

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LOS ANGELES TIMES
COMMUNICATIONS LLC, et al.,

Plaintiffs,

v.

SCOTT KERNAN, et al.,

Defendants.

Case No. [18-cv-02146-RS](#)

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS COMPLAINT IN
PART**

I. INTRODUCTION

Plaintiffs Los Angeles Times Communications LLC, a company covering United States and international news; KQED, Inc., a non-profit media organization; and San Francisco Media Center, a non-profit publishing online media, (collectively the “News Organizations”) bring this lawsuit against Scott Kernan, Secretary of the California Department of Corrections and Rehabilitation, and Ronald Davis, the Warden of San Quentin State Prison (collectively the “State”). The News Organizations aver the State’s lethal injection protocols bar access to key portions of executions such as the preparation of lethal injection chemicals, their administration, the effect the injection has on the condemned, and any medical assistance provided if the execution does not result in death.

The State moves to dismiss the complaint in part pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim of a First Amendment right to observe the chemical preparation and medical assistance portions of California’s execution process. The State argues the News Organizations have not pleaded facts, nor law, showing these portions of the execution should be open to public observation. Moreover, the State contends the complaint lacks averments of an insufficient penological interest even if there was a public right to access. The News

United States District Court
Northern District of California

1 Organizations' allegations, however, are sufficient to raise the constitutional claims above the
2 speculative level. Accordingly, the motion to dismiss is denied.

3 **II. BACKGROUND¹**

4 Executions in the United States have historically been open to the public. This practice
5 originated with hangings, where scaffolds were constructed to accommodate large crowds. The
6 actual means of execution were open and obvious; so the public could witness not only the death
7 but the cause and effect of the State's executions. During hanging executions, the public was also
8 provided access to observe detailed information about the size, quality, and production of the rope
9 used. This practice of public executions continued with lethal gas and electrocutions as well.

10 California's current law requires executions be carried out through the Department of
11 Corrections and Rehabilitation by lethal injection or lethal gas. These executions occur in a facility
12 at San Quentin State Prison. The lethal injection facility includes a centralized Lethal Injection
13 Room surrounded by three viewing rooms for witnesses to see the execution via viewing windows
14 with curtains. Adjacent to the Lethal Injection Room, but out of the sight or hearing of any
15 witnesses, is the Infusion Control Room where prison officials prepare the lethal injection
16 chemicals.

17 The State's most recent lethal injection execution regulations went into effect on March 1,
18 2018 and outline the procedures in preparation and completion of the condemned's execution. The
19 Warden of San Quentin State Prison initially selects one of two chemicals to use for the execution:
20 pentobarbital or thiopental. The lethal injection regulations require the Warden to make the lethal
21 chemical decision, but do not require the Warden to notify the public with any information about
22 that choice.

23 Three hours before the initial scheduled execution date and time, a team of prison officials
24 prepares three doses of the lethal chemical in the adjacent Infusion Control Room. Chemical

25
26 ¹ The factual background is based on the averments in the complaint, which are taken as true for
27 purposes of a motion to dismiss, as well as on documents incorporated by reference in the
28 complaint.

1 preparation varies depending on the Warden's choice of either pentobarbital or thiopental. Each
2 dose of pentobarbital is 7.5 grams, administered with three syringes of 2.5 grams. Thiopental is
3 also 7.5 grams per dose, but is administered with five syringes of 1.5 grams each. Therefore, if
4 observers were permitted to view the Infusion Control Room they could determine what chemical
5 was used based on the number of syringes in the preparation process. Executions with
6 pentobarbital involve nine syringes total, while thiopental involves fifteen. The News
7 Organizations also aver FDA-approved manufacturers of pentobarbital prohibit its use for
8 executions, and thiopental cannot be lawfully imported into the United States.

9 Two hours before the condemned's execution, witnesses are allowed into the surrounding
10 viewing rooms. The number of witnesses is limited to at least twelve reputable citizens, and
11 members of the press who serve as a proxy for the general public. At this stage in the process,
12 witnesses have a view of the Lethal Injection Room absent the inmate, and they can hear inside the
13 room through a public address system. Witnesses cannot hear into the Infusion Control Room.

