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

**NOTICE OF LODGING OF POST-HEARING PROPOSED MEMORANDUM AND ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT**

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

Pursuant to this Court's request, defendant Michael Planet, in his official capacity as the Court Executive Officer of the Superior Court of California, County of Ventura ("VSC"), hereby submits, and lodges with Chambers a Word version of,

the enclosed Proposed Memorandum And Order Granting Motion To Dismiss Amended Complaint attached to this Notice as Exhibit "A."

Dated: August 26, 2014.

JONES DAY

By: */s/*
Robert A. Naeve

Attorneys for Defendant
MICHAEL PLANET

# EXHIBIT "A"

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Defendant.

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

**[PROPOSED] MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT**

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

On August 18, 2014, this Court heard and considered the Motion to Dismiss Amended Complaint filed by defendant Michael Planet in the action captioned above. Rachel E. Matteo-Boehm and Jonathan G. Fetterly appeared on behalf of plaintiff Courthouse News Service. Robert A. Naeve and Erica Reilley appeared on behalf of defendant Michael Planet. Having considered the parties' arguments and

submissions, and for the reasons outlined below, the Court hereby issues the following Memorandum and Order.

A. Procedural History.

(1) This is a civil action by Plaintiff Courthouse News Service ("CNS") for alleged violation of the First Amendment right of access to judicial records against Defendant Michael Planet in his official capacity as the Court Executive Officer of the Superior Court of California, County of Ventura ("VSC").

(2) On November 30, 2011, this court dismissed CNS's original complaint, which contained three claims for relief for violation of the First Amendment, federal common-law, and California Rule of Court 2.550. This Court held that CNS's state-law claim was barred by the Eleventh Amendment and that CNS's federal claims should be dismissed pursuant to the *Younger* and *O'Shea* abstention doctrines. (ECF No. 38).

(3) On April 7, 2014, the Ninth Circuit reversed, holding that district courts should not abstain from ruling on First Amendment claims like those asserted by CNS. *Courthouse News Service v. Planet*, 750 F.3d 776, 793 (9th Cir. 2014); *see also* ECF No. 52 (receipt of mandate from Ninth Circuit).

(4) On June 30, 2014, CNS amended its complaint to eliminate its federal common-law and state law claims for relief. (ECF Nos. 56 at 2-3 [stipulation to amend complaint], 57 [order permitting amendment]; 58 [amended complaint].) The Amended Complaint contains a single claim for relief for injunctive and declaratory relief arising from an alleged violation of the First Amendment to the United States Constitution. The Amended Complaint asks this Court to find that CNS has a constitutional right to review unlimited civil complaints on the same day they are received by VSC's clerks, even before these complaints are processed, filed, and entered into the court's official records – a so-called right of "same-day access."

(5) VSC now moves to dismiss CNS's Amended Complaint for failure to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. Facts.

(1) CNS is a news wire service that specializes in reporting on civil lawsuits with 3,000 subscribers ranging from major media outlets to law firms, universities, and law school libraries. (ECF No. 58, ¶¶ 7, 17.) CNS sends reporters to visit courthouses around the country to review recently filed complaints. (*Id.* ¶ 18.)

(2) CNS alleges that it began covering new civil case filings at VSC in 2001. (*Id.* ¶ 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 VSC, challenging its practice of "releasing newly filed complaints for press review" only "after a certain amount of processing has been completed." (*Id.* Ex. 2.)

(3) 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." (*Id.* Ex. 3.) Moreover, VSC explained, "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.*)

(4) 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. (*Id.* ¶ 29.)

(5) Commencing June 2014, VSC began "creating electronic copies of all new civil unlimited complaints, excluding exhibits and attachments, prior to processing and filing by the Court." (ECF No. 67 at 86.) New civil unlimited complaints received before 3 p.m. typically will be made available for viewing that day. However, Complaints received after 3:00 p.m. typically will be available for electronic viewing the next business day. These scanned copies are not yet official documents and may still be rejected by the clerk. (*Id*.) During oral argument, counsel for CNS indicated that "Courthouse News is currently seeing approximately 80 percent of new civil complaints on a same-day basis." Tr. at 3:4-5.

