

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE JUDGE

KRISTIN M. PERRY, ET AL.,)

PLAINTIFFS,)

VS.)

NO. C 09-2292 VRW (JCS)

ARNOLD SCHWARZENEGGER,)

ET AL.,)

DEFENDANTS.)

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, JANUARY 20, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES :

FOR PLAINTIFF: GIBSON DUNN & CRUTCHER LLP
1050 CONNECTICUT AVE., NW
WASHINGTON, DC 20036
BY: **MATTHEW DEMPSEY MC GILL**
ATTORNEY AT LAW

FOR DEFENDANT: LAW OFFICES OF
ANDREW P. PUGNO
101 PARKSHORE DR. #100
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BY: **ANDREW PERRY PUGNO**
ATTORNEY AT LAW

REPORTED BY: JAMES YEOMANS, CSR 4039, RPR
OFFICIAL REPORTER

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

1 WEDNESDAY, JANUARY 20, 2010

9:00 A.M.

2 (THE FOLLOWING PROCEEDINGS WERE HEARD IN OPEN COURT:)

3 **THE CLERK:** CALLING CASE NUMBER C 09-2292, PERRY
4 VERSUS ARNOLD SCHWARZENEGGER.

5 COUNSEL.

6 **MR. PUGNO:** ANDREW PUGNO THE GENERAL COUNSEL FOR THE
7 DEFENDANT INTERVENORS.

8 **MR. MC GILL:** GOOD MORNING, YOUR HONOR.

9 MATTHEW MC GILL GIBSON DUNN & CRUTCHER FOR THE
10 PLAINTIFFS.

11 **THE COURT:** GOOD MORNING.

12 SO I'VE SKIMMED THE PAPERS THAT I WAS ALERTED TO 20
13 MINUTES AGO. REGARDING THE -- I GUESS, IT IS THE INTERVENOR'S
14 REQUEST, THAT THE COURT MODIFY WHAT THE COURT LISTED IN A
15 JANUARY 8TH 2010 ORDER.

16 IN A SECOND I'M GOING TO ASK ONE OF YOU IF YOU HAVE A
17 COPY OF THE LAST NINTH CIRCUIT FINNEY OPINION, I DIDN'T HAVE
18 TIME TO GET IT.

19 BUT MY FIRST QUESTION FOR YOU, MR. PUGNO, WHY SHOULD
20 I -- THIS IS A MOTION TO RECONSIDER, NOT A MOTION TO CORRECT.

21 IT'S A CLEVER USE OF THE PHRASE CORRECT, BUT IT IS A
22 MOTION TO RECONSIDER. A MOTION TO RECONSIDER TYPICALLY WOULD
23 REQUIRE THAT YOU HAVE A SUBSTANTIAL SHOWING ON HOW THE
24 SITUATION HAS CHANGED.

25 **MR. PUGNO:** CERTAINLY.

1 **THE COURT:** IT CERTAINLY STRIKES ME THAT YOU HAVE AN
2 UPHILL BATTLE ON THAT, YOU KNOW, WITH RESPECT TO -- CERTAINLY
3 YOU WANT TO ADD FOUR PEOPLE TO THE GROUP, ONE OF WHICH IS MCSI
4 AND I FORGOT THE NAME OF THE GENTLEMAN INVOLVED.

5 **MR. PUGNO:** MR. CRISWELL.

6 **THE COURT:** MR. CRISWELL, THAT WAS VENTILATED MANY
7 TIMES.

8 AS TO THE OTHERS, THESE ARE INDIVIDUALS THAT, AT
9 LEAST, TWO OF THEM, WELL-KNOWN IN THE CAMPAIGN FOR VARIETY OF
10 REASONS.

11 I DON'T KNOW WHO MR. DOE IS, SO I CAN'T TELL YOU
12 WHETHER HE'S WELL-KNOWN IN THE CAMPAIGN FOR VARIETY OF REASONS.

13 ORDINARILY ONE WOULD SAY YOU'VE HAD SEVERAL BITES AT
14 THIS APPLE, AND YOU WAITED UNTIL TWO THIRDS OF THE TRIAL WAS
15 DONE AND NOW YOU WANT TO STOP FROM GETTING THESE DOCUMENTS, AT
16 LEAST, UNTIL THEIR CASE IN CHIEF IS ALMOST DONE. WHY SHOULDN'T
17 I DENY IT ON THAT BASIS?

18 **MR. PUGNO:** THANK YOU, YOUR HONOR. I APOLOGIZE WE
19 HAVE TO COME BACK WITH THIS, WE DO.

20 **THE COURT:** NO NEED TO APOLOGIZE, THIS IS LITIGATION
21 AND YOU DO WHAT YOU NEED TO DO.

22 **MR. PUGNO:** LET ME ADDRESS EACH OF THOSE ISSUES.
23 FIRST OF ALL, JUST TO -- REMINDER THAT THE NINTH CIRCUIT
24 AMENDED OPINION CAME OUT ON A MONDAY THE 4TH, IT WAS TWO DAYS
25 LATER THAT MY CO-COUNSEL CAME BEFORE YOU IN THE INITIAL HEARING

1 ON THE 6TH. WE WERE ESSENTIALLY GIVEN OVERNIGHT TO COME UP
2 WITH A NEW LIST THAT IS DIFFERENT THAN ANY PREVIOUS CORE LIST.

3 CORE LIST IN THE PAST HAD BEEN WITH REGARD TO OTHER
4 DISCOVERY MATTERS, WITH REGARD TO MANAGEMENT RESPONSIBILITY AND
5 DECISION MAKING RESPONSIBILITY. THE NEW CORE AS DEFINED BY
6 THAT -- IN THE AMENDED OPINION, WAS A DIFFERENT KIND OF CORE, A
7 CORE OF PEOPLE INVOLVED, ENGAGED IN FORMULATION OF STRATEGY.
8 SO WE WERE GIVEN --

9 **THE COURT:** WHAT WAS THE LANGUAGE EXACTLY THE
10 CIRCUIT'S OPINION?

11 **MR. PUGNO:** IT WAS IN YOUR HONOR'S -- ACTUALLY QUOTED
12 IN YOUR HONOR'S DECISION OF THE 8TH AT PAGE TWO, AND IT'S THAT
13 THE PROPONENTS FIRST AMENDMENT PRIVILEGE PROTECTS QUOTE
14 "PRIVATE INTERNAL CAMPAIGN COMMUNICATIONS CONCERNING
15 FORMULATION OF MESSAGE -- EXCUSE ME, OF STRATEGY AND MESSAGES."

16 AND FURTHER, THAT THE PRIVILEGE PROTECTS QUOTE
17 "COMMUNICATIONS AMONG THE CORE GROUP OF PERSONS ENGAGED IN THE
18 FORMULATION OF CAMPAIGN STRATEGY AND MESSAGES." AND THAT IS AT
19 PAGE -- WELL, THE SLIP OPINION AT PAGE 36 12 OF THAT DECISION.

20 **THE COURT:** THE CORE GROUP OF PERSONS ENGAGED IN THE
21 FORMULATION OF STRATEGY AND MESSAGE?

