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22 **Pro Hac Vice* Application forthcoming

23 **UNITED STATES DISTRICT COURT**
24 **EASTERN DISTRICT OF CALIFORNIA**
25 **SACRAMENTO DIVISION**

26) Case No.: _____
27)
28 ProtectMarriage.com – Yes on 8, a Project of)
California Renewal,) **COMPLAINT FOR DAMAGES AND**
Plaintiff,) **EQUITABLE RELIEF**
v.) **DEMAND FOR JURY TRIAL**
Courage Campaign; Courage Campaign)
Institute,)
Defendants.)

1 Plaintiff ProtectMarriage.com – Yes on 8, a Project of California Renewal, for its claim against
2 Defendants Courage Campaign and Courage Campaign Institute, states as follows:

3 **PARTIES**

4 1. Plaintiff ProtectMarriage.com is a non-profit corporation organized under the laws of
5 the state of California having a principal place of business located at P.O. Box 20012, Riverside,
6 California, 92516.

7 2. Upon information and belief, Defendant Courage Campaign is a corporation organized
8 under the laws of the state of California having a principal place of business located at 7119 West
9 Sunset Boulevard, No. 195, Los Angeles, California, 90046 and transacts business in this District.

10 3. Upon information and belief, Defendant Courage Campaign Institute is a corporation
11 organized under the laws of the state of California having a principal place of business located at 7119
12 West Sunset Boulevard, No. 195, Los Angeles, California, 90046 and transacts business in this
13 District.

14 **JURISDICTION AND VENUE**

15 4. Jurisdiction is founded on a federal question under the Lanham Act. The Court has
16 subject matter jurisdiction over the trademark infringement, false designation of origin, and unfair
17 competition claims pursuant to the Lanham Act, 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331, 1332 and
18 1338(a) & (b). The Court has supplemental jurisdiction over the claims arising under state law
19 pursuant to 28 U.S.C. § 1367(a). The Court has personal jurisdiction over Defendants because, *inter*
20 *alia*, Defendants do business in this District.

21 5. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial portion
22 of the property that is the subject of this action (ProtectMarriage's trademarks, etc.) is situated in this
23 District and Defendants advertise in this District.

24 **FIRST CLAIM FOR RELIEF**

25 **(False Designation of Origin, Unfair Competition Under §43(a) of the Lanham Act;**
26 **15 U.S.C. § 1125(a))**

27 6. Plaintiff re-alleges and incorporates by reference the allegations contained in
28 Paragraphs 1 through 5 above as if fully rewritten herein.

1 7. Plaintiff is a non-profit corporation representing a broad-based coalition of California
2 families, community leaders, religious leaders, pro-family organizations and individuals from all
3 walks of life who have joined together to defend and restore the definition of marriage as between a
4 man and a woman. Well over 150,000 Californians have become active in supporting traditional
5 marriage through Plaintiff. Plaintiff is defending traditional marriage in the courts, through activism
6 and advocacy, and through public education and academic research.

7 8. Plaintiff operates a website at www.protectmarriage.com, which is accessed by
8 individuals all over the United States and all over the world.

9 9. Plaintiff advertises and uses a trademark logo (“ProtectMarriage Trademark”) as set
10 forth below, including variations thereof:



18 A copy of the Protect Marriage Trademark is attached as Exhibit 1 to this Complaint.

19 10. Plaintiff’s use of the ProtectMarriage Trademark is set forth on its website.

20 11. Plaintiff has extensively used the ProtectMarriage Trademark throughout its website
21 and the United States of America.

22 12. Plaintiff adopted the ProtectMarriage Trademark at least as early as January 2008 and
23 has continuously used it in interstate commerce in association with, *inter alia*, providing information
24 and support of traditional marriage.

25 13. Over the years, Plaintiff has spent a considerable amount of money in establishing the
26 ProtectMarriage Trademark in the minds of customers as a source of conservative views and
27 traditional family values.

28 14. Today, the ProtectMarriage Trademark has become associated in the minds of

1 individuals with Plaintiff. In fact, the ProtectMarriage Trademark has even acquired secondary
2 meaning in the minds of the conservative public.

3 15. On information and belief, from the Defendants' websites at www.pro8trialtracker.com
4 and www.couragecampaign.com, Defendants own and operate the aforementioned websites.

5 16. On information and belief, from the Defendants' websites, Defendants "mission is to
6 build a more progressive California and nation through innovative trainings, strategic research and
7 educational campaigns."

8 17. On information and belief, Defendants are supporters of non-traditional marriage and,
9 as such, their views are directly opposite that of Plaintiff.

10 18. On information and belief, Defendants' website www.pro8trialtracker.com is also
11 established to allow visitors to its site to follow the recent trial taking place in the Federal District
12 Court for the Northern District of California, captioned as *Perry v. Schwarzenegger*, which involves a
13 challenge to Proposition 8, the measure passed by California voters in November 2008 to define
14 marriage as one man and one woman.

15 19. Plaintiff was the official proponent of Proposition 8 and continues to defend it in legal
16 challenges.

17 20. Defendants' website is using the following image ("Infringing Logo") on
18 www.prop8trialtracker.com, a website established to provide commentary in favor of the *Perry*
19 plaintiffs' legal team and give regular updates on the *Perry v. Schwarzenegger* trial several times a
20 day:



27 A copy of the Infringing Logo is attached as Exhibit 2 to this Complaint.

28 21. Well after Plaintiff's adoption and first use of the ProtectMarriage Trademark,

1 Defendants commenced using the Infringing Logo, on or about January 11, 2010. Defendants' use of
2 the Infringing Logo is set forth in Exhibit A.

