Karra J. Porter, 5223
Karra.Porter@chrisjen.com
David C. Richards, 6023
David.Richards@chrisjen.com
Phillip E. Lowry, 6603
Phil.Lowry@chrisjen.com
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Telephone: (801) 323-5000
Facsimile: (801) 355-3472
Attorneys for Plaintiffs

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 MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM** Civil No. _____ Judge _____

Plaintiff Utah Newspaper Project, dba Citizens For Two Voices, hereby submits its Motion for Preliminary Injunction and Supporting Memorandum.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

LIST OF EXHIBITS

Exhibit A 1952 JOA

Exhibit B 1983 JOA

Exhibit C 2006 JOA

Exhibit D 2013 JOA

Exhibit E G. Donald Gale Declaration

Exhibit F Curtis Bramble Declaration

Exhibit G Joan O'Brien Declaration

Exhibit H Nancy Conway Declaration

Exhibit I Jeffrey Miller Declaration

Exhibit J USA v. Daily Gazette – Memo of USA in Opposition to Motion to Dismiss

Exhibit K Amicus Brief of USA in Support of Hawaii v. Gannett Pacific Corp.

INTRODUCTION

For more than 140 years, *The Salt Lake Tribune* has played a unique role in a unique state. It has provided a voice for non-Mormon and Mormon residents alike, and been a thorn in the side of local governments, politicians and other powerful entities. It is currently the Salt Lake Valley's only secular daily newspaper and the state's largest newsgathering operation. The *Tribune* impacts the daily lives of residents throughout northern Utah, whether or not they subscribe to the newspaper, thanks to its contributions to its marketplace of ideas.

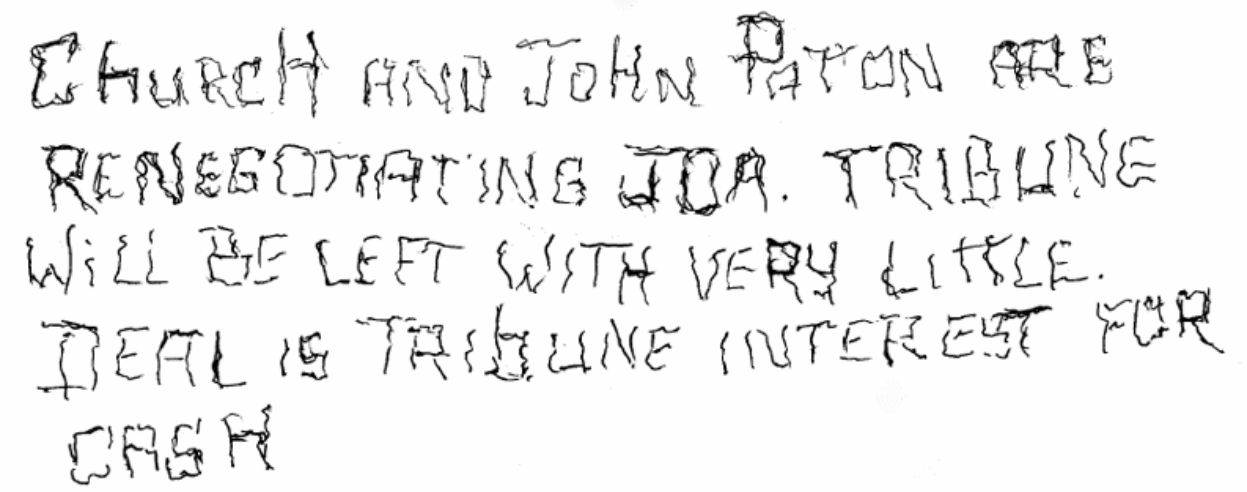
At the time of its formation in 1871, the *Tribune* touted itself as an "independent" voice, *i.e.*, independent of the Church of Jesus Christ of Latter-day Saints, which owned the competing daily newspaper, the *Deseret News. See The First 100 Years: A History of The Salt Lake Tribune 1871-1971*, O. N. Malmquist (Utah State Historical Society, 1971). For more than a century, the *News* and *Tribune* have competed for readers in the Salt Lake Valley. The rivalry, while occasionally contentious, has served the community well.

Utahns understand the need for this balance – for two voices. Even those who are loyal to the competing *News* and its owner, or who have been on the receiving end of *Tribune* barbs or Pat Bagley caricatures, understand it. So do businesses looking to locate here, and advertisers, and the individuals who formed Citizens for Two Voices. *See* Exh. E, Don Gale decl., ¶¶ 9-13; Exh. F, Sen. Curtis Bramble decl., ¶¶ 24-32; Exh. G, Joan O'Brien decl., ¶¶ 4-8.

Unfortunately, *the Tribune* and the *News* recently came under the control of persons who do not understand this balance. In 2010, a former Brigham Young University-Idaho academic, Mr. Clark Gilbert, was hired by Deseret News Publishing Company to run the *News*. In 2011, the *Tribune* was purchased by a hedge fund in New York. Being in the business to make money

and not to publish newspapers, the fund did what hedge funds do: It (according to Mr. Gilbert) approached the *News* with an offer. As discussed below, the terms of that negotiation were lucrative to the fund – including a one-time cash payment by the *News*'s owner which reportedly exceeded $15 million – but the deal threatens the continued existence of one of the Valley's diverse voices, the *Tribune*.

Antitrust laws were enacted to prevent this very thing, one competitor essentially paying another not to compete. It is one of the few areas of law in which outsiders can – are *encouraged* to – scrutinize the terms of an otherwise private deal. In October 2013, Citizens for Two Voices learned about this new deal – in true journalistic style, from an anonymous tipster:



("Church and John Paton [representative of Alden Global Capital] are renegotiating JOA. Tribune will be left with very little. Deal is Tribune interest for cash.") Exh. G, O'Brien decl., ¶ 7.[1]

After receiving the note, a *Tribune* reporter was able to obtain a copy of the October 2013 JOA from the Department of Justice's files. On October 28, 2013, Joan O'Brien with plaintiff

[1] "JOA" refers to a Joint Operating Agreement between the two owners.

Utah Newspaper Project and 29 other former journalists and readers of the *Tribune* wrote to the Antitrust Division of the Department of Justice, asking the DOJ to commence a formal investigation into the October 2013 JOA. The letter was highly publicized. *Id.*, ¶¶ 7-8.

In April 2014, the DOJ confirmed that it had commenced an investigation of the deal. But DOJ processes necessarily are not immediate: The Division must complete its investigation before it can decide to file (or not to file) an antitrust suit. As discussed below, there is no "vetting" or "preapproval" process by which the DOJ can short-circuit this process with respect to newspaper JOAs (unless this Court concludes that the October 2013 JOA is really a "new" JOA, *see* pp. 17-19, *infra*).