14 It is not until fifteen minutes before the scheduled execution time when prison officials
15 escort the condemned to the Lethal Injection Room, strap him or her to a gurney, and insert
16 intravenous lines to deliver the lethal injection. The condemned is given one last chance to address
17 those gathered, and witnesses can see and hear these portions of the execution. The intravenous
18 lines, however, lead back into the Infusion Control Room where the lethal injection is
19 administered until the inmate dies or all three prepared doses are used.

20 If the condemned is still alive after the three doses are administered, the Warden is
21 required to stop the execution by the terms of the current lethal injection regulations. In response,
22 prison officials cut the public address system, close the curtains on the viewing windows, and lead
23 witnesses out of the viewing room. The lethal injection execution regulations provide for this
24 scenario and require medical assistance to be summoned. The regulations do not, however, direct
25 how medical care is provided, and observers are kept from seeing or hearing what happens in the
26 aftermath of the lethal injection.

27 The News Organizations initiated this lawsuit on April 11, 2018 after the State's most

1 recent lethal injection execution regulations limited public access. They seek to vindicate the First
2 Amendment right to observe: (1) the preparation of the lethal injection chemical; (2) the
3 administration of the chemicals; and (3) the provision of medical assistance if an execution fails.
4 The State filed a Partial Motion to Dismiss on May 3, 2018, only challenging the adequacy of the
5 News Organizations' pleading a First Amendment right to observe preparing the chemical and
6 providing medical assistance.

7 III. LEGAL STANDARD

8 A complaint must contain "a short and plain statement of the claim showing that the
9 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations" are not
10 required, a complaint must have sufficient factual allegations to "state a claim to relief that is
11 plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*,
12 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows
13 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
14 *Id.* This standard asks for "more than a sheer possibility that a defendant acted unlawfully." *Id.*
15 The determination is a context-specific task requiring the court "to draw on its judicial experience
16 and common sense." *Id.* at 679.

17 A motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil
18 Procedure tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus.,*
19 *Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be
20 based either on the "lack of a cognizable legal theory" or on "the absence of sufficient facts
21 alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
22 (9th Cir. 1990). When evaluating such a motion, the court must accept all material allegations in
23 the complaint as true, even if doubtful, and construe them in the light most favorable to the non-
24 moving party. *Twombly*, 550 U.S. at 570. "[C]onclusory allegations of law and unwarranted
25 inferences," however, "are insufficient to defeat a motion to dismiss for failure to state a claim."
26 *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *see also Iqbal*, 556 U.S. at 678
27 ("threadbare recitals of the elements of the claim for relief, supported by mere conclusory

1 statements,” are not taken as true).

2 IV. DISCUSSION

3 As noted above, the News Organizations assert the right to access public executions in
 4 California, including portions of the execution when the State prepares the lethal injection
 5 chemical before the condemned is brought into the Lethal Injection Room and when the State
 6 provides any medical care if the execution fails. The First Amendment guarantees the public and
 7 the press a qualified right of access to governmental proceedings like executions. *California First*
 8 *Amendment Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002) (“*CFAC*”). To determine if
 9 there is a First Amendment right of access to a proceeding, the Ninth Circuit looks to two
 10 complementary considerations: (1) whether the proceeding has “historically been open” to the
 11 public; and (2) whether public access has a “significant positive role” in the proceeding. *Id.* at 875
 12 (citing *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) (“*Press–Enterprise II*”). If
 13 there is a right of access to a proceeding, access can still be limited when concealing the
 14 proceeding is “reasonably related to legitimate penological objectives” that are not an
 15 “exaggerated response to those concerns.” *Id.* at 878 (quoting *Turner v. Safley*, 482 U.S. 78, 87
 16 (1987)). In *CFAC*, the Ninth Circuit applied this analysis and determined “the public enjoys a First
 17 Amendment right to view executions from the moment the condemned is escorted into the
 18 execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the
 19 process of putting the condemned inmate to death.” *Id.* at 877.

