Courthouse News Service v. Michael Planet Doc. 24

Rachel Matteo-Boehm (SBN 195492)
rachel.matteo-boehm@hro.com
David Greene (SBN 160107)
david.greene@hro.com
Leila C. Knox (SBN 245999)
leila.knox@hro.com
HOLME ROBERTS & OWEN LLP
560 Mission Street, Suite 250
San Francisco, CA 94105-2994
Telephone: (415) 268-2000
Facsimile: (415) 268-1999

Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Courthouse News Service,

Plaintiff,

v.

Michael D. Planet, in his official capacity as Court Executive Officer/Clerk of the Ventura County Superior Court.

Defendant.

CASE NO. CV11-08083 R (MANx)

PLAINTIFF COURTHOUSE NEWS SERVICE'S OPPOSITION TO THE MOTION TO DISMISS AND ABSTAIN OF DEFENDANT MICHAEL PLANET

Date: Nov. 21, 2011
Time: 10:00 am
Courtroom: G-8 (2nd Floor)
Judge: The Hon. Manuel L. Real

Dockets.Justia.com

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. DEFENDANT'S MOTION MISSTATES THE NATURE OF THE RELIEF COURTHOUSE NEWS SEEKS, AND CERTAIN CORRECTIONS TO DEFENDANT'S ASSERTIONS ARE ALSO IN ORDER 2

A. Defendant's Concession That There Is A First Amendment Right Of Access To Civil Court Records Means Access To Those Records Cannot Be Denied Unless Strict Requirements Are Met, And Those Requirements Trump State Statutes That Are Less Protective Of Access 2

B. The Failure Of SB 326 To Pass Earlier This Year Demonstrates The Need For This Court To Act 3

C. Defendant's Description Of The Nature Of Courthouse News' Claims And The Relief Sought Is Inaccurate; Courthouse News Seeks Only An Order That Defendant Stop Obstructing Same-Day Access 5

II. THIS COURT SHOULD NOT ABSTAIN FROM DECIDING THE IMPORTANT ISSUES OF FEDERAL LAW RAISED IN THE COMPLAINT 6

A. Abstention Is Strongly Disfavored; A Federal Court Should Decline To Exercise Its Federal Question Jurisdiction In Only The Rarest Of Situations 6

B. The *O'Shea* Abstention Doctrine Does Not Apply Because The Relief Courthouse News Seeks Will Not Be Highly Intrusive On The State Court, Unworkable Or Require This Court To Audit The State Court 7

C. *Pullman* Abstention is Not Appropriate Because This Court Need Not Decide A Single Issue of State Law 14

III. DEFENDANT'S ATTEMPT TO AVOID ADJUDICATION OF HIS DELAYS IN ACCESS UNDER THE FIRST AMENDMENT AND COMMON LAW HAS NO MERIT, AND HIS MOTION TO DISMISS

COURTHOUSE NEWS' FIRST AND SECOND CLAIMS FOR RELIEF SHOULD BE DENIED 16

A. Defendant's Motion Should Be Denied Because The First And Second Claims For Relief Are Grounded Not Just In The Denial Of Same-Day Access In Particular, But Also The Overall Delays In General 16

B. Whether A Denial Of Same Day Access Violates The First Amendment And Common Law Rights Of Access Is A Factual Inquiry To Be Determined On A Case-By-Case Basis, And Is Not An Appropriate Basis For Dismissal Under FRCP 12(b)(6) 18

C. Defendant's Other Arguments In Support Of His Motion To Dismiss Lack Merit 19

IV. GIVEN DEFENDANT'S ASSERTION OF ELEVENTH AMENDMENT IMMUNITY, COURTHOUSE NEWS CONSENTS TO THE DISMISSAL OF ITS STATE LAW CLAIM, AND THAT CLAIM ONLY 23

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES

Page(s)

31 Foster Children v. Bush,
329 F.3d 1255 (11th Cir. 2003) 8

Ad Hoc. Commission on Judicial Admin v. Massachusetts,
488 F.2d 1241 (1st Cir. 1973).....11

Associated Press v. District Court,
705 F.2d 1143 (9th Cir. 1983) 3, 19

Benavidez v. Eu,
34 F.3d 825 (9th Cir. 1994) 8, 9

Clement v. California Department of Corrections,
364 F.3d 1148 (9th Cir. 2004) 9

Colorado River Water Conservation District v. United States,
424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) 7

Connecticut Magazine v. Moraghan,
676 F. Supp. 38 (D. Conn. 1987).....14

County of Allegheny v. Frank Mashuda,
360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959) 7

Courthouse News Service v. Jackson,
2009 U.S. Dist. LEXIS 62300,
38 Media L. Rep. 1890 (S.D. Tex. 2009) 5, 6, 19, 22

Courthouse News Service v. Jackson,
2010 U.S. Dist. LEXIS 74571,
38 Media L. Rep. 1894 (S.D. Tex. 2010) 5, 6, 19, 22

Doe v. United States Department of Justice,
753 F.2d 1092 (D.C. Cir. 1985).....17

In re Eastman Kodak Co.,
2010 WL. 2490982 (S.D.N.Y. 2010).....23

E.T. v. Cantil-Sakauye,
___ F.3d ___, No. 10-15248, slip op. 17457 (9th Cir., Sept. 13, 2011).....10, 11

FOCUS v. Allegheny Court of Common Pleas,
75 F.3d 834 (3rd Cir. 1996) 14

Family Division Trial Lawyers of the Superior Court-D.C. v. Moultrie,
725 F.2d 695 (D.C. Cir. 1984).....10

Gardner v. Luckey,
500 F.2d 712 (5th Cir. 1974) 10

Gerstein v. Pugh,
420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) 8

Gilbertson v. Albright,
381 F.3d 965, 968 (9th Cir. 2004) (en banc) 8

Globe Newspaper Co. v. Pokaski,
868 F.2d 497 (1st Cir. 1989).....19

Globe Newspaper Co. v. Superior Court,
457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) 3, 13

Green v. City of Tucscon,
255 F.3d 1086 (9th Cir. 2001) 8

Joseph A. v. Ingram,
275 F.3d 1253 (10th Cir. 2002) 8

Kamakana v. City & County of Honolulu,
447 F.3d 1172 (9th Cir. 2006) 18

Kaufman v. Kaye,
466 F.3d 83 (2d Cir. 2006) 12

Lake v. Speziale,
580 F. Supp. 1318 (D. Conn. 1984).....10

Los Angeles County Bar Association v. Eu,
979 F.2d 697 (9th Cir. 1992) 11

Luckey v. Miller,
976 F.2d 673 (11th Cir. 1992) 10

Mason v. County of Cook,
488 F. Supp. 2d 761 (N.D. Ill. 2007).....10

Massey v. Banning Unified School District,
256 F. Supp. 2d 1090 (C.D. Cal. 2003).....17

