

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
DEMOCRATIC SENATORIAL)
CAMPAIGN COMMITTEE,)
)
Plaintiff,)
)
NATIONAL REPUBLICAN)
SENATORIAL COMMITTEE,)
)
Defendant.)
_____)

Civil Action No. 97-1493
(JHG) (D.D.C.)

FILED

JUL 18 1997

CLERK U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS
OR FOR ALTERNATIVE RELIEF

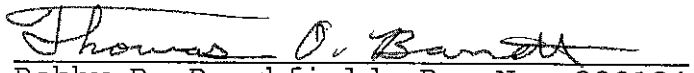
Defendant National Republican Senatorial Committee ("NRSC") requests that the Court stay all proceedings in this case pending resolution of the appeal by the Federal Election Commission (the "Commission") of the Court's May 30, 1997 order in Democratic Senatorial Campaign Committee v. Federal Election Commission, Civil Action No. 96-2184. The NRSC became aware, after the fact, that the Commission had moved for a stay of the May 30 order and that the Court denied the motion earlier this week. For the reasons set forth in the accompanying memorandum, however, the NRSC respectfully requests that the Court consider the irreparable harm to the NRSC of allowing the Democratic Senatorial Campaign Committee ("DSCC") to prosecute an action that (i) is wholly duplicative of administrative litigation before the Commission, and

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(ii) threatens to provide the DSCC access to confidential political information concerning NRSC operations and strategies. This access cannot be erased if, for any reason, the Court's May 30 order is not upheld on appeal.

Alternatively, the NRSC requests that the Court modify its protective orders to allow the NRSC access to the pleadings and documents in Civil Action Nos. 95-0349 and 96-2184. The DSCC does not oppose NRSC access to these documents, which may be material to the NRSC's preparation of a defense in this case. The Commission's counsel has indicated that it does not consent to modifying the protective orders. Further, the NRSC requests an extension of time to answer or otherwise respond to the complaint until 15 days after obtaining access to the sealed documents. Without prejudice to this request, the parties have separately stipulated to a 15-day extension of time until August 5, 1997, to respond to the complaint.

Respectfully submitted,


Bobby R. Burchfield, Bar No. 289124
Thomas O. Barnett, Bar No. 426840
Charles D. Haley, Bar No. 453352

COVINGTON & BURLING
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

July 18, 1997

Attorneys for Defendant National
Republican Senatorial Committee

CERTIFICATE OF SERVICE

I, Thomas O. Barnett, hereby certify that a copy of the foregoing submission was served by hand on this 18th day of July, 1997; upon the following:

Robert F. Bauer (#938902)
Marc E. Elias (#442007)
PERKINS COIE
607 14th Street, N.W.
Washington, D.C. 20005
(202) 628-6600

Attorneys for Plaintiff
Democratic Senatorial
Campaign Committee


Thomas O. Barnett

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL)
CAMPAIGN COMMITTEE,)
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Plaintiff,)
v.)
NATIONAL REPUBLICAN)
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Defendant.)

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CLERK U.S. DISTRICT COURT
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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION
FOR STAY OF PROCEEDINGS OR FOR ALTERNATIVE RELIEF

Bobby R. Burchfield, Bar No. 289124
Thomas O. Barnett, Bar No. 426840
Charles D. Haley, Bar No. 453352

COVINGTON & BURLING
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

July 18, 1997

Attorneys for Defendant

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INTRODUCTION

Defendant National Republican Senatorial Committee ("NRSC") requests that the Court stay all proceedings in this case pending the resolution of the appeal by the Federal Election Commission ("Commission") of the Court's May 30, 1997 order in Democratic Senatorial Campaign Committee v. Federal Election Commission, Civil Action No. 96-2184. The NRSC became aware, after the fact, that the Court earlier this week denied the Commission's motion for a stay pending appeal of the May 30 order. The NRSC respectfully submits, however, that this motion presents a more compelling case for a stay or alternative relief.

First, one cannot have reviewed the publicly-available record in DSCC v. FEC without detecting the Court's frustration with the Commission's inaction, even in response to direct orders of the Court. While that inaction could properly be considered in denying the Commission's stay motion in Civil Action No. 96-2184, the NRSC is not accountable for these delays, and, indeed, has itself suffered harm due to the Commission's inefficient process. In this motion, the NRSC asks the Court to consider the irreparable harm that the NRSC will suffer if this action proceeds in tandem with the now active administrative litigation. The Court was not presented with and, accordingly, the July 15 order did not address this harm. Further, unlike the Commission, the NRSC requests only that the Court stay this action and does not ask the Court to

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stay its mandate to the Commission to make a probable cause determination in MUR 3774 -- a determination that the NRSC believes will vindicate the challenged activities.

