

IN THE SUPREME COURT OF PENNSYLVANIA

No. 94 MAP 2008

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

Ralph Nader, Appellant.

BRIEF OF APPELLANT

On Direct Appeal from the Commonwealth Court's December 4, 2008 and December 31,
2008 Orders Entered at No. 568 MD 2004

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant 42 Pa. C.S. § 723(a), as an appeal from a final order of the Commonwealth Court entered in a matter which was originally commenced in that court, and pursuant to Pa. R.A.P. 1101, as an appeal as of right from a final order of the Commonwealth Court entered in a matter originally commenced in that court. This election law matter was originally commenced in the Commonwealth Court on August 9, 2004.

ORDERS IN QUESTION

The Orders appealed from state as follows:

AND NOW, this 4th day of December, 2008, the Petition to Open the Record or Set Aside Judgment Based upon Newly Discovered Evidence of Criminal Misconduct in the above captioned matter is DENIED. Further, the Objector's Motion to Stay Discovery is hereby DISMISSED AS MOOT.

Upon consideration of the Petition by Ralph Nader and Peter Miguel Camejo for reconsideration of the December 4, 2008 order denying their request to open the record or set aside the judgment, IT IS HEREBY ORDERED that the Petition for Reconsideration is DENIED.

STATEMENT OF SCOPE OF REVIEW AND STANDARD OF REVIEW

A petition to open or set aside a judgment is an appeal to the equitable powers of the Court, and the denial of such a petition is reviewed for an error of law or an abuse of discretion. *See Cintas Corp. v. Lee's Cleaning Services, Inc.*, 700 A.2d 915, 919 (Pa. 1997); *First Seneca Bank & Trust Company v. Laurel Mountain Development Corporation*, 485 A.2d 1086, 1088 (Pa. 1984); *Schultz v. Erie Insurance Exchange*, 477 A.2d 471, 472 (Pa. 1984). The petition must establish equitable considerations which demonstrate that justice would best be served by opening the judgment. *See Carrier v. William Penn Broadcasting Company*, 233 A.2d 519, 520 (Pa. 1967). In such cases, the

courts possess “inherent power...to act where equity so demands,” and the court’s decision is “governed only by the facts and equity of the case.” *Great American Credit Corporation v. Thomas Mini-Markets, Inc.*, 326 A.2d 517, 519 (Super. Ct. 1974).

STATEMENT OF QUESTIONS INVOLVED

A. Questions Involved

1. Whether the Commonwealth Court erred in staying discovery and denying Appellant's Petition to Open the Record or to Set Aside Judgment Based Upon Newly Discovered Evidence of Criminal Misconduct ("Petition"), without affording Appellant the opportunity for discovery or for oral argument, where Appellees' Answer to the Petition raised numerous disputed issues of material fact and Appellant was proceeding with discovery pursuant to Pa. R.C.P. 206.7(c), and where Appellant requested oral argument pursuant to the mandatory language Pa. R.C.P. 211?

2. Whether the Commonwealth Court erred in denying Appellant's Motion for Reconsideration of the Court's December 4, 2008 Opinion and Order denying Appellant's Petition, without allowing oral argument, where such Motion incorporated sworn testimony delivered in a criminal proceeding related to this matter, which contradicts the factual conclusions on which the Court's December 4, 2008 Opinion and Order rely, and where Appellant requested oral argument pursuant to the mandatory language of Pa. R.C.P. 211?

B. Answers of the Commonwealth Court

1. The Commonwealth Court denied Appellant's Petition and declined to open the record or set aside the judgment, based on its conclusion that newly discovered evidence that Appellees' challenge in the underlying proceedings was prepared using funds and resources allegedly misappropriated from the taxpayers of Pennsylvania is "wholly extraneous" to the Court's decision to award litigation costs to Appellees. Appellant attempted to take depositions regarding numerous disputed issues of material fact raised by Appellees' Answer to Appellant's Petition, pursuant to Pa. R.C.P. 206.7(c), but the Court entered an Order granting Appellees' motion to stay discovery, and then denied the Petition on the pleadings, based on its conclusion that all such issues are "irrelevant and immaterial." The Court did not address Appellant's request for oral argument pursuant to Pa. R.C.P. 211.

2. The Commonwealth Court issued an Order denying Appellant's Motion for Reconsideration, but the Court did not enter an Opinion or address Appellant's request for oral argument pursuant to Pa. R.C.P. 211.

STATEMENT OF THE CASE

A. Form of Action

This appeal arises from the Commonwealth Court’s denial of a Petition that Appellant Ralph Nader (the “Candidate”) filed on August 4, 2008, seeking to open the record or to set aside a judgment entered on April 23, 2007 (the “Judgment”), which awards litigation costs in the amount of \$81,102.19 to Linda S. Serody, Roderick J. Sweets, Ronald Bergman, Richard Trinclist, Terry Trinclist, Bernie Cohen-Scott, Donald G. Brown and Julia A. O’Connell (the “Objectors”). The Objectors are the nominal parties who challenged the Candidate’s nomination petitions, pursuant to 25 P.S. § 2937, during the 2004 presidential election. The Candidate’s Petition seeks relief from the Judgment based upon a Grand Jury Presentment that Pennsylvania Attorney General Tom Corbett filed on July 10, 2008 (the “Presentment”), which alleges that the Objectors’ challenge was prepared using funds and resources misappropriated from the taxpayers of Pennsylvania. The Petition also seeks relief from the Judgment based upon the misconduct of Objectors’ counsel in the prior proceedings.

B. Procedural History

1. The Underlying Judgment

This action was commenced on August 9, 2004, when a petition was filed in Objectors’ names, which challenged approximately 35,000 signatures on the nomination petitions that the Candidate submitted pursuant to 25 P.S. § 2911(b), in order to qualify for placement on Pennsylvania’s ballot as a candidate for President of the United States in the 2004 General Election. Under the Pennsylvania Election Code and the decisions of this Court, the Candidate was required to submit 25,697 valid signatures of registered Pennsylvania voters. On August 2,

2004, the Candidate filed nomination petitions that included a total of 51,273 signatures, which the Secretary of the Commonwealth of Pennsylvania accepted.

Between September 27, 2004 and October 12, 2004, the Commonwealth Court held multiple hearings across the Commonwealth on the Objectors' challenges to the Candidate's nomination petitions. Following the conclusion of these hearings, on October 13, 2004, the Commonwealth Court issued findings and conclusions of law with respect to the Objectors' challenges. *See In re: Nomination Paper of Ralph Nader ("Nader I")*, 865 A.2d 8 (Pa. Commw. 2004). Thereafter, the Commonwealth Court entered a final order setting aside the Candidate's nomination petitions and directing the Secretary of the Commonwealth not to certify his name on the ballot. On October 14, 2004, the Commonwealth Court entered an Order assessing costs against the Candidate for defending his nomination petitions against the Objectors' challenge. The Candidate noticed timely appeal from this Order.

On October 19, 2004, a majority of this Court entered a *per curiam* Order affirming the Commonwealth Court's decision to set aside the Candidate's nomination petitions. *See In re: Nomination Paper of Nader ("Nader II")*, 860 A.2d 1 (Pa. 2004). On October 22, 2004, Justice Saylor filed a Dissenting Statement in which he concluded that the Commonwealth Court erroneously invalidated thousands of signatures, and that for this reason alone, the Court erred in setting aside the Candidate's nomination petitions. *See id.* (Saylor, J. dissenting).

On December 3, 2004, while the appeal from the Commonwealth Court's Order assessing costs was pending before this Court, the Objectors submitted a Bill of Costs in the amount of \$81,102.19. By its Order entered on January 14, 2005, the Commonwealth Court approved the Bill of Costs in its entirety, and directed the Candidate to pay Objectors \$81,102.19. The Candidate timely noticed appeal from this Order.