3 22. On information and belief, Defendants have visitors who access their websites from all
4 over the United States.

5 23. On January 12, 2010, Plaintiff sent a cease and desist letter to Defendants, placing
6 Defendants on actual notice of trademark and copyright infringement.

7 24. Defendants have refused to cease using the mark and have relied upon a defense of
8 parody.

9 25. Upon information and belief, Defendants have never utilized the Infringing Logo in any
10 way that would result in humor, a necessary requirement for a parody, among others. In fact
11 Defendants have used the Infringing Logo to promote a serious discussion of a trial of national
12 importance, and have further used the Infringing Logo in conjunction with seeking public
13 contributions to support the efforts of Defendants.

14 26. Defendants' use of the Infringing Logo in association with their websites, *inter alia*, is
15 an infringement of ProtectMarriage's ProtectMarriage Trademark and is likely to result in confusion,
16 mistake, or deception to visitors of their respective sites as to the source of origin of its services.

17 27. Visitors are likely to view Defendants' websites believing them to be in association
18 with ProtectMarriage's website, since Defendants use the ProtectMarriage Trademark, thereby
19 resulting in damage to ProtectMarriage.

20 28. Plaintiff has never allowed Defendants, and would not allow Defendants in the future,
21 to use the ProtectMarriage Trademark in association with Defendants' websites as it is currently in
22 use.

23 29. Defendants' uses of the Infringing Logo are infringements of the ProtectMarriage
24 Trademark and have caused confusion, mistake, and deception to the visitors of Defendants' websites
25 as to the source of origin of the services.

26 30. Defendants' use of the ProtectMarriage Trademark has resulted in the dilution of the
27 exclusive rights which Plaintiff formerly enjoyed in connection with its trademark, to the great
28 detriment of Plaintiff.

1 31. The infringement by Defendants is willful and deliberate, designed specifically to trade
2 upon the goodwill associated with the ProtectMarriage Trademark.

3 32. The goodwill associated with the ProtectMarriage Trademark is of great value, and
4 should the infringement be allowed to continue, Plaintiff will suffer irreparable harm and detriment to
5 its trade reputation and goodwill.

6 33. Defendants' use of the ProtectMarriage Trademark constitutes a false designation of
7 origin, which is likely to deceive and has deceived customers and prospective customers into believing
8 that Defendants' website and services they render thereupon are that of Plaintiff's—or, at the very
9 least, are authorized by Plaintiff—and are therefore likely to divert and have diverted customers away
10 from Plaintiff.

11 34. By their unauthorized use of the ProtectMarriage Trademark, Defendants have falsely
12 designated the origin of their services and have competed unfairly with Plaintiff in violation of
13 U.S.C. § 1125(a).

14 35. The acts of Defendants described above have caused injury and damages to Plaintiff,
15 have caused injury to Plaintiff's goodwill and reputation, and, unless enjoined, will cause further
16 irreparable injury, for which Plaintiff will have no adequate remedy at law.

17 **SECOND CLAIM FOR RELIEF**
18 **(Common Law Trademark Infringement)**

19 36. Plaintiff re-alleges and incorporates by reference the allegations contained in
20 Paragraphs 1 through 35 above as if fully rewritten herein.

21 37. Plaintiff owns and uses the ProtectMarriage Trademark in connection with at least
22 those services as set forth within its website, i.e., to promote traditional marriage.

23 38. Plaintiff owns and enjoys common law rights in California and throughout the United
24 States in and to the ProtectMarriage Trademark, and which are superior to any rights which
25 Defendants may claim in and to the Infringing Logo trademark, in any form or style.

26 39. Defendants' use of the ProtectMarriage Trademark in the State of California and
27 elsewhere in the United States is likely to cause and has caused confusion as to the source of
28 Defendants' services, in that visitors thereof will be likely to associate or have associated such services

1 with and as originating from Plaintiff, all to the detriment of Plaintiff.

2 40. Defendants’ willful and deliberate acts described above have caused injury and
3 damages to Plaintiff, have caused injury to Plaintiff’s goodwill and reputation, and, unless enjoined,
4 will cause further irreparable injury, for which Plaintiff will have no adequate remedy at law.

5 **THIRD CLAIM FOR RELIEF**
6 **(Unfair Competition)**

7 41. Plaintiff re-alleges and incorporates by reference the allegations contained in
8 Paragraphs 1 through 40 above as if fully rewritten herein.

9 42. This claim is for unfair competition under California law.

10 43. Defendants’ conduct described above constitutes unfair competition pursuant to the
11 common law of California.

12 44. As a result of Defendants’ intentional and wrongful acts described above, Defendants
13 have infringed the distinctive features in Plaintiff’s mark in a manner that tends to confuse, in the
14 public mind, others’ services and advertising with Plaintiff’s services and advertising. Defendants’
15 conduct has caused, and will continue to cause, damage to Plaintiff, and is causing irreparable injury to
16 Plaintiff in a manner that may not be adequately compensated by money damages. Unless enjoined,
17 Defendants’ actions will cause further injury to Plaintiff for which Plaintiff shall have no adequate
18 remedy at law.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff ProtectMarriage.com prays for judgment as follows:

A. Judgment against Defendants Courage Campaign and Courage Campaign Institute for temporary, preliminary, and permanent injunctions granted pursuant to 15 U.S.C. § 1116, enjoining Defendants and their affiliates, partners, representatives, servants, employees, attorneys, and all persons in active concert, privity, or participation with Defendants, from using the ProtectMarriage Trademark (and the Infringing Logo), and from otherwise infringing Plaintiff’s trademarks; from competing unfairly with Plaintiff; from falsely designating the origin of the Defendants’ services; from diluting the distinctive quality of Plaintiff’s trademarks; from engaging in deceptive trade practices in violation of 15 U.S.C. § 1051 et seq. and California law; and further specifically from:

