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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UTAH NEWSPAPER PROJECT, dba CITIZENS FOR TWO VOICES, Plaintiff, vs. DESERET NEWS PUBLISHING COMPANY and KEARNS-TRIBUNE, LLC, Defendants.	**DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** Case No. 2:14-cv-00445-CW Judge Clark Waddoups

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Kearns-Tribune, LLC and Deseret News Publishing Company (collectively, "Defendants"), by and through counsel, hereby submit this joint Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction.

INTRODUCTION

The entire premise of Plaintiff's Motion for a Preliminary Injunction is that the *Salt Lake Tribune* ("*Tribune*") is going to close, if not tomorrow, then certainly in the next few weeks or months. Plaintiff claims that this is the likely result of amendments made to the parties' joint operating agreement ("JOA") that were agreed to late last year by the *Tribune*'s owner, Kearns-Tribune, LLC ("Kearns-Tribune") and the owner of the *Deseret News* ("*News*"), Deseret News Publishing Company ("Deseret"). Plaintiff's claim is based on little more than conjecture and deep suspicions of the motives of Kearns-Tribune, and its parent, MediaNews Group, Inc. (which does business as Digital First Media ("DFM")) and of The Church of Jesus Christ of Latter-day Saints ("the Church"), which controls the *News*. The declarations filed with this Opposition show that the entire premise of Plaintiff's motion is simply false. The Chief Executive Officers of both DFM and Deseret, both of whom are highly respected newspaper executives, declare under oath that they have no plans to shut down the *Tribune*—not this week, this month, this year, or ever.

Plaintiff asks this Court to issue a mandatory preliminary injunction that would unwind a transaction that closed in October 2013. In the Tenth Circuit, and elsewhere, injunctions that compel a party to affirmatively act in a particular way are disfavored, even more so than the "extraordinary" and "drastic" remedy of a typical prohibitory injunction. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005).

Plaintiff's motion fails for at least three reasons.

First, Plaintiff's conclusory allegation, unsupported by any facts or evidence, that the *Tribune* is in imminent danger of being shut down is effectively rebutted by its eight-month delay in bringing this action and by the declarations submitted in support of this Opposition. Plaintiff cannot therefore establish that its claim of irreparable harm is "immediate" and "certain" as it must in order to obtain the "drastic" and "extraordinary" remedy of a preliminary injunction.

Second, unlike Plaintiff and its members, who will suffer no injury if an injunction is denied, the *Tribune* and the *News* would be irreparably harmed by an order compelling the unwinding of the 2013 amendments to the JOA after spending the last eight months operating and restructuring their respective businesses. The balance of harms therefore tips decisively in favor of denying a preliminary injunction.

Third, Plaintiff cannot establish that it is likely to succeed on the merits of its antitrust claims. The Newspaper Preservation Act exempts newspaper joint operating agreements like the 2013 Amended JOA from those laws. That Act was designed to protect newspapers that have combined their business operations, while keeping their editorial content separate, from just the type of frivolous antitrust claims Plaintiff assert here. Plaintiff's entire case centers on questioning the business judgment of two of the most respected executives in the newspaper industry, something a court should consider with great reluctance and only on much stronger evidence than anything Plaintiff presents here.

STATEMENT OF FACTS

1. Defendants' opposition to Plaintiff's Motion is best understood in the context of: (1) the historical relationship between the *Tribune* and the *News*; (2) the history of the JOA (as

amended in 2013, the "2013 Amended JOA"); (3) the current status of the JOA; and (4) Plaintiff's allegations.

The Historical Relationship Between the Tribune *and the* News

2. Kearns-Tribune,[1] as owner of the *Tribune*, and Deseret, as owner of the *News*, have been parties to a JOA since 1952. (*See* Pl.'s Mot. Ex. A, 1952 Joint Operating Agreement ("1952 JOA").) Under the terms of the 1952 JOA, as subsequently amended, the newspapers have conducted business through the Newspaper Agency Corporation and its successors ("NAC") for over 60 years. (*Id*.) The news and editorial functions of the *Tribune* and the *News* are, and always have been, separate and distinct from the NAC operations. (*Id*.) Profits derived from NAC operations, largely from the sale of circulation and advertising, are paid to the two members of the NAC in proportion to the revenue split set forth in the JOA. (*Id*., 1952 JOA § 13.) Kearns-Tribune cannot unilaterally decide to suspend or cease publishing the *Tribune*. (Pl.'s Mot. Ex. D, 2013 Amended JOA § 2.02.) Specifically, there is no provision in the 2013 Amended JOA that would allow Kearns-Tribune to unilaterally cease publication of the *Tribune* if the distributions it receives from the NAC are insufficient to cover its editorial expenses.

3. The 1952 JOA has been amended several times since it came into effect. (Pl.'s Mot. Exs. A-D; Declaration of Jaime Steinfink ("Steinfink Decl.") Ex. A.) These amendments have, for example, changed the allocation of profit sharing in the NAC between the parties on several occasions, (*see, e.g*., Pl.'s Mot. Ex. B, 1983 Amended JOA § 13), permitted the *News*, at its option, under certain circumstances, to publish a Sunday morning edition in direct competition

1 Kearns-Tribune is a wholly-owned subsidiary of MediaNews Group Inc., which has conducted business as Digital First Media since December 2013. Specific references to "MediaNews Group" in this brief refer to the entity that existed before it adopted the DFM name.

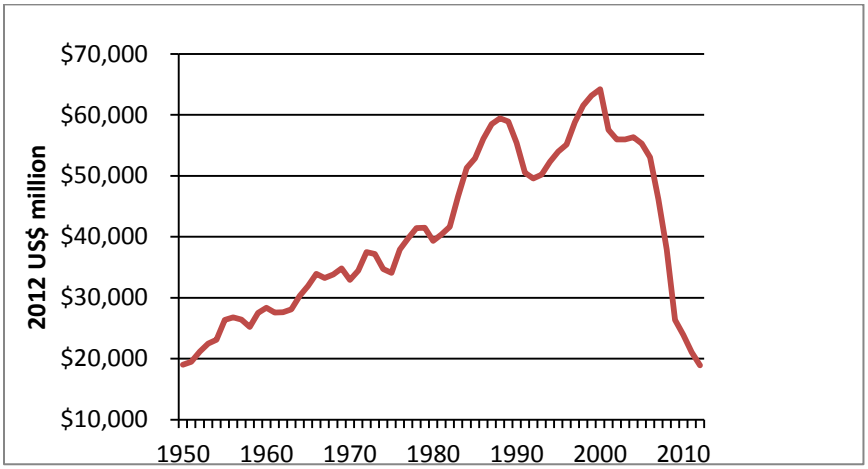
with the *Tribune*, (*id*., 1983 Amended JOA § 4), and conditioned further changes of ownership of the *Tribune* on Deseret's right to consent to its new partner. (Steinfink Decl. Ex. A, 2001 Amended JOA § 10.) None of these amendments, however, changed the JOA's fundamental structure under which the news and editorial functions of the two newspapers remain completely separate. (*See*, *e.g*., Pl.'s Mot. Ex. A, 1952 JOA § 15.)

4. In the 2001 Amended JOA, the parties agreed that the JOA would expire in 2020 unless both parties agreed to renew it. (Steinfink Decl. Ex. A, 2001 Amended JOA § 11.) In or around 2012, concerned that the JOA was unlikely to be renewed, and that the *Tribune* was likely to incur significant losses in the coming years without substantial restructuring, DFM decided that it needed to move aggressively to protect the value of its asset and to ensure that the *Tribune* would be able to survive outside of the NAC as an independent entity after 2020. (Declaration of John Paton ("Paton Decl."), at ¶¶ 16, 22, 29.)

The History of the 2013 Amended JOA

5. In 2012, as DFM began reviewing the performance of its newspaper in Salt Lake City, the U.S. newspaper industry was in a state of crisis. Since 2006, total print advertising revenues (which comprise approximately half of all revenues earned by newspapers) had fallen by more than half, and over the last 20 years, circulation had fallen by nearly one-third. (Paton Decl. at ¶¶ 9-10, 12(c).)

Figure 1
Print Newspaper Advertising Revenue
(Adjusted for Inflation)[2]



6. This precipitous decline in revenue has forced all newspapers to make painful adjustments. Since 2000, newspapers have reduced their newsroom staffs by roughly 30% and today are publishing fewer pages and are relying on more third-party content than ever.[3] The *Tribune* has not been immune to the changes affecting the newspaper industry. In line with the collapse of revenues in the newspaper business generally, the *Tribune*'s distributions from NAC profits began declining sharply after 2006 and are now a mere fraction of what they were then, let

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2 Rick Edmonds et al., *Newspapers: Building Digital Revenues Proves Painfully Slow*, Pew Research Ctr. (Apr. 11, 2012), http://stateofthemedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/#print-and-digital-advertising.

3 Emily Guskin, *Newspaper newsrooms suffer large staffing decreases*, Pew Research Ctr. (Jun. 25, 2013), http://www.pewresearch.org/fact-tank/2013/06/25/newspaper-newsrooms-suffer-large-staffing-decreases/; *see also* Kara Bloomgarden-Smoke, *The New York Times to Reduce Size of Newsroom*, N.Y. Observer (Dec. 3, 2012), http://observer.com/2012/12/the-new-york-times-to-reduce-size-of-newsroom/.

alone what they were when MediaNews Group bought the newspaper in 2001 for $200 million.[4] (Paton Decl. at ¶ 15.) By 2012, the *Tribune*, as a standalone entity, was already losing money on its newspaper business. (Paton Decl. at ¶ 17.)

The Digital First Strategy

7. There is little disagreement that the legacy print business of newspapers is shrinking, as readers abandon print for digital media, causing print advertising revenues to drop sharply. (Paton Decl. at ¶¶ 8-12.) In the face of falling demand for their product, print newspapers have been able to prevent an equally sharp fall in their circulation revenues by increasing per-copy and subscription prices. This strategy has questionable long-term sustainability because these trends are not reversible. (*Id*.)

8. The areas of the newspaper business that are growing are digital readership and digital ad sales, which is not surprising as the primary cause of the decline of the print newspaper business is that readers are migrating from print to digital media. Today, more Americans get their news from online sources than from newspapers. (Paton Decl. at ¶ 12 & Ex. G.) Consistent with its name, Digital First Media's business strategy is built around aggressively restructuring its newspapers to compete in the rapidly growing digital world. To this end, its "digital first" strategy has numerous components, including: (i) reducing exposure to legacy costs associated with print publication, (ii) increasing collaboration among its various newspaper holdings, (iii) taking advantage of the unique qualities of digital publication to provide a more robust multimedia experience for readers, and (iv) developing digital advertising models that go beyond simply

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4 *See Salt Lake Tribune Publ'g Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1085 (10th Cir. 2003) ("MediaNews bought KTLLC, which as noted above owned The Tribune, for $200 million in January 2001.").

selling advertising on a web page. (Paton Decl. at ¶ 12(c).) DFM's "digital first" strategy has produced excellent results since it was launched in 2010. Since then, its newspapers have grown digital advertising revenues to more than $180 million per year. (Paton Decl. at ¶ 13.) The term "digital first" is now used widely in the newspaper industry worldwide as a transformation strategy. (Paton Decl. at ¶ 5.)

