

1 H. SINCLAIR KERR, JR. (61713)  
2 JAMES M. WAGSTAFFE (95535)  
3 IVO LABAR (203492)  
4 **KERR & WAGSTAFFE LLP**  
5 100 Spear Street, Suite 1800  
6 San Francisco, CA 94105-1528  
7 Telephone: (415) 371-8500  
8 Fax: (415) 371-0500

9 Attorneys for Defendants  
10 NEW TIMES MEDIA LLC, SF WEEKLY LP,  
11 EAST BAY EXPRESS PUBLISHING LP, TROY  
12 LARKIN

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **CITY AND COUNTY OF SAN FRANCISCO**  
15 **UNLIMITED JURISDICTION**

16 BAY GUARDIAN COMPANY, INC.,

17 Plaintiff,

18 v.

19 NEW TIMES MEDIA LLC, SF WEEKLY LP,  
20 EAST BAY EXPRESS PUBLISHING LP,  
21 TROY LARKIN, DOES ONE through 10,  
22 inclusive,

23 Defendants.

Case No. 04-435584

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT UNDER *MIAMI HERALD*  
v. *TORNILLO***

Case Filed: October 19, 2004

Date: September 14, 2007

Time: 11:00 a.m.

Courtroom: 304

Trial: October 15, 2007

HON. RICHARD A. KRAMER

24  
25 **FILED CONDITIONALLY UNDER SEAL PURSUANT TO C.R.C. 2.551(d)**  
26  
27  
28

1 **I. INTRODUCTION**

2 The Bay Guardian Company, Inc. (“Bay Guardian, Inc.”) seeks an injunction that would  
3 violate constitutional free speech rights by interfering with the editorial content of Defendants’  
4 newspapers. The injunction that the Bay Guardian seeks would force the Defendants’ to cut  
5 editorial expenses, and thus content, in order to comply with an antiquated Depression-era statute  
6 (Unfair Practices Act; Bus.& Prof. Code § 17000 *et seq.*) that was designed to apply to  
7 commodities like bread and milk, and not fundamental rights like free speech.

8 There is no evidence that any advertising could have been sold by the SF Weekly or the  
9 East Bay Express at rates greater than it was sold for in the post-dot.com bust, post-9/11, Bay  
10 Area advertising market. Insofar as Business & Professions Code section 17026 defines “cost,”  
11 as “the cost of raw materials, labor, and all overhead expenses of the producer,” this Court’s  
12 observation early in the proceedings that “selling below cost” and “losing money” have identical  
13 statutory meanings is spot on.

14 In the absence of a single piece of evidence showing or even suggesting that the  
15 defendant newspapers could have sold advertising at a higher rate than they did—that they could  
16 have magically increased the revenues side of their ledgers in a market meltdown, had they only  
17 wanted to—what is left is the “cost” side of the section 17043 equation. For, as any business  
18 person knows, if revenues cannot be increased, then the only other option in moving toward  
19 profitability is cost-cutting. As will be shown below, if a state statute would, *as applied to a*  
20 *newspaper*, compel the cutting of editorial content and distribution expenditures, it violates the  
21 free press protections of both the United States and California constitutions.

22 While laws that regulate the economic activities and conduct of businesses, including  
23 newspapers, can survive facial constitutional challenges if genuinely speech-neutral, a statute  
24 runs afoul of the constitution when, either facially or *as applied*, it results in governmental  
25 infringement on editorial content and freedoms, including the editorial decision-making of  
26 editors and publishers. In this case, a newspaper subject to a mandated price floor at its fully  
27 allocated costs has only one option in practice: gut editorial content and staff. That is what the  
28 Bay Guardian has done; that is what it seeks to impose on the defendant newspapers. Under the

1 governing authorities, the result of such an injunction would violate constitutional free speech  
2 protections as would the imposition of punitive sanctions against the defendant newspapers’  
3 decision to spend more on editorial and distribution than they received in advertising revenues.

