

BEFORE THE DULY CONSTITUTED  
ILLINOIS STATE BOARD OF ELECTIONS

IN THE MATTER OF:

David W. Cooke,	)	
	)	
Complainant,	)	
	)	
v.	)	Board File # 16 CD 093
	)	
Committee for Frank J. Mautino,	)	
	)	
Respondent.	)	
	)	

NOTICE OF FILING

TO: David W. Cook	
Ken Menzel	kmenzel@elections.il.gov
James Tenuto	jtenuto@elections.il.gov

Please take notice that on Wednesday, June 1, 2016, I filed with the Illinois State Board of Elections the attached Respondent's Motion to Stay, a copy of which is hereby served upon you.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that copies of the attached pleading were served upon the parties referenced above by email on Wednesday, June 1, 2016.

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**RESPONDENT’S MOTION TO STAY**

Respondent, Committee for Frank J. Mautino (the “Committee”), by its attorneys, Hinshaw & Culbertson LLP, for their motion to stay, state:

**INTRODUCTION**

This case should be stayed so that Frank J. Mautino (“Mautino”) will not be forced to have to choose to claim or waive the protection of his Fifth Amendment rights in this Illinois State Board of Elections (“Board”) proceeding where there is a pending, parallel federal criminal investigation and both proceedings involve the same subject matter.

**BACKGROUND**

The Committee dissolved as a political committee and filed its final report on December 30, 2015 pursuant to the Illinois Election Code. The Committee’s final report includes a final disposition of its funds and assets. As of the date of the final report, the Committee’s funds balance was zero (\$0). Mautino, the candidate and office holder for the Committee, became the Illinois Auditor General, effective as of January 1, 2016. Illinois law does not permit the

Auditor General to become a candidate for elective office, hold public office other than as Auditor General, or actively participate in any political campaign for any public office.

On February 13, 2016, David W. Cooke (the "Complainant") filed a complaint (the "Complaint") against the Committee for violation of the Campaign Disclosure Act. The Complaint seeks information and clarification as to certain reported expenditures. On May 16, 2016, the Board ordered that the Committee amend its reports on or before July 1, 2016, as to expenditures made to Happy's Super Service and Spring Valley City Bank. Subsequent to the issuance of the Board's order, on about May 19, 2016, it was publically reported that campaign workers for Mautino, while he was a state legislator, have received federal grand jury subpoenas and that a federal investigation is pending. Mautino, through undersigned counsel, acknowledges that the U.S. Attorney's Office for the Central District of Illinois is conducting an investigation related to the Committee and its expenditures.

**I. THIS CASE SHOULD BE STAYED UNTIL AFTER THE FEDERAL INVESTIGATION HAS BEEN RESOLVED.**

The entry of a stay maintains the Board's proceeding in its existing state without ruling on the dispute between the parties. *See Davies ex rel. Harris v. Pasamba*, 17 N.E.3d 763 (Ill. App 1<sup>st</sup> Dist. 2014). When a federal investigative matter is pending during the course of a civil action, the Board can stay the civil action based on the Fifth Amendment until the resolution of the federal investigative matter. *See People ex rel. Hartigan v. Kafka & Sons Building & Supply Co.*, 252 Ill.App.3d 115, 119 (1993). Under the Illinois Administrative Law Code, the Board has the discretion to stay a pending matter. 26 Ill.Admin.Code 125.110(e).

Mautino is currently subject to a federal investigation at the same time as the Board's pending proceeding, and he could assert a Fifth Amendment privilege as to any information or discovery in connection with the Complaint or other proceedings of the Board. If Mautino was

to waive his Fifth Amendment privilege in connection with the filing of amendments to the Committee's campaign reports or any discovery in this case, he would also be waiving his privilege in the federal investigative matter.

