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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 MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE AND SUPPORTING MEMORANDUM** Case No. 2:14-cv-00445-CW Judge Clark Waddoups

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), Kearns-Tribune, LLC and Deseret News Publishing Company (collectively, "Defendants"), by and through counsel, hereby submit this Joint Motion to Dismiss the Complaint with Prejudice, and Supporting Memorandum.

This motion is made on the basis that the allegations in the complaint are insufficient as a matter of law. Specifically, the 2013 Joint Operating Agreement challenged in the complaint is exempt from antitrust laws under the Newspaper Preservation Act. Moreover, even absent NPA immunity, the complaint would fail to state a claim under the antitrust laws. Finally, Plaintiff does not have standing to bring suit.

A memorandum in support of this motion follows.

INTRODUCTION

This is a most unusual antitrust case. As the Complaint acknowledges, all competition for circulation and print advertising between *The Salt Lake Tribune* ("*Tribune*") and *The Deseret News* ("*News*") ended more than sixty years ago when the two newspapers formed a Joint Operating Arrangement ("JOA") to combine the business operations of the two newspapers while keeping their editorial content separate. (Compl. ¶ 1.) Through the JOA, they benefited from economies of scale that enabled them to compete effectively against the new media of that day—radio and television—for both circulation and advertisers. (*Id*.) By combining their printing and distribution, and by jointly selling circulation and advertising, the JOA enabled the two newspapers to reduce their costs substantially. This made it possible for both to survive in a market that otherwise would support only one newspaper, but it eliminated all economic competition between the two papers because they shared the profits from the sale of circulation and advertising in fixed proportions.

In 1970, Congress passed the Newspaper Preservation Act, 15 U.S.C. §§ 1801-04, to protect newspaper JOAs, including the Salt Lake JOA, from overzealous antitrust enforcers who sought to label such arrangements as *per se* illegal price-fixing agreements under the antitrust laws, just as Plaintiff does here in Count I of its Complaint. (*See* Compl. ¶ 57.) The NPA grandfathered then-existing JOAs, including this one, and gave them a broad exemption from the antitrust laws, allowing newspapers to combine their business operations as long as they kept their editorial functions separate. 15 U.S.C. § 1802(2). The NPA also expressly allowed newspapers to amend their JOAs freely as long as they did not add any more newspapers to their joint venture. *Id*. § 1803(a).

This arrangement has worked very well for residents of the Salt Lake Valley, as Plaintiff itself acknowledges. (Compl. ¶¶ 1, 4.) It has allowed the community to enjoy the luxury of having two daily newspapers long after most cities of similar size were reduced to one.[1] Plaintiff now challenges this arrangement, as amended last year (the "2013 Amended JOA"), because its members prefer the *Tribune*'s voice to that of the *News*, which Plaintiff alleges is controlled by the Church of Jesus Christ of Latter-day Saints (the "Church"). (*Id*. ¶ 22.) Plaintiff invokes the antitrust laws to challenge the 2013 Amended JOA, which Plaintiff alleges (without any facts to support its suppositions) will force the *Tribune* to cease publishing. (*Id*. ¶ 39(d).) Alternatively, Plaintiff alleges that the *Tribune*'s editorial content has been diminished since the 2013 amendments. (*Id*. ¶ 19, 50.)

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1. *See* Robert G. Picard, *Natural Death, Euthanasia, and Suicide: The Demise of Joint Operating Agreements*, 4 J. Media Bus. Studies 41, 62 (2007).

Plaintiff seems to forget that our founding fathers added the First Amendment to the Constitution to protect freedom of the press. This case is not only an assault on the right of a business owner to decide what makes the most sense for its business; it is also an assault on the right of the *Tribune* and the *News* to make the same kinds of adjustments to the Salt Lake JOA that the NPA expressly allows all JOAs to make. This Court should reject Plaintiff's request that it substitute its judgment for that of the *Tribune*'s owners as to what is best for the *Tribune*. The antitrust laws Plaintiff invokes are for "the protection of competition." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quotation omitted). They do not give Plaintiff and its members the right to decide how large an editorial budget the *Tribune* should have, what content the *Tribune* should publish, or how Defendants should run their businesses.

THE ALLEGATIONS OF THE COMPLAINT

A. The Parties

Plaintiff, Utah Newspaper Project, d/b/a Citizens for Two Voices, is a Utah non-profit organization whose members, among whom are former employees of the *Tribune*, include "consumers of daily news in the Salt Lake Valley, including subscribers to and readers of *The Salt Lake Tribune*." (Compl. ¶ 19.)

The Defendants are the owners of the two daily newspapers in Salt Lake City. Deseret News Publishing Company ("Deseret") owns the *Deseret News*. Deseret is allegedly owned by the Church. (*Id.* ¶ 22.) Kearns-Tribune, LLC owns *The Salt Lake Tribune*. (*Id.* ¶¶ 21.) It is owned by MediaNews Group, Inc., which does business under the name "Digital First Media" ("DFM"). Alden Global Capital, LLC ("Alden") is a shareholder of DFM. Plaintiff alleges that Alden is a New York hedge fund that controls DFM. (*Id.* ¶ 5.)

In 1952, the owners of the *Tribune* and the *News* formed a JOA, through which they combined their printing, sales, and distribution functions while keeping their newsrooms and editorial operations separate. (*Id.* ¶¶ 24-25.) The JOA allowed both newspapers to continue to publish by reducing their costs. A joint venture, currently known as the Newspaper Agency Company, LLC ("NAC"), continues to this day to handle the joint operations of the *Tribune* and the *News*. (*Id.* ¶ 24.)

B. Plaintiff's Allegations

Plaintiff concedes that the 1952 JOA (together with subsequent amendments prior to October 2013) has made it possible for residents of the Salt Lake Valley to "enjoy[] the benefits of two local daily newspapers." (*Id.* ¶ 1.) The JOA has achieved this procompetitive result by enabling the *Tribune* and the *News* to "coordinate" their "printing, distribution, and sales of circulation and advertising . . . as a means of aiding the struggling *News*." (*Id.* ¶¶ 1, 3.) Plaintiff alleges, however, that in October 2013 Deseret and Kearns-Tribune agreed to amend the JOA in ways that Plaintiff alleges "would effectively eliminate the *Tribune* as a competitor," (*id.* ¶ 6), thereby creating a monopoly in which the *News* is the sole daily newspaper in the Salt Lake Valley." (*Id.* ¶ 36.)

The Complaint bases these conclusory allegations on what it terms "the totality of the circumstances alleged herein." (*Id.* ¶ 36.) These circumstances include that: (1) "prior to January 1, 2014, the *Tribune* was consistently profitable, whereas it is now hemorrhaging and is no longer self-sustaining"; and (2) in anticipation of, and as a result of, the October 2013 amendments, Kearns-Tribune "has ordered mass layoffs of Tribune employees." (*Id.*) Based on

these and other circumstances, Plaintiff surmises that the *Tribune* "is in imminent danger of ceasing publication under the terms of the October 2013 JOA." (*Id*. ¶ 38.)

