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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

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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

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INTRODUCTION

Plaintiff Courthouse News Service ("CNS") seeks an immediate mandatory injunction against Michael D. Planet, in his official capacity as Executive Officer and Clerk of the Superior Court of California, County of Ventura (the "Ventura Superior Court"). CNS contends it has a constitutional or common law right to "same-day access" to all newly filed unlimited civil complaints, and that Ventura Superior Court must *change* its current procedures—which do everything possible to provide reasonable access, as the law requires, and actually provides same- or next-day access in the majority of instances—to guarantee "same-day access." CNS's requested injunction is fundamentally flawed in several respects, and must be denied.

First, as detailed in Ventura Superior Court's Motion to Dismiss (filed October 20, 2011), CNS's requested injunction would require this *federal* court to involve itself in the administration of the *state's* judicial system, which runs afoul of settled principles of federalism, comity, and institutional competence, and which urges this Court to exercise its discretion to abstain from the case entirely.

Second, CNS requests a "disfavored" mandatory injunction insofar as it seeks to compel Ventura Superior Court to take an affirmative action—that is, to guarantee "same-day access" to all new unlimited civil complaints. This type of injunction is subject to heightened scrutiny that CNS cannot survive given that it cannot survive even ordinary scrutiny for issuance of a preliminary injunction.

Third, as just alluded to, CNS cannot make the requisite clear showing on *any* of the four factors it must establish. It cannot prevail on the merits because it cannot establish a constitutional or common law right to "same-day access;" it cannot establish irreparable harm because any alleged harm cannot be presumed as a matter of law and is not sufficiently "real and concrete;" it cannot show the equities tip in its favor because the harm to Ventura Superior Court is grave compared to CNS's isolated and legally unsupportable complaints; and issuing the type of injunction CNS requests actually would harm the public interest. The Motion must be denied.

STATEMENT OF FACTS

A. Ventura Superior Court Clerks Must Process *By Hand* More Than 150,000 New Filings Per Year.

As explained in the Declaration of Cheryl Kanatzar (filed concurrently herewith, ("Kanatzar Decl.")), who is one of the Deputy Executive Officers of Ventura Superior Court, the court receives and processes more than 150,000 separate filings each year. (Kanatzar Decl. ¶ 5.) The Civil Department employs 14 Court Processing Assistants ("CPAs") and one supervisor to process all these filings. (*Id.* ¶ 6.) Assuming there are 260 court days—which is far too forgiving, as that number only takes into account weekends, and not court holidays, mandatory closure days, staff vacation days, and the like—that equates to more than 575 filings *each day*.

None of these 150,000-plus documents can be filed electronically. Unlike federal courts, which have long since adopted PACER, or state courts that have electronic filing capabilities, *all* filings in Ventura must be processed *by hand*. Ms. Kanatzar puts it this way in paragraph 4 of her Declaration:

> Ventura Superior Court maintains only standard physical files for all actions pending in the County of Ventura. Litigants must physically file paper copies of their documents. They can do so either by depositing them with CPAs in our Civil Department as described elsewhere in this Declaration, or by faxing or emailing their documents to our fax-filing desk CPA, who must then generate paper documents for our files. Therefore, unlike the clerk's office in federal and other electronic filing courts, the clerk's office in the Ventura Superior Court *is* burdened by the substantial additional administrative task imposed by the need to process by hand every document filed with the court.

Hence, at least this much is certain of the court's current operations:

First, each of the court's CPAs carries a *very heavy* workload to begin with. Second, it is incredibly misleading to suggest that the court's CPAs need "only" process "fewer than eight complaints per court day." (Mot. at 6.) The truth is that

the court's CPAs handle *hundreds* of *filings* each day, many of which (including *ex parte* applications and motions of various types) demand more immediate attention than "new complaint files [which] remain essentially inactive for approximately 65 days, until the summons and complaint are served, and the defendant(s) answer or take some other action." (Kanatzar Decl. ¶ 17.) And third, CNS compares apples with oranges by suggesting that Ventura Superior Court should be ordered to guarantee "same-day access" to new complaints because the federal courts and other courts identified in its survey that accept electronic filings have the ability to do so. (Compl. ¶¶ 11, 13; Marshall Decl. ¶¶ 4-6; Girdner Decl. ¶¶ 13-16 .)

B. The State's Budget Crisis Affects Ventura Superior Court's Ability To Process Newly Filed Unlimited Civil Complaints.

The responsibilities borne by each CPA have and will continue to become even heavier. Over the last three years, Ventura Superior Court's budget has been cut by more than $13 million, which has resulted in a growing deficit between its revenue and expenses. (Declaration of Robert Sherman in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, filed concurrently herewith ("Sherman Decl.") ¶ 3.) This fiscal year, Ventura Superior Court's deficit has reached $5.9 million; next fiscal year, the deficit is expected to exceed $12 million. (*Id.* ¶¶ 12-13.)