DFM's Efforts to Strengthen the Tribune *Through the 2013 Amended JOA*

9. Far from being designed to "gut" or "cripple" the *Tribune*, the changes that were made in the 2013 Amended JOA were designed to recognize the changed reality of the newspaper business and enable it to compete effectively as readers continue to migrate from print to digital media. In keeping with its digital first strategy, DFM sought to reduce the *Tribune*'s exposure to declining legacy assets (such as the parties' jointly owned printing facility) and to reduce its dependence on declining print revenues by gaining full control over the *Tribune*'s expanding digital advertising sales. The 2013 Amended JOA permitted the *Tribune* to take its digital ad sales business, Utah Digital Services, out of the NAC and develop an in-house digital marketing force, as the *News* had done a few years before. (Paton Decl. at ¶¶ 24, 33.)

10. As part of the 2013 Amended JOA, DFM also negotiated for, and the *News* agreed to, several important provisions designed to protect the *Tribune* and ensure that it could continue to publish after 2020, and ensure its editorial independence. Contrary to Plaintiff's allegations, the changes to the JOA made by adoption of 2013 Amended JOA do not threaten the editorial independence of the *Tribune*, but rather substantially increase the protections afforded the minority partner in the JOA. These changes include:

- The right to have NAC continue to print the *Tribune* at cost at the production facility now wholly-owned by Deseret for the entire life of the JOA, because the

Tribune no longer bears any of the rent or other costs or expenses associated with the lease of the plant other than its pro rata share of the costs and expenses that flow through to the NAC. (Pl.'s Mot. Ex. D, 2013 Amended JOA § 7);

- If the JOA expires or terminates, the right to have the *Tribune* printed at the production facility at market rates. (*Id*., 2013 Amended JOA § 13);
- The right to prevent Deseret from taking any actions that might weaken the *Tribune* without the consent of at least one of the two DFM board members. This includes:
    - Changing the *Tribune*'s publication schedule (*Id*., 2013 Amended JOA § 2.02, ¶ 5(m));
    - Budgeting less news or color to the *Tribune* than to the *News* (*Id*., 2013 Amended JOA § 2.02, ¶ 5(p));
    - Reducing the *Tribune*'s primary circulation area (*Id*., 2013 Amended JOA § 2.02, ¶ 5(q));
    - Changing the *Tribune*'s press deadlines, delivery targets, number of editions, or days of publication (*Id*., 2013 Amended JOA § 2.02, ¶ 5(r)); or
    - Suspending or ceasing publication of the *Tribune* (*Id*., 2013 Amended JOA § 2.02, ¶ 5(s)).

11. Since the 2013 Amended JOA came into effect on October 18, 2013, the *Tribune* has continued to publish and plans to continue to do so. (Paton Decl. at ¶ 22.) As John Paton affirms, there are no plans to cease publication of the *Tribune* today, tomorrow, next week, next month, next year, or ever. (*Id*.) There have never been any discussions, either at the board level or among the executives of DFM, contemplating closing the *Tribune*. (*Id*.) Any suggestion to the contrary can only be based on rumor and speculation.

12. Deseret's leadership likewise has no plan or desire to cause the *Tribune* to cease publication. Given the additional contractual protections that Deseret agreed to provide to the *Tribune* and the assurances from its ownership that the 2013 amendments would help to reposition the newspaper for the digital age, the *News*' leadership agreed to the 2013 Amended JOA as a

prudent part of its own "dual transformation" strategy of "migrating to digital while simultaneously maintaining and expanding its traditional print capabilities." (Declaration of Clark Gilbert ("Gilbert Decl.") at ¶ 7.)

The Status Quo

13. The 2013 Amended JOA was executed and became effective on October 18, 2013. (Pl.'s Mot. Ex. D, 2013 Amended JOA § 1.) DFM and Deseret publicly filed the 2013 Amended JOA with the U.S. Department of Justice (the "Justice Department" or "DOJ"), as they were required to do by the Newspaper Preservation Act ("NPA"), 15 U.S.C. § 1803(a). (Steinfink Decl. at ¶ 4.) None of this was concealed from Plaintiff or its members; the newspapers publicly announced the 2013 Amended JOA on October 21, 2013.[5] Just two weeks later, on October 28, 2013, Joan O'Brien, one of Plaintiff's members, sent a letter to the DOJ asking it to investigate those amendments, in which she expressed many of the concerns found in Plaintiff's Complaint.[6] Ms. O'Brien repeated many of the same concerns in a longer letter to DOJ in February 2014.[7]

14. Over the eight months since Ms. O'Brien sent her first letter to the Justice Department, both the *Tribune* and the *News* have moved forward under the 2013 Amended JOA. For example, as part of the transfer to the *Tribune* of the NAC's interest in Utah Digital Services

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5 *See Deseret News, S.L. Tribune revise joint operating agreement*, Deseret News (Oct. 21, 2013), available at http://www.deseretnews.com/article/865588855/Deseret-News-SL-Tribune-revise-joint-operating-agreement.html (last visited on June 26, 2014).

6 Letter from Joan O'Brien et al. to John R. Read, Litigation III Section, Antitrust Division (October 28, 2013), *available at* http://extras.sltrib.com/docs/JOAletter.pdf.

7 Letter from Joan O'Brien to David Kully, Acting Chief, Litigation III Section, Antitrust Division (February 28, 2014), *available at* www.utahnewspaperproject.org/userfiles/file/DOJ%202nd%20letter%20final.pdf.

(the *Tribune*'s digital arm), the *Tribune* and the *News* terminated their internet advertising agreement and the two newspapers have since been competing head-to-head in digital advertising. (Declaration of Kirk MacDonald ("MacDonald Decl.") at ¶ 11.) Utah Digital Services has closed its offices at the NAC and has transferred its equipment and furniture to the *Tribune*. (*Id*.) The *Tribune* has hired new representatives to supplement the digital advertising sales force it brought with it from the NAC and expects additional employees to be hired in the coming weeks. (*Id*. at ¶ 15.) DFM also cannot retrieve the monies it received from Deseret in consideration for the 2013 amendments at this late date. The monies were already used, in part, to fund the NAC's pension plan and pay down debt. (Paton Decl. at ¶ 26.) These transactions cannot be undone now. (*See infra* fn 17.)

15. In April, the Justice Department opened a formal investigation, in connection with which it sent Civil Investigative Demands ("CIDs"), the equivalent of an administrative subpoena, to the owners of both the *Tribune* and the *News*. Both parties are now in the process of responding to those CIDs. (Pl.'s Mot. at vii.)

16. Since the 2013 Amended JOA came into force, several individuals, including Jon Huntsman, Sr., have expressed an interest in buying the *Tribune*. Discussions with these potential buyers have had to be put on hold because of the uncertainty created first by the DOJ's investigation and now by this lawsuit.[8] Having disrupted the *Tribune*'s efforts to run its business, Plaintiff's members have also engaged in a highly-publicized advocacy campaign to generate

8 *See, e.g.*, Tony Semerad, *Huntsman: Buy The Tribune? Maybe, but Any Sale Is on Hold*, Salt Lake Trib. (June 6, 2014), www.sltrib.com/sltrib/news/58037565-78/tribune-huntsman-news-council.html.csp.

public opposition to the 2013 Amended JOA.[9] Because of Plaintiff's members' efforts, the 2013 Amended JOA has become the subject of dozens of reports in print, radio, television, and online media.[10] Their efforts to inflame public opinion threaten to reduce circulation and advertising revenues by damaging the reputations and goodwill of both the *Tribune* and the *News*.

Plaintiff's Allegations

17. Plaintiff's pleadings and motion papers are filled with rumor, innuendo, and outright falsehoods. Most notably, while Plaintiff concedes that it lacks access to any detailed financial information about the *Tribune* or the NAC, (Pl.'s Mot. at 5-6), Plaintiff surmises that the *Tribune* is now "hemorrhaging" so badly that its demise is imminent. (Pl.'s Mot. at vii.) This is simply untrue. The *Tribune*'s owners have no plans to shut down the newspaper. (Paton Decl. at ¶ 22.) To the contrary, they are working hard to ensure that the *Tribune* will be able to continue to publish a strong, independent news product. (*Id*., MacDonald Decl. at ¶¶ 12-15.)

18. Despite the fact that the *Tribune* has continued to publish on each of the 255 days since the 2013 Amended JOA came into effect last year, Plaintiff alleges a conspiracy between the *Tribune*'s owners and the Church designed to mute "Salt Lake's sole daily secular and

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9 *See, e.g*., Utah Newspaper Project, http://www.utahnewspaperproject.org/ (last visited June 25, 2014); *Save the Salt Lake Tribune*, Facebook, https://www.facebook.com/savethesaltlaketribune (last visited June 25, 2014).

10 *See, e.g*., Glen Warchol, *Fighting for the Trib*, Salt Lake Magazine Blog (Apr. 10, 2014), http://saltlakemagazine.com/blog/2014/04/10/sl-trib-goes-down-fighting/; Dean Starkman, *A newspaper deal threatens Utah's main non-Mormon-owned daily, critics say*, Columbia Journalism Rev. (Apr. 25, 2014), http://www.cjr.org/the_audit/a_newspaper_deal_threatens_uta.php; Richard Markosian, *Why the* Salt Lake Tribune *Will Fail Unless the DOJ Takes Action*, Utah Stories (May 28, 2014), http://www.utahstories.com/2014/05/why-the-salt-lake-tribune-will-fail-unless-the-doj-takes-action/.

investigative newspaper." (Pl.'s Mot. at 8.) Plaintiff cites no direct evidence of this conspiracy but bases its claim on what it calls "the totality of the circumstances." (Compl. ¶ 36.) In each instance, however, the "circumstances" on which Plaintiff relies are contradicted by the plain language of the documents it attached to its Complaint or by the historical record. For example:

- Plaintiff alleges that through the 2013 Amended JOA, Deseret gained the right to veto changes in ownership of the *Tribune*. (Compl. ¶ 39(b)(a); Pl.'s Mot. at xv.) In fact, the language Plaintiff quotes from those Amendments has been part of the JOA since MediaNews Group acquired the paper in 2001. (*See, e.g.*, Steinfink Decl. at Ex. A, 2001 Amended JOA § 10; Pl's Mot. at xiii, xv; Pl.'s Mot. Ex. C, 2006 Amended JOA § 10.)

- Plaintiff alleges that NAC profits were distributed in rough proportion to the newspapers' respective circulation numbers before the 2013 Amended JOA. (Compl. ¶ 39(b)(c); Pl.'s Mot. at xiii.) That is also wrong. For most of the first 30 years of the JOA, the distributions of NAC profits were shared pursuant to a preset schedule. (Pl.'s Mot. Ex. A, 1952 JOA § 13.) In 1982, the parties agreed to permanently increase the *Tribune*'s share to 58 percent when the *News* sought to move its Saturday evening edition to a Sunday morning edition that would be in direct competition with the *Tribune*, a change that was likely to decrease, not increase, the *Tribune*'s circulation. (Pl.'s Mot. Ex. B, 1983 Amendments § 13.) There has never been any language in the JOA to require that the profit sharing mirror differences in circulation.

- Plaintiff alleges that Deseret can now hold NAC meetings, even if a *Tribune* representative is unavailable. (Compl. ¶ 39(b)(e); Pl.'s Mot. at xiv.) In fact, prior to the 2013 Amended JOA, the JOA lacked a quorum provision altogether. DFM negotiated for and secured the addition of the quorum provisions to prevent Deseret from holding a meeting without the presence of at least one of the *Tribune*'s representatives to the board. (Pl.'s Mot. Ex. D, 2013 Amended JOA § 2.02.)

