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MICHAEL PLANET, IN HIS OFFICIAL CAPACITY AS COURT EXECUTIVE OFFICER/CLERK OF THE VENTURA COUNTY SUPERIOR COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COURTHOUSE NEWS SERVICE,

Plaintiff,

v.

MICHAEL PLANET, IN HIS OFFICIAL CAPACITY AS COURT EXECUTIVE OFFICER/CLERK OF THE VENTURA COUNTY SUPERIOR COURT,

Defendant.

Case No. CV11-08083 R (MANx)

Assigned for all purposes to Hon. Manuel L. Real

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND ABSTAIN

Date: November 21, 2011
Time: 10:00 a.m.
Courtroom: 8

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INTRODUCTION

Plaintiff Courthouse News Service ("CNS"), a purportedly widely read legal news wire service, seeks broad declaratory and injunctive relief against Michael D. Planet, in his official capacity as Executive Officer and Clerk of the Superior Court of California, County of Ventura ("Mr. Planet" or the "Ventura Superior Court"). The gravamen of CNS's lawsuit rests on the misplaced notion that it has a *constitutional* or common law right to "same-day access" to all newly filed unlimited civil complaints. Specifically, CNS complains that "any delay in the reporter's ability to review a newly filed complaint necessarily creates delay in [CNS's] ability to inform interested persons of the factual and legal allegations in those complaints . . . ." (Compl., ¶ 18 (emphasis added).) CNS further complains that purportedly increasing access delays at Ventura Superior Court, and an alleged "policy" that CNS (and every other member of the public) cannot have access to new filings at that court until the requisite document processing is completed has resulted in new filings being "as good as sealed," in violation of the First and Fourteenth Amendments to the U.S. Constitution, federal common law, and the California Rules of Court. (*Id.*, ¶ 6.) Thus, CNS wants nearly instantaneous access to all newly filed unlimited civil complaints.

CNS can cite to *no case* holding that the First Amendment protects a news agency's right to "same-day access" to newly filed complaints. Instead, it claims that because certain other courts are able to extend the *courtesy* of "same-day access", this Court should make such access a constitutional mandate. But the law does not countenance such a decree, and for good reason. *First*, CNS's request that this *federal* district court involve itself in the administration of the *state's* judicial system runs afoul of settled principles of federalism, comity, and institutional competence—all of which urge this Court to exercise its discretion to abstain from hearing the matter at all. *Second*, CNS's first and second claims for relief for

violation of the First Amendment to the United States Constitution and federal common law fail to state a claim upon which relief may be granted, as there simply is no constitutional or common-law right to "same-day access" to newly filed unlimited civil complaints. *Third*, CNS's third claim for relief, which alleges that the Ventura Superior Court violates California Rule of Court 2.550, runs afoul of the Eleventh Amendment, and is barred. Ventura Superior Court's motion should be granted, and the entire action should be dismissed accordingly.

FACTUAL BACKGROUND

A. California Law Grants To All Members Of The Public, Including The Press, The Right Of "Reasonable Access" To Documents Filed In California's Courts.

It has long been settled in California that members of the public have a right of access to "adjudicative proceedings and filed documents of trial and appellate courts." *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 1212, 86 Cal. Rptr. 2d 778 (1999). This is because "the public has an interest, in all civil cases, in observing and assessing the performance of its public judicial system . . . ." *Id*. at 1210; s*ee also Hibernia Savings and Loan Soc. v. Boyd*, 155 Cal. 193, 200, 100 P. 239 (1909) ("A judicial record is a public writing . . . ."); *In re Marriage of Nicholas*, 186 Cal. App. 4th 1566, 1575, 113 Cal. Rptr. 3d 629 (2010) ("A strong presumption exists in favor of public access to court records in ordinary civil trials"); *Estate of Hearst*, 67 Cal.App.3d 777, 784, 136 Cal. Rptr. 821 (1977) ("[T]he public has a legitimate interest in access to public records, such as court documents.").

The California Legislature codified this right of access in Government Code section 68150. In particular, the Legislature mandated in section 68150(l) that, "[u]nless access is otherwise restricted by law," court records of all types, including paper and electronic, "shall be made *reasonably accessible* to all members of the public for viewing and duplication as the paper records would have been

accessible." Cal. Gov't Code § 68150(l) (emphasis added). Significantly, this right of "reasonable access" extends to documents only after they have been "filed . . . in the case folder, but if no case folder is created by the court, all filed papers and documents that would have been in the case folder if one had been created." Cal. Gov't Code § 68151(a)(1); see also Cal. Civ. Proc. Code § 1904 (defining "judicial record").

The Legislature directed the Judicial Council of California to "adopt rules to establish the standards or guidelines for the creation, maintenance, reproduction, or preservation of court records . . . ." Cal. Gov't Code § 68150(c). The Judicial Council complied with the Legislature's directive by adopting Title 2, Division 4 of the Rules of Court relating to maintenance of and access to trial court records. As is relevant to these proceedings, Rule of Court 2.400(a) provides that, "Only the clerk may remove and replace records in the court's files," and that, "[u]nless otherwise provided by these rules or ordered by the court, court records may only be inspected by the public in the office of the clerk." Cal. R. Ct. 2.400(a). The Rules of Court further acknowledge that "[u]nless confidentiality is required by law, court records are presumed to be open," Cal. R. Ct. 2.550(c), and that the public has a right of "reasonable access" to them. *E.g.*, Cal. Rs. Ct. 2.500(a), 2.503(a). *See generally In re Marriage of Mosley*, 190 Cal. App. 4th 1096, 1102-03, 82 Cal. Rptr. 3d 497 (2010).

