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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Plainning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Monday November 2, 2009 2:30 p.m.

TRANSCRIPT OF PROCEEDINGS

Reported By: Lydia Zinn, CSR #9223, RPR
Official Reporter - U.S. District Court

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(Appearances continued on next page)

Appearances via speaker telephone (Cont'd.)

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THE COURT: Good afternoon, counsel. This is Judge Walker. I'm here with a court reporter; Ms. Delfin, the court clerk, whom you know; and two law clerks.

Can we have the appearances of counsel, please?

MR. DETTMER: Good afternoon, your Honor. Ethan Dettmer, Gibson, Dunn & Crutcher, on behalf the plaintiffs.

THE COURT: Good afternoon, Mr. Dettmer.

MS. LEE: Good afternoon, your Honor. Mollie Lee, on behalf of Plaintiff-Intervenor, City and County of San Francisco.

THE COURT: Good afternoon.

MR. COOPER: Good afternoon, Chief Judge Walker. This is Charles Cooper, Cooper & Kirk, representing the Defendant-Intervenors.

Present with me here in my office on the phone, my colleague, Jesse Panuccio, whom you've met previously.

THE COURT: Very well. Good afternoon, Mr. Cooper.

MR. COOPER: Thank you.

THE COURT: Who else?

MR. STROUD: Good afternoon, your Honor. This is Andrew Stroud, Mennemeier, Glassman & Stroud, on behalf of governor Arnold Schwarzenegger, and the Administration defendants.

THE COURT: Good afternoon, Mr. Stroud.

MS. PACHTER: Good afternoon, your Honor. This is Tamar Pachter, for the Attorney General.

THE COURT: Ms. Pachter, good afternoon.

MR. MARTINEZ: Good afternoon, your Honor. Manuel Martinez, for the County of Alameda, representing Defendant Patrick O'Connell.

THE COURT: Very well. Anyone else?

MS. WHITEHURST: Good afternoon, your Honor. This is Judy Whitehurst, representing Dean C. Logan, the Los Angeles County Registrar-Recorder.

THE COURT: Very well. Good afternoon.

Who else? Anybody?

MR. NIELSON: Good afternoon, Chief Judge Walker. Howard Nielson, of Cooper & Kirk, representing the Defendant-Intervenors.

THE COURT: All right. You're with Mr. Cooper?

MR. NIELSON: A different location, but yes.

THE COURT: I see. Anyone else on the line?

MR. PATTERSON: Good afternoon, Chief Judge Walker. This is Pete Patterson, also with the Defendant-Intervenors, from a different location.

THE COURT: All right.

MS. MOSS: And good afternoon, your Honor. Nicole Moss, with Cooper & Kirk, also for Defendant-Intervenors.

THE COURT: All right.

MR. MC GILL: Good afternoon, your Honor. This is Matthew McGill, from Gibson, Dunn & Crutcher, for the plaintiffs.

THE COURT: Very well.

MR. DUSSEAULT: Chris Dusseault, also with Gibson, Dunn & Crutcher for the plaintiffs.

THE COURT: And good afternoon, your Honor. I think I might be the last one. Enrique Monagas, Gibson, Dunn & Crutcher, also for the plaintiffs.

MR. FLYNN: City and County of San Francisco, for Plaintiff-Intervenor.

(Reporter interruption.)

THE COURT: I'm afraid we'll have to have that appearance again. The reporter did not catch it.

MR. FLYNN: Ron Flynn, City and County of San Francisco.

THE COURT: All right. Well, let's begin.

The subject of our discussion this afternoon is the document request that the plaintiffs have made of the Defendant-Intervenors, who I'll call "the proponents of Proposition 8." That's a nomenclature that I think we've used principally throughout the case.

Let me just make some general comments, and then allow you to react to those comments.

I haven't had a chance to review in great depth the issues that are before us, although the issue is really, I think, not a terribly complicated one. It deals with the proponents' assertion of a qualified First Amendment privilege with respect to certain documents that have been requested by the plaintiffs.

Concerning a privilege assertion, as I read the cases, the Ninth Circuit, the Supreme Court, and other district courts have essentially adopted three approaches to dealing with the assertion of a privilege.

First, of course, is that provided about for in Rule 26(b)(5): the preparation of what has come to be called a "privilege log." The cases that have developed in accordance with that describe some of the requirements of a privilege log. And as we get into our discussion, we may find it appropriate to deal with some of those specifics.

A second approach is that which the proponents, I understand, have advanced. And that is some form of *in camera* review by the Court to test the sufficiency of the privilege assertion.

And a third approach, which is the production of redacted portions of documents, or the production of documents or materials that contain privileged matter but also contain nonprivileged matter, and the privileged matter is redacted from the material that is produced.

There may be other approaches, but those are the three that have come to my attention in thinking about the problem that we're going to be talking about this afternoon, and, obviously, are three approaches that have been used in cases that I'm familiar with. And it sometimes is the situation where more than one of these approaches is appropriate.

So I suppose the first question that comes at least to my mind in thinking about this problem is whether the material, Mr. Cooper, over which your client is asserting a qualified First Amendment privilege embraces the entirety of the material that you have discussed in your recent correspondence, or whether only portions of those materials are, in your view, privileged; because, obviously, if it's a situation in which only a portion of the material is privileged, then, obviously, the redaction approach may be an appropriate way to proceed, and may make a lot of sense; but if not, then perhaps one or two or some combination of the other two approaches might be appropriate.

So let me ask you whether -- of the material that you're asserting the privilege over, are you asserting the privilege as to the entirety of these materials, or only a portion of these materials?