4 **II. BACKGROUND**

5 **A. DEFENDANTS’ DECISIONS AND EXPENDITURES TO MAINTAIN EDITORIAL**  
6 **QUALITY AND STAFF**

7 Defendant New Times Media, LLC (“New Times”), the parent company at the times in  
8 question for co-defendants SF Weekly LP (“SF Weekly”) and East Bay Express, began as a  
9 newsweekly in Phoenix in 1970 in response to the pro-war stance of the commonly owned daily  
10 newspapers, *The Arizona Republic* and *Phoenix Gazette*. (*Declaration of Michael Lacey* (“*Lacey*  
11 *Decl.*”) ¶ 3.) Before the SF Weekly and East Bay Express were acquired a conscious decision  
12 was made to incur 5 or 6 years of operating losses in a highly competitive Bay Area advertising  
13 market, by investing heavily in editorial content and broader circulation. (*Id.* ¶ 7; *Declaration of*  
14 *J. Larkin* ¶ 8-9) A movement away from the pre-acquisition use of freelance writers to more  
15 costly full-time professional journalists was the most salient organizational and economic intent  
16 and result. (*Id.* ¶ 5.)

17 New Times’ commitment to editorial investment and to pursuing exacting journalistic  
18 standards has resulted in award-winning newspapers. (*Id.* ¶ 9.) For example, this strategy  
19 produced fruit last month as LA Weekly writer Jonathan Gold won a Pulitzer Prize for criticism.  
20 (*Id.* ¶ 10.) With a commitment to editorial excellence—to the simple idea that quality journalism  
21 costs money—in mind, SF Weekly and the East Bay Express were acquired in 1995 and 2001  
22 respectively. (*Id.* ¶¶ 2, 7.)

23 In addition to markets in which the defendants have competed with multiple daily papers  
24 (and a large and growing list of competing advertising platforms), they compete in cities like San  
25 Francisco with a single paid-circulation daily. Only in San Francisco does the dominant daily—  
26 traditionally thought within the industry to share market power attributes with a toll road—lose  
27 money. (*Declaration of Joseph Kalt., Exh. A at pp. 22-23 (hereafter “Kalt Report”).*) The \$330  
28 million in losses the Chronicle has reported since it was acquired by Hearst Corp. in 2000 are

1 unprecedented. (*Id.*) It is economically axiomatic that the Chronicle has sold more print  
2 advertising at less than its fully allocated cost in the past seven years than the total revenues of  
3 the plaintiff and defendant newspapers *combined*. The cost and revenue trend lines point to San  
4 Francisco becoming the first major city in America without a paid circulation daily.

5 **B. DEFENDANTS’ ADVERTISING COSTS UNDER PREVAILING MARKET CONDITIONS**  
6 **AND THEIR COMMITMENT TO PRESERVING EDITORIAL CONTENT AND STAFF**

7 As demonstrated more specifically in defendants’ companion motion for summary  
8 adjudication, the Bay Area marketplace for advertising space has experienced extremely adverse  
9 market conditions that have devastated sellers of advertising space. (*Kalt Report at pp. 13-18.*)  
10 These changing conditions have reduced the demand for advertising space in print media and  
11 increased the overall supply of advertising space as new options (*e.g.*, Craigslist) have emerged  
12 and continued to grow in importance. (*Id.*)

13 The natural marketplace response to conditions of declining demand and rising supply is  
14 to reduce fair market prices, the effect of which has been that firms can, and do, readily suffer  
15 losses. (*Id. at pp. 22-35.*) In the case of defendants, the inability to obtain a price so as to cover  
16 its fully allocated costs due to market conditions necessarily would require the company to cut  
17 costs elsewhere if the advertising prices were required to be at a sufficiently low level as a result  
18 of application of a prohibition on selling at less than fully allocated, total costs. (*Id. at pp. 9, 30,*  
19 *Lacey Decl. ¶ 11.*) For the defendants, that would mean making substantial cuts in editorial  
20 spending, resulting in a substantial reduction in editorial content, staffing and the overall size of  
21 the newspapers. (*Id.*)

22 **III. ARGUMENT**

23 **A. THE APPLICATION OF AN OTHERWISE VALID STATE STATUTE IS**  
24 **UNCONSTITUTIONAL IF IT NECESSARILY INTERFERES WITH A NEWSPAPER’S**  
**EDITORIAL FUNCTION AND DECISION-MAKING**

25 It is well-settled that if application of a state statute might interfere with or restrain a  
26 newspaper’s editorial function, both a facially defective statute and a valid statute, *as applied*,  
27 are unconstitutional.

