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15 UNITED STATES DISTRICT COURT
 16 CENTRAL DISTRICT OF CALIFORNIA
 17 WESTERN DIVISION

18 COURTHOUSE NEWS SERVICE,

19 Plaintiff,

20 v.

21 MICHAEL PLANET, in his official
 22 capacity as Court Executive
 23 Officer/Clerk of the Ventura County
 24 Superior Court,

25 Defendant.

Case No. 2:11-cv-08083-R-MAN

**MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF DEFENDANT'S
 MOTION TO DISMISS
 AMENDED COMPLAINT**

Date: August 4, 2014

Time: 10:00 a.m.

Judge: Hon. Manuel L. Real

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1 particular judicial records and documents.” *Stone v. Univ. of Maryland Med. Sys.*
2 *Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (emphasis added).

3 With this background, the novel question presented by CNS’s Amended
4 Complaint is easily stated. The issue here is *not* whether the First Amendment right
5 of access could ever apply to civil complaints. Instead, the question is whether the
6 First Amendment right of access attaches the moment a new complaint crosses
7 under the courthouse transom, *before* the defendant has notice of its existence, and
8 *before* it sees the light of day inside a courtroom. *See United States v. Inzunza*, 303
9 F. Supp. 2d 1041, 1048 (S.D. Cal. 2004) (“the issue is not whether the public will
10 gain access, but when”). This is “an important question of first impression” about
11 which the Ninth Circuit took “no position” when it remanded this case for further
12 proceedings. *Courthouse News Service v. Planet*, --- F.3d ----, 2014 WL 1345504,
13 at *10, *14 (9th Cir. Apr. 7, 2014).

14 CNS’s unprecedented claim to a constitutional right of same-day access to
15 civil complaints fails on several levels:

- 16 1. ***Newly Civil Complaints Are Not “Judicial Records”***: The First
17 Amendment right of access extends only to certain “judicial records.”
18 “[T]he mere filing of a paper or document with the court is insufficient
19 to render that paper a judicial document subject to the right of public
20 access.” *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995).
21 Rather, complaints become “judicial records” only when they “come
22 before the court in the course of an adjudicatory proceeding” and are
23 “relevant to that adjudication.” *In re Providence Journal Co.*, 293
24 F.3d 1, 9 (1st Cir. 2002).
- 25 2. ***There Is No History Or Experience Of Same-Day Access***: Even if
26 complaints were “judicial records,” CNS cannot satisfy the
27 “experience” prong of the First Amendment right of access test
28 established in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501
(1984). For more than a century, federal and state courts have
recognized that there is no same-day right of access to complaints filed
in civil cases. *E.g.*, *In re Reporters Comm. for Freedom of Press*, 773
F.2d 1325 (D.C. Cir. 1985); *Schmedding v. May*, 85 Mich. 1 (1891);
Cowley v. Pulsifer, 137 Mass. 392 (1884).

1 3. ***There Is No Logic To Mandating Same-Day Access:*** CNS similarly
2 cannot satisfy the “logic” prong of the *Press-Enterprise* test. First
3 Amendment access rights have been extended to documents that shed
4 light upon the administration of justice; that salutary goal, however,
5 has “no application whatever to the contents of a preliminary written
6 statement of a claim or charge ... whose form and contents depend
7 wholly on the will of a private individual.” *Cowley*, 137 Mass. at 394;
8 *see also NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal.4th
9 1178, 1208 n.25 (1999).

10 4. ***CNS’s Amended Complaint Does Not Allege A First Amendment***
11 ***Violation:*** CNS alleges that VSC lacks a “compelling or overriding
12 interest” for providing public access to unlimited civil complaints after
13 processing. Assuming that the First Amendment right of access
14 applies to newly unlimited civil complaints (which it does not), the
15 Amended Complaint should nonetheless be dismissed because (a) the
16 “compelling interest” standard does not apply to delays in access, *see*
17 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), and (b) CNS
18 does not (and cannot) allege that processing new complaints prior to
19 public release amounts to an unreasonable time, place and manner
20 restriction, *see Planet*, 2014 WL 1345504, at *44 n.9. To the contrary,
21 VSC’s alleged policy reasonably balances the interests of CNS with
22 those of litigants and court staff, safeguards unprocessed documents
23 from theft and damage, and protects the privacy interests of third
24 parties. *See, e.g., Bruce v. Gregory*, 65 Cal.2d 666, 676 (1967).

25 CNS’s Amended Complaint accordingly should be dismissed with prejudice.

26 BACKGROUND

27 **A. Procedural Background.**

28 CNS filed its original complaint on September 29, 2011, alleging that VSC
unlawfully failed to provide CNS with same-day access to unlimited civil
jurisdiction complaints. (ECF No. 1 ¶¶ 4-6.) CNS asserted claims under 42 U.S.C.
§ 1983 for violations of the First Amendment’s right of access, the federal common
law, and California Rule of Court 2.550. (*Id.* ¶¶ 31-43.)

On November 30, 2011, this Court dismissed CNS’s claim under California
Rule of Court 2.550 as barred by the Eleventh Amendment to the United States
Constitution. (ECF No. 38 at 2.) The Court abstained and dismissed the remainder

1 of CNS’s Complaint under the abstention doctrines enunciated in *O’Shea v.*
2 *Littleton*, 414 U.S. 488 (1974), and *Railroad Commission of Texas v. Pullman Co.*,
3 312 U.S. 496 (1941).

4 The Ninth Circuit reversed and remanded on April 7, 2014. *Planet*, 2014
5 WL 1345504. The Ninth Circuit first invoked a “general rule against abstaining
6 under *Pullman* in First Amendment cases,” and found that CNS’s right of access
7 claim should be adjudicated in federal court. *Id.* at *8. The Ninth Circuit further
8 found *O’Shea* abstention improper because CNS’s requested injunction “poses little
9 risk of an ‘ongoing federal audit’ or ‘a major continuing intrusion of the equitable
10 power of the federal courts into the daily conduct of state ... proceedings.’” *Id.* at
11 *14 (quoting *O’Shea*, 414 U.S. at 500, 502).

