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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, v. DESERET NEWS PUBLISHING COMPANY and KEARNS-TRIBUNE, LLC, Defendants.	**PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION FOR STAY OF DISCOVERY** Civil No. 2:14-cv-00445-JNP-BCW Judge Jill N. Parrish

Plaintiff Utah Newspaper Project, dba Citizens For Two Voices, here opposes the Defendants' Joint Motion for a Stay of Discovery.

INTRODUCTION

The Defendants argue for a stay. Underlying their request is their challenge to the associational standing of Utah Newspaper Project (UNP), alleging that under applicable law UNP cannot as an association bring suit on its own behalf. Defendants invoke *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977), in arguing that associational standing does not

apply to UNP. They argue that UNP's case should now be dismissed. The Defendants err. *Hunt* clearly vests UNP, either through its directors or through the citizen participants it represents, with sufficient indicia of membership to confer standing upon it. Thus lacking any predicate for a stay to issue, the request for stay should be viewed as yet another delay tactic and denied.

ARGUMENT

1. As a Threshold Matter, the Directors have the Right to Pursue the Causes of Action in the Complaint in Their Individual Capacities, Should They Choose to Do So.

UNP has associational standing to pursue this action. Because part of that analysis requires that the constituents who are part of the indicia of membership have the independent right to pursue individual actions, UNP first briefly addresses this issue. Accompanying this memorandum as Exhibit A is the declaration of Joan O'Brien, a director of UNP. She executed the discovery that Defendants invoke in their attempt to deny UNP's standing. She incorporates that discovery into her declaration, and further avers that she and the other members of the board of directors have the knowledge and suffered the requisite harm to pursue an action in their own right. Declaration of Joan O'Brien *passim*. They also possess the ability to select members of the board and to finance UNP's activities, and have actually done so. As shown *infra*, this confers upon UNP associational standing..

2. *Hunt* and the Majority of its Progeny Adopt a Functional "Indicia of Membership" Test for Associational Standing.

Defendants forward a notion of "membership" suggesting that groups with associational standing must trail behind them hundreds or thousands of civic activists as traditional

"members", actively subscribed, whose needs and views the association fulfills. This is incorrect. *Hunt* specifically repudiated such a bright-line test for what constituted adequate membership to confer associational standing. In *Hunt*, an interstate commerce trade dispute, North Carolina complained that the members of a Washington apple commission were not voluntary, but were statutorily conscripted into their roles. They thus could not be "members" of the commission. The Court rejected this argument, analogizing compulsory membership to that of a trade union or state bar. *Hunt* at 345. Rather than adopt a rigid requirement of a particular type of membership, *Hunt* instead adopted a "practical" approach. *Id.* at 344. It elected to assess "indicia" of membership, not whether a constituent of a body could be traditionally defined as a "member" in a bright-line sense. *Id.* The factors the court devised included whether those associated with the entity are eligible for board service, whether they could participate in board selection, and whether they finance the entity's activities. I*d.* at 344-45. Significantly, *Hunt* stated that these three factors, taken together, were sufficient to find standing, but did not state that they were necessary. More significantly, it did not state which of these factors, or to what degree, was the bare minimum to establish associational standing. *See generally* K. Coplan, *Is Voting Necessary? Organization Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 Se. Envtl. L.J. 47, 55 (2005)(hereinafter *Voting*).

Avoiding hidebound requirements of "membership" makes sense, perhaps now more than ever (and in ways the *Hunt* was ostensibly prescient enough to foresee). The primacy of corporate "personhood" has surged as of late, *see, e.g., Citizens United v. FEC*, 558 U.S. 310 (2010), as has the destabilizing effect of hostile takeovers of nonprofits by disenchanted

members with voting rights (such as the attempted hostile takeover of the Sierra Club in 2004). *Voting* at 55-57. These events are coupled with an increasing number of states authorizing nonprofit corporations with no members, such as Utah did in 2000. Utah Code Ann. § 16-6a-601. Instead of having "members", a term in and of itself ambiguous (being a "member" of KUED, for example, vests one with no legal status within KUED), nonprofit corporations have increasingly adopted the model of self-perpetuating boards with no members. *Voting* at 49-40.

Recognizing this trend, courts following *Hunt* have not required strict compliance with traditional membership requirements to show that indicia of membership have been established. For example, in considering the advocacy efforts of the Friends of the Earth (FOE), the Fifth Circuit was willing to overlook lack of compliance with corporate statutes when considering the overall ability of an entity to represent the interests of those with whom it was aligned (even those these persons were not "members" of the entity in an official sense):

> While a corporation's failure to comply with state and internal rules for identification of its members might be relevant to the issue of whom the corporation represents, we do not believe this defect should overshadow the considerable activities of FOE with and for those persons its officers and staff have consistently considered to be members.

