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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.

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JOINT MOTION OF THE NON-PARTIES FOR REHEARING, RECONSIDERATION OR, ALTERNATIVELY, FOR CLARIFICATION

Pursuant to Fla. R. Civ. P. 1.530, all of the Non-Parties, including (i) Rich Heffley, Marc Reichelderfer, Joel Springer, Frank Terraferma, Rich Johnston, Andrew Wiggins, and Jim Rimes, (ii) Patrick Bainter, Matthew Mitchell, Michael Sheehan, and Data Targeting, Inc., a Florida corporation, (together referred to as the "Bainter Group") and (iii) Stafford Jones, Christie Jones, Delana May, Henry Russell, III, and Barbara May (together referred to as the "Alachua Republicans") respectfully move for rehearing, reconsideration or clarification of certain portions of the Court's Order, dated June 26, on the "Bainter Group's" and "Heffley Group's" Motions to Quash (the "Order").

As grounds for the requested relief, the Non-Parties state as follows.

1. Each of the Non-Parties filed motions to quash, or for protective order, directed to substantially identical records subpoenas that Plaintiffs caused to issue. Among other objections, the Non-Parties objected to the production of documents and materials as to which they claim privilege under the First Amendment. The Court heard those motions at the hearing on June 18.

2. After the records subpoenas issued, but before the hearing, Plaintiffs noticed for deposition some, but not all, of the Non-Parties.[1] Also, Non-Parties Barbara May, Christie Jones, Delana May, Henry Russell, III, Matthew Mitchell, Michael Sheehan, Pat Bainter and Stafford Jones determined that they did not have any documents, or any additional ones besides those they had already provided to Plaintiffs.[2] The remaining Non-Parties had not conducted searches for responsive documents before the hearing; and, as a result, the Court's Order directed that those Non-Parties produce certain records responsive to the Plaintiffs' records subpoenas by Monday, July 13. *See* Order, ¶¶4, 6.[3]

3. The Order states at paragraph 1 that:

> The discovery of non-parties in this case shall be governed by the decision in *Perry v. Schwarzenegger,* 591 F.3d1147, 1160-1161 (9th Cir. 2010). To the extent that this Order grants discovery objected to by the Defendants, the Court finds that the information sought is highly relevant to the claims or defenses in the litigation; the request is carefully tailored to avoid unnecessary interference with protected activities; and the information is otherwise unavailable.

4. With respect to Non-Parties Rich Heffley, Marc Reichelderfer, Joel Springer,

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[1] Plaintiffs filed on May 14 a series of notices of deposition related to Non-Parties Barbara May, Christie Jones, Delana May, Henry Russell, III, Matthew Mitchell, Michael Sheehan, Pat Bainter and Stafford Jones. The indicated deposition dates, which have now passed, were all "place-holder" dates, or ones that were chosen merely to provide a basis or vehicle for the Court to consider issues related to the taking of those depositions. The other Non-Parties, however, were not noticed for deposition at all, an omission that Plaintiffs' counsel was the result of his error. Transcript of Motion Hearing conducted on June 18, 2015, pp. 143-144.

[2] Henry Russell claimed Associational privilege to four emails with another member of the Association. Mr. Russell file a privilege log with respect to these four emails.

[3] The Court directed that certain travel, compensation and telephone records Plaintiffs requested did not need to be produced but, otherwise, required production in response to all other records categories set forth in the subpoenas.

Frank Terraferma, Rich Johnston, Andrew Wiggins, and Jim Rimes, some of them *may* have responsive documents in their possession, custody or control.[4] If they do have responsive materials, the Non-Party in possession of them is very likely to claim that many of those materials are protected under the First Amendment from judicially compelled disclosure.[5] As a result, the Court should modify the Order to clarify that, if these Non-Parties locate responsive materials and claim they are privileged, the documents should not be produced to the Plaintiffs but, instead, should be provided to the Court for *in camera* inspection.[6]

5. Rehearing, reconsideration, or clarification of the Order should also be granted as the Order relates to depositions of the Non-Parties that Plaintiffs may now attempt to schedule. Paragraph 2 of the Order appears to provide that matters into which Plaintiffs' counsel have already inquired at previous depositions, or at the trial in the Congressional case, should not be the subject of additional deposition questioning. The Order states that "[t]o the extent practicable, matters that were previously addressed . . . do not have to be provided a second

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[4] As was stated in their Motion to Quash, these Non-Parties requested that Plaintiffs provide them with a list of suggested search terms, particularly because of the indefinite nature of several of the subpoenas' individual records requests. The Order did not reach that request but, in any event, Plaintiffs' counsel pledged to undersigned counsel to provide such a list, which occurred on July 2.