20 A. The Right to Observe Chemical Preparation and Medical Assistance During an Execution

21 The State contends preparing the lethal injection chemical and providing medical
 22 assistance are not part of the execution, taking these specific portions of the process outside the
 23 holding of *CFAC*. Going further, it argues *CFAC* necessarily decided against a right of access to
 24 viewing the chemical preparation since that process occurs before “the moment the condemned is
 25 escorted into the execution chamber.” *Id.* The State argues no case law extends a right of access to
 26 viewing subsequent medical care either, because at that point the execution has ended. In
 27 response, the News Organizations emphasize the dependent clause of the same holding, averring

1 they have satisfied their burden by pleading the chemical preparation and medical assistance
2 portions are “inextricably intertwined with the process of putting the condemned inmate to death.”
3 *CFAC*, 299 F.3d at 877.

4 The parties briefing raises the question of whether the Ninth Circuit created a right of
5 access beginning only “the moment the condemned is escorted into the execution chamber,” as the
6 State argues, or if the right could extend further to “those ‘initial procedures’ that are inextricably
7 intertwined with the process of putting the condemned inmate to death.” *Id.* On the one hand, case
8 authority has only found historical access to executions starting from the moment the condemned
9 is brought before the public. No cases in this Circuit have since extended *CFAC* or opined on the
10 right of access to the specific portions of the execution process sought here. On the other hand, no
11 case has provided an exhaustive list of “initial execution procedures” the public has a right to
12 observe, and the Ninth Circuit rejected attempts to define when an execution begins as “simply of
13 defendants’ own making.” *CFAC*, 299 F.3d at 876–877. The *CFAC* holding only addressed
14 portions of California’s execution protocol that the plaintiffs sought access to in the district court,
15 all of which involved portions of the execution after the inmate was brought to the Lethal Injection
16 Room.²

17 On balance, *CFAC* supports a more open interpretation of the right of access to observe
18 executions, which can be applied as public debate reflects changes in society’s view of capital
19 punishment. The State argues the “inextricably intertwined” language is limited by the temporal
20 aspect of the clause before it, suggesting no right of access to observe executions beyond the terms
21 in *CFAC*. Considering the reasoning behind the Ninth Circuit’s holding, however, as well as the
22 limited number of other district court interpretations of *CFAC*, the State’s position cannot defeat
23

24 ² In the lower court plaintiffs only sought “to enjoin defendants from...preventing witness
25 observation of the entry, treatment, placement and restraint of the prisoner in the execution
26 chamber, the insertion of the [intravenous lines], and the connection to the execution
27 apparatus...[and] using a curtain or other obstructive device to prevent the witnesses’ observation.”
California First Amendment Coal. v. Woodford, No. C-96-1291-VRW, 2000 WL 33173913, at *2
(N.D. Cal. July 26, 2000), *aff’d*, 299 F.3d 868 (9th Cir. 2002).

1 the News Organizations’ claims at the pleading stage.

2 The Ninth Circuit did not propound a rigid limit on the public’s right of access beginning
3 the moment the State brings an inmate into the Lethal Injection Room. To the contrary, *CFAC*
4 represents a more flexible understanding of the evolving nature of society’s public debate on the
5 death penalty. *See id.* at 876 (“To determine whether lethal injection executions are fairly and
6 humanely administered, or whether they ever can be, citizens must have reliable information about
7 the ‘initial procedures,’ which are invasive, possibly painful and may give rise to serious
8 complications.”). The court began its analysis by acknowledging the right of access involves a
9 balance of the State’s ability to carry out executions in a safe and orderly manner with the public’s
10 right to be informed. *Id.* at 873. The Ninth Circuit then applied *Press–Enterprise II*, considering
11 the significance of historical tradition and the functional importance of public access to
12 executions, before holding there was a right of access to observe the specific portions of an
13 execution sought in that case. Treating the inmate’s entry into the execution chamber as the
14 definitive trigger of a First Amendment right of access is not consistent with the reasoning of
15 *CFAC*, and ignores its concern for an informed public debate on “the evolving standards of
16 decency which mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

