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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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. 2:11-cv-08083-R-MAN

CORRECTED 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

Dockets.Justia.com

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Courthouse News Service ("CNS") filed this action against defendant Michael Planet in his official capacity as the Court Executive Officer of the Superior Court of California, County of Ventura ("VSC"). CNS's Amended Complaint asks this Court to enter declaratory and injunctive orders giving CNS the right to review new unlimited civil complaints on the same day they are received by VSC's clerks, even before they are processed, filed, and entered into the court's official records – a so-called right of "same-day access."

CNS's Amended Complaint does not attempt to ground this purported right of same-day access in California law or federal common law. Nor could it: California law recognizes only a right of "reasonable access" to documents after they have been "filed … in the case folder." Cal. Gov't Code §§ 68150 & 68151(a)(1). Similarly, while federal common law creates a rebuttable right to inspect judicial records, it is settled that the right is *not* absolute and that "[e]very court has supervisory power over its own records and files." *Nixon v. Warner Comm'cns, Inc.*, 435 U.S. 589, 597 (1978). Thus, the federal common law does not obligate a court to "open its files to the press and risk the loss or destruction of documents therein." *Valley Broadcasting Co. v. United States Dist. Court*, 798 F.2d 1289, 1295 (9th Cir. 1986).

Instead, CNS seeks to create a new access right of constitutional dimension, by asking this Court to hold that the purported right of same-day access is enshrined in the First Amendment. But this is a tall order. The United States Supreme Court has yet to hold that the First Amendment creates a right of access to documents filed in civil cases. *See Warner Comm'cns*, 435 U.S. at 608-09. And while most federal circuit courts recognize a "qualified right" of access in civil cases, they invoke this right of access with discrimination and temperance. Rather than impose a constitutional standard of access upon all records in a court's file, federal courts recognize that "the First Amendment guarantee of access has been extended only to

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

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

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

1. ***New Civil Complaints Are Not "Judicial Records":*** The First Amendment right of access extends only to certain "judicial records." "[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). Rather, complaints become "judicial records" only when they "come before the court in the course of an adjudicatory proceeding" and are "relevant to that adjudication." *In re Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002).

2. ***There Is No History Or Experience Of Same-Day Access:*** Even if complaints were "judicial records," CNS cannot satisfy the "experience" prong of the First Amendment right of access test 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).

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

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

CNS's Amended Complaint accordingly should be dismissed with prejudice.

BACKGROUND

A. Procedural Background.

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

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

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

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

B. Factual Allegations.

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

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

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

According to the Amended Complaint, CNS receives over 80% of VSC's new unlimited civil complaints within six days of filing, while approximately 18% of the complaints reviewed by CNS's reporter between August 8, 2011, and September 2, 2011, were not available until more than six days after filing. (ECF No. ¶ 29.) CNS alleges these "delays" violate "a longstanding tradition for both 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." (*Id.* ¶ 4.)

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

LEGAL STANDARD

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

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

ARGUMENT

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

A. The First Amendment Right Of Access Extends Only To "Judicial Records" That Satisfy The *Press-Enterprise* "Experience And Logic" Test.

CNS's Amended Complaint is limited to the sole claim that it has a First Amendment right of same-day access to VSC's unlimited civil complaints. Neither the Supreme Court nor the Ninth Circuit has ever ruled on the scope of the 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*, 667 F.3d 1078,

1088 (9th Cir. 2012) (recognizing that "whether the First Amendment right of public access to judicial records applies to civil proceedings" is an issue of first impression in the Ninth Circuit). CNS's asserted right to same-day access to unlimited civil complaints therefore requires this Court to assess a novel issue within the framework established in other "access" contexts.

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

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

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

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

[1] The Ninth Circuit's interpretation is inconsistent with the interpretation of other circuits, which require a showing of *both* tradition and logic. *See, e.g.*, *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*

"experience and logic" test properly applies to the First Amendment right of access to civil judicial records, CNS's Amended Complaint fails to state a claim for the reasons set forth below.

B. The Motion To Dismiss Should Be Granted Because CNS Cannot Establish That New Civil Complaints Are "Judicial Records."

"For a right of access to a document to exist under … the First Amendment …, the document must be a 'judicial record.'" *United States v. Appelbaum*, 707 F.3d 283, 290 (4th Cir. 2013). Hence, to establish a First Amendment right of same-day access to unlimited civil complaints, CNS must first demonstrate that civil complaints are "judicial records" even before they are processed by VSC. Whether a document is a "judicial record" is a question of law for the Court. *Id.*

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

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

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Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 291 (4th Cir. 2013) ("Our post-*Press Enterprise* precedent makes clear that both the experience and logic prongs are required."); *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 (2d Cir. 2009) (same); *In re Reporters 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").

