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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

FOUR DIRECTIONS, ET AL.,	)	CASE NO. C 14-03022 YGR
)	
Petitioners,	)	RESPONDENTS' MOTION TO DISMISS AND
	)	OPPOSITION TO FIRST AMENDED PRE-
v.	)	COMPLAINT PETITION TO PRESERVE
	)	EVIDENCE
COMMITTEE ON JUDICIAL CONDUCT)	
AND DISABILITY OF THE JUDICIAL	)	Date: January 13, 2015
CONFERENCE OF THE UNITED STATES,	)	Time: 2:00 p.m.
ET AL.,	)	Place: Courtroom 1, 4th Floor, 1301 Clay Street,
	)	Oakland, California
Respondents.)	
	)	Honorable Yvonne Gonzalez Rogers

NOTICE OF MOTION

PLEASE TAKE NOTICE that Respondents COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY OF THE JUDICIAL CONFERENCE OF THE UNITED STATES and THE OFFICE OF THE CIRCUIT EXECUTIVE CATHY A. CATTERSON, CIRCUIT AND COURT OF APPEALS EXECUTIVE, U.S. COURTS FOR THE NINTH CIRCUIT, will move this Court on January 13, 2015, at 2:00 p.m. in Courtroom 1, 4th Floor, United States Federal Building, 1301 Clay Street, Oakland, California, before the Honorable Yvonne Gonzalez Rogers, United States District Judge, under Fed. R. Civ. P. 12(b)(1), (6) for an order dismissing the First Amended Pre-Complaint Petition to Preserve Evidence (the "Amended Petition") (Doc. #34) filed by Petitioners FOUR DIRECTIONS, INDIAN PEOPLE'S ACTIONS, SARA PLAINS FEATHER, and CLIFFORD BIRD IN GROUND. The motion is based on this notice, the memorandum of points and authorities, all the matters of record filed with the Court, and such other evidence as may be submitted.

STATEMENT OF RELIEF

Respondents move for an order dismissing the Amended Petition under Rule 12(b)(1) or Rule 12(b)(6) or denying the Amended Petition.

ISSUES TO BE DECIDED

A. Whether the Amended Petition should be dismissed under Rule 12(b)(1) or Rule 12(b)(6) or denied because the information at issue is confidential and prohibited from disclosure under 28 U.S.C. § 360.

B. Whether the Amended Petition should be dismissed under Rule 12(b)(1) or Rule 12(b)(6) or denied because Petitioners have not shown there would be federal jurisdiction over any future complaint.

C. Whether the Amended Petition should be dismissed under Rule 12(b)(1) or Rule 12(b)(6) or denied because Rule 27 cannot be used to discover unknown information.

D. Whether the Amended Petition should be dismissed under Rule 12(b)(1) or Rule 12(b)(6) or denied because Petitioners have not shown justice would be delayed or denied.

E. Whether the Amended Petition should be dismissed under Rule 12(b)(1) or Rule 12(b)(6) or denied because it does not comply with numerous other requirements of Rule 27.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.¹

Petitioners had their original Petition (Doc. #1) dismissed with leave to amend because they failed to satisfy the requirements of Rule 27 and failed to overcome the statutory bar to disclosure. The Amended Petition fails to cure these defects and Petitioners continue to use Rule 27 improperly in an attempt to obtain information from a confidential File to determine *if* they have a potential claim. The Amended Petition should be dismissed or denied for the same reasons as before: (1) the information at issue is, by statute, confidential and prohibited from disclosure; (2) Petitioners have not shown there would be federal jurisdiction over any future action given obstacles of standing and immunity; (3) Rule 27 can only be used to perpetuate known information and not to discover unknown information; (4) Petitioners have not shown justice would be delayed or denied; and (5) the Amended Petition does not comply with numerous other requirements of Rule 27.

II. STATEMENT OF FACTS.

Respondents hereby refer to and fully incorporate by reference the statement of facts contained in section II of Respondents' Cross-Motion to Dismiss and Opposition to Pre-Complaint Petition to Preserve Evidence ("Respondents' First MTD") (Doc. #19).

After Respondents' First MTD was filed, a hearing was held on October 7, 2014, and on October 28, 2014, the Court granted Respondents' First MTD with leave to amend. (Doc. #32.) Petitioners filed the Amended Petition on November 14, 2014. (Doc. #34.)

III. LEGAL STANDARD.

Respondents hereby refer to and fully incorporate by reference the legal standard contained in section III of Respondents' First MTD.

IV. ARGUMENT.

Respondents hereby refer to and fully incorporate by reference all of the arguments contained in section IV of Respondents' First MTD and in section II of Respondents' first reply brief ("Respondents'

¹ In this motion and opposition, Respondents specially appear for the purpose of contesting the Amended Petition on the merits. Respondents do not concede they have been properly served and do not waive service, personal jurisdiction or venue and expressly reserve the right to contest those issues as necessary in the future.