1. A Four-Year Hiring Freeze Prevents Hiring Of New CPAs.

These increasing budgetary shortfalls have required a four-year-running hiring freeze and increased mandatory furlough days; as a result, Ventura Superior Court's administrative vacancy rate has more than doubled—from 22 in 2008, to 48 in 2011. (Kanatzar Decl. ¶ 11; Sherman Decl. ¶ 5.) Moreover, at least eight of those vacancies are for positions within the civil processing unit and records departments, thereby directly implicating the resources available to process filings such as those that CNS seeks guaranteed "same-day access" to here. (Kanatzar Decl. ¶ 11.)

2. The Superior Court Reduced Public Hours And Established A "Drop Box" For Late-In-The Day Filings.

To further mitigate the impact of budgetary shortfalls, Ventura Superior Court reduced its public business hours from a closing time of 5:00 p.m. back to 4:00 p.m. (*Id.* ¶ 12.) And effective January 1, 2012, the clerk's office will close another hour earlier, at 3:00 p.m. (Sherman Decl. ¶ 7.) To accommodate this change, Ventura Superior Court installed a secure drop box in which filings of all types could be received. (Kanatzar Decl. ¶ 13.) That drop box is checked twice per day—once at 4:30 p.m. to check how many documents it contains, and once at 5:00 p.m. to retrieve all the documents and take them inside for processing. (*Id.*) All documents deposited in the drop box are stamped "received" on the back of the first page of the filing, and are deemed filed on that date. (*Id.*)

3. New Complaints Can Only Be "Received" For Later Processing By New Filings Desk CPAs.

As an additional mitigating measure, Ventura Superior Court changed the procedure by which it accepts new complaints for filing. Prior to June 2010, most new complaints were received by the clerk's office at the public filing windows, and CPAs were immediately responsible for fully processing and opening new files. (*Id.* ¶ 14.) This practice of creating new files upon receipt of complaints at the filing window became increasingly unworkable due to the small number of open clerk windows and the reduced number of CPAs available to staff them. (*Id.*)

Ventura Superior Court therefore implemented a change requiring that most new complaints could only be "dropped off" at the filing windows to be processed by back-counter CPAs. (*Id.* ¶¶ 15-16.) This change allowed the Civil Department's limited staff to deal with other customers waiting in line at the civil filing windows, and to handle *ex parte* applications and other time-sensitive matters. (*Id.* ¶ 17.)

C. Despite These Constraints, Newly Filed Unlimited Civil Complaints Typically *Are* Available The Day *After* Receipt.

CNS complains that during the period from August 8, 2011, through September 2, 2011, it was permitted same-day or next-day access in only a very small percentage of the 152 new unlimited civil complaints Ms. Krolak reviewed. (Compl. ¶ 29.) These figures conflict in every way with what the actual data shows.

There were 147 total new unlimited civil complaints filed during the time period at issue. (Declaration of Julie Camacho in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, filed concurrently herewith ["Camacho Decl."] ¶ 15.) Forty-seven (47) of those new complaints were received, processed and placed in the media bin all on the same day—i.e., "same-day access." (*Id.* ¶ 16.) Fifty-four (54) of those new complaints were received on one day and processed and placed in the media bin the next day—i.e., next-day access. (*Id.* ¶ 17.) And 18 of those new complaints were processed and placed in the media bin within two days of receipt. (*Id.* ¶ 18.) Thus, a full 77% of new complaints were accessible within two days after receipt, with the bulk of them available the same- or next-day.

Of the remainder, at least 17 new complaints (or another 11%) needed to be assigned to a judicial officer immediately. (*Id.* ¶ 19.) Another seven did not get placed in the media bin due to an inadvertent clerical error. (*Id.* ¶ 20.) The balance of new complaints that had delayed access—only a handful—all had unusual delays that can be explained. (*Id.* ¶ 21.)[1]

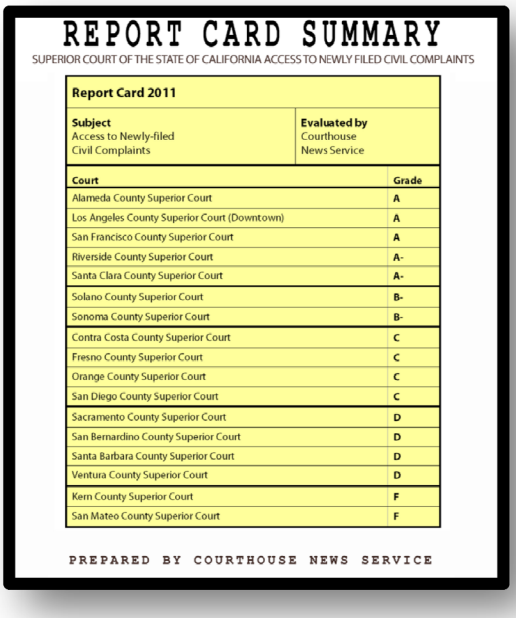
D. CNS Cannot Honestly Claim There Is A "Longstanding Tradition" Of "Same-Day Access" To Newly Filed Complaints.