Plaintiff further alleges that because of these and other changes, the 2013 Amended JOA no longer qualifies for the antitrust exemption granted by the Newspaper Preservation Act to newspaper JOAs. (*Id*. ¶ 39.)

C. The Relevant Markets

Plaintiff alleges that the relevant market affected by the 2013 Amended JOA is "the publication and sale of local daily newspapers," and "the sale of advertising space in local daily newspapers" in a geographic market consisting of Salt Lake City, Utah, and surrounding communities. (*Id*. ¶ 41.)

D. Injury

Plaintiff alleges that Defendants' actions "have resulted, and will result in harm to competition and consumers," the "imminent effect" of which, concludes Plaintiff, will be "to end publication of the *Tribune*, or to achieve materially the same effect." (*Id*. ¶ 50 & n.18.) Plaintiff alleges that the 2013 Amended JOA, therefore, is "likely to result in an increase in newspaper prices and an increase in rates paid by advertisers, . . . diminution in newspaper quality, and a decrease in newspaper output," as well as in a "restrict[ion of] consumer choice." (*Id*. ¶¶ 50-54.)

E. Claims for Relief

Based on these allegations, the Complaint asserts three claims for relief. Count I, against both Defendants, claims that the 2013 Amended JOA "constitutes a contract, combination or concerted action" by and among Defendants that is a "*per se* violation" of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Compl. ¶¶ 56-59.) Count II, against Deseret only, claims that

Deseret "has monopolized, or attempted to monopolize, the Salt Lake Valley local daily newspaper market" in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. (*Id*. ¶¶ 60-63.) Count III, also against Deseret only, claims that the 2013 Amended JOA "constitute[s] an acquisition of assets by [Deseret], the effect of which may be substantially to lessen competition, or tend to create a monopoly, in the relevant markets in violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18." (*Id*. ¶¶ 64-67.)

F. Requested Relief

By way of relief, Plaintiff asks the Court to (i) adjudge and decree that Defendants have violated the laws cited in their claims for relief, and (ii) both preliminarily and permanently enjoin Defendants from implementing the 2013 Amended JOA. (*Id*. at 29-30.)

ARGUMENT

Fed. R. Civ. P. 12(b)(6) requires a complaint to be dismissed if, taking all of its well-pled factual allegations to be true, the complaint fails to state a claim upon which relief can be granted. "The complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." *Shero v*. *City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007) (quoting *Bell Atl*. *Corp*. *v*. *Twombly*, 550 U.S. 544, 555 (2007)). In applying this standard, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v*. *Iqbal*, 556 U.S. 662, 678 (2009). "[L]egal conclusions, deductions, and opinions couched as facts are not presumed to be true, and the Court must disregard conclusory allegations without supporting factual averments." *Woodford v*. *Robillard*, No. 2:11-CV-370 CW, 2012 WL 1156400, at *2 (D. Utah Apr. 6, 2012) (Waddoups, J.).

A claim is not plausible when the conduct alleged is "compatible with, . . . [and] more likely explained by, lawful . . . behavior." *Iqbal*, 556 U.S. at 680. To cross the "line between possibility and plausibility," *Twombly*, 550 U.S. at 557, a plaintiff asserting an antitrust claim may not merely ascribe "anticompetitive motive and intent" to conduct that can be equally well explained in terms of a defendant's regular and lawful management of its business, but must allege facts to show that the conduct was likely to harm to competition without any legitimate business purpose. *See TKO Energy Servs., LLC v. M-I L.L.C.*, 539 F. App'x 866, 872-73 (10th Cir. 2013) (unpublished) (affirming dismissal of Sherman Act claims where the complaint "provide[d] no basis for distinguishing between a business arrangement with problems and true anticompetitive conduct"); *see also Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1197 (10th Cir. 2009) (affirming dismissal of Sherman Act claim where plaintiff failed to provide evidence that defendant "was motivated by anything other than a desire to make more money for itself").

In reviewing a complaint under Rule 12(b)(6), a court is permitted to look not just at the complaint itself but also at documents that are central to the plaintiff's claim, regardless of whether the plaintiff has attached them to its pleading. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (citing, among others, *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("when a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the defendant may produce [that document] when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of its own failure.")). Here, the 1952 agreement that formed the Salt

Lake JOA and subsequent amendments thereto are central to Plaintiff's claim but are not appended to the Complaint. For the Court's consideration, therefore, Defendants attach to this Motion as Exhibits A-E copies of the 1952 JOA (Exhibit A), the 1983 Amended JOA[2] (Exhibit B), the 2001 Amended JOA (Exhibit C), the 2006 Amended JOA (Exhibit D) and the 2013 Amended JOA (Exhibit E), all of which are available to the public in the files of the U.S. Department of Justice.

Applying these well-established principles, the Complaint in this action should be dismissed for at least three reasons. *First*, the 2013 Amended JOA is exempt from the antitrust laws under the Newspaper Preservation Act. *Second*, Plaintiff lacks standing under the antitrust laws because neither it nor its members have alleged that they will suffer a "threatened loss or damage" caused by any competition-*reducing* behavior in a market in which Plaintiff or its members participate. *Third*, even absent the NPA exemption, the Complaint fails to state a claim upon which relief could be granted under the provisions of the antitrust laws on which Plaintiff relies. Each of these reasons independently compels dismissal of all of Plaintiff's claims. Such dismissal should be with prejudice, because there is no reason to believe that amendment could cure the Complaint's basic inadequacy.

2. The 1983 Amended JOA was signed in 1982, but became effective in 1983. We refer herein to the "1983 Amended JOA."

I. THE 2013 AMENDED JOA IS EXEMPT FROM THE ANTITRUST LAWS UNDER THE NEWSPAPER PRESERVATION ACT

A. The Newspaper Preservation Act Exempts Newspaper Joint Operating Arrangements from the Antitrust Laws.

The Newspaper Preservation Act ("NPA") grants an exemption from the antitrust laws for newspaper JOAs—like the *Tribune*'s 1952 JOA with the *News*—entered into prior to 1970. 15 U.S.C. § 1803(a).[3] Section 1803(a) of the Act gives a JOA that satisfies the Act's requirements a complete defense to antitrust claims arising from its formation or operation unless it engages in predatory conduct. *See Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1197 (N.D. Cal. 2000) ("*Reilly I*") (concluding as a matter of law that JOA provisions which constituted probable violation of antitrust laws became exempt from enforcement upon enactment of NPA); *Am.'s Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328, 334 (N.D. Ind. 1972) (finding alleged antitrust violations arising from newspapers' advertising policies exempt under the NPA).[4]

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3. 15 U.S.C §. 1803(a) provides:

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

4. 15 U.S.C. § 1802(2) defines a "joint newspaper operating arrangement" as:

> [A]ny contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper

B. None of Plaintiff's Arguments for Stripping the 2013 Amended JOA of Its NPA Immunity Has Merit.

The Complaint alleges no predatory conduct by Defendants. Instead, it seeks to strip the Salt Lake JOA of its NPA antitrust exemption altogether because of amendments made to the JOA in October 2013 that adjusted the profit sharing between the two newspapers, and that revised some of the agreement's corporate governance provisions. The Complaint appears to concede that the Salt Lake JOA satisfied three of the four requirements for the NPA exemption before the 2013 amendments:

- Both the *Tribune* and the *News* are published on newsprint in one or more issues weekly with a substantial portion of their content devoted to news and editorial opinion. (15 U.S.C. § 1802(4); Compl. ¶ 29(a).)
- There is "no merger, combination, or amalgamation of editorial or reportorial staffs" of the *Tribune* and the *News*. (15 U.S.C. §1802(2); Compl. ¶ 29 (c).)
- The "editorial policies [of the *Tribune* and the *News* were] independently determined." (15 U.S.C. § 1802(2); Compl. ¶ 29(d).)

> publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

15 U.S.C. § 1802(4) further defines a "newspaper publication" as:

> [A] publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

The Complaint claims, however, that the JOA never met a fourth requirement for the NPA exemption, alleging that although the *News* was "struggling financially," it could not establish that it was "unlikely to remain or become a financially sound publication" in 1952 when the JOA was formed. (Compl. ¶ 39(a)).

The Complaint also states three additional reasons that the 2013 amendments should cost the JOA its antitrust exemption: (1) those amendments so changed the JOA as to constitute a new arrangement, which required prior consent from the Department of Justice (*Id*. ¶ 39(b)); (2) the 2013 Amended JOA "intrude[s] upon the editorial independence of the *Tribune*" (*Id*. ¶ 39(c)); and (3) the "intent and effect" of the 2013 Amended JOA was to "cause the cessation of the *Tribune*" or terminate the prior JOA. (*Id*. ¶ 39(d), (e).)

None of the reasons the Complaint gives for stripping the 2013 Amended JOA of its NPA exemption from the antitrust laws can survive a motion to dismiss under Rule 12(b)(6). They are either time-barred or are nothing more than conclusory statements without any factual support. As the Tenth Circuit has repeatedly held, "in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011); *accord, Moya v. Schollenbarger*, 465 F.3d 444, 457 (10th Cir. 2006). Disregarding its conclusory statements, the Complaint here does not allege any "plausible grounds" to show that the 2013 Amended JOA is not entitled to the NPA exemption, thus requiring dismissal of all of Plaintiff's antitrust claims.

1. Plaintiff's challenge to the 1952 JOA is too late and should not be entertained.

The Complaint fails to plead any facts to show how a newspaper that Plaintiff concedes was "struggling" financially (Compl. ¶ 3) would nonetheless be unable to show that it was unlikely "to remain or become a financially sound publication," as required under Section 1803(a) of the NPA. (*Id*. ¶ 39(a).) Instead, Plaintiff seeks to place the burden on Defendants to show, over sixty years after the fact, that the *News* met this test when the JOA was formed in 1952.

Plaintiff's attempt to challenge a sixty-two-year old contract on this basis is both time-barred and inconsistent with the entire purpose of the NPA, which was to prevent just such second-guessing of the reasons for a JOA years after it was formed.[5] Plaintiff's claim, relating to the financial conditions of the two newspapers when the 1952 JOA was first formed, accrued no later than the date the NPA was enacted. The claim has, therefore, long been barred by the four-year statute of limitations applicable to antitrust claims generally. 15 U.S.C. § 15b; *see City & Cnty. of Honolulu v. Haw. Newspaper Agency, Inc.*, 559 F. Supp. 1021, 1025-26 (D. Haw. 1983) (antitrust claim premised on JOA allegedly not within the NPA accrued no later than the date the NPA was enacted and was barred by the four-year statute of limitations).

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5. The NPA's legislative history shows that a major purpose of the Act was to bar exactly this type of belated challenge to a grandfathered JOA that had been in place for decades. "The prime concern was that such JOAs had received tacit approval through decades of government inaction." *Reilly I*, 107 F. Supp. 2d at 1202 (citing NPA, Hearings on HR 279 before the Antitrust Subcommittee of the House Committee on the Judiciary, 91st Cong, 1st Sess. 481-82 (comments of Chairman Celler)). Allowing Plaintiff to challenge the validity of the 1952 JOA now—sixty-two years after the JOA was formed and over 44 years since the NPA was enacted—would be patently unfair and contrary to Congressional intent in enacting the NPA.

Plaintiff's suggestion that a grandfathered JOA should have to show, over six decades after it was formed, that one of the two newspapers was not likely to remain or become financially viable, if accepted, would effectively read the concept of a grandfathered JOA out of the statute. JOAs, no matter how long they had existed, would have to stand ready at any time to prove that when they were created one of their newspapers was not a "financially sound publication," a showing that becomes increasingly difficult as time passes. This is certainly not what Congress intended when it enacted the NPA to overturn a 1969 Supreme Court decision declaring unlawful a JOA that had been created during the Great Depression because the parties had failed to show that one of the papers was failing more than three decades earlier. *See* n.17 *infra*.

2. Plaintiff's "new agreement" allegation is wrong as a matter of law.

The NPA expressly permits amendments to grandfathered JOAs: "It shall not be unlawful under any antitrust law for any person to . . . amend any joint newspaper operating arrangement entered into prior to July 24, 1970." 15 U.S.C. § 1803(a). The only condition the Act imposes on the right to amend freely is that the parties not add a new newspaper to the JOA. Only if an amendment adds a newspaper to a JOA do the parties have to get prior approval from the Justice Department. The Complaint appears to assume that the NPA should somehow be read to impose different and unexpressed conditions on the right to freely amend a grandfathered JOA under the NPA. That assumption, however, violates a cardinal rule of statutory construction: *expressio unius est exclusio alterius*. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). For this reason, the

only court to have considered an allegation similar to the one Plaintiff is advancing here squarely rejected it. *See Mahaffey v. Detroit Newspaper Agency*, 969 F. Supp. 446, 448 (E.D. Mich. 1997) (holding that the parties were allowed to amend their JOA to permit joint weekday publication in the event of a strike without seeking Department of Justice approval).

The Complaint's invitation to have the Court review amendments to a JOA is also inconsistent with the Act's legislative history. Congress rejected a proposed amendment to the Act that would have required DOJ approval of all amendments to pre-1970 JOAs, and instead adopted the much narrower language now in the Act, requiring DOJ approval only for amendments that add one or more newspapers to the JOA. *See* 116 Cong. Rec. 23172-74 & 23177 (1970). Prior to the vote, Rep. Jacobs, the narrower amendment's sponsor, stated his understanding of what the Act would require in light of these two votes:

> [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).

