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8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11 SAN JOSE DIVISION

12
 13 **PACIFIC NEWS SERVICE,**

14 Plaintiff,

15 v.

16 **MATTHEW CATE, et al.,**

17 Defendants.

C 06-1793 JF

**DEFENDANTS' MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF THEIR MOTION TO
 DISMISS THE SECOND AMENDED
 COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF UNDER
 FRCP 12(b)(6) FOR FAILURE TO STATE
 A CLAIM**

Date: December 2, 2010
 Time: 1:30 p.m.
 Dept: Ct. Rm. 3, 5th Fl.
 Judge The Honorable Jeremy Fogel
 Trial Date None
 Action Filed: March 21, 2006

1 Defendants Governor Arnold Schwarzenegger, Secretary Matthew Cate, and Warden
2 Vincent Cullen (Defendants) submit their Memorandum of Points and Authorities in Support of
3 their Motion to Dismiss the second amended complaint under FRCP 12(b)(6) for failure to state a
4 claim.

5 INTRODUCTION

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

12 Plaintiff's second amended complaint, which alleges that pancuronium bromide functions
13 as a "chemical curtain" that conceals information from the press and the public, does not state a
14 claim for relief. The use of pancuronium bromide during a lethal-injection execution does not
15 impede the right that was defined in *CFAC* because that drug does not affect Plaintiff's ability to
16 watch the condemned inmate enter the execution chamber, be attached to the execution device,
17 and then die. *Id.* at 876. Plaintiff, in arguing that the use of pancuronium bromide violates its
18 right of access to public proceedings under the First Amendment, is essentially seeking to observe
19 a different execution proceeding than the State affords by prescribing the drug combination that
20 will be used. However, nothing in *CFAC* gives Plaintiff the right to dictate the method that the
21 State uses to perform a lethal-injection execution. Accordingly, because the second amended
22 complaint fails to set forth a legally cognizable claim under the First Amendment, it should be
23 dismissed.

24 The second amended complaint should also be dismissed because the Supreme Court's
25 recent decision in *Baze v. Rees*, 553 U.S. 35 (2008), demonstrates that there is a "constitutionally
26 legitimate and justifiable reason for administering pancuronium bromide." (2d Am. Compl. 5:1-
27 2.) In upholding Kentucky's three-drug lethal-injection protocol, the Court stated that the state's
28 use of pancuronium bromide did not offend the Eighth Amendment. *Id.* at 57-58. It also noted

1 that pancuronium bromide serves two purposes during an execution. First, it preserves the
2 dignity of the procedure by preventing involuntary physical movements during unconsciousness
3 that could accompany the injection of the third drug, potassium chloride. *Id.* at 57. Second, it
4 stops respiration, hastening death. *Id.* Given that Defendants have legitimate reasons for
5 administering pancuronium bromide, the second amended complaint should be dismissed.

6 **STATEMENT OF THE ISSUE**

7 Whether Plaintiff's second amended complaint, which alleges that the use of pancuronium
8 bromide during a lethal-injection execution functions as a "chemical curtain" that conceals
9 information from the press and the public, states a claim upon which relief can be granted.

10 **STATEMENT OF FACTS**

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

16 In this case, Plaintiff does not dispute that Defendants permit the press to view execution
17 proceedings. Rather, Plaintiff essentially complains that it is unable to observe a lethal-injection
18 execution conducted without pancuronium bromide. Plaintiff contends that Defendants' use of
19 pancuronium bromide, a paralytic agent that allegedly acts as a "chemical curtain" over the lethal-
20 injection process, makes it impossible for witnesses to "view adequately" the dying process. (Sec.
21 Am. Compl. at 1:17-19.) PNS alleges that pancuronium bromide (1) prevents society from
22 watching, in a meaningful way, executed inmates die (Sec. Am. Compl. at 6:5-7); (2) suppresses
23 information about whether the inmate experiences pain, and if so, how much (Sec. Am. Compl. at
24 6:8-10); (3) conceals information from members of the press and the public about whether pain is
25 present or absent (Sec. Am. Compl. at 6:23-24); and (4) masks both disputed and undisputed
26 indicia of pain or consciousness (Sec. Am. Compl. at 7:2-3). PNS also alleges that the use of
27 pancuronium bromide prevents the public and the press from obtaining other "socially relevant
28

1 information,” including an inmate’s attempt to express “repentance, confession, anger or
2 defiance” while fighting off the effects of the sodium pentothal. (Sec. Am. Compl. at 8:5-8.)

