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COURTHOUSE NEWS SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Courthouse News Service,

Plaintiff,

vs.

David Yamasaki, in his official capacity as Court Executive Officer/Clerk of the Orange County Superior Court,

Defendant.

Case No. 8:17-CV-126

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Courthouse News Service ("CNS"), by and though its undersigned attorneys, alleges the following as its Complaint for Injunctive and Declaratory Relief:

PRELIMINARY STATEMENT

1. In May 2016, the Honorable Judge S. James Otero of this District held that CNS and other members of the press and public have a First Amendment right of timely access to new complaints that attaches upon their receipt by a court for filing. *Courthouse News Service v. Planet*, CV11-08083 SJO (FFMx), Order Granting in Part Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment ("Order") 18-19 (May 26, 2016) (ECF 195). The Order also held the Court Executive Officer/Clerk of Ventura Superior Court ("VSC") had violated that right by denying access until after complaints are "processed" – because the resulting delays in access were not essential to preserve higher values nor a reasonable time, place and manner restriction – and by receiving complaints for filing after public access was terminated for the day, which created "a distinct possibility that complaints filed late in the day may not be viewable by the public until the next day." *Id.* at 20-30. The right recognized in *Planet* applies "regardless of whether courts use paper filing or e-filing systems." Judgment for Declaratory Relief and Permanent Injunction ("Judgment") 2 (June 14, 2016) (ECF 199).

2. A few courts, however, such as Orange County Superior Court ("OSC"), continue to deny access until after complaints are processed, even after being notified of the Order and Judgment in *Planet*. And OSC continues to receive complaints for e-filing after public access is terminated for the day. CNS thus brings this action against Defendant David Yamasaki, in his official capacity as Court Executive Officer/Clerk of OSC, to restrain the deprivation under color of state law of CNS's rights, privileges and immunities under 42 U.S.C. §§ 1983-1988 and the Constitution.

3. This action simply seeks the same relief granted in *Planet* – timely access to new civil unlimited jurisdiction complaints upon receipt for filing, prior to processing. As *Planet* held, it has been a longstanding tradition for both state and

federal courts to provide reporters who visit the court every day with timely access to new complaints upon their receipt by the court for filing in order to facilitate the crucial role played by the media of informing interested persons about new court cases. This access upon receipt ensures that interested members of the public learn about new civil litigation while the initiation of that litigation is still newsworthy.

4. In contrast, at OSC delays in access are routine. During the week in May 2016 before Judge Otero's Order in *Planet*, the majority of new unlimited complaints were withheld two to 12 days while being processed. Even after the Order was entered, OSC withheld about half of all new unlimited complaints received during the last three months of 2016 for between one and nine days while they were being processed.

5. Denying CNS timely access upon receipt to newly filed civil unlimited jurisdiction complaints is tantamount to sealing those records for an appreciable amount of time after filing, in violation of the rights secured to CNS by the First and Fourteenth Amendments. Having failed in its efforts to work cooperatively with Defendant Yamasaki and his predecessor to reach an amicable resolution to these delays, CNS brings this action challenging the legality of OSC's actions and seeking injunctive and declaratory relief.

JURISDICTION AND VENUE

6. CNS's claims arise under the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, Title 42 U.S.C. §§ 1983-1988. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights) and 2201 (declaratory relief). Defendant is subject to personal jurisdiction in this judicial district at the time this action is commenced.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because, on information and belief, Defendant resides in California and is employed in this district, and because a substantial part of the events or omissions giving rise to CNS's claims occurred in this district.

PARTIES

8. Plaintiff CNS is a California corporation with its principal place of business in Pasadena, California. A widely read news service with subscribers across the nation, CNS is similar to other news services, such as the Associated Press, except that it focuses its reporting on civil litigation in state and federal courts, from the filing of new civil actions through appellate arguments and rulings. CNS's timely and comprehensive coverage of civil litigation through its print, web and e-mailed publications has made it a go-to source of information about the nation's civil courts. CNS has more than 2,000 institutional and individual subscribers across the nation, including more than 500 in California, and its freely available website, www.courthousenews.com, is read by hundreds of thousands of people each month.

9. Defendant Yamasaki is the Court Executive Officer/Clerk of the OSC, and is sued in that official capacity. The Court Executive Officer/Clerk is responsible for, among other things, the administration of court records. Acting in his official capacity, Defendant, and those acting under his direction and supervision, is directly involved with and/or responsible for the delays in access to new complaints experienced by CNS, which acts reflect the official policy of the clerk's office as a whole. Defendant's actions, as alleged in this Complaint, are under the color of California law and constitute state action within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. On information and belief, Defendant's primary place of employment is in Orange County, California.

10. Defendant is sued in his official capacity only. CNS seeks relief against Defendant as well as his agents, assistants, successors, employees, and all persons acting in concert or cooperation with him or at his direction or under his control.

FACTUAL ALLEGATIONS

11. CNS has covered OSC since 1995. Both before and after the Order and Judgment in *Planet*, CNS notified Defendant and his predecessor that their policies denied timely access to many new unlimited complaints, sometimes for several days.

But they refused to change their policies, and the denial of timely access continues.

A. News Reporting Activities of CNS

12. CNS is a nationwide news service, founded in 1990 and employing more than 240 people, most of them reporters, covering courts in all 50 states in the nation. In California, CNS currently employs 78 people, including 52 reporters and editors who cover the state and federal trial and appellate courts of California.

13. CNS's core publications are its New Litigation Reports, which contain original, staff-written summaries of significant new civil complaints. In California, the New Litigation Reports only cover "unlimited jurisdiction" civil complaints – that is, complaints where the amount in controversy usually exceeds $25,000 – and focus on those against business institutions, public entities, prominent individuals or other civil actions of interest to CNS's subscribers. They do not cover family law matters, name changes, probate filings, most mortgage foreclosures, or collection actions against individuals unless the individual is famous or notorious. For larger courts, such as OSC, reports are e-mailed to subscribers each evening and provide coverage of new complaints filed that day.

14. CNS publishes 16 New Litigation Reports on California courts, which cover civil actions filed in all four federal district courts as well as superior courts in Alameda, Contra Costa, Fresno, Kern, Los Angeles (downtown and Santa Monica courthouses), Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Solano, Sonoma, Stanislaus and Ventura Counties. CNS covers OSC in its *Orange County Report*, which has about 275 subscribers.

15. Among CNS's other publications are its two print newsletters – the *Entertainment Law Digest* and the *Four District Almanac* (which includes reports on all four federal district courts in California) – and an electronic "Daily Brief," which covers published appellate rulings throughout the nation, including all U.S. Supreme Court and federal circuit decisions, as well as significant rulings from a growing

number of federal district courts (again including all four districts in California).

16. CNS also publishes a freely available website featuring news reports and commentary, which is read by hundreds of thousands of people each month. The website functions much like a daily newspaper, providing staff-written articles from around the country that rotate on and off the page on a 24-hour news cycle.

17. CNS has been credited as the original source of reporting on civil litigation matters and topics by a wide range of publications, including the *ABA Journal*, ABC News, *The Atlantic*, *Austin American Statesman*, Black Christian News Network, *California Bar Journal*, CBS News, The Daily Beast, *The Christian Science Monitor*, *The Dallas Morning News*, Forbes, Fox News, *The Guardian*, The Hill, *Houston Chronicle*, The Huffington Post, *Long Island Press*, *Los Angeles Times*, *Mother Jones*, NBC News, *New York Daily News*, *New York Magazine*, *The New York Times*, NPR, *The Orange County Register*, Politico, *The Telegraph* (UK), *Rolling Stone*, *San Antonio Express-News*, Slate, *Salt Lake City Tribune*, *The Washington Times*, *Women's Health Policy Report*, *U.S. News and World Report*, *USA Today*, *The Wall Street Journal*, *The Washington Post*, UPI and others. In addition, U.S., Canadian and New Zealand radio shows have interviewed CNS reporters.

18. To prepare the New Litigation Reports and identify new cases that may warrant a website article, CNS's reporters visit their assigned court each work day so they can review all the complaints received by the court for filing that day to determine which are of interest to CNS's readers. Given the nature of the coverage in the New Litigation Reports and its other news publications, including its website, any delay in the ability of a reporter to obtain and review new complaints necessarily delays CNS's ability to inform subscribers and other readers of the factual and legal allegations that the reporter has identified to be of interest to CNS's readers.

19. Many news and entertainment outlets subscribe to CNS's publications, including but not limited to the *Los Angeles Times*, *Los Angeles Business Journal*, *Pacific Coast Business Times*, *San Jose Mercury News*, *The Atlanta Journal*

Constitution, *The Boston Globe*, BuzzFeed, *The Dallas Morning News, Detroit Free Press*, Fox Entertainment Group, *Houston Chronicle*, *The Salt Lake Tribune*, *San Antonio News Express*, *The Wall Street Journal*, Warner Bros. and many TV stations. The Washington-based Center for Public Integrity also subscribes.

20. Among academic institutions, subscribers to CNS's New Litigation Reports include Boston College Law School, Boston University, Case Western Reserve University, Harvard Law School, MIT School of Management, UC Hastings College of Law and UCLA School of Law, among others.

21. The New Litigation Reports also have several government subscribers, including the Los Angeles City Attorney's office and the City of Santa Monica.

22. All but a few of the nation's large and mid-sized law firms subscribe to one or more of CNS's publications, as do many smaller law firms in California.

B. <u>There Is a Long Tradition of Timely Access to New Complaints on Receipt</u>

23. A new complaint initiates an official governmental proceeding. In recognition of the media's crucial role in informing the public about how its government is functioning and other news of interest, there is a longstanding tradition of courts providing reporters with access to new civil complaints upon receiving them for filing, whether or not the clerical tasks associated with the intake of that complaint have been completed. This ensures that interested members of the public learn about new cases in a timely manner and while those cases are still newsworthy.

24. Accordingly, Judge Otero found that "[t]here is a long history of courts making complaints available to the media and the public soon after they are received, regardless of whether such courts use paper filing or e-filing systems." Order 18.

25. Prior to 2002, reporters for CNS and other media traditionally reviewed paper copies of newly filed complaints at OSC towards the end of the day on which they were received, regardless of whether court staff had completed administrative processing. This was (and is) the practice in many other counties in California and in cities and counties across America. Beginning about 2002, OSC began implementing

administrative procedures that delayed access until completion of processing. Although some state court clerks recently began withholding access until after processing as part of a transition to e-filing, OSC began delaying access until after processing before it adopted e-filing, and has continued to abide by that practice in its current mandatory e-filing environment.

C. The Value in Timely Access on Receipt Is Lost When Access Is Delayed

26. The complaint forms the basis, or foundation, of any litigation. It is the document by which the jurisdiction of a branch of government is invoked to use its authority and power to resolve what had previously been a private dispute. Even if dismissed without prejudice before judicial action, the filing of an action may affect the parties' rights under rules and statutes such as Federal Rule of Civil Procedure 41(a)(1)(B) and California Code of Civil Procedure § 425.16, or may be used to extract a private settlement that would not have been possible without a pending public case.

27. When a complaint is received by a court clerk for filing, the public – which funds the operation of the courts – is entitled to know who has invoked the jurisdiction and authority of the judicial branch and to what ends. The identity of the parties, the subject matter and factual and legal nature of the claims, and the day of filing are all matters of public interest, and often of immediate public concern.

28. The value of public access to complaints is lost if access is delayed until after processing. Withholding access until a complaint is deemed sufficiently "processed" withholds from the public knowledge of the important fact that a lawsuit has been filed, who is involved and what is at stake, until such time as the court clerk determines that a complaint is ready for the public to see.

29. Delays in access to complaints lead to errors in news reporting about those cases. In addition, denying access to complaints when they are received for filing allows the plaintiff to control what information the public is allowed to know about a complaint because the plaintiff can limit disclosure to a single select member

of the media whom plaintiff views as likely to be sympathetic to plaintiff's perspective.

30. As Judge Otero held in *Planet*, "'[l]ogic' [therefore] demands that the qualified right of timely access must arise the moment a complaint is received by the court, rather than after 'processing' is completed." Order 19.

D. Delays in Access at Orange County Superior Court

31. When CNS began covering OSC in 1995, the court provided reporters with a "media box" into which court staff placed complaints on the day the court received them, prior to the completion of administrative processing, which reporters could review at the end of each day. In this way, new complaints were consistently and reliably available for review by reporters in a timely fashion.

32. Beginning in 2002, OSC began slowing press access to new civil complaints, first by withholding them until the morning after they were filed, and then by withholding them until after they were docketed and scanned.

33. As a result of this change in policy and practice, access to new complaints was often delayed by four or five days. After several meetings and discussions with CNS and other media, access improved slightly but was still delayed by at least one and often two or three days.

34. In 2009, OSC stopped providing the media box of paper complaints altogether, making electronic terminals housed in the Records and Exhibits Management Unit ("Records Area") the only way to view civil court records at the courthouse.

35. OSC implemented optional e-filing in civil cases in 2010 and mandatory e-filing in 2013. E-filing has not solved the access delays, however, because the court does not make newly filed complaints available upon electronic receipt by the court and instead withholds them until court staff have completed administrative processing. As a result, there continue to be significant delays between the filing of a complaint and its being made available to the press and the public.

36. The delays caused by OSC's denial of access until after processing are exacerbated by its policy of closing the Records Area to the public each day at 4 p.m. Court staff continue processing complaints until 5, but members of the press and public cannot view any complaints received for filing and/or processed between 4 and 5 on the public access terminals until at least the next court day.