12 As noted above, the Ninth Circuit declined to take any “position on the
13 ultimate merits of CNS’s claims.” *Planet*, 2014 WL 1345504, at *14. Thus, the
14 Ninth Circuit did not address whether the First Amendment enshrines a right of
15 same-day access to new unlimited civil complaints. Instead, the Ninth Circuit
16 merely noted that lower federal courts extend the constitutional right of access to
17 certain “civil proceedings and associated records and documents” in order to
18 “ensure[] that the constitutionally protected discussion of governmental affairs is
19 an informed one.” *Id.* at *22-23 (quoting *Cal. First Amendment Coal. v.*
20 *Woodford*, 299 F.3d 868, 874 (9th Cir. 2002)). The Ninth Circuit further
21 emphasized that “[t]here may be limitations on the public’s right of access to
22 judicial proceedings, and mandating same-day viewing of unlimited civil
23 complaints may be one of them.” *Id.* at *14. And the court mused that a “delay in
24 making the complaints available may ... be analogous to a permissible ‘reasonable
25 restriction [] on the time, place, or manner of protected speech.’” *Id.* at *14 n.9
26 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).
27
28

1 **B. Factual Allegations.**

2 CNS filed an Amended Complaint on June 3, 2014, limited to one cause of
3 action under 42 U.S.C. § 1983 for violation of its First Amendment right of access.
4 (ECF No. 58 ¶¶ 31-35.) CNS is a corporation that reports about civil lawsuits
5 “from the date of filing through the appellate level.” (*Id.* ¶ 7.) CNS employs
6 reporters who visit assigned courts, review civil complaints, and prepare a summary
7 of each complaint that is likely of interest to CNS’s subscribers. (*Id.* ¶ 18.) CNS’s
8 subscribers are lawyers and law firms, among others. (*Id.* ¶ 17.)

9 CNS allegedly began covering new civil case filings at VSC on a regular
10 basis in 2001. (ECF No. 58 ¶ 21.) Initially, CNS’s reporter visited the court only
11 once or twice each week. (*Id.* ¶ 22.) In November 2010, CNS began covering VSC
12 on a daily basis. (*Id.* ¶ 25.) Shortly thereafter, counsel for CNS wrote the court,
13 challenging its practice of “releasing newly filed complaints for press review” only
14 “after a certain amount of processing has been completed.” (*Id.* Ex. 2.)

15 VSC responded on July 11, 2011, explaining that, notwithstanding CNS’s
16 “interest in same-day access, the Court cannot prioritize that access above other
17 priorities and mandates.” (ECF No. 58 Ex. 3.) Moreover, “the Court must ensure
18 the integrity of all filings, including new filings, and cannot make any filings
19 available until the requisite processing is completed.” (*Id.*) Accordingly, VSC
20 pledged to continue “mak[ing] every effort to make new filings available as early as
21 is practicable given the demands on limited court resources.” (*Id.*)

22 According to the Amended Complaint, CNS receives over 80% of VSC’s
23 new unlimited civil complaints within six days of filing, while approximately 18%
24 of the complaints reviewed by CNS’s reporter between August 8, 2011 and
25 September 2, 2011 were not available until more than six days after filing. (ECF
26 No. ¶ 29.) CNS alleges these “delays” violate “a longstanding tradition for both
27 state and federal courts to provide reporters who visit the court every day with
28 access to new complaints at the end of the day on which they are filed.” (*Id.* ¶ 4.)

1 CNS thus requests an injunction permanently enjoining VSC from “denying
2 Courthouse News timely access to new unlimited civil jurisdiction complaints on
3 the same day they are filed,” and a declaration that VSC’s alleged policies violate
4 the First Amendment. (*Id.* at 13.)

5 LEGAL STANDARD

6 Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a
7 complaint “based on the lack of cognizable legal theory or the absence of sufficient
8 facts alleged under a cognizable legal theory.” *Balistreri v. Pacific Police Dep’t*,
9 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, the complaint
10 “must contain sufficient factual matter ... to ‘state a claim to relief that is plausible
11 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). While
12 the Court generally must accept as true the allegations of the complaint, this rule
13 does not apply to “a legal conclusion couched as a factual allegation.” *Bell Atl.*
14 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

15 The existence (or non-existence) of a qualified First Amendment right “is a
16 matter of law.” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir.
17 2004); *see also Times Mirror Co. v. United States*, 873 F.2d 1210, 1212 (9th Cir.
18 1989) (same).

19 ARGUMENT

20 **I. THERE IS NO CONSTITUTIONAL RIGHT OF SAME-DAY ACCESS** 21 **TO NEW UNLIMITED CIVIL COMPLAINTS.**

22 **A. The First Amendment Right Of Access Extends Only To “Judicial** 23 **Documents” That Satisfy The *Press-Enterprise* “Experience And** 24 **Logic” Test.**

25 CNS’s Amended Complaint is limited to the sole claim that it has a First
26 Amendment right of same-day access to VSC’s unlimited civil complaints.
27 Neither the Supreme Court nor the Ninth Circuit has ever ruled on the scope of the
28 First Amendment right of access in the context of records in civil cases. *See*
Hagestad v. Tragesser, 49 F.3d 1430, 1434 n.6 (9th Cir. 1995); *Perry v. Brown*,

1 667 F.3d 1078, 1088 (9th Cir. 2012) (recognizing that “whether the First
2 Amendment right of public access to judicial records applies to civil proceedings”
3 is an issue of first impression in the Ninth Circuit). CNS’s asserted right to same-
4 day access to unlimited civil complaints therefore requires this Court to assess a
5 novel issue within the framework established in other “access” contexts.

6 In 1980, the Supreme Court found that the “common core purpose of
7 assuring freedom of communication on matters relating to the functioning of
8 government” shared by the various clauses of the First Amendment created a
9 qualified right to access and observe criminal trial proceedings. *Richmond*
10 *Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). In subsequent cases, the
11 Supreme Court articulated a two-part test for determining whether a qualified right
12 of access attaches to a particular kind of criminal hearing. Under this “experience
13 and logic” test, the Court examines: (1) whether the proceeding has historically
14 been open to the public; and (2) whether the right of access plays an essential role
15 in the proper functioning of the judicial process and the government as a whole.
16 *Press-Enterprise Co.*, 464 U.S. at 505-10; *Globe Newspaper Co. v. Superior Court*,
17 457 U.S. 596, 606-07 (1982).