- (i) using in any manner ProtectMarriage’s ProtectMarriage Trademark, any mark or name confusingly similar to the ProtectMarriage Trademark, or any other mark which so resembles the ProtectMarriage Trademark as to be likely to cause confusion, deception, or mistake, in connection with marriage or conservative values;
- (ii) passing off, inducing or enabling others to sell or pass off any goods or services as being rendered by Plaintiff, which goods or services are not in fact that of Plaintiff or belonging to Plaintiff, under the control, supervision and approval of ProtectMarriage, or for sale under the marks owned by Plaintiff, or any other mark which so resembles Plaintiff’s mark so as to be likely to cause confusion, deception or mistake;
- (iii) committing any acts, including use of the ProtectMarriage Trademark, calculated to cause purchasers to believe that Defendants’ goods or services are those sold under the control and supervision of Plaintiff, or are sponsored or approved or connected with Plaintiff, are guaranteed by Plaintiff, or are rendered under the control and supervision of Plaintiff;
- (iv) further diluting and infringing Plaintiff’s ProtectMarriage Trademark and damaging its goodwill;

1 (v) selling or offering to sell any products or services, or otherwise accepting donations
2 pursuant to the use of, or under, the ProtectMarriage Trademark, or any other
3 distinctive design or trademark confusingly similar thereto.

4 B. Judgment against Defendants pursuant to the power granted to the Court under 15
5 U.S.C. §§ 1117 and 1118 that Defendants cease and desist any and all use of any and all products,
6 including labels, signs, packages, brochures, advertising matter, receptacles, sale and purchased
7 documents, letterhead, and other material in the possession of Defendants or under Defendants'
8 control which bear the ProtectMarriage Trademark or any other mark confusingly or substantially
9 similar to Plaintiff's trademarks, or which have been used in connection with the manufacturing,
10 advertising, offering for sale or sale of products bearing said ProtectMarriage Trademark which are not
11 Plaintiff's or made without the authorization or control of ProtectMarriage;

12 C. Ordering that Defendants be adjudged to have violated Sections 32, 43(a) and 43(c) of
13 the Lanham Act, 15 U.S.C. §§ 1114, 1125(a) and 1125(c), and Unfair Competition under California
14 law.

15 D. Ordering an accounting of all gains, profits, savings, and advantages realized by
16 Defendants from its aforesaid acts of trademark infringement and dilution, false designation of origin
17 and unfair competition;

18 E. Awarding such damages as Plaintiff shall establish in consequence of Defendants'
19 aforesaid acts of trademark infringement and dilution, false designation of origin, and unfair
20 competition, together with appropriate interest thereon, including three times the amount found as
21 actual damages by the trier of fact to properly compensate Plaintiff for its damages, pursuant to 15
22 U.S.C. § 1117(a);

23 F. Ordering Defendants to recall from all chains of distribution all goods, services,
24 product packaging, promotional materials, advertisements, commercials, infomercials and other items,
25 the dissemination of which by Defendants would violate the injunction herein granted;

26 G. Ordering Defendants to deactivate all websites displaying the Infringing Logo until
27 such time that the Infringing Logo(s) is/are removed and deliver up for destruction any and all goods,
28 services, product packaging, promotional materials, advertisements, commercials, and other items in

1 the possession, custody or control of Defendants which, if sold, displayed or used, would violate the
2 injunction herein granted;

3 H. Awarding Plaintiff punitive and exemplary damages against Defendants and in favor of
4 ProtectMarriage by reason of Defendants' acts set forth herein, including, but not limited to, unfair
5 competition;

6 I. Awarding Plaintiff the costs of this action;

7 J. Declaring that this is an exceptional case, pursuant to 15 U.S.C. § 1117, and that
8 Plaintiff be awarded its reasonable attorneys' fees;

9 K. Judgment against Defendants indemnifying Plaintiff from any claims brought against
10 Plaintiff for negligence, debts, malpractice, or other breaches of any duty owed by Defendants to any
11 person who was confused as to some association between Plaintiff and Defendants as alleged in this
12 Complaint;

13 L. Judgment against Defendants for any and all claims, demands, or causes of action (now
14 or in the future) resulting from Defendants' actions alleged in the complaint; and

15 M. For such other and further relief as this Court deems just and equitable.
16

17 Dated this 19th day of January, 2010.

Respectfully submitted,

18 /s/David J. Hacker
19 David J. Hacker (CA Bar No. 249272)
20 ALLIANCE DEFENSE FUND
21 *Attorney for Plaintiff*
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EXHIBIT 1



ProtectMarriage.com

EXHIBIT 2



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21 *Attorneys for Plaintiff ProtectMarriage.com*

22 **Pro Hac Vice* Application forthcoming

23 **UNITED STATES DISTRICT COURT**
24 **EASTERN DISTRICT OF CALIFORNIA**
25 **SACRAMENTO DIVISION**

26) Case No.: _____
27)
28 ProtectMarriage.com – Yes on 8, a Project of) **PLAINTIFF’S MEMORANDUM OF**
California Renewal,) **POINTS AND AUTHORITIES IN**
Plaintiff,) **SUPPORT OF EX PARTE MOTION FOR**
vs.) **TEMPORARY RESTRAINING ORDER**
) **AND PRELIMINARY INJUNCTION**
29)
30 Courage Campaign; Courage Campaign) Date: _____
31 Institute,) Time: _____
32) Dept.: _____
33 Defendants.) Judge: _____
34)
35 _____)

