

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**In Re: Nomination Paper Of Ralph
Nader and Peter Miguel Camejo
as Candidates of an Independent
Political Body for President and
Vice President in the General
Election of November 2, 2004**

No. 568 MD 2004

**Ralph Nader and Peter
Miguel Camejo,
 Petitioners.**

**PETITIONERS' MOTION FOR RECONSIDERATION OF THE COURT'S
DECEMBER 4, 2008 OPINION AND ORDER AND INCORPORATED
MEMORANDUM IN SUPPORT**

In a criminal proceeding before the Dauphin County Court of Common Pleas, several employees of the Commonwealth of Pennsylvania testified under oath that they used taxpayer funds and resources to prepare the challenge to the 2004 General Election nomination petitions of Ralph Nader ("Petitioner"), which the law firm Reed Smith, LLP filed in the names of Linda S. Serody, Roderick J. Sweets, Ronald Bergman, Richard Trinclisti, Terry Trinclisti, Bernie Cohen-Scott, Donald G. Brown and Julia A. O'Connell ("Objectors"). *See* Transcript of Preliminary Hearing Before Honorable Richard A. Lewis (Oct. 7-8, 2008) (attached in relevant part as Exhibit A). Commonwealth employee Melissa Lewis testified that Reed Smith Attorney Efreem Grail coordinated this effort, that she personally met with Attorney Grail on several occasions at Reed Smith's Pittsburgh offices in connection therewith, and that Attorney Grail "definitely knew" that she worked for former Pennsylvania House Minority Whip Mike Veon. *See id.* at 28-29, 46-48. Pursuant to an ongoing Grand Jury investigation into the alleged misappropriation of

taxpayer funds and resources for such purposes, on July 10, 2008 Attorney General Tom Corbett charged Mr. Veon and eleven others with multiple counts of criminal conspiracy, theft and conflict of interest.

These post-election proceedings commenced on December 3, 2004, when Attorney Efrem Grail submitted a Bill of Costs for \$81,102.19. *See* Reed Smith Bill of Costs Cover Letter (attached as Exhibit B). Attorney Grail submitted the Bill of Costs on behalf of the Objectors, but Reed Smith, LLP is the true party in interest. *See* Thomas Fitzgerald, *Pa. Law Firm Duns Nader for Expenses*, THE PHILADELPHIA INQUIRER, July 14, 2007 (quoting Attorney Efrem Grail, “I just want *my firm’s money*...[and] to recoup some of *our costs*”) (emphasis added). The Court approved the Bill of Costs by its Order of January 15, 2005, which was entered as a final judgment on April 23, 2007, long before Attorney General Corbett filed criminal charges and a Grand Jury Presentment (“Presentment”) in connection with this matter.

In light of the allegations set forth in the Presentment, on August 4, 2008 Petitioner filed his Petition to Open the Record or to Set Aside Judgment Based Upon Newly Discovered Evidence of Criminal Misconduct (“Petition”). The Court denied the Petition by its December 4, 2008 Memorandum Opinion and Order. Once again, however, the Court did not have the benefit of key information, including the above-referenced testimony indicating that the Reed Smith attorney who submitted the Bill of Costs at issue in this matter was directly involved in the events at issue in the Presentment. The Court’s December 4, 2008 Opinion and Order therefore relies upon a premature and erroneous factual conclusion that the improper and illegal conduct set forth in the Presentment is “wholly extraneous” to the instant matter.

Based on the foregoing facts, and for the reasons set forth more fully below, Petitioner respectfully requests that the Court reconsider its December 4, 2008 Opinion and Order. Specifically, Petitioner requests that the Court set aside its April 23, 2007 judgment, or in the alternative, Petitioner requests that the Court open the record and allow discovery to determine the nature and extent of Attorney Efrem Grail's involvement, and that of Attorney Grail's law firm Reed Smith, LLP, in the events set forth in the Presentment. Pursuant to Pa. R.C.P. 211, Petitioner requests oral argument on this motion. In further support of such relief, Petitioner, by and through counsel, states as follows:

1. On August 2, 2004, Petitioner filed nomination papers with the Secretary of the Commonwealth of Pennsylvania seeking to have his name printed on the ballot as a candidate for President of the United States during the 2004 General Election.

2. On August 9, 2004, attorneys from Reed Smith, LLP, including Attorney Efrem Grail, filed a petition in Objectors' names, challenging Petitioners' nomination petitions.

