Filing # 29212176 E-Filed 07/02/2015 12:00:09 PM

**IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION**

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, et al.,

Plaintiffs,

vs. **Case No. 2012 CA 2842**

KENNETH W. DETZNER etc., et al.,

Defendants.

_____________________________________/

Non-Parties' Additional Submission Regarding *In Camera* Inspection Issues

Certain of the Non-Parties, namely Rich Heffley, Marc Reichelderfer, Joel Springer, Frank Terraferma, Rich Johnston, Andrew Wiggins and Jim Rimes, provide this additional submission in support of their continuing claims of First Amendment privilege, and to further assist the Court with its inspection *in camera* of those portions of the 1,295 pages of "Data Targeting Group Documents" that the Non-Parties have designated as being subject to their privilege claims (the "Designated Documents").[1]

Initially, it should be noted that Special Master Major Harding, Judge Lewis and a panel of the First DCA all have already reviewed the Designated Documents *in camera* and applied the Perry balancing test to them. In each case, all three jurists found these very documents privileged. Accordingly, this Court's application of the Perry balancing test to the same

[1] *See* Certain Non-Parties' Additional Submission in Support of Their Motion to Quash or for Protective Order or, Alternatively, Request for Ruling, for Reconsideration or a Stay filed June 23 and the preliminary designations contained therein, as subsequently modified by these Non-Parties' filing of June 29 entitled Certain Non-Parties' Continuing Designation of Materials Subject to Claims of Privilege and Requesting Review In Camera, pp. 2 -3.

documents should result in the same outcome: the documents are protected by the associational privilege and should not be disclosed.

1. The Required *Perry* Balancing Test. The Court's general task is framed in *Perry v. Schwarzenegger,* 591 F.3d 1147 (9th Cir. 2010) -

> [A] claim of First Amendment privilege [as asserted by the Non-Parties] is subject to a two-part framework. The party asserting the privilege must demonstrate . . . a prima facie showing of arguable first amendment infringement . . . If [the Non-Parties] can make the necessary *prima facie* showing, the evidentiary burden will then shift to the [Plaintiffs] . . . [to] demonstrate the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] is the least restrictive means of obtaining the desired information . . . To implement this standard, we balance the burdens imposed on individuals and associations against the significance of the . . . interest in disclosure."

Id. at 1161 (citations omitted, emphasis added).

2. The *Prima Facie* Case for First Amendment Privilege. The Non-Parties under this test have made not just an "arguable" but, indeed, a compelling claim to First Amendment privilege. Federal courts in *Perry* and related cases explained when a *prima facie* claim to First Amendment privilege arises -

> A "*prima facie* showing requires [the withholding party] to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights . . . The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities.

Perry, 591 F.3d at 1160, 1161 (emphasis added). Therefore, a *prima facie* showing was demonstrated, and indeed was declared to be "self-evident," when a civil discovery request directed to a full party to the proceedings demanded disclosure of "internal campaign

communications," particularly when the privilege proponent testified that any compelled disclosure would cause him to "drastically alter how I communicate in the future." *Id.* at 1163-1164. *See also Heartland,* 2007 WL 852521 at *5 (finding that a *prima facie* showing of entitled to a First Amendment privilege was shown by discovery requests directed to documents reflecting "strategy of advocating" for legislation or "past political activity"); *AFL-CIO v. FEC,* 333 F. 3d 168, 177 (D.C. Cir. 2003) (finding that associational privilege attached to documents that if disclosed to political opponents would reveal political "activities, strategies and tactics...").