B. CNS Insisted That The Ventura Superior Court's Clerk's Office Provide "Same-Day Access" To Newly Filed Civil Unlimited Complaints.

CNS claims to be "a widely-read legal news wire service with thousands of subscribers across the nation . . . ." (Compl., ¶ 4.) Its "core news publications are its new litigation reports, which are e-mailed to its subscribers and contain staff-written summaries of all significant new civil complaints filed in a particular court." (¶15.) To obtain these summaries, CNS assigns "reporters" to various courthouses

with the instruction to review newly-filed "unlimited jurisdiction" civil complaints in which the matter in controversy exceeds $25,000. (Compl., ¶ 18.)

Significantly, CNS does not seek the same "reasonable access" to new case filings afforded to members of the general public. *Cf. Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S. Ct. 1306 55 L. Ed. 2d 570 (1978) (holding that members of the media generally have no greater rights or privileges than do members of the general public). Instead, CNS explicitly alleges that it is constitutionally entitled to what amounts to immediate or "same-day access" to newly filed unlimited civil complaints, ostensibly because this "ensures that interested members of the public learn about new civil litigation while the initiation of that litigation is still newsworthy . . . . ." (Compl., ¶¶ 4, 18.)

For most of the time periods alleged in its complaint, CNS did not seek to obtain "same-day access" to filings in Ventura Superior Court. Instead, CNS alleges that from 2000 to 2010, CNS's reporter only visited the Ventura Superior Court's clerk's office "once or twice a week" to review new complaints maintained in a "media bin." (*Id.*, ¶¶ 22-25.) Hence, whatever delays CNS may have experienced during this period of time has little bearing on the substance of its current claim to "same-day access" to civil filings.

CNS changed its business model in November 2010 by asking one of its reporters to visit the Ventura Superior Court's clerk's office every day. (*Id.*, ¶ 25.) However, rather than seek the same access as the clerk's office grants to other members of the general public, CNS asked for more. In particular, CNS alleges at paragraph 25 of its complaint that it asked Ventura Superior Court should "adjust" its procedures to grant "same-day access" to unlimited civil complaints not because other members of the public obtained "same-day access" to complaints in Ventura, but because courts in other jurisdictions allegedly have the ability to do so:

> 25. In an effort to improve the quality of the Central Coast Report through more timely reporting on new civil unlimited jurisdiction complaints, in November 2010, Courthouse News began covering Ventura Superior a daily basis. Prompted by its change to daily coverage and the access problems it continued to experience, Courthouse News once again initiated discussions with the clerk's office about the possibility of adjusting its procedures so that Ms. Krolak could have same-day access to newly filed unlimited jurisdiction civil complaints, as news reporters do in other courts they visit on a daily basis.

CNS alleges that it sent a June 20, 2011 demand letter to Mr. Planet, attached as Exhibit 2 to its Complaint. (*Id.*, ¶ 26.) The demand letter explains that courts in other jurisdictions, including federal courts that have adopted electronic filing through the PACER system, have the ability to grant "same-day access" to CNS reporters. (*Id.*, ¶ 26 & Ex. 2.) Mr. Planet responded to CNS's June 20, 2011 demand letter on July 11, 2011. (*Id.*, ¶ 27 & Ex. 3.) He explained that, while it was not possible for the court to provide "same-day access" to all civil complaints, the court would continue make files available "as early as practicable:"

> As you have noted, the Court has met and spoken with you and representatives of Courthouse News Service several times over the past couple of years to both explain the Court's serious resource shortages as a result of budget reductions, and steps that could reasonably be taken to make new complaints available to the media. The budget recently signed by the Governor imposes even more drastic reductions to the Courts, which makes it even more difficult to provide same-day access to new filings.
>
> While I appreciate the Courthouse News Services' interest in same-day access, the Court cannot prioritize that access above other priorities and mandates. Further, the Court must ensure the integrity of all filings, including new filings, and cannot make any filings available until the requisite processing is completed. We will continue to make every effort to make new filings available as early as is practicable given the demands on limited court resources.

(*Id.*, ¶ 27 & Ex. 3.)

CNS alleges that, since receipt of the July 11, 2011 response from Mr. Planet, its reporters have not obtained ""same-day access"" to all newly filed civil unlimited complaints filed in the Ventura Superior Court. (¶¶ 29-30).

C. CNS's Complaint Asks This Court To Create Constitutional And Common-Law Rights To "Same-Day Access" To Unlimited Civil Complaints, Except As Deemed Permissible Following A "Case-By-Case" Adjudication Of Individual Claims.

CNS's complaint contains three claims for relief, the first two of which are asserted pursuant to 42 U.S.C. § 1983:

1. First Claim for Relief. CNS alleges that Ventura Superior Court violates the First Amendment to the United States Constitution by delaying access to new civil unlimited complaints and by failing to provide "timely, same-day access to new civil unlimited complaints." (*Id.*, ¶¶ 32-35.)

