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17 **United States District Court**
Eastern District of California
18 **Sacramento Division**

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| 19 PROTECTMARRIAGE.COM, et al., 20 Plaintiffs, 21 vs. 22 DEBRA BOWEN, et al., 23 Defendants. 24 | Case No. 2:09-CV-00058-MCE-DAD Responses of National Organization for Marriage California - Yes on 8, Sponsored by National Organization for Marriage and National Organization for Marriage California PAC to Attorney General's First Demand for Production, Inspections, and Copying of Documents Judge Morrison C. England, Jr. |
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28 **Resp. Of NOM California and
NOM California PAC to A.G.'s
First Demand for Production,
Inspections, and Copying of Documents**

1 Plaintiffs National Organization for Marriage California - Yes on 8, Sponsored by National
2 Organization for Marriage (“NOM California”) and National Organization for Marriage
3 California PAC (“NOM California PAC”), hereby responds to the Attorney General’s First
4 Demand for Production, Inspections, and Copying of Documents as follows:

5 **General Objections**

6 1. NOM California and NOM California PAC objects to the Requests to the extent they call
7 for documents irrelevant to the issues in this case. Significant portions of the discovery sought
8 by these Requests are legally irrelevant and not designed to lead to the discovery of admissible
9 evidence, and it would therefore be objectionably burdensome for NOM California and NOM
10 California PAC to have to collect, review, produce, and/or log all such documents. Because of
11 the irrelevant nature of these materials, the time and expense that would be required to gather and
12 produce them cannot be reasonably justified. *See* Fed. R. Civ. P. 26(b)(1).

13 2. In *Buckley v. Valeo*, the Supreme Court created the reasonable probability test in response
14 to, and in rejection of, the argument that the proof of a chill on expressive association would be
15 impossible. 424 U.S. 1, 73 (1976). In the *Buckley* appellate court, a dissenting opinion noted the
16 difficulty of obtaining “witnesses who are too fearful to contribute but not too fearful to testify
17 about their fear.” *Id.* at 74. Noting this concern, the Supreme Court established the reasonable
18 probability test, which included a mandate that courts allow “sufficient flexibility” in evidence to
19 fit the situation where witnesses are difficult to obtain because they are chilled by fear of threats,
20 harassment, or reprisals. *Id.* Under the reasonable probability test, the court must determine
21 whether there is a “reasonable probability that the compelled disclosure of a party’s contributors’
22 names will subject them to threats, harassment, or reprisals from either Government officials or
23 private parties.” *McConnell v. FEC*, 540 U.S. 93, 198 (2003) (citation omitted). Here, Plaintiffs
24 have alleged just such threats, harassment, and reprisals, and have provided numerous
25 declarations in support of that.

26 These document requests seek to compel disclosure of speech involving an advocacy
27 association during an election on a ballot measure—speech that “is at the heart of the First
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1 Amendment’s protection,” and “the type of speech indispensable to decisionmaking in a
2 democracy.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). As the U.S.
3 Court of Appeals for the Ninth Circuit recently held, “[t]he freedom to associate with others for
4 the common advancement of political beliefs and ideas lies at the heart of the First Amendment.
5 Where, as here, discovery would have the practical effect of discouraging the exercise of First
6 Amendment associational rights, the party seeking such discovery must demonstrate a need for
7 the information sufficient to outweigh the impact on those rights.” *Perry v. Schwarzenegger*, 591
8 F.3d 1147, 1152 (9th Cir. 2010).

9 Thus, NOM California and NOM California PAC object to these document requests to the
10 extent that they seek information protected from disclosure by the First Amendment. *See*
11 *DeGregory v. Attorney General of the State of New Hampshire*, 383 U.S. 825, 829 (1966). These
12 document requests call for responses that reflect core First Amendment activity—e.g., political
13 views, legislative and political strategy, religious beliefs, voter intent, political speech, and
14 associational activity—and are not appropriate subjects of discovery and are protected from
15 disclosure. *See, e.g., Dole v. Service Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456,
16 1459 (9th Cir. 1991). Specifically, these document requests call for information on individuals
17 who asserted their First Amendment right to speak and confidentially associate with a political
18 advocacy group to further a political belief. To the extent individuals who have associated with
19 NOM California and NOM California PAC have been willing to publicly come forward, these
20 individuals have submitted declarations in this case in support of Plaintiffs. However, to the
21 extent that individuals have not been willing to publicly come forward, Plaintiffs have not, and
22 will not, produce information on those individuals.