37. Moreover, electronically filed documents received by the courts in California after the close of business are deemed to be filed the next court day, unless the court provides otherwise by local rule. Cal. R. Ct. 2.250(b)(7) & 2.259(c). By local rule, OSC provides that "[e]lectronically filed documents filed prior to midnight on a court day will be deemed filed as of that day." OSC Local Rule 352. However, OSC provides no way for the press and public to see these complaints until at least the next court day, at the earliest, depending on when they are processed.

38. CNS has attempted several times to work cooperatively with Defendant and his predecessor to resolve its concerns over OSC's denial of timely access, but has been unsuccessful. In October 2010, during one of several meetings between CNS and OSC staff to discuss the issue dating back to 2003, Defendant's predecessor, Alan Carlson, conceded it was technologically feasible to provide access to new complaints promptly upon filing, but he refused to do so because, he said, the public and press have no right to access complaints until court staff have completed administrative processing and "accepted" the complaint. Further communications with OSC were equally unavailing.

39. In October 2016, following Judge Otero's rulings in *Planet*, CNS's counsel sent Carlson a letter explaining that withholding complaints until after administrative processing, and denying access after 4 p.m., were inconsistent with the recent Order and Judgment in *Planet*. CNS again asked that OSC adopt one of the various alternatives that would result in timely access, regardless of how long processing takes. A true and correct copy of CNS's counsel's correspondence is attached hereto as Exhibit A.

40. In an October 20 response, OSC General Counsel Jeff Wertheimer informed CNS that the court believed its policy and procedures complied with the First Amendment requirements in *Planet*, but did not address the *Planet* Court's ruling that withholding access until after processing, and denying access during the very end of the court day, both violated the First Amendment. A true and correct copy of Wertheimer's response is attached hereto as Exhibit B.

41. Wertheimer's letter also did not mention that Carlson had retired as Court Executive Officer effective October 2016, to be succeeded by Yamasaki as of December 2. When CNS learned of this change, it wrote to Wertheimer on December 1 to inquire whether Yamasaki was willing to resolve the matter by adopting one of the means available to ensure timely access to new complaints "irrespective of whether they have been processed." By letter dated December 12, 2016, which CNS's counsel did not receive until December 27, Wertheimer informed CNS that "Mr. Yamasaki's recent transition to the Court Executive Officer position at our Court will not cause any changes to be made to [its] policy" or "current procedures."

42. OSC's policy and procedures of withholding complaints until after processing, and denying access after 4 p.m. each day, prevent CNS from being able to access, and thus report on, a substantial percentage of newly filed civil complaints in a timely fashion.

43. CNS tracked and compiled access data for all civil unlimited complaints filed in OSC in October, November and December 2016, noting delays between when each complaint was received by the court for filing and when the court first made it available. Of the 3,225 civil unlimited complaints filed between October 1 and December 31, 2016, nearly half (49.1%) were withheld from the press and public for at least one and up to nine days after the court received them for filing.

44. During some periods, the delays were much worse. For example, during the first two weeks of October 2016, approximately 542 complaints were received for filing by OSC, of which 425 (more than 75%) were withheld from the press and

public for at least one and up to nine days. Access varied considerably from day to day, and on many days access was even more limited than that. Of the 52 complaints received for filing on October 6, 45 (or 86.5%) could not be seen for at least one day. On October 7, 42 out of 62 complaints (close to 70%) could not be seen for at least four days. On October 12, only four of 41 complaints received for filing that day (9.8%) could be reviewed that day, while 22 (more than 53%) could not be seen for at least two days. For October as a whole, 705 of the 1,069 complaints filed that month (roughly 66%) were not available for viewing for at least one day after they were received for filing, of which 265 (nearly 25%) were not available until two to nine days after filing. While access improved somewhat during the last two months of 2016, even then OSC denied access to more than four out of every 10 complaints received during that period (880 of 2,156 unlimited complaints, or 40.8%) for between one and nine days after filing.

45. These delays have impaired CNS's ability to provide timely reporting on civil filings of public interest. To cite just three examples from last year:

- In December 2016, a former NFL player filed a class action against a medical clinic specializing in emotional and behavioral issues, alleging that the clinic's purportedly confidential and HIPAA-compliant online patient portal was not secure and allowed unprotected access to patients' personal health information. This complaint was filed on Thursday, December 1, but was withheld by the court for more than a week, until Thursday, December 8. *McBean v. Amen Clinics, et al.*, Case No. 30-2016-00891254-CU-NP-CXC.
- In November 2016, consumers brought a class action against Procter & Gamble Co., alleging that Pampers-brand baby wipes marketed as "natural clean" contained "an unnatural and potentially harmful ingredient called phenoxyethanol" that could be harmful to infants. The complaint was filed on Monday, November 14, but was withheld by the

court until Friday, November 18. *Brenner v. Procter & Gamble Co.*, No. 30-2016-00887781-CU-BT-CXC.

- And in January 2016, a class action was filed against the City of San Juan Capistrano alleging the city overcharged residents millions of dollars for water and, when it was caught, offered refunds of only 20% of the overcharges. The complaint was filed on Friday, January 8, at 4:02 p.m., but was withheld by the court until the following Monday, January 11. *Daneshmand v. City of San Juan Capistrano*, No. 30-2016-00829167-CU-BC-CXC.

46. The most efficient way to provide access to newly e-filed civil complaints is to provide electronic pre-processing access via computer terminals located at the courthouse and available to the press even after the Records Area closes for the day and/or remotely online via the Internet (as the vast majority of federal district courts and a growing number of state courts do). Other options exist, as well. The method used to provide timely access is not the issue. What is important is that the public and press be provided timely access to new complaints upon their receipt for filing, as required by the First Amendment.

COUNT ONE

Violation of U.S. Const. Amend. I and 42 U.S.C. § 1983

47. Plaintiff CNS incorporates the allegations of Paragraphs 1-46 herein.

48. Defendant's actions under color of state law, including without limitation his policy and practice of withholding newly filed civil unlimited complaints from press and public view until after administrative processing, and the resulting denial of timely access to new civil unlimited complaints upon receipt for filing, deprive CNS, and by extension its subscribers, of their right of access to public court records secured by the First Amendment to the U.S. Constitution.

49. There is no compelling or overriding interest sufficient to justify Defendant's actions resulting in the denial of timely access to new complaints under

the First Amendment. And even if an overriding or compelling interest did exist, there are far less restrictive means of achieving any such interest, and Defendant's policies and practices are not narrowly tailored to serve any such compelling interest.

50. Defendant's policies and practices, including without limitation his policy and practice of denying access to new complaints until after they are processed, also are not narrowly tailored to serve a significant governmental interest. Nor do Defendant's policies and practices leave open ample alternative channels for communication of the information. They therefore are also not reasonable time, place or manner restrictions.

51. CNS has no adequate and speedy remedy at law to prevent or redress Defendant's unconstitutional actions, and will suffer irreparable harm as a result of Defendant's violation of its First Amendment rights. CNS is therefore entitled to declaratory and both preliminary and permanent injunctive relief to prevent further deprivation of the First Amendment rights guaranteed to it and its subscribers.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Courthouse News Service prays for judgment against Defendant David Yamasaki, in his official capacity as the Court Executive Officer/ Clerk of the Superior Court of the State of California, County of Orange, as follows:

1. For preliminary and permanent injunctions against Defendant, including his agents, assistants, successors, employees, and all persons acting in concert or cooperation with him, or at his direction or under his control, prohibiting him preliminarily, during the pendency of this action, and permanently thereafter, from continuing his policies that deny CNS timely access to new civil unlimited jurisdiction complaints once they are received by the court for filing, including, *inter alia*, his practice of denying access to complaints until after administrative processing.

2. For a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring Defendant's policies and practices that knowingly affect delays in access to newly filed civil unlimited complaints are unconstitutional under the First and Fourteenth

Amendments to the United States Constitution because these policies and practices constitute an effective denial of timely public access to documents that become public court records when they are received by the court for filing.

3. For an award of costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

4. For all other relief the Court deems just and proper.

Dated: January 24, 2017

BRYAN CAVE LLP
Rachel Matteo-Boehm
Roger Myers
Goli Mahdavi

By: /s/ Rachel Matteo-Boehm
Rachel Matteo-Boehm
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EXHIBIT A

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October 11, 2016

Alan Carlson
Court Executive Office and Clerk
Superior Court of California
County of Orange
Central Justice Center
700 W. Civic Center Dr.
Santa Ana, CA 92701

Re: Access To Civil Complaints At Orange County Superior Court

Dear Mr. Carlson:

Bryan Cave represents Courthouse News Service ("CNS"). Over the last several years, CNS has attempted several times to persuade your office to reverse its policy of withholding access to new unlimited civil complaints until after they are processed. To date, those efforts have failed.

As you no doubt know, a few months ago, the United States District Court for the Central District of California ruled that there is a First Amendment right of timely access to newly-filed civil complaints. *Courthouse News Serv. v. Planet*, 2016 WL 4157210 (C.D. Cal. May 26, 2016). Applying two decisions by the Ninth Circuit Court of Appeals in that case, United States District Court Judge James Otero ruled that the right of access attaches upon receipt – before processing – and that Ventura County Superior Court ("VSC") Clerk Michael Planet's practice of withholding access to new complaints until after processing violated that right. *Id.* Judge Otero therefore "permanently enjoined [VSC] from refusing to make newly filed unlimited civil complaints and their associated exhibits available to the public and press until after such complaints and associated exhibits are 'processed,' regardless of whether such complaints are filed in paper form or e-filed." *Courthouse News Serv. v. Planet*, 2016 WL 4157354, *1 (C.D. Cal. June 14, 2016). Copies of that order, judgment and permanent injunction are enclosed for your reference.

With Judge Otero's order and judgment to help inform the discussion, we once again write to respectfully request access to new unlimited civil complaints after they are received and before they are processed at the Orange County Superior Court ("OSC").

In 1995, CNS began reporting on the new civil actions at OSC, and its reporter made a daily check of a wooden box at the back of the records room next to the intake windows at the Central Justice Center on Civic Center Drive. The records room clerk gathered up the day's new complaints from the intake clerks at the end of the day and placed them in the box. The new actions were then reviewed by CNS as well as reporters from the *Orange County Register*, the *Los Angeles Times*, the *Los Angeles Daily Journal*, and City News Service on the same day they were filed, well before they were docketed.

Beginning in approximately 2002, the clerk's office began dismantling press access, first by withholding new complaints until the morning after they were filed, then by withholding them until after they were docketed and scanned. As a result, access to the new complaints was withheld from journalists for a period that ran from a few days up to a week.

With the transition to mandatory e-filing at OSC, the clerk's office policy of withholding access until after docketing – now referred to as "processing," which in the e-filing environment often includes "acceptance" – has remained in place, and is still in place to this day. Upon receipt by your office, new e-filed complaints are stamped with the date and time of receipt and consistent with Rule of Court 1.20(a), the filing date given to the filing party is the date of receipt. But your office withholds public and press access, on public terminals or by any other means, until after processing.

This practice has a direct effect on the timeliness of the reporting done by CNS reporter Joanna Mendoza, who visits the clerk's office in the Central Justice Center every court day, working through the afternoon until shortly before the clerk's office closes at 4:00 p.m., unless she is sick or on vacation. The only means by which Ms. Mendoza is able to view the new complaints is through public access computer terminals in the clerk's office, on which complaints are made available for public viewing only on a post-processing basis.[1] Although the press and public are required to leave the clerk's office by 4:00 p.m., court personnel continue to process new complaints until approximately 5:00 p.m.

The length of time that new complaints are withheld after filing varies from day to day and week. For example, in the week before Judge Otero's May 2016 ruling, the great majority of newly filed unlimited civil complaints were withheld two days or more while they were being processed. After the ruling, the pace of processing clearly picked up, and reached a point in August 2016 where a

[1] OSC also makes complaints available for online viewing for a fee, which ranges from a minimum of $7.50 to a maximum of $40, depending on the number of pages. This is what it costs just to see a complaint online, even if CNS does not need its own copy. There are roughly 70 new unlimited complaints filed at OSC each day. For a news service like CNS, whose reporter conducts an independent review of the entire flow of new civil complaints to determine which ones are newsworthy, paying to review all of these complaints would quickly add up to thousands of dollars per month. As such, CNS does not typically use the court's web site to conduct its daily review of complaints. In any event, complaints on the web site also are not available for review until after processing.

majority of cases were made available on the day of the filing. But since then, the processing pace has fallen off and access varies from day to day. For example, on October 5, 2016, 70% of the new unlimited civil complaints were withheld from public viewing. And since the viewing software was not working the following day (October 6, 2016), the withheld cases could not be seen until two days later, on Friday, October 7. We note that even when the viewing software is not working – something that happens not infrequently at OSC – court staff can still see, and take action on, the new cases, and it is entirely possible to provide access to them through one of the means noted below even without the viewing software.

As the order, judgment and permanent injunction in *Planet* make clear, a court clerk cannot constitutionally withhold access to new civil actions until after those complaints have been "processed" – that is, "the performance of administrative tasks that follow the court's receipt of a new complaint." 2016 WL 4157210 at *12-13, 19 (order granting in part and denying in part CNS motion for summary judgment and denying Planet's motion for summary judgment). This right of access on receipt before processing applies regardless of whether complaints are filed in paper or electronically. *Id.* at *12; *accord* 2016 WL 4157354 at *1 (judgment). While Judge Otero declined to find a "bright-line rule" requiring same day access in all circumstances for the purposes of the summary judgment motions before him, he went on to find, for the purposes of his permanent injunction, that the Ventura clerk's practice of withholding access to new complaints filed late in the day until the next court day did not pass constitutional muster. 2016 WL 4157210 at *20.

