UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 11-8083-DMG (FFMx)**	Date	January 26, 2021
Title	***Courthouse News Service v. Michael Planet***	Page	1 of 8

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE PLAINTIFF'S PROPOSED AMENDED JUDGMENT [263]

On January 17, 2020, the Ninth Circuit issued its ruling in *Courthouse News Service v. Planet*, 947 F.3d 581 (9th Cir. 2020) ("*Planet III*"), affirming in part and reversing in part the Court's Order on the Parties' Cross-Motions for Summary Judgment ("MSJ Order") [Doc. # 195], and remanding for further consideration consistent with its opinion. On July 21, 2020, Plaintiff Courthouse News Service ("CNS") lodged a Proposed Amended Judgment in light of *Planet III*'s holdings. [Doc. # 263.] On July 31, 2020, Defendant Michael Planet, in his official capacity as Court Executive Officer and Clerk of the Ventura County Superior Court ("VSC"), filed Objections and a competing Proposed Amended Judgment. VSC filed a Notice of Errata and Corrected Objections on August 3, 2020.[1] [Doc. ## 266, 267.] On August 7, 2020, CNS filed a Reply in support of its Proposed Amended Judgment. [Doc. # 268.]

For the reasons set forth below, the Court **OVERRULES** all of VSC's objections, with the caveats discussed herein, and will lodge a Final Amended Judgment largely consistent with CNS's Proposed Amended Judgment, subject to the Court's modifications.

I.
FACTUAL AND PROCEDURAL BACKGROUND

The facts and long procedural history of this case prior to Summary Judgment are described in detail in the MSJ Order, issued by Hon. S. James Otero, United States District Judge, and in *Planet III*. In short, CNS challenged VSC's practice of restricting public access to newly filed civil unlimited complaints until after they were "processed," rather than providing same-day access. 947 F.3d at 586-87. During litigation, VSC changed its practice, instead allowing access

[1] The Court's citations herein to VSC's Objections refer to the corrected document.

to new complaints after they were scanned by court staff, which would occur before formal processing. *Id.* at 587.

In his ruling on summary judgment, Judge Otero found that CNS did not have a right to same-day access to complaints, but did find that a qualified First Amendment right of timely access to complaints and their exhibits arises when the complaints are received. MSJ Order at 18.[2] Accordingly, the Court held that the "no-access-before-process" policy (the "processing policy") violated CNS's First Amendment right. *Id.* at 19-27. Judge Otero also determined that VSC's change in policy did not render CNS's challenge to the processing policy moot. *Id.* at 21-23. The Court therefore prohibited VSC from refusing to make newly filed complaints and attached exhibits available until after they are processed, and ordered VSC to make such complaints and exhibits available "in a timely manner" from the moment they are received. *Id.* at 27. Finally, the Court held that VSC's policy of prohibiting access to complaints until after they are scanned (the "scanning policy") also did not pass constitutional scrutiny. The Court ordered that VSC make copies of complaints and their exhibits available "regardless whether such documents are scanned, e-filed, or made viewable in any other format." *Id.* at 30.

The Court subsequently issued a Judgment in accordance with the MSJ Order (the "Original Judgment"). [Doc. # 199.] The Original Judgment granted CNS declaratory relief mirroring its holdings in the MSJ Order—declaring that "[t]here is a qualified First Amendment right of timely access to newly filed civil complaints, including their associated exhibits" which "attaches on receipt regardless of whether courts use paper filing or e-filing systems," and that both VSC's processing policy and its subsequent scanning policy violated this right. *Id.* at ¶ 1. It also 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,'" and further enjoined VSC 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." *Id.* at ¶ 2. Finally, the Court awarded attorneys' fees and costs to CNS as the "prevailing party" pursuant to 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 54(d). *Id.* at ¶ 3.