23 3. Furthermore, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) recognized that in
24 cases involving political speech, “extensive discovery” including “ha[ving] to turn over many
25 documents related to . . . operations, plans, and finances[,] . . . constitutes a severe burden on
26 political speech,” *id.* at 2666, n.5, so that there must be “minimal if any” discovery in such cases.
27 *Id.* at 2666. Citizen groups asserting First Amendment rights of privacy and freedom from
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1 burden in their associational rights may not be penalized through discovery for asserting their
2 First Amendment rights.

3 4. NOM California and NOM California PAC object to these Requests to the extent that the
4 information contained in these requests may be prevented from disclosure by the ongoing case of
5 *Doe #1 v. Reed*, U.S. Supreme Court Case No. 09-0559, which is currently on petition for a writ
6 of certiorari to the Supreme Court of the United States of America, and may be dispositive on the
7 issue of whether and to what extent the information sought by the Attorney General may be
8 divulged by NOM California and NOM California PAC, as well as the extent of the reasonable
9 probability test at issue in this case. The case deals with the extent to which individuals who
10 have not contributed to a campaign may be publicly disclosed.

11 5. NOM California and NOM California PAC object to the Requests and their
12 accompanying instructions as unduly burdensome and beyond the scope of the obligations
13 imposed by the Federal Rules of Civil Procedure to the extent that they seek documents and
14 information that are publicly available and/or otherwise in the custody or control of third parties.
15 To the extent the Attorney General's Requests place an obligation on P NOM California and
16 NOM California PAC to produce documents and information from entities and/or individuals
17 who are not uniquely within Plaintiffs' custody and control, the Requests are objectionable.
18 *See* Fed. Civ. P. 26(b)(2)(C)(ii).

19 6. NOM California and NOM California PAC object to these Requests as vague, ambiguous
20 and/or unduly burdensome to the extent that the certain terms are not defined and/or limited in
21 any way, and taken at face value would encompass all communications NOM California and
22 NOM California PAC may have had with any individuals or entities bearing any relationship the
23 campaign surrounding Proposition 8 whatsoever. Such documents include, but are not limited
24 to, communications with individual donors, volunteers, or voters; communications with political
25 strategists and other agents or contractors of the NOM California and NOM California PAC; and
26 communications with friends, colleagues, and casual acquaintances. Moreover, the Attorney
27 General seeks these communications regardless of whether they relate to disclosure of
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1 individuals who donate to ballot initiatives. This presents not only First Amendment concerns,
2 but also creates an undue burden on NOM California and NOM California PAC in attempting to
3 gather, review, and produce all such communications. *See* Fed. R. Civ. P. 26(b)(1); *see also* Fed.
4 R. Civ. P. 26(b)(1) advisory committee's note (2000).

5 7. NOM California and NOM California PAC object to these Requests to the extent that they
6 prematurely call for information that is unavailable to NOM California and NOM California
7 PAC in its final form at this time.

8 8. NOM California and NOM California PAC object to these Requests to the extent they
9 seek drafts and other pre-decisional documents or communications associated with preparing
10 final documents or communications regarding Proposition 8 that were actually disseminated by
11 NOM California and NOM California PAC to the electorate at large. These documents are
12 legally irrelevant and protected from disclosure by the First Amendment.

