

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,  
Plaintiffs,  
v.  
Arnold Schwarzenegger, et al.,  
Defendants.

NO. C 09-02292 JW

**ORDER DENYING MOTION FOR  
ORDER COMPELLING RETURN OF  
TRIAL RECORDINGS**

Presently before the Court is Defendant-Intervenors’ Motion for Order Compelling Return of Trial Recordings.<sup>1</sup> The Court conducted a hearing on June 13, 2011. Based on the papers submitted to date and oral argument, the Court DENIES Defendant-Intervenors’ Motion for Order Compelling Return of Trial Recordings.

**A. Background**

This Motion is related to the trial held by Chief Judge Vaughn Walker (retired) in this case. A detailed summary of the background to the case and its procedural history can be found in the

---

<sup>1</sup> (Appellants’ Motion for Order Compelling Return of Trial Recordings, hereafter, “Motion,” Docket Item No. 771-1.) This Motion was originally brought before the Ninth Circuit, which currently has appellate jurisdiction over the merits of the underlying decision in this case, including the judgment. (See Order at 2, Docket Item No. 771.) On April 27, 2011, the Ninth Circuit transferred the Motion to this Court, on the ground that this Court still has jurisdiction over “ancillary matters” associated with this case, such as the protective order regarding the trial recordings at issue in this Motion. (*Id.* at 2-3.)

1 Order issued by Judge Walker on August 4, 2010.<sup>2</sup> The Court reviews the procedural history  
2 relevant to the present Motion.

3 On December 21, 2009, a coalition of media companies requested the Court’s permission to  
4 televise the trial.<sup>3</sup> (See Docket Item No. 313.) On January 6, 2010, the Court held a hearing  
5 regarding the recording and broadcasting of the trial at which the Court announced that an audio and  
6 video feed of the trial would be streamed to several courthouses in other cities, and that the trial  
7 would be recorded for broadcast over the Internet. Hollingsworth, 130 S. Ct. at 708-09. On January  
8 7, 2010, the Court notified the parties that it had made a formal request to Chief Judge Kozinski that  
9 the trial be included in the Ninth Circuit’s pilot project on audio-video recording and transmission.  
10 (See Docket Item No. 358.) On January 8, 2010, Chief Judge Kozinski issued an order approving of  
11 real-time streaming of the trial to certain courthouses, pending the resolution of technical  
12 difficulties. Hollingsworth, 130 S. Ct. at 709. On January 9, 2010, Defendant-Intervenors applied  
13 to the Supreme Court for a stay of the Court’s order broadcasting the trial, which the Supreme Court  
14 granted on January 13, 2010. See id. at 709-10 (staying the broadcast because the Northern District  
15 of California’s amendment of its Local Rules to permit broadcast of the trial “likely did not” comply  
16 with federal law). On January 15, 2010, the Court notified the parties that, in compliance with the  
17 Supreme Court’s January 13, 2010 Order, it had formally requested Chief Judge Kozinski to  
18 withdraw the case from the pilot project on transmitting trial court proceedings to remote federal  
19 courthouse locations or for broadcast or webcast. (See Docket Item No. 463 at 2.) However, the  
20 Court notified the parties that it would continue recording the trial “for use in chambers.” (Id.)

21 On May 31, 2010, the Court notified the parties that “[i]n the event any party wishes to use  
22 portions of the trial recording during closing arguments, a copy of the video can be made available  
23 to the party.” (Docket Item No. 672 at 2.) The Court stated that the parties “will of course be

---

24 <sup>2</sup> (See Pretrial Proceedings and Trial Evidence; Credibility Determinations; Findings of Fact;  
25 Conclusions of Law; Order, hereafter, “August 4 Order,” Docket Item No. 708.)

26 <sup>3</sup> A detailed discussion of the factual background of the Court’s consideration of whether the  
27 trial should be recorded or broadcast may be found in the Supreme Court’s opinion staying the  
28 broadcast of the trial. See Hollingsworth v. Perry, 130 S. Ct. 705 (2010).

1 obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the  
2 protective order.”<sup>4</sup> (Id.) On June 2, 2010, both Plaintiffs and Plaintiff-Intervenor City and County  
3 of San Francisco requested a copy of the video, pursuant to the Court’s May 31, 2010 Order.<sup>5</sup> In its  
4 August 4 Order, the Court noted that the “trial proceedings were recorded and used by [the Court] in  
5 preparing the findings of fact and conclusions of law,” and directed the Clerk to “file the trial  
6 recording under seal as part of the record.” (August 4 Order at 4.) The Court stated that the “parties  
7 may retain their copies of the trial recording pursuant to the terms of the protective order.” (Id.)