18 The Supreme Court has never extended the First Amendment right of access
19 to civil proceedings, or to judicial records in civil or criminal proceedings. The
20 closest case on point is *Nixon v. Warner Communications*, 435 U.S. at 589, which
21 concerned court records in a criminal case. The Supreme Court rejected reporters’
22 claims of a right to physical access to the “Watergate tapes” introduced and played
23 at a criminal trial. The Court recognized a general federal common law right “to
24 inspect and copy public records and documents, including judicial documents and
25 records” in federal criminal cases. *Id.* at 597. The Court explained, however, that
26 the federal common law right “is not absolute,” that “[e]very court has supervisory
27 power over its own records and files,” and that “the decision as to access is one best
28 left to the sound discretion of the trial court.” *Id.* at 598-99. The trial court’s

1 responsibility to exercise its sound discretion over access to the tapes did not
2 permit, the Court ruled, “copying upon demand”; otherwise, there would exist a
3 danger that the “court could become a partner in the use” of the tapes “to gratify
4 private spite or promote public scandal.” *Id.* at 603 (citation omitted). The Court
5 further found that the reporters’ claimed right of access could not be rooted in the
6 First Amendment’s “freedom of press” clause, as “the public [had] never had
7 physical access” to the tapes in question, and the First Amendment “generally
8 grants the press no right to information about a trial superior to that of the public.”
9 *Id.* at 608-10; *see also Estes v. Texas*, 381 U.S. 532, 589 (1965) (“Once beyond the
10 confines of the courthouse, a news-gathering agency may publicize, within wide
11 limits, what its representatives have heard and seen in the courtroom. But the line
12 is drawn at the courthouse door; and within, a reporter’s constitutional rights are no
13 greater than those of any other member of the public.”).

14 Notwithstanding the lack of Supreme Court precedent extending the First
15 Amendment “right of access” to civil trials or judicial records, the Ninth Circuit *has*
16 used the Supreme Court’s “experience and logic” test to determine the extent of the
17 right of access to judicial documents in criminal proceedings. *See, e.g., Oregonian*
18 *Publ’g Co. v. United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990).
19 Under the Ninth Circuit’s interpretation of the “experience and logic test,” “[w]here
20 access has traditionally been granted to the public without serious adverse
21 consequences, logic necessarily follows.” *United States v. Higuera-Guerrero*, 518
22 F.3d 1022, 1026 n.2 (9th Cir. 2008). If access has traditionally not been granted to
23 the court documents at issue, the court “look[s] to logic. If logic favors disclosure
24 in such circumstances, it is necessarily dispositive.” *Id.*¹ Even assuming the

25
26 ¹ The Ninth Circuit’s interpretation is inconsistent with the interpretation of
27 other circuits, which require a showing of *both* tradition and logic. *See, e.g.,*
28 *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510, 514 (3d
Cir. 2013) (“In order to qualify for public access, both experience and logic must
counsel in favor of opening the proceeding to the public.”); *In re U.S. for an Order*

1 “experience and logic” test properly applies to the First Amendment right of access
2 to civil judicial documents, CNS’s Amended Complaint fails to state a claim for the
3 reasons set forth below.

4 **B. The Motion To Dismiss Should Be Granted Because CNS Cannot**
5 **Establish That New Civil Complaints Are “Judicial Documents.”**

6 “For a right of access to a document to exist under ... the First Amendment
7 ..., the document must be a ‘judicial record.’” *United States v. Applebaum*, 707
8 F.3d 283, 290 (4th Cir. 2013). Hence, to establish a First Amendment right of
9 same-day access to unlimited civil complaints, CNS must first demonstrate that
10 civil complaints are “judicial records” even before they are processed by VSC.

11 Whether a document is a “judicial record” is a question of law for the Court. *Id.*

12 CNS presumably believes that a complaint becomes a “judicial record” as
13 soon as it is lodged with the VSC. But “the mere filing of a paper or document
14 with the court is insufficient to render that paper a judicial document subject to the
15 right of public access.” *Amodeo*, 44 F.3d at 145. Courts have limited the qualified
16 right of access to “those materials which properly come before the court *in the*
17 *course of an adjudicatory proceeding* and which are relevant to that adjudication.”
18 *In re Providence Journal Co.*, 293 F.3d at 9 (emphasis added). Thus, for the right
19 of access to possibly attach, the documents must be “submitted to, and accepted by,
20 a court of competent jurisdiction in the course of adjudicatory proceedings.” *FTC*
21 *v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987).

22 Conversely, documents “that are preliminary, advisory, or, for one reason or
23 another, do not eventuate in any official action or decision being taken” are not

24

Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 291 (4th Cir. 2013) (“Our
25 post-*Press Enterprise* precedent makes clear that both the experience and logic
26 prongs are required.”); *In re New York Times Co. to Unseal Wiretap & Search*
27 *Warrant Materials*, 577 F.3d 401, 410 (2d Cir. 2009) (same); *In re Reporters*
28 *Comm.*, 773 F.2d at 1332 (holding that “both” the experience and logic prongs
“must be answered affirmatively before a constitutional requirement of access can
be imposed”).

1 “judicial records.” *United States v. El-Sayegh*, 131 F.3d 158, 161-62 (D.C. Cir.
2 1997) (quotation marks and citation omitted); *Littlejohn v. BIC Corp.*, 851 F.2d
3 673, 680 n.14 (3d Cir. 1988) (“the first amendment does not require us to hold that
4 a document never specifically referred to at trial or admitted into evidence became a
5 part of the public record subject to presumptive public access”). In short, the
6 definition of “judicial records” “assumes a judicial decision. If none occurs,
7 documents are just documents; with nothing judicial to record, there are no judicial
8 records.” *El-Sayegh*, 131 F.3d at 162; *see also Associated Press v. United States*
9 *Dist. Court for Cent. Dist.*, 705 F.2d 1143, 1149 (9th Cir. 1983) (Poole, J.,
10 concurring) (“The *Globe* court has made it crystal clear that neither the First
11 Amendment nor the Sixth gives press, public or the defendant the right to look first,
12 before the court has had an opportunity to judge the nature of questioned documents
13 or other matter.”).