EVIDENTIARY OBJECTIONS

Plaintiff has submitted five declarations in support of its Motion for a Preliminary Injunction. The Court should give little, if any, weight to these declarations, because all of them suffer from significant evidentiary deficiencies.

A. Legal Standards

1. General Standards for Declarations on a Motion for Preliminary Injunction

On a motion for preliminary injunction, a trial court has broad discretion to determine how much weight to give a declaration, and the evidentiary quality of the declaration "will have a significant effect on this determination." 11A Charles Alan Wright *et al*., Federal Practice & Procedure § 2949 (3d ed.). Thus, where a declaration is conclusory, speculative, or is not based on personal knowledge of the facts it recites, it will be disregarded or given minimal weight. *See Paramount Pictures Corp. v. Video Broad. Sys., Inc*., 724 F. Supp. 808, 811 (D. Kan. 1989) (excluding portions of affidavits submitted on motion for preliminary injunction where such affidavits contained "inadmissible hearsay, incompetent testimony, or matters outside of the affiant's personal knowledge"); *Voile Mfg. Corp. v. Dandurand*, 551 F. Supp. 2d 1301, 1307 (D. Utah 2008) ("Mr. Dandurand's conclusory affidavit is not enough to demonstrate irreparable harm here. Courts require more than unsupported factual conclusions to support such a finding.").[11]

2. The Standards for "Expert" Declarations

Not surprisingly, courts scrutinize opinion testimony even more carefully, whether on a motion for preliminary injunction or otherwise. Just as at trial, "it is the Court's duty to assess and

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11 *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 45 (E.D. La. 1966) (holding that plaintiff failed to carry burden supporting preliminary injunction where it presented a speculative affidavit opposed by non-speculative affidavits and the sworn testimony of defendant.); *Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp*., 676 F. Supp. 2d 857, 861 (N.D. Cal. 2009) (disregarding affidavit, noting that the allegations therein suffered from several evidentiary deficiencies, including lack of any relevance to the dispute before the court). As one federal court observed, inadmissible evidence should be scrutinized at the preliminary injunction stage because it "calls into question plaintiffs' likelihood of later success on the merits." *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 257 F.R.D. 607, 615-16 (E.D. Cal. 2009).

weigh the credibility of all expert witnesses, while guided by the standards of Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)." *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2008 WL 4453098, at *3 (N.D. Okla. Sept. 29, 2008), *aff'd sub nom. Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009) (on motion for preliminary injunction, evaluating expert testimony under a *Daubert* analysis).[12]

A trial court may, in its discretion, admit expert testimony and conduct its Rule 702 analysis assessing the weight to be given that testimony. *See Nilson v. JPMorgan Chase Bank, N.A.*, 690 F. Supp. 2d 1231, 1266 (D. Utah 2009) (giving reduced weight to expert opinion proffered by CPA with expertise in public accounting and financial analysis, because he had "no expertise in banking and lending practices"). Alternatively, a court may give deficient opinion testimony no weight at all and exclude it altogether. *See Autotech Tech. Ltd. P'ship v. Automationdirect.com*, 471 F.3d 745, 749 (7th Cir. 2006) (approving district court's holding that plaintiff's proffered expert was unqualified because his opinion was unreliable under *Daubert* standards); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 257 F.R.D. 607, 616

12 Generally, Rule 702 of the Federal Rules of Evidence allows the court to admit expert testimony when "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. In *Kumho Tire Co., Inc. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court emphasized that a district court's gatekeeping function was not limited to scientific testimony but rather covered all expert testimony. Furthermore, "[t]he proponent of expert testimony bears the burden of showing that its proffered expert's testimony is admissible." *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009).

(E.D. Cal. 2009) (observing that even at the preliminary injunction stage, it may be appropriate to exclude evidence where objections are raised under Rule 702).

B. All of Plaintiff's Proffered Declarations Suffer from Fatal Deficiencies

Here, all of Plaintiff's proffered declarations suffer from serious evidentiary failings and all recite unfounded and unreliable opinion testimony.

To begin with, all five declarations rest on the erroneous assumption that the *Tribune* faces imminent closure if the 2013 Amended JOA continues in effect. As discussed at length in this memorandum, it is not now and has never been the intent of the owners of the *News* or the *Tribune* to close the *Tribune*, nor to hamper its business prospects. Accordingly, affidavits purporting to decry the calamity that would result from a hypothetical *Tribune* closure should be disregarded for the purpose of analyzing Plaintiff's motion. *See Zugsmith v. Davis*, 108 F. Supp. 913, 915 (S.D.N.Y. 1952) ("What is signified by the affidavit is merely an expression of *fear and apprehension* of irreparable injury, which is not a sufficient basis for granting the injunctive relief sought.") (emphasis added); *Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 73 (1st Cir. 2004) ("Preliminary injunctions are strong medicine, and they should not issue merely to calm the imaginings of the movant.").

While each of Plaintiff's declarants has an interesting professional history, none of them has the credentials nor the factual knowledge to address the issues raised by Plaintiff's motion – namely, whether the Court should second-guess the business judgment of industry leaders seeking to position the *Tribune* and the *News* to compete effectively against a growing number of digital rivals.

1. Jeffrey Miller

Jeffrey Miller "feels strongly" that if the *Tribune* were to close its print- and internet-based operations, the *Tribune*'s subscribers would not turn to reading the *News*, and therefore some of his audience for automobile advertising would be irretrievably lost. (Pl.'s Mot. Ex. I, Miller Decl. at ¶¶ 2, 6-7.) Mr. Miller's declaration is based on his conjecture that the *Tribune* may someday cease publishing. His opinion testimony therefore is speculative and lacks foundation, and should therefore be given no weight.

2. Nancy Conway

Nancy Conway, who was once an editor at the *Tribune*, but who has since retired, states that "based on [her] experience," the 2013 Amended JOA "fails to provide sufficient revenue" to allow for the *Tribune*'s continued existence. (Pl.'s Mot. Ex. H, Conway Decl. at ¶ 4.) She further opines that no other media source in Salt Lake City is a "reasonable substitute" for that paper. (*Id*., Conway Decl. at ¶ 5.) Her testimony likewise lacks foundation.

Ms. Conway left the *Tribune* nearly a year ago, and thus has no personal knowledge of the *Tribune*'s current operating expenses or revenues, or of its projected *future* operating expenses or revenues. As a journalist, Ms. Conway played some vague and unspecified role in "setting and implementing budgets for the newspaper." (*Id*., Conway Decl. at ¶ 3.) She has no familiarity with the long-term strategic planning of the *Tribune*'s current management. Ms. Conway's opinion as to the financial condition of the *Tribune* should therefore be given little, if any, weight.

3. Joan O'Brien

Joan O'Brien is a former mid-level editor at the *Tribune* and the daughter of one of the *Tribune*'s publishers, who claims to be a "regular and careful reader" of the *Tribune*. (*See* Pl.'s

Mot. Ex. G, O'Brien Decl. at ¶¶ 2-4.) She does not purport to have *any* familiarity with the *Tribune*'s financials, nor with the terms of the original or amended JOAs. Nevertheless, Ms. O'Brien speculates that there has been a decline in the *Tribune*'s offerings "due to revenue cuts dictated by the 2013 Joint Operating Agreement"; guesses that 30 percent of the *Tribune*'s employees have been laid off since September of last year (and apparently guesses that this is somehow related to the 2013 Amended JOA as opposed to independent economic forces that are affecting newspapers everywhere); presumes that "[c]uts required under the new JOA" have forced the *Tribune* to terminate certain of its features; and laments that "readers, including me, are noticing that they are getting less from their paper now." (*Id*., O'Brien Decl. at ¶¶ 4-6.) These statements again lack foundation, and do not satisfy Rule 702's standards."[13]

4. Curtis Bramble

Curtis Bramble is a member of the Utah State Senate. Like Plaintiff's other declarants, he rests his declaration on his unfounded assumption that the 2013 Amended JOA will lead to the closure of the *Tribune*. Senator Bramble's prediction, with no evidence that closure is likely, is completely speculative. (Pl.'s Mot. Ex. F, Bramble Decl. at ¶¶ 27-32.) Senator Bramble's declaration is "merely an expression of *fear and apprehension* of irreparable injury, which is not a

13 Ms. O'Brien adds that she "recalls" seeing, in 2004, a *Tribune* endorsement for George W. Bush as a political candidate, and that the endorsement was purportedly determined by the *Tribune*'s owner. (Pl.'s Mot. Ex. G, O'Brien Decl. at ¶ 10.) This is hearsay upon hearsay and, at any rate, has no bearing on the issues before the Court. Ms. O'Brien's apparent suggestion that conservative owners of the *Tribune* have long been dictating its editorial content is directly at odds with Plaintiff's general celebration of the *Tribune* as Utah's liberal, "independent" voice and its cry that the 2013 Amended JOA will subject the *Tribune* to sudden, runaway editorial intrusion by its owners. (*See id*. Ex. F, Bramble Decl. at ¶ 30.) Her entire declaration should be disregarded.

sufficient basis for granting the injunctive relief sought." *Zugsmith*, 108 F. Supp. at 915 (emphasis added).

5. G. Donald Gale

Finally, journalist G. Donald Gale, like Senator Bramble, recites his prediction of the consequences of his imagined closure of the *Tribune* – including alleged loss of reporting on civil rights and governmental conduct, and a "weaken[ed]" public awareness of local issues. (Pl.'s Mot. Ex. E, Gale Decl. at ¶¶ 9, 11-12, and Ex. A.) Mr. Gale's declaration, like Plaintiff's other declarations, is entirely speculative and is entitled to no weight.

* * * *

In sum, none of the declarations proffered by Plaintiff in support of its Motion for a Preliminary Injunction rests on reliable, admissible evidence. They should all be excluded or given little to no weight in the Court's analysis of Plaintiff's Motion.

ARGUMENT

Plaintiff's Motion for a Preliminary Injunction should be denied because Plaintiff cannot satisfy any of the four criteria for issuing a preliminary injunction: (1) that plaintiff will suffer immediate and irreparable injury if the injunction is not granted; (2) that plaintiff's threatened injury outweighs the harm caused to the non-movant resulting from an injunction; (3) that plaintiff has a substantial likelihood of success on the merits; and (4) that an injunction would not be adverse to the public interest. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004).

Plaintiff faces a particularly heavy burden in meeting this four-part test here because it asks the Court to issue the "disfavored," "extraordinary," and "drastic" remedy of a mandatory

preliminary injunction.[14] *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005). Courts in the Tenth Circuit hold such motions to a high standard: a plaintiff seeking a mandatory injunction must make a "strong showing" on all four of the prerequisites to merit issuance of a preliminary injunction. *See Schrier*, 427 F.3d at 1261 (citing *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004)). The Tenth Circuit imposes this higher standard because a mandatory injunction "affirmatively require[s] the non-movant to act in a particular way, and as a result . . . place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the non-movant is abiding by the injunction." *Schrier*, 427 F.3d at 1261 (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991)) (alterations in original).

