

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20543

DEC 14 20 11 '97

BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of)
)
Republican National Committee, *et al.*) MUR 4250

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter involves the Republican National Committee's, and Alec Poitevint, as treasurer, ("RNC's") apparent violation of 2 U.S.C. § 441e by accepting the proceeds of a loan secured with foreign national funds. *See* Memorandum in MUR 4250 dated May 8, 1997; *see also* the General Counsel's Report ("GCR") in MUR 4250 dated August 3, 1997.

As the Commission is aware, in lieu of responding to discovery in this matter, the RNC on September 24, 1997 filed a motion to stay the Commission's administrative proceedings pending resolution of the Department of Justice's criminal inquiry into substantially the same transactions at issue in this matter.¹ *See* the GCR in this matter dated November 9, 1997. On September 30, 1997, the Commission unanimously denied respondent's motion.

The RNC now files the instant motion for reconsideration of the Commission's September 30, 1997 decision, but fails to cite to any provision in the Act or the Commission's regulations providing for any such motion. Moreover, this motion is untimely, filed approximately six weeks after the Commission's decision. Despite the foregoing, in order to

¹ In its most recent motion, the RNC further notes that both Senate and House investigatory committees have begun inquiries into activity surrounding the 1996 election cycle which may involve aspects of the transactions at issue in this matter.

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apprise the Commission of the merits of respondent's motion, this Office addresses respondent's arguments in the following discussion.

II. ANALYSIS

In its present motion the RNC reiterates its arguments, albeit at greater length, in support of its motion for a stay of these proceedings, but again fails to cite any legal authority or factual basis for the Commission granting the requested stay. Based on a five part test derived from various Federal court decisions addressing stay requests, many of which have not been adopted by the District of Columbia Circuit ("D.C. Circuit"),² the RNC concludes that failure to stay this matter imposes an unreasonable burden on respondent and may be prejudicial to its interests in a possible criminal action. As before, the RNC not only concludes that a stay would not adversely affect the Commission's investigation because no public interest will be harmed by the consequent administrative delay, but that a stay in fact may actually benefit the investigation.

Importantly, the RNC's most recent motion does not in any way challenge the proper standard in the D.C. Circuit for granting stays as held in the court's interpretation of United States v. Kordel, 397 U.S. 1 (1970), in SEC v. Dresser Indus., 628 F.2d 1368 (D.C. Cir. 1980). As noted in this Office's previous report addressing this issue, in United States v. Kordel, the Supreme Court in addressing simultaneous civil and criminal investigations, noted that a stay of the civil proceeding need be balanced against the public interest in preserving the unhampered function of an agency's regulatory duties. Only where the government intention in bringing the civil action may be improper is a stay required. Where such improper conduct is not present, as in

² Any litigation in this matter is likely to be filed in the D.C. District court.

this case, the court has discretion in granting a stay, and should only do so where there is a demonstrable prejudicial affect on respondent. *See Kordel*, 397 U.S. at 769.

In an *en banc* decision in SEC v. Dresser Indus., the District of Columbia Court of Appeals in balancing the various interests reasoned, like *Kordel*, that “in the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.” *Dresser*, 628 F.2d. at 1374. Noting that “[t]he Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings,” the court explained that stays are proper only “[i]f delay of the noncriminal proceeding would not seriously injure the public interest.” *Id.* at 1375-76.

These decisions make clear that the presumption is in favor of allowing parallel civil and criminal investigations to proceed unimpeded, even when both are brought by the government, absent a showing that preservation of the civil matter will materially harm a party’s interest in the criminal matter and a stay of the civil matter will not injure the public interest. It is within this context that the RNC’s arguments are properly examined.

As an initial matter, the RNC correctly notes that the Commission, like the district courts, has discretion in granting stays based on a balancing of the particular facts of the case and the judicial interests in staying proceedings.³ *See* Attachment 1, at 3. The RNC introduces a five

³ In this introduction to its analysis, the RNC, citing Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), also seems to suggest that where both the criminal and civil actions are brought by the government, there is a presumption favoring a stay of the civil proceeding in favor of the criminal action. However, Campbell involved a claim against the government by a taxpayer for the refund of collected taxes. The government moved for a stay to protect against discovery where the taxpayer admitted that the civil discovery was in part aimed to aid the criminal defense. Accordingly, Campbell does not stand for the proposition apparently advanced by respondent. “Those who read Judge Wisdom’s dicta to require a stay of the civil proceedings are in error. Regardless of who brings the civil action, the Government or a private litigant, the Constitution does not ordinarily require a stay of the civil proceedings pending outcome of related criminal proceedings.” The Honorable Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 202 (1990).