14 The Fourth Circuit recently explored this dispositive distinction in
15 *Applebaum*, 707 F.3d at 283. In that case, the court harmonized two prior
16 decisions: one holding that documents filed in connection with a dispositive
17 motion, such as summary judgment, are subject to the right of access because
18 “summary judgment adjudicates substantive rights” (*Rushford v. New Yorker*
19 *Magazine*, 846 F.2d 249, 253 (4th Cir. 1988)), the other holding that the right of
20 access does not attach to documents not considered by the court but filed with a
21 motion to dismiss, reasoning that they “do not play any role in the adjudicative
22 process” (*In re Policy Mgmt. Sys. Corp.*, 67 F.3d 296 (4th Cir. 1995)). Taking
23 those cases together, the Fourth Circuit held that “documents filed with the court
24 are ‘judicial records’ if they play a role in the adjudicative process, or adjudicate
25 substantive rights.” *Applebaum*, 707 F.3d at 290-91; *see also Amodeo*, 44 F.3d at
26 145 (“[T]he item filed must be relevant to the performance of the judicial function
27 and useful in the judicial process in order for it to be designated a judicial
28 document.”).

1 In California, complaints filed with a superior court do not play any role in
2 the adjudicative process until they are considered by the court and made the subject
3 of some judicial decision. *Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60
4 (2007) (complaint not subject to First Amendment right of access until “it is filed
5 with the court and is used in some manner by the court ‘as a basis for adjudication’
6 of a material controversy”); *see also NBC Subsidiary*, 20 Cal.4th at 1208 n.25;
7 *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal.App.4th 588, 596 (2007). As federal
8 courts have recognized, the plaintiff might voluntarily dismiss, or the parties might
9 dismiss the case pursuant to settlement immediately after a complaint is received
10 for filing. In that event, the complaint is a document, but not a “judicial document”
11 to which the right of access attaches. *Cf. IDT Corp. v. eBay, Inc.*, 709 F.3d 1220,
12 1222-23 (8th Cir. 2013) (“There may be a historical case to be made that a civil
13 complaint filed with a court, but then soon dismissed pursuant to settlement, is not
14 the sort of judicial record to which there is a presumption of public access.”). Thus,
15 CNS has no possible right of access to complaints unless and until they are the
16 subject of some judicial decision.

17 Construing the right of access as limited to documents that play a role in the
18 adjudicative process makes sound sense. The First Amendment right of access is
19 grounded in the “public’s interest in keeping ‘a watchful eye on the workings of
20 public agencies.’” *Washington Legal Found’n v. U.S. Sentencing Comm’n*, 89 F.3d
21 897, 905 (D.C. Cir. 1996) (quoting *Warner Comm’ns*, 435 U.S. at 598).
22 Mandating that courts grant immediate access to new complaints before they are
23 processed, filed and acted upon does not promote any interest in the supervision of
24 the court system. Accordingly, the First Amendment right of access does not attach
25 to the documents at issue in CNS’s Complaint, and the Court may dismiss on that
26 basis alone.

1 **C. The Motion To Dismiss Should Be Granted Because CNS Cannot**
2 **Establish The Requisite “Experience” Of Same-Day Access.**

3 But even if newly received unlimited civil complaints qualified as “judicial
4 records,” CNS’s claim fails as a matter of law under the Supreme Court’s
5 “experience and logic” test. As explained above, the qualified First Amendment
6 right of access has been extended “only to particular judicial records and
7 documents.” *Stone*, 855 F.2d at 180. The right of access does not reach this case
8 because there is no “historical tradition” of same day access to unlimited civil
9 complaints. *Times Mirror Co.*, 873 F.2d at 1213.

10 The historic context of the particular proceeding or document at issue is
11 important not only “because the Constitution carries the gloss of history,” but also
12 because “a tradition of accessibility implies the favorable judgment of experiences.”
13 *Globe Newspaper Co.*, 457 U.S. at 605. In *Richmond Newspapers Inc.*, the
14 Supreme Court identified an “unbroken, uncontradicted history” of public access to
15 criminal trials that supported a First Amendment right of access. 448 U.S. at 573.
16 This precedent included the time when “our organic laws were adopted,” and
17 extended to the present day. *Id.* at 569. While the Supreme Court has not stated
18 how long a history of openness the experience prong requires, courts are “mindful
19 that ‘[a] historical tradition of at least some duration is obviously necessary, . . . [or]
20 nothing would separate the judicial task of constitutional interpretation from the
21 political task of enacting laws currently deemed essential.’” *Detroit Free Press v.*
22 *Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) (citation omitted). An analysis of the
23 historical tradition of openness depends not only on the type of document or
24 proceeding at issue, but also “on the particular stage of the proceeding at issue.”
25 *Inzunza*, 303 F. Supp. 2d at 1046.

26 Contrary to CNS’s legal allegation, there is nothing approaching “an historic
27 practice of such clarity, generality and duration as to justify the pronouncement of a
28 constitutional rule” requiring all courts to provide the public and press with same-
day access to civil complaints. *In re Reporters Comm.*, 773 F.2d at 1336; *see also*

1 *IDT Corp.*, 709 F.3d at 1224 (finding plaintiff “has not established a strong
2 historical tradition of public access to complaints in civil cases that are settled
3 without adjudication on the merits”); *U.S. Tobacco, Inc. v. Big South Wholesale of*
4 *Va.*, No. 5:13-cv-527-F, 2013 U.S. Dist. LEXIS 165638, at *8 (E.D.N.C. Nov. 21,
5 2013) (“Cases from within the Fourth Circuit indicate that only the common law
6 right of access, as opposed to the First Amendment right of access, attaches to a
7 complaint.”); *ACLU v. Holder*, 652 F. Supp. 2d 654, 662 (E.D. Va. 2009) (holding
8 First Amendment does not enshrine right of access to qui tam complaint).

