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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 On March 22, 2010, the court upheld Magistrate Judge
2 Spero's March 5 discovery order and ordered nonparties Equality
3 California and the ACLU (the "No on 8 groups"), along with
4 Californians Against Eliminating Basic Rights, to produce all
5 responsive non-privileged documents on a rolling basis to conclude
6 not later than March 31, 2010. Doc #623. The No on 8 groups
7 appealed the court's orders, which were stayed until the Ninth
8 Circuit dismissed the No on 8 groups' appeal for lack of
9 jurisdiction. Perry v Schwarzenegger, No 10-15649 Doc #14 (9th Cir
10 April 12, 2010). Proponents now ask the court to hold the No on 8
11 groups in contempt, as they have failed to produce documents as
12 ordered in the March 5 and March 22 orders. Doc #632.

13 The No on 8 groups assert that they are withholding
14 documents because they believe the First Amendment privilege should
15 apply to communications between or among all No on 8 core group
16 members regardless of organizational affiliation. See Doc #639 at
17 4. The No on 8 groups' current position stems from the Ninth
18 Circuit's observation that the First Amendment privilege applies to
19 communications among individuals who have formed an associational
20 bond regardless of organizational membership. Perry, No 10-15649
21 Doc #14 at 9. The No on 8 groups have not however pointed to any
22 evidence in the record to support a finding that communications
23 between the No on 8 groups were sufficiently private to be deemed
24 privileged under the First Amendment. See Doc #639 at 4 (arguing
25 that the No on 8 groups' evidentiary submissions support an
26 expanded First Amendment privilege but failing to refer to
27 particular evidence in the record supporting this position). The
28 No on 8 groups have thus not shown that any amendment to the

1 court's previous orders is appropriate.

2 In order for the No on 8 groups to be held in contempt,
3 the court must find by clear and convincing evidence that (1) the
4 No on 8 groups violated the March 5 and March 22 orders; (2) beyond
5 substantial compliance; and (3) the violation was not based on a
6 good faith and reasonable interpretation of the order. See In re
7 Dual-Deck Video Cassette Recorder Antitrust Litig, 10 F3d 693, 695
8 (9th Cir 1993). It appears from the record before the court that
9 the No on 8 groups have not in any way complied with the court's
10 orders. See Doc #639 (explaining that the No on 8 groups do not
11 intend to comply with the court's orders as currently formulated).
12 The No on 8 groups are therefore ORDERED to SHOW CAUSE in writing
13 by not later than April 27, 2010 at 5 PM PDT and at a hearing
14 before the undersigned on April 28, 2010 at 10:30 AM PDT why they
15 should not be held in contempt for failing to produce documents as
16 ordered in the March 5 and March 22 orders.

17 The declaration of Geoff Kors estimates that production
18 of Equality California's documents could cost \$20,000. Doc #609
19 ¶10. If the court determines that the No on 8 groups are in
20 contempt of its orders, the court is considering imposing sanctions
21 to coerce compliance in the amount of \$2,000 per day per group, or
22 one-tenth the cost of production, for each day that the No on 8
23 groups fail to comply with the court's orders.

24
25 IT IS SO ORDERED.

26 

27
28 VAUGHN R WALKER
United States District Chief Judge