28

1           In Miami Herald v. Tornillo, 418 U.S. 241 (1974), the United States Supreme Court was  
2 asked to decide whether a Florida “right to reply” statute, granting a political candidate the right  
3 to equal space in order to reply to criticism or attacks by a newspaper, invaded the province of  
4 editors and publishers by requiring that they “...publish what [they] would prefer to withhold.”  
5 Id. at 255, citing Branzburg v. Hayes, 408 U.S. 665, 681 (1969). In a unanimous decision  
6 striking down the Florida statute, the Court found the law suffered from two essential  
7 constitutional infirmities. First, “since the amount of space [in a] newspaper...is finite, if a  
8 newspaper is forced to publish a particular item, it must as a practical matter omit something  
9 else.” Id. at 256. Second, “[e]ven if a newspaper would face no additional costs to comply with  
10 a compulsory access law and would not be forced to forgo publication of news or opinion by the  
11 inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because  
12 of the *intrusion into the function of editors*. A newspaper is more than a passive receptacle or  
13 conduit for news, comment and advertising. The choice of material to go into a newspaper, and  
14 the decisions as to the *size and content* of the paper...constitute the exercise of *editorial control*  
15 *and judgment*.” Id. at 258 (emphasis added).

16           There is no question that newspapers, like other businesses, can claim no talismanic  
17 immunity from the general operation of antitrust laws and other commercial regulation. In  
18 Associated Press v. United States, 326 U.S. 1, 20 (1945), a group of newspapers jointly  
19 established bylaws prohibiting members from selling news content to nonmembers, and giving  
20 an existing member a veto over the admission of a new member with whom it competes  
21 geographically. In such a situation, the Court held, the protections of the First Amendment were  
22 not advanced by the bylaws in question, but were subverted by them. Simply put, there is no  
23 conflict with the First Amendment under such circumstances, but rather there is a conflict  
24 between the anticompetitive goals of a group of businesses and the free press and speech  
25 protections of the constitution.

26           Where, however, a conflict between the First Amendment is *real*—as where an industry  
27 group or labor union with anticompetitive designs is otherwise unlawful under the Sherman Act  
28 petitions the government for a change in the law or for a favorable agency interpretation of

1 law—the bar to antitrust enforcement under the First Amendment is absolute, even where the  
2 defendants were found to have violated the substantive provisions of the antitrust laws. Eastern  
3 Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1960); United Mine  
4 Workers of America v. Pennington, 381 U.S. 657 (1965).

5         Such protections are even more pronounced under Article I, Section II, of the California  
6 Constitution. Under this provision, free speech and press protections are “unlike the First  
7 Amendment’s, unlimited in scope.” R.H. Macy & Co. v. Contra Costa County, 226 Cal. App. 3d  
8 352,361 (1990), citing U.S. v. Salerno, 481 U.S. 739, 745 (1987). California courts have  
9 consistently embraced Justice Mosk’s observation that “...the ordinary deference a Court owes  
10 to any legislative action vanishes when constitutional rights are threatened.” Spiritual Psychic  
11 Church v. City of Azuza, 39 Cal. 3d 501, 514 (1985). Or, as Justice Tobriner said, where free  
12 speech rights conflict with the application of a statute, courts “...are not free to disregard the  
13 practical realities” of the precise factual context in which the First Amendment challenge arises.  
14 White v. Davis, 13 Cal. 3d 757, 767 (1975). Importantly, Courts in California can draw no  
15 substantive distinction between free speech encroachment at the hands of a facially invalid  
16 statute or at the hands of a plaintiff asking the court to apply an otherwise valid statute in an  
17 unconstitutional manner, or to produce an unconstitutional result. See Tobe v. City of Santa  
18 Ana, 9 Cal. 4th 1069 (1995). A statute simply “cannot be construed for purposes of  
19 constitutional analysis without concern for its...ultimate effect” in a particular factual context.  
20 San Francisco Unified School District v. Johnson, 3 Cal. 3d 937, 953 (1971).

