

**BEFORE THE FEDERAL ELECTION COMMISSION**

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In the Matter of )	
)	
The Republican National Committee )	MUR 4250
and Alex Poitevint, Treasurer )	
)	
_____ )	

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**THE REPUBLICAN NATIONAL COMMITTEE'S  
MOTION FOR RECONSIDERATION**

The Republican National Committee and Alec Poitevint, its Treasurer, (collectively "RNC") hereby move for reconsideration of the Federal Election Commission's (the "Commission" or "FEC") September 30, 1997 decision denying the RNC's motion for a stay of the above-referenced administrative proceeding. The Commission should reconsider its decision in light of the parallel investigatory proceedings being conducted into the same matters by the United States Senate Committee on Governmental Affairs (the "Senate Committee"), the House of Representatives Committee on Government Reform and Oversight (the "House Committee"), and the United States Department of Justice ("DOJ").

The Commission's simultaneous consideration of MUR 4250 would be unnecessarily complicated by these on-going parallel investigations. With the specter of criminal prosecution looming, individuals will likely resist producing documents and testifying before the Commission. Moreover, delaying these proceedings until the conclusion of the DOJ investigation will not harm the Commission or the public interest. In fact, the commission's proceeding will be much more productive for all involved if conducted after the DOJ's criminal investigation is complete. Accordingly, the Commission should reconsider its

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prior decision and stay MUR 4250 at least until the DOJ completes its parallel criminal proceeding.

### FACTUAL BACKGROUND

The nature of various "campaign finance" proceedings is by now well-known. Campaign finance and related reform has been the hottest topic in Washington since the Senate Committee and the House Committee began their investigations. The campaign finance hearings and related Congressional investigations continue to be the subject of front-page new articles in Washington and throughout the country. This intense media scrutiny and political posturing, along with the misinformation that accompanies them, have plagued these investigations from the start. For example, on September 26, 1997, a Wall Street Journal article quoted Mr. Jim Jordan of the Senate Minority Staff as having forwarded confidential Committee documents relating to the RNC to the DOJ. Mr. Jordan confirmed that the Minority Staff did turn over "depositions" and other confidential Committee materials to persons at the DOJ. The RNC does not know what documents were leaked, to whom they were given, or when they were leaked.

As the Commission is aware, the DOJ is conducting a parallel criminal investigation of the same issues which the Commission seeks to examine in this administrative matter. The same witnesses and the same documents the Commission seeks are currently involved in grand jury proceedings. To date, the RNC has cooperated in providing documents and producing witnesses with respect to all ongoing investigations, and it will continue to do so. However, the simultaneous proceedings before the Congressional Committees and the DOJ

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have put a substantial burden on the RNC, and they will inevitably hamper the RNC as well as the Commission in resolving MUR 4250.

## ARGUMENT

### **I. The Balance of the Equities Favors a Stay of these Administrative Proceedings.**

The Commission should stay its administrative proceedings in light of the parallel Committee hearings and DOJ criminal investigation. See United States v. Kordel, 397 U.S. 1, 9, 12 (1970) (a district court has discretion to stay civil and administrative proceedings when a party also faces related criminal proceedings); see also Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987) (same). The decision to stay depends on the particular circumstances of the case; a stay should be granted “when the interests of justice seem[] to require such action.” Kordel, 397 U.S. at 12 n.27. See also Campbell v. Eastland, 307 F.2d 478, 487 (5<sup>th</sup> Cir. 1962), cert. denied, 371 U.S. 955 (1963) (noting that “[a]dministrative policy gives priority to the public interest in law enforcement.”). The courts generally treat four factors as significant in conducting a balancing test in favor of or against a stay: (1) the commonality of issues; (2) the timing of the motion; (3) judicial (governmental) efficiency; and (4) the public interest. The Honorable Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201 (1990). The burden on the party being forced to respond to the parallel proceedings must be considered as well. Texaco, Inc. v. Borda, 383 F.2d 607, 608-09 (5<sup>th</sup> Cir. 1967); Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980).

A balancing of the above-identified interests demonstrates that the Commission should stay MUR 4250 pending resolution of the DOJ criminal proceeding.

**A. The Commonality of the Issues and Witnesses.**

“The most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues.” Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. at 203. The overlap of issues in parallel proceedings strongly suggests that a civil matter should be stayed pending the criminal proceedings. See Brock v. Tolkow, 109 F.R.D. 116, 119 (E.D.N.Y. 1985) (noting that a stay is most likely to be granted where the criminal and civil matters involve the same subject matter); see also Brumfield v. Shelton, 727 F.Supp. 282, 284 (E.D. La. 1989) (granting defendant’s motion to stay civil proceedings until completion of criminal investigation in large part because the facts at issue in the civil suit and the criminal investigation were the same). The issues in these proceedings are identical.

