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May 1, 2013

VIA CM / ECF FILING

Ms. Molly C. Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, California 94103

Re: *Courthouse News Service v. Planet*
Case No. 11-57187

Dear Ms. Dwyer:

Appellee Michael Planet responds to Appellant Courthouse News's April 24, 2013 Rule 28(j) letter as follows:

1. Appellant's reliance on *Rivas v. Napolitano*, 2013 U.S. App. LEXIS 6663 (9th Cir. 2013) is misplaced. Federal courts considering FRCP 12(b)(1) jurisdictional challenges need not assume the truth of a complaint's allegations, *Thornhill Publishing Co. v. GTE Corp.*, 594 F.2d 730, 733 (9th Cir.1979), and can "resolv[e] factual disputes where necessary" prior to trial. *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir.1983). The rule is different only when jurisdictional and merits questions "overlap completely." *Rivas*, at *8. Courts understandably assume the truth of the complaint's allegations when jurisdictional and merits questions completely overlap to avoid ruling on the merits in the absence of a full record. *E.g.*, *Roberts v. Corrothers*, 812 F. 2d 1173, 1177 (9th Cir. 1987).

*Rivas* does not apply here because jurisdictional and merits questions do not overlap, and because the district court *abstained* from deciding the merits, holding that "[i]f reasonable access were defined to mean 'same-day access,' this would avoid the necessity of this Court deciding the federal constitutional issues …." ER 9.

2. Appellant's citation to *NAGE v. Mulligan*, 849 F. Supp. 2d 167 (D. Mass. 2012), and *Crisante v. Coats*, 2012 U.S. Dist. LEXIS 53646 (M.D. Fla. 2012) also is unavailing. This Court held in *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987) that "there is no absolute rule against abstention in first amendment cases," and that abstention may be justified when "[t]he fears of chill that justify our preference against abstention in first amendment cases are not present …."

3. *Dex Media West, Inc. v. City of Seattle*, 696 F. 3d 952 (9th Cir. 2012)'s holding that "yellow page" phone books qualify as protected commercial speech is inapposite. This is an "access-to-information" and not a "freedom-of-expression" case. *L.A.P.D. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999).

4. *Dorsett v. County of Nassau*, 2012 U.S. Dist. LEXIS 168073 (E.D.N.Y. 2012) refused to permit press access to sealed documents on file in a settled lawsuit, and is entirely inapposite for this reason.

Very truly yours,

Robert A. Naeve

9th Circuit Case Number(s) 11-57187

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Signature (use "s/" format) s/ Robert A. Naeve

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