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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AMERICAN NEWS AND INFORMATION SERVICES, INC., a Connecticut corporation, EDWARD A. PERUTA, and JAMES C. PLAYFORD,

Plaintiffs,

vs.

WILLIAM D. GORE, individually and in his official capacity as San Diego County Sheriff, JAN CALDWELL, individually and in her official capacity as San Diego County Sheriff's Department Public Affairs Director, THOMAS SEIVER, San Diego County Sheriff's Department Deputy, individually, BRENDAN COOK, San Diego County Sheriff's Department Deputy, individually, JESSE ALLENSWORTH, San Diego County Sheriff's Department Deputy, individually, JAMES BRENEMAN, San Diego County Sheriff's Department Deputy, individually, MICHAEL PROCTOR, San Diego County Sheriff's Department Deputy, individually, JOHN DOE 1-10, San Diego County Sheriff's Department, WILLIAM LANSDOWNE,

CASE NO. 12-CV-2186-BEN (KSC)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT [DOC. # 56]

The Honorable Roger T. Benitez
Courtroom: 5A

Hearing Date: March 10, 2014
Time: 10:30 a.m.

individually and in his official capacity as San Diego Police Chief, JOHN DOE 1-10, San Diego Police Department, and BONNIE DUMANIS, individually and in her official capacity as San Diego County District Attorney, JOHN DOE 1-10, San Diego County District Attorney's Office, individually,

Defendants.

The Plaintiffs American News and Information Services, Inc. ("American News"), Edward A. Peruta ("Peruta"), and James C. Playford ("Playford"), hereby respond to a Motion to Dismiss the Amended Complaint submitted by the Defendants County of San Diego, William D. Gore, Jan Caldwell, Thomas Seiver, Brendan Cook, Jesse Allensworth, James Breneman, Michael Proctor, the San Diego Sheriff's Department, and Bonnie Dumanis (collectively, "SD County Defendants"). The Second Amended Complaint alleges in six counts claims against the various SD County Defendants.

I. INTRODUCTION

The SD County Defendants obstructed American News, Peruta, and Playford from gathering, recording, and distributing information of public interest by three general means:

- First, by excluding Playford, a duly authorized representative of American News, from gathering information in a public place where the public was present and not excluded. (Second Am. Compl. ¶ 44(a))
- Second, by excluding Playford from gathering information at locations where media holding credentials issued by the San Diego Police Department (SDPD) were allowed for news gathering purposes. (Second Am. Compl. ¶ 44(b))
- Third, by disregarding the property interest created in § 409.5(d) which allows duly authorized representatives of news services to gather news in areas of calamity, including accident scenes, closed to the general public by government order. (Second Am. Compl. ¶ 44(b))

American News is a *bona fide* news and information gathering organization held expressly exempt in California Penal Code § 409.5(d) from government orders closing areas of danger to the general public created by calamities, including flood, storm, fire, earthquake, explosion, accident, or other disaster. Cal. Penal Code § 409.5 (emphasis in underline added). (Second Am. Compl. ¶ 2) Each of the three means used to obstruct Playford, and specifically the first which prohibited Playford from gathering news at locations not closed to the public where the public was present, were motivated by intent to retaliate against Playford for challenging the conduct of deputies assigned to the San Diego County Sheriff's Department (SDCSD). The second means not only obstructed Playford but any member of the media without a San Diego Police Department (SDPD) government-issued media credential from gathering news where the SD County Defendants refused to recognize non-government issued media credentials. Finally, the third means used to obstruct Playford barring him from accident scenes when he validly possessed a media credential of a *bona fide* news organization as its duly authorized representative deprived Playford of an interest in earning a livelihood as a journalist founded in state statute.

In the course of obstructing Playford from gathering news, the SD County Defendants seized Playford's property and searched its contents in violation of federal statutory and constitutional laws.

