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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION

16 COURTHOUSE NEWS SERVICE,
17 Plaintiff,

18 v.

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

23 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

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

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

3 A. Procedural History.

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

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

14 (3) On April 7, 2014, the Ninth Circuit reversed, holding that district
15 courts should not abstain from ruling on First Amendment claims like those
16 asserted by CNS. *Courthouse News Service v. Planet*, 750 F.3d 776, 793 (9th Cir.
17 2014); *see also* ECF No. 52 (receipt of mandate from Ninth Circuit).

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

28

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

4 B. Facts.

5 (1) CNS is a news wire service that specializes in reporting on civil
6 lawsuits with 3,000 subscribers ranging from major media outlets to law firms,
7 universities, and law school libraries. (ECF No. 58, ¶¶ 7, 17.) CNS sends reporters
8 to visit courthouses around the country to review recently filed complaints. (*Id.* ¶
9 18.)

10 (2) CNS alleges that it began covering new civil case filings at VSC in
11 2001. (*Id.* ¶ 21.) Initially, CNS's reporter visited the court only once or twice each
12 week. (*Id.* ¶ 22.) In November 2010, CNS began covering VSC on a daily basis.
13 (*Id.* ¶ 25.) Shortly thereafter, counsel for CNS wrote VSC, challenging its practice
14 of "releasing newly filed complaints for press review" only "after a certain amount
15 of processing has been completed." (*Id.* Ex. 2.)

16 (3) VSC responded on July 11, 2011, explaining that, notwithstanding
17 CNS's "interest in same-day access, the Court cannot prioritize that access above
18 other priorities and mandates." (*Id.* Ex. 3.) Moreover, VSC explained, "the Court
19 must ensure the integrity of all filings, including new filings, and cannot make any
20 filings available until the requisite processing is completed." (*Id.*) Accordingly,
21 VSC pledged to continue "mak[ing] every effort to make new filings available as
22 early as is practicable given the demands on limited court resources." (*Id.*)

23 (4) According to the Amended Complaint, CNS receives over 80% of
24 VSC's new unlimited civil complaints within six days of filing, while
25 approximately 18% of the complaints reviewed by CNS's reporter between August
26 8, 2011 and September 2, 2011 were not available until more than six days after
27 filing. (*Id.* ¶ 29.)
28

1 (5) Commencing June 2014, VSC began “creating electronic copies of all
2 new civil unlimited complaints, excluding exhibits and attachments, prior to
3 processing and filing by the Court.” (ECF No. 67 at 86.) New civil unlimited
4 complaints received before 3 p.m. typically will be made available for viewing that
5 day. However, Complaints received after 3:00 p.m. typically will be available for
6 electronic viewing the next business day. These scanned copies are not yet official
7 documents and may still be rejected by the clerk. (*Id.*) During oral argument,
8 counsel for CNS indicated that “Courthouse News is currently seeing
9 approximately 80 percent of new civil complaints on a same-day basis.” Tr. at 3:4-
10 5.

11 C. Analysis.

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

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

1 might apply. *U.S. v. Inzunza*, 303 F. Supp. 2d 1041, 1048 (S.D. Cal. 2004). This is
2 “an important question of first impression” about which the Ninth Circuit took “no
3 position” when it remanded this case for further proceedings. *Planet*, 750 F.3d at
4 793.

5 (3) To survive a motion to dismiss, the complaint “must contain sufficient
6 factual matter ... to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
7 *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). While the Court generally must
8 accept as true the allegations of the complaint, this rule does not apply to “a legal
9 conclusion couched as a factual allegation.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
10 544, 555 (2007).

11 (4) The existence (or non-existence) of a qualified First Amendment right
12 “is a matter of law.” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir.
13 2004); *see also Times Mirror Co. v. United States*, 873 F.2d 1210, 1212 (9th Cir.
14 1989) (same).