17 Other district court decisions in this Circuit interpreting *CFAC* are informative on the
18 scope of its holding. In *First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 956
19 (D. Ariz. 2016), the district court found Arizona’s execution protocol satisfied *CFAC* by allowing
20 witnesses to view, at times only via closed-circuit television, when the condemned enters the
21 execution chamber, is strapped to the gurney, and when intravenous lines are inserted. The court
22 did not extend the First Amendment right of access to portions of an execution before the inmate
23 is brought into the execution chamber. On the distinct question of a right of access to documents
24 or information about executions before it is carried out, not at issue in this case, the court refused
25 to extend *CFAC*. *Id.* (“[*CFAC*] did not address a right of access to information about lethal
26 injection drugs, the development of lethal injection protocols, the qualification of the execution
27 team, the effects of the paralytic, or any of the other information Plaintiffs seek.”).

1 By contrast, in *Guardian News & Media LLC v. Ryan*, 225 F. Supp. 3d 859, 867 (D. Ariz.
2 2016), different plaintiffs sought the right to witness visually, but not aurally, “whether the State is
3 administering additional doses of lethal injection drugs.” The complaint described how witnesses
4 could see the intravenous lines inserted via closed-circuit television, but could not see where the
5 drugs were mixed and injected, or view the execution team while it actually was administering the
6 drugs. *Id.* The court, on a motion for summary judgment, interpreted *CFAC*’s holding to apply
7 with equal force to “the contemporaneous awareness of the administration of drugs,” finding a
8 right of access could include viewing where the lethal chemical mixing and administration occurs
9 if the State lacked a legitimate penological objective to conceal this from view. *Id.* at 869. In
10 addition, the court found the State’s discretionary authority to remove witnesses or to close the
11 curtains on the viewing room after the inmate is in the execution chamber was a violation of the
12 First Amendment right of access. *Id.* Finally, the district court ruled, consistent with *First*
13 *Amendment Coal. of Arizona*, that *CFAC* did not extend to a right of access to documents or
14 information on drug quality, composition, qualifications of personnel, identities, and sources of
15 the drugs. *Id.* at 871. This application of *CFAC* supports a more open rather than static treatment
16 of its holding to cases involving a right of access to observe portions of an execution, distinct from
17 a right of access to documents or information about the execution.

18 Therefore, *CFAC*’s holding cannot be interpreted as strictly limiting all rights of access
19 claims by its language beginning “the moment the condemned is escorted into the execution
20 chamber.” *CFAC*, 299 F.3d at 877. At the motion to dismiss stage, plaintiffs can satisfy their
21 pleading burden under *CFAC* for a First Amendment right of access to observe portions of an
22 execution. The fact there is no precedent currently extending rights of access before the inmate
23 enters the Lethal Injection Room, or when medical care is provided after the injections have been
24 administered, does not preclude a plausible claim from being made that such a right exists. The
25 *CFAC* court’s decision not to identify the bounds of when an execution begins and ends in terms
26 of the First Amendment right of access, similarly supports such an interpretation.

27 Turning now to the averments in the complaint, the News Organizations raise facts

1 sufficient to achieve the requisite standard of plausibility. Preparing the chemicals, as pleaded,
 2 could be an initial procedure “inextricably intertwined with the process of putting the condemned
 3 inmate to death.” *Id.* at 877. The News Organizations aver the lethal chemical injections are the
 4 actual cause of death and are prepared in the same Infusion Control Room where the chemicals are
 5 administered, by the same team of prison officials who administers them. This is sufficient to state
 6 a plausible claim preparing the chemicals is inextricably intertwined with the execution process—
 7 including the process of administering the chemicals which *CFAC* has already found a right of
 8 access to observe. *See id.* at 886 (affirming a permanent injunction for the “uninterrupted viewing
 9 of executions”); *see also Guardian News*, 225 F. Supp. 3d at 869 (finding a First Amendment right
 10 of access to observe “the contemporaneous awareness of the administration of drugs,” and noting
 11 this is the same space where the chemicals are mixed and administered).