Following entry of the permanent injunction, access at VSC, which is currently provided by making copies of scanned complaints available on public access terminals before processing, has been near-perfect. For example, of the 159 new civil unlimited jurisdiction complaints filed during the three-week period between September 12-30, 2016, CNS's reporter was able to access and review all but one of those complaints, or 99.37%, on the same day they were filed. Meanwhile, OSC continues to withhold press and public access until new unlimited complaints are processed, with a resulting denial of timely access. Were Judge Otero's order and permanent injunction to be expanded to cover your court, we have no doubt that OSC's policy and practice would not be in compliance and thus would be found to be in violation of the First Amendment

It is relatively simple and very feasible for court clerks to provide timely access to newly e-filed civil complaints on receipt and prior to processing, as is currently being done by individual courts in Nevada, Georgia, Utah and Connecticut, along with the vast majority of federal district courts including all four of California's federal District Courts. In those federal and state courts where new e-filed complaints are not auto-accepted, this is often accomplished by giving journalists access to the queue into which newly filed complaints flow upon receipt by a court. Generally, that is the same queue that is seen by processing clerks before they process the new complaints. The general jurisdiction court in Atlanta, for example, moved to provide journalists with access to this queue, which can be thought of as an electronic in-box, in August 2016.

It is our understanding that at OSC, processing clerks work from a queue that holds new general civil complaints and another queue that holds new complex civil complaints. One simple way for OSC to bring itself into compliance with Judge Otero's order, then, would be to allow CNS access

to those queues in order to review new general civil complaints and new complex civil complaints. Indeed, providing access to these queues would be the functional equivalent of the physical box that OSC used in the past to provide access to complaints, prior to processing, to journalists.

Providing access to an electronic queue where complaints can be viewed on receipt, before processing, is ***not*** technologically difficult, nor is it dependent on use of a particular electronic case management or e-filing system. The ease with which this electronic in-box can be established is illustrated by the fact the e-filing vendor for these Georgia courts did not charge the courts any additional fees in order to set up in-boxes for journalists.

Alternatively, OSC could provide access to complaints on receipt by some other means, such as by printing out paper copies for press and public review, but given the ease of providing access to an electronic queue, there is no need to do so.

In light of the foregoing, CNS respectfully requests that your office discontinue its practice of withholding access until after processing, and adopt the electronic queue procedure described above or some other means of ensuring timely access to new complaints on receipt, irrespective of whether those complaints has been processed.

CNS appreciates your attention to these important issues, and looks forward to hearing from you.

Sincerely,

Rachel Matteo-Boehm

Enclosures

cc: Courthouse News Service

2016 WL 4157354
Only the Westlaw citation is currently available.
United States District Court,
C.D. 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 SJO (FFMx)

Signed 06/14/2016

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JUDGMENT FOR DECLARATORY RELIEF AND PERMANENT INJUNCTION IN FAVOR OF PLAINTIFF COURTHOUSE NEWS SERVICE AND AGAINST DEFENDANT MICHAEL PLANET

S. James Otero, U.S. District Judge

*1 This action came before the Court on the Amended Complaint of Plaintiff Courthouse News Service ("CNS") for Injunctive and Declaratory Relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the U.S. Constitution against Defendant Michael Planet, in his official capacity as Court Executive Officer and Clerk of the Superior Court in and for the County of Ventura, California.

The Court having entered an Order on May 26, 2016, Granting in Part and Denying in Part CNS's Motion for Summary Judgment, and Denying Defendant's Motion for Summary Judgment, it is hereby ORDERED, ADJUDGED and DECREED that, pursuant to Federal Rule of Civil Procedure 58, Judgment be entered in this action for Plaintiff CNS and against Defendant Planet as follows:

1. On CNS's Prayer for Declaratory Relief, it is ORDERED, ADJUDGED and DECREED that:

a. There is a qualified First Amendment right of timely access to newly filed civil complaints, including their associated exhibits.

b. This qualified right of timely access attaches when new complaints are received by a court, rather than after they are "processed" — i.e., rather than after the performance of administrative tasks that follow the court's receipt of a new complaint.

c. This qualified right of timely access attaches on receipt regardless of whether courts use paper filing or e-filing systems.

d. Planet's policy prior to June 18, 2014 of requiring that newly filed complaints and their associated exhibits be "processed" prior to providing the press and public with access to those complaints violates CNS's qualified First Amendment right of timely access to newly filed complaints and their associated exhibits because, for the reasons stated in this Court's May 26 Order, Planet has not met his burden of proving that this policy is essential to preserve higher values and narrowly tailored to serve that interest, as required to overcome CNS's qualified First Amendment right of access, or that this policy constitutes a reasonable time, place and manner restriction.

e. Planet's June 18, 2014 scanning policy also violates CNS's qualified First Amendment right of timely access to newly filed complaints and their associated exhibits because, for the reasons stated in this Court's May 26 Order, Planet has not met his burden of proving that this policy is essential to preserve higher values and narrowly tailored to serve that interest, or that this policy constitutes a reasonable time, place and manner restriction.

2. On CNS's Prayer for Injunctive Relief, it is ORDERED, ADJUDGED and DECREED that Planet is hereby permanently enjoined from refusing to make newly filed unlimited civil complaints and their associated exhibits available to the public and press until after such complaints and associated exhibits are "processed," regardless of whether such complaints are

filed in paper form or e-filed, and is further directed to make such complaints and exhibits accessible to the public and press in a timely manner from the moment they are received by the court, regardless of whether such complaints are scanned, e-filed, or made available in any other format, except in those instances where the filing party has properly moved to place the complaint under seal.

*2 3. On CNS's Prayer for Costs and Attorneys' Fees, it is ORDERED, ADJUDGED and DECREED that CNS is the prevailing party in this action. Pursuant to Federal Rule of Civil Procedure 54(d), CNS is awarded its costs in an amount to be determined pursuant to the procedures specified in Local Rules 54-1 *et seq.* Pursuant to 42 U.S.C. § 1988, CNS is further awarded its costs and attorneys' fees in an amount to be determined on noticed motion pursuant to Federal Rule of Civil Procedure 54(d)(2) and Local Rules 54-10 and 54-11, which shall be filed within 60 days of the date of entry of this judgment.

All Citations

Slip Copy, 2016 WL 4157354

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United States District Court,
C.D. California.

Courthouse News Service
v.
Planet.

CASE NO.: CV 11-08083 SJO (FFMx)
|
Signed 05/26/2016

Attorneys and Law Firms

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PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [Docket No. 119]; **DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** [Docket No. 163]

HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

*1 These matters come before the Court on cross-motions for summary judgment filed by Plaintiff Courthouse News Service ("CNS") ("CNS Motion") and Defendant Michael Planet ("Planet"), in his official capacity as Court Executive Officer of the Ventura County Superior Court ("VSC") ("Planet Motion") on or about March 14, 2016.[1] On March 28, 2016, Planet opposed the CNS Motion ("Planet Opp'n") and CNS opposed the Planet Motion ("CNS Opp'n"). On April 4, 2016, CNS replied to the Planet Opp'n ("CNS Reply") and Planet replied to the CNS Opposition ("Planet Reply"). Thirteen media organizations[2] filed an *amicus* brief in support of CNS ("Amicus Br.") on March 21, 2016. The Court found these matters suitable for disposition without oral argument and vacated the hearings set for April 11, 2015. *See* Fed. R. Civ. P. 78(b). For the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** the CNS Motion and **DENIES** the Planet Motion.

I. FACTUAL AND PROCEDURAL HISTORY

CNS, a national news organization that publishes daily reports for its subscribers about civil litigation, including the filing of new lawsuits, initiated the instant lawsuit on September 29, 2011 seeking same-day access to new civil unlimited jurisdiction cases filed with VSC. (*See* Compl., ECF No. 1.) In its Complaint and First Amended Complaint ("FAC") filed on June 3, 2014, CNS alleges that, in contrast to the "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[,] ... same-day access is a rarity at VSC and delays in access are rampant." (Compl. ¶¶ 4-5; FAC ¶¶ 4-5, ECF No. 58.) Indeed, according to CNS's pleadings, "[d]uring a four-week period between August 8 and September 2, 2011, C[NS] was given same-day access to only small minority of new civil unlimited complaints, with the vast majority of complaints delayed for days or even weeks." (FAC ¶ 5.) "Having failed in its efforts to work cooperatively with [VSC] to reach an amicable resolution to these delays," CNS filed suit against VSC seeking injunctive and declaratory relief, asserting causes of action for violations of the First Amendment and federal common law pursuant to 42 U.S.C. § 1983 and California Rule of Court 2.550. (*See* FAC ¶ 6.)

A. Procedural History

*2 The instant action was initially assigned to Judge Manuel L. Real, who on November 30, 2011 granted VSC's motion to dismiss and abstain. (Order Granting Def.'s Mot. to Dismiss and Abstain ("First Dismissal Order"), ECF No. 38.) In the First Dismissal Order, Judge Real dismissed CNS's third claim for relief for violation of California Rule of Court 2.550 pursuant to the Eleventh Amendment to the United States Constitution and dismissed CNS's remaining § 1983 claims pursuant to the abstention doctrines enunciated in *O'Shea v. Littleton*, 414 U.S. 488 (1974) ("*O'Shea* abstention") and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) ("*Pullman* abstention"), under which federal courts may decline to decide matters over which they

have jurisdiction but which implicate sensitive state interests. (*See* First Dismissal Order.)

CNS appealed the dismissal of its § 1983 claims[3] to the Court of Appeals for the Ninth Circuit, which on April 30, 2014 reversed and remanded in light of the important First Amendment questions raised in CNS's Complaint. *Courthouse News Service v. Planet*, 750 F.3d 776 (9th Cir. 2014) ("*Planet I*"). In particular, the Ninth Circuit, noting that "*Pullman* abstention 'is generally inappropriate when First Amendment rights are at stake,' " found that "CNS's claims, like other First Amendment claims, raise issues of particular federal concern." *Id.* at 784-85 (citing *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010)).

Upon remand, CNS filed its First Amended Complaint ("FAC") pursuant to the parties' stipulation, and Planet soon thereafter moved to dismiss the FAC for failure to state a claim upon which relief could be granted. (Stip. to Amend Compl., ECF No. 56; FAC, ECF No. 58; Mot. to Dismiss FAC, ECF No. 61.) On August 28, 2014, Judge Real, describing "the discrete issue presented in this case [a]s entirely temporal," dismissed the FAC under the Ninth Circuit's "experience and logic" test enunciated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), which describes the extent of the right of access to judicial documents in criminal proceedings. (Order Granting Def.'s Mot. to Dismiss ("Second Dismissal Order") 4, ECF No. 82.) In particular, Judge Real found that CNS's request for same-day access failed both the "experience" and "logic" prongs as a matter of law, for "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 to any type of judicial proceeding, and before they are available to the judges and their law clerks or the parties to the suit." (Second Dismissal Order 6-8 [emphasis in original].) Judge Real also noted that state courts "have the right to safeguard unprocessed documents from theft and damages, thereby ensuring the integrity of their files, and protecting the privacy and other interests of litigants and third parties." (Second Dismissal Order 8-9.)

CNS appealed the Second Dismissal Order to the Ninth Circuit, which on June 23, 2015 reversed and remanded, finding that the district court misapplied the standard governing Rule 12(b)(6) motions. *See Courthouse News Service v. Planet*, 614 Fed.Appx. 912 (9th Cir. 2015) ("*Planet II*"). In particular, the Ninth Circuit held that although the district court applied the correct Supreme Court precedent, it failed to determine whether the delays alleged in the FAC, which must be taken as true for the purpose of ruling on a Rule 12(b)(6) motion, implicated the constitutional right to access to civil complaints. *Id.* at 914-15. The Ninth Circuit also granted CNS's request that the Clerk of Court for the Central District of California assign this case to a different district court judge upon remand. *Id.* at 915.

*3 The instant action was subsequently remanded to the Central District of California and reassigned to this Court. (Mandate, ECF No. 90; Notice of Reassignment of Case, ECF No. 91.) On August 28, 2015, Planet filed his Answer to the FAC. (Answer, ECF No. 100.) On September 21, 2015, the Court held a scheduling conference in which it set a trial date for June 21, 2016 and a motion hearing cutoff date of April 25, 2016. (*See* Minutes of Scheduling Conference, ECF No. 105.) The parties filed their respective motions for summary judgment on or about March 14, 2016. (CNS Mot., ECF No. 119; Planet Mot., ECF No. 163.)

B. Undisputed Facts

As correctly noted by Planet in his reply brief, this case presents the "rare circumstance where cross-motions for summary judgment appear to be two ships passing in the night ..." (Planet Reply 1, ECF No. 185.) Notwithstanding the parties' widely divergent views regarding First Amendment jurisprudence and the relevance of voluntary changes in one parties' practices in a constitutional challenge brought pursuant to § 1983, the parties do not dispute a number of key material facts, as set forth below.

1. Courthouse News Service

CNS is a nationwide legal news service founded in 1990 that specializes in news reporting on the legal record, from the date of filing new complaints through judgment and appeal. (Pl.'s Statement of Undisputed Material Fact ("PSUMF") ¶ 8, ECF No. 157.) CNS covers approximately 2,600 state and federal trial and appellate courts around the nation and employs more than 250 reporters and editors, each of whom covers one or more federal and/or state courts. (PSUMF ¶¶ 9-10.) Except in certain instances in which courts covered by CNS publish new civil complaints on the internet, CNS's employees visit their respective courts near the end of each day to review new civil complaints filed earlier that day and determine which ones merit coverage. (PSUMF ¶ 10.)