Second, the NRSC requests, as alternative relief, that the Court modify its protective orders to grant the NRSC access to the documents under seal in Civil Action Nos. 95-0349 and 96-2184. The NRSC cannot adequately prepare its defense against the DSCC's complaint, including potential motions to dismiss, without access to documents in the DSCC's predicate actions. In this regard, the NRSC requests an extension of time to respond to the complaint to allow it to review documents under seal.

STATEMENT OF THE CASE

1. MUR 3774

This action arises from complaints filed by the DSCC on May 14, 1993, and February 22, 1995, with the Federal Election Commission concerning allegedly impermissible "soft" money expenditures by the NRSC during the 1992 and 1994 election cycles. The Commission appears to have consolidated the two complaints filed by the DSCC as Matter Under Review ("MUR") 3774.

The Federal Election Campaign Act ("FECA") sets forth the following procedure for responding to the DSCC's complaint in MUR 3774:

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- The Commission must provide persons accused of committing a violation with notice of and an opportunity to respond to the complaint;
- The Commission determines whether there is reason to believe that a violation occurred and, if so, opens an investigation;
- After an investigation, the Commission determines whether there is probable cause to believe that a violation occurred;
- If the Commission finds probable cause, it must seek to conciliate the matter for a period of 30 to 90 days; and
- If no conciliation agreement is reached, the Commission may initiate judicial proceedings to seek an injunction and/or penalties.

See 2 U.S.C. § 437g(a) (1) - (6).

The Commission found reason to believe that a violation may have occurred in MUR 3774 on August 1, 1995, and opened an investigation that is still in progress. To date, this investigation has entailed voluminous written, documentary, and deposition testimony and has already cost the NRSC over \$100,000 in attorneys fees alone. See Declaration of Mary Margaret Dotter (Attachment A).

2. DSCC v. Federal Election Commission

In 1995 and 1996, the DSCC filed two complaints in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief pursuant to 2 U.S.C. § 437g(a) (8) alleging that the Commission had improperly failed to act on MUR 3774. (See Civil Action Nos. 95-0349 and 96-2184.) The first action sought an order requiring the

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Commission to make a reason-to-believe finding. In April 1996, the Court held that the Commission had acted on MUR 3774 by making a reason-to-believe finding, but that the delay before making such a finding was contrary to law.

In the second DSCC action, on May 30, 1997, the Court ordered the Commission to make a probable cause determination within 30-days. The Commission notified the Court on June 20, 1997, that it could not comply with such an order and noticed an appeal to the U.S. Court of Appeals for the District of Columbia Circuit. That appeal is pending.

The Commission moved for a stay pending appeal of the May 30 order. On July 15, 1997, the Court held that the potential harm to the Commission from enforcing the May 30 order, which the Court found was speculative, and the prospects for its appeal were not sufficient to warrant a stay. Today, because of the severe potential impact this litigation may have on the NRSC, the NRSC is moving to intervene in that appeal.

3. DSCC v. NRSC (Civil Action No. 97-1493)

Based on the Court's May 30 order, the DSCC filed the complaint in the above-captioned action against the NRSC alleging the same violations addressed in MUR 3774. The complaint alleges that the Court has jurisdiction pursuant to 2 U.S.C. § 437g(a)(8)(C) because the Commission failed to

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render a probable cause finding within 30 days of the Court's May 30 order. Compl. at ¶ 17.

The action taken by the DSCC is extraordinary and, based on extensive legal research, appears to be without precedent. Notwithstanding that the NRSC has no responsibility for the Commission's delay, the NRSC now faces legal proceedings on two fronts concerning the very same allegations and seeking the very same relief. If the Commission finds probable cause in MUR 3774, it could file a judicial action for civil penalties and/or injunctive relief that would require the NRSC to defend against the same allegations in separate judicial proceedings.

Moreover, the civil action instituted by the DSCC would, if it were to proceed, deprive the NRSC of important procedural protections that are afforded by Congress under the FECA but are not available in a private action, such as the following:

- The Commission must keep confidential all information and materials obtained during an investigation, preventing access to and potential abuse of such information by private parties engaged in the political process. 2 U.S.C. § 437g(a)(12). In the instant action, however, the DSCC -- the political competitor of the NRSC -- would very likely gain access to highly confidential NRSC information;
- The Commission decides whether to proceed at each step as a neutral government agency with expertise in federal election law matters. Here, by contrast, the litigation is prosecuted by a partisan political organization; and

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- The Commission employs a statutorily-mandated conciliation process intended to avoid the burden and expense of litigation. See 2 U.S.C. § 437g(a)(4).

If the DSCC's action proceeds, the NRSC will lose these Congressionally-provided protections through no fault of its own. Further, if the Commission prevails in its appeal, the DSCC's complaint will lack any jurisdictional basis. Under these circumstances, the NRSC respectfully submits that the Court should stay all proceedings pending resolution of the appeal in Civil Action No. 96-2184.