part test for balancing these concerns.⁴ Examination of the overlapping arguments advanced under this five part test discloses that respondent essentially makes four arguments in support of its motion. The RNC argues that: A) the granting of a stay in the civil matter is judicially preferred when the parallel civil and criminal matters are both brought by the government; B) the delay resulting from a stay will not harm the public interest and would be beneficial to the Commission; C) the Commission's investigation interferes with the criminal inquiry and may lead to improper criminal discovery; and D) proceeding with both the civil and criminal inquiries is overly burdensome to respondent.

A. **The granting of a stay in the civil matter is not judicially preferred when the parallel civil and criminal matters are both brought by the government.**

Initially, the RNC notes that a threshold to determining the propriety of a stay is the degree to which the parties and issues in the parallel matters overlap. Primarily relying on a New York district court case, Brock v. Tolkow, 109 F.R.D. 116 (E.D.N.Y. 1985), the RNC then concludes that the subject matter of the Commission's and the grand jury's investigations are "identical" and that "this threshold factor weighs in favor of a stay" in the civil proceeding. Attachment 1, at 4-5. While undoubtedly aspects of the grand jury inquiry involve the transaction at issue in this matter, the grand jury may be investigating issues going beyond the present parameters of MUR 4250. Consequently, it is not clear that the two matters are "identical."

More importantly, the overlap in issues in the two matters does not presume a stay. This overlap serves only as an initial threshold, making the matter suitable for further analysis.

⁴ The five parts are: (1) the commonality of issues; (2) the timing of the motion; (3) judicial (governmental) efficiency; (4) the public interest; and (5) the burden on the party being forced to respond to parallel proceedings.

Respondent's reliance on Brock is misplaced.⁵ This district court case involved a breach of fiduciary duty action brought by the Department of Labor against the trustees of United Welfare Fund. The trustees moved for a suspension of discovery arguing that responding to the civil discovery put them in the position of invoking their fifth amendment rights, and thereby prejudicing their ability to disclose the facts necessary to conduct an effective defense in the civil matter, or responding to civil discovery at risk of compromising interests in a potential parallel criminal matter. Citing Kordel, this district court acknowledged that there is no constitutional right to a stay, but departing from Kordel reasoned that stays are most appropriate when parallel actions are brought by the government and that pre-indictment posture of matter, while "counseling against a stay," does not preclude consideration of the motion. *Id.* at 119 n.2.

Based on this criteria, the court granted the stay explaining that a government action addressing breaches of a fiduciary duty where the government is primarily protecting a pecuniary interest, and the trust's recipients are experiencing no harm and continue to receive trust proceeds, does not present the same public interest at stake in Kordel (protecting public against misbranded drugs) or Dresser (protecting public confidence in the securities markets).

The reasoning in Brock does not apply here. The RNC, as a corporate entity, does not possess a fifth amendment right against self incrimination, nor does respondent, aside from vague references to uncooperative witnesses, directly claim that associated individuals will refuse to provide information based on the fifth amendment.⁶

⁵ Respondent also relies on Brumfield v. Shelton, 727 F.Supp. 282 (E.D. La. 1989). However, this breach of fiduciary duty case involved only private litigants, not the government. Thus, the cited case did not raise the public interest protection concerns at issue in the present matter.

⁶ In responding to the Commission's discovery, the RNC is compelled to appoint an agent who could, "without fear of self-incrimination, furnish requested information as was available to the corporation."

Additionally, it is clear that the Commission's interest in MUR 4250 goes beyond the mere collection of money from the RNC. The Commission is entrusted with the responsibility of ensuring that the federal election laws are adhered to in order to preserve the public's confidence in the electoral system by preventing political corruption and the appearance of political corruption. The timely resolution of this matter will preserve this public confidence by both correcting the present violations and protecting against the re-occurrence of this activity in the future. It would appear that even under this court's permissive view, a stay in this matter is improper. In fact, a D.C. district court in citing Brock has taken a consistent view.