First Reply”) (Doc. #26). Respondents here address only new arguments or allegations raised by the Amended Petition.

A. The Amended Petition Should Be Dismissed or Denied Because the Requested Information is Confidential and Prohibited From Disclosure by Statute.

The requested information is barred from disclosure by 28 U.S.C. § 360(a). The case from the District Court for the District of Montana, Cox v. McClean, No. CV 14-199-M-DLC, 2014 WL 4824808 (D. Mont. Sept. 30, 2014) (a copy of the order handed out by Petitioners’ counsel at the hearing is attached hereto as Appendix A), does not alter that conclusion and is not on point. The plaintiff in Cox had filed a complaint with the Montana Judicial Standards Commission against a Montana state judge, and the Commission dismissed the complaint and informed the plaintiff of its decision by letter. See id. at 3-4. The plaintiff sought to publish his complaint and the letter. See id. at 4. However, under Montana law, he could be charged with contempt if he did so. See id. at 6. He thus moved for a preliminary injunction enjoining the defendants from prosecuting him if he published the complaint and letter. See id. at 2. He contended the potential contempt charge violated his rights under the First Amendment. See id. at 6. The court, applying a four-part test for preliminary injunctions, granted the preliminary injunction, permitting him to publish the complaint and letter without being punished for contempt. See id. at 17. The court concluded, among other things, that the plaintiff had made a colorable claim that his First Amendment rights had been infringed. See id. at 7.

Cox does not overcome the bar to disclosure in § 360(a) for numerous reasons. First, Cox had nothing to do with § 360, but concerned certain provisions of the Montana Constitution that are not at issue in this case. Second, Cox did not involve Rule 27, but arose under the very different posture of a motion for preliminary injunction. Third, whereas Petitioners seek to have the File preserved and to obtain a list of all persons who worked on the File, the plaintiff in Cox, by contrast, did “*not* seek internal Commission documents such as the Commission’s correspondence with the judge named in the complaint, the identity of witnesses, or transcripts of the proceedings.” App. A at 4 (emphasis added).

Fourth, unlike Cox, Petitioners’ First Amendment rights have not been implicated. In Cox, the plaintiff already had the information at issue and wished to publish it, but was restrained from doing so by the threat of contempt. Petitioners, by contrast, do not even have the information at issue, and instead

1 seek to have it preserved or produced. Petitioners have not been threatened with contempt if they
2 publish anything.

3 Fifth, the confidentiality statutes are applied in fundamentally different ways between the two
4 cases. In Cox, the confidentiality statute was used to restrain the *plaintiff* from publishing certain
5 information, whereas here, § 360 prohibits *Respondents* from providing the requested information to
6 Petitioners. Cox simply does not apply.

7 **B. The Amended Petition Should Be Dismissed or Denied Because Petitioners Have**
8 **Not Shown Any Future Action Would Be Cognizable in Federal Court.**

9 Petitioners cannot show there would be federal jurisdiction over any future action. They
10 allegedly “anticipate filing an action pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 1983 to pursue the
11 violations of their constitutional rights to equal treatment under the law.” Doc. #34 ¶ 14(d). But they
12 have not shown federal jurisdiction would lie given standing and immunity obstacles.

13 Initially, Petitioners do not show they would have standing. The Amended Petition remains full
14 of speculation about whether Petitioners may or may not have a claim. See Doc. #34 ¶¶ 5, 8, 9, 12
15 (containing speculative words such as “potentially,” “might,” “may,” “if” and “possible”). The whole
16 purpose of this action is so Petitioners can have the File preserved and eventually review the emails
17 therein to determine if they support a legal claim. If they do not, then Petitioners will not have standing
18 to sue for anything. As Petitioners themselves stated in their last brief: “Until Petitioners are able to
19 establish evidence of the nature of such claims, *they cannot determine whether they or their members*
20 *have standing to sue.*” Doc. #22 at 15:8-11 (emphasis added). Petitioners, at this point, cannot show
21 they would have standing to sue.

22 Moreover, the Petitioners that are organizations have not shown they would have organizational
23 standing. Organizational standing requires a showing that: (1) the members would otherwise have
24 standing to sue in their own right, (2) the interests at stake are germane to the organization’s purpose,
25 and (3) neither the claim asserted nor the relief requested requires the participation of individual
26 members in the lawsuit. See Washington Envtl. Council v. Bellon, 732 F.3d 1131, 1139 (9th Cir. 2013).
27 Because Petitioners do not know what claims, if any, they may have, they cannot establish any of these
28 three requirements. Furthermore, to the extent Petitioners would seek monetary relief, they could not

1 meet the third element because individualized proof would be required. See United Union of Roofers,
 2 Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am., 919 F.2d 1398, 1400 (9th Cir. 1990).