ARGUMENT

I. THE COURT SHOULD STAY ALL PROCEEDINGS PENDING RESOLUTION OF THE APPEAL IN CIVIL ACTION 96-2184.

The "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy and time and effort for itself, for counsel, and for litigants." NL Chemicals, Inc. v. Southern Clay Products, Inc., 704 F. Supp. 299, 300 (D.D.C. 1989) (quoting Landis v. North American Co., 299 U.S. 248, 254-55 (1936)).

In deciding whether to stay proceedings in this case, the Court should consider the traditional factors applied to a motion to stay an order pending appeal: (i) the likelihood of success of the appeal on the merits; (ii) whether the movant would suffer irreparable injury if a stay is not granted; (iii) whether other interested parties would

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suffer harm if a stay is granted; and (iv) whether the public interest would be served by granting a stay. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977).^{1/} As explained below, the balance of these factors warrants a stay.

A. The Appeal Presents Difficult Questions That Affect The Jurisdiction Of The Court In This Action.

This case stems from the Court's May 30 order providing that the Commission must make a "probable cause" determination in MUR 3774 within 30 days and that, if the Commission does not comply, the DSCC can "bring a civil action to remedy the violation . . . pursuant to 2 U.S.C. § 437g(a)(8)(C)." See Memorandum Opinion and Order of May 30, 1997 at 14 (Civil Action No. 96-2184). If that order is vacated for any reason on appeal, the DSCC's complaint must be dismissed.

The Commission's appeal of the May 30 order presents difficult questions that warrant a stay. As an example, the May 30 order found that the Commission abused its prosecutorial discretion in allocating enforcement resources among MURs. This question is reviewed under a standard highly

^{1/} A showing of 50% probability of success on the merits is not required, as the first factor is governed by the "balance of equities as revealed through an examination of the other three factors." Brown v. Artery Organization, Inc., 691 F. Supp. 1459, 1460 at n.2 (D.D.C. 1987) (quoting Washington Metropolitan Area Transit Commission, 559 F.2d at 844).

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deferential to the Commission that has in the past led the Court of Appeals to reach a conclusion different from the district court. See, e.g., Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986) (discussing disagreement with district court as to reasonableness of Commission's handling of complaint).

Further, our research has not identified a single instance in which a private party has been allowed to proceed in an action directly against another private party pursuant to Section 437g(a)(8)(C). The standard for assessing the Commission's reasonableness in deciding whether to conclude an investigation in a complex and sensitive matter and the conditions under which a private action might be brought remain largely untested in the courts.

Courts have issued a stay in analogous cases where related proceedings may determine the outcome of the litigation. For example, in NL Chemicals, this Court stayed a patent action because a petition pending before the Patent and Trademark Office had the potential to render one of the competing patents "invalid as a matter of law without need of a judicial declaration of such." NL Chemicals, Inc., 704 F. Supp. at 301. Here, the Court of Appeals decision may eliminate the DSCC's argued jurisdictional basis for its claim and thereby eliminate the need for any further litigation.

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B. Allowing the Case to Proceed Will Impose Irreparable Harm on the NRSC.

The DSCC's action will inflict irreparable harm on the NRSC if allowed to proceed. As discussed above, the DSCC's private action deprives the NRSC of important safeguards provided under the FECA. The DSCC would be likely to obtain access to confidential NRSC information addressing core political strategies. Congress explicitly sought to avoid such disclosures by requiring the Commission to keep confidential information concerning its MURs. 2 U.S.C. § 437g(a)(12). Indeed, it appears that the Court sealed the proceedings in the prior DSCC actions to protect this interest. The NRSC also would lose the benefit of a neutral governmental prosecutor making judgments at each stage of the investigation.

In addition, the NRSC would be required to defend itself in the on-going Commission investigation in MUR 3774 while simultaneously defending itself in the instant action. The NRSC would be required to respond to duplicative documentary and deposition discovery for the same alleged facts and the same alleged violations.

C. A Stay Would Not Inflict Irreparable Harm on Other Parties.

The Commission moved for a stay of the Court's May 30 order and indicated in its papers that it favors a stay of proceedings in this case pending its appeal. The DSCC has

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tolled the statute of limitations by filing the instant complaint. Moreover, unlike the direct and virtually certain harm to the NRSC if the action proceeds, the interest of the DSCC depends on the merits of the allegations in MUR 3774, which remain unproven and speculative.

D. A Stay of Proceedings Is in the Public Interest.

Finally, the public interest is best served by issuing a stay pending resolution of the Commission's appeal in Civil Action No. 96-2184. When it passed the Federal Election Campaign Act, Congress recognized that the Commission would have jurisdiction over political speech -- the most sensitive regulatory mandate ever given to a federal agency, much more laden with constitutional concerns than mandates over financial markets, trade, or other segments of the economy. Accordingly, Congress incorporated in the FECA numerous unique procedural protections. See pp. 5-6 above.