22 **MR. PUGNO:** THAT'S RIGHT. THAT IS A DIFFERENT CONCEPT
23 THAN COUPLE OF MONTHS EARLIER WHEN WE WERE ACTUALLY DEALING
24 WITH WHO HAD MANAGEMENT AND DECISION MAKE RESPONSIBILITIES FOR
25 THE OPERATION OF THE CAMPAIGN.

1 THEY'RE JUST DIFFERENT CONCEPTS, THIS WAS -- THIS CORE
2 GROUP WITH REGARD TO THE FORMULATION OF STRATEGY AND MESSAGING
3 IS A -- WAS A NEW CONCEPT THAT WAS AMENDED AND RESTATED THAT
4 MONDAY IN FOOTNOTE 12.

5 WE WERE HERE TWO DAYS LATER OVERNIGHT, WE DID THE VERY
6 BEST WE COULD HAVE PREDICT UNDER THIS NEW STANDARD WHO WOULD BE
7 IN THAT CORE GROUP.

8 **THE COURT:** THAT ACTUALLY IS NOT MY PROBLEM. YOU HAD
9 THREE DAYS FROM THE COURT'S OPINION TO GENERATE THAT. YOU DID
10 NOT TAKE THE SLIGHTEST STEP FOR TWO DAYS TO TRY TO IDENTIFY THE
11 CORE GROUP. THEN YOU HAD -- THIS COURT GAVE YOU ANOTHER DAY.

12 **MR. PUGNO:** OKAY.

13 **THE COURT:** SO I DON'T WANT TO --

14 **MR. PUGNO:** THAT'S FINE.

15 **THE COURT:** NOT THAT THAT'S IMPORTANT. THIS IS NOT A
16 SUBJECT THAT IS FOREIGN TO YOU.

17 **MR. PUGNO:** LET ME --

18 **THE COURT:** DEAL WITH THE PARTICULAR, I HAVE ABOUT 30
19 PEOPLE COMING IN.

20 **MR. PUGNO:** WHAT WE DID NOT KNOW AND WHAT HAS CHANGED
21 SINCE THEN, IS THAT WE HAVE AMAZINGLY MOVED HEAVEN AND EARTH TO
22 REVIEW TENS OF THOUSANDS OF DOCUMENTS, THAT INVOLVED HIRING
23 ALMOST TWO DOZEN LAWYERS TO WORK 12 HOURS A DAY FOR SEVEN OR
24 EIGHT DAYS.

25 IT HAS BEEN AN ENORMOUS UNDERTAKING AND IN THAT REVIEW

1 PROCESS HUNDREDS AND HUNDREDS AND HUNDREDS OF HOURS OF REVIEW
2 WE DISCOVERED THREE. I'LL ADDRESS THE FIRST THREE.

3 **THE COURT:** ADDRESS MR. CRISWELL FIRST, HE SEEMS THE
4 MOST OBVIOUS.

5 **MR. PUGNO:** CERTAINLY. WITH RESPECT TO MR. CRISWELL,
6 WE'VE DISCOVERED THAT HE PERSONALLY WAS INCLUDED IN THE VAST
7 MAJORITY OF COMMUNICATIONS, THROUGH ALL THE STEPS OF THE MOST
8 SENSITIVE INTERNAL DECISION MAKING WITH REGARD TO FORMULATION
9 OF STRATEGY AND MESSAGES.

10 PARTICULARLY COMING UP THE CIRCULATION OF INITIAL
11 CONCEPTS, THE PREPARATION OF TEST ADS TO SHOW TO FOCUS GROUPS.
12 HE ATTENDED THE FOCUS GROUP WHERE THEY WERE TESTED WITH VOTERS.

13 HE PARTICIPATED IN THE POST FOCUS GROUP ANALYSIS AND
14 DISCUSSION. HE WAS GIVEN DRAFT SCRIPTS OF VIRTUALLY ALL THE
15 ADVERTISEMENTS.

16 AND AS YOU CAN SEE FROM THE IN CAMERA INSPECTION, AND
17 I'M HOPING THAT THE COURT HAS THE EXHIBIT A, MR. CRISWELL IS AN
18 ADDRESSEE ON THESE E-MAILS.

19 **THE COURT:** THAT'S NOT THE TEST. COPYING ON AN E-MAIL
20 OR EVEN ADDRESSEE IN THE E-MAIL, HAS TO BE A CORE GROUP. CORE
21 IS ONE OF THE ADJECTIVES ABOUT THE GROUP, OTHERS IS ENGAGED IN
22 THE FORMULATION OF STRATEGY AND MESSAGING. AND MY POINT IS
23 THIS:

24 MR. CRISWELL IS NOT UNKNOWN COMMODITY. YOU HAVE
25 PEOPLE INVOLVED IN THE CAMPAIGN WHO ARE ENGAGED IN WITH COUNSEL

1 IN PREPARING THIS TRIAL FOR THE LAST 90 DAYS. HOW IS IT THAT
2 NOBODY ACTUALLY KNEW IN THE TWO PREVIOUS DECLARATIONS ABOUT
3 MR. CRISWELL'S ROLE IN THE CAMPAIGN?

4 **MR. PUGNO:** WE ACTUALLY DID, THAT IS WHY WE SUBMITTED
5 HIS COMPANY MARKETING.

6 **THE COURT:** I UNDERSTAND THAT, YOU DIDN'T JUSTIFY IT.
7 IT'S THE CHANGE THAT MATTERS. I ALREADY RULED ON THE BASIS,
8 IT'S THE CHANGE THAT MATTERS.

9 NOW, YOU'RE TRYING TO SAY I GOT NEW INFORMATION, YOUR
10 HONOR, THAT I COULDN'T REASONABLY HAVE HAD BEFORE.

11 **MR. PUGNO:** WHAT THE DIFFERENCE, IS THAT AT THE TIME
12 OF THE HEARING THE PLAINTIFFS BROUGHT IN A DECLARATION FROM A
13 MR. CRISWELL, WHERE IN HIS DECLARATION SPEAKING FOR THE
14 COMPANY, HE SAID THAT THE COMPANY, AND HIS DECLARATION HE NEVER
15 SAID I DID NOT PARTICIPATE, HE SAID MCSI.

16 **THE COURT:** IS THERE EVIDENCE HE WAS DOING ANYTHING
17 OTHER THAN, AS FAR AS WITH MCSI?

18 **MR. PUGNO:** I DON'T KNOW, YOUR HONOR.

19 **THE COURT:** THAT MEANS THERE IS NO EVIDENCE. IF YOU
20 CAN'T SHOW IT, THEN THERE'S NO EVIDENCE OF IT.

21 **MR. PUGNO:** BUT THE -- YOUR HONOR HAD SAID WE COULD
22 PUT FORTH ENTITIES AND THEIR EMPLOYEES AND THEIR ASSISTANTS.

23 SO WE'RE NOT COMING BACK ASKING MCSI EMPLOYEES AND
24 ASSISTANTS BE INCLUDED, WHAT WE ARE SAYING, IS THAT IN CONTRAST
25 TO THE EVIDENCE THAT THE PLAINTIFFS BROUGHT AT THAT HEARING,

1 UPON UNDERTAKING THIS REVIEW OF TENS OF THOUSANDS OF DOCUMENTS,
2 WE DISCOVERED MANY DOCUMENTS WHERE THERE ARE -- AND WE'VE
3 SUBMITTED COPIES IN CAMERA, WHERE THAT CONTAINED THE MOST
4 PRIVATE AND THE MOST INTERNAL AND THE MOST SENSITIVE DOCUMENTS
5 WITH REGARD TO HOW WE DECIDED WHAT TO SAY AND WHEN TO SAY IT.