On August 22, 2006, a majority of this Court entered a decision quashing the Candidate's appeal of the Commonwealth Court's Order assessing costs, and affirming the Commonwealth Court's Order approving the Objectors' Bill of Costs. *See In re: Nomination Paper of Ralph Nader* ("Nader III"), 905 A.2d 450 (Pa. 2006). Justice Saylor dissented, on the ground that Section 2937 of the Pennsylvania Election Code does not authorize the taxation of litigation costs against candidates who *defend* their nomination petitions from an objector's challenge, but only against parties who *initiate* such challenges but do not prevail. *See id.* at 468; 25 P.S. § 2937. Justice Eakin concurred in Justice Saylor's analysis of Section 2937. *See id.* at 467. The Supreme Court of the United States denied the Candidate's petition for a writ of certiorari on January 8, 2007. *See In re: Nomination Paper of Ralph Nader*, 127 S. Ct. 995 (Jan. 8, 2007). On April 23, 2007, the Commonwealth Court entered its Order of January 14, 2005 as a final judgment.¹

2. The Grand Jury Presentment and the Candidate's Petition to Open the Record or to Set Aside Judgment Based Upon Newly Discovered Evidence of Criminal Misconduct

On July 10, 2008, the Attorney General filed the Grand Jury Presentment and charged 12 individuals with numerous felony counts, alleging that they, and others yet un-named, engaged in a concerted pattern of illegal conduct in which millions of dollars in taxpayer funds and resources were misdirected to campaign efforts. The Grand Jury found that Objectors' challenge to the Candidate's nomination petitions is chief among such campaign efforts, and an entire section of the Presentment describes in detail how Commonwealth employees prepared the

¹ On May 16, 2007, Objectors initiated attachment proceedings in the Superior Court of the District of Columbia in an effort to enforce their Judgment against the Candidate. On November 7, 2007, the Candidate filed a Motion for Relief from Objectors' Judgment pursuant to D.C. Super. Ct. R. 60(b), alleging newly discovered evidence of misconduct by Objectors' counsel in the prior proceedings as grounds for vacating the Judgment. That motion is pending. On April 16, 2009, the Candidate filed a Motion to Dismiss pursuant to D.C. Super. Ct. R. 41(b), which the Objectors did not oppose. That motion is also pending.

challenge at taxpayers' expense. The Attorney General's investigation and criminal prosecution is ongoing.

On August 4, 2008, the Candidate filed his Petition to Open the Record or to Set Aside Judgment Based upon Newly Discovered Evidence of Criminal Misconduct in the Commonwealth Court. The Petition alleges criminal misconduct in connection with the preparation of Objectors' challenge, as set forth in the Presentment, and misconduct of Objectors' counsel in the prior proceedings, as grounds for relief. The Petition requested that the Court set aside its final Judgment of April 23, 2007, or, in the alternative, that the Court open the record for discovery and further proceedings relating to such newly discovered evidence.

On August 22, 2008, Objectors filed an Opposition to the Petition. The Candidate filed a Reply to Objectors' Opposition on September 5, 2008. The Candidate's Reply requested, pursuant to Pa. R.C.P. 206.7, that the Court allow discovery with respect to disputed issues of material fact, including but not limited to whether Objectors and their counsel knowingly financed their litigation in the prior proceedings using funds and resources misappropriated from the Commonwealth of Pennsylvania.

On August 28, 2008, the Commonwealth Court entered an Order directing Objectors to file an Answer to the Petition. Objectors filed such Answer on September 24, 2008. Objectors' Answer disputed virtually all of the material allegations in the Petition, including allegations that Objectors' counsel prepared Objectors' challenge with aid and support from, and in direct cooperation with, employees of the Commonwealth of Pennsylvania, who were working on taxpayer time and using taxpayer resources to do such work, and allegations that Objectors procured the Judgment at issue in this matter as a result of the allegedly criminal conspiracy set forth in the Presentment. Because Objectors' Answer to the Petition raised these and many other

disputed issues of material fact, on October 9, 2008, the Candidate served Notices of Depositions in an effort to conduct discovery pursuant to Pa. R.C.P. 206.7(c).

On October 22, 2008, Objectors filed a Motion to Stay Discovery. On October 23, 2008, the Commonwealth Court entered an Order granting a stay of discovery and directing the Candidate to file an Answer to Objectors' Motion to Stay. The Candidate filed such Answer and Memorandum on November 3, 2008, once again requesting that the Court allow discovery as required by Pa. R.C.P. 206.7(c). Petitioner also requested oral argument pursuant to Pa. R.C.P. 211.

On December 4, 2008, the Commonwealth Court entered a Memorandum Opinion and Order denying the Petition without affording the Candidate the opportunity for discovery or for oral argument, as required by Pa. R.C.P. 206.7(c) and Pa. R.C.P. 211, respectively.² That Order is the subject of the instant appeal, which the Candidate timely noticed on December 15, 2008. The Candidate also filed a Motion for Reconsideration of the Court's December 4, 2008 Order on December 15, 2008. The Commonwealth Court entered an Order denying the Candidate's Motion for Reconsideration on December 31, 2008. This Court noted probable jurisdiction over this appeal on April 16, 2009.³

The Candidate's appeal from the Commonwealth Court's December 31, 2008 Order denying his Motion for Reconsideration is incorporated herein.

C. Statement of Facts

² The Commonwealth Court's December 4, 2008 Memorandum Opinion is attached hereto as Exhibit A.

³ Objectors opposed this Court's exercise of jurisdiction over the instant appeal, arguing that the postmark of a private carrier, Pitney Bowes, was insufficient to prove that the Candidate's Notice of Appeal was timely filed by mail on December 15, 2008. Notwithstanding such objection, this Court noted probable jurisdiction over the instant appeal on April 16, 2009. In support of this conclusion, an affidavit of Pitney Bowes' Assistant General Counsel Joseph C. Kirincich is attached hereto as Exhibit B, which states that engineers from Pitney Bowes have analyzed the postmark and concluded that it was printed on December 15, 2008 or prior thereto, but could not have been printed thereafter.

This appeal is from the Commonwealth Court’s December 4, 2008 Opinion and Order denying the Candidate’s Petition to Open the Record or to Set Aside Judgment Based Upon Newly Discovered Evidence of Criminal Misconduct. Reproduced Record (“R.”) 28a; Ex. A. The Petition seeks relief from a Judgment awarding Objectors \$81,102.19 in litigation costs following a challenge filed in their names to nomination petitions that the Candidate filed in an effort to qualify for placement on Pennsylvania’s 2004 general election ballot. R. 1a. The Commonwealth Court entered the Judgment pursuant to a Bill of Costs filed by Objectors’ counsel, which avers that “[j]ustice...requires” the Court to award such costs. R. 6a. The Judgment directs the Candidate personally to pay such costs. R. 1a.

After final Judgment was entered in Objectors’ favor, the Attorney General of Pennsylvania initiated a Grand Jury investigation into potential public corruption and criminal misconduct within the Pennsylvania Legislature. R. 40a. In a Presentment filed by the Attorney General, the Grand Jury identified Objectors’ challenge as one of the “most outstanding examples of misappropriation of taxpayer resources” uncovered by its ongoing investigation, R. 49a, and concluded that that the challenge was produced by means of “a concerted pattern of illegal conduct in which millions of dollars in taxpayer funds and resources were misdirected to campaign efforts.” R. 40a. The Grand Jury specifically found that Objectors’ challenge was prepared by employees of the Commonwealth of Pennsylvania, who were working on taxpayer time, at taxpayer expense, and using taxpayer resources. R. 40a, 48a-52a. Further, the Grand Jury found that “a veritable army” of Commonwealth employees – “as many as fifty” – worked on the challenge, and that such employees “contributed a staggering number of man-hours” to the effort. R. 49a-50a. Based on these findings, the Attorney General charged 12 individuals with

numerous felony counts, including criminal conspiracy, theft and conflict of interest, and has stated that more charges will follow. R. 34a.

The Commonwealth employees who prepared Objectors' challenge did so in cooperation with "a law firm which was ultimately involved in filing the challenge." R. 49a. Two Commonwealth employees were specifically appointed by their superiors to coordinate "the dissemination of materials and information to the aforementioned law firm." R. 49a. The Commonwealth employees' superiors, who directed the Commonwealth employees to engage in such conduct, are among the 12 individuals facing criminal charges for misappropriation of taxpayer funds and resources in connection with Objectors' challenge. R. 34a.

The Presentment does not identify the foregoing law firm by name, but the record in this case confirms that Objectors' counsel, Reed Smith, LLP, is the law firm that the Presentment references. R. 34a; *see Nader I*, 865 A.2d 8 (listing 17 Reed Smith attorneys as Objectors' counsel); *Nader II*, 860 A.2d 1 (same); *Nader III*, 905 A.2d 450 (same). Further, according to sworn testimony delivered in the Attorney General's criminal prosecution relating to this matter, the Commonwealth employees who prepared Objectors' challenge at taxpayer expense delivered their work-product directly to Reed Smith's Pittsburgh offices, where Reed Smith attorney Efrem Grail accepted such work product and gave the employees additional nomination petitions to be reviewed and returned to him. R. 104a-105a. According to such testimony, Attorney Grail "definitely knew" that the Commonwealth employee he met with on such occasions worked for now-indicted former Rep. Michael Veon. R. 105a.

Efrem Grail is the attorney who submitted the Bill of Costs at issue in this matter on Objectors' behalf. R. 3a. Attorney Grail has publicly stated, however, that his law firm is the true party in interest seeking to collect such costs. Candidate's Motion for Reconsideration at 8-10

(attached as Exhibit C). Thus, according to the foregoing testimony and other evidence in the record, which remains uncontroverted, the Judgment in this case directs the Candidate to pay \$81,102.19 in litigation costs to parties who allegedly aided, abetted or directly participated in an allegedly criminal misconduct that the Attorney General is actively prosecuting. Ex. C 8-10; R. 48a-52a; 104a-105a.