**A. A Stay is the Appropriate Means of Protecting Fifth Amendment Rights and Ensuring a Fair Proceeding.**

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. **Once the Fifth Amendment right to remain silent is waived in a civil case, it is waived in federal criminal investigative matters as well.** *U.S. v. Kordel*, 397 U.S. 1 (1970). In a civil matter, a party may claim privilege against self-incrimination under the Fifth Amendment to protect himself from involuntarily disclosing information which might implicate him criminally. *People ex rel. Hartigan v. Kafka & Sons Building & Supply Co.*, 252 Ill.App.3d 115, 119 (1993); *10-Dix Building Corporation v. McDannel*, 134 Ill.App.3d 66 (1st Dist. 1985); *Galante v. Steel City National Bank of Chicago*, 66 Ill.App.3d 476 (1st. Dist. 1978).

"[I]t is not at all rare for a person faced with criminal charges or a pending investigation to invoke the privilege [in a civil matter] even though he may have done nothing wrong out of an abundance of caution prompted by a careful criminal defense lawyer." *Chagolla v. City of Chicago, et al.*, Case No. 07 C 4557 (U.S. Dist. Ct. N.D.Ill. 2008) (Judge Kennelly)\*. For this reason, courts routinely endorse a stay of the civil proceeding as an appropriate means of addressing the Fifth Amendment dilemma created by a parallel federal criminal proceeding. *See, e.g., United States v. Kordel*, 397 U.S. 1, 9 (1970); *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir.) (cert. denied 449 U.S. 993 (1980)).

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\* A copy of Judge Kennelly's opinion is attached.

Mautino unquestionably has a Fifth Amendment privilege as to any statement related to the Complaint in this proceeding, including statements made in connection with any amendments to his Committee's reports—a privilege he has an absolute right to assert in this proceeding.

Moreover, there is no urgency to amending the Committee's campaign reports because the Committee has been dissolved and closed since December 30, 2015, and Mautino is not and will not be a candidate for electoral office in any upcoming election. For these reasons, and for the reasons set forth below, this Board should exercise its discretion to stay this matter, where, as here, a parallel federal investigation that may result in a criminal proceeding would force Mautino to choose between protecting his Fifth Amendment right and amending his Committee's campaign reports and responding to discovery in this proceeding. *See, Chagolla v. City of Chicago, et al.*, Case No. 07 C 4557 (U.S. Dist. Ct. N.D.Ill. 2008); *U.S. v. All Meat and Poultry Products*, No. 02 C 5145, 2003 WL 22284318, \*1 (N.D. Ill. 2003); *Cruz v. County of DuPage*, No 96 C 7170, 1997 WL 370194, \*1 (N.D. Ill. 1997); and *United States v. Kordel*, 397 U.S. 1, 9 (1970); *Securities and Exchange Com'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir.)(*cert. denied*, 449 U.S. 993 (1980)).

**B. The Relevant Factors Warrant a Stay Here.**

In determining whether a stay should be granted in a civil proceeding based on the existence of a parallel federal criminal investigation, the Board should consider various factors: (1) whether the civil action involves the same subject matter as the federal investigation; (2) whether the government is a party in both proceedings; (3) the posture of the federal proceedings; (4) the effect of a stay on the public interest; (5) Complainant's interest in proceeding expeditiously; and (6) the burden imposed upon Respondent regarding any particular aspect of the administrative proceedings. *Benevolence International Foundation, Inc. v. John Ashcroft, et al.*, 200 F.Supp.2d 935 (N.D. Ill. 2002); *Chagolla v. City of Chicago, et al.*, Case No.

07 C 4557 (U.S. Dist. Ct. N.D.Ill. 2008); *CHB Uptown Properties*, 378 Ill.App.3d at 108–09, 317 Ill.Dec. 255, 881 N.E.2d 423; *Jacksonville Savings Bank v. Kovack*, 326 Ill.App.3d 1131, 1136 (4th Dist. 2002). These factors weigh heavily in favor a stay in this matter.

**1. The Complaint Involves the Same Subject Matter as the Federal Investigation.**

The Complaint currently pending before the Board and the federal investigation involve the same subject matter. Based on the information available to the undersigned counsel, the federal investigation relates to the Committee’s and, by extension, Mautino’s campaign expenditures and his disclosures of campaign expenditures to the Board. The Complaint that is the subject of the Board’s proceedings involves the same matter. The close relationship between the Board’s proceeding and the federal investigation weighs in favor of a stay. *See, e.g., Chagolla v. City of Chicago, et al.*, Case No. 07 C 4557 (U.S. Dist. Ct. N.D.Ill. 2008).