Middlesex County Ethics Commission v. Garden State Bar Association,
457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982) 8

Miofsky v. Superior Court,
703 F.2d 332 (9th Cir. 1983) 7

Navarro v. Block,
250 F.3d 729 (9th Cir. 2001) 17

New Orleans Public Service, Inc. v. Council of City of New Orleans,
491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) 7

Newcal Industrial, Inc. v. Ikon Office Solution,
513 F.3d 1038 (9th Cir. 2008) 4

Norwalk Core v. Norwalk Redevelopment Agency,
395 F.2d 920 (2d Cir. 1968) 17

In re NVIDIA, ,
2008 WL. 1859067 (N.D. Cal. 2008) 22

O'Shea v. Littleton,
414 U.S. 488, 94 S. Ct. 669 38, L. Ed. 2d 674 (1974) .. 6, 7, 8, 9, 10, 11, 12, 13

Papasan v. Allen,
478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) 23

Parker v. Turner,
626 F.2d 1 (6th Cir. 1980) 10

Phoenix Newspapers, Inc. v. United States District Court,
156 F.3d 940 (9th Cir. 1998) 3

Pompey v. Broward County,
95 F.3d 1543 (11th Cir. 1996) 10

Porter v. Jones,
319 F.3d 483 (9th Cir. 2003) 15, 16

Potrero Hills Landfill, Inc. v. County of Solano,
__ F.3d __, No. 10-15229 slip op. 17295 (9th Cir., Sept. 13, 2011).....7, 15

Press-Enterprise Co. v. Superior Court,
478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) 3, 18

Pulliam v. Allen,
466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 .....6, 7, 8, 10

Railroad Commission of Texas v. Pullman,
312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941) 14, 15, 16

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) 1, 15, 18

Ripplinger v. Collins,
868 F.2d 1043 (9th Cir. 1989) 15

Rivera-Puig v. Garcia-Rosario,
983 F.2d 311 (1st Cir. 1992).....13, 14, 15

Shroyer v. New Cingular Wireless Services, Inc.,
622 F.3d 1035 (9th Cir. 2010) 17

The Fort Wayne Journal-Gazette v. Baker,
788 F. Supp. 379 (N.D. Ind. 1992) 13, 14

The Hartford Courant Co. v. Pellegrino,
380 F.3d 83 (2d Cir. 2004) 13, 14, 15, 16

Times Mirror Co v. United States,
873 F.2d 1210 (9th Cir. 1989) 18

United States v. Brooklier,
685 F.2d 1162 (9th Cir. 1982) 2

United States v. Edwards,
672 F.2d 1289 (7th Cir. 1982) 18

United States v. Edwards,
823 F.2d 111 (5th Cir. 1987) 21, 22

Valley Broad. Co. v. United States District Court,
798 F.2d 1289 (9th Cir. 1986) 18

Wisconsin Department of Corrections v. Schacht,
524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998) 23

Wisconsin v. Constantineau,
400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971) 14

Wolfson v. Brammer,
616 F.3d 1045 (9th Cir. 2010) 15

Younger v. Harris,
401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) 7, 8, 9, 12, 13, 14

STATE CASES

In re Estate of Hearst,
67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977) 19

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,
20 Cal. 4th 1178, 86 Cal. Rptr. 2d 778 (1999) 15, 19

FEDERAL STATUTES

Federal Rule of Civil Procedure 12(b)(6) 4, 17, 18, 22

STATE STATUTES

Cal. Code Civ. Proc. § 124 15

Cal. Rule of Court 2.550 15

California Government Code § 68150 .....3, 5, 16

California Penal Code § 868 3

INTRODUCTION

The public's right of timely access to court records is not simply a "courtesy" granted by the courts. It is a fundamental civil liberty that the courts cannot infringe upon without conducting a demanding constitutional analysis, even though court executives like Defendant may prefer to avoid it.

Despite acknowledging that the public has First Amendment rights of access to the court records in his control, Defendant shows little respect for those rights, and seems affronted by a request that such access be timely. Moreover, Defendant is dismissive of the press's role, recognized repeatedly by the Supreme Court, in obtaining access to the courts as the public's surrogate. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

In an effort to avoid having a federal court examine his practice of denying access to civil complaints until his staff – and his staff alone – exercising its unfettered discretion, determines when it will make those records available, Defendant mischaracterizes both the First Amendment rights at issue and the relief Courthouse News seeks to vindicate those rights. As the Supreme Court has repeatedly held, when a First Amendment right of access exists, blanket rules and policies restricting such access must give way to case-by-case determinations in order to ensure that access is restricted in only exceptional circumstances. The Complaint in this case seeks only injunctive and declaratory relief that would prevent Defendant from continuing his practice of restricting access to new complaints without complying with the procedural and substantive requirements the Supreme Court and the Ninth Circuit have set forth. Nor is there any reason for this Court to abstain from deciding these issues of federal constitutional law, leaving Courthouse News to enforce these rights in the very court that is denying them.

With one exception, *see infra*, Defendant's Motion to Dismiss and Abstain must thus be rejected. The Complaint clearly sets forth claims based on the denials of the rights of access for which this Court can, and should, grant relief.

I.

DEFENDANT'S MOTION MISSTATES THE NATURE OF THE RELIEF COURTHOUSE NEWS SEEKS, AND CERTAIN CORRECTIONS TO DEFENDANT'S ASSERTIONS ARE ALSO IN ORDER

As a preliminary matter, Defendant's motion to dismiss and abstain is notable for the extent to which it misstates both the nature Courthouse News' claims as well as the facts and the law relevant to those claims. Accordingly, before proceeding to address the merits of Defendant's motion, certain preliminary observations and corrections are in order.

A. Defendant's Concession That There Is A First Amendment Right Of Access To Civil Court Records Means Access To Those Records Cannot Be Denied Unless Strict Requirements Are Met, And Those Requirements Trump State Statutes That Are Less Protective Of Access

Defendant concedes, as he must, that there is a First Amendment right of access to civil court records, and that such access must be timely. Def's Memorandum, at 18 ("CNS alleges that it has both a constitutional and common-law right of access to court records, and that such access must be timely. ... Ventura Superior Court does not dispute either proposition"). Nor does he appear to dispute that there is a First Amendment right of access to civil court complaints. However, he fails to appreciate two important features of the First Amendment access right.