In addition, Plaintiff seeks an injunction under Section 16 of the Clayton Act, therefore, it must also show "that the danger of irreparable loss or damage is *immediate*" before a preliminary injunction may issue. 15 U.S.C. § 26 (2012) (emphasis added); *see also In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 528-29 (4th Cir. 2003) (noting that the necessity that the irreparable harm be "immediate" or "imminent" "arises not only from equity but also from Section 16 of the Clayton Act itself"), *abrogated on other grounds by Pashby v. Delia*, 709 F.3d 308 (4th Cir. 2013). Courts have uniformly held that harm that is unlikely to materialize within a quantifiable time frame is not sufficiently "imminent" or "immediate" to qualify for injunctive relief. *See, e.g., Los*

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14 We note that Plaintiff has not submitted a draft order for the Court's consideration and that the relief requested in its Complaint is vague, at best. It appears from the discussion in Plaintiff's Motion that Plaintiff is seeking an injunction that would do far more than simply proscribe future conduct: "If the parties are ordered to restore, or resume, their pre-dispute position (i.e., pre-October 2013 JOA), the primary effect would be to adjust the allocation of a cash payment and ongoing revenue between the two entities." (Pl.'s Mot. at 7.)

Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1201 (9th Cir. 1980) (speculative allegations of harm occurring in eight months' time deemed insufficient to establish imminent harm); *Va. Airmotive, Ltd. v. Canair Corp.*, 393 F.2d 126, 128 (4th Cir. 1968) (harm not "imminent" because it would not take place "automatically or in the near future" because plaintiff could continue to advertise the relationship between the parties).

Plaintiff's Motion fails on all counts under these rigorous standards. It cannot meet any of the four requirements for issuance of a preliminary injunction.

I. PLAINTIFF DOES NOT FACE IMMINENT AND IRREPARABLE HARM

In the Tenth Circuit, a plaintiff's allegations of irreparable harm must be "certain, great, actual and not theoretical" for a preliminary injunction to issue. *Schrier*, 427 F.3d at 1267. In addition, Plaintiff's injuries must be "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (emphasis added).

At the outset, Plaintiff's claim that its alleged harm is both irreparable and immediate is undercut by the fact that Plaintiff waited a full eight months before bringing this Motion. During this eight-month period, Plaintiff concedes that the general terms of the 2013 Amended JOA were widely publicized and, in fact, one of the leaders of Plaintiff's group, Joan O'Brien, chronicled those terms in two letters to the DOJ in October 2013 and February 2014. *See* fns. 6 and 7, *supra*. Courts in this circuit have routinely declined to grant injunctive relief for similar delays. *See GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) ("'Although plaintiff contends that it will be irreparably harmed should defendants' activities not be enjoined, it has waited nearly a year before seeking any relief. Delay of this nature undercuts the sense of urgency that ordinarily accompanies

a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.'"); *Kan. Health Care Assoc., Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994) ("As a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury."); *see also Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1221 (D. Utah 2004) (other churches' challenge to sale of pedestrian easement to the Church rejected where plaintiffs delayed preliminary injunction filing until five months after the transaction closed). Plaintiff's motion should be denied for this reason alone.

Plaintiff fares no better when the merits of its motion are considered. Plaintiff alleges that its members would be irreparably harmed if the *Tribune* were to cease publishing. (Pl.'s Mot. at 4.) Yet Plaintiff has alleged no facts to suggest that closure of the *Tribune* is likely, let alone "imminent" or "immediate." Plaintiff's sole basis for alleging that the *Tribune* is in imminent danger of closing is its declarants' opinion testimony that the 2013 Amended JOA "fails to provide sufficient revenue to the *Tribune* to allow for the *Tribune*'s continued existence." (*Id.* at 6.) Yet, as Plaintiff readily concedes, neither it nor its members have visibility into the finances of the *Tribune*. (*Id.* ("[Plaintiff] is not privy to exact revenue figures.").) Plaintiff's conclusion regarding the state of the *Tribune*'s finances therefore amounts to nothing more than rumor and speculation[15] and is entitled to little or no weight against the declaration of DFM CEO John Paton,

15 Plaintiff's parade of horribles stems from its complete reliance on this central assumption. Plaintiff wrongly deduces that layoffs of staff and changes in the features and content of the newspaper are compelled by the reduced profit sharing with the NAC rather than by the overall decline of NAC profits. (Paton Decl. at ¶ 23.) Plaintiff's further deduction that greater reliance on digital media will reduce the *Tribune*'s audience is also unfounded. (*See* MacDonald Decl. at ¶ 7.) Finally, in what amounts to pure fiction, Plaintiff baldly claims that the 2013 Amended JOA was intended to set up a failing firm basis for terminating the JOA. (Compl. ¶ 7.) In fact, one of the

who has unconditionally represented to this Court that there are no plans, imminent or otherwise, to have the *Tribune* cease publishing. (Paton Decl. at ¶ 22.)

Courts in this circuit have routinely refused to grant preliminary injunctions, let alone disfavored mandatory preliminary injunctions, on such scant evidence. For example, in *Systemic Formulas, Inc. v. Kim*, No. 1:07-cv-159, 2009 WL 4981631, at *5 (D. Utah Dec. 14, 2009), the plaintiff claimed that, absent a preliminary injunction, "'the very continued existence' of its business [was] threatened." Even though the plaintiff had experienced a decrease in sales to certain customers, the court found that plaintiff's business was "stable" and "not on the verge of extinction." *Id*. The court therefore denied the plaintiff's motion for a preliminary injunction because its claimed injury was "not actual, but speculative and greatly exaggerated." *Id*. In another case in which the plaintiff alleged that its business was in imminent danger of collapse, the court again denied a preliminary injunction because "there is nothing on the record that strongly supports the conclusion that [plaintiff] is in imminent danger of folding." *Seroctin Research & Techs., Inc. v. Unigen Pharm., Inc.*, 541 F. Supp. 2d 1238, 1247 (D. Utah 2008).

The newspaper cases that Plaintiff cites in support of its Motion are easily distinguished from the facts here. In each of these cases, the parties' intention to close of one of the two JOA newspapers was never in dispute. For example, in *Hawaii ex rel Anzai v. Gannett Pacific Corp.*, 99 F. Supp. 2d 1241 (D. Haw. 1999), two newspapers agreed to terminate their JOA and subsequently announced that one would cease publication in a month's time. Mere days after this public announcement, the Hawaii Attorney General sought a preliminary injunction to prevent the

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intended purposes of the amendments was just the reverse, to prevent the *Tribune* from failing. (Paton Decl. at ¶¶ 21-22.)

implementation of the agreement. Despite the parties having conceded their intent to close the newspaper, the court called its decision "a difficult, close call," *id*. at 1243, but issued an injunction to prevent any further actions under the parties' agreement.

The instant case differs in all material respects. First, the parties have not announced the imminent closure of the *Tribune*. Defendants have submitted sworn declarations to this Court testifying that, to the contrary, there are no plans to cease publication at any time. Second, in contrast to the swift action taken by the Hawaii Attorney General, Plaintiff waited a full eight months to bring this Motion. Finally, while the Hawaii Attorney General sought only to prevent any further steps from being taken under the agreement in that case, Plaintiff here seeks to unwind more than eight months of planning and implementation of DFM's digital strategy for the *Tribune*.

The other newspaper cases cited by Plaintiff are similarly inapplicable. In *Reilly v. Hearst Corp*., 107 F. Supp. 2d 1192, 1194 (N.D. Cal. 2000), the court issued a temporary restraining order to prevent further steps from being taken under an agreement to terminate the JOA and place both papers under the control of the same party, after which the parties themselves agreed not to take further steps to implement the agreement until after an expedited trial on the merits in which the court ultimately ruled for the defendants. Again, in that case, the stated purpose of the transaction being challenged was to terminate the JOA, unlike the case here. In *United States v. Daily Gazette Co*., 567 F. Supp. 2d 859 (S.D. W. Va. 2008), the DOJ challenged a transaction that had been consummated several years before and a preliminary injunction was neither sought nor granted. The parties subsequently agreed to a consent decree that guaranteed the editorial and business independence of the second paper. *United States v. Daily Gazette Co*., No. 2:07-0329, 2010 WL 3290289, at *1 (S.D. W. Va. July 19, 2010). Plaintiff's claim that the 2013 Amended JOA will

cause irreparable injury that could not be remedied after a trial on the merits is flatly contradicted by *Daily Gazette*.

Unable to show that the *Tribune* is about to close its doors, Plaintiff submits a lengthy critique of editorial decisions made by the *Tribune* and its owners. Plaintiff does not allege that this "change of editorial voice" amounts to irreparable harm, nor could it for three very important reasons. First, under Utah law and that of every other state in the Union, the informed decisions of business owners that are taken in good faith and do not violate any laws are immune from attack under the well-established business judgment rule. *See, e.g.*, Utah Code Ann. § 16–10a–840(4) (West 2013); *FMA Acceptance Co. v. Leatherby Ins. Co.*, 594 P.2d 1332, 1334 (Utah 1979). Under these cases, Plaintiff cannot use the antitrust laws to interfere with a newspaper owner's unilateral business judgment as to how much and what kind of news to publish.[16] *See* p. 28 *infra*. Second, as discussed in greater detail *infra* at 27, asking the Court to issue an injunction to change the editorial policies and decisions of the *Tribune* raises serious First Amendment issues. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding Florida statute unconstitutional on First Amendment grounds because of its "intrusion into the function of editors"). Finally, this very argument was considered and rejected by the Tenth Circuit as insufficient to constitute irreparable harm when DFM's (as MediaNews Group) acquired the *Tribune* over ten years ago. *See Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1105-06 (10th Cir. 2003) (holding that termination of the management contract, the consequent

16 Significantly, Plaintiff has not alleged any agreement between the *News* and the *Tribune* as to how much or what kind of news to publish. As discussed below, this omission is fatal to their claim in Count I of their complaint that the 2013 Amended JOA was a *per se* violation of Section 1 of the Sherman Act. *See* pp. 40-42 *infra*.

loss of "editorial voice," and the other changes to management of the *Tribune* could not constitute irreparable harm as required for a preliminary injunction). *See* p. 33, *infra*.

Plaintiff has made no showing that it will suffer any irreparable harm, imminent or otherwise. For this reason alone, Plaintiff's motion fails.

II. IF A PRELIMINARY INJUNCTION ISSUED, THE HARM TO THE DEFENDANTS WOULD SIGNIFICANTLY OUTWEIGH THE SPECULATIVE HARM ALLEGED BY PLAINTIFF

To prevail on its motion, Plaintiff must additionally make a strong showing that its irreparable injuries would outweigh any harm to Defendants resulting from Defendants' compliance with the requested injunction. *See Dominion Video*, 356 F.3d at 1260. Plaintiff has not made any showing in this regard, let alone a strong one. To the contrary, the harm to Defendants should the court issue the requested injunctive relief would be substantially greater than the speculative and hypothetical harm that Plaintiff claims its members would suffer if its motion were denied.

If granted, Plaintiff's requested preliminary injunction would do irreparable harm to DFM and the *Tribune*, as well as to the *News*. As Mr. Paton's declaration shows, the 2013 amendments are important in repositioning the *Tribune* to compete more effectively, both for readers and advertisers, with the growing number of digital alternatives available to them. (Paton Decl. at ¶¶ 21-25.) The 2013 Amended JOA furthers DFM's strategy of reducing exposure to legacy assets of declining value, such as printing presses. (*Id*. at ¶ 25.)