Friends of the Earth v. Chevron Chem. Co., 129 F.3d 826, 828 (5th Cir. 1997). The court continued that "an organization's form under state law does not affect its federal standing." *Id*., citing *Sierra Association for Environment v. FERC*, 744 F.2d 661 (9th Cir.1984) (suspended California corporation had standing: "because this action arises under federal law, SAFE had capacity to sue as an unincorporated association, and any incapacity under California law is accordingly irrelevant."). *FOE* concluded,

> the policy underlying the decision in *Hunt*, as well as the decisions in other circuits, supports holding that the "indicia of membership" test is the correct one to apply to determine whether a purported corporation, despite the failure to meet state law requirements, has "members" whose interests it can represent in federal court. As the Third Circuit said in a recent case involving FOE, "we do not accept this formalistic argument because it lacks merit. To meet the requirements of organizational standing, PIRG and FOE need only prove that their members possess the 'indicia of membership' in their organizations."

FOE at 829, citing *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 119 (3d Cir. 1997). Other circuits have concurred with *FOE*'s express analysis and holding. *See, e.g., Friends of the Earth v. Gaston Copper Recycling Corp.*, 9 F. Supp. 2d 589, 599 (D.S.C. 1998), *standing issue affirmed*, 204 F.3d 149 (4th Cir. 2000).

The Tenth Circuit is in accord. It has held that being able to identify just one member is sufficient to confer associational standing, *John Roe #2 v. Ogden*, 253 F.3d 1225, 1230 (10th Cir. 2001), and in a case where an entity purported to represented the interests of tens of thousands of Colorado voters, accepted general affidavits of harm from just eleven voters to establish an entity's associational standing. *Citizen Ctr. v. Gessler*, 770 F.3d 900, 909-10 (10th Cir. 2014). This approach reflects the general refusal, described *supra*, of *Hunt* and other courts to impose strict membership requirements. It also reflects the practical doctrine of assessing membership on a pragmatic, de facto basis rather than a strict de jure one. *Voting* at 65-68. *See, e.g. Free Speech Coalition, Inc. v. Shurtleff*, 2007 U.S. Dist. LEXIS 21556 (D. Utah March 23, 2007)(extending associational standing to a trade association).

The Supreme Court of Utah aptly described the membership requirement as "pragmatic" when adopting into Utah law the first two prongs of the *Hunt* test:

> [Federal] courts have developed useful principles relating to the standing of an association to bring an action on behalf of its members. [They] have granted standing to associations where two criteria are met: (i) the individual members of the association have standing to sue; and (ii) "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause . . . ." *Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). This test is a pragmatic one. Where, as a practical matter, the rights asserted and the remedies sought do not require direct participation by affected individuals who would have standing, there is no reason not to permit associations to press claims common to their members. This approach to associational standing has the advantage of permitting the prosecution of legitimate claims by an entity with the capacity to spread the costs of litigation among its members and to assume the burdens incident to it, rather than requiring a single litigant to carry the entire load. To deny an association standing under such circumstances just might deter the assertion of valid claims without serving any countervailing public purpose. We decline to take such a sterile approach to standing and adopt the test above stated for determining an association's standing to sue."

Utah Rest. Ass'n v. Davis Cty. Bd. of Health, 709 P.2d 1159, 1162-63 (Utah 1985), cited by *Soc'y of Prof'l Journalists v. Briggs*, 675 F. Supp. 1308 (D. Utah 1987)(only one member of an entity need show standing to confer associational standing on the entity).

In light of this precedent, the rigid and stark view of associational standing advocated by Defendants is inaccurate. The District of Columbia (not the DC Circuit, but the DC *city* appellate court) cases cited by Defendants have been, as demonstrated above, rejected by multiple circuits, including, most important, the Tenth Circuit. Defendants pay passing lip service to the fact that the Tenth Circuit acknowledges *Hunt* as binding precedent (an obvious

premise), but, troublingly, fail to acknowledge that it and other circuits wildly diverge from the approach taken by the District precedent the Defendants cite.[1]

3. UNP has Associational Standing Because its Constituents Possess Sufficient Indicia of Membership.

Applying the correct precedent to the facts of this case, associational standing clearly exists. The directors of UNP have clearly and unequivocally stated their cognizable claims against Defendants. Those claims are being made associationally. The directors (all five of them) meet the minimum threshold membership requirements repeatedly articulated by the Tenth Circuit and the Utah District Court, which have found associational standing predicated on the presence of one member. The vague definition of "member" clearly would allow directors, who have a stake both in the goings-on of the entity and of its litigation goals, to possess indicia of membership. *Hunt* and *Citizen Center* both endorse such a result with their pragmatic and functional approach. *See generally Voting* 75-81. A bare-bones application of the *Hunt* elements to the directors establishes associational standing: they have helped finance UNP through fundraising and other efforts, they are eligible to serve on the governing board, and may