First, once the First Amendment right of access is found to attach to a record or a class of records, it can *only* be overcome on a case-by-case basis, by way of an adjudicative process performed by a judge where the party seeking to restrict access satisfies the stringent three-part test established by the Ninth Circuit. *United States v. Brooklier*, 685 F.2d 1162, 1168-69 (9th Cir. 1982). Under the test, the party seeking to restrict access (in this case, Defendant) must prove: (1) the existence of a right of comparable importance to the First Amendment that is threatened by public access to the court records; (2) a substantial probability of irreparable damage to the asserted right will result if access is not withheld; and (3) a substantial probability that alternatives to withholding access will not adequately protect the asserted right.

Phoenix Newspapers, Inc. v. United States District Court, 156 F.3d 940, 949 (9th Cir. 1998); *Associated Press v. District Court*, 705 F.2d 1143, 1145-46 (9th Cir. 1983).

Second, neither California Government Code § 68150 nor any of the Rules of Court Defendant relies on may trump the federal constitutional right of access. In its landmark 1986 decision in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) ("*Press-Enterprise II*"), the U.S. Supreme Court found California Penal Code § 868 unconstitutional because the law permitted courts to close criminal preliminary hearings on a mere showing of a reasonable probability of harm rather than meeting the more demanding test mandated by the First Amendment. Similarly, in 1982, the high court held unconstitutional a Massachusetts state statute requiring trial courts to exclude the public from the courtroom during the testimony of a minor victim of a sex crime in all instances; such determinations, the high court said, would have to be made on a case-by-case basis in accordance with First Amendment standards. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-08, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

As these and other cases make clear, neither Government Code § 68150 nor the Rules of Court on which Defendant relies can set lower standards for access than what is required by the First Amendment. Senate Bill 326 would have provided clear direction to trial courts to provide same day access, but it would not have allowed courts to provide fewer rights than those already guaranteed by the Constitution. Thus, neither existing state law nor SB 326 should deter this Court from making a determination about Courthouse News' First Amendment rights.

B. The Failure Of SB 326 To Pass Earlier This Year Demonstrates The Need For This Court To Act

Because Defendant makes so much of Courthouse News' support of SB 326, and incorrectly attributes certain statements made in connection with that bill to Courthouse News, a brief response is in order.

Traditionally, and as demonstrated by the examples set forth in paragraphs 10-

14 & Exhibit 1 of Courthouse News' Complaint,[1] courts have provided same-day access to new civil complaints after initial intake tasks, for example accepting the filing fee, assigning a case number, and/or noting the first-named plaintiffs and defendants on an intake log, but well before full processing. This enabled reporters who visit courts at the end of each court day to review the large majority of civil cases filed earlier that same day. Many courts in California and across the nation still provide the traditional same-day access in this manner, including this Court. *See* Complaint ¶¶ 10-14 & Exh. 1. As indicated in the bill text, however, the use of new electronic technologies for filing court actions and modernizing access to court records has, in some instances, resulted in delays in access to court documents.

Senate Bill 326 would have addressed these delays by directing the California Judicial Council, which governs California's state courts, to adopt a Rule of Court requiring newly filed complaints to be made available for inspection at the courthouse no later than the end of each court day. However, as Defendant readily acknowledges, that bill did not make it out of committee this year, and it is strongly opposed by the California Judicial Council, Administrative Office of the Courts. Given this reality, and having tried and failed in its efforts to work cooperatively with Defendant and his staff to resolve the delays in access at Ventura Superior, Courthouse News' only real avenue to resolving those delays was federal litigation. Thus, if anything, SB 326 only serves to emphasize the need for this Court to exercise its jurisdiction over the current dispute.

---

[1] Nowhere in Defendant's notice of motion or supporting memorandum does he specify the Federal Rule of Civil Procedure or other statutory authority under which he is bringing his motion. However, because Defendant states his motion to dismiss is for "failure to state a claim," Courthouse News assumes it is brought under FRCP 12(b)(6). As such, the Court must "accept as true all facts alleged in the complaint, and drawing all reasonable inferences in favor of" the plaintiff. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008).

One final point about SB 326 is also in order. On page 8 of his memorandum, Defendant asserts that in sponsoring the bill, Courthouse News "claimed that: (a) Government Code section 68150 already 'provides the public with reasonable access to court records;'" and that "(b) the term 'reasonable access is not defined ... .'" Def's Memorandum, at 8; *see also* 17 (making similar assertions about what Courthouse News purportedly "acknowledged").

This is flat-out wrong. Courthouse News *never* claimed that Government Code § 68150 "already 'provides the public with reasonable access to court records,'" nor has it ever "acknowledged" that "the term 'reasonable access is not defined.'" As is clear from Defendant's own Request for Judicial Notice, these "claims" were made not by Courthouse News but rather by the California Senate Judiciary Committee, the author of the Bill Analysis in question. Def's RJN, Exh. B at B9.

C. Defendant's Description Of The Nature Of Courthouse News' Claims And The Relief Sought Is Inaccurate; Courthouse News Seeks Only An Order That Defendant Stop Obstructing Same-Day Access

In an effort to support his abstention arguments, Defendant mischaracterizes the nature of Courthouse News' claims and the scope of relief it seeks, claiming that a ruling favoring Courthouse News "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 state budgetary concerns." This is not correct. Nor is Courthouse News asking Defendant to, as he puts it, "hurry up," or otherwise resolve delays in judicial administration. Def's Memorandum, at 13, 22.

The relief Courthouse News is seeking is quite simple: prohibit Defendant from obstructing timely access to the newly filed civil complaints at Ventura Superior – documents that, because they are newly filed, are literally sitting right there in the intake area. This is nothing more than the relief the United States District Court for the Southern District of Texas granted in a recent case involving similar delays in access to new case-initiating documents. *Courthouse News Service v. Jackson*, 2009

U.S. Dist. LEXIS 62300, at *14, 38 Media L. Rep. 1890 (S.D. Tex. 2009).[2] And it is nothing more than what is already being provided to Courthouse News and other reporters in other state and federal courts in California and across the nation, as described in the Complaint at paragraphs 10-14 & Exhibit 1. And as the experience of these courts demonstrates, same-day access need not involve any undue cost or staff effort, much less the far-reaching restructuring of the California court system that Defendant suggests.

II.

THIS COURT SHOULD NOT ABSTAIN FROM DECIDING THE IMPORTANT ISSUES OF FEDERAL LAW RAISED IN THE COMPLAINT

Defendant has moved this Court to abstain or in the alternative dismiss the Complaint on the basis of the *O'Shea* and *Pullman* abstention doctrines. Neither doctrine properly applies to the Complaint. Defendant's abstention arguments must thus be rejected.