The issuance of an injunction would also force DFM to undo much of the progress it has made building the *Tribune*'s digital advertising revenues over the last eight months. (*See* fn. 15, *supra*, and Pl.'s Mot. at 7.) Since the 2013 Amended JOA was adopted, DFM has devoted

substantial resources and effort to expanding the *Tribune*'s business operations to take over the digital advertising sales function from the NAC. (MacDonald Decl. at ¶¶ 12-15, Paton Decl. at ¶ 33.) An injunction would require the reassignment of the *Tribune*'s digital advertising sales force to the NAC, the termination of employment where such reassignments are surplus to the NAC's requirements, the cancellation of certain digital initiatives, and the unwinding of the *Tribune*'s entire digital strategy. DFM and the *Tribune* would incur significant reputational damage and further lose the transaction benefits that DFM negotiated carefully and at great expense. *See* pp. 10-11 *supra*. More broadly, any injunctive relief would impose uncertainty that would be disruptive and harmful to DFM's and the *Tribune*'s operations, employees and business partners, as well as to the *News*.

Kearns-Tribune also used a portion of the money it received from Deseret in exchange for its interest in the Salt Lake printing facility and a reduction of its share of future NAC profits from print advertising and circulation to fund the NAC's pension plan. (Paton Decl. at ¶ 29.) It cannot get that money back.[17]

As it would be impossible to remedy the damage caused by the requested preliminary injunction should Defendants ultimately prevail, Plaintiff's motion must be denied because it would grant substantially all the relief sought and would "render a trial on the merits largely or completely meaningless." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 (10th Cir. 2001) (quoting *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 35 (2d Cir. 1995)).

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17 *See* ERISA § 403(c), 29 U.S.C. § 1103(c) (2012).

By comparison, Plaintiff and its members will sustain no injury if the Court declines to issue an injunction. This is because Plaintiff's theories of harm are fundamentally based on its incorrect assumption that the *Tribune* is in imminent danger of closing. (Compl. ¶ 50 ("[t]he imminent effect is to end publication of the *Tribune*"); Pl.'s Mot. at 4 ('[t]he loss of a newspaper, or threatened loss, constitutes irreparable harm").) Plaintiff's conjecture that the paper is in imminent danger of shutting down is wholly unsupported; to the contrary, DFM has no plans to close the *Tribune* at any time. (Paton Decl. at ¶ 22.)

Plaintiff's only specific allegations regarding its current "injuries" flow from some recent changes in the *Tribune*'s editorial content. Specifically, Plaintiff claims that the *Tribune* is publishing fewer pages, has eliminated some sections and features, reduced the number of op-ed columnists, and reduced the scope of its news coverage. (Pl.'s Mot. at 6.) This is hardly the type of immediate and irreparable injury that is necessary to justify a preliminary injunction. As the Supreme Court held in its landmark *Miami Herald* opinion:

> 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—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . .

418 U.S. at 258.

Even apart from First Amendment concerns, this Court should be reluctant to entertain Plaintiff's invitation to second-guess the well-informed and good faith business judgment as exercised by the owner of the *Tribune*. Even in the context of derivative actions—in which a plaintiff has a direct ownership interest in the corporation—Utah courts routinely decline to

entertain such claims. *Brewster v. Brewster*, 241 P.3d 357, 363 (Utah Ct. App. 2010) (dismissing all claims because "courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments"). *See also State Distribs., Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 413 (10th Cir. 1984) (dismissing a challenge to a decision terminating a franchise because "[t]he Franchise Act is not to be read as forcing a particular supplier and distributor to deal with one another despite irreconcilable conflicts in marketing philosophies, nor can it be read so as to require the court to second-guess the business judgment of the supplier in terminating such a franchise"); *Becker v. Egypt News Co., Inc.*, 548 F. Supp. 1091, 1098 (E.D. Mo. 1982) (denying preliminary and permanent injunctions preventing defendant from ending its business relationship with plaintiff because the "[c]ourt does not wish to unnecessarily inhibit by judicial fiat the right of any business to freely exercise its discretion in an effort to protect its valid business interest").

In sum, the balance of harm here tips decisively in favor of the Defendants, not the Plaintiff. Thus, even if Plaintiff could make a strong showing of probability of success on the merits – which it cannot – the motion for a preliminary injunction should still be denied.

III. PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS ANTITRUST CLAIMS

Because a preliminary injunction is an "extraordinary remedy," a moving party seeking a preliminary injunction must establish that there is "a substantial likelihood that the movant will eventually prevail on the merits" of its claims. *SCFC ILC, Inc., v. VISA USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) (quoting *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank of Kansas City, Mo.*, 665 F.2d 275, 278 (10th Cir. 1981)). Under this standard, the movant's "right to relief must be clear and unequivocal." *Id.* Plaintiff's burden is even higher when, as here, it seeks a

mandatory injunction that will disrupt, rather than simply maintain, the status quo. *See Schrier*, 427 F.3d at 1261. [18]

Plaintiff's motion for a preliminary injunction falls well short of showing a probability of success under these high standards.

A. Plaintiff Has Suffered No Injury-In-Fact, and Therefore Lacks Article III Constitutional Standing

Plaintiff lacks Article III standing to bring this lawsuit. Plaintiff is a nonprofit organization seeking relief on behalf of its members, and, as such, must show that it has associational standing. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551-53 (1996). Associational standing obligates Plaintiff to show that its members would have constitutional standing to bring suit on their own. *Id.* at 553 ("[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977))). For Plaintiff's members to have Article III standing they must have suffered an "injury in fact," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992),

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18 As discussed on pp. 18-20, supra, Plaintiff, in arguing that it need not make a strong showing on the likelihood that it will succeed on the merits of its antitrust claims (Pl. Mot. at 10), seeks impermissibly to apply the 10th Circuit rule for proscriptive injunctions to motions for mandatory injunctions, such as Plaintiff's, which seeks to force Defendants to take affirmative steps to undo the implementation of the 2013 Amended JOA. Under 10th Circuit law, Plaintiff must make a "strong showing" on all four prerequisites for the issuance of a preliminary injunction, including a "strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Schrier*, 427 F.3d at 1261 (quoting *Ashcroft*, 389 F.3d at 975-76).

that is both "(a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*.

Because Plaintiff's members have not suffered (and will not suffer) an injury-in-fact, they lack constitutional standing and, consequently, so does Plaintiff. Primarily, Plaintiff argues that it has standing to prevent the imminent closure of the *Tribune*. It can hardly be said that, as a result of the adoption of the 2013 Amended JOA, Plaintiff has suffered an "injury in fact," let alone one that is "concrete and particularized" for two reasons. First, the fact remains that the *Tribune* continues to publish seven days a week, and has published an issue for each and every one of the 255 days since the 2013 Amended JOA went into effect. Second, the CEO of the *Tribune*'s owner, DFM, has represented to this Court that he and his management team are working hard to ensure the continued publication of the *Tribune*, and have no plans to shut it down. (Paton Decl. at ¶ 22.) The injury that Plaintiff alleges it would suffer from a shutdown of the *Tribune* is entirely "hypothetical" and "conjectural," and as such does not satisfy constitutional standing requirements.

Plaintiff's allegation that it and its members are dissatisfied with the amount and type of news the *Tribune* is now publishing likewise does not represent the type of "concrete and particularized" injury-in-fact required to give them Article III standing. The First Amendment's guarantee of freedom of the press would not allow this Court to grant Plaintiff relief just because they do not like how the *Tribune*'s owner is exercising its First Amendment rights. *See supra at* 27, discussing *Miami Herald Publ'g Co*., 418 U.S. at 258.

Where an association "cannot demonstrate that its members are themselves 'among the injured,'" it does not have standing. *Am. Forest & Paper Ass'n v. U.S. Envtl. Prot. Agency*, 154

F.3d 1155, 1159 (10th Cir. 1998) (quoting *Lujan*, 504 U.S. at 563). As Plaintiff's lack of Article III standing requires the dismissal of the Complaint, Plaintiff has no chance to prevail on the merits of any of its claims.[19]

B. The 2013 Amended JOA Remains Exempt from the Antitrust Laws Under the Newspaper Preservation Act

In July 1970, Congress passed the Newspaper Preservation Act ("NPA"), 15 U.S.C. §§ 1801-04, in recognition of the "unique economic forces [that] operate in the newspaper industry, forces which caused the decline and closure of numerous newspapers since the turn of the century." *Comm. for an Indep. P-I v. Hearst Corp.*, 704 F.2d 467, 480 (9th Cir. 1983). The NPA confers Congressional approval on pre-1970 JOAs, formed prior to the enactment of the statute, by "grandfathering" their legality under the antitrust laws, requiring only that any amendment or renewal be filed with the DOJ. 15 U.S.C. § 1803(a). The 1952 JOA is such a grandfathered JOA.

Under the NPA, Defendants are immune from antitrust liability if they satisfy four requirements:

- Not more than one of the two newspapers in the JOA "was likely to remain or become a financially sound publication" at the time that the JOA was formed in 1952. *Id.*

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19 Plaintiff lacks antitrust standing to bring its claims. Standing to bring private actions under the federal antitrust laws is limited to those plaintiffs who can show that they have been injured by some competition-reducing aspect of the defendants' behavior. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). As noted at pp. 7-11, *supra*, Defendants' agreement and implementation of the 2013 Amended JOA are pro-competitive, as they enhance competition in digital advertising. No court has ever held that a plaintiff has standing to challenge a transaction that, on balance, is pro-competitive. As the Supreme Court has noted, "[i]t is inimical to the purposes of [the antitrust] laws" to allow challenges to procompetitive conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (affirming dismissal of complaint, which was based on conduct that the Court found "preserved competition").

- Both newspapers are published on newsprint in one or more issues weekly with a substantial portion of their content devoted to news and editorial opinion. *Id*. § 1802(4).

- The newspapers have established common production facilities, and have taken joint action on "one or more" functions such as printing, distribution, advertising solicitation, and circulation, among others. *Id*. § 1802(2).

- There has been "no merger, combination, or amalgamation of editorial or reportorial staffs," and "editorial policies [are] independently determined." *Id*.

(*See* Compl. ¶ 29.) The only additional requirement that the statute imposes on grandfathered JOAs is that all amendments to or renewals of such JOAs be filed with the DOJ and that the agreement not add any newspaper publications to the JOA. 15 U.S.C. § 1803(a).

For purposes of its Motion, Plaintiff does not question the Salt Lake JOA's eligibility for the NPA exemption during the first 62 years of its existence. Instead, Plaintiff argues that the provisions that it claims were added in October 2013 should cost the *Tribune* and the *News* their exemption—which has been instrumental in ensuring their survival for the last 62 years—for two reasons. Both are wrong on the facts and on the law.

First, Plaintiff argues that the change of control provision at Section 10 of the 2013 Amended JOA vitiates the editorial independence of the *Tribune*. (Pl.'s Mot. at 13-16.) This argument is both factually misleading and flat out wrong. That provision was not added in October 2013, but has been in the JOA for the past *thirteen years*. It has never been exercised, either to approve or disapprove a change of ownership.[20] Plaintiff's speculation that the provision

20 Plaintiff implies that this provision was added as part of the 2013 Amended JOA. It was not. The same provision is contained-word for word–in both the 2006 Amended JOA (Pl.'s Mot. Ex. C) and the 2001 Amended JOA (Steinfink Decl. Ex. A.)

might be used to block an ownership change at some unspecified future time is thus purely speculative.