Meanwhile, presumably aware of media coverage of both the request for an investigation and confirmation of the investigation, defendants elected to move ahead under the new JOA. Specific revenue information is not available – even after extensive recent publicity surrounding the *Tribune*'s fate, neither defendant has sought to assuage concerns by releasing the figures – but the *Tribune* is hemorrhaging: In conjunction with the new JOA, the *Tribune*'s owner has directed the layoff of nearly 30 percent of its staff (so far). The newspaper and its coverage have noticeably contracted, with multiple offerings eliminated, including its award-winning Faith Section. The new deal, which cuts the newspaper's revenues nearly in half, "fails to provide sufficient revenue to the *Tribune* to allow for the *Tribune*'s continued existence." (*See* SOF ¶¶ 14-16, *infra*.)

Prospective buyers are out there, but they are waiting to see what happens. *See, e.g.*, "Huntsman: Buy The Tribune? Maybe, but any sale is on hold", *The Salt Lake Tribune*, June 7, 2014 (Jon Huntsman, Sr., confirming interest in buying the *Tribune* but awaiting results of DOJ

investigation). No rational buyer would purchase a newspaper whose owner has, for a one-time cash payment, agreed to such crippling terms.

Citizens for Two Voices contends that these and other JOA provisions are *per se* illegal under federal antitrust laws, and that it is likely to prevail on the merits. If the Court agrees, or if the DOJ similarly concludes, the destructive terms may be nullified, but it will be too late. The plaintiff will be entitled to equitable relief, but there will be no effective relief available. The DOJ will have concluded its investigation, but that investigation will be moot if the *Tribune* is in the downward spiral, a "failing" paper, by then. *See* pp. 4-7, *infra*.

The end of the fiscal year is approaching (June 30) and if, as all evidence suggests, the *Tribune* is bleeding out, more layoffs are likely, more reductions in newsgathering and reporting, are imminent. Citizens for Two Voices recognizes that a preliminary injunction is an extraordinary remedy, not lightly granted. But the loss of a daily newspaper, and particularly the Salt Lake Valley's only secular daily, would result in irreparable and immeasurable harm. *See* pp. 4-7, *infra*.

STATEMENT OF FACTS

The facts relevant to these proceedings are set forth in the Complaint in this action, and will be briefly summarized here.

1. Plaintiff Utah Newspaper Project, LLC, dba Citizens for Two Voices, is a Utah non-profit organization concerned about the perpetuation of independent voices in daily newspapers in the Salt Lake Valley. The organization's members include consumers of daily news in the Salt Lake Valley, including subscribers to and readers of *The Salt Lake Tribune*. Participants in Citizens for Two Voices, and the Utah Newspaper Project itself, are also

advertisers in the *Tribune* and advertisers (or attempted advertisers) in the *News*. Complaint, ¶ 19.

2. Defendant Deseret News Publishing Company is a Utah corporation that owns and publishes the *Deseret News*, a daily newspaper. Its principal place of business is Salt Lake City, Utah.

3. Defendant Kearns-Tribune LLC is a Delaware limited liability company that owns and publishes *The Salt Lake Tribune*, a daily newspaper. Its principal place of business is Salt Lake City, Utah.

4. The relevant markets for purposes of this case are the publication and sale of local daily newspapers, and the sale of advertising space in local daily newspapers, in the Salt Lake Valley. The sale of local daily newspapers and the sale of advertising in local daily newspapers are relevant product markets because, *inter alia*, they provide a unique aggregation of features for which reasonable substitutes are not readily available. Complaint, ¶¶ 41-49.

5. The relevant markets are characterized by high concentration and high barriers to entry. Complaint, ¶¶ 41-55.

6. In 1952, the then-owners of the *Deseret News* and *The Salt Lake Tribune* entered into a Joint Operating Agreement ("JOA") that, among other things, combined the two newspapers' printing, advertising, subscription sales, and distribution functions under a single management agency (referred to in the JOA as "Newspaper Agency Company" or "NAC").

7. Both the October 2013 JOA and the original 1952 JOA contain various provisions that, in the absence of an exemption or immunity, constitute *per se* violations of antitrust law. Those provisions include the pooling of profits, fixing of prices for advertising and subscriptions,

and market allocation. *See, e.g.,* Exh. A (1952 JOA), § 4 (market allocation/restriction), § 13 (profit pooling), and Exh. B (2013 JOA), ¶¶ 4 (profit pooling), 5 (market allocation/restriction), 6.04 (fixing of advertising and subscription prices).

8. In 1970, Congress enacted the Newspaper Preservation Act, 15 U.S.C. § 1801, *et seq.*, which conferred limited antitrust immunity upon then-existing joint operating agreements so long as they met certain statutory requirements. To receive that immunity, Congress required, *inter alia,* that:

a) 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;

b) there must be "no merger, combination, or amalgamation of editorial or reportorial staffs"; and

c) "editorial policies" must be "independently determined."

See 15 U.S.C. §§ 1802(2) and 1803(a).

9. The *News-Tribune* JOA was amended at various times subsequent to 1952. Because the original JOA was executed prior to the enactment of the NPA in 1970, there is no statutory mechanism for prior review of or consent to "amendments" thereto. *See* 18 U.S.C. § 1803(a). Instead, joint operating agreements that are identified by their participants as "amendments" to a pre-1970 JOA are filed with the Department of Justice, but are not screened or otherwise subject to pre-approval by the DOJ. *Id.*

10. By contrast, new joint operating agreements entered into after 1970 confer no immunity unless and until they have been approved by the Department of Justice. *See* 15 U.S.C. § 1803(b). Such approval requires, *inter alia*, a determination by the DOJ that "not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of [the Newspaper Preservation Act]." *Id.*

11. On October 18, 2013, Mr. Clark Gilbert, on behalf of Deseret News Publishing Company, Ms. Barbara J. Bennett on behalf of Kearns-Tribune, LLC, and Mr. Brent Low on behalf of Newspaper Agency Company, LLC ("NAC"), executed a document titled "2013 Amendment and Restatement of Agreement," hereinafter "October 2013 JOA". *See* Exh. B. The effective date of the October 2013 JOA was January 1, 2014. *Id.*

12. The October 2013 JOA states that it is to remain in effect through December 31, 2020, after which it will automatically renew every five years unless previously terminated in accordance with its provisions. Exh. B, § 11.

13. As part of the transaction, in exchange for an undisclosed cash payment (upon information and belief in excess of $15 million), Deseret News Publishing Company acquired various assets of Kearns-Tribune LLC, including the latter's interest in certain printing equipment and facilities, approximately 48 percent of Kearns-Tribune's interest in NAC/MediaOne, and the same percentage of Kearns-Tribune's right to payment of revenues

under the JOA. *See* Exh. B, §§ 4, 7.[2] Among other things, the October 2013 JOA cut the *Tribune*'s share of revenues nearly in half.[3] It also gave the Deseret News control of NAC. *Id*.