12 The News Organizations also sufficiently aver a right to observe medical assistance
 13 because it occurs after the inmate is brought into the execution chamber. Specifically, plaintiffs
 14 claim the medical care occurs when the inmate is still in the Lethal Injection Room, and after the
 15 lethal injection is administered and the condemned may still die.³ *CFAC* found a historical right of
 16 access “to witness California’s entire execution process from start to finish,” and ultimately
 17 affirmed the district court’s permanent injunction to allow access to executions “through, to and
 18 including, the time the condemned is declared dead.” *Id.* at 871, 886. The discretion to close
 19 curtains during an execution, or to remove witnesses from viewing rooms if needed, has also been
 20 addressed by at least one district in this Circuit, and was found to violate the First Amendment
 21 under *CFAC* if the State lacked a valid penological purpose. *See Guardian News*, 255 F. Supp. 3d
 22 at 870 (finding a provision granting discretionary authority to lower curtains and remove witnesses
 23 from the execution facility violated the First Amendment right of access).

24
 25 ³ At the hearing the State repeated argument that *CFAC* does not go as far as a right of access to
 26 observe things outside the execution process, including medical assistance in this case because the
 27 intent changes from attempting to execute to attempting to provide medical aid. This argument,
 however, appears to be premised on the flawed notion that the condemned is no longer at risk of
 dying as a consequence of the execution process being suspended.

1 As noted above, notwithstanding a First Amendment right of access, the State may still
 2 close a proceeding from the public if it has a legitimate penological interest reasonably related to
 3 the regulations barring access. *Turner v. Safley*, 482 U.S. 78, 87 (1987) (quoting *Pell v. Procunier*,
 4 417 U.S. 817, 827 (1974)) (internal quotations omitted). If the concealment “represents an
 5 ‘exaggerated response’ to those concerns” it is not sufficient. *Id.* Some generally recognized
 6 legitimate penological interests include “deterrence of future crime, protection of society by
 7 quarantining criminal offenders, rehabilitation of those offenders and preservation of internal
 8 security.” *CFAC*, 299 F.3d at 878 (citing *Pell*, 417 U.S. at 822–23). There is a noted tendency for
 9 penological interests outside those generally recognized to “fail to satisfy even the most
 10 deferential analysis under *Turner*.” *Id.* at 879.

11 To determine whether a restriction is reasonable or exaggerated, courts apply the four-
 12 factor *Turner* standard: (1) whether there is “a ‘valid, rational connection’ between the prison
 13 regulation and the legitimate governmental interest put forward to justify it;” (2) “whether there
 14 are alternative means of exercising the right that remain open to prison inmates;” (3) what “impact
 15 accommodation of the asserted constitutional right will have on guards and other inmates, and on
 16 the allocation of prison resources generally;” and (4) whether there exist “ready alternatives...that
 17 fully accommodate[] the prisoner’s rights at de minimis cost to valid penological interests.” *Id.* at
 18 878 (citing *Turner*, 482 U.S. at 89–91).

19 Here, the State first argues the News Organizations only aver conclusory statements
 20 negating a penological purpose for concealing the chemical preparation or subsequent medical
 21 assistance.⁴ As plaintiffs correctly observe, however, this inserts prematurely an affirmative
 22 defense at the pleading stage. *Van Hook v. Curry*, No.C06-3148 PJH (PR), 2008 WL 685646, at
 23

24 _____
 25 ⁴ The News Organizations aver, “[d]efendants and their predecessors incorporated into the lethal
 26 injection process procedures intentionally aimed at suppressing important information from those
 27 observing the execution.” Compl. ¶ 36. The State insists the court should reject claims it has some
 28 ulterior motive. As pleaded, these conclusory averments do not allow an inference of the bad
 motives alleged and would be insufficient assuming, contrary to the law, it was the News
 Organizations burden to plead no penological interest here. *Iqbal*, 556 U.S. at 678 (2009).