2. Second Claim for Relief. CNS alleges that Ventura Superior Court violates federal common law by delaying access to new civil unlimited complaints and by failing to provide "timely, same-day access to new civil unlimited complaints." (*Id.*, ¶¶ 37-39.)

3. Third Claim for Relief. Finally, CNS claims that, by failing to provide "timely, same-day access" to newly filed unlimited civil complaints, Ventura Superior Court has "effectively seal[ed]" these complaints, in violation of California Rule of Court 2.550. (*Id.*, ¶¶ 41-43.)

This is *not* a case in which the plaintiff seeks the standard prohibitory injunction designed to maintain the status quo pending trial. Instead, as can be seen from paragraph 1 of CNS's prayer for relief, CNS effectively seeks a stringent mandatory injunction that is designed to alter the status quo pending trial by requiring Ventura Superior Court to cease denying "same-day access" to civil unlimited complaints:

> 1. For preliminary and permanent injunctions against Defendant, including his agents, assistants, successors, employees, and all persons acting in concert or cooperation with him, or at his direction or under his control, prohibiting him preliminarily, during the pendency of this action, and permanently thereafter, from continuing his policies resulting in delayed access to new unlimited jurisdiction civil complaints and denying Courthouse News timely access to new civil unlimited jurisdiction complaints on the same day they are filed, except as deemed permissible following the appropriate case-by-case adjudication.

In addition, CNS asks this Court to enter a declaratory judgment that Ventura Superior Court's failure to provide "same-day access" to newly filed unlimited civil complaints violates the First Amendment, federal common law and California Rule of Court 2.550:

> 2. For a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring Defendant's policies that knowingly affect delays in access and a denial of timely, same-day access to new civil unlimited complaints as unconstitutional under the First and Fourteenth Amendments to the United States Constitution and in violation of the federal common law and California Rule of Court 2.550, for the reason that that it constitutes an effective denial of access to court records.

D. What CNS's Complaint Fails To Allege.

At the motion to dismiss stage, this Court is obligated to assume the truth of the complaint's allegations. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Nonetheless, three notable *omissions* are worthy of comment.

1. CNS Sponsored SB 326 —A Bill That Would Provide The Precise Relief CNS Seeks Here.

CNS's Complaint repeatedly suggests that it is entitled to "same-day access" to newly filed unlimited civil complaints because such access historically has been granted. However, CNS fails to disclose that it made the precise opposite claim when it sponsored a "same-day access" bill known as Senate Bill 326 in the California Legislature. (RJN, Ex. A[1] [Cal. Senate Bill 326].) There, CNS claimed that: (a) Government Code section 68150 already "provides the public with reasonable access to court records;" (b) the term "reasonable access" is not defined; (c) "many other courts have failed and refused to provide a system whereby the public has access to court record information in a timely manner;" and (d) for these reasons, legislation is necessary to "require the Judicial Council of California to adopt a rule or rules of court to require courts to provide public access to case-initiating civil and criminal court records, as defined, by no later than the end of the day on which those records are received by the court." (*Id.*, Ex. B [Cal. Senate Judiciary Comm. May 3, 2011 Bill Analysis].)

CNS also failed to disclose that the Judicial Council of California has objected to SB 326, advising that, "[w]hile the Council strongly favors timely public access to court records that are subject to public disclosure, SB 326 sets a standard for access that cannot be achieved without a significant increase in court staffing." (*Id.*, Ex. C [Apr. 27, 2011 Letter].) Subsequent revisions were made to the bill, and Judicial Council changed its position to neutral. (*Id.*, Ex. D [June 9, 2011 Letter].) With those revisions and Judicial Council's neutral position, SB 326 passed in the Senate on May 31, 2011. (*Id.*, Ex. E [Complete Bill History].)

After passing out of the Assembly Judiciary Committee with the amendments required by the Senate Judiciary Committee, the bill was subsequently amended in

[1] All citations to "RJN, Ex. ___" are to the exhibits attached to Mr. Planet's concurrently filed Request for Judicial Notice in Support of Motion to Abstain and Dismiss.

the Assembly Appropriations Committee a number of times. The latest version of CNS's proposed bill eliminated the key facets of the Senate Judiciary Committee's revisions, and Judicial Council renewed its opposition, which highlighted the unworkable mandate of SB 326, particularly in light of ever-increasing state court budget cuts:

> Subsequent to the Senate Judiciary Committee hearing, the ongoing cuts to the judicial branch in the budget were increased by an additional $150 million. Most courts were not in a position to comply with the same day mandate in SB 326 before these additional cuts were enacted, but in the face of even deeper reductions, courts will not have sufficient staff available to fulfill the requirements of SB 326.

(*Id.*, Ex. F [Aug. 8, 2011 Letter] at 2.) The bill was held in the Assembly Appropriations Committee at the time the committee reviewed those bills with significant fiscal impact, and despite a further amendment taken on September 1, 2011, it remains in that committee. (*Id.*, Ex. E [Complete Bill History].)