[5] In other words, any additional responsive documents that may turn up in a subsequent search would be subject to the same or similar privilege claims that these particular Non-Parties continue to assert with respect to certain of the Data Targeting Group Documents that are now the subject of the Court's *in camera* review.

[6] When a *bona fide* claim of privilege or confidentiality is presented, the Court would err if it were to require production of the subject documents without first reviewing them *in camera*. *See, e.g., Westco, Inc. v. Scott Lewis's Gardening & Trimming, Inc.,* 26 So.3d 620, 622 (Fla. 4th DCA 2009) ("A trial court departs from the essential requirements of law in ordering production of confidential information without conducting an in camera review to determine whether the assertion of privilege is valid."); *Nationwide Mut. Fire Ins. Co. v. Hess,* 814 So. 2d 1240, 1243 (Fla. 5th DCA 2002).

time." To avoid future disputes or confusion on this important point, the Court should clarify that it intended to narrow the scope of any of the Non-Parties' depositions in this manner.

6. The permitted scope of questioning at any upcoming depositions of the Non-Parties is also an issue that will result in controversies between the Non-Parties and the Plaintiffs. Absent revision or clarification, the Order may have inadvertently heightened the potential for such controversies, rather than relieving that prospect. For example, at the June 18 hearing the following exchange occurred between Plaintiffs' counsel and the Court regarding this very issue:

By Mr. Zehnder: I think it has, Your Honor. If I could just speak to the issue of depositions --

The Court: You know, that's the real issue in front of us is, who's going to be deposed and what documents are going to be produced.

By Mr. Zehnder: If they don't have documents to produce, okay. We can't do anything about that. If they've produced now for the first time we've heard, Bainter has produced everything he's got, that 1295, all that's left. Okay, great. But in terms of depositions, Judge, none of these people have been deposed in any case about the documents that we got in May right before the Congressional trial started, that 538 pages, and the additional 60 pages, by the way, that they produced out of the 1295 in the appeal.

The Court: What is your response to their argument they have a First Amendment right not to be deposed?

By Mr. Zehnder: They don't have a First Amendment right not to be deposed. What would that right be? Associational privilege? If it is, it has to yield under –

The Court: They have a right to participate in politics even to the extent of being anonymous.

By Mr. Zehnder: Well, Your Honor, that doesn't mean you don't have the right to be deposed if you're part of a conspiracy that a court, in a three-week trial, has already adjudicated occurred. We have to get to the bottom of whether that happened here in the Senate case. That's the whole point of this case.

Transcript of Hearings Conducted on June 18, 2015, pp. 116-117.

5. The Non-Parties disagree with Plaintiffs' characterization of their activities, because of the very First Amendment protection of associational activity that the Court recognized at the hearing to be directly implicated here. The Non-Parties' assert that Plaintiffs not only should not be prohibited from attempting to re-visit old ground; but also, because of the First Amendment's protections, Plaintiffs should be permitted to inquire only regarding what information, if any, the particular Non-Party actually communicated to the legislative members or staff regarding proposed Senate district maps. That information (if any) -- and only that information -- is the proper scope of any future deposition examinations. To the extent Plaintiffs seek to inquire at deposition regarding the Non-Parties' other associational activities, such deposition examination would improperly invade the Non-Parties' rights protected under the First Amendment. The Order should be clarified in this regard.

6. The propriety of the Non-Parties' position in this regard is confirmed by *Perry v. Schwarzenegger,* 591 F.3d 1147 (9th Cir. 2010), which the Court's Order recognized is controlling. That is particularly so because of (i) the limited matters Plaintiffs place at issue in their Amended Complaint, and (ii) the Plaintiffs' acknowledgments in open court at the June 18 hearing. To review briefly, the court in *Perry* stated:

> [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). Next, the court explained that:

> 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).

Being subject to deposition examination at the hands of attorneys who represent one's political opponents, and who have stated that they intend to pry into one's political speech and associational activities with other, like-minded individuals, self-evidently has an "impact" or "chilling" effect on the Non-Parties' exercise of activities the First Amendment was fundamentally designed to protect. In other words, the First Amendment privilege that *Perry* and the Court recognize unavoidably will be directly "in play" at any depositions of the Non-Parties that Plaintiffs may choose to convene.

7. Since the Non-Parties have demonstrated a valid *prima facie* claim of First Amendment privilege to be invoked at any deposition examination as to questions beyond what was communicated to the Legislature, the Court should consider the second stage of the *Perry* analysis: In order to continue with the examination, the burden is on the Plaintiffs to make two showings to sustain any argument that the Non-Parties' First Amendment privilege claim should be overruled: (i) the information that is the subject of deposition questioning is *highly relevant* to Plaintiffs' claims in this case, and (ii) the line of questioning is *narrowly tailored* to meet Plaintiffs' demonstrated, compelling need for the requested information. *Perry,* 591 F.3d at 1161.