CNS has more than 2,700 subscribers nationwide, including lawyers, law firms, news organizations, other media outlets, and entertainment and watchdog groups. (PSUMF ¶¶ 11-12.) In California state courts, CNS only

reports on "unlimited jurisdiction" civil complaints, in which the amount in controversy exceeds $25,000. (PSUMF ¶ 16.) There are approximately 65 subscribers to the "Central Coast Reports," which is the CNS publication that reports on lawsuits pending at VSC. (Def.'s Statement of Undisputed Material Fact ("DSUMF") ¶ 2, ECF No. 163-2.)

2. Michael Planet and Ventura Superior Court

Defendant Michael Planet is, and has been since 2001, employed by VSC as its Court Executive Officer and Clerk. (PSUMF ¶ 1.) As Court Executive Officer and Clerk, Planet is responsible for the administration of court records at VSC, including responding to requests by the media and the public for access to court records. (PSUMF ¶ 2.) Cheryl Kanatzar ("Ms. Kanatzar") is, and has been since 2006, the Deputy Executive Officer for VSC, and responds directly to Planet. (PSUMF ¶ 3.) In this role, Ms. Kanatzar is and was responsible for both processing civil court complaints filed at VSC and overseeing the management of all of the Court Processing Assistants ("CPAs") who work in the Civil Department of VSC. (PSUMF ¶¶ 4-5.)

3. History of the Relationship Between CNS and VSC

CNS began coverage of VSC in 2001, initially sending a reporter to visit the courthouse once per week. (DSUMF ¶ 6.) In November 2010, CNS began covering VSC on a daily basis. (DSUMF ¶ 7.) It again sought to work out an informal procedure to enable same-day access for its reporter, but it could not reach agreement with court staff. (*See* PSUMF ¶ 35.) In June 2011, CNS's counsel wrote to Planet, explaining that the delays were "effectively denials of access" and requesting that complaints be made available on the day of filing before being fully processed. (PSUMF ¶ 36.) In this correspondence, CNS's counsel noted that many other courts, in California and elsewhere, permitted reporters to access complaints before full processing was complete. (PSUMF ¶ 36.) Three weeks later, Planet denied this request. (PSUMF ¶ 37.) Citing "serious resource shortages as a result of budget reductions," Planet explained that VSC could not "prioritize [same-day] access over other priorities and mandates." (PSUMF ¶ 37 [citing Decl. Jonathan Fetterly in Supp. CNS Mot. ("Fetterly CNS Mot. Decl."), Ex. 1 ("Planet Dep. Tr.") at Ex. 11].) Prior to June 18, 2014, Planet refused to make complaints available before they had been fully processed. (PSUMF ¶¶ 34, 37 [citing Planet Dep. Tr. at Ex. 11].) Indeed, Planet to this day takes the position that new unlimited civil complaints received at VSC are not "filed" until after they are processed, nor do newly filed complaints become "official court records" or "public records" until after they are processed. (PSUMF ¶¶ 30-32.)[4] Planet maintains that it is appropriate for VSC to deny media requests to examine newly filed complaints on the ground that VSC has not yet completed its administrative tasks associated with processing those complaints. (PSUMF ¶ 33.) In particular, Planet contends that this no-access-before-processing policy was justified because of (1) concerns about privacy and confidentiality;[5] (2) concerns about accounting protocols and checks attached to complaints; (3) quality control ("QC") concerns; (4) efficient administration of the court; and (5) integrity of court records. (PSUMF ¶¶ 86-87.) VSC, however, generally does not redact information from new complaints themselves before filing them and making them available to the public, in part because California Rule of Court 1.20(b) provides that it is the filer's sole responsibility to exclude or redact private information from publicly filed documents. (PSUMF ¶ 88; PSUMF Opp'n ¶ 88.)

*4 As of October 31, 2011, VSC's Civil Department received approximately 8 unlimited civil complaints per day. (PSUMF ¶ 43.) At her November 18, 2015 deposition, Ms. Kanatzar estimated that in 2012, VSC's Civil Department received "probably between 10 and 12" unlimited civil complaints per day, and that the department receives "between 12 and 15 civil unlimited cases per day now." (PSUMF ¶¶ 44-45.)

4. VSC's Access Policy Between 2010 and June 18, 2014; CCMS Processing

VSC does not maintain any civil unlimited jurisdiction case files in electronic format and does not require litigants to submit complaints, motions, or any other documents through an electronic filing system; instead, it maintains all case files in hard copy form. (DSUMF ¶ 4; PSUMF Opp'n ¶ 60.) Prior to enacting the Scanning Policy discussed in greater detail below, VSC maintained a "media bin" in its Records Department in which newly filed civil complaints, with the exception of those requiring "immediate judicial review," were intended to be deposited for public access after processing by a Court Processing Assistant ("CPA"). (DSUMF ¶ 4.)
Since at least November 1, 2010, VSC processed most new unlimited civil complaints received by VSC at either the filing counters or the new filings desk(s) in the Civil Department. (PSUMF ¶ 46.) Since at least 2010, VSC has

used the Court Case Management System, Version 3 ("CCMS") to process new complaints it receives and to maintain its docket of court filings. (PSUMF ¶ 47.) The utilization of CCMS required CPAs at VSC to enter "considerably more information" and required "a fair amount of time" to process new complaints before a file number could be generated. (PSUMF ¶ 48.)[6]

CPAs who were newly assigned to the new filings desk were subject to QC review, which consisted of a supervisor's review of the clerk's entry of data into CCMS and confirmation that documents were signed and stamped correctly. (PSUMF ¶ 54.) CPAs assigned to the new filings desk were rotated frequently and were subject to such QC review for varying periods of time, between several weeks and several months. (PSUMF ¶ 55.) The actual QC review process could take one to several days to complete, and newly filed complaints could "stack up" on the desk of a CPA or supervisor awaiting QC review. (PSUMF ¶¶ 57-58.)

Between November 2010 and June 18, 2014, unless a newly filed complaint was required to be presented to a judicial officer for review,[7] CPAs who processed such complaints first designated such complaints as "located to Media Bin" in CCMS, and subsequently routed such complaints to the physical media bin in the records department for viewing by the public. (PSUMF ¶ 52.) The QC review noted above took place after new complaints were processed and "located" to the media bin, but before they were actually routed to the physical media bin. (PSUMF ¶ 56.) Newly filed complaints processed by CPAs who were subject to QC review would not go to the physical media bin until after the QC process had been completed. (PSUMF ¶ 59.)

*5 New complaints designated as "located to the media bin" in CCMS, however, were not always located in the physical media bin. (PSUMF ¶ 61.) Moreover, VSC did not maintain a record of when new complaints were delivered to the media bin or who delivered them until April 22, 2014. (PSUMF ¶ 62.) Perhaps in part as a result of these issues, new complaints received for filing at VSC are not always processed on the same day they are received for filing. (PSUMF ¶ 60.)

For example, between August 8 and September 2, 2011, CNS reviewed 152 new complaints filed at VSC; of these, only 9 were made available to CNS the same day they were filed, 28 were made available to CNS the next court day, and 115 were not made available for review for two or more court days. (PSUMF ¶ 63.)[8] During other periods between 2012 and 2015, CNS experienced the following delays:

Time Period	Same Day (%)	Next Day (%)	2+ Day (%)
June 11-22, 2012	0	55	45
December 10-21, 2012	2	46	52
August 12-23, 2013	0	67	33
March 24-April 4, 2014	3	32	65
April 14-25, 2014	14	66	20
November 16-27, 2015	69	14	17

(PSUMF ¶ 64.) Staff at VSC acknowledged these delays, as evidenced by internal memoranda that identify backlogs ranging from several days to several weeks. (PSUMF ¶¶ 65-70.) One such memorandum, dated July 19, 2010, states in relevant part: "The civil department continues to show significant amount of backlog in new filings and judgments. However, the oldest date items are within reason per our new drop off policy." (PSUMF ¶ 67.)

5. VSC Explores Alternatives to Its System of Making Complaints Available After Processing in CCMS

In light of these noted delays and several correspondences between Planet and representatives and counsel for CNS regarding these delays, (*see* PSUMF ¶¶ 38-40), VSC brainstormed several potential alternatives to its then-existing process-then-access procedure. First, in June 2013, VSC conducted a "pilot program" to test whether VSC could make scanned copies of new complaints available before processing. (PSUMF ¶ 77.) Although "[t]he 'test' project in scanning the new filings went well," it was ultimately not implemented due to "bugs" and concerns about "firewall issues." (PSUMF ¶ 77; PSUMF Opp'n ¶ 77.)

Moreover, in April 2014, VSC employees discussed "the idea of making a copy [of new complaints] or possibly having a local rule requiring the submitting party to submit an additional copy" that could be placed in the media bin at no additional cost to VSC. (PSUMF ¶¶ 79, 81.) VSC expressly rejected the idea of having a local rule requiring parties to submit an extra copy of the complaint and its exhibits for the media to review,[9] and VSC employees never followed up with the suggestion of having VSC itself make copies to place in the media bin. (PSUMF ¶¶ 80, 82-83.)

6. VSC's Implements the "Scanning Policy" on June 18, 2014

*6 On June 18, 2014, VSC adopted a scanning program whereby new civil complaints—and only such complaints—are scanned, before processing, and made available for public viewing at computer terminals located in the clerk's office ("Scanning Policy"). (PSUMF ¶ 85; PSUMF Opp'n ¶ 96; Planet Dep. Tr., Ex. 16 ("Scanning Policy").) VSC does not review the complaints themselves before scanning, and does not scan accompanying documents, such as fee waiver applications, due to privacy concerns. (*See* PSUMF ¶ 89; PSUMF Opp'n ¶ 89.) Planet believes the Scanning Policy addresses VSC's previously expressed concerns, as complaints are scanned prior to processing and possible QC review. (PSUMF ¶ 99; PSUMF Opp'n ¶ 99.)

CMS has identified one instance in which a complaint filed in VSC on January 7, 2016 was not made available to be viewed in the computer terminals to which the public has access until January 11, 2016. (PSUMF ¶ 72.) Planet acknowledges this example, but contends that it was the result of human error, and is one of the 134 out of 4,628 civil complaints filed since the scanning policy's implementation that was not made available the same day it was filed. (PSUMF Opp'n ¶ 72.)

II. DISCUSSION

Tasked with playing the part of judicial lighthouse for these "two ships passing in the night," (*see* Planet Reply 1), the Court must first shed light on the parties' legal positions and the relevant First Amendment principles.

According to CNS and Amici, the central question the Court must answer in this case is whether the First Amendment of the United States Constitution requires that new civil complaints filed on a particular day must be made available for review by the media and the public by the end of that day. (*See* CNS Mot. 1 ["[T]his case only seeks to restore the simple premise that new civil complaints filed throughout the day can and should be available for media review by the end of the day."]; Amicus Br. 12 ["Denying reporters access to civil complaints on the day they are filed threatens to stifle free speech and public debate at the moment complaints are most newsworthy."]; CNS Reply 2 ["[T]he access right attaches '[u]pon th[e] court's receipt of a submitted document,' ... from which point delaying access until the end of the court day may be a reasonable TPM restriction, but a delay of '48 hours,' ... or '24 hours' to a single document or hearing is unconstitutional unless necessary to protect a compelling interest ..."].) CNS contends the Court must answer this question in the affirmative, taking the position that because many state and federal courts across the nation traditionally have and do provide journalists with same-day access to newly filed complaints, Planet cannot carry his burden of showing VSC's delays in granting access to newly filed complaints

as a result of its "processing" procedure is justified.

Planet responds as follows: (1) CNS's argument fails because it is undisputed that VSC's Scanning Policy has "cured" any delays resulting from VSC's previous processing procedure, rendering permanent injunctive relief inappropriate; (2) the First Amendment does not require "same-day" access, even though this is what VSC now provides in 97% of cases; and (3) VSC's Scanning Policy is a reasonable time, place, and manner restriction. (*See generally* Planet Opp'n, Planet Reply.)

Having set forth the parties' respective positions, the Court now discusses the applicable legal standards.

A. Legal Standards

1. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party does not need to produce any evidence or prove the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 325. Rather, the moving party's initial burden "may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* "Summary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.' " *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (quoting *Celotex*, 477 U.S. at 322).

*7 Once the moving party meets its burden, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by [the] depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotation marks omitted). A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radios Corp.*, 475 U.S. 574, 586 (1986). "If the [opposing party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50. "[I]nferences to be drawn from the underlying facts," however, "must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 587.

2. First Amendment Right of Access to Judicial Documents and Proceedings

"The First Amendment, in conjunction with the Fourteenth, prohibits governments from 'abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' " *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (quoting U.S. CONST. amend. I). "Although the First Amendment does not enumerate special rights for observing government activities, '[t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment.' " *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012) (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978)). "To provide this First Amendment protection, the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities," which "originated in a series of cases in which the media sought to observe criminal judicial proceedings." *Id.* at 898.

The scope of this qualified right of access has since expanded, and the Court of Appeals for the Ninth Circuit now holds "that access to public proceedings and records is an indispensable predicate to free expression about the workings of government." *Planet I*, 750 F.3d at 785. Moreover, "federal courts of appeals have widely agreed that this important First Amendment right of access 'extends to civil proceedings and associated records and documents.' " *Planet II*, 614 Fed.Appx. at 914 (quoting *Planet I*, 750 F.3d at 786). This is because the right of

access is "an essential part of the First Amendment's purpose to 'ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.' " *Planet I*, 750 F.3d at 785 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982)); *see also Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("We thus find that the public and press have a first amendment right of access to pretrial documents in general.").