3. Each of the Non-Parties has filed their affidavit in support of their privilege claims.[2] They each generally testified that (i) Plaintiffs are aligned with the Non-Parties' political opponents or competitors, (ii) having to respond to Plaintiffs' discovery has diverted them from their professions, and (iii) they are very concerned that Plaintiffs are using, or attempting to use, the Court's discovery processes to harass Republican consultants or party members. Mr. Reichelderfer's additional testimony is typical with respect to the Non-Parties' establishment of their *prima facie* claim of privilege -

> I also reviewed the filing my counsel made on June 10 asserting various privilege claims on my behalf with respect to the documents that are the subject of the Plaintiffs' Motion to Compel filed April 1, 2015. I state without doubt that, if the non-public communications contained in the contested documents are ordered to be disclosed to the Plaintiffs, it will drastically affect how I communicate within the RPOF and with its retained consultants and agents. I will be constrained in my ability to engage in frank communications, knowing that my thoughts on sensitive political subjects and issues and my thoughts on political strategies may be disclosed to those who are my political opponents simply because I may be called as a witness in litigation to which neither I nor the

[2] *See* these Non-Parties' filing on June 17 of their Notice of Filing Affidavits in Support of Certain Non-Parties' Motion to Quash or for Protective Order

> RPOF is a party. I am also very concerned that Plaintiffs will use any of the documents that they can obtain to further any campaign to harass, embarrass or annoy me.

Affidavit of Marc Reichelderfer dated June 17, 2015, ¶15. Under *Perry* and its progeny, the Non-Parties' affidavits make out a *prima facie* case of entitlement to the First Amendment privilege.

4. The Plaintiffs' Resulting, Heavy Burden. With a *prima facie* case of the Non-Parties established, the burden shifts to the Plaintiffs to make two showings, the absence of either of which leaves Plaintiffs without any right to obtain any of the Designated Documents. More specifically, Plaintiffs are required to show that (i) the Designated Documents are *highly relevant* to their claims, and (ii) their blanket request for production of *all* of the Designated Documents is *narrowly tailored* to meet their compelling need for the Non-Parties' otherwise protected communications. *Perry,* 591 F.3d at 1161. *See also Heartland,* 2007 WL 852521 at *6 (noting the same heightened relevancy inquiry and collecting cases). Importantly, the degree of relevancy that Plaintiffs must show is significantly *greater* than the minimal discovery standard that governs most discovery issues, namely the standards set forth in either Fed. R. Civ. P. 26 or its equivalent, namely Fla. R. Civ. P. 1.280. *See Perry*, 591 F.3d at 1164. The tenor of the First Amendment cases in this regard is that Plaintiffs would basically be precluded from proving their claims or issues without access to the Designated Documents.

5. As the Court will readily see from a review of the Designated Documents, none of them reflect any communications between any of the Non-Parties on the one hand, and any members of the Florida Legislature or their respective staffs on the other hand. Several of the documents deal only generally with redistricting matters or issues. While some of the Designated Documents reflect association members' exchange of communications between or

among themselves and other associates related to potential Senate district map configurations, none of the communications reflect that they were ever provided to any legislator or members of redistricting staff.

6. That is very significant for purposes of the Court's *in camera* inspection and resulting determinations. In their pending Amended Complaint, Plaintiffs raise a flurry of Tier 1 and Tier 2 challenges to the current Senate district map, only one of which theories bears even an arguable relationship to these Non-Parties. More specifically, Plaintiffs allege that -

> During the 2012 redistricting cycle, **legislators and legislative staff** gave partisan political operatives insider access to the legislative redistricting process, privately sought input from partisan political operatives regarding redistricting decisions, invited the surreptitious submission of maps by partisan political operatives, and intentionally caused the Legislature's redistricting plans to incorporate various partisan- and incumbent-biased features and to achieve overall political-performance bias in the Republican majority's favor. As a result, the Legislature's initial Senate plan - CS/SJR 1176 (S9008) - included various districts that Senate decision makers knew were tainted with partisan- and incumbent-biased intent . . . After the Florida Supreme Court struck down the first Senate map . . . the Legislature adopted a new Senate plan - CS-SJR 2-B (S9030) - that once again reflected blatant incumbent favoritism and partisan gamesmanship, and once again included various districts that **Senate decision makers knew** were tainted with partisan- and incumbent-biased intent . . . Indeed, the Senate decision makers portrayed to the Florida Supreme Court and citizens of Florida that the redistricting process was fair, unbiased, open and transparent, **even though Senate decision makers knew it was not.**

Amended Complaint, ¶¶4, 5 (emphasis added). In other words, Plaintiffs' operative pleading only places at issue, at most, what Senate leaders, other legislators and their staffs knew or did in the context of actually promulgating the two Senate district maps.