As the table in paragraph 39 of the Complaint shows, the amendments Plaintiff cites as "materially different" from the original JOA are all just the type of "corporate changes" Rep. Jacobs was referring to: adjustments in the profit sharing between the two members, changes in the composition of the management board, and provisions designed to protect each newspaper from opportunistic behavior by the other. (*See* Compl. ¶ 39.) None of these changes is so material that it could even arguably justify stripping the JOA of its NPA exemption. Plaintiff

concedes that there have been numerous other amendments to the Salt Lake JOA in the sixty-two years since it was created. (Compl. ¶ 9.) Plaintiffs do not dispute that several of these amendments involved changes in profit-sharing and in corporate governance, and none of which has been challenged as creating a new JOA.[6]

3. The Complaint's allegations relating to editorial independence are based on a misreading of the 2013 Amended JOA.

The Complaint's allegation that the 2013 Amended JOA is no longer entitled to its NPA exemption because it now "contains provisions that, expressly or by effect, intrude upon the editorial independence of the *Tribune*" (Compl. ¶ 39(c)) is similarly without merit. The first part of this statement is plainly false: there is no provision in the 2013 Amended JOA that "expressly" limits the *Tribune*'s editorial independence. To the contrary, the 2013 Amended JOA expressly provides for such independence.[7] Plaintiff's allegation therefore depends on its claim that two alleged changes in the JOA will have the "effect" of superseding the express language of the 2013 Amended JOA and intruding on the *Tribune*'s editorial independence: (1) the alleged addition of a provision giving Deseret "a veto power over ownership and management of the *Tribune*'s owner," and (2) the change in the division of revenues from the JOA, which Plaintiff claims will deny the *Tribune* "revenues sufficient to finance its essential

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6. *See*, *e.g.*, Ex. B (1983 Amended JOA); Ex. C (2001 Amended JOA); Ex. D (2006 Amended JOA).

7. For example, Section 8 of the 2013 Amended JOA states that "[e]ach of the parties hereto retains unto itself complete and exclusive control of its news and editorial departments and policies, together with its editorial contracts, conduct and contents, and the selection of its editors and news and editorial department employees. There shall be no merger, combination or amalgamation of editorial or reportorial staffs, and editorial policies shall be independently determined." (Ex. A, 2013 Amended JOA, § 8.)

editorial and news gathering functions." (*Id*.) The first of these claims is time-barred; the second rests on wholly conclusory allegations that do not pass muster under *Twombly* and *Iqbal*.

(a) Alleged veto power. Contrary to the Complaint's allegations, the provision requiring Deseret's consent to any change in the ownership of the *Tribune*'s owner, Kearns-Tribune, was added to the JOA over a decade ago in 2001 when MediaNews Group first acquired the *Tribune* and not in 2013 as the Complaint alleges. (*See* Ex. C, 2001 Amended JOA §10.) Plaintiff's claim that this provision should deprive the JOA of its NPA exemption, like its attack on the initial formation of the JOA in 1952, is therefore barred by the four-year statute of limitations on antitrust claims. 15 U.S.C. § 15b.

Even if this claim were not time-barred, the fact that this provision has been in effect for over a decade, during which time the Complaint itself alleges the *Tribune* was editorially independent from the *News* (*see* Compl. ¶¶ 25-26), renders completely implausible Plaintiff's claim that this consent provision intrudes on the *Tribune*'s editorial independence.[8] Similar consent provisions are common in other joint venture agreements and serve the legitimate business purpose of ensuring that a party to a joint venture can choose a partner with whom it can work effectively.[9] The addition of this provision, therefore, should not deprive the JOA of its NPA exemption.

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8. Indeed, the example of different editorial voices that is pled in the Complaint occurred *after* the 2013 Amended JOA became effective. (*Compare* Compl. ¶ 39(c)(i) *with id*. ¶ 39(c)(ii).) If Plaintiff's speculation concerning the impact of the JOA's ownership provisions on editorial independence had any validity, the editorials would not be different.

9. As in any partnership or joint venture, the parties to a newspaper JOA 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,

The Tenth Circuit reached exactly this conclusion in rejecting a challenge by another plaintiff who claimed that the *Tribune*'s editorial independence was compromised by the JOA's restriction on the transfer of NAC shares. *See Salt Lake Tribune Publ'g Co., LLC v. AT & T Corp*., 320 F.3d 1081, 1093-94 (10th Cir. 2003). As the Tenth Circuit explained:

> 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) (alterations in original).

(b) Insufficient revenues to support editorial functions. Plaintiff's allegation that reducing the *Tribune*'s share of the JOA's profits from 58 percent to 30 percent will deprive it of sufficient revenues to finance its editorial and news gathering functions is entirely conclusory and, like its other claims, is unsupported by any factual allegations. This claim asks the Court, in effect, to decide what revenues a newspaper needs to run its newsroom, a calculation that depends on how much and what kind of news the newspaper's owners choose to publish. Second-guessing how large an editorial budget a newspaper needs would require the Court to

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and deadlocks, causing inefficiency and poor performance. This is why most 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.

intrude into a newspaper's editorial judgments, which is plainly something the First Amendment would not allow. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). It would also require the Court to second-guess the business judgments of an experienced management as to how to position a newspaper for survival in a radically-changed business and media environment. Finally, it also wrongly assumes that NAC revenues from the sale of print advertising and circulation are the only funding sources for the *Tribune*'s editorial budget, notwithstanding that the *Tribune* is but one of more than 100 newspapers owned and managed by Kearns-Tribune's parent, Media News Group, Inc. d/b/a Digital First Media ("DFM").

4. Plaintiff's "cessation" or "termination" arguments are unavailing.

The final reason Plaintiff gives for stripping the 2013 Amended JOA of its NPA exemption is that "the intent and effect" of the 2013 amendments will be "to cause the cessation of the *Tribune*" and "to terminate" the pre-existing JOA. (Compl. ¶ 39(d), (e).) Plaintiff alleges no direct evidence of any such intent, but instead relies entirely on what it calls "the totality of the circumstances." A plaintiff relying on circumstantial evidence must show that the inferences it asks the Court to draw from that evidence are plausible and that there are no other inferences that could be drawn from that evidence that are equally or more plausible, under which the plaintiff would not be entitled to recover. *See Iqbal*, 556 U.S. at 680 (a claim is not plausible when the conduct alleged is "compatible with . . . [and] more likely explained by, lawful . . . behavior").

Here, the Complaint contains no facts to show the intent it ascribes to the owners of both the *Tribune* and the *News*. Nor does it allege any facts to show any realistic danger that the *Tribune* will cease publishing at any time in the foreseeable future or that the JOA will be

terminated prior to its current expiration date in 2020. Without such facts, Plaintiff has not met its burden to show that it has "plausible grounds" to support its claim that the 2013 Amended JOA is no longer entitled to its NPA exemption from the antitrust laws. *See Shero*, 510 F.3d at 1200 (a "complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations") (quoting *Twombly*, 550 U.S. at 556).

II. PLAINTIFF DOES NOT HAVE STANDING

A. Plaintiff Lacks Constitutional Standing Because Its Members Have Not Suffered an Injury-in-Fact.

Plaintiff's claim should be dismissed because it lacks Article III standing to bring this lawsuit. Plaintiff is a non-profit 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 standing to bring suit on their own. *Id.* at 553. 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), that is both "(a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (internal citations omitted). Because Plaintiff's members have not suffered (and will not suffer) an injury-in-fact, they lack constitutional standing individually and, consequently, so does Plaintiff.

