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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 STATE OF ARIZONA, EX REL. TERRY  
9 GODDARD, ATTORNEY GENERAL,

10 - vs -

11 GANNETT CO., INC.; CITIZEN  
12 PUBLISHING COMPANY;  
13 LEE ENTERPRISES, INCORPORATED;  
14 STAR PUBLISHING COMPANY; and TNI  
PARTNERS,

Civil Action No.  
4:09-cv-00281-RCC

15 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S**  
16 **MOTION FOR A TEMPORARY RESTRAINING ORDER**  
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1 Defendants Gannett Co., Inc. (“Gannett”), Lee Enterprises, Inc. (“Lee”), TNI Partners  
2 (“TNI”), Citizen Publishing Company and Star Publishing Company, by counsel, submit this  
3 opposition to plaintiff’s motion for a temporary restraining order (“TRO”).  
4

5 **INTRODUCTION**

6 The Arizona Daily Star and Tucson Citizen were published under a newspaper joint  
7 operating arrangement under which all of the newspapers’ business operations were  
8 combined in and conducted by a partnership: TNI. Lee and Gannett, through subsidiaries, are  
9 equal 50% partners in TNI, and share equally in TNI’s profit and loss.  
10

11 On May 15, 2009, four months after Gannett publicly announced its intention to stop  
12 publishing the Citizen, and after the United States Department of Justice (“Justice  
13 Department”) closed a six and one-half month investigation, Gannett announced that it would  
14 stop the print publication of the Citizen. At the same time, Gannett announced that it would  
15 continue the Citizen’s editorial voice on the Citizen’s web site, and that a Citizen editorial  
16 would be printed each week in the Star. Gannett severed the employment of all Citizen staff,  
17 except for those involved in the Citizen’s web site or the Citizen’s winding down, and ceased  
18 print publication on May 16, 2009.  
19  
20

21 The plaintiff, which was fully aware of Gannett’s intentions and the Justice  
22 Department investigation, now asks this Court for a mandatory injunction requiring the  
23 Citizen to be published and distributed at January 15, 2009 “levels.” Its theory is that the  
24 cessation of the Citizen’s print publication violates Section 1 of the Sherman Act, 15 USC § 1  
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28

1 and the Uniform State Antitrust Act, Ariz. Rev. Stat. Ann § 44-1402.1[1]. Gannett and TNI,  
2 it asserts, are not using the Citizen's assets, and, thus, Gannett must sell them for a fraction of  
3 their value to Gannett under the failing company test.  
4

5 Plaintiff's motion must be denied. Plaintiff cannot establish the requisite probability  
6 of success on the merits. The closure of the Citizen's print edition cannot harm competition –  
7 and thus cannot violate the antitrust laws – because there was no cognizable economic  
8 competition between the Star and Citizen. No such competition existed, as the State itself  
9 concedes, under the joint operating arrangement. Furthermore, plaintiff has offered  
10 absolutely no evidence nor even allegations to support its alleged market definition, and there  
11 is no relevant market, in today's world, of local daily newspapers in Tucson. And even if the  
12 failing company test were applied, Gannett has met it. The Citizen was financially failing,  
13 and Gannett had no obligation to subsidize a buyer by selling the assets it is currently using  
14 below their liquidated value. Furthermore, the plaintiff cannot establish the other elements  
15 required for the extraordinary mandatory injunction it seeks. Finally, plaintiff's moving  
16 papers are completely silent on how the constitutionally protected public interest in a free  
17 press can be squared with a court order requiring defendants to publish a newspaper against  
18 their will.  
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## 22 FACTS

23  
24 As of Saturday, May 16, 2009, the Tucson Citizen ceased publication as a daily  
25 printed newspaper, but its editorial voice continues on its Internet site, tucsoncitizen.com.

26  
27 <sup>1</sup> As in the case of plaintiff's memorandum, this memorandum will focus on federal  
28 antitrust law, since Arizona's courts generally interpret the state's antitrust laws in  
harmony with the Sherman Act. *See* Pl. Mem. at n.4.

1 Exhibit 1 (Declaration of Kate Marymont) at ¶¶ 3, 6-12. Prior to that, beginning in the 1940s,  
2 the Citizen (now owned by Citizen Publishing Company, a subsidiary of Gannett) and the  
3 Arizona Daily Star (owned by Star Publishing, a subsidiary of Lee Enterprises) were  
4 published under a newspaper joint operating arrangement (“JOA”) in Tucson, Arizona.  
5  
6 Complaint ¶ 10.

7 The original Tucson JOA was held unlawful in *Citizen Publishing Company v. United*  
8 *States*, 394 U.S. 131 (1969). Congress responded by enacting the Newspaper Preservation  
9 Act (“NPA”), 15 U.S.C. § 1801, *et seq.*, which created an antitrust exemption for newly  
10 created JOAs and grandfathered JOAs, like the Tucson JOA, which existed prior to its  
11 enactment. *Id.*

12  
13 The NPA specifically authorizes the newspaper owners in JOAs to combine the  
14 newspapers’ business operations, provided that the newspapers maintain separate reportorial  
15 and editorial staffs and their editorial policies are independently determined. *Id.* The Justice  
16 Department opposed the passage of the NPA because it would eliminate “all commercial  
17 competition” between the newspapers in a JOA.<sup>2</sup> But Congress recognized that “it had  
18 become nearly impossible for more than one newspaper to survive in any major market due to  
19 a variety of economic factors unique to the newspaper industry.” *Hawaii Newspaper Agency*  
20 *v. Bronster*, 103 F. 3d 742, 748 (9th Cir. 1996).

21  
22  
23  
24 Beginning in 1970, the Citizen and Star operated as a JOA within the meaning of the  
25 NPA. Most recently, the two newspapers functioned pursuant to a 1988 Amended and

26 <sup>2</sup> Statement of Richard W. McLaren, Assistant Attorney General, Antitrust Division,  
27 United States Department of Justice, Hearings before the Antitrust Subcommittee of the  
28 Committee on the Judiciary, House of Representatives on H.R. 279 and Related Bills,  
91st Cong., 1st Sess. (1969) at 360.

1 Restated Joint Operating Agreement (the “JOA Agreement”), and all of their business  
2 operations were handled by TNI, a partnership ultimately owned 50% each by Gannett and  
3 Lee. Pl. Mem., Exhibit B at §§ 1.1(b), 2.1. TNI was responsible for, among other things:<sup>3</sup>  
4 (i) selling all advertising and setting advertising rates; (ii) selling the newspapers to  
5 subscribers and other purchasers and setting circulation rates; (iii) handling physical  
6 production; (iv) distributing the newspapers; and (v) setting the reimbursable editorial budget  
7 for both newspapers and providing the revenue to pay their staffs. *Id.* at §§ 2.1, 2.5(a). Each  
8 TNI partner appoints half of TNI’s board of directors, and TNI has its own officers and  
9 employees who serve at the discretion of the board. *Id.* at § 4.1. The partners share TNI’s  
10 profits and losses equally, regardless of circulation disparities between the newspapers. *Id.* at  
11 § 3.1.

12 While a JOA under the NPA, the Citizen and Star each had their own news and  
13 editorial staffs, and independently determined editorial policies. *Id.* at §2.3. The Star  
14 publishes seven days a week in the mornings, and the Citizen was a six day afternoon  
15 publication. *Id.* at § 2.1. When the Citizen stopped being published as a daily print  
16 newspaper on May 16, 2009, the JOA Agreement ceased being a JOA under the NPA,  
17 although the partnership and TNI continues. Both the JOA Agreement (Pl. Mem., Exhibit B  
18 at § 5.1) and the TNI partnership agreement (Pl. Mem., Exhibit C at § 5.1) terminate only  
19 upon the agreement of both parties, and the parties have not terminated either agreement.

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25 *The Citizen Follows Newspaper Business Trends*

26 <sup>3</sup> TNI also engages in certain other business activities, such as the publication and  
27 distribution of other products, and the parties share expenses and profit and loss from  
28 those activities as well. Pl. Mem., Exhibit B at § 2.1(e).

1 The business prospects of newspapers have changed dramatically since the 1970  
2 passage of the NPA. Traditional daily printed newspapers compete with a host of other  
3 products and services for advertising dollars and readers' time and attention, including  
4 broadcast, cable and satellite television, radio, magazines, direct mail, weeklies and specialty  
5 publications (such as realtor home guides or booklets containing used car ads) and,  
6 especially, the Internet. Employment and other Internet sites, as well as individual  
7 advertiser's own sites, have deprived newspapers of much of their traditional advertising  
8 revenue, and consumers can obtain news and information from across the country, if not the  
9 world, for free.  
10  
11

12 The current economic downturn has exacerbated the decline in reader-buyers and  
13 advertisers. The result is that newspaper closings and cut-backs have accelerated, and will  
14 continue.<sup>4</sup> For example, in just the past six months, the Tribune Company (publisher of  
15 many newspapers, including the *Chicago Tribune*, *Los Angeles Times* and *Baltimore Sun*);  
16 *The Minneapolis Star-Tribune*; Philadelphia Newspapers LLC (publisher of the *Philadelphia*  
17 *Daily News* and *Philadelphia Enquirer*); and the Sun-Times Media Company (publisher of  
18 the *Chicago Sun-Times* and 58 other papers) filed for bankruptcy protection. In the same  
19 time period, Hearst Corporation, after failing to locate a buyer and enduring years of losses,  
20 printed the final print edition of the *Seattle Post-Intelligencer*, replacing it with an online-only  
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24 <sup>4</sup> Certainly the markets have taken a pessimistic view: newspaper shares dropped an  
25 average of 83.3% in 2008, wiping out \$64.5 billion in market value in just 12 months.  
26 <http://newsosaur.blogspot.com/2008/12/newspaper-share-value-fell-64b-in-08.html> (last  
27 visited April 6, 2009). The shares of eight of the 14 publishers tracked in the survey fell  
28 by 90% or more. *Id.* Gannett's stock was trading above \$60 a share two years ago, it  
closed on May 15, 2009 at \$4.36. Lee's stock fell in the same period from \$30.05 to  
\$1.15.