In re: Save More Foods, Inc., 96 B.R. 1 (D.D.C. 1989), involved a bankruptcy proceeding where creditors sought to have the president of the corporation designated as "debtor" in Bankruptcy Court, thus subjecting him to certain financial inquiry. The president, who had secured a prior stay of his deposition in the bankruptcy proceedings because of a parallel criminal matter, argued that subjecting him to inquiry as "debtor" would nullify the deposition stay, burdening his fifth amendment rights. The Bankruptcy court rejected these arguments, designating the president as "debtor" and subjecting him to inquiry. On the appeal, the district court initially noted that the deposition stay was intended to serve the narrow purpose of protecting the debtor's right against self-incrimination, and "not to prohibit all discovery in the civil action, even of [the debtor]." *Id.* at 3. The court next examined the governmental interest in the bankruptcy proceeding of "administering a multiparty process of distribution and compensation, in which several parties -- as well as the public at large -- have interests," against

Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1206 (Fed. Cir. 1987) (citation omitted). Only upon showing that no agent could speak for the RNC without incrimination, may the RNC refuse to respond on fifth amendment grounds. *See, e.g., Kordel*, 397 U.S. at 8-11.

the president's interest in protecting his fifth amendment rights. *Id.* at 4. In upholding the lower court's denial of a stay, the court held that the public interest in the timely distribution of the debtor's assets outweighed any possible harm to the president in the continuation of the bankruptcy proceedings, explaining that "[t]he equities in this context are simply different than in a bipolar civil action seeking a money judgment." *Id.*

Clearly, the Commission's interest in preserving the public's confidence in the electoral system is as compelling a public interest as preserving creditors' pecuniary interests in a bankruptcy proceeding. As noted by the Brock court, this public interest gains even greater weight in cases like the present where no criminal indictment has been returned and the RNC has no fifth amendment rights. Contrary to the RNC's conclusions, the cited case not only fails to support a presumption for granting stays in matters like this one, but in fact "counsel[s] against a stay." Brock, F.R.D. at 119 n.2.⁷

B. The Commission's enforcement of MUR 4250 serves a compelling public interest and delay would adversely affect this interest.

In a related argument, the RNC next contends that because the activities at issue in MUR 4250 present no harm to the public interest, the National Policy Forum ("NPF") is no longer active and the witnesses in this matter are unlikely to cooperate during the pendency of the

⁷ In addition to Brock, respondent cites a string of cases for the proposition that stays may be granted prior to a criminal indictment. See Attachment 1, at 6. Initially, it should be noted that all cases cited by respondent either did not involve the government as a party (Koshi v. Gratos, 790 F.2d 1050 (2nd Cir. 1986), Wehling v. CBS, 608 F.2d 1084 (5th Cir. 1979), Brumfield) or the protection of a compelling public interest was not at issue (U.S. v. Certain Real Prop., 751 F.Supp. 1060 (E.D.N.Y. 1989), (government forfeiture action not comparable to actions brought by federal regulatory agencies to protect broad segments of the public)). Nonetheless, it may be that under the appropriate facts, a D.C. district court will grant a pre-indictment stay. See, e.g., Capitol Engineering v. Weinberger, 695 F.Supp. 36 (D.C.C. 1988), (government's motion for stay granted to protect pre-indictment criminal case from improper discovery). However, the presumption remains for denying stays in most circumstances, especially where there is a compelling public interest in continuing the civil matter.

criminal inquiry, the Commission is best served by granting a stay until completion of the criminal matter when these witnesses presumably will be cooperative. *See* Attachment 1, at 7-11.

In advancing this argument, respondent initially attempts to equate the Commission's enforcement proceedings with various court cases involving principally pecuniary interests or claimed public interests which had been revoked. Again relying principally on Brock, and also on 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), the RNC argues that "there is no strong public interest in having the Commission proceed . . . at this time" because "enforcement of the public interest has occurred in this case . . . by virtue of the ongoing Committee hearing and DOJ investigation." Attachment 1, at 11.

However, unlike the Commission's responsibility in protecting the public confidence in the electoral system, these cases involved significantly less compelling policy concerns. As already discussed, the Brock court was unable to identify a compelling public interest because the beneficiaries of the trust were not suffering harm as a result the fiduciary breach by the trustees. Similarly, in Armada, the court found that the public interest identified by the government had been revoked. Armada involved a price fixing action by the Department of Energy against a petroleum company. The lower court refused to enforce discovery against the defendant pending completion of criminal matter. On appeal by the government, the court applying a Dresser analysis upheld the lower court concluding that defendant's interest in protecting his rights in the criminal matter outweighed the government's stated public interest because "price control of oil is

no longer in effect, pursuant to the President's order of decontrol." Armada, 562 F.Supp. at 709 (citations omitted).