8 **B. Discussion**

9 Defendant-Intervenors move for an order as follows: (1) directing Judge Walker to cease  
10 disclosures of the video recordings of the trial proceedings in this case, or any portion thereof, and  
11 that all copies of the trial recordings in the possession, custody or control of Judge Walker be  
12 returned to the Court;<sup>6</sup> and (2) directing that all copies of the trial recordings in the possession,  
13

---

14 <sup>4</sup> On January 12, 2010, the parties entered into an Amended Protective Order. (hereafter,  
15 “Protective Order,” Docket Item No. 425.) The Protective Order was entered because disclosure and  
16 discovery activity in the case would be “likely to involve production of confidential, proprietary, or  
17 private information for which special protection from public disclosure and from use for any purpose  
18 other than prosecuting this litigation would be warranted.” (Id. at 1.) Paragraph 7.3 of the Amended  
19 Protective Order addresses items that are designated as “HIGHLY  
20 CONFIDENTIAL–ATTORNEYS’ EYES ONLY,” and states that such items may only be disclosed  
21 to the parties’ counsel of record, certain experts, the Court and its personnel, “court reporters, their  
22 staffs, and professional vendors” who have signed an agreement to be bound by the Protective  
23 Order, and the author of the item. (Id. at 8-9.) The Protective Order specifies that “[e]ven after the  
24 termination of this litigation, the confidentiality obligations imposed by [the Order] shall remain in  
25 effect until a Designating Party agrees otherwise in writing or a court order otherwise directs.” (Id.  
26 at 2.)

27 <sup>5</sup> (See Notice to Court Clerk from Plaintiff-Intervenor City and County of San Francisco Re  
28 Use of Video, Docket Item No. 674 (stating that Plaintiff-Intervenor “wishes to obtain a copy of  
[certain portions] of the trial video to review for possible use at closing argument”); Notice to Court  
Clerk Re Plaintiffs’ Request for a Copy of the Trial Recording, Docket Item No. 675 (stating that  
Plaintiffs “respectfully request a copy of the trial recording for possible use during closing  
arguments”).)

<sup>6</sup> In its April 28, 2011 Order, the Court ordered “[a]ll participants in the trial,” including  
Judge Walker, “who are in possession of a recording of the trial proceedings” to appear at the June  
13, 2011 hearing “to show cause as to why the recordings should not be returned to the Court’s  
possession.” (Order Setting Hearing on Motion at 2, hereafter, “April 28 Order,” Docket Item No.  
772.) On May 12, 2011, Judge Walker voluntarily lodged his chambers copy of the video recording  
with the Court, which filed the copy under seal. (See Docket Item Nos. 777, 781.) Accordingly,

1 custody or control of any party to this case be returned to the Court and held under seal, because,  
2 now that the trial is over, there is “no legitimate reason” for the parties to continue to have a copy of  
3 the recording. (Motion at 1, 20.) Plaintiffs respond as follows: (1) because no “prior orders or local  
4 rules barred” Judge Walker from disclosing portions of the video, and because Judge Walker’s use  
5 of the video was “harmless,” the Court should not order him to stop disclosing portions of the video  
6 or to return his copy to the Court; and (2) because “use of the trial video would aid the parties in  
7 connection with any additional proceedings,” and because the parties “have dutifully complied with  
8 the protective order,” the Court should not order the parties to return their copies of the video.<sup>7</sup>

9       Upon review, the Court does not find good cause to require the parties to return their copies  
10 of the video recordings of the trial to the Court. As discussed previously, the Court made copies of  
11 the video available to the parties, pursuant to the Protective Order, for use during the trial.  
12 Defendant-Intervenors’ Motion does not contend that the parties have violated the terms of the  
13 Protective Order by disclosing the video recordings of the trial. Because there is no indication that  
14 the parties have violated the Protective Order, and because appellate proceedings in this case are still  
15 ongoing, the parties may retain their copies of the trial recordings.<sup>8</sup>

16       Accordingly, the Court DENIES Defendant-Intervenors’ Motion for Order Compelling  
17 Return of Trial Recordings and discharges its Order to Show Cause regarding the return of the trial  
18 recordings.

19 \_\_\_\_\_  
20 Defendant-Intervenors’ Motion, insofar as it requests an order requiring Judge Walker to return his  
21 copy of the video recording, is DENIED as moot. The Court does not reach any issue with respect  
22 to Judge Walker’s use of the trial recordings.

23       <sup>7</sup> (Plaintiffs-Appellees’ Opposition to Appellants’ Motion Regarding Trial Recordings and  
24 Plaintiffs-Appellees’ Motion to Unseal at 6-11, Docket Item No. 771-4.) In addition, the Opposition  
25 contends that the recordings of the trial should be unsealed. (*Id.* at 9-10.) However, in its April 28  
26 Order, the Court stated that it would “bifurcate Plaintiffs’ Cross-Motion to lift the protective order  
27 [on the video recordings] until it has the opportunity to resolve the underlying Motion.” (April 28  
28 Order at 1.) Accordingly, the Court does not consider at this time Plaintiffs’ contention that the  
recordings should be unsealed. The Court, in conjunction with Plaintiffs’ Cross-Motion to lift the  
Protective Order, will consider any request by Judge Walker for the return of the copy of the video  
recording that Judge Walker voluntarily returned to the Court.