13 9. NOM California and NOM California PAC object to the Requests to the extent that they
14 call for the disclosure of any information or document that (a) involves litigation strategy and
15 trial preparation; (b) is protected by the attorney-client privilege; (c) discloses the mental
16 impressions, conclusions, opinions, or legal theories of any attorneys involved in this litigation;
17 (d) was prepared in anticipation of litigation; (e) NOM California and NOM California PAC to
18 produce information from entities/individuals who are not uniquely within NOM California's
19 and NOM California PAC's custody and control; or (f) is otherwise protected from disclosure
20 under applicable privileges, immunities, laws, or rules. By responding to these document
21 requests, NOM California and NOM California PAC do not concede that the information
22 requested is relevant to a claim or defense on the subject matter of this litigation, or is admissible
23 at the trial thereof. NOM California and NOM California PAC reserve any and all objections as
24 to competency, relevance, materiality, privilege, admissibility, or any other grounds on which
25 objection may be made. NOM California and NOM California PAC expressly reserve the right
26 to object to further discovery into the subject matter of these requests. Subject to the objections
27 detailed herein, including objections to having to undertake the burden of reviewing and/or

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1 logging documents implicated by these Requests, NOM California and NOM California PAC
2 will produce as soon as possible following the completion of any agreed or ordered production of
3 documents a log of all responsive documents that have been withheld from production pursuant
4 to these objections and that NOM California and NOM California PAC are required to review
5 and/or log pursuant to the Federal Rules of Civil Procedure and/or any existing or future order of
6 the Court.

7 Subject to and without waiving any of the foregoing General Objections, which are hereby
8 incorporated into each response given below, NOM California and NOM California PAC are
9 answering these Requests in substance to the extent practicable and reasonable under the present
10 circumstances, as stated below. NOM California and NOM California PAC hereby respond to
11 the individual Requests as follows.

12 **Responses to Requests**

13 **Request No. 1:** All documents relating to Plaintiffs' fundraising for Proposition 8, including but
14 not limited to fundraising letters, internal communications, communications with contributors
15 and potential contributors, and communications with third parties. If Plaintiffs sent the same
16 letter to multiple recipients, please provide only one copy.

17 **Response:** Subject to the objections above and without waiving further objection, NOM
18 California and NOM California PAC respond as follows:

19 Plaintiffs have produced or are in the process of producing documents responsive to this
20 request. To the extent that such documents are privileged under an applicable privilege, such
21 documents will be logged in a privilege log which will be provided to opposing counsel.

22 To the extent this response may need revision, NOM California and NOM California PAC
23 reserve the right to amend this response and will provide any such a revised response to
24 Defendants in a timely manner.

25 **Request No. 2:** All documents relating to fundraising for Proposition 8 by any individual, group
26 or entity other than Plaintiffs. This includes but is not limited to fundraising letters,
27 communications with contributors and potential contributors, communications with third parties
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1 provided to or acquired by Plaintiffs, and copies of draft documents or internal communications
2 provided to or acquired by Plaintiffs.

3 **Response:** Subject to the objections above and without waiving further objection, NOM
4 California and NOM California PAC respond as follows:

5 Plaintiffs have produced or are in the process of producing documents responsive to this
6 request. To the extent that such documents are privileged under an applicable privilege, such
7 documents will be logged in a privilege log which will be provided to opposing counsel.

8 To the extent this response may need revision, NOM California and NOM California PAC
9 reserve the right to amend this response and will provide any such a revised response to
10 Defendants in a timely manner.

11 **Request No. 3:** All documents relating to any harassment alleged by any person as a result of
12 that person's contribution to Organization Plaintiffs or other support for Proposition 8, including
13 all communications between Plaintiffs and any person regarding harassment alleged by that
14 person. This includes drafts of all declarations and other documents regarding the harassment,
15 regardless of whether those documents were filed in this action.

16 **Response:** Subject to the objections above and without waiving further objection, NOM
17 California and NOM California PAC responds as follows:

18 Plaintiff has produced or is in the process of producing documents responsive to this request
19 to the extent that individuals have come forward publicly regarding threats, harassment, and
20 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
21 were directed at NOM California and NOM California PAC or employees of NOM California
22 and NOM California PAC.

