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

RENE ROMO, et al.,

Plaintiffs,

v.

KEN DETZNER, et al.,

Defendants.
_____/

CASE NO.: 2012 CA 00412

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

Plaintiffs,

v.

KEN DETZNER, et al.,

Defendants.
_____/

REPORT OF SPECIAL MASTER

I have been asked to determine the issue of whether Mr. Frank Terraferma, Director of House Campaigns of the Republican Party of Florida (RPOF), can lawfully assert a First Amendment Associational Privilege in the above matter and not be required to produce certain communications between himself and other employees, consultants, or members of the RPOF.

Mr. Terraferma is not a party to the litigation the Coalition Plaintiffs have filed seeking to have the Congressional Plan and/or individual districts in the Legislature's Congressional Plan declared unconstitutional.

Mr. Terraferma was served with a subpoena duces tecum asking him to produce, among other things:

> Congressional redistricting maps (whole or partial, completed or draft) that were: (a) submitted to or discussed with any legislator, legislative staff member, or any legislative committee; or (b) submitted to or discussed with any person with the intent that the person would convey it to any legislator, legislative staff member, or any legislative committee submitted to, considered by or passed by the Florida Legislature; (and)
>
> Any communication with any person about the subjects described…; [and]
>
> Any knowledge you have about: (a) the method or process by which the 2012 Florida redistricting maps were drawn; (b) any person [who] was involved in any way in drafting any map or district that was submitted to any legislator, legislative staff member, or to any legislative committee.

Mr. Terraferma has produced documents in his possession that relate to the drawing of boundaries for redistricting maps or communications about that with other persons. The additional documents, which he objects to produce, do not deal with redistricting maps submitted or communications about maps submitted or intended to be submitted to the Legislature. The additional documents consist of communications between him and other employees, consultants, or members of the RPOF.

The parties have submitted excellent, comprehensive, and helpful memoranda, and on September 9, 2013 I heard excellent, comprehensive, and helpful arguments on the issue.

The Coalition Plaintiffs assert that this case does not create a context to uphold associational privilege and that the discovery is focused on political operatives' unlawful influence in the redistricting process. They further insist that Mr. Terraferma has not presented sufficient evidence to support his claim of associational privilege urging that he must show an objective threat of hostility so extreme (particularly over redistricting) as to cause paid consultants of the party to abandon lawful campaigning if Terraferma discloses discussions he had or may have relayed to other political operatives secretly involved with legislative leaders

and staff in the redistricting process, and that the public interests overcome the political operatives' alleged interests.

To answer, Mr. Terraferma, in an affidavit filed in this cause, asserts that the communications to which he claims a privilege are those between him and employees of or persons under contract with the RPOF. He further asserts that the documents and communications to which he claims a privilege have not been shared with any person who are not employees or under contract with the RPOF, and, if he is required to disclose the documents to the Plaintiffs, it will drastically affect how he communicates within the RPOF and its consultants and agents. He further states that he will be constrained in his ability to engage in frank communications, knowing that his thoughts on sensitive political subjects and issues and political strategies may be disclosed to those who are his political opponents.

Both parties cited the case of NAACP v. Alabama, 78 S.Ct. 1163 (1958) and Perry v. Schwarzenegger, 591 F.3rd 1147 (9th Cir. 2010). In NAACP the U.S. Supreme Court held that an order requiring association to produce records including names and addresses of all members and agents was a denial of due process. In Perry same sex couples brought an action again state officials alleging that ballot proposition to amend California's constitution to ban gay civil marriages violated the Due Process and Equal Protection Clauses of the United States Constitution. The proponents of the proposition intervened, and the plaintiffs sought production of proponents' internal campaign communications concerning strategy and messaging. The Court determined that a claim for First Amendment privilege is subject to a two-part framework and that the party asserting the privilege must demonstrate a prima facie showing that the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new member, or (2) other consequences which suggest an impact on, or "chilling" of, the

members' associational rights (Page 1160). The Court went on to say that if a prima facie showing is made the question then is whether the party seeking discovery "has demonstrated an interest in obtaining the disclosure it seeks…. which is sufficient to justify the deterrent effect . . of the free exercise…. of (the) constitutionally protected right of association. (Page 1161). The Court held that the proponents made a prima facie showing that the compelled disclosure infringed the First Amendment associational rights and that the plaintiffs had not "demonstrated an interest in obtaining the disclosure…which is sufficient to justify the deterrent effect…on the free exercise…of (the) constitutionally right of association." (Page 1164 quoting from NAACP at Page 463).

The Coalition Plaintiffs claim that Mr. Terraferma has not made a prima facie showing for the Associational Privilege to be granted. They stress that there is no presumptive privilege that attaches to what Mr. Terraferma seeks to shield and that there is no showing of harassment, membership withdrawal, or discouragement of new members as required by section one of the framework requirements.

Mr. Terraferma seeks protection of the Associational Privilege and, as previously stated, filed an affidavit asserting that the disclosure of the documents sought by the Coalition Plaintiffs would drastically affect how he communicates within the RPOF and its agents and consultants; that he would be constrained in his ability to engage in frank communications knowing that his thoughts on sensitive political subjects and issues and thoughts on political strategies may be disclosed to political opponents. The affidavit is similar in content to the affidavit that the Court in Perry v. Schwarzenegger found sufficient to grant the privilege.