As noted by the Supreme Court in the seminal *Richmond Newspapers* decision, however, the "First Amendment rights of the public and representatives of the press are [not] absolute," analogizing right of access cases to those in which "a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic ..." *Richmond Newspapers*, 448 U.S. at 581 n. 18. Following this analogy, the Ninth Circuit holds that the "right of access may be overcome by an 'overriding [governmental] interest based on findings that closure is essential to preserve higher values,' " acknowledging that "[t]he delay in making the complaints available may also be analogous to a permissible 'reasonable restriction[ ] on the time, place, or manner of protected speech.' " *Planet I*, 750 F.3d at 785 n. 9 (quoting *Leigh*, 677 F.3d at 898; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

*8 Accordingly, to determine whether Planet has violated CNS's constitutional right to access newly filed civil complaints, the Court must apply the two-part test announced in *Press-Enterprise Co. v. Superior Court of California for Riverside County* ("*Press-Enterprise II*"). First, the Court must determine the scope of the qualified First Amendment right of access—i.e., whether the Constitution requires that courts make civil complaints available to the press and the public at large the same day that such complaints are filed, or instead imposes some other obligation—which requires examining "considerations of experience and logic." *Press-Enterprise II*, 478 U.S. 1.9 (1986). If such a "qualified First Amendment right of public access attaches," then the Court must determine whether Planet's access policy or policies are "essential to preserve higher values and [are] narrowly tailored to serve that interest," i.e. by constituting a reasonable time, place, or manner restriction. *Id.* In particular, in order to prevail as to this second inquiry, Planet must demonstrate that its access policies amount to "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

3. Injunctive Relief, Declaratory Relief, and Mootness

In its prayer for relief, CNS seeks both "preliminary and permanent injunctions against" Planet that would prohibit him "from continuing his policies resulting in delayed access to new unlimited jurisdiction civil complaints and denying C[NS] timely access to new civil unlimited jurisdiction complaints on the same day they are filed, except as deemed permissible following the appropriate case-by-case adjudication." (FAC at 13.) "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). To be awarded a permanent injunction, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Amoco Prod'n Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

"An injunction is an exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief." *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (citing *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)). "The sole function of an action for injunction is to forestall future violations. It is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured." *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952).

"Equitable relief is not granted as a matter of course ..., and a court should be particularly cautious when contemplating relief that implicates public interests ...." *Salazar*, 559 U.S. at 714 (internal citations omitted).

"Because injunctive relief 'is drafted in light of what the court believes will be the future course of events, ... a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an 'instrument of wrong.' " *Id.* at 714-15 (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2961, pp. 393-94 (2d ed. 1995)).

*9 One instance in which an injunction should not issue is where a change in the defendant's conduct has rendered the case moot. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Already, LLC v. Nike, Inc.*, — U.S. —, 133 S. Ct. 721, 726 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, — U.S. —, 132 S. Ct. 2277, 2287 (2012); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (internal quotation marks omitted)). "But voluntary cessation can yield mootness if a 'stringent' standard is met: 'A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (quoting *Friends of the Earth*, 528 U.S. at 189).

Although courts "presume that a government entity is acting in good faith when it changes its policy ... when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Id.* (internal citations omitted). This is because "a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the [offending] provision." *Id.* (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991)). "A statutory change ... is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Id.* (quoting *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006)). "By contrast, 'repeal or amendment of an ordinance by local government or agency does not necessarily deprive a federal court of its power to determine the legality of the practice' at issue." *Id.* (quoting *Bell v. City of Boise*, 709 F.3d 890, 899 (9th Cir. 2013)). Finally, "a policy change not reflected in statutory changes or even in changes in ordinances or regulations will not necessarily render a case moot ..., but it may do so in certain circumstances." *Id.* (internal citations omitted). Thus, the Ninth Circuit has indicated that consideration of the following five factors may indicate whether mootness is more likely:

> (1) the policy change is evidenced by language that is "broad in scope and unequivocal in tone;" (2) the policy change fully "addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case;" (3) "th[e] case [in question] was the catalyst for the agency's adoption of the new policy;" (4) the policy has been in place for a long time when we consider mootness; and (5) "since [the policy's] implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff[.]"

Id. at 972 (internal citations omitted). "On the other hand, [courts] are less inclined to find mootness where the 'new policy ... could easily be abandoned or altered in the future.' " *Id.* (quoting *Bell*, 709 F.3d at 901). "Ultimately, the question remains whether the party asserting mootness 'has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.' " *Id.* (quoting *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000)).

CNS also seeks a declaration that Planet's "policies that knowingly affect delays in access and a denial of timely, same-day access to new civil unlimited complaints a[re] unconstitutional under the First and Fourteenth Amendments to the United States Constitution ..." (FAC at 13.) "A judicial declaration ... 'clarifies the parties' legal relations and affords relief from the uncertainty surrounding [a defendant's] obligations," including those under the First Amendment. *Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co.*, 873 F.2d 229, 232 (9th Cir. 1989).

B. Analysis

1. CNS Has Not Demonstrated that the First Amendment Requires that Courts Grant Access to Complaints the "Same Day They Are Filed"

*10 Starting from the undisputed premise that "the public and press have a first amendment right of access to pretrial documents in general," *Associated Press*, 705 F.2d at 1145, CNS and Amici principally advocate that the Constitution requires that courts provide public access to newly filed civil complaints the same day they are filed. (*See generally* CNS Mot., Amicus Br., CNS Reply.)

In support of this contention, CNS selectively quotes from a number of Ninth Circuit cases involving distinct First Amendment rights; none of these cases, however, lead to the conclusion that the First Amendment requires affording same-day access to all newly filed civil complaints.

First, neither of the appellate decisions arising out of this case, *Planet I* or *Planet II*, hold that the First Amendment requires providing same-day access to newly filed complaints. In *Planet I*, the Ninth Circuit noted 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." *Planet I*, 750 F.3d at 792-93. The Ninth Circuit expressly stated that it "take[s] no position on the merits of CNS's claims," and remanded so that the district court could adjudicate the case on the merits. *Id.* at 793. Thus, CNS's citation to *Planet I* for the proposition that because many courts allow the press to see complaints the day they are filed, same-day access must be what the First Amendment requires, does not persuade. (*Cf.* Mot. 1 [citing *Planet I* for the following language: "[i]n courthouses around the country – large and small, state and federal – CNS reporters review civil complaints on the same day they are filed."].)

Moreover, in *Klein v. City of San Clemente*, the Ninth Circuit enjoined the City of San Clemente's anti-litter ordinance prohibiting vehicle leafletting, noting (1) that neither the interest in prohibiting litter nor the protection of private property constituted sufficiently substantial government interests to warranting restricting speech; and (2) that such a blanket prohibition was not narrowly tailored to advance either of its asserted interests. 584 F.3d 1196 (9th Cir. 2009). Although the Court finds *Klein's* broad declaration "that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,' " *id.* at 1207-08 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), the case is otherwise distinguishable from the case at bar.

The only case the Court has been able to locate that even arguably holds that a state court violates the First Amendment by withholding access to newly filed complaints for even one day is *Courthouse News Service v. Jackson*, a case from the Southern District of Texas in which the district court, in its order granting CNS's motion for a preliminary injunction, determined "that the 24 to 72 hour delay in access is effectively an access denial and is, therefore, unconstitutional." *Courthouse News Service v. Jackson* ("*Jackson I*"), Civil Action No. H-09-1844, 2009 U.S. Dist. LEXIS 62300, at *10-12 (S.D. Tex. July 20, 2009). In so ruling, the court relied on a case from the Seventh Circuit stating that "[t]he newsworthiness of a particular story is often fleeting." *Id.* at *11. The court in *Jackson*, however, ultimately entered an **agreed-upon** permanent injunction requiring the Harris County District Clerk's Office to provide "same-day access to, and ability to download, print, or obtain a hard copy of, all petitions and case-initiating documents in civil cases (excluding family law cases), filed and received by the Harris County District Clerk between 12:00 a.m. midnight and the time the Harris County District Clerk's Office closes (at the present time, this means up until 5:00 p.m. Central Time Monday through Friday)," subject to a number of express limitations. *Courthouse News Service v. Jackson* ("*Jackson II*"), Civil Action No. 4:09-CV-01844, 2010 U.S. Dist. LEXIS 74571, at *3 (S.D. Tex. Feb. 26, 2010). These limitations include, *inter alia*, (1) "where the filing party is seeking a temporary restraining order or other emergency relief, or has properly filed the document under seal, or an applicable court order, statute, or local rule provides that the document is confidential;" (2) where the intake department of the Clerk's Office "is in critical staffing mode or completely closed for business due to inclement weather, building evacuation, or other emergency;" and (3) "where other extraordinary circumstances outside of the control of the District Clerk's Office make compliance literally impossible, in which case the document will be made available on the same day that compliance is no longer impossible." *Id.* at *3-4.

***11** The Court agrees with the reasoning in *Jackson I* insofar as the case holds that the First Amendment requires that courts provide **timely access** to newly filed complaints. To the extent one could read the preliminary injunction order in *Jackson I* as conferring a **same-day right of access** to newly filed complaints, however, this Court would reach a different conclusion. In the chief case cited by *Jackson* on this issue, *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, the Seventh Circuit, tasked with determining whether members of the press had standing to challenge a protective order issued in a single case, held that "[i]n light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be **immediate and contemporaneous**." 24 F.3d 893, 897 (7th Cir. 1994) (emphasis supplied) (quoting *Nebraska Press Ass'n v. Stuart* ("*Stuart II*"), 427 U.S. 539 (1976)). According to the Seventh Circuit, the requirement of "immediate and contemporaneous" access follows from the premise that "each passing day may constitute a separate and cognizable infringement of the First Amendment." *Id.* (quoting *Nebraska Press Ass'n v. Stuart* ("*Stuart I*"), 423 U.S. 1327, 1329 (1975)). Both the *Grove Fresh* and

Stuart II cases, however, involved instances in which individual members of the press were denied access to documents or proceedings that were particularly requested by the members of the press, who then challenged those denials of access on First Amendment grounds. Here, by contrast, CNS challenges Planet's former and current access policies generally, which in certain instances have resulted in complaints not being accessible for more than a day after they were filed. Although *Grove Fresh, Stuart II*, and the instant action all center on the First Amendment right of access, the Court finds "the legal context in which [they] arise[ ]" to materially differ, *Stuart II*, 427 U.S. at 551, and therefore declines to read a universal "same-day" access requirement into the First Amendment.

Moreover, neither the numerous non-binding cases cited by CNS in the CNS Motion nor the voluminous declarations submitted in support of its motion convince the Court that "experience" or "logic" teach that the First Amendment requires same-day access to newly filed complaints. First, although the bulk of the cited cases discuss the longstanding history of courts granting expeditious public access to complaints and the policy rationales underlying this historical practice, aside from the *Jackson* case discussed above in which the parties stipulated to the entry of an agreed-upon judgment, none instruct that the Constitution requires same-day access. *See, e.g., Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, No. 15-0374-cv, 2016 U.S. App. LEXIS 3233, at *17 (2d Cir. Feb. 24, 2016) (invoking the "experience and logic" test to find a presumptive right of access to complaints in the context of sealing such documents, and not addressing same-day access). Indeed, a review of the various states' rules of court and the parties' numerous declarations regarding the access procedures of courts across the country reveal the existence of a genuine dispute[10] as to whether a practice of same-day access has been adopted nationwide. (*See* PSUMF Opp'n ¶ 19 [highlighting the dispute regarding the access procedures of various courts].) Because "the experience test requires that a right be established nationwide" and because the existence of a nationwide practice of providing same-day access is genuinely disputed, the Court concludes that CNS has failed meet its burden of demonstrating the existence of a qualified right of access to complaints the same day they are filed.

*12 The Court likewise finds that CNS has failed to demonstrate the "logic" in creating a bright-line rule mandating same-day access to newly filed complaints. Although "same-day access" certainly has a pleasant ring to it, the cases selectively cited by CNS do not call for such a rule, separate and apart from the principle that the First Amendment requires providing timely access to newly filed complaints. To the extent CNS contends that "same-day access" is the only logical line that can be drawn to ensure that "timely access" is afforded—given, for example, the "news cycle" cited by CNS's president, (*see* Girdner Decl. ¶ 63)—in light of the "24/7" nature of the news cycle, (CNS Mot. 20 [quoting Drechsel Decl. ¶¶ 14, 45-49]), such an argument logically culminates with a requirement that courts make complaints available the exact moment they are received. CNS can petition others for such a rule, but the Court finds that it would defy logic to read an unyielding same-day access requirement into the First Amendment.

For the foregoing reasons, the Court **DENIES** the CNS Motion insofar as it asks the Court to find a First Amendment right of same-day access to newly filed complaints.[11]

2. CNS Has, However, Demonstrated that a Qualified First Amendment Right of Timely Access to Complaints Arises When New Complaints Are Received

Notwithstanding the Court's rejection of a qualified First Amendment right of access to newly filed complaints the same day they are filed, the Court concludes that CNS has succeeded in establishing a qualified First Amendment right of **timely access** to such complaints that **attaches when new complaints are received by a court.** As a starting point, the Ninth Circuit in *Planet I* held that "there is no question that CNS itself has alleged a cognizable injury caused by the Ventura County Superior Court's denial of timely access to newly filed complaints," without deciding whether Planet and VSC's policy in fact violated the First Amendment. *Planet I*, 750 F.3d at 788. Thus, the Ninth Circuit recognizes a qualified right of timely access to newly filed complaints.