II. LEGAL ARGUMENT

A. Count One - Retaliatory Government Actions (Second Am. Compl. ¶¶ 197-213)

In Count One the Plaintiffs allege that Deputy Seiver on February 28, 2010, (Am. Compl. ¶¶ 81-92) and March 9, 2010, (Second Am. Compl. ¶¶ 93-

105) arrested Playford in public places where members of the public were present to prevent Playford from recording a public event of public interest; that Deputy Cook arrested Playford on December 1, 2011, in a public place where members of the public were present to prevent Playford from recording a public event of public interest (Second Am. Compl. ¶¶ 106-128); and that Deputy Breneman, Deputy Proctor, and Deputy Allensworth arrested Playford on May 25, 2012, (Second Am. Compl. ¶¶ 136-171) in the vicinity of an accident scene where members of the media with SDPD government-issued media credentials were authorized to gather news.

The arrests were motivated by a series of events that began in July 2008 when Playford captured an audio-video recording of SDCSD deputies beating a man in Ramona. (Second Am. Compl. ¶¶ 35-38) Playford's involvement in the subsequent criminal and civil proceedings as a witness resulted in an August 2009 letter warning Playford that his SDPD media credentials would be revoked if he interfered with any investigation. (Second Am. Compl. ¶ 39-43) Prior to July 2008 Playford enjoyed a positive rapport with the SDCSD. (Second Am. Compl. ¶ 34) When Playford recorded and posted information on the Internet in October 2009 contrary to information provided by the SDCSD Public Information Office (PIO) about activities in McGonigle Canyon, he received a January 2010 notice that his SDPD government-issued media credentials would not be renewed. (Second Am. Compl. ¶¶ 45-47)

1. Statute of Limitations

Federal courts look to state law to determine the application of tolling rules. Harding v. Galceran, 889 F.2d 906, 908 (9th Cir. 1989) (citing Board of

Regents v. Tomanio, 446 U.S. 478, 485-86 (1980)). California Government Code § 945.3 provides, in relevant part:

> No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a superior court.
>
> Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a superior court.

"[W]hile a state prohibition against filing an action cannot prohibit a criminal defendant from filing a section 1983 action against a peace officer while the criminal case is pending, section 945.3 should not be so applied as to force him to do so or lose his cause of action." Id. at 909. In Harding, the court of appeals held that "[b]ecause the statute of limitations on Harding's section 1983 claims was tolled while criminal charges were pending against him, his section 1983 claims were timely filed." Id.

The criminal matters against Playford arising from the February 28, 2010, and March 9, 2010, arrests resolved in state court after trial on March 29, 2011. (Second Am. Compl. ¶101-105) Playford commenced the instant matter by Complaint on September 6, 2012, less than two years later.

2. The General Public Was Not Excluded From the February 28, 2010, March 9, 2010, and December 1, 2011, Scenes and Media Possessing SDPD Government-Issued Media Credentials Were Not Excluded From the May 25, 2012, Accident Scene

But for Playford's exercise of rights guaranteed under the Free Press Clause of the First Amendment, Playford would not have been excluded from recording matters of public interest conducted in public locations where the public was present on February 28, 2010, March 9, 2010, and December 1, 2011, or at the scene of an accident on May 25, 2012, where media having SDPD government-issued media credentials were allowed. But for Playford's outspokenness about his right to gather news, he would not have been arrested on February 28, 2010, March 9, 2010, and December 1, 2011, or at the scene of an accident on May 25, 2012.

In the August 2009 letter the SDPD warned Playford that jeopardy to public safety caused by interference with an investigation, or any indication that such conduct occurred at the scene of an investigation, could result in revocation of SDPD government-issued media credentials. The letter informed Playford that a SDPD government-issued media credential is a privilege, not a right. (Second Am. Compl. ¶¶ 42-43) Playford's ability to gather news through the apparently exclusive access afforded by the SDPD government-issued media credential necessary to justify its existence was subject to a revocation or denial standard based on "any indication of interference," and did not require even a violation of the law, arrest, or conviction.