21         The normal analytical distinction between “facial” and “as applied” challenges is  
22 meaningless in a Miami Herald attack, as is any “balancing” of public versus private interests.  
23 As Justice White wrote in concurrence in Miami Herald, the State of Florida had advanced “...a  
24 concededly important interest in ensuring free and fair elections by means of an electorate  
25 informed about the issues.” Miami Herald, 418 U.S. at 260. But, he wrote, “A newspaper... is  
26 not a public utility subject to ‘reasonable’ governmental regulation in matters affecting the  
27 exercise of journalistic judgment as to what shall be printed.” Id. at 259.

28

1 Courts have regularly upheld an “as applied” constitutional challenge by a newspaper  
2 defendant to an otherwise valid statute when such application will interfere with freedom of the  
3 press. In Nelson v. McClatchy Newspapers, Inc., 936 P. 2d 1123 (S. Ct. Wash. 1997), for  
4 example, a reporter sued her newspaper employer under a state statute barring discrimination  
5 against an employee for political activities undertaken outside the workplace when it applied its  
6 internal code of ethics that prohibited high-profile political activity by reporters.<sup>1</sup> The two issues  
7 before the court were whether the Washington law “...prohibits an employer from discriminating  
8 against an employee because the employee refuses to remain politically abstinent, [and if so,  
9 whether] its application violates a newspaper’s constitutionally guaranteed free press right to  
10 editorial control of the paper’s content.” Nelson, 936 P.2d at 1124. The court answered both  
11 questions in the affirmative.

12 The plaintiff reporter, a self-professed lesbian, spent much of her off-duty time serving as  
13 a political activist, attending pro-gay demonstrations, testifying before public bodies on issues of  
14 concern to her, collecting signatures for ballot initiatives—in short, exercising her First  
15 Amendment rights. As a result of her activities, her employer transferred her from reporting  
16 duties to swing shift copy editor. She sued, seeking, among other things, reinstatement to her  
17 reporting duties that her employer conceded she had performed in an exemplary fashion.

18 The court found a clear and unambiguous violation by the defendant newspaper of the  
19 state statute. The court then looked to whether the statute, as applied, conflicted with the  
20 newspaper’s free press rights under Miami Herald.<sup>2</sup> The arguments of the parties were straight-  
21 forward. The newspaper argued that “...requiring reporters to abide by its no-conflict-of-interest  
22 policy [was] necessary to uphold editorial integrity, which [it] assert[ed] is constitutionally  
23 protected.” Nelson, 936 P.2d at 1129. The reporter countered that “...what [the newspaper’s]  
24

25  
26 <sup>1</sup> See RCW Section 42.17.680 (2).

27 <sup>2</sup> Article I, Section 5 of the Washington Constitution is substantially identical to California’s  
28 Article I, Section II. It provides: “Every person may freely speak, write and publish on all  
subjects, being responsible for the abuse of that right.”

1 reporters do on their own time has nothing to do with the content or credibility of the newspaper  
2 and accordingly the free press clauses of the state and federal constitutions is irrelevant.” *Id.*

3 The court first took note that “...of all the media, the written press has been protected  
4 most vehemently. *Id.* at 1130. It then found that Miami Herald’s absolute bar on governmental  
5 interference with the functions of editors and publishers—with what goes into the newspaper and  
6 what does not—applied to the reinstatement of the reporter. In reinstating summary judgment  
7 against the reporter, the court held that it simply had no authority to order reinstatement. “[I]f a  
8 newspaper cannot be required to publish a reporters’ work” the court asked, “how can it be  
9 constitutionally required to employ the individual as a reporter?” *Id.* at 1131.