On appeal, the Ninth Circuit "affirm[ed] the district court's grant of summary judgment as to the no-access-before-process policy, but reverse[d] the district court's grant of summary judgment as to the scanning policy." *Planet III*, 947 F.3d at 600. Specifically, the panel held, "as

[2] All page references herein are to page numbers inserted by the CM/ECF system.

the district court correctly concluded, [that] a qualified First Amendment right of access extends to timely access to newly filed civil complaints." *Id.* at 591. It also "agree[d] with the district court that CNS's challenge to Ventura County's no-access-before-process policy is not moot." *Id.* at 598, n. 10. The Ninth Circuit then applied the requisite constitutional test to both the process policy and the scanning policy, and while it agreed with the District Court that the processing policy did not survive scrutiny, it disagreed as to the scanning policy. *Id.* at 600. Accordingly, the panel "vacate[d] the district court's injunction and award of fees, and remand[ed] for further consideration consistent with this opinion." *Id.*

On June 30, 2020 the Ninth Circuit issued another order holding that CNS is the prevailing party, and therefore granting CNS's Motion for Attorneys' Fees and remanding to this Court to determine the amount of the fee award. [Doc. # 255.]

II.
LEGAL STANDARD

Under the rule of mandate, "[a] district court, upon receiving the mandate of an appellate court 'cannot vary it or examine it for any other purpose than execution.'" *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)). While district courts "are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate." *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000) (internal quotation marks omitted). "The ultimate task is to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not." *Id.* at 1093. The district court therefore cannot refuse to take an action that the mandate requires, but also cannot "revisit its already final determinations unless the mandate allowed it." *Cote*, 51 F.3d 178 at 181. The district court also should "not consider any arguments that [a party] did not present to the district court at the prior proceedings, or that [a party] did not pursue on appeal: the Court finds that such matters are waived or abandoned." *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 925 F. Supp. 2d 1067, 1071 (C.D. Cal. 2012).

V.
DISCUSSION

VSC lodges the following objections to CNS's Proposed Amended Judgment: 1) an injunction against the processing policy is improper; 2) declaratory relief that the scanning policy is constitutional should be included; 3) relief should be limited to complaints that are "filed," are

not "confidential," are not electronically filed, and excluding their exhibits; and 4) the Court's prior cost award under Federal Rule of Civil Procedure 54(d) should not be re-imposed.

A. *Planet III* Affirmed the Permanent Injunction Against VSC's Processing Policy

CNS's Proposed Amended Judgment includes the following injunctive relief, which VSC argues should be stricken in its entirety:

> On CNS's Prayer for Injunctive Relief, it is ORDERED, ADJUDGED and DECREED that Planet is hereby permanently enjoined from refusing (a) 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 (b) 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, except in those instances where the filing party has properly moved to place the complaint under seal.

Pltf's Proposed Amended Judgment at ¶ 2 [Doc. # 263-1]. The language is nearly identical to the injunctive relief granted in the Original Judgment, with one exception, removing the clause, "regardless of whether such complaints are scanned, e-filed, or made available in any other format" from subpart (b). Original Judgment at ¶ 2.

VSC argues that CNS has not made a "clear showing" that a permanent injunction against its former processing policy is necessary, given that it abandoned the practice in 2014. VSC's brief includes a lengthy analysis of the standards for imposing a permanent injunction, as if this Court was considering the merits of an injunction for the first time. Obj. at 9-12. But of course, this is not the first time the Court has evaluated the need for an injunction against the processing policy. Judge Otero's MSJ Order squarely dealt with the contention that VSC's cessation of the processing policy rendered judicial action against it moot, ruling that VSC "has failed to meet its heavy burden" of showing that the case was moot. MSJ Order at 22. The Court therefore enjoined the policy.

On appeal, the Ninth Circuit expressly affirmed both the Court's findings on mootness and on the need for an injunction. *Planet III*, 947 F.3d at 598, n. 10 ("We agree with the district court that CNS's challenge to Ventura County's no-access-before-process policy is not moot."); *id.* ("nothing other than the injunction in this litigation prevents Ventura County from returning to its pre-2014 policy"). Yet, in spite of this clear mandate, VSC inexplicably expects the Court to re-

litigate the need for an injunction against the processing policy.[3] Perhaps in light of the Ninth Circuit's language, VSC avoids describing the need for an injunction as "moot," but still makes essentially the same mootness argument that both this Court and the appellate court already rejected: that there is no need for an injunction because VSC changed its policy and is unlikely to revert. *See* Obj. at 11-16.[4] To the extent that VSC's "clear showing" argument differs from what the district and appellate courts already addressed, VSC has "waived or abandoned" it. *Fleischer Studios*, 925 F. Supp. 2d at 1071.

Accordingly, the Court **OVERRULES** VSC's objections to the injunction and will adopt CNS's proposed language for injunctive relief in full.