[1] Both cases the Defendants cite, *Am. Forest & Paper Ass'n v. E.P.A.*, 154 F.3d 1155, 1158-59 (10th Cir. 1998) and *Natural Arch & Bridge Society v. Alston*, 209 F. Supp. 2d 1207, 1219 (D. Utah 2002), are distinguishable, as in both cases the courts determined that the members lacked standing to sue in their individual capacities. As shown *infra*, that is not the case here. Because there was no individual standing, the cases do not treat in detail the issue squarely before this Court, that is, the nature and definition of "membership." The membership question was irrelevant.

vote for the board. At least one scholar states that it would be "hard" for a court to deny standing in the presence of such a board. *Voting* at 84.[2]

Moreover, and even without considering the directors' role, under the de facto membership test articulated in *FOE* and other cases cited *supra*, an association's bringing to bear important interests on behalf of citizens who would otherwise have standing in their own right is sufficient to confer associational standing. This is true even without traditional membership status (de jure membership) being conferred. The volunteers and other citizens who are aligned with UNP have compelling interests in the preservation of the Tribune, as alleged in the complaint and articulated in their previous defense to the Defendants' Motion to Dismiss. It is precisely such interests that an association can efficiently protect in the litigation process, protection recognized by the courts above.

4. Lack of Associational Standing Should Not Affect the Forward Progress of this Action, as in its Absence the Directors May Proceed in Their Own Right Through Amendment.

Perhaps most important, and most ironic, is the pure pointlessness of Defendants' motion. If associational standing fails, yet those asserting associational standing retain standing in their

[2] In footnote 4 of their Memorandum, Defendants preemptively strike against the argument that the directors should be permitted membership status for purposes of a *Hunt* analysis. The argument relies entirely on the stern DC District precedent repudiated by the Tenth Circuit and at least three other circuits in favor of a functional approach. Defendants' protest that such an approach eviscerates *Hunt* proves too much: it indicts the very precedent binding on this Court. For example, one could easily supplant the one-member sufficiency articulated in *John Roe #2 v. Ogden*, 253 F.3d 1225 (10th Cir. 2001) as undermining *Hunt*, were one to (incorrectly) interpret *Hunt* as strict rather than functional. The same is true for virtually every other case cited in this Memorandum.

own right, those individuals are free to proceed. Every individual director of UNP has the right to sue in their individual capacity. Leave to amend to allow addition of those individuals (or others similarly situated) in the absence of UNP's standing should be permitted.

> Generally, dismissal with leave to amend is warranted "if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief[.]" *Brever v. Rockwell Intern. Corp*., 40 F.3d 1119, 1131 (10th Cir. 1994) (*quoting* 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1483 at 587 (2d ed. 1990)). If Plaintiffs can allege facts as to OWAA's members' participation, control and funding, they may also be able to allege facts as to the identity of its members and whether they have standing to sue in their own right. Therefore, leave to amend will be granted.

Walker v. Apex Wind Constr., LLC, 2015 U.S. Dist. LEXIS 8460 (D. Okla. Jan. 26, 2015).

Accordingly, if this Court determines that there is no associational standing, it should allow plaintiff leave to amend to add the directors as plaintiffs. The Declaration of Joan O'Brien, filed herewith, clearly demonstrates the ability of the directors to continue in their individual capacities as plaintiffs. The Declaration also demonstrates the likelihood of hundreds or thousands of other Tribune subscribers who could assert such standing. Additionally, revising the corporate documents to allow for membership for these members of the public would be a simple affair. Thus, amending at this juncture would clearly be appropriate and should be permitted, if needed.[3]

[3] Defendants argue that the amendment deadline has passed, presumably to point out UNP's tardiness. Despite this invocation of the pretrial order's amendment deadline, the Defendants' steadfast refusal to participate in discovery has resulted in virtually no discovery occurring up to this point. Defendants cannot now invoke a deadline they have made meaningless through their own delay, especially not as a sword to deprive the UNP a substantive response to the standing argument.

The applicable law overwhelmingly augers in favor of associational standing. Even if it does not, the lack of associational standing will in no way impede the progress of cognizable claims against Defendants. Defendants' motion for a stay is thus illusory. No matter the consequence of the threatened motion for summary judgment, the information being sought in discovery, and which Defendants has refused to produce, will still be required in order to allow justiciable claims to proceed. The motion for stay should thus be seen for what it is: a delay tactic. As such, it violates the very discovery rules that it seeks to stay. The Court should not sanction such tactics and should, accordingly, deny the motion for stay.

DATED this 28th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2016, a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION FOR STAY OF DISCOVERY** was delivered via the court's electronic filing system to the following:

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