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." The *Tribune* continues to publish seven days a week, and has published an issue for each and every one of the

263 days since the 2013 Amended JOA became effective. The Complaint alleges, but includes no facts to show, that there are any plans to close down the *Tribune* or that it is likely to cease publishing at any time in the foreseeable future. Any injury that Plaintiff alleges it would suffer from such a shutdown is, therefore, purely "hypothetical" and "conjectural," and as such does not satisfy constitutional standing requirements.

Plaintiff's alternative 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 does not allow any court to grant relief just because a plaintiff does not like how the owners of a newspaper are exercising their First Amendment rights. *See 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). Plaintiff's lack of Article III standing requires dismissal of Plaintiff's claims in their entirety.

B. Plaintiff Fails to Allege a Cognizable Antitrust Injury and Therefore Lacks Antitrust Standing.

Although Plaintiff alleges that its members are *Tribune* subscribers,[10] Plaintiff has failed to allege that its members have suffered a cognizable antitrust injury. For this reason alone,

10. To the extent that Plaintiff has alleged that Defendants' conduct has restrained competition in the alleged market for the sale of advertising space in local daily newspapers, Plaintiff lacks antitrust standing to pursue those claims. Plaintiff does not allege that any of its members are advertisers. (Compl. ¶ 19 (alleging that while Plaintiff's "members" include subscribers to the *Tribune*, only Plaintiff's "participants" are advertisers in the *Tribune*).) Plaintiff itself

Plaintiff's members (and therefore Plaintiff itself) lack antitrust standing to pursue any of these claims, requiring the dismissal of its Complaint.

As federal courts have recognized for decades, the antitrust laws are not intended to provide a remedy for every type of purportedly objectionable conduct; their purpose is to protect *competition*. *See Brunswick Corp*., 429 U.S. at 489 (defining antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful"); *Cargill, Inc. v. Monfort of Colo., Inc*., 479 U.S. 104, 113 (1986) (requirement to allege an antitrust injury extended to claims for injunctive relief under Section 16 of the Clayton Act). Consistent with this purpose, the antitrust injury requirement seeks to ensure that a plaintiff can recover only if the loss stems from a "competition-*reducing* aspect or effect of the defendant's conduct." *Atl. Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 344 (1990) (emphasis added).

Plaintiff's sole allegation of antitrust injury in the form of economic harm can be found at Paragraph 52 of the Complaint: "defendants' agreements are likely to result in an increase in

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claims to have purchased an advertisement in the *Tribune* on only one occasion (Compl. ¶ 40); this single purchase is insufficient to afford antitrust standing. *See*, *e.g*., *Reilly v. MediaNews Grp., Inc*., No. C 06-04332 SI, 2007 WL 1068202, at *6 n.3 (N.D. Cal. Apr. 10, 2007) (unpublished) ("*Reilly II*") (finding that where plaintiff had placed a "handful of advertisements" through a company in which plaintiff was a shareholder and had no stated plan to advertise in the future, plaintiff did not have standing as an advertiser). Plaintiff alleges also that that *News* refused to publish one advertisement it attempted to place. A newspaper's exercise of its First Amendment right not to publish that advertisement, *see World Peace Movement of Am. v. Newspaper Agency Corp*., 879 P.2d 253, 258 (Utah 1994) (declining to require NAC to publish advertisement based on First Amendment grounds), can hardly be used to show antitrust injury.

newspaper prices."[11] This allegation is premised on Plaintiff's supposition that the *Tribune*'s closure is imminent and that, as the lone local daily newspaper remaining, the *News* will have sufficient market power to raise subscription and single copy prices. This claim is purely hypothetical. Under the JOA, the NAC has long had the sole authority to determine the price of, sell subscriptions to, and sell single copies of, both the *Tribune* and the *News*. (*See*, *e.g.*, Ex. B, 1983 Amended JOA § 7). Accordingly, the NAC has had unilateral power over the pricing of both subscription and single copy sales of both newspapers for decades. *Cf. Hawaii ex rel. Anzai v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241, 1249 (D. Haw. 1999) (finding that where the sales function was combined within a JOA, the newspapers no longer competed economically). For this reason, even if one of the NAC's two newspapers were to fold, there would be no *reduction of competition* in the alleged market for the sale of local daily newspapers.[12]

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11. Plaintiff also alleges that the 2013 Amended JOA will cause an "increase in rates paid by advertisers." (Compl. ¶ 52.) Even if this Court were to presume the truth of this conclusory allegation, which it should not, Plaintiff lacks standing to challenge alleged anticompetitive conduct in what it alleges to be a relevant antitrust market for the sale of advertising in local daily newspapers. *See* fn. 10, *supra*.

12. Paragraphs 50-53 of the Complaint appear to have been copied, almost word-for-word, from Paragraph 24 of the Complaint in *Reilly II*. Compl. ¶ 24, *Reilly II*, No. 1 (N.D. Cal. July 14, 2006). In so doing, Plaintiff appears to have overlooked the significant factual differences between *Reilly II* and this case. *Reilly II* was not a JOA case. Rather, the plaintiff in *Reilly II* sought to challenge a series of mergers and acquisitions whereby the number of independent entities that published newspapers in the San Francisco Bay Area would have been reduced from three to two. *Id.* ¶¶ 16-23. Here, by comparison, there is no increase in market concentration whatsoever. The NAC has been and will be the sole decision-maker in the relevant antitrust markets alleged by Plaintiff. The market structure in Salt Lake will not change in this respect, regardless of whether the NAC continues to publish one newspaper or two.

The bulk of Plaintiff's other conclusory allegations of threatened injury focus on two disfavored theories of antitrust injury: reduction in consumer choice and diminution of quality.[13] Yet even if this Court were to accept these questionable theories of anticompetitive harm, Plaintiff's antitrust claims would still fail.

Consumer choice. Plaintiff's allegation that the 2013 Amended JOA will reduce, or has already reduced, consumer choice in local daily newspapers in the Salt Lake Valley is based on its conjecture that the *Tribune* is in imminent danger of ceasing publication. (Compl. ¶ 50.) This conjecture is based only on speculation, rumor and innuendo. (Compl. ¶¶ 6, 7 (speculating that "the hedge fund agreed to terms of a new joint operating agreement that would effectively eliminate the *Tribune* as a competitor to the *News*" and then wrongly deducing that the "new JOA . . . [was intended to] weaken the *Tribune* to the point where it could be characterized as a 'failing' newspaper").) These conclusory allegations are not entitled to any presumption of truth and this Court should afford them no weight in deciding this motion. *Iqbal*, 556 U.S. at 681.