The public's commercial interests sought to be protected by the federal agencies in these matters are simply not analogous to the interests entrusted to the Commission's protection.⁸ While the public can be made financially whole after a delay, the integrity of the electoral system can be harmed by a delay, regardless of the ultimate results of the investigation. Similarly, the termination of the NPF is not material to the Commission's interests. The respondent in this matter is the RNC; the entity primarily responsible for the transaction at issue and the principal beneficiary of the transaction proceeds.

C. **The Commission will not benefit from a delay in MUR 4250 and continuation of the matter does not interfere with the parallel criminal inquiry.**

Based on its above conclusion that no public interest will be harmed by a delay in MUR 4250, respondent next argues that the Commission will in fact benefit from the delay. Respondent notes that the Commission's resources will be preserved by not having to engage in discovery enforcement against uncooperative parties, that the inefficiency of conducting overlapping investigations will be avoided, and that the resolution of the criminal matter will lead to information that will ultimately facilitate resolution of MUR 4250. *See* Attachment 1, at 6-8.

⁸ The additional cases cited by the RNC do not change this conclusion. Both Gordon v. Federal Deposit Insurance Corporation, 427 F.2d 578 (D.C. Cir. 1970), and United States v. Certain Real Property, 751 F.Supp. 1060 (E.D.N.Y. 1989), involved primarily pecuniary interests. In Gordon, the FDIC brought action for payment on a promissory note and in Certain Real Property the government brought a property forfeiture action. In both cases the courts found stays appropriate where the only governmental interest was "merely the collection of money." Gordon, 427 F.2d at 580. In fact, the court in Certain Real Property explicitly noted that "[t]his forfeiture action is 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, whose welfare could be jeopardized by deferral of the action." Certain Real Property, 751 F.Supp. at 1062.

As the Commission is aware, while some witnesses in this matter have refused to comply with the discovery pending resolution of the grand jury inquiry, most notably the RNC and the NPF, other sources have provided this Office with substantial probative information concerning this matter. Respondent's assertion that this discovery will be substantially hampered by the parallel criminal inquiry is just not true. Nor is there any indication that allowing for the resolution of the criminal inquiry will ultimately benefit resolution in this case. "The current stage of the parallel criminal proceeding will often substantially effect the net balance of equities. Is resolution nearby or remote in time?" Pollack, Parallel Civil and Criminal Proceedings, 126 F.R.D. at 203. The parallel criminal matter remains in its preliminary stage, without any clear indication of the direction or anticipated duration of the matter. Nor should we "assume that the criminal proceedings will result in a conviction of the defendant, which . . . should not and cannot be predicted prematurely." *Id.* at 204. The RNC provides no bases for concluding that awaiting resolution of the potential criminal matter benefits the Commission.

In a related argument, the RNC next contends that continuation of the Commission's enforcement matter will interfere with the criminal investigation and may allow discovery obtained through this enforcement matter to improperly find its way to the criminal case. *See* Attachment 1, 6-7. In this context, respondent relies on Armada, Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987), and Capitol Engineering & Manufacturing Co. v. Weinberger, 695 F.Supp. 36 (D.D.C. 1988). While these cases illustrate concern over potential abuse of the more permissive civil discovery as a means of obtaining information for the parallel criminal matter, that concern is not a reason to stay civil discovery. There is no reason to believe the Commission will abuse its discovery processes for an improper purpose.

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The proper inquiry is whether the Commission believes the public will be better served by delaying this investigation. As already discussed, Armada is distinguishable from the present matter in that the identified public interest had been revoked. Afro-Lecon and Capitol Engineering, both contract cases, are equally distinguishable. Afro-Lecon involved an administrative action brought by a government contractor for costs incurred due to a delay in the contract. Upon learning that information gathered in the civil matter had been shared with the criminal prosecutor in a parallel criminal matter, the contractor moved for a stay of the administrative proceedings. GSA denied the requested stay. On appeal, the court reasoned that because the government was the defendant in the civil matter, and may ultimately have to compensate the plaintiff, no public interest would be harmed by a delay. Similarly, in Capital Engineering, a contractor sued the Army claiming suspension of its contract was unlawful. In this case the government moved for a stay to protect the government's criminal case from improper disclosure in the parallel civil matter. The court granted the government's motion citing the public's interest in preserving the government's criminal case.

Unlike these cases, the Commission is not the defendant in this context and, as already discussed, a stay will not protect the public interest in enforcing the FECA, but instead will harm such interest. Significantly, the Department of Justice has not requested that the Commission suspend this investigation, nor can respondent make a showing of abuse of civil discovery in this matter because it has not occurred.