2. Ventura Superior Court Is *Not* An Electronic Filing Court.

CNS's Complaint purports to make much of the fact that other courts allegedly provide it with "same-day access" to newly filed unlimited civil complaints. As its primary examples, CNS alleges that this Court and other U.S. District Courts in California provide "same-day access." (Compl., ¶ 11.) CNS also makes lengthy allegations about a state court in Las Vegas, Nevada. (*Id.*, ¶13.) However, all those courts—and many others in CNS's self-selected summary of court access policies (*id.*, Ex. 1)—are electronic filing courts. Indeed, all federal courts throughout the country employ the PACER system for court records management (*id.*, ¶ 11), which mandates electronic filing of substantially all documents filed with the court. And the Las Vegas court also recently implemented a mandatory e-filing protocol. (*Id.*, ¶ 13.) The result is that clerk's offices in these courts are not burdened by the substantial additional administrative task imposed by the need to process by hand every document filed with the court.

CNS does not allege—and cannot allege—that Ventura Superior Court is an electronic filing court. Rather, the clerk's office staff at Ventura Superior Court must process by hand each and every document filed with the court. This distinction, which CNS ignores, is critical. It is not surprising that many e-filing courts can provide "same-day access"; they are not burdened with the additional administrative tasks that non-e-filing courts, like Ventura Superior Court, must perform. But the fact that e-filing courts are *not* burdened with those tasks does not somehow compel imposition of an even *greater* burden on non-e-filing courts.

3. CNS Has Not Attempted To Seek Appropriate Relief In State Court.

As explained above, California law already requires courts to provide "reasonable access" to court documents once they are filed. *See* Cal. Gov't Code § 68150(l) & 68151. CNS curiously avoids any reference to this governing statute. Instead, CNS argues that Ventura Superior Court's failure to provide "same-day access" violates California Rule of Court 2.550 as an "exercise of unguided discretion to effectively seal a court record," the authority for which "lies only in a judge of the court." (*Id.*, ¶ 33.) Even if this claim were well taken (it is not, *see infra* Section III), CNS has not sought relief from this alleged violation from "a judge of the court." It has not sought *any* relief from the state courts under the governing state law.

ARGUMENT

I. THIS COURT SHOULD ABSTAIN FROM HEARING THIS CASE.

Article III of the Constitution limits federal court review to justiciable "cases and controversies." *See generally* U.S. Const., Art. III, §§ 1, 2. As the Supreme Court recognized in *Los Angeles v. Lyons*, 461 U.S. 95, 112, 103 S. Ct. 1660,75 L. Ed. 2d 675 (1983), "[a] federal court . . . is not the proper forum to press" general complaints about the way in which government goes about its business. *See also*

Missouri v. Jenkins, 515 U.S. 70, 112-113, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995) (O'Connor, J., concurring) ("Article III courts are constrained by the inherent constitutional limitations on their powers. Unlike Congress, which enjoys discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, federal courts have no comparable license and must always observe their limited judicial role.") (internal citations and quotations omitted).

Whether a case is justiciable is governed, in part, by important separation of powers principles. *See Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). Thus, the Supreme Court has developed several related abstention doctrines grounded in principles of comity and federalism to ensure that federal courts do not improvidently resolve disputes and award relief that will intrude upon the prerogatives of states to structure and fund their own governmental institutions. *See Rizzo v. Goode*, 423 U.S. 362, 378-80, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) ("When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs") (internal quotations and citations omitted).

A. This Court Should Equitably Abstain From Hearing This Matter Pursuant To *O'Shea v. Littleton*.

The Supreme Court first articulated the doctrine of equitable abstention in *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974). This doctrine counsels federal courts to decline to exercise their equitable powers in cases seeking to reform state institutions, because such suits offend traditional notions of federalism by calling for "restructuring . . . state government institutions" and "dictating state or local budget priorities." *O'Shea*, 414 U.S. at 500; *see also Horne v. Flores*, 129 S. Ct. 2579, 2593, 174 L. Ed. 2d 406 , 557 U.S.

__ (2009) ("Federalism concerns are heightened when, as in these cases, a federal decree has the effect of dictating state and local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."); *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992) ("We should be very reluctant to grant relief that would entail heavy federal interference in such sensitive state activities as administration of the judicial system"); *Ad Hoc Comm. on Judicial Admin. v. Massachusetts*, 488 F.2d 1241, 1245-46 (1st Cir. 1973) ("In this nation, the financing and, to an important extent, the organization of the judicial branches, federal and state, have been left to the people, through their legislature. . . . [I]t would be both unprecedented and unseemly for a federal judge to attempt a reordering of state priorities").

Last month, the Ninth Circuit recognized that "[w]hen the state agency in question is a state court . . . the equitable restraint considerations [of *O'Shea*] appear to be nearly absolute." *E.T. v. Cantil-Sakauye*, No. 10-15248, slip op. 17457, 17464 (9th Cir. Sept. 13, 2011) (quoting *Parker v. Turner*, 626 F.2d 1, 7 (6th Cir. 1980)). In that case, the Ninth Circuit affirmed a district court's decision to abstain from entertaining a suit seeking a declaration that the caseloads in dependency courts in the Superior Court of California, County of Sacramento, were unconstitutionally excessive.[2] Specifically, the court reasoned the lower court had properly "[h]eed[ed] the teachings of *O'Shea* and cases since" by concluding that "'[P]laintiffs' challenges to the juvenile dependency court system necessarily require the court to intrude upon the state's administration of its government, and more specifically, its court system.'" *Id.*, at 17463 (quoting *E.T. v. George*, 681 F. Supp. 2d 1151, 1164 (E.D. Cal. 2010)). The court further rejected the plaintiffs'

