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UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF CALIFORNIA

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10 PROTECTMARRIAGE.COM -  
11 YES ON 8, a PROJECT OF  
12 CALIFORNIA RENEWAL,

NO. CIV. S-10-132 LKK/DAD

12

Plaintiff,

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v.

O R D E R

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15 COURAGE CAMPAIGN, COURAGE  
16 CAMPAIGN INSTITUTE,

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Defendants.

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18 This is a trademark dispute. Plaintiff seeks a temporary  
19 restraining order enjoining defendant from using the allegedly  
20 infringing mark. For the reasons stated below, the court concludes  
21 that plaintiff is unlikely to overcome the conclusion that  
22 defendant's use of the mark is protected under the First Amendment,  
23 in that the use is relevant to an expressive parody and the use is  
24 not explicitly misleading. Plaintiff's motion is therefore denied.

24

**I. BACKGROUND**

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26 In 2008, the California Electorate passed Proposition 8, which  
amended the state constitution to provide that "Only marriage

1 between a man and a woman is valid or recognized in California.”  
2 California Constitution Art. I, § 7.5. Plaintiff California  
3 Renewal is a nonprofit corporation which operates  
4 “ProtectMarriage.com - Yes on 8.” Plaintiff helped place  
5 Proposition 8 on the ballot, campaigned for Proposition 8’s  
6 passage, and has since informed the public about challenges to  
7 Proposition 8 and raised funds to defend against such challenges.  
8 Perhaps most recently, plaintiff has intervened as a defendant in  
9 a federal constitutional challenge to Proposition 8 currently being  
10 tried in the Northern District of California, Perry v.  
11 Schwarzenegger, 09-cv-02292.

12 In all of the above activities, plaintiff has used a logo it  
13 refers to as the “ProtectMarriage Trademark.” This logo depicts  
14 four stylized silhouettes: two larger figures, one in pants and one  
15 in a dress, standing on either side of two smaller figures, also  
16 one in pants and one in a dress. Thus, the logo represents a  
17 heterosexual family. All four figures have their arms raised.  
18 This graphic is often, but not always, presented in blue, under an  
19 arcing banner reading “Yes on 8 Protect Marriage.” In this banner,  
20 the 8 is centered and in larger type. Plaintiff submits the  
21 following rendition:

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23 ////  
24 ////  
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10 Defendant is a nonprofit organization that supports a right  
11 to homosexual marriage. Thus, plaintiff and defendant have  
12 opposing views on Proposition 8. When trial in Perry v.  
13 Schwarzenegger began on January 11, 2010, defendant began operating  
14 a website dedicated to providing coverage of the trial,  
15 prop8trialtracker.com. Prop8trialtracker.com uses a logo  
16 admittedly derived from the "ProtectMarriage" logo. The  
17 prop8trialtracker logo also features four stylized silhouettes.  
18 While plaintiff's logo depicts the "parent" figures in pants and  
19 a dress, both "parent" figures in defendant's logo wear dresses,



20 suggesting same-sex parents. The text in  
21 the banner in defendant's logo has been  
22 replaced to read "Prop 8 Trial Tracker."  
23 On January 19, 2010 (the day the TRO was  
24 filed), the image appeared on the website  
25 as the image to the left.  
26

1 Defendant has filed an opposition to plaintiff's motion. The  
2 court concludes that no hearing on the matter is necessary, and  
3 resolves the motion on the papers.<sup>1</sup>

## 4 II. STANDARD

5 Fed. R. Civ. P. 65 provides authority to issue either  
6 preliminary injunctions or temporary restraining orders.  
7 Ordinarily, a plaintiff seeking a preliminary injunction must  
8 demonstrate that it is "[1] likely to succeed on the merits, [2]  
9 that he is likely to suffer irreparable harm in the absence of  
10 preliminary relief, [3] that the balance of equities tips in his  
11 favor, and [4] that an injunction is in the public interest." Am.  
12 Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th  
13 Cir. 2009) (quoting Winter v. Natural Res. Def. Council, 129 S. Ct.  
14 365, 374 (2008)). The requirements for a temporary restraining  
15 order are largely the same. Stuhlberg Int'l Sales Co. v. John D.  
16 Brush & Co., 240 F.3d 832, 839 (9th Cir. 2001); see also Wright and  
17 Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (2d ed.).