CNS claims the First Amendment guarantees a right of "same-day access" to newly filed civil complaints because of an allegedly "longstanding tradition for both

[1] Similarly, in a February 7, 2011 letter to Ventura Superior Court, CNS points to four cases demonstrating access "nowhere near same-day." (Marshall Decl., Ex. 4.) CNS's claims again conflict with the actual data. (Camacho Decl. ¶¶ 22-23.)

state and federal courts to provide reporters who visit the court every day with access to new complaints at the end of the day on which they are filed." (Compl. ¶ 4.)

Whatever else may be said of that alleged "tradition," CNS *contradicts* its own argument in two of its most recent public pronouncements. First, in February 2011, CNS published its "Report Card Summary—Superior Court of the State of California Access To Newly Filed Civil Complaints:"



REPORT CARD SUMMARY

SUPERIOR COURT OF THE STATE OF CALIFORNIA ACCESS TO NEWLY FILED CIVIL COMPLAINTS

Report Card 2011

Subject Access to Newly-filed Civil Complaints	**Evaluated by** Courthouse News Service

Court	Grade
Alameda County Superior Court	A
Los Angeles County Superior Court (Downtown)	A
San Francisco County Superior Court	A
Riverside County Superior Court	A-
Santa Clara County Superior Court	A-
Solano County Superior Court	B-
Sonoma County Superior Court	B-
Contra Costa County Superior Court	C
Fresno County Superior Court	C
Orange County Superior Court	C
San Diego County Superior Court	C
Sacramento County Superior Court	D
San Bernardino County Superior Court	D
Santa Barbara County Superior Court	D
Ventura County Superior Court	D
Kern County Superior Court	F
San Mateo County Superior Court	F

PREPARED BY COURTHOUSE NEWS SERVICE

(Declaration of Karen Dalton-Koch Submitted in Opposition to Plaintiff's Motion for Preliminary Injunction, filed concurrently herewith ("Dalton-Koch Decl.") Ex. A.) CNS gave "As" to 5 courts that maintain electronic files (Alameda, Los Angeles, Riverside, Santa Clara) or that are considerably larger and have greater staff (San Francisco, Los Angeles). However, CNS reported that the remaining 12 courts *failed* to provide "same-day access." (*Ibid.*)

Second, in sponsoring SB 326—*see* Defendant's Motion to Dismiss at 8-9—CNS claimed to have "directly experienced the deterioration of timely access to the civil court record." (Deft's Req. for Judicial Notice In Support of Mot. to Dismiss, Ex. B at B9.) Indeed, it appears that CNS supported SB 326 *precisely because* there is *no* historical right to "same-day access" to newly filed complaints in California.

E. Starting In About November 2010, CNS Demanded "Same-Day Access" To Newly Filed Unlimited Civil Complaints.

Shortly after Ventura Superior Court implemented its change for processing only "dropped off" complaints, CNS changed its business model by deciding to visit Ventura Superior Court on a daily, rather than the once- or twice-weekly basis. (Compl., ¶¶ 22, 25.) In November 2010, CNS's reporter, Juliana Krolak, started demanding "same-day access" to newly filed unlimited civil complaints. (*Id.* ¶ 25.) From about February 2011 through March 2011, Ventura Superior Court staff communicated with CNS on several occasions to try and reach a compromise on CNS's demands. (Kanatzar Decl. ¶¶ 19-20, 22-27.)

As a result of those exchanges, Ventura Superior Court reprioritized the procedures by which newly filed complaints are processed and made available to the public. (*Id.* ¶¶ 22-27.) Specifically, the procedure was changed to give "the highest priority" to processing new civil unlimited complaints, so that they could be filed and placed in the media bin with a general two-day turnaround. (*Id.* ¶¶ 27-28.) To further facilitate this change, Ventura Superior Court even obtained this past August an exception from the court-wide hiring freeze to create a second new filings desk and to staff it with a CPA whose first priority is to identify and process newly filed unlimited civil complaints. (*Id.* ¶ 29.)

But CNS still remains unsatisfied. There are, however, a number of reasons why "same-day access"—certainly a laudable goal—cannot be guaranteed in every instance:

- Unpredictable "drop off." New complaints can be "dropped off" in a number of different ways, and may not get picked up for processing until the end of the day; Ventura Superior Court has no control over the timing by which these new complaints are dropped and therefore cannot guarantee "same-day access" to them under even the best of circumstances. (*Id.* ¶ 31.)

- Immediate judicial action. Certain new complaints must be assigned to judicial officers immediately upon receipt, and may remain in chambers for one or more days (or even weeks) as the judicial officer evaluates whether any additional action needs to be taken. (*Id.* ¶ 33.) These new complaints are placed in the media bin upon release from chambers, but Ventura Superior Court cannot guarantee "same-day access" prior to that point. (*Id.*)
- Quality control. When new CPAs begins working in the clerk's office, it is not uncommon for them to process incomplete complaints that should be rejected; to enter crucial case data improperly that would impair CCMS from properly tracking and assigning the case; and to enter contact information for attorneys improperly. (*Id.* ¶ 34.) To maintain the public's trust in its system and filings, Ventura Superior Court subjects to a quality control review any new files processed by new CPAs. (*Id.*) This review must occur before the file is sent to media bin so that errors may be corrected and resubmitted. (*Id.*) This process can take several days and is another reason why Ventura Superior Court cannot guarantee "same-day access" to those complaints.