In covering the news, the media interferes by mere presence. How that presence is interpreted by police officers and whether or not it "interferes" is a function of how averse or welcoming police officers are to the attention paid to their activities. See Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011) ("the fact that the 'officers were unhappy they were being recorded during an arrest … does not make a lawful exercise of a First Amendment right a crime.'"); see also Estes

v. State of Texas, 381 U.S. 532, 546 (1965) ("We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony."). If, as the SDPD asserts, access to government-issued media credentials is a privilege and not a right and Playford's exercise of a First Amendment constitutional right relies upon access to SDPD government-issued media credentials then revocation or denial of SDPD government-issued media credentials denies Playford and others a constitutional rights based on no more than an indication of interference.[1]

3. Filming Police Officers In Public Is A Constitutionally Protected Right[2]

[1] See Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011). Simon Glik ("Glik"), concerned that police officers were using excessive force, used his cell phone to record an arrest on the Boston Commons. One officer told Glik that he had taken enough pictures and asked Glik if he had recorded any audio. When Glik affirmed that audio had been recorded, he was placed under arrest and his cell phone and computer flash drive seized. The charges filed against Glik for illegal wiretapping, aiding and abetting the escape of a prisoner, and disturbing the peace were dismissed by the Commonwealth. Glik sued the police officers for First and Fourteenth Amendment violations. The criminal court noted in dismissing the charges that "the fact that the 'officers were unhappy they were being recorded during an arrest … does not make a lawful exercise of a First Amendment right a crime.'" Id. at 80. The government moved to dismiss Glik's federal civil rights action claiming that "it is not well-settled that he [Glik] has a constitutional right to record the officers." Id. The district court declined to grant the police officers qualified immunity and the court of appeals affirmed, finding it firmly established that there is "a constitutional protected right to videotape police carrying out their duties in public." Id. at 82.

[2] In their Memorandum, the Defendants argue that the First Amendment cause of action in Count One does not accrue until the pending criminal prosecution against Playford arising from the May 25, 2012, is resolved in his favor. (Defs.' Mem. at 4; doc. # 37-1) But see Harding, 889 F.2d at 909 ("[W]hile a state prohibition against filing an action cannot prohibit a criminal defendant from filing a section 1983 action against a peace officer while the criminal case is pending, section 945.3 should not be so applied as to force him to do so or lose his cause of action."). If the criminal prosecution of the May 25, 2012, arrest were to last longer than two years from the date of arrest and Playford waited until then to file, according to the argument made by the Defendants in another part of their Memorandum, Plaintiff's section 1983 claims would be untimely. (Defs.' Mem. at 3; doc. # 37-1)

In Veth Mam v. City of Fullerton, 2013 WL 951401 (C.D. Cal. March 12, 2013), Veth Mam ("Mam") recorded an early morning, physical struggle between a police officer and Sokha Leng ("Leng") on a public street. As Mam moved closer to record the struggle, another police officer told Mam twice to "back off." Id. at 2. Officers repeatedly told Mam to "back off" and eventually Mam obeyed. Mam's cell phone was knocked out of his hand as he was hand-cuffed and pinned face-down on the ground. Mam proceeded to trial on charges of obstructing a police officer, assault, and battery and was acquitted. Id.

Mam filed a civil rights action claiming first that there was no probable cause to arrest him for interfering under California Penal Code § 148(a)(1).[3] The district court granted summary judgment against Mam on his unlawful seizure claims finding the arrest supported by probable cause. Id. at 8-9.

In considering Mam's First Amendment claim that he was "retaliated against for exercising his First Amendment right to film the acts of the police in public – namely the Leng arrest," the court recognized: "In this Circuit, an individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause." Id. at 10 (quoting Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013)).

4. Retaliatory Arrests Supported By Probable Cause Are Actionable

In Ford v. City of Yakima, 706 F.3d 1188 (9th Cir. 2013), a motorist brought a civil rights action alleging First Amendment retaliation against a municipality and the police officers who arrested and held him in custody

