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MICHAEL PLANET

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. CV11-08083 R (MANx)

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

Date: August 18, 2014
Time: 10:00 a.m.
Judge: Hon. Manuel L. Real

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

Other Authorities

INTRODUCTION

Plaintiff Courthouse News Service's ("CNS") Amended Complaint turns on one limited, discrete issue:

> Does the First Amendment create a constitutional right of "same-day access" to review new unlimited civil complaints on the same day they are received by Ventura Superior Court's clerks, even before they are processed, filed, and entered into the court's official records?

We explained in our opening memorandum that the answer to this question is "**No**" under the experience and logic test set forth in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). E.g., IDT Corp v. eBay Inc., 709 F.3d 1220, 1224 (8th Cir. 2013); In re Reporters Comm. for Freedom of Press, 773 F.2d 1325, 1336 (D.C. Cir. 1985); U.S. Tobacco, Inc. v. Big South Wholesale of Va., No. 5:13-cv-527-F, 2013 U.S. Dist. LEXIS 165638, at *8 (E.D.N.C. Nov. 21, 2013); ACLU v. Holder, 652 F. Supp. 2d 654, 662 (E.D. Va. 2009). We also explained that CNS's complaint used the wrong standard to measure compliance with the constitutional right of access because "public access to judicial records is subject to reasonable administrative regulations as to the manner of inspection." 84 A.L.R.3d 598 § 12 (2014); see also Bruce v. Gregory, 65 Cal. 2d 666, 676 (1967).

CNS's opposition begs to differ. We will discuss CNS's arguments in detail below, but we emphasize the following overarching points here.

1. The Ninth Circuit's decision in this case did not rule on the question presented in our motion to dismiss. To the contrary, the panel expressed "no opinion on the ultimate merits of CNS's claims, which the district court has yet to address in the first instance" and remanded this matter so that it "may be adjudicated on the merits in federal court." Courthouse News v. Planet, 750 F.3d 776, 793 (9th Cir. 2014). And contrary to CNS's suggestions, a "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'" Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 n.3 (1981) (citation omitted); see also Bell v. Hood, 327 U.S. 678, 682 (1946).

2. None of the state access statutes and rules cited in CNS's Request for Judicial Notice mandate or even mention a right of same-day access to new civil complaints. To the contrary, state laws mandate only that access requests be responded to within a reasonable period of time. E.g., S.D. Codified Laws § 15-15A-14(2) (South Dakota courts will respond "within a reasonable time regarding the availability of the information and provide the information within a reasonable time"). Indeed, many of these authorities recognize that access requests should not interfere with a court's duty to maintain and secure its official records. E.g., Ariz. S. Ct. R. 123(f)(4)(A)(i) & (ii); Md. R. Proc. 16-1002(b)(i) ("a clerk is not required to permit inspection . . . until the document has been docketed or recorded and indexed" (emphasis added)). Hence, it is no understatement to say that the First Amendment access right CNS seeks to establish in this case would invalidate the court document access laws in virtually all of the 50 states.

3. The cases cited by CNS are inapposite for a host of reasons. Among other things, most of them deal with court orders sealing filed documents from public inspection, as opposed to the steps courts can and should take to secure official records before they are released for public inspection. See U.S. v. Edwards, 823 F.2d 111, 118 (5th Cir. 1987) ("The gravamen of the constitutional infirmities found in Associated Press are far afield from our inquiry, which addresses the timing of the (already-presumed) disclosure of the record").

Second and more critically, CNS's cases do not evaluate whether the Press-Enterprise (or any other) test recognizes a right of same-day access to unfiled documents. See Times Mirror Co. v. U.S., 873 F.2d 1210, 1213 (9th Cir. 1989) ("the public has no right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public," using the Press-Enterprise tests).

Third, CNS's authorities beg the question to the extent they argue that, "once [the First Amendment presumption is] found to be appropriate, access should be

immediate and contemporaneous." Grove Fresh Distribs. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994). It bears repeating that the question in this case is whether the First Amendment presumption applies to civil complaints before they are processed, secured and filed for public viewing. The fact that an exacting First Amendment standard might eventually apply to complaints during the course of civil proceedings does not require a holding that the First Amendment applies even before these documents make it into a court's files. Cf. Times Mirror Co., 873 F.2d at 1217-18 (although a judicial document "may, in due course, be disclosed to a defendant so she can challenge the constitutionality of the search at a suppression hearing to which the public has a First Amendment right of access, it does not follow that the public should necessarily have access to the information before that time") (emphasis added).

For these reasons, and the reasons advanced below and in our opening memorandum, VSC's motion to dismiss should be granted without leave to amend.

ARGUMENT

I. THE NINTH CIRCUIT DID NOT ADJUDICATE THE MERITS OF CNS'S FIRST AMENDMENT CLAIM.

CNS first urges this Court not to consider VSC's motion to dismiss under the law of the case and rule of mandate doctrines, claiming that the Ninth Circuit already found that CNS had stated a claim under the First Amendment when it opined that CNS "alleged a cognizable injury."

CNS's argument badly misstates the scope of the Ninth Circuit's holding in this case. The Ninth Circuit addressed only whether the Pullman and O'Shea abstention doctrines apply in First Amendment cases. During the course of its analysis, the panel cited to cases assessing whether a plaintiff has "standing to bring a facial First Amendment challenge against a statute that has not been directly enforced against him." Planet, 750 F.3d at 788 (citation omitted). The Ninth Circuit found that standing was no issue in this case because "CNS itself has

alleged a cognizable injury." Id.; see also R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 302 (D.R.I. 1999) (for purposes of standing, "actual injury exists where a regulation would have a chilling effect on the exercise of a constitutional right" (citation omitted)).