[2] Although a petition for rehearing and rehearing en banc is pending in *E.T.* before the Ninth Circuit, the original three-judge panel decision remains valid law unless and until the court grants the petition. *See* 9th Cir. Gen. Order 5.5(d).

invitation to consider only a request for declaratory relief (not injunctive relief): "For 'even the limited decree[]' sought here 'would inevitably set up the precise basis for *future intervention* condemned in *O'Shea*.'" *Id.* at 17465 (quoting *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992)); *see also id.* ("[W]ere we to declare the current Dependency Court attorney caseloads unconstitutional or unlawful, the Defendants' compliance with that remedy and its effect in individual cases could be subject to further challenges in federal district court.").

1. CNS's Complaint Seeks The Exact Sort of Intervention With State Judicial Administration That O'Shea Condemns.

The same equitable restraint considerations that underlie *E.T., Ad Hoc Committee* and other cases compel abstention here. CNS seeks a mandatory injunction that, by its very nature, would require this Court to "inquire into the administration of [California's judicial] system, its utilization of personnel," and the advisability of requiring it to adopt a "same-day access" policy in light of critical and competing statewide budgetary concerns. *Ad Hoc Comm.*, 488 F.2d at 1245; *see also O'Shea*, 414 U.S. at 502 (criticizing the court of appeal's proposed "periodic reporting system" as "a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity").

Most significantly, beyond an injunction requiring this Court's continuing oversight to ensure the Ventura Superior Court's general compliance, CNS seeks an injunction that necessarily would put the "federal district court in the role of receiver for a state judicial branch" insofar as CNS seeks "same-day access" to new civil unlimited jurisdiction complaints "except as deemed permissible *following the appropriate case-by-case adjudication*." (Compl., Prayer, ¶ 1 (emphasis added); *see also* Compl., ¶ 34.) Thus, CNS acknowledges that "same-day access" might not be possible in all circumstances (even if required, which it is not), and wants this Court to resolve those situations.

As *Ad Hoc Committee* warned, "[w]hile the state judiciary might appreciate the additional resources, it would scarcely welcome the intermeddling with its administration which might follow." *Ad Hoc Comm.*, 488 F.2d at 1246. This Court should decline CNS's invitation to intermeddle with the California court system for this reason. *See also Kaufman v. Kaye*, 466 F.3d 83, 87 (2d Cir. 2006) ("[W]e cannot resolve the issues raised here as to present assignment procedures without committing to resolving the same issues as to the remedy chosen by the state and as to the subsequent case-by-case implementation of the assignment procedures in the Second Department. This is exactly what *O'Shea* forbids.").

2. CNS's Current Legislative Attempts For Relief Underscore The Wisdom In This Court's Abstention.

Case law consistently recognizes that decisions concerning budgets, staffing, and procedural matters of local agencies are best left to resolution by a "legislative or executive, rather than a judicial, power." *Jenkins*, 515 U.S. at 133; *see also Ad Hoc Comm.*, 488 F.2d at 1245 ("In this nation, the financing and, to an important extent, the organization of the judicial branches, federal and state, have been left to the people, through their legislature."). And CNS knows this better than anyone. Before filing its lawsuit here, CNS sought from the California legislature the very same relief—albeit on a statewide basis—that it seeks here. (RJN, Ex. A.)

CNS's legislative effort supports abstention in at least three respects. First, SB 326 is still pending with the legislature, which will reconvene in January. Thus, there is a risk that this Court's jurisdiction over the case could be mooted by intervening events. Even worse, this Court could render a decision inconsistent with the state's legislative directive, causing confusion and uncertainty and wasting precious resources.

Second, SB 326 demonstrates that CNS's complaints about access are not limited to one theoretically anomalous court. CNS actually contends that "timely" access to newly filed unlimited civil complaints is a problem throughout the state.

(*Id.*, Ex. B.) Thus, if the Court were to entertain this action, it is likely to become embroiled not just in the administration of the Ventura Superior Court, but in the administration of the entire state judicial branch—an exponentially greater level of intermeddling that *O'Shea* intended to prevent.

Third, SB 326 demonstrates the arbitrariness of CNS's position. Prior to 2010, CNS did not visit Ventura Superior Court every day (and even then apparently reported only on new filings from only one of Ventura's three courthouses), and therefore had no need for "same-day access." (Compl., ¶¶ 22-25.) In late 2010, it changed its business model to increase coverage of that court and began sending a reporter daily. (*Id.*, ¶ 25.) Now, through its Complaint, CNS seeks "same-day access" to newly filed unlimited civil complaints filed in Ventura Superior Court. Through SB 326, however, CNS seeks "same-day access" to newly filed unlimited civil complaints filed throughout the state. And, as CNS determines (in its sole discretion) that other types of filings are "newsworthy" (*id.*, ¶ 15), it may seek "same-day access" to those. Indeed, at some point, CNS may contend that "same-day access" is no longer sufficient; it must be "within the hour" access. But this Court has no obligation, much less prudential need, to conform the law to CNS's ever-changing business model. If anything, the law should require *CNS* to change its model to adapt to the reasonable access that it already is provided.