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

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

In California, complaints filed with a superior court do not play any role in the adjudicative process until they are considered by the court and made the subject of some judicial decision. *Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60, 90 (2007) (complaint not subject to First Amendment right of access until "it is filed with the court and is used in some manner by the court 'as a basis for adjudication' of a material controversy"); *see also NBC Subsidiary*, 20 Cal.4th at 1208 n.25; *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal.App.4th 588, 596 (2007). As federal courts have recognized, the plaintiff might voluntarily dismiss, or the parties might dismiss the case pursuant to settlement immediately after a complaint is received for filing. In that event, the complaint is a document, but not a "judicial record" to which the right of access attaches. *Cf. IDT Corp. v. eBay, Inc.*, 709 F.3d 1220, 1222-23 (8th Cir. 2013) ("There may be a historical case to be made that a civil complaint filed with a court, but then soon dismissed pursuant to settlement, is not the sort of judicial record to which there is a presumption of public access."). Thus, CNS has no possible right of access to new complaints unless and until they are the subject of some judicial decision.

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

C. The Motion To Dismiss Should Be Granted Because CNS Cannot Establish The Requisite "Experience" Of Same-Day Access.

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

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

Contrary to CNS's legal allegation, there is nothing approaching "an historic practice of such clarity, generality and duration as to justify the pronouncement of a 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 IDT Corp.*, 709 F.3d at 1224 (finding plaintiff "has not established a strong

1 historical tradition of public access to complaints in civil cases that are settled
2 without adjudication on the merits"); *U.S. Tobacco, Inc. v. Big South Wholesale of*
3 *Va.*, No. 5:13-cv-527-F, 2013 U.S. Dist. LEXIS 165638, at *8 (E.D.N.C. Nov. 21,
4 2013) ("Cases from within the Fourth Circuit indicate that only the common law
5 right of access, as opposed to the First Amendment right of access, attaches to a
6 complaint."); *ACLU v. Holder*, 652 F. Supp. 2d 654, 662 (E.D. Va. 2009) (holding
7 First Amendment does not enshrine right of access to qui tam complaint).
8 There certainly was no such tradition when our organic laws were adopted:
9 "The press had no privilege for the reporting of pretrial judicial proceedings under
10 English common law." *Gannett Co. v. DePasquale*, 443 U.S. 368, 389 n.20 (1979);
11 *see also King v. Fisher*, 2 Camp. 563, 170 Eng. Rep. 1253 (N. P. 1811) (forbidding
12 dissemination of information about a pretrial hearing). To the contrary, early
13 English law held it "to be a contempt of court to publish a pleading of one party in a
14 newspaper … before the matter has come on to be heard." *Cowley*, 137 Mass. at
15 396 (citing cases).
16 Similarly, one can discern no tradition of providing same-day access (or
17 access at all) to civil complaints from early American jurisprudence. A few select
18 examples conclusively establish that American courts have followed a contrary
19 tradition. In *Schmedding v. May*, 85 Mich. 1, a Detroit newspaper sought access to
20 court documents to further its purpose and intention "to publish in brief narrative
21 form, all and the whole of the proceedings and causes commenced and pending in
22 the courts of the said county of Wayne, so far as the same is revealed by the files,
23 records, proceedings, and sittings of said court, in an impartial and just manner,
24 without desire or intention to injure, or in any manner to prejudice, the rights of
25 litigants." *Id.* at 2. Acknowledging that "no one would probably question the right
26 of any person to inspect" the record of a cause after a public trial or hearing, the
27 Michigan Supreme Court held that right "does not extend to nor include the papers
28 filed in the case necessary to frame the issue to be tried." *Id.* at 5. Rejecting the

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

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

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

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

Even as federal and state entities increasingly opened their files to public review during the twentieth century, the notion that members of the public have the right to inspect and copy public records on demand has been soundly rejected. For example, in *Adams County Abstract Co. v. Fisk*, 788 P.2d 1336 (Idaho Ct. App. 1990), a title insurance company sought permission to bring its copying equipment into the courthouse to make duplicates of original documents filed with the county recorder's office. Noting that Idaho law protected the public's right to inspect records maintained at the recorder's office, the court nevertheless rejected the plaintiff's claim that it had a right to photocopy original documents before they were microfilmed by the recorder. *Id.* at 1339. The court explained that the recorder maintains the right "to protect the safety of the documents entrusted to his care," and "to control the orderly function of his office." *Id.* If public records were altered or damaged before microfilmed, "the public record would be affected," and "private rights or obligations could be put in doubt." *Id.* Therefore, the court ruled, "the recorder reasonably may restrict the physical handling of original documents at all times when they are in his custody." *Id.* at 1340; *see also Bell v. Commonwealth Title Ins. Co.*, 189 U.S. 131, 133 (1903) ("custodian can make such reasonable

regulations as will secure to him and his assistants full use . . . of the records . . . and also will guard against any tampering with or injury to those records and at the same time give . . . access to the [records]").