When this matter was previously before this Court, Objectors submitted a brief in support of their Bill of Costs, in which they falsely claim that the record contains “evidence of literally thousands of forged petition signatures” in the Candidate’s nomination petitions. Brief of Appellees at 5, *Nader III*, 905 A.2d 450 (filed May 5, 2005). Although the Commonwealth Court invalidated more than 30,000 signatures on the Candidate’s nomination petitions, however, the Court did so not based upon any allegation or finding of fraud, but based exclusively upon purported technical or procedural defects in the signatures. *See Nader I*, 865 A.2d at 18.

Specifically, the Court invalidated:

- 8,976 signatures because qualified electors were not registered on the day they signed the petition;
- 7,851 signatures because omitted data like dates or incomplete addresses was filled in after electors signed the petition;
- 6,411 signatures because the elector’s current address did not match the elector’s registered address;
- 1,869 signatures because information like dates or addresses was incomplete;
- 1,855 signatures because of unspecified “affidavit problems”;
- 3,513 signatures because of unspecified “other” defects;
- and 206 signatures because signatures were illegible, printed or included initials.

See id.

The Commonwealth Court thus invalidated a total of 30,681 signatures based exclusively on its findings of purported technical or procedural defects. *See id.* The Court counted another 1,087 signatures as duplicates. *See id.* Finally, the Court counted 18,818 signatures as valid. *See id.* In total, therefore, the Court found that 50,586 out of 51,273 signatures on the nomination petitions were either valid, or invalid based exclusively upon its findings of purported technical or procedural defects. *See id.*

The Commonwealth Court counted the remaining 687 out of the 51,273 total signatures (or 1.3 percent) as “forgeries” – a category denoting obviously fictitious names resulting from mischief or sabotage by signers of the petitions. *See id.* Although the Court indicated in dicta that such signatures account for a significant percentage of the total, Justice Saylor has demonstrated, in an analysis that remains unrebutted, that the Commonwealth Court’s own findings do not support such dicta.⁴ *See Nader III*, 860 A.2d at 8 n.13 (Saylor, J. dissenting). Moreover, as Justice Saylor emphasized, the record contains “no evidence” that the Candidate or anyone associated with his campaign was aware of the small number of such signatures. *See id.* at 8 n.13.

In addition to distorting the factual record in a manner that favors Objectors’ position, Objectors’ counsel also failed to disclose certain material facts in the proceedings below, including that Objectors’ counsel was concurrently representing and appearing before the former Chief Justice of this Court, as the true party in interest seeking to collect litigation costs in this matter. R. 31a-32a; Ex. C at 3.

D. The Commonwealth Court Decision

⁴ The author of the Commonwealth Court’s opinion may have inadvertently exaggerated the number and percentage of so-called “forgeries” by petition signers engaged in sabotage or mischief, because the author personally counted 568 out of the 687 total such signatures, while the other ten Commonwealth Court judges combined counted only 119. *See Nader I*, 865 A.2d at 12-13, 17-18.

The Candidate's Petition alleged that newly discovered evidence of criminal misconduct in connection with Objectors' challenge, and of misconduct by Objectors' counsel in the prior proceedings, constitutes grounds to set aside the Judgment, or in the alternative, to open the record for discovery and evidentiary hearings regarding such evidence. President Judge Bonnie Brigrance Leabbetter authored the Commonwealth Court's December 4, 2008 Memorandum Opinion denying the Candidate's Petition. President Judge Leadbetter concluded that the allegations in the Petition, although "serious and deserving of criminal prosecution," are "wholly extraneous" to its decision to award litigation costs to Objectors. Ex. A. at 9. The Opinion is unreported and attached hereto as Exhibit A. President Judge Leadbetter also entered the Commonwealth Court's December 31, 2008 Order denying the Candidate's Motion for Reconsideration of the Commonwealth Court's December 4, 2008 Opinion.

SUMMARY OF ARGUMENT

Newly discovered evidence of criminal misconduct in connection with Objector's challenge, and of misconduct by Objectors' counsel in the prior proceedings, constitutes extraordinary cause for judicial intervention in this matter. In such cases, the courts of this Commonwealth possess inherent power to open the record or set aside judgments, governed only by the facts and equity of the case. Nevertheless, the Commonwealth Court denied the Candidate's Petition without allowing the Candidate any opportunity to prove the allegations set forth therein by means of discovery and oral argument. In so doing, the Court violated the express provisions of Rule 206.7 and Rule 211 of the Pennsylvania Rules of Civil Procedure, which explicitly grant the Candidate the right to take depositions and to be heard at oral argument, respectively. The Court further erred by basing its decision upon conclusions of fact that contradict uncontroverted facts in the record. Finally, because the Court erroneously

concluded that evidence of criminal misconduct in connection with Objectors’ challenge is not material to its decision to award litigation costs to Objectors, the Court failed to consider equitable considerations in this matter, which establish that justice is best served by granting the Candidate relief from the Judgment. The Commonwealth Court therefore abused its discretion in denying the Petition, and must be reversed.

ARGUMENT

I. THE COMMONWEALTH COURT HAS INHERENT POWER TO OPEN THE RECORD OR SET ASIDE THE JUDGMENT.

A. Judicial Intervention to Grant Relief From a Judgment Is Warranted in Any Case Involving Extraordinary Cause.

The Commonwealth Court correctly noted that it has discretionary power to open or set aside any judgment where circumstances arise that constitute “extraordinary cause,” notwithstanding the provisions of Section 5505 of the Judicial Code, which permits the Court to amend or alter its orders within thirty days of entry. Ex. A at 6-7; 42 Pa. C.S. § 5505. As this Court has long recognized, “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.” *Estate of Gasbarini v. Medical Center of Beaver City, Inc.*, 409 A.2d 343, 345 (Pa. 1979); *see also Fredley v. Crandall Filling Machinery, Inc.*, 342 A.2d 757, 758 (Pa. Super. 1975) (*citing Lengyel v. Heidelberg Sports Industries*, 194 A.2d 869 (Pa. 1963) (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) (*citing Hambleton v. Yocum*, 108 Pa. 304 (Pa. 1885) (“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 general rule is that final judgments entered in adverse proceedings should be opened or vacated after the

term in which they were entered where fraud or some other circumstances “so grave or compelling as to constitute ‘extraordinary cause’ justify[] intervention by the court.”

Commonwealth v. Axsom, 598 A.2d 616, 619 (Pa. Commw. 1991) (quoting *Simpson v. Allstate Insurance Co.*, 504 A.2d 335 (Pa. Super. 1986)); see also *Brodsky v. Philadelphia Athletic Club*, 419 A.2d 1285 (Pa. 1980); *York v. George*, 39 A.2d 625, 626 (Pa. 1944); *Lowrey v. East Pikeland Township & Valley Forge Sewer Authority*, 599 A.2d 271, 274 (Pa. Commw. 1991). Accordingly, it is well settled that the Commonwealth Court possesses inherent power to open the record or to set aside the Judgment in this matter. See *id.*

B. The Commonwealth Court Abused Its Discretion By Failing to Recognize That the Petition Establishes Extraordinary Cause to Open the Record or Set Aside the Judgment.

The “extraordinary cause” that compels judicial intervention in this case is manifest: newly discovered evidence arising from a Grand Jury investigation by the Attorney General of Pennsylvania indicates that Objectors’ challenge was prepared using funds and resources misappropriated from the taxpayers of Pennsylvania. R. 28a, 45a, 48a-52a. Based upon such evidence, the Attorney General has already charged 12 individuals with numerous felony counts in his ongoing investigation. R. 31a. Furthermore, according to sworn testimony delivered in the Attorney General’s criminal proceeding, Objectors’ counsel Efrem Grail, the same attorney who submitted the Bill of Costs at issue in this proceeding, coordinated the allegedly unlawful effort by Commonwealth employees to prepare Objectors’ challenge using taxpayer funds and resources. Ex. C at 8-10; R. 3a, 48a-52a. According to such testimony, Attorney Grail knew that the Commonwealth employees worked for former Rep. Michael Veon, who is among the 12 individuals indicted in this matter. Ex. C at 10. Finally, Attorney Grail has publicly stated that his

law firm is the true party in interest seeking to collect the Judgment on Objectors' behalf. Ex. C at 3.