It is undisputed that the *Tribune* is, and has always been, editorially independent from the *News*. (*See* Pl.'s Mot. at Ex. E, Bramble Decl. ¶ 29; Ex. G, O'Brien Decl. ¶ 11.) While Plaintiff claims that the 2013 Amended JOA instituted a change of control provision that "intrude[s] upon the editorial independence of the *Tribune*," (Pl.'s Mot. at xv), nothing could be further from the truth. As Plaintiff itself demonstrates, the *News* and the *Tribune* have been no less independent during the thirteen years these provisions have been in effect than they were before these provisions were adopted in 2001. Indeed, the entire premise of the Complaint is that the *News* and the *Tribune* have taken dramatically different editorial positions and different approaches to news coverage throughout the period leading up to the 2013 Amended JOA. (Pl.'s Mot. at xvi, citing as examples two editorials published shortly after the amendments were adopted; one from the *Tribune* supporting Judge Shelby's decision striking down Utah's same-sex marriage prohibition, and one from the *News* sharply criticizing that same decision.) Plaintiff has offered no evidence showing that the editorial policies of either paper have changed in any way since the 2013 Amended JOA was adopted.[21] Plaintiff is, therefore, in the same position as the plaintiff in an

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21 Plaintiff argues that the approval provision is similar to a right of first refusal, which they call "inherently 'suspect' under the antitrust laws and the Newspaper Preservation Act." (Pl.'s Mot. at 15.) Other JOAs have contained similar provisions that have received DOJ approval, however. The then-new Denver JOA was approved by the DOJ in 2001(see Press Release, Department of Justice, Attorney General Approves *Denver Rocky Mountain News* and *The Denver Post* Joint Newspaper Operating Agreement (Jan. 5, 2001), http://www.justice.gov/atr/public/press_releases/2001/7222.htm, and it contained an express right of first refusal: "Right of First Refusal. (a) No Member or any Transferee of all or any portion of a Member's Interest may hereafter transfer all or any part of its Interest in the Company unless it .

earlier case who argued that the restrictions on transfers of ownership in the JOA compromised the *Tribune*'s editorial independence. *See Salt Lake Tribune Publ'g Co.*, 320 F.3d at 1093-94. The Tenth Circuit rejected this argument in that case for the same reason this Court should here:

> The theory that Section 2 of the JOA has undermined the editorial and reporting independence of *The Tribune* fails for at least two reasons. First, the JOA expressly requires in other provisions of the contract that editorial and reporting functions remain independent. Section 15 of the JOA states that "[e]ach of the parties hereto shall retain unto itself complete and exclusive control of its news and editorial departments and policies...." That section also states that "there shall be no merger, combination or amalgamation of editorial or reportorial staffs, and editorial policies shall be independently determined." The same language also appears in the recitals and in Section 9 of the JOA as well.

Id. (citations omitted).[22] These same provisions of the JOA that guarantee the newspapers' editorial independence remain word-for-word, and indeed have been substantially supplemented with new, additional protections, in the 2013 Amended JOA.

Second, Plaintiff argues that the accumulation of amendments over the 62-year life span of the 1952 JOA have somehow changed the JOA so fundamentally that it now, for the first time, requires DOJ approval. (Pl.'s Mot. at 17-19.) Plaintiff cites no authority for the proposition that at some undefined point in time, the accretion of amendments transforms a JOA into a new

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. . first offers to sell such interest to the other Members . . . ." Limited Liability Partnership Agreement of the Denver Newspaper Agency LLP § 9.5(a) (May 11, 2000).

22 As in any partnership or joint venture, the parties have a legitimate interest in who their business partner is. If the partners differ as to how the joint operations of the business should be run, the joint venture will be marked by tensions, disagreements, and deadlocks, causing inefficiency and poor performance. This is why the majority of joint venture agreements have change of control provisions. *See*, *e.g*., Martin Kock, *Change-of-Control Clauses in Joint-Venture Companies: Legal Pitfall in the Context of Group Restructurings*, Mondaq (Oct. 14, 2008), http://www.mondaq.com/x/67752/Corporate+Commercial+Law/ChangeOfControl+Clauses+In+JointVenture+Companies+Legal+Pitfall+In+The+Context+Of+Group+Restructurings.

agreement requiring DOJ approval. Plaintiff does not point to any court decision so holding, or to any time the DOJ has taken the position that amendments to a JOA were so extensive as to require that they be treated as creating a new JOA and therefore requiring DOJ approval.

The lack of any such precedent is not surprising given that Plaintiff's position is inconsistent with both the language of the NPA and its longstanding interpretation by Congress, the courts, and the Attorney General. The plain language of Section 4(a) of the NPA requires only that amendments and renewals of a JOA be filed with DOJ; it does not require that they be approved, except where they would add a "newspaper publication" to the arrangement. 15 U.S.C. § 1803(a). No other requirements appear in the statute. Thus, the plain language of the statute suggests that revisions to an existing JOA will only require DOJ approval if they add a newspaper.

This reading of the plain language of the Act is supported by its legislative history. Congress rejected a proposed amendment to the Act that would have required DOJ approval of all amendments to pre-1970 JOAs. 116 Cong. Rec. 23172-74 (1970). A narrower second amendment—that an amendment to a JOA could not add more newspapers —was adopted. *Id*. at 23177. Prior to the vote, Rep. Jacobs, the amendment's sponsor, stated his understanding of what the Act would require in light of the rejection of the first amendment and the adoption of the second, an understanding directly contrary to the argument Plaintiff is advancing here:

> [I]f the existing arrangement is amended, it can be amended to streamline the operation and have *a variety of corporate changes*. . . . The amendment simply states that an existing newspaper arrangement which is given the grandfather clause under section 4 of the bill *can be amended in any way* except that it cannot be amended to add more newspapers to the arrangement . . . .

Id. (emphasis added). In short, unless a newspaper is added, amendments do not require DOJ approval.

Consistent with the Act's language and its legislative history, the court in *Mahaffey v. Detroit Newspaper Agency*, 969 F. Supp. 446, 448 n.1 (E.D. Mich. 1997), after noting that "[p]re-1970 JOAs may be amended freely," rejected a claim that a JOA had forfeited its antitrust immunity by not obtaining DOJ approval for an amendment to a JOA to allow joint weekday publication of the two JOA newspapers in the event of a strike.

> The court declines to find that, as a matter of law, any unapproved amendment would immediately cause the forfeiture of antitrust immunity for an entire JOA. First, neither the NPA nor its regulations set forth a procedure for amending post-1970 JOAs. . . . Plaintiffs suggest that no specific amendment procedure exists because amendments to post-1970 JOAs create "new" JOAs. Had Congress intended all amendments to create such sweeping consequence, however, it could easily have included language to that effect in the statute. Further, requiring the parties to a JOA to go through the cumbersome approval process (including possible judicial review) for every amendment, no matter how minor, defies common sense.

Id. at 448 (citations omitted). Recognizing that JOAs, like any other long-term contract defining the commercial relationship between joint venture partners, must be amended from time to time to adapt to changing circumstances, the *Mahaffey* court added, in language that applies equally to the grandfathered Salt Lake City JOA: "The Detroit JOA, in the form approved by the attorney general, has a hundred-year term. Presumably, some changes to the agreement were contemplated [by the NPA] which permits amendment to the JOA if the amendment is in writing." *Id*.

Plaintiff's case here is even weaker than that of the plaintiff in *Mahaffey*. Whereas the amendments there expressly allowed joint publication of the two papers—something the NPA seemingly would not allow—the amendments now before the Court are exactly the kind that Rep. Jacobs contemplated would be allowed without DOJ approval: "corporate changes" and changes "to streamline operations." The "corporate changes" in the 2013 Amended JOA simply adjusted

the profit sharing between the two parties as had been done in the past, and changed the composition of the management board, while adding provisions designed to protect the *Tribune*, which was going from being the senior to being the junior partner in the JOA. (*See* Steinfink Decl. at ¶¶ 6-7 and Ex. B.) The changes "to streamline operations" included removing the *Tribune*'s digital advertising sales from the NAC, just as the *News* had done with its digital sales years earlier, allowing the NAC to concentrate exclusively on publishing the print editions of the two papers and on selling print circulation and advertising. (*Id*.) None of these are the types of fundamental changes that would justify treating the 2013 Amended JOA as creating a whole new JOA, thereby requiring DOJ approval.

In arguing for a result that flies in the face of the language of the statute, its legislative history, and prior court decisions interpreting the Act, Plaintiff relies almost exclusively on the Justice Department's 2007 lawsuit against the participants in the Charleston, West Virginia JOA, but it obscures the dramatic differences between that case and this one. The Charleston case was settled with no adjudication of the Justice Department's allegations and the provisions added to the Charleston JOA agreement as part of that settlement—intended to protect the editorial and business independence of the *Charleston Daily Mail*—are substantially included in the 2013 Amended JOA.

In the Charleston complaint, Justice Department alleged (but did not prove):

> On May 7, 2004, Gazette Company, the *Charleston Gazette*'s owner, acquired all of the assets of the *Charleston Daily Mail*, its only competitor, from MediaNews Group. On that same day, Gazette Company and MediaNews Group also entered into a new arrangement that gave MediaNews Group nominal responsibility for the news and editorial content of the *Charleston Daily Mail*, but gave Gazette Company ultimate control over the budgets, management, and news gathering and reporting of both newspapers,

> as well as the right to receive all the profits of both newspapers. The arrangement also gave Gazette Company the unilateral right to shut down the *Charleston Daily Mail*.

Complaint at ¶ 3, *United States v. Daily Gazette Co.*, 567 F. Supp. 2d 859 (S.D. W. Va. 2008), No. 2:07-0329, 2007 WL 1571956. In the Charleston case, the Justice Department argued that the amendments to the Charleston JOA gave one party impermissible control over both newspapers in violation of the NPA. It was on the basis of these allegations in Charleston—absent in this case—that DOJ took the position that "[t]he May 7 transactions ended the prior JOA and created an entirely new arrangement between Gazette Company and MediaNews Group that does not meet the statutory definition of a JOA under the Newspaper Preservation Act." *Id.* at ¶ 21.

The allegations here could not be more different. Plaintiff does not allege, nor could it, that the 2013 Amended JOA "created an entirely new arrangement" between the *News* and the *Tribune*, nor does it allege, as the Justice Department did in Charleston, that a single transaction transformed the Salt Lake City JOA at a single stroke into a new, unapproved arrangement. Unlike in Charleston,

- Deseret did not "acquire all of the assets" of the *Tribune*. All of the *Tribune*'s assets remain under the sole control of Kearns-Tribune and its parent, DFM.
- Deseret did not acquire "ultimate control over the budgets, management, and news gathering and reporting of both newspapers, as well as the right to receive all the profits of both newspapers."
- Deseret did not acquire "the unilateral right to shut down" the *Tribune*. The 2013 Amended JOA expressly provides that "suspending or ceasing to publish the *Tribune* is one of numerous "Reserved Matters" on which the NAC cannot act without the consent of at least one Kearns-Tribune board member.[23]

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23. Plaintiff misleadingly cites § 2.02, ¶ 5, of the 2013 Amended JOA as conferring "authority" on the NAC "to stop publishing the Tribune[.]" (Pl's Mot. at xiv, n.6). The cited provision, however, merely defines "suspending or ceasing to publish the *Tribune*" as one of

Instead, all we have here are the types of changes JOA partners make all the time, adjusting their respective shares in the JOA, shifting the identity of the junior and senior partners, and streamlining its operations to reflect changes in market conditions and in business strategy. The ability to evolve in these ways over time is the only reason the Salt Lake City JOA and a handful of others have survived long after most JOAs have been dissolved, leaving their markets with only one newspaper.[24] The antitrust laws should not be used to interfere with this dynamic process. That is exactly what the NPA was intended to prevent.

