IN THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

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MARK A. WINSLOW,	)	
	)	
Plaintiff,	)	
	)	**Docket No. 11C229**
v.	)	
	)	
JOHN BRUCE SALTSMAN et al.,	)	
	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER

INTRODUCTION

This is the second attempt by Congressman Charles Fleischmann to conceal from public view the details of the guileful pursuit of the office which he now holds. If the court will recall, the incurious candidate allowed his handler, Mr. Saltsman, to publish private personnel file materials from the headquarters of the Tennessee Republican Party. These papers, which Mr. Saltsman remarkably claims merely appeared on the steps in his garage in Nashville, included an employment agreement signed by candidate Robin Smith on behalf of the party with Mr. Winslow. He also purportedly received a copy of a settlement proposal made on behalf of Mr. Winslow by an attorney, which was not signed or accepted by the party. Saltsman also obtained a routine review conducted by accountants on behalf of the party, which is customary when the office of chairman changes hands. The document under which Mr. Winslow was actually paid was signed on behalf of the party by its chairman, Chris Devaney.

Saltsman, with the approval of Mr. Fleischmann, falsely characterized these documents as providing a "lavish bonus" to Mr. Winslow so that he could dishonestly work in the Smith campaign while being paid by the party. This was described by him as at least unethical and probably illegal.

The campaign even established a meretricious website within which it displayed and mischaracterized two confidential documents, neither of which had resulted in the payment of a dime to Mr. Winslow. A fraudulent document upon which had been placed the great seal of the state of Tennessee in order to create the false impression that the party had been audited by the comptrollers office was broadcast in television commercials. Mr. Fleischmann admits that he broadcast "approvals" of these corrupt messages without having actually reviewed them.

The Defendants employed professional polling companies to help craft their mendacious message and to measure its success. The court denied the first motion primarily because Mr. Fleischmann was an elected public official. The Defendants return to this court seeking now to deprive the public access to the polling data from the summer of 2010.

Mr. Fleischmann remains a public official. The press is entitled to explore and the public is entitled to see the means by which Mr. Fleischmann measured the success of his lies. For the benefit of the people of the third congressional district of Tennessee and for those hearty souls who remain interested in the concept of honest campaigns, this motion should likewise be denied.

ARGUMENT

As was discussed in response to the Defendants' first motion for protective order, the Tennessee Supreme Court has established standards under which trial courts should adjudicate applications for protective orders. *Ballard v. Herzke,* 924 S.W.2d 652 (S.Ct. 1996) is specifically referenced in Local Rule 7.02. Applicants must show that the disclosure will result in a clearly defined injury to the party seeking closure. Three categories of factors have been found to weigh against a finding of good cause for a protective order:

(1) when the party benefitting from the protective order is a public entity or official;

(2) the information sought to be sealed relates to a matter of public concern; and

(3) the information sought to be sealed is relevant to other litigation and sharing it would promote fairness and efficiency. Id. (Italics Added)

The first two considerations are relevant in this case. Mr. Fleischmann obviously is a public official. The information he seeks to seal is a matter of public concern. While many citizens have expressed their dismay and even disgust with negative political advertising, the phenomenon persists for a single reason: it works.

It is anticipated that this data, when produced, will demonstrate that Mr. Fleischmann trailed Ms. Smith opponents in 2010 by a substantial margin prior to obtaining documents through treachery, the creation of what amounted to a forged financial record, and the relentless devotion of campaign funds to perpetrate lies and to create false impressions.

The credibility of witnesses has long been held to be peculiarly a question for a jury. *Pool v. First National Bank of Smyrna* 195 S.W.2d 563 (1947).

A political campaign is an expensive, more or less organized effort to persuade. If the evidence, as it were, presented by a candidate is knowingly false, there is a public interest in learning of the lies. If a candidate cynically tracks the success of his mendacity, the public is entitled to judge him for it.

OBSOLETE POLLING RESULTS ARE NOT TRADE SECRETS

Data collected in a concluded election three years in the past are not "trade secrets."

The defendants have argued by analogy that this data would fall within definition of trade secrets under Tennessee law. Aside from the fact that a congressional campaign is not a business entity engaged in commerce, the analogy is not apt.

All expenditures in congressional campaigns must be publically reported. All the funds paid to purchase the advertising together with the businesses employed for that purpose are public knowledge. The competitor, if we follow the analogy, in the summer of 2010 was Ms. Robin Smith. That election concluded in August of that year.

Subsequently, the third congressional district was reapportioned in light of the 2010 census. Another election cycle has taken place. Plaintiff does not seek the unbridled disclosure of current polling, regardless of its purpose. Plaintiff seeks information important to show the wide dissemination of the false message and its effects. This information is stale and of no use to a current candidate, even if one were announced or identified.

Defendants complain that Mr. Winslow has no legitimate need to publish this information. The interests that the court it protecting, however, are not those

of Mr. Winslow, because he will have this information himself. It is the public whom the court protects and the First Amendment rights of the news media to access information which may inform voters about their choices in the future. The press performs no greater service to the public in a democracy than this.

This lawsuit is in Davidson County. Mr. Winslow and Mr. Saltsman reside here. The local news media has paid scant attention to this case. The Chattanooga Times Free Press, however, has reported extensively. The readership of that newspaper is in the Third Congressional District. None of the jurors in this case will be drawn from any county in the Third District. The jurors in this lawsuit, however, will have presented to them at trial in February, 2014 substantial portions, if not all of the polling data. Because the court is open to the public, these materials will be public at that time in any event. Mr. Fleischmann's next election, should he choose to seek office again, would be in the August, 2014 primary.

Consequently, anyone who would wish to make use of what would then be four-year-old data on a reconfigured district would have access to the information merely by attending the trial.

CONCLUSION

The Defendants have shown no legitimate basis to conceal polling data from the public. Mr. Fleischmann is not a private business with a right to protect proprietary information. He is a public office holder whose conduct the public is entitled to measure. The motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of June, 2013, a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid, and electronic mail to the following:

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