Accordingly, the newly discovered evidence set forth in the Petition plainly constitutes "extraordinary cause" that justifies judicial intervention in this matter. *Axsom*, 598 A.2d at 619. Such evidence indicates that enforcement of the Judgment would reimburse parties who aided, abetted or directly participated in an allegedly criminal conspiracy for costs that they claim to have incurred in connection with their alleged misconduct. R. 3a, 48a-52a; Ex. C at 8-10. If such allegations can be proved by means of discovery and hearings, as provided for by the Pennsylvania Rules of Civil Procedure, then judicial intervention is warranted as an exercise of the Courts' power "to relieve against inequitable judgments." *Great American Credit Corp.*, 326 A.2d at 519; *see, e.g., First Union Mortgage Corp. v. Frempong*, 744 A.2d 327, 335 (Pa. Super. 1999) ("relatively mild step of vacating...prior order and scheduling a hearing" justified based upon "extraordinary... abuse of our legal system").

II. THE COMMONWEALTH COURT ABUSED ITS DISCRETION BY MISAPPLYING RULE 206.7 AND ERRONEOUSLY CONCLUDING THAT THE DISPUTED ISSUES OF FACT RAISED BY OBJECTORS' ANSWER ARE NOT MATERIAL.

A. The Commonwealth Court Misapplied Rule 206.7 By Granting Objectors' Request to Decide the Petition on the Pleadings Over the Candidate's Objection.

In clear violation of the plain language of Rule 206.7, the Commonwealth Court granted Objectors' request to decide the Petition on the pleadings, over the Candidate's objection, even though the rule does not authorize Objectors to make such a request. R. 65a, 68a-69a, 71a-72a, 94a-95a, 100a-105a; Pa. R.C.P. 206.7. Rule 206.7 governs procedure following the filing of a petition, and states:

If an answer is filed raising no disputed issues of material fact, the court *on request of the petitioner* shall decide the petition on the petition and answer.

Pa. R.C.P. 206.7(b) (emphasis added). Thus, the plain language of Rule 206.7 explicitly authorizes *petitioners* – here, the Candidate – to move the Court for a decision upon the pleadings, but the rule does not authorize *respondents* – here, the Objectors – to make such a motion. *Id.* Nevertheless, upon the Objectors’ motion, which purported to rely on Rule 206.7, R. 91a, the Court entered an Order staying discovery, and then decided the Petition upon the pleadings, in spite of the Candidate’s repeated objections.⁵ R. 2a, 65a, 68a-69a, 87a, 94a-95a, 100a-105a. This was an abuse of discretion.

B. The Commonwealth Court Violated Rule 206.7 By Denying the Candidate’s Right to Take Depositions With Respect to Disputed Issues of Fact Raised By Objectors’ Answer to the Petition.

The Commonwealth Court also violated Rule 206.7 by deciding the Petition upon the pleadings, thus depriving the Candidate of his right to take depositions with respect to disputed issues of material fact raised by Objectors’ Answer. Pa. R.C.P. 206.7(c). Rule 206.7 explicitly grants the Candidate that right. Specifically, Rule 206.7 states:

If an answer is filed raising disputed issues of material fact, *the petitioner may take depositions* on those issues.

Pa. R.C.P. 206.7(c) (emphasis added). In an effort to exercise this right, the Candidate repeatedly requested that the Court allow discovery, R. 68a-69a, 101a, 105a, and had served Notices of Depositions when the Court entered its Order staying discovery. R. 2a.

⁵ Although the Commonwealth Court’s December 4, 2008 Order technically dismissed the Objectors’ motion to stay discovery as moot, in fact the Court had already granted the motion by its October 23, 2008 Order. R. 2a.

Objectors' Answer plainly raised numerous disputed issues of material fact, because it denied virtually every substantive allegation in the Petition.⁶ *Compare* R. 33a-35a with R. 76a-81a. Such disputed issues of material fact include but are not limited to: whether Objectors participated in a criminal conspiracy to finance their litigation using funds and resources misappropriated from the taxpayers of Pennsylvania; whether Objectors procured their Judgment by means of such criminal conspiracy; and whether enforcement of the Judgment would reimburse Objectors for costs incurred in furtherance of such criminal conspiracy. *Id.* These disputed issues of fact are material for purposes of Rule 206.7, because they are “predictably capable of affecting, [or have] a natural tendency to affect,” the Court’s decision to approve Objectors’ Bill of Costs. *Commonwealth v. King*, 939 A.2d 877, 882 (Pa. 2007) (*quoting Kungys v. United States*, 485 U.S. 759, 769 (1988) (identifying the “central object” of the “materiality” inquiry). The test is not whether such disputed issues “actually influenced” the Court’s decision, but only whether they are “capable” of doing so. *Id.* The foregoing disputed issues are plainly material, therefore, because if proven, the allegations in the Petition would provide grounds for

⁶ Objectors’ Answer specifically denied the following allegations in the Petition: that the law firm that filed Objectors’ challenge did so in direct coordination with and in direct reliance upon employees of the Commonwealth of Pennsylvania; that Objectors’ law firm knew or had reason to know that such employees were working on taxpayer time, using taxpayer resources and at taxpayer expense; that Objectors’ law firm divided the pages of the Candidate’s nomination petitions with such employees; that such employees disseminated materials and information to Objectors’ law firm and that Objectors’ law firm relied upon such materials and information; that such employees delivered materials for the challenge filing in Harrisburg, Pennsylvania; and that Objectors’ law firm prepared and filed Objectors’ challenge with aid and support from such employees. *Compare* R. 33a-34a with R. 76a-78a. Objectors’ Answer also denied the following allegations in the Petition: that the record in this case implicates Objectors’ attorneys in the misconduct alleged in the Presentment; that Objectors’ attorneys divided their labor on Objectors’ challenge with individuals who misappropriated taxpayer funds and resources in connection with the challenge; that Objectors’ attorneys coordinated the dissemination of materials relevant to the challenge with individuals who misappropriated taxpayer funds and resources in connection with the challenge; that Objectors’ attorneys received boxes of documents necessary for the challenge directly from individuals who misappropriated taxpayer funds and resources in connection with the challenge; and that the Presentment indicates that Objectors’ Judgment is the product of a wide-ranging criminal conspiracy to misappropriate taxpayer funds and resources. *Compare* R. 34a-35a with R. 78a-81a.

setting aside the Court's decision approving the Bill of Costs by virtue of the "clean hands" doctrine.⁷ *See id.*; *infra* Part IV-A.

Accordingly, as the Candidate argued below, he has a right to take depositions on all disputed issues of fact raised by Objectors' Answer to the Petition, "including but not limited to the degree to which Objectors and their counsel knowingly intended to finance their litigation in the prior proceedings using funds and resources misappropriated from the Commonwealth of Pennsylvania." R. 69a; R. 102a-105a. The Court thus violated Rule 206.7 by deciding the Petition on the pleadings, without allowing the Candidate to take depositions. Pa. R.C.P. 206.7(c). This, too, was an abuse of discretion.

C. The Commonwealth Court Erroneously Concluded That the Disputed Issues of Fact Raised By Objectors' Answer to the Petition Are Not Material for Purposes of Rule 206.7.

The Commonwealth Court denied the Candidate's right to take depositions with respect to disputed issues of material fact raised by Objectors' Answer on the ground that such issues are not "material" for purposes of Rule 206.7, because they only concern the "pre-challenge period," and are therefore "wholly extraneous" to the adjudication of the challenge itself. Ex. A at 9, 9 n.3. This was clear error. As the Court itself acknowledged:

[A] successful challenge to [the Candidate's] nominating documents would not have been possible without the public employees, funds and resources that were utilized.

Ex. A at 5-6. By the Court's own analysis, therefore, there is no basis in fact for distinguishing between the so-called "pre-challenge period" and the adjudication of the challenge itself. *Id.* On the contrary, the allegedly criminal misconduct in connection with the preparation of Objectors'

⁷ The allegations in the Petition are also "material" under any common understanding of that term, as editorials in Pennsylvania's two leading newspapers attest. *See* Editorial, *Nader's Payback*, THE PHILADELPHIA INQUIRER, Aug. 18, 2008 (calling for Objectors' Judgment to be set aside if allegations in the Presentment are proven); Editorial, *If Nader Was Kept Off Ballot By State Democrats, He Deserves Court-Cost Relief*, HARRISBURG

challenge was an integral part of the process by which Objectors procured their Judgment. *See id.*; R. 48a-52a.

Testimony in the record implicating Objectors' counsel as participants in the alleged misconduct makes the Commonwealth Court's error plainer still. R. 104a-105a; Ex. C at 8-10. Commonwealth employees have testified under oath in the Attorney General's related criminal proceeding that they prepared Objectors' challenge using funds and resources misappropriated from the taxpayers of Pennsylvania. *Id.* One employee testified that she delivered the employees' work product directly to the Pittsburgh law office of Objectors' counsel, Reed Smith, LLP. *Id.* Another employee testified that Commonwealth employees went to "the law office in Pittsburgh" for training on how to prepare Objectors' challenge. Ex. C at 10. Finally, an employee testified that Reed Smith attorney Efreem Grail – the very same attorney who submitted Objectors' Bill of Costs, R. 3a – coordinated the allegedly unlawful effort to prepare Objectors' challenge using taxpayer funds and resources, and that he knew the employees who prepared the challenge worked for the now-indicted former Rep. Veon. R. 104a-105a; Ex. C at 8-10.