[3] Playford was convicted of interfering with an officer (Cal. Penal Code § 148(a)(1)) after trial on the December 1, 2011, arrest. A jury deadlocked on the same charges arising from the February 28, 2010, and March 9, 2010, arrests and Playford pleaded guilty to disorderly conduct. (Second Am. Compl. ¶¶ 101-103)

following a traffic stop. Eddie Ford ("Ford"), the motorist, was driving just after midnight and listening to music when he noticed a police cruiser approaching rapidly from the rear. Ford changed lanes twice to allow the cruiser to pass. When Ford stopped at a red light he emerged from his vehicle to ask the officer behind him why the officer was following him so closely. The officer ordered Ford to return to his vehicle and proceed but then changed his mind and, after he and Ford went through the intersection, the officer turned on his lights and signals and stopped Ford. Ford emerged from his vehicle yelling and accused the officer of racism. The officer ordered Ford to return to his vehicle or risk arrest. Ford obeyed. The officer then commented to another officer about Ford's attitude and arrested Ford. In the course of a back-and-forth discussion in the cruiser, Ford informed the officer that he was exercising his First Amendment right to free speech and the officer responded that he was exercising his right to arrest Ford.

At trial, the officer testified that he arrested Ford for violation of a noise ordinance and for a disrespectful attitude toward the officer that endangered public safety. Ford was acquitted, then brought a civil rights action alleging that the officer retaliated against him for exercising his First Amendment right to freedom of speech. The district court granted the defendants qualified immunity finding that there was no constitutional violation as "the officers did not retaliate against Ford in violation of the First Amendment because they had probable cause to arrest Ford for violating the city noise ordinance." Id. at 1192.

The Ninth Circuit performed a two-prong analysis: First, whether the facts supported a violation of Ford's First Amendment rights and, second, whether

such violation, if demonstrated, had been clearly established at the time Ford was arrested and held by the defendants.

First Prong: To determine whether the facts could support a First Amendment violation the court first asked if the defendants' "'acts would chill or silence a person of ordinary firmness from future First Amendment activities.'" Id. at 1192 (quoting Mendocino Envtl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir.1999)). A rational jury could find that the officers' arrest and detention "deterred or chilled the future exercise of Ford's First Amendment rights." Id. at 1194. The court next determined whether the "speech was a but-for cause" of the defendants' conduct. As the court stated: "In other words, would Ford have been booked and jailed, rather than cited and arrested, but for the officers' desire to punish Ford for his speech?" Id. The "issue of causation ultimately should be determined by a trier of fact … ." Id.

Second prong: "Police officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech." Id. at 1195 (citing Duran v. City of Douglas, 904 F.2d 1372, 1375-78 (9th Cir.1990)). Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1232 (9th Cir.2006) established that "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." Ford, 706 F3d at 1195-96.

Playford, like Ford, has "put forth facts sufficient to allege a violation of his clearly established First Amendment right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action." Id. at 1196.

5. "'But For' And Causation In Mam and Ford As Applied to Playford

Question #1: Would a person of ordinary firmness be chilled from future First Amendment activity based on the facts in Mam and Ford and the allegations regarding Playford's arrests in the Amended Complaint?

In Mam the answer is "Yes" because Mam was arrested, searched, and his cell phone seized. In Ford the answer is "Yes" because Ford was arrested and detained. Playford was arrested and detained four times and his property seized on March 9, 2010, December 1, 2011, and May 25, 2012. (Am. Compl. ¶¶216-218) The Amended Complaint sufficiently alleges that a person of ordinary firmness would be chilled from future First Amendment activities when subject to the conduct attributed to the arresting SDCSD deputies.

Question # 2: Was Mam's, Ford's, and Playford's First Amendment activity a "but for" cause of their arrests?

In Mam the answer is "Yes" because "the only difference between Mam and those near him was the cell phone being used to record." Mam, 2013 WL 951401 at 6. In Ford the answer is "Yes" because Ford was outspoken in exercising his First Amendment rights. Playford recorded police activity in public locations on February 28, 2010, March 9, 2010, and December 1, 2011. Although other individuals in the vicinity had cell phones on December 1, 2011, in the public location where Playford was recording, the SDCSD deputies seized Playford's cell phone on suspicion of an explosive device. (Am. Compl.¶¶ 108, 109). Moreover, the history between Playford and the SD County Defendants as alleged in the Amended Complaint from the July 2008 recording of the Alan Baker beating, the August 2009 SDPD warning letter, Playford's participation as a witness in the Alan Baker criminal and civil proceedings, the McGonigle Canyon controversy which pitted Playford's video recordings against the official

SDCSD PIO version of events, the January 2010 renewal denial of Playford's SDPD government-issued media credentials, to the SD County Defendants' refusal to recognize American News' media credentials sufficiently allege a retaliatory animus absent which, in combination with his First Amendment activities, Playford would not have been arrested.

