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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,

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.

No C 09-2292 VRW
ORDER

United States District Court
For the Northern District of California

1 Plaintiffs and plaintiff-intervenor City and County of
2 San Francisco (collectively "plaintiffs") seek an order compelling
3 production of non-privileged documents responsive to document
4 requests 1, 6 and 8. Doc #325 at 8. Defendant-intervenors, the
5 official proponents of Proposition 8 ("proponents") oppose
6 production, arguing all non-privileged responsive documents have
7 been produced and that additional production at this time would not
8 be practical. Doc #314. Underlying the dispute is the scope of
9 proponents' First Amendment privilege and the application of that
10 privilege to the documents in proponents' possession. The court
11 heard the matter on January 6, 2010. This written order
12 memorializes the oral order made at the hearing.

I

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15 Proponents' First Amendment privilege protects "*private,*
16 *internal* campaign communications concerning the *formulation of*
17 *strategy and messages.*" Perry v Hollingsworth, 09-17241 Slip Op at
18 36 n12 (9th Cir January 4, 2010) (emphasis in original). The
19 privilege protects "communications among the core group of *persons*
20 engaged in the formulation of campaign strategy and messages." *Id*
21 (emphasis in original). The Ninth Circuit left it to this court
22 "to determine the persons who logically should be included" in the
23 core group. *Id.*

24 At the January 6 hearing, the court heard argument from
25 counsel concerning the identities of individuals within the core
26 group. Proponents argued the court should consider as part of the
27 core group organizations other than the official campaign in
28 support of Proposition 8, Yes on 8 and ProtectMarriage.com. But

1 proponents have never asserted a First Amendment privilege over
2 communications to other organizations. Indeed, proponents'
3 November 6, 2009 in camera filing, which was intended to represent
4 (by providing the Court with a representative sample) the universe
5 of documents over which proponents claim a First Amendment
6 privilege, does not identify other organizations' documents as part
7 of proponents' privilege claim. Doc #251. To the contrary, the
8 declaration accompanying the in camera submission refers only to
9 the management structure of the Yes on 8 campaign. Accordingly,
10 the court finds that proponents have only claimed a First Amendment
11 privilege over communications among members of the core group of
12 Yes on 8 and ProtectMarriage.com.

13 Even if the Court were to conclude that the First
14 Amendment privilege had been properly preserved as to the
15 communication among the members of core groups other than the Yes
16 on 8 and ProtectMarriage.com campaign, proponents have failed to
17 meet their burden of proving that the privilege applies to any
18 documents in proponents' possession, custody or control. There is
19 no evidence before the Court regarding any other campaign
20 organization, let alone the existence of a core group within such
21 an organization. There is also no evidence before the Court that
22 any of the documents at issue are private internal communications
23 of such a core group regarding formulation of strategy and
24 messages.

25 Counsel did not agree on a core group of Yes on 8 and
26 ProtectMarriage.com at the January 6 hearing, and in the absence of
27 agreement, the court looked to a declaration by Ron Prentice
28 submitted by proponents under seal on November 6, 2009. Doc #251.

1 The Prentice declaration explains the structure of the "Yes on 8"
2 campaign and identifies by name the individuals with decision-
3 making authority over campaign strategy and messaging. Proponents
4 admitted the individuals in the Prentice declaration form at least
5 a part of the core group but sought an additional 24 hours to
6 determine whether additional individuals should also be included.
7 The court granted the request and ordered proponents to supplement
8 their filing not later than January 7, 2010 at 4 PM. Proponents
9 filed a second Declaration of Mr. Prentice (the "Second Prentice
10 Declaration") which offers addition persons that are claimed to be
11 in the core group of ProtectMarriage.com. Doc #364. Plaintiffs
12 submitted objections to the Second Prentice Declaration on January
13 8, 2010. Doc #367. Having reviewed both of the Prentice
14 declarations and plaintiffs' opposition, the court finds that the
15 court group consists only of the following individuals:

16 Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-
17 Shing William Tam and Mark A Jansson (The official proponents
18 of Proposition 8); Ron Prentice, Mark A Jansson, Ned Dolejsi
19 and Doug Swardstrom (the members of ProtectMarriage.com's
20 executive committee); David Bauer (the treasurer of
21 ProtectMarriage.com); Andrew Pugno, Joe Infranco and Glen Lavy
22 (ProtectMarriage.com's attorneys); Mike Spence and Gary
23 Lawrence (individuals who provided significant advice and
24 assistance to the campaign); Sonja Eddings Brown, Chip White
25 and Jennifer Kerns (spokespersons for ProtectMarriage.com);
26 Meg Waters and the individuals listed in ¶6(i)-(iii) and
27 ¶6(v)-(vii) of the Second Prentice Declaration (volunteers who
28 had significant roles in formulating strategy and messaging);
employees of Schubert Flint Public Affairs, Lawrence Research,
Sterling Corporation, Bieber Communications, Candidates
Outdoor Graphics, The Monaco Group, Infusion PR, Connell
Dontatelli, JRM Enterprises and K Street Communications
(consulting firms who had significant input on strategic
decisions); and assistants to the named individuals acting on
the named individuals' behalf.

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1 Communications to anyone outside the core group are not
2 privileged under the First Amendment. While the First Amendment
3 privilege only protects internal communications relating to
4 strategy or messaging, proponents will not be ordered at this
5 juncture to produce any internal communications on any subject.
6 Nevertheless, proponents must revise their privilege log to
7 include, as protected by the First Amendment privilege, all
8 documents consisting of communications between or among members of
9 the core group. The revised privilege log shall be served and
10 filed not later than January 24, 2010.

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II

 Plaintiffs seek an order directing proponents to produce
all non-privileged documents responsive to document requests 1, 6
and 8. Doc #325 at 8. To the extent requests 1, 6 and 8 seek
documents that contain, refer or relate to arguments for or against
Proposition 8, the requests seek relevant discovery as defined in
FRCP 26(b)(1). See Doc #252 at 3; Perry, 09-17241 Slip op at 34.
Because the scope of proponents' First Amendment privilege has been
defined, proponents are now able to identify non-privileged
documents and produce them to plaintiffs pursuant to the protective
order, Doc #360. Proponents are therefore ordered to produce all
documents responsive to requests 1, 6 and 8 that contain, refer or
relate to any arguments for or against Proposition 8 other than
communications solely among the core group as defined above. They
shall begin production of the documents on a rolling basis not
later than Sunday, January 10, 2010 at 12 PM. Production shall
conclude not later than Sunday, January 17, 2010 at 12 PM. The

United States District Court
For the Northern District of California

1 short production schedule is necessary in light of the trial
2 scheduled to begin on January 11, 2010.

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4 IT IS SO ORDERED.



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7 JOSEPH C SPERO
8 United States Magistrate Judge
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