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

In that case, reporters appealed from two district court orders, delaying the public's access to civil court records used at trial and in summary judgment proceedings until after entry of judgment. Rejecting the reporters' claim of immediate access under the First Amendment, the D.C. Circuit found it could not discern a historic practice "preventing federal courts and the states from treating the records of private civil actions as private matters until trial or judgment." 773 F.2d at 1336. Indeed, the court noted its "inability to find *any* historical authority, holding or dictum" mandating public access to pre-judgment records in private civil cases. *Id.* at 1335-36 (italics in original); *see also Gannett Co.*, 443 U.S. at 396 (Burger, C.J., concurring) (finding that in 18th-century litigation, "no one ever suggested that there was any 'right' of the public to be present at … pretrial proceedings"). Thus, the court held, the First Amendment right of access is not implicated in civil cases until after a judgment has been entered. *In re Reporters Comm.*, 773 F.2d at 1336. Judge Skelly Wright dissented, but only to the extent he interpreted the historic record to support a First Amendment right of access to civil documents "at the time the trial began, not at the time judgment issued." *Id.* at 1351 (Wright, J., dissenting). Under both the majority and dissent's interpretation,

therefore, CNS's position that the First Amendment enshrines a right of same-day access to new unlimited civil complaints falls far short.

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

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

Finally, as then-Judge Scalia noted, "it is risky to generalize from one's familiarity with the practice in a few jurisdictions, or, for that matter, to assume that a practice of granting access where no objection is made establishes the existence of

an acknowledged right of access." *In re Reporters Comm*, 773 F.2d at 1336. Certain jurisdictions with the technological capacity to provide same-day access recently may have begun to provide such access to CNS without objection. But CNS's limited and recent experience of same-day access in select courts does not establish the kind of "enduring and vital tradition of public entrée" necessary to support a First Amendment right of access. *Richmond Newspapers, Inc.*, 448 U.S. at 588 (Brennan, J., concurring).

D. The Motion To Dismiss Should Be Granted Because CNS Cannot Establish The "Logic" Of Requiring Same-Day Access.

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

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

"Even assuming, as seems unlikely, that these functions are as important in the context of civil suits between private parties as they are in criminal

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

On the day a complaint is filed, there is no fact-finding to safeguard, no fairness to assure, no judicial process to be checked, and no justice to be observed. The filing of a complaint sets forth the plaintiff's allegations and relief sought, and informs the court of the grounds for jurisdiction. Other than disclosing those allegations to a court clerk, however, the complaint remains a purely private document. As Justice Holmes explained over 100 years ago, while "it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed," those grounds have "no application whatever to the contents of a preliminary written statement of a claim or charge." *Cowley*, 137 Mass. at 394. Complaints "do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court." *Id.*; *Inzunza*, 303 F. Supp. 2d at 1048-49 ("public scrutiny does not play a positive role as neither the

court nor the public is able to analyze the claims, issues, or evidence" until an issue "is raised before the court").

More recently, courts have recognized that the logic of compelling exposure to court records is "largely derived from the role those documents play[] in determining litigants' substantive rights—conduct at the heart of Article III—and from the need for public monitoring of that conduct." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995); *see also Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-1180 (9th Cir. 2006) (noting that there are "good reasons to distinguish between dispositive and nondispositive motions," and that "the public has less of a need for access to court records attached only to non-dispositive motions because those documents are often unrelated, or only tangentially related, to the underlying cause of action") (internal citations and quotations omitted). Before a court adjudicates any aspect of a complaint's claims on the merits, however, the complaint plays no more than a "negligible role" in the performance of judicial duties. *IDT Corp.*, 709 F.3d at 1224 (no logic supported right of access to antitrust complaint). The "logic" that compels public access to certain proceedings and documents, therefore, is inapplicable to civil complaints. *See id.*; *see also ACLU v. Holder*, 652 F. Supp. 2d at 661 (logic does not compel disclosure of qui tam complaint, which "does not – by itself – adjudicate rights"); *Mercury Interactive Corp.*, 158 Cal.App.4th at 97.

CNS's contention that complaints might be "newsworthy" does not, by itself, justify a gross expansion of the First Amendment right of access. *United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987). Indeed, if a document's potential newsworthiness were the *sine qua non* of the First Amendment test, there would be no limit to the First Amendment's application to judicial hearings and documents. After all, any document or process has the potential to be newsworthy. In any event, the "right of access is premised on 'the common understanding that a major purpose of [the First] Amendment was to protect the free discussion of

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

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

II. THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE CNS DOES NOT ALLEGE THAT VSC'S "POLICY" IS AN UNREASONABLE TIME LIMITATION.

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

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

But this is the wrong standard. The alleged delay in access to new unlimited civil complaints "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Rhinehart*, 467 U.S. at 33. As the Supreme Court explained in *Richmond Newspapers*, *Inc.,* "[j]ust as a government may impose reasonable

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

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

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

complaints be processed before exposed to public access, that test is easily satisfied here.

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

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

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

immediate access to new civil unlimited complaints and TRO applications), and the interests of court staff (who must transact business with *all* members of the public and accept for filing literally hundreds of papers of various stripes per day).

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

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

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

reasonable restriction on CNS's asserted right of access.

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

CONCLUSION

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

Dated: June 30, 2014.

JONES DAY

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