B. Qualified Immunity

On February 11, 2014, a court in the Northern District of California, citing Ford, recognized that "[i]n this Circuit, '[p]olice officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech.'" Morse v. San Francisco Bay Area Rapid Transit Dist. (BART), 12-CV-5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014)(citing Ford, 706 F.3d at 1195). In rejecting the officers' assertion of qualified immunity by motion for summary judgment the district court left the issue of whether the protestor was subject to arrest and retaliatory police action for his speech to the trier of fact. Rejecting the officers' reliance on Acosta v. City of Costa Mesa, 718 F.3d 800 (9th Cir.2013), the court was not persuaded by their argument that Skoog no longer governs in light of the U.S. Supreme Court's decision in Reichle v. Howards, __ U.S. UU, 132 S.Ct. 2088 (2013), a case cited by the SD County Defendants in this action.

> In Ford, the Ninth Circuit specifically applied Skoog's holding to a post-Reichle case in confirming that since 2006 it has been clearly established in this Circuit that retaliatory police conduct is actionable even if the officer's conduct was supported by probable cause. Further, Defendants fail to explain how Reichle overruled Skoog. In Reichle, the Court found that there was not a clearly established right to be free from a retaliatory arrest supported by probable cause under either Supreme Court precedent or Tenth Circuit precedent. The Court did not address the question of whether the absence of probable cause is necessary to

> state a claim for retaliatory arrest. Although not supported by any authority, Defendants' argument appears to be that the Supreme Court's conclusion that there is no clearly established right under its precedent precludes the Ninth Circuit from looking to its own precedent to see if the right was clearly established there. That is not the law.

Morse, 2014 WL 572352 at *12. "'The relevant inquiry is whether, *at the time of the officers' action,* the state of the law gave the officers fair warning that their conduct was unconstitutional." Id. at *13 (emphasis added in Morse)(quoting Ford, 706 F.3d at 1195). In the Ninth Circuit "the inquiry begins by looking to see "[i]f the right is clearly established by decisional authority of the Supreme Court *or* this Circuit."Id. (emphasis added in Morse)(quoting Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir.2004). In Morse, at the time of the protestor's arrest on September 8, 2011, and in the instant case at the time of Playford's arrests on February 28, 2010, March 9, 2010, December 1, 2011, and May 25, 2012, "it was indisputable that Skoog was the law in the Ninth Circuit" and thus the officer in Morse and the SD County Defendants in the instant case were "given fair warning" that their "alleged conduct was unconstitutional." Id.

C. Count Two – Illegal Search and Seizure
(Second Am. Compl. ¶¶ 214-223)

The search of the contents of an electronic device incident to arrest is not justified by the exigency of the circumstance, the need to preserve evidence, or officer safety. Electronic devices hold large amounts of information, the majority of which will probably not relate to the criminal offense charged. The contents of electronic devices are prone to a highly private nature.[4]

[4] See Riley v. California, 134 S.Ct. 999 (2014) ("Petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District, Division One, granted limited to the following question: Whether evidence admitted at petitioner's trial

In Schlossberg v. Solesbee, 844 F.Supp.2d 1165, 1170 -1171 (D.Or. 2012) the court found:

> Warrantless searches of such devices are not reasonable incident to a valid arrest absent a showing that the search was necessary to prevent the destruction of evidence, to ensure officer safety, or that other exigent circumstances exist.

In seizing the device, the contents may easily be preserved until a warrant is obtained. When Playford's camera was seized on December 1, 2011, and May 25, 2012, exigent circumstances to search the contents did not exist. The rationales for searches incident to arrest do not apply to seizures of electronic device contents and are overcome by the heightened privacy concerns. See U.S. v. Park, 2007 WL 1521573, *8 (N.D.Cal. 2007) ("The searches at issue here go far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence."); U.S. v. Wurie, 728 F.3d 1, 13, cert. granted 134 S.Ct. 999 (1st Cir. 2013) ("We therefore hold that the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person, because the government has not convinced us that such a search is ever necessary to protect arresting officers or preserve destructible evidence.")

