upon the Sun's editorial autonomy.

Given the conclusion that the Quality Provision and the Cooperation Provision are enforceable and applicable

to the Sun's conduct so long as they do not interfere with the Sun's editorial autonomy, what is left to determine is whether the RJ has marshaled sufficient evidence to survive summary judgment on the issue of breach. The Court finds that it has. Specifically, the RJ's expert Kenneth Paulson has opined that the Sun's quality has deteriorated, pointing to data supporting his opinion. Moreover, the RJ has pointed to specific ads the Sun has published in the printed *Sun* driving readers and revenue away from the joint operation and to the Sun's website. These facts are sufficient to survive summary judgment on the issue of breach for the RJ's breach of contract and breach of the implied covenant of good faith and fair dealing claims. Moreover, the ads the RJ points to are sufficient to create a triable issue of fact on whether Brian Greenspun engaged in intentional acts intended or designed to disrupt the contractual relationship.

The only remaining issue is whether the RJ has shown sufficient evidence of damages to survive summary judgment. The RJ alleges three kinds of damages flowing from the Sun's conduct: (1) attorney and expert fees incurred as a result of defending against the Sun's "sham litigation"; (2) loss of revenue caused by the Sun pushing subscribers to cancel their subscriptions to the print newspaper and subscribe to its website; and (3) damages "caused by having been forced to print the *Sun* after the Sun began breaching the JOA, after the purpose of the joint operation has been frustrated, and as a result of being forced to perform under an unlawful JOA." (ECF No. 840-7 at 23-24.)

Appendix B

To survive the Sun's motion for summary judgment, the RJ must show there is a triable issue of fact on its claim that it suffered damages caused by the Sun's actions. *Richardson v. Jones*, 1 Nev. 405, 408 (1865) (damages required for breach of contract claim); *State, University and Community College System v. Sutton*, 103 P.3d 8, 19 (Nev. 2004) (damages required for breach of implied covenant of good faith and fair dealing); *J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003) (damages required for intentional interference with contractual relations). "The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof." *Gibellini v. Klindt*, 885 P.2d 540, 543 (Nev. 1994) "To meet this burden, the plaintiff must provide an evidentiary basis from which a fact finder could determine a reasonably accurate amount of damages." *Baroi v. Platinum Condominium Development LLC*, 2012 WL 2860655, at *2 (D. Nev. 2012) (citing *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 784 P.2d 954, 955 (Nev. 1989)). Although a plaintiff need not establish the amount of damages "with mathematical certainty, testimony on the amount may not be speculative." *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 168 P.3d 87, 97 (Nev. 2007).

i. Sham Litigation Costs

This damage claim is not a subject of the Sun's motion for summary judgment. (ECF No. 836 at ii n.1.)

Even if it were, the Sun's actions do not constitute sham litigation. To obtain relief for an opposing party's

sham litigation, a defendant must show that the litigation against it is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 (1993). The Sun's antitrust claims, which have survived summary judgment, are not "objectively baseless." Sham litigation costs are therefore not a cognizable damage.

ii. Loss of Subscribers

The RJ fails to show there is a triable issue of fact on its claim that it suffered damages because the Sun's actions caused it to lose subscribers. The RJ effectively concedes this point in its opposition by failing to respond to the Sun's argument. *Compare* (ECF No. 836 at 59) *with* (ECF No. 861 at 52-54). The RJ offers no evidence indicating that it lost subscribers as a result of the Sun's actions. The RJ's 30(b)(6) witness on the subject of "harms and damages" could only quantify the RJ's costs related to sham litigation and continued printing of the Sun. (ECF No. 863-12 at 3:22-24 ("the only two things that we provided a definitive value for are the . . . legal expenses and the printing expenses for the Sun"); *Id.* at 4:21-5:1 ("I'm sounding like . . . a broken record here. . . . [T]here's only two that we've quantified at this point, which is relating to the attorney's fees and the printing expenses.").) That witness could not quantify or support the existence of costs related to lost subscribers. (*Id.*) The RJ has therefore failed to carry its burden of showing damages related to any alleged loss of subscribers.