A. Abstention Is Strongly Disfavored; A Federal Court Should Decline To Exercise Its Federal Question Jurisdiction In Only The Rarest Of Situations

Federal courts have an "unflagging obligation" to exercise their jurisdiction

---

[2] In *Jackson*, the United States District Court for the Southern District of Texas issued a preliminary injunction requiring the Houston state court clerk to cease his practice of delaying access to new to case-initiating civil petitions filed in that court until after they had been fully processed and posted on his web site, and instead provide those documents to Courthouse News Service "on the same day the petitions are filed," except where the filing party was seeking a temporary restraining order or other immediate relief or had properly placed the pleading under seal. *Id.* at *14-15. That preliminary injunction order was followed by a stipulated permanent injunction requiring same-day access. *Courthouse News Service v. Jackson*, 2010 U.S. Dist. LEXIS 74571, 38 Media L. Rep. 1894 (S.D. Tex. 2010). In light of these decisions, Courthouse News respectfully disagrees with Defendant's assertion that no court has "even considered" whether access to new civil case filings should be provided on the same day they are filed or submitted to the court. Def's Memorandum, at 20.

and thus should abstain from deciding issues of federal constitutional law, especially when raised in the context of § 1983 lawsuits, in only the most "extraordinary and narrow" situations. *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), and *County of Allegheny v. Frank Mashuda*, 360 U.S. 185, 188, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959)). *See also Potrero Hills Landfill, Inc. v. County of Solano*, __ F.3d __, __, No. 10-15229 slip op. 17295, 17305 (9th Cir., Sept. 13, 2011) (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) ("*NOPSI*") ("[A]bstention remains an extraordinary and narrow exception to the general rule that federal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'"). Courts must thus apply abstention doctrines narrowly to avoid "mak[ing] a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368, and should be extremely reluctant to expand established abstention doctrines beyond their strictly defined bounds. *Potrero Hills*, No. 10-15229 at 17304-05; *Miofsky*, 703 F.2d at 338.

B. The *O'Shea* Abstention Doctrine Does Not Apply Because The Relief Courthouse News Seeks Will Not Be Highly Intrusive On The State Court, Unworkable Or Require This Court To Audit The State Court

Defendant's attempt to apply *O'Shea* abstention to the present matter must be rejected because the straightforward relief Courthouse News seeks is not the type to which the doctrine applies.

The *O'Shea* abstention doctrine, first announced in *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669 38, L. Ed. 2d 674 (1974), is a seldom-used and highly specialized application of the abstention doctrine established by the Supreme Court in *Younger v. Harris*, 401 U.S. 37, 43-44, 91 S. Ct. 746, 27 L. Ed. 2d. 669 (1971). *See Pulliam v. Allen*, 466 U.S. 522, 539 n.20, 104 S. Ct. 1970, 80 L. Ed. 2d 565

(describing *O'Shea* as being decided on "*Younger v. Harris* grounds").[3] Whereas *Younger* addressed the concern that federal courts not *unduly* interfere with *pending* state court proceedings, *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982), *O'Shea* focused on the concern that federal lawsuits against state court systems would result indirectly in the same type of undue and serious interruption of both pending and future state court litigation "that *Younger v. Harris* and related cases sought to prevent." 414 U.S. at 500. The hallmark of both *Younger* and *O'Shea* is thus the actual interruption of and interference with the adjudication of lawsuits in the state court. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n.9, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (rejecting *Younger* abstention in action to require Florida prosecutors to hold probable cause hearings).

As such, as in *Younger*, a dismissal under *O'Shea* is based on prudential concerns for comity and federalism raised by the interference with state adjudicatory proceedings rather than a lack of jurisdiction. *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994). Like *Younger* abstention, *O'Shea* abstention is not discretionary; this Court has no discretion to abstain from this case when the narrow and exacting legal standards of *O'Shea* are not strictly met. *See Green v. City of Tucscon*, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc), *overruled on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 968 (9th Cir. 2004) (en banc).

In *O'Shea*, a potential class of all African-American residents of an Illinois city claimed that the county magistrate and judge denied them their civil rights by setting higher bonds, imposing harsher confinement conditions and bringing mere ordinance violations to trial in a racially discriminatory and retaliatory manner, and sought an injunction against such practices. 414 U.S. at 491-92. As one of its bases for

---

[3] Justice White, the author of *O'Shea*, was a member of the majority in *Pulliam* as well. Many courts analyze the *O'Shea* concerns as merely components of *Younger* abstention. *See, e.g., 31 Foster Children v. Bush*, 329 F.3d 1255, 1276-77 (11th Cir. 2003); *Joseph A. v. Ingram*, 275 F.3d 1253, 1271 (10th Cir. 2002).

dismissal, the court found that the injunction contemplated by the Seventh Circuit would establish a basis for future intervention that would be "a major continuing intrusion" because it would lead to "continuous or piecemeal interruptions" of future state court proceedings by "any of the members of the respondents' broadly defined class." *Id.* at 500. The court further found the contemplated injunction "unworkable" because of "inherent difficulties in defining the proper standards against which such claims might be measured, and the significant problems of proving noncompliance in individual cases" and the fact that the federal court would be required to continuously monitor and supervise the operation of the state court. *Id.* at 501-02. Because the class of plaintiffs was so broad and the potential violations of law so varied and numerous, enforcement of the contemplated injunction would require "nothing less than an ongoing federal audit of state criminal proceedings." *Id.* at 500.

O'Shea abstention is thus required only if the requested relief meets three conditions: (1) it will be a major continuing intrusion, (2) it will be unworkable, and (3) it will require the federal court to audit/monitor the state court extensively on an ongoing basis.[4] *See Clement v. California Dep't of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004) (applying this formulation of *O'Shea* as a substantive limitation on the injunctive relief available against a state entity to address similar federalism and comity concerns).

---

[4] As with *Younger*, a court must not abstain unless all of these elements are satisfied; the court is not permitted to use the strength of one element to balance out weaknesses in the others. *See Benavidez,* 34 F.3d at 832. Notably, the fact of potential legislation that might address the same issues raised in federal court is not part of the *O'Shea* analysis, despite Defendant's extensive discussion of it. Def's Memorandum, at 14-15. But, as discussed above, because the First Amendment sets the floor for the access a state must allow the public to its court system, the Legislature can do no more than grant the public and the media the same or greater access than what Courthouse News seeks by the Complaint. A decision by this Court thus poses no threat of inconsistency, uncertainty or confusion, even in the event the proposed legislation were to ever became law.