CNS claims that guaranteeing "same-day access" is as "simple as opening a door" or permitting CNS to "go behind the counter" to review "dropped-off" complaints that have not yet been processed. (Girdner Decl. ¶ 22.) As Ventura Superior Court has tried to explain to CNS, this is not a workable solution. First, Ventura Superior Court's security procedures were tightened considerably after a shooting incident several years ago at the Employment Development Department in Oxnard. (Kanatzar Decl. ¶ 36.) Ventura Superior Court's current policies prohibit members of the general public from accessing processing desks where new civil unlimited complaints are maintained prior to processing. (*Id.*) Second, Ventura Superior Court cannot allow CNS or other members of the public to review new unlimited civil complaints until they are filed to ensure proper respect for the privacy of its litigants. (*Id.* ¶ 37.) It would be entirely inappropriate to permit CNS access to

fee waiver requests or other documents—which typically accompany new filings—containing such confidential information. (*Id.*) Third, permitting CNS access behind the counter would violate Ventura Superior Court's accounting protocols, which impose strict cash handling and audit procedures. (*Id.* ¶ 38.)

Beyond all this, though, Ventura Superior Court fully complies with its legal obligation to provide "reasonable access" to "court records," and overwhelmingly that access is in fact provided on a same-day or next-day basis.

ARGUMENT

I. CNS FAILS TO SATISFY ANY OF THE FOUR FACTORS THAT MIGHT OTHERWISE JUSTIFY THE "DISFAVORED" PRELIMINARY INJUNCTIVE RELIEF IT SEEKS.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (emphasis in original; citation omitted). In *Winter v. Nat'l Res. Def. Council,* 555 U.S. 7, 20 (2008), the United States Supreme Court affirmed that a plaintiff seeking a preliminary injunction must make a clear showing of *all four* following factors: (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest.

For the reasons discussed below, CNS cannot satisfy a single factor, much less all four. And this outcome only is bolstered by the stricter scrutiny that must guide this Court's consideration of CNS's requested mandatory injunction.

A. CNS's Requested Mandatory Injunction Is "Disfavored" And Subject To Even Stricter Scrutiny.

To avoid the more stringent scrutiny applied to disfavored mandatory injunctions, CNS constructs an argument that, because the alleged "policy" sought to be enjoined restricts First Amendment rights, CNS's requested injunction is

presumed to preserve the status quo, and therefore is prohibitory in nature, rather than mandatory. (Mot. at 7 & n.4.) *Cf. Stanley v. Univ. of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (a "mandatory" injunction "goes well beyond simply maintaining the status quo pendente lite [and] is particularly disfavored") (internal quotations and citations omitted); *Dahl v. HEM Pharms. Corp*., 7 F.3d 1399, 1403 (9th Cir. 1993) (stating that mandatory preliminary injunctions are "subject to a heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party"). CNS's construction must fail.

First, CNS's position assumes too much. There is no First Amendment right to "same-day access." (*See infra* Section I.B.1.) Thus, even if there was a "presumption" in First Amendment cases that the status quo is the condition in which a person is free to exercise their rights (there is not[2]), CNS cannot invoke it here.

Second, CNS mischaracterizes the nature of its requested relief. Whereas a prohibitory injunction *prohibits a party from taking action*, "[a] mandatory injunction orders a responsible party to 'take action.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879-80 (9th Cir. 2009) (vacating mandatory injunction requiring defendant to take affirmative steps to recall infringing drug where record failed to establish harm) (internal quotation omitted). Here, CNS tries to cleverly articulate its injunction as one "*prohibiting* him [Mr. Planet] . . . from continuing his policies resulting in delayed access to new unlimited jurisdiction civil complaints." (Compl. Prayer ¶ 1 (emphasis added).) But Ventura Superior Court is providing access to newly filed unlimited civil complaints as quickly as possible given the resources available and the competing concerns over accurate processing of litigants' documents. What CNS really wants is an injunction

[2] And CNS's cited cases do not establish otherwise. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975) (denying plaintiff's application to use municipal venue based on content of "speech" actually changed status quo of venue generally being publicly available); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d Cir. 2006) (recognizing that proper label can be somewhat ambiguous because injunction commands usually can be phrased in either prohibitory or mandatory terms).

that makes Ventura Superior Court provide that access *faster*. Doing something faster requires an affirmative act. To be sure, if Ventura Superior Court simply "stopped" what it was doing now, nothing would get processed and access would be indefinitely delayed. CNS's requested injunction would require Ventura Superior Court to "take action"—it is a mandatory injunction subject to heightened scrutiny.

Third, the mandatory nature of CNS's requested injunction only is underscored by the fact that it does not seek to *preserve* the status quo, but instead meaningfully alters it. "Status quo" is defined as the last uncontested status that preceded the pending controversy. *See Dep't of Parks & Rec. v. Bazaar Del Mundo, Inc*., 448 F.3d 1118, 1124 (9th Cir. 2006) (citing *GoTo.Com, Inc. v. Walt Disney Co*., 202 F.3d 1199, 1210 (9th Cir. 2000)). Thus, if CNS sought to preserve the status quo, it would seek an injunction that would order Ventura Superior Court to *not change* its current processes in a way that might negatively impact CNS's access to newly filed unlimited civil complaints. That is not what CNS seeks. It wants a preliminary injunction guaranteeing "same-day access"—now.