Unlike plaintiffs in other newspaper antitrust cases, Plaintiff has not alleged any facts to plausibly suggest that the *Tribune* is in "imminent danger" of closing. For example, in *Reilly I*, the plaintiff challenged plans by Hearst (the owner of the *San Francisco Examiner*) to acquire the other paper in its JOA, the *San Francisco Chronicle*, terminate the JOA, and then close the *Examiner*. *Reilly I*, 107 F. Supp. 2d at 1195 ("Plaintiff claims that the challenged transaction

13. These theories of antitrust injury have long been disfavored. *See*, *e.g.*, Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405, 2423 (2013) ("[S]hifting to defendants the burden of justifying any reduction in consumer choice would be merely a revival of the long ago repudiated inhospitality tradition in antitrust that should and likely will be rejected by the enforcement agencies and the courts.").

would eliminate one of only two [newspapers] . . . [based on] Hearst's stated intention [] to cease production of the Examiner.") In *United States v. Daily Gazette Co.*, the Department of Justice sought to prevent the acquisition of the entire economic interest of the *Charleston Daily Mail* by the owner of the *Charleston Daily Gazette*, who, the Justice Department alleged based on specific actions,[14] intended to cease publication of the *Daily Mail*. 567 F. Supp. 2d 859, 863 (S.D. W.Va. 2008). Finally, in *Gannett*, the Hawaii Attorney General sued to prevent the termination of a JOA where the parties had publicly announced plans to cease publication of one of the two newspapers involved. *See Gannett*, 99 F. Supp. 2d at 1246-47.

None of these facts is present in this case. The 2013 Amended JOA does not provide that the *Tribune* will close, nor does the Complaint allege any facts to show that Kearns-Tribune plans to shut down the *Tribune* or has taken any steps to do so. Both newspapers continue to publish, under separate ownership, with separate and independent editorial policies and staffs, and continue to be printed, sold, and distributed by the NAC. Plaintiff's conclusory allegations

14. Specifically, the Justice Department alleged that "[s]hortly after the May 7 transactions were consummated, Gazette Company stopped all promotions and discounts for the *Charleston Daily Mail*; it stopped soliciting new readers for the *Charleston Daily Mail*; it stopped delivering the *Charleston Daily Mail* to thousands of customers; it attempted to convert existing *Charleston Daily Mail* home delivery subscribers to *Charleston Gazette* subscriptions; it stopped publishing a Saturday edition of the *Charleston Daily Mail*; it allowed almost half of the *Charleston Daily Mail*'s reporters to leave the newspaper without permitting replacements, thus crippling the ability of the *Charleston Daily Mail* to cover the news; and it cut the *Charleston Daily Mail*'s newsroom budget substantially in both 2004 and 2005, which forced the *Charleston Daily Mail* to continue reducing the breadth and depth of its news coverage." Compl. ¶ 22, *Daily Gazette Co.*, 567 F. Supp. 2d 859 (No. 2:07-0329), 2007 WL 1571956. By comparison, more than eight months after the 2013 Amended JOA came into effect, Plaintiff can only point to the same sort of staff reductions that are impacting every newspaper in America.

do not give rise to a plausible claim that the 2013 Amended JOA will reduce consumer choice of local daily newspapers in the Salt Lake Valley. *Twombly*, 550 U.S. at 556-57.[15]

Diminution in quality. Finally, Plaintiff alleges that, as subscribers to the *Tribune*, its members "have suffered, and will suffer, the diminution of quality, quantity, sources, availability, and diversity of news, advertising, innovation, and editorial and other content" as a result of the adoption of the 2013 Amended JOA. (Compl. ¶¶ 19, 50.) Like all of Plaintiff's allegations of injury, these are entirely conclusory and should not be afforded the presumption of truth. *See Iqbal*, 556 U.S. at 680. Even if the Court were to consider, however, that Plaintiff has adequately alleged facts to show that the 2013 Amended JOA resulted in a diminution in the quality of the *Tribune*, Plaintiff would be foreclosed by the First Amendment to the U.S. Constitution from challenging editorial policies and decisions, even if they affect the perceived "quality" of the newspaper. *Miami Herald Publ'g Co*., 418 U.S. at 256 (holding that plaintiff's interest in ensuring "a wide variety of views" was not sufficient to overcome the *Miami Herald*'s constitutional right to freely determine its own editorial policies).

In sum, the Complaint's allegations designed to try to show antitrust injury are all fatally deficient. Outside of bare conclusory allegations, Plaintiff has alleged no facts to plausibly suggest that the *Tribune* is in imminent danger of ceasing publication, and is constitutionally prohibited from asking this Court to change the *Tribune*'s editorial policies or otherwise compel

15. Plaintiff also altogether ignores the provisions protecting the *Tribune* that were added in the 2013 Amended JOA or carried over from earlier versions, such as 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. (*See*, *e.g*., Ex. E, 2013 Amended JOA § 2.02).

the *Tribune* to publish certain content. Having failed to allege that any of its members have suffered a cognizable antitrust injury, all of Plaintiff's antitrust claims should be dismissed.

III. THE COMPLAINT WOULD FAIL TO STATE A CLAIM UNDER THE ANTITRUST LAWS EVEN ABSENT NPA IMMUNITY

A. The 2013 Amended JOA Is Not *Per Se* Illegal As Plaintiff Claims.

Count I of the Complaint alleges that, absent NPA immunity, the 2013 Amended JOA "constitutes a contract, combination or concerted action by and among defendants that is a *per se* violation of antitrust laws, and that has unreasonably restrained trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." (Compl. ¶ 57.) This count fails to state a claim under the antitrust laws, even absent the NPA exemption, because the 2013 Amended JOA is an economically integrated joint venture and cannot be treated as *per se* illegal under Section 1, but must be evaluated under the rule of reason *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006).

1. Section 1 outlaws only unreasonable restraints.

By its literal language, Section 1 of the Sherman Act condemns "[e]very contract . . . in restraint of trade." 15 U.S.C. § 1. Since its 1911 decision in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the United States Supreme Court has recognized that Section 1 cannot mean what it says literally because every contract restrains trade to some extent. *Id.* at 59-62; *see Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). The Court has repeatedly held, therefore, that Section 1 "outlaw[s] only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

Since *Standard Oil*, "the accepted standard for testing whether a practice restrains trade in violation of § 1" has been the rule of reason. *See Leegin Creative Leather Prods., Inc. v.*

PSKS, Inc., 551 U.S. 877, 885 (2007). "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint of trade on competition." *Cont'l T. V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 49 (1977). These circumstances include "the restraint's history, nature, and effect," *Khan*, 522 U.S. at 10, "[w]hether the businesses have market power," *Leegin*, 551 U.S. at 885, and "the purpose or end sought to be attained." *Bd. of Trade*, 246 U.S. at 238.

Over the years, the Court has carved out a narrow exception for restraints "that would always or almost always tend to restrict competition and decrease output," *Bus. Elecs. Corp. v. Sharp Elecs. Corp*., 485 U.S. 717, 723 (1988) (quotations omitted), and that can be "deemed unlawful *per se*." *Khan*, 522 U.S. at 10. Today, this narrow category is limited to a small number of "naked restraints of trade with no purpose except stifling of competition," *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), such as naked price fixing and market allocation agreements among competitors. A restraint is not "naked" if it is part of some potentially efficiency-enhancing integration of the parties' economic activities. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20-21 (1979) ("*BMI*") (holding that alleged restraint was not a naked restraint of trade because it facilitated "the integration of sales, monitoring, and enforcement" of copyright rights).