MR. COOPER: Yes. Thank you, Chief Judge Walker.

Our assertion of privilege, your Honor, is, in fact,

over the entirety of this documents that we believe are privileged. And a process of -- of redaction would not speak to the nature of the privilege we've asserted.

And -- and even if there were some theoretical possibilities that a document that was within and responsive to the requests as they have now been revised in light of the Court's October 1 ruling might contain information that was -- that was otherwise unobjectionable, the practical reality is that, you know, we -- we expect to have and have now taken, essentially, inventory of the -- of the universe of documents from which responsive documents are being culled. And we would be talking about thousands and thousands of documents that would have to be reviewed for this redaction purpose, but the real and, to our mind, disqualifying answer is that we do assert a privilege over the entirety of these -- of these confidential nonpublic communications and documents.

THE COURT: Well, that being the case, that would appear to point us in the direction of either an *in camera* review, or a privilege log with respect to -- to these documents.

And I understand from your letter that you believe that the preparation of a privilege log may be burdensome, and you therefore offered to make a production of a sample of the documents; but let's put that issue to one side for the moment.

MR. COOPER: Okay.

THE COURT: Are there approaches that we ought to be considering, other than the two that I've mentioned: privilege log, or *in camera* review? Is there some fourth or fifth alternative that I haven't mentioned this afternoon that we ought to put on the table for discussion?

MR. DETTMER: Your Honor, if I may. Ethan Dettmer, on behalf the plaintiffs.

THE COURT: Yes, Mr. Dettmer.

MR. DETTMER: I'm sorry, your Honor.

THE COURT: Yes. You may proceed, sir.

MR. DETTMER: Thank you.

Your Honor, I think it's helpful to -- I do have -- the answer to your question is, yes, I do have another alternative that I would like to propose and, in fact, have proposed to the proponents --

THE COURT: All right.

MR. DETTMER: -- several weeks ago.

THE COURT: Let me interrupt you, Mr. Dettmer. Before I hear from you, let me direct that question first to Mr. Cooper, and then I'll come back to you. Is that okay?

MR. DETTMER: Certainly.

THE COURT: Mr. Cooper, do you have the question in mind?

MR. COOPER: I think I do, your Honor.

And our efforts to think of an approach to having the

Court make a decision -- make a judgment with respect to the validity of our First Amendment claim has -- we haven't been able to come up with an alternative to essentially what we take to have been at least your implied suggestion in your October 23rd order. And we view that approach as combining the elements of a privilege log, and *in camera* review; but as you mentioned, a privilege log that attempted to log all of the documents over which we are claiming a First Amendment privilege would be a very, very labor-intensive, time-consuming process.

THE COURT: All right. Well, let's -- let put -- as I said, let's put the burdensome issue to one side, and come back to that as it may be necessary to come back to it.

So I gather you would agree, then, that the two alternatives that we should consider are either an *in camera* review, or privilege log, or perhaps a combination of those two; but those are the two that ought to be on the table for discussion this afternoon. I gather that's your position?

MR. COOPER: Well, yes, your Honor. We've made our proposal in my letter to the Court. And -- and, in light of the Court's October 23rd order, we think that is a measured and reasonable way now to proceed.

THE COURT: All right.

Now, Mr. Dettmer, you indicated that you have some third alternative that you think ought to be put on the table

for discussion?

MR. DETTMER: Yes, your Honor. Thank you.

Ethan Dettmer.

And the proposal, I think --

If I may just step back a moment and look at the nature of, I think, the problem that is presented to us all jointly in trying to get to a trial date as it's set, and at the same time address the concerns that Mr. Cooper and his colleagues have raised on behalf of their clients -- the concerns as I've read them in the papers and heard them in the arguments are twofold.

One is that production of these documents would lead to a chilling of their political speech, and a potential harm of, I guess -- related harm of harassment and intimidation of Proposition 8 supporters.

And I could sort of answer that several ways. One is that the Court has already held that they have not made a sufficient showing regarding that chilling and those harms.

And, I guess, as I had mentioned in my letter, the additional answer to that is that these are the Official Proponents of Proposition 8 whose documents we are most interested in. And they are obviously central to this campaign and, in fact, the architects of the campaign. And it seems to me that chilling of their speech seems unlikely, given their centrality to the case.

And certainly, the *NAACP* case and other cases have not protected that: the identities or the speech of those central players in campaigns.

THE COURT: Well, let me get you back on track here.

MR. DETTMER: Oh, of course, your Honor.

THE COURT: What are the approaches that I ought to be considering?

MR. DETTMER: And -- I'm sorry.

THE COURT: Other than a privileged log or *in camera* review or a combination of the two, is there --

MR. DETTMER: The --

THE COURT: -- is there some other approach that ought to be put on the table for consideration?

MR. DETTMER: Yes, your Honor.

The approach that we proposed to the proponents, I believe, on October 14th, but they have thus far not agreed to, is that they produce these disputed documents under a provisional attorneys'-eyes-only protective order until the question of a stay of discovery is finally resolved at whatever level they decide to stop seeking the stay of this discovery, and that at that point, they may then go back and designate the documents as appropriate under the Court's protective order that we have proposed to be entered.

And that solution would allow both for their concerns over these documents to be addressed by the protective order,

and the agreement to have this as an attorneys'-eyes-only protective order, and at the same time, our concerns about moving this case forward promptly and being able to take meaningful depositions. We'll also be able to go forward and move toward a January trial date in an effective way.

THE COURT: All right. Well, that is a third alternative that we can consider: Production under an attorneys'-eyes-only protective order. Fair enough.