9 There certainly was no such tradition when our organic laws were adopted:
10 “The press had no privilege for the reporting of pretrial judicial proceedings under
11 English common law.” *Gannett Co. v. DePasquale*, 443 U.S. 368, 389 n.20 (1979);
12 *see also King v. Fisher*, 2 Camp. 563, 170 Eng. Rep. 1253 (N. P. 1811) (forbidding
13 dissemination of information about a pretrial hearing). To the contrary, early
14 English law held it “to be a contempt of court to publish a pleading of one party in a
15 newspaper ... before the matter has come on to be heard.” *Cowley*, 137 Mass. at
16 396 (citing cases).

17 Similarly, one can discern no tradition of providing same-day access (or
18 access at all) to civil complaints from early American jurisprudence. A few select
19 examples conclusively establish that American courts have followed a contrary
20 tradition. In *Schmedding v. May*, 85 Mich. 1, a Detroit newspaper sought access to
21 court documents to further its purpose and intention “to publish in brief narrative
22 form, all and the whole of the proceedings and causes commenced and pending in
23 the courts of the said county of Wayne, so far as the same is revealed by the files,
24 records, proceedings, and sittings of said court, in an impartial and just manner,
25 without desire or intention to injure, or in any manner to prejudice, the rights of
26 litigants.” *Id.* at 2. Acknowledging that “no one would probably question the right
27 of any person to inspect” the record of a cause after a public trial or hearing, the
28 Michigan Supreme Court held that right “does not extend to nor include the papers

1 filed in the case necessary to frame the issue to be tried.” *Id.* at 5. Rejecting the
2 newspaper’s argument that certain members of the public would be interested in
3 allegations leveled in a complaint, the court noted that “[t]he claim on which suit is
4 brought may be wholly unfounded,” and that such “suits, involving private
5 transactions, may never come to trial or hearing. The troubles may be settled, and
6 the charges withdrawn.” *Id.* at 5-6. Accordingly, the court held, “[i]n such cases
7 there can be no objection to the papers remaining under the control of the court and
8 the parties until such time as they choose to make them public by proceedings in
9 open court or otherwise.” *Id.*; *see also* *Burton v. Reynolds*, 110 Mich. 354, 355-356
10 (1896) (same); *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (D.C. Cir. 1894) (“there
11 is also a distinction made in some of the cases between the right to inspect judicial
12 records *after trial*, and the right to inspect and take copies from papers merely filed,
13 but before any action had thereon by the court. In the latter case, it has been held,
14 in one instance at least, that the court might withhold from a publisher of a
15 newspaper the right to inspect and take copies of papers or documents on file, for
16 publication before the trial of the cause”).

17 Justice Oliver Wendell Holmes expressed similar reasoning in *Cowley v.*
18 *Pulsifer*, 137 Mass. 392. In that case, an attorney sued the Boston Herald for libel,
19 based on its accurate account of a petition filed in, but never “presented to,” the
20 state court. *Id.* at 393. The Herald argued its report was privileged under the rule
21 attached to “fair reports of judicial proceedings.” *Id.* Despite acknowledging the
22 “vast importance to the public that the proceedings of courts of justice should be
23 universally known,” the Massachusetts Supreme Court held the privilege does not
24 apply “whatever to the contents of a preliminary written statement of a claim or
25 charge. These do not constitute a proceeding in open court. Knowledge of them
26 throws no light upon the administration of justice. Both form and contents depend
27 wholly on the will of a private individual, who may not be even an officer of the
28 court.” *Id.* at 394. Finding that complaints “are not open to public inspection,” the

1 court found it “enough to mark the plain distinction between what takes place in
2 open court, and that which is done out of court by one party alone, or more exactly,
3 as we have already said, the contents of a paper filed by him in the clerk’s office.”
4 *Id.* at 395, 396; *see also Park v. Detroit Free Press Co.*, 72 Mich. 560 (1888) (“The
5 public have no rights to any information on private suits till they come up for public
6 hearing or action in open court; and, when any publication is made involving such
7 matters, they possess no privilege, and the publication must rest on either non-
8 libelous character or truth to defend it.”).

9 To be sure, both *Cowley* (and *Park*) concerned the privilege to publish
10 libelous statements. Yet, “[i]t would be strange, if not unthinkable, to assess civil
11 liability for bringing to the public’s attention government records which the public
12 is entitled to see.” *In re Reporters Comm.*, 773 F.2d at 1335.

13 Even as federal and state entities increasingly opened their files to public
14 review during the twentieth century, the notion that members of the public have the
15 right to inspect and copy public records on demand has been soundly rejected. For
16 example, in *Adams County Abstract Co. v. Fisk*, 788 P.2d 1336 (Idaho Ct. App.
17 1990), a company that issued policies of title insurance sought permission to bring
18 its copying equipment into the courthouse to make duplicates of original documents
19 filed with the county recorder’s office. Noting that Idaho law protected the public’s
20 right to inspect records maintained at the recorder’s office, the court nevertheless
21 rejected the plaintiff’s claim that it had a right to photocopy original documents
22 before they were microfilmed by the recorder. *Id.* at 1339. The court explained
23 that the recorder maintains the right “to protect the safety of the documents
24 entrusted to his care,” and “to control the orderly function of his office.” *Id.* If
25 public records were altered or damaged before microfilmed, “the public record
26 would be affected,” and “private rights or obligations could be put in doubt.” *Id.*
27 Therefore, the court ruled, “the recorder reasonably may restrict the physical
28 handling of original documents at all times when they are in his custody.” *Id.* at

1 1340; *see also Bell v. Commonwealth Title Ins. Co.*, 189 U.S. 131, 133 (1903)
2 (“custodian can make such reasonable regulations as will secure to him and his
3 assistants full use . . . of the records . . . and also will guard against any tampering
4 with or injury to those records and at the same time give . . . access to the
5 [records]”).

6 Not only does CNS’s asserted First Amendment right to access civil
7 complaints find no support in historical tradition, CNS argues the right attaches the
8 *same* day a complaint is received for filing. But CNS’s asserted right to immediate
9 access is even further afield from historical tradition than the general right to access
10 civil complaints at all. Reviewing some of the historical precedent cited above,
11 then-Judge Antonin Scalia held for the D.C. Circuit that the public does not have a
12 First Amendment right of immediate access to *any* civil document, let alone
13 complaints. *In re Reporters Comm.*, 773 F.2d at 1325.

