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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA; THE NATIONAL COUNCIL OF LA RAZA; COMMON CAUSE; JOAN ERWIN; ROLAND SANCHEZ-MEDINA, JR.; J. STEELE OLMSTEAD CHARLES PETERS; OLIVER D. FINNIGAN; SERENA CATHERINA BALDACCHINO; AND DUDLEY BATES, PLAINTIFFS, v. KENNETH W. DETZNER, in his official capacity as Florida Secretary of State; THE FLORIDA SENATE; DON GAETZ, in his official capacity as President of the Florida State Senate; THE FLORIDA HOUSE OF REPRESENTATIVES; and WILL WEATHERFORD, in his official capacity as Speaker of the Florida House of Representatives, DEFENDANTS.	CASE NO.: 2012-CA-2842

COALITION PLAINTIFFS' MOTION FOR REHEARING

The Coalition Plaintiffs move for rehearing, pursuant to Florida Rule of Civil Procedure 1.530 and/or this Court's inherent authority to reconsider interlocutory rulings, of the Court's May 15, 2014, Order on Non-Parties' Motion to Determine Confidentiality of Court Records (the "Confidentiality Order") and May 2, 2014, Second Order on Special Master's Report Dated September 14, 2013, Regarding Non-Parties (the "Production Order") and in support thereof state:

1. The Production Order concluded that the Non-Parties' claims of privilege based on the First Amendment and Florida's trade secret laws, which they asserted in resisting discovery of 1,388 pages of documents, had to yield with regard to 538 pages of documents that

the Non-Parties subsequently produced to the Coalition Plaintiffs (the "Produced Documents"). The Non-Parties have not been ordered to produce the remaining 850 pages of documents (the "Withheld Documents").[1] The Confidentiality Order concluded that under Florida Rule of Judicial Administration 2.420, the Produced Documents would remain confidential and under seal until used at trial. By this motion, the Coalition Plaintiffs seek reconsideration of these orders and two forms of ultimate relief: (1) production of the Withheld Documents and (2) a determination that none of the Produced Documents that are used at either the congressional redistricting trial still in progress or the senate redistricting trial to be held should remain confidential and that any future proceedings related to those documents should be open.

Authority for This Request

2. At the Non-Parties' invitation, the First District Court of Appeal has construed the Confidentiality Order as concluding this Court's judicial labor involving discovery disputes between with the Non-Parties, which necessarily implies that it interpreted the Production Order as denying the Coalition Plaintiffs' request to produce the Withheld Documents. Accordingly, the Confidentiality Order appears to be a final order, which is therefore subject to a motion for rehearing under Rule 1.530, which must be served within 15 days of the order. The Coalition Plaintiffs thus file this motion now to avoid any timeliness challenge, but this is not an emergency that should require any judicial labor until the Court concludes the ongoing trial and issues a final decision as to the challenge of the congressional districts. But once that is complete, this matter will become urgent because the Coalition Plaintiffs seek discovery of the Withheld Documents as part of their preparation for the next trial, which challenges the state senate districts.

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[1] Thus, to be clear on terms, the 1,388 pages of allegedly privileged documents are divided into two categories: (1) the 538 pages of Produced Documents and (2) the 850 pages of Withheld Documents.

3. In the event the First District is mistaken and this Court did not complete its judicial labor with regard to the allegedly privileged documents, then the Confidentiality Order, like the Production Order, is a non-final order subject to reconsideration by this Court at any time.

4. As indicated, the Non-Parties have already appealed the two subject orders. The First District has issued a brief order declaring that the Production Order and Confidentiality Order are reversed, but the Supreme Court of Florida has stayed the district court's order, and ruled that until further order, this Court must keep the Produced Documents under seal and close any proceedings discussing their substance. Thus, while the First District has evidenced an intent to reverse the subject orders, they remain in effect subject only to keeping the court closed when the Produced Documents are addressed.

5. Because this motion is timely and authorized by Rule 1.530, the Coalition Plaintiffs' right to seek rehearing is unaffected by the Non-Parties' notice of appeal. *Harris v. Aberdeen Golf & Country Club*, 134 So. 3d 1097, 1097-98 (Fla. 3d DCA 2014); *Romano v. Mechaia Investments, LLC*, No. 3D09-1736, 2009 WL 2764130, *1-2 (Fla. 3d DCA Sept. 2, 2009); *Howell v. Jackson*, 810 So. 2d 1081, 1081 (Fla. 4th DCA 2002); *Marsh & McLennan, Inc. v. Aerolineas Nacionales Del Ecuador*, 530 So. 2d 971, 973 (Fla. 3d DCA 1988) (en banc). But due to the unique procedural posture of this case, the Coalition Plaintiffs intend to seek clarification and, if necessary, relinquishment of jurisdiction from the First District to make clear that this Court has authority to rule on this motion.

The Withheld Documents

6. To the extent the Court intended to finally deny the Coalition Plaintiffs' requests to compel production of the Withheld Documents, it should now reconsider that decision for at

least four reasons. To the extent it reserved ruling on those, it should now order them produced for the same four reasons.

7. First, the main ground for the Non-Parties' appeal is their claim that this Court did not, as it said it did, perform the balancing test required by *Perry* and did not apply the proper test for determining trade secrets. To make its point, the Non-Parties voluntarily included in the supplemental appendix to their initial brief a number of Withheld Documents that they correctly contend are of such a similar nature to the Produced Documents. Accordingly, under *Perry* and Florida trade secrets laws, the Court should have reached the same result as to those documents. Because the Produced Documents were, in the Coalition Plaintiffs' view, correctly ordered to be produced, the same ruling should apply to the Withheld Documents. Moreover, if the First District ultimately explains that it is reversing this Court's order because it concluded that this Court did not apply the proper analysis, then fairness dictates that the Court should re-review **all** of the allegedly privileged documents under whatever analysis is directed by the First District.