Significantly, the Charleston litigation was settled by a consent decree. *See United States v. Daily Gazette Co*., No. 2:07-0329, 2010 WL 3290289, at *1 (S.D. W. Va. July 19, 2010). As part of that settlement, the parties to that JOA agreed to amend it to add provisions intended to protect the editorial and business independence of the *Charleston Daily Mail*. While Plaintiff does not mention them, the 2013 amendments added substantially the same provisions to the Salt Lake JOA. (Steinfink Decl. at ¶ 7.) Thus, rather than reducing its editorial and business independence, the 2013 Amended JOA significantly enhanced the protections afforded to the *Tribune*. Indeed, the *Tribune* as minority partner has significantly more protection than the *News* ever had when it was in that position. The addition of those provisions, designed to protect the editorial and business independence of the *Tribune*, flatly contradicts Plaintiff's claim that the 2013 amendments were designed to reduce its independence.

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numerous "Reserved Matters" on which the NAC Board is powerless to act without the concurrence of at least one Kearns-Tribune board member. This supermajority requirement ensures that the *Tribune* cannot cease publication unless its owner agrees. By selective quotation and aggressive misinterpretation, Plaintiff attempts to turn an additional protection for the *Tribune*'s continued publication into a threat to its existence.

24 *See* Robert G. Picard, *Natural Death, Euthanasia, and Suicide: The Demise of Joint Operating Agreements,* 4 J. Media Bus. Studies, Jun. 2007, at 41.

C. The 2013 Amended JOA, Even Without the NPA Exemption, Does Not Violate the Antitrust Laws

Plaintiff alleges that without the NPA exemption, the 2013 Amended JOA would violate Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Even assuming that Defendants did not enjoy immunity from the antitrust laws, each of Plaintiff's claims would fail.

1. Plaintiff's Claim in Count I that the 2013 Amended JOA Would Be *Per Se* Unlawful but for the NPA Exemption Has No Probability of Success

Count I of Plaintiff's Complaint alleges that, absent immunity under the NPA, the JOA between the *Tribune* and the *News* would be *per se* unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. This claim rests on a single case that has been superseded by later Supreme Court decisions and is no longer good law.

The only case Plaintiff cites to support this proposition is *Citizen Publishing Co., Inc. v. United States*, 394 U.S. 131 (1969). That case was decided at the high-water mark of an era in which, as Justice Breyer has reminded us, "antitrust theories [were] so abbreviated as to prevent proper analysis," *California Dental Ass'n v. FTC*, 526 U.S. 756, 794 (1999) (Breyer, J., dissenting), thereby assuring that the "Government always wins." *Id.* (*quoting United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting)). *Citizen Publishing* held that a JOA between the two daily newspapers in Tucson, Arizona that had been formed during the Great Depression was *per se* unlawful. 394 U.S. at 135-36. That result was so contrary to common sense that it led Congress, less than a year later, to enact the NPA to exempt already-existing and future JOAs from the antitrust laws, so long as they continued to publish two newspapers, each with its own independent editorial content. *See* 15 U.S.C. §§ 1803(a) ("It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any

joint newspaper operating arrangement."); *id*. § 1802(2) (defining "joint operating agreement" as "[any] arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications . . . *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.").

Although it took somewhat longer, the Supreme Court itself has since overruled *Citizen Publishing* and other similar cases from that era that had held joint ventures in a variety of industries *per se* unlawful.[25] In a series of decisions beginning in 1979, the Supreme Court has repeatedly held that joint ventures and agreements among joint venture partners as to how to structure and manage their venture must be evaluated under the rule of reason, rather than treated as *per se* unlawful price-fixing agreements. *See*, *e.g*., *Broad*. *Music*, *Inc*. *v*. *Columbia Broad*. *Sys*., *Inc*., 441 U.S. 1, 9 (1979) ("When two partners [in a joint venture] set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act."); *Ariz*. *v*. *Maricopa Cnty*. *Med*. *Soc'y*, 457 U.S. 332, 356 (1982) (*per se* rule does not apply to "joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit").[26] To the extent there could have been any doubt about this, the Court eliminated it in its unanimous decision in *Texaco*, *Inc*. *v*. *Dagher*, 547

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25 *See Rothery Storage & Van Co*. *v*. *Atlas Van Lines*, *Inc*., 792 F.2d 210, 226 (D.C. Cir. 1986) (observing with respect to similar joint venture decisions decided during the same period as *Citizen Publishing*, that "to the extent [those cases] stand for the proposition that all horizontal restraints are illegal *per se*, they must be regarded as effectively overruled" by later decisions).

26 *Cf*. *NCAA v*. *Board of Regents of Univ*. *of Okla*., 468 U.S. 85, 101 (1984) (*per se* rule does not apply to "horizontal restraints on competition [that] are essential if the product is to be available at all"). Plaintiff's complaint here appears to recognize that the JOA has been essential to the continued publication of two daily newspapers in Salt Lake City.

U.S. 1 (2006). There, reversing a decision of the Ninth Circuit, the Court held that it is not *per se* illegal under the Sherman Act for partners in an economically integrated joint venture to agree jointly on the prices at which the venture will sell its products.[27]

Given these decisions, Count I of the Complaint, alleging that the JOA between the *Tribune* and the *News* would now be *per se* unlawful absent the NPA exemption, fails to state a claim upon which relief could be granted under Section 1 of the Sherman Act and should be dismissed as a matter of law.[28]

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27 One district court has suggested that *Dagher* might not apply to newspaper joint operating agreements because newspapers are not fungible products like gasoline and because there is less integration in a JOA than in *Dagher* because the editorial content of the papers is still independently produced by the JOA partners, not by the JOA itself. *See Daily Gazette Co*., 567 F. Supp. 2d at 865-68. That decision cannot be reconciled with the Supreme Court's other decisions holding that joint ventures cannot be treated as *per se* unlawful, such as *BMI*, *Maricopa*, and *NCAA*, all of which involved differentiated products that were produced by the joint venture partners themselves, but then sold through the joint venture.

28 We know of no other case in which a plaintiff has tried to use the antitrust laws to dictate to the partners in a joint venture who should be the senior partner and how they should divide up the profits or losses of their partnership. This is like asking the court to decide how the partners in a law firm should divide up the firm's profits and who should be the managing partner. Plainly, that is not the purpose of the antitrust laws. We also know of no other case in which a plaintiff has tried to use the antitrust laws to take away from the partners in a joint venture the right to decide who they want as their partner. Requiring that one partner consent to a change in the ownership of the other partner is customary not just in newspaper joint operating agreements, but in many other joint venture and other partnership agreements. Using the antitrust laws to interfere with this right is directly contrary to one of the central principles of antitrust law—namely, that "[i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v*. *Colgate & Co*., 250 U.S. 300, 307 (1919).

2. Plaintiff Has Not Alleged and Cannot Prove the Essential Elements of Its Section 2 Monopolization Claim Against Deseret

Section 2 of the Sherman Act makes it unlawful to monopolize, attempt to monopolize, or conspire to monopolize any line of commerce in any section of the country. 15 U.S.C. § 2 (2012). In Count II, Plaintiff alleges that Deseret is attempting to gain a monopoly over newspaper advertising and readership in the Salt Lake Valley through the 2013 amendments to the JOA. (Compl. ¶¶ 60-63.) Proving that claim will require Plaintiff to show that Deseret had both (i) the specific intent to put the *Tribune* out of business and thereby acquire a monopoly in the relevant markets, and (ii) a dangerous probability of succeeding. *See Spectrum Sports*, *Inc*. *v*. *McQuillan*, 506 U.S. 447, 459 (1993).[29] Plaintiff will be unable to prove either element.

(1) Plaintiff cannot prove specific intent.

As to the first element, *specific intent*, Plaintiff has offered no direct evidence that Deseret—much less Kearns-Tribune or DFM—agreed to the 2013 Amended JOA for the purpose of putting the *Tribune* out of business and thereby gaining a monopoly. The only direct evidence in the record as to the intent of the parties in adopting the 2013 Amended JOA is in the declarations of the CEOs of Deseret and of Kearns-Tribune's parent company, DFM, John Paton and Clark Gilbert. Both Mr. Paton and Mr. Gilbert declare under oath that they negotiated the 2013 Amended JOA in good faith believing that the amendments would strengthen both the *Tribune* and the *News*. (Paton Decl. at ¶¶ 21-22, Gilbert Decl. at ¶¶ 6-7.) Both also testify that their purpose

29 Although Plaintiff also alleges that Kearns-Tribune and DFM conspired with Deseret to put the *Tribune* out of business and give Deseret a monopoly, its conspiracy theory is unsupported by any facts or evidence and is so implausible that it likewise has no probability of success.

was not to put the *Tribune* out of business or to enable Deseret to acquire it, and that they have no plans to do either. (*Id*.)

In contrast to this direct testimony from the two individuals who negotiated those amendments as to their intent, Plaintiff relies entirely on what it admits is circumstantial evidence. (Compl. ¶ 36.) But its circumstantial evidence is little more than the unsupported supposition of its members and declarants that the new profit-sharing agreement will leave the *Tribune* without the resources it would need to continue publishing. (Compl. ¶¶ 36(e), 37.)

As shown by Defendants' evidentiary objections (*see* pp. 12-18, *supra*), none of the declarations Plaintiff has proffered in support of its Motion contains any admissible evidence to support this assertion, and therefore is not entitled to any weight. In fact, the only one that even addresses this issue is the declaration of Nancy Conway, a former editor of the *Tribune*. Ms. Conway admits that she has no knowledge of the motivation of DFM and Deseret in adopting the 2013 Amended JOA. (Conway Decl. ¶ 4.)

Ms. Conway's opinion that the 2013 Amended JOA will leave the *Tribune* with too little revenue to survive is directly contradicted by the more informed opinion of the CEO of DFM, John Paton, who is an experienced and widely respected newspaper executive and who does have personal knowledge of the *Tribune*'s financial performance, strategy, and business plans. For the reasons he explains at length in his Declaration, Mr. Paton believes that the 2013 Amended JOA will enable the *Tribune* to grow its digital advertising revenues more rapidly to replace the declining revenues and balance the increasing costs of its legacy print business. This, he believes, will make the *Tribune* a stronger newspaper, not a weaker one, and will help to ensure its continued existence. (Paton Decl. at ¶¶ 24-25.)

To prevail on its attempted monopolization claim, Plaintiff would have to prove that Mr. Gilbert—another highly respected newspaper executive and former Harvard Business School professor—was secretly planning the *Tribune*'s demise, and that Mr. Paton agreed to changes in the JOA that will harm, rather than help, the *Tribune*. Mr. Gilbert denies that he had any such intention. (Gilbert Decl. at ¶¶ 6-7.) And Mr. Paton's declaration makes it clear that shutting down the *Tribune*, or weakening it so that it could be sold to Deseret, was the farthest thing from his mind when he negotiated the 2013 Amended JOA. (Paton Decl. at ¶ 22.) He saw these amendments as a way to strengthen the *Tribune*, and to further DFM's digital strategy, not destroy the *Tribune*.

(2) Plaintiff cannot prove a dangerous probability of success

Plaintiff also has not shown that it will be able to prove the second essential element of its attempted monopolization claim—a dangerous probability of success. To prove that there is a dangerous probability that Deseret will gain a monopoly because of the 2013 Amended JOA, Plaintiff must show two things: first, that the *Tribune* will either have to cease publishing or be sold to Deseret because of the amendments; and, second, that this will give Deseret monopoly power—that is, "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), *quoting United States v E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Plaintiff can show neither.