10 Similarly, in Passaic Daily News v. NLRB, 736 F.2d 1543 (D.C. Cir. 1984), the National  
11 Labor Relations Board alleged that the cancellation of a reporter/union organizer’s newspaper  
12 column violated the National Labor Relations Act. As in Nelson, there was no question about a  
13 violation of the underlying statute—the Board’s finding being richly supported that “...the  
14 company discontinued [plaintiff’s] weekly column because of his involvement in protected  
15 [union] activities.” *Id.* at 1549. The court nonetheless refused to uphold the Board’s order  
16 mandating reinstatement. “Until its decision in [Miami Herald] the [Supreme] Court’s view on  
17 whether a newspaper could be compelled to publish that which it chose to withhold could be  
18 discovered only by implication. In [Miami Herald], however, the Court was explicit.” *Id.* at  
19 1557. The arguments of the NLRB were compelling that punishment of protected union activity  
20 had occurred in this case and that disallowing reinstatement essentially held the newspaper above  
21 the National Labor Relations Act. Yet the court was not persuaded. “However much vitality  
22 may be found in these arguments, at each point the implementation of a remedy such as an  
23 enforceable right to access necessarily calls for some mechanism, either governmental or  
24 consensual. If it is governmental coercion, this at once brings about a confrontation [with] the  
25 express provisions of the First Amendment.” *Id.*

26 If this Court turns over the Miami Herald coin, what it will find on the other side *is this*  
27 *case*. There is no free press distinction—none—between the application of a statute in a manner  
28 that requires an editor or publisher to “publish that which he would prefer to withhold” and the

1 application of a sales below cost statute in a manner that would require that they “withhold that  
2 which they would prefer to publish” simply because ad revenues are insufficient to offset  
3 editorial and distribution costs at the levels *editors and publishers choose*.

4 **B. AS APPLIED TO THE DEFENDANT NEWSPAPERS, SECTION 17043 WOULD**  
5 **UNCONSTITUTIONALLY INTERFERE WITH FREE SPEECH RIGHTS**

6 Plaintiff, in its complaint, seeks to enjoin and punish decisions made by the defendant  
7 newspapers in selling advertising below their fully allocated costs. Business & Professions Code  
8 section 17026 defining “cost” makes “selling below cost” synonymous, as this Court has noted,  
9 with “losing money” since substantially all costs incurred by the defendants—from reporter  
10 salaries and health insurance, to printing and distribution costs—are part of the “rate base” in  
11 determining what constitutes “cost” in a below-cost transaction.

12 The “First Amendment economics” facing newspaper editors and publishers to which the  
13 Court in Miami Herald made such unmistakable reference are much more stark and glaring in  
14 this case than they were in Miami Herald. This case is not about governmental authority to order  
15 the insertion of a single reply by a single political candidate to a single news story. The rule the  
16 plaintiff asks this Court to articulate—that the defendant newspapers may spend on editorial and  
17 distribution only as much as advertising revenues will permit within the strictures of the sales  
18 below cost statute—has no history in the First Amendment and should have no future.

19 It is telling that when Judge Easterbrook searched his mind for an example of markets  
20 that absolutely *require* an investment in years of below-cost pricing in order for a new market  
21 entrant to achieve profitability, he chose, from a limitless commercial universe, print advertising.  
22 “New magazines,” he wrote, “lose money for years as they try to increase circulation and attract  
23 advertising revenue, without creating the tiniest risk of monopoly.” A.A. Poultry Farms, Inc. v.  
24 Rose Acre Farms, 881 F.2d 1396, 1400 (7th Cir. 1991). In the Bay Area, there was a period of  
25 years in which the investment in editorial content and distribution was not offset by advertising  
26 revenues as the company sought to build a readership and advertising base. From 1995-1999 the  
27 SF Weekly operated at a deficit. In 2000-2001 it turned a small profit. (*Lacey Decl.* ¶ 8.) And,  
28 following the dot.com bust and the events of 9/11, profitability has not been restored. (*Id.*) The

1 East Bay Express was never profitable and, most tellingly, the new ownership group led by the  
2 paper’s editor has shed salaried reporters from the defendants’ ownership era whose annualized  
3 compensation exceeds \$163,000. (*Id.* ¶ 6.) Discovery also shows that the Bay Guardian itself  
4 made massive cuts to its editorial expenditures year after year, as the Bay Area advertising  
5 market spiraled into a sustained decline. Whether the new ownership of the East Bay Express or  
6 the Bay Guardian have achieved revenues that exceed their costs is not clear, but what is clear is  
7 that slashing editorial costs brings both papers closer to the cost/revenues equilibrium the  
8 plaintiff seeks to impose on the defendants using section 17043 as the animating statutory  
9 weapon.