The panel's opinion suggesting that CNS has standing is not tantamount to a holding that CNS stated a claim under the First Amendment. To the contrary, the Ninth Circuit held only that that federal abstention doctrines do not apply. Planet, 750 F.3d at 779. The panel repeatedly explained that it took no position on the merits of CNS's First Amendment claim, and remanded this matter so that it could be considered on the merits by the district court in the first instance. Id. at 793.

CNS thus cannot avail itself of the law of the case doctrine. The doctrine "does not apply to issues or claims that were not actually decided." Mortimer v. Baca, 594 F.3d 714, 720 (9th Cir. 2010) (citation omitted); see also Hall v. City of L.A., 697 F.3d 1059, 1067 (9th Cir. 2012) (same); U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186 (9th Cir. 2001) (same); Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995) (same).

The rule of mandate doctrine is inapposite for similar reasons. It is settled that "the rule of mandate allows a lower court to decide anything not foreclosed by the mandate." Hall (citation omitted), 697 F.3d at 1067; see also U.S. v. Kellington, 217 F.3d 1084, 1094 (9th Cir. 2000) ("although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it leaves to the district court any issue not expressly or impliedly disposed of on appeal") (internal quotation marks and citation omitted). Mandate "require[s] respect for what the higher court decided, not for what it did not decide." Hall, 697 F.3d at 1067 (citation omitted). Nothing in the Ninth Circuit's mandate limits consideration of VSC's motion to dismiss.

The Ninth Circuit knows full well how to expressly decide issues. It didn't do that with respect to the merits of CNS's First Amendment claim. It only held

that federal courts cannot abstain in First Amendment cases like this, and remanded the case back to this Court for a decision "on the merits." VSC's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) now addresses the merits. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 951 (9th Cir. 1999).

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

A. New Civil Unlimited Complaints Do Not Qualify As "Judicial Records."

CNS argues in Part II of its Opposition that civil complaints become "judicial records" when they are filed. (ECF No. 66 at 17-21.) This argument should be rejected for several independent reasons.

1. The First Amendment Right Of Access Does Not Apply To New Complaints Before They Have Been "Filed."

First, CNS's argument erroneously equates "receipt" of a new complaint with its eventual "filing." CNS filed this action because VSC declined to "make any new filings available until the requisite processing is completed." (ECF No. 58, ¶ 27.) In CNS's world, the act of processing and securing a file for public viewing "effectively seal[s] a court record without providing any of the procedural or substantive protections required by the First Amendment." (Id. at 12 ¶ 53.)

But a document cannot be a "judicial record" under any definition unless it has been "filed" in a court's official records. Goesel v. Boley Int'l (H.K.) Ltd., 738 F.3d 831, 833 (7th Cir. 2013) ("Settlements are ubiquitous in the legal system, but most settlement agreements never show up in a judicial record and so are not subject to the right of public access"); SEC v. Am. Int'l Group, 712 F.3d 1, 4 (D.C. Cir. 2013) ("if a document was never part of [a court's] record, it cannot have played any role in the adjudicatory process: though filing a document with the court is not sufficient to render the document a judicial record, it is very much a prerequisite") (emphasis added); Fed. Trade Comm'n v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 409 (1st Cir. 1987) ("Documents which are submitted to, and

accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 782 (3d Cir. 1994) (whether a document is a judicial record turns "on the technical question of whether a document is physically on file with the court").

In California, new complaints do not become "filed" upon "receipt." Instead, new complaints are "filed" only after they have been processed, reviewed and entered into the court's records. Cal. R. Ct. 2.250(B)(7) (noting that electronic filing "does not include the processing and review of the document, and its entry into the court records, which are necessary for a document to be officially filed").[1] VSC made this precise point in its Notice of Public Access to Scanned Civil Complaints, which is Exhibit 40 to CNS's Request to Take Judicial Notice, ECF 67-4 at 86[2]:

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[1] Take, for example, a complaint deposited in VSC's drop box at 4:30 p.m. on a Friday afternoon. VSC's clerk will accept the complaint and note that it was received on Friday, but the complaint will not actually be processed until the following Monday – three days later. Under California Rule of Court 1.20(a), the complaint can be backdated as "filed" on Friday. See Cal. R. Ct. 1.20(a) ("a document is deemed filed on the date it is received by the court clerk"). But the complaint will not actually be placed in a file until after processing.

This common sense analysis does not turn, as CNS suggests, on the distinction between a "lodged" document and a "filed" document. (See ECF No. 66 at 16 n.7 (citing Rocky Mountain Bank v. Google, 428 Fed. Appx. 690, 692 (9th Cir. 2011)).) A "lodged" document, like a "filed" document, is made part of the court file. But an unprocessed civil complaint does not even have a court file in which to be placed until it is first processed.

[2] CNS attempts to make much of VSC recent announcement that it could provide electronic scans of some new unlimited complaints "prior to processing and filing" when they are received by the court prior to 3:00 p.m. However, the point of VSC's motion is not whether a court can find some way to grant access to unfiled and unprocessed documents in order to avoid being sued. Instead, the point of VSC's motion is that exacting First Amendment access standards should not extend to documents that haven't even made it to the official court record. As previously explained, while the common law access presumption extends to all "judicial records and documents," Nixon *v. Warner Comm'cns*, 435

> Scanned complaints do not constitute official records of the Court. The Court may ultimately reject for filing any complaint that does not meet the applicable standards of the *California Rules of Court*. Complaints become official records of the Court only after they are assigned a case number, stamped "filed" and placed in a file folder.