iii. Printing Costs

Finally, the RJ has carried its burden of showing damages related to printing costs it incurred for printing the Sun after the Sun's alleged breaches. The RJ is contractually obligated to print both papers in the newspaper bundle, so the only way the RJ can claim printing costs as damages is if it is entitled to terminate its printing obligations under the 2005 JOA. The Court finds that a plain reading of Article 9 of the 2005 JOA allows for termination "if either party defaults in the performance of any of its material obligations hereunder. . . ." (ECF No. 830-6 at 8 (§ 9.1.2).) Should the RJ succeed in proving the Sun breached the Quality Provision or Cooperation Provision at trial, it will also necessarily show that it had a right to terminate the 2005 JOA at the time of breach. Any printing costs it incurred after the alleged breach are therefore a cognizable damage. The RJ has pointed to evidence of the amount of the printing costs damages, thereby satisfying its burden. (ECF No. 861 at 46.)

Thus, the RJ has pointed to evidence creating genuine issues of material facts on all necessary elements of its claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contractual relations. The Sun's motion for summary judgment on these claims is therefore denied.

8. Frustration of Purpose and Force Majeure

Finally, the RJ argues it has the power to terminate through the Nevada frustration of purpose doctrine and

the JOA's force majeure clause. The parties disagree about whether the force majeure clause preempts application of the frustration of purpose doctrine. (*Compare* ECF No. 836 at 54-55 *with* ECF No. 861 at 54.) The Court does not reach that issue because neither doctrine allows the RJ to terminate under the alleged facts.

Nevada recognizes both frustration of purpose and impossibility as valid bases for terminating one's obligations under a contract. *Graham v. Kim*, 899 P.2d 1122, 1124 (Nev. 1995) (frustration of purpose); *Nebaco, Inc. v. Riverview Realty Co.*, 482 P.2d 305, 307 (Nev. 1971) (force majeure), *cited in Baroi v. Platinum Condominium Development, LLC*, 874 F. Supp. 2d 980, 984 (D. Nev. 2012). Force majeure applies when a promisor's performance "is made impossible or highly impractical by the occurrence of unforeseen contingencies," *Nebaco*, 482 P.2d at 307 (internal quotation marks omitted), while frustration applies "when performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event," *Graham*, 899 P.2d at 1124. Both doctrines require that the events giving rise to their application be unforeseeable. *Nebaco*, 482 P.2d at 307 ("The doctrine of commercial frustration does not apply if the unforeseen contingency is one which the promisor should have foreseen, and for which he should have provided."); *Graham*, 899 P.2d at 1124 (applying *Nebaco*'s foreseeability requirement to the impossibility defense).

The RJ argues that the purpose of the 2005 JOA has been frustrated by the "proliferation of internet-enabled

mobile devices," such as smartphones and tablets, which have drastically reduced the public's interest in daily print news. It argues that performance has become impossible because the "catastrophic decline" of the print newspaper industry makes continued performance "excessively and unreasonably difficult or expensive." (ECF No. 861 at 56.) These arguments fail because such changes were foreseeable by the parties when they entered into the 2005 JOA. Congress enacted the NPA to "preserve the publication of newspapers," recognizing that JOAs were entered by "failing newspaper[s]" in "probable danger of financial failure." *See* 15 U.S.C. §§ 1801 and 1802(6); *see also Committee for and Independent P-I v. Hearst Corp.*, 704 F.2d 467, 471 (9th Cir. 1983) (noting, in 1983, that "[n] ewspapers have been folding at an alarming rate"). The 2005 JOA explicitly refers to electronic (non-print) news media (ECF No. 837-6 at 10 (§ 10.6) (referencing "electronic replica technology" and other media distinct from "the printed newspaper")), and the parties' websites, (*id.* at 11 (§ 10.13) (referencing "lvrj.com, reviewjournal.com, [and] lasvegasnewspapers.com")). It also contemplates the possibility of separately delivering the RJ and the Sun based on a decline in the newspaper bundle's revenue and profits. (*Id.* at 15 (App. A.5).) Though the parties may not have anticipated smartphones, the 2005 JOA anticipated technological and financial challenges that could affect the profitability and viability of each newspaper.