10         It is axiomatic that a newspaper’s content and advertising are inextricably intertwined.  
11 “The more attractive the newspaper is to its targeted audience, the more readers it attracts. The  
12 more readers it attracts, the better is the newspaper’s ability to attract advertisers.”<sup>3</sup> This  
13 precisely describes the defendant newspapers’ market and competitive strategy. It is  
14 unquestionable that an expanded use of freelance writers, for example, rather than professional  
15 reporters with health insurance and a retirement plan would have greatly reduced the fully  
16 allocated cost of producing the defendants’ newspapers, at least in the short term. The same  
17 could be said for cutting distribution by several thousand copies.

18         But just as the First Amendment prohibits courts from ordering a newspaper to produce a  
19 more editorial costly and robust, or widely distributed, newspaper than it chooses to produce, it  
20 also prohibits enjoining or punishing the defendant newspapers’ decision to invest in editorial  
21 content and distribution. It has been over 30 years since anyone suggested that a statute, even a  
22 statute with sound public policy objectives, could be applied in a way that restricted the  
23 expenditure of money on speech. Buckley v. Valeo, 424 U.S. 1 (1976). The Supreme Court’s  
24 ruling that any governmental limitation on federal candidate expenditures necessarily restrained  
25 free speech rights was both telling and an apt admonition in this case:

26 \_\_\_\_\_  
27 <sup>3</sup> Stucke & Grunes, ANTITRUST AND THE MARKETPLACE OF IDEAS, 69 Antitrust L.J. 249, 271  
28 (2001).

1           Being free to engage in unlimited political expression subject to a ceiling on expenditures  
2 is like being free to drive an automobile as far and as often as one desires on a single tank of  
3 gasoline. Id. at p. 19, n. 18.

4           By framing its complaint in terms of the competition for Bay Area *advertisers* rather than  
5 Bay Area *readers*, the plaintiff asks this Court to debase and devalue the quite obvious  
6 conclusion that both are implicated here. And by focusing its complaint entirely on the question  
7 of the cost and price of the defendants' advertising, and not on the economic inputs, principally  
8 editorial content and distribution, that drive the cost side, the plaintiff seeks to devalue editorial  
9 decision-making that chooses to incur those costs, irrespective of whether ad revenues fully  
10 cover the gap.

11           The Supreme Court in Miami Herald did not find the state statute offensive because it  
12 would impact the decisions of editors or publishers about what to put into or leave out of their  
13 paper. They found it offensive because it might impact those decisions. The court in Passaic  
14 Daily News did not find that the NLRA's goal of advancing employee welfare by collective  
15 bargaining was not a good and laudable goal, it found precisely the opposite. But it also found  
16 that any order it might fashion might impact the editorial judgment, the content determinations,  
17 of editors and publishers, and that, Miami Herald says, is turf upon which a court may not  
18 constitutionally tread. Even a substantive finding that the defendant newspaper in Nelson  
19 abridged its employee's First Amendment rights when it pulled her out of the newspaper was  
20 insufficient to induce the court into the business of deciding what goes into, or is left out of, a  
21 newspaper.

22           This case does not require the court to decide whether there are circumstances in which  
23 section 17043 might be properly applied against a newspaper. There are undoubtedly instances  
24 in which the ad pricing decisions of an established and profitable paper—a species not readily  
25 identifiable in the Bay Area today—would bring a newspaper within the sanctions of section  
26 17043. But this is not that case. This case is at least as much about editorial decision-making as  
27 it is about advertising prices. As such, section 17043, as the plaintiff asks the Court to apply it,  
28 would unconstitutionally infringe defendants' free speech rights, by articulating a rule that the

1 largesse of the advertising marketplace, not the decisions of editors and publishers, control the  
2 size, editorial quality and distribution of the defendant newspapers.