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INTRODUCTION

1
2 This lawsuit concerns Defendants Courage Campaign and Courage Campaign Institute’s
3 knowing and intentional infringement of Plaintiff ProtectMarriage.com’s ProtectMarriage Trademark.
4 Defendants are willfully misusing the trademark and have altered it in such a way to intentionally
5 harm Plaintiff, despite having full knowledge of Plaintiff’s rights to the ProtectMarriage Trademark.
6 Each passing day generates more visits to this website, and more donations to Courage Campaign by
7 visitors who “click on” the Courage Campaign infringing logo, thus harming Plaintiff. The harm to
8 Plaintiff is its loss of goodwill in its mark, the tarnishing of its trademark, and likelihood of confusion
9 in the marketplace, when individuals believe they recognize the ProtectMarriage Trademark only to
10 find out that it is instead a mark used by Courage Campaign and Courage Campaign Institute.
11 Plaintiff is also in danger of exponentially more harm due to Defendants’ subtle, material alteration to
12 the ProtectMarriage Trademark. In addition, visitors unfamiliar to ProtectMarriage.com will come to
13 believe that the ProtectMarriage Trademark is actually owned by Defendants, resulting in the
14 destruction of ProtectMarriage Trademark’s goodwill, which is irreparable. As such, Plaintiff requires
15 immediate relief against Defendants.

16 As more fully explained below, Defendants are blatantly infringing upon Plaintiff’s intellectual
17 property, namely, ProtectMarriage’s trademark and copyright rights, all of which are exclusively and
18 solely owned by Plaintiff. More specifically, Defendants have knowingly and willfully copied the
19 ProtectMarriage’s Trademark and altered it in a manner inconsistent with the ProtectMarriage’s mark
20 and ideals, thus causing irreparable harm. Accordingly, Plaintiff respectfully requests that this Court
21 issue a temporary restraining order enjoining Defendants from continuing to use Plaintiff’s intellectual
22 property. Specifically, Plaintiff seeks a temporary restraining order and preliminary injunction against
23 Defendants Courage Campaign and Courage Campaign Institute to stop them from continuing to use
24 the ProtectMarriage Trademark on websites owned and/or controlled by Defendants. Plaintiff also
25 seeks the impoundment and/or destruction of anything in Defendants’ possession or control bearing
26 the ProtectMarriage Trademark.

1 **I. STATEMENT OF FACTS**

2 **A. Plaintiff and the ProtectMarriage Trademark**

3 Plaintiff is a California non-profit corporation representing a broad-based coalition of
4 California families, community leaders, religious leaders, pro-family organizations and individuals
5 from all walks of life who have joined together to defend and restore the definition of marriage as
6 between a man and a woman. (Decl. of Ronald Prentice, Jan. 16, 2010, at ¶2.) Plaintiff was the
7 proponent of Proposition 8 in California during the 2008 election season. During the petition drive,
8 Plaintiff used their logo, the ProtectMarriage Trademark, all over the state in numerous formats while
9 collecting more than 1.1 million signatures to place the measure on the ballot. (*Id.* ¶4.) The logo was
10 ubiquitous and clearly represents support for Proposition 8. Subsequently, the Trademark was used
11 during the time leading up to the November 2008 election to garner support for the measure: on the
12 ProtectMarriage.com website, written campaign materials, billboards, yard signs, bumper stickers, and
13 television commercials, among others. (*Id.* ¶¶4-8.) In November 2008, more than seven million
14 Californians voted in favor of Proposition 8. (*Id.* ¶3.) During the campaign, over 150,000
15 Californians joined with ProtectMarriage.com to become active in supporting traditional marriage
16 through defending traditional marriage in the courts, through activism and advocacy, and through
17 public education and academic research. (*Id.*) After the passage of Proposition 8, Plaintiff has
18 continued to use a variation of the logo on its website, which now serves the purpose of informing the
19 public about issues related to the legal challenges to Proposition 8 and collecting donations to fund its
20 legal defense. (*Id.* ¶9.)

21 **B. Defendants, Their Motives, and Their Infringing Uses**

22 Defendants hold views that are diametrically opposed to those of Plaintiff and are using
23 Plaintiff's mark for a website designed to provide commentary on the trial in *Perry v. Schwarzenegger*
24 and the efforts of ProtectMarriage.com. (*Id.* ¶¶12-13.)

25 As this Court is likely aware, there is a trial ongoing in the District Court for the Northern
26 District of California, captioned *Perry v Schwarzenegger*. (*Id.* ¶¶10, 17.) The *Perry* plaintiffs have
27 challenged Proposition 8 as a violation of federal law. The state defendants have refused to defend the
28 measure, and Plaintiff intervened in order to defend the measure, making it the functional defendants

1 in the litigation. (*Id.* ¶10.) Defendants are using the ProtectMarriage Trademark to promote a website
2 that provides commentary in favor of the *Perry* plaintiffs’ legal team and gives daily updates on the
3 *Perry* trial several times a day via its website, www.prop8trialtracker.com. (*Id.* ¶¶13, 14.)