1 operation and the Ann Arbor News announced that, in July 2009, it will cease print  
2 publication and will instead produce a bi-weekly online edition. The market realities have  
3 taken their toll on JOA newspapers, too. In just the last 16 months, JOAs have ended in  
4 Cincinnati, Albuquerque, Seattle, and Denver, and one of the two newspapers from each JOA  
5 is no longer printed.  
6

7 Most importantly for this action, despite the JOA, market forces have, unfortunately,  
8 led to the failure of the Citizen. In 1975, the Star and Citizen had roughly equal circulation  
9 of about 61,000 (Exhibit 2 (Declaration of Mike Jameson) at ¶ 4); the years since have  
10 witnessed the Citizen's decline. By 1994, the Star's circulation was more than twice as large  
11 as the Citizen's. *Id.* By March 2009, the Star's circulation was more than five times as large  
12 as the Citizen's - approximately 102,600 for the Star to less than 19,000 for the Citizen. *Id.* at  
13 ¶ 6.  
14

15  
16 Economic analyses demonstrate that the Citizen was a financial drain: its incremental  
17 costs of operation far exceeded the revenues that may be attributed to it. Exhibit 4  
18 (Declaration of Dr. Kent Mikkelsen) at ¶¶ 23-24. It simply costs TNI more to operate the  
19 Citizen than the revenues it generates from the Citizen's operation.  
20

21 *The Justice Department Concludes Its Investigation Without Enforcement Action*

22 On October 31, 2008, the Justice Department began a six and a half-month  
23 investigation into the closing of the Citizen when Gannett informed the Justice Department  
24 that it intended to offer ("shop") the assets of the Citizen for sale privately to potential buyers,  
25 and that if the assets were not sold, it would cease publishing the Citizen. Exhibit 5  
26 (Declaration of Gordon L. Lang) at ¶¶ 3-4. During the investigation, the defendants produced  
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1 over 27,000 pages of documents in response to Civil Investigative Demands issued under the  
2 Antitrust Civil Process Act. Exhibit 5 (Declaration of Gordon L. Lang) at ¶¶ 5-6; Exhibit 7  
3 (Declaration of Brian K. McCalmon) at ¶¶ 4-5. In addition, the Justice Department took nine  
4 depositions of Gannett, Lee and TNI personnel. Exhibit 5 (Declaration of Gordon L. Lang) at  
5 ¶¶ 7-8; Exhibit 7 (Declaration of Brian K. McCalmon) at ¶ 6. There were also numerous  
6 meetings, emails, and telephone calls with the Department's staff soliciting information.  
7 Exhibit 5 (Declaration of Gordon L. Lang) at ¶ 9; Exhibit 7 (Declaration of Brian K.  
8 McCalmon) at ¶ 7. During the course of the investigation, plaintiff requested and was  
9 granted access to the material accumulated by the Justice Department. Exhibit 5 (Declaration  
10 of Gordon L. Lang) at ¶ 12; Exhibit 7 (Declaration of Brian K. McCalmon) at ¶ 8.

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14 At the Justice Department's request, Gannett conducted a public shop of the Citizen  
15 assets for sale. See January 16, 2009 press release ([http://www.gannett.com/news/](http://www.gannett.com/news/pressrelease/2009/pr011609b.htm)  
16 [pressrelease/2009/pr011609b.htm](http://www.gannett.com/news/pressrelease/2009/pr011609b.htm) (last visited May 16, 2009)).

17  
18 Gannett ultimately received bids from two entities: Unisystems Mainframe LLC  
19 ("Unisystems") and Santa Monica Media Company LLC ("SMMC"), and continued to  
20 negotiate with them through April 2009. Exhibit 3 (Declaration of Daniel S. Ehrman Jr.) at ¶  
21 2. Importantly, both SMMC's and Unisystems' purchase offers were lower than liquidation  
22 value; that is, the value of the Citizen's assets if used for something other than the publication  
23 of a daily printed newspaper. *Id.* at ¶¶ 4, 7. The defendants provided the Justice Department  
24 with a study that valued the Citizen's assets offered for sale at \$760,000. Exhibit 3  
25 (Declaration of Daniel S. Ehrman Jr.) at ¶ 4; Exhibit 5 (Declaration of Gordon L. Lang) at  
26 Exhibit C. In addition, Gannett presented evidence that Gannett had licensed the rights to the  
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1 archives of the 138-year old Citizen for a sum that alone was close to the value of SMMC's  
2 and Unisystems' offers. Exhibit 5 (Declaration of Gordon L. Lang) at Exhibit D.

3  
4 Each bidder also lowered their bid values in other ways. Unisystems insisted that  
5 Gannett subsidize and finance its offer by accepting installment payments rather than cash at  
6 closing; it offered no evidence of its ability to pay or security for the assets and transition  
7 services (including a year's printing) it sought; and it refused to commit to using the Citizen's  
8 assets to publish a daily printed newspaper. Exhibit 3 (Declaration of Daniel S. Ehrman Jr.)  
9 at ¶¶ 7-8. SMMC refused to provide financial information indicating its ability to perform  
10 under the asset purchase agreement or to pay for the year's printing and other services it  
11 wanted; and it insisted that Gannett and TNI continue to keep the Citizen open and incur  
12 expenses (and losses) until SMMC's preferred closing date. *Id.* at ¶¶ 4-5.

13  
14  
15 On Thursday, May 14, 2009, the Justice Department informed the defendants that it  
16 was closing its investigation without taking any action. Exhibit 5 (Declaration of Gordon L.  
17 Lang) at ¶ 17; Exhibit 7 (Declaration of Brian K. McCalmon) at ¶ 11. The Department's  
18 decision was made after numerous further communications with staff, as well as meeting with  
19 Assistant Attorney General Christine Varney and others. Exhibit 5 (Declaration of Gordon L.  
20 Lang) at ¶¶ 14-15; Exhibit 7 (Declaration of Brian K. McCalmon) at ¶¶ 9-10. A  
21 representative of plaintiff was to participate in that meeting by telephone but asked no  
22 questions nor made any comment. Exhibit 5 (Declaration of Gordon L. Lang) at ¶ 14 and  
23 Exhibit A.  
24  
25

26 Following the Justice Department decision not to proceed, the last print edition of the  
27 Citizen was finalized and all employees of the Citizen were terminated from employment,  
28

1 other than individuals who are involved in the Citizen’s continuing online presence and  
2 individuals who are completing the paper’s closure (*i.e.*, finishing the payroll processing;  
3 completing the digital archiving, securing personnel files, transferring corporate property to  
4 Gannett). Exhibit 1 (Declaration of Kate Marymont) at ¶ 4. Once the last print edition was  
5 completed, the Citizen employees closed down the operation, including cleaning out their  
6 desks, canceling appointments, shredding notes, advising sources, etc. *Id.* at ¶ 5. In short, the  
7 daily newspaper infrastructure of the Citizen no longer exists. *Id.* at ¶¶ 4-12.

### 10 *The Citizen Is Not Gone*

11 Although the Citizen will no longer be a daily printed newspaper, the Citizen will  
12 continue in the community. Its tucsoncitizen.com web site will continue as a “town hall” site  
13 for the community to explore and debate the hottest topics each day. *Id.* at ¶ 8. The topics  
14 will be hosted by veteran Citizen journalists, who will offer opinion and commentary about a  
15 wide range of topics of interest to those in the community. *Id.* at ¶¶ 8-9, 12. In addition, the  
16 Citizen will publish a weekly editorial in the Star. *Id.* at ¶ 13. Finally, Gannett will continue  
17 to license the Citizen’s archives, and collect the associated income. Exhibit 5 (Declaration of  
18 Gordon L. Lang) at Exhibit D.

### 21 **STANDARD OF REVIEW**

22 Injunctive relief prior to a trial is an “extraordinary and drastic” remedy that is “never  
23 awarded as of right.” *Munaf v. Geren*, 128 S.Ct. 2207, 2219 (2008). “The standard for  
24 issuing a TRO is the same as that for issuing a preliminary injunction.” *Esquivel v. Mortgage*  
25 *Electronic Registration Sys., Inc.*, 2009 U.S. Dist. LEXIS 8071, \*2 (D. Ariz. Jan. 26, 2009)  
26 (Snow, J.). To obtain a TRO or preliminary injunction the moving party must show each of  
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1 the following: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer  
2 irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in  
3 his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def.*  
4 *Council, Inc.*, 129 S. Ct. 365, 376 (2008); *American Trucking Assoc. v. Los Angeles*, 559 F.3d  
5 1046 (9th Cir. 2009). Unless the plaintiff is likely to succeed on the merits, its request for  
6 extraordinary preliminary relief must be denied.<sup>5</sup>

7  
8 In addition, where, as here, the moving party is seeking a mandatory injunction (*i.e.*,  
9 an order requiring the paper to start publishing), the movant's burden is greater. *Stanley v.*  
10 *Univ. of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (“[a] mandatory injunction  
11 goes well beyond simply maintaining the status quo *pendente lite* and is particularly  
12 disfavored” (citations omitted)). Under the applicable “heightened standard” for a mandatory  
13 injunction, the Court should deny the request unless the facts and law *clearly favor* the  
14 moving party. *Transwestern Pipeline Co., LLC v. 17.19 Acres*, 550 F.3d 770, 776 (9th Cir.  
15 2008) (emphasis added).

16  
17  
18 Importantly, the moving party must demonstrate its likelihood of success on the merits  
19 for each element of its claim. *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596,  
20 608 (9th Cir. 2000) (considering each element of claim); *Mothershed v. Thomson*, 2006 U.S.  
21 Dist. LEXIS 6968, \*25 (D. Ariz. Feb. 16, 2006) (Teilborg, J.) (denying preliminary  
22 injunction motion because “[t]he Plaintiff does not state the elements of any of the claims,  
23  
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25 <sup>5</sup> Plaintiff incorrectly states that a TRO may issue on grounds that “serious questions” are  
26 presented (Pl. Mem. at 4), but in this Circuit, the presence of “serious questions” is no  
27 longer sufficient to justify a preliminary injunction. *American Trucking Assoc.*, 559 F.3d  
28 1046, 2009 U.S. App. LEXIS 5827, \*15 (9th Cir. Mar. 20, 2009) (“To the extent that our  
[pre-*Winter*] cases have suggested a lesser standard, they are no longer controlling, or  
even viable”).