14 In that case, reporters appealed from two district court orders, delaying the
15 public’s access to civil court records used at trial and in summary judgment
16 proceedings until after entry of judgment. Rejecting the reporters’ claim of
17 immediate access under the First Amendment, the D.C. Circuit found it could not
18 discern a historic practice “preventing federal courts and the states from treating the
19 records of private civil actions as private matters until trial or judgment.” 773 F.2d
20 at 1336. Indeed, the court noted its “inability to find *any* historical authority,
21 holding or dictum,” mandating public access to pre-judgment records in private
22 civil cases. *Id.* at 1335-36 (italics in original); *see also Gannett Co.*, 443 U.S. at
23 396 (Burger, C.J., concurring) (finding that in 18th-century litigation, “no one ever
24 suggested that there was any ‘right’ of the public to be present at . . . pretrial
25 proceedings”). Thus, the court held, the First Amendment right of access is not
26 implicated in civil cases until after a judgment has been entered. *In re Reporters*
27 *Comm.*, 773 F.2d at 1336. Judge Skelly Wright dissented, but only to the extent he
28 interpreted the historic record to support a First Amendment right of access to civil

1 documents “at the time the trial began, not at the time judgment issued.” *Id.* at
2 1351 (Wright, J., dissenting). Under both the majority and dissent’s interpretation,
3 therefore, CNS’s position that the First Amendment enshrines a right of same day
4 access to new unlimited civil complaints falls far short.

5 In the face of this uniform precedent, CNS asserts the existence of a
6 “longstanding tradition” of same-day access to complaints on the basis of a self-
7 generated survey attached as Exhibit 1 to the Amended Complaint. The
8 attachment, dated September 2011, merely surveys the then-*current* practices of a
9 handful of federal and state courts. It may be that the advent of technological
10 advances helps certain courts process, file and provide access to some civil
11 complaints as a matter of practice. But nothing in the survey identifies the kind of
12 clear and longstanding tradition necessary to impose on every court in this Union
13 the constitutional *obligation* to provide same-day access. *See N.J. Media Group,*
14 *Inc. v. Ashcroft*, 308 F.3d 198, 211 (3d Cir. 2002) (finding no First Amendment
15 right of access where “the tradition of open deportation hearings is too recent and
16 inconsistent”).

17 Moreover, CNS’s survey proves the point when it identifies select courts in
18 23 of the 50 states where CNS allegedly is provided same-day access to new civil
19 complaints. In determining whether a historical tradition of access exists, the
20 Court “does not look to the particular practice of any one jurisdiction, but instead
21 ‘to the experience in that *type* or *kind* of hearing throughout the United States....’”
22 *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993). By
23 highlighting only a few courts in fewer than half of the states, CNS implicitly
24 concedes that the vast majority of courts, in more than half the states, do *not*
25 provide same-day access. CNS’s self-serving survey does not create evidence of
26 the kind of “established and widespread tradition” necessary to satisfy the
27 “experience” test of *Globe Newspaper and Press-Enterprise*.

28 Finally, as then-Judge Scalia noted, “it is risky to generalize from one’s

1 familiarity with the practice in a few jurisdictions, or, for that matter, to assume that
2 a practice of granting access where no objection is made establishes the existence of
3 an acknowledged right of access.” *In re Reporters Comm.*, 773 F.2d at 1336.

4 Certain jurisdictions with the technological capacity to provide same-day access
5 recently may have begun to provide such access to CNS without objection. But
6 CNS’s limited and recent experience of same-day access in select courts does not
7 establish the kind of “enduring and vital tradition of public entrée” necessary to
8 support a First Amendment right of access. *Richmond Newspapers, Inc.*, 448 U.S.
9 at 588 (Brennan, J., concurring).

10 **D. The Motion To Dismiss Should Be Granted Because CNS Cannot**
11 **Establish The “Logic” Of Requiring Same-Day Access.**

12 CNS’s claimed right of same-day access to civil complaints also fails the
13 logic prong of the “experience and logic” test, which requires a showing that access
14 plays an essential role in the proper functioning of government. CNS’s obligation
15 to satisfy this “logic” prong is “needed, since otherwise the most trivial and
16 unimportant historical practices ... would be chiseled in constitutional stone.” *In re*
17 *Reporters Comm.*, 773 F.2d at 1332. And, because “[there] are few restrictions on
18 action which could not be clothed by ingenious argument in the garb of decreased
19 data flow,” the First Amendment right of access “must be invoked with
20 discrimination and temperance.” *Richmond Newspapers, Inc.*, 448 U.S. at 588
21 (Brennan, J., concurring).

22 The Supreme Court has found that access to criminal trials plays an essential
23 role in the proper functioning of the judicial process because open trials: (1)
24 enhance the quality and safeguard the integrity of fact-finding; (2) assure an
25 appearance of fairness; (3) function as a check on the judicial and governmental
26 process; and (4) play a cathartic role in permitting the community to observe justice
27 being done. *Press-Enterprise*, 464 U.S. at 508-09; *Globe Newspaper Co.*, 457 U.S.
28 at 606; *Richmond Newspapers, Inc.*, 448 U.S. at 569-72.

1 “Even assuming, as seems unlikely, that these functions are as important in
2 the context of civil suits between private parties as they are in criminal
3 prosecutions,” *In re Reporters Comm.*, 773 F.2d at 1337, they are not greatly
4 enhanced by mandating same-day access to unlimited civil complaints. CNS
5 alleges that “same-day access ensures that interested members of the public learn
6 about new civil litigation while the initiation of that litigation is newsworthy.”
7 (ECF No. 56-1 ¶ 4.) But not every form of access that “plays a positive role in the
8 judicial process is considered a constitutional right.” *United States v. Wecht*, 537
9 F.3d 222, 257 (3d Cir. 2008). The logic test allows courts to “distinguish between
10 what the Constitution permits and what it requires.” *Gannett Co.*, 443 U.S. at 385.
11 Thus, the question is whether obligating all courts to provide same-day access to
12 civil complaints “is significantly important to the public’s ability to oversee the
13 [judicial] process and to ensure the judicial system functions fairly and effectively.”
14 *Wecht*, 537 F.3d at 257. The answer to that question in this case is a resounding no.