23 To the extent that such documents are privileged under an applicable privilege, such
24 documents will be logged in a privilege log which will be provided to opposing counsel.

25 To the extent this response may need revision, P NOM California and NOM California PAC
26 reserve the right to amend this response and will provide any such a revised response to
27 Defendants in a timely manner.

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1 **Request No. 4:** All documents relating to any harassment or hostility expressed by any
2 government entity toward Plaintiffs or any other person as a result of those persons' support of
3 Organization Plaintiffs or Proposition 8.

4 **Response:** Subject to the objections above and without waiving further objection, NOM
5 California and NOM California PAC responds as follows:

6 Plaintiff has produced or is in the process of producing documents responsive to this request
7 to the extent that individuals have come forward publicly regarding threats, harassment, and
8 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
9 were directed at NOM California and NOM California PAC or employees of NOM California
10 and NOM California PAC.

11 To the extent that such documents are privileged under an applicable privilege, such
12 documents will be logged in a privilege log which will be provided to opposing counsel.

13 To the extent this response may need revision, P NOM California and NOM California PAC
14 reserve the right to amend this response and will provide any such a revised response to
15 Defendants in a timely manner.

16 **Request No. 5:** All documents relating to Plaintiffs' efforts to collect information regarding
17 harassment or harms suffered by any persons as a result of those persons' support of
18 Organization Plaintiffs or Proposition 8. This includes but is not limited to letters, emails or
19 internet postings produced or sent by Plaintiffs seeking information or names of individuals who
20 suffered harassment or harm.

21 **Response:** Subject to the objections above and without waiving further objection, NOM
22 California and NOM California PAC responds as follows:

23 Plaintiff has produced or is in the process of producing documents responsive to this request
24 to the extent that individuals have come forward publicly regarding threats, harassment, and
25 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
26 were directed at NOM California and NOM California PAC or employees of NOM California
27 and NOM California PAC.

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1 To the extent that such documents are privileged under an applicable privilege, such
2 documents will be logged in a privilege log which will be provided to opposing counsel.

3 To the extent this response may need revision, P NOM California and NOM California PAC
4 reserve the right to amend this response and will provide any such a revised response to
5 Defendants in a timely manner.

6 **Request No. 6:** All documents relating to any allegations of harassment experienced by any
7 persons as a result of those persons' opposition to Proposition 8, including all communications
8 between Plaintiffs and any person regarding the alleged harassment suffered by those persons.

9 **Response:** Subject to the objections above and without waiving further objection, NOM
10 California and NOM California PAC responds as follows:

11 Plaintiff has produced or is in the process of producing documents responsive to this request
12 to the extent that individuals have come forward publicly regarding threats, harassment, and
13 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
14 were directed at NOM California and NOM California PAC or employees of NOM California
15 and NOM California PAC.

16 To the extent that such documents are privileged under an applicable privilege, such
17 documents will be logged in a privilege log which will be provided to opposing counsel.

18 To the extent this response may need revision, P NOM California and NOM California PAC
19 reserve the right to amend this response and will provide any such a revised response to
20 Defendants in a timely manner.

21 **Request No. 8:** All communications Plaintiffs received from persons stating they were
22 concerned about making a contribution to Plaintiffs because of threats and harassment directed at
23 them or others.

24 **Response:** Subject to the objections above and without waiving further objection, NOM
25 California and NOM California PAC responds as follows:

26 Plaintiff has produced or is in the process of producing documents responsive to this request
27 to the extent that individuals have come forward publicly regarding threats, harassment, and
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1 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
2 were directed at NOM California and NOM California PAC or employees of NOM California
3 and NOM California PAC.

4 To the extent that such documents are privileged under an applicable privilege, such
5 documents will be logged in a privilege log which will be provided to opposing counsel.

6 To the extent this response may need revision, P NOM California and NOM California PAC
7 reserve the right to amend this response and will provide any such a revised response to
8 Defendants in a timely manner.