We have already explained why Plaintiff has not shown, and will not be able to show, that the *Tribune* will have to cease publishing or be acquired by Deseret because of the 2013 Amended JOA. But even if either were to happen, Plaintiff would still not be able to show that the *Tribune*'s

disappearance would give Deseret the power to control prices or exclude competition, as it must in order to prove that Deseret would thereby obtain monopoly power.

Daily newspapers no longer enjoy the monopoly they once had over either readers or advertisers. *See Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1201 (N.D. Cal. 2000) ("While a merger of the two dominant San Francisco dailies in 1965 might well have posed an unquestionable threat of undue concentration of market power under the old paradigm, that threat today is far from clear.").[30] Today, even more so than when *Reilly* was decided in 2000, daily newspapers face competition for readers from a plethora of other news sources, both national and local. (Paton Decl. at ¶ 12.) They likewise face intense competition for advertisers from a wide range of other media—broadcast and cable television, radio, direct mail, magazines, billboards, and—most importantly—digital. (*Id.*)

This growing competition for both readers and advertisers has had a dramatic impact on the newspaper industry. Circulation of daily newspapers has declined by nearly one-third since 1990.[31] (Paton Decl. at ¶ 12(c).) Today, more readers get their news from digital sources than from print editions of daily newspapers. (*Id.* at ¶ 12(b).) As a result, newspaper revenues from advertising—the lifeblood of any newspaper—have fallen by more than half in just seven years from 2006 through 2013. (*Id.* at ¶ 9.)

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30 *See also Berlyn Inc. v. The Gazette Newspapers, Inc.*, 73 Fed. Appx. 576, 583 (4th Cir. 1993) (holding that Appellants had failed to meet their burden to establish that the relevant product market for advertisers was limited to weekly newspapers).

31 Newspaper Circulation (In Millions), research Center, http://www.journalism.org/media-indicators/newspaper-circulation/.

John Paton and Clark Gilbert understand, as do most senior newspaper executives, that they have to change in order to compete in this new world. As their Declarations show, their principal motivation in amending the JOA is to enable both the *Tribune* and the *News* to compete more effectively for both readers and advertisers against all the other media now available to them. (Paton Decl. at ¶ 33; Gilbert Decl. ¶¶ 6-7.)

Plaintiff's allegation that there is a separate and distinct market for "the publication and sale of local daily newspapers and the sale of advertising space in local daily newspapers" (Complaint ¶ 41) and that putting the *Tribune* out of business would give the *News* a monopoly in that narrow market flies in the face of the very purpose of the 2013 Amended JOA, which was to enable the *Tribune* to compete more effectively with other media for advertising. "When there are numerous sources of interchangeable demand, the plaintiff cannot circumscribe the market to a few buyers in an effort to manipulate those buyers' market share." *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1119 (10th Cir. 2008) (claim dismissed). *See also, e.g., TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992) (affirming the district court's dismissal of cable provider's monopolization claim for failure to define a relevant market).

The declarations of both John Paton and Kirk MacDonald show that the market in which daily newspapers must compete for readers and advertisers can no longer be limited to just the two daily newspapers in Salt Lake City, but must be broadened to include the other digital media with which newspapers compete every day. (Paton Decl. at ¶¶ 8-12; MacDonald Decl. at ¶ 9.) By comparison, Plaintiff has done almost nothing to meet its burden of establishing that it will be able to show that there is a discrete relevant antitrust market for print newspapers. *See, e.g., Smalley &*

Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993) (to establish § 2 Sherman Act violation for monopolization or attempted monopolization, plaintiff must define relevant market). None of Plaintiff's declarations even addresses this issue.

Plaintiff has therefore offered nothing to show that acquiring the *Tribune* or putting it out of business (which Deseret has no intention of doing) would give Deseret the power to control prices or exclude competition in this broader market, as it must in order to prevail on its attempted monopolization claim. Plaintiff therefore cannot show that it has a strong probability of success on the merits of its Section 2 claim.

3. Plaintiff's Section 7 Claim Against Deseret Is Equally Weak

Plaintiff also asserts a claim against Deseret under Section 7 of the Clayton Act, 15 U.S.C. § 18. Section 7 makes it unlawful for one person to acquire the voting securities or assets of another "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition or tend to create a monopoly." *Id*. Plaintiff alleges that Deseret's acquisition of a part of Kearns-Tribune's interest in the NAC violates Section 7 because it is likely substantially to lessen competition in their alleged markets for readers and advertisers in the Salt Lake Valley, even though the NAC is already jointly owned by the two companies. Plaintiff cannot show any probability of success, much less a strong probability, on this claim for four reasons.

- *First*, Plaintiff does not cite a single case, and we have been unable to find any, in which a court has held that a mere shift in the relative shares of two partners in a joint venture violated Section 7.

- *Second*, even if such a claim could be stated, Plaintiff's Section 7 claim, like its Section 2 claim, rests on unsupported conjecture that the *Tribune* cannot survive under the 2013 Amended JOA so that the acquisition may indirectly at some unspecified time result in lessened competition. Again, Plaintiff cites no case that

has ever held an acquisition unlawful under Section 7 on such an indirect and speculative theory of harm to competition.

- *Third*, Plaintiff's Section 7 claim, like its Section 2 claim, relies on Plaintiff's anachronistic view that print newspapers do not have to compete with other forms of digital, print and other media for readers and advertisers. This implausibly narrow market definition dooms Plaintiff's Section 7 claim for the same reason it does the Section 2 claim. *See* pp. 43-48, *supra*.

- *Fourth*, as the declarations of the two individuals who negotiated the 2013 Amended JOA show, the purpose of those amendments was pro-competitive. (Paton Decl. at ¶ 35; Gilbert Decl. at ¶¶ 6-7.) By removing the *Tribune*'s digital business from the NAC, the amendments enable the *Tribune*, for the first time, to compete directly against the *News* for digital advertising. That will increase competition, not lessen it.[32]

For all four reasons, Plaintiff has not demonstrated a strong probability of success on its Section 7 claim.

IV. GRANTING THE PRELIMINARY INJUNCTION WOULD BE AGAINST THE PUBLIC INTEREST

To be entitled to a preliminary injunction, Plaintiff must demonstrate that, if issued, the injunction would not be "adverse to the public interest." *Heideman*, 348 F.3d at 1191. Here, Plaintiff argues that its ultimate goal, the preservation of the *Tribune*, would serve the public interest. Defendants agree that preservation of the *Tribune* is in the public interest, but it is for this very reason that a preliminary injunction here would be adverse to the public interest. As shown throughout this Opposition, a preliminary injunction would do serious damage to the *Tribune*. Plaintiff's alternative argument, that the public has an interest in seeing the *Tribune* continue to publish certain sections or editorials, is overridden by the even stronger public interest in ensuring

32 *See, e.g., FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999) (recognizing that efficiencies and other procompetitive benefits from a merger are a defense to an alleged violation of Section 7).

a free press, essential to which is the editorial freedom to determine what and how much to publish. *See Miami Herald Publ'g Co.*, 418 U.S. at 258.

Granting the preliminary injunction Plaintiff seeks would require the *Tribune* immediately to transfer its digital advertising sales organization, Utah Digital Services, back to the NAC and to return the money it received from Deseret in exchange for a part of the *Tribune*'s interest in the JOA. As Mr. MacDonald testifies in his Declaration, such an injunction would prevent the *Tribune* from continuing to compete directly with the *News* in the sale of digital advertising and would likely lead to the layoff of the employees the *Tribune* has hired and trained to sell its digital advertising. (MacDonald Decl. at ¶¶ 17-18.)

A preliminary injunction would cause serious injury to those employees who lose their jobs because of it, a result that is itself plainly contrary to the public interest. More broadly, it would deny advertisers and the public generally of the benefits they are now receiving from the increased competition the *Tribune* is bringing into the market through the expansion of its digital advertising sales effort. *See, e.g., Medi-Flex, Inc. v. Nice-Pak Products, Inc.*, 422 F. Supp. 2d 1242, 1255 (D. Kan. 2006) ("Public interest favors competition in the marketplace."). It cannot be in the public interest to grant a preliminary injunction that will eliminate jobs and the new digital competition the *Tribune* is bringing to the market, in an effort to protect competition in the declining print side of the newspaper industry at some unspecified time in the future when Plaintiff speculates the *Tribune* might otherwise go out of business.

V. IF ITS MOTION IS GRANTED, PLAINTIFF SHOULD BE REQUIRED TO POST A BOND

If an injunction were to issue, Plaintiff should be required to post a bond to protect DFM's and Deseret's interests. Plaintiff's request to post a minimal bond or dispense with the bond

requirement altogether (Pl.'s Mot. at 20-21) is foreclosed by the plain language of Rule 65(c), which provides that "the court may issue a preliminary injunction . . . *only if the movant gives security* . . . to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." (emphasis added). "[T]he giving of security is an absolute condition precedent to the issuance of a preliminary injunction." *Atomic Oil. Co. of Okla. v. Bardahl Oil Co.*, 419 F.2d 1097, 1100 (10th Cir. 1969).

Contrary to Plaintiff's assertions, non-profit entities are not exempt from Rule 65(c). *Habitat Education Center. v. U.S. Forest Service*, 607 F.3d 453, 459-60 (7th Cir. 2010) (rejecting rule proposed by Habitat that nonprofit entities should be exempt from having to post injunction bonds and sustaining trial court's order to post a bond commensurate with the expected harm to the Forest Service). As the court wrote in *Habitat Educ. Ctr.*, "the principle that nonprofit entities should pay their way, reimbursing the losses incurred by entities whose operations the nonprofits impede by obtaining preliminary injunctions later dissolved, is general." *Id.*[33]

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33 The cases cited by Plaintiff in support of its waiver request are no longer followed or are easily distinguishable. *See, e.g., Cmtys for a Better Env't v. Cenco Ref. Co.*, 179 F. Supp. 2d 1128, 1148 (C.D. Cal. 2001) (declining to follow *People ex rel. Van de Kamp v. Tahoe Reg. Planning Agency*, 766 F.2d 1319 (9th Cir. 1985) and imposing an "appropriate" bond); *Md. Dept. of Human Res. v. U.S. Dept. of Agric.*, 976 F.2d 1462, 1483 (4th Cir. 1992) (distinguishing *Natural Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167 (D.D.C. 1971) on the grounds that defendant faced no material harm in that case and holding that "[u]nlike the computation of the bond amount, which may be set 'in such sum as the court deems proper' the decision whether to require a bond is strictly circumscribed by the terms of Rule 65(c)."") (citation omitted). The cases on which Plaintiff relies on are further distinguished because the non-movant in those cases was a governmental agency; the cases thus are based on the policy that any party adversely affected by government action has a right regardless of his financial situation to seek judicial review of that action. *See, e.g., Bass v. Richardson*, 338 F. Supp. 478, 491 (S.D.N.Y.1971). The instant case involving two private defendants is therefore distinguished.

The requested injunction would impose significant and irreparable harm to both DFM and Deseret. (*See* pp. 25 to 28, *supra*; Paton Decl. at ¶¶ 27-33; MacDonald Decl. at ¶¶ 16-24; Gilbert Decl. at ¶ 9.) Because Plaintiff will suffer little to no harm if this injunction were not issued (*supra* at 20-25), Plaintiff should be required to post a bond commensurate with the expected damage to Defendants.

CONCLUSION

For the reasons set forth herein, Plaintiff's Motion for a Preliminary Injunction should be denied.

DATED this 30th day of June, 2014.

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