3 Turning to immunity, any claim by Petitioners under § 1981 or § 1983 would be barred by
 4 sovereign or judicial immunity and would not be cognizable against a federal actor. Section 1983
 5 claims against federal agencies are barred by sovereign immunity. See Jachetta v. United States, 653
 6 F.3d 898, 908 (9th Cir. 2011). Furthermore, § 1983 claims may not be brought against federal actors
 7 because § 1983 applies only to those acting under color of state law, not federal law. See Mullis v. U.S.
 8 Bankr. Ct. for the Dist. of Nevada, 828 F.2d 1385, 1387 (9th Cir. 1987). Indeed, any § 1983 claim
 9 against a federal actor “is invalid on its face” and “is ‘unreasonable’ and ‘meritless.’” Morse v. N. Coast
 10 Opportunities, Inc., 118 F.3d 1338, 1343 (9th Cir. 1997) (citations omitted).

11 Likewise, § 1981 claims are barred by sovereign immunity. See Affiliated Prof’l Home Health
 12 Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 1999); United States v. Timmons, 672 F.2d 1373,
 13 1380 (11th Cir. 1982); Gottschalk v. City & County of San Francisco, 964 F. Supp. 2d 1147, 1162 (N.D.
 14 Cal. 2013); accord Ardalan v. McHugh, No. 13-CV-01138-LHK, 2013 WL 6212710, at *12 (N.D. Cal.
 15 Nov. 27, 2013). And, like § 1983, the phrase “under color of State law” in § 1981(c) means that § 1981
 16 does not apply to federal actors. See Dotson v. Griesa, 398 F.3d 156, 162 (2d Cir. 2005); Davis v. Dep’t
 17 of Justice, 204 F.3d 723, 725 (7th Cir. 2000); Davis-Warren Auctioneers v. F.D.I.C., 215 f.3D 1159,
 18 1161 (10th Cir. 2000); Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998); Gottschalk, 964 F. Supp.
 19 2d at 1162-63.

20 Finally, any suit against Judge Cebull for decisions he made in his judicial role would also be
 21 barred by absolute judicial immunity. See Mullis, 828 F.2d at 1388, 1394.

22 **C. The Petition Should Be Dismissed or Denied Because It Constitutes an Improper**
 23 **Attempt to Obtain Pre-Complaint Discovery.**

24 The Amended Petition continues to be an improper attempt to conduct pre-complaint discovery
 25 that exceeds the scope of Rule 27, as Petitioners admit: “Petitioners respectfully request that the Court in
 26 the instant case *expand* the scope of Rule 27 to permit *pre-complaint discovery* of the File in order to
 27 permit them to determine with more particularity *the extent to which* a due process complaint *may* be
 28 filed.” Doc. #34 ¶ 15 (emphasis added). Rule 27 may not be used for such a purpose: “[W]e hold that

Rule 27 is not appropriate where, as here, the petitioner seeks discovery of unknown information that the petitioner hopes will assist it in the future when the petitioner applies for judicial relief.” Nevada v. O’Leary, 63 F.3d 932, 933 (9th Cir. 1995). O’Leary is controlling and dispositive.

D. The Petition Should Be Dismissed or Denied Because Petitioners Have Not Shown Justice Would Be Delayed or Denied.

Petitioners allege there are exigent circumstances because their process server was allegedly locked out of the Ninth Circuit clerk’s office. Doc. #34 ¶ 18. Respondents deny that allegation, and it does not create exigent circumstances in any event. The exigent circumstance must be that the requested information will be lost or destroyed if the Petition is not granted; it is not how easy or difficult service may have been. See Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995); Ash v. Cort, 512 F.2d 909, 911 (3d Cir. 1975). There is nothing in the Amended Petition indicating the File, or the identities of the persons who worked on the File, will be lost or destroyed. Cf. Hr’g Tr. 12:17-20, Oct. 7, 2014 (Court: “there’s nothing in the petition that suggests that the Ninth Circuit is destroying any of the materials with respect to the investigation.”).

E. The Petition Should Be Dismissed or Denied Because It Does Not Comply With Numerous Other Requirements of Rule 27.

Aside from complying with the verification requirement, the Amended Petition still suffers from the same defects identified for the original Petition in section IV.E of Respondents’ First MTD and in section II.F of Respondents’ First Reply. Respondents refer the Court to the arguments raised in those briefs, which are fully incorporated herein by reference.

V. CONCLUSION.

For the foregoing reasons, the Amended Petition should be dismissed or denied.

Respectfully submitted,

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United States Attorney

DATED: December 9, 2014

/s/
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Attorneys for Respondents