7. That alleged legislative knowledge and actions, and *only* those matters, therefore form the proverbial "bulls eye" of what is highly relevant in this case and, by negative

implication, what is not.[3] More specifically, the actions or communications of the Non-Parties as is set forth in the Designated Documents, because they do not reflect communications or contacts with legislators or staff, and thus only reveal the thoughts and actions of the Non-Parties, cannot be "highly" relevant to Plaintiffs' case. This central, key fact (beyond any others) shows that Plaintiffs cannot prevail under the standards articulated in *Perry*.

8. The Resulting Balancing in Favor of the Non-Parties. If the Court were nonetheless to assume that the Plaintiffs can make a showing that the Designated Documents are, in fact, "highly relevant" or indeed central to their case (they cannot for the reasons stated), the Court's inquiry does not end there. Instead, the Court must weigh and balance the Non-Parties' clear, constitutional right to protect their communications and associational activities from scrutiny at the hands of their political opponents versus the Plaintiffs' alleged, critical need to obtain the Designated Documents to prove up their alleged case against the Florida Legislature. Here again the Court in conducting the final balancing is guided by additional factors set forth in *Perry* and its progeny.

First, the fact that the Non-Parties seek no relief in the case "weighs against compelling disclosure." *See Heartland,* 2007 WL 852521 at *6 (collecting other cases).

Secondly, the Court must in the final analysis closely examine and weigh the Plaintiffs' claims that they really need access to the Designated Documents to prove their case. As the federal court stated in *Perry,* what is the "*centrality* of the information sought to the issues in the case." *Perry,* 591 F.3d at 1161 (emphasis added)? *See also Heartland,* 2007 WL 852521 at *6

---

[3] It is axiomatic that the outermost scope of what are relevant matters in a civil case is framed in the operative pleadings. *See, e.g., Allstate Ins. Co. v. Langston,* 655 So. 2d 91, 93 (Fla. 1995), *citing Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications,* 629 So. 2d 852, 855 (Fla. 1st DCA 1993),

(refusing to require the production of documents that were "only *minimally* relevant to the claims made in the lawsuit").

This factor in the final weighing is particularly key given the statements made by Plaintiffs' counsel at the hearing conducted on June 16 on the various discovery motions, including the following:

By Mr. Zehnder: Remember, our theory that we proved in the Congressional case was that the process was tainted because these folks, the operatives -- the Bainter operatives, the Heffley Group, members of the Republican Party of Florida, and also these third parties that they've called themselves the Alachua Republicans -- were all involved in a conspiracy, Your Honor. And Judge Lewis found that there was a conspiracy to infiltrate the public map submission process that the legislature touted as the most open and transparent process in history, to infiltrate that behind the scenes so that that's how they could get their maps to the legislature. And what we found out from these documents is how they did it.

Transcript of Motion Hearing, pp. 11-12. These and other, similar statements from Plaintiffs' counsel are telling indeed. They confirm that Plaintiffs already have all of the information they really need to make their case in September and, instead, the information sought in the form of the Designated Documents is, at best, cumulative of the information they claim to have already.

Next, counsel to other non-parties associated with the Data Targeting firm stated in open court at the same hearing as follows:

By Mr. Safriet: We'll stipulate that the nine maps -- well, the five that my clients [identified in Plaintiffs' response to their Motion to Quash] were submitted by my clients with the intent to support the Republican Party. So take that map and go to the legislature and prove their case if they can with that.