Now, does anybody else have any fourth approach that the Court ought to put on the table for consideration?

Hearing none, it looks to me like we've got the alternatives before us.

Now, let's talk about each of these. And let me direct my initial comments to Mr. Cooper.

I've had a lot of experience recently with production of *in camera* material. That experience has largely been in cases involving the assertion of the state-secrets privilege by the government in various cases.

I can tell you, Mr. Cooper, as a Judge who's called upon to try to be impartial and fair to both sides to conduct an evenhanded proceeding, there have been very few things in my judicial experience which have left me with as unsatisfactory a feeling as *in camera* review of materials; that is, review of materials submitted by one side, but as to which access has been denied to the other side.

And, able and experienced as you are, I'm sure you can empathize with that comment.

It's just antithetical to our system of justice for one side to furnish information to the Judge without the other side having access to that material. And so, as between the two -- well, as between the three alternatives that we are discussing this afternoon, an *in camera* review isn't very appealing to me.

Now, it may be the only practical alternative, but I want to hear from you why we shouldn't consider one or the other of the alternatives.

MR. COOPER: Certainly, your Honor. Your Honor, I am certainly sympathetic to the concern that you've voiced about the nature of *in camera* review.

We view it as, frankly, the next and perhaps only step available to us to have a judicial determination of -- as the Court suggested in the October 23rd order, of the First Amendment -- of the validity of our First Amendment privilege with respect to, now, specific documents.

And the case that the Court cited is the *Kerr* case, obviously. And, you know, notwithstanding the limitations on *in camera* review, it suggests that -- as the Court's October 23rd order did, it suggests that process as, I guess, essentially the only one available to now have the privilege claim assessed in light of the Court's order rejecting our

claim of a categorical privilege; a "blanket privilege," as you put it.

So long as there is a possibility that a document-by-document review by the Court of the -- of the types of documents over which we are making this claim is available, it's -- it just seems to me, anyway, that -- and to us that it's the only course really that now is left available for ultimately deciding the First Amendment question.

THE COURT: Well, let's talk about the alternatives. We have three on the table.

Let's talk about the one that Mr. Dettmer has suggested here this afternoon; and that is production under an attorneys'-eyes-only protective order; perhaps a fairly restrictive attorneys'-eyes-only protective order; one in which the attorneys are specifically identified by name, so that the production doesn't become widespread, and we could track back to an individual attorney a disclosure of any of the material that is disclosed. What's wrong with that approach?

MR. COOPER: Your Honor, we don't think, frankly, that that approach is a viable alternative to our claim of privilege.

First, it would -- it would contemplate this limited disclosure only until such time as the -- as the plaintiffs made use of the information that was disclosed to them in the context of the trial itself.

I mean, the only purpose for the plaintiffs to desire disclosure of this information is on the theory that it is relevant to issues they intend to prove up.

And so ultimately, the disclosure -- even if one assumes that it can remain attorneys' eyes only during the discovery process, its ultimate purpose would be to call upon and to use and introduce at trial; but beyond that, your Honor, it -- the disclosure, even at the level of attorneys'-eyes-only, we believe, would -- notwithstanding Mr. Dettmer's very able argument, it would -- it would -- it would constitute an invasion of the First Amendment freedoms of my clients and -- and the individuals who were the volunteers; ordinary citizens who volunteered to -- to undertake this initiative campaign, and to commit their time and their efforts and their resources and engage as professional -- professional political consultants and campaign experts, but -- but again, ordinary citizens who came forward and who -- who engaged in the political process, formed associational funds with -- with their colleagues who had volunteered to join them, and -- and who engaged in the freest kinds of exchange of ideas and political expression.

If you were to tell those people that -- if you hadn't told those people, I would submit to the Court, before this campaign got under way that everything that they said in their e-mails and in their -- and in their conversations and --

and in their counseling with their volunteer colleagues in this campaign -- that all of that information would, after the election, in litigation, be open to and available to their political opponents or even just the lawyers of their political opponents in postelection litigation over the referendum, it is our submission that many of those volunteers either would not have engaged in the process at all or they would certainly have censored their communications and their expression of their political speech.

And I believe that to be true not just of the ordinary citizen volunteers. I believe it surely also to be true of the professional political, you know, campaign people who these -- who the proponents and the members of the ad hoc executive committee and others hired to assist them in their effort to wage this political campaign.

THE COURT: Well, let me respond to that.

And you've certainly made a good points, but let me modify the alternative that Mr. Dettmer has advanced. And that is that the disclosure of these materials subject to an attorneys'-eyes-only privilege order [sic] -- protective order -- excuse me -- the production of this material subject to an attorneys'-eyes-only protective order would not be production for all purposes in the litigation, but only for purposes of testing the privilege assertion.

And if the privilege assertion is sustained with

respect to those documents, then the documents could not be used for any purpose in the litigation; but the idea which I am now advancing is a production of these documents on an attorneys'-eyes-only basis, simply so we can get both sides in the litigation sufficiently well informed about the materials so that we can -- well, so that the Court can have two sides of the issue, whether or not the privilege actually should apply to these materials.

What's your reaction to the idea of, thus, an attorneys'-eyes-only protective order, and a limitation that the production would be simply for purposes of testing the privilege assertion?

MR. COOPER: Your Honor, my -- my admittedly off-the-top-of-my-head reaction is, frankly, a negative one.

I remain concerned about the -- about -- I remain concerned that that even limited type of production would be an invasion of my clients' First Amendment freedoms.