In short, "the proposed cure" that CNS seeks would be worse "than the disease." *Ad Hoc Comm.*, 488 F.2d at 1246. This Court should exercise its discretion to equitably abstain from hearing this action accordingly.

B. This Court Should Abstain From Hearing This Matter Pursuant To *Railroad Comm'n of Texas v. Pullman Co*.

Abstention doctrines do more than prevent federal courts from intruding upon the prerogatives of states to structure and fund their own governmental

institutions. Abstention doctrines also honor comity and federalism by avoiding "unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460, 1462 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (internal quotations omitted). Hence, under a separate abstention doctrine first announced in *Railroad Comm'n of Texas v. Pullman Co*., 312 U.S. 496, 500-01, 61 S. Ct. 643, 85 L. Ed. 971 (1941), "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

In the Ninth Circuit, federal courts have the discretion to abstain under *Pullman* when: "(1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open[;] (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy[; and] (3) The possibly determinative issue of state law is doubtful." *Smelt v. County of Orange*, 447 F.3d 673, 679 (9th Cir.), *cert. denied*, 549 U.S. 959 (2006); *see generally Canton v. Spokane Sch. Dist. # 81*, 498 F.2d 840 (9th Cir. 1974).

Pullman and its progeny create a narrow exception to a federal court's duty to adjudicate claims properly before it. *E.g.*, *County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 188, 3 L. Ed. 2d 1163, 79 S. Ct. 1060 (1958). Nonetheless, *Pullman* abstention warrants careful consideration because all three of the factors enunciated by the Ninth Circuit are present in this case. To start, as explained above, the Complaint here asks this Court to become the overseer of the administrative operations of the Ventura Superior Court, and to decide, apparently on a case-by-case basis, whether access to newly filed unlimited civil complaints

must be granted on a "same-day basis." *Pullman* abstention is appropriate in this circumstance because "federal courts owe deference to their state counterparts in situations where public perceptions of the integrity of the state judicial system are affected." *Hughes v. Lipscher*, 906 F.2d 961, 967 (3d Cir. 1990); *see also Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987) ("the 'sensitive social policy' prong . . . recognizes that abstention protects state sovereignty over matters of local concern, out of considerations of federalism, and out of scrupulous regard for the rightful independence of state governments").

As for the second and third *Pullman* factors, resolution of at least *two* unsettled questions of state law could obviate the need for this action in its entirety. As noted above, Government Code section 68150(l) already provides that court records of all types "shall be made *reasonably accessible* to all members of the public for viewing and duplication . . . . ." Cal. Gov't Code § 8150(l) (emphasis added). However, as CNS and other sponsors of SB 326 have already acknowledged, the term, "'reasonable access' is not defined under existing law." (RJN, Ex. B at 2.)

Much the same can also be said of CNS's third claim for relief for violation of California Rule of Court 2.550. This Rule of Court provides that "court records are presumed to be open," and permits trial courts to seal a court record only when "(1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." Cal. R. Ct. 2.550(c) & (d); *see also* Compl., ¶¶ 41-42 (quoting these provisions). It certainly is an open and unsettled question whether these Rules of Court somehow recognize an enforceable right to "same-day access" to newly filed unlimited civil complaints.

As explained in greater detail below (*see infra* Section III), the Eleventh Amendment precludes a federal court from ruling on CNS's state-law claim. In any event, a state court ruling requiring "same-day access" to newly filed unlimited civil complaints pursuant to Government Code section 68150(l) *or* Rule of Court 2.550 would, of necessity, obviate the need for this Court to rule on the First Amendment issues CNS presses here. *Pullman* abstention is warranted for this reason. *See C-Y Dev. Co. v. Redlands*, 703 F.2d 375, 377-78 (9th Cir. 1983) ("[T]he assumption which justifies abstention is that a federal court's erroneous determination of a state law issue may result in premature or unnecessary constitutional adjudication, and unwarranted interference with state programs and statutes. A state law question that has the potential of at least altering the nature of the federal constitutional questions is thus an essential element of *Pullman* abstention.") (citation omitted); *Canton*, 498 F.2d at 845 ("With regard to elements (2) and (3) [of the *Pullman* abstention test], it is crucial that the uncertainty in the state law be such that construction of it by the state courts might obviate, or at least delimit, decision of the federal (constitutional) question.").

II. CNS'S FIRST AND SECOND CLAIMS FOR RELIEF FAIL TO STATE A CLAIM FOR A CONSTITUTIONAL OR FEDERAL COMMON LAW "RIGHT" OF SAME-DAY ACCESS TO NEWLY FILED UNLIMITED CIVIL COMPLAINTS.

Even if *O'Shea* and *Pullman* abstention doctrines could not be invoked here, CNS's first and second claims for relief should be dismissed for failure to state a claim as a matter of law. As noted above, CNS alleges that it has both a constitutional and common-law right of access to court records, and that such access must be timely. (Compl., ¶¶ 32, 37.) Ventura Superior Court does not dispute either proposition; as discussed above, even the California Government Code mandates "reasonable access" to all court records. Cal. Gov't Code § 68150(l). But CNS then takes the unsupportable leap that timely access to court

records equates to *"same-day access"*. (Compl., ¶¶ 32, 37.) No such right exists under the law.