It is conceivable that state law could mandate public access to documents before they constitute official public records, although it doesn't do so in California. But CNS makes no pretense of alleging a right of pre-filing access under state law. Instead, CNS limits its Amended Complaint to a claim under the First Amendment. Courts extend the more demanding requirements of this constitutional right of access with "discrimination and temperance" Richmond Newspapers, Inc. v. Va., 448 U.S. 555, 588 (1980), and only to a smaller and more "particular" set of judicial records and documents. Stone, 855 F.2d at 180. A complaint that has only been received, but has not been—and may never be—accepted by a court for filing in its official records, isn't one of them. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 1178, 1208 n. 25 (1999) (recognizing a "First Amendment right of access to civil litigation documents filed in court as a basis for adjudication" (emphasis added)).

2. Even If They Were "Filed," New Complaints Do Not Qualify As "Judicial Records."

Federal appellate courts apply "varying standards" to determine whether a document may be classified as a "judicial record" or "judicial document" for public access purposes. U.S. v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995). As noted above, some circuits focus only on whether a complaint has been "filed," e.g., Pansy, 23 F.3d at 782, while others limit the First Amendment access right to filed documents that play "a role in the adjudication process," Amodeo, 44 F.3d at 145

U.S. 589, 597 (1978), the First Amendment right access is "extended only to particular judicial records and documents." Stone v. Univ. of Maryland Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988).

(citing Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986)); see also U.S. v. El-Sayegh, 131 F.3d 158, 161-62 (D.C. Cir. 1997) (the definition of "judicial records" "assumes a judicial decision. If none occurs, documents are just documents; with nothing to record, there are no judicial records").

The Ninth Circuit most closely aligned itself with the Third/D.C. Circuit approach in U.S. v. Bus. of Custer Battlefield Museum and Store, 658 F.3d 1188 (9th Cir. 2011). There, the court held that search warrant applications and supporting affidavits are "judicial records" subject to the right of access because "[a] judicial officer must review the affidavit to determine whether the warrant should issue." Id. at 1193 (citation omitted). The court explained that "documents upon which a [judicial officer] bases a decision … are clearly judicial in character." Id. (quotation marks and citation omitted). Under that standard, civil complaints do not magically become "judicial records" at the moment they are received. See El-Sayegh, 131 F.3d at 161-62 (plea agreement not a "judicial record" because it did not eventuate "in any official action or decision being taken").

Contrary to CNS's argument, none of the cases cited in its opposition recognizes complaints as "judicial records" at the moment they are received. CNS relies most heavily on Vassiliades v. Israely, 714 F. Supp. 604, 605-06 (D. Conn. 1989), where the district court denied the plaintiff's request to file his complaint under seal based on the salutary proposition that "[b]oth the common law and the first amendment protect the public's right of access to court documents." (See ECF No. 66 at 17.) A sealing order, however, precludes "inspection by the public" well after the day of its filing. Cal. R. Ct. 2.550(b). The court in Vassiliades, therefore, was not confronted with the issue presented here, but with the far different question whether a complaint may be sealed in perpetuity, even after it becomes the basis for some adjudication.[3]

[3] CNS cites (ECF No. 66 at 19, 19 n.10) a slew of other district court opinions, which similarly do not address whether a complaint is a "judicial record"

The closest CNS gets is IDT Corp. v. eBay Inc., 709 F.3d 1220 (8th Cir. 2013), where the parties did not dispute that the complaint in the case—already processed and filed by the court clerk—was a "judicial record" to which a right of access attaches. Id. at 1222. The Eighth Circuit acknowledged a modern trend "to treat pleadings" generally as presumptively public, even when the case is pending before judgment. Id. at 1223. Yet that court did not remotely suggest that a modern trend of treating pleadings as public before judgment equates to a constitutional right of access to civil complaints before they are even processed. Indeed, the court noted "the merit" of an interpretation of "judicial record" that does not include civil complaints. Id. Ultimately, however, because the parties "waived" the issue, the court merely assumed the right of access attached to the plaintiff's antitrust complaint. Id. The Eighth Circuit's acceptance of the parties' concession in IDT is shaky ground upon which to predicate an unprecedented extension of the First Amendment. See Webster v. Fall, 266 U.S. 507, 511 (1925) (unstated assumptions on non-litigated issues are neither precedential nor solid ground for basing an unprecedented extension of constitutional law); Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 938 (9th Cir. 2007) (same).