6 THERE'S JUST ABSOLUTELY NO -- THE EXAMPLES INCLUDE
7 DRAFT SCRIPTS AND ENTIRE ANALYSIS OF EVERY ARGUMENT THAT WE
8 CONSIDERED, HOW IT TESTED IN THE FOCUS GROUPS, HOW IT COULD BE
9 CHANGED.

10 **THE COURT:** YOUR JUST WETTING HIS APPETITE.

11 **MR. PUGNO:** I'M SORRY, I PROBABLY SAID TOO MUCH, BUT
12 HERE'S THE WHOLE POINT.

13 **THE COURT:** YOU THINK THAT ANYBODY COPIED ON THAT MUST
14 BE PART OF THE CORE GROUP?

15 **MR. PUGNO:** WE'RE SAYING IT'S EVIDENCE.

16 **THE COURT:** HE CLAIMS THAT HE WAS NOT INVOLVED IN THE
17 FORMULATION OF MESSAGING MESSAGES, YOU'RE SAYING LOOK AT ALL
18 THIS EVIDENCE THAT HE WAS.

19 **MR. PUGNO:** HE'S NOT A PARTY AND WE'RE NOT ABLE TO
20 SPEAK FOR HIM, BUT WHAT WE ARE ABLE TO SAY, THE PRENTICE
21 DECLARATION SHOWS HE ATTENDED THESE FOCUS GROUPS AND HE WAS
22 ENGAGED IN THE BACK AND FORTH COMMUNICATION AMONG CORE GROUP OF
23 PEOPLE OVER WHAT --

24 **THE COURT:** ENGAGED BY THAT DO YOU MEAN, DID HE SAY
25 THINGS THAT ARE INCLUDED IN THESE?

1 SO HE FORMULATED THE STRATEGY, IT SEEMS UNLIKELY, IN
2 LIGHT OF HIS DECLARATION, THAT DID NOT HAPPEN.

3 **MR. PUGNO:** WELL, LET'S -- I THINK THERE ARE. IN
4 FACT, WE DO HAVE COMMUNICATIONS FROM MR. CRISWELL IN RESPONSE
5 TO THESE, BUT LET ME JUST LOOK AT A HIGHER LEVEL, ACTUALLY,
6 BROADER PICTURE.

7 AND THAT IS, THAT IF MR. CRISWELL'S INVOLVEMENT MAKES
8 THESE DOCUMENTS NOT PROTECTED, THEN THE FIRST AMENDMENT
9 PRIVILEGE ESSENTIALLY HAS BEEN COMPLETELY ABROGATED. BECAUSE
10 THERE IS NO MORE CORE INTERNAL DISCUSSION IN THIS CAMPAIGN THEN
11 THESE.

12 AND IF HE WAS PRESENT AND PARTICIPATED AND WAS GIVEN A
13 FRONT ROW SEAT AND WAS INCLUDED IN THE DISTRIBUTION LIST OF
14 DRAFTS FOR COMMENTS AND DISCUSSION, IF HE'S NOT INCLUDED IN
15 THAT GROUP AND IF HE'S SEEN AS AN OUTSIDER, THEN THERE IS
16 ESSENTIALLY NOTHING THAT REMAINS PRIVILEGED.

17 BECAUSE HE WAS COPIED ON VIRTUALLY ALL THESE. THE
18 CORE, ABSOLUTE CORE. HERE ARE SCRIPTS OF ALL OF THE ADS WE'RE
19 CONSIDERING, GIVE US YOUR FEEDBACK, THAT IS ENGAGED IN THE
20 FORMULATION.

21 **THE COURT:** OF COURSE, IT IS. YOUR ARGUMENT FOR, YOU
22 MAY REGRET MAKING IT, JUST WETS THE OTHER SIDE'S APPETITE
23 AGAIN, BUT IT PROVES TOO MUCH.

24 THAT MEANS, WHOEVER WAS GIVEN A SCRIPT TO LOOK AT THEY
25 ARE PART OF THE CORE GROUP, RESPONSIBLE FOR FORMULATION,

1 ENGAGED IN THE FORMULATION OF STRATEGY AND MESSAGING, ACTION
2 THAT PROVES TOO MUCH.

3 WE'RE APPLYING A NINTH CIRCUIT STANDARD. WE'RE NOT --
4 WE'RE NOT -- YOU MAY HAVE YOUR OWN VIEWS ABOUT THE SCOPE OF THE
5 FIRST AMENDMENT PRIVILEGE, THOSE ARE INTERESTING TO ME, BUT NOT
6 PARTICULARLY RELEVANT. THE QUESTION IS, WHAT THE CIRCUIT SET
7 DOWN.

8 SO I HEARD ENOUGH ON MR. CRISWELL, UNFORTUNATELY,
9 NEEDS TO BE RESOLVED RIGHT AWAY. I'M GOING TO DENY THE MOTION
10 TO RECONSIDER WITH MR. CRISWELL.

11 FIRST, THERE'S NO REASONABLE BASIS ON WHICH YOU DIDN'T
12 BRING THIS MATTER TO THE ATTENTION OF THE COURT BEFORE.

13 MR. CRISWELL HAS BEEN LITIGATED ABOUT, AT LEAST, TWICE NOW.

14 AND SECOND, THE EVIDENCE, IN ANY EVENT, IN PRENTICE'S
15 NEWEST DECLARATION DOES NOT MAKE HIM PART OF THE CORE GROUP.

16 SO LET'S GO ONTO THE OTHER THREE, I THINK, ARE
17 SLIGHTLY MORE DIFFICULT. AND I WANT TO TAKE THEM ONE AT A
18 TIME.

19 THE ONE ON WHICH I THOUGHT YOU HAD THE BEST ARGUMENT,
20 ACTUALLY, WAS DOE. AND AS REFLECTED IN THE REDACTED
21 DECLARATION DOE IS PROFESSIONAL OPINION RESEARCH CONSULTANT
22 HIRED BY PROTECTMARRIAGE.COM TO CONDUCT FOCUS GROUP AND OTHER
23 VOTER OPINION RESEARCH, WHICH WERE ESSENTIAL PARTS OF THE
24 INTERNAL FORMULATION OF THE CAMPAIGN STRATEGY AND MESSAGING.

25 AND MY QUESTION FOR THE PLAINTIFFS, ISN'T THAT EXACTLY

1 THE KIND OF PERSON THAT I PREVIOUSLY HELD WAS PART OF THE CORE
2 GROUP?

3 AND WHY SHOULDN'T I INCLUDE -- I DON'T KNOW, MR. OR
4 MS. DOE IN THE CORE GROUP?

5 **MR. MC GILL:** FOR TWO REASONS, YOUR HONOR.

6 FIRST, THIS IS MANIFESTLY NOT A CASE OF EXCUSABLE
7 NEGLECT ON THE PART OF THE DEFENDANT INTERVENORS. THEY FILED
8 THIS MOTION OR THEY ALERTED US TO THIS MOTION 53 MINUTES BEFORE
9 THEIR PRODUCTION DEADLINE.