4 **II. ARGUMENT**

5 Under the well-established requirements in this circuit for a preliminary injunction or
6 temporary restraining order, Defendants should be immediately enjoined from using Plaintiff’s mark.
7 A plaintiff seeking a preliminary injunction or a temporary restraining order must establish that he is
8 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
9 relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.
10 *Winter v. Nat’l Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *see also Stuhlbarg Int’l Sales Co.*
11 *v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that the standard for a
12 temporary restraining order is “substantially identical”). To obtain a preliminary injunction based on a
13 trademark infringement claim, a trademark holder need “only show a likelihood of success on the
14 merits.” *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998). The Court will presume
15 irreparable injury because trademark damages are, by their very nature, irreparable. “This
16 presumption effectively conflates the dual inquiries of this prong into the single question of whether
17 the plaintiff has shown a likelihood of success on the merits.” *Garden of Life, Inc. v. Letzer*, 318 F.
18 Supp. 2d 946, 956 (C.D. Cal. 2004) (citing *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205
19 n.4 (9th Cir. 2000)); *Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 633 (9th Cir.
20 2007); *K-2 Corp. v. Body Glove Int’l, LLC*, No. C09-0042JLR, 2009 WL 87446, *2 (W.D. Wash. Jan.
21 13, 2009); *Moroccanoil, Inc. v. Moroccan Gold, LLC*, 590 F. Supp. 2d 1271, 1281 (C.D. Cal. 2008).
22 Thus, Plaintiff need only establish a likelihood of success to obtain a preliminary injunction here.

23 **A. Plaintiff Has a Strong Probability of Success on the Merits.**

24 The Lanham Act, 15 U.S.C. § 1051 *et seq.*, regulates the use of trademarks in commercial
25 activity and protects both registered and unregistered marks from infringement. *Two Pesos v. Taco*
26 *Cabana*, 505 U.S. 763, 768 (1992). To prevail on a claim under this act for trademark infringement or
27 unfair competition, plaintiff must show that it owns a valid trademark, that there is an infringing use
28 by the defendant, and that the defendant’s use creates a likelihood of confusion. 15 U.S.C. § 1125;

1 *Sleep Country USA, Inc. v. Northwest Pacific, Inc.*, No. C02-1923P, 2003 WL 23842534, *3-6 (W.D.
2 Wash., Oct. 10, 2003); *see also Applied Info. Sci. Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir.
3 2007) (“To prevail on its trademark infringement claim, AIS must show that: (1) it has a valid,
4 protectable trademark, and (2) that eBay’s use of the mark is likely to cause confusion.”).

5
6 **1. The Mark Is a Valid Trademark That Belongs to Plaintiff ProtectMarriage.**

7 Plaintiff is likely to succeed in demonstrating its ownership of the mark, as the demonstrated
8 facts show ownership rests squarely with Plaintiff.

9 It is axiomatic in trademark law that the standard test of ownership is
10 priority of use. To acquire ownership of a trademark it is not enough to
11 have invented the mark first or even to have registered it first; the party
12 claiming ownership must have been the first to actually use the mark in
13 the sale of goods or services.

14 *Senguko Works Ltd. v. RMC Int’l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir.1996).

15 “Under the principle of first in time equals first in right, priority ordinarily comes with earlier
16 use of a mark in commerce.” *Grupo Gigante SA De CV v. Dallo & Co., Inc.*, 391 F.3d 1088, 1093
17 (9th Cir. 2004) (emphasis in original). “Use in commerce” is established when it is shown that a party
18 has both adopted the mark and used it “in a way sufficiently public to identify or distinguish the
19 marked [services] in an appropriate segment of the public mind as those of the holder of the mark.”
20 *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1159 (9th Cir. 2001).

21 Here, Plaintiff created the mark. (Prentice Decl. at ¶4). Plaintiff used the mark well before
22 Defendant. (*Id.* ¶¶5-6, 14.) Plaintiff adopted the mark and used it extensively and continuously in a
23 way that identifies its services with the mark continuously since at least January 2008. (*Id.* ¶¶4-9.)
24 Plaintiff’s use of the mark on its website, as well as the myriad of other uses during the 2008 campaign
25 and after, constitutes more than sufficient use in commerce of the mark. As such, Plaintiff has
26 established the mark as a trademark and enjoys a superior claim to the mark. In contrast, Defendants
27 copied Plaintiff’s mark and began using a counterfeit version of the mark on or about January 11,
28 2010, to coincide with the start of the trial proceedings in *Perry v. Schwarzenegger*. (*Id.* ¶¶13-14.) It
does not appear that Defendants ever used the ProtectMarriage Trademark prior to this date and for

1 any other purpose. Thus, as Plaintiff began extensively using the mark in commerce well before
2 Defendants, Plaintiff has established ownership of the mark.

3 **2. Defendants' Use of the ProtectMarriage Trademark is Likely to Cause**
4 **Confusion.**

5 "The core element of trademark infringement is the likelihood of confusion, i.e., whether the
6 similarity of the marks is likely to confuse customers about the source of the products." *Brookfield*
7 *Comm'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1053 (9th Cir. 1999). Several types of
8 confusion are actionable: product confusion, confusion over source, or confusion over sponsorship,
9 affiliation or connection. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §
10 23:5 (4th ed. 1994). The Ninth Circuit looks at eight factors for guidance in determining the
11 likelihood of confusion: similarity of the conflicting designations; relatedness or proximity of the two
12 companies' products or services; strength of the mark; marketing channels used; degree of care likely
13 to be exercised by purchasers in selecting goods; defendant's intent in selecting its mark; evidence of
14 actual confusion; and likelihood of expansion in product lines. *Brookfield*, 174 F.3d at 1053-54.
15 Some factors are more important than others depending on the case. *Id.* at 1054. In the Internet
16 context, the most important factors are the virtual identity of the mark, relatedness of the goods, and
17 simultaneous use of the Web as a marketing channel. *Id.* at 1055 n.16. Notably, the mere likelihood
18 of confusion is enough to satisfy this inquiry. "The failure to *prove* instances of actual confusion is
19 *not* dispositive against a trademark plaintiff, because actual confusion is hard to prove; difficulties in
20 gathering evidence of actual confusion make its absence generally unnoteworthy." *Id.* at 1050
21 (emphasis in original).