Fourth, CNS's requested injunction also would award it with all the relief to which it claims it is entitled after a full trial on the merits, which is itself disfavored: "[I]t is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir. 1963). CNS's requested injunction would require all the same changes to Ventura Superior Court's internal operations and processing procedures—and all the same strains on its budget and already-stretched resources—as would be required from an (unlikely) judgment on the merits. And Ventura Superior Court's ability to resume its prior operations following CNS's defeat on the merits only would cost the court more.

CNS's requested injunction is disfavored and subject to heightened scrutiny.

B. CNS Cannot Succeed On The Merits.

1. CNS Does Not Have a Right to "Same-Day Access."

For all the same reasons that CNS fails to even *state* a claim as a matter of law (*see* Deft's Mot. to Dismiss at 18-23)—that is, because there is no constitutional or federal common law right to "same-day access" to court records—CNS is unlikely to *succeed* on such claim as well.

CNS does not cite a single, published decision establishing a right of "same-day access" to court records. Indeed, 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 first held that the First Amendment afforded the press and public an affirmative, *qualified* right of access to criminal court proceedings. That qualified right has since been extended to civil filings. *See, e.g.*, *New York Civil Liberties Union v. New York City Transit Auth.*, 652 F.3d 247, 250-51 (2d Cir. 2011); *In re Marriage of Burkle*, 135 Cal. App. 4th 1045, 1052-53, 1060-62, 37 Cal. Rptr. 3d 805 (2006).

In determining whether such a right exists, the Court identified two related criteria, 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*). CNS cannot satisfy either criteria.

a. "Experience" fails to demonstrate a right to "same-day access."

For the "experience" inquiry, CNS's purports to establish "a longstanding tradition" of "same-day access" to new complaints, by citing a handful of decisions concerning the public's access rights in the context of motions to seal or unseal records. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178-80 (9th Cir. 2006); *In re NVIDIA Corp.*, Case No. C 06–06110 SBA, 2008 WL 1859067 *1,

**2-4 (N.D. Cal. 2008); *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989). Although those courts acknowledged a general right of access to those records (a point Ventura Superior Court does not dispute), those courts in *no way* addressed whether such access *must* occur the same day the documents are filed.

CNS next resorts to an unpublished Texas decision where CNS successfully obtained the kind of preliminary injunctive relief it seeks here. *Courthouse News Service v. Jackson*, No. H-09-1844, 2009 WL 2163609 1, **2-5, 38 Media L. Rep. 1890 (S.D. Tex. July 20, 2009). Yet, for the same reasons discussed here, the reasoning of that decision lacks rational support: *None* of the authority on which that district court relied actually held—or even considered whether—a First Amendment right to "same-day access" of newly filed civil complaints exists. At most, the court's discussion of a First Amendment right of access confirms general principles of *reasonable* access in criminal and civil cases. *See id.* at **3-4.

CNS lastly attempts to construct a "tradition" of "same-day access" to court records from a sampling of courts that extend to it the *courtesy* of providing "same-day access" to new complaints. (Mot. at 2-4; Girdner Decl. Ex. 3.) CNS identifies courts in only 23 of the 50 states where it is allegedly provided "same-day access" to new civil complaints. (Girdner Decl. Ex. 3.) 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.) Indeed, CNS's "Report Card Summary" only underscores the lack of any such "tradition." (Dalton-Koch Decl., Ex. A.) There simply is no "tradition" of "same-day access" in California.

b. "Logic" fails to demonstrate a right to "same-day access."

Nor does the "logic" component of the First Amendment analysis recognize a right of "same-day access" to court records. CNS suggests that local court considerations—including budget 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. (Mot. at 15-16.) But the lack of contemporaneous news reporting does not *itself* diminish the significance of the news reports, even in the criminal context. *United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987) ("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."). 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.

CNS attempts derive "logic" supporting a "same-day access" right from its claim that any delay in access to public records is the functional equivalent of an outright denial of access to those records. (Mot. at 14-16.) But CNS's authority is all inapposite—it involves either *blanket* restrictions on access to records[3] or proceedings,[4] not at issue here, or has nothing to do with the public right of access whatsoever.[5] Indeed, in *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994), where the Third Circuit rejected the later release of a transcript as a permissible

[3] *See Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 895, 897 (7th Cir. 1994) (considering journalists' motion to intervene to vacate seal of entire court file and to modify protective order); *Globe v. Newspaper Co. v. Pokaski*, 868 F.2d 497, 502-07 (1st Cir. 1989) (challenging state sealing statute automatically sealing records of cases ending in acquittal or a finding of no probable cause); *Estate of Hearst*, 67 Cal. App. 3d 777, 784-86 (1977) (considering propriety of probate court order vacating prior sealing order).