And I -- and I'm also not clear if -- if the Court is suggesting that all of our -- of the documents over which we would claim privilege -- the responsive documents over which we would claim privilege, which, you know, will be thousands and thousands of them -- would be produced for this -- for this purpose, or whether the Court is suggesting that the more manageable -- at least, what we have suggested as being more manageable sampling of documents that our proposal contemplates

in for *in camera* review would be shared for this -- for purposes of -- of testing this issue on this -- on a limited basis, such as we have proposed.

THE COURT: Well, it's true my suggestion didn't distinguish between those alternatives, but let's consider, just for the sake of our discussion, the limited sampling that you've referred to; say, the 25 or so -- whatever the appropriate number is -- of documents necessary for a true test of the adequacy of the privilege assertion. Say we limited the production of documents pursuant to an attorneys'-eyes-only protective order to that number; and with the further restriction that the purpose for which the production is made is simply to test the adequacy of the privilege assertion.

In other words, putting to one side the issue of burden, which does seem to me to be categorically a different kind of objection --

MR. COOPER: Your Honor, I would ask the Court to permit me to consider that. It is -- and it's with appreciation for the Court's effort here with -- with the parties before it to grope for a reasonable and measured solution that I would ask the Court to permit me to consider that; and in particular, to consider it with my client -- my clients; but I -- but I'm obliged to say that I am concerned that even that limited approach to disclosing these materials would be -- would threaten to -- an unacceptable infringement

upon the confidential documents at issue here; but with that, would the Court be -- would the Court be amenable to permitting me to counsel with my clients on that?

THE COURT: Well, offhand, I'm hard pressed to deny a lawyer the chance to communicate with his client. And I think that's fair -- a fair request of you to make; but let's follow our discussion on, and see if there might not be some other alternative that we can explore. And possibly as we explore other alternatives, you'll want to place before your client more than one option.

So, without saying, "No, you can't," or, "Yes, you can consult with your client about this" -- and I must say my strong inclination will be to allow you to consult with your client, of course -- but let's continue our discussion to see where we go next. And that is to shift to the other alternative. And that's the alternative that I opened with in our discussion this afternoon. And that is the production of a privilege log.

And, again, putting to one side whether we're talking about a privilege log covering all of the thousands of documents that you've mentioned -- putting that aside, and focusing only on the 25 or so, the limited number of documents that you think are a fair sample, what's wrong with the production of a privilege log?

After all, a privilege log is generally required,

even for the assertion of the attorney-client privilege, which is an absolute privilege; whereas here, we're dealing with a qualified privilege. What's wrong with a privilege log?

MR. COOPER: Well, your Honor, there's nothing in -- in principle, wrong with a privilege log.

And, in fact, our proposal to the Court for this -- this 25-document selection for *in camera* review contemplates that it would be accompanied with a privilege log, and that our friends representing the plaintiffs and the Plaintiff-Intervenors would have access to that -- to the privilege log; but you know, a privilege log is -- is -- is always nothing more than a tool and a prelude, a predicate to ultimate determination of the privileged nature of the document that it logs.

And there will certainly -- there -- you know, we can't conceive of -- and our efforts to begin the process of logging documents doesn't reveal to us any method by which the -- by which logging the documents that are responsive and privileged would -- would reveal information just on the face of a log that could -- would allow the Court or even our -- our friend for the plaintiffs to make any kind of determination that a document either is or is not privileged.

In fact, to us, it simply confirms that each one of the documents is within the description of the documents that we believe are privileged; that is, they deal with -- as the

Court's October 1st opinion outlined, they deal with issues of campaign strategy. They are documents exchanged between the -- I guess Mr. Dettmer used the term "architects"; that is, the individuals in responsible, lead roles within the campaign itself. And they are -- you know. And they are those types of communications, mainly. I mean, the vast bulk of these thousands and thousands, as I'm sure the Court suspected, are e-mail messages with this kind of, you know, private communication going back and forth among them.

So we don't oppose privilege logs on principle, but it would not, it seems to us, in any way relieve the Court's -- you know, any burden on the Court or the parties to -- to review actual documents to assess their privileged nature.

I guess the final point I want to make, your Honor, if I may, is this. If -- preparing a privilege log that covered all of these documents wouldn't be in anyone's interest. It wouldn't be -- I mean, it would be a hugely resource-intensive and costly enterprise for a party to this case that is an intervenor party that is already -- believe me, your Honor -- strained in terms of its resources and its ability to, you know, deal with the pace and the demands of the litigation, even apart from it. And to commit the resources necessary to prepare that log would -- would just be -- it would -- it would take a long time, and consume enormous talents and resources.

And -- and it would just put off what -- what seems to us to be inevitable anyway; and that is, in light of the Court's determination in the October 23rd order, just put off the inevitability of an *in camera* review and an ultimate decision -- judicial decision whether, you know, a document or these documents or perhaps, you know, this category of documents is or is not protected by the qualified First Amendment privilege in the context of the case.

THE COURT: Well, we are making some progress, it seems to me.

You've indicated that there's nothing wrong with a privilege log per se. And, indeed, you point out that that is an alternative that you've suggested, along with *in camera* review. And that seems fair enough.

And, indeed, I find that suggestion to be appealing, because -- appealing in this sense, Mr. Cooper: it allays, at least to some degree, the uneasiness that I have about conducting an *in camera* review of materials produced by one side in litigation, without access to that information by the other.

It's true that the plaintiffs would not have access to the documents that were subject to *in camera* review, but they would have the information produced by a privilege log, and enable them to attempt to make a case that the assertion of privilege should not extend to the documents at issue.