15 On the day a complaint is filed, there is no fact-finding to safeguard, no
16 fairness to assure, no judicial process to be checked, and no justice to be observed.
17 The filing of a complaint sets forth the plaintiff’s allegations and relief sought, and
18 informs the court of the grounds for jurisdiction. Other than disclosing those
19 allegations to a court clerk, however, the complaint remains a purely private
20 document. As Justice Holmes explained over 100 years ago, while “it is of the
21 highest moment that those who administer justice should always act under the sense
22 of public responsibility, and that every citizen should be able to satisfy himself with
23 his own eyes as to the mode in which a public duty is performed,” those grounds
24 have “no application whatever to the contents of a preliminary written statement of
25 a claim or charge.” *Cowley*, 137 Mass. at 394. Complaints “do not constitute a
26 proceeding in open court. Knowledge of them throws no light upon the
27 administration of justice. Both form and contents depend wholly on the will of a
28 private individual, who may not be even an officer of the court.” *Id.*; *Inzunza*, 303

1 F. Supp. 2d at 1048-49 (“public scrutiny does not play a positive role as neither the
2 court nor the public is able to analyze the claims, issues, or evidence” until an issue
3 “is raised before the court”).

4 More recently, courts have recognized that the logic of compelling exposure
5 to court records is “largely derived from the role those documents play[] in
6 determining litigants’ substantive rights—conduct at the heart of Article III—and
7 from the need for public monitoring of that conduct.” *United States v. Amodeo*, 71
8 F.3d 1044, 1049 (2d Cir. 1995); *see also Kamakana v. City & County of Honolulu*,
9 447 F.3d 1172, 1178-1180 (9th Cir. 2006) (noting that there are “good reasons to
10 distinguish between dispositive and nondispositive motions,” and that “the public
11 has less of a need for access to court records attached only to non-dispositive
12 motions because those documents are often unrelated, or only tangentially related,
13 to the underlying cause of action”) (internal citations and quotations omitted).

14 Before a court adjudicates any aspect of a complaint’s claims on the merits,
15 however, the complaint plays no more than a “negligible role” in the performance
16 of judicial duties. *IDT Corp.*, 709 F.3d at 1224 (no logic supported right of access
17 to antitrust complaint). The “logic” that compels public access to certain
18 proceedings and documents, therefore, is inapplicable to civil complaints. *See id.*;
19 *see also ACLU v. Holder*, 652 F. Supp. 2d at 661 (logic does not compel disclosure
20 of qui tam complaint, which “does not – by itself – adjudicate rights”); *Mercury*
21 *Interactive Corp.*, 158 Cal.App.4th at 97.

22 CNS’s contention that complaints might be “newsworthy” does not, by itself,
23 justify a gross expansion of the First Amendment right of access. *United States v.*
24 *Edwards*, 823 F.2d 111, 119 (5th Cir. 1987). Indeed, if a document’s potential
25 newsworthiness were the *sine qua non* of the First Amendment test, there would be
26 no limit to the First Amendment’s application to judicial hearings and documents.
27 After all, any document or process has the potential to be newsworthy. In any
28 event, the “right of access is premised on ‘the common understanding that a major

1 purpose of [the First] Amendment was to protect the free discussion of
2 *governmental affairs.*” *Cal. First Amendment Coal.*, 299 F.3d at 874 (quoting
3 *Globe Newspaper Co.*, 457 U.S. at 604) (emphasis added). The Ninth Circuit made
4 the same point in this case, repeatedly emphasizing that the First Amendment right
5 of access is designed to “enabl[e] the free discussion of *governmental* affairs,” and
6 to “bring to bear the beneficial effects of public scrutiny upon the administration of
7 justice.” *Planet*, 2014 WL 1345504, at *22-24 (citations omitted).

8 CNS seeks to publicize the contents of purely private pleadings, before any
9 adjudication thereon. That, however, is not the sort of objective that supports a
10 First Amendment right of access. *See Burton*, 110 Mich. at 355-56 (“[I]t is not the
11 absolute right of persons to make merchandise of the contents and allegations
12 contained in the records of private actions and suits, before trial, for gain.”).

13 **II. THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE**
14 **CNS DOES NOT ALLEGE THAT VSC’S “POLICY” IS AN**
15 **UNREASONABLE TIME LIMITATION.**

16 Even if the Court finds that the First Amendment somehow enshrines a right
17 of access to new unlimited civil complaints, CNS’s amended complaint should be
18 dismissed because it asks this Court to apply the wrong standard to evaluate
19 whether CNS’s purported rights have been abridged.

20 CNS analogizes the delays inherent with processing new complaints with a
21 court order *sealing* filed documents from public view. (ECF No. 58 ¶ 34.) It then
22 suggests that a constitutional violation occurs each time access is delayed, unless
23 VSC can establish a “compelling or overriding interest” that overcomes CNS’s
24 presumptive right of access, and that there are no “less restrictive means” of
25 achieving such an interest. *See Phoenix Newspapers v. United States Dist. Court*,
156 F.3d 940, 946-47 (9th Cir. 1998).

26 But this is the wrong standard. The alleged delay in access to newly
27 unlimited civil complaints “is not the kind of classic prior restraint that requires
28 exacting First Amendment scrutiny.” *Rhinehart*, 467 U.S. at 33. As the Supreme

1 Court explained in *Richmond Newspapers, Inc.*, “[j]ust as a government may
2 impose reasonable time, place, and manner restrictions upon the use of its streets ...
3 so may a trial judge ... impose reasonable limitations on access to a trial.” 448
4 U.S. at 581 n.18. Whereas complete denial of a First Amendment access right must
5 be necessitated by a compelling governmental interest and must be narrowly
6 tailored to serve that interest, “limitations on the right of access that resemble ‘time,
7 place, and manner’ restrictions on protected speech [are] not subjected to such strict
8 scrutiny.” *Globe Newspaper Co.*, 457 U.S. at 607 n.17.