1 and he does not discuss how the facts alleged meet the elements of those claims and/or  
2 indicate a likelihood of success on the merits”). If it does not, no injunction can issue. *See,*  
3 *e.g., FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999) (reversing the  
4 lower court’s grant of a preliminary injunction to the Federal Trade Commission in an  
5 antitrust action because the agency failed to establish the relevant market).  
6

7 Accordingly, under the plaintiff’s Section 1 and state law claims, the plaintiff must  
8 show (i) an agreement; (ii) which unreasonably restrains interstate or foreign trade or  
9 commerce. *Tanaka v. University of Southern California*, 252 F.3d 1059, 1062 (9th Cir.  
10 2001). Because the plaintiff does not allege that any conduct of defendants is *per se* unlawful  
11 in its Section 1 claim, the plaintiff must also establish (iii) the relevant product and  
12 geographic market it alleges under each of its claims: local daily printed newspapers in the  
13 Tucson area. *See Newcal Indus. v. Ikon Office Solutions*, 513 F.3d 1038, 1045 n.4 (9th Cir.  
14 2008) (“Antitrust law requires allegation of both a product market and a geographic market”);  
15 *United States v. LSL Biotechnologies, Inc.*, 2002 U.S. Dist. LEXIS 6499, \*12 (D. Ariz. Mar.  
16 28, 2002) (Collins, J.) *aff’d*, 379 F.3d 672 (9th Cir. 2004) (dismissing antitrust complaint  
17 because plaintiff failed to show relevant market).  
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21 As shown below, because the plaintiff cannot establish the likelihood of success or any  
22 of the other predicates for granting extraordinary preliminary injunctive relief, its motion  
23 should be denied.  
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**ARGUMENT**

**I. THE PLAINTIFF CANNOT DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS**

Closing the Citizen does not violate the antitrust laws for four independent reasons. First, there was no antitrust cognizable competition within the JOA that closing the Citizen harmed. TNI, a single, economically integrated partnership, handles all of the JOA’s business operations. And importantly, the plaintiff’s claim that competition exists within the JOA is flatly contradicted by the exhibits to the Complaint itself. Indeed, the Complaint suggests plaintiff fundamentally misunderstands the most basic fact concerning Lee’s and Gannett’s partnership. It appears plaintiff believes that Gannett and Lee newly agreed on their partnership to share the profits of the Star upon the closing of the Citizen. In fact, the partnership has been in place, unchanged, for decades, and the parties have agreed to no new profit-sharing arrangement. They are continuing the same partnership with the same terms that have always been in place. Nothing has or will change. The only thing that has occurred is that the partnership has closed a failing newspaper to cut its losses.

Second, the plaintiff makes no attempt to allege facts that support a market definition that the Complaint suggests is “daily local newspapers.” Complaint ¶ 14. All plaintiff does is state—obliquely and using a standard of illegality reserved for claims under the Clayton Act, not the more restrictive Sherman Act and Arizona Antitrust Act—that Lee’s and Gannett’s conduct will “substantially lessen competition in the Tucson Area daily newspaper market.” This failure dooms the Complaint. Nor can plaintiff’s attempt to skirt its obligations by a misapplication of the “quick look” doctrine, which plaintiff uses in an

1 attempt to avoid obligations clearly placed on antitrust plaintiffs by the Court under *Bell*  
2 *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2006).

3  
4 Third, defendants do not have market power in any properly defined relevant market.  
5 The relevant product market is not the sale of advertising and the sale to readers and others of  
6 local daily newspapers. Rather, the Star and Citizen compete in broader markets consisting  
7 of all sellers of advertising in the Tucson area, and all alternatives for readers' time and  
8 attention—including, but not limited to, a vast array of news and information available over  
9 the Internet for free. Within those markets, the Star and Citizen lack market power, and the  
10 closure of the Citizen cannot harm competition.

11  
12 Finally, even if the Complaint established that local daily newspapers is a relevant  
13 market (which it does not), the Citizen is a failing company under any accepted standard of  
14 the term and Gannett made every effort required of them to sell it above liquidation value, but  
15 could not. Thus, its closure cannot adversely affect competition (even if competition were  
16 occurring in the first place).

17  
18 **A. There Can be No Antitrust Violation Because There Was No Economic**  
19 **Competition Within The Tucson JOA**

20 The plaintiff insists that the Star and the Citizen compete with each other for  
21 readership by maintaining a high degree of journalistic rivalry. Complaint ¶ 11. This was  
22 certainly true before the Citizen was closed, but it is entirely beside the point. The antitrust  
23 laws only regulate commercial transactions. See 15 U.S.C. §§ 1, 2 (regulating “trade or  
24 commerce”), § 18 (applying to any person “engaged in commerce or in any activity affecting  
25 commerce”); *e.g.*, *U.S. v. Brown University in Providence in State of R.I.*, 5 F.3d 658, 665 (3d  
26 Cir. 1993) (“It is axiomatic that section one of the Sherman Act regulates only transactions  
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28

1 that are commercial in nature.”). A company may engage in a range of commercial and non-  
2 commercial activities, but its non-commercial activities are outside the scope of conduct  
3 regulated by the antitrust laws. *See Hamilton Chapter of Alpha Delta Phi v. Hamilton*  
4 *College*, 128 F.3d 59, 63 (2d Cir. 1997) (“the Sherman Act does not apply to all activities of  
5 all organizations”); *Dedication & Everlasting Love to Animals v. Humane Society*, 50 F.3d  
6 710, 713 (9th Cir. 1995) (antitrust laws extend only to “commercial competition”).  
7

8  
9 Indeed, in this case such rivalry is no more cognizable in antitrust than the rivalry  
10 between brand managers within General Motors. TNI is a 50/50 partnership between  
11 Gannett’s wholly-owned subsidiary Citizen Publishing and Star Publishing, which is  
12 ultimately wholly owned by Lee. Pl. Mem., Exhibit B at § 1.1(a). TNI sells all advertising  
13 and sets advertising rates; sells all newspapers and sets prices to subscribers and other buyers;  
14 physically produces and distributes the newspapers; pays all expenses, and collects all  
15 revenues; sets the editorial budgets and provides the revenue to pay the staff. *Id.* at § 2.1.  
16 The two partners share profit and loss equally. *Id.* at § 3.1. Thus, regardless of the  
17 discrepancy in sales or popularity between one newspaper and the other, or the journalism  
18 awards that one or the other might get, the newspaper owners each have the same financial  
19 result. As the Supreme Court held, the purpose of the Tucson JOA “was to end any business  
20 or commercial competition between the two papers. . . All commercial rivalry between the  
21 papers ceased.” *Citizen Pub.*, 394 U.S. at 133, 134. There is no competition for the cessation  
22 of the publication of the Citizen to harm.  
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26 In reality, TNI is a single economic entity. In *Texaco v. Dagher*, 547 U.S. 1 (2006),  
27 Texaco and Shell formed a joint venture to refine and sell gasoline. Like TNI’s partners,  
28

1 Texaco and Shell pooled their resources and shared profit and loss, and sold products under  
2 two brand names. Service station owners then challenged the joint venture as illegal per se  
3 price-fixing. The Court held that it was not, reversing the Ninth Circuit's decision:  
4

5 the pricing policy challenged here amounts to little more than  
6 price setting by a *single entity*—albeit within the context of a joint  
7 venture—and *not a pricing agreement between competing entities*  
8 *with respect to their competing products.*

9 *Id.* at 6 (emphasis added).

10 *Dagher* applies here. TNI is a single economic entity. From an antitrust perspective, a  
11 decision by TNI or its partners to cease publishing the Citizen is no different than an auto  
12 maker deciding to drop a line of cars despite the competition of the designers for each  
13 nameplate, or a magazine publisher deciding to drop one of its titles, despite the editorial  
14 competition between the staffs at each publication. *See Copperweld Corp. v. Independence*  
15 *Tube Corp.*, 467 U.S. 752 (1984) (rejecting the intra-enterprise conspiracy doctrine). *See also*  
16 Exhibit 6 (Declaration of Joseph P. Kalt., Ph.D.) at ¶ 21 (“The very idea of competition under  
17 antitrust economics is founded on separate entities competing by separately setting prices and  
18 supply offerings to maximize their separate profits by competing for each others’  
19 customers”).

20  
21 The editorial rivalry cited by the plaintiff is outside of the concern of antitrust. Exhibit  
22 6 (Declaration of Joseph P. Kalt., Ph.D.) at ¶ 7(b). (“editorial competition” is not competition  
23 among separate sellers of competing products that is cognizable under the antitrust laws). It  
24 is the sale of daily newspapers to readers, and the sale of those readers to advertisers – not the  
25 creation of news and editorial content – that the plaintiff appears to allege are the relevant  
26 markets. But all of the decisions affecting circulation and advertising are made by TNI. It  
27  
28

1 also does not matter that Gannett and Lee may compete in other markets. The joint venturers  
2 in *Dagher* also engaged in independent activity – they each separately explored for and  
3 extracted crude oil. *Dagher*, 547 U.S. at 4. But to the Supreme Court (and the plaintiff), the  
4 joint venture was a single economic entity.  
5

6 Finally, the plaintiff urges that the parties to a JOA compete to position themselves for  
7 possible post-JOA competition, and for potential renegotiation of profit splits or other JOA  
8 terms. As a threshold matter, in theory the same might be said for most integrated joint  
9 ventures—one party might want to renegotiate the joint venture agreement, or to terminate it.  
10 Moreover, the Justice Department rejected the very same “theory” of competition in its  
11 amicus brief to the Court in *Dagher*. See Brief for the United States as Amicus Curiae  
12 Supporting Petitioners in *Texaco, Inc. v. Dagher*, 2004 U.S. Briefs 805, \*18 (U.S. Sept. 12,  
13 2005) (“partnerships or other joint arrangements in which persons who would otherwise be  
14 competitors pool their capital and share the risks of loss as well as the opportunities for  
15 profit” are “regarded as a single firm competing with other sellers in the market” (quoting  
16 *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 356 (1982))). If the plaintiff’s  
17 argument were compelling, then the Court should have ruled for, and not against, the  
18 plaintiffs in *Dagher*. See Exhibit 6 (Declaration of Joseph P. Kalt., Ph.D.) at ¶ 20 (the fact  
19 that Buick and Pontiac may vie for buyers does not make them competitors under the antitrust  
20 laws).  
21  
22  
23  
24

25 Most importantly, plaintiff is simply wrong about the existence of economic  
26 competition in the Tucson JOA while the Citizen was being published as a daily newspaper.  
27 Competition to maximize the sale value of one paper versus the other or to improve one  
28

1 paper's leverage for renegotiation of the JOA profit splits could not occur in the Tucson JOA  
2 because the termination or amendment of the JOA required the consent of both parties. Pl.  
3 Mem., Exhibit B at § 5.1  
4

5 Plaintiff's theory only works if one of the parties has the unilateral ability to terminate  
6 the JOA, or the JOA terminates automatically on a date certain. But that cannot occur in the  
7 Tucson JOA. The JOA Agreement had no finite duration, and neither party could terminate it  
8 unilaterally. *Id.* Although the JOA's term (before it was terminated) expired in 2015, it  
9 could have been continued for an additional 25 years "at the option of either Star or Citizen."  
10 *Id.* Furthermore, the JOA would automatically renew thereafter for subsequent 25 year  
11 periods ad infinitum unless "written notice is given by both Star and Citizen . . . ." *Id.*  
12 Finally, any modification of the JOA Agreement, of course, would have required the  
13 agreement of both parties. *Id.* at § 6.5. Thus, regardless of the amount of the discrepancy  
14 between the circulation of the Star and the Citizen might have become, Gannett remained  
15 entitled to 50% of the JOA's profits. Lee had no ability to terminate or to credibly threaten to  
16 terminate the JOA or to reduce Gannett's profit share.<sup>6</sup> The within-the-JOA competition that  
17 the plaintiff alleges simply did not, and cannot, occur.<sup>7</sup>  
18  
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20

21 **B. A TRO Should Not Issue On A Complaint that Fails To Define A Relevant**  
22 **Market**  
23

24 <sup>6</sup> The Partnership Agreement, which continues and also controlled the ability of the  
25 partners to renegotiate shares had no termination date and could not be changed or  
terminated absent the agreement of both parties. *See* Pl. Mem., Exhibit C at § 5.1

26 <sup>7</sup> By contrast, both the Honolulu JOA at issue in *State of Hawaii v. Gannett Pacific* and the  
27 Charleston JOA in *United States v. Daily Gazette* were of finite duration, a fact the courts  
28 relied upon in finding that economic competition existed. *See, e.g., State of Hawaii*, 99  
F. Supp. 2d at 1246; *Daily Gazette*, 567 F. Supp. 2d at 870.