14. The terms of the October 2013 JOA more than handicap *The Salt Lake Tribune*. The October 2013 JOA fails to provide sufficient revenue to the *Tribune* to allow for the *Tribune*'s continued existence. It almost certainly lays the way to the newspaper's demise, because the JOA will not yield sufficient revenue for the *Tribune* to cover costs. Exh. H, Conway decl., ¶¶ 3-4.

15. The October 2013 JOA is materially different from the pre-1970 (1952) JOA. Examples of material differences between the 1952 and 2013 JOAs include:

	1952 JOA (Exh. A)	**2013 JOA** (Exh. B)
a.	*News*'s owner has veto power over ownership of the *Tribune*. *Passim.*	*News* owner has Veto power over owner of *Tribune* (Kearns-Tribune, LLC), and over purchaser of minority interest if purchaser is permitted to participate in management: "[T]he present ownership of K-T, LLC (ie., one hundred percent owned by MediaNews Group, Inc.) shall not be changed without written consent of DNPC, which shall not be unreasonably withheld; provided, however, that DNPC shall have the unrestricted discretionary right to withhold its consent if any sale, transfer or conveyance in one or more transactions would result in more than 49% of the ownership of K-T, LLC

[2] Not all of the terms associated with the October 2013 JOA are publicly available. For example, several leases referenced in the October 2013 JOA and the terms of the cash payment were not filed with the Department of Justice.

[3] Reducing a 58-42 split to a 30-70 split is a reduction of approximately 48 percent.

	1952 JOA (Exh. A)	**2013 JOA** (Exh. B)
		being held by any entity or entities other than MNG or if any such owner or owners of a minority interest in K-T, LLC, individually or collectively, would have the right to manage or participate in management of K-T, LLC or compel it to take or forbear any action with respect to this Agreement or the management of the NAC." (§10; also § 21 ("neither this Agreement nor any of the rights or obligations of either party thereto shall be assignable or delegable by either party without the written consent of the other"))
b.	NAC management board comprised of three members, two appointed by the *News*, two appointed by the *Tribune*, and one appointed by mutual agreement or by the American Newspaper Publishers Association. § 2.[4]	NAC board comprised of five members, three appointed by the *News* and two by the *Tribune*. § 2.02.
c.	NAC revenues allocated roughly proportional to the newspapers' circulation, 58% to the *Tribune*, 42% to the *News* since 1983.[5]	Revenues allocated 30 percent to the *Tribune* and 70 percent to the *News*.

[4] In later versions, this fifth member would be appointed only when needed to resolve deadlocks; if the participants could not agree upon the identity of the tiebreaking member, he or she would be appointed by the ANPA. E.g., Exh. C (1983 JOA), § 2 pp. 4-5; Exh. D (2006 JOA) § 2.02 second paragraph.

[5] Prior to a 1983 Amendment to the JOA, the allocation of revenues between the *Tribune* and the *News* varied in five-year increments, 50%-50% from 1952-1957, 60-40 (1958-1962), 55-45 (1963-1967), and 50/50 (1968-1983). Exh. A, ¶ 13. The "Designated Market" and "Retail Trading Zone" circulation of the *Tribune* is 91,399 on Sunday and 67,135 on weekdays, accounting for 61 percent of the two newspapers' northern Utah readers, according to the Alliance for Audited Media.

	1952 JOA (Exh. A)	**2013 JOA** (Exh. B)
d.	No reference or authority of NAC management committee to terminate publication of either newspaper. *Passim.*	New section added authorizing "suspending or ceasing to publish *The Salt Lake Tribune*". § 2.02 fifth paragraph.[6]
e.	No provision for Chair and Vice Chair of NAC management committee. *Passim*.[7]	Chair and Vice Chair to be appointed by the *News*. § 2.02. No provision to resolve deadlocks (presumably because it is no longer a four-person committee). *Passim*.
f.	No NAC meeting can take place without a representative of both newspapers present. § 2 and *passim*.[8]	*News* can unilaterally hold NAC meetings if *Tribune* representatives are unavailable for a scheduled meeting or five days thereafter. § There are no circumstances in which a meeting can be held in the absence of a *News* representative. *Passim*.
g.	President of NAC jointly appointed. § 7 second para.[9]	President of NAC appointed by majority of Committee. § 2.04.

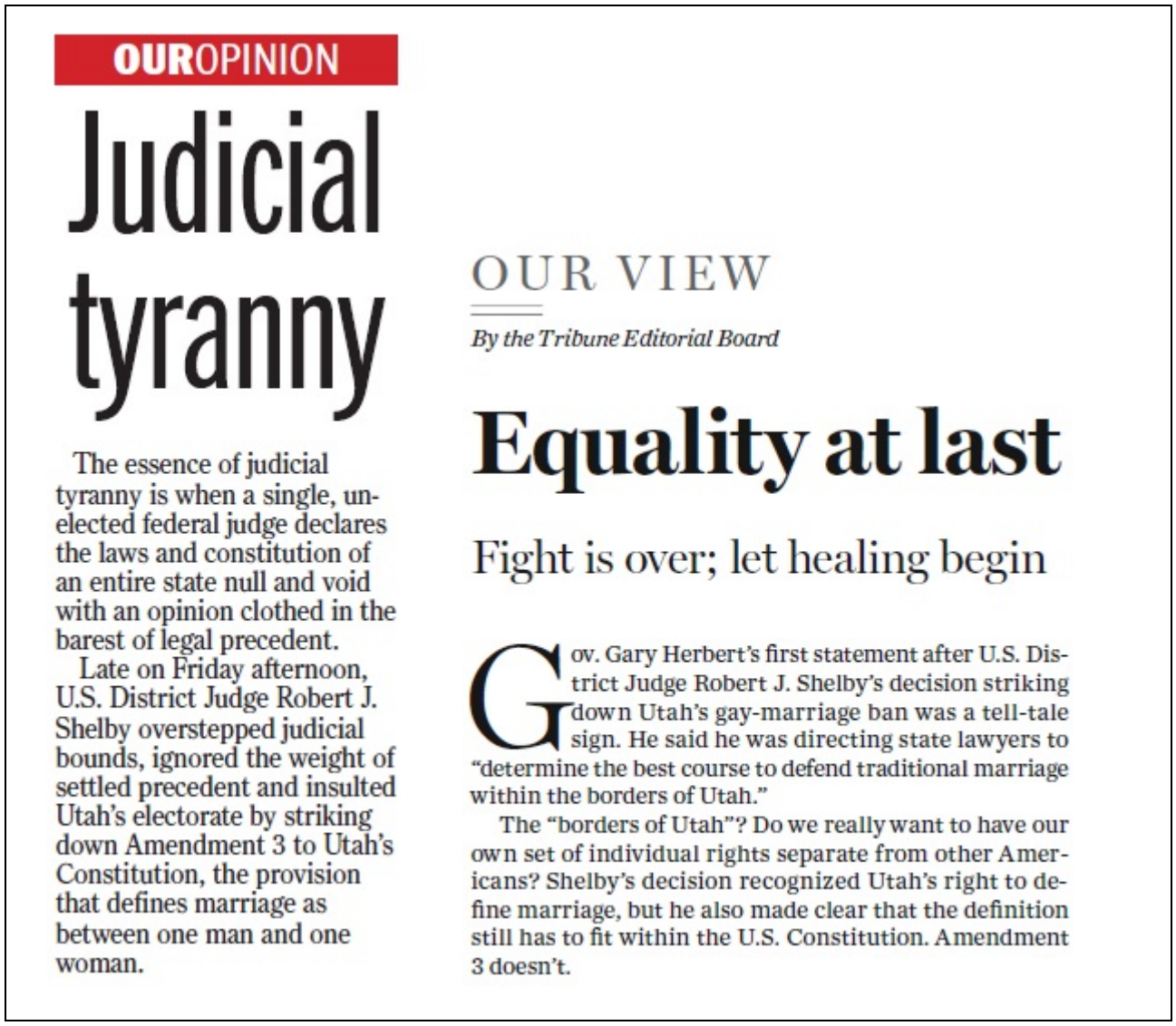
[6] This stated authority of NAC under the October 2013 JOA to stop publishing the *Tribune* is the first such reference in any version of the joint operating agreement.

