FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DATA TARGETING, INC.,
PAT BAINTER, MATT MITCHELL,
and MICHAEL SHEEHAN,
Petitioners,

v.

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, THE NATIONAL COUNCIL OF LA RAZA, COMMON CAUSE FLORIDA, JOAN ERWIN, ROLAND SANCHEZ-MEDINA, JR., J. STEELE OLMSTEAD, CHARLES PETERS, OLIVER D. FINNIGAN, SERENA CATHERINA BALDACCHINO, DUDLEY BATES, RENE ROMO, BENJAMIN WEAVER, WILLIAM EVERETT WARINNER, JESSICA BARRETT, JUNE KEENER, RICHARD QUINN BOYLAN, BONITA AGAN, KENNETH W. DETZNER, in his official capacity as Florida Secretary of State, THE FLORIDA SENATE, MICHAEL HARIDOPOLOS, in his official capacity as President of the Florida State Senate; THE FLORIDA HOUSE OF REPRESENTATIVES, and DEAN CANNON, in his official capacity as Speaker of the Florida House of Representatives, and PAM BONDI, in her official capacity as Attorney General of the State of Florida,
Respondents.

DCA Case No.: 14-_____
Lower Case Nos.: 2012-CA-00412
2012-CA-00490
2012-CA-2842

PAT BAINTER, MATT MITCHELL, MICHAEL SHEEHAN, AND DATA TARGETING, INC.'S EMERGENCY MOTION FOR STAY OF ORDER REQUIRING DISCLOSURE OF CONSTITUTIONALLY PRIVILEGED AND TRADE SECRET INFORMATION PENDING FILING AND RESOLUTION OF A PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.310(f) of the Florida Rules of Appellate Procedure, the Non-Parties – Pat Bainter, Matt Mitchell, Michael Sheehan, and Data Targeting, Inc. – move for an emergency stay of the Circuit Court's May 2, 2014 and May 15, 2014 Orders,[1] which require disclosure of information protected by the First Amendment to the U.S. Constitution and Florida's trade secrets statutes, until after the Non-Parties file and this Court resolves the Non-Parties' petition for writ of *certiorari* related to these Orders. In support, the Non-Parties state:

RELEVANT LEGAL STANDARD

1. A stay is appropriate where one demonstrates likelihood for success on the merits[2] and likelihood of harm absent a stay. *Perez v. Perez*, 769 So. 2d

[1] The Non-Parties do not yet have a copy of the May 15, 2014 Order. The Non-Parties, together with the Plaintiffs, submitted two sets of proposed orders to the Circuit Court following the May 12, 2014 hearing where the Circuit Court denied the Non-Parties' request for a sealed proceeding as it relates to the Non-Parties' confidential and privileged information, and the denied the Non-Parties' request to stay the ruling pending appellate review. The Circuit Court has yet to issue a written order; the Non-Parties expect an Order on or after May 15, 2014. Since time is of the essence, the Non-Parties include highlighted portions of the rough transcript (the only transcript available to Non-Parties at this time) from the May 12, 2014 hearing that show the Circuit Court's denial of the Non-Parties' request, and the proposed orders filed with the Circuit Court under **Tab 2** of the Appendix contemporaneously filed with the Court. The Non-Parties fear that waiting any longer for the Circuit Court to issue a written order would further burden their ability to seek appellate review. The Non-Parties will, however, supplement this Motion and the Appendix once the Circuit Court issues an Order.

[2] The subsequent petition for writ of *certiorari* would be granted if the underlying "discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and

389, 391 n.4 (3d DCA 1999) (citing *State ex rel. Price v. McCord*, 380 So. 2d 1037 (Fla. 1980)); *see also Campbell v. Chitty*, 37 Fla. L. Weekly D 2036 (Aug. 23, 2012) (Thomas, J., dissenting) (citing *Perez* for relevant legal standard).