1           The Complaint does not explicitly define a product or geographic market. At most, it  
2 indirectly suggests that the market is local daily newspapers in Tucson, based on statements  
3 in the section of the Complaint entitled “Anticompetitive Effects.” Complaint ¶ 14.  
4 Nowhere in the Complaint, however, is there a discussion of any facts that would support  
5 such a market definition. For example, despite having had months in its open investigation to  
6 conduct pre-Complaint discovery on such issues—and despite having the benefit of the  
7 discovery conducted by the Justice Department in its own investigation—the plaintiff  
8 includes no allegations in either the Complaint or its memorandum regarding cross-  
9 elasticities of demand among purchasers of news, and no allegations regarding choices (or  
10 lack thereof) faced by advertisers who wish to sell services to Tucson residents. These  
11 factors are critical to any definition of a relevant market within which the effects of Lee’s and  
12 Gannett’s actions must be measured. But there is no basis in the Complaint or the motion on  
13 which the Court can do so.  
14

15  
16  
17           **1. Twombly and Ninth Circuit Precedent Require Product Market**  
18           **Definition.**

19           In *Twombly*, the Court “retired” the long-cited “no set of facts” pleading standard of  
20 *Conley v. Gibson*, 355 U.S. 41 (1957), and replaced it with a strict requirement that a  
21 complaint state enough facts to “raise a right to relief above a speculative level,” *Twombly*,  
22 550 U.S. at 555, and “nudge [its] claims across the line from conceivable to plausible.” *Id.* at  
23 570. In *Twombly*, the issue was whether the plaintiff’s allegations of parallel conduct  
24 suggested the defendants had engaged in illegal conspiracy and tended to exclude the  
25 possibility of independent self-interest and a “rational and competitive business strategy.” *Id.*  
26 at 554.  
27  
28

1 Courts across the country, including the Ninth Circuit, have since applied *Twombly* to  
2 the most basic requirement to allege facts in a Complaint that support each element of an  
3 antitrust cause of action. See, e.g., *Rick-Mik Enterprises, Inc. v. Equilon Enterprises, Inc.*,  
4 532 F.3d 963, 972-75 (9th Cir. 2008) (dismissing complaint for, *inter alia*, failure to allege  
5 facts establishing defendant's market power (such as percentages of sales among retail  
6 franchises), and for failure to allege facts about the demand for credit card services that would  
7 support the allegation of a separate tied product market).  
8  
9

10 As much as *Twombly* redefined the requirements for a well-pleaded complaint in  
11 antitrust matters, however, the plaintiff's complaint fails to satisfy even the pleading  
12 standards in the Ninth Circuit that governed pre-*Twombly*. In *Tanaka v. University of*  
13 *Southern California*, 252 F.3d 1059 (9th Cir. 2001), the court dismissed a complaint that  
14 contained only a "conclusory assertion" of the relevant market, much like the complaint here.  
15 See also *United States v. LSL Biotechnologies, Inc.*, 2002 U.S. Dist. LEXIS 6499, \*12-13 (D.  
16 Ariz. Mar. 28, 2002), *aff'd*, 389 F.3d 672 (9th Cir. 2004) (dismissing complaint for failure to  
17 allege facts supporting market definition in seed industry, noting that different types of seeds  
18 have inelastic demand, and noting that "without clearly defined relevant geographic and  
19 product markets, it is impossible for this Court to grant any type of relief").  
20  
21

22 Just like the plaintiff in *Tanaka* and *LSL Biotech*, the plaintiff in this case has failed to  
23 allege any facts that would suggest the product market is limited to daily local newspapers.  
24 Nothing in the Complaint or memorandum, for example, addresses the cross-elasticity of  
25 demand between newspapers, television, radio, the Internet, and a host of other media for  
26 advertisers to reach customers and for the public to obtain news and information. See Exhibit  
27  
28

1 6 (Declaration of Joseph P. Kalt., Ph.D.) at ¶ 7(a) (“By restricting the competitive landscape  
2 to daily newspapers, and ignoring all other media options available to consumers and  
3 advertises, Plaintiff artificially ignores and misstates the degree of competition demonstrably  
4 observable in the Tucson area”). Conclusory labels are inadequate to survive *Tanaka* or the  
5 later, more exacting, requirements of *Twombly*. A TRO should not issue on a complaint as  
6 threadbare as this.  
7

## 8 **2. This Case is Inappropriate for a “Quick Look.”**

9  
10 Perhaps well aware of the complaint’s shortcomings, the plaintiff argues that no  
11 market definition is necessary because this is a case best evaluated on a “quick look” basis.  
12 Pl. Mem. at 7. According to plaintiff, no detailed market analysis is necessary. *Id.* This is  
13 incorrect. First, as a threshold matter, plaintiff’s reliance on Supreme Court and Ninth Circuit  
14 precedent is misleading. In both *Indiana Federation of Dentists* and *Oltz* (both relied upon by  
15 plaintiff), the courts decided no detailed market analysis was necessary because the trial  
16 courts in both cases found evidence of *actual anticompetitive effects* in the market (e.g., price  
17 increases) that rendered detailed market definition unnecessary. *See FTC v. Indiana Fed. of*  
18 *Dentists*, 476 U.S. 447, 461 (1986); *Oltz v. Saint Peter’s Community Hosp.*, 861 F.2d 1440,  
19 1448 (9th Cir. 1988). And in *California Dental*, the Court *rejected* the application of the  
20 quick look analysis—even though it was an agreement between non-integrated competitors to  
21 limit advertising—because the agreements “might plausibly be thought to have a net  
22 precompetitive effect, or possibly no effect at all on competition.” *California Dental Ass’n v.*  
23 *FTC*, 625 U.S. 756, 771 (1999). *Cf. Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006)  
24  
25  
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1 (rejecting quick look suggestion by party and holding that quick look should be limited “to  
2 business activities that are so plainly anticompetitive”).

3  
4 Moreover, it is undisputed that TNI has operated for 40 years on paper and in practice  
5 as an integrated joint venture by which Lee and Gannett produce news in Tucson. This is not  
6 like other “quick look” cases cited by plaintiff, where a group of independent and separately-  
7 run competitors cooperated with each other in a way that limited aspects of their competitive  
8 relationship. *See, e.g., Indiana Fed. of Dentists*, 476 U.S. 447 (1986) (independent dentists  
9 agreed to withhold X rays that insurers requested to evaluate benefits claims); *Oltz*, 861 F.2d  
10 at 1448 (anticompetitive agreement between hospital and anesthesiologists); *Glen Holly*  
11 *Entertainment v. Tektronix Inc.*, 343 F.3d 1000 (9th Cir. 2003) (defendant competitors agreed  
12 to cease competing and divide product markets amongst themselves; no economic integration  
13 present).

14  
15  
16 Indeed, in this case the integrated relationship of the parties is greater than even  
17 plaintiff acknowledges, or even realizes; as discussed *infra* and as disclosed to plaintiff in  
18 earlier conversations, the Tucson JOA is unlike other JOAs in that it has no effective end date  
19 and one party cannot terminate the JOA unilaterally. *See* § I.A, *supra*. Thus it is far more of  
20 an integrated joint venture—akin to a merger—than other JOAs, and as discussed *infra*,  
21 plaintiff’s theory of intra-JOA economic competition based on jockeying for post-JOA sale or  
22 profit renegotiations is baseless. Because TNI is an integrated joint venture, the closure of  
23 the Citizen cannot be viewed simplistically as the act of unrelated competitors, but must be  
24 evaluated as the decision of the joint venture (TNI), or failing that, at least as the decision of  
25  
26  
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1 Lee and Gannett in the context of their long-standing economic venture. This is not at all  
2 conducive to a “quick look.”

3 **C. TNI Competes With All Advertising Sellers And All Purveyors Of News**  
4 **And Information**

5 Even assuming that the plaintiff has adequately plead a relevant market, it can not  
6 prove that the relevant product market is limited to the sale of advertising in, and the sale of,  
7 local daily physical newspapers. It is the plaintiff’s burden on this motion to establish that it  
8 is likely to succeed on the product market it alleges. *See, e.g., Tanaka v. Univ. of Southern*  
9 *California*, 252 F.3d 1059, 1063 (9th Cir. 2001) (“Failure to identify a relevant market is a  
10 proper ground for dismissing a Sherman Act claim”); *Verducci v. Sonoma Valley Hosp. Dist.*,  
11 1996 U.S. App. LEXIS 16492, \*7 (9th Cir. June. 18, 1996) (“[antitrust plaintiff] has the  
12 burden of proving the relevant market”); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045,  
13 1052 (8th Cir. 1999) (“The plaintiff has the burden of proving the relevant geographic  
14 market. . . . It is thus essential that the FTC identify a credible relevant market before a  
15 preliminary injunction may properly issue”). The plaintiff has not, and cannot, meet that  
16 burden here. TNI competes with all advertising vehicles serving the Tucson area for the sale  
17 of advertising, and all media and other contenders for readers’ time and attention.