In each of these elements, a *high degree* of intrusion upon the state court is essential. Surely, any federal lawsuit against a court official raises the possibility of *some* disruption to the operation of the court and *some* inquiry by the federal court into the workings of the state court. And any federal court decision finding state court policies invalid entails *some* continuing responsibility on the state court to comply. But treating *O'Shea* as barring *all* such actions, regardless of the degree of intrusion, transforms a narrow abstention doctrine into a grant to state court officers of immunity, a protection the Supreme Court has repeatedly denied them. *See Pulliam*, 466 U.S. at 541-42 & n.20.

Thus *O'Shea* abstention has been confined to cases, typically class actions, seeking as relief wide-ranging institutional reform of the judiciary.[5] And it has been rejected in cases in which major restructuring is not sought, such as where the court is merely required to replace an existing rule or policy with a different one.[6]

E.T. v. Cantil-Sakauye, __ F.3d __, No. 10-15248, slip op. 17457 (9th Cir., Sept. 13, 2011), decided last month, and as Defendant notes, subject to a pending motion for rehearing en banc, is the only Ninth Circuit case that discusses *O'Shea* as an

---

[5] *See, e.g., Pompey v. Broward County*, 95 F.3d 1543, 1544-45 (11th Cir. 1996) (action by five indigent fathers challenging numerous constitutional violations during court's "Daddy Roundups"); *Luckey v. Miller*, 976 F.2d 673, 676 (11th Cir. 1992) (class action that sought to substantially revamp Georgia's indigent defense system); *Parker v. Turner*, 626 F.2d 1, 2 (6th Cir. 1980) (class action by indigent fathers seeking institutional reform of juvenile courts); *Gardner v. Luckey*, 500 F.2d 712, 713 (5th Cir. 1974) ("sweeping class action" by prisoners to reform the Florida Public Defender Office).

[6] *See, e.g., Family Division Trial Lawyers of the Superior Court-D.C. v. Moultrie*, 725 F.2d 695, 703-04 (D.C. Cir. 1984) (action by three attorneys who request assignments of juvenile neglect cases seeking to change court's payment structure); *Mason v. County of Cook*, 488 F. Supp. 2d 761, 765 (N.D. Ill. 2007) (proposed class action challenging bond hearing procedures); *Lake v. Speziale*, 580 F. Supp. 1318, 1331 (D. Conn. 1984) (class action to require judges to advise indigent defendants in civil contempt proceedings of their right to counsel).

abstention doctrine, and is distinguishable from the present case on these grounds. In *E.T.*, like in *O'Shea*, a proposed large class sought wholesale institutional reform and a major re-structuring of a court system, namely a decrease in the caseloads of the court-appointed attorneys in the Sacramento County dependency courts. *Id.* at 17460-61. The Ninth Circuit held that abstention was required because the requested relief would require the district court to seriously intrude upon and extensively audit the operation of the court system. *Id.* at 17643. The Ninth Circuit distinguished its previous decision in *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 699 (9th Cir. 1992) ("*LA Bar*"), in which the Bar sought an order that the court needed more judges. *E.T.*, at 17464. In *LA Bar*, the Ninth Circuit concluded that it could grant the requested relief even though it would require some "restructuring," and even though its ruling would lead to subsequent federal actions "exploring the contours" of the constitutional right the court would announce. 979 F.2d at 703. The *E.T.* court characterized the relief sought in *E.T.* as far more intrusive than the relief sought in *LA Bar*: the relief sought in *LA Bar* was "a simple increase in the number of judges" while the relief in *E.T.* would involve "a substantial interference with the operation of the program, including allocation of the judicial branch budget, establishment of program priorities, and court administration," and potentially the "examination of the administration of substantial number of individual cases." *E.T.*, at 17464.

The relief sought by Courthouse News is not nearly as intrusive on the court system as that sought in either *O'Shea* or *E.T.* or any of the institutional reform cases.[7] Indeed, it is not even as intrusive as the appoint-more-judges relief approved of in *LA*

---

[7] Nor does the relief in the instant case sought bear any relation to that sought in another case upon which Defendant relies, *Ad Hoc. Comm'n on Judicial Admin v. Massachusetts*, 488 F.2d 1241, 1245-46 (1st Cir. 1973), a pre-*O'Shea* case, decided primarily on political question rather than *Younger* grounds. In *Ad Hoc Comm'n*, a putative class asked the federal court to "order enlargement and restructuring of the entire state court system." *Id.* at 1243.

Bar. Courthouse News does not seek any restructuring of Ventura Superior. Courthouse News simply asks this Court to prohibit Defendant from affirmatively obstructing same day access to complaints, access that, as alleged in the Complaint, the media has traditionally been given in courts around the country, and which, as alleged in the Complaint, Defendant simply lacks the will, not the ability, to do. Complaint, ¶¶ 10-14 & Exh. 1, Prayer for Relief, ¶1.[8]

Most importantly, the hallmark of both *O'Shea* and *Younger* – the prospect that the federal court's action will interfere with pending or future state adjudications – is entirely absent in this case. The prohibition Courthouse News seeks will not interfere with, interrupt, delay, disrupt, of affect the outcome of any pending or future matter in Ventura Superior, or in any California state court.[9]

Nor are any of the other *O'Shea* factors present. The relief Courthouse News seeks is eminently workable. As alleged in paragraphs 10-14 and Exhibit 1 to the Complaint, numerous other courts across the country provide the public and/or the press with same day access to complaints. Ventura Superior thus has numerous models for compliance with the requested relief. Moreover, the relief sought by Courthouse News has single and wholly objective criterion: do not obstruct same-day

---

[8] Nor does Courthouse News by its Complaint seek this Court to order Defendant to expend funds. Complaint, Prayer for Relief ¶¶ 1-2.

[9] The present case is thus unlike *Kaufman v. Kaye*, 466 F.3d 83, 87 (2d Cir. 2006), upon which Defendant also relies. In *Kaufman*, the plaintiff complained that his due process rights were violated by the New York appellate court system's secret process of assigning appellate judges to matters on a non-random basis. *Id.* at 86. The Second Circuit abstained because if it declared that the assignment system was unconstitutional, it would open the door to any party who did not like his assigned panel to delay the appeal by way of a federal enforcement action. "Such challenges would inevitably lead to precisely the kind of 'piecemeal interruptions of ... state proceedings' condemned in *O'Shea*." *Id.* at 87 (omission in original). In contrast, any future challenge to Ventura Superior's compliance with the injunction will not interrupt any proceeding in that court.

access. Nor will the relief Courthouse News seeks require this Court to audit or monitor Ventura Superior beyond simply asking Defendant to justify his current policy.[10]

