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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PACIFIC NEWS SERVICE,

Plaintiff,

v.

JAMES E. TILTON, Secretary of the California Department of Corrections and Rehabilitation; ROBERT L. AYERS, JR., Warden, California State Prison at San Quentin, San Quentin, CA; ARNOLD SCHWARZENEGGER, Governor, State of California; and Does 1-50,

Defendants.

C 06-1793 JF

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER FRCP 12(b)(6) FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, UNDER FRCP 12(b)(1) FOR LACK OF SUBJECT-MATTER JURISDICTION

Hearing: September 21, 2007
Time: 9:00 a.m.
Courtroom: 3
Judge: The Honorable Jeremy Fogel

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Defendants Tilton, Ayers, and Schwarzenegger (Defendants) submit their Memorandum of Points and Authorities in Support of their Motion to Dismiss the first amended complaint under FRCP 12(b)(6) for failure to state a claim or, in the alternative, under FRCP 12(b)(1) for lack of subject matter jurisdiction.

I.

INTRODUCTION

In *California First Amendment Coalition v. Woodford,* 299 F.3d 868 (9th Cir. 2002) (*CFAC*), the Ninth Circuit defined the press and the public's right to view executions under the First Amendment. There, the court concluded that the press and the public have the right to view executions from the moment the condemned is escorted into the execution chamber, including those initial procedures that are inextricably intertwined with the process of putting the condemned inmate to death. *CFAC*, 299 F.3d at 877.

Plaintiff's first amended complaint, which alleges that pancuronium bromide functions as a "chemical curtain" that conceals information from the press and the public, does not state a claim upon which relief can be granted. The use of pancuronium bromide during a lethal injection execution does not impede the right that was defined in *CFAC*, because that drug does not affect Plaintiff's ability to watch the condemned inmate enter the execution chamber, be attached to the execution device, and then die. *CFAC*, 299 F.3d at 876. Nothing in *CFAC* gives Plaintiff the right to dictate the method that the State uses in order to perform a lethal-injection execution. Accordingly, because the first amended complaint fails to set forth a legally cognizable claim under the First Amendment, it should be dismissed.

In the alternative, even if this Court finds that the first amended complaint sets forth a legally sufficient claim, it should still be dismissed on ripeness grounds. The ripeness doctrine seeks to avoid the premature adjudication of cases when the issues posed are not fully formed. Here, Plaintiff's complaint assumes that both the revised lethal injection protocol and the use of pancuronium bromide are constitutional. However, because both the revised protocol and the utilization of pancuronium bromide have been challenged in the *Morales* action, it is unclear whether Defendants will be able to use pancuronium bromide when it next performs a lethal-

injection execution. Accordingly, because the claims set forth in Plaintiff's first amended complaint are not sufficiently focused to permit judicial resolution, they are not ripe, and should be dismissed without prejudice.

II.

STATEMENT OF ISSUES

1. Whether Plaintiff's first amended complaint states a claim upon which relief can be granted.
2. Whether Plaintiff's first amended complaint is ripe for judicial resolution.

III.

STATEMENT OF FACTS

In its amended complaint for declaratory and injunctive relief, Plaintiff, a media organization that reports on California executions, seeks temporary, preliminary, and permanent injunctive relief to prevent Defendants from executing any death row inmates in a manner that conceals important information to which the public is constitutionally entitled. (Amended Complaint [Am. Compl.] at 1:10-13.)

Plaintiff contends that Defendants' use of pancuronium bromide, a paralytic agent that allegedly acts as a "chemical curtain" over the lethal-injection process, makes it impossible for witnesses to "view adequately" the dying process. (Am. Compl. at 1:16-18.) PNS alleges that pancuronium bromide (1) prevents society from watching, in a meaningful way, executed inmates die (Am. Compl. at 5:14-16); (2) suppresses information about whether the inmate experiences pain, and if so, how much (Am. Compl. at 5:17-19); (3) conceals information from members of the press and the public about whether pain is present or absent (Am. Compl. at 6:4-5); and (4) masks both disputed and undisputed indicia of pain or consciousness (Am. Compl. at 6:11-12). PNS also alleges that the use of pancuronium bromide prevents the public and the press from obtaining other "socially relevant information," including an inmate's attempt to express "repentance, confession, anger or defiance" while fighting off the effects of the sodium pentothal. (Am. Compl. at 7:1-6.)