10 IF THEY HAD FILED THE MOTION -- IF THIS HAD -- IF THIS
11 MOTION HAD BEEN FILED IN THE IMMEDIATE AFTERMATH OF YOUR
12 JANUARY 8TH ORDER IT MIGHT BE BELIEVABLE THAT THIS OPINION
13 RESEARCH CONSULTANT WAS PART OF THEIR CORE GROUP. IF THEY HAD
14 SAID ON JANUARY 9TH WE FORGOT TO ADD MR. DOE.

15 BUT THEY WAITED UNTIL JANUARY 17TH, HOW CAN IT BE THAT
16 THIS PERSON IS PART OF THEIR CORE GROUP WHEN IT DIDN'T EVEN
17 OCCUR TO THEM TO ALERT THE COURT'S ATTENTION THAT HE MIGHT BE A
18 PART OF THE CORE GROUP UNTIL 53 MINUTES BEFORE THE PRODUCTION
19 DEADLINE?

20 **THE COURT:** WHAT THEY'LL SAY IN RESPONSE, I'D LIKE TO
21 HEAR YOUR THOUGHTS ON IT, IT'S THE NATURE OF THE CAMPAIGN THEY
22 WERE RUNNING.

23 IS THAT IT'S A DISPERSED GROUP OF PEOPLE, OVER A LONG
24 PERIOD OF TIME AND, THEREFORE, NOT SURPRISING THAT A CONSULTANT
25 SLIPPED THROUGH THE CRACKS. THEY HAVE DOZENS OF CONSULTANTS.

1 **MR. MC GILL:** I WOULD RESPOND TO THAT, YOUR HONOR, TO
2 SAY THAT THE NINTH CIRCUIT'S PRIVILEGE DOES NOT EMBRACE EVERY
3 SINGLE PERSON WHO TOUCHED UPON THE ISSUES OF CAMPAIGN MESSAGING
4 AND STRATEGY. IT EMBRACES UPON THE CORE GROUP.

5 AND THE VERY NATURE OF YOUR STATEMENT THAT THEY MIGHT
6 HAVE BEEN DISPERSED AND ONLY DID A LITTLE BIT HERE OR A LITTLE
7 BIT THERE, MEANS THEY'RE NOT PART OF THE CORE GROUP.

8 I WOULD ADD, THAT IT WOULD SEEM, JUST BASED ON MY
9 KNOWLEDGE OF THEIR PRIVILEGE LOG, THAT IF THEY'RE WITHHOLDING
10 97 DOCUMENTS, I WOULD WAGER 80 OR MORE OF THOSE RELATE TO
11 MR. CRISWELL.

12 THE VERY FACT WE'RE LIKELY TALKING ABOUT LESS THAN 20
13 DOCUMENTS HERE, AGAIN, ILLUSTRATE TO ME THESE ARE NOT MEMBERS
14 OF THE CORE GROUP.

15 AND MR. PUGNO CAN TELL US EXACTLY HOW MANY DOCUMENTS
16 RELATE ONLY TO MR. DOE, BUT IT CANNOT BE THAT SOMEBODY WHO,
17 THAT IS ONLY MENTIONED ON A HANDFUL OF DOCUMENTS, WAS PART OF
18 THE CORE GROUP, RESPONSIBLE FOR THE FORMULATION OF CAMPAIGN
19 MESSAGING AND STRATEGY.

20 MOREOVER, I WOULD JUST -- I HAVE TO POINT TO
21 MR. PRENTICE'S DECLARATION HERE, WHERE HE DOESN'T SAY, HE JUST
22 DOESN'T SAY HE WAS RESPONSIBLE FOR THE FORMULATION OF CAMPAIGN
23 STRATEGY AND MESSAGING.

24 **THE COURT:** IT'S NOT QUITE THE TEST, IS IT CORE GROUP
25 OF PERSONS ENGAGED IN THE FORMULATION. SO I DON'T -- MY

1 RECOLLECTION OF THE CIRCUIT'S DECISION DOESN'T USE THE WORD
2 RESPONSIBILITY.

3 **MR. MC GILL:** I THINK, THAT'S RIGHT.

4 **THE COURT:** SLIGHTLY DIFFERENT.

5 **MR. MC GILL:** I THINK YOUR HONOR HAS STATED IT
6 CORRECTLY, BUT LET'S LOOK AT WHAT MR. PRENTICE SAYS. HE SAYS
7 HE WAS HIRED TO CONDUCT FOCUS GROUPS AND OTHER VOTER OPINION
8 RESEARCH, WHICH ARE ESSENTIAL PARTS OF FORMULATION OF STRATEGY
9 AND MESSAGING.

10 DOESN'T SAY THAT MR. DOE WAS RESPONSIBLE FOR, ENGAGED
11 IN THE FORMULATION OF CAMPAIGN STRATEGY AND MESSAGING. HE
12 COULD HAVE SAID THAT. HE COULD HAVE JUST TAKEN THE WORDS FROM
13 THE NINTH CIRCUIT OPINION. THERE'S SOME CAREFUL WORDSMITHING
14 GOING ON HERE.

15 **THE COURT:** SO LET ME GIVE YOU A HYPOTHETICAL. THEY
16 HAVE ONE CAMPAIGN CONSULTANT, THE CAMPAIGN CONSULTANT IS A
17 PROFESSIONAL RESEARCH CONSULTANT.

18 WHAT THAT OPINION RESEARCH CONSULTANT DOES IS CONDUCT
19 FOCUS GROUPS AND VOTER OPINION RESEARCH, AND THEN REPORTS ON
20 THAT RESEARCH IN MEETINGS IN WHICH IT'S DECIDED WHAT THE
21 MESSAGE IS GOING TO BE. IS THAT PERSON PART OF THE CORE GROUP?

22 **MR. MC GILL:** I WOULD SAY, UNDER YOUR HYPOTHETICAL,
23 YES, FOR TWO REASONS. ONE, YOU IDENTIFIED THE FACT THIS PERSON
24 IS THE ONLY OUTSIDE RESEARCH CONSULTANT.

25 TWO, WHICH BY -- ALMOST BY DEFINITION MAKES HIM PART

1 OF A CORE. TWO, AS YOU'VE -- IN YOUR HYPOTHETICAL YOU STATED
2 HE WAS SEEMINGLY INVOLVED IN THE DEVELOPMENT OF CAMPAIGN
3 STRATEGY AND MESSAGING, AND THAT IS NOT WHAT MR. PRENTICE HAS
4 SAID HERE.

5 BUT, I THINK, THE MORE IMPORTANT POINT, YOUR HONOR, IS
6 THAT THE REQUIREMENTS FOR A MOTION FOR RECONSIDERATION HERE ARE
7 SIMPLY NOT MET.

8 THIS IS NOT A CASE WHERE THE JANUARY -- WHERE IT
9 OCCURRED TO THEM ON JANUARY 9 OR 10 THAT THEY HAD INADVERTENTLY
10 OMITTED SOMEBODY. THEY WAITED UNTIL THEY SAW WHAT ARE LIKELY
11 SOME DOCUMENTS THAT THEY REALLY DO NOT WANT TO BE INTRODUCED
12 INTO EVIDENCE, AND DECIDED THAT THIS PERSON ALSO NEEDED TO BE
13 PART OF THE CORE GROUP ON JANUARY 17TH, 53 MINUTES BEFORE THE
14 PRODUCTION DEADLINE.