Having failed to identify any case that expressly holds civil complaints are "judicial records" on the day they are received, CNS resorts to the argument that the

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on the day it is received and before it is subject to some judicial act. See In re Nvidia Corp. Derivative Litig., 2008 U.S. Dist. LEXIS 120077, at *11 (N.D. Cal. Apr. 22, 2008) (identifying standard for adjudicating motion to seal complaint); *Standard Chartered Bank Int'l v. Calvo*, 757 F. Supp. 2d 258, 259-60 (S.D.N.Y. 2010) (characterizing complaint as an "important paper[]," but failing to analyze whether a "judicial record" at time of filing); *In re Eastman Kodak Company's* Application for Order Sealing Files, 2010 WL 2490982, at *1 (S.D.N.Y. June 15, 2010) (denying motion to seal complaint because it "forms the basis of a civil action and invokes the jurisdiction of the Court," but failing to assess whether a "judicial record" at time of filing); U.S. ex rel. Dahlman v. Emergency Physicians, 2004 U.S. Dist. LEXIS 31304, at *3 (D. Minn. Jan. 5, 2004) (holding that complaint should be unsealed after dismissal).

definition of "judicial record" should not turn on whether the complaint has been considered by a court. For this proposition, CNS cites Lugosch v. Pyramid Co., 435 F.3d 110, 121 (2d Cir. 2006), and In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 42-43 (C.D. Cal. 1984), both of which held that pleadings submitted in support of a motion for summary judgment are "judicial documents" – even if the summary judgment motion has "not yet been decided."

CNS's reliance on Lugosch and Coordinated Pretrial Proceedings is misplaced. Once again, the cases cited by CNS concerned the right to access pleadings after they have already been processed by the court. They also concerned the right to access summary judgment motions, pleadings to which the right of access indisputably attaches because summary judgment "adjudicates substantive rights and serves as a substitute for trial." Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252-53 (4th Cir. 1988). But civil complaints and summary judgment pleadings are not identical for First Amendment purposes. Summary judgment pleadings are filed to obtain an adjudication, and "an adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." Lugosch, 435 F.3d at 121 (quoting Joy v. North, 692 F.3d 880, 893 (2d Cir. 1982)). Conversely, a complaint received by a superior court may not ever play any role in the adjudicative process; and certainly will not until it is filed by the clerk, considered by the court and made the subject of some motion, such as a demurrer. On the day it is received, a complaint, unlike summary judgment papers, is not "submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings." Lugosch, 435 F.3d at 122 (quoting Standard Fin. Mgmt, 830 F.2d at 409) (emphasis added).

B. CNS Fails To State A Claim Under The "Alternative" First Amendment Test Because There Are No Corollary Proceedings Before The Complaint Has Been Processed.

Even if new unlimited civil complaints qualify as judicial records, CNS's claim would still fail as a matter of law because the First Amendment does not enshrine a right of same day access. In its motion to dismiss, VSC showed that CNS's claim fails under the Supreme Court's "experience and logic" test. CNS now argues that its claim should be assessed under an alternative standard (ECF No. 66 at 21): one that asks whether the document sought is "derived from or a necessary corollary of the capacity to attend the relevant proceedings." Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93 (2d Cir. 2004).

Other than the Ninth Circuit's aside in Associated Press v. U.S. Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983), that "[t]here is no reason to distinguish between pretrial proceedings and the documents filed in regard to them," the court has never indicated that it would utilize the alternative test identified in Hartford Courant. But even if this alternative test were employed, CNS's claim plainly fails, for there is no corollary public proceeding on the day a civil complaint is received.

The reasoning behind this alternative access test is that the "right of access extends to materials submitted in conjunction with judicial proceedings that themselves would trigger the right to access." Co. Doe v. Pub. Citizen, 749 F.3d 246, 267 (4th Cir. 2014). But if the documents sought are not filed in conjunction with a public proceeding, the First Amendment right of access does not attach. For example, there is no constitutional right of access to wiretap applications because the public and press are not permitted to attend the proceedings where wiretap applications are presented to a district judge. In re N.Y. Times Co., 577 F.3d 401, 410 (2d Cir. 2009).

To be sure, once a civil complaint is made the subject of a public hearing—such as a demurrer or motion to dismiss—the alternative rule would counsel in favor of requiring public access to the corollary documents, including the

complaint. But CNS's limited claim is that it has a constitutional right to same day access to new civil complaints, before they are processed, secured, and entered into the record. That theory finds no traction under the "alternative" First Amendment test, or under the traditional experience and logic test, as will now be shown.

C. CNS Fails To State A Claim Under The Experience and Logic Test.

1. There Is No Historical Tradition Of Same-Day Access To Civil Complaints.

Under the first prong of the Supreme Court's experience and logic test, CNS bears the burden of identifying an "historic tradition of public access." Times Mirror, 873 F.2d at 1213. It is not enough to establish an historic tradition of public access to complaints at some point in legal proceedings; CNS must establish a historic tradition of same-day access to new civil complaints, before they are processed, secured, and entered into the record. See U.S. v. Inzunza, 303 F. Supp. 2d 1041, 1046 (S.D. Cal. 2004) ("an analysis of the historical tradition of openness depends on the particular stage of the proceedings") (citing Times Mirror, 873 F.2d at 1211). In other words, "the issue is not whether the public will gain access, but when." Id. at 1048.

CNS cannot dispute that, historically, both English and American courts have rejected a public right to access complaints before they come before the court at a public trial or hearing. See Gannett Co. DePasquale, 443 U.S. 368, 389 n.20 (1979); Schmedding v. May, 85 Mich. 1, 5-6 (1891); Cowley v. Pulsifer, 137 Mass. 392, 395-96 (1884). Nor can CNS seriously dispute that at least two federal circuits have found, in the "modern age," no historical tradition of public access to a civil complaint before it comes before the court for hearing or adjudication. See IDT Corp., 709 F.3d at 1224 (finding no "strong historical tradition of public access to complaints in civil cases that are settled without adjudication on the merits"); In re Reporters Comm., 773 F.2d at 1336 ("we cannot discern an historic practice of such

clarity, generality and duration as to justify the pronouncement of a constitutional rule preventing federal courts and the states from treating the records of private civil actions as private matters until trial or judgment").