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IV.

STANDARD OF REVIEW

A. The Standards for Rule 12(b)(6) and 12(b)(1) motions

A Rule 12(b)(6) motion tests the "legal sufficiency of the claim or claims stated in the complaint." *Beliveau v. Caras,* 873 F. Supp. 1393, 1395 (C.D. Cal. 1995) (quoting Schwarzer, Tashima and Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial,* §9:187 (1994)). Although Federal Rule of Civil Procedure 8(a)(2) does not require a complaint to contain specific facts, it does require the complaint to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1974 (2007) (abrogating the "no set of facts" language of Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In other words, Plaintiff is obligated to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* at 1964-65. The complaint has to have enough factual allegations "to raise a right to relief above the speculative level." *Id.* at 1965.

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to seek dismissal of an action for lack of subject matter jurisdiction. The plaintiff has the burden to allege in his complaint "whatever is essential to federal jurisdiction." *Smith v. McCullough,* 270 U.S. 456, 459 (1926). If the plaintiff fails to do so and the defendant brings the deficiency to the court's attention, the court "must dismiss the case, unless the defect be corrected by amendment." *Id*

V.

ARGUMENT

A. THE FIRST AMENDED COMPLAINT SHOULD BE DISMISSED, BECAUSE IT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. The Decision in *California First Amendment Coalition v. Woodford* Establishes the First Amendment Right of the Press and the Public to View an Execution.

In *California First Amendment Coalition v. Woodford,* 299 F.3d 868 (9th Cir. 2002) (CFAC), the Ninth Circuit examined the extent to which the public and the press are entitled to view an execution. There, the press plaintiffs challenged a procedure that prohibited witnesses

from observing an execution until after the execution team had brought the condemned into the chamber, inserted the intravenous lines, and left him alone to await the order to dispense the chemicals. *Id.* at 870. The court found that the "public and press historically have been allowed to watch the condemned inmate enter the execution place, be attached to the execution device, and then die." *Id.* at 876. The court found that historical tradition strongly supported the public's First Amendment right to view the condemned as the guards escorted him into the chamber, strapped him to the gurney, and inserted the intravenous lines. *Id.* The court, therefore, held that the public enjoyed a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those "initial procedures" that are inextricably intertwined with the process of putting the condemned inmate to death. *Id.* at 877.

Plaintiff's first amended complaint fails to set forth any violation of the First Amendment or any other claim upon which relief can be granted, since the state's use of pancuronium does not restrict Plaintiff's access to or ability to view an execution. Moreover, nothing in the *CFAC* decision gives Plaintiff the power to dictate the particular drugs that the State can use in order to perform an execution by lethal injection.

a. The Use of Pancuronium Bromide does not Violate Plaintiff's First Amendment Right to Observe an Execution.

As mentioned, under *CFAC*, Plaintiff has the right to view executions "from the moment the condemned enters the execution chamber through, to and including, the time the condemned is declared dead." *CFAC*, 299 F.3d at 885-86. In its amended complaint, Plaintiff asserts that "pancuronium bromide acts as a chemical curtain that conceals indicia of pain from the members of the press and the public that are observing the executions." (Am. Compl. at 6:1-3.) Plaintiff also contends that pancuronium bromide is administered with the intention of concealing information from the press and the public. (Am. Compl. at 8:9-12.)