Transcript of Motion Hearing, p. 157, lns. 17-22. In other words, counsel to certain of the other non-parties confirmed that certain of his clients exercised their First Amendment right to petition their state government, on a permitted, anonymous basis, by submitting five proposed Senate

district maps through the public submission portal. Moreover, counsel to those non-parties readily acknowledges that those maps, as submitted, were drawn to favor either the Republican Party or individual Republican incumbents or candidates for the Florida Senate.[4] In light of those admissions, Plaintiffs can have no proper need to pry further into the workings and communications of these Non-Parties, particularly under the compelling need test that *Perry* articulates.

Thirdly, the Court must weigh in the balance "the substantiality of the First Amendment interests at stake." *Perry,* 591 F.3d at 1161. Without question, the Designated Documents directly reflect the Non-Parties' communications within their association about matters of core political concern and, therefore, the documents spring from their exercise of rights fundamentally guaranteed under the First Amendment.

Finally, a court must consider "the importance of the litigation" and "the existence of less intrusive means of obtaining the information." *Id.* The last consideration is particularly significant. Plaintiffs in their Amended Complaint have clearly identified which "Senate leaders" or other members of staff were supposedly instrumental in tainting the enactment of the current Senate District map as Plaintiffs allege. Indeed, the Amended Complaint specifically names certain Florida Senators who introduced amendments to the draft district maps, which amendments Plaintiffs claim were primary instruments in the supposed taint to the final enactments. Plaintiffs have issued a number of records subpoenas to current and former Senators and members of staff yet, astonishingly, have not bothered to depose the actual, alleged decision makers, even though this case has been pending since 2012, while continuing to attempt to

[4] The Non-Parties are informed that other groups aligned with the Democratic Party, including some of the Plaintiffs in this case and the Congressional redistricting matter, also

obtain their political adversaries' protected communications. Moreover, Plaintiffs have not even attempted to offer any *evidence* that they cannot obtain the information that claim Plaintiffs need for trial except from these Non-Parties. That should concern the Court. More particularly, it should frame Plaintiffs' continued attempts to obtain documents and testimony from these Non-Parties for what it fundamentally must be - Plaintiffs' attempted usurpation of the Court's subpoena power to harass the political opposition. That should not be countenanced, at least if the First Amendment privilege is to have any practical meaning at all.[5]

Conclusion

A review of the Designated Documents shows that they are not highly relevant to the issues of this case as Plaintiffs have themselves chosen to frame them. Any interest Plaintiffs may have in the documents pales in comparison to the substantial rights the Non-Parties have under the First Amendment to keep their communications and protected political activities confidential, particularly against judicially compelled disclosure to their political opponents. Finally, Plaintiffs have not exhausted other, obvious discovery avenues to discovery any other needed information, namely that which is not merely cumulative of the information Plaintiffs represent they already have.

As a result, the Court should order that the Designated Documents should not be produced, while providing the Non-Parties with all other appropriate relief.

---

submitted maps that favored their party or candidates.

[5] The Court correctly noted at the last hearing that the discovery rulings made in this case may have continuing effects. For example, the scope of discovery allowed from third-parties in this case may set legal precedent for the scope of discovery allowed in the next decade, when the maps are redrawn again. Then, as the Court also observed, it may be groups aligned with the Democratic Party that are in the position of the Non-Parties.

Daniel C. Brown (191049)
Carlton Fields Jorden Burt, P.A.
215 S Monroe St Ste 500
Tallahassee, FL 32301-18044
(850) 224-1585
(850) 222-0398
dbrown@cfjblaw.com
Co-Counsel to the Non-Parties

/s/ David P. Healy (940410)
David P. Healy
Dudley, Sellers & Healy, PL
3522 Thomasville Rd., Suite 301
Tallahassee, Florida 32309
(850) 222-5400
(850) 222-7339 (fax)
dhealy@davidhealylaw.com
Co-Counsel to the Non-Parties

Certificate of Service

I HEREBY CERTIFY that I filed the foregoing on July 2, 2015 using the State of Florida's online filing portal which will cause a true and correct copy to be electronically transmitted to all counsel and interested parties of record.

/s/ David P. Healy (940410)