[4] *See United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (holding release of transcript following exclusion of news media from criminal proceedings inadequate substitute given right of access to attend judicial proceedings); *In re Charlotte Observer*, 882 F.2d 850, 852-56 (4th Cir. 1989) (holding unconstitutional trial court's hearing closure for change of venue determination).

[5] *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-61, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (considering whether order restraining media from publishing or broadcasting accounts of confessions or admission made by the accused constituted impermissible prior restraint on speech); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 247-50 (7th Cir. 1975) (analyzing whether restrictions on speech amounted to a prior restraint).

substitute for the media's right to be present at a judicial hearing, the court nevertheless stated, "[w]e do not doubt that the *ten day* interval between the hearing and the release of the transcript *had very little effect on the value of the information as news*." (Emphasis added.) Thus, neither *Simone* nor any other of CNS's cases establish a constitutional or common law right to "same-day access."[6]

2. CNS Has Only A Right To *Reasonable* Access, Which CNS Already Receives.

Starting from the flawed premise that it has a right to "same-day access" to begin with, CNS seeks to impose a "stringent three-part test" that Ventura Superior Court must satisfy to "overcome" that "right." (Mot. at 16-17 (relying on *United States v. Brooklier*, 685 F.2d 1162, 1168-69 (9th Cir. 1982) and its progeny).) CNS's entire analysis is inapposite.

As discussed, there is no right to "same-day access," and none of the additional cases cited by CNS that invoke this three-part test suggest otherwise. They all concern instances where courts have made specific orders directed at a particular hearing, transcript or filing for the purpose of sealing the record or closing off access to the public—entirely or indefinitely. *See Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940 (9th Cir. 1998) (order sealing transcripts of hearings conducted during jury deliberations in a criminal trial); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143 (9th Cir. 1983) (order requiring filings in a particular criminal case to be filed in camera with 48-hour window for objections prior to sealing determination); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982) (orders closing various hearings and refusing release of *in camera* proceedings prior to close of criminal trial).

[6] CNS's alternative reliance on the "serious questions" standard for injunctive relief fares no better than its claim of likely success. There are no serious questions on this issue, and CNS still cannot satisfy the other three factors. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Neither situation is implicated here. Ventura Superior Court's "policy" of processing new complaints prior to making them available to the public does not target any particular case or subject matter, or withhold documents from any particular group; it does not delay access for a set period of time, if at all. In fact, its "policy" is to process *all* new complaints as promptly as its resources will allow, and to give the public access immediately thereafter. And overwhelmingly that "policy" provides *reasonable* access, or next-day access, if not "same-day access." (See Camacho Decl. ¶¶ 4-22.)

This is all the law requires. Cal. Gov't Code § 68150(l); *see also* Cal. Rs. Ct. 2.500(a), 2.503(a); *Richmond Newspapers, Inc.*, 448 U.S. at 581 n.18 (acknowledging "reasonable limitations" may be placed on public's access to criminal trial); *Globe Newspaper Co. v. Super. Ct*., 457 U.S. 596, 607 n.17 (1982).

C. CNS Cannot Demonstrate A "Real And Concrete" Harm, Much Less Irreparable Harm.

To obtain the mandatory injunctive relief it seeks, CNS must demonstrate irreparable harm that is not just hypothesized, but is "real and concrete." *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201-1202 (9th Cir. 1980). CNS cannot meet that burden.

1. CNS Cannot Avail Itself Of Any Presumed Harm Derived Under Inapposite Freedom Of Expression Cases.

CNS relies on a host of inapposite authorities for the unsupportable proposition that *any* delay in access to newly filed unlimited civil complaints constitutes irreparable harm. All the cases cited by CNS, however, involve harm caused by restraint on the freedom of *expression or speech*, not restraint on access to court records. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 357 (1976) (freedom of belief and association); *New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (freedom of press); *Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175 (1968) ("The elimination of prior restraint was a 'leading purpose' in the adoption of the First

Amendment."); *Wood v. Georgia*, 370 U.S. 375, 376 (1962) (freedom to publish "thoughts and opinions"); *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151, 1154 (9th Cir. 1987) (involving vendor's freedom to sell newspapers in public forum).

There is an important distinction between freedom of expression cases and those involving access to information; both of them are *rooted* in First Amendment principles, but they have developed along distinctly different lines. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9-10 (1978) (distinguishing right to access information cases from First Amendment cases where courts are "concerned with the freedom of the media to communicate information once it is obtained"). Thus, although CNS attempts to conflate the two, the United States Supreme Court has made clear that they are *not* intrinsically linked:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information*.

Id. at 12 (internal quotations omitted and emphasis added); *see also S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559-560 (6th Cir. 2007).

For this reason, CNS's reliance on the "precious First Amendment right of freedom of press" in *Jacobsen* (Mot. at 22) to demonstrate irreparable harm here—which concerns, at most, the right to "gather information"—is misplaced. *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 183 (3rd Cir. 1999) (stating forum analysis inapplicable to resolve restrictions on right of access); *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 21-22 (2d Cir. 1984) (calling forum analysis "inapposite" to access to courtroom cases); *see also Houchins*, 438 U.S. at 10 (holding news organizations hold no greater "access to

government information beyond that open to the public generally"). The cases do not support recognition of a right to "same-day access" to court records, much less a presumption of irreparable harm resulting from a purportedly violation of that non-existent right.