B. VSC Is Not Entitled to Declaratory Relief on CNS's Prayer

VSC proposes adding an additional paragraph to the Judgment on declaratory relief, affirmatively stating that its scanning policy is constitutional, as follows:

> On CNS's Prayer for Declaratory Relief, it is FURTHER ORDERED, ADJUDGED and DECREED that VSC's policy, implemented on June 18, 2014, of scanning new civil complaints and making the scans available on public computer terminals "passes constitutional scrutiny" as it is directly related to VSC's interests in orderly administration and processing of new complaints, and the First Amendment does not require courts to second guess the careful policy considerations VSC undertook in enacting this policy, for the reasons stated in Planet III. Accordingly, this Court hereby vacates its prior order granting summary

[3] While the *Planet III* opinion concluded by "vacat[ing] the district court's injunction," it clearly did so for the purpose of this Court revising it consistent with the opinion. 947 F.3d at 600 ("We vacate the district court's injunction and award of fees, and *remand for further consideration consistent with this opinion*.") (emphasis added). This *pro forma* statement and procedure was not an invitation to re-litigate injunctive relief.

[4] VSC also points out that on July 30, 2020—the day before filing its Objections—it issued a public notice declaring that it recognized the *Planet III* opinion and "shall not revert to the pre-2014 practice of fully processing civil unlimited complaints prior to making them publicly available." Obj. at 14-16. First, VSC provides no authority supporting the notion that it may submit new evidence of facts occurring after both the district court's order and the appellate court's decision on remand. Second, the self-serving statement does not materially alter any of the facts or analysis that Judge Otero and the Ninth Circuit addressed. It remains true, as it was then, that the enjoined policy is not currently in effect, but that the current policy could "easily be abandoned or altered in the future" such that "nothing other than the injunction in this litigation prevents Ventura County from returning to its pre-2014 policy." MSJ Order at 22; 947 F.3d at 598, n. 10. And in any event, if VSC truly would never consider returning to the processing policy, then it would have no reason to vociferously object to an injunction against such policy.

> judgment and its June 14, 2016 Judgment for declaratory and injunctive relief in favor of CNS as to the June 18, 2014 scanning policy.

Obj. at 30, Def's Proposed Amended Judgment ¶ 2. The Declaratory Judgment Act allows the Court to grant declaratory relief to the "party seeking such declaration." 28 U.S.C. § 2201. VSC did not file a claim or counterclaim for declaratory relief, nor did it include a prayer for declaratory relief in its Answer. [*See* Doc. # 100.] VSC provides no authority allowing the Court to grant declaratory relief in *VSC's* favor "[o]n *CNS's* Prayer for Declaratory Relief."

That said, this Court's final judgment should still reflect the full extent of the Ninth Circuit's ruling, including those aspects that limit CNS's relief. Therefore, the Court will add the following language to Paragraph 1 of CNS's Proposed Amended Judgment:

> e. Planet's policy, implemented on June 18, 2014, of scanning new civil complaints and making the scans available on public computer terminals does not violate CNS's qualified First Amendment right of timely access to newly filed complaints and their associated exhibits for the reasons stated in *Planet III*.

C. VSC Waived its Objections to Language Reflected in the Original Judgment

VSC objects to several other aspects of CNS's Proposed Amended Judgment: 1) its exclusion of only complaints that are under seal from the right of access, as opposed to all those that are "confidential;" 2) its extension of the right of access to electronically filed complaints; and 3) its inclusion of "associated exhibits" with the right of access to newly received complaints. Obj. at 17-19.

VSC complains about the relevant language as if CNS had newly drafted it for the first time. But on each of these issues, CNS's proposed language merely repeats what Judge Otero ordered in the Original Judgment. *Compare* Pltf's Proposed Amended Judgment *with* Original Judgment. As for access to associated exhibits, Judge Otero expressly held that CNS had a right of access to exhibits attached to complaints. MSJ Order at 28. *Planet III* did not address the issue, as VSC recognizes. *See* Obj. at 18 ("*Planet III* contains only five references to the 'exhibits' that accompany new civil complaints."). VSC then comes to the conclusion that, "[t]hus, *Planet III* does not, in any way, suggest that the failure to automatically scan exhibits runs afoul of the First Amendment or is otherwise improper." *Id.* This approach gets the rule of mandate backwards. Unless something in the mandate allows for it, "a district court could not revisit its already final determinations." *Cote*, 51 F.3d at 181. To put it another way, by failing to raise on appeal its

objection to Judge Otero's inclusion of associated exhibits in the right of access, VSC "waived or abandoned" the issue. *Fleischer Studios*, 925 F. Supp. 2d at 1071.