[7] Per 2006 amendments, former MediaNews Group, LLC principal Dean Singleton was to serve as Chair as long as he was able and willing. Afterward, appointment of the Chair was to alternate every four years, beginning with an appointment by the *News*. Vice Chair would be appointed by the other party. Exh. C, § 2.03. Deadlocks were to be resolved by the President of NAC (recommended by the *Tribune* but subject to two unconditional vetoes by the *News*), or, if the deadlock involved a designated "reserved matter," by arbitration. Exh. C p. 6, § 2.02 second paragraph, and § 26.

[8] In the 1952 JOA, the committee was comprised of five members, one of whom was mutually selected or selected by the American Newspaper Publishing Association. Exh. A § 2. Under that JOA, a meeting could have occurred with two members appointed by the *Tribune* and the independent member. In 1983, the fifth member was eliminated (except as needed to resolve deadlocks), and in 2001 on, there were no provisions for a fifth member. Consequently, from 1983 on, no quorum could exist without either the presence of the independent appointee or a *News* appointee.

[9] As noted above, in the 2006 JOA, Kearns-Tribune, LLC could appoint the President, but only if Deseret News Publishing Company had rejected its first two recommendations for the position.

16. The October 2013 JOA contains provisions that, expressly or by effect, intrude upon the editorial independence of the *Tribune*. For example, § 10 (along with §§ 2.01 and 21) expressly give Deseret News Publishing Company a veto power over ownership and management of the *Tribune*'s owner. *See* ¶ 13(a), *supra*. The identity of a newspaper's owner is directly related and integral to, and to a significant degree controlling of, a newspaper's editorial policies and priorities. This control relates to both newsgathering and the expression of opinions. As examples, the *Deseret News* has stated that "[i]ts mission is to be a leading news brand for faith and family oriented audiences," consistent with the viewpoint of its (ultimate) owner, the LDS Church. *See* Exh. G, O'Brien decl., ¶ 9. In 2004, *The Salt Lake Tribune*'s owner directed the newspaper to endorse George W. Bush for president, overruling the stated preference of the *Tribune*'s editorial board. *Id.*, ¶ 10. One recent illustration of this reality is these competing headlines after the December 2013 ruling by a Utah federal court judge that Utah's Amendment 3 is unconstitutional:



OUROPINION

Judicial tyranny

The essence of judicial tyranny is when a single, unelected federal judge declares the laws and constitution of an entire state null and void with an opinion clothed in the barest of legal precedent.

Late on Friday afternoon, U.S. District Judge Robert J. Shelby overstepped judicial bounds, ignored the weight of settled precedent and insulted Utah's electorate by striking down Amendment 3 to Utah's Constitution, the provision that defines marriage as between one man and one woman.

OUR VIEW

By the Tribune Editorial Board

Equality at last

Fight is over; let healing begin

Gov. Gary Herbert's first statement after U.S. District Judge Robert J. Shelby's decision striking down Utah's gay-marriage ban was a tell-tale sign. He said he was directing state lawyers to "determine the best course to defend traditional marriage within the borders of Utah."

The "borders of Utah"? Do we really want to have our own set of individual rights separate from other Americans? Shelby's decision recognized Utah's right to define marriage, but he also made clear that the definition still has to fit within the U.S. Constitution. Amendment 3 doesn't.

(left, Deseret News, December 21, 2013; right, The Salt Lake Tribune, December 21, 2013)

c) The October 2013 JOA division of revenues denies the *Tribune* revenues sufficient to finance its essential editorial and news gathering functions. Exh. H, Conway decl. ¶ 4.

ARGUMENT

Introduction

In the Tenth Circuit, a party seeking a preliminary injunction must show the following four factors:

> (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.

Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001).

The showing required to demonstrate a likelihood of success varies depending upon the other three factors. In general, to demonstrate a substantial likelihood of success on the merits of a claim, the movant is required "to present a prima facie case showing a reasonable probability that it will ultimately be entitled to the relief sought." *Salt Lake Tribune Publ. Co. v. AT&T Corp.*, 320 F.3d 1081, 1100 (10th Cir. 2003), *citing Autoskill v. Nat'l Educ. Support Sys.*, 994 F.2d 1476, 1487 (10th Cir. 1993), and *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781 (10th Cir. 1964).

However, if the other three elements – generally referred to as the "balance of harms" elements – tip decidedly in the movant's favor, then the success element is relaxed; the movant need only show "that questions going to the merits are so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999); *Davis v. Mineta*, 302 F.3d 1104, 1116-17 (10th Cir. 2002) (under "sliding scale" test,

"[i]f plaintiffs have made a 'strong showing' on the last three factors, the showing on the merits of their claim could be relaxed."); *Okla. ex rel. Oklahoma Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006); *see also Reilly v. Medianews Group, Inc.*, 2006 U.S. Dist. LEXIS 61696, *30 (N.D.C. 2006) (in a newspaper antitrust case, "a plaintiff may establish 'either a combination of probable success on the merits and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in its favor.'").