15 (5) VSC’s Motion to Dismiss is not barred by the Ninth Circuit’s decision
16 in *Courthouse News Service v. Planet*, 750 F.3d 776. The Ninth Circuit held that
17 federal abstention doctrines do not preclude this Court from hearing this matter, and
18 remanded CNS’s claims to this court so that they could be decided “on the merits”
19 in the first instance. *Id.*, 750 F.3d at 779, 793. VSC’s motion to dismiss addresses
20 “the merits” and is properly before this Court pursuant to a stipulated briefing
21 schedule. *Federated Dep’t Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981); ECF
22 Nos. 63 (stipulation) & 64 (order granting stipulation). The law of the case and rule
23 of mandate doctrines do not apply in this circumstance. *E.g., Hall v. City of L.A.*,
24 697 F.3d 1059, 1067 (9th Cir. 2012).

25 (6) The Supreme Court has not yet ruled on the scope of the First
26 Amendment right of access in the context of records in civil cases. *Nixon v.*
27 *Warner Comm’cns, Inc.*, 435 U.S. 589, 608-10 (1978); *Perry v. Brown*, 667 F.3d
28 1078, 1088 (9th Cir. 2012).

1 (7) Most circuit courts, including the Ninth Circuit, rely upon the
2 “experience and logic” test enunciated in *Press-Enterprise Co. v. Superior Court*,
3 464 U.S. 501 (1984), to determine the extent of the right of access to judicial
4 documents in criminal proceedings. *See, e.g., U.S. v. Higuera-Guerrero*, 518 F.3d
5 1022, 1026 (9th Cir. 2008); *Oregonian Publ’g Co. v. U.S. Dist. Court*, 920 F.2d
6 1462, 1465 (9th Cir. 1990). In addition, federal courts “have applied the *Press-*
7 *Enterprise II* framework to evaluate attempts to access a wide range of civil and
8 administrative government activities.” *Leigh v. Salazar*, 677 F.3d 892, 899 (9th
9 Cir. 2012). Hence, this Court will apply the *Press-Enterprise* test to decide the
10 merits of VSC’s motion to dismiss. *Times Mirror Co.*, 873 F.2d at 1213 (“the
11 public has no right of access to a particular proceeding without first establishing
12 that the benefits of opening the proceedings outweigh the costs to the public,” using
13 the *Press-Enterprise* tests). The Court does so “with discrimination and
14 temperance” *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 588
15 (1980) (Brennan, J., concurring).

16 (8) This Court finds that there is no “experience” of same-day access
17 under the first prong of the *Press-Enterprise* test. *E.g., IDT Corp. v. eBay Inc.*, 709
18 F.3d 1220, 1224 (8th Cir. 2013); *In re Reporters Comm. for Freedom of Press*, 773
19 F.2d 1325 (D.C. Cir. 1985).

20 (9) Indeed, when Justice Oliver Wendell Holmes was a member of the
21 Massachusetts Supreme Judicial Court, he held that civil complaints are not
22 proceedings in open court and that the reporter’s fair report privilege does not
23 attach to them. Writing for a unanimous court, Justice Holmes explained in part
24 that the rationales for creation of the privilege “have no application whatever to the
25 contents of a preliminary written statement of a claim or charge. These do not
26 constitute a proceeding in open court. Knowledge of them throws no light upon the
27 administration of justice. Both form and contents depend wholly on the will of a
28 private individual, who may not be even an officer of the court.” *Cowley v.*

1 *Pulsifer*, 137 Mass. 392, 394 (1884). Finding that complaints “are not open to
2 public inspection,” Justice Holmes found it “enough to mark the plain distinction
3 between what takes place in open court, and that which is done out of court by one
4 party alone, or more exactly, as we have already said, the contents of a paper filed
5 by him in the clerk’s office.” *Id.* at 395, 396; *see also, e.g., Schmedding v. May*, 85
6 Mich. 1 (1891). Regardless of whether this and similar cases remain good law
7 today, they demonstrate that there is no tradition of same-day access to complaints.