D. Count Three – Failure to Train
(Second Am. Compl. ¶¶ 2204-235)

The San Diego County Defendants control media access to news by using the SDPD to determine which media will enjoy government-condoned access.

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was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights.").

When a policy is enforced which allows even an indication that there may be interference with law enforcement as cause for the government to withdraw its consent and revoke the privilege it has granted to the media, then the First Amendment ceases to exist. The Plaintiffs do not claim that the SDPD's denial of government-issued media credentials constitutes a First Amendment violation; the Plaintiffs claim that the SD County Defendants' refusal to accord Playford's American News media credentials the same status as the SDPD government-issued credentials violates the First Amendment.

Premise #1: The First Amendment guarantees the right to film matters of public interest. Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).

Premise #2: Playford has alleged that because he did not possess SDPD government-issued media credentials on February 28, 2010, March 9, 2010, and December 1, 2011, the SD County Defendants did not recognize him as a member of the media and retaliated against him for the same conduct that led the SDPD to deny him renewal of his SDPD government-issued media credentials in January 2010, i.e. media coverage of public matters of public interest that the SD County Defendants did not want recorded by the media.

Premise #1: California Penal Code § 409.5(d) allows the media access to accident scenes where the general public has been excluded by law enforcement.

Premise #2: Playford has alleged that because he did not possess SDPD government-issued media credentials on May 25, 2012, he was denied access to an accident sconce that his American News media credentials specifically allowed him access to as a duly authorized representative of American News and that media with SDPD government-issued media credentials were allowed access at the same time that Playford was denied.

Conclusion: The SDPD's government-issued media credentials and the reliance on these credentials by the San Diego County Defendants in deciding who may record matters in public locations of public interest and at accident scenes where the general public has been excluded infringes upon the First Amendment rights of media which do not seek or cannot obtain government approval and the First Amendment rights of media which hold SDPD government-issued media credentials and must operate under the threat that any activity not condoned by the SDPD and San Diego County Defendants or carries at least an inference of interference may result in the government's revocation or future denial of renewal. If the SDPD government-issued media credentials did not provide greater access to news then there would be no reason for their existence. See Second Amended Complaint ¶20 ("Defendant William Lansdowne … designates through the issuance of 'media credentials' which news and information services will receive superior access to 'the most up to date and reliable information' in San Diego County."). But the government-issued media credentials provide no more access than is guaranteed under the First Amendment or provided by state statute to duly authorized representatives of news organizations. If this is the case then revoking or denying the SDPD government-issued media credentials must result in the diminution of the access that is guaranteed under the First Amendment or provided by state statute to duly authorized representatives of news organizations.

The SDPD's issuance of media credentials where the credentials afford no more access than guaranteed under the First Amendment or provided by state statute and the diminished access afforded those with media credentials issued by news organizations independent of government approval and oversight

sufficiently allege that San Diego County, Gore, Caldwell, and Dumanis employ a policy, practice, and custom to deny *bona fide* news organizations and their duly authorized representatives rights guaranteed under the First Amendment and provided by state statute despite there being no rationale, other than not obtaining government approval. This violates the First Amendment.

E. Count Five – Property Interest in Media Credentials
(Second Am. Compl. ¶¶ 240-249)

The issuance, renewal, and revocation process in holding SDPD government-issued media credentials creates a property interest subject to the Due Process Clause guarantees of the Fourteenth Amendment, including notice and an opportunity to be heard either pre-deprivation or post-deprivation. The media depends upon access to news to earn a livelihood and profit. California Penal Code § 409.5(d) which creates a statutory property interest in gathering news as a duly recognized representative of a news organization.