Indeed, federal actions to enforce the public's First Amendment right of access to state court records and proceedings will rarely raise the federalism and comity concerns that underlie both *Younger* and *O'Shea*. In *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 85-86 (2d Cir. 2004), a case strongly analogous to the instant action, several media companies brought a § 1983 action challenging the practice of the Connecticut state court system of sealing the docket sheets of certain cases so that the public could not discover even the existence of the litigation from the court records. In *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 322 (1st Cir. 1992), a reporter challenged the constitutionality of a Puerto Rico court rule that closed all criminal preliminary hearings. In both instances, the Court rejected the defendant court system's claim that the *Younger* abstention applied, even though similar actions had been filed in the state/commonwealth courts. *Hartford Courant*, 380 F.3d at 101;

---

[10] Defendant contends that, "most significantly," the injunction Courthouse News seeks will require this Court to perform case-by-case adjudications of instances when same day access could not be provided. Def's Memorandum, at 13. However, Defendant both mischaracterizes the Complaint and misstates the abundant body of First Amendment law on court access. As discussed above, *supra* at 3-4, the First Amendment requires that *the court that is seeking to seal its own records* perform the case-by-case adjudication to determine whether such closure is permissible. *See Globe Newspaper Co.*, 457 U.S. at 608. Courthouse News seeks no more than that here: that Defendant cease his policies preventing Courthouse News from accessing the new complaints at the end of the day on which they are filed, except where there is a determination *by the judges of his own court* that delay is necessary in accordance with First Amendment standards. To be sure, under existing law, a party may contest in federal court a state court's future determination that access should be delayed. *See, e.g., The Fort Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379, 382-83 (N.D. Ind. 1992). But that would be a new federal lawsuit at some later point in time, not an enforcement action in this one. These federal lawsuits are already permitted; a decision by this Court will not create a new basis for federal lawsuits.

Rivera-Puig, 983 F.2d at 319-20. Despite the presence of federalism and comity concerns, those courts held that federal court was an appropriate venue to the infringement of the First Amendment right of court access in state courts. *Hartford Courant*, 380 F.3d at 101; *Rivera-Puig*, 983 F.2d at 319-20.

Indeed, under current law, federal courts routinely entertain challenges by the media to closure orders in ongoing state court litigation over federalism and comity objections because access issues are at most collateral to the proceedings in which they arise. As a federal court considering a challenge to a state court gag order found:

> An injunction issuing from this Court against the enforcement of the gag order ... would not prohibit in any way the pending prosecution itself from going forward. Any interference with the state proceedings would be minimal and therefore cannot justify the eschewal of the Court's jurisdiction to protect the federal constitutional rights of the plaintiff.

Connecticut Magazine v. Moraghan, 676 F. Supp. 38, 41 (D. Conn. 1987) (citations omitted). *See also FOCUS v. Allegheny Court of Common Pleas,* 75 F.3d 834, 843 (3rd Cir. 1996) (rejecting *Younger* abstention in federal court challenge to state court gag order); *Fort Wayne Journal-Gazette*, 788 F. Supp. at 382-83 (rejecting *Younger* abstention in federal court challenge to state court protective order).

C. *Pullman* Abstention is Not Appropriate Because This Court Need Not Decide A Single Issue of State Law

Defendant also argues that this Court should abstain under the *Pullman* abstention doctrine, which permits a federal court to wait for a state court to interpret controlling, but ambiguous, state law authoritatively. *See Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 500-01, 61 S. Ct. 643, 85 L. Ed. 971 (1941); *see also Wisconsin v. Constantineau*, 400 U.S. 433, 438, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515 (1971) (holding that abstention is not appropriate when the federal claim is not entangled with complicated unresolved state law issues). Unlike *Younger*, *Pullman* abstention is entirely discretionary: a federal court may retain jurisdiction even if all

of the conditions for abstention are met. *Potrero Hills*, No. 10-15229, at 17317. In this case, none of the conditions are met.

Three conditions must be met before a federal court may even consider a *Pullman* abstention: (1) the complaint touches a sensitive area of state social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) a definitive ruling on an issue of state law would terminate the controversy; and (3) the possibly determinative issue of state law is doubtful. *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989).

In the Ninth Circuit, the first *Pullman* factor "will almost never be present" in First Amendment cases "because the guarantee of free expression is always an area of particular federal concern" upon which a federal court should rule. *Ripplinger*, 868 F.2d at 1048; *see Hartford Courant*, 380 F.3d at 100 (denying *Pullman* abstention on these grounds in court access case).[11] Indeed, constitutional challenges based on First Amendment rights "are the kind of cases that the federal courts are particularly well-suited to hear." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003); *accord Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010).

Nor are the second and third *Pullman* factors present. There is no uncertain question of state law that can resolve this case. Indeed, the California Supreme Court has already issued its definitive ruling on the rights of access to courts, and in so doing adopted the First Amendment analysis developed by the U.S. Supreme Court. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1181, 1197-1226 & n.13, 86 Cal. Rptr. 2d 778 (1999) (construing Cal. Code Civ. Proc. § 124 as incorporating First Amendment protections).[12] California thus does not have its own

---

[11] The First Amendment right of access to courts is included in the right of free speech. *Richmond Newspapers*, 448 U.S. at 580; *Rivera-Puig*, 983 F.2d at 322-23.

[12] The Judicial Council then incorporated the First Amendment requirements described in *NBC Subsidiary* into its rule of court governing restrictions on access to court records. Cal. Rule of Court 2.550.

body of court access law that does not track the federal right; to the extent a state court would be interpreting Government Code § 68150(1)'s requirement of "reasonable access" to trial court records, the state court would be interpreting federal law. *See Hartford Courant*, 380 F.3d at 100 (denying *Pullman* abstention in court access case because resolution of the state law would "not illuminate what should happen").

Finally, abstention is improvident because Courthouse News would suffer even further delay of a determination on its First Amendment question while its grievances are heard in state court, thus exacerbating the very constitutional injury that Courthouse News has asked this court to remedy. *Porter*, 319 F.3d at 492-93.

III.

DEFENDANT'S ATTEMPT TO AVOID ADJUDICATION OF HIS DELAYS IN ACCESS UNDER THE FIRST AMENDMENT AND COMMON LAW HAS NO MERIT, AND HIS MOTION TO DISMISS COURTHOUSE NEWS' FIRST AND SECOND CLAIMS FOR RELIEF SHOULD BE DENIED

Conceding as he must that the First Amendment and common law both provide a right of access to civil court records and that such access must be timely, Def's Memorandum, at 18, Defendant nevertheless asks this Court to dismiss Courthouse News' First Amendment and common law claims (the First and Second Causes of Action) for failure to state a claim. Defendant's sole basis for dismissal of these claims is his contention that neither the First Amendment nor the common law "guarantee" a right of same-day access to new civil complaints. As explained below, Defendant's motion to dismiss these claims is not well taken and should be denied for at least two separate and independent reasons.