9 **Request No. 9:** All documents relating to Plaintiffs' efforts to respond to concerns expressed by
10 contributors or potential contributors to Organization Plaintiffs about disclosure and reporting of
11 contributions, including internal communications, communications with contributors, and
12 communications with other persons.

13 **Response:** Subject to the objections above and without waiving further objection, NOM
14 California and NOM California PAC responds as follows:

15 Plaintiff has produced or is in the process of producing documents responsive to this request
16 to the extent that individuals have come forward publicly regarding threats, harassment, and
17 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
18 were directed at NOM California and NOM California PAC or employees of NOM California
19 and NOM California PAC.

20 To the extent that such documents are privileged under an applicable privilege, such
21 documents will be logged in a privilege log which will be provided to opposing counsel.

22 To the extent this response may need revision, P NOM California and NOM California PAC
23 reserve the right to amend this response and will provide any such a revised response to
24 Defendants in a timely manner.

25 **Request No. 10:** All documents relating to Organization Plaintiffs' communications with
26 contributors and potential contributors concerning whether or how information about those
27 contributors would be publicly disclosed or reported in public filings.

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1 **Response:** Subject to the objections above and without waiving further objection, NOM
2 California and NOM California PAC responds as follows:

3 Plaintiff has produced or is in the process of producing documents responsive to this request
4 to the extent that individuals have come forward publicly regarding threats, harassment, and
5 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
6 were directed at NOM California and NOM California PAC or employees of NOM California
7 and NOM California PAC.

8 To the extent that such documents are privileged under an applicable privilege, such
9 documents will be logged in a privilege log which will be provided to opposing counsel.

10 To the extent this response may need revision, P NOM California and NOM California PAC
11 reserve the right to amend this response and will provide any such a revised response to
12 Defendants in a timely manner.

13 **Request No. 11:** All documents relating to Plaintiffs' collection, handling, sharing and
14 distribution of information regarding contributors and potential contributors to Organization
15 Plaintiffs or other persons supporting Proposition 8.

16 **Response:** Subject to the objections above and without waiving further objection, NOM
17 California and NOM California PAC respond as follows:

18 Plaintiff has produced or is in the process of producing documents responsive to this request.
19 To the extent that such documents are privileged under an applicable privilege, such documents
20 will be logged in a privilege log which will be provided to opposing counsel.

21 To the extent this response may need revision, NOM California and NOM California PAC
22 reserve the right to amend this response and will provide any such a revised response to
23 Defendants in a timely manner.

24 **Request No. 12:** All documents produced or disseminated in any form by Plaintiffs indicating
25 that a majority of residents, citizens, voters or persons in California or the United States agree
26 with Plaintiffs' public positions regarding the legal definition of marriage.

27 **Response:** Subject to the objections above and without waiving further objection, NOM
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1 California and NOM California PAC respond as follows:

2 Plaintiff has produced or is in the process of producing documents responsive to this request.
3 To the extent that such documents are privileged under an applicable privilege, such documents
4 will be logged in a privilege log which will be provided to opposing counsel.

5 To the extent this response may need revision, NOM California and NOM California PAC
6 reserve the right to amend this response and will provide any such a revised response to
7 Defendants in a timely manner.

8 **Request No. 13:** All documents relating to Organization Plaintiffs' attempts after November 4,
9 2008 to raise funds to pay or otherwise retire any debt incurred or accrued by Organization
10 Plaintiffs prior to November 5, 2008.

11 **Response:** Subject to the objections above and without waiving further objection, NOM
12 California and NOM California PAC respond as follows:

13 Plaintiff has produced or is in the process of producing documents responsive to this request.
14 To the extent that such documents are privileged under an applicable privilege, such documents
15 will be logged in a privilege log which will be provided to opposing counsel.

16 To the extent this response may need revision, NOM California and NOM California PAC
17 reserve the right to amend this response and will provide any such a revised response to
18 Defendants in a timely manner.

19 **Request No. 14:** All documents relating to any discussion, consideration or suggestion that
20 Organization Plaintiffs would cease or limit their operations or their support for Proposition 8 at
21 any time because Organization Plaintiffs lacked or anticipated lacking sufficient funds.