15 **THE COURT:** OKAY. COUNSEL.

16 **MR. PUGNO:** YOUR HONOR, WE'VE -- WE HAVE MOVED AS
17 RAPIDLY AS WE POSSIBLY COULD TO GET TO THIS POINT.

18 **THE COURT:** BUT HERE'S THE PROBLEM THAT YOU FACE. ALL
19 OF YOUR ARGUMENTS ABOUT WE ONLY HAD TWO DAYS OR WE ONLY HAD
20 THREE DAYS ARE NO LONGER APPLICABLE.

21 THIS MOTION, THIS DECLARATION WAS ACTUALLY FILED ON
22 THE 18TH OF THIS MONTH, THAT'S 14 DAYS AFTER THE CIRCUIT'S
23 OPINION AND IT IS ALMOST -- AND IT IS 14 DAYS, BUT 10 DAYS OR
24 11 DAYS AFTER THE ORIGINAL PRENTICE DECLARATION.

25 IT IS -- THE POINT THAT COUNSEL MAKES IS THAT YOU HAVE

1 NOT BEEN DILIGENT WITH RESPECT TO THAT MATTER. YOU KNOW THIS
2 IS AT ISSUE.

3 YOU'RE DOING THE REVIEW OF MR. WIRTHLIN, FOR EXAMPLE,
4 IS NOT SOMEBODY UNKNOWN, YOU USED HIM IN THE TRIAL. THERE'S A
5 VIDEOTAPE OF HIM THAT WAS INTRODUCED IN THE TRIAL.

6 I'M NOT PAYING THAT MUCH ATTENTION TO THE TRIAL, BUT I
7 GET SNIPPETS. THE POINT THAT IS BEING MADE, IS YOU CAN'T SAY
8 THAT YOU'RE BEING DILIGENT, IF YOU HAD MORE THAN -- YOU'VE HAD
9 TWO WEEKS FROM -- YOU WAIT TWO WEEKS FROM THE OPINION TO BRING
10 SOMETHING TO THE COURT'S ATTENTION, ON PEOPLE THAT YOU KNEW
11 ABOUT LONG BEFORE THAT TWO WEEKS WAS UP AND WAITED UNTIL THE
12 PLAINTIFF'S CASE WAS LARGELY IN, IT SEEMS TO ME.

13 **MR. PUGNO:** I'D LOVE TO ADDRESS THAT, IF I COULD.

14 THE MOTION WAS FILED ON THE 18TH BECAUSE THE ECF
15 SYSTEM WAS DOWN OVER THE WEEKEND. WE SERVED IT ON THE 17TH.
16 THE DECLARATION WAS SIGNED THE -- LATE IN THE NIGHT BEFORE,
17 BECAUSE WE WERE UNDER A BREAKNECK PACE TO TRY AND GET THROUGH
18 THESE DOCUMENTS.

19 AND IT IS, ACTUALLY, THE REVIEW OF THE DOCUMENTS THAT
20 BROUGHT THIS NAME FORWARD, THAT WE HAD FORGOTTEN HE WAS USED,
21 WAS NOT USED THROUGHOUT THE ENTIRE CAMPAIGN. NOT A NAME THAT
22 IMMEDIATELY CAME TO MIND, BUT HE WAS WITH RESPECT TO A COUPLE
23 OF THE FOCUS GROUPS THAT WERE CONDUCTED, HIRED TO CONDUCT THOSE
24 AND DID SO, AND DID SOME RESEARCH FOR US AND THE NAME CAME OUT
25 DURING.

1 IN OTHER WORDS, WE'RE REVIEWING TENS OF THOUSANDS OF
2 DOCUMENTS AND THE FIRST REVIEW -- WELL, I WON'T GET INTO THE
3 REVIEW PROCESS, BUT YOU START TO SEE INFORMATION THAT YOU DON'T
4 REMEMBER FROM A YEAR AND A HALF AGO.

5 AND AS WE SEE IT WE SET IT ASIDE AND WE THINK WE MIGHT
6 END UP WITH A COUPLE OF NAMES WE HAD OVERLOOKED AND THAT WE
7 WOULD BRING THAT TOGETHER AS A SINGLE MOTION.

8 **THE COURT:** OKAY. YOU JUST OPENED THE DOOR AND I'M
9 GOING TO STEP THROUGH IT. WHEN DID YOU FIRST SEE MR. DOE'S
10 NAME?

11 **MR. PUGNO:** I DON'T REMEMBER WHAT POINT OF THE WEEK,
12 YOUR HONOR.

13 **THE COURT:** IF YOU DECIDED MY ORDER WAS THE 8TH, FOR
14 EXAMPLE, IF YOU LEARNED ABOUT IT ON THE 9TH OR THE 10TH AND YOU
15 WAITED UNTIL THE 17TH TO FILE THIS MOTION, I WOULD CALL THAT AN
16 INTERESTING FACT AND ONE THAT MIGHT BE LACK OF DILIGENCE.

17 **MR. PUGNO:** I'D BE HAPPY TO ADDRESS THAT. FIRST OF
18 ALL, WE ARE IN TRIAL WHILE THIS IS GOING ON. I MADE THE
19 JUDGMENT CALL AS GENERAL COUNSEL THAT RATHER THAN EVERY TIME A
20 NAME POPPED UP WE GO AND FILE MOTIONS AND MOTIONS TO SEAL AND
21 SUBMIT IN CAMERA SUBMISSIONS, THAT WE COLLECT THE TWO OR THREE.
22 AND BY THE WAY --

23 **THE COURT:** YOU WAIT UNTIL THE PLAINTIFF'S CASE IS
24 ALMOST OVER? YOU UNDERSTAND, TURN BACK ON YOU.

25 **MR. PUGNO:** ABSOLUTELY NOT.

1 **THE COURT:** WHY SHOULDN'T I TAKE THAT INTO ACCOUNT,
2 THOUGH, EVEN THOUGH I'M SURE YOU DID IT FOR THE BEST OF
3 REASONS, YOU WANTED TO NOT BURDEN THE COURT WITH MULTIPLE
4 APPLICATION OR YOUR STAFF.

5 CAN'T I TAKE INTO ACCOUNT THAT YOU'VE HAD A WEEK
6 DURING WHICH TIME TIME HAS BEEN PASSING AT A BREAKNECK PACE, AS
7 YOU SAY, THE TRIAL BEEN PASSING AND THE PLAINTIFFS ARE SEVERELY
8 PREJUDICED EVEN IN ADDRESSING THIS ISSUE.

9 **MR. PUGNO:** WE WERE -- OUR FIRST PRIORITY WAS TO
10 COMPLY WITH THE ORDER TO GET EVERYTHING IN BY NOON SUNDAY, AND
11 IT WAS LITERALLY AROUND THE CLOCK ORDEAL FOR A FULL WEEK, AND
12 THE WAY THE TECHNOLOGY WORKS WE HAD TO FINISH OUR REVIEW, SO
13 THAT IT COULD BE UPLOADED TO THE SYSTEM.