3. On October 13, 2004, the Court granted the petition filed in Objectors' names, and set aside Petitioner's nomination petitions. *See In re: Nomination Paper of Ralph Nader (Nader I)*, 865 A.2d 8 (Pa. Commw. 2004). On October 14, 2004, the Court entered an Order assessing costs against Petitioner. Petitioner noticed timely appeal from this Order.

4. On December 3, 2004, while the appeal from the Court's Order of October 14, 2004 was pending before the Pennsylvania Supreme Court, Attorney Efrem Grail and his colleagues submitted a Bill of Costs in the amount of \$81,102.19.

5. By its Order entered on January 14, 2005, the Court approved the Bill of Costs, and directed Petitioner to pay \$81,102.19. Petitioner timely noticed appeal from this Order.

6. On August 22, 2006, a majority of the Pennsylvania Supreme Court entered a decision quashing Petitioner's appeal of this Court's Order of October 14, 2004, and affirming this Court's Order of January 14, 2005. *See In re: Nomination Paper of Ralph Nader*, 905 A.2d 450 (Pa. 2006). Mr. Justice Saylor dissented and Mr. Justice Eakin concurred and dissented, on the ground that the relevant provision of the Pennsylvania Election Code does not authorize the assessment of costs against candidates. *See id.* On April 23, 2007, the Pennsylvania Commonwealth Court entered its Order of January 14, 2005 as a final judgment.

7. On July 10, 2008, Attorney General Tom Corbett charged twelve individuals with numerous counts of criminal conspiracy, theft and conflict of interest pursuant to an ongoing Grand Jury investigation into the misappropriation of taxpayer funds and resources for political campaign purposes. The Grand Jury Presentment filed in connection with such charges alleges that the challenge to Petitioner's 2004 nomination petitions, which Attorney Efram Grail and his colleagues filed in Objectors' names, was actually prepared by as many as fifty employees of the Commonwealth, who were working on taxpayer time and using taxpayer resources to prepare the challenge.

8. On August 4, 2008, Petitioner filed the Petition requesting that the Court set aside its January 14, 2005 judgment based upon the newly discovered evidence of criminal misconduct set forth in the Presentment. In the alternative, Petitioner requested

that the Court open the record for evidentiary proceedings to determine whether and to what extent the Objectors and their counsel participated in such misconduct.

9. On August 22, 2008, Objectors filed an Opposition to the Petition. Petitioner filed a Reply to Objectors' Opposition on September 5, 2008. Petitioner's Reply requested, pursuant to Pa. R.C.P. 206.7, that the Court allow discovery with respect to disputed issues of material fact in this matter.

10. On August 28, 2008, the Court entered an Order directing Objectors to file an Answer to the Petition. Objectors filed such Answer on September 24, 2008.

11. Objectors' Answer denied virtually all of the material allegations in the Petition. The Petition and Answer therefore raise numerous disputed issues of material fact, including: whether the record in this case implicates Reed Smith attorneys in the misconduct alleged in the Presentment; whether Reed Smith attorneys knew or had reason to know that the challenge that they filed in Objectors' names was actually prepared by employees of the Commonwealth of Pennsylvania, who were working on taxpayer time, at taxpayer expense, using taxpayer resources, and who received taxpayer-funded bonuses for such work; and whether the judgment at issue in these proceedings, which directs Petitioner to pay \$81,102.19 in litigation costs, is the product of a wide-ranging criminal conspiracy to misappropriate taxpayer funds and resources. Compare Pet. at ¶¶ 11-12 with Obj. Ans. at ¶¶ 11-12.

12. On October 9, 2008, pursuant to Pa. R.C.P. 206.7(c), Petitioner served Notices of Depositions in an effort to conduct discovery with respect to the disputed issues of material fact raised by the Petition and Answer. Objectors responded by filing a Motion to Stay Discovery on October 22, 2008, which the Court granted on October 23,

2008. The Court issued an Order directing Petitioner to file an Answer to Objectors' motion, and a Memorandum in support thereof. Petitioner filed such Answer and Memorandum on November 3, 2008, once again requesting that the Court allow discovery as required by the Pennsylvania Rules of Civil Procedure. Pa. R.C.P. 206.7(c) ("If an answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues"). Petitioner also requested oral argument pursuant to Pa. R.C.P. 211, which is required by the mandatory language of that rule. Pa. R.C.P. 211 ("Any party *shall* have the right to argue any motion...") (emphasis added).