18  
19  
20  
21 Newspapers, of course, have long competed with other media. In *Lorain Journal v.*  
22 *United States*, 342 U.S. 143 (1951), a daily newspaper was held to have unlawfully  
23 monopolized as a result of its refusing to accept advertisements from businesses which  
24 advertised on a local radio station. The Court chastised the “publisher’s attempt to *regain* its  
25 monopoly of interstate commerce by forcing advertisers to boycott a competing radio  
26 station.” *Id.* at 152 (emphasis added). In other words, the newspaper had lost its monopoly  
27  
28

1 due to competition from the radio station. *Id.* Later, the Ninth Circuit rejected a district  
2 court's holding that the only local daily newspaper was a monopoly:

3           The district court assumed that the Statesman had monopoly  
4 power because it was essentially the only daily paper in Ada  
5 County. Evidence in the record, however, indicates that the  
6 merchants saw door-to-door delivery, direct mail, and the weekly  
7 papers as viable substitutes for daily newspaper delivery.

8 *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 739 n.3 (9th Cir. 1985).

9           The onslaught, of course, has continued with cable television, and especially the  
10 Internet. Internet sites like Craigslist.com, Monster.com, Jobs.com,  
11 Roommateconnectin.com, Cars.com, Tucsonhelpwanted.com and Jobing.com, as well as  
12 individual advertiser's own sites (including, for example, local advertisers like  
13 Desertdiamondcasino.com and Jimclickhyundai.com and national advertisers like Qwest.com  
14 and McDonalds.com), have deprived newspapers of the heart of their traditional advertising  
15 revenue. And established web sites compete with newspapers through banner advertising,  
16 which allows advertisers to advertise on relevant web pages and reach a targeted audience  
17 and through advertisements on search results screens. Exhibit 8 (Declaration of Susan  
18 Cantrell) at ¶ 12; <https://adwords.google.com/support/bin/topic.py?topic=21> (explaining how  
19 Google allows local businesses to place targeted advertisements (last visited May 17, 2009)).  
20 Indeed, TNI has a dedicated on-line sales team to compete for advertising dollars currently  
21 being spent on the Internet. Exhibit 8 (Declaration of Susan Cantrell) at ¶ 11.

22           Another court in this circuit recognized the importance of media choices on readers  
23 and advertisers in 2000 when it, *sua sponte*, questioned whether newspapers could constitute  
24 an antitrust market:

25           [i]n 1999, there were thirty-two AM stations, forty-three FM  
26 stations, and twenty-eight television stations broadcasting in the  
27  
28

1 San Francisco Bay area. Cable television imports a multitude of  
2 distant signals and provides a plethora of specialized  
programming and advertising.

3 The Internet has opened a staggering array of news sources. With  
4 relative ease, a person can select from a host of suppliers of  
5 newspaper-like news, features, and opinions. Most major  
6 newspapers have web sites making it possible to access a  
7 substantial part of their content on line. An Internet user can  
8 design a unique individually tailored on-line newspaper by  
9 roaming all news content servers and selecting stories and  
10 subjects of interest. These new media provide new outlets for  
11 advertisers as well. “Banner” advertisements have become  
commonplace on news and shopping web sites.

Free-distribution newspapers and direct-mail advertising vehicles  
provide attractive alternatives to traditional newspaper advertising  
. . . . In addition, there are many weekly newspapers that circulate  
in San Francisco and the surrounding counties and several  
alternative news weeklies . . . , ethnic publications . . . , and  
special interest publications.

12 *Reilly v. The Hearst Corp.*, 107 F. Supp. 2d 1192, 1200 (N.D. Cal. 2000). *See also Reilly v.*  
13 *MediaNews Group, Inc.*, 2006 U.S. Dist. LEXIS 61696, \*20-21 (N.D. Cal. July 28, 2006)  
14 (“there will undoubtedly continue to be other sources that continue to provide consumers with  
15 ‘news, editorial, entertainment, and advertising content,’ such as the television, radio, and the  
16 Internet. While the Court reserves for another day the determination whether those sources  
17 occupy the same market as newspapers, they nonetheless provide services that overlap with  
18 the services Reilly complains he will be deprived of”).<sup>8</sup>

19  
20  
21 Furthermore, today, any individual can effectively create his or her own newspaper by  
22 using Google alerts and RSS feeds. Google News searches and browses 25,000 news sources  
23 constantly and aggregates the results at [www.news.google.com](http://www.news.google.com). In a survey conducted in  
24 December 2008 among 1489 adults by the Pew Research Center for the People & the Press,  
25

26 <sup>8</sup> Indeed, the recent opinion in *Charleston*, cited by the plaintiff, is in accord: “[m]any daily  
27 newspapers find it increasingly difficult to compete in a media market so radically altered  
28 by the shift of readers and advertising dollars to the Internet.” *Daily Gazette*, 567 F.  
Supp. 2d at n.1.

1 “more people reported that they rely mostly on the internet for news than cite newspapers.”  
2 <http://pewresearch.org/pubs/1066/internet-overtakes-newspapers-as-news-source> (last visited  
3 May 17, 2009). The same study reported that “[t]elevision continues to be cited most  
4 frequently as a main source for national and international news, at 70%.” *Id.*

6 The most compelling evidence of a robust all-ad seller, all-media market is TNI’s own  
7 behavior. *See, e.g., Berlyn, Inc. v. Gazette Newspapers, Inc.*, 2003 U.S. App. LEXIS 16814  
8 (4th Cir. Aug. 18, 2003) (defendant publication’s attempt to sell against other media showed  
9 that other media were in the same market). Here, the evidence shows that:

- 11 • TNI tracks its penetration against 111 other media outlets, including 26 print  
12 publications (including The Tucson Shopper, Tucson Weekly, and Bear  
13 Essential News); 34 local radio stations; 12 local television stations and 38  
14 other Internet web sites (Exhibit 8 (Declaration of Susan Cantrell) at ¶ 4);
- 15 • TNI compares its reach with other print publications in the Tucson area,  
16 including Tucson Weekly, Tucson Lifestyle, Desert Leaf, Green Valley News  
17 & Sun and Inside Tucson Business (increase of 55.4%) (*Id.* at ¶ 5);
- 18 • TNI tracks advertising dollars spent by major advertisers among web sites,  
19 radio, and television and uses the information to pitch advertisers to spend  
20 advertising dollars, or increase their advertising spending, with TNI (*Id.* at ¶ 6);
- 21 • TNI developed and is implementing a plan specifically targeted at Yellow  
22 Pages advertisers. For example, in the power point presentation “Competitive  
23 Media: Selling Against Yellow Pages,” TNI discusses the Yellow Pages’  
24 market share (17% of the local market); the most referenced and fastest-growing  
25 headings; the factors that lead consumers to utilize the Yellow Pages; the types  
26 of advertisers who advertise in the Yellow Pages; and provides strategies for its  
27 ad sales team to pitch the yellow pages advertisers, including emphasizing the  
28 newspapers’ reach and readership demographics (*Id.* at ¶ 7);
- TNI has targeted specific television advertisers or categories of television  
advertisers, and prepared marketing materials to persuade these advertisers to  
choose TNI over television for advertising (*Id.* at ¶ 8);
- TNI has successfully targeted, and captured, advertising dollars previously  
spent on television, including, in the past year, a \$125,000 contract with A-  
Atlas Moving; a \$100,000 contract with the Tucson College of Art, and a  
\$40,00 contract with Sleep America, all of whom moved television money to  
print (*Id.* at ¶ 9);
- TNI has lost both local and national advertisers to television. For example, in  
2008, TNI lost over \$500,000 when American Home Furniture switched from  
being primarily a print advertiser to television. *Id.* at ¶ 10. In the fourth quarter

1 of 2008, TNI lost Jim Click's Automotive advertising revenue to television. *Id.*  
2 Additionally, while CarMax had previously run both print and television  
3 advertisements, in March 2008 it switched to an all-broadcast advertising  
4 model. *Id.*

5 Even local business owners in Tucson do not subscribe to the notion that local daily  
6 newspapers provide the only forum for advertising. In fact, Jim Click (the owner of Jim  
7 Click Automotives) reports that he advertises in a variety of media outlets including  
8 television and radio. *See* Exhibit 9 (Declaration of Jim Click) at ¶ 6. Click says that, without  
9 the Star or the Citizen, he would be free to pursue other media outlets for his business. *Id. at*  
10 ¶¶ 5, 7. *See also* Exhibit 10 (Declaration of Steve Lace) at ¶ 4 (there are "significant choice"  
11 available to advertisers in the Tucson market); Exhibit 11 (Declaration of Don Mackey) at ¶ 7  
12 ("if we think that the rates are too high, we have the ability to advertise elsewhere); Exhibit  
13 12 (Declaration of Anna Martinez Ross) at ¶ 7 ("There are so many other mediums in the  
14 marketplace that there will be competition for advertising dollars from many media, no matter  
15 what the Citizen does"); Exhibit 13 (Declaration of Tim Weiland) at ¶ 9 ("we would transfer  
16 our advertising spending from the Star to another advertising vehicle (radio, direct mail,  
17 Internet). We have other choices"); Exhibit 14 (Declaration of Cyndy Neighbors) at ¶ 3  
18 (advertises in many media for her clients).

19  
20  
21 The necessary (though unstated) implication of plaintiff's proposed market definition –  
22 that daily newspapers only compete with other daily newspapers for ad dollars and readers –  
23 cannot be sustained and the plaintiff has offered no proof, argument, or even conjecture to  
24 support it. *See, e.g. Berlyn, Inc. v. Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718, 727 (D.  
25 Md. 2002), *aff'd* 2003 U.S. App. LEXIS 16814 (4th Cir. Aug. 18, 2003) (plaintiffs failed  
26 "[t]o demonstrate that the relevant product market [of weekly community newspapers and  
27  
28

1 supplements] and excludes direct mail, shoppers, and any form of electronic broadcast  
2 media”); *Midwest Radio Co., Inc. v. Forum Pub. Co.*, 942 F.2d 1294, 1297 (8th Cir. 1991)  
3 (product market includes newspaper, radio, television, billboards and direct mail); *America*  
4 *Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 858 (E.D. Va. 1999) (“[t]here are  
5 numerous substitutes for e-mail advertising, some of which are less expensive, including use  
6 of the World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflets, to  
7 name a few”). *See also* Exhibit 6 (Declaration of Joseph P. Kalt., Ph.D.) at ¶¶ 8-15 (market  
8 participants in Tucson “recognize the economics of competition” and have a wide range of  
9 alternatives to local daily newspapers for advertising and to obtain news).

12 **D. Closing The Citizen Eliminated No Competition Because The Citizen Was**  
13 **Failing, And Gannett Properly Rejected The Offers Of SMMC And**  
14 **Unisystems**

15 There can be no violation of the Sherman Act if competition is unaffected by the  
16 allegedly illegal agreement. Competition is unaffected by the elimination of a newspaper that  
17 is failing. That is precisely the position taken by the primary enforcer of the federal antitrust  
18 laws, the Justice Department: “a decision to terminate a newspaper whose incremental costs  
19 exceed the incremental revenues attributable to its operation is unlikely to violate the antitrust  
20 laws.” Amicus Brief of the United States in *State of Hawaii v. Gannett Pacific*, 1999 U.S.  
21 App. LEXIS 30030 (9th Cir. 1999) at n.15.