Even if this Court accepts as true all of Plaintiff's allegations regarding the use of pancuronium bromide (which it must when analyzing a Rule 12(b)(6) motion), the amended complaint fails to set forth a claim upon which relief can be granted. Defendants' use of pancuronium bromide during a lethal injection execution does not impede Plaintiff's ability to

exercise the First Amendment right to view executions that was delineated in *CFAC*. To the contrary, Plaintiff, under the revised version of O.P. 770, has the right to examine the execution process from the moment the condemned is escorted into the lethal injection chamber, and has no restrictions on what it may observe, publish, or choose to withhold. Nothing in Plaintiff's amended complaint suggests that Plaintiff will be denied the opportunity to view every aspect of the execution procedure authorized by the courts. Because the administration of pancuronium bromide does not hinder Plaintiff's right of access to view a lethal injection execution, the amended complaint does not state a claim that merits relief.

b. Nothing in the *CFAC* Decision Permits the Press or the Public to Define How an Execution Should be Conducted.

Although Plaintiff has the right to observe an execution from the moment the condemned is led into the execution chamber, the *CFAC* decision does not provide the press or the public with the right to dictate how the state performs an execution or manipulate what is being observed. If the State were planning to execute a condemned inmate by electric chair, hanging or firing squad, Plaintiff would have a right to attend and view the proceedings under *CFAC*. However, in those situations, Plaintiff would not have a First Amendment right to challenge the amount of electricity used to execute the condemned inmate, the number of bullets used by a firing squad, or the type of rope employed in a hanging on the grounds that a different method would enable Plaintiff to better view the "dying process" or to observe the physical impact of the procedures on the inmate. (Am. Compl. at 1:14-18.) Plaintiff similarly lacks a First Amendment right to object to the use of pancuronium bromide in the course of a lethal injection execution on those grounds.

The U.S. Supreme Court has recognized that the Constitution does not accord the press special access to information not shared by members of the public generally. *Pell v. Procunier,* 417 U.S. 817, 834 (1974). In objecting to the use of pancuronium bromide, Plaintiff demands more than special access–it seeks the unprecedented right to alter the method used by the State in order to perform a lethal injection execution. However, because Plaintiff's only interest under the First Amendment is viewing the execution that is actually provided by the State, rather than

viewing some other execution comporting more closely to its preferences, the first amended complaint does not state a claim for relief. If *CFAC* were read as Plaintiff urges, every execution would be subject to challenges on the theory that it "masks" or places a "curtain" over what would occur if the execution were only conducted differently. Furthermore, every change in the execution process would provide a basis for challenging the next execution. Accordingly, because the First Amendment does not provide Plaintiff with the sweeping power to change the State's execution methods, the first amended complaint should be dismissed.

B. IN THE ALTERNATIVE, THIS SUIT SHOULD STILL BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFF'S CLAIM IS NOT RIPE.

1. Plaintiff has the Burden of Establishing that its Claim is Ripe.

Even if federal-question jurisdiction may be established by pleading a substantial constitutional claim, the claim must still be ripe for review before a court will exercise jurisdiction. *Association of American Med. Colleges v. United States,* 217 F.3d 770, 784, n.9 (9th Cir. 2000). Whether statutory or constitutional in origin, an unripe claim is not justiciable. *Id.* A cause of action presumptively lies outside of a federal court's limited jurisdiction, and the "burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994) (quoting *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 182-83 (1936)). Accordingly, in the instant action, Plaintiff has the burden of establishing that its claim is ripe.

2. Because Plaintiff's Claim Is Not Ripe, It Must Be Dismissed Without Prejudice.

The ripeness doctrine determines the time, if any, at which a party may seek pre-enforcement review of a statute or regulation. *Triple G Landfills, Inc. v. Board of Commrs.,* 977 F.2d 287, 289 (7th Cir. 1992). It seeks to avoid the premature adjudication of cases when the issues posed are not fully formed, or when the nature and extent of the statute's application are uncertain. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Inquiries into ripeness generally address two factors: first, whether the relevant issues are sufficiently focused to permit judicial resolution without further factual development; and, second, whether the parties would

suffer any hardship by the postponement of judicial action. *Id.* at 149.