2. The 2013 Amended JOA is not *per se* unlawful under Section 1.

In Count I, Plaintiff claims that the 2013 Amended JOA falls within this narrow exception to the rule of reason and is a *per se* violation of Section 1. Plaintiff is wrong as a matter of law. The Supreme Court has squarely held that an economically integrated joint venture, like a newspaper joint operating arrangement or a law firm partnership, cannot be

treated as a *per se* unlawful price fixing or market allocation agreement. *See Dagher*, 547 U.S. at 1, 7. *Dagher* concerned a joint venture partnership very similar to the 2013 Amended JOA. Shell and Texaco—two of the largest vertically integrated oil companies in the United States—agreed to combine all of their downstream operations, including refining and marketing, in a joint venture, while keeping their upstream exploration and production operations separate. As part of their joint venture, Shell and Texaco agreed that Equilon would market gasoline under both pre-existing brand names and would charge exactly the same price for Shell-branded and Texaco-branded gasoline products.

The Ninth Circuit held that Shell and Texaco's agreement to market their two brands at a uniform price was a *per se* violation of Section 1 of the Sherman Act. *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1117 (9th Cir. 2004). The Supreme Court, in an eight-page unanimous opinion, reversed, holding that "[i]t is not *per se* illegal under § 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products." *Dagher*, 547 U.S. at 1. This unanimous opinion was fully consistent with a series of prior Supreme Court decisions over more than a quarter-century, beginning with *BMI*, in which the Court repeatedly stated that economically integrated joint ventures and partnerships could not be treated as *per se* illegal price fixing or market allocation agreements.[16]

16. *See*, *e.g.*, *Arizona 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"); *BMI*, 441 U.S. at 9 ("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.").

The Tenth Circuit reached this same conclusion even before *Dagher*. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 964 (10th Cir. 1994) ("In rejecting automatic *per se* treatment in these joint venture cases, the Court directs us instead to look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation; whether it has the effect of decreasing output; and whether it affects price."). Plainly, a newspaper JOA that combines the printing, sale, and distribution of the partners' newspapers and the sale of advertising involves the integration of all the core activities of the two papers, other than their editorial content.

The only case Plaintiff could cite to support its *per se* claim against 25 years of Supreme Court cases is *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969).[17] That case was decided in 1969, prior to the enactment of the NPA and more than ten years before this more recent series of cases. It was decided during an era in which, as Justice Breyer has reminded us, "antitrust theories [became] so abbreviated as to prevent proper analysis," *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 794 (1999) (Breyer, J., dissenting in part). Just as the Court has expressly overruled many of its other decisions from that era,[18] *Citizen Publ'g* must be treated as having been superseded by the later Supreme Court decisions holding that economically integrated joint

17. *Citizen Publ'g* held that a JOA between the two daily newspapers in Tucson, Arizona, which had been formed during the Great Depression when both papers were struggling to survive, was *per se* unlawful. 394 U.S. at 135-36. This decision evoked such a strong negative reaction that it led Congress, less than a year later, to enact the NPA to exempt already-existing and future JOAs from the antitrust laws, as long as they continued to publish two newspapers, each with its own independent editorial content. *See* pp. 1-2 *supra*.

18. *See*, *e.g.*, *Khan*, 522 U.S. at 7 (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Cont'l T. V.*, 433 U.S. at 58 (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

ventures cannot be treated as *per se* illegal. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986) (Bork, J.) (observing with respect to similar joint venture cases decided around the same time 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 these later decisions).

It is plain from the face of the Complaint that the 2013 Amended JOA involves substantial integration of the business activities of the *News* and the *Tribune*. (Compl. ¶ 1.) It cannot, therefore, be treated as *per se* unlawful after *Dagher*, *SCFC ILC, Inc.*, and the other Supreme Court joint venture decisions since *Citizen Publishing*. Because Count I asserts only a *per se* violation of Section 1 of the Sherman Act, it should be dismissed as a matter of law.[19]

B. Count II Does Not State a Claim.

Count II, which is asserted only against Deseret, alleges that by virtue of the 2013 Amended JOA, Deseret has monopolized or attempted to monopolize "the Salt Lake Valley local daily newspaper market." (Compl. ¶ 61.) This count should be dismissed for two reasons. *First*, it ignores the reality of any JOA: there is no competition for the sale of either circulation or

19. Insofar as the Complaint seeks to assert a Section 1 claim under the rule of reason, it should be dismissed for the same reasons as Counts II and III of the Complaint. *See* pp. 28-34 *infra*. A rule of reason claim requires the plaintiff both to define the relevant market and to show that the alleged restraint will harm competition in that market. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) ("In order to plead injury to competition, the third element of a Section 1 claim, sufficiently to withstand a motion to dismiss, 'a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably.'" (citations omitted)); *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1119 (10th Cir. 2008) (affirming dismissal of Section 1 claims because of the "legally inadequate market definition within [plaintiff's] complaint"). The Complaint does neither.

advertising that Deseret could monopolize; that competition ended over 60 years ago. *Second*, to the extent the Complaint could be read to allege a market for "editorial voices," it is facially under-inclusive and cannot give rise to a plausible claim for relief under Section 2. The "market" for news and other editorial content abounds with alternatives to daily newspapers, including radio, television, and an ever-growing number of digital sources for news and other content.

A monopolization claim under Section 2 of the Sherman Act "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." *Campfield*, 532 F.3d at 1117-18 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966)). To successfully plead an attempted monopolization claim, a plaintiff must show: "(1) relevant geographic and product markets; (2) specific intent to monopolize; (3) anticompetitive conduct in furtherance of an attempt to monopolize; and (4) a dangerous probability of success." *MultiState Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (quoting *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992)).

Competition for the sale of daily newspapers and advertising. The Complaint describes the relevant market as "the publication and sale of local daily newspapers," and "the sale of advertising space in local daily newspapers." (Compl. ¶ 41.) If this is, indeed, the relevant market, the Complaint fails on its face to state a claim under Section 2, because all competition between the *News* and the *Tribune* in this alleged market ceased over 60 years ago when the JOA was first formed. The 2013 amendments could not have destroyed that which did not exist.

As the Complaint acknowledges, the *News* and the *Tribune* combined their business operations, including their circulation and advertising sales, in 1952. (Compl. ¶ 24.) Because the newspapers have always divided profits from the JOA on a percentage basis, each newspaper shares in the revenues generated by the other. (Compl. ¶ 39(b).) If one newspaper sells a subscription, a single copy, or an advertisement, a fixed amount of every dollar of profit from that sale is paid to the owner of the other newspaper, eliminating any financial incentive to compete for these sales.

As discussed above (*see* pp. 9-17, *supra*), the elimination of competition for circulation and advertising through the JOA was lawful at the time it was formed in 1952 and remains lawful today because it was facially part of an arrangement in which the two newspapers integrated their economic activities in order to create an "economically sound newspaper operation." *See* S. Rep. No. 91-535, at 2-3 (1969) (observing that "the elimination of commercial competition" through a joint operating arrangement "permits economically sound newspaper operation").

Because of their JOA, the *Tribune* and the *News* are not—and for over 60 years have not been—competitors in the only relevant product market alleged in the Complaint. Deseret cannot, therefore, be accused of monopolizing, or attempting to monopolize, a market in which there is already only one seller of circulation and advertising.