On the right of access to e-filed complaints, again VSC concedes that "e-filings or e-filing systems were not any part of *Planet III*'s analysis or holdings." Obj. at 18-19. But they were part of Judge Otero's Original Judgment, which specified that the right of access attaches "regardless of whether courts use paper filing or e-filing systems." Original Judgment ¶ 1(c); *see also* Pltf's Proposed Amended Judgement ¶ 1(c). VSC abandoned its objection to this language by not raising it on appeal, and this Court cannot now revisit its already final determination on the issue. *Fleischer Studios*, 925 F. Supp. 2d at 1071; *Cote*, 51 F.3d at 181.

VSC's only objection that arguably does have a basis in *Planet III* is whether only formally under seal complaints and exhibits should be exempt from the right of access, as opposed to those that are "confidential." The Original Judgment excluded from its injunction "those instances where the filing party has properly moved to place the complaint under seal," Original Judgment ¶ 2. CNS's proposal repeats this language. *See* Pltf's Proposed Amended Judgment ¶ 2. *Planet III*, by contrast, includes a footnote observing that "our decision here concerns only publicly available civil complaints, i.e., those deemed non-confidential by state law or judicial determination, or those that were not otherwise properly filed under seal." 947 F.3d at 586 n.1. CNS offers to remedy this discrepancy by revising the clause to exclude "those instances in which the filing party has designated the complaint as confidential by law or properly moved to place the complaint under seal." Reply at 18-19. Accordingly, the Court will adopt this revision.

Finally, although not discussed in its brief, VSC's Proposed Amended Judgment changes the language to read that the right of access attaches when new complaints are "filed," as opposed to when they are "received by a court." *See* Reply, Ex. A (redlined version of VSC's edits to CNS's Proposed Amended Judgment). Again, *Planet III* did not address the distinction between "filed" and "received" because VSC did not raise the issue, and so VSC abandoned any objection. The Court will therefore adopt CNS's proposed language on the right of access attaching when complaints are "received by a court"—which is consistent with the Original Judgment.

In sum, the Court **OVERRULES** all of VSC's objections and revisions, with the one exception discussed above, to the language in CNS's Proposed Amended Judgment that merely reflects this Court's prior final determinations that were unaltered by the Ninth Circuit on appeal.

D. The Ninth Circuit Allowed for CNS's Costs Award to be Reinstated

Prior to *Planet III* and after the Original Judgment, the Court entered an award of taxable costs in the amount of $20,730.81 in favor of CNS as the prevailing party, pursuant to Federal Rule of Civil Procedure 54(d). [Doc. # 204.] The Ninth Circuit concluded its decision in *Planet III* by "vacat[ing] the district court's . . . award of fees." 947 F.3d at 600. VSC therefore argues that the costs award—incorporated into CNS's Proposed Amended Judgment—should be stricken. Obj. at 19. But the Ninth Circuit affirmed that CNS is the prevailing party. [*See* Doc. # 255.] Recognizing that CNS would therefore be awarded costs anyway, VSC apparently proposes that CNS refile an Application to the Clerk to Tax Costs, *see* L.R. 54-2.1, and have the Clerk of Court calculate CNS's costs again—notwithstanding that it has already done so. Neither party suggests that the taxable costs amount should be any different from that already calculated.[5] Therefore, for the sake of efficiency, the Court will incorporate its prior award of taxable costs into the Judgment, as CNS proposes.

VI. CONCLUSION

After nearly a decade of litigation, the Ninth Circuit's detailed ruling in *Planet III* should have finally put this case to rest. Instead, VSC attempts to seize on what should be a routine procedural matter—implementing the appellate court's mandate—to relitigate issues that either the Ninth Circuit already decided, or that the District Court already decided and which VSC failed to challenge on appeal. Therefore, with the exception of those discussed above, the Court **OVERRULES** all of VSC's objections to CNS's Proposed Amended Judgment. Subject to the modifications discussed herein, and other minor revisions that the Court finds appropriate, the Court will issue a Final Amended Judgment largely consistent with CNS's Proposed Amended Judgment.

IT IS SO ORDERED.

[5] Indeed, if there were a difference, the amount would most likely be higher.