The Ninth Circuit did not decide, however, at what point in time this qualified right attaches—i.e., when the complaint is received by the court, or instead after a complaint has been sufficiently "processed." Although the principal case cited by CNS in support of its contention that "Ninth Circuit law makes clear [the right of] access attaches upon receipt by the clerk," *Associated Press*, does not actually contain such a holding,[12] the Court nevertheless finds that CNS has met its burden of demonstrating that both "experience" and "logic" dictate such a result.

Indeed, CNS has submitted a number of declarations demonstrating that there is a long history of courts making complaints available to the media and the public soon after they are received, regardless whether such

courts use paper filing or e-filing systems. (*See, e.g.*, Decl. Robert Drechsel in Supp. CNS Mot. ("Drechsel Decl.") ¶ 39, ECF No. 120; Decl. Adam Angione in Supp. CNS Mot. ("Angione Decl.") ¶¶ 51, 61, 66-68, ECF No. 131; Decl. Nick Cahill in Supp. CNS Mot. ("Cahill Decl.") ¶ 8, ECF No. 148.) Although Planet genuinely disputes whether CNS's numerous declarations reveal a history of same-day access across the nation, (*see* CNS Opp'n 12-13), Planet does not contend that there is no history of courts providing timely access to newly filed complaints upon receipt of such documents by court personnel. Moreover, it is undisputed that complaints newly filed at VSC itself are and have at all relevant times been deemed "filed" on the date they are received, which Planet contends is required in order to comply with California Rule of Court 1.20(a), which mandates that complaints must be "deemed filed on the date [they are] received by the court clerk." (PSUMF ¶ 23; PSUMF Opp'n ¶ 23.) Thus, the Court finds that civil complaints have historically been made available to the public and the press soon after they are received by the court.

*13 "Logic" likewise demands that the qualified right of timely access must arise the moment a complaint is received by the court, rather than after "processing" is completed. Planet does not meaningfully dispute that timing is a critical element of a story's newsworthiness. (*Cf.* PSUMF Opp'n ¶ 26 [arguing first that CNS is often its own cause for delay in reporting, and then submitting that "while same-day access might impact the timeliness of reporting, it does not affect the newsworthiness of the complaint's substance"].) Indeed, it would be nonsensical for a qualified right of access to arise only after a complaint has been "processed," for such a rule would run contrary to the text of and purpose underlying various rules of court—including California Rule of Court 1.20(a), which requires that complaints be "deemed filed on the date [they are] received by the court clerk"—every time a complaint is not processed the day it is received for filing. *See* Cal. R. 1.20(a). Moreover, given the express need to "balance[ ] the vital public interest in preserving the media's ability to monitor the government's activities against the government's need to impose restrictions if necessary for safety or other legitimate reasons," *Leigh*, 677 F.3d at 900, it would make little sense to restrict the media's ability to monitor until after court personnel have had an opportunity to delay providing access to the requested complaints.

For the foregoing reasons, the Court concludes that the qualified right of timely access to newly filed complaints arises when a complaint is received by a court, rather than after it is "processed." The propriety of Planet's processing system is discussed in the section immediately below.

3. Planet Has Not Met His Burden of Proving the Processing Before Providing Access Policy Satisfies the Second Prong of the *Press-Enterprise II* Test

Having determined that the press and public have a qualified right of timely—but not "same-day"—access to newly filed complaints, the Court must determine whether Planet's policies limiting such access at VSC are "essential to preserve higher values and [are] narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 9. In particular, in order to prevail as to this second inquiry, Planet must demonstrate that VSC's access policies amount to "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 at 293).

Two different access policies are relevant to the second *Press-Enterprise II* inquiry. First, there is VSC's former policy of processing newly received complaints using CCMS prior to making such complaints available for public viewing by placing them in a physical media bin. Second, there is VSC's current policy of "scanning" newly filed complaints and making such complaints available for review. The Court considers each of these policies in turn.

a. Planet Has Failed to Justify Delays Resulting from VSC's Process-Before-Access System

As noted above, the following facts regarding VSC's access policy that existed between 2010 and June 18, 2014 are undisputed. Complaints received by CPAs were not placed in the physical media bin in the records department for viewing by the public until after such complaints were "processed." (PSUMF ¶ 52.) As part of this "processing" procedure, CPAs were required to (1) review complaints and supporting materials to determine that they were being filed in the correct court and review the filing fee or fee waiver; (2) enter all the required case information to "create" a new case in CCMS, VSC's case management system; (3) enter all accompanying instruments, such as checks, into CCMS and generate a receipt for these instruments; (4) issue any required summons; (5) stamp the complaint as "Filed;" (6)

generate labels from CCMS and place them on the physical case file along with the filing date, courtroom assignment, and case destruction stamp; and (7) place the documents in a physical case file. (PSUMF ¶ 49.) Thereafter, CPAs were required to designate complaints as "located to Media Bin" in CCMS, and subsequently route the complaints to the physical media bin. (PSUMF ¶ 52.) This procedure was elongated if the CPA was subject to QC review; in such an instance, newly filed complaints processed by such CPAs would not be routed to the physical media bin until after the entire QC process had been completed, which could take up to several days to complete. (PSUMF ¶¶ 57-58.)

*14 Moreover, new complaints designated as "located to Media Bin" in CCMS were not always located in the physical media bin. (PSUMF ¶ 61.) VSC did not maintain a record of when new complaints were delivered to the media bin or who delivered them until April 22, 2014. (PSUMF ¶ 62.) Perhaps as a result of these issues, new complaints received for filing at VSC were not always processed on the same day they were received for filing. Indeed, the CMS reporter assigned to cover VSC has declared that during several periods of more than ten days, VSC did not make the majority of newly filed complaints available for public viewing until two or more days after they were received. (PSUMF ¶¶ 60, 63-64.) VSC staff acknowledged these delays as early as July 19, 2010. (PSUMF ¶¶ 65-70.) Indeed, VSC staff brainstormed and ultimately explored alternative access policies, but did modify the aforementioned policy until June 18, 2014, the date the Scanning Policy was adopted. (PSUMF ¶¶ 77, 79-85.)

i. Planet Has Not Demonstrated that VSC's Adoption of the Scanning Policy Renders the Case Moot

Planet does not attempt to justify the constitutionality of the delays that resulted from VSC's access policy that was in place prior to the adoption of the Scanning Policy on June 18, 2014. (*See generally* Planet Mot.; CNS Opp'n; Planet Reply.) Instead, Planet contends that VSC's Scanning Policy—which is discussed in detail in Section 11(B)(3)(b), *infra*—provides same-day access to newly filed complaints in the vast majority of cases and does not require processing, and further argues that the case is now "moot" in light of this newly implemented procedure. (*See generally* Planet Mot.; Planet Reply; PSUMF Opp'n.)

Planet has failed, however, to meet its burden of showing why this case is moot. "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox*, ___ U.S. ____ 132 S. Ct. at 2287; *see also Friends of the Earth*, 528 U.S. at 189 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (internal quotation marks omitted)). "But voluntary cessation can yield mootness if a '**stringent**' standard is met: 'A case might become moot if subsequent events make it **absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Rosebrock*, 745 F.3d at 971 (emphasis added) (quoting *Friends of the Earth*, 528 U.S. at 189).

Although courts "presume that a government entity is acting in good faith when it changes its policy ... when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Id.* (internal citations omitted). This is because "[a] case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the [offending] provision." *Id.* (quoting *Coral Constr. Co.*, 941 F.2d at 928 (9th Cir. 1991)). The Ninth Circuit has indicated that consideration of the following five factors may indicate whether mootness is more likely:

> (1) the policy change is evidenced by language that is "broad in scope and unequivocal in tone;" (2) the policy change fully "addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case;" (3) "th[e] case [in question] was the catalyst for the agency's adoption of the new policy;" (4) the policy has been in place for a long time when we consider mootness; and (5) "since [the policy's] implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff[.]"

Id. at 972 (internal citations omitted). "On the other hand, [courts] are less inclined to find mootness where the 'new policy ... could easily be abandoned or altered in the future.' " *Id.* (quoting *Bell*, 709 F.3d at 901). "Ultimately, the question remains whether the party asserting mootness 'has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.' " *Id.* (quoting *White*, 227 F.3d at 1243-44).

*15 In this case, Planet has failed to meet its "heavy burden" of demonstrating that its voluntary change in policy renders this case moot. As a threshold matter, the question the Court has been asked to resolve—whether the First Amendment permits VSC to "withhold[ ] newly

filed unlimited complaints from the public until they have been fully processed, which sometimes may take days or weeks," *Planet I*, 750 F.3d at 779—is still squarely at issue given the recent affirmation by both Planet and Ms. Kanatzar that neither CNS nor any other member of the press or public are entitled to see a new complaint "until it is processed." (PSUMF ¶¶ 31-33; Planet Dep. Tr. 80:10-81:9, 84:11-23; Kanatzar Dep. Tr. 140:1-6.) Thus, the Scanning Policy does not "fully 'address all of the objectionable measures that [VSC] officials took against [CNS] in th [is] case.' " *Rosebrock*, 745 F.3d at 972.

Furthermore, Planet does not contend that VSC's Scanning Policy, which was not enacted pursuant to any statute or regulation, cannot "easily be abandoned or altered in the future," and CNS has submitted evidence that VSC is contemplating switching to an e-filing system in the not-too-distant future. (*See* Req. for Judicial Notice in Supp. CNS Reply, Ex. A.)[13] "[A] case should not be considered moot if the defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return to it at any time." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994). Given the "suspicious" timing of VSC's adoption of the Scanning Policy, *McCormack v. Herzog*, 788 F.3d 1017, 1023-25 (9th Cir. 2015)—i.e., after receiving an adverse ruling from the Ninth Circuit in *Planet I*—undercuts the likelihood that Planet can "show that it is 'absolutely clear' that [he] 'could not reasonably be expected' to revoke the exception," *Butler v. WinCo Foods*, 613 Fed.Appx. 584, 585 (9th Cir. 2015).

In addition, the Scanning Policy has been in place for less than two years, making the policy far less "entrenched" than the five-and-a-half year old policy at issue in *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000). Furthermore, although Planet has testified that he has no intention of changing the Scanning Policy, there is no rule of law preventing him from making changes, and Planet has even testified that he would stop scanning complaints on account of e-filing if it were a "better process." (PSUMF ¶¶ 118, 121.)

CNS also submits that certain access problems persist even under this new policy. In particular, CNS contends that Planet's refusal to scan exhibits attached to the complaints runs afoul of the notion that "[i]f a complaint is a judicial record, then it follows that attached exhibits must also be treated as judicial records." *FTC v. AbbVie Prods. LLC*, 713 F.3d 54, 63 (11th Cir. 2013); *see also* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

Finally, the language of the Scanning Policy is neither "broad in scope [nor] unequivocal in tone," for the policy neither acknowledges a First Amendment right of timely access to complaints once received nor prohibits VSC staff from denying CNS or other members of the public timely access to the complaints and their exhibits. (PSUMF ¶ 115.) Instead, the Scanning Policy states that scanned copies "typically will be available for electronic viewing on the same day." (PSUMF ¶ 115.)

***16** On balance, the Court concludes that Planet has not met the "heavy burden" of establishing the mootness of this case. The Court now turns to the merits of Planet's stated justifications for his access policies.

ii. Planet Has Not Shown that the Undisputed Delays Resulting from Processing Are "Essential to Preserve Higher Values"

Although it is difficult for the Court to glean Planet's justifications for the delays resulting from processing given his decision not to address the merits of this former policy, the deposition transcripts of Planet and Ms. Kanatzar provide some guidance as to their reasoning.

During his deposition, Planet testified that VSC did not allow CNS or other members of the public access to new civil complaints until they are processed for the following reasons: (1) to ensure that the Court respects the privacy of litigants and third parties by removing confidential information, such as material in fee waivers; (2) to ensure proper accounting protocols are followed; and (3) to ensure that information is correctly entered into CCMS, which may require QC procedures. (*See* Planet Dep. Tr. 116-120.) During her deposition, Ms. Kanatzar, when asked whether anyone at VSC considered allowing CNS to review newly filed complaints prior to processing, responded that she "would not have allowed [her] staff to do that" because, in her view, a document is "not a complete and accurate court record until [VSC has] processed it and put it in [their] case management system." (Kanatzar Dep. Tr. 112:13-23.) In particular, Ms. Kanatzar testified that VSC "ha[s] a public trust and confidence that [it] needs to maintain," which involves "maintaining their privacy ... handling their documents appropriately," and ensuring that "any fees that are included with their document gets attached accordingly." (Kanatzar Dep. Tr. 112:23-113:3.) Later in the deposition, Ms. Kanatzar reiterated the reasons she believed that the public should not view complaints until they are processed: "Needs to be accurate. There's private information. We need to maintain the integrity of the case file. There's a lot of information in those cases that the

public should not be viewing," such as "[f]ew [sic] waiver information, financial status ... social security numbers ... addresses, et cetera, that the public would not want the general public having access to." (Kanatzar Dep. Tr. 140:3-25.)

From this testimony, the Court understands that Planet and Kanatzar believed that, prior to implementing the Scanning Policy, processing complaints prior to making them publicly available was necessary for the following reasons: (1) to protect the confidentiality of those filing complaints and third parties; (2) to ensure information is accurately input into CCMS, which might require the use of QC review protocols; (3) to ensure that proper accounting procedures are followed—i.e., that VSC keeps track of filing fees attached to complaints; and (4) to "maintain the integrity of the case file."