Although the Court purported to distinguish the allegations of criminal misconduct in connection with Objectors' challenge as irrelevant, Ex. A at 9 n.3, in fact the Court simply rejected such allegations. The Court concluded, for example, that "the persons accused of improper conduct during the pre-challenge period are not the Objectors to whom payment was directed," and therefore, that the Objectors "did not act improperly or illegally in asserting the challenge." *Id.* at 8-9. These are disputed issues of fact, however, and the Court's conclusions not only contradict allegations in the Petition, *see, e.g.*, R. 35a, but also uncontroverted facts in the record, which indicate that Objectors' counsel was involved in the allegedly unlawful effort to

PATRIOT-NEWS, July 29, 2008 (same). The Court may take judicial notice of newspaper editorials and their contents. *See Watson v. Pennsylvania Turnpike Commission*, 125 A.2d 354, 362 (Pa. 1956).

prepare Objectors' challenge from its inception, and even provided training to the Commonwealth employees who allegedly prepared the challenge using taxpayer funds and resources. R. 104a-105a; Ex. C at 8-10. As the Court recognized, such alleged misconduct is "serious and deserving of criminal prosecution." Ex. A at 9. Therefore, the Court's conclusion that such alleged misconduct is "wholly extraneous" to this matter is erroneous – particularly given that Objectors' counsel are the true parties in interest who seek to collect the Judgment. Ex. A. at 9; Ex. C at 3.

III. The Commonwealth Court Abused Its Discretion By Violating Rule 211.

The Commonwealth Court compounded its errors in violating Rule 206.7 by denying the Candidate's right be heard at oral argument, in violation of the mandatory language of Rule 211, which states that "Any party or the party's attorney *shall have the right to argue any motion.*" Pa. R.C.P. 211 (emphasis added). The Candidate repeatedly requested that the Court schedule oral argument pursuant to Rule 211, first in his Answer to Objectors' Motion to Stay Discovery, R. 94a, and then again in his Motion for Reconsideration of the Court's December 4, 2008 Opinion and Order. Ex. C at 4, 14. Notwithstanding the mandatory language of Rule 211, however, the Court neglected to address such requests, thus denying the Candidate's right to argue the very motions by which the Court disposed of this matter. Pa. R.C.P. 211; R. 2a. Therefore, the Court denied the Petition without allowing the Candidate any opportunity to prove the allegations set forth therein, despite mounting evidence of criminal misconduct in connection with the preparation and filing of Objectors' challenge. This, too, was an abuse of discretion.

IV. THE ALLEGATIONS IN THE PETITION ESTABLISH EQUITABLE CONSIDERATIONS DEMONSTRATING THAT JUSTICE IS BEST SERVED BY OPENING THE RECORD OR SETTING ASIDE THE JUDGMENT.

A. The Clean Hands Doctrine Bars Objectors From Seeking Equitable Relief in This Matter If Their Challenge Was Prepared Using Funds and Resources Misappropriated From the Taxpayers of Pennsylvania.

If allegations that Objectors' challenge was prepared using funds and resources misappropriated from the taxpayers of Pennsylvania can be proved, then Objectors are barred from seeking litigation costs in this matter by virtue of the "clean hands" doctrine. The clean hands doctrine requires that a party seeking equitable relief from the courts have 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 claim that they are entitled to litigation costs because the Candidate allegedly adopted a "burdensome approach" during the challenge proceedings. R. 59a. A Grand Jury has found, however, that Objectors themselves were able to mount their challenge only by marshalling "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. R. 49a-50a. If such allegations can be proved, therefore, they provide grounds for setting aside Objectors' Judgment, because the alleged wrongdoing in connection with Objectors' challenge directly affected the parties' relationship and is directly related to the propriety of the Judgment, which requires the Candidate to reimburse Objectors for costs they claim to have incurred in connection with their challenge. *See Fumo*, 541 A.2d at 821; *Giddings*, 669 A.2d at 434.

B. Reversal Is Required to Ensure That the Judgment Does Not Reimburse Parties for Costs Incurred in Connection With Allegedly Criminal Misconduct That the Attorney General Is Actively Prosecuting.

The Commonwealth Court did not have notice of the newly discovered evidence of criminal misconduct in connection with Objectors' challenge when the Court entered its Order approving Objectors' Bill of Costs and its final Judgment in Objectors' favor. Likewise, this Court did not have notice of such evidence when the Court affirmed the Commonwealth Court's Orders awarding Objectors' costs. Thus, neither the Commonwealth Court nor this Court had any opportunity to consider such evidence prior to entering Judgment in Objectors' favor. Now that such evidence has been disclosed, however, the Commonwealth Court abused its discretion by denying the Petition without affording the Candidate any opportunity to prove the allegations set forth therein. The effect of the Court's denial of the Petition is to leave undisturbed the Court's prior Order approving a Bill of Costs submitted by an attorney who, according to sworn testimony and other evidence cited herein, coordinated an allegedly criminal conspiracy that the Attorney General is actively prosecuting. R. 104a-105a; Ex. C at 8-10. Under these circumstances, the Court's failure to take the "relatively mild step" of opening the record for evidentiary hearings in this matter was an abuse of discretion. *First Union Mortgage Corp.*, 744 A.2d at 335. Accordingly, reversal is required to ensure that the Judgment does not reimburse parties for costs incurred in connection with criminal misconduct.

C. There Is "No Evidence" of Fraud in the Nominating Petitions.

The dicta cited in the Commonwealth Court's December 4, 2008 Memorandum Opinion does not justify leaving the Judgment in this matter undisturbed in spite of the newly discovered evidence of criminal misconduct set forth in the Petition. Ex. A at 3-4. To the extent that such dicta suggests that Petitioner's nomination petitions were fraudulent, it is contradicted by the Court's own findings in this matter. *See Nader I*, 865 A.2d at 18; *supra* pp. 5-6. 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 the Candidate or anyone associated with the Candidate's campaign. *See Nader III*, 860 A.2d at 8 n.13 (Pa. 2004) (Saylor, J. dissenting).

D. The Commonwealth Court Failed to Address Allegations of Misconduct By Objectors' Counsel, Which Establish Further Equitable Grounds for Relief From the Judgment.

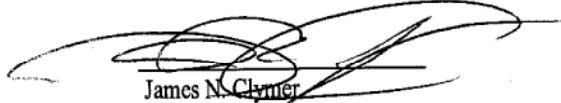
Misconduct by Objectors' counsel in the prior proceedings, including that Objectors' counsel was concurrently representing and appearing before the former Chief Justice of this Court as the true party in interest seeking to collect litigation costs in this matter, establish further equitable grounds for the Court to grant relief from the Judgment. R. 31a, 32a n.1. The Commonwealth Court erroneously concluded, however, that the Candidate's Petition for relief from the Judgment is "based entirely on the information contained in the Presentment and the fact of the filing of the criminal charges." Ex. A at 5. Accordingly, the Court's failure to consider allegations of misconduct by Objectors' counsel in the prior proceedings constitutes further grounds for reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse the Commonwealth Court's December 4, 2008 Order denying the Candidate's Petition, with instructions to the Commonwealth Court either to set aside the Judgment, or to open the record for depositions and other discovery relating to the newly discovered evidence set forth in the Petition.

Oral argument is requested pursuant to Pa. R.A.P. 2315, to enable the Court to acquire a full understanding of the issues presented.

Respectfully submitted,



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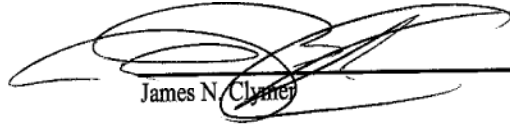
*Application for admission pro hac vice pending

CERTIFICATE OF SERVICE

I the undersigned hereby certify that on ~~May 28~~^{June 1}, 2009 I served a copy of the foregoing Brief of the Appellant and the attached Reproduced Record by First Class Mail, postage prepaid, on the following, which service complies with the Pennsylvania Rules of Appellate Procedure:

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James N. Chaney

EXHIBIT A

Commonwealth Court's December 4, 2008 Opinion

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 M.D. 2004
Linda S. Serody, Roderick J. Sweets, :
Ronald Bergman, Richard Trinclisti, :
Terry Trinclisti, Bernie Cohen-Scott, :
Donald G. Brown and Julia A. :
O'Connell, :
Objectors :
Ralph Nader and Peter Miguel Camejo, :
Petitioners :

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE
BONNIE BRIGANCE LEADBETTER

FILED: December 4, 2008

Ralph Nader and Peter Miguel Camejo (Petitioners) petition to open or set aside a judgment entered on April 23, 2007. That order assessed certain costs incurred in connection with hearings on challenges to the nomination papers they filed seeking to run for the respective offices of President and Vice President of the United States in the 2004 general election.¹ They contend that opening or vacating the judgment is justified by newly discovered evidence of a criminal scheme by

¹Subsequent to the filing of the petition to open or set aside the judgment, the Court received notification of the death of petitioner Peter Miguel Camejo. Prior to his death, Camejo submitted payment of \$20,000.00 in exchange for Objector's relinquishment of all claims against him arising from the nomination challenge.

which employees and misappropriated funds and resources of the Commonwealth were used to review signatures on the nomination papers in preparing the challenge to the nominations.