CNS therefore attempts to downplay the significance of that historical precedent by relying on Seattle Times Co. v. U.S. Dist. Court, 845 F.2d 1513, 1516 (9th Cir. 1988), where the Ninth Circuit held that "the historical tradition" surrounding access to bail proceedings was "much less significant" because the history and prevalence of bail procedures had changed dramatically over time. (ECF No. 66 at 24). Seattle Times is inapposite, however, because CNS has not identified anything about the filing of civil complaints that has changed significantly over the last 200 years, so as to justify ignoring the extant historical precedent undermining its claim to immediate access.

Because the historical tradition is against them, CNS also retreats to the position that a historic tradition of same-day access to civil complaints can be discerned from current state statutes. (ECF No. 66 at 24.) For this proposition, CNS cites, Cal-Almond, Inc. v. U.S. Dep't of Agriculture, 960 F.2d 105, 109 (9th Cir. 1992), where the Ninth Circuit found a tradition of public access to agricultural department voter lists based on a review of several state statutes expressly providing for such access, and "none that bar public access." Cal-Almond stands for the limited proposition that "a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted." Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002). In fact, however, a careful review of the state statutes and rules cited by CNS (as well as the statutes and rules that CNS selectively omits) demonstrates that the overwhelming and uncontradicted modern rule is against same-day access.

As explained more fully in VSC's opposition to CNS's Request for Judicial Notice, CNS has misleadingly selected excerpts from various state statutes and

rules while omitting the relevant language that demonstrates public access laws do not support a right of same day-access to civil complaints. To take one example, CNS cites certain provisions of Arizona Supreme Court Rule 123 in its RJN, but neglects to reference subsection (f)(4), which provides that requests for records may be delayed or denied if they "create an undue burden on court operations" or "substantially interfere with the . . . functions of the court." CNS also fails to acknowledge that Rule 123(f)(2) provides that, upon receiving a request to inspect or obtain copies of records, the custodian shall provide the records "in a **reasonable** time"—not on the same day the request is made. Similar examples abound.

Ultimately, therefore, CNS is forced to retreat even further, to the position that a modern right of same-day access can be cobbled together from an assortment of off-topic and unpersuasive case law. Thus, CNS cites (ECF No. 66 at 28) to a Texas district court decision where it obtained the kind of preliminary injunctive relief it seeks here. Courthouse News Serv. v. Jackson, 2009 WL 2163609 (S.D. Tex. July 20, 2009). But the defendant in that case agreed with CNS's claim "that there is a [First Amendment] right of access to newly-filed petitions in civil cases." Id. at *4. For that reason, another district court in Texas already has held that "Courthouse News does not establish that access to court records and documents is guaranteed under the First Amendment." Sullo & Bobbitt, PLLC v. Abbott, 2012 U.S. Dist. LEXIS 95223, at *47 (N.D. Tex. July 10, 2012).

CNS also relies on generic language from a variety of sealing cases that do not speak to the issue here. (ECF No. 66 at 23). For example, CNS cites U.S. ex rel. Dahlman v. Emergency Physicians, 2004 U.S. Dist. LEXIS 31304, at *3 (D. Minn. Jan. 5, 2004), which ordered a dismissed complaint unsealed based on a public policy, grounded in the federal common law, of open access to complaints on file. And in In re Globe Newspaper Co., 958 N.E.2d 822, 828-29 (Mass. 2011), the court held that documents, such as criminal inquests, are "public records" under Massachusetts common law when filed in court.

Once again, CNS is conflating two issues: limitations on sealing documents already filed under the common law, and same-day public access to civil complaints before they have been processed and filed, under the First Amendment. In the latter case, an unbroken line of precedent confirms that courts are entitled to adopt reasonable administrative regulations as to the manner and time of public inspection of court documents. See U.S. v. Gurney, 558 F.2d 1202, 1210 & n.13 (5th Cir. 1977) (permissible for judge to condition inspection of trial exhibits upon clerk's availability); U.S. v. Peters, 754 F.2d 753, 763-64 (7th Cir. 1985) (judge may control mid-trial access to exhibits to extent needed for orderly trial); U.S. v. Edwards, 672 F.2d 1289, 1296 (7th Cir. 1982) (judge may consider administrative burden and potential trial disruption in evaluating mid-trial request for immediate copies of videotapes introduced as evidence); U.S. v. Webbe, 791 F.2d 103, 107 (8th Cir. 1986) (same); U.S. v. Rosenthal, 763 F.2d 1291, 1294-1295 (11th Cir. 1985) (same); LeClair v. New England Tel. & Tel. Co., 112 N.H. 187, 189 (1972) (despite right of access to transcript, "it is proper for the trial court in the interest of efficient use of court stenographers' time to limit transcripts unconnected with the trial and to establish priorities among transcripts ordered"); State ex rel. Williston Herald, Inc. v. O'Connell, 151 N.W.2d 758, 763 (N.D. 1967) ("any right of inspection of the respondent's criminal records is subject to reasonable rules and regulations as to who may inspect the records and where and how such inspection may be made"); Stevenson v. News Syndicate Co., 276 A.D. 614, 618 (N.Y. App. Div. 1950) ("judicial records of the state should always be accessible to the people for all proper purposes," but "under reasonable restrictions as to the time and mode of examining the same"); Direct Mail Serv. v. Registrar of Motor Vehicles, 296 Mass. 353, 357 (1937) ("No one person can take possession of the [office] or monopolize the record books so as to interfere unduly with the work of the office or with the exercise of equal rights by others, and the applicant must submit to such reasonable supervision on the part of the custodian as will guard the safety of the

records and secure equal opportunity for all."); Bend Pub. Co. v. Haner, 118 Or. 105, 110 (1926) (reporter's right to access judicial record subject to such rules and regulations as the clerk might deem necessary to preserve those records and prevent interference with the clerk's regular duties); Upton v. Catlin, 17 Colo. 546, 548 (1892) (clerk "had the right to make reasonable regulations concerning the use of the records by the public," including time when files may be copied).