3 In his Miami Herald concurrence, Justice White spoke words familiar to all First  
4 Amendment scholars. He said that where decisions about a newspaper's size and content are  
5 concerned, "it has yet to be demonstrated how government regulation of this crucial process can  
6 be exercised consistent with the First Amendment guarantees of a free press as have evolved to  
7 this time." Miami Herald, *supra* at 258. Allowing a newspaper that has massively cut its own  
8 editorial spending in response to a market meltdown to use a predation statute to force massive  
9 cuts on two less-established market competitors would crudely invade editor and publisher  
10 decision-making through the back door to achieve precisely what Miami Herald said cannot be  
11 constitutionally imposed through the front door. Losing money on newspaper's editorial content  
12 may, as a subjective business proposition, be a good idea or a bad one. But it is a constitutional  
13 right.

14 **IV. CONCLUSION**

15 For the foregoing reasons, defendants respectfully request that the Court summarily  
16 adjudicate the section 17043 claim in their favor because, as applied, the statute is  
17 unconstitutional.

18 DATED: June 29, 2007

**KERR & WAGSTAFFE LLP**

19 By \_\_\_\_\_  
20 JAMES M. WAGSTAFFE

21 Attorneys for Defendants  
22 NEW TIMES MEDIA LLC, SF WEEKLY LP,  
23 EAST BAY EXPRESS PUBLISHING LP, TROY  
24 LARKIN

25 29625

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<i>Page</i>
I. INTRODUCTION .....	1
II. BACKGROUND .....	2
A. Defendants’ Decisions and Expenditures to Maintain Editorial Quality and Staff.....	2
B. Defendants’ Advertising Costs under Prevailing Market Conditions.....	3
III. ARGUMENT .....	3
A. The Application of an Otherwise Valid State Statute is Unconstitutional if it Necessarily Interferes with a Newspaper’s Editorial Function and Decision-Making.....	3
B. As Applied to the Defendant Newspapers, Section 17043 Would Unconstitutionally Interfere with Free Speech Rights.....	8
IV. CONCLUSION.....	11

**TABLE OF AUTHORITIES**

*Page*

**Cases**

1

2

3

4 A.A. Poultry Farms, Inc. v. Rose Acre Farms,  
881 F.2d 1396, (7th Cir. 1991) ..... 8

5

6 Associated Press v. United States,  
326 U.S. 1 (1945)..... 4

7 Branzburg v. Hayes,  
408 U.S. 665 (1969)..... 4

8

9 Buckley v. Valeo,  
424 U.S. 1 (1976)..... 9, 10

10 Eastern Railroad Presidents Conference v. Noerr Motor Freight,  
365 U.S. 127 (1960)..... 5

11

12 Miami Herald v. Tornillo,  
418 U.S. 241 (1974)..... 4, 5, 11

13 Nelson v. McClatchy Newspapers, Inc.,  
936 P. 2d 1123 (S. Ct. Wash. 1997)..... 6, 7

14

15 Passaic Daily News v. NLRB,  
736 F.2d 1543 (D.C. Cir. 1984) ..... 7

16 R.H. Macy & Co. v. Contra Costa County,  
226 Cal. App. 3d 352 (1990) ..... 5

17

18 San Francisco Unified School District v. Johnson,  
3 Cal. 3d 937 (1971) ..... 5

19 Spiritual Psychic Church v. City of Azuza,  
39 Cal. 3d 501 (1985) ..... 5

20

21 Tobe v. City of Santa Ana,  
9 Cal. 4th 1069 (1995) ..... 5

22 U.S. v. Salerno,  
481 U.S. 739 (1987)..... 5

23

24 United Mine Workers of America v. Pennington,  
381 U.S. 657 (1965)..... 5

25 White v. Davis,  
13 Cal. 3d 757 (1975) ..... 5

26

**Statutes**

27

28 Bus. & Prof. Code § 17043..... 1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Other Authorities*

RCW Section 42.17.680 (2)..... 6

Stucke & Grunes, ANTITRUST AND THE MARKETPLACE OF IDEAS,  
69 Antitrust L.J. 249, 271 (2001)..... 9