An analysis of the two ripeness "factors" in the instant action establishes that Plaintiff's claim is not ripe for review, and should be dismissed without prejudice.

a. Plaintiff's Claims Are Not Fit For Judicial Decision, Since It Is Unclear Whether the Revised Version of O.P. 770 Will Be Implemented.

A federal court should normally refrain from resolving issues involving "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996). The ripeness doctrine requires a live, focused case of real consequence to the parties. *Triple G Landfills, Inc.*, 977 F.2d at 291.

Plaintiff's claim is dependent on a "contingent future event that may not occur as anticipated, or . . . at all," namely, a conclusion by this Court that the revised version of O.P. 770 and Defendants' use of pancuronium bromide as part of the lethal injection protocol may be implemented because it is valid under the Eighth Amendment. In *Morales v. Tilton*, condemned inmate Morales claims that the "protocol and actual practice by which lethal injection executions are performed under Procedure No. 770 violates constitutional and statutory provisions enacted to prevent cruelty, pain and torture." *Morales v. Tilton,* 06-219 JF (N.D. Cal.), Third Am. Compl. at 3:27-4:2. Moreover, Morales claims that the use of pancuronium bromide to paralyze condemned inmates greatly increases the risk that an inadequately sedated prisoner will be subjected to a painful and protracted death, and will cause an unnecessarily painful death. *Id.* at 18:19-22.

Because virtually every portion of the revised version of O.P. 770, including the use of pancuronium bromide, has been challenged in the *Morales* case, the issues raised by Plaintiff in this case are not sufficiently focused to permit judicial resolution. Although Defendants believe the revised version of O.P. 770 is constitutional, it has not yet been approved by this Court. Indeed, there is a possibility that this Court could rule in *Morales* that the revised version of O.P. 770 or the protocol's inclusion of pancuronium bromide as one of the three drugs used to execute an inmate violates the Eighth Amendment. Accordingly, because Plaintiff's case hangs on "future contingencies that may or may not occur," the case is not yet ripe for judicial review.

Clinton, 94 F.3d at 572.

b. Plaintiff will not Suffer any Hardship if Judicial Action is Postponed in this Case.

Plaintiff will not experience hardship if this Court withholds consideration of the claims raised in the amended complaint. To the contrary, postponing action would actually be advantageous to both the parties and the court. The parties would benefit because they would not have to spend time and money propounding written discovery upon each other, taking depositions, and filing motions until this Court has determined that the use of pancuronium bromide in the lethal injection protocol is permitted under the Eighth Amendment. Moreover, the Court would be able to avoid ruling on motions and other filings until it has found that the Eighth Amendment does not bar the State from using pancuronium bromide in the lethal injection process.

Plaintiff will not suffer financial, legal, or any other hardship if the adjudication of their claim is postponed until after a decision has been issued in *Morales*. Moreover, adjudicating Plaintiff's claim while O.P. 770 and the use of pancuronium bromide is being litigated in the *Morales* action would be a poor use of both the parties' and this Court's resources. Accordingly, Plaintiff should not be allowed to pursue its claims until after a decision in *Morales* has been issued by this Court.

VI.

CONCLUSION

The press and the public have the right to view executions from the moment the condemned enters the chamber until he is declared dead. Because the use of pancuronium bromide does not impede Plaintiff's ability to view a lethal injection execution, Plaintiff's first amended complaint does not state a claim upon which relief can be granted. Accordingly, the first amended complaint should be dismissed.

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In the alternative, the Court should dismiss this case for lack of subject matter jurisdiction because the complaint will not be ripe for judicial resolution until a ruling has been issued in the *Morales* case.

Dated: July 17, 2007

Respectfully submitted,

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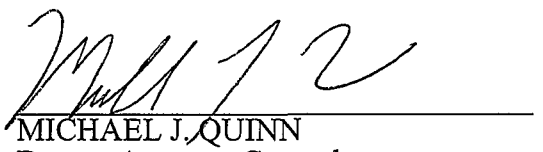

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