Because the "balance of harms" elements determine the standard by which the "likelihood of success" element is viewed, it is logical to consider those three elements first. *See Utahns for Better Transportation v. United States Department of Transportation*, 2001 WL 1739458 *1 (10th Cir. 2001) (because of sliding scale standard, "[w]e therefore begin our analysis by examining the 'balance of harms' factors").

Relevant standards

The Tenth Circuit has stated that a preliminary injunction is an extraordinary remedy, to be granted only when entitlement thereto is clear and unequivocal. Application of that principle, however, particularly under antitrust laws, is informed by two other considerations, 1) the First Amendment to the United States Constitution, and 2) Congressional intent.

In *Associated Press v. United States*, 326 U.S. 1, 89 L.Ed. 2013, 65 S.Ct. 1416 (1945), the Supreme Court observed that the First Amendment provides "powerful reasons" for application of antitrust laws to newspaper organizations. "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to

the contrary," the court wrote. "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Id.* at 20. Those same considerations exist in this case, where one of those "diverse and antagonistic sources" is at stake.

The determination of injunctive relief must also take into consideration the express intent of Congress. Congress has identified both the enforcement of antitrust laws and the preservation of independent newspapers as important public interests. *See Hawaii v. Gannett Pac. Corp.*, 99 F.Supp.2d 1241, 1253 (D. Hawaii 1999) ("The Court recognizes that Congress enacted Section 16 of the Clayton Act to encourage the grant of injunctive relief in order to prevent the threat of irreparable injury," *citing* 15 U.S.C. § 26); and 15 U.S.C. § 1801 (statement of congressional policy in Newspaper Preservation Act: "In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter."). A court has greater power to fashion equitable relief in defense of the public interest than it has when only private interests are involved. *Virginian Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937).

The public purpose that is supposed to be served by the Newspaper Preservation Act, with reference specifically to the JOA in Salt Lake City, was stated during debate by Senator [Wallace F.] Bennett:

> If the pending bill passes, it will be assurance to the people of Salt Lake City . . . of the continuation of our two daily newspapers, the Salt Lake Tribune and the Deseret News, both excellent newspapers. They compete effectively in news and editorial opinion. It will, therefore, provide the readers with the needed difference of opinion, difference of information, and difference of point of view which is necessary to maintain a choice.
>
> It is this competition in ideas, so precious to this democracy, which will be preserved by the enactment of the pending bill.

116 Cong. Rec. S1787 (daily ed. Jan. 29, 1970) (remarks of Sen. Bennett).

All of these considerations should be taken into account in weighing plaintiff's request for preliminary relief.

I. THE BALANCING OF HARMS FACTORS WEIGH DECIDEDLY IN FAVOR OF CITIZENS FOR TWO VOICES.

A. Citizens for Two Voices will suffer irreparable harm if the preliminary injunction is denied.

Citizens for Two Voices is a consumer of local news in the Salt Lake Valley. It is also an advertiser, and potential advertiser, in both newspapers (to the extent the *News* will allow it). The loss of a newspaper, or threatened loss, constitutes irreparable harm to both consumers and advertisers. As one court wrote:

> Once closed, the Star-Bulletin is unlikely to be reopened because it will have lost its subscriber and advertiser base. The Court finds that no monetary amount will be able to compensate for the loss of the Star-Bulletin's editorial and reportorial voice, the elimination of a significant forum for the airing of ideas and thoughts,

> the elimination of an important source of democratic expression, and the removal of a significant facet by which news is disseminated in the community.

Gannett Pac. Corp., 99 F. Supp. 2d at 1253-54.

The Salt Lake Tribune is Utah's "most important news organization for reporting on civil rights and governmental conduct." Exh. E, Don Gale decl., ¶ 11. The importance to consumers of having a newspaper that undertakes this responsibility cannot be overstated. "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 250, 94 S.Ct. 2831, 2835, 41 L. Ed. 2d 730 (1974), quoting B. Bagdikian, *The Information Machines* 127 (1971); *see also Reilly v. Hearst Corp.*, 107 F.Supp.2d 1192, 1195 (N.D. Calif. 2000) (allegation that transaction would result in "ultimate annihilation" of an otherwise economically viable newspaper "would appear to state a cognizable injury to plaintiff as a consumer of newspaper news, features and opinion and to competition in that market"). Here, as in *Gannett*, "[i]f these actions are not enjoined now, and [Citizens for Two Voices] later prevails, any relief that this Court could afford would be inadequate because [the *Tribune*] would no longer be a viable newspaper." *Id.* at 1254.

To obtain a preliminary injunction, the plaintiff is not required to prove that the harm has already occurred or is occurring, but only that it is "threatened," that "the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26. That standard is met here. Citizens for Two

Voices is not privy to exact revenue figures, and the exact extent of the harm that has been inflicted upon the *Tribune* in conjunction with the new JOA. However, the new JOA "fails to provide sufficient revenue to the Tribune to allow for the Tribune's continued existence." (Exh. H, Conway decl., ¶ 4.) Nearly 30 percent of the Tribune's staff has been laid off. Exh. G, O'Brien decl., ¶¶ 5.[10] The *Tribune* has shrunk dramatically, eliminating a number of longstanding sections and features, and the amount and scope of news coverage has been reduced. *Id.* Employment cuts have so depleted the ranks of the paper's opinion section that in April 2014, for the first time, the *Tribune*'s Monday editorial page did not have a staff-written editorial. *Id.* The *Tribune* does not have a single reporter or editor assigned to cover business in Utah. *Id.* Readers are literally getting less from their newspaper now, as the overall size of the paper has been reduced, and the percentage of paid (advertising) space versus editorial content has increased. *Id.*

There is nothing in the October 2013 JOA designed to stanch this flow (indeed, the JOA expressly instructs the NAC to favor the *News* in its future promotions. Exh. B, § 9). Moreover, this appears to be the very outcome contemplated by the participants – it is not accidental that the owners expressly added a new provision to the October 2013 JOA giving the NAC – for the first time – authority to stop publishing the *Tribune*. SOF ¶ 15.

[10] As noted in the Complaint, ¶ 36, the first round of layoffs was directed shortly before, and in anticipation of, execution of the new JOA. *Id.*

B. The threatened injury to Citizens for Two Voices vastly outweighs the potential injury to the Defendants.

There may be inconvenience, but will be no significant injury, to the defendants if the injunction is granted and then later dissolved. First, any risk is purely monetary. As the *Gannett* court observed, the risk of a newspaper's demise outweighs monetary risks of cost of continued publication of a newspaper even if the defendant is incurring operating losses. *Gannett Pac. Corp.*, 99 F. Supp. at 1254.[11]

If the parties are ordered to restore, or resume, their pre-dispute positions (*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. That same adjustment could be made again if the injunction were later terminated. The October 2013 JOA itself provides a mechanism for handling underpayments or failure to pay a share of working capital, for example: Such underpayment is deemed an interest-bearing advance, "which advance shall be repaid in full before the party failing to provide its required share of working capital shall be entitled to receive further distribution of profits of the NAC pursuant to Section 4 [of the JOA]." *See* Exh. B § 6.06. There is thus no real risk of financial loss to either defendant, but mere accounting inconvenience.