13. On December 4, 2008, the Court issued its Memorandum Opinion and Order denying the Petition to Open the Record or Set Aside Judgment Based Upon Newly Discovered Evidence of Criminal Misconduct. In so doing, however, the Court made two significant errors of law. First, the Court erred by deciding the Petition upon the pleadings, without affording Petitioner the opportunity to conduct discovery with respect to disputed issues of material fact, as required by Pa. R.C.P. 206.7(c). Second, the Court erred by failing to grant Petitioner's request for oral argument, as required by the mandatory language of Pa. R.C.P. 211.

14. The Court's errors of law resulted from its erroneous conclusion that the disputed issues of fact raised by the Petition and Objector's Answer are not "material" for purposes of Pa. R.C.P. 206.7(c). The materiality of such disputed issues is manifest, however, because the Court was obliged to resolve them in reaching its decision. Specifically, the Court concluded that "the persons accused of improper conduct...are not the Objectors to whom payment was directed," that the Objectors themselves "did not act improperly or illegally in asserting the challenge to the nominations," and that the

improper and illegal conduct set forth in the Presentment is therefore “wholly extraneous” to the Court’s decision to approve the Bill of Costs. Mem. Op. at 7-8.

15. The Court’s factual conclusions contradict the allegations in the Petition that the judgment directing Petitioner to pay \$81,102.19 in litigation costs “is the product of a wide-ranging criminal conspiracy to misappropriate taxpayer funds and resources.” Petition ¶ 12. As the Court recognized, “a successful challenge to Petitioners’ nominating documents would not have been possible without the public employees, funds and resources that were utilized.” Mem. Op. at 4-5. In other words, Reed Smith never would have been able to file its challenge but for the misconduct alleged in the Presentment, including the work of “no fewer than 50 employees of the Commonwealth of Pennsylvania, using taxpayer funds and resources misappropriated from the Commonwealth of Pennsylvania.” Petition ¶ 9. The Court’s conclusion that such misconduct is “wholly extraneous” to the process by which the challenge was decided thus ignores the fact that the process itself would not have been initiated but for such misconduct. *Compare* Petition ¶ 9 *with* Mem. Op. at 8. Furthermore, the Court’s conclusion that the Objectors “did not act improperly or illegally in asserting the challenge,” either individually or through their counsel at Reed Smith, LLP, is premature in the absence of discovery with respect to this disputed issue of fact. *Compare* Petition ¶¶ 11-12 *with* Mem. Op. at 7-8.

16. The Court’s error in resolving disputed issues of material fact to deny the Petition without affording Petitioner the opportunity for discovery is underscored by the sworn testimony of several current and former employees of the Commonwealth of Pennsylvania, which was delivered in criminal proceedings before the Dauphin County

Court of Common Pleas on October 7-8, 2008. Specifically, Melissa Lewis testified that she and other state employees prepared the challenge that was filed in Objectors' names using taxpayer funds and resources, and that they delivered their work-product "to Reed Smith in Pittsburgh." Under questioning by Anthony J. Krastek, Jr., an attorney from Attorney General Corbett's office, Ms. Lewis further testified:

Q: Was there one particular lawyer you were working for?

A: Yes.

Q: Who was that?

A: Efrem Grail.

THE COURT: I didn't catch the name.

THE WITNESS: Efrem Grail.

THE COURT: Can you spell that?

THE WITNESS: E-f-r-e-m, G-r-a-i-l.

Q: Would it be correct that Mr. Grail was coordinating the effort?

A: Yes.

Q: Did you deal with him personally?

A: Yes.

Q: You would come from the Beaver County office [of former Minority Whip Veon], go to Pittsburgh with your boxes of binders and nominating petitions and you would give those to Mr. Grail, he would give you other ones back and you go back and work on the new ones?

A: Correct. Ex. A at 28-29.

Upon further questioning by Attorney Krastek, Ms. Lewis testified as follows:

Q: You met with Attorney Efrem Grail?

A: Yes.

Q: Do you know how many occasions you met with him?

A: It was nearly every time I brought the completed work to him to be traded, almost every time.

Q: You met with him personally?

A: Yes, I did meet with him personally.

Q: He was an attorney?

A: Yes.

Q: Can you guess how many times that may have been?

A: I would say probably three, three or four times that I met with him personally.

Q: Did you talk to him over the phone?

A: Yes, I did.

Q: Approximately how many times would you have spoken with him over the phone?

A: Probably about the same amount of time.

Q: Do you know what kind of attorney Efrem Grail is or what his specialty is?

A: No, I do not.

Q: In your meeting with Efrem Grail, did he know who you were?