In August 2004, Petitioners filed with the Secretary of the Commonwealth of Pennsylvania nominating papers to have their names listed as candidates for the offices of President and Vice President of the United States on the ballot in the general election. To qualify to be listed on the ballot for those offices, the Petitioners were required to provide nominating papers containing the signatures of 25,697 persons registered to vote in the Commonwealth. Petitioners submitted papers containing 51,273 signatures. The Objectors, as registered voters in the Commonwealth, filed this action challenging whether a sufficient number of the signatures were valid and authentic. On October 13, 2004, after three weeks of exhaustive and expedited hearings reviewing challenged signatures line-by-line, this Court issued its Consolidated Findings, Opinion and Order in which it determined that only 18,818 of the 51,273 signatures were valid and authentic, and ordered the Secretary of the Commonwealth not to certify Petitioners as candidates on the ballot. *In re Nader*, 865 A.2d 8 (Pa. Cmwlth. 2004).

Then President Judge Colins observed with respect to the proceedings and the force of the evidence heard by the Court that:

By this Court's Order of August 20, 2004, both sides were directed to be prepared to present their case in the various forums commencing Monday September 27, 2004 and were told that cooperation from both sides was necessary if the review were to be done in anything approaching a timely manner and that the Court would not tolerate intemperate or obstructionist conduct on the part of either the Candidates or the Objectors. The Candidates, through then counsel Samuel Stretton, Esq., were warned that a review of over 50,000 signatures was an ominous undertaking requiring a great deal of

manpower and expense and that the Candidates' pre-hearing cooperation in examining challenged signatures with the Objectors, such that potentially valid and invalid signatures could be stipulated to, would be essential to an efficient and timely review. The Candidates chose to ignore this Court's warning and proceeded to do as little as possible prior to the hearings, in an initial attempt to prevent an accurate tally of the signatures.

* * *

When this Court's review began on September 27, 2004, the Candidates, in total disregard of this Court's order of August 20, 2004, were unprepared to respond to the allegations set forth in the Objectors Petition and chose instead to focus on delay and obfuscation.

* * *

[T]his signature gathering process was the most deceitful and fraudulent exercise ever perpetrated upon this Court. The conduct of the Candidates, through their representatives (not their attorneys), shocks the conscience of the Court. In reviewing signatures, it became apparent that in addition to signing names such as "Mickey Mouse," "Fred Flintstone," "John Kerry," and the ubiquitous "Ralph Nader," there were thousands of names that were created at random and then randomly assigned either existent or non-existent addresses by the circulators.

Id. at 13-14, 18.

Following entry of the order setting aside the nomination papers, the Court entered orders assessing costs against Petitioners individually and the Nader/Camejo campaign. On October 14, 2004, the court ordered payment for the appearance of court reporters and transcript preparation and, on January 14, 2005, the court approved the Bill of Costs submitted by the Objectors, which in addition to the costs of stenographic services and transcript preparation included the costs incurred for handwriting expert witnesses. The approved costs totaled \$81,102.19. The Pennsylvania Supreme Court affirmed both the order striking the nominations

and the assessment of costs. *In re Nomination Paper of Nader*, 588 Pa. 450, 905 A.2d 450 (2006). Thereafter, Objectors entered Judgment and undertook efforts toward execution.

In July 2008, Pennsylvania's Attorney General announced the filing of criminal charges against members or employees of the Pennsylvania House of Representatives and released a Grand Jury Presentment of the investigation leading up to the filing of the charges. The Presentment and charges alleged a scheme that had been on-going for several years to use public funds, employees and resources for political campaign purposes, including to challenge nominating petitions of candidates who were political opponents of incumbents of the Pennsylvania Legislature, and to pay secret bonuses to legislative employees for their work in such campaigns. A section of the Presentment entitled "Nader Petition Challenge" noted that it was felt in Democratic Party circles that Nader's presence on the ballot would siphon votes from the Party's Presidential nominee, John Kerry, and described how as many as 50 House Democratic Caucus employees were enlisted by Caucus supervisors and worked a substantial amount of time during their regular employment hours at their Caucus workplaces, using Caucus computers and a computer program designed for legitimate legislative use, to examine Petitioners' nominating papers for improprieties that could be the basis of a challenge, and that this work produced evidence of a significant number of probably invalid signatures. Caucus members and staffers felt that, given the number of signatures on Petitioners' papers and the requirement of Pennsylvania's Election Code that a challenge to nominating documents be filed within seven days after the last day permitted for their filing, a successful challenge to Petitioners' nominating documents would not have been possible without the public

employees, funds and resources that were utilized. Many of the Caucus employees and supervisors involved received secret bonuses for 2004.

Petitioners' instant request that the Judgment be opened or set aside is based entirely on the information contained in the Presentment and the fact of the filing of the criminal charges. Petitioners cite Pennsylvania appellate cases for the proposition that final judgments entered in adverse proceedings should be opened or vacated where there is fraud or some other circumstance so grave and compelling as to constitute "extraordinary cause". They argue that unless the Judgment is opened or vacated, they "will be required by the Court's own judgment to reimburse parties for costs allegedly incurred in connection with criminal misconduct," and that this constitutes "extraordinary cause" justifying the relief they request. Petition to Open the Record or to Set Aside Judgment, ¶15.

Section 5505 of the Judicial Code, 42 Pa. C.S. §5505, restricts the power of the courts to amend, modify or vacate final orders to the 30 day period following the date the order is entered. *Ainsworth v. Department of Transportation*, 807 A.2d 933 (Pa. Cmwlth. 2002). The discretionary power of courts to open or set aside judgments after the 30 day period is very limited. *Simpson v. Allstate Insurance Co.*, 504 A.2d 335 (Pa. Super. 1986). For example, in *Department of Transportation v. Axsom*, 598 A.2d 616 (Pa. Cmwlth. 1991)², the trial judge reconsidered and vacated an order dismissing Axsom's appeal from the Department's suspension of his driving privileges more than thirty days after the order became final based on having misperceived the facts in issuing the order. This Court reversed and reinstated the order on the ground that there was not fraud

² *Axsom* was overruled in part on other grounds in *Shapiro v. Center Township*, 632 A.2d 994 (Pa. Cmwlth. 1993).

or another grave or compelling circumstance since the trial judge's misperception was not caused by the Department. In *Axson*, the court stated:

Generally, judgments regularly entered in adverse proceedings cannot be opened or vacated after they have become final, unless there has been fraud or some other circumstances "so grave or compelling as to constitute 'extraordinary cause' justifying intervention by the court." ... Such circumstances have customarily entailed an oversight or act by the court, or failure of the judicial process, which operates to deny the losing party knowledge of entry of final judgment and commencement of the running of the appeal period. (Citations omitted.)

Id. at 619.

The few cases cited by Petitioners in which a judgment was opened or vacated after the time for appeal had run indicate that, beyond matters that deny the losing party knowledge of entry of final judgment and commencement of the running of the appeal period, circumstances that constitute "extraordinary cause" to open a judgment after the time for appeal has run are those that involve gravely wrongful or flawed conduct or processes in the case before the court. See *Gasbarini's Estate v. Medical Center of Beaver County, Inc.*, 487 Pa. 266, 409 A.2d 343 (1979) (judgment opened after thirty days where plaintiff's attorney, while assuring client he was prosecuting action, had been suspended from practice and thus could not appear at hearing, resulting in dismissal of client's action); *First Union Mortgage Corp. v. Frempong*, 744 A.2d 327 (Pa. Super. 1999) (summary judgment opened after thirty days where additional damages associated with mortgage foreclosure were attributable to lengthy delays caused by defendant's extraordinary abuses of legal system); *Fredley v. Crandall Filling Machinery, Inc.*, 342 A.2d 757 (Pa. Super. 1975) (judgment on pleadings in breach of warranty

action opened after thirty days where, three days after argument and less than one month before judgment entered, Superior Court decision changed the applicable law and neither counsel nor trial court learned of decision until months after judgment entered); *Great American Credit Corp. v. Thomas Mini-Markets, Inc.*, 326 A.2d 517 (Pa. Super. 1974) (summary judgment granted on basis of trial court's belief that motion was uncontested was opened when trial court subsequently discovered that request for extension of time to answer motion had been mislaid in transmission through court processes).