Moreover, any risk would largely be "self-inflicted." Knowing that antitrust scrutiny had been requested before the effective date of the October 2013 JOA, and that the Department of Justice has confirmed an antitrust investigation, the defendants have chosen simply to move

[11] Presumably, the defendants will not complain that they are suffering injury from being forced to continue publishing the *Tribune*, as they deny any intent to stop publishing it.

ahead. Self-inflicted or knowingly assumed risk weighs against a defendant's claim of harm. *See Utahns for Better Transportation*, *supra*, 2001 WL 1739458 *2 ("Although intervenors have presented substantial evidence that they will incur a financial loss if the injunction is granted, it appears that much of this harm is self-inflicted. . . . [T]he state agency was aware that there were several court cases challenging the approval of the Legacy Parkway, but chose to proceed nevertheless. This cuts against their claim of harm outweighing the environmental concerns."), *citing Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 806 (3d Cir. 1998) ("The self-inflicted nature of defendant's harm weighs in favor of granting preliminary injunctive relief.") (ellipses and brackets omitted).

C. The public interest weighs heavily in favor of a preliminary injunction to preserve Salt Lake's two newspapers, including its only secular daily paper.

In any newspaper market, there is a strong public interest "in maintaining a newspaper press editorially and reportorially independent and competitive." *Gannett Pac. Corp.*, 99 F. Supp. at 1254. Here, the public interest is even stronger than typical newspaper markets because the *Tribune* exists as Salt Lake's sole daily secular and investigative newspaper. The *Tribune*'s disappearance would "seriously weaken public awareness of critical local events, such as the ongoing investigations into Utah's former Attorney General." Exh.E, Don Gale decl., ¶¶11-12.

To a substantial segment of the Salt Lake Valley, loss of the Tribune would not make Salt Lake City a "one newspaper" town – it would make it a "no newspaper" town. Whether because they are uncomfortable with the *News*' ownership, or its self-described focus on "faith and family" and decreased emphasis on hard news, a significant portion of *Tribune* readers do not

(and will not) consider the *News* as a reasonable substitute for the *Tribune*. *See* Exh. E, Gale decl., ¶ 13; Exh. I, Miller decl., ¶¶ 6-7; Exh F, Bramble decl. ¶ 32. And so they should not, as the *Tribune* has established itself as the sole source of statewide investigative reporting upon which many businesses, politicians and readers rely. Exh. F, Bramble decl. ¶¶ 24-32.

Losing the *Tribune* would also cause significant economic harm to the state. As explained by Utah State Senator Curtis Bramble, losing the *Tribune* would make it more difficult to recruit businesses here. The *Tribune*, as stated by Sen. Bramble, is a watchdog on the predominant faith, and debunks notions that Utah is controlled by a monolithic Mormon presence. Out-of-state businesses frequently express concern over such a presence when considering whether to relocate to Utah, and are thus concerned about diversity in Utah, including diversity of voices. *Id.*

Advertisers, meanwhile, would face immediate loss of access to *Tribune* readers who will not consider the *News*. Exh.I, Miller decl., ¶¶ 6-7. Indeed, any advertiser who happens to sell a legal product for which the *News* will not accept advertising – e.g., coffee, alcohol – would have

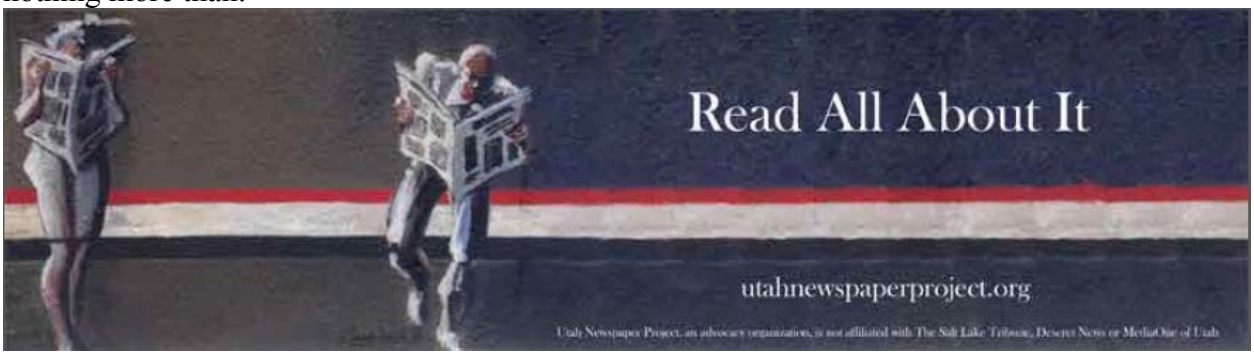
no outreach to daily news consumers in the Salt Lake Valley at all.[12] This includes advertisers using the online *Tribune* because, if the paper is shuttered, there will be no online *Tribune*.

D. Likelihood of success on the merits.

Citizens for Two Voices respectfully submits that the "balancing of harms" elements decidedly tip in their favor, as discussed above. Consequently, it need show only the existence of serious issues that warrant more deliberate investigation. In any event, however, plaintiff can demonstrate a reasonable probability of prevailing on the merits.

The Complaint alleges a number of claims for relief and bases upon which the defendants' actions are unlawful. *See, e.g.,* Complaint, Section VIII. For purposes of this motion, however, Citizens for Two Voices focuses on three claims, two of which can be resolved by simply reviewing the Newspaper Preservation Act, the October 2013 JOA, and the original 1952 JOA.

[12] For example, the *News* refused to run Utah Newspaper Project's recent banner ad, which said nothing more than:



("Read All About It. Utahnewspaperproject.org. Utah Newspaper Project, an advocacy organization, is not affiliated with The Salt Lake Tribune, Deseret News or MediaOne of Utah."" Exh. G, O'Brien decl., ¶ 11.

This case is a bit unusual, in that *prima facie* illegality of the October 2013 JOA has already been established by the United States Supreme Court. In 1964, the Department of Justice began an investigation into a joint operating agreement between two newspaper owners in Tucson, Arizona. Among other things, the Tucson agreement pooled profits, allocated markets, and fixed prices of advertising and subscriptions. In 1965, the DOJ filed suit, alleging that the agreement violated federal antitrust laws.