23 **1. The Citizen was Failing.**

24 A failing JOA newspaper is one which would be failing “if operated outside the JOA.”  
25 *Reilly v. Hearst*, 107 F. Supp. 2d 1192, 1203 (N.D. Cal. 2000) (holding San Francisco  
26 Examiner was a failing newspaper). *See also* Exhibit 15 (United States Department of  
27  
28

1 Justice, Antitrust Division, Press Release, November 8, 1983 (concluding that St. Louis  
2 Globe-Democrat would fail “if it were taken out of the joint operating agreement”)); United  
3 States Department of Justice Business Review Letter concerning News-Herald Printing  
4 Company and Derrick Publishing Company, 1985 DOJBRL LEXIS 17 (April 29, 1985)  
5 (concluding the JOA newspaper News-Herald would fail “if operated outside the JOA”; the  
6 plaintiff “postulated the revenues that would be generated, and the expenses incurred, in one  
7 year’s operation . . . as an independent entity”). Contrary to plaintiff’s assertions in the  
8 Complaint, whether or not the JOA *as a whole* is profitable is irrelevant. What matters to this  
9 analysis is the state of the Citizen before it was closed.  
10  
11

12 In *Reilly*, the court endorsed the incremental analysis test that the Justice Department  
13 had offered in *State of Hawaii*. *Reilly*, 107 F. Supp. 2d at 1204. The court concluded that the  
14 “most reliable evidence at trial” was “the change in JOA profits that would result from  
15 closing” one of the JOA newspapers. *Id.* at 1204-05.  
16

17 The evidence before this Court establishes that the Citizen’s incremental costs exceed  
18 its incremental revenues, and that it would fail if operated outside the JOA. Dr. Kent  
19 Mikkelsen, a former Department of Justice economist now in the consulting firm Economists  
20 Incorporated, and an experienced newspaper economist, conducted a financial analysis of the  
21 operations of TNI, the Star, and the Citizen, and calculated the change in TNI’s performance  
22 that would result from ceasing to publish the Citizen. Exhibit 4 (Declaration of Dr. Kent  
23 Mikkelsen) at ¶¶ 4-5.  
24  
25

26 Using full year 2008 data, Dr. Mikkelsen ascribed to the Citizen the percentage of  
27 advertising revenue that equaled the Citizen’s percentage of the JOA’s daily circulation, as  
28

1 well as a portion of Sunday advertising revenue corresponding to Citizen subscribers who  
2 take the Star on Sundays (even though the Citizen was not published on Sundays). *Id.* at ¶  
3 14. Dr. Mikkelsen attributed to the Citizen all of its circulation revenue, and a portion of  
4 Sunday Star circulation corresponding to the Citizen subscribers who take the Star on  
5 Sundays. *Id.* Finally, Dr. Mikkelsen worked with TNI and Gannett personnel to determine  
6 the expenses attributable to the Citizen. *Id.* at ¶¶ 16-20.  
7

8  
9 Dr. Mikkelsen's analysis confirms that the Citizen is failing. He concluded that, if the  
10 Star retains only 35% of the Citizen's circulation, "revenues would decrease by \$6,289,238,  
11 but costs would decrease by \$8,251,147." *Id.* at ¶ 24. This means that "[o]n net, the  
12 reduction in cost is \$1,961,909 greater than the reduction in revenue. Compared with the  
13 scale of the Citizen-related operations, this is a very large deficit. For instance, the estimated  
14 incremental expenses would have to be 24 percent lower—with no reduction in estimated  
15 incremental revenues—for this deficit to be eliminated." *Id.* Moreover, if the Star picked up  
16 80% of the Citizen's circulation, the closure of the Citizen would yield a cost reduction of  
17 approximately \$4.8 million. *Id.* at ¶ 23.  
18

19  
20 Dr. Mikkelsen's conclusions are supported by the Citizen's circulation history. In  
21 1975, the Star and Citizen had roughly equal circulation of about 61,000. Exhibit 2  
22 (Declaration of Mike Jameson) at ¶ 4. By March 2009, the Star's circulation was more than  
23 five times as large as the Citizen's – approximately 102,600 for the Star to less than 19,000  
24 for the Citizen. *Id.* at ¶ 6. As the Court held in *Reilly*, such a circulation advantage is too  
25 much for the smaller JOA newspaper to overcome outside of the JOA:  
26

27 [t]he Examiner, operating as a general circulation metropolitan  
28 daily and Sunday newspaper outside the JOA and independent of

1 the Chronicle, would have to overcome a 4:1 circulation  
2 disadvantage to achieve not only future profitability, but  
3 profitability sufficient to recoup any losses . . . . A circulation  
4 disadvantage of this magnitude is considerably greater than that  
5 which Hearst or any commercial motivated publisher could  
6 surmount to achieve profitability.

7 *Reilly*, 107 F. Supp. 2d at 1204.

8 **2. Gannett is Using the Citizen’s Assets, and It had No Obligation to  
9 Sell to SMMC or Univision, Whose Offers were Below Liquidated  
10 Value and Unreasonable.**

11 The plaintiff asserts that Gannett was obligated to sell the Citizen’s assets to SMMC  
12 for \$250,000, and that Gannett’s alleged lack of a plan to use the assets indicates that its offer  
13 to sell them was a sham. As a threshold matter, Gannett and TNI are using the Citizen’s  
14 assets: the website tuconcitizen.com will continue as a “town hall” site for the community to  
15 explore and debate the hottest topics each day. Exhibit 1 (Declaration of Kate Marymont) at  
16 ¶¶ 6-7. The topics will be hosted by veteran Citizen journalists, who will offer opinion and  
17 commentary about a wide range of topics of interest to those in the community. *Id.* at ¶¶ 8-9,  
18 12. In addition, the Citizen will publish a weekly editorial in the Star. *Id.* at ¶ 13.

19 Additionally, Gannett continues to receive revenues from the licensing of the Citizen’s  
20 archives—revenue it would lose if the Citizen were sold. Exhibit 5 (Declaration of Gordon  
21 L. Lang) at Exhibit D. Furthermore, Gannett had no obligation to accept the offers from  
22 SMMC or Unisystems, both of which were below the liquidation value of the Citizen’s assets,  
23 and failed in other respects as well.

24 Under the failing company test, an offer is not reasonable unless, among other things,  
25 it (1) would “keep” the “assets in the relevant market”; and (2) the price is above “liquidation  
26 value,” defined as “the highest valued use outside the relevant market.” US Department of  
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28

1 Justice and Federal Trade Commission Horizontal Merger Guidelines, § 5.1 and n.39  
2 (available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/51.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/51.html) (last visited May  
3 17, 2009)). *See also Reilly*, 107 F. Supp. 2d at 1211-12. Under the relevant market implied by  
4 the plaintiff here, the buyer would have to use the assets as a daily newspaper in Tucson. *See*  
5 *St. Louis Business Review* (purchaser must continue to operate as a daily newspaper outside  
6 the JOA). Gannett did not receive reasonable offers here, and it thus had no obligation to  
7 accept the bids.  
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9  
10 Gannett received bids from Unisystems and SMMC, and negotiated with each of them.  
11 As discussed above, in its best and final offer, Unisystems refused to pay the whole or part of  
12 the purchase price at closing; sought to have Gannett provide printing services for one year;  
13 offered no proof of its ability to pay; and, crucially, refused to commit to publishing the  
14 Citizen as a daily printed newspaper. Exhibit 3 (Declaration of Daniel S. Ehrman Jr.) at ¶¶ 8-  
15 9.  
16

17 SMMC offered only \$250,000 (later offered in the alternative as \$400,000 payable  
18 over 5 years); refused to provide evidence of its ability to pay Gannett at closing or to pay for  
19 the printing and other transition services; and refused to bear all of the costs for Gannett and  
20 TNI keeping the Citizen open until SMMC's desired closing date. *Id.* at ¶¶ 4-5.  
21

22 Neither the preservation of competition nor the antitrust laws required Gannett to  
23 accept either offer. First, neither Unisystems nor SMMC made a "reasonable" offer.  
24 Unisystems demanded that Gannett subsidize and finance its purchase with an installment  
25 contract. *Id.* at ¶ 8. But the plaintiff has shown no basis in law or fact why Gannett must take  
26 that burden on. The case law and the federal government's own policy are to the contrary.  
27  
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1 *See Reilly*, 107 F. Supp. 2d at 1212 (holding that Hearst was not required to subsidize the sale  
2 of a JOA newspaper, and that its doing so at the plaintiff's insistence was "inimical to  
3 competition and could constitute a violation of the antitrust laws"). And the Justice  
4 Department's policy when it requires a divestiture of assets is to prohibit seller financing  
5 because it creates incentives for buyer and seller to not compete with each other until the debt  
6 is paid off, and the seller's inability to get financing elsewhere "raises questions about the  
7 seller's viability." Antitrust Division Guide to Merger Remedies, § IV.G.  
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10 Furthermore, neither Unisystems nor SMMC provided evidence of ability to pay – let  
11 alone security – for either the assets or the year's worth of printing and other services they  
12 sought to obtain. *Id.* at ¶¶ 5, 8. The plaintiff has shown no basis in law or fact why Gannett  
13 should have proceeded with a sale absent evidence of the buyer's ability to perform.  
14

15 Finally, Gannett was not obligated to take either of the offers for a more basic reason:  
16 they were both below the \$760,000 liquidation value of the Citizen's assets established in a  
17 valuation study by experienced newspaper appraisers at American Appraisal Associates and  
18 supplied to the Justice Department that determined the highest value use of those assets  
19 outside what the plaintiff implies is the relevant market. *Id.* at ¶¶ 4, 7. The study analyzed  
20 three value components for a potential purchaser of those assets: (1) \$543,000 for the use of  
21 the Citizen name, masthead, web address, subscriber list, and other Citizen assets for a  
22 weekly newspaper; (2) \$205,000 for the licensing of the Citizen's archives; and (3) \$14,000  
23 for the Citizen's subscriber list. Exhibit 5 (Declaration of Gordon L. Lang) at Exhibit C.  
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1           The first was based on the business plan for a weekly publication<sup>9</sup> created by Mr.  
2 Evan Ray, Senior Vice-President for Finance and Operations of Gannett's Community  
3 Newspapers Division that American Appraisal Associates determined, after appropriate  
4 adjustments for taxation, risk, and other matters, would have a value of about \$543,000. *Id.*  
5 As to the archives, American Appraisal concluded that the owner of the assets would  
6 recognize income from the licensing and use of the Citizen's newspaper archives, based on  
7 Gannett's current contract with ProQuest and another offer Gannett received. *Id.* American  
8 Appraisal determined the assets, discounted to present value, would bring the owner of the  
9 Citizen's assets an additional \$205,000. *Id.* Finally, American Appraisal determined the  
10 Citizen's subscriber lists would yield additional revenue for a value of approximately  
11 \$14,000. *Id.*