A. Defendant's Motion Should Be Denied Because The First And Second Claims For Relief Are Grounded Not Just In The Denial Of Same-Day Access In Particular, But Also The Overall Delays In General

As a preliminary matter, Courthouse News' Complaint alleges a violation of the First Amendment and the common law right of access not just from the denial of same-day access in particular, but also because of delays in access in general – delays

that, as set forth in the Complaint, commonly last for multiple days or weeks and have recently stretched up to 34 calendar days. Complaint, ¶¶ 29, 30.[13]

So long as a complaint contains "sufficient factual matter to state a facially plausible claim to relief," dismissal under Federal Rule of Civil Procedure 12(b)(6) is '"proper only where there is no cognizable legal theory.'" *Shroyer v. New Cingular Wireless Servs., Inc*., 622 F.3d 1035, 1041 (9th Cir. 2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). Moreover, "a complaint should not be dismissed for legal insufficiency except where there is failure to state a claim on which *some* relief, not limited by the request in the complaint, can be granted." *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) (quoting *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 925-26 (2d Cir. 1968)). *Accord, e.g., Massey v. Banning Unified School Dist.*, 256 F. Supp. 2d 1090, 1092 (C.D. Cal. 2003) ("'It need not appear that plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted.'") (quoting *Doe*, 753 F.2d at 1104).

As Courthouse News will demonstrate as this case proceeds, under the particular facts and circumstances of this case, it is entitled to injunctive and declaratory relief that would require Defendant to refrain from his policy of denying its reporter, who visits Ventura Superior at the end of each court day for the specific purpose of viewing newly filed unlimited civil complaints, with access at the end of each court day to the approximately 15 unlimited civil complaints that are filed each day with that court. However, the Complaint is not so limited. As such, Defendant is not entitled to dismissal.

---

[13] As noted above, although Ventura Superior is not the only California superior court where Courthouse News has recently been encountering delays, the extent of those delays, and Defendant's resistant attitude to working cooperatively with Courthouse News to resolve them, make Ventura Superior one of the worst courts in the state in terms of delayed access to new complaints.

B. Whether A Denial Of Same Day Access Violates The First Amendment And Common Law Rights Of Access Is A Factual Inquiry To Be Determined On A Case-By-Case Basis, And Is Not An Appropriate Basis For Dismissal Under FRCP 12(b)(6)

Determining whether there has been a violation of the First Amendment and/or common law right of access involves a two-step process. The first step is to determine whether a right of access attaches in the first instance. In the case of the First Amendment right of access, courts use the two-prong inquiry first employed by the Supreme Court in *Richmond Newspapers*, which examines the considerations of "tradition" and "logic" to determine whether a constitutional right of access exists. 448 U.S. at 564-76; *accord*, *e.g.*, *Press-Enterprise II*, 478 U.S. at 8-10. In the case of the common law right of access, in the Ninth Circuit, the right has been recognized as applying to all court files except for that very narrow range of records that, for policy reasons, have "traditionally been kept secret." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *Times Mirror Co v. United States*, 873 F.2d 1210 (9th Cir. 1989).

Once it is determined that the First Amendment and common law right of access attach to a particular document or class of documents – in this case, unlimited jurisdiction civil complaints filed in a state court – the inquiry shifts to whether the party seeking to restrict access can do so. In order to deny access, the strict standards for overcoming that right of access, as set forth in section I(A) above, must be met.[14] The same scrutiny is applied where a court seeks to deny access temporarily; as

[14] In the case of the common law right of access, the presumption of access can be overcome only on the basis of "'articulable facts, known to the court, not on the basis of unsupported hypothesis or conjecture.'" *Valley Broad. Co. v. United States District Court*, 798 F.2d 1289, 1293 (9th Cir. 1986) (quoting and adopting the rule of *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) and rejecting a less rigorous requirement). Moreover, the party seeking to restrict access must have a *compelling* reason to do so; a "good cause" showing will not suffice. *Kamakana*, 447 F.3d at 1180.

numerous state and federal courts have previously recognized, all but *de minimis* delays in access are the functional equivalent of access denials. *E.g.*, *Associated Press*, 705 F.2d at 1147 (district court's withholding of newly filed documents for 48 hours after filing as part of a procedure designed to protect the defendant's Sixth Amendment right to a fair trial was "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"); *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *11 ("the 24 to 72 hour delay in access is effectively an access denial and is, therefore, unconstitutional"); *NBC Subsidiary*, 20 Cal. 4th at 1220 & n.42 (even temporary denials of access warrant "exacting First Amendment scrutiny"); *In re Estate of Hearst*, 67 Cal. App. 3d 777, 785, 136 Cal. Rptr. 821 (1977) (even temporary limitations on public access to court records require a "sufficiently strong showing of necessity").

Defendant conflates this two-part analysis by denying the existence of any "First Amendment" right of "same day access." Having conceded the First Amendment right of access to civil records, the extent to which access may be temporarily denied is an issue for the second part of the analysis. But Defendant disclaims any need to perform that second part of the analysis at all. Such an end run around the First Amendment is not permitted, and does not support dismissal.

C. Defendant's Other Arguments In Support Of His Motion To Dismiss Lack Merit

Although no further analysis is needed to conclude that Defendant's motion to dismiss Courthouse News' first and second claims for relief should be denied, certain other arguments advanced by Defendant in connection with his motion lack merit and warrant a response:

A tradition of same-day access in other courts – In paragraphs 10-14 of its Complaint and the Access Summary attached as Exhibit 1 thereto, Courthouse News

provided examples of some, but not all, of the state and federal courts around the nation that have traditionally and continue to provide reporters who visit each court day with access to newly filed cases at the end of the court day on which they are filed. In an effort to avoid this reality, Defendant characterizes these access practices as mere "courtesies" and takes issue with what he refers to as a "deficient sampling," arguing that this "does not constitute a 'tradition' of anything, much less warrant imposition of a right to 'same-day access.'" Def's Memorandum, at 21. Setting aside the fact that for the purposes of this motion, the allegations in the Complaint must be taken as true, Courthouse News has two main responses.

First, the tradition of daily, same-day access that Courthouse News describes has not occurred in a vacuum. Quite appropriately, it is one that has developed in those courts that reporters from various media outlets actually visit on a daily basis to review the new civil actions. For the purposes of the Complaint and Access Summary, Courthouse News focused only on those larger courts that its reporters visit on a daily basis.