The Supreme Court agreed. In *Citizen Publishing Co. v. United States*, 394 U.S. 131, 22 L.Ed.2d 148, 89 S.Ct. 927 (1969), the court held that the newspapers' joint operating agreement violated Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act.[13] The court rejected a judicially-created "failing company" defense because the defendants could not show that one of the newspapers actually was contemplating liquidation and that there was no other viable alternative, including a purchaser or bankruptcy reorganization. *Id.*

---

[13] Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 respectively, and Section 7 of the Clayton Act, 15 U.S.C. § 18, provide in pertinent part:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.' (Section 1)
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. (Section 2)
>
> No person engaged in Commerce . . . shall acquire . . . the whole or any part of the stock. . . and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . . (Section 7)

The October 2013 JOA contains provisions similar to those held illegal in *Citizen Publishing*. For example, it fixes prices of advertising and subscriptions for both newspapers. It pools profits between the two competitors. It voluntarily restricts competition beyond designated markets without its competitor's consent. *See* pp. x-xiv, *supra*.

This case thus begins with a United States Supreme Court ruling in the plaintiff's favor. To avoid antitrust liability, the defendants must establish the existence and applicability of an exemption. In response to *Citizen Publishing*, Congress enacted the Newspaper Preservation Act, which exempted certain newspaper joint operating agreements from antitrust laws, and grandfathered in pre-1970 JOAs, if they met certain criteria. To receive that immunity, Congress required, *inter alia,* that:

a) 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;

b) there must be "no merger, combination, or amalgamation of editorial or reportorial staffs"; and

c) "editorial policies" must be "independently determined."

15 U.S.C. §§ 1802(2) and 1803(a).

Plaintiff's Complaint alleges that various requirements of this Act are not satisfied or cannot be established by the defendants. *See* Complaint, ¶¶ 29-36. However, for purposes of this memorandum, plaintiff addresses two, reserving the others for future proceedings.

1. Editorial independence

The Newspaper Preservation Act requires, as a condition of the exemption granted from antitrust laws, that "editorial policies be independently determined." 15 U.S.C. § 1802(2). If they are not, then the agreement does not meet the Act's definition of a "joint newspaper operating arrangement," *id.*, and hence does not qualify for the exemption granted by § 1803(a).

The editorial policy of a newspaper is determined by, or at least subject to being determined by, the newspaper's owner. This principle is both obvious and irrefutable. (Indeed, it is unlikely that Deseret News Publishing Company will take the position in this lawsuit that its editorial policies are wholly independent of the views of its (ultimate) owner, The Church of Jesus Christ of Latter-day Saints.) Examples are provided above, including the public incident in which the *Tribune*'s owner overrode the newspaper's editorial board on a 2004 presidential endorsement. Perhaps the most succinct capsulation of this reality comes, not surprisingly, from a local political cartoonist:

(Pat Bagley)

As noted above, the October 2013 JOA contains a provision that purports to give the owners of the *Deseret News* a veto power over the identity of any new owner of *The Salt Lake Tribune*, and over the identity of any minority investor who is entitled to "participate in management." Similarly, the October 2013 JOA prohibits assignment or delegation of "any of the rights or obligations" of either participant "without the written consent of the other." This clause purports to give either owner an unrestricted veto over the transfer of any of the rights or

obligations of either party under the JOA, including, presumably, the right to publish a newspaper.[14]

These provisions, on their face, preclude the complete editorial independence that must be shown to exempt a joint operating agreement from antitrust liability. In that sense, they are similar to a right of first refusal, which is inherently "suspect" under antitrust laws and the Newspaper Preservation Act. *See Reilly v. Hearst Corp.*, 107 F.Supp.2d 1192, 1195, 1199 (N.D. Cal. 2000) (the legality of provisions "restricting the sale of a JOA publication," such as a "right of first refusal and the right to prevent a sale . . . to a publisher within sixty miles of San Francisco," is "suspect").

With respect to whether editorial policies are independently determined, a right to grant or withhold consent to a new owner of the competing newspaper is more damaging to such independence than is a right of first refusal. A right of first refusal cannot be exercised without merging the two ownerships and thus killing the JOA. Its exercise is necessarily public and thus may draw antitrust (and other) challenge, both from public agencies and private individuals. *See, e.g., United States of America v. Daily Gazette Company*, et al., United States Distrct Court Southern District of West Virginia, 2:07-cv-00329 (Department of Justice alleging that newspaper's exercise of right of first refusal over purchase of competitor violated antitrust law); *Gannett Pacific Corp.*, *supra*.

[14] Section 2.01 of the October 2013 JOA also provides that each party's share of NAC stock is inalienable. *See* Exh. B. This provision thus purports to give each owner the right to approve or veto sale of the other party's interest in the JOA; it is an absolute prohibition and contains no provision that consent may be given or withheld, reasonably or not.

In contrast, a right of one publisher to grant or withhold consent to the sale of the other newspaper will be exercised, typically, within the framework of an existing joint operating agreement, and without significant cost to the exercising party. It may be exercised any number of times over the entire course of the agreement. Its exercise typically will be secret, further reducing the cost to the exercising party. Moreover, while a right of first refusal is a narrow right, enabling the right-holder to choose just one party – itself – as the new owner, a right of consent can cover any number of potential purchasers.

A right of consent thus gives the right-holding publisher a continuing, silent power to determine who may purchase, or manage, the other newspaper. Such rights are inconsistent with the Newspaper Preservation Act's requirement that editorial policies be independently determined. An editorial voice is not independent from a voice that effectively selected it. The October 2013 JOA, and specifically sections 10 and 21, do not qualify for the Newspaper Preservation Act's limited immunity and the JOA is subject to antitrust scrutiny, a challenge it cannot survive. *Citizen Publishing*, *supra*.

2. The October 2013 JOA is so materially different from the grandfathered 1952 JOA as to constitute a "new" JOA. Consequently, the October 2013 JOA affords no antitrust immunity absent consent of the Department of Justice.

The 1970 Newspaper Preservation Act grandfathered in existing JOAs, and amendments thereto, that met certain criteria. Conversely, before any JOA entered into *after* 1970 can be immunized from antitrust laws, the participants must obtain the consent of the Department of Justice. *See* 15 U.S.C. § 1803(b).

"Amendment" is not defined in the Act. By definition, the word suggests that the material terms of the original document still exist, *i.e.*, that there is still an original document to amend. The Department of Justice has argued that "amendment" under the Newspaper Preservation Act means changes in the "course of ordinary business operations."

> Congress implicitly recognized, when it debated the scope of amendments of pre-1970 JOAs, that a transaction of this sort [de facto termination] would not qualify for immunity, and that such amendments would be limited to ordinary operational matters. Rep. Kastenmeier, floor manager of the bill, rejected the notion that the term "amend" gave JOA newspapers a "carte blanche" to take any action they desired. Specifically, he stated that the provision allowing pre-1970 JOAs to amend their agreements was limited to ordinary "operational reasons":
>
> > Newspapers do amend their agreements sometimes on an annual basis for the purpose of labor contracts and for many other operational reasons . . . . Accordingly, we specifically included the word "amend" to refer to changes that might take place in the course of ordinary business operations.