8. That analysis must be grounded on what Plaintiffs have actually alleged in their

Amended Complaint. In their pending pleading, Plaintiffs allege:

> 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).[7]

As is apparent from their Amended Complaint, the issues they raise have no bearing at all on what the Non-Parties said or did among themselves in the context of their protected associational activities. The only communications relevant to the claims asserted in the Amended Complaint are those (if any) the Non-Parties had with members or staff of the Legislature in the course of the adoption of the current Senate District map. Under *Perry's* analysis, deposition questions that go beyond what any of the Non-Parties communicated to the Legislature is not *highly relevant* to the Plaintiffs' case as they themselves have stated it, nor is the expansive questioning Plaintiffs admittedly seek to pursue *narrowly tailored* to obtain information

[7] In the remainder of their pleading, Plaintiffs raise a host of other Tier 1 and Tier 2 challenges to the current Senate district map that are unrelated to the Non-Parties.

Plaintiffs need to prove what they allege.

9. Under the final part of the *Perry* test, the Court must balance the Non-Parties' clear constitutional right to protect their communications and associational activities from deposition questioning at the hands of their political opponents against the Plaintiffs' alleged need for testimony from the Non-Parties to prove up their alleged case against the Florida Legislature. The Court must consider several factors in the final balancing.

(A) First, the fact that the Non-Parties seek no relief in the case "weighs against compelling disclosure." *See Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.,* 2007 WL 852521 at *6 (D. Kan. 2007)(collecting other cases).

(B) Second, the Court must closely examine and weigh the Plaintiffs' claims that they actually need access to the requested information to prove their case. As the court stated in *Perry,* the courts must evaluate 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 (refusing to require the production of documents that were "only *minimally* relevant to the claims made in the lawsuit").

This factor is particularly important, in light of the concessions by Plaintiffs' counsel at the hearing conducted on June 18, 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 similar statements by Plaintiffs' counsel are telling. They confirm that Plaintiffs already have the information needed to make their case. The private associational communications they intend inquire about at depositions of the Non-Parties is, at best, cumulative of the information they admit they already have. And, inquiry into such private communications among associational members clearly breaches the First Amendment's associational privilege.

Next, counsel for 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.[8] Thus, counsel for the "Alachua Republicans" Non-Parties confirmed that his clients exercised their First Amendment right to petition government, on a First-Amendment-sanctioned anonymous basis, by submitting proposed Senate district maps through the public submission portal.

Moreover, counsel for the "Alachua Republicans" Non-Parties readily acknowledged that those maps, as submitted, were drawn to favor either the Republican Party or individual Republican incumbents or candidates for the Florida Senate. In light of those admissions, Plaintiffs can show no compelling need to pry at deposition into the workings and communications of the Non-Parties under the compelling need test that *Perry* and other cases

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[8] Counsel Safriet clarifies that it is only four (not five) of the Alachua Republicans that submitted maps through the Legislative public portal: Christie Jones (HPUBS0090); Henry E. Russell, III (SPUBS0105); Delana May (SPUBS0123). Barbara Martin (SPUBS0146).

have established.

(C) Thirdly, the Court must weigh "the substantiality of the First Amendment interests at stake." *Perry,* 591 F.3d at 1161. Without question, the line of questioning Plaintiffs' admittedly intend to pursue bears directly on the Non-Parties' communications within their association about matters of core political concern. Therefore, the information the Non-Parties would be required to disclose in response to such questioning invades rights fundamentally protected by the First Amendment.

(D) Finally, the Court must consider "the importance of the litigation" and "the existence of less intrusive means of obtaining the information." *Id.* This consideration is particularly significant. In their Amended Complaint, Plaintiffs allege with specificity the "Senate leaders" or other members and staff who supposedly were instrumental in tainting the current Senate District map. Indeed, the Amended Complaint specifically names certain Florida Senators who introduced amendments to the draft district map, which Plaintiffs claim were the primary instruments in the supposed taint.