C. Analysis.

(1) The question presented by this case is *not* whether VSC can lawfully refuse to provide access to civil complaints. To the contrary, CNS alleges that VSC does provide access to new civil unlimited complaints, albeit not always on the date they are received for filing. (*E.g.*, *id*. No. 58, ¶ 27 & Ex. 3; *id.* No. 67 at 86.) Similarly, the question presented by this case is *not* whether the qualified First Amendment right of access could ever apply to civil complaints. California courts, for example, recognize a First Amendment right of access once documents are both "filed in court" *and* "used at trial or submitted as a basis for adjudication." *Savaglio v. Wal-Mart Stores, Inc*., 149 Cal.App.4th 588, 596 (2007).

(2) Rather, the discrete issue presented in this case is entirely temporal. As CNS itself frames the issue, the question presented is whether the First Amendment enshrines a constitutional right of access to civil complaints on the same day they are received by a court, "irrespective of whether the complaint has been processed, reviewed, and/or entered into the court's official records," and "irrespective of whether the court has taken action in the case or the defendant has been served." (ECF No. 77-1 at 3.) In other words, "the issue is not whether the public will gain access, but when" the qualified First Amendment right of access

might apply. *U.S. v. Inzunza*, 303 F. Supp. 2d 1041, 1048 (S.D. Cal. 2004). This is "an important question of first impression" about which the Ninth Circuit took "no position" when it remanded this case for further proceedings. *Planet*, 750 F.3d at 793.

(3) 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).

(4) 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).

(5) VSC's Motion to Dismiss is not barred by the Ninth Circuit's decision in *Courthouse News Service v. Planet*, 750 F.3d 776. The Ninth Circuit held that federal abstention doctrines do not preclude this Court from hearing this matter, and remanded CNS's claims to this court so that they could be decided "on the merits" in the first instance. *Id.*, 750 F.3d at 779, 793. VSC's motion to dismiss addresses "the merits" and is properly before this Court pursuant to a stipulated briefing schedule. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981); ECF Nos. 63 (stipulation) & 64 (order granting stipulation). The law of the case and rule of mandate doctrines do not apply in this circumstance. *E.g.*, *Hall v. City of L.A.*, 697 F.3d 1059, 1067 (9th Cir. 2012).

(6) The Supreme Court has not yet ruled on the scope of the First Amendment right of access in the context of records in civil cases. *Nixon v. Warner Comm'cns, Inc.*, 435 U.S. 589, 608-10 (1978); *Perry v. Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012).

(7) Most circuit courts, including the Ninth Circuit, rely upon the "experience and logic" test enunciated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), to determine the extent of the right of access to judicial documents in criminal proceedings. *See, e.g., U.S. v. Higuera-Guerrero*, 518 F.3d 1022, 1026 (9th Cir. 2008); *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990). In addition, federal courts "have applied the *Press-Enterprise II* framework to evaluate attempts to access a wide range of civil and administrative government activities." *Leigh v. Salazar*, 677 F.3d 892, 899 (9th Cir. 2012). Hence, this Court will apply the *Press-Enterprise* test to decide the merits of VSC's motion to dismiss. *Times Mirror Co.*, 873 F.2d at 1213 ("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). The Court does so "with discrimination and temperance . . . ." *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring).

(8) This Court finds that there is no "experience" of same-day access under the first prong of the *Press-Enterprise* test. *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 (D.C. Cir. 1985).

(9) Indeed, when Justice Oliver Wendell Holmes was a member of the Massachusetts Supreme Judicial Court, he held that civil complaints are not proceedings in open court and that the reporter's fair report privilege does not attach to them. Writing for a unanimous court, Justice Holmes explained in part that the rationales for creation of the privilege "have no application 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." *Cowley v.*

*Pulsifer*, 137 Mass. 392, 394 (1884). Finding that complaints "are not open to public inspection," Justice Holmes 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, e.g.*, *Schmedding v. May*, 85 Mich. 1 (1891). Regardless of whether this and similar cases remain good law today, they demonstrate that there is no tradition of same-day access to complaints.