United States' Memorandum in Opposition to Motion to Dismiss, *United States of America v. Daily Gazette Company*, supra, pp. 29-30, *quoting* 116 Cong. Rec. 23173-74 (1970) (statement of Rep. Kastenmeier, responding to statement of Rep. Jacobs) (brackets in original); *see also id.*, pp. 30-31 ("Defendants' expansive reading of the term 'amend' in Section 1803(a) would

obliterate any limits on what JOA newspapers could do and still receive immunity. In effect, they want the Court to interpret the word 'amend' to nullify every other provision of the Act. The defendants would have the Court adopt a position that turns the Newspaper Preservation Act on its head: that a statute enacted to preserve competing newspapers actually immunizes from antitrust scrutiny an acquisition that ends the competition between those same newspapers.").[15]

The changes at issue here have nothing to do with ordinary business operations like printing or distributing newspapers. *See also* 15 U.S.C. § 1802(2) listing business activities of JOAs). The original 1952 JOA emphasized equality. Neither party had control over the NAC. Revenues were allocated roughly in proportion to circulation. The JOA did not authorize the NAC to stop publishing either newspaper. The JOA did not give either participant a say – let alone a veto – over ownership of its competitor.

All of those critical provisions – the guts of the 1952 JOA – are dramatically different in the October 2013 JOA. Deseret News Publishing Company now has control over the NAC. Revenue split has shifted to 70% (*News*) – 30% (*Tribune*), grossly disproportional to circulation. The NAC is now authorized to stop publishing the *Tribune* (and only the *Tribune* – there is no

[15] *See also* Exh. K, Brief Amicus Curiae of the United States of America in Support of Appellee State of Hawaii and Affirmance, *State of Hawaii v. Gannett Pacific Corp., et al.*, No. 99-17201, U. S. Court of Appeals for the Ninth Circuit, November 3, 1999, pp. 17-18 ("The NPA is not a shield for whatever agreement the parties style as an amendment to a JOA"). The interpretive views of the Newspaper Preservation Act by the Department of Justice, the agency charged with implementing the Act, are entitled to some degree of deference. *See Olmstead v. LC*, 527 U.S. 581, 597-598 and n.9 (1999); *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir. 1989), *aff'd by equally divided court*, 493 U.S. 38 (1989) (*Chevron* deference granted Attorney General under Newspaper Preservation Act).

authority to terminate the *News*). And the *Deseret News* has veto power over any purchaser or manager-investor of the *Tribune* (again unilateral; the *Tribune* has no corresponding authority).

In spirit, letter, and effect, this is an entirely different Joint Operating Agreement than the 1952 JOA that was (*arguendo*) grandfathered in by the 1970 statute. Under the Newspaper Preservation Act, therefore, the October 2013 JOA offers no immunity because it has not been submitted to the Department of Justice for preapproval.

E. Because the October 2013 JOA denies the Tribune sufficient resources to continue publishing long term, it is in reality a termination of the agreement, and thus not immunized by the Newspaper Preservation Act.

No matter how they are labeled, changes to a joint operating agreement that have the intended or actual effect of terminating the JOA, or of ending publication of one participant, do not qualify as "amendments" under the Newspaper Preservation Act. *See, e.g.*, *Reilly v. Hearst Corp.*, 107 F.Supp.2d 1192 (N.D. Cal. 2000) ("Although inartful drafting of the NPA [Newspaper Preservation Act] leaves open the argument that termination of a JOA is exempt from antitrust scrutiny as an amendment to the agreement, the defendants here, quite sensibly, have not advanced this argument").

"The limited antitrust immunity that the NPA provides does not extend to an agreement having the aim or effect of closing a JOA newspaper, even if the parties seek to camouflage their agreement as an 'amendment' to a lawful JOA agreement. . . . Actions taken to bring about the closure of one of the newspapers or the termination of the JOA fall outside the express language of the NPA's exemptions. Calling such actions amendments, as defendants do here, does not save them from antitrust scrutiny." United States Memorandum in Opposition to Motion to

Dismiss, *United States of America v. Daily Gazette Company*, Exh. J hereto,, pp. 35-36, and *id.*, p. 36 (focus is on practical effect of the agreement, not the parties' label).

For any and all three of these basic reasons, plaintiff has shown a reasonable probability of prevailing on the merits of this case. A preliminary injunction is appropriate and necessary.

II. NO BOND, OR A MINIMAL BOND, SHOULD BE REQUIRED.

F.R.Civ.P. 65(c) provides that a successful applicant for a preliminary injunction post a bond or other security "in such sum as the court deems proper" for the payment of costs and damages that may be incurred by a party who is wrongfully enjoined. Fed.R.Civ.P. 65(c). Courts regularly exercise their discretion to dispense with the security requirement, or to request mere nominal security, where an action is brought in the public interest. *See, e.g., People ex rel. Van de Kamp v. Tahoe Reg. Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir.), amended on other grounds, 775 F.2d 998 (9th Cir.1985) and cases cited therein; C. Wright & A. Miller, *Federal Practice and Procedure*, § 2954 (court can accept minimal security in public interest cases); *Natural Resources Defense Council v. Morton*, 337 F.Supp. 167 (D.C.D.C.1971); *Bass v. Richardson*, 338 F. Supp. 478 (S.D.N.Y. 1971) (bond should not be required where Congress has encouraged parties to seek correction of abuses). Moreover, special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute. *Natural Resources Defense Council*, 337 F.Supp. at 168–69.

This action is brought in the public interest, and the Sherman and Clayton Acts specifically encourage private enforcement by consumers. *See* 18 U.S.C. § 16. Indeed, "[c[onsumers in the market where trade is allegedly restrained are presumptively the proper

plaintiffs to allege antitrust injury." *Glen Holly Entertainment Inc. v. Tektronix, Inc.*, 352 F.3d 367, 371 (9th Cir. 2003). The Court should order that Citizens for Two Voices need not post a bond, or may post a minimal bond.

CONCLUSION

Once a newspaper dies, it cannot be resurrected. No court order can rebuild a newspaper no matter how carefully crafted. The *Tribune*'s unique editorial voice will be lost when staff is laid off, forced to seek employment elsewhere, and wary of risking their livelihood on an uncertainty. A 140-year track record will be destroyed. These are issues of importance that need to be litigated, and entry of a preliminary injunction is needed to allow that to happen.

DATED this 16th day of June, 2014.

CHRISTENSEN & JENSEN, P.C.

/s/ Karra J. Porter
Karra J. Porter
David C. Richards
Phillip E. Lowry
Attorneys for Plaintiffs