So that does seem to me to be a reasonably practical step in the direction of resolving this. And I gather that that is something that your side is prepared to do promptly.

MR. COOPER: Yes, your Honor, we -- we would. You know, we would be prepared to do that whenever the Court gave us permission to do so.

THE COURT: Now, I did take a look at, at least, a couple of cases with respect to the content of a privilege log.

And, of course, the federal rules describe that when a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must expressly make the claim, and then describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in the manner, without revealing the information itself privileged or protected, that will enable other parties to assess the claim.

In reviewing a fairly old Ninth Circuit case -- 1992. That doesn't seem old to me, but I'm sure to some of the younger lawyers who may be listening in, it seems old.

MR. COOPER: Nor to me, your Honor.

THE COURT: All right. We're on the same wavelength, then.

This is *In re: Grand Jury Investigation*, at 974 F. 3d. 1046.

And the content of the privilege log that is described by the Ninth Circuit in that case identifies, one --

And parenthetically, of course, they're talking here about an attorney-client privilege, but we can extend that to our context.

One, the attorney and client involved; two, the nature of the document; three, all persons or entities shown on the document to have received or sent the document; four, all persons or entities to have been furnished the document or informed of its substance; and, five, the date of the document -- the date the document was generated, prepared, or dated.

Now, the privilege log that you contemplate, I assume, Mr. Cooper, would follow that general pattern, adapted, of course, to the specifics of this privilege. Is that a fair assumption?

MR. COOPER: Your Honor, it is a fair assumption.

I want to quickly add that, however, the privilege log we would contemplate would not be able to identify all of the addressees, as it is our, you know, view, as the Court knows, that there are volunteers who were involved in this whose -- whose anonymity has -- has never been -- has never been compromised, and whose -- and for whom anonymity was

important from the beginning.

And so, apart from -- apart from that caveat, we would contemplate that the privilege log would -- would contain the information that you have referenced, but it would -- what we had contemplated was that it would list as Does, which is what we've done in our previous -- our previous dealings with the counsel for the plaintiffs -- list as Does individuals who may have been addressees on a particular document whose -- whose identities have not -- have never come forward.

THE COURT: Well -- hold on. Hold on.

MR. DETTMER: Certainly.

THE COURT: You say "volunteers." Can you tell me who you mean by "volunteers"?

I assume that a lot of people who were involved in the campaign were not compensated, and therefore, might fall under the rubric of a volunteer; but they might, nonetheless, have had a significant role in the management and direction of the campaign.

MR. COOPER: That's certainly true, your Honor. There were -- but the campaign was -- was really, apart from the compensated political consultants and other -- and other political professionals who were engaged by the -- by the campaign, the Proposition 8 campaign was, in fact, managed, and -- and staffed by volunteers. No one was -- no one was compensated.

And, yes, the volunteers had roles that ranged from being members of the ad hoc executive committee, to licking stamps.

And -- and the -- however, the documents that we're talking about here, as Mr. Dettmer has made clear previously, are -- are documents that -- that, by and large, had individuals who had, you know, responsible volunteer positions in the campaign.

I would -- I would also like to note that in the context of an attorney-client privilege, the identity of addressees is a crucial feature of the -- of whether the privilege itself applies or not; perhaps even the most crucial; but that is not the case, we would submit, with respect to the privilege we're talking about.

The identity of individuals who -- whose anonymity has never been compromised is -- is not really a necessary piece of information to determine whether or not the communication itself is within the privilege, at least, that we are advocating for.

THE COURT: Well, let's talk about that for a minute.

I wonder if there isn't an analogy here. Looking at the cases which have crafted this First Amendment qualified privilege, it appears that the cases have drawn a distinction between individuals who were rank-and-file members of the various organizations -- principally, the NAACP, which is the

organization that was involved in most of the cases from which this doctrine has arisen -- and those who were officers or directors or managers of the NAACP, who may very well have included people who were, in your phrase, "volunteers," or who may not have been compensated monetarily for their efforts.

So there is a distinction -- isn't there? -- between managers, directors, individuals who have had responsibility for directing the organization, and those who were rank-and-file members, such as those, as you put it, who lick stamps or distribute fliers or do activities of that kind.

So isn't there an analogy with the attorney-client privilege, at least, in this, at least, as far as this context is concerned?

MR. COOPER: Your Honor, I agree with you that in the *NAACP* case, the issue of the directors and officers of that branch of the NAACP was not an issue, but I would submit that it wasn't an issue because there was never a claim in that case over the -- over the identities of those individuals. Either they had been made public, as a number of individuals in the Proposition 8 campaign have been, and whose identities we are not in any way seeking to protect, or, for whatever reason, the NAACP did not assert any kind of privilege over them.

THE COURT: Well, are there individuals who were involved in the management of the campaign, whether compensated or not, who were equivalent to officers, directors, managing

agents; individuals who sat on the executive committee, and who otherwise were charged with directing the campaign? Are there individuals in that role whose identity you are seeking not to disclose?

MR. COOPER: Yes, your Honor. There are a couple of members of the executive committee -- the ad hoc executive committee -- whose -- whose identities have never been disclosed, and who we have not disclosed before, and over whom we have -- we have asserted a First Amendment privilege, yes.

THE COURT: Well, how does the First Amendment privilege extend to those individuals, as distinguished from people in the position of, say, a Mrs. MacIntyre, who I'm sure you remember from that case that reached the Supreme Court; that is, someone who licked envelopes or who passed out leaflets? How does this First Amendment qualified privilege extend to people who had a role in managing and directing the Proposition 8 campaign?

