

No. 09-17241

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,

v.

DENNIS HOLLINGSWORTH, et al.
Defendant-Intervenors-Appellees.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

DECLARATION OF NICOLE JO MOSS

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Attorneys for Defendant-Intervenors-Appellants

I, Nicole Jo Moss, declare as follows:

1. I am Of Counsel at the law firm of Cooper & Kirk, PLLC, and I am one of the attorneys for Defendant-Intervenors-Appellants Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, A Project of California Renewal. I make this declaration in support of Appellants’ Show-Cause Brief, submitted pursuant to an Order of this Court dated October 20, 2009. I have personal knowledge of the facts set forth herein.

2. After the district court entered its October 1 order, counsel for Plaintiffs, Ethan Dettmer, began inquiring as to when Defendant-Intervenors would begin producing materials in response to Plaintiffs’ document requests. Mr. Dettmer sent several emails regarding this issue, and those emails reflect Plaintiffs’ position that Defendant-Intervenors are required to produce under the October 1 order. For example, in an email dated October 12, 2009, Mr. Dettmer asked: “[C]an you please let us know whether you intend to withhold the documents that should be produced pursuant to Chief Judge Walker’s October 1, 2009 Order while your motion to stay and/or your appeal are pending?” And in an email dated October 14, 2009, Mr. Dettmer stated: “our position is that you must produce all relevant documents.” He also stated: “Chief Judge Walker directed us to revise our request number 8, and we have done so in a way that we believe conforms with his Order. The Court de-

nied your protective order with respect to all other outstanding requests, and thus they stand as drafted.” A true and correct copy of these emails is attached hereto as Exhibit A.

I declare, under penalty of perjury under the laws of the United States, that these facts are true and correct and that this Declaration is executed this 13th day of November 2009 at Washington, D.C.

/s/ Nicole J. Moss
Nicole J. Moss

Exhibit A

From: Dettmer, Ethan D. [EDettmer@gibsondunn.com]
Sent: Monday, October 12, 2009 6:56 PM
To: Nicole Moss; Jesse Panuccio
Cc: David Thompson; McGill, Matthew D.; Dusseault, Christopher D.
Subject: Outstanding Perry Discovery Issues

Nicole and Jesse - in addition to following up on the matters in my email, below, I have two additional questions regarding the status of discovery in this case. Can you please respond to two questions for us by the close of business on Tuesday, October 13?

First, can you confirm that you have produced all non-privileged communications responsive to our outstanding discovery requests that were sent to "targeted" groups smaller than the public at large (e.g., teachers, registered Republicans, truck drivers, church groups)?

Second, can you please let us know whether you intend to withhold the documents that should be produced pursuant to Chief Judge Walker's October 1, 2009 Order while your motion to stay and/or your appeal are pending?

I very much appreciate your prompt response to these questions.

Best,

Ethan

From: Dettmer, Ethan D. [EDettmer@gibsondunn.com]
Sent: Wednesday, October 14, 2009 9:15 AM
To: Nicole Moss; Jesse Panuccio; David Thompson
Cc: McGill, Matthew D.; Dusseault, Christopher D.
Subject: RE: Outstanding Perry Discovery Issues
Attachments: 100744480_2.DOC; 100744425_3 (Perry Search Terms for discovery).DOC

Dear Nicole:

Thanks for your email, and thank you for your team's work in getting the responsive and non-privileged documents gathered and prepared for production.

I want to clarify and correct a couple of the points in your email.

1. You have not requested in the past that we provide you with search terms in connection with document production. We have discussed search terms in a general manner on a couple of occasions, but prior to the October 1 Order, your clients' position was that you were not going to produce anything other than public communications, so the issue of search terms was academic. In our conversation last week, I proposed that the best way to ease the burden of production and move production along in a prompt and efficient manner is to get a targeted list of custodians who will be subject to production. I thought that you were open to this idea in our call last week, but I take it from your email below that you are no longer open to this idea.

2. We are, as you know, deeply interested in and committed to moving this case along on the schedule set by the Court. I know that you and your team are, as well. The following proposals are in the interest of meeting that mutual commitment and the schedule ordered by the Court.

a. I have attached our initial list of search terms to speed production of relevant documents. As you note, we reserve the right to augment this list.

b. I have attached a proposed form of protective order for your consideration in advance of the October 19 date you propose. This is the Northern District of California's form confidentiality order, and it contains an attorneys' eyes only provision. Given our mutual desire to advance discovery and meet the Court's deadline, I suggest we agree to this right away, and then you can produce the relevant names to us under an "Attorneys' Eyes Only" designation right away so that we can further narrow and target discovery.

c. Upon entering the proposed protective order, your clients can immediately start producing responsive documents (on a rolling basis) that are the subject of your appeal, but do so on a provisional "attorneys' eyes only" basis. If discovery is not stayed, you can re-designate produced documents as appropriate. If discovery is stayed pending appeal, we return the documents to you pending final resolution. But production now under these terms will allow us to move forward in preparing for discovery on an expeditious basis. In addition, there is no harm to your clients in doing so, as the interests you claim are protected are not threatened by production on an attorneys' eyes only basis.

In response to the questions at the end of your email:

First, our position is that you must produce all relevant documents. Your stated position was that, because you believe "all internal communications are legally irrelevant to any claim in this case, [you] 'deem such communications' as 'tend[ing] [neither] to support or refute' any claim in this case." General Objections to First Set of Requests for Production, paragraph 12. But the Court expressly disagreed with this interpretation of relevance (Dkt. 214 at 12-13), and so all documents that support or refute any of your claims and defenses in this case must be produced, whether they are external communications or purely internal.

Second, with respect to your question about "unexpressed motivations," we are unclear on exactly what you are asking. Could you kindly specify what you mean by "documents that reveal unexpressed motivations"?

Third, Chief Judge Walker directed us to revise our request number 8, and we have done so in a way that we believe conforms with his Order. The Court denied your protective order with respect to all other outstanding requests, and thus they stand as drafted.

As we have said before, we stand ready to discuss these matters with you at any point. I look forward to hearing back from you promptly.

Best,

Ethan