Plaintiffs have issued records subpoenas to current and former Senators and members of staff. Yet, astonishingly, Plaintiffs have not bothered to depose the alleged actual decision makers, even though this case has been pending since 2012. Nevertheless, Plaintiffs continue a campaign to obtain their political adversaries' First Amendment protected communications and other First Amendment protected information regarding the Non-Parties' associational activities. 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.[9]

[9]At most, Plaintiffs' counsel asserted at hearing that this is supposedly the case. But, the unverified statements of a party's counsel are not evidence. *State v. Thompson*, 852 So. 2d 877,

10. As the foregoing discussion demonstrates, the Non-Parties have *bona fide* First Amendment privileges that will be compromised if Plaintiffs are allowed proceed with Non-Party depositions in the manner they have conceded they intend. Moreover, the Non-Parties are likely to succeed in having privilege invocations judicially sustained regarding questions that do not deal with what a particular Non-Party communicated to the Legislature.

11. Although recognizing the applicability of *Perry*, the Court's Order, at paragraph 1, summarily states that:

> To the extent that this Order grants discovery objected to by the Defendants, the Court finds that the information sought is highly relevant to the claims or defenses in the litigation; the request is carefully tailored to avoid unnecessary interference with protected activities; and the information is otherwise unavailable.

The Non-Parties respectfully submit that the quoted finding is not supported by the record, and should be revisited or clarified.

It is not clear that the Court intended to make that finding with respect to Non-Party depositions that have not yet occurred. Nonetheless, the Non-Parties are confident that Plaintiffs will seize on that passage to claim they have unfettered right to depose the Non-Parties regarding any topic or issue, even as to those matters protected from inquiry by the First Amendment. At a minimum, therefore, the Court should clarify that it did not intend to summarily and preemptively decide the propriety of such questioning under *Perry* and similar decisions.

12. Indeed, the Non-Parties have good reason to believe that the Court's Order did not so intend. None of the prior cases applying *Perry*, or analyzing the First Amendment associational privilege, did so without the benefit of the actual documents or questioning that

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878 (Fla. 2d DCA 2003) (Argument of counsel is not evidence.).

were the subject of the claim of privilege. The Non-Parties are not aware of any case involving a First Amendment privilege claim in which the trial court summarily applied the required balancing test before conducting a particularized inquiry in the manner that *Perry* requires.

13. Moreover, the quoted portion of the Court's Order appears inconsistent with the manner in which other Florida appellate cases have directed that the courts should address invocations of privilege at deposition. In the normal course, deponents invoking a claim of privilege must do so on a question-by-question basis. *See, e.g., Kanji v. Valli,* 621 So. 2d 750, 751 (Fla. 5th DCA 1993); *Fischer v. E.F. Hutton and Co., Inc.,* 463 So. 2d 289, 291 (Fla. 2nd DCA 1984).[10] The reason for the rule is apparent. It creates the proper context in which the trial court may assess the claim of privilege and a clear record for appellate review.

Without revision or clarification, Plaintiffs will no doubt seize upon the quoted portion of the Court's Order to contend that the Court has summarily overruled any claims of First Amendment privilege, even before the first question is asked. That is inconsistent with established Florida law.

14. In connection with the impending depositions of the Non-Parties which Plaintiffs have announced that they intend to take, the Court should likewise clarify that the Order does not predetermine that a voluntary disclosure of a privileged First Amendment communication by one of the communicants amounts to a waiver of the First Amendment privilege as to another Non-Party who did not make a voluntary disclosure. *See Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 226 (S.D.N.Y. 2000) (waiver of rights by plaintiff legal aid society is not deemed

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[10] *Compare Rainerman v. Eagle National Bank of Miami,* 541 So.2d 740 (Fla. 3d DCA 1989), where the court found that a blanket invocation of privilege was permitted when the scope of the examination was narrow and the questions would necessarily trigger privileged matters.

binding on co-plaintiff union and legal aid employees.) Indeed, even as to a communication privilege that is merely statutory, a breach of the privilege by one communicant over the objection of another does not constitute a waiver as to the objecting communicant. *See Taylor v. State*, 855 So. 2d 1, 26 (Fla. 2003) (spousal privilege). *See also,* § 90.507, Fla. Stat. ("A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses . . . .") (underscoring added). That rule is all the more imperative in the case of a constitutionally guaranteed First Amendment privilege against compelled disclosure. A waiver of First Amendment privilege "must be narrowly rather than expansively construed." *Christ Covenant Church v. Town of Southwest Ranches,* 2008 WL 2686860, *9 (S.D. Fla. June 29, 2008).

15. As required by §2.2 of the Court's rules and procedures, undersigned counsel certify that they conferred with counsel to the Plaintiffs in a good faith effort to resolve the issues raised by this Motion.

WHEREFORE, the Non-Parties for the stated reasons respectfully move for rehearing, reconsideration or clarification of the Order, as well as such other and further relief that is just and appropriate.

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Certificate of Service

I HEREBY CERTIFY that I filed the foregoing on July 7, 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)