It is undisputed that the Commission’s investigation in MUR 4250 concerns the same factual allegations as those that are the subject of the grand jury investigation. The relevant parties, witnesses, documents and defenses are also identical. Those individuals that have testified (or are expected to testify) before the grand jury will undoubtedly be reluctant to participate in the Commission’s proceedings. See e.g., U.S. v. Certain Real Property, 751 F.Supp. 1060, 1061 (E.D.N.Y. 1989) (defendants in civil action face “Hobson’s choice” when asked to respond to civil proceedings while criminal investigation in pending); Brumfield, 727 F.Supp. at 284 (where there is a real risk of self-incrimination, civil proceedings are properly stayed). When the grand jury proceedings are over, however, these same individuals will be more likely to fully cooperate and facilitate the Commission’s search for the truth.

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In this case an individual's reluctance to testify in the Commission's proceeding is not likely to reflect an unwillingness to tell the truth. While the grand jury is sitting, individuals will naturally resist giving further testimony on these issues. Even the most careful individual testifying multiple times on the same subject will be concerned that his or her testimony could be twisted to create contradictions.

Because the issues and individuals involved in MUR 4250 are identical to those in the DOJ investigation, this "threshold" factor weighs in favor of a stay of these proceedings.

**B. The Timing of the Motion/Entanglement of Parallel Discovery**

The status of these parallel proceedings weighs in favor of a stay because the RNC is currently in the midst of the DOJ's grand jury proceedings. When confronted with parallel actions, courts agree that "[a] stay of civil proceedings . . . is even more appropriate when both actions are brought by the government." Brock, 109 F.R.D. at 119 (citation omitted). In Brock, the Department of Labor brought a civil action in April 1985 against trustees of an employee benefit plan for violations of fiduciary obligations under the Employee Retirement Income Security Act of 1974 ("ERISA"). In September 1985, the DOJ served grand jury subpoenas on the benefit plan demanding various documents. The plan trustees moved to stay all discovery in the Department of Labor action pending the outcome of any criminal investigation.

The district court exercised its discretion in granting the defendant trustees' motion to stay despite recognizing that the defendants had no right to a stay. Id. at 119. The court noted that the lack of an indictment against the defendants did not make a stay any less

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appropriate. Id. at 119 n.2. The court emphasized that a stay of discovery was proper because it would cause no serious damage to the public interest and the resolution of the criminal case might reduce the scope of discovery in the civil action. Id. at 119-120. Like Brock, other cases have granted stays of noncriminal proceedings where no indictment had been handed down. See e.g., Koshi v. Gratos, 790 F.2d 1050, 1057 (2<sup>nd</sup> Cir. 1986) (affirming district court's stay of civil suit pending U.S. Attorney's announcement declining prosecution); Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5<sup>th</sup> Cir. 1979) (district court abused its discretion in denying litigant's motion to stay where litigant was threatened with potential criminal prosecution, but had not been indicted); United States v. Certain Real Property, 751 F. Supp. 1060, 1063 (E.D. N.Y. 1989) (staying civil forfeiture proceeding against a defendant who had not been indicted); Brumfield v. Yeltin, 727 F.Supp. 282, 284 (E.D. La. 1989) (civil suit stayed pending outcome of criminal investigation where defendant had not been indicted).

Regardless of whether indictments are ever handed down, if the Commission proceeds with MUR 4250, it will interfere with the DOJ's criminal investigation. The recent Senate Minority Staff leak of confidential documents to the DOJ in violation of Senate protocol illustrates how parallel proceedings create an inherent and continuing risk of interference with the grand jury investigation. In Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987), the Court observed the benefits of staying civil proceedings under these circumstances:

[I]t has long been the practice to "freeze" civil proceedings when a criminal prosecution involving the same facts is warming up or underway... The "freeze" we think is not for the protection of the [defendant] only, but also arises out of a sense that deferrable civil proceedings constitute improper interference with the

criminal proceedings if they churn over the same evidentiary material.

Id. at 1204, quoting Peden v. United States, 512 F.2d 1099, 1103 (Ct. Cl. 1975).

This same concern prompted a Temporary Emergency Court of Appeals to affirm a district court's stay order in United States v. Armada Petroleum Corp., 700 F.2d 706 (Temp. Emer. Ct. App. 1983). The Court of Appeals said that where there was an overlap in the time periods covered by the criminal investigation and administrative subpoena, additional documents sought by the subpoena might be used in the criminal proceeding. Id. at 709. In the Court of Appeals' view, "[t]he result would be the impermissible expansion of the government's right to pretrial discovery in the criminal prosecution." Id. See also Capital Engineering & Manufacturing Co., Inc. v. Weinberger, 695 F.Supp. 36 (D.D.C. 1988) (where civil discovery and criminal investigation were "inextricably intertwined," civil discovery was stayed pending grand jury's decision whether to indict).