A. The First Claim For Relief Should Be Dismissed Because The First Amendment Does Not Guarantee Same-Day Access.

1. First Amendment Public Rights Of Access To Court Records Are Governed By "Experience And Logic."

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-81, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980), the Supreme Court held for the first time that the First Amendment gave the press and public an affirmative *qualified* right of access to criminal court proceedings. The Court identified two related criteria for evaluating First Amendment right of access, *id*. at 588-89 (Brennan, Marshall, JJ, concurring), which it later termed "considerations of experience and logic:" (1) whether the place and process have historically been open to the press and general public (i.e., "experience"); and (2) whether public access plays a significant positive role in the functioning of the particular process in question (i.e., "logic"). *Press-Enterprise Co. v. Superior Court*, 478 US 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*). *Both* criteria must be satisfied to establish a qualified right to access. CNS cannot satisfy either.

2. Historic "Experience" Does Not Recognize A Right To Same-Day Access To Court Records.

a. There Is No Historic Right To Same-Day Access As A Matter Of Law.

Since *Richmond*, the Supreme Court has revisited the First Amendment right of access only in the context of *criminal* proceedings. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-11, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) (closing proceedings during testimony of underage rape victim unconstitutional); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-13, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (closing voir dire in criminal case unconstitutional in light of

importance of that process to the criminal justice system and the long history of public voir dire); *Press-Enterprise II*, 478 U.S. at 10-15 (qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as conducted in California); *cf. Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 391-92, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (assuming, without deciding, a First Amendment right of access to attend criminal trial and holding First Amendment was not violated by orders excluding members of public and press from pretrial suppression hearing and temporarily denying access to transcript of suppression hearing).

Although several lower federal and state courts have extended the public's First Amendment right of access to *civil* proceedings and related court records, none has held that (or even considered whether) access to civil case filings must occur the same day they are filed or otherwise submitted to a court. *See, e.g.*, *New York Civil Liberties Union v. New York City Transit Auth.*, 652 F.3d 247, 250-51 (2d Cir. 2011) (permanently enjoining on First Amendment grounds City Transit Authority's policy precluding public access to administrative adjudicatory proceedings); *Rushford v. New Yorker Mag.*, 846 F.2d 249, 253 (4th Cir. 1988) (applying "the more rigorous First Amendment standard to documents filed in connection with a summary judgment motion in a civil case" and ordering sealed documents unsealed, save those subject to a protective order); *NBC Subsidiary (KNBC-TV), Inc.*, 20 Cal. 4th at 1181-82 (concluding trial court's order excluding public and press from high profile civil trial violated First Amendment right of access to "ordinary civil trials and proceedings"); *In re Marriage of Burkle*, 135 Cal. App. 4th 1045, 1052-53, 1060-62, 37 Cal. Rptr. 3d 805 (2006) (holding facially invalid statute requiring sealing of pleadings in divorce proceedings upon party request; under First Amendment strict scrutiny statute was not narrowly

tailored to serve overriding privacy interests in light of presumption of openness to civil court proceedings).

b. The Courtesies Extended To CNS By Some Courts Does Not Otherwise Establish An Historic Right To Same-Day Access.

CNS alleges a "tradition" of "same-day access" to new unlimited civil complaints based on its experience with other court procedures. (Compl., ¶¶ 11-14 & Ex. 1.) Closer scrutiny of CNS's claims, however, shows that they establish no such right.

CNS identifies courts in only 23 of the 50 states where it is allegedly provided "same-day access" to new civil complaints. (*Id.*) Moreover, many of those courts employ e-filing systems that dramatically reduce the processing burdens on clerk office staff, which contrasts sharply with Ventura Superior Court. And within California, CNS alleges the courtesy of "same-day access" at only *seven* of approximately 532 court locations within California's 58 counties. (*Id.* at 23, 25, 27, 29-31.) This deficient sampling does not constitute a "tradition" of anything, much less warrant imposition of a *right* to "same-day access."

3. "Logic" Does Not Recognize A Right To Same-Day Access, Either.

The "logic" prong of the Supreme Court's two-part test inquires whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise II*, 478 US at 8. CNS suggests that local court considerations—including budgets constraints, court caseloads, personnel capacities, and priorities of other court business—must bow to the "newsworthiness" of newly filed unlimited civil complaints in the short window between when they are received by the court for processing and then filed. (*See* Compl., ¶ 10.) But the lack of contemporaneous news reporting does not *itself* diminish the significance of the news reports, even in the criminal context:

> We recognize the worth of timely news reported on the front page and, by contrast, the diminished value of noteworthy, but untimely, news reported on an inside page. Implicit in that assessment, however, is the fair assumption that significant news will receive the amount of publicity it warrants. The value served by the first amendment right of access is in its guarantee of a public watch to guard against arbitrary, overreaching, or even corrupt action by participants in judicial proceedings. Any serious indication of such an impropriety, would, we believe, receive significant exposure in the media, *even when such news is not reported contemporaneously with the suspect event*.

United States v. Edwards, 823 F.2d 111, 119 (5th Cir. 1987) (emphasis added). Thus, even where the Supreme Court historically has been the most protective, there has been no recognized right of "*same-day access*" to such records.