The RJ argues that the JOA's force majeure provision allows it to terminate its printing obligations, but that argument fails because the provision is not sufficiently specific. The force majeure clause states:

> "[n]either party shall be liable to the other for any failure or delay in performance . . . occasioned by war, riot, government action, act of God or public enemy, acts of terrorism, damage to or destruction of facilities, strike, labor dispute, failure of supplies or worker, inability to obtain adequate newsprint or supplies, or any other cause substantially beyond the control of the party required to perform . . . ."

(*Id.* at 7 (§ 8.2).)

Parties can agree to force majeure protections that are more extensive than the protections afforded to them under common law. *Nebaco*, 482 P.2d at 307. But any such protections must be provided for in the contract with adequate specificity. *Id.* at 306-07 (declining to apply a contract's impossibility provision, which excused performance if one party was unable to procure funding, when the party's specific difficulty procuring funding was not described with adequate specificity). Here the force majeure provision's catch-all clause cannot be stretched to apply to the present situation because it does not describe the "catastrophic decline" of the print newspaper industry with sufficient specificity. *See id.*

Thus, neither force majeure nor frustration of purpose is a sufficient basis for termination of the 2005 JOA.

As for the remaining non-evidentiary motions before the Court, good cause appearing, and under its inherent

power to control its docket, the Court grants the Sun's motions for leave to file excess pages (ECF No. 925) and motion for leave to file reply (ECF No. 946). It denies the RJ's motion to strike (ECF No. 922) and denies its motion to file sur-reply (ECF No. 923).

V. CONCLUSION

It is therefore ordered that the RJ's motion (ECF No. 632) to dismiss or strike various claims in the Sun's Amended Complaint is granted in part and denied in part. The Sun's Claim 3 (Sherman § 2 conspiracy) and Claim 4 (Clayton § 7) are stricken. Its Claim 6 (Sherman § 1) may move forward.

It is further ordered that the RJ's motion to dissolve preliminary injunction (ECF No. 852/853) is denied, and its motion to expedite resolution of that motion (ECF No. 915) is denied as moot.

It is further ordered that the RJ's motion for summary judgment on each of the Sun's claims (ECF No. 843/845) is denied, except for its claim for preclusion on the Sun's failure to prove damages flowing from the breach of the promotional expenses provision during the period from December 11, 2015, through March 31, 2018, which is granted.

It is further ordered that the Sun's motion for summary judgment (ECF No. 829/836) is granted in part and denied in part consistent with this Order.

It is further ordered that the RJ's motion to exclude the testimony of Lawrence J. Aldrich (ECF No. 867/868) is granted.

It is further ordered that the Sun's motions for leave to file excess pages (ECF No. 925) is granted *nunc pro tunc.*

It is further ordered that the RJ's motions to strike and file sur-reply (ECF Nos. 922, 923) are denied.

It is further ordered that the Sun's motion to file reply (ECF No. 946) is granted *nunc pro tunc.*

Dated this 31st day of March 2024.

s/ Anne Rachel Traum
ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 11, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 24-2287
D.C. No. 2:19-cv-01667-ART-MDC
District of Nevada Las Vegas

LAS VEGAS SUN, INC.,

Plaintiff-Appellee,

v.

SHELDON ADELSON; PATRICK DUMONT;
NEWS+MEDIA CAPITAL GROUP, LLC;
LAS VEGAS REVIEW-JOURNAL, INC.;
INTERFACE OPERATIONS, LLC d/b/a ADFAM,

Defendants-Appellants.

Filed September 11, 2025

ORDER

Before: COLLINS, VANDYKE, and MENDOZA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and the petition for rehearing en

banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* FED. R. APP. P. 40. Accordingly, Appellee's petition for panel rehearing and for rehearing en banc (Dkt. Entry 62) is **DENIED.**

APPENDIX D — RELEVANT STATUTORY PROVISION

§ 1803. Antitrust exemptions

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

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

(b) Written consent for future joint operating arrangements

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

(c) Predatory practices not exempt

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