LIKELIHOOD FOR SUCCESS ON THE MERITS

2. The May 2, 2014 and May 15, 2014 Orders below ignore two fundamental precepts of law. *See* **Tab 1**; **Tab 2**. First, the Circuit Court failed to conduct the balancing required by the First Amendment to the U.S. Constitution prior to ordering disclosure of information that would chill the ability of like-minded individuals to freely and privately associate. Second, the Circuit Court failed to conduct an evidentiary hearing prior to ordering disclosure of information the Non-Parties claim as trade secrets.

Associational Privilege

3. According to the U.S. Supreme Court, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an

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effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995) (citations omitted). This would be especially appropriate where, as here, "once discovery is wrongfully granted, the complaining party is beyond relief." *Horne v. Sch. Bd. of Miami-Dade Cnty.*, 901 So. 2d 238, 240 (Fla. 1st DCA 2005) (citations omitted). And the Non-Parties' subsequent petition would make clear the deviation from essential requirements of the law by showing that the Circuit Court's Orders stand in stark contrast to the associational privilege and well-established procedural safeguards for protecting trade secrets. *See Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003) (departing from essential requirements of the law when relying on erroneous "interpretation or application of a statute, a procedural rule, or a constitutional provision").

inseparable aspect of the 'liberty' assured" by the U.S. Constitution and that action "curtailing the freedom to associate is subject to the closet scrutiny." *NAACP v. State of Ala.*, 357 U.S. 449, 460-61 (1958). Thus, as the Ninth Circuit explained in *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010), courts have recognized an "associational privilege" that protects the right to freely and privately associate with like-minded individuals despite ongoing litigation. The associational privilege attaches where the one asserting the privilege demonstrates "a prima facie showing of arguable first amendment infringement" by noting the "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or a chilling of, the members' associational rights." *Id.* (citations omitted). The evidentiary burden then shifts to the party seeking discovery, and that party must show that the "information sought is highly relevant" and that its request is "carefully tailored to avoid unnecessary interference with protected activities." *Id.* at 1161. The trial court, in turn, must balance the burdens imposed on the privileged party's First Amendment rights by evaluating the "importance of the litigation," the "centrality of the information sought to the issues in the case," and "the existence of less intrusive means of obtaining the information." *Id.* (citations omitted).

4. In this case, Justice Major Harding, the Special Master below, and the Circuit Court both concluded that the Non-Parties established a prima facie case

for associational privilege as to the 1,833 pages of documents for which the Non-Parties claim the privilege. *See* **Tab 3** at 3-4; **Tab 4** at 5-6.[3] Justice Harding went further. After conducting an evidentiary hearing and an *in camera* review, Justice Harding prohibited the disclosure of *any* of the Non-Parties' confidential documents. In particular, Justice Harding concluded that the Plaintiffs failed to "show[] a compelling need sufficient to deny Non-Parties Pat Bainter, Matt Mitchell, Michael Sheehan and Data Targeting, Inc. the privilege." **Tab 4** at 6.

5. The Circuit Court's May 2, 2014 Order, however, departs from Justice Harding's findings by requiring the disclosure of 538 pages of confidential and privileged information. *See* **Tab 1** at 2. The Circuit Court conducted no separate hearing to discuss why the First Amendment balancing tilts in favor of disclosure for these 538 pages; made no specific finding as to whether the information in these documents is highly relevant to the central issue of legislative intent, especially since the Non-Parties have long since disclosed any communications with individual legislators or legislative staff; nor whether less intrusive means of obtaining and releasing the information are available to the Circuit Court or the parties. *Compare id.* at 2-3, *with Perry*, 591 F.3d at 1161.[4]

[3] **Tab 5** and **Tab 6** of the Appendix include the Non-Parties' correspondence regarding the applicability and scope of the associational privilege.