Second, while some courts have, in recent years, imposed administrative tasks between the filing of a new complaint and its being made available to the press that have resulted in delays in access, many courts still do provide this same-day access. Moreover, the fact that delays in access have recently become a problem in some courts does not change the historical provision of same-day access to reporters who visit the court every day, a tradition that Courthouse News has been able to observe firsthand throughout its twenty-one year history. Complaint, ¶¶ 10, 14.

Defendant's suggestion that same-day courts are predominantly e-filing courts is wrong – Defendant also complains that many of the courts providing same-day access "employ e-filing systems that dramatically reduce the processing burdens on clerk office staff," suggesting that because Ventura Superior is not an e-filing court, this somehow excuses the access delays occurring at his court. Def's Memorandum, at 9-10, 21. There are two problems with this. First, Defendant

misstates the facts. While federal courts are indeed e-filing courts, in many of those courts – including this Court and the Northern District of California – the case-initiating document, *i.e.*, the complaint, is filed in *paper form*. *See* Complaint, ¶ 11 & Exh. 1. Similarly, there are numerous examples of state courts, both in California and throughout the nation, that provide same-day access to new complaints that are not e-filed but are rather filed in the traditional paper form. In California, these superior courts include the San Francisco, Los Angeles, Alameda, Santa Clara, Contra Costa, and the Riverside County superior courts. Complaint, ¶¶ 11-12 & Exh. 1.[15]

Second, contrary to Defendant's suggestion, e-filing is not the cure for access delays. Courthouse News has observed that in many instances, e-filing has led to access *delays* where none existed before. *See* Complaint, ¶ 13 & Exh. 1 (describing the delays in access that followed mandatory e-filing at the Eighth Judicial District Court in Las Vegas, Nevada).

***Edwards* does not entitle Ventura Superior to continue its practice of delayed access –** Contrary to Defendant's suggestion, *United States v. Edwards*, 823 F.2d 111 (5th Cir. 1987), does *not* stand for the proposition, as he alleges, that there is "no recognized right of 'same day access'" to court records. Rather, in *Edwards*, the Fifth Circuit held that the trial court did not err, *under the facts and circumstances in that particular case*, in delaying release of closed hearing transcripts concerning juror misconduct until after the jury had reached its verdict. In *Edwards*, a criminal trial was underway and the Court was forced to weigh the First Amendment interests at stake with the "paramount interest in maintaining an impartial jury and its inherent vulnerability." *Id.* at 119. Here, there is no "paramount" interest in delaying access that even approaches the interest in protecting an impartial jury, and the Sixth

---

[15] At the Los Angeles, Alameda, and Riverside County Superior Courts, complaints are scanned immediately on intake and made available for viewing in electronic form. In Santa Clara, Contra Costa, and San Francisco Counties, complaints are made available for viewing in their as-filed paper form. Complaint, Exh. 1.

Amendment rights of a defendant, and even assuming *arguendo* that Defendant were to attempt to articulate such an interest, that inquiry is the second part of the First Amendment and common law analysis and would not support dismissal under Rule 12(b)(6).

The differences between *Edwards* and the present situation are further confirmed by the Southern District of Texas' discussion of that case in *Jackson*. Distinguishing *Edwards*, the Southern District explained:

> Defendants attempt to analogize the 24 to 72 hour delay in access in this case to the district court's refusal to release transcripts of closed proceedings prior to the jury verdict in *Edwards*. In *Edwards*, the Fifth Circuit held that the district court did not err in its decision because it reasonably restricted access given the paramount interest in maintaining an impartial jury. ... The Fifth Circuit went on to state that the trial court should avoid unnecessary delay in releasing the record of closed proceedings following the trial. *Id*. The Court is unpersuaded by Defendants' argument and finds that the delay in access to newly-filed petitions in this case is not a reasonable limitation on access.
>
> *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *12-13 (2009).

The press has a legitimate interest in timely access to new civil case filings – Defendant contends that the press and public do not have legitimate interest in timely access to newly filed civil case-initiating documents. Def's Memorandum, at 22 ("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"). Defendant's view ignores the many authorities noted above that recognize the public interest in ensuring timely access to civil proceedings in general, as well as those authorities noting the public interest to civil complaints in particular. *E.g.*, *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *14 ("There is an important First Amendment interest in providing timely access to new case-initiating documents."); *In re NVIDIA*,

2008 WL 1859067, at *3 (N.D. Cal. 2008) ("[W]hen a plaintiff invokes the Court's authority by filing a complaint, the public has a right to know who is invoking it, and toward what purpose, and in what manner."); *In re Eastman Kodak Co.*, 2010 WL 2490982 at *1 (S.D.N.Y. 2010) (a complaint "is a pleading essential to the Court's adjudication of the matter as well as the public's interest in monitoring the federal courts.").

IV.

GIVEN DEFENDANT'S ASSERTION OF ELEVENTH AMENDMENT IMMUNITY, COURTHOUSE NEWS CONSENTS TO THE DISMISSAL OF ITS STATE LAW CLAIM, AND THAT CLAIM ONLY

The Eleventh Amendment grants a state defendant the power to assert a sovereign immunity defense, barring a state law claim against it in federal court, should it choose to do so. *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S. Ct. 2047, 2052, 141 L. Ed. 2d 364, 372 (1998). Defendant having now asserted sovereign immunity over the state law claim included in the Complaint, Courthouse News consents to the dismissal of the Third Cause of Action.

Defendant's assertion of sovereign immunity does not, however, affect the viability of the First or Second Cause of Action, which are both federal law claims. *Id.* at 389-90. *See Papasan v. Allen*, 478 U.S. 265, 277-78, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (holding that sovereign immunity does not bar claims for prospective relief against state defendants when such relief is based on ongoing violations of the plaintiff's federal law rights).

CONCLUSION

Defendant's motion to dismiss and abstain boils down to his positions that he should not be required to comply with the substantive and procedural requirements of the First Amendment right of access, and that his lack of compliance should not be subject to adjudication by a federal court. Neither one has any merit.

Accordingly, Plaintiff Courthouse News Service respectfully requests that Defendant's motion to dismiss and abstain be denied as to Courthouse News Service's

First and Second Causes of Action for violations of the First Amendment and common law. Defendant having now asserted sovereign immunity over the state law claim, Courthouse News consents to the dismissal of the Third Cause of Action, and respectfully requests that it be given 30 days to amend its Complaint accordingly.

Date: October 31, 2011

HOLME ROBERTS & OWEN LLP
RACHEL MATTEO-BOEHM
DAVID GREENE
LEILA KNOX

By: /s/ Rachel Matteo-Boehm
Rachel Matteo-Boehm
Attorneys for Plaintiff

COURTHOUSE NEWS SERVICE