The Court finds the stated reasons do not pass constitutional muster. With respect to the "confidentiality" concern, California Rule of Court 1.20(b) provides that it is the filer's sole responsibility to exclude or redact private information from publicly filed documents. *See* Cal. R. 1.20(b). In any event, VSC generally does not redact information from new complaints before filing them, and Ms. Kanatzar testified that for civil matters, any such private information is contained in fee waiver applications rather than in complaints or their exhibits. (PSUMF ¶¶ 87-88.) Moreover, if the potential confidentiality of material contained in the complaint itself were a genuine concern "essential to preserve higher values," then it would make little sense for VSC as part of its Scanning Policy to not review the complaints for such sensitive information prior to scanning them; this, however, is precisely what VSC currently does. (PSUMF ¶ 89.) To the extent VSC is concerned about confidential information contained in exhibits, other than fee waiver applications, being made public, Planet points to no evidence that VSC reviews exhibits for such information prior to making them public. Regardless, as noted above, it would be the filer's responsibility pursuant to California Rule of Court 1.20(b) to redact such information.

*17 Planet's expressed concerns regarding the accuracy of information input into CCMS and the following of accounting procedures, while superficially appealing, are upon closer inspection illusory. With respect to accuracy, Planet has not pointed to any evidence that complaints scanned prior to processing using the Scanning Procedure resulted in accurate input of information into CCMS, undercutting his theory that processing prior to making complaints available is necessary. Similarly, with respect to accounting, Planet testified that he could not think of an example of a situation in which there was an accounting problem associated with providing access to a newly received civil complaint prior to processing. (PSUMF ¶ 95.) Moreover, it is undisputed that in many courts in which reporters view complaints the same day they are submitted for filing, checks are separated from the complaints to which they pertain before the reporter sees the complaints. (PSUMF ¶ 97.)

Finally, the Court is not persuaded that Planet and Ms. Kanetzar's argument regarding maintaining the "integrity of the case file" is an "overriding [governmental] interest" warranting delaying access to newly filed complaints. As with Planet's accuracy and accounting arguments, Planet testified that he could not think of an example of a situation in which providing a reporter with access to a newly filed complaint prior to processing resulted in the loss, destruction, mutilation, or any other potential "loss of integrity" that might result from making such complaints available. (PSUMF ¶ 102.) Planet's argument that this fact "only indicates that VSC's procedures and preemptive measures have been successful," (PSUMF Opp'n ¶ 102), does not belie the conclusion that "ensuring the integrity" of these filings by first processing them in the manner in which VSC did does not comport with the First Amendment.

In short, Planet has not met his burden of proving that delays brought on by VSC's processing of newly filed complaints and their associated documents prior to making such complaints available to the public and press—which indisputably resulted in CNS not being afforded "timely access" to such complaints—is the result of "overriding [governmental] interest" or that such delays are "essential to preserve higher values." *Planet I*, 750 F.3d at 793 n.9 (quoting *Leigh*, 677 F.3d at 898).

iii. Planet Has Not Demonstrated VSC's Processing Policy Was "Narrowly Tailored to Serve a Significant Governmental Interest" or "Left Open Ample Alternative Channels for Communication of the Information"

The Ninth Circuit in *Planet I* held that "[t]he delay in making the complaints available may also be analogous to a permissible 'reasonable restriction[ ] on the time, place, or manner of protected speech,' " which is commonly referred to as a "reasonable TPM restriction." *Planet I*, 750 F.3d at 793 n.9 (quoting *Ward*, 491 U.S. at 791). In order for Planet to demonstrate that his processing procedure constitutes a reasonable TPM restriction, he must demonstrate that VSC's processing policy was "justified without reference to the content of the regulated speech, that [the policy is] narrowly tailored to serve a

significant governmental interest, and that [the policy] leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark*, 461 U.S. at 177). The parties do not appear to dispute that VSC's processing policy is content-neutral, and therefore the Court only considers the latter two requirements.

First, for largely the same reasons provided above, the Court does not find that VSC's processing policy is "narrowly tailored to serve a significant governmental interest." As a backdrop, the Court previously determined that Planet has not met his burden of proving that VSC's processing policy neither is the result of protecting some "overriding [governmental] interest" nor is "essential to preserve higher values." *See* Section II(B)(3)(a)(ii), *supra*. The Court likewise finds that Planet has not demonstrated why his four expressed concerns are "significant" in light of the evidentiary record suggesting otherwise. Moreover, with respect to "narrow tailoring," the Court concludes that a number of alternative policies and procedures—many of which were contemplated by Planet and his staff, but were ultimately rejected—would have provided improved access for the public and the press. The Court considers each of these potential alternatives in turn.

*18 Perhaps the most simple alternative would have been for VSC to create copies of newly filed complaints and make them available for public viewing. In fact, VSC considered this exact policy, as evidenced by an email from VSC's Records Department manager to its Civil Department manager on April 9, 2014. (PSUMF ¶ 83 ["Can we try having Ina make copies of Complaints for cases that she doesn't locate to the Media Bin and put copies in the Media Bin?"].) VSC's Civil Department manager responded that she would "get back with you," but this suggestion was never adopted. (PSUMF ¶ 83.) Although it is not clear why this policy was never put into place, it is Planet's burden to demonstrate why such an "easily available alternative" would not have been feasible. *See Food Not Bombs*, 450 F.3d at 1041. The Court notes, however, that to the extent Planet might argue that such a practice would have been cost-prohibitive or unduly labor intensive, he has not quantified the cost of copying the full versions of unlimited civil complaints, nor has he detailed the additional labor that would have been required to complete such copying. (*See* PSUMF ¶ 111.) Absent such evidence, the Court cannot "articulate facts demonstrating an administrative burden sufficient to deny access." *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1295 (9th Cir. 1986); *see also In re Associated Press*, 172 Fed.Appx. 1, 5-6 (4th Cir. 2006) ("We do not doubt that the administrative burdens facing the district court are enormous.... However, Petitioners maintain—and we agree—that there are ways to ease the incremental administrative burdens that would arise from accommodating their First Amendment right of access, such as providing access to one copy of an exhibit—either through the parties or through the court—and requiring the media to make additional copies at their own expense.").

Relatedly, VSC's policy regarding complaints routed to judges is also deficient, and highlights another reason the processing policy was not "narrowly tailored." During her deposition, Ms. Kanatzar discussed VSC's procedure for immediately routing complaints to judges, such as those with fee waivers that needed to be approved, ex parte requests, writs, and other categories of documents on a list that "need[s] to be reviewed immediately," available to the public. (*See* Kanatzar Dep. Tr. 117:10-19.) At some point in 2012, VSC modified its judicial review procedure (1) to provide judges with routing slips to enable their secretaries to send reviewed documents directly to the media bin; and (2) to make a copy of the face page of such complaints so that the media could "make note" of these documents that will eventually make it to the media bin. (Kanatzar Dep. Tr. 121:8-123:9.) When asked whether VSC considered copying entire complaints instead of only the face page, Mr. Kanatzar responded that although VSC "considered it," given "the fact that [they] were in the middle of a major budget crisis, [they] did not want to go to the expense of making copies of all of those documents if [they] didn't need to, especially not knowing what cases the reporter would be interested in. [They] waited for her to tell [them] what interested her." (Kanatzar Dep. Tr. 128:6-15.) As a preliminary matter, Planet has not indicated why this face-page-only policy was not put in place for every newly filed civil complaint, rather than solely for those routed to judicial officers. Furthermore, Planet has not provided documentation regarding the additional cost that VSC would be required to bear were it to copy entire complaints instead of only the first page. (PSUMF ¶ 111.)

There are, of course, measures that VSC could have taken to obtain excess hard copies at no additional cost to the court. In fact, VSC discussed, but ultimately rejected, one such idea. It is undisputed that VSC at least as early as April 9, 2014 discussed implementing "a local rule requiring the submitting party to submit an additional copy" that could be made available for review by the public and press. (PSUMF ¶ 79.) According to Planet, however, "VSC made the commonsense decision not to impose upon each and every litigant the burden and cost of submitting an extra copy of filed complaints, which would inure only to the benefit of CNS, a for-profit corporation, which is generally the only media outlet that

requests access to civil complaints filed at VSC." (PSUMF Opp'n ¶ 81.) The Court is not persuaded that VSC's decision sounds in "commonsense," particularly given the Court's obligation to "consider other mechanisms to provide the public with access," such as "requiring [litigants] to file duplicates" of their pleadings. *Valley Broadcasting*, 798 F.2d at 1295. At the very least, the Court concludes that Planet's statement on this point is insufficient to demonstrate that VSC's processing policy was "narrowly tailored" given VSC's recognition of such an alternative.

*19 Nor does the Court find that the processing policy "leave[s] open ample alternative channels for communication of the information." The Ninth Circuit has held that "[t]o comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006). Under VSC's processing policy, however, a CNS reporter interested in seeing a newly filed complaint that they consider "newsworthy" would be subject to the whims and turnaround times of Planet and his inferiors, who could reject such access on the departmental policy that a complaint is not a "public record" until it is "processed." Indeed, Planet does not genuinely dispute CNS's proffered statement that "[t]here is no adequate or reliable way for reporters to view new complaints on the same day they are filed other than to obtain them from the courts at which they are filed." (PSUMF ¶ 113.)

For the foregoing reasons, the Court concludes that Planet has failed to meet its burden of demonstrating that VSC's policy of refusing to provide the public and press access to newly filed complaints until after they are "processed" is either "essential to preserve higher values" or is "narrowly tailored to serve [a substantial governmental] interest." Accordingly, the Court **GRANTS IN PART** the CNS Motion insofar as it asks the Court to find that Planet's policy of requiring that newly filed complaints be "processed" before providing access to such complaints violates CNS's qualified First Amendment right of timely access to newly filed complaints. The Court **PROHIBITS** Planet, in his official capacity as Court Executive Officer and Clerk of the Ventura County Superior Court, from refusing to make newly filed unlimited civil complaints and exhibits attached thereto available until after such complaints and associated exhibits are "processed"—i.e., the performance of administrative tasks that follow the court's receipt of a new complaint—and **ORDERS** that Planet make such complaints and associated exhibits accessible by the public and press in a timely manner from the moment they are received by the court.

b. Although Access to Complaints Is Significantly Improved Under VSC's Scanning Policy, Certain Problems Persist

In response to the Ninth Circuit's reversal of the First Dismissal Order, VSC on June 18, 2014 implemented a new policy, called the "Scanning Policy," whereby each new civil complaint, excluding exhibits and other attachments, is electronically scanned into a PDF-formatted document "prior to any processing or filing of the complaint as an official court record," (Scanning Policy.) PDFs scanned in such a manner are then made accessible to the public for 10 days through public computer terminals in the lobby of VSC's Records Department, and paper copies may be obtained for a per-page-charge upon request. (Scanning Policy.)

CNS contends that VSC's Scanning Policy, which permits the public and press access—although the nature of such access is disputed, as is discussed below—to newly filed complaints prior to processing, likewise runs afoul of the First Amendment for two reasons. First, CNS argues that, contrary to Planet's insistence throughout its papers and separate statements of undisputed material facts, the scanning procedure does not allow same-day access to 97% of complaints, but instead "often provides same-day access to only half or less of the complaints because many are scanned after 3:00 p.m., when access to the public terminals ends despite the court remaining open until 4:30 or later." (Planet Reply 1-2.) Second, CNS submits that Planet's "refusal to scan exhibits" along with the associated complaints violates the public's right of access to documents that comprise the entire "complaint." (Planet Reply 2.)

Addressing CNS's latter contention first, the Court finds that there is a qualified right of access to exhibits attached to complaints, and that Planet has not met its burden of demonstrating why it is justified in refusing to provide access to such exhibits as part of its Scanning Policy. Federal Rule of Civil Procedure 10(c) provides that "[a] statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion," and further states that "[a] copy of a written instrument that is an **exhibit** to a pleading **is a part of the pleading for all purposes**." Fed. R. Civ. P. 10(c) (emphasis added). The Court therefore follows the Eleventh Circuit's reasoning in *FTC. v. AbbVie Prods. LLC* that "[i]f a complaint is a judicial record, then it follows that attached exhibits must also be treated as judicial records." 713 F.3d at 63; *see also In re Associated Press* 172 Fed.Appx. 5-6 (finding a qualified First Amendment right of access to documentary exhibits admitted into evidence and published to the jury);

Baldwin v. U.S., 732 F. Supp. 2d 1142, 1143-45 (D. N. Mar. I. 2010) (exhibits attached to complaints are "part of the judicial record ... and ... integral to the underlying cause of action," and therefore denials of access as a result of sealing must meet the "compelling reasons" test). Moreover, the Court finds that both "experience" and "logic" weigh in favor of finding a qualified right of timely access to exhibits attached to complaints, particularly given the lack of any dispute regarding the longstanding history of courts across the nation providing CNS and other reporters to both civil complaints and the complaints' exhibits in a timely manner. (*See* PSUMF ¶¶ 8, 9, 19.)

***20** Given the Court's conclusion that the public and press have a qualified right of timely access to both complaints and exhibits that make up part of the pleading, Planet has not met its burden of demonstrating how its affirmative decision not to scan such exhibits constitutes a reasonable TPM restriction. For example, Planet has not provided evidence regarding the marginal cost of scanning such exhibits, or indeed argued that scanning these exhibits would result in a significant administrative burden. Instead, Planet's employees contend that exhibits are difficult to scan "because they have the tabs" and "just don't feed into the scanner," making the process "[t]oo time consuming." (Fetterly Decl., Ex. 8 ("Camacho Dep. Tr.") 255:17-256:7.) Although "articulable administrative difficulties [may] warrant a denial of access" in some cases, the defendant must articulate "facts demonstrating an administrative burden sufficient to deny access," which Planet has failed to do here. *Valley Broadcasting*, 798 F.2d at 1295. In light of these evidentiary shortcomings, Planet's argument that "the type of summaries CNS publishes would not be informed by a complaint's exhibits, as they are most often one sentence, generalized descriptive phrases such as 'car collision' " does not persuade. (CNS Opp'n 3 n.6.) Accordingly, the Court **ORDERS** Planet, in his official capacity as Court Executive Officer and Clerk of the Ventura County Superior Court, to make exhibits attached to newly filed unlimited civil complaints accessible to the public and the press in a timely manner.