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

26 (11) The First Amendment access right CNS seeks to establish in this case
27 is inconsistent with the practices of virtually every state in the union.
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1 (12) This Court also finds that there is no “logic” to a right of same-day
2 access under the second prong of the *Press-Enterprise* test. Logic supports a right
3 of constitutional access where it “is significantly important to the public’s ability to
4 oversee the [judicial] process and to ensure the judicial system functions fairly and
5 effectively.” *U.S. v. Wecht*, 537 F.3d 222, 257 (3d Cir. 2008). Thus, the Ninth
6 Circuit has recognized a constitutional right of access to documents filed in regard
7 to criminal pretrial proceedings because such documents are “important to a full
8 understanding of the way in which ‘the judicial process and the government as a
9 whole’ are functioning.” *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145
10 (9th Cir. 1983). But on the day a civil complaint is received, and before it has even
11 been processed, secured and filed for public access, there is no corresponding
12 judicial process that would benefit from public disclosure. The First Amendment’s
13 salutary goal of shedding light upon the administration of justice has “no
14 application whatever to the contents of a preliminary written statement of a claim or
15 charge ... whose form and contents depend wholly on the will of a private
16 individual.” *Cowley*, 137 Mass. at 394. Hence, the “logic” that compels public
17 access to certain proceedings and documents does not compel access to new civil
18 unlimited complaints the moment they are received by a state court, *before* they are
19 the subject of any type of judicial proceeding, and before they are available to the
20 judges and their law clerks or the parties to the suit. *See IDT Corp.*, 709 F.3d at
21 1224; *In re Reporters Comm.*, 773 F.2d at 1336-37; *NBC Subsidiary (KNBC-TV) v.*
22 *Superior Court*, 20 Cal.4th 1178, 1208 n.25 (1999); *Mercury Interactive Corp. v.*
23 *Klein*, 158 Cal.App.4th 60, 96-97 (2007).

24 (13) The Court notes that, “to the extent that courthouse records could serve
25 as a source of public information, access to that source customarily is subject to the
26 control of the trial court.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 n.19
27 (1984); *see also Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 599 (1978). State
28 courts have the right to safeguard unprocessed documents from theft and damage,

1 thereby ensuring the integrity of their files, and protecting the privacy and other
2 interests of litigants and third parties. *E.g.*, *Bell v. Commonwealth Title Ins. Co.*,
3 189 U.S. 131, 133 (1903); *Bruce v. Gregory*, 65 Cal.2d 666, 676 (1967); *Adams*
4 *County Abstract Co. v. Fisk*, 788 P.2d 1336, 1889 (Idaho Ct. App. 1990) (following
5 *Bell* and *Bruce* in holding that a county recorder has a “duty to protect the safety of
6 documents entrusted to his care” and the “power to control the orderly function of
7 his office.” The court further held that, “[e]ven if the public is entitled to know the
8 contents of a document when it has been ‘filed,’ this entitlement does not
9 necessarily extend to physical handling of the document. To allow physical
10 handling of an original document before it becomes an official record upon
11 microfilming would carry a potential for abuse. If the document were altered or
12 damaged, the public record would be affected”).

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

17 (15) The Court does not doubt that a constitutional right of access to civil
18 complaints could arise under the *Press-Enterprise* test at some point during the
19 course of civil proceedings. *E.g.*, *United States v. Appelbaum*, 707 F.3d 283, 290
20 (4th Cir. 2013); *Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002); *United*
21 *States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *cf. Foltz v. State Farm Mut.*
22 *Auto. Ins. Co.*, 331 F.3d 1122, 1135-1136 (9th Cir. 2003) (recognizing “good
23 reasons to distinguish between dispositive and nondispositive motions” for
24 purposes of access to judicial records); *Savaglio*, 149 Cal.App.4th at 596. But
25 while civil complaints may someday be the subject of a “hearing to which the
26 public has a First Amendment right of access, it does not follow that the public
27 should necessarily have access to the information before that time.” *Times Mirror*
28 *Co.*, 873 F.2d at 1217-18.

1 (16) The fact that VSC may provide access to scanned copies of new civil
2 complaints before they are processed and filed does not alter this Court’s analysis.
3 As noted above, the issue in this case is whether the First Amendment *requires*
4 courts to provide access to new civil unlimited complaints irrespective of whether
5 they have been processed, reviewed and entered into a court’s official records.
6 (ECF No. 77-1 at 3.) The issue is *not* whether state law might mandate, or state
7 courts might choose to provide, greater access than the First Amendment requires.
8 *See In re Reporters Comm.*, 773 F.2d at 1336 (“it is risky to generalize from one’s
9 familiarity with the practice in a few jurisdictions, or, for that matter, to assume that
10 a practice of granting access where no objection is made establishes the existence of
11 an acknowledged *right* to access”) (emphasis added).

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

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

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16 _____
17 United States District Court Judge

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