A: Yes.

Q: Did he know you were a legislative assistant?

A: I don't know if he knew my title but he definitely knew I worked for Representative Veon.

Q: Did he ever say to you, you know Miss Lewis, you really shouldn't be doing this on state time, it is improper?

A: No, he never mentioned anything like that.

17. Another Commonwealth employee, Janet (Nero) MacNeil, testified that she and other state employees went to the “law office in Pittsburgh” for training on how to conduct petition challenges. Ex. A at 161-62.

18. Such testimony contradicts the Court’s conclusion that the misconduct alleged in the Presentment is “wholly extraneous” to the Court’s decision to approve the Bill of Costs in the instant matter. Attorney Efrem Grail and his colleagues at Reed Smith submitted that Bill of Costs, *see* Ex. B, and Attorney Efrem Grail and Reed Smith are both identified by name in the above-referenced testimony as working in cooperation with the Commonwealth employees who allegedly prepared the challenge to Petitioner’s nomination papers using taxpayer funds and resources. The nature and extent of Attorney Grail’s conduct, and that of his law firm Reed Smith, LLP, in connection with the events described in the Presentment is therefore a “material” fact for purposes of Pa. R.C.P. 206.7, because resolution of the issue is “capable of affecting” the Court’s decision to approve the Bill of Costs that Attorney Grail and his Reed Smith colleagues submitted. *Commonwealth v. King*, 939 A.2d 877, 882 (Pa. 2007) (*quoting Kungys v. United States*, 485 U.S. 759, 769 (1988)).

19. Had the allegations in the Presentment been known to the Court at the time that Attorney Grail and his Reed Smith colleagues submitted their Bill of Costs on December 3, 2004, such allegations would have been “capable of affecting” the Court’s decision to approve the Bill by virtue of the “clean hands” doctrine. *Id.* The clean hands doctrine requires that the party seeking relief from the court has acted fairly and without fraud and deceit in the litigation at issue. *See Fumo v. Redevelopment Authority of the City of Philadelphia*, 541 A.2d 817, 821 (Pa. Commw. 1988) (citation omitted). The

doctrine bars relief where the alleged “wrongdoing directly affects the relationship subsisting between the parties and is directly connected to the matter in controversy.” *Giddings v. State Bd. of Psychology*, 669 A.2d 431, 434 (Pa. Commw. 1995). That is the case here: Objectors, through their counsel, claim that the taxation of costs in this matter is justified on the ground that Petitioner adopted a “burdensome approach” to the proceedings, Objectors’ Opp. to Pet. at 6. According to the Grand Jury’s findings and the conclusion of this Court, however, the attorneys who filed this challenge were able to do so only because they relied upon “a veritable army” of Commonwealth employees who “contributed a staggering number of man-hours” to the effort – on taxpayer time, using taxpayer resources and at taxpayer expense, including the secret payment of taxpayer-funded bonuses to such employees. Presentment at 55-56; Mem. Op. at 4-5. These allegations clearly would have provided Petitioner with grounds for contesting the Bill of Costs on the ground that Attorney Grail and his Reed Smith colleagues lack clean hands in this matter. *See Fumo*, 541 A.2d at 821; *Giddings*, 669 A.2d at 434. Accordingly, the allegations are “material” for purposes of Pa. R.C.P. 206.7, and Petitioner is entitled to conduct discovery with respect to such issues of fact, as he was attempting to do when the Court entered its October 23, 2008 Order staying discovery. Pa. R. Civ. P. 206.7(c).

20. Nothing in Section 5505 of the Judicial Code, 42 Pa. C.S. § 5505, which permits the Court to amend or alter its orders within thirty days of entry, prevents the Court from setting aside the judgment or opening the record in the instant matter. *See Estate of Gasbarini v. Medical Center of Beaver City, Inc.*, 409 A.2d 343, 345 (Pa. 1979) (“Where equity demands, the power of the court to open and set aside its judgments may extend well beyond the term in which the judgment was entered”); *Fredley v. Crandall*