Petitioners do not claim that the Presentment and criminal charges reveal that fraudulent, wrongful or flawed conduct or processes in the case then before the Court marred the Court's decision to set aside the nominations and to assess costs. They do not assert that any of the evidence upon which any of the signatures on the nominating petitions were disqualified or upon which the cost for court reporters and handwriting experts was determined was fabricated or doctored or that any part of the process by which the Court conducted the proceedings or reached and rendered its decision with respect to those matters was in any way improper or flawed.

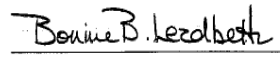
Rather, Petitioners point to the Presentment and criminal charges indicating that public funds, personnel and resources were improperly used to marshal evidence of numerous invalid signatures on the nominating papers. They contend that inasmuch as this use of public employees, funds and resources is not only improper, but also criminal, the Judgment reimburses Objectors for costs incurred in the performance of illegal acts. This contention wrongly associates the improper/illegal conduct with the costs incurred in adjudicating the signature challenge. The Objectors did not act improperly or illegally in asserting the

challenge to the nominations. The costs assessed against Petitioners are not related to the pre-challenge review of the nominating papers; the persons accused of improper conduct during the pre-challenge period are not the Objectors to whom payment was directed. Any improper conduct or expenses associated with the pre-challenge signature review neither tainted the adjudication of the signature challenge itself, which proved meritorious, nor played any role in the Petitioners' unnecessary delay and obdurate refusal to concede the invalidity of some obviously defective signatures during the adjudication.³ Improper conduct on the part of legislative staffers involved in reviewing the nominating papers, serious and deserving of criminal prosecution as it may be, does not undermine the essential facts supporting the Judgment. The Nader/Camejo nominating papers did not contain the requisite number of valid signatures, but rather nearly two-thirds of the signatures on Petitioners' nominating papers were invalid, very many blatantly so. This wanton deficiency in the papers coupled with the actions that unnecessarily delayed and extended the adjudication of the challenge to the papers, fully justified the assessment of costs. The alleged conduct set forth in the Presentment and criminal charges is wholly extraneous to the merits of the challenge to Petitioners' nominating papers and the assessing of costs, and the process by which the challenge and cost assessment were decided. Petitioners have cited no case in which a judgment was opened after the time allowed on the basis of circumstances

³ This conclusion renders irrelevant and immaterial any disputes of fact regarding conduct prior to the filing of the challenge to the nomination papers. Hence, there appear no material disputes of fact and there is no justification for the taking of depositions under Pa. R.C.P. No. 206.7(c). Inasmuch as the Petition to Open the Record or Set Aside the Judgment is herein determined based on the averments in the Petition and Answer thereto under Pa. R.C.P. No. 206.7(b), the Objectors' Motion to Stay Discovery is rendered moot.

extraneous to the merits of the case and the judicial process by which the issues were resolved.

Accordingly, the motion to open or vacate the Judgment is denied, and the Objectors' Motion to Stay Discovery is dismissed as moot.



BONNIE BRIGANCE LEADBETTER,
President Judge

Exhibit B

Affidavit of Pitney Bowes' Assistant General Counsel Joseph C. Kirincich

IN THE SUPREME 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	:	No. 94 MAP 2008
Election of November 2, 2004	:	
	:	
Ralph Nader,	:	
Petitioner-Appellant.	:	

Affidavit of Joseph C. Kirincich, Esquire

Now comes Joseph C. Kirincich, Assistant General Counsel to Pitney Bowes, Inc., who declares, subject to the penalties of 18 Pa. C. S. § 4904, the following:

1. I am an Assistant General Counsel at Pitney Bowes, Inc., a mailstream technology company founded in 1920 with more than \$6.3 billion in annual revenues.
2. Pitney Bowes leases a postal meter with serial number 0003311846 to the law firm Clymer & Musser, P.C.
3. On April 9, 2009, Oliver B. Hall sent to me by email attachment a scanned image of an envelope, in .pdf format, that bears an address label indicating that it was sent from the offices of Clymer & Musser, P.C., at 408 West Chestnut Street, Lancaster, Pennsylvania, 17603, to Michael F. Krimmel, Chief Clerk of Court, Commonwealth Court of Pennsylvania, 624 Irvis Office Building, Harrisburg, Pennsylvania, 17120.
4. Mr. Hall indicated in a prior telephone conversation that the Clerk of the Court had sent him a photocopy of the envelope in question. Mr. Hall asked me to examine the envelope to determine whether I, on behalf of Pitney Bowes, could verify the date that the envelope was stamped by the aforementioned Pitney Bowes postal meter.

{0100178.1 }

5. The envelope bears the stamp of Pitney Bowes postal meter serial number 0003311846. The stamp also indicates that it was sent from zip code 17603 on December 15, 2008.

6. I submitted the scanned image of the envelope to engineers employed by Pitney Bowes, and requested that they analyze the data.

7. Pitney Bowes' engineers concluded that the meter in question is a newer model provided by Pitney Bowes, and as such it cannot be backdated in any way.

Therefore, the stamp on the envelope must have been printed on or before December 15, 2008.

Executed: 5/8/09

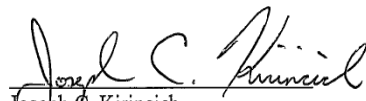

Joseph C. Kirincich
Assistant General Counsel

EXHIBIT C

**Candidate's Motion for Reconsideration of Commonwealth Court's
December 4, 2008 Opinion**

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). Justice Saylor dissented and 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 Efrem 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. A, 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.⁸ 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

⁸ *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*,

identified by name as “coordinating the effort” with the individuals who engaged in such misconduct.

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,

Oliver B. Hall, Esquire
1835 16th Street N.W.
Washington, D.C. 20009
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D.C. Bar No. 976463

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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.**

ORDER

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.

BONNIE BRIGANCE LEADBETTER,
President Judge

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:

Daniel I. Booker, Esquire
Reed Smith, LLP
435 6th Avenue
Pittsburgh, PA 15219

Gregory M. Harvey, Esquire
Montgomery, McCracken, Walker &
Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

James N. Clymer

EXHIBIT A

Transcript of Proceedings, Preliminary Hearing for Ramaley and Perretta-Rosepink
Before Honorable Richard A. Lewis at 28-29, 46-48 (Oct. 7-8, 2008)

1 COMMONWEALTH OF PENNSYLVANIA: IN THE COURT OF COMMON PLEAS
 2 : DAUPHIN COUNTY, PENNSYLVANIA
 3 VS :
 4 SEAN RAMALEY : No. 1207 M.D. '08/4664 CR'08
 5
 6
 7 COMMONWEALTH OF PENNSYLVANIA: IN THE COURT OF COMMON PLEAS
 8 : DAUPHIN COUNTY, PENNSYLVANIA
 9 VS :
 10 ANNAMARIE PERRETTA-ROSEPINK : No. 1211 M.D. '08/4663 C.R. '08
 11
 12 COMMONWEALTH OF PENNSYLVANIA: IN THE COURT OF COMMON PLEAS
 13 : DAUPHIN COUNTY, PENNSYLVANIA
 14 VS :
 15 MICHAEL VEON : No. 1206 M.D. '08/4656 C.R. '08
 16
 17 COMMONWEALTH OV PENNSYLVANIA: IN THE COURT OF COMMON PLEAS
 18 : DAUPHIN COUNTY, PENNSYLVANIA
 19 VS :
 20 BRETT COTT : No. 1210 M.D. '08/4655 C.R. '08
 21
 22 COMMONWEALTH OF PENNSYLVANIA: IN THE COURT OF COMMON PLEAS
 23 : DAUPHIN COUNTY, PENNSYLVANIA
 24 VS :
 25 EARL J. MOSLEY : No. 1212 M.D. '08/4654 C.R. '08

DAUPHIN COUNTY COURT REPORTERS

COPY

1 COMMONWEALTH OF PENNSYLVANIA: IN THE COURT OF COMMON PLEAS
2 : DAUPHIN COUNTY, PENNSYLVANIA
3 VS :
4 STEPHEN KEEFER : No. 1215 M.D. '08/4653 C.R. '08
5