### C. Governmental Efficiency

Moreover, staying this proceeding will put both the Commission's and the RNC's resources to better use. As mentioned above, individuals will be much less likely to cooperate with the Commission while a grand jury is sitting. A stay will spare the Commission the difficulty and expense of battling with those individuals (and their lawyers) who resist testifying for fear that they may be subject to criminal prosecution. In addition, common sense dictates that the government should not spend money conducting simultaneous investigations into the same underlying activities where there is no prejudice to the Commission in waiting until the grand jury proceeding is completed. In fact, the Commission

may be in a better posture to resolve MUR 4250 after these parallel proceedings are concluded.

Many courts have recognized that the resolution of criminal investigations can often prompt settlement or simplify issues and reduce the scope of civil discovery. See e.g., Brock, 109 F.R.D. at 120 (noting that resolution of criminal investigation might reduce the scope of discovery or simplify issues); Texaco, Inc. v. Borda, 383 F.2d 607, 609 (5<sup>th</sup> Cir. 1967) (recognizing that proceeding with the criminal case will reduce the scope of discovery in the civil action and may simplify issues).

In light of the overlap in the DOJ investigation, the congressional hearings, and the Commission proceeding, both the RNC and the Commission will be best served by a stay of these proceedings until the grand jury investigation is finished.

The governmental efficiency factor strongly weighs in favor of a stay of these proceeding.

**D. Public Interest.**

As Judge Milton Pollack has noted, the impact of a stay of a civil matter upon the public interest is "perhaps the most important factor in the equation, albeit the one hardest to define." Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. at 205. This is not a case where the quick response of a regulatory body is necessary for the maintenance and preservation of the integrity of the securities markets. Cf. SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C.Cir.), cert. denied, 449 U.S. 993 (1980). Nor do mislabeled drugs threaten the public health, as was the case in Kordel. The alleged campaign finance violations at issue here are already at least a year or two old. The results of the 1994 Congressional

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elections and the 1996 Presidential election are final and irreversible. The National Policy Forum, the vehicle for the alleged impropriety, is inactive. The public interest is in no way threatened even if the allegations in MUR 4250 are proven to be true.

Should the Commission proceed with MUR 4250, the remedy most likely sought would be a conciliation agreement, including payment of a civil penalty. If the conciliation process failed and the Commission brought a civil action against the RNC, the remedy would be the payment of a fine and perhaps some sort of injunctive relief. 2 U.S.C. § 437g(6)(C). Given that the NPF is no longer active, there is no need for quick action in the form of injunctive relief. In addition, where a money remedy is sought in a regulatory proceeding, there is no irreparable injury if the administrative matter is stayed. See Gordon v. Federal Deposit Insurance Corporation, 427 F.2d 578 (D.C. Cir. 1970) (“the Government’s need for civil relief, which involves merely the collection of money is not as strong as that in Kordel. . .”). This proposition has also been recognized in parallel civil forfeiture proceedings brought by the government. For example, in United States v. Certain Real Property, 751 F.Supp. at 1062, the court stayed a drug forfeiture action against the defendants, who also faced criminal proceedings, because a forfeiture action was “not comparable in public importance to a civil enforcement action brought by a federal regulatory agency entrusted with the protection of consumers, investors, or other broad segments of the population.” See also United States v. U.S. Currency, 626 F.2d 11, 17 (6<sup>th</sup> Cir.), cert. denied, Gregory v. U.S., 449 U.S. 993 (1980) (staying civil forfeiture action where there was “no strong interest in proceeding expeditiously”).

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The importance of the public interest factor is illustrated by United States v. Armada Petroleum Corp., 562 F.Supp. 43 (S.D. Tex. 1982), aff'd. 700 F.2d 706 (Temp. Emer. Ct. App. 1983). In Armada Petroleum, the respondent corporation faced parallel civil and criminal proceedings brought by the Department of Energy (DOE) and the DOJ concerning the allocation and pricing of crude oil. The DOE's Office of Special Investigations had referred certain matters to the DOJ for prosecution, which resulted in an indictment. The DOE then continued related civil proceedings and went to court seeking enforcement of an administrative subpoena that requested materials overlapping the time in question in the criminal proceedings.

In considering the DOE's motion to enforce its subpoena, the district court analyzed the facts in light of SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir. 1980), and concluded that the proper course was to defer ruling on the petition to enforce the DOE subpoena until the completion of the related criminal proceedings. 562 F.Supp. at 54. The court's view that a delay in the noncriminal proceedings would not seriously injure the public interest was dispositive. Id. The district court's finding of lack of injury to the public interest was affirmed on appeal. 700 F.2d at 709.