12           These findings are buttressed by recent examples of similar assets being sold. For  
13 example, in April 2009, the Journal Register Company sold certain weeklies, with total  
14 circulation of less than 9,000, for \$185,000, plus up to \$110,000 in assumed liabilities.  
15 Exhibit 16 (April 2, 2009 Order). Here, in Tucson, the Tucson Explorer (a free distribution  
16 weekly) sold in 2007 for an estimated \$2.5 million (even though it did not have a printing  
17 plant). Moreover, if Gannet sold rights to the Citizen, it would forfeit over \$195,000 of  
18 licensing revenue over the next five years (*see* Exhibit D to Declaration of Gordon L. Lang)  
19 and could not sell the Citizen circulation list. In fact, it is perfectly reasonable for Gannett to  
20 refuse to sell its rights to the Citizen in a market in which they are arguably of the least

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26 <sup>9</sup> American Appraisal concluded that it would be reasonable to assume that, under a  
27 liquidation value premise, a rational investor would continue to utilize the Citizen's  
28 assets as part of a newspaper operation to maximize value. Exhibit 5 (Declaration of  
Gordon L. Lang) at Exhibit C.

1 possible value, when holding on to those assets – and using them – offers the possibility of  
2 exploiting the value of the Citizen when times improve. Because selling at the bottom of the  
3 market makes no business sense, it cannot be required under the antitrust laws.

4  
5 **II. THE PLAINTIFF HAS NOT SHOWN THAT IT WOULD BE IRREPARABLY  
6 HARMED IF IT DOES NOT OBTAIN INJUNCTIVE RELIEF<sup>10</sup>**

7 The plaintiff must demonstrate a significant threat of irreparable injury to succeed on  
8 its motion for a TRO. *Hobdy v. Los Angeles Unified School Dist.*, 252 Fed. Appx. 174, 175  
9 (9th Cir. 2007) (district court properly denied injunction where moving party failed to show a  
10 sufficient threat of irreparable injury). The plaintiff has not met this standard because the  
11 Citizen is already closed. If an injunction does not issue but the plaintiff ultimately prevails  
12 on a trial on the merits, nothing prevents a buyer from reassuming operations. Because TNI  
13 could be required to divest its rights to the name and design of the paper and its circulation  
14 list (neither of which would lose value as a result of a short interruption), a TRO would do  
15 nothing to amend what has already been done and would add nothing to the relief available  
16 after a trial. Finally, the Citizen was in such poor financial condition that its closure did not  
17 harm competition in the relevant market.

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20 The plaintiff argues that the Citizen’s closure has resulted in its limited readers being  
21 “deprived of access to their preferred editorial voice.” Pl. Mem. at 11 (citing *Hawaii v.*  
22 *Gannett Pacific Corp.*, 99 F. Supp. 2d 1241, 1254 (D. Haw. 1999)). But the Citizen has  
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25 <sup>10</sup> If a moving party fails to show a likelihood of success on the merits, the Court never  
26 considers the irreparable harm prong. *See, e.g., Global Horizons, Inc. v. United States*  
27 *DOL*, 510 F.3d 1054, 1058 (9th Cir. 2008); *Nouveau Riche Corp. v. Tree*, 2008 U.S. Dist.  
28 *LEXIS 105577*, \*26 (D. Ariz. Dec. 23, 2008) (Teiborg, J.) (holding that, because the  
moving party failed to show a likelihood of success on the merits, the motion for  
preliminary relief must be denied without consideration of any other factor).

1 already closed and there was no economic competition cognizable under the antitrust laws  
2 between the Citizen and the Star even when the Citizen was publishing. *See supra* § I.A.

3  
4 In *Hawaii*, the court held that the circulation, advertiser base and relationship between  
5 the thriving paper and the community would be harmed beyond repair without an injunction.  
6 *Hawaii*, 99 F. Supp. 2d at 1253. Here, however, the paper's circulation is already harmed  
7 beyond repair. In 2007, the Citizen's circulation declined for the 20th straight year. Exhibit  
8 2 (Declaration of Mike Jameson) at ¶ 5. The paper's circulation in the first quarter of 2009  
9 was less than 19,000 – leaving the paper with less than 20% of the Star's circulation. *Id.* at ¶  
10 6.  
11

12 Plaintiff's assertion that it would be irreparably harmed if a TRO does not issue  
13 because of the loss of an editorial voice in the community is equally dubious. First, the  
14 editorial voice of the Citizen continues through the web site and the weekly editorial in the  
15 Star. Exhibit 1 (Declaration of Kate Marymont) at ¶¶ 6, 13. Moreover, the Internet allows  
16 any person, group or organization to offer a voice on any topic of choosing. If anything,  
17 current editors and reporters of the paper, free of any restrictions on their ability to offer  
18 commentary and criticism, are more likely to add to the discourse.  
19  
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21 Additionally, the Citizen's assets can be sold and operations resumed even now that  
22 the paper is closed. For example, the Journal Register Taconic Weekly recently sold assets  
23 (including mastheads and subscriber lists) associated with nine weekly newspapers after it  
24 had already closed them and declared bankruptcy. Exhibit 16 (April 2, 2009 Order). One of  
25 them is now publishing on a weekly basis. *See*  
26 <http://www.putnamcountycourier.com/common/contact.html> (last visited May 9, 2009). The  
27  
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1 closure of the Citizen will not cause the assets to depreciate to a point where they become  
2 completely worthless.

3  
4 Finally, the plaintiff's argument ignores that, because of the paper's significantly  
5 weakened condition, its exit from the market would not harm competition. *See U.S. v.*  
6 *General Dynamics Corp.*, 415 U.S. 486, 508 (1974) (even if the acquired company had  
7 "remained in the market [as a stand-alone company, it] did not have sufficient reserves to  
8 compete effectively"). The same is true here. The incremental costs of the paper exceed its  
9 incremental revenue and the circulation of the paper has declined to less than 19,000. Exhibit  
10 2 (Declaration of Mike Jameson) at ¶ 6; *see also Reilly v. Hearst Corp.*, 107 F. Supp. 2d  
11 1192, 1205 (N.D. Cal. 2000) (affirming that a failing JOA newspaper is one whose  
12 incremental costs exceed the incremental revenues). Further, in each of three incremental  
13 analyses conducted, the paper's expenses are greater than its revenues. Exhibit 4  
14 (Declaration of Dr. Kent Mikkelsen) at ¶¶ 23-24. Thus, even if the paper does not technically  
15 meet the failing company defense, it is so weakened that its disappearance from the  
16 marketplace would not have a significant impact on competition, let alone constitute an  
17 irreparable injury.  
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### 21 **III. ANY BALANCING OF HARDSHIPS TIPS DECIDEDLY IN THE** 22 **DEFENDANTS' FAVOR**

23 This Court must weigh the hardship that the plaintiff will allegedly suffer if its request  
24 for extraordinary relief is denied against the hardship the paper will allegedly suffer if the  
25 plaintiff's motion is granted. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*,  
26 634 F.2d 1197, 1203 (9th Cir. 1980). The plaintiff has not shown that the hardships tip  
27 decidedly in his favor.  
28

1 In fact, the hardships tilt sharply in the defendant's favor. TNI loses over ten thousand  
2 dollars each day the paper is published. Exhibit 4 (Declaration of Dr. Kent Mikkelsen) at ¶¶  
3 23-24. The paper's closure will stem those losses, but forced publication would compound  
4 them. See, e.g., *U.S. Cellular Inv. Co. of Los Angeles, Inc. v. Airtouch Cellular*, 2000 U.S.  
5 Dist LEXIS 4731, \*34-37 (C.D. Cal. Mar. 27, 2000) (holding that the loss of substantial cost  
6 savings was one factor that tipped the hardships in favor of the non-moving party). And the  
7 parties could never recover those monies from the plaintiff because it has sovereign  
8 immunity, which renders its harm irreparable. See *Clouse v. State of Arizona*, 16 P.3d 757  
9 (Ariz. 2001) (citing that the basic rule of sovereign immunity is that the plaintiff cannot be  
10 sued without its consent); cf. *Herbert J. Sims & Co. v. Roven*, 548 F. Supp. 2d 759, 766 (N.D.  
11 Cal. 2008) (holding that party would suffer irreparable harm "because Plaintiff has no  
12 adequate remedy at law to recover the monetary and human capital it would expend  
13 defending itself in arbitration"). In addition, the defendants will also have to reassemble an  
14 editorial staff because the paper is closed and almost all staff is gone. The time and expense  
15 spent in contract renegotiations and hiring new employees would be unrecoverable. *Herbert*  
16 *J. Sims & Co.*, 548 F. Supp. 2d at 766. Finally, as discussed *infra*, forcing the paper to  
17 continue publishing against its will raises serious First Amendment issues. The well-  
18 established right to speak concurrently carries a well-established right to remain silent.

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24 Conversely, as shown *supra*, the hardships alleged by the plaintiff pale in comparison,  
25 particularly as the Citizen continues online and as a weekly editorial in the Star. For these  
26 reasons, any balancing of hardships tips decidedly in favor of the defendants.