14 SO MANY DOCUMENTS IT'S NOT EVEN POSSIBLE TO PRODUCE,
15 WE GOT IT UPLOADED TO A SYSTEM, THEY CAN DOWNLOAD IT, WE HAD TO
16 DO THAT BY SATURDAY AFTERNOON FOR THE COMPUTER SYSTEM TO
17 PRODUCE IT ON SUNDAY.

18 SO WE HAD TO GET THAT DONE FIRST AND THEN SATURDAY
19 AFTERNOON TURN TO DRAFTING THE DECLARATIONS, AND DRAFTING THE
20 MOTION AND DRAFTING THE MOTIONS TO SEAL.

21 IF WE HAD STOPPED DOING THE DOCUMENT REVIEW TO WRITE
22 MOTIONS ALL WEEK LONG WE MAY NOT HAVE MADE THE PRODUCTION
23 DEADLINE THAT THE COURT ESTABLISHED OF SUNDAY.

24 IT SIMPLY A MATTER OF RESOURCE ALLOCATION, IT'S
25 ASTONISHING WE GOT THROUGH THIS.

1 **THE COURT:** I KNEW YOU'D DO IT.

2 **MR. PUGNO:** WELL, IT WAS EXTRAORDINARY EXPENSE AND
3 MANY PEOPLE DID NOT SLEEP ALL WEEK LONG IN ORDER TO GET THIS
4 ACCOMPLISHED. AND THE DEADLINE WAS TO GET THE REVIEW DONE, THE
5 FIRST REVIEW DONE BY SATURDAY AFTERNOON, SO THAT THE COMPUTER
6 SYSTEM COULD PRODUCE IT BY SUNDAY AT NOON.

7 AND THEN THE MOMENT THAT WAS DONE WE BEGAN DRAFTING
8 THE DECLARATIONS AND THE MOTION. THAT'S ALL I DID, SAY WE'VE
9 DONE ABSOLUTELY EVERYTHING POSSIBLE.

10 AND WE WERE ALSO, BY THE WAY, YOUR HONOR, TRYING TO,
11 IF THERE'S, SAY, A SINGLE DOCUMENT, A PERSON THAT POPS UP, AND
12 IF WE CAN DETERMINE LATER IN THE WEEK THAT IT'S BETTER TO JUST
13 GIVE UP THE E-MAIL THEN TO GO THROUGH ALL THE BURDEN OF
14 BRINGING A MOTION LIKE THIS, THAT WE COULD SET IT ASIDE AND
15 MAKE A JUDGMENT CALL OR ARE WE WILLING TO FIGHT THIS BATTLE OR
16 LET IT GO.

17 THAT WAS A VERY REASONABLE BASIS TO AT, I DON'T KNOW,
18 TUESDAY, WEDNESDAY, THURSDAY, WHENEVER IT WAS, WHENEVER THESE
19 NAMES POPPED UP, TO SAY, YOU KNOW WHAT, WE'RE GOING TO JUST
20 HOLD THESE, FINISH GETTING THROUGH THE REST OF THE DOCUMENTS
21 WE'RE UNDER ORDER TO GET THROUGH BY SUNDAY, THEN FILE THE
22 MOTION AT THE VERY EARLIEST OPPORTUNITY.

23 WE HAD TO CONTACT MR. PRENTICE ON A SATURDAY NIGHT
24 AND GET HIM TO A PLACE TO SIGN THE DECLARATION, JUST SO WE CAN
25 GET IT FILED IN THE MORNING.

1 WE DID ABSOLUTE EVERYTHING WE POSSIBLY COULD, WE FILED
2 THIS, WE SERVED IT AS SOON AS WE COULD, WE EVEN SERVED IT AND
3 SAID WE HAVEN'T HAD TIME TO DRAFT THE MOTIONS TO SEAL YET, BUT
4 THEY'RE COMING AND WE WANT TO LET YOU KNOW THEY'LL COME THIS
5 AFTERNOON.

6 WE DID EVERYTHING WE ABSOLUTELY POSSIBLY COULD, SO
7 THAT'S THAT.

8 **THE COURT:** OKAY.

9 **MR. MC GILL:** MAKE TWO QUICK POINTS IN RESPONSE. THAT
10 THE NOTION THAT WE'RE TOO BUSY TO STOP AND FILE A MOTION IS
11 COMPLETELY BELIED BY THEIR VERY EXPEDITIOUS TRIP TO THE UNITED
12 STATES SUPREME COURT ON THE CAMERAS ISSUES. WHEN IT'S
13 IMPORTANT TO THEM THEY FIND THE TIME TO FILE A MOTION.

14 **THE COURT:** I MUST TELL YOU I DON'T PAY ANY ATTENTION
15 TO THE NOTION THAT THEY DIDN'T -- WEREN'T ABLE TO FILE A
16 MOTION. I DON'T PAY ANY ATTENTION TO IT, ACTUALLY, BECAUSE I'M
17 ON THE CASE AND I'M SUPPOSED TO KEEP TRACK OF IT.

18 I WATCH THE DOCKET SHEET EVERYDAY. YOU FILED MANY
19 MOTIONS THEN AND NOW YOU FILED MOTION YOU THINK ARE IMPORTANT,
20 YOU DON'T THINK THEY'RE IMPORTANT.

21 THE ONLY POINT YOU MADE WHICH IS WORTH CONSIDERING IS
22 IT MAYBE THAT WHILE YOUR FIRST REACTION TO A DOCUMENT WITH A
23 PERSON'S NAME ON IT IS WITHHOLD, YOU MAY RECONSIDER THAT DURING
24 THE COURSE OF A COUPLE DAYS AND THAT'S A NORMAL DOCUMENT REVIEW
25 PROCESS AND I APPRECIATE THAT.

1 BUT LET'S -- I WANT TO TALK ABOUT SOMEONE OTHER THAN
2 DOE, LET'S TALK ABOUT THE OTHER TWO PEOPLE. WHAT ABOUT --
3 WHAT'S THE PLAINTIFF'S VIEW ON PETERSON AND WIRTHLIN? WHY
4 AREN'T THEY --

5 **MR. MC GILL:** CAN I MAKE ONE MORE POINT, I THINK, WILL
6 BE HELPFUL TO THE COURT?

7 THESE PEOPLE APPEARED ON THEIR PRIVILEGE LOG WHICH WAS
8 PRODUCED ON DECEMBER 16TH.

9 **THE COURT:** WE DON'T KNOW WHETHER DOE WAS. SO
10 PETERSON AND WIRTHLIN TELL ME ABOUT WHY YOU VIEW THEM NOT PART
11 OF THE CORE GROUP OR HAVING WAITED TOO LONG OR WHATEVER YOUR
12 ARGUMENT IS?

13 **MR. MC GILL:** ONE, THERE'S NO EXCUSABLE NEGLECT
14 NECESSARY, PETERSON FOR SURE APPEARED ON THE PRIVILEGE LOG
15 PRODUCED IN DECEMBER AND, I BELIEVE, WIRTHLIN DID AS WELL.