The Brock court also distinguished Dresser and Kordel as cases involving "a tangible threat of immediate and serious harm to the public at large." 109 F.R.D. at 120. Brock recognized the importance of ERISA as a remedial statute, but said that the alleged ERISA violation "simply does not present the same danger to the public interest" as the alleged violations in Dresser and Kordel. Id.

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The courts in Armada Petroleum and Brock recognized Dresser as arguably strong precedent. However, in Dresser the distinguishable public interest factor was clearly the driving force behind the denial of the motion to stay. The Dresser court properly recognized the SEC's responsibility to ensure the efficient working of the securities markets and to protect investors: "If the SEC suspects that a company has violated the securities laws, it must be able to respond quickly: it must be able to obtain relevant information concerning the alleged violation and to seek prompt judicial redress if necessary." 628 F.2d at 1377. Given this backdrop, the Dresser decision was not surprising because "[f]or the SEC to stay its hand might well defeat its purpose." Id. at 1380.

This case should be controlled by Brock and Armada Petroleum, rather than Dresser. Enforcement of the public interest has occurred in this case, and it will continue by virtue of the ongoing Committee hearings and the DOJ investigation. In fact, the threat of prosecution in the DOJ investigation is the ultimate vindication of the public interest. See Brock, 109 F.R.D. at 121 (noting that "a criminal prosecution serves to enforce those same [public] interests"). With three ongoing, related investigations in high gear, there is no strong public interest in having the Commission proceed with this administrative matter at this time. Staying MUR 4250 will not prevent the Commission from discharging its statutory responsibilities. The Commission's proceeding will be equally as effective after the DOJ proceeding is concluded, and may actually be enhanced.

Because the public interest will not be harmed by a stay of MUR 4250, this decisive factor weighs heavily in favor of the RNC's motion for a stay.

**E. Burden on the Defendant.**

Requiring the RNC to respond to MUR 4250 at this time would be extraordinarily burdensome to the RNC. In Texaco, Inc. v. Borda, 383 F.2d 607 (5<sup>th</sup> Cir. 1967), the Fifth Circuit Court of Appeals upheld a district court's decision to stay a civil antitrust proceeding against a group of individuals and companies who were targets of an ongoing criminal proceeding arising out of the same alleged conduct. The Court of Appeals found that the district judge had properly exercised his discretion in concluding as follows:

Upon a consideration of all factors involved in this case...a balancing of the equities, so to speak, in my opinion, justify a stay, at least until after a trial of the criminal action. The indicted defendants should not be unduly hampered, as I believe they would be if they had to fight on two fronts at the same time.

Id. at 608-09. This concern cannot be overstated here, where the RNC is responding on four fronts, rather than two.

Similarly, in Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53 (E.D. Pa. 1980), the court observed the burden faced by entities which are forced to contend with civil and criminal proceedings simultaneously:

Defendants are confronted with the necessity of developing a defense to complex criminal charges. They face the possibility of substantial penalties in that criminal action. The preparation of the defense will impose upon both the corporate and individual defendants, and their counsel, substantial burdens. Intensive discovery at this time in the civil cases will divert valuable resources from the defense of the criminal action.

87 F.R.D. at 56-57.

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The RNC has been dealing with the Congressional Committees for several months. In conjunction with the Congressional hearings and subpoenas, the RNC and its counsel have been forced to review hundreds of thousands of documents. The RNC has also been cooperating with the DOJ in its ongoing criminal investigation, but its resources are becoming increasingly taxed. See Golden Quality Ice Cream Co., 87 F.R.D. at 56-57 (noting that civil proceedings would spread thin the time of key individuals who must conduct normal managerial functions and be responsible for coordinating defense to criminal charges). These on-going proceedings have required untold hours of document review and witness preparation by counsel. Full defense of yet a fourth proceeding related to the same issues will compromise the RNC's ability to defend itself. See Brock, 109 F.R.D. at 121 (granting defendants' motion to stay because public interest did not outweigh "the distinct possibility that the defendants will be unable to defend both actions to the fullest").

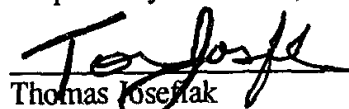
This final factor, undue burden, weighs in favor of the RNC's motion for a stay.

### CONCLUSION

The Commission should stay MUR 4250 in the interests of all parties. The same individuals who have testified in the Congressional hearing and the DOJ investigation will naturally be hesitant to testify and produce documents in this matter. There will be no prejudice to the Commission if the proceedings are stayed, nor will the public interest be harmed in any way. In fact, the search for the truth will be facilitated by waiting for the conclusion of the criminal investigation. Finally, it is burdensome for the RNC to respond to four separate, yet related proceedings simultaneously. In sum, the balance of the equities

favors staying these proceedings at least until the DOJ proceeding is completed. Accordingly, the Commission should reconsider its prior decision and stay MUR 4250 at least until the DOJ finishes its parallel criminal proceeding.

Respectfully submitted,

  
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