[4] While the Circuit Court considered legal arguments on exceptions to the Special Master's findings, that hearing focused primarily on whether the Non-Parties

6. Indeed, the Circuit Court's May 2, 2014 Order fails to provide a single reason or rationale for departing from Justice Harding's finding that *all* of the materials should continue to be protected by the associational privilege. A review of the 538 pages that the Non-Parties must now disclose reveals the Circuit Court's Order is the product of a standardless standard – of an *ad hoc* approach that requires disclosure of some privileged documents but not substantially similar privileged documents.[5]

7. The Circuit Court's questioning of Non-Party Pat Bainter *after* ordering disclosure of the 538 pages confirms that Circuit Court's May 2, 2014 Order was not the product of close scrutiny, as required by the U.S. Supreme Court, but of the type of cursory review that invites error. Specifically, the Circuit Court asked Pat Bainter – one of the Non-Parties – "what exactly does your company do?" **Tab** 7 at 77. The Circuit Court seemingly remained unaware that the Non-Parties are "a political consulting firm" despite having already concluded that the associational privilege applies to the Non-Parties, *id.*; having already reviewed documents that detail the Non-Parties operations and confidential client

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established a prima facie case for the associational privilege to apply. The Circuit Court did not invite legal or factual argument regarding whether the privilege, once applicable, should yield for any particular documents. The Circuit Court also offered explanation of its own for the 538 pages now ordered to be disclosed.

[5] The Non-Parties will include with their petition for writ of *certiorari* a sealed appendix demonstrating these inconsistencies should the Court require it.

communications; and having already ordered that the Non-Parties disclose 538 pages of documents because these documents are ostensibly central to the issue of legislative intent, otherwise highly relevant, and no less intrusive means of obtaining the information in these documents exists. *See Perry*, 591 F.3d at 1160.

8. The May 14, 2014 Order compounds the error by rejecting the Non-Parties' attempt to consent to the use of this information in a sealed proceeding, and then denying the Non-Parties' attempt to stay the effect of these Orders until the Non-Parties seek review before this Court. *Compare* **Tab 2** *with Perry,* 591 F.3d at 1160-61 (requiring requests for protected information to be "carefully tailored to avoid unnecessary interference with protected activities" and suggesting that courts employ "less intrusive means of obtaining information" for trial) *and Am. Express Travel Related Servs., Inc. v. Cruz,* 761 So.2d 1206, 1209-10 (Fla. 4th DCA 2000) (holding "a trial court should not provide [a party] with [records claimed as confidential and privileged] if it determines they are subject to disclosure without first allowing [the party claiming privilege] an opportunity to seek meaningful appellate review").

Trade Secrets

9. The Circuit Court's Orders also ignore well-established Florida law regarding the protection of trade secret information. The assertion of trade secret protections triggers specific obligations for trial courts. "When trade secret

privilege is asserted as the basis for resisting production, the trial court *must* determine whether the requested production constitutes a trade secret; if so, the court *must* require the party seeking production to show reasonable necessity for the requested materials." *Am. Express Travel Related Servs.*, 761 So. 2d at 1208 (emphasis added). This requires the trial court to "first conduct[] an *in camera* inspection to determine whether [the given material] constitute[s] a trade secret and a subsequent *evidentiary hearing* on the issue of reasonable necessity for disclosure." *Premiere Lab Supply, Inc. v. Chemplex Indus., Inc.*, 791 So. 2d 1190, 1190 (Fla. 4th DCA 2001) (emphasis added).

10. Here, Justice Harding conducted only a "very cursory examination of the documents" for trade secret protection, **Tab 4** at 4, because, having concluded that the associational privilege protected all of the documents, Justice Harding explained that he "[did] not need to deal with the Trade Secret issue." *Id.* at 6. There was no clear finding regarding whether a trade secret actually applied much less an evidentiary hearing regarding the trade secret issue. Only after being prompted by the Non-Parties did the Circuit Court make a passing statement regarding its *in camera* review for trade secret protection before entering an order that would deprive the Non-Parties of their trade secrets (and fundamental First

Amendment rights) without procedural due process. *See* **Tab 7** at 7-8.[6] The law requires far more than two words uttered near the end of an unrelated hearing. *See Am. Express Travel Related Servs.*, 761 So. 2d at 1208; *Premiere Lab Supply*, 791 So. 2d at 1190.