2. CNS's Alleged Loss Of Goodwill Is Hypothetical, At Best.

CNS's effort to demonstrate irreparable harm "as a matter of law because the Eleventh Amendment bars [CNS] from seeking monetary damages" for its alleged loss of goodwill (Mot. at 22) fares no better. The inability to recover money damages does not alone establish irreparable harm. *See Los Angeles Memorial Coliseum Comm'n*, 634 F.2d at 1202 (reversing injunction where proponent failed to establish both irreparable harm *and* inadequacy of legal remedies). CNS still must demonstrate that its alleged injury to goodwill is concrete and real. It has not done so; in fact, its own pleadings demonstrate that such harm is hypothetical, at best. (*See* Mot. at 22 ("Prolonged delays in access *will* diminish the value of its reports to its subscribers, *leading to* a loss of goodwill.") (emphasis added); *see also* Compl. ¶ 39; Girdner Decl. ¶ 28.)

CNS does not allege or attest that any subscriber *actually* has questioned the value of its reports; it does not allege or attest that it has *actually* lost any subscribers; it also does not allege or attest that it has lost out on an opportunity to timely report an event. CNS's theoretical and conclusory claims of loss to goodwill fail to demonstrate a real and concrete harm, much less an irreparable one. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1264 (10th Cir. 2004) (reversing issuance of preliminary injunction where requesting party failed to establish irreparable harm solely by alleging breach of contract).

D. No Clear Showing That The Balance Of Equities Tips In Favor Of CNS.

CNS purports to show that the balance of equities tips in its favor by making the incredible claim that Ventura Superior Court "will suffer no injury." (Mot. at

23.) Nothing could be farther from the truth. As a matter of finance, Ventura Superior Court cannot gather additional resources to address CNS's concerns—there simply is no money available. (Sherman Decl. ¶¶ 12-15.) In fact, the budgetary shortfall anticipated for the next fiscal year is so great that even depletion of every last penny of Ventura Superior Court's reserve fund ($4.3 million), combined with use of every last penny of the only other local funding source ($2.7 million), will still leave a shortfall of $5.2 million. (*Id.* ¶ 14.) As a result, Ventura Superior Court will have no choice but to cut additional staff resources or further reduce court hours (*id.* ¶ 15)—either of which only will be exacerbated by an order requiring it to provide "same-day access" to every unlimited civil complaint.

As practical matter, Ventura Superior Court *cannot*, even with unlimited resources, guarantee "same-day access." As described above, the timing of "dropped" filings, the need for immediate assignment to judicial officers, and the need to ensure quality control over the processing of new complaints all make it impossible to guarantee "same-day access." (Kanatzar Decl. ¶¶ 31-34.) CNS's suggestion that its reporters simply could be let "behind the counter" likewise is unworkable. It puts court staff in an increased security risk, it violates the confidentiality of litigants' privacy interests, and it violates the strict accounting protocols to which Ventura Superior Court must adhere. (*Id.* ¶¶ 35-39.)

By contrast, CNS is the *only* news outlet that seeks regular access—much less "same-day access"—to Ventura Superior Court's new complaints. (*Id.* ¶ 18.) Requests are only infrequently received from other reporters, and reasonable access is provided without any objection from the reporters. (*Id.*) Merely asking whether the equities of a demanding news outlet seeking an unsupported right to "same-day access" to court records should trump the equities of a cash- and resource-strapped court doing its best under the circumstances to provide reasonable access—and often *achieving* same- or next-day access—seems to answer the question. The balance of

equities here tips sharply in Ventura Superior Court's favor and compels denial of CNS's requested mandatory injunction.

E. CNS's Requested Injunction Will Not Serve The Public Interest; If Anything, It Will Harm It.

The Supreme Court has properly cautioned that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunctions." *Winter*, 555 U.S. at 377 (quotations and citation omitted). And although various courts have recognized a strong public interest in upholding First Amendment principles, that interest is recognized only in *freedom of expression* cases, as CNS's own authority demonstrates. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The ordinance [which restricts leafleting] thus infringes on the free speech rights not only of Klein, but also of anyone seeking to express their views in this manner in the City of San Clemente."); *see also Sammartano v. First Judicial Dist. Ct. , In and For Cnty. of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) (summarizing other circuit cases recognizing right in freedom of expression cases). This is not a freedom of expression case; the public interest on which CNS relies simply is not implicated here.[7]

Even if it were, that public interest is not absolute and can be overcome "where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Sammartano*, 303 F.3d at 974. That is precisely the circumstance here: CNS faces a very limited delay (if any) in access to newly filed unlimited civil complaints that must bow to the severe harm to various other public interests that would be incurred by granting the mandatory injunction CNS seeks.

