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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER,
PAUL T KATAMI and JEFFREY J
ZARRILLO,

No C 09-2292 VRW
ORDER

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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 planning for the
California Department of Public
Health; PATRICK O'CONNELL, in his
official capacity as clerk-
recorder of the County of
Alameda; and DEAN C LOGAN, in his
official capacity as registrar-
recorder/county clerk for the
County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
HAKSHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF
CALIOFORNIA RENEWAL, as official
proponents of Proposition 8,

Defendant-Intervenors.

1 The court ordered defendant-intervenors ("proponents") to
2 produce documents responsive to plaintiffs' eighth document request
3 pursuant to a production schedule to be worked out among the
4 parties. Doc #252 at 9. The parties apparently have not been able
5 to agree to a production schedule, and plaintiffs have submitted a
6 letter asking the court to "direct immediate production of those
7 documents and categories of documents found to be relevant,
8 responsive and non-privileged." Doc #256. Proponents oppose an
9 order directing immediate production. Doc #257.¹ The court held a
10 telephonic hearing on the issues raised by these two letters on
11 November 19, 2009. The following counsel appeared: Matthew McGill
12 for plaintiffs, Nicole Jo Moss for proponents, Mollie Lee for
13 plaintiff-intervenors City and County of San Francisco, Andrew
14 Stroud for defendants Arnold Schwarzenegger, Mark B Horton and
15 Linette Scott and Tamar Pachter for defendant Edmund G Brown Jr.

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18 On October 1, 2009, the court denied proponents' blanket
19 claim that the qualified First Amendment privilege protects Yes on
20 8 campaign documents against disclosure. Doc #214. Proponents
21 appealed the order or alternatively sought mandamus relief. Doc
22 #222. Simultaneously, proponents sought a stay of discovery in
23 this court, which was denied. Doc #237. The Ninth Circuit issued
24 an order to show cause why proponents' appeal should not be
25 dismissed for lack of jurisdiction but has otherwise not acted on
26 the appeal. See Ninth Circuit case no 09-17241 at Doc #8.

27 _____
28 ¹Chief Judge Walker has referred discovery disputes that arise
in his absence to the undersigned pursuant to 28 USC § 636(b)(1)(A).

1 After the court denied proponents' motion for a stay,
2 proponents sought in camera review over a sample of sixty documents
3 to allow the court to determine whether the First Amendment
4 qualified privilege might apply to some of the thousands of
5 potentially responsive documents in proponents' possession. Doc
6 #238. After reviewing the documents in camera, the court
7 determined that the qualified First Amendment privilege offered
8 little, if any, protection against disclosure. Doc #252 (the
9 "November 11 order") at 2-3. As part of the balancing process
10 required in the case of qualified privileges, the court noted that
11 plaintiffs do not oppose redaction of the names of rank-and-file
12 volunteers and similarly situated individuals. Id at 3. The court
13 previously noted that an appropriate protective order could
14 eliminate any tangible harm that disclosure of the disputed
15 documents might otherwise exacerbate. Doc #214 at 6. The court
16 determined that only twenty-one of the sixty documents provided for
17 review were responsive to plaintiffs' eighth document request and
18 explained its reasoning to assist the parties in determining the
19 potential relevance of the remaining documents not provided for
20 review. Doc #252 at 3-9. The November 11 order relied on the able
21 counsel for the parties to develop an appropriate production
22 schedule. Id at 9.

23 Proponents now seek to appeal the court's discovery
24 orders (Doc ##214, 237, 252) or alternatively seek mandamus relief.
25 Doc #253. The Ninth Circuit has not yet accepted the appeal or
26 mandamus petition or issued a stay. Proponents have asked the
27 Ninth Circuit "to expedite these appeals." Ninth Circuit case no
28 09-17241 Doc #14 at 25.

1 and until the Ninth Circuit stays discovery, the November 11 order
2 remains in effect, and proponents are obligated to produce the
3 documents the court has found to be responsive and not privileged.
4 The court ordered the parties to "work out a production schedule."
5 Doc #252 at 9. While the court relied on the parties to schedule
6 the actual production of the responsive material in an appropriate
7 manner, that charge plainly did not authorize proponents to
8 "decline to produce any documents" while the possibility of a stay
9 exists. See Doc #256-1 at 2. The court has previously set a fact
10 discovery cut off date of November 30, 2009. See Doc #160 at 2.

11 The practical difficulties associated with production of
12 documents responsive to plaintiffs' eighth document request counsel
13 against entering an order compelling production of all responsive
14 documents within three days. Nevertheless, the upcoming discovery
15 cut off date of November 30, 2009, as well as the impending January
16 trial, necessitate a production schedule that is consistent with
17 those dates. Accordingly, and in light of the parties' inability
18 to agree to a production schedule, the court DIRECTS the parties to
19 proceed as follows:

20 The court reiterates its view that appropriate
21 protections can be implemented to reduce or eliminate many of the
22 problems that proponents believe they will suffer as a result of
23 the production of documents pursuant to the November 11 order. The
24 parties shall meet and confer on the terms of a protective order.
25 Any stipulated protective order shall be filed not later than
26 Monday, November 23, 2009 at 12 PM PST. The Court is available to
27 assist the parties in that matter. However, if no stipulated order
28 is filed, the court intends to enter an appropriate order based on

1 the standard protective order that can be viewed on the court's
2 website.

3 The twenty-one documents identified by the court in its
4 November 11 order as responsive and not privileged shall be
5 designated "attorneys-eyes only" and produced to plaintiffs not
6 later than the close of fact discovery on Monday, November 30,
7 2009. Similarly, proponents shall produce the additional documents
8 responsive to plaintiffs' eighth document request on a rolling
9 basis to conclude not later than the close of fact discovery on
10 November 30, 2009. Proponents shall be guided by the November 11
11 order, at 3-9, in determining which documents are responsive to
12 plaintiffs' request. Names of rank-and-file campaign volunteers
13 and similarly situated individuals shall be redacted from all
14 documents produced to plaintiffs. These documents may only be
15 viewed by counsel of record in this action until a full protective
16 order is entered by the court.

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18 IT IS SO ORDERED.

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20 Dated: November 19, 2009

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24 JOSEPH C SPERO
25 United States Magistrate Judge
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