MR. COOPER: Well, your Honor, I think that our view, your Honor, is that it extends to those individuals to ensure that they are willing to engage in the First Amendment political expression and associational activity of a campaign of this kind.

I mean, they are -- we, frankly, don't see why or how the purposes of the First Amendment privilege would not apply equally to those who step forward to take and volunteer for a

substantial role, even a leadership role or some type of volunteer managerial role, than those who -- who volunteer to associate themselves with this campaign or with any type of referendum campaign on some lesser basis.

I think the concern of the First Amendment is that the type of consequences that flowed, for example, as a result of the disclosure of donors who -- who donated more than a hundred dollars to the campaign -- the kind of unfortunate harassment and other kinds of consequences that flowed to them are -- are the very kinds of things that -- that make, oftentimes, individuals desire to -- desire to involve themselves and associate with political efforts of -- of this controversial kind only on an anonymous basis. And it's our submission that the First Amendment entitles them to do that, and that if it didn't, the prospect that they would step forward to take a leadership role, as opposed to some, you know, lesser type of role, would, we think, be dramatically reduced and chilled.

THE COURT: Now, the campaign for Proposition 8 raised a substantial amount of money. And, of course, there was a substantial amount of money raised in opposition. Did this ad hoc committee that you've mentioned, Mr. Cooper, have the responsibility of managing those funds?

MR. COOPER: To be quite honest with you, your Honor, I am not sure what level of -- what level of responsibility the

ad hoc executive committee had to that. I feel confident in telling you that it had ultimate responsibility, but I do believe that there was a different group with -- with, perhaps, you know, a cross membership, but a different group of -- and a different committee that had particular responsibility for handling of the financial issues.

And, of course, as the Court knows from previous hearings, the Protect Marriage organization itself had a treasurer who was responsible for financial -- had financial responsibilities as well.

THE COURT: Did the treasurer report to and answer to the ad hoc executive committee?

MR. COOPER: My recollection is that that is so, yes, your Honor.

THE COURT: Okay. All right. Well, we've covered a lot of ground. And I've held you off, Mr. Dettmer. And I'm sure you would like to join in this discussion, so let me give you the floor.

MR. DETTMER: Thank you very much, your Honor. I appreciate it.

And I do have a number of comments, but I'd like to keep them as brief as possible; but the ultimate problem that I see that we all collectively face right now is trying to meet the deadlines that exist in this case, while still getting these documents in this litigation that your Honor has found

are at least potentially relevant to the litigation.

And I'm concerned that a privilege log or an *in camera* review of all of these documents would use up all of the time that we have left before trial and, thus, these documents would not be used in the trial or certainly in the discovery process.

THE COURT: Well, let's put that issue to one side for a moment. We can deal with that. I understand your concern and, indeed, I share your concern; but put that to one side, and address these other topics that I've discussed and had a nice discussion with Mr. Cooper about.

MR. DETTMER: Certainly, your Honor.

Well, maybe I can address the privilege-log issue first.

I think that, first of all, it was a little unclear from the discussion about whether we were talking about a privilege log that encompassed all or a substantial portion of these documents, or just 25 documents. Obviously, we would have a serious concern about any *in camera* review or privilege log that had such a small subset of documents that were hand-selected by counsel for the proponents.

I think that that procedure takes the problems of an *in camera* review that your Honor had mentioned, and amplifies them dramatically, given that the Court is only seeing the documents that the proponents' counsel have picked for that

purpose. And obviously, if we're seeing a privileged log for only 25 documents, that even further amplifies that concern.

So I -- I think that the privilege-log issue becomes very difficult for that reason. And it would be very difficult for us to, based on the information that Mr. Cooper had identified as being something that he'd be willing to put on a privilege log, and other items, such as names, that he would not -- it would be of, I think, limited value for us in determining how to argue with Mr. Cooper to your Honor about that privilege, and whether it is, indeed, valid.

With respect to the *in camera* review, your Honor has mentioned that -- the concerns that we would have about that, and that I think any litigant would have in having items presented to the Court without them having an opportunity to comment on them.

And I think what all of this pulls me back to is -- is the fundamental issue here which both you and Mr. Cooper spoke about, your Honor, which is the point that this is not the attorney-client privilege; this is a qualified privilege that is based on very specified concerns that have been laid out in a number of cases.

And those concerns are, as Mr. Cooper mentioned, intimidation and harassment of participants in the political process, and the concern that there will be a chilling of their speech based on that.

And Mr. Cooper has also raised the issue of sharing campaign strategy with the campaign's opponents.

And I would put a footnote there, and say: my clients are not the campaign's opponents; they're individual people. And we're not part of the campaign against Proposition 8, except in, you know, the most -- the most attenuated way.

So I guess the point of this is that those concerns that are the basis for all of this case law that protects these types of things from disclosure, I think, are very amply protected by a good protective order.

And the notion that Mr. Cooper's clients are going to be harmed or their speech is going to be chilled by some handful of lawyers looking at these documents seems to me far-fetched.

And, as your Honor has pointed out, there's already been substantial exposure by Mr. Schubert and Mr. Flint, the campaign -- the Yes on 8 campaign's political strategists, of their strategy. And they've talked about it and -- and broadcast it in several different venues. Your Honor has seen one of them, and commented on it in the October 1st order.

In light of all of that, it seems to me that there is a good way to cut this knot, which is to produce these documents right away to a limited group of lawyers who can look at them and analyze them and move forward. And, at the same

time, Mr. Cooper's clients will be protected from the harms that they've articulated until such time as there's no longer a stay of discovery that can be gotten.