22 **a. The ProtectMarriage Trademark and Defendants' Infringing Mark are**
23 **Similar.**

24 "The similarity of the marks will always be an important factor. Where the two marks are
25 entirely dissimilar, there is no likelihood of confusion." *Id.* at 1054. Here, however, the similarity
26 between the marks is unmistakable. The ProtectMarriage Trademark and Defendants' "Trial Tracker"
27 logo share the same color scheme, four figures, and banner displays. Defendants did not create their
28 mark; rather, it is clear that they blatantly copied and adopted Plaintiff's mark.

1 Notwithstanding the nearly identical nature of the two marks, Defendants have distinguished
 2 their logo in one subtle way. Due to Defendants' social view regarding the definition of marriage,
 3 which is diametrically opposed to that of Plaintiff, Defendants altered the male figure in Plaintiff's
 4 mark (appearing to wear pants) to be that of a female (appearing to wear a dress), so that two female
 5 figures, rather than a male and female figure, represented the adults in the depiction of a family. Such
 6 alteration may be subtle, but this slight change shows that Defendants copied Plaintiff's mark and
 7 altered it to support their views and use it for their own purposes.

8 **b. Defendants' Infringing Use of the ProtectMarriage Trademark is Related
 to Plaintiff's.**

9 Next, the relatedness of the uses supports a conclusion of infringement. This inquiry is a
 10 common-sense one: "[W]hether the consuming public is likely somehow to associate [defendant's]
 11 products [or services] with [plaintiff's]." *Id.* at 1056. The focus here is on plaintiff's actual or
 12 potential visitors. McCarthy, *supra*, at § 23:5. And where the actions of defendant "improperly
 13 divert[s] attention in a case where the products or services of the battling parties are not competitive,
 14 [they] may be 'related' because confusion over affiliation, connection or sponsorship is likely." *Id.*
 15 Even when the relationship could only result in "initial interest confusion," and would probably be
 16 dispelled prior to a purchase being made, a mark-owner is entitled to protection against such
 17 confusion. *Id.*

18 Here, Defendants are using the ProtectMarriage Trademark on their websites purporting to
 19 "keep track" of the court proceedings being held to determine the validity of Proposition 8, the voter
 20 initiative supported by Plaintiff. (Prentice Decl. ¶¶13-14.) Plaintiff has used the same mark
 21 throughout its campaign to get Proposition 8 on the ballot and to pass Proposition 8, and continues to
 22 use a variation of the logo on its current site to represent its views on the definition of marriage and to
 23 denote consistency with the campaign. (*Id.* ¶¶4-9.) Individuals on both sides of the marriage issue
 24 will likely be interested in "tracking" the *Perry* trial, especially Plaintiff's supporters, since Plaintiff is
 25 a party to the litigation and has been raising money for legal defense of the measure on its website.
 26 (*Id.* ¶¶ 9-11, 17.) Although Plaintiff's and Defendants' views are opposite to one another, any visitor
 27 to Defendants' sites, after reviewing the logo, either will initially believe that they are at a site
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1 authorized by Plaintiff or at Plaintiff's site, or will believe that the logo is owned by Defendants.
2 Thus, the uses are highly related.

3 **c. Both Plaintiff and Defendants Simultaneously Use the Internet as a**
4 **Marketing Channel.**

5 As noted, both parties use the Web to advertise. Plaintiff uses its website,
6 www.protectmarriage.com to promote the logo in association with its ideals. (*Id.* ¶¶6-7.) Defendants
7 advertise via "prop8trialtracker.com" and "couragecampaign.org." (*Id.* ¶13.) If both parties use the
8 Web as a marketing and advertising facility, "courts have consistently recognized [this factor] as
9 exacerbating the likelihood of confusion." *Brookfield*, 174 F.3d at 1057. Here, both parties use the
10 Web as their primary marketing channel. As stated above, Plaintiff has used the same mark
11 throughout its campaign to get Proposition 8 on the ballot and to pass Proposition 8, and continues to
12 use a variation of the logo on its current site to represent its views on the definition of marriage.
13 Individuals on both sides of the marriage issue will likely be interested in "tracking" the *Perry* trial,
14 especially Plaintiff's supporters, since Plaintiff is a party to the litigation and has been raising money
15 for legal defense of the measure on its website. Plaintiff, like Defendants, is tracking the progress of
16 the *Perry* trial on its blog, which is on its website. (Prentice Decl. ¶17.) Thus, this factor strongly
17 weighs in favor of a finding that consumer confusion is likely.

18 Given that the marks are virtually identical, the uses are related, and the Internet is used for
19 marketing by both parties, many types of confusion arise: (1) consumers might assume they have
20 reached Plaintiff's website when they reach Defendants'; (2) consumers might incorrectly believe
21 Defendants are licensed by, sponsored by, or related to Plaintiff, or they might incorrectly conclude
22 that perhaps Plaintiff's services are no longer available; or (3) Defendants may gain the goodwill of
23 Plaintiff's supporters who look for Plaintiff's services at Defendants' site, immediately recognize the
24 distinction, but continue on Defendant's site anyway, since the initial interest confusion that brought
25 them to the site was a misappropriation of the goodwill associated with Plaintiff's mark. All of these
26 types of likelihoods of confusion are actionable and common in Internet-related cases. *Brookfield*, 174
27 F.3d at 1057 (listing this same confusion in that case, both offering goods and/or services in the
28 entertainment industry).