6 TRANSCRIPT OF PROCEEDINGS

7 Preliminary Hearing for Ramaley and Perretta-Rosepink
8 Waiver of Hearing for Veon, Cott, Mosley and Keefer
9

10 BEFORE: HONORABLE RICHARD A. LEWIS, P.J.

11 DATE: October 7 and 8, 2008

12 PLACE: COURTROOM NO. 1
13 DAUPHIN COUNTY COURTHOUSE
HARRISBURG, PENNSYLVANIA

14 APPEARANCES:

15 ANTHONY J. KRASTEK, JR., Esquire
16 JAMES M. REEDER, Esquire
Attorney General's Office
For - Commonwealth

17 PHILIP A. IGNELZI, Esquire
18 For - Defendant Ramaley

19 CYNTHIA R. EDDY, Esquire
For - Defendant Perretta-Rosepink

20 ROBERT G. DELGRECO, Jr., Esquire
21 For - Defendant Veon

22 BRYAN S. WALK, Esquire
For - Defendant Cott

23 MATTHEW R. GOVER, Esquire
24 For - Defendant Mosley

25 WILLIAM A. FETTERHOFF, Esquire
For - Defendant Keefer

DAUPHIN COUNTY COURT REPORTERS

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9	3. Joseph Tarquinio	92	--	--	--
10	4. Stephen Webb	106		153	
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12	By Ms. Eddy		--		
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1 Q State computers?
2 A Yes.
3 Q You were doing this political work on
4 there?
5 A Yes.
6 Q You said that you would take these
7 results once you finished looking at the hard
8 copies, you took them to a law firm. Where did
9 you take them?
10 A We took those to Reed Smith in
11 Pittsburgh, downtown Pittsburgh.
12 Q Was there one particular lawyer you were
13 working for?
14 A Yes.
15 Q Who was that?
16 A Efrem Grail.
17 THE COURT: I didn't catch the name.
18 THE WITNESS: Efrem Grail.
19 THE COURT: Can you spell that?
20 THE WITNESS: E-f-r-e-m, G-r-a-i-l.
21
22 BY MR. KRASTEK:
23 Q Would it be correct that Mr. Grail was
24 coordinating the effort?
25 A Yes.

DAUPHIN COUNTY COURT REPORTERS

1 Q Did you deal with him personally?

2 A Yes.

3 Q You would come from the Beaver County
4 office, go to Pittsburgh with your boxes of
5 binders and nominating petitions and you would
6 give those to Mr. Grail, he would give you other
7 ones back and you go back and work on the new
8 ones?

9 A Correct.

10 THE COURT: The petitions you were
11 reviewing or examining, were they from a
12 particular region of the state?

13 THE WITNESS: I believe those were from
14 all over the state actually.

15

16 BY MR. KRASTEK:

17 Q Do you know where Mr. Grail got that
18 mother lode?

19 A I am not sure where he obtained those.

20 Q How long did you work on the Ralph Nader
21 petition challenge?

22 A That took probably about a week, maybe a
23 little more than a week, week and a half.

24 Q Can you give the Judge some kind of a
25 sense of the manpower involved, the legislative

DAUPHIN COUNTY COURT REPORTERS

1 Q I believe you stated that there was quote
2 no accounting for time?

3 A Yes.

4 Q Are you aware of what the Democratic
5 Caucus policy was for accounting for time in the
6 district office?

7 A When I was working in the district
8 office, I was not aware of leave tracking and the
9 -- leave tracking program and also the leave
10 slips.

11 Q You are not aware that there was any
12 policy which required leave tracking?

13 A No.

14 Q Now, I believe you also stated that you
15 would take these petitions that you reviewed and
16 you were taking stacks to an attorney in downtown
17 Pittsburgh, correct?

18 A Correct.

19 Q I believe you stated that he worked for a
20 law firm Reed Smith, correct?

21 A Correct.

22 Q Can you give us any idea what size law
23 firm that was?

24 A It is a large law firm.

25 Q In downtown Pittsburgh?

DAUPHIN COUNTY COURT REPORTERS

- 1 A Yes.
- 2 Q You met with Attorney Efrem Grail?
- 3 A Yes.
- 4 Q Do you know how many occasions you met
5 with him?
- 6 A It was nearly every time I brought the
7 completed work to him to be traded, almost every
8 time.
- 9 Q You met with him personally?
- 10 A Yes, I did meet with him personally.
- 11 Q He was an attorney?
- 12 A Yes.
- 13 Q Can you give me any guess about how many
14 times that may have been?
- 15 A I would say probably three, three or four
16 times that I met with him personally.
- 17 Q Did you talk to him over the phone?
- 18 A Yes, I did.
- 19 Q Approximately how many times would you
20 have spoken with him over the phone?
- 21 A Probably about the same amount of time.
- 22 Q Do you know what kind of attorney Efrem
23 Grail is or what his specialty is?
- 24 A No, I do not.
- 25 Q In your meeting with Efrem Grail, did he

1 know who you were?

2 A Yes.

3 Q Did he know you worked in the district
4 office of Mike Veon?

5 A Yes.

6 Q Did he know you were a legislative
7 assistant?

8 A I don't know if he knew what my title was
9 but he definitely knew I worked for
10 Representative Veon.

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

14 A No, he never mentioned anything like
15 that.

16 Q Did you ever ask him, you know, I am
17 being paid to do this for my job and can they
18 make me do that for my job? Did you ever have
19 those discussions?

20 A No.

21 Q Did you ever ask him if it was improper
22 for you to be working on the Nader petition?

23 A No.

24 Q He never says that it was, correct?

25 A No, he never did.

DAUPHIN COUNTY COURT REPORTERS

1 Q Now, in this context what I am trying to
2 find out is how you are working for Lend-A-Hand,
3 at the time you are not working you say for the
4 district office, how is it that you get to go
5 challenge the Ralph Nader nominating petitions?

6 A It was asked of us.

7 Q By whom?

8 A Annamarie and I believe Mike.

9 Q What did they ask you to do?

10 A To work on this project to help John
11 Kerry.

12 Q Was there some kind of instruction on
13 what you would do? Did you know what to do
14 already?

15 A No, they trained us on what to do. We
16 just went through the petitions.

17 Q Who trained you?

18 A The law office that was hired.

19 Q Do you recall the name?

20 A The law office in Pittsburgh, I can't
21 remember their name off the top of my head. We
22 went there and they told us what to do. We
23 brought the books home, back to the district
24 office and did them on the computers.

25 Q Who is we? Who went with you to the law

1 office in Pittsburgh to challenge Nader's
2 nominating petitions?

3 A Names that I can definitely name is Chet
4 Orelli and Melissa Lewis. I believe Dennis
5 Pietrandrea went once but when we brought them
6 back, everybody participated.

7 Q What do you mean by everybody?

8 A All the staff. It was all the staff, the
9 interns, all of the staff that was on staff
10 during that summer and I can't remember all of
11 them but.

12 Q I want to be clear because we are talking
13 about three entities here and you have identified
14 yourself at that time being with Lend-A-Hand and
15 we will get the records to see who was actually
16 paying you at that time but was this an
17 office-wide thing where the district office,
18 Lend-A-Hand and BIG were all working on this?

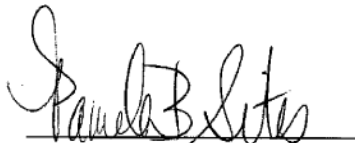
19 A Actually I don't recall. I don't recall
20 BIG really.

21 Q Okay.

22 A I don't know. There was a transition at
23 some point with BIG and I didn't really know a
24 lot about BIG. It was after that that the BIG
25 staff came on. And I don't remember, I don't

1 C E R T I F I C A T I O N

2
3 I hereby certify that the proceedings
4 and evidence are contained fully and accurately
5 in the notes taken by me on the hearing of the
6 above cause, and that this is a correct
7 transcript of the same.

8
9
10 

11 Pamela B. Sites, RPR
12 Official Court Reporter
13
14

15 The foregoing record of the
16 proceedings upon the hearing of the above cause
17 is hereby approved and directed to be filed.

18
19
20 _____
21 Richard A. Lewis, P.J.

22 Date: _____, 2008
23
24
25

DAUPHIN COUNTY COURT REPORTERS

EXHIBIT B

Reed Smith Bill of Costs Cover Letter

ReedSmith

Efrem M. Grail
Direct Phone: 412.288.4586
Email: egrail@reedsmith.com

Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219-1886
412.288.3131
Fax 412.288.3063

December 3, 2004

Charles R. Hostutler
Deputy Prothonotary/Chief Clerk
Commonwealth Court of Pennsylvania
624 Irvis Office Building
Harrisburg, PA 17120

Re: 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 M.D. 2004

Dear Mr. Hostutler:

With respect to the above-captioned matter, enclosed for filing please find the PETITIONERS' BILL
OF COSTS. We have provided a self-addressed, stamped envelope for your convenience in returning a
time-stamped copy of this document to our offices.

By copy of this letter, all counsel has been provided with a copy of this document.

Very truly yours,

REED SMITH LLP

By: 
Efrem M. Grail

EMG:seg

Enclosure

cc: Ronald L. Hicks, Esq. (w/enclosure)
Samuel C. Stretton, Esq. (w/enclosure)
Basil C. Cuylba, Esq. (w/enclosure)

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reedsmith.com

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