To start, CNS's requested mandatory injunction would harm the overall administration of justice in Ventura Superior Court insofar as vital personnel

[7] CNS attempts to create an "even more pronounced" public interest in access cases by noting "the press serves as the surrogate of the public." (Mot. at 23.) This is a non-starter. The press has no greater right to access than any other member of the public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S. Ct. 1306 55 L. Ed. 2d 570 (1978)

resources would need to be diverted from other areas of the court's judicial administration system. There is absolutely no funding available to hire additional staff to accommodate CNS's request. (Sherman Decl. ¶ 15.) Indeed, each and every department of Ventura Superior Court has been forced through budget cuts to operate on less than full staffing capacity. (*See id.* ¶ 5.) That means that each and every department already needs *more* resources that it presently has. To require Ventura Superior Court to pull resources from those other departments to accommodate CNS's request not only will put CNS's interests improperly above the interests of every other member of the public, but it also will necessarily and negatively impact the administration of justice in those departments.

Moreover, CNS's requested mandatory injunction would harm the public's confidence in the court system. Requiring Ventura Superior Court to provide "same-day access"—either through rushed processing of newly filed complaints, or through partial processing of those complaints[8]—would dramatically increase the likelihood of processing errors and with no possibility of quality control. (Kanatzar Decl. ¶ 34.) Documents might be misplaced; file numbers might be mistakenly switched; funds might be lost, stolen, or misfiled. (*Id.*) If nothing else, the public expects its courts to handle responsibly the materials it is given.

Likewise, CNS's requested mandatory injunction would harm individual litigants' interests in having their documents properly managed by Ventura Superior Court. CNS suggests it could have "behind the counter" access to received but not yet filed complaints to avoid any burden on court staffing resources. (*See* Compl. ¶ 1; Mot. at 3; Gardner Decl. ¶ 22.) But Ventura Superior Court has an obligation to its litigants to ensure that confidential information—including name change petitions and fee waiver requests—remain confidential. (Kanatzar Decl. ¶ 37.) Similarly,

[8] CNS alleges that in June 2009, Ventura Superior Court agreed to make newly filed complaints available "after some processing but before the complaint had been fully processed . . . ." (Compl. ¶ 24.) That is untrue. For the very same reasons articulated here, Ventura Superior Court *never* agreed to provide CNS with partially processed complaints. (Kanatzar Decl. ¶ 21.)

new filings often are accompanied by filings fees, which usually come by cash or check. (*Id.* ¶ 38.) Those funds are subject to strict cash handling and audit procedures designed to ensure that litigants' monies remain secure. (*Id.*) Allowing access behind the clerk's counter would compromise these established security procedures.

Finally, CNS's requested mandatory injunction would create a slippery slope that puts Ventura Superior Court—and potentially every other court in the state and the nation—at the mercy of CNS's ever-changing business plan. CNS admits that its determination of what is "newsworthy" is governed entirely by CNS's own preferences. (*See* Compl. ¶ 15; Krolak Decl. ¶ 3.) Right now CNS seeks access to only new civil unlimited complaints now; it may later determine (in its sole discretion) that other types of filings are "newsworthy" (*id.*), and 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. All these harms to the public interest will only be magnified and compounded.

II. UNDER ANY CIRCUMSTANCE, A BOND IS REQUIRED.

There are important reasons why Rule 65(c) of the Federal Rules of Civil Procedure provides that a "court may issue a preliminary injunction or a temporary restraining order *only if* the movant gives security in an amount that the court considers proper" (emphasis added), and that it may be reversible error to issue an injunction without such security. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999).

None of CNS's cases support a nominal bond—much less a waived bond—here. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (affirming injunction with $50,000 bond); *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) (affirming injunction without additional bond where the funds at issue in the injunction were held in sequestration by the court); *Tradition Club*

Assocs., LLC v. Tradition Golf Club, No. EDCV 08-1581, 2008 WL 5352927 at *6 (C.D. Cal. Dec. 18, 2008) (ordering $2500 bond even where enjoined party "state[d] it will suffer little injury, if any at all, from the entry of an injunction," and the court still ordered a $2500 bond); *Doctor John's, Inc. v. City of Sioux City*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) (waiving bond in case of quintessential censure of free speech where "City has not pointed to any evidence supporting a contention that the City will suffer compensable economic 'secondary effects' if its amended ordinances are improvidently enjoined").[9]

Moreover, as detailed above, the mandatory injunctive relief CNS seeks will result in substantial financial and practical harm to Ventura Superior Court. To comply, and not otherwise harmfully affect the administration of justice to its litigants, Ventura Superior Court would be compelled to increase its staff resources at a time when budget constraints have forced it to cut them. Thus, if the Court were to issue such an injunction, a sizeable bond should be required.

CONCLUSION

CNS's Motion for Preliminary Injunction should be denied.

Dated: October 31, 2011

Respectfully submitted,

JONES DAY

By: /s/ Robert A. Naeve
Robert A. Naeve

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

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[9] CNS citation to the unpublished Texas decision it procured a couple years ago does not justify a nominal or waived bond here, either. *Jackson*, 2009 WL 2163609 at **2-5. There, the court ordered a $1000 bond without *any* discussion of the relevant authorities or facts. *Id.* Much like the rest of that opinion, the court's order on this point is not persuasive authority.