In Spinelli v. City of New York, 759 F.3d 160 (2d Cir. 2009), the court concluded that a gunshop owner's due process rights were violated when New York City suspended her license without a prompt post-deprivation hearing. Id. at 175. The City conceded that the investigation and hearing process for suspended gun dealer licenses often took "months or years" to complete. Id. Spinelli hired a lawyer whose successful negotiations with the city officials resulted in reinstatement of the suspended license after only fifty-eight (58) days. But given that Spinelli's business and livelihood were at stake, the court held that even this

delay exceeded the bounds of due process. Id. at 174; see also Jones v. City of Modesto 408 F.Supp.2d 935 (E.D.Cal. 2005) (withholding massage therapist license and massage establishment license for close to sixty days resulted in loss of income and violation of right to prompt hearing).

F. Count Six – Federal Privacy Protection Act
(Second Am. Compl. ¶¶ 250-255)

The Federal Privacy Protection Act (FPPA), 42 U.S.C. §§ 2000aa et seq., "generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public." Citicasters v. McCaskill, 89 F.3d 1350, 1353 (8th Cir. 1996). An exception to the FPPA attaches when "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." Morse v. Univ. of California, Berkley, 821 F.Supp.2d 1112, 1120 (N.D. Cal. 2011) (quoting 42 U.S.C. § 2000aa(a)(1), (b)(1)). Playford was charged in the December 1, 2011, and May 25, 2012, arrests with resisting an officer in violation of California Penal Code § 148(a)(1). Did the recordings seized from his camera relate to the charge of resisting an officer? To answer in the affirmative is to allow the exception to eviscerate the rule in cases where recording police activity is the gravamen of the arrest. The police officer claims that the media is interfering by recording the officer's conduct; the recording of the conduct confirms the interference; therefore, the work product or documentary material that the officer objected to being recorded relates to the criminal offense and may be seized from the media and from public scrutiny. At the least, until both elements of the first prong in the retaliatory animus analysis are determined, applying an exemption in

the FPPA to the conduct of the SDCSD deputies when but for a retaliatory animus the arrests and seizures would not have occurred is premature pending discovery. See Ford, 706 F.3d at 1194 ("The "issue of causation ultimately should be determined by a trier of fact … .").

G. Count Seven – False Arrest
(Second Am. Compl. ¶¶ 256-260)

136. Section 409.5(d) exempts a duly authorized representative of any news service, newspaper, or radio or television station or network from an area closure order made by law enforcement pursuant to § 409.5(a) or (b). (Second Am. Complaint ¶ 217)(emphasis in underline added). The scene on May 25, 2012, on State Road 67 in San Diego County involved a motor vehicle accident as enumerated in § 409.5(a) which allows the SDCSD to close the area upon a determination that the accident rose to a calamity creating a menace to public health or safety or upon the establishment of an emergency command post pursuant to § 409.5(b). (Second Am. Complaint ¶ 139) Despite closing the area however, Playford, as a duly authorized representative of American News, could not be prevented from accessing the area closed pursuant to § 409.5(d). (Second Am. Complaint ¶ 140) Eleven minutes prior to Playford's arrival, the SDCSD permitted *Ramona Sentinel* reporter Karen Brainard to drive her vehicle southbound toward the accident scene without incident. (Second Am. Complaint ¶ 140) SDCSD Deputy Breneman then approached and informed Playford: "My sergeant advised me you do not have press credentials," and told Playford "you cannot be over here." (Second Am. Complaint ¶ 153) While SDCSD Deputy Breneman prevented Playford from proceeding further southbound, within sight of SDCSD Deputy Breneman and Playford in a southbound direction were other

media representatives, including *Ramona Sentinel* reporter Karen Brainard and one local NBC media vehicle and staff. (Second Am. Complaint ¶ 154)

137.

III. CONCLUSION

For all the foregoing reasons, the Plaintiffs oppose the Defendants' Motion to Dismiss and respectfully ask the Court to deny the motion in its entirety.

Dated: June 10, 2013

PLAINTIFFS
AMERICAN NEWS AND INFORMATION SERVICES, INC., EDWARD A. PERUTA, AND JAMES C. PLAYFORD

BY: /s/ Rachel M. Baird
Rachel M. Baird, (admitted *pro hac vice)*

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