9 Hence, where governmental conduct does not “totally exclude” the press, but
10 merely imposes a restriction or limitation upon access, the time, place and manner
11 test applies. *United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983); *see*
12 *also Planet*, 2014 WL 1345504, at *44 n.9. In this case, CNS does not, and cannot,
13 allege that VSC totally precludes CNS from reviewing newly received unlimited
14 civil complaints. Instead, VSC complains only that access to these complaints is
15 delayed for processing and other reasons. Its Amended Complaint seeks to impose
16 too exacting a standard of review, and should be dismissed on that basis alone.

17 But even if CNS’s Complaint had invoked the correct standard, it still fails to
18 allege facts demonstrating that VSC’s “policy” of providing public access to civil
19 complaints after they have been processed and secured is unreasonable. Under the
20 time, place, manner test, as applied to the restriction of access to judicial hearings
21 or documents, a restriction is constitutional if it is reasonable, if it promotes
22 “significant governmental interests,” and if the restriction does not “unwarrantly
23 abridge ... the opportunities for the communication of thought.” *Hastings*, 695
24 F.2d at 1282 (quotation marks and citations omitted). The validity of a time, place
25 or manner restriction “depends on the relation it bears to the overall problem the
26 government seeks to correct, not on the extent to which it furthers the government’s
27 interests in an individual case.” *One World One Family Now v. City & County of*
28 *Honolulu*, 76 F.3d 1009, 1013 n.6 (9th Cir. 1996) (quotation marks and citation

1 omitted). In light of the salutary purposes served by a rule requiring that
2 complaints be processed before exposed to public access, that test is easily satisfied
3 here.

4 First, VSC’s alleged “policy” of restricting the public’s access to unlimited
5 civil complaints until after they are processed is reasonable in light of its “limited
6 capacity.” *Richmond Newspapers, Inc.*, 448 U.S. at 581 n.18. It is well established
7 that access to judicial records may be limited by reasonable time, place, and manner
8 restrictions when unrestricted access “is likely to impair in a material way the
9 performance of [courthouse] functions.” *Amodeo*, 71 F.3d at 1050.

10 For example, in *Barber v. Conradi*, 51 F. Supp. 2d 1257 (N.D. Ala. 1999),
11 three members of the public sought access to the files of 4,200 divorce cases filed
12 in state court. Because the access requests were disrupting the court’s normal
13 business, the court limited inspection of divorce files to only two hours per week
14 and only when the clerk’s office was not busy. *Id.* at 1260. The plaintiffs filed suit,
15 claiming the two-hours-per-week limit violated their First Amendment right of
16 access. The district court rejected that claim, finding that because “there has not
17 been a complete or total denial of access to the court records” sought by the
18 plaintiffs, the defendants’ conduct had to be analyzed as a time, place, and manner
19 restriction. *Id.* at 1267. Under that framework, the district court had “no trouble
20 holding that the efficient administration of ... the circuit clerk’s office is a
21 substantial government interest” and that the two hour-per-week limit was not
22 “substantially broader than necessary to further” that interest.” *Id.*

23 As in *Barber*, requiring court staff to provide the public with same-day
24 access to all civil complaints, regardless of other court obligations, would unduly
25 interfere with the efficient administration of court functions. *See, e.g.*, ECF No. 25-
26 2; ECF No. 25-3; ECF No. 58 Ex. 3. Forcing courts to provide same-day access to
27 unlimited civil complaints would compel budget-strapped court systems to promote
28 the interests of CNS over the interests of litigants (who deserve the timely

1 processing of their filings), the interests of judicial officers (who may require
2 immediate access to new civil unlimited complaints and TRO applications), and the
3 interests of court staff (who must transact business with *all* members of the public
4 and accept for filing literally hundreds of papers of various stripes per day).

5 Second, the Supreme Court long ago sanctioned the use of reasonable
6 restrictions that secure the custodian of records “and his assistants full use ... of the
7 records ... and also will guard against any tampering with or injury to those records
8 and at the same time give ... access to the [records.]” *Bell*, 189 U.S. at 133.
9 Custodians should be able “to protect the safety of the records against theft,
10 mutilation or accidental damage, to prevent inspection from interfering with the
11 orderly function of his office and employees and generally to avoid chaos in the
12 record archives.” *Bruce*, 65 Cal.2d at 676.

13 Requiring courts to provide the public with same-day access to complaints,
14 before they have been processed, presents a grave risk that pleadings will be
15 damaged, mutilated, or even stolen before effectively recorded in court files. It is
16 not enough that CNS may be willing to provide assurances that *their* employees
17 will make every effort to avoid compromising the integrity of civil complaints. The
18 First Amendment does not permit the prescription of one rule for CNS and one rule
19 for the general public. The First Amendment access rights of the public and press
20 are coextensive; if courts must provide CNS with access to complaints before they
21 are processed, courts must provide any member of the public with the same access.

22 Third, courts have long been permitted to restrict access based on the privacy
23 interests of third parties. *See Amodeo*, 71 F.3d at 1050-51. If courts are required to
24 provide the public with same-day access to civil complaints, they will be unable to
25 protect the privacy of litigants. For example, litigants who file fee waiver requests
26 must include personal financial information – that information is kept with the
27 complaints they accompany until after they are assigned to a judicial officer and
28 processed by the court. *See ECF No. 25-2 ¶ 37*. Providing courts with time to

1 process civil complaints and protect litigants' private financial information is a
2 reasonable restriction on CNS's asserted right of access.

3 On the other side of the equation, VSC's alleged practice of providing access
4 to civil complaints once processed does not unwarrantly abridge the opportunities
5 for communication of thought. While CNS's profit-driven model might benefit
6 from immediate access to unlimited civil complaints, there is no allegation that
7 VSC's failure to provide same-day access in every instance has materially affected
8 the ability of the public to access information about news-worthy cases. *See*
9 *Rhinehart*, 467 U.S. at 37 ("Where, as in this case, a protective order is entered on a
10 showing of good cause, . . . is limited to the context of pretrial civil discovery, and
11 does not restrict the dissemination of the information if gained from other sources,
12 it does not offend the First Amendment").

13 CONCLUSION

14 For the foregoing reasons, Defendant's motion to dismiss should be granted
15 without leave to amend.

16 Dated: June 24, 2014.

JONES DAY

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