18 In the trademark context, however, the likelihood of success  
19 on the merits largely determines the remaining factors. The Ninth  
20 Circuit has held that in trademark cases, "irreparable injury may  
21 be presumed from a showing of likelihood of success on the merits."  
22 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d  
23 873, 877 (9th Cir. 2009) (quotations omitted). This presumption  
24 in turn influences the balancing of hardships. Id. Finally,

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26 <sup>1</sup> Because the court denies the request for a TRO, the court  
does not address whether venue is proper in this district.

1 "avoiding confusion to consumers," the goal of trademark  
2 protection, is itself a public interest that is often demonstrated  
3 by likelihood of success. Internet Specialties West, Inc. v.  
4 Milon-Digiorgio Enters., 559 F.3d 985, 993 (9th Cir. 2009). Both  
5 Marlyn Nutraceuticals and Internet Specialties West were decided  
6 subsequent to Winter, and cited Winter in their analysis.  
7 Accordingly, the court's analysis is limited to the first Winter  
8 factor.

### 9 III. ANALYSIS

10 Plaintiff's complaint alleges claims under section 43(a) of  
11 the Lanham Act, 15 U.S.C. § 1125(a), and under California unfair  
12 competition and common law trademark infringement. Plaintiff's  
13 motion for a temporary restraining order refers only the to Lanham  
14 Act trademark claim.

15 "Trademark law aims to protect trademark owners from a false  
16 perception that they are associated with or endorse a product."  
17 Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 806 (9th Cir.  
18 2003). The traditional elements of a claim for trademark  
19 infringement are ownership of a protectable mark and likelihood of  
20 confusion arising from defendant's use of the mark.<sup>2</sup> Applied Info.  
21 Scis. Corp. v. eBay, Inc., 511 F.3d 966, 969 (9th Cir. 2007). In  
22 this case, the mark is protectable in that it is suggestive and  
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24 <sup>2</sup> Plaintiff's claim is "traditional" in this regard, in that  
25 the alleged harm is likelihood of confusion. Trademark law also  
26 protects against other types of harm, such as dilution even when  
there is no likelihood of confusion. Plaintiff has not alleged  
such harm in the instant motion.

1 thus inherently distinctive. Id. at 970. While the mark is  
2 unregistered, registration is not a prerequisite to suit. Two  
3 Pesos v. Taco Cabana, 505 U.S. 763, 768 (1992). Plaintiff's prior  
4 public use of the mark indicates plaintiff's ownership thereof.  
5 Sengoku Works v. RMC Int'l, 96 F.3d 1217, 1219 (9th Cir. 1996).

6 The second element of a claim for infringement is the  
7 likelihood of confusion as to the source, sponsorship, or approval  
8 of the allegedly infringing product. Dr. Seuss Enters., L.P. v.  
9 Penguin Books USA, Inc., 109 F.3d 1394, 1405 (9th Cir. 1997). One  
10 way to negate the element of confusion is to show that the  
11 allegedly infringing mark is a parody of the original mark, and  
12 that this parody is unlikely to show confusion.<sup>3</sup> Id. The Ninth  
13 Circuit has explained that for this reason, parody is not  
14 technically a defense to a trademark infringement claim. Id., see  
15 also Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc., 776  
16 F. Supp. 1454, 1462 (W.D. Wash. 1991); but see E.S.S. Entm't 2000,  
17 Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1099 (9th Cir. 2008)  
18 (implicitly treating parody as a defense).