1 *2 (N.D. Cal. Mar. 13, 2008). The burden remains with the State to propose a legitimate
2 penological interest if one exists. *Van Hook* held “it is not possible to tell [a penological interest]
3 on a motion to dismiss, where the court has only the complaint before it” because the defendants’
4 proposed penological interest is not yet known. *Id.*

5 The State appears to concede no legitimate penological purpose in concealing the lethal
6 chemical preparations in the Infusion Control Room, for present purposes, since it identifies no
7 such interest in its briefing. *See Bretches v. Kirkland*, 335 F. App’x 675, 682 (9th Cir. 2009)
8 (“Ordinarily, the penological justifications considered in the *Turner* analysis are raised by the
9 defendant in the district court.) (citing *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir.2001)).

10 Defendants only offer a potential medical privacy interest in preventing public access to an
11 inmate’s medical information during execution. The State contends the balance weighs against
12 access to observing medical care since it runs afoul of state and federal medical privacy laws.
13 *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n. 2 (1978) (stating inmates are not like “animals in a zoo
14 to be filmed and photographed at will by the public or by media reporters.”). Dismissal on the
15 pleadings is “possible if a ‘common-sense connection’ exists between a legitimate penological
16 objective and the challenged regulation or action. *Bretches*, 335 F. App’x at 682 (quoting
17 *Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th Cir.2002)).

18 It is not clear, however, if an inmate’s medical privacy interest is a legitimate State
19 penological interest.⁵ *See Associated Press v. Otter*, 682 F.3d 821, 824 (9th Cir. 2012) (expressing
20 “significant doubt” the State’s interest in protecting the privacy and dignity of the condemned
21

22
23 ⁵ The News Organizations also claim the State lacks standing to assert an inmate’s privacy rights.
24 *See Ass’n for Los Angeles Deputy Sheriffs v. Los Angeles Times Commc’ns LLC*, 239 Cal. App. 4th
25 808, 821, 191 Cal. Rptr. 3d 564, 574 (2015) (“the right of privacy is purely a personal one.”). In
26 reply, the State provides federal case law acknowledging a physician’s standing to assert privacy
27 rights on behalf of their patients in the context of a custodian of records. *See e.g., Sterner v. U.S.*
28 *Drug Enf’t Agency*, 467 F. Supp. 2d 1017, 1026 (S.D. Cal. 2006) (finding persuasive physicians
“must be permitted to speak” for absent patients where a physician’s rights are coincident with
their patients). The State’s standing cases are inapposite to the issue here of whether the State can
assert a medical privacy interest to bar observations of the actual care after the State has already
opened the door for the public to observe the condemned’s death.

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

prisoners qualifies as a legitimate penological concern). In *Associated Press*, the Ninth Circuit rejected the State’s concern for privacy and dignity as it “already offends the dignity of condemned inmates and the sensibilities of their families and fellow inmates by allowing strangers to watch as they are put to death.” *Id.* at 824. The court relied directly on *CFAC* and found “[i]t strains credulity for the State to assert that these interests will be offended to a meaningfully greater degree when witnesses are permitted to watch the insertion of intravenous lines than when they are simply allowed to watch the inmates die.” *Id.* at 824–25. The same logic applies here to the administration of medical care during an execution, where notably the condemned is still in the Lethal Injection Room after the chemical has been injected. Therefore, the complaint states a claim for a First Amendment right of access to observe the chemical preparation and medical assistance portions of an execution under the State’s current lethal injection execution regulations.

V. CONCLUSION

For the foregoing reasons, the motion to dismiss portions of the complaint is denied.

IT IS SO ORDERED.

Dated: 8/17/18



RICHARD SEEBORG
United States District Judge