Competition in news and viewpoints. While seeming to acknowledge that the 1952 JOA eliminated all competition between the two newspapers in selling circulation and advertising, the Complaint alleges that keeping the *Tribune* alive is critical to ensure that residents of the Salt Lake Valley will have "two competing editorial voices." (Compl. ¶ 4.) The Complaint makes

no effort, however, to define the scope of a relevant market for "editorial voices." The reason for this omission is obvious. As in all cities, there is a vast sea of competing "editorial voices" in the Salt Lake Valley not limited to daily newspapers. The Complaint itself provides just a partial list: "weekly newspapers, radio news, television news, internet news, or any other media[.]" (Compl. ¶ 42.) With the growing cacophony of diverse voices available to them, residents are unlikely to view their choices of news and other content as limited to just the two daily newspapers.

The Complaint's failure to allege a relevant market for "editorial voices," much less what share of that market the *News* and *Tribune* represent, is fatal to Plaintiff's monopolization and attempted monopolization claims against Deseret. "To state a cause of action for conduct prohibited under § 2 of the Sherman Act, the plaintiff must define a relevant market within which the defendants allegedly engaged in anticompetitive behavior. . . . Failure to allege a legally sufficient market is cause for dismissal of the claim." *Campfield*, 532 F.3d at 1117-18 (citations omitted); *see also Philips Elecs. N. Am. Corp. v. BC Technical, Inc.*, 2:08-cv-639, 2009 WL 2381333, at *1 (D. Utah Aug. 3, 2009) (Waddoups, J.) (unpublished) (attempted monopolization claim subject to dismissal where there is "no factually supported definition or description of what the relevant product or geographic market is").

A relevant market is legally insufficient when it excludes obvious substitutes. "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*, 532 F.3d. at 1119 (claim dismissed). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . .

even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Id*. at 1118 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997)).

Here, it is obvious on the face of the Complaint that a market for "editorial voices" could not be limited to daily newspapers. The Complaint itself lists many of the other "editorial voices" available to Salt Lake Valley residents. (Compl. ¶ 42.) The Complaint attempts to dismiss these other sources of local and national news and other content with a conclusory allegation that "[m]ost readers of local daily newspapers in the Salt Lake Valley do not consider [these alternatives] adequate substitutes for, or reasonably interchangeable with, the two local daily newspapers serving the Salt Lake Valley area." (*Id*.) This allegation is facially deficient because it mentions only "readers of local daily newspapers," not all residents of the Salt Lake Valley, the majority of whom may not read newspapers and may already get their news and other content from other sources—such as movie listings from Fandango, television programming from a cable website, job listings from Monster.com, car listings from Autotrader.com, and local, national and international news and opinion from print, radio, television, cable and internet providers. Beyond that, the Complaint fails to supply any facts to support its effort to read the minds of "[m]ost readers."[20]

Because it neither defines, nor alleges any facts to support, a hypothetical market for "editorial voices," the Complaint's Section 2 claims against Deseret should be dismissed. *See*

20. Indeed, Plaintiff complains that the *News* rejected a print advertisement that it wished to place, but the only content of that advertisement (with the headline "Read All About It") was to direct audiences to its web site. (Compl. ¶ 40.) Plaintiff's market definition would exclude the viewpoints expressed in its own web site from its proposed product market.

Conte v. Newsday, Inc., 703 F. Supp. 2d 126, 142-43 (E.D.N.Y. 2010) (dismissing monopolization and attempted monopolization claims based on allegation that "print advertising sales" constituted a relevant market); *cf. Berlyn Inc. v. Gazette Newspapers, Inc.*, 73 F. App'x 576, 582-83 (4th Cir. 2003) (unpublished) (rejecting alleged product market confined to "weekly community newspapers" to exclusion of other print and electronic media).

C. Count III Does Not State a Claim.

Count III alleges that Deseret violated Section 7 of the Clayton Act through its acquisition of a portion of Kearns-Tribune's interest in the JOA. (Compl. ¶¶ 64-67.) This count, too, should be dismissed for failure to allege the facts necessary to state a claim under Section 7.

Section 7 prohibits an acquisition of assets or voting securities "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 to tend to create a monopoly." 15 U.S.C. § 18. Plaintiff cannot plausibly allege that Deseret's acquisition of assets from Kearns-Tribune would reduce or eliminate competition today for circulation or advertising, because, as described in section III.B, *supra*, no such competition exists. Rather, the Complaint appears to allege that future competition may be prevented should the *Tribune* emerge from the JOA as an independent newspaper, and resume the competition for circulation and advertising that lawfully ended sixty-two years ago.

In other words, without saying so, Plaintiff is relying on an alleged reduction of potential competition resulting from an acquisition, a theory of competitive harm that the Federal Trade Commission describes as "a rather peculiar theory of competitive injury" that has never been accepted (or rejected) by the Supreme Court. *In re B.A.T. Indus., Ltd.*, No. 9135, 1984 WL

565384, at *3 (F.T.C. Dec. 17, 1984). The doctrine "rests on speculation about the future conduct and competitive impact of a firm currently outside the market and perhaps intending to remain so. Even if the likelihood of a firm's entry is a probability, as distinguished from an 'ephemeral possibility,' . . . its potential entry does not promote existing competition, since at most it may become a competitor *in futuro*." *United States v. Siemens Corp.*, 621 F.2d 499, 504 (2d Cir. 1980).

An essential element of a potential competition theory is that there be "at least a 'reasonable probability'" and "preferably clear proof" that the firm outside of the market—under Plaintiff's theory, the *Tribune*—would enter that market absent the claimed violation. *Siemens Corp.*, 621 F.2d at 506-07; *see also United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 633 (1974) (an "essential precondition" to actual potential entry theory is that firm merging party have "available feasible means" to enter).

Plaintiff alleges no facts to support its mere supposition that, absent the digital strategy enabled by the 2013 Amended JOA, the *Tribune* intended or had the means to resume publication as a stand-alone newspaper if and when the JOA expires six years from now. Whether it would have had the ability to do so before the 2013 amendments, or that it would have been likely to do so, is entirely speculative. To state a potential competition claim, Plaintiff would have to show that, absent the 2013 amendments, (a) the JOA would have been allowed to expire in 2020 (or been terminated before then), and (b) the *Tribune* would at that time have had both the intent and ability to re-enter as a free-standing newspaper. The Complaint alleges no facts to show either. Its potential competition claim under Section 7 should, therefore, be dismissed. *See Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (actual potential

competition theory requires showing that firm "would likely have entered the market in the near future").[21]

CONCLUSION

For the reasons set forth herein, Defendants' Motion to Dismiss the Complaint should be granted and the Complaint should be dismissed with prejudice.

DATED this 7th day of July, 2014.

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21. To the extent that Plaintiff's Section 7 claim is based on an alleged reduction in editorial competition, it suffers from the same fatal defect as Plaintiff's Section 2 claims: the absence of a plausible relevant market. "Determination of the relevant market is the necessary predicate" to a Section 7 claim. *United States v. E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

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