16 MOREOVER WIRTHLIN CAN'T CONCEIVABLY COME WITHIN ANY
17 DEFINITION OF THE CORE GROUP. THE MAN IS A RESIDENT OF
18 MASSACHUSETTS, HIS ONLY INVOLVEMENT IN THE CAMPAIGN SO FAR AS
19 DISCLOSED IN THE DECLARATION OF MR. PRENTICE IS THAT HE
20 APPEARED IN THE AD THAT HAS NOW BEEN INTRODUCED INTO EVIDENCE
21 BY THE DEFENDANT INTERVENORS.

22 MOREOVER EVEN IF THEY DID COME WITHIN ANY DEFINITION
23 OF THE CORE GROUP, THE FACT THAT THE DEFENDANT INTERVENORS HAVE
24 PUT INTO EVIDENCE THE ADS INVOLVING THESE PEOPLE MEANS THAT
25 COMMUNICATIONS RELATING TO THOSE ADS WERE -- ARE NOW HIGHLY

1 RELEVANT AND --

2 **THE COURT:** YOU SAID THAT IN YOUR BRIEF, AND I'M SORRY
3 TO INTERRUPT, WE HAVE VERY LITTLE TIME, SO LET'S ADDRESS THAT.
4 DOESN'T THAT PROVE TOO MUCH?

5 I MEAN, THE RELEVANCE STANDARD THE CIRCUIT WAS DEALING
6 WITH WAS THAT COMMUNICATIONS TO VOTERS WERE GOING TO BE
7 IRRELEVANT OR, AT LEAST, DEEMED RELEVANT BY THE JUDGE, DISTRICT
8 JUDGE, THEY WEREN'T FIGHTING THAT.

9 NONETHELESS, NONETHELESS, FORMULATION OF THOSE
10 MESSAGES WAS HELD TO BE -- WITHIN THE CORE GROUP WAS HELD TO BE
11 WITHIN THE FIRST AMENDMENT PRIVILEGE. YOU DON'T MEET THE
12 STANDARD FOR EXTRAORDINARY, STANDARD SET DOWN BY THE CIRCUIT BY
13 JUST SAYING IT'S RELEVANT TO A MESSAGE TO THE VOTERS.

14 **MR. MC GILL:** SPECIFICALLY WHAT THE DEFENDANT
15 INTERVENORS HAVE PUT INTO ISSUE, WHICH IS THE MEANING OF THE
16 ADS AND SPECIFICALLY THE MEANING OF THE PROTECT OUR CHILDREN
17 CATCH LINE.

18 IF THERE ARE COMMUNICATIONS THAT GO TO THAT, I THINK,
19 THEY ARE NOW HIGHLY RELEVANT BECAUSE THE DEFENDANT INTERVENORS
20 HAVE PUT THAT ISSUE IN PLAY.

21 BUT, I THINK, EASIER WAY TO GO HERE, YOUR HONOR, IS
22 THE FACT THAT THESE -- THIS CANNOT CONCEIVABLY BE VIEWED AS A
23 CASE OF EXCUSABLE NEGLIGENCE.

24 THE VERY FACT THAT MR. PUGNO HAS NOW ADMITTED THESE
25 PEOPLE PLAYED SMALL ROLES IN THE CAMPAIGN, INCLUDING MR. DOE,

1 SMALL ROLES IN THE CAMPAIGN MEANS BY DEFINITION THEY ARE NOT
2 PART OF THE CORE GROUP. IT DEFIES THE DEFINITION OF CORE GROUP
3 TO INCLUDE EVERY PERSON WHO PLAYED A BIT PART.

4 **THE COURT:** SO WHAT DO YOU KNOW ABOUT PETERSON OR
5 WIRTHLIN?

6 WIRTHLIN YOU DESCRIBED SOMEWHAT, DO YOU KNOW ANYTHING
7 ELSE OTHER THAN PETERSON APPEARED ON THE PRIVILEGE LOG IN
8 DECEMBER?

9 **MR. MC GILL:** I KNOW FOR THE FACT MR. PETERSON
10 APPEARED ON THE PRIVILEGE LOG. I'M TRYING TO CONFIRM RIGHT NOW
11 WHETHER MR. WIRTHLIN DID.

12 MR. PETERSON WAS -- IS, I BELIEVE, A LAW PROFESSOR AT
13 PEPPERDINE WHO APPEARED IN A NUMBER OF YES ON 8 ADS, AND THE
14 SAME THING HOLDS TRUE AS TO WIRTHLIN AS IT DOES TO MR. --
15 PROFESSOR PETERSON.

16 THAT THEY HAVE -- THE DEFENDANT INTERVENORS NOW
17 BASICALLY PUT INTO ISSUE WHAT PROTECT OUR CHILDREN REALLY MEANS
18 AND IF THERE ARE COMMUNICATIONS THAT GO TO THAT THEY ARE NOW
19 HIGHLY RELEVANT.

20 BUT MORE TO THE POINT THIS IS A MAN WHO APPEARED ON
21 THE PRIVILEGE LOG. THEY KNEW ABOUT IT NO LATER THAN DECEMBER.
22 THE FACT IT DIDN'T OCCUR TO THEM TO INCLUDE HIM ON JANUARY 7TH,
23 ON A JANUARY 7TH DECLARATION CANNOT -- IT DEFIES BELIEF TO SAY
24 THAT, WELL, WE CAN WAIT UNTIL JANUARY 17TH TO BRING THIS TO THE
25 COURT'S ATTENTION.

1 THIS WAS, IT APPEARS IT WAS DESIGNED TO MAXIMIZE
2 PREJUDICE TO THE PLAINTIFFS, NOT BECAUSE THEY SIMPLY FORGOT
3 ABOUT HIM.

4 **THE COURT:** COUNSEL.

5 **MR. PUGNO:** WELL, YOUR HONOR, THE -- BOTH THESE
6 INDIVIDUALS APPEARED IN STATE-WIDE TELEVISION ADS ON BEHALF OF
7 THE CAMPAIGN.

8 WE, OF COURSE, KNEW ABOUT THEM. WHEN WE WERE SITTING
9 DOWN AND THINKING WHO WAS -- WHO ARE OUR CAMPAIGN OFFICIALS AND
10 OUR CONSULTANTS AND OUR ADVISERS AND WHO WAS IN THE CORE GROUP,
11 WE KNEW THEY WERE THERE, BUT DIDN'T OCCUR TO US THERE WOULD BE,
12 IN THE REREVIEW THAT WE DID THE FOLLOWING WEEK COMMUNICATIONS,
13 ACTUALLY TURNING WHAT MESSAGE THEY SHOULD -- WITH THEM WHAT
14 MESSAGE THEY WOULD LIKE TO CONVEY AND WHAT THEY SHOULD SAY.

15 IN OTHER WORDS, WE KNEW WE HAD COMMUNICATIONS SAYING
16 SHOW UP AT THIS TIME AT THE STUDIO, THIS IS AN EXAMPLE, I DON'T
17 KNOW FOR SURE.

18 **THE COURT:** SURE.

19 **MR. PUGNO:** BUT SAYING SHOW UP AT THIS TIME AT THE
20 STUDIO, THAT'S NOT NECESSARILY A FORMULATION OF MESSAGE AND
21 STRATEGY, BUT WE KNEW THEY EXISTED.