IRREPARABLE HARM TO NON-PARTIES

11. While the Non-Parties will file a petition for writ of *certiorari* challenging the substance of the Circuit Court's Orders, an emergency stay is both appropriate and necessary because the trial in the case begins in 5 days, on May 19, 2014, well before the 30-day window in which to seek interlocutory review expires. The Circuit Court has made plain that – absent a stay from this Court – the Plaintiffs may use the Non-Parties' confidential and privileged information at

[6] After the Circuit Court listed the page numbers of the protected documents that it required the Non-Parties to disclose, counsel for the Non-Parties, Mr. Safriet asked:

> MR. SAFRIET: And just if I can, ask a clarifying question on your prior ruling when you listed those numbers. We also had asserted trade secret privilege to numerous of those documents.
>
> And the special master didn't get there, because he found all of them to be protected by the associational privilege. So did Your Honor do the analysis for trade secret too when you looked at these documents, such that we don't need to go back through the record?
>
> THE COURT: I did.

Tab 7 at 7-8.

trial. *See* **Tab 2.**[7] Permitting Plaintiffs to use the Non-Parties confidential information would cause the Non-Parties irreparable harm.

12. As Justice Harding observed, "the economic well-being of Data Targeting, its employees and clients" is inextricably linked to the continuing confidentiality of the information at issue. *See* **Exhibit 4** at 6. Irreparable harm would result from disclosure of the Non-Parties' confidential and privileged business processes and strategies because that information is proprietary information that the Non-Parties rely on in their business as political consultants.

13. And disclosure of the lists of people with whom the Non-Parties associate – their names, contact information, and sometimes controversial views – would tear at the very fabric of the First Amendment that views "[a]nonymity [as] a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995).

14. Worse yet, if the confidential and privileged information at issue were made public, the Non-Parties would be hard-pressed to "un-ring the bell" because, once confidential information becomes public, one can do little to make it confidential once more. *See, e.g., Holmes Reg'l Med. Ctr., Inc. v. Agency for Health Care Admin.,* 731 So. 2d 51, 53 (Fla. 1st DCA 1999) (recognizing same in

[7] Until this information is used at trial, it is subject to a confidentiality order whereby counsel for the Plaintiffs may not share the information with anyone other than the Plaintiffs' experts in the case. *See* **Tab 1** at 2-3.

a trade secret context and also holding that information improperly disclosed cannot be entered into evidence at a trial or a final administrative hearing).

15. Meaningful review after disclosure of the Non-Parties' confidential and privileged information during the scheduled trial would be unlikely. If the Circuit Court allows the Plaintiffs to discuss the confidential and privileged information in open court, and this Court later grants the Non-Parties' petition for writ of *certiorari*, one of the parties to the underlying case may move for a mistrial. *See id.* But, as their status implies, the Non-Parties are not parties to the case, and it is unclear what right (if any) the Non-Parties have to file an appeal in a case after the Circuit Court issues a final judgment. *Cf. Holland v. Barfield*, 35 So. 3d 953, 955 (Fla. 5th DCA 2010) (explaining that a writ of certiorari is appropriate where, among other things, "a discovery order . . . effectively leav[es] no adequate remedy on appeal").

16. A stay is thus necessary to safeguard the Non-Parties' interests. A stay will allow the Non-Parties time to file their petition for writ of *certiorari*, and will allow this Court the time to meaningfully consider the Non-Parties' petition. A stay will also prevent the improper use of confidential and privileged information in the trial, which should prevent the prospect of a prejudicial trial, or even a mistrial, for the parties to the case.

WHEREFORE the Court should grant the Non-Parties' Emergency Motion for Stay pending the filing and resolution of the Non-Parties' petition for writ of *certiorari*.

Respectfully submitted:

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Dated: May 14, 2014

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing has been generated with Times New Roman 14 point font and thus complies with Rule 9.100, Florida Rules of Appellate Procedure.

/s/ D. Kent Safriet
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and all appendices has been furnished by electronic mail to counsel of record identified on the attached service list on this 14th day of May, 2014.

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