(10) Even if that historical tradition could be ignored, and the Court limited its review to current state statutes and practices, CNS's claim would still fail to satisfy the "experience" prong of the *Press-Enterprise* test. Current state statutes and rules governing access to civil complaints do not recognize a right of access to court documents before a case file has even been created. To the contrary, these authorities only contemplate providing reasonable access to court case files. *E.g.*, Ariz. S. Ct. R. 123(2) & (4); Ohio R. Super. 45(b); R.I. Gen. Laws § 38-2-3(a). In addition, most of these laws mandate varying time periods – including a "reasonable period of time" in Arizona and South Dakota, one to three days in Alaska, three days in Colorado, five days in New York, ten days in Hawaii, fourteen days in Texas, up to sixty working days in Maine, and no specific time at all in Wisconsin – in which to respond to access requests. *See* Alaska Guidelines for Inspecting and Obtaining Copies of Public Records V(B)(1), V(C) & V(D); Colo. Rev. Stat. § 24-72-303; Hawaii Court Records Rule 10.4; Maine Administrative Order JB-05-20; New York Administrative Rule of the Unified Court System 124.6; S.D. Codified Laws § 15-15A-14 (2); Texas Rule of Judicial Administration 12.1; Wisconsin Department of Justice, *Compliance Outline: Wis. Stat. §§ 19.31-19.39*, § VII(B)(1) (Sept. 2012).

(11) The First Amendment access right CNS seeks to establish in this case is inconsistent with the practices of virtually every state in the union.

(12) This Court also finds that there is no "logic" to a right of same-day access under the second prong of the *Press-Enterprise* test. Logic supports a right of constitutional access where it "is significantly important to the public's ability to oversee the [judicial] process and to ensure the judicial system functions fairly and effectively." *U.S. v. Wecht*, 537 F.3d 222, 257 (3d Cir. 2008). Thus, the Ninth Circuit has recognized a constitutional right of access to documents filed in regard to criminal pretrial proceedings because such documents are "important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning." *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983). But 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. The First Amendment's salutary goal of shedding light upon the administration of justice 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. Hence, the "logic" that compels public access to certain proceedings and documents does not compel access to new civil unlimited complaints the moment they are received by a state court, *before* they are the subject of any type of judicial proceeding, and before they are available to the judges and their law clerks or the parties to the suit. *See IDT Corp.*, 709 F.3d at 1224; *In re Reporters Comm.*, 773 F.2d at 1336-37; *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal.4th 1178, 1208 n.25 (1999); *Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60, 96-97 (2007).

(13) The Court notes that, "to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 n.19 (1984); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978). State courts have the right to safeguard unprocessed documents from theft and damage,

thereby ensuring the integrity of their files, and protecting the privacy and other interests of litigants and third parties. *E.g.*, *Bell v. Commonwealth Title Ins. Co.*, 189 U.S. 131, 133 (1903); *Bruce v. Gregory*, 65 Cal.2d 666, 676 (1967); *Adams County Abstract Co. v. Fisk*, 788 P.2d 1336, 1889 (Idaho Ct. App. 1990) (following *Bell* and *Bruce* in holding that a county recorder has a "duty to protect the safety of documents entrusted to his care" and the "power to control the orderly function of his office." The court further held that, "[e]ven if the public is entitled to know the contents of a document when it has been 'filed,' this entitlement does not necessarily extend to physical handling of the document. To allow physical handling of an original document before it becomes an official record upon microfilming would carry a potential for abuse. If the document were altered or damaged, the public record would be affected").

(14) Hence, neither "experience" nor "logic" support CNS's claimed right of same-day access to new civil unlimited complaints before they have been minimally processed, usually to include assigning a case number, and a hard or electronic copy has been made accessible to the public.

(15) The Court does not doubt that a constitutional right of access to civil complaints could arise under the *Press-Enterprise* test at some point during the course of civil proceedings. *E.g.*, *United States v. Appelbaum*, 707 F.3d 283, 290 (4th Cir. 2013); *Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *cf. Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-1136 (9th Cir. 2003) (recognizing "good reasons to distinguish between dispositive and nondispositive motions" for purposes of access to judicial records); *Savaglio*, 149 Cal.App.4th at 596. But while civil complaints may someday be the subject of a "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." *Times Mirror Co.*, 873 F.2d at 1217-18.

(16) The fact that VSC may provide access to scanned copies of new civil complaints before they are processed and filed does not alter this Court's analysis. As noted above, the issue in this case is whether the First Amendment *requires* courts to provide access to new civil unlimited complaints irrespective of whether they have been processed, reviewed and entered into a court's official records. (ECF No. 77-1 at 3.) The issue is *not* whether state law might mandate, or state courts might choose to provide, greater access than the First Amendment requires. *See In re Reporters Comm.*, 773 F.2d at 1336 ("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* to access") (emphasis added).

(17) For all of these reasons, the Court hereby GRANTS VSC's motion to dismiss CNS's Amended Complaint in its entirety with prejudice.

IT IS SO ORDERED this ___ day of August, 2014.

_____

United States District Court Judge