**2. Whether the Government is a Party in Both Proceedings.**

Here, neither the Board nor the federal government is a party to both proceedings. Mautino concedes this factor weighs against a stay.

**3. Posture of the Federal Proceeding.**

The federal investigation is ongoing. Although no party has been indicted, the fact that the federal investigation is ongoing and that it concerns the use of the Committee’s campaign funds by Mautino, places Mautino at risk of potentially facing criminal charges. This point weighs in favor of a stay.

**4. The Public has Important Interests in Upholding the Fifth Amendment and Promoting Full and Fair Civil Trials.**

Granting a stay in this case will promote two important public interests. First, it will support the public’s interest in seeing that the protections afforded by the Fifth Amendment are safeguarded. *See, e.g., Ex parte Coastal Training Inst.*, 583 So. 2d 979, 981

(Ala. 1991) (“[Courts] must favor the constitutional privilege against self-incrimination over the interest in avoiding the delay of a civil proceeding.”). Second, a stay will promote the public’s interest in ensuring that civil disputes, including Complainant’s, are fairly decided on a full factual record. *Cf. Edwards v. Atrium Village*, 127 F.R.D. 494, 499 (N.D. Ill. 1989) (noting the “important public interest in having [an] issue decided on the basis of a full factual record”). When also considering that the Committee has been closed since December 30, 2015 and that Illinois law under Section 2-7 of the Illinois State Auditing Act, 30 ILCS 5/2-7, restricts Mautino from operating a political committee and from participating in any political campaign while holding the office of Illinois Auditor General, this factor also favors a stay.

**5. A Stay Would Not Prejudice Complainant.**

While entry of a stay would delay the Board’s proceedings, Complainant, who is a pro se concerned public citizen, filed the Complaint to examine questions raised with respect to the Committee’s campaign finance reports filed with the Board. There is no urgency with the Board’s proceedings. The Committee was dissolved months ago and is no longer conducting any campaign activities. The Complainant has no personal interest in obtaining resolution of this matter that would be prejudiced by a stay. Thus, there would be no irreparable harm or prejudice to Complainant if the Board grants a stay until resolution of the federal investigation.

**6. Not Issuing a Stay Will Prejudice Mautino.**

If Mautino is forced to amend his Committee’s campaign finance reports, he will be faced with the choice of whether to claim or waive the Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege protects a person from having to answer official questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *See, Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 (1973). Once the Fifth Amendment privilege is waived in a civil case, however, it

is waived in the federal investigative matter as well. As Judge Kennelly observed in the *Chagolla* case:

“[I]t is not at all rare for a person faced with criminal charges or a pending investigation to invoke the privilege even though he may have done nothing wrong out of an abundance of caution prompted by a careful criminal defense lawyer...A civil defendant in this situation who is effectively backed into a corner in which he has no viable choice but to claim the privilege is forced to face a significant risk of unfair prejudice that may be virtually impossible to remedy.”

*Chagolla v. City of Chicago, et al.*, Case No. 07 C 4557 (U.S. Dist. Ct. N.D.Ill. 2008). Therefore, a stay in the current Board proceeding is critical to permit Mautino to preserve his Fifth Amendment rights by not being forced to choose to claim the privilege, thereby creating risk that the claim could be used against him. This is a significant factor weighing in favor of a stay.

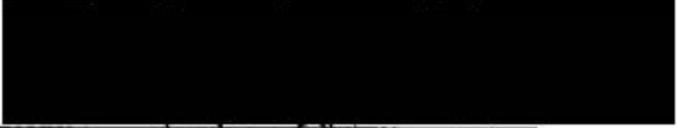
WHEREFORE, based upon the foregoing, Respondent respectfully urges the Board to grant its Motion to Stay the Board's proceedings in this matter pending resolution of the federal investigation.

Dated: June 1, 2016

Respectfully submitted,

COMMITTEE FOR FRANK J. MAUTINO

By:

  
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