D. Respondent fails to show that continuation of MUR 4250 creates an undue burden.

Last, the RNC claims that to defend this matter, in light of the other parallel inquiries, places an undue burden on respondent and compels a stay. *See* Attachment 1, at 12-13. In its argument, respondent relies on a Third Circuit appellate decision upholding a stay of a civil private right of action “anti-trust suit covering alleged illegal activity in a three state area, going back many years” pending resolution of a parallel criminal matter. Texaco Inc. v. Borda, 383 F.2d 607, 608-609 (3rd Cir. 1967). Based on the unusual scope of the matter, the court concluded that to defend two matters at the same time would unduly burden defendant. While the RNC’s contention that it may be forced to defend the transaction at issue in MUR 4250 in three additional forums may prove accurate, this fact alone does not compel a stay. Borda involved exclusively private litigants; public interest considerations were not weighed by the court in granting the stay. Moreover, the court relied heavily in its conclusion on the complicated nature of the anti-trust action. By contrast, the present matter concerns only one transaction.

Similarly, Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53 (E.D. Pa. 1980), the second case relied on by respondent, also involved a complicated anti-trust litigation. In that case, the court relied principally on preserving the court’s economy in granting the stay. “[T]he question with which we are here concerned is tied most directly to the court’s responsibility ‘to control the disposition of the cases on its docket with economy of time and effort’ for all actors in the litigation, including the court itself.” *Id.* at 57 (citation omitted). Because material discovery has already been completed in this matter, resulting in the acquisition

of substantial probative evidence, a stay in this matter would not preserve the Commission's resources and, instead, would only serve to hamper this successful investigation.

Indeed, the RNC's claim that responding to and defending this proceeding creates an undue burden, contradicts respondent's representation that it has already "cooperated in providing documents and producing witnesses with respect to all [other] ongoing investigations."

Attachment 1, at 2. As noted by the Golden Quality court in limiting the scope of the stay order, to the extent that documents were "turned over to the grand jury investigating the alleged criminal violations[, s]ince the documents in question have already been identified and sorted, compliance with this request should impose only a minimal burden upon the defendants." Golden Quality, 87 F.R.D. at 59. Respondent's prior cooperation in the parallel investigations, rather than creating a burden, facilitates respondent's compliance with the outstanding discovery.

III. CONCLUSION

The RNC fails to cite any authority challenging the legal standard relied upon by the Commission in its September 30, 1997 denial of respondent's previous motion. To reiterate, under Kordel and Dresser, the applicable law in this jurisdiction, a stay should only be granted when the movant's interest in protecting against possible prejudicial harm in a parallel criminal matter outweighs the public interest sought to be protected by the government in the civil matter. "The effect of a stay of the civil case upon the 'public interest' is perhaps the most important factor in the equation." Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. at 205. As fully discussed in this Office's report addressing respondent's prior motion, under this balance it would be improper to stay MUR 4250. Moreover, the RNC fails to cite a single case where the

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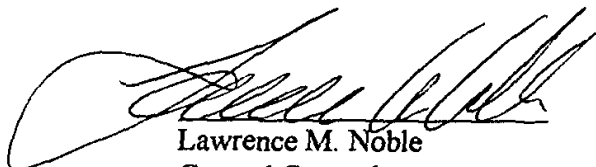
public interest at issue was comparable with the Commission's responsibility of preserving public confidence in our electoral system.

Accordingly, because the RNC has provided no basis for reconsideration of the Commission's September 30, 1997 action, this Office recommends that the Commission deny respondent's motion.

IV. RECOMMENDATION

Deny the motion by the Republican National Committee and Alec Poitevint, as treasurer, for reconsideration of the Commission's decision of September 30, 1997 in MUR 4250.

12/1/97
Date


Lawrence M. Noble
General Counsel

Attachment:

- 1. RNC Motion for Reconsideration of Commission Action

Staff Member: Jose M. Rodriguez

00.04.795.4786



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/LISA DAVIS
COMMISSION SECRETARY

DATE: DECEMBER 5, 1997

SUBJECT: MUR 4250 - General Counsel's Report

The above-captioned document was circulated to the Commission
on Tuesday, December 02, 1997.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Aikens	—
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	—
Commissioner McGarry	—
Commissioner Thomas	—

This matter will be placed on the meeting agenda for
Tuesday, January 06, 1998.

Please notify us who will represent your Division before the Commission on this
matter.

00.04.395.1707