And I think the final point -- and then I'll stop, your Honor -- is the notion that at some point -- and these are going to be introduced in the record -- is something that -- as your Honor knows, there's a whole series of rules in the Court's local rules about how that happens once we get to the point after we've reviewed these documents and looked at them and seen which ones we may want to use at trial or to submit to your Honor.

Then the question of whether they will be in the public record or not is something that I think we could then have a manageable discussion about between Mr. Cooper's team and our team. And then, if we have disagreements at that point, we can bring them to your Honor and get them resolved in advance of anything being submitted in the public record.

THE COURT: Anybody else want to speak up before I go back to Mr. Cooper with a little further discussion on another aspect of this?

Ms. Lee? Mr. Stroud? Ms. Pachter? Martinez? Whitehurst? Who else wants to speak? Anybody?

MS. LEE: This is Mollie Lee, from San Francisco. I have just one quick additional comment.

San Francisco agrees with Plaintiff that a protective

order would adequately -- is the right solution to this problem, and that an attorneys'-eyes-only protective order is more than sufficient to address any concerns that proponents might have about possible harm or chill resulting from disclosure.

And on that line, I wanted to note that in another case, *Protect Marriage v. Mullen*, which is pending in the Eastern District of California, proponents raised similar concerns about disclosure of information that they believed was highly sensitive. And in that case, they did stipulate to a protective order that provided access to sensitive information. And it provided it, I think, particularly as relevant to some of the timing issues in this case -- the protective order was entered, and governed the production and disclosure of confidential information through discovery in all pretrial processes.

So I guess to me, that suggests that that's a very workable solution with respect to these particular parties and the particular concerns that opponents have raised here.

THE COURT: All right. Anyone else?

All right. Let me come back to you, Mr. Cooper. One subject we didn't cover in our discussion, which I thought was very helpful, is the category of the various documents or information that we're talking about.

You mentioned e-mails.

In thinking about the qualified privilege as it has been developed in the case law, various kinds of documents or materials have been discussed: member lists, financial records.

What are we talking about here? Are we talking about membership lists? Members of the campaign? Volunteers who have agreed to walk precincts? Are we talking about financial records? Are we talking about letters from persons in a management position?

And by "letters," I mean not just letters, but also e-mails, telephone calls, documents, as defined in the Federal Rules of Evidence.

Are we talking about communications between those in a management position in the campaign, and the paid political consultants? Just exactly what are we talking about here?

MR. COOPER: Your Honor, we're talking about most of the things that you've identified.

We're talking about, for example, e-mails that -- that discuss campaign finance strategy and fund-raising strategy.

We're talking about -- we're talking about communications back and forth with respect to advertising strategy, and the actual content of ads, and how those ads should be -- or whether they should be revised in some fashion.

We're talking about communications dealing with the

results of focus groups, and the kind of things that -- you know, just the kinds of things you would expect, I think, in any kind of political effort of this kind.

We're talking about drafts of -- of everything from, you know, advertisements to -- to letters.

THE COURT: Hello?

MR. COOPER: Yes.

And I'm just -- there are probably other -- others on my team who are better -- even better acquainted to a level with the kinds of -- with the kinds of internal confidential communications and documents that -- that we're talking about here.

I -- we're not -- we -- we do not have any longer -- as a result of the Court's October 1 ruling, we're not talking about membership lists of, you know, rank and file volunteers or, you know, members of ProtectMarriage.com, or donors that -- whose names haven't been already disclosed, because, you know, we no longer understand that to be even responsive.

So that's not among the information that we have now. You know, we're deep into the culling process, but the kinds of things are along the lines of what I've just -- what I've just described.

And I could perhaps describe a few more kinds of things, if the Court would permit me to confer with my colleagues -- my colleagues here.

THE COURT: Sure, sure. You have some colleagues on the line. Maybe -- maybe they've gotten down to a somewhat more granular level in the pretrial discovery, and they might be able to be helpful. Any of those individuals? Let's see. That's Nielson, Moss. I think there was one other name that I missed: Mr. Panuccio.

MR. COOPER: Mr. Panuccio; but actually, I would ask my colleague, Nicole Moss, who has a much more granular-level understanding of the kinds of documents we're talking about. Nikki, would you like to add to what I've -- what I've described?

MS. MOSS: Certainly. This is Nicole Moss.

I think Chuck has very well stated the sorts of documents that are at issue.

I would note that, while membership lists are not encompassed in light of the October 1 ruling, that is not to say that there are not volunteers' and members' names revealed in these documents. There -- there certainly are references to individuals. And their names are in these documents; but primarily what we're dealing with, as Mr. Cooper noted, is e-mail communications which go to the heart of strategy; discussing specific messaging; what language to use; how to craft a message; the timing of messaging; both language to use, and suggesting things not to be said. That goes to sort of the heart of the strategy.

In addition, there is a great deal of information about fund-raising. And where strategic -- you know, strategic plans for the entire fund-raising plan for the campaign is reflected in some of these documents. The communications plan for the campaign is reflected in these documents.

I mean, on a general basis, that is what we're dealing with primarily here.

THE COURT: All right that's very helpful. Very helpful indeed.

Let me, before drawing this to a close, ask: does anyone have anything that he or she would like to add before I make a suggestion, and see how we proceed from this point? Anybody have anything that he or she thinks ought to be expressed before I try to draw this matter to a close?

Hearing nothing --

MR. COOPER: Nothing more from the proponents, your Honor.

MR. DETTMER: No, your Honor. Thank you.