19 The Ninth Circuit cases on the issue concern "artistic"  
20 parodies of trademarks. Rock Star Videos, 547 F.3d at 1099,  
21 Walking Mt. Prods., 353 F.3d at 807, Mattel, Inc. v. MCA Records,  
22 296 F.3d 894, 900 (9th Cir. 2002). Under a test borrowed from the  
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24 <sup>3</sup> In this regard, the Lanham Act is unlike the Copyright Act.  
25 The Copyright Act includes a specific statutory provision defining  
26 "fair use" as non-infringing, 17 U.S.C. § 107, and this statutory  
provision protects parody. Campbell v. Acuff-Rose Music, 510 U.S.  
569 (1994).

1 Second Circuit, an artistic work's use of a mark does not violate  
2 the Lanham Act unless the use "has no artistic relevance to the  
3 underlying work whatsoever" or the use "explicitly misleads as to  
4 the source or the content of the work." Walking Mt. Prods., 353  
5 F.3d at 807 (quoting Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir.  
6 1989)). The Ninth Circuit has taken "no relevance" literally.  
7 Rock Star Videos, 547 F.3d at 1100. Thus, a video game's use of  
8 a strip club's trademark logo was entitled to First Amendment  
9 protection even though the video game was not primarily "about" the  
10 club, and was instead "about," at most, the club's neighborhood.  
11 Id.

12 In this case, the logo itself is artistic. Moreover, the  
13 broader website, while perhaps not artistic, is undeniably  
14 expressive of a political idea, and both political and artistic  
15 expression are protected by the First Amendment. Rock Star Videos,  
16 547 F.3d at 1099 (parody defense rooted in the First Amendment).  
17 Defendant's use of the mark has relevance to the expressive  
18 message, namely, support for homosexual marriages, and  
19 specifically, opposition to recent California efforts to limit the  
20 right to such marriages. This support is expressed by the  
21 modification of the "father" figure in the original mark to depict  
22 a second "mother." Further, the mark does not explicitly mislead  
23 as to the source of the work. Any potential for confusion or  
24 misdirection is obviated by the images and text that uniformly  
25 accompany defendant's use of the mark, namely, photos of homosexual  
26 couples together with text explicitly endorsing homosexual

1 marriage. C.f. Rogers, 875 F.2d at 999-1000 (discussing  
2 circumstances that might constitute explicit misdirection).  
3 Plaintiff is unlikely to succeed in showing that a visitor to the  
4 prop8trialtracker website is likely to be confused as to whether  
5 plaintiff is affiliated with the site. Rock Star Videos, 547 F.3d  
6 at 1100.

7 The court further notes that the four parody cases relied upon  
8 by plaintiff all concerned cases in which a protected mark was used  
9 to sell a product. Hard Rock Cafe Licensing Corp. v. Pacific  
10 Graphics, Inc., 776 F. Supp. 1454 (W.D. Wash. 1991) ("Hard Rain  
11 Cafe" t-shirts), Nabisco Brands, Inc. v. Kaye, 760 F. Supp. 25 (D.  
12 Conn. 1991) ("A.2" steak sauce), Mutual of Omaha Ins. Co. v.  
13 Novak, 648 F. Supp. 905, 907 (D. Neb. 1986) ("mutant of Omaha"  
14 shirts and other items), Gucci Shops, Inc. v. R. H. Macy & Co., 446  
15 F. Supp. 838 (S.D.N.Y. 1977) ("Gucchi Goo" diaper bags). Plaintiff  
16 provides no indication of similar economic activity here.

17 When use of a trademark is a protected parody under the Rogers  
18 rule, further analysis of the trademark infringement is  
19 unnecessary. Rock Star Videos, 547 F.3d at 1098, 1101.  
20 Alternatively, even if Rogers does not apply to this case, it  
21 appears that the text and images that uniformly accompany  
22 defendant's use of the mark are sufficient to dispel any possible  
23 consumer confusion. For these reasons, plaintiff is unlikely to  
24 succeed on the merits of its trademark infringement claim.

#### 25 **IV. CONCLUSION**

26 For the reasons stated above, plaintiff's motion for a



1 temporary restraining order is DENIED.


2 IT IS SO ORDERED.

3 DATED: January 20, 2010.

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LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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