22 BUT IN THE REVIEW WE FOUND DOCUMENTS COMMUNICATING
23 WITH PROFESSOR PETERSON AND WITH MR. WIRTHLIN WHERE THERE IS AN
24 EXCHANGE OF IDEAS OF WHAT SHOULD BE SAID IN THESE ADS, WHAT
25 THEY WOULD LIKE TO SAY.

1 AND, IN FACT, TO QUOTE THE NINTH CIRCUIT OPINION, SAYS
2 IMPLICIT IN THE RIGHT OF ASSOCIATION IS THE RIGHT TO EXCHANGE
3 IDEAS AND FORMULATE STRATEGY AND TO DO SO IN PRIVATE. AND THE
4 E-MAILS THAT WE DISCOVERED --

5 **THE COURT:** ONLY AMONG THE CORE GROUP. SO YOU'RE
6 BEGGING THE QUESTION, THE QUESTION WHETHER THEY'RE PART OF THE
7 CORE GROUP.

8 **MR. PUGNO:** THEY HAVE TO BE.

9 **THE COURT:** ANYONE EVER WHO GAVE AN OPINION TO THE
10 CAMPAIGNS COUNSEL, FOR EXAMPLE, ABOUT WHAT SHOULD BE IN THE
11 MESSAGING, THAT'S PART OF THE CORE GROUP?

12 **MR. PUGNO:** ABSOLUTELY NOT. WE TURNED OVER TONS OF
13 DOCUMENTS WITH LOTS OF SUGGESTIONS FROM PEOPLE OUT THERE ABOUT
14 HOW THE CAMPAIGN SHOULD BE WRITTEN AND THEY WERE, THEY ALL BEEN
15 PRODUCED AND THEY WERE NOT HELD BACK AS PRIVILEGED.

16 WE'RE FOCUSING ON THE WORD ENGAGED. IF THERE WAS A
17 BACK AND FORTH, AN EXCHANGE OF IDEAS AND A FORMULATION OF THE
18 MESSAGE IN CONCERT WITH SOMEBODY, ESPECIALLY A MESSAGE THEY'RE
19 GOING TO DELIVER ON TELEVISION, THAT HAS TO BE IN THE CORE.

20 **THE COURT:** OKAY.

21 **MR. MC GILL:** YOUR HONOR, OF --

22 **THE COURT:** I DON'T NEED TO HEAR ANYMORE. I'VE GOT TO
23 RULE ON THIS BECAUSE OF THE PRESS OF THE TRIAL. I THINK, THAT
24 YOU BOTH HAD AN OPPORTUNITY TO MAKE YOUR POINTS AND SITTING
25 HERE I'VE ALSO MANAGED TO READ THE PRENTICE DECLARATION IN

1 DETAIL AND HERE'S THE RULING AS FOLLOWS:

2 AS TO -- AS WITH CRISWELL, WITH RESPECT TO PETERSON
3 AND WIRTHLIN, THE COURT FINDS THAT THERE'S NO NEWLY DISCOVERED
4 EVIDENCE OR CLEAR ERROR OR INTERVENING CHANGE IN THE LAW WHICH
5 WOULD JUSTIFY THE GRANTING OF ITS MOTION.

6 THERE IS NO REASONABLE BASIS FOR HAVING NOT BROUGHT
7 THEM TO THE ATTENTION OF THE COURT EARLIER IN THE PREVIOUS --
8 WHEN THE COURT PREVIOUSLY RULED ON THIS OR IN THE INTERVENING
9 TIME BETWEEN THEN AND NOW.

10 IN PARTICULAR I'LL NOTE MR. PETERSON WAS ON A
11 PRIVILEGE LOG AND, IN ANY EVENT, WAS WELL-KNOWN TO THE CAMPAIGN
12 HAVING DONE A PUBLISHED STATEWIDE TELEVISION AD ON THE
13 CAMPAIGN.

14 LIKewise MR. WIRTHLIN WAS INVOLVED IN THAT SECOND,
15 NEITHER OF THOSE INDIVIDUALS ARE PART OF THE CORE GROUP ENGAGED
16 IN FORMULATION OF STRATEGY AND MESSAGING. THEY WERE
17 INDIVIDUALS WHO APPEARED ON CAMPAIGN ADS AND DID HAVE
18 DISCUSSIONS WITH OTHERS ABOUT WHAT MIGHT BE IN THOSE PARTICULAR
19 CAMPAIGN ADS THAT THEY WERE PARTICIPATING IN, BUT I DON'T THINK
20 THAT'S MAKES THEM THE CORE GROUP.

21 WITH RESPECT TO MR. DOE, I'M GOING TO FIND MR. DOE IS
22 WITHIN THE CORE GROUP AND THAT THERE'S NO EVIDENCE BEFORE THE
23 COURT TO CONTRADICT THE STATEMENTS OF MR. PRENTICE, THAT
24 MR. DOE IS A PERSON WHO'S IDENTITY THEY COULDN'T REASONABLY
25 HAVE FOUND BEFORE, THEY JUST REMEMBERED.

1 PARTICULARLY, IT STRIKES THE COURT AS PARTICULARLY
2 CREDIBLE ASSERTION IN LIGHT OF THE DESCRIPTION OF THEIR HEARING
3 OF MR. DOE'S ROLE AS ONE OF MANY, MANY CAMPAIGN CONSULTANTS.

4 SO WITH RESPECT TO MR. DOE I'LL GRANT THE MOTION. YOU
5 CAN AMEND TO ADD THAT. I'LL DENY IT WITH RESPECT TO THE OTHER
6 THREE.

7 NOW, I WANT TO ORDER THE PRODUCTION OF THOSE
8 DOCUMENTS. WHEN IS THE QUICKEST YOU CAN GET THROUGH THOSE '95
9 DOCUMENTS?

10 **MR. PUGNO:** AS SOON AS I CAN MAKE THE PHONE CALL AND
11 THE FOLKS THAT HAVE THEM CAN GET THEM MARKED ATTORNEY'S EYES
12 ONLY. WE WILL CLAIM PROTECTION UNDER THE PROTECTIVE ORDER.

13 **THE COURT:** AS YOU'RE ALLOWED TO CLAIM.

14 **MR. PUGNO:** WE'LL GET THEM MARKED AND GET THEM IN AS
15 SOON AS WE CAN.

16 **THE COURT:** WHAT'S THE TRIAL SCHEDULE TODAY?

17 **MR. MC GILL:** WE'RE IN TRIAL UNTIL 4:00 P.M. TODAY, WE
18 WILL BE IN TRIAL TOMORROW, I WOULD ASK THE COURT ORDER THEY BE
19 PRODUCED BY NO LATER THAN 5:00 P.M.

20 **THE COURT:** OKAY. SO ORDERED. PRODUCE THE REMAINING
21 DOCUMENTS BY 5:00 P.M.

22 **MR. PUGNO:** CERTAINLY.

23 **THE COURT:** AND, I THINK, THAT'S IT. IS THERE
24 ANYTHING ELSE I'M SUPPOSED TO ADDRESS?

25 **MR. MC GILL:** NO.

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

FURTHERMORE, I CERTIFY THE INVOICE DOES NOT CONTAIN CHARGES FOR THE SALARIED COURT REPORTER'S CERTIFICATION PAGE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 8TH DAY OF FEBRUARY, 2010.

/S/ JAMES YEOMANS

JAMES YEOMANS, CSR, RPR