THE COURT: Well, I think this has been a very helpful discussion. And I certainly share Mr. Dettmer's concern about getting discovery wrapped up in time to meet the scheduled trial date.

And I have some empathy for you all on the other end of this telephone conversation. Although I have been on this side of the bench for almost 20 years, I haven't completely

forgotten what it's like to be on the other side, and know what it's like to be dealing with discovery deadlines.

And I will say that, having not forgotten what it's like, I'm going to try to work with you, because of the schedule that we've set, which I think is a practical schedule, and one that the nature of the case warrants; but I'm going to try to work with you so that we can get the discovery completed in an orderly fashion in time to beat the case schedule, as well as to allow a full and fair opportunity to conduct the discovery that's necessary, so that the case can be adequately presented.

It seems to me that Mr. Cooper's suggestion of combining a privilege log with the *in camera* disclosure of documents is worth a try, to see if that is not sufficient to begin sorting out this issue.

I'm reasonably sure that it's not going to deal with all aspects of the discovery concerns that we have on both sides here, but I think it is a good start.

So -- and I understand also Mr. Cooper's concern about requiring a privilege log as to the entire universe of documents that he or his clients feel are covered by the qualified First Amendment privilege that his clients are claiming.

So a privilege log and an *in camera* review of a limited number of those documents, I think, is an appropriate

way to proceed.

Now, however, in order to make that meaningful and to ensure fairness in the selection of the documents listed on the privilege log and included within the documents offered up for *in camera* review, I think there are a couple of additional elements that we need to flesh out at this point. And that is a bit more detail about the nature or category of the documents that are involved in the privilege assertion.

Certainly, that is consistent with a requirement of a privilege log, which requires that the nature of the document be described; but it seems to me that if there are a limited number of documents -- whether it's 25, 50, or a hundred -- it may not cover all categories of the kinds of documents that the proponents are asserting the privilege over. And so I think a fuller description of those categories than we've had the opportunity to include today would be very, very helpful.

Mr. Cooper has mentioned e-mails and other communications involving finance of a campaign, campaign strategy, advertising strategy, focus-group results, drafts of advertisements, advertisements or appeals that the campaign decided not to make, and internal communications. That's, I think, a helpful first start of categorizing these kinds of documents, but I think in addition to a privilege log, a fuller description of those kinds of materials would be extremely helpful in deciding whether or not we should pursue discovery

of those categories of documents.

And the other issue that I find still to be troubling is this issue of the identity of the individuals who were in management responsibility for the campaign.

And perhaps a way to deal with that, Mr. Cooper, would be for -- and I'll throw this out for your reaction -- would be for you to disclose the identity of all of those who were in a position of management responsibility as part of the *in camera* disclosure, so that I could make some kind of a determination whether it seems reasonable that the identity of such individuals would have the kind of chilling effect that you contend applies to this situation.

It does seem to me that, in reading the cases -- four to five in this view -- there is a pretty clear distinction that is drawn between those who are running the campaign, and those who were simply supporting or opposing a campaign. And I am -- I am troubled that individuals who have management responsibility for a political campaign should be shielded from disclosure, given all of the case law and all of the other law that applies to running initiative and referendum campaigns.

I'm not by any means saying that I reject the argument that the identity of these individuals may not implicate First Amendment privileges that are important here; but frankly, I do need to be persuaded of that. And maybe the only way to -- to achieve that would be for an *in camera*

disclosure of those individuals. So that's what I would propose.

And I would propose further that, with respect to the preparation of a privilege log, the full list of the categories of documents that you think are covered by the qualified privilege and the identity of those in management positions or with management responsibility for the campaign -- that if at all possible, to meet Mr. Dettmer's concern about the pace of discovery, that we have that production *in camera* together with the log and the other disclosures that I've mentioned not later than the end of this week.

Now, is that possible?

MR. COOPER: Your Honor, that is possible.

With respect to fleshing out the categories, I hear you. We will do that. We will do our level best to -- to make the descriptions as -- as thorough and as granular as we can.

And with respect to the *in camera* review of all identities, we will -- we will provide that information for the Court's *in camera* review. And -- and, yes, sir, we will commit ourselves to get that to you by the end of the week.

In light of this -- the Court's further guidance on this, it may be well -- and I suspect that it will be well -- for us to perhaps enlarge the sampling a bit; but it's been our idea that -- that, you know, we didn't want to overburden the Court; but I think in light of the Court's further guidance

here this evening, that we may want to add some number of documents to the sampling that -- just to ensure that we -- we -- we have addressed all of the categories that we can identify discretely.

THE COURT: Good. Well, I think that probably would be helpful to you, and would certainly be helpful and informative to the Court.

Well, counsel, I appreciate your willingness to have this discussion this afternoon or evening. And I will express the hope that this may be the last time that we'll have a discovery discussion, but I will not be surprised if it is not the last time; but I do appreciate the good work on both sides of the case. And I think we've made some fairly significant progress this afternoon.

So, if no one has anything further, I'll let you all go.

MR. DETTMER: Thank you very much, your Honor.

THE COURT: Mr. Dettmer, Ms. Lee, Mr. Stroud, any of the others? Anything further?

MS. LEE: Nothing further, your Honor.

MR. STROUD: No thank you, your Honor.

MR. DETTMER: Nothing further, your Honor. Thank you.

(At 3:55 p.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C. 09-2292-VRW, Kristin M. Perry v. Arnold Schwarzenegger, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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/s/ Lydia Zinn, CSR 9223, RPR

Tuesday, November 3, 2009