8. Second, the Court made its ruling based on its in camera review of the allegedly privileged documents before their potential relevance was fully developed. In light of the lack of detail on the Non-Parties' amended privilege log, the Coalition Plaintiffs never had a chance to review any meaningful description of the allegedly privileged documents in order to fully demonstrate why the qualified privilege should yield as to each. The Court should conduct a second review where the Coalition Plaintiffs' counsel are allowed to either see all the Withheld Documents (subject to attorneys-eyes-only pending a ruling) or at least have a sufficiently detailed privilege log so as to have a meaningful opportunity to argue why any alleged privilege should yield. At the very least, now that the Court has heard the evidence developed at the congressional redistricting trial, it should re-review the Withheld Documents in camera to

determine anew if any alleged privilege should yield as to the Withheld Documents. This is especially so as to documents the Court might not have ordered produced in time for the congressional redistricting trial because they relate to the state senate districts.

9. Third, now that the Court has a complete sense of the core relevance of these documents and has seen from the evidence presented at trial that the Non-Parties have been erroneously claiming that none of the Produced Documents relates to communications with the Legislature, the Court should revisit its initial conclusion that the documents are subject to any privilege or grounds for confidentiality in the first place. Neither the First Amendment nor Florida's trade secret laws offer any protection for secret documents that relate to attempts to induce or assist legislators to engage in unconstitutional activity.

10. Fourth, the Court should find that the Non-Parties waived any claims of privilege. The Coalition Plaintiffs have previously argued that the Non-Parties waived the privileges by not timely asserting them in response to the Court's order directing them to produce the documents by April 22, 2013. At the contempt hearing on this issue, the Court held the Non-Parties in contempt as a result, but chose to impose the sanction of an award of attorneys' fees for the Coalition Plaintiffs' efforts in obtaining the documents at issue and, in light of that sanction, declined to find a waiver. It similarly rejected the Coalition Plaintiffs' request to find waiver when the Non-Parties filed a noncompliant one-page "privilege log." The Coalition Plaintiffs respectfully request that the Court reconsider its decision not to find waiver based on the untimely and deficient privilege log.

11. Subsequent events have, in any event, revealed that any privilege has been waived even apart from the privilege log issues. Now that the Coalition Plaintiffs have reviewed the Produced Documents, it is clear that the Non-Parties and other members of the alleged

"association" testified at length regarding the subject matter of the allegedly privileged documents – *i.e.*, the preparation of and intent behind the redistricting maps they participated in drawing. When Bainter testified in his deposition and before the Special Master that the Non-Parties and their collaborators drew redistricting maps only out of "intrigue" and "interest," claimed not to have submitted any maps in the public process, and disavowed knowledge as to whether his fellow partisan operatives submitted maps, he addressed the substance of these documents and did so in an evasive and even false manner. A witness cannot offer evasive or false testimony and then seek to shield documents on the very same subject that undermine his testimony. *See, e.g.*, *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 511 (Fla. 2d DCA 2006); *Hoyas v. State*, 456 So. 2d 1225, 1229 (Fla. 3d DCA 1984); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994).

12. The Non-Parties' subject-matter waiver is re-enforced by the Non-Parties' voluntary disclosure of their direct communications with the Legislature and later claim that those were the only documents representing their interaction or communication with the Legislature. They made these representations about the subject matter of the allegedly privileged documents knowing full well that those documents tended to reveal that they engaged in indirect communications for the intended purpose (and result) of enabling the Legislature to engage in intentional, partisan gerrymandering. This conduct constitutes a subject matter waiver.

Confidentiality of the Produced Documents

13. As stated above, now that the true facts have been revealed, it should be clear that none of the Produced Documents are protected by either the First Amendment or Florida's trade secret laws. Thus, there is no basis for keeping them confidential under Rule 2.420(c)(9)(A).

14. Alternatively, there can now be no doubt that whatever privilege or protection might apply to the documents must yield in light of the central relevancy of these documents to

the most paramount of public purposes. Thus, keeping documents used at trial under seal is a protection that is broader than necessary to protect the Non-Parties' legitimate interests and should therefore be lifted under Rule 2.420(c)(9)(B). Moreover, to the extent the Non-Parties can point to portions of those documents that were not critically relevant to the issues at trial, redaction constitutes a less restrictive measure for protecting confidentiality that should be ordered pursuant to Rule 2.420(c)(9)(C).

15. The public's right to know the contents of the documents that have been entered into evidence clearly outweighs any need for protection. Thus, all Produced Documents actually used at the congressional trial should no longer be kept under seal and the transcript of the closed proceedings should be unsealed.

16. The same is true with regard to any Produced Documents or Withheld Documents to be used during the senate redistricting trial. At least if and when the Court rules them admissible, those documents should no longer be under seal and any trial proceedings regarding them should not be closed.

WHEREFORE, the Court should grant rehearing or reconsideration, order the Withheld Documents to be produced to the Coalition Plaintiffs, order that all Produced Documents used at the congressional redistricting trial and all proceedings discussing them during trial should be unsealed, and order that when any Produced Documents or Withheld Documents are used at the senate redistricting trial, the court shall remain open and the documents will no longer be maintained under seal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2014 I filed the foregoing using the State of Florida ePortal Filing System. I further certify that a copy of the foregoing has been served via email on all counsel of record listed on the Service List below.

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