Finally, CNS points to a series of cases that, contrary to Cowley v. Pulsifer, have extended the fair report privilege in libel actions to claims based on the publication of allegations in a complaint. (ECF No. 66 at 23 n.13 & 25 (citing Campbell v. New York Evening Post, Inc., 157 N.E. 153, 155 (N.Y. 1927); Lybrand v. The State Co., 184 S.E. 580, 583 (S.C. 1936); Bull v. LogEtronics, Inc., 323 F. Supp. 115, 135 (E.D. Va. 1971); Salzano v. N. Jersey Media Grp., Inc., 993 A.2d 778, 790 (N.J. 2010)). According to CNS, this case law makes clear that since at least 1927, the weight of modern authority supports CNS's claim of an immediate right of public access to civil complaints.

But even accepting that certain courts have begun to extend libel protections to media that report on allegations in a complaint, that trend does not establish "an historic practice of such clarity, generality and duration as to justify the pronouncement of a constitutional rule preventing federal courts and the states from treating the records of private civil actions as private matters" before civil complaints are even processed. In re Reporters Comm., 773 F.2d at 1336 (emphasis in original).

Indeed, as late as 1977, the Restatement of Torts recognized the prevailing rule that "publication … of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the" ambit of the fair report privilege. Restatement (Second) of Torts § 611, cmt. e (1977). Even now, there is no clear majority position on the application of the fair reporting privilege to allegations in a complaint. See Moreno v. Crookston Times

Printing Co., 610 N.W.2d 321, 332 (Minn. 2000) ("the patchwork nature of the law of defamation and confusion across jurisdictions makes articulating a clear statement concerning a majority or minority position on section 611 difficult"); see also Burrill v. Nair, 217 Cal.App.4th 357, 397-98 (2013) (statements in radio interview paraphrasing the allegations of complaint were not within the fair reporting privilege absent "some judicial action"); Quigley v. Rosenthal, 327 F.3d 1044, 1062 (10th Cir. 2003) (same). Thus, the current state of libel law does not provide a sound basis for inferring a policy of same-day access to civil complaints of such uniformity as to announce a new constitutional imperative.

2. Same-Day Access To Civil Complaints Is Not Essential To The Proper Functioning Of Government.

CNS's opposition also fails to establish that the "logic" prong of the test established in Press-Enterprise compels same-day access to civil complaints. According to CNS, the "logic" prong of the Supreme Court test is satisfied where "the process operates best under public scrutiny" than "secrecy." (ECF No. 66 at 25 (emphasis added).) But CNS's formulation only proves the point. On the day a civil complaint is received, and before it has even been processed, secured, and filed for public access, there is no corresponding judicial process that would benefit from public disclosure.

To be sure, once a complaint becomes the subject of some governmental adjudication, public access can serve a useful purpose. Before that time, however, the First Amendment right of access—which is based on "the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs'"—does not compel disclosure. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (emphasis added and citation omitted); see also Leigh v. Salazar, 677 F.3d 892, 900 (9th Cir. 2012) ("Press–Enterprise II balances the vital public interest in preserving the media's ability to monitor government activities against the government's need to impose

restrictions if necessary for safety or other legitimate reasons.") (emphasis added); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 529 F. Supp. 866, 898 (E.D. Pa. 1981) ("access rights exist to promote knowledge of and attention to the performance of the courts"); Mercury Interactive Corp. v. Klein, 158 Cal.App.4th 60, 96-97 (2007) ("Public access to a … document that is not considered or relied on by the court in adjudicating any substantive controversy does nothing to (1) establish the fairness of the proceedings, (2) increase public confidence in the judicial process, (3) provide useful scrutiny of the performance of judicial functions, or (4) improve the quality of the truth-finding process.").

There is nothing in the Ninth Circuit's opinion in Associated Press which concerned the right of access in a criminal case, to support CNS's contrary view. In a criminal case, of course, the public's interest in monitoring government activities is triggered as soon as the prosecutor, i.e., the government, files a pleading. The same cannot be said of a civil complaint filed by a private party. Moreover, the Associated Press court found a First Amendment right to access "documents filed in regard to … pretrial proceedings" because such documents "are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning." Id. at 1145 (emphasis added). Critically, the Ninth Circuit has limited the First Amendment right of access to pretrial documents that transcribe or are otherwise tethered to a pretrial proceeding: transcripts of hearings that occurred during jury deliberations, Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 949 (9th Cir. 1998), plea agreements and related documents, Oregonian Publ'g Co. v. U.S. Dist. Court, 920 F.2d 1462, 1465–66 (9th Cir. 1990), and pretrial release documents, Seattle Times Co., 845 F.2d at 1517. In every one of those cases, logic compels disclosure because public access promotes the public's understanding of some judicial process. The same cannot be said of a civil complaint on the day it is received, and before it is made the subject of some judicial hearing or proceeding. See Inzunza, 303 F. Supp. 2d at

1048-49 (logic did not compel public access to wiretap materials prior to substantive challenge to those materials; "until an issue is raised before the court . . . public scrutiny does not play a positive role as neither the court nor the public is able to analyze the claims, issues, or evidence required to make an informed judgment").