#### 1 **IV. THE PUBLIC INTEREST FAVORS DEFENDANTS**

2 Finally, while the plaintiff strenuously argues that the public interest prong of the  
3 injunctive relief standard is satisfied because the public is harmed by anti-competitive  
4 conduct of the type alleged here (Pl. Mem. at 12), as shown above, TNI has not acted in  
5 violation of any antitrust laws. In the absence of any unlawful conduct – and none has been  
6 shown here – there is no public interest in preventing TNI from acting as any rational  
7 business would act. Simply put, the public has no interest in watching a company bleed to  
8 death.  
9  
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11 Moreover, “[w]hen evaluating the public interest, courts are ‘not bound by the  
12 plaintiff’s litigation posture’ and should instead ‘make an independent judgment as to the  
13 public interest.’” *Plata v. Schwarzenegger*, 2008 U.S. Dist. LEXIS 104035, \*35 (N.D. Cal.  
14 Nov. 7, 2008) (citation omitted). “It is clearly in the public interest to ensure that  
15 constitutional rights are protected.” *Id.* For this reason, courts considering requests for  
16 injunctive relief have consistently recognized the significant public interest in upholding First  
17 Amendment principles. *See, e.g., G&V Lounge, Inc. v. Michigan Liquor Control Com’n*, 23  
18 F.3d 1071, 1079 (6th Cir. 1994) (“it is always in the public interest to prevent the violation of  
19 a party’s constitutional rights” (citations omitted)); *Iowa Right to Life Committee, Inc. v*  
20 *Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (“the public interest favors protecting core First  
21 Amendment freedoms”). As discussed more fully below, forcing TNI to continue publishing  
22 the paper would violate the First Amendment’s freedoms of speech and association. If  
23 anything, the public interest prong supports TNI, and not the plaintiff.  
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1 **V. THE COURT CANNOT ORDER DEFENDANTS TO PUBLISH A**  
2 **NEWSPAPER**

3 The First Amendment to the U.S. Constitution provides that “Congress shall make no  
4 law . . . abridging the freedom of speech, or of the press . . .”<sup>11</sup> The Plaintiff seeks an order  
5 forcing TNI to begin again to publish the Citizen against its will and at a financial loss at  
6 “levels equivalent to those on January 15, 2009.” Proposed Order at 2. Such a request is  
7 extraordinary, both in terms of the financial and managerial burdens it imposes upon TNI as  
8 well as the extent of infringement upon its fundamental constitutional rights.  
9

10 **A. Forcing Speech Is The Same As Restricting Speech**

11 A TRO that would require a defendant to publish the Citizen against its will violates  
12 the First Amendment just as would a TRO requiring it to cease publication altogether. The  
13 First Amendment protects a person’s right not only to speak but also to refrain from speaking.  
14 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (invalidating New Hampshire law that  
15 required residents to display the state’s “Live Free or Die” motto on automobile license plates  
16 as unconstitutionally compelled expression). This right applies to prevent the compelled  
17 expression of both non-commercial and commercial speech, as well as the compelled  
18 subsidization of speech. *See United States v. United Foods, Inc.*, 533 U.S. 405, 409-10  
19 (2001). The rule applied in such cases is generally strict scrutiny: the plaintiff action will be  
20 invalidated if it lacks a compelling state interest or is not narrowly tailored to achieve such an  
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27 <sup>11</sup> The First Amendment also applies to actions of the federal judiciary and executive  
28 branches, as well as to state action. *See New York Times Co. v. United States*, 403 U.S.  
713 (1971); *Gitlow v. New York*, 268 U.S. 652 (1925).

1 interest. *See Riley v. National Fed. of the Blind of North Carolina*, 487 U.S. 781, 798, 800  
2 (1988).<sup>12</sup>

3  
4 Newspapers, in particular, are shielded by the First Amendment from plaintiff  
5 compelled expression. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256  
6 (1974), the Court struck down a state “right of reply” statute requiring newspapers that were  
7 critical of political candidates to print their responses. Proponents of the state statute  
8 asserted that “the ‘marketplace of ideas’ is today a monopoly controlled by owners of the  
9 market” and—echoing the instant case—that “plaintiff has an obligation to ensure that a wide  
10 variety of views reach the public.” *Id.* at 248, 251. The Court rejected such justifications for  
11 infringing upon newspapers’ rights, noting that “governmental coercion . . . at once brings  
12 about a confrontation with the express provisions of the First Amendment and the judicial  
13 gloss on that Amendment developed over the years.” *Id.* at 254.

14  
15  
16 Certain activities involving free speech are so fundamental to our nation’s  
17 commitment to a robust political discourse that their infringement is intolerable. Chief  
18 among these is the publication of a newspaper. *See New York Times Co. v. Sullivan*, 376 U.S.  
19 254, 270 (1964). In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the  
20 Court explained why it could uphold the Federal Communications Commission’s “must-  
21 carry” rules requiring cable television operators to carry local broadcast television stations,  
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24 <sup>12</sup> Although the Supreme Court has applied an “intermediate scrutiny” standard in some  
25 cases to strike down state action compelling speech, *see, e.g., Wooley v. Maynard*, 430  
26 U.S. at 715-16, strict scrutiny is appropriate here because the very purpose of the TRO is  
27 to compel expression and it seeks to single out one member of the press for special  
28 treatment. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-42 (1994).  
In addition, injunctive relief warrants heightened scrutiny due to its inherent capacity for  
censorship, as noted below. *See Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753,  
764-65 (1994).

1 even though it would be required by the First Amendment to strike down a similar provision  
2 aimed at newspapers:

3 A daily newspaper, no matter how secure its local monopoly,  
4 does not possess the power to obstruct readers' access to other  
5 competing publications—whether they be weekly local  
6 newspapers, or daily newspapers published in other cities. Thus,  
7 when a newspaper asserts exclusive control over its own news  
8 copy, it does not thereby prevent other newspapers from being  
9 distributed to willing participants in the same locale.

10 *Id.* at 656.

11 Forcing TNI to publish the Citizen again would plainly run afoul of the First  
12 Amendment. The Citizen contained editorial content, which is unquestionably speech of a  
13 non-commercial nature that is fully protected expression under the First Amendment. *See*  
14 *Tornillo*, 418 U.S. at 255-56.<sup>13</sup> Forcing TNI to publish the Citizen would strip the parties of  
15 their fundamental right to refrain from speaking. *See Riley*, 487 U.S. at 796-97 (no  
16 distinction between compelled silence and compelled expression); *Tornillo*, 418 U.S. at 256  
17 (“governmental restraint on publishing need not fall into familiar or traditional patterns to be  
18 subject to constitutional limitations on plaintiff powers”).

19 First Amendment concerns in particular warrant heightened attention where a party  
20 seeks injunctive relief because injunctions necessarily involve the court in regulating the  
21 content of speech. “Injunctions also carry greater risks of censorship and discriminatory  
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23 <sup>13</sup> The fact that the newspaper is a for-profit enterprise does not alter its status as protected  
24 speech. *See Riley*, 487 U.S. at 801 (“It is well settled that a speaker’s rights are not lost  
25 merely because compensation is received; a speaker is not less a speaker because he or  
26 she is paid to speak.”), *citing New York Times Co. v. Sullivan*, 376 U.S. at 265-66. To the  
27 extent the newspaper contains commercial speech, such speech is “inextricably  
28 intertwined” with the non-commercial speech and the entire newspaper must be accorded  
the highest protection. *See Riley*, 487 U.S. at 796 (“we do not believe that the speech  
retains its commercial character when it is inextricably intertwined with otherwise fully  
protected speech”).

1 application than do general ordinances . . . We believe that these differences require a  
2 somewhat more stringent application of general First Amendment principles in this context.”  
3 *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 764-65 (1994). “Mandating speech  
4 that a speaker would not otherwise make necessarily alters the content of the speech,” which  
5 constitutes “a content-based regulation of speech” subject to strict scrutiny. *Riley*, 487 U.S. at  
6 795.  
7

8  
9 In *Riley*, the Supreme Court struck down a state law that required solicitors raising  
10 funds for charitable organizations to disclose to potential donors the percentage of  
11 contributions actually turned over to charity. The Court found no distinction between  
12 compelled statements of opinion or compelled statements of fact—“either form of  
13 compulsion burdens protected speech.” *Id.* at 797-98. The content of the speech is thus  
14 irrelevant; it is the forced expression of any content where the speaker prefers silence that  
15 gives rise to the constitutional violation. *Id.*; see also *Tornillo*, 418 U.S. at 256 (rejecting the  
16 plaintiff’s argument that the statute in question was constitutional because it “has not  
17 prevented the Miami Herald from saying anything it wished”).  
18  
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20 If the Court issues a TRO in this case, each edition of the Citizen published and  
21 disseminated thereafter will constitute compelled expression in violation of the First  
22 Amendment. Each editorial, each article, each column and each advertisement would not  
23 have been expressed but for the plaintiff’s compulsion. The Court would be forced to  
24 approve each and every editorial and content decision made by TNI which the plaintiff  
25 asserted constitutes a reduction or detrimental change in the publication of the Citizen below  
26 “levels equivalent to those on January 15, 2009.” See Proposed TRO Order. Thus, the Court  
27  
28

1 might be called upon to adjudicate TNI's decisions to publish a shorter paper, reduce space  
2 for news coverage to allow for more ads or vice versa, decide not to cover local or national  
3 stories, or even to cover some stories rather than others. Such an intrusion in TNI's  
4 constitutionally protected discretion to formulate how, when and where it speaks is not  
5 countenanced—the plaintiff does not enjoy the right to determine what is worth saying and  
6 what is not; that decision rests solely with TNI. “The general rule is that the speaker and the  
7 audience, not the government, assess the value of the information presented.” *United Foods*,  
8 533 U.S. at 411 (citing *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).  
9  
10

11 **B. A TRO Cannot Withstand Strict Scrutiny by Relying on the Antitrust**  
12 **Laws**

13 The plaintiff's request for a TRO utterly fails strict scrutiny analysis because the state  
14 interest it asserts is not compelling and the means chosen to achieve that interest are not  
15 narrowly tailored. The plaintiff asserts that by ceasing publication of the Citizen, Gannett and  
16 Lee have unreasonably restrained trade and lessened competition in an undefined Tucson  
17 product market, and that a TRO is necessary to preserve competition. In *Tornillo*, however,  
18 the Supreme Court determined that a reduction in newspaper competition was not a  
19 sufficiently compelling interest to warrant infringement upon a newspaper's First  
20 Amendment rights by forcing it to publish certain content. 418 U.S. at 251, 256; *see also*  
21 *Turner*, 512 U.S. at 640 (“the mere assertion of dysfunction or failure in a speech market,  
22 without more, is not sufficient to shield a speech regulation from the First Amendment  
23 standards”). Moreover, a TRO forcing the continued publication of a newspaper at a  
24 financial loss is an extraordinary remedy that is not narrowly tailored.  
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1 Put simply, the Court has no business dictating the continued publication of a  
2 newspaper. The First Amendment encompasses the right not only to speak but also to refrain  
3 from speaking. The antitrust laws do not strip competitors of their First Amendment rights.  
4 The remedy the plaintiff seeks here would substantially intrude upon constitutional freedoms  
5 and is inappropriate in the newspaper context.<sup>14</sup> The Court would quickly find itself drawn  
6 into bitter disputes between the parties over what the Citizen published, what it did not  
7 published, and when and to whom it will speak. This is not the role of the Court.  
8  
9

### 10 CONCLUSION

11 For all of these reasons, defendants respectfully request that the Court deny plaintiff's  
12 motion for a temporary restraining order.

13 Dated: May 18, 2009

14 Respectfully submitted,

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14 Indeed, agreements between competitors to exercise First Amendment rights are immune from antitrust liability. See *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

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