The Coalition Plaintiffs have cited cases in which the Associational Privilege has been denied. In McCormick v. City of Lawrence, Kansas (not reported in F. Supp), the court

determined that discovery requests at issue were documents targeted toward discovering whether the Plaintiff was engaged in the unauthorized practice of law and thus no privilege was allowed.

In Wilkinson v. F.B.I., 111 F.R.D. 432 (1986) the Court denied the Privilege stating: "In contrast, Braden seeks to apply the privilege not to specific membership documents, but instead to prevent any discovery of her files. While it is clear that the privilege may be asserted with respect to specific requests for documents raising these core associational concerns, it is equally clear that the privilege is not available to circumvent general discovery." (At p.436)

In In re Motor Fuel Temperature Sales Practices Litigation, 707 F. Supp. 2d 1145 (2010) the Defendants sought a First Amendment privilege against disclosure of communication between trade associations and other similar groups regarding collective lobbying and legislative activity concerning ATC for motor fuel. The Court upheld the Magistrate's holding that the privilege did not apply holding that the communications between trade associations would not chill the defendants' First Amendment rights.

In John Doe No.1 v. Reed, 130 S.Ct. 2811 (2010) the Supreme Court rejected a First Amendment privilege claimed by a group who had collected petition signatures necessary to place a referendum on the ballot challenging legislation that expanded the rights and responsibilities of state-registered domestic partners, including same-sex domestic partners. After the Washington Secretary of State determined that the petition contained sufficient signatures to qualify the referendum, a party intervened and invoked the Washington Public Records Act (PRA) to obtain copies of the petition, which contained the signers' names and addresses. The Court rejected the plaintiff's claim of privilege to disclosing the names and addresses of the signers of the petition concluding that public disclosure of referendum petitions

in general is substantially related to the important interest of preserving the integrity of the electoral process.

After reviewing the cases cited by the Coalition Plaintiffs in support of denying the Associational Privilege, I concur in their assertion that there is no presumption of Associational Privilege and that anyone claiming the privilege must make a prima facie showing of entitlement to it. The framework set out in Perry is clear. Anyone claiming a First Amendment privilege must either show "(1) harassment, membership withdrawal, or discouragement of new members, **or** *emphasis added* (2) other consequences which objectively suggest an impact on, or "chilling" of, the members' associational rights. (At p.1161).

As I review the cases cited by the Coalition Plaintiffs in which the Associational Privilege has been denied, it is clear that the facts of those cases are decidedly different from the facts of the current matter I have been requested to decide. Here Mr. Terraferma claims the privilege to documents that constitute internal communications with RPOF members, employees, officials, or vendors on matters of political messaging, strategy research, media messaging, party operations and other matters of political concerns. He has previously submitted documents (a) submitted to or discussed with any legislator, legislative staff member, or any legislative committee; or (b) submitted to or discussed with any person with the intent that the person would convey it to any legislator, legislative staff member, or any legislative committee submitted to, considered by or passed by the Florida Legislature.

This is not a claim of privilege for information from a party about whether he was engaged in the unauthorized practice of law as was the case in City of Lawrence, Kansas. Nor is it seeking privilege for personal files that had been given to a museum under a secrecy condition as was the case in Wilkinson v. F.B.I. It is not seeking a privilege for communications with

those outside the membership, employment, or those who contract with the RPOF as was the case in In re: Motor Fuel Temperature Sales Practices Litigation. And certainly the claim of privilege here does not seek to hide the names and personal information of those who potentially are to be plaintiffs in a lawsuit as was the case in John Dow #1, et al v. Sam Reed, Washington Secretary of State.

Mr. Terraferma is seeking an Associational Privilege for in-house communications, like the Proponents in Perry where the privilege was upheld, to prevent the disclosure of internal campaign communications relating to campaign strategy, etc. The Court in Perry concluded that the Proponents (by the affidavits filed) had shown that discovery would likely have a chilling effect on political association and the formulation of political expression. In effect, the court held that the Proponents had met the requirements of the second point of the framework finding the disclosure of the materials would have an impact on, or "chilling" of, the members' associational rights." Perry at p.1160. I note once again that the framework requirements of Perry are in the alternative, not the conjunctive, thus not requiring one seeking the Associational Privilege from satisfying both points of the framework.

Basically, the Coalition Plaintiffs argue that Mr. Terraferma tried to draw a privilege line at a point to cover documents and communications that may well reflect partisan rationales or intent behind the drafting and selection of legislative redistricting plans. As in Perry this goes contrary to the holding that requirement to produce these documents would have a chilling effect on political association and the formulation of political expression. The Court in Perry indicated that the Proponents had agreed to produce all communications actually disseminated to voters. Here, as previously indicated, Mr. Terraferma has already produced all documents, except attorney-client communications, that discuss or relate to the drawing of, or the possible

configuration of, redistricting maps for the election of members of the Florida Senate or Florida members of Congress.

I find that non-party, Mr. Terraferma, has made a prima facie showing that he is entitled to an Associational Privilege under section (2) of the Perry framework and that the Coalition Plaintiffs have not shown a compelling need sufficient to deny Mr. Terraferma the privilege. Therefore, the First Amendment Associational Privilege should be granted to Mr. Terraferma as to the in house documents and communications that have not been shared with anyone who is not a member, employee, or under contract with the RPOF .

Respectfully submitted this 20th day of September, 2013.

/s/ Major B. Harding
MAJOR B. HARDING, Special Master

Copies to:

Honorable Terry P. Lewis
Counsel of Record