For example, Congress undoubtedly knew that requiring a minimum 4-2 vote -- necessitating the vote of at least one member of the respondent's party -- to initiate litigation would leave many close cases unprosecuted. Yet it made a legislative judgment that the public interest required such a result. Proceeding with this case will clearly deprive the NRSC of those protections, and even if the appeal is successful, these protections will be lost to the NRSC forever. By filing its action and tolling the statute of

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limitations, the DSCC has preserved its ability -- in the event the D.C. Circuit affirms -- to pursue its charges.

II. THE COURT SHOULD GRANT THE NRSC ACCESS TO ALL DOCUMENTS UNDER SEAL IN CIVIL ACTION NOS. 95-0349 AND 96-2184.

If the DSCC's complaint is allowed to proceed either now or after resolution of the Commission's appeal, the NRSC requests the Court to modify its protective orders to allow the NRSC access to documents under seal in Civil Action Nos. 95-0349 and 96-2184. The Court has ample authority to issue such an order.

The NRSC is entitled to access to these documents in preparing its defense. As discussed above, the prior DSCC actions against the Commission constitute the sole basis for the complaint's invocation of the Court's jurisdiction. The substantive pleadings and even parts of the Court's May 30 order have been sealed. The DSCC has had access to such documents, and fundamental fairness requires that the NRSC be provided access to all pleadings as well as other materials produced by the Commission to the DSCC.

There is no reason to deny the NRSC access to such documents. The principal basis for placing the documents under seal was that they contain information about the subjects of the investigation in MUR 3774, which include, of course, the NRSC. Indeed, while the heavy redaction of the record makes it difficult to be certain, the apparent reason for sealing the record was the statutory mandate of

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confidentiality, which in this instance was intended to protect the respondents, including the NRSC.

Accordingly, the NRSC requests that the Court modify its protective orders to permit it access to all documents currently under seal in the DSCC's actions against the Commission. Counsel for the DSCC have indicated that they would consent to such a modification of the protective orders. Counsel for the Commission have indicated that they would not consent.

III. THE COURT SHOULD GRANT THE NRSC AN EXTENSION OF TIME TO RESPOND TO THE COMPLAINT.

If the Court does not grant a stay of all proceedings pending the Commission's appeal, the NRSC respectfully submits that it should receive an extension of time to answer or otherwise respond to the DSCC's complaint. The NRSC requires time to review the documents under seal in the prior DSCC actions against the Commission to determine its appropriate responses.

Accordingly, the NRSC requests a limited extension of time until 15 days after obtaining the documents under seal in the prior actions or 15 days after the Court's decision on this motion (whichever is later) to answer or otherwise respond to the complaint. Counsel to the DSCC has agreed separately to a fixed 15 day extension of time to respond until August 5, 1997 (see stipulation filed under separate

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cover) but does not consent to an extension of time to allow the NRSC to review the sealed documents before responding.

CONCLUSION

For the reasons stated above, defendant National Republican Senatorial Committee respectfully urges the Court to stay the proceedings in this case or, in the alternative, modify its protective orders to give the NRSC access to the sealed documents in the DSCC's prior actions, and grant the NRSC an extension of time to file an answer or otherwise respond to the complaint.

Respectfully submitted,



Bobby R. Burchfield, Bar No. 289124
Thomas O. Barnett, Bar No. 426840
Charles D. Haley, Bar No. 453352

COVINGTON & BURLING
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Defendant National
Republican Senatorial Committee

July 18, 1997

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,)
)
Plaintiff,)
v.)
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,)
)
Defendant.)

**Civil Action No. 97-1493
(JHG) (D.D.C.)**

DECLARATION OF MARY MARGARET DOTTER

In accordance with 28 U.S.C. § 1746, I, Mary Margaret Dotter, hereby declare as follows:

1. I am the Assistant Treasurer and Custodian of Records for the National Republican Senatorial Committee ("NRSC"). This declaration is based on my personal knowledge.
2. I have calculated the attorneys fees incurred by the NRSC in connection with responding to the investigation of the Federal Election Commission in Matter Under Review 3774. Those fees currently total \$101,220.60.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, D.C., on July 18, 1997.


Mary Margaret Dotter

CERTIFICATE OF SERVICE

I, Thomas O. Barnett, hereby certify that a copy of the foregoing submission was served by hand on this 18th day of July, 1997, upon the following:

Robert F. Bauer (#938902)
Marc E. Elias (#442007)
PERKINS COIE
607 14th Street, N.W.
Washington, D.C. 20005
(202) 628-6600

Attorneys for Plaintiff
Democratic Senatorial
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Thomas O. Barnett