3 STANDARD OF REVIEW

4 I. THE STANDARD FOR RULE 12(B)(6) MOTIONS.

5 A Rule 12(b)(6) motion tests the “legal sufficiency of the claim or claims stated in the
6 complaint.” *Beliveau v. Caras*, 873 F. Supp. 1393, 1395 (C.D. Cal. 1995) (quoting Schwarzer,
7 Tashima and Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial*,
8 §9:187 (1994)). Although Federal Rule of Civil Procedure 8(a)(2) does not require a complaint to
9 contain specific facts, it does require the complaint to plead “enough facts to state a claim to relief
10 that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)
11 (abrogating the “no set of facts” language of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In
12 other words, Plaintiff is obligated to provide “more than labels and conclusions, and a formulaic
13 recitation of the elements of a cause of action.” *Id.* at 555. The complaint has to have enough
14 factual allegations “to raise a right to relief above the speculative level.” *Id.*

15 ARGUMENT

16 I. THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO 17 STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

18 A. The Decision in *California First Amendment Coalition v. Woodford*, Which 19 Established a First Amendment Right of the Press and the Public to View an Execution, Does Not Support Plaintiff’s Claim.

20 In *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002)
21 (*CFAC*), the Ninth Circuit examined the extent to which the public and the press are entitled to
22 view an execution. There, the press plaintiffs challenged a procedure that prohibited witnesses
23 from observing an execution until after the execution team had brought the condemned into the
24 chamber, inserted the intravenous lines, and left him alone to await the order to dispense the
25 chemicals. *Id.* at 870.

26 *CFAC* recognized that there was both an historical tradition—beginning with entirely
27 public executions and continuing with the practice of inviting official witnesses—and a functional
28 importance of public access to executions. *Id.* at 877. According to the court, the “public and

1 press historically have been allowed to watch the condemned inmate enter the execution place, be
2 attached to the execution device, and then die.” *Id.* at 876. Historical practice strongly supported
3 the public’s First Amendment right to view the condemned as the guards escorted him into the
4 chamber, strapped him to the gurney, and inserted the intravenous lines. *Id.*

5 The court also noted that independent public scrutiny—made possible by the public and
6 media witnesses to an execution—played a significant role in the proper functioning of capital
7 punishment. *Id.* In determining whether lethal-injection executions are “fairly and humanely
8 administered, or whether they ever can be, citizens must have reliable information about the
9 ‘initial procedures,’ which are invasive, possibly painful and may give rise to serious
10 complications.” *Id.* The decision added that the information is best gathered first-hand or from
11 the media, which serves as the public’s surrogate. *Id.* Therefore, the court held that the public
12 enjoyed a First Amendment right to view executions from the moment the condemned is escorted
13 into the execution chamber, including those “initial procedures” that are inextricably intertwined
14 with the process of putting the condemned inmate to death. *Id.* at 877.

15 Neither the historical tradition of access to executions nor the functional importance of
16 providing public access to executions supports Plaintiff’s claim. To the contrary, Plaintiff’s
17 second amended complaint fails to set forth any violation of the First Amendment or any other
18 claim upon which relief can be granted, since the state’s use of pancuronium bromide does not
19 restrict Plaintiff’s access to or ability to view an execution. Moreover, nothing in the *CFAC*
20 decision gives Plaintiff the power to dictate the particular drugs that the State can use in order to
21 perform an execution by lethal injection.

22 **1. The Use of Pancuronium Bromide Does Not Violate Plaintiff’s First**
23 **Amendment Right to Observe an Execution.**

24 As mentioned, under *CFAC*, Plaintiff has the right to view executions “from the moment
25 the condemned enters the execution chamber through, to and including, the time the condemned
26 is declared dead.” 299 F.3d at 885-86. In its second amended complaint, Plaintiff asserts that
27 “pancuronium bromide acts as a chemical curtain that conceals indicia of pain from the members
28 of the press and the public that are observing the executions.” (2d Am. Compl. 6:20-22.)

1 Plaintiff also contends that pancuronium bromide is administered with the intention of concealing
2 information from the press and the public. (*Id.* at 9:12-14.)