22 **Response:** Subject to the objections above and without waiving further objection, NOM
23 California and NOM California PAC respond as follows:

24 Plaintiff has produced or is in the process of producing documents responsive to this request.
25 To the extent that such documents are privileged under an applicable privilege, such documents
26 will be logged in a privilege log which will be provided to opposing counsel.

27 To the extent this response may need revision, NOM California and NOM California PAC
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1 reserve the right to amend this response and will provide any such a revised response to
2 Defendants in a timely manner.

3 **Request No. 15:** All documents relating to Organization Plaintiffs' assets, liabilities, and cash
4 flow, including internal communications and reports, communications with contributors and
5 communications with other persons.

6 **Response:** Subject to the objections above and without waiving further objection, NOM
7 California and NOM California PAC respond as follows:

8 Plaintiff has produced or is in the process of producing documents responsive to this request.
9 To the extent that such documents are privileged under an applicable privilege, such documents
10 will be logged in a privilege log which will be provided to opposing counsel.

11 To the extent this response may need revision, NOM California and NOM California PAC
12 reserve the right to amend this response and will provide any such a revised response to
13 Defendants in a timely manner.

14 **Request No. 16:** All documents that tend to support or refute the claims or assertions made in
15 your Third Amended Complaint in this litigation (Doc # 106).

16 **Response:** Subject to the objections above and without waiving further objection, NOM
17 California and NOM California PAC responds as follows:

18 Plaintiff has produced or is in the process of producing documents responsive to this request
19 to the extent that individuals have come forward publicly regarding threats, harassment, and
20 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
21 were directed at NOM California and NOM California PAC or employees of NOM California
22 and NOM California PAC.

23 To the extent that such documents are privileged under an applicable privilege, such
24 documents will be logged in a privilege log which will be provided to opposing counsel.

25 To the extent this response may need revision, P NOM California and NOM California PAC
26 reserve the right to amend this response and will provide any such a revised response to
27 Defendants in a timely manner.

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1 **Request No. 17:** All documents that tend to support or refute the arguments made in your
2 Memorandum in Support of Motion for Summary Judgment (Doc # 111).

3 **Response:** Subject to the objections above and without waiving further objection, NOM
4 California and NOM California PAC responds as follows:

5 Plaintiff has produced or is in the process of producing documents responsive to this request
6 to the extent that individuals have come forward publicly regarding threats, harassment, and
7 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
8 were directed at NOM California and NOM California PAC or employees of NOM California
9 and NOM California PAC.

10 To the extent that such documents are privileged under an applicable privilege, such
11 documents will be logged in a privilege log which will be provided to opposing counsel.

12 To the extent this response may need revision, P NOM California and NOM California PAC
13 reserve the right to amend this response and will provide any such a revised response to
14 Defendants in a timely manner.

15 **Request No. 18:** All documents that relate to any one of Plaintiffs' responses to the Attorney
16 General's interrogatories Nos. 1-23, propounded on October 30, 2009.

17 **Response:** Subject to the objections above and without waiving further objection, NOM
18 California and NOM California PAC responds as follows:

19 Plaintiff has produced or is in the process of producing documents responsive to this request
20 to the extent that individuals have come forward publicly regarding threats, harassment, and
21 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
22 were directed at NOM California and NOM California PAC or employees of NOM California
23 and NOM California PAC.

24 To the extent that such documents are privileged under an applicable privilege, such
25 documents will be logged in a privilege log which will be provided to opposing counsel.

26 To the extent this response may need revision, P NOM California and NOM California PAC
27 reserve the right to amend this response and will provide any such a revised response to
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NOM California PAC to A.G.'s
First Demand for Production,
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1 Defendants in a timely manner.

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3 Dated this 1st day of March, 2010.

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Respectfully submitted,

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s/ Sarah E. Troupis

6 Benjamin W. Bull (Ariz. State Bar No. 009940)
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