1 **d. The Additional Factors Relating to Confusion Also Favor Plaintiff.**

2 **(1) Defendants' Intent in Adopting the Mark**

3 "The law has long been established that if an infringer adopts his designation with the intent of
4 deriving benefit from the reputation of the trade-mark or trade name, its intent may be sufficient to
5 justify the inference that there are confusing similarities." *Id.* at 1059 (internal quotation omitted).
6 "This factor favors the plaintiff where the alleged infringer adopted his mark with knowledge, actual
7 or constructive, that it was another's trademark." *Id.* (citing *Official Airline Guides, Inc., v. Goss*, 6
8 F.3d 1385, 1394 (9th Cir. 1993) ("When an alleged infringer knowingly adopts a mark similar to
9 another's, courts will presume an intent to deceive the public."); *Fleischmann Distilling Corp. v.*
10 *Maier Brewing Co.*, 314 F.2d 149, 157 (9th Cir. 1953)). The similarities between Plaintiff's mark and
11 the mark used by Defendants show that Defendants *intentionally* cut, altered and pasted Plaintiff's
12 trademark from Plaintiff's website onto its own. Defendants then *intentionally* promoted and created
13 confusion by posting the mark on its site, knowing full well that the mark was not their own. That
14 alone demonstrates a calculated disregard of plaintiff's rights—and the law infers confusion from such
15 an intent.

16 **(2) The Degree of Care Likely to be Exercised by the Public**

17 This factor also weighs in favor of Plaintiff. The Defendants are targeting an audience
18 interested in the outcome and daily happenings of the lawsuit, *Perry v. Schwarzenegger*. None of
19 these visitors is expected to be especially sophisticated. Additionally, in the Internet context, in
20 particular, entering a web site takes little effort—usually one click from a linked site or a search
21 engine's list; thus, Web surfers are more likely to be confused as to the ownership of a web site than
22 traditional patrons of a brick-and-mortar store would be of a store's ownership. *Id.* at 1057; *see also*
23 *GoTo.com*, 202 F.3d at 1209 ("Navigating amongst web sites involves practically no effort
24 whatsoever, and arguments that Web users exercise a great deal of care before clicking on hyperlinks
25 are unconvincing."). Here, both parties make use of the internet, a medium inherently susceptible to
26 easy confusion, which weighs in favor of Plaintiff. The possibility of confusion is even more likely
27 here, where the name of Defendants' website, www.prop8trialtracker.com, does not indicate which
28

1 side of the issue is being advocated. Thus, any person seeking information about the *Perry* trial may
2 find themselves at Defendants' website, where Plaintiff's logo is being used.

3 **e. Defendants' Logo is not a Parody.**

4 It is presumed that Defendants will attempt to defend their actions by arguing that its logo is a
5 "parody" of Plaintiff's trademark. But without question, it is clear that Defendants' logo is not a
6 parody. In a traditional trademark infringement suit founded on the likelihood of confusion rationale,
7 the claim of parody is not really a separate "defense" as such, but merely a way of phrasing the
8 traditional response that customers are not likely to be confused as to the source, sponsorship or
9 approval. *Mutual of Omaha Ins. Co. v. Novak*, 648 F. Supp. 905, 910 (D. Neb. 1986), *aff'd*, 836 F.2d
10 397 (8th Cir. 1987). "Some parodies will constitute an infringement, some will not. But the cry of
11 'parody!' does not magically fend off otherwise legitimate claims of trademark infringement or
12 dilution. There are confusing parodies and non-confusing parodies. All they have in common is an
13 attempt at humor through the use of someone else's trademark. A non-infringing parody is merely
14 amusing, not confusing." McCarthy, *supra*, at § 31.38[1].

15 In several cases, the courts have held, in effect, that poking fun at a trademark is no joke and
16 have issued injunctions. Examples include: a diaper bag with green and red bands and the wording
17 "Gucchi Goo," allegedly poking fun at the well-known Gucci name and the design mark, *Gucci Shops,*
18 *Inc. v. R.H. Macy & Co.*, 446 F. Supp. 838, 838-39, 841 (S.D.N.Y.1977); and the use of a competing
19 meat sauce of the trademark "A.2" as a "pun" on the famous "A.1" trademark, *Nabisco Brands, Inc. v.*
20 *Kaye*, 760 F. Supp. 25, 26, 29 (D. Conn. 1991). Since a true parody will be so obvious that a clear
21 distinction is preserved between the source of the target and the source of the parody, a court found
22 that the "Hard Rain" logo was an infringement of the "Hard Rock" logo. *Hard Rock Cafe Licensing*
23 *Corp. v. Pacific Graphics, Inc.*, 776 F. Supp. 1454, 1462-64 (W.D. Wash. 1991). In such a case, the
24 claim of parody is no defense "where the purpose of the similarity is to capitalize on a famous mark's
25 popularity for the defendant's own commercial use." *Id.* at 1462.

26 As shown in Exhibit 4 and 5 to the Declaration of Ronald Prentice, which are true and accurate
27 images of Defendants' websites, there is nothing to suggest any "poking fun" in using Plaintiff's
28 Trademark. Defendants' views on marriage are clearly set forth in the logo, namely, same-sex

1 marriage. There is nothing whatsoever to suggest that Defendants are “poking fun” at Plaintiff, i.e.,
2 there is no joke, no cartoon and no comic relief. The words in Defendants’ logo, “Prop. 8 Trial
3 Tracker,” are not humorous or comedic, nor is the title of their website; in fact, both are rather
4 straightforward. As such, Defendants’ logo is not a parody in any way. Instead, Defendants appear to
5 be using the logo in the same manner as which Plaintiff is using its trademarked logo, as a source
6 identifier. But Plaintiff created, adopted and used its logo before this use by Defendants. Defendants’
7 logo is therefore an infringement of Plaintiff’s ProtectMarriage logo.