<sup>8</sup> The video recordings of the trial continue to be subject to the Protective Order, pending the  
Court’s resolution of the Cross-Motion to lift the Protective Order.

1 **C. Conclusion**

2 The Court DENIES Defendant-Intervenors' Motion for Order Compelling Return of Trial  
3 Recordings, and orders as follows:

4 (1) The Court sets **August 29, 2011 at 9 a.m.** for a hearing on Plaintiffs' Cross-Motion  
5 to lift the Protective Order on the video recording of the trial.

6 (2) Although it appears that Plaintiffs' Cross-Motion has been fully briefed at the circuit  
7 level, the Court invites anyone who wishes to file further responses to the Cross-  
8 Motion to do so in compliance with the following briefing schedule:

9 (a) On or before **July 15, 2011**, any party desiring to do so shall file their  
10 Opposition;

11 (b) On or before **August 1, 2011**, any party desiring to do so shall file their  
12 Reply.

13 The Court hereby gives notice that it intends to return the trial recordings to Judge Walker as  
14 part of his judicial papers. Any party who objects shall articulate its opposition in the supplemental  
15 briefing in accordance with the schedule outlined above.

16

17

18 Dated: June 14, 2011

19

20

21

22

23


24

25

26

27

28

  
\_\_\_\_\_  
JAMES WARE  
United States District Chief Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

- 2 Alan Lawrence Schlosser aschlosser@aclunc.org  
3 Amir Cameron Tayrani Atayrani@gibsondunn.com  
4 Andrew Perry Pugno andrew@pugnotlaw.com  
5 Andrew Walter Stroud stroud@mgsllaw.com  
6 Angela Christine Thompson angelathompsonesq@gmail.com  
7 Austin R. Nimocks animocks@telladf.org  
8 Brian Ricardo Chavez-Ochoa chavezchoa@yahoo.com  
9 Brian W Raum braum@telladf.org  
10 Charles J. Cooper ccooper@cooperkirk.com  
11 Charles Salvatore LiMandri cslimandri@limandri.com  
12 Christine Van Aken christine.van.aken@sfgov.org  
13 Christopher Dean Dusseault cdusseault@gibsondunn.com  
14 Christopher Francis Stoll cstoll@nclrights.org  
15 Christopher James Schweickert cjs@wcjuris.com  
16 Claude Franklin Kolm claude.kolm@acgov.org  
17 Daniel J. Powell Daniel.Powell@doj.ca.gov  
18 Danny Yeh Chou danny.chou@sfgov.org  
19 David Boies [dboies@bsflp.com](mailto:dboies@bsflp.com)  
20 David E. Bunim Dbunim@haasnaja.com  
21 David H. Thompson dthompson@cooperkirk.com  
22 David L. Llewellyn Dllewellyn@LS4law.com  
23 Diana E Richmond drichmond@sideman.com  
24 Elizabeth O. Gill egill@aclunc.org  
25 Enrique Antonio Monagas emonagas@gibsondunn.com  
26 Ephraim Margolin ephraim\_margolin@yahoo.com  
27 Eric Grant grant@hicks-thomas.com  
28 Eric Alan Isaacson erici@rgrdlaw.com  
29 Erin Brianna Bernstein Erin.Bernstein@sfgov.org  
30 Ethan D. Dettmer edettmer@gibsondunn.com  
31 Gordon Bruce Burns Gordon.Burns@doj.ca.gov  
32 Herma Hill Kay hkay@law.berkeley.edu  
33 Holly L Carmichael holly.l.carmichael@gmail.com  
34 Howard C. Nielson hnielson@cooperkirk.com  
35 Ilona Margaret Turner iturner@nclrights.org  
36 James Bopp jboppjr@bopplaw.com  
37 James A Campbell jcampbell@telladf.org  
38 James C. Harrison jharrison@rjp.com  
39 James Dixon Esseks jesseks@aclu.org  
40 James J. Brosnahan jbrosnahan@mofa.com  
41 Jennifer Carol Pizer jpizer@lambdalegal.org  
42 Jennifer Lynn Monk jmonk@faith-freedom.com  
43 Jennifer Lynn Monk jmonk@faith-freedom.com  
44 Jeremy Michael Goldman jgoldman@bsflp.com  
45 Jerome Cary Roth Jerome.Roth@mto.com  
46 Jesse Michael Panuccio jpanuccio@cooperkirk.com  
47 John Douglas Freed jfreed@cov.com  
48 Jon Warren Davidson jdavidson@lambdalegal.org  
49 Jordan W. Lorence jlorence@telladf.org  
50 Jose Hector Moreno jhmoreno@jhmlaw.com  
51 Josh Schiller jischiller@bsflp.com  
52 Josh Schiller jischiller@bsflp.com