The public's interest in being on "watch" at the case-initiation stage of a civil case is far less pronounced, if it exists at all, than in pending criminal proceedings where it has been held there is no right to contemporaneous access to judicial records. *See id.* at 118 (concluding that "the first amendment guarantees a limited right of access to the record of closed proceedings concerning potential jury misconduct and raises a presumption that the transcript of such proceedings will be released within a *reasonable time*") (emphasis added).

Moreover, courts have long recognized that alleged delays in case adjudication—not unlike delays in judicial administration generally—are an "old story and a traditional source of exasperation to litigants." *Lucien v. Johnson*, 61 F.3d 573, 574 (7th Cir. 1995) (noting that "when the relief sought is an order to the delaying agency to hurry up, the seeker's prospects are, as a practical matter, very close to nil"). Nevertheless, outside the criminal arena (which constitutionally mandates the right to a speedy trial), it is "exceedingly difficult to obtain a remedy against delay by an adjudicative body" because "[h]arm from delay is difficult to prove, and judges are reluctant to order other judges (or their administrative counterparts) to hurry up." *Id.*; *see, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Los Angeles Cnty. Bar Ass'n*, 979 F.2d at 706-07 ("Given the risks to the quality of judicial decision-

making implicit in hasty or forced action, we are unwilling to suggest that the Constitution may dictate or even countenance a time limit on the consideration a judge may give to a civil case.").

Here, there is no harm from the reasonable access CNS already receives at Ventura Superior Court. CNS has failed to identify a single subscriber that has lamented CNS's purportedly delayed reporting. CNS has failed to identify one instance where any alleged delay in processing a new complaint meant that CNS lost out on an opportunity to timely report on an event. In fact, exactly the opposite is true. CNS touts itself as such a trusted source for timely reporting on key litigation events that numerous other news sources use CNS's reporting as a jump-off for their own reporting, which often occurs many days after CNS's reporting. (*See* Compl., ¶ 17.) Thus, there is no "logic"-based reason why a same-day right of access should be recognized, much less compelled, here. The first claim for relief should be dismissed accordingly.

B. The Second Claim For Relief Should Be Dismissed Because Federal Common Law Does Not Guarantee Same-Day Access.

Although there exists a general common law right to inspect and access judicial records, that right is likewise qualified and affords even less substantive protection to the interests of the press and public than does the First Amendment. *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598; *Rushford*, 846 F.2d at 253.

Moreover, CNS's reliance on this general common-law right of access is insufficient to state a claim under 42 U.S.C. § 1983 because, despite CNS's suggestion to the contrary, Ventura Superior Court does not have a "blanket rule" preventing CNS from accessing and inspecting all civil unlimited jurisdiction complaints. (Compl., ¶ 38.) Indeed, that very notion is belied by CNS's allegations elsewhere that detail (albeit with questionable accuracy) the number of complaints to which they have "same-day access." (*Id.*, ¶ 29.)

As with its First Amendment claim, though, CNS fails to identify any authority that would support a common-law right of access claim for failure to provide "same-day access" to civil complaints. The second claim for relief should be dismissed accordingly.

III. THE ELEVENTH AMENDMENT BARS CNS'S THIRD CLAIM FOR RELIEF FOR VIOLATION OF RULE OF COURT 2.550.

The Eleventh Amendment to the United States Constitution operates as a jurisdictional limit on the Court's power, and bars suits that seek either damages or injunctive relief against a State, an arm of the State, as well as the instrumentalities and agencies of a State. U.S. Const., Amend XI; *Durning v. Citibank, N.A.*, 950 F.2d 1422, 1422-23 (9th Cir. 1991); *Cal. Mother Infant Program v. Cal. Dep't of Corrs.*, 41 F. Supp. 2d 1123, 1125 (S.D. Cal. 1999).

Lawsuits against state officials in their official capacity are nothing more than attempts to sue the State, and thus also are barred. *Kentucky v. Graham*, 473 U.S. 159, 164-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1988) (holding that "'arms of the State' for Eleventh Amendment purposes" are not liable under § 1983); *Cent. Reserve Life of N. Am. Ins. Co. v. Struve*, 852 F.2d 1158, 1160 (9th Cir. 1988) (affirming district court's conclusion that Eleventh Amendment precluded prosecution of state claims against a state official). Settled law holds that state courts are arms of the state for Eleventh Amendment purposes. *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987). And the Ninth Circuit has specifically held that lawsuits against court employees in their representative capacities are subject to the Eleventh Amendment: "Plaintiff cannot state a claim against the Sacramento County Superior Court (or its employees), because such suits are barred by the Eleventh Amendment." *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003); *see also*

Cal. Gov't Code § 811.9 ("[C]ourt executive officers of the superior courts are state officers . . . .").

Here, CNS alleges a claim for violation of California Rule of Court 2.550 against Mr. Planet, sued in his official capacity as Executive Officer and Clerk of the Superior Court of California, County of Ventura. That claim is barred by the Eleventh Amendment. *Pennhurst State School & Hosp. v. Helderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."). CNS's third claim for relief should be dismissed accordingly.

CONCLUSION

For all these reasons, Ventura Superior Court's motion to abstain and dismiss should be granted, and this action should be dismissed in its entirety.

Dated: October 20, 2011

Respectfully submitted,

JONES DAY

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