3 Even if this Court accepts as true all of Plaintiff's allegations regarding the use of
4 pancuronium bromide (which it must when analyzing a Rule 12(b)(6) motion), the amended
5 complaint fails to set forth a claim upon which relief can be granted. Defendants' use of
6 pancuronium bromide during a lethal-injection execution does not impede Plaintiff's ability to
7 exercise the First Amendment right to view executions that was delineated in *CFAC*. To the
8 contrary, Plaintiff, under the lethal-injection regulations, has the right to examine the execution
9 process from the moment the condemned is escorted into the lethal-injection chamber, and has no
10 restrictions on what it may observe, publish, or choose to withhold. Cal. Code Regs. tit. 15, §
11 3349.4.4(a)(6) (2010). Nothing in Plaintiff's amended complaint suggests that Plaintiff will be
12 denied the opportunity to view every aspect of the execution procedure authorized by the courts.
13 Because the administration of pancuronium bromide does not hinder Plaintiff's right of access to
14 view a lethal injection execution, the amended complaint does not state a claim that merits relief.

15 **2. Nothing in the *CFAC* Decision Permits the Press or the Public to**
16 **Define How an Execution Should Be Conducted.**

17 Although Plaintiff has the right to observe an execution from the moment the condemned is
18 led into the execution chamber, the *CFAC* decision does not provide the press or the public with
19 the right to dictate how the state performs an execution or manipulate what is being observed. If
20 the State were planning to execute a condemned inmate by electric chair, hanging, or firing squad,
21 Plaintiff would have a right to attend and view the proceedings under *CFAC*. However, in those
22 situations, Plaintiff would not have a First Amendment right to challenge the amount of electricity
23 used to execute the condemned inmate, the number of bullets used by a firing squad, or the type
24 of rope employed in a hanging on the grounds that a different method would enable Plaintiff to
25 better view the "dying process" or to observe the physical impact of the procedures on the inmate.
26 (Sec. Am. Compl. at 1:17-19.) Plaintiff similarly lacks a First Amendment right to object to the
27 use of pancuronium bromide in the course of a lethal injection execution on those grounds.
28

1 The U.S. Supreme Court has recognized that the Constitution does not accord the press
2 special access to information not shared by members of the public generally. *Pell v. Procunier*,
3 417 U.S. 817, 834 (1974). In objecting to the use of pancuronium bromide, Plaintiff demands
4 more than special access—it seeks the unprecedented right to alter the method used by the State to
5 perform a lethal-injection execution. However, because Plaintiff’s only interest under the First
6 Amendment is viewing the execution that is actually provided by the State, rather than viewing
7 some other execution comporting more closely to its preferences, the second amended complaint
8 does not state a claim for relief. If *CFAC* were read as Plaintiff urges, every execution would be
9 subject to challenges on the theory that it “masks” or places a “curtain” over what would occur if
10 the execution were only conducted differently. Furthermore, every change in the execution
11 process would provide a basis for challenging the next execution. Accordingly, because the First
12 Amendment does not provide Plaintiff with the sweeping power to change the State’s execution
13 methods, the second amended complaint should be dismissed.

14 **B. The Supreme Court’s Decision in *Baze v. Rees* Demonstrates That There Is**
15 **a Constitutionally Legitimate Reason for Administering Pancuronium**
16 **Bromide.**

17 In *Baze v. Rees*, 553 U.S. 35, 63 (2008), the United States Supreme Court upheld
18 Kentucky’s three-drug lethal-injection protocol against allegations that it violated the Eighth
19 Amendment’s guarantee against cruel and unusual punishment. The Court’s opinion noted that
20 Kentucky’s use of pancuronium bromide did not violate the Eighth Amendment. *Id.* at 57-58. To
21 the contrary, administering pancuronium bromide during a lethal-injection execution served two
22 valid purposes. *Id.* at 57. First, it ensured the dignity of the procedure by preventing involuntary
23 physical movements during unconsciousness that could accompany the injection of potassium
24 chloride. *Id.* Second, it stopped respiration, hastening death. *Id.*

25 Plaintiff’s claims that pancuronium bromide “does not meaningfully affect consciousness or
26 the perception of pain,” does not hasten death, and “appears to serve no purpose other than
27 concealing important information about the execution process from the public and the press” are
28 meritless. (2d Am. Compl. 8:13-16.) The *Baze* decision establishes that pancuronium bromide
serves a valid purpose in lethal-injection executions and does not violate the Eighth Amendment.

1 Therefore, because the second amended complaint fails to set forth a legally cognizable claim, it
2 should be dismissed.

3 **CONCLUSION**

4 The press and the public have the right to view executions from the moment the
5 condemned enters the chamber until he is declared dead. Because the use of pancuronium
6 bromide, which the *Baze* Court found to be constitutional, does not impede Plaintiff's ability to
7 view a lethal-injection execution, the second amended complaint does not state a claim upon
8 which relief can be granted. Accordingly, the complaint should be dismissed.

9 Dated: October 25, 2010

10 Respectfully Submitted,

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