**United States District Court**

For the Northern District of California

- 1 Judy Whitehurst [jwhitehurst@counsel.lacounty.gov](mailto:jwhitehurst@counsel.lacounty.gov)
- 2 Kari Lynn Krogseng [krogseng@rjp.com](mailto:krogseng@rjp.com)
- 3 Kelly Wayne Kay [oakkelly@yahoo.com](mailto:oakkelly@yahoo.com)
- 4 Kevin Trent Snider [kevinsnider@pacificjustice.org](mailto:kevinsnider@pacificjustice.org)
- 5 Lauren Estelle Whittemore [lwhittemore@fenwick.com](mailto:lwhittemore@fenwick.com)
- 6 Leslie A Kramer [lkramer@fenwick.com](mailto:lkramer@fenwick.com)
- 7 Louis P. Feuchtbaum [lfeuchtbaum@sideman.com](mailto:lfeuchtbaum@sideman.com)
- 8 Manuel Francisco Martinez [manuel.martinez@acgov.org](mailto:manuel.martinez@acgov.org)
- 9 Mark Russell Conrad [Mark.Conrad@mto.com](mailto:Mark.Conrad@mto.com)
- 10 Mary Elizabeth McAlister [court@lc.org](mailto:court@lc.org)
- 11 Matthew Albert Coles [mcoles@aclu.org](mailto:mcoles@aclu.org)
- 12 Matthew Dempsey McGill [mmcgill@gibsondunn.com](mailto:mmcgill@gibsondunn.com)
- 13 Michael Wolf [mwolf@nethere.com](mailto:mwolf@nethere.com)
- 14 Michael James McDermott [mjmlusa@aol.com](mailto:mjmlusa@aol.com)
- 15 Michael Stuart Wald [mwald@stanford.edu](mailto:mwald@stanford.edu)
- 16 Patrick John Gorman [pgorman@wctlaw.com](mailto:pgorman@wctlaw.com)
- 17 Peter Obstler [peter.obstler@bingham.com](mailto:peter.obstler@bingham.com)
- 18 Peter A. Patterson [ppatterson@cooperkirk.com](mailto:ppatterson@cooperkirk.com)
- 19 Peter C Renn [prenn@lambdalegal.org](mailto:prenn@lambdalegal.org)
- 20 Richard J. Bettan [rbettan@bsflp.com](mailto:rbettan@bsflp.com)
- 21 Robert Henry Tyler [rtyler@faith-freedom.com](mailto:rtyler@faith-freedom.com)
- 22 Ronald P. Flynn [ronald.flynn@sfgov.org](mailto:ronald.flynn@sfgov.org)
- 23 Rosanne C. Baxter [rbaxter@bsflp.com](mailto:rbaxter@bsflp.com)
- 24 Sarah Elizabeth Piepmeier [spiepmeier@gibsondunn.com](mailto:spiepmeier@gibsondunn.com)
- 25 Shannon Minter [sminter@nclrights.org](mailto:sminter@nclrights.org)
- 26 Stephen V. Bomse [sbomse@orrick.com](mailto:sbomse@orrick.com)
- 27 Steven Edward Mitchel [mitchelsteve@yahoo.com](mailto:mitchelsteve@yahoo.com)
- 28 Susan Marie Popik [spopik@chapop.com](mailto:spopik@chapop.com)
- 29 Tamar Pachter [Tamar.Pachter@doj.ca.gov](mailto:Tamar.Pachter@doj.ca.gov)
- 30 Tara Lynn Borelli [tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)
- 31 Terry Lee Thompson [tl\\_thompson@earthlink.net](mailto:tl_thompson@earthlink.net)
- 32 Theane Evangelis Kapur [tkapur@gibsondunn.com](mailto:tkapur@gibsondunn.com)
- 33 Theodore B Olson [tolson@gibsondunn.com](mailto:tolson@gibsondunn.com)
- 34 Theodore Hideyuki Uno [tuno@bsflp.com](mailto:tuno@bsflp.com)
- 35 Theodore J. Boutrous [tboutrous@gibsondunn.com](mailto:tboutrous@gibsondunn.com)
- 36 Thomas R. Burke [thomasburke@dwt.com](mailto:thomasburke@dwt.com)
- 37 Timothy D Chandler [tchandler@telladf.org](mailto:tchandler@telladf.org)

- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

**Dated: June 14, 2011**

**Richard W. Wieking, Clerk**

By:           /s/ JW Chambers            
**Susan Imbriani**  
**Courtroom Deputy**