In effect, CNS seeks to publicize the allegations asserted by one private party against another, on the same day those allegations are leveled and before any governmental party has reviewed (or even processed, secured and filed) the complaint. Whatever interest the public has in learning about new allegations made by one private party against another, it is not an interest founded in the First Amendment, which seeks to bring transparency to governmental affairs.

CNS unpersuasively argues that the mere act of filing a civil complaint gives the allegations therein a governmental or judicial imprimatur that requires immediate disclosure under the First Amendment. (ECF No. 66 at 26 (citing Paducah Newspapers v. Bratcher, 118 S.W.2d 178, 180 (Ky. App. 1937); In re Johnson, 598 N.E.2d 406, 410 (Ill. App. 1992).) CNS is conflating two concepts. On the one hand, a controversy "is no longer private" when it becomes a court case in the sense that the parties have invoked the power of a public body to adjudicate the dispute. On the other hand, requiring same-day disclosure of the allegations in a civil complaint does not promote public knowledge and attention over the performance of the government (i.e., the judiciary). See Inzunza, 303 F. Supp. 2d at 1048-49 (although "public scrutiny of criminal proceedings . . . plays an important role by serving as a check on possible governmental abuses, by enhancing the quality and integrity of the fact-finding process, and by providing 'community therapeutic value,'" public scrutiny "does not play a positive role … until an issue is raised before the court" (citation omitted)).

Nor is it an answer to argue, as CNS does, that permitting courts to provide access to complaints after they are processed and filed will "literally, kill and

maim," because the public may never learn about lawsuits over toxic spills and faulty heart valves settled in secret. (ECF No. 66 at 27.) This is not a case about whether the public has a right to access civil complaints received by VSC, but when. Neither the public interest, nor the First Amendment's goal of bringing transparency to governmental affairs and proceedings, is offended when a court ensures that a civil complaint is properly processed and secured before providing a copy to CNS to publicize its contents. See In re NHC – Nashville Fire Litig., 293 S.W.3d 547, 569 (Tenn. Ct. App. 2008) (four-month delay in deciding whether to seal documents did not effectively deprive media of its rights to access documents "in view of the trial judge's multiple obligations and responsibilities"; court was entitled to establish protocols for assessing whether the materials should be kept under seal given "the trial judge's multiple obligations and responsibilities").

Even further afield are CNS's citations to cases holding that if the First Amendment right of access applies, minimal delays in disclosure may be unconstitutional. (ECF No. 66 at 28.) The question here is not whether VSC may delay disclosure of a judicial record to which CNS is entitled, but whether CNS is entitled to same-day access of civil complaints at all.

III. CNS DOES NOT PLAUSIBLY ALLEGE THAT VSC'S "POLICY" IS AN UNCONSTITUTIONAL TIME RESTRICTION.

Even if CNS could identify "an enduring and vital tradition of public entree" to civil complaints on the day they are received, and could demonstrate that same-day access is essential to the public's ability to oversee the judicial process, CNS fails to allege that VSC's alleged policy of providing access to civil complaints once processed is an invalid time restriction on that constitutional right. Thus, CNS's Amended Complaint should be dismissed on that basis alone.

A. The Complaint Should Be Dismissed Because It Seeks To Hold VSC To A "Strict Scrutiny" Test That Is Inapplicable To VSC's Alleged Policy Of Processing New Civil Complaints Before Releasing Them To The Public.

The Supreme Court has recognized that limitations on the right of access that "resemble" time, place, and manner restrictions on protected speech are not subject to strict scrutiny. Globe Newspaper, 457 U.S. at 607 n.17; see also Richmond Newspapers v. Va., 448 U.S. 555, 581 n.18 (1980). And the Ninth Circuit, in this very case, observed that VSC's alleged "delay in making the complaints available may . . . be analogous to a permissible" time, place, or manner restriction. Planet, 750 F.3d at 793 n.9.

The Ninth Circuit's observation accords with common sense and the courts' formulation of a "time, place, manner" restriction. First Amendment jurisprudence draws a distinction between prior restraint cases, in which speech is totally prohibited and "time, place, and manner" cases in which the time, location, or volume of speech are regulated. See Rosen v. Port of Portland, 641 F.2d 1243, 1249-50 (9th Cir. 1981).

Sealing orders, which totally prohibit the dissemination of information, are akin to prior restraint laws. See, e.g., Hurvitz v. Hoefflin, 84 Cal.App.4th 1232, 1235 (2000). Court policies that provide the public with access to civil complaints as soon as processed are not. Rather, such policies are akin to government regulations that temporarily bar speech, which are evaluated under the time, place, manner rubric if they are content-neutral and ultimately permit the speech to occur when certain conditions are satisfied. For example, in Thomas v. Chi. Park Dist., 534 U.S. 316 (2002), protestors challenged a municipal ordinance that required individuals to obtain a permit before conducting more-than-50-person events. This regulation effectively barred the plaintiffs' speech until that point in time when the government was satisfied its interests in park users' health and safety would be protected. Nonetheless, the Supreme Court had no difficulty characterizing the

permitting regulation as a time, place, and manner restriction. Id. at 322-23; see also Schultz v. City of Cumberland, 228 F.3d 831, 851 (7th Cir. 2000) ("Licensing, though functioning as a prior restraint, is constitutionally legitimate when it complies with the standard for time, place or manner requirements."). Just so here, VSC's alleged policy does not totally prohibit access to civil complaints. It merely delays access until the court can satisfy itself that the privacy of third parties and the integrity of court-filed complaints will be protected.