8 Because Plaintiff has shown that they own the ProtectMarriage Trademark, that Defendants’
9 use is likely to create confusion, and that Defendants have infringed Plaintiff’s trademark, Plaintiff is
10 likely to succeed on the merits of their claim, satisfying the first element of the test for issuing a
11 temporary restraining order or preliminary injunction.

12 **B. Plaintiff Will Suffer Irreparable Harm Without Immediate Injunctive Relief.**

13 The next consideration is whether irreparable injury is likely in the absence of a preliminary
14 injunction. *Winter*, 129 S. Ct. at 375. In a trademark infringement claim in the Ninth Circuit,
15 “irreparable injury may be presumed from a showing of likelihood of success on the merits.” *Marlyn*
16 *Nutraceuticals, Inc., v. Mucos Pharma GmbH Co.*, 571 F.3d 873, 877 (9th Cir. 2009) (quoting *El*
17 *Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir.2003) and *GoTo.com*, 202 F.3d at 1205 n.4).
18 Thus, at the preliminary injunction stage, likelihood of success of trademark infringement warrants
19 relief without delving further: “This presumption effectively conflates the dual inquiries of this prong
20 into the single question of whether the plaintiff has shown a likelihood of success on the merits.”
21 *Garden of Life*, 318 F. Supp. 2d at 956 (citing *GoTo.com*, 202 F.3d at 1205 n.4).

22 Further reflection only confirms that the injury to Plaintiff without an injunction, contrasted
23 with the total absence of harm to Defendants if injunctive relief were granted, strongly supports
24 injunctive relief. First, damages to trademarks are “by their very nature, irreparable.” *Id.* Secondly,
25 Defendants are capitalizing on the public notoriety of a high profile trial that is scheduled to end in a
26 matter of days or weeks. Should the court refuse to enter a temporary restraining order, the very
27 subject matter incorporated into the counterfeit logo, the *Perry* trial, will have concluded and
28 Defendants will have achieved their goal of capitalizing on Plaintiff’s mark to the detriment of

1 Plaintiff. Accordingly, Plaintiff has demonstrated irreparable harm as a result of Defendants'
2 infringement.

3 **C. The Balance of Equities Favors Granting Immediate Injunctive Relief.**

4 A plaintiff seeking a preliminary injunction must establish that the balance of equities tips in
5 her favor. *Winter*, 129 S. Ct. at 374. When considering this factor, “courts will not shy away from
6 issuing preliminary injunctive relief, ‘where to do so would be to aid a second comer who has sought
7 to trade upon the efforts and good will of the first comer.’” *Moroccanoil*, 590 F. Supp. 2d at 1281
8 (quoting *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1333 (7th Cir. 1977)).

9 As the Federal Circuit has noted, if a plaintiff will ultimately prevail at trial, then any harm
10 befalling the defendant is its own doing. *Bell & Howell Document Mgmt. Prods. Co. v. Altek Sys.*, 132
11 F.3d 701, 708 (Fed. Cir. 1997). As discussed above, Plaintiff has shown it is likely to succeed on the
12 merits of its claim. The harm to Plaintiff from Defendants’ infringement is substantial. Moreover,
13 Defendants are not in a position to protest the entry of an injunction because any injury suffered by
14 Defendants are self-inflicted—they have chosen to knowingly infringe Plaintiff’s long-used mark, and
15 refused to rectify the harm once it was pointed out. Plaintiff is not requesting the removal of
16 Defendants’ entire website—rather, Plaintiff is merely seeking to prevent Defendants from using a
17 mark that is confusingly similar to the mark of the Plaintiff. The balance of equities tips in Plaintiff’s
18 favor, and further favors issuance of a temporary restraining order.

19 **D. Immediate Injunctive Relief Against Defendants Is in the Public Interest.**

20 The last factor to consider in granting a preliminary injunction is whether issuance would be in
21 the public interest. *Winter*, 129 S.Ct. at 374. “The dual purposes of infringement law [are to ensure]
22 that owners of trademarks can benefit from the goodwill associated with their marks and that
23 consumers can distinguish among competing producers.” *Thane Int’l v. Trek Bicycle Corp.*, 305 F.3d
24 894, 901 (9th Cir.2002). A preliminary injunction in this case furthers the motivations for trademark
25 law and the public interest in avoiding deception and confusion in the market. *See Moroccanoil*, 590 F.
26 Supp. 2d at 1282. Moreover, given that immediate relief is needed in this case in order to be effective,
27 due to the relatively short duration of the *Perry* trial, the extraordinary relief of a temporary restraining
28 order is warranted and is in the public interest.

1 **III. CONCLUSION**

2 Plaintiff ProtectMarriage.com respectfully requests that this Court grant its motion for a
3 temporary restraining order against Defendants Courage Campaign and Courage Campaign Institute
4 immediately. Plaintiff seeks an Order in accordance with the Proposed Order filed simultaneously
5 herewith.

6
7 Dated this 19th day of January, 2010.

Respectfully submitted,

8 /s/David J. Hacker
9 David J. Hacker (CA Bar No. 249272)
10 ALLIANCE DEFENSE FUND
11 Attorney for Plaintiff
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