Filling Machinery, Inc., 342 A.2d 757, 758 (Pa. Super. 1975) (citation omitted) (the Court's term is a procedural rule that does not limit subject matter jurisdiction to open final judgments)); *Great American Credit Corp. v. Thomas Mini-Markets, Inc.*, 326 A.2d 517, 519 (Pa. Super. 1974) (citation omitted) ("ordinarily courts...may open and set aside judgments not only after a term, but after years, governed only by the facts and equity of the case")). The effect of the Court's December 4, 2008 Opinion and Order is to leave undisturbed the Court's prior Order approving the Bill of Costs that Attorney Efreem Grail and his Reed Smith colleagues submitted in this matter. Sworn testimony and other evidence cited herein indicates, however, that the challenge that these attorneys filed was prepared using funds and resources misappropriated from the taxpayers of Pennsylvania. Therefore, the Court should exercise its inherent power to open and set aside judgments to correct the manifest injustice that will result if Petitioner is required to pay costs allegedly arising from such challenge. *See id.*

21. Finally, the dicta cited in the Court's December 4, 2008 Memorandum Opinion does not justify leaving the judgment in this matter undisturbed despite the after-discovered evidence of criminal misconduct cited herein. Mem. Op. at 2-3. To the extent that such dicta suggests that Petitioner's former counsel engaged in "intemperate or obstructionist conduct," such conduct pales in comparison to the widespread and felonious criminal misconduct committed by parties who prepared the challenge to Petitioner's nomination papers, as alleged in the Presentment and in sworn testimony before the Dauphin County Court of Common Pleas. Furthermore, to the extent that such dicta suggests that Petitioner's nomination petitions were fraudulent, such dicta is contradicted by the Court's factual findings in this matter. *See In Re: Nomination Paper*

of Ralph Nader, 865 A.2d at 18 (counting 50,586 out of 51,273 total signatures – or 98.7 percent – as either valid or invalid on purely technical or procedural grounds, and counting only 687 – or 1.3 percent – as “forgeries” by petition signers, which petition circulators failed to detect prior to submitting the petitions). As Pennsylvania Supreme Court Justice Thomas Saylor has previously emphasized, there is simply “no evidence” in the record to support any allegation of wrongdoing by Petitioner or anyone associated with Petitioner’s campaign. *See In Re: Nomination Paper of Ralph Nader*, 860 A.2d 1, 8 n.13 (Pa. 2004) (Saylor, J. dissenting).

22. The allegations in the Presentment and Attorney General Corbett’s ongoing Grand Jury investigation suggest that a grave injustice has been perpetrated in this matter, not only upon Petitioner, but also upon the Court itself, and upon the voters and taxpayers of the Commonwealth of Pennsylvania.¹ In deciding the Petition without affording Petitioner the opportunity for discovery, as required by Pa. R.C.P. 206.7, or oral argument, as required by Pa. R.C.P. 211, the Court committed errors of law that warrant correction. As the testimony cited herein demonstrates, these errors led the Court to the false conclusion that the misconduct alleged in the Presentment is “wholly extraneous” to the Court’s decision to assess costs against Petitioner, when the attorney who submitted the Bill of Costs that the Court approved has been identified by name as “coordinating the effort” with the individuals who engaged in such misconduct.

¹ See, e.g., Editorial, *Nader’s Payback*, THE PHILADELPHIA INQUIRER, Aug. 18, 2008 (the Grand Jury Presentment “makes the case for Nader’s plea to overturn the order that he pay more than \$81,000 in legal costs run up by the Democrats”); Editorial, *If Nader Was Kept Off Ballot By State Democrats, He Deserves Court-Cost Relief*, HARRISBURG PATRIOT-NEWS, July 29, 2008 (if the Grand Jury’s “allegations ultimately are proven true in court, Nader has a right to relief from an \$81,102 penalty he was assessed by Commonwealth Court”).

WHEREFORE, Petitioner respectfully requests that the Court vacate its Memorandum Opinion and Order entered December 4, 2008 and enter the Proposed Order attached hereto, opening the record for discovery and evidentiary proceedings with respect to newly discovered evidence of criminal misconduct set forth in the Petition. Pursuant to Pa. R.C.P. 211, Petitioner further requests oral argument on the motion.

Dated: December 15, 2008

Respectfully submitted,

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AND NOW, this ____ day of ____, the Motion to Reconsider in the above-captioned matter is GRANTED, and the Court's December 4, 2008 Memorandum Opinion and Order is hereby VACATED. Further, the Court's October 23, 2008 Order staying discovery is hereby VACATED, and Petitioner shall proceed immediately with depositions in this matter pursuant to Pa. R.C.P. 206.7.

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CERTIFICATE OF SERVICE

I the undersigned hereby certify that on December 15, 2008 I served a copy of the foregoing Motion for Reconsideration and Memorandum of Law in support thereof by First Class Mail, postage prepaid, on the following, which service complies with the Pennsylvania Rules of Appellate Procedure:

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