Similarly, in Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), members of the press relied on Richmond Newspapers to argue that they had a constitutional right of access to troops in combat. The D.C. Circuit held that for purposes of analyzing the media's public access claim, the U.S. military's decision to delay access to combat troops on the ground of public safety would be analyzed as a time, place, manner restriction. Id. at 410. Because the reporters "offered no reason to conclude" that the military's public safety restrictions were unreasonable, the court affirmed dismissal of the reporters' First Amendment claim. Id.

The cases cited by CNS actually support VSC's position. In both U.S. v. Hernandez, 124 F. Supp. 2d 698 (S.D. Fla. 2000), and U.S. v. Sampson, 297 F. Supp. 2d 342 (D. Mass. 2003), the court analyzed temporary delays in access to judicial records under the time, place, and manner rubric. Thus, VSC's alleged "policy" is a time restriction, and CNS's failure to allege the proper standard of review compels dismissal.

B. The Facts Alleged In The Amended Complaint Establish That VSC's Alleged "Policy" Is A Valid Time Restriction.

Even if CNS had invoked the correct standard in its Amended Complaint, VSC's alleged policy satisfies the three prongs of a valid "time" restriction set forth in Comite de Jornaleros de Redondo Beach v. Redondo Beach, 657 F.3d 936 (9th Cir. 2011) (en banc).

1. VSC's Alleged Policy Is Content Neutral.

CNS argues that VSC's policy is not content neutral because court staff "examine" the contents of complaints to determine whether they are fit for processing. (ECF No. 66 at 32.) But "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989). "The government's purpose is the controlling consideration." Id. CNS does not allege that VSC's policy of processing complaints before making them publicly accessible is motivated by "an effort to suppress expression merely because public officials oppose the speaker's view." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

2. VSC's Alleged Policy Is Narrowly Tailored.

VSC's alleged policy is also "narrowly tailored to serve" the court's "legitimate, content-neutral interests." Ward, 491 U.S. at 798. The requirement of narrowly tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. (citation marks and quotation omitted). Thus, while a time restriction may not "burden substantially more speech than is necessary to further the government's legitimate interests," a limitation will not be invalidated "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id. at 799-800.

CNS does not dispute that VSC has a legitimate interest in utilizing its resources in the manner that most efficiently administers justice for litigants, in securing the integrity of court filings, and protecting the privacy interests of third parties. (See ECF No. 61-1 at 29-30.) Instead, CNS contends that VSC has not shown how a policy of providing access to civil complaints after processing promotes those interests. (ECF No. 66 at 33.) For all the reasons explained in VSC's motion, however, its alleged policy of processing complaints before

providing a copy to CNS "would indeed appear to 'actually advance'" the court's legitimate interests – that is all the narrow tailoring test requires. Reed v. Town of Gilbert, 587 F.3d 966, 980 (9th Cir. 2009).

CNS also observes that since June 18, 2014, VSC has adopted a scanning program that typically allows the court to provide public access to complaints received before 3 p.m. on the same day, and to complaints received after 3 p.m. on the next business day. (ECF No. 67 Ex. 40.) According to CNS, this technological advance at VSC proves that same-day access does not infringe on the court's legitimate interests. (ECF No. 66 at 33.) VSC's adoption of the scanning program demonstrates that technological advances are allowing the court to provide access to complaints more quickly than before CNS filed suit – nothing more. VSC's new ability to typically provide the public with same-day or next-day access due to technological advances does not retroactively alter the scope of the First Amendment right of access.

Finally, CNS argues that VSC's alleged policy is not narrowly tailored because other means of protecting the court's interests exist. (ECF No. 66 at 33.) Although CNS's proposals—such as allowing the public behind the counter to pick up complaints before processing—would ensure same-day access, they would not satisfy VSC's interest in protecting the safety of court staff, the integrity of court documents, or the privacy interests of third parties. See Planet, 750 F.3d at 791. To the contrary, VSC's legitimate interests would be grossly impaired by the kind of unadulterated access outlined by the Ninth Circuit.

3. VSC's Alleged Policy Leaves Open Ample Alternative Channels Of Communication.

While a time, place, manner restriction must leave open ample channels of communication, courts have been "cautioned against invalidating government regulations for failing to leave open ample alternative channels unless the regulation foreclose[s] 'an entire medium of public expression across the landscape

of a particular community or setting.'" G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1074 (9th Cir. 2006) (citation omitted). Here, VSC's alleged policy does not prohibit CNS from reporting on newly-received civil complaints, or impede CNS from obtaining the complaints from alternative sources, such as the parties themselves. VSC's "policy" permits CNS to communicate on any topic CNS desires; it simply recognizes the long-standing principle that "[e]very court has supervisory power over its own records and files." Nixon, 435 U.S. at 598-99.

CONCLUSION

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

Dated: August 4, 2014.

JONES DAY

By: /s/
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