The extent to which complaints scanned under the Scanning Policy are made available to the public and the press presents a more difficult question, both in the factual and remedial sense. Planet steadfastly maintains that "VSC has provided same day access to approximately 97% of the civil complaints filed since implementing the June 2014 scanning policy," far exceeding CNS's stated "goal" of 85% access. (*See generally* PSUMF Opp'n.) CNS contends, however, (1) that its reporter assigned to VSC "does not recall experiencing access of close to 97% of new civil complaints on the same day they are received for filing [;]" (2) that during several periods, the same reporter was unable to view a percentage of scanned documents the same day they were received anywhere near the 97% figure touted by Planet; and (3) Planet's declaration that provides the basis for his 97% figure neither takes account of the fact that viewing terminals close at 3 p.m. while the courthouse does not close until at least 4:30 p.m. nor reflects Planet's policy of "backdating" the filed date to the date a complaint is received. (CNS's Statement of Additional Material Facts ("PSAMF") ¶¶ 46, 55, ECF No. 176; Planet Opp'n 24.)

Notwithstanding this apparently irreconcilable evidentiary dispute, its resolution is not necessary for the purpose of ruling on the parties' motions. That is because the following two facts are undisputed: (1) even though VSC's Records and Civil Departments close their doors to the public at 3:00 p.m., the courthouse itself remains open to the public, who can continue to file new complaints, until at least 4:30 p.m.; and (2) the Records Department requires all members of the public, including CNS's reporter, to leave once the last member of the public is helped. (PSAMF ¶¶ 44, 53.) Thus, depending on when the Records Department closes its doors for the day, there is a distinct possibility that complaints filed late in the day may not be viewable by the public until the next day. Viewed in this light, the case is similar to *Ridenour v. Schwartz*, a case in which the Arizona Supreme Court, sitting en banc, held that an "administrative order [that] limit[ed] public access to court proceedings that continue after 3:00 p.m. to those persons who are in the courthouse before 3:00 p.m." unconstitutionally infringed on the public's right of access to observe and attend court proceedings. 179 Ariz. 1, 875 P.2d 1306, 1307 (1994) (en banc). Although the administrative order was designed to "reduce the cost of providing security at the courthouse and to permit the clerical and administrative to do work it cannot do with a reduced staff while the public also has access," the Arizona Supreme Court held that "[i]f less drastic alternatives were available to implement the court's duty to exercise good faith efforts during the county's financial crisis, the presiding judge was compelled to have opted for those less drastic alternatives." *Id.* at 1307, 1309. In so ruling, the Arizona Supreme Court cited the *Globe Newspaper* case for the proposition that an order closing the court must be narrowly tailored to serve a compelling government interest. *Id.* at 1309.

***21** Planet has not provided any reason, much less one that is "compelling," why VSC should be permitted to preclude members of the public and the press from viewing newly filed complaints that happen to be scanned after the Records Department—the sole area in which one can read such scanned documents—shuts its doors.

Accordingly, the Court **ORDERS** Planet, in his official capacity as Court Executive Officer and Clerk of the Ventura County Superior Court, to make copies of newly filed unlimited civil complaints and their associated exhibits, regardless whether such documents are scanned, e-filed, or made viewable in any other format, available to be viewed by the public and the press in a timely manner.

III. RULING

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the CNS Motion and **DENIES** the Planet Motion. Plaintiff Courthouse News Service shall file a proposed judgment consistent with this Order that addresses the claims in this action within fourteen (14) days of the issuance of this Order.

IT IS SO ORDERED.

All Citations

Slip Copy, 2016 WL 4157210

Footnotes

1 Although Planet filed the Planet Motion several hours after the deadline imposed by the Court's Initial Standing Order, which deems such late-filed motions as filed on the next court day, (*see* Initial Standing Order, ECF No. 92), the Court overruled CNS's objection to the Planet Motion, noting that CNS had not indicated that it would suffer any prejudice as a result of the tardy filing, (*see* Minute Order, ECF No. 174).

2 The thirteen *amici* are: The Reporters Committee for Freedom of the Press; American Society of News Editors; The Associated Press, Association of Alternative Newsmedia; Dow Jones & Company, Inc.; The E.W. Scripps Company; First Amendment Coalition; First Look Media Works, Inc.; The McClatchy Company; National Press Photographers Association; New England First Amendment Coalition; News Corp; and Radio Television Digital News Association (together, "Amici"). (*See* Mot. to File Amicus Br., Ex. 2 ("Amicus Br."), ECF No. 171; Order Granting Mot. to File Amicus Br., ECF No. 173.)

3 CNS did not appeal the dismissal of its cause of action for violation of California Rule of Court 2.550, and therefore this cause of action remains dismissed. (*See* Mandate 9 n.5.)

4 Although Planet "disputes" a number of purportedly undisputed facts recited in the PSUMF "as vague, ambiguous and misleading to the extent it refers to facts and testimony that pre-date VSC's scanning policy," he does not point to evidence in the record indicating there is a genuine dispute whether he has taken the position that new unlimited civil complaints received at VSC are neither "official court records" nor "public records" until after they are processed, or whether he maintains that it is appropriate for VSC to deny media requests to examine newly filed complaints on the ground that VSC had not yet completed its administrative tasks associated with processing those complaints. (*See* Def.'s Opp'n to PSUMF ("PSUMF Opp'n") ¶¶ 31-33, ECF No. 182.) Moreover, as "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," for the defendant could freely reenact the same practice, Planet's insinuation that VSC's enactment of the scanning policy moots this action misses the mark. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Whether Planet has demonstrated that the "likelihood of further violations is sufficiently remote to make injunctive relief unnecessary" is an issue discussed in detail in Section II(B)(3)(a)(i), *infra*. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633-36 (1953).

5 Ms. Kanatzar testified that concerns regarding the disclosure of private information contained in fee waiver applications and perhaps in other filed documents—such as social security numbers, financial status, and mailing addresses—is one reason VSC requires processing before the public is permitted to view newly filed complaints. (PSUMF ¶ 87.) Ms. Kanatzar also testified, however, that she did not know whether VSC staff reviewed newly filed unlimited civil cases before they were placed in the media bin, nor whether VSC redacted information contained in such complaints. (*See* Fetterly CNS Mot. Decl., Ex. 2 ("Kanatzar Dep. Tr.") at 139:19-143:17.)

6 VSC requires the following steps to process a new civil complaint using CCMS:

> First, a CPA reviews the documents to determine that the complaint is being filed in the correct court and the documents necessary to initiate the case are presented with the correct filing fee or fee waiver. Second, the CPA enters all the required case information to "create" a new case in CCMS. Third, all accompanying instruments, for example checks, are entered and the receipt is generated. Fourth, any summons required are issued. Fifth, the documents are stamped as "Filed." Sixth, the labels generated from CCMS are placed on the physical case file, along with the filing date, courtroom assignment, and case destruction stamp. Finally, the documents are placed in

a physical case file.
(PSUMF ¶ 49.)

7 Since at least February 2012, certain complaints, such as those filed with a Civil Case Cover Sheet requesting the case be deemed "complex" or CEQA cases, were routed to judicial officers in lieu of being placed in the media bin. (PSUMF ¶¶ 52, 73.) Such complaints were processed before being routed to judicial officers, and in the event of a processing backlog, these complaints were not given priority. (PSUMF ¶ 74.)

8 Although Planet "disputes" this allegation, he points to no evidence as to why these allegations are "inaccurate individually (based on a review of the individual case files) [or] collectively ..." (PSUMF Opp'n ¶ 63.) To the extent Planet contends that "even before the scanning policy was implemented, such delays were rare, and were the result of inadvertent clerical errors" is belied by his own declaration submitted by Julie Camacho, in which she admits that during the same time period, 54 of the 147 new complaints filed were processed and placed in the media bin on the next day, 18 were processed and placed in the media bin on the following day, 7 were not placed in the media bin due to an "inadvertent clerical error," 3 were "backdated five (5) days and one filing was backdated 10 days" as a result of either being received and couriered from the Simi Valley branch or from an "anomaly in processing." (Decl. Charlotte S. Wasserstein in Supp. Planet Opp'n ("Wasserstein Opp'n Decl."), Ex. P ¶¶ 15-21, ECF No. 182-1.)

9 Planet submits that this idea was not implemented because "VSC made the common sense decision not to impose upon each and every litigant the burden and cost of submitting an extra copy of filed complaints, which would inure only to the benefit of CNS, a for-profit corporation, which is generally the only media outlet that requests access to civil complaints filed at VSC." (PSUMF Opp'n ¶ 79.)

10 CNS contends that Planet's dispute is not "genuine" because Planet "offers only CNS's Report Cards from 2011 identifying 6-10 courts with poor grades in same-day access," while CNS has presented 32 declarations, arguing that Planet's minimal evidence cannot, as a matter of law, create a genuine dispute over whether there is history of same-day access. (Planet Opp'n 20 n.10.) Notwithstanding the existence of Ninth Circuit law holding that "an unbroken history of public access" is not required to satisfy the "experience" prong, the Court finds Planet's (1) reference to the CNS "Report Card," (*see* Planet Mot. 14 n.11); (2) use of CNS's own declarants' testimony regarding percentages of courts providing same-day access, (*see* PSUMF Opp'n ¶ 19); and (3) citation to several statutes and regulations regarding access to complaints that do not require same-day access, (*see* Planet Mot. 14 n.12, 15 n.13), sufficient to demonstrate a genuine dispute as to whether courts nationwide have historically provided same-day access to complaints.

11 Because the Court finds that CNS has failed to meet its burden of demonstrating that the "experience" prong of the *Press-Enterprise II* test is satisfied, it need not consider whether a requirement of same-day access "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 9.

12 CNS's citation refers instead to a sealing procedure put in place by this district in 1983, and does not refer to a holding that the right of access attaches upon receipt by the court. *Associated Press*, 705 F.2d at 1145.

13 The Court takes judicial notice of the Judicial Council of California's April 2014 report titled "Trial Court E-Filing Survey and Findings Report" pursuant to Federal Rule of Evidence 201(b), for the Court does not find this report, which is posed on the California Courts website, to be "subject to reasonable dispute" given it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

End of Document

EXHIBIT B

Superior Court of California
County of Orange

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October 20, 2016

Rachel Matteo-Boehm
Bryan Cave LLP
560 Mission Street, 25th Floor
San Francisco, CA 94105-2994

Dear Ms. Matteo-Boehm,

Thank you for your letter of October 11, 2016. You are correct in assuming that our Court is familiar with the recent Central District case addressing the access issues at Ventura Superior Court. As you know, in its ruling the District Court specifically held that CNS is not entitled to same day access to newly filed complaints. (*Courthouse News Serv. v. Planet* (C.D. Cal., May 26, 2016) 2016 WL 4157210 at * 8-10.) With respect to complaints that arrive at four o'clock on a weekday afternoon, I do not believe you are entitled to access within one hour after they arrive in our work queue. If you have any compelling authority indicating that CNS is entitled to such access to newly filed complaints, please do not hesitate to share that with me.

Absent any such evidence to the contrary, the Court believes its state-of-the-art procedures comply with all First Amendment requirements discussed in *Planet*. For these reasons, the Court is not inclined to alter its current procedures.

Please do not hesitate to contact me if you have any additional questions.

Very truly yours,

Jeff Wertheimer
General Counsel

cc: Honorable Charles Margines, Presiding Judge
Honorable Kirk Nakamura, Assistant Presiding Judge
Alan Carlson, Chief Executive Officer

Burnett, Nancy

From:	cacd_ecfmail@cacd.uscourts.gov
Sent:	Tuesday, January 24, 2017 5:12 PM
To:	ecfnef@cacd.uscourts.gov
Subject:	Activity in Case 8:17-cv-00126 Courthouse News Service v. Yamasaki Complaint (Attorney Civil Case Opening)

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
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UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Matteo-Boehm, Rachel on 1/24/2017 at 5:11 PM PST and filed on 1/24/2017

Case Name: Courthouse News Service v. Yamasaki
Case Number: 8:17-cv-00126
Filer: Courthouse News Service
Document Number: 1

Docket Text:
COMPLAINT Receipt No: 0973-19244606 - Fee: $400, filed by plaintiff Courthouse News Service. (Attachments: # (1) Exhibit A, # (2) Exhibit B) (Attorney Rachel E Matteo-Boehm added to party Courthouse News Service(pty:pla))(Matteo-Boehm, Rachel)

8:17-cv-00126 Notice has been electronically mailed to:

Rachel E Matteo-Boehm rachel.matteo-boehm@bryancave.com, joel.rayala@bryancave.com, leila.knox@bryancave.com, nancy.burnett@bryancave.com

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36c9fda6f2a4f9f070bc18fc8567f5fb19552916a5ed3519ac98712680422]]
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3342b1c8af7fc214d83081b1e4867fc4d08cccafa141fe4b5cd0bd8367902]]
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Original filename:\\bc.firm.local\sfodfs01\REDIR\8kr\Desktop\Ex. B to Complaint.pdf
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[STAMP cacdStamp_ID=1020290914 [Date=1/24/2017] [FileNumber=22894618-2
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