

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILIP J. BERG,

Plaintiff

v.

BARACK OBAMA, et al.,

Defendants

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:

Civ. Action No. 2:08-cv-04083-RBS

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**ORDER**

AND NOW, THIS \_\_\_ DAY OF \_\_\_\_\_, 2008, upon consideration of the Motion of Defendants Democratic National Committee and Senator Barack Obama for Protective Order Staying Discovery Pending Decision On Dispositive Motion, and of the submissions of the parties relating thereto, it is hereby ORDERED that said Motion is GRANTED.

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Surrick, J.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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Plaintiff	:
	:
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	:
BARACK OBAMA, et al.,	:
	:
Defendants	:

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**MOTION OF DEFENDANTS  
DEMOCRATIC NATIONAL COMMITTEE AND  
SENATOR BARACK OBAMA FOR A PROTECTIVE ORDER  
STAYING DISCOVERY PENDING DECISION ON DISPOSITIVE MOTION**

Pursuant to Fed. R. Civ. P. 26(c)(1), defendants Democratic National Committee and Senator Barack Obama respectfully move the Court for a protective order staying all discovery in this action pending the Court’s decision on defendants’ motion to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Pursuant to Fed. R. Civ. P. 26(c)(1), on October 6, 2008, counsel for defendants conferred with plaintiff about agreeing to stay or defer discovery, including deferring responses to the discovery requests already served by plaintiff (attached as Exhibit A hereto). Plaintiff refused to consent to any such stay or deferral.

Pursuant to Local Rule 7.1, accompanying this Motion is a Brief in Support of Motion for Protective Order and a proposed Protective Order.

Respectfully submitted,

Dated: October 6, 2008

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Attorneys for Defendants  
Senator Barack Obama and  
Democratic National Committee

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**BRIEF OF DEFENDANT DEMOCRATIC NATIONAL COMMITTEE  
AND DEFENDANT SENATOR BARACK OBAMA  
IN SUPPORT OF MOTION FOR PROTECTIVE ORDER  
STAYING DISCOVERY PENDING DECISION ON  
DISPOSITIVE MOTION**

Defendants Democratic National Committee and Senator Barack Obama submit this Brief in support of their Motion for Protective Order Staying Discovery Pending Decision on Dispositive Motion. Plaintiff has served extensive discovery requests on defendants. As noted in Defendants’ Brief in Support of their Motion to Dismiss, this lawsuit is entirely without merit and plaintiffs’ allegations are patently false. Defendants have moved to dismiss this action for lack of subject matter jurisdiction and failure to state a claim. That motion presents solely issues of law; no discovery is needed in order to resolve the motion. If the motion is granted, it will dispose of the entire action, obviating the need for the burdensome discovery sought by plaintiff. A protective order staying discovery is therefore warranted.

## **I. Procedural Background**

In his Complaint, plaintiff Berg alleges that Senator Barack Obama, the Democratic Party's nominee for President of the United States, is not eligible to serve as President under Article II, section 1 of the Constitution because, Mr. Berg alleges (falsely), Senator Obama is purportedly not a natural-born citizen. Complaint ¶¶3. Mr. Berg seeks a declaratory judgment that Senator Obama is ineligible to run for President; an injunction barring Senator Obama from running for that office; and an injunction barring the DNC from nominating him.

On September 15, 2008, plaintiff Berg served on Senator Obama's office a request for production of seventeen different categories of documents, including copies of all of the Senator's college and law school applications, requests for financial aid, college and law school papers, and "a copy of your entire presidential file pertaining to being vetted." Plaintiff also served 56 requests for admission on Senator Obama. On that same date, plaintiff served on the DNC 27 requests for admission and requests for production of five categories of documents, including all documents in the possession of the DNC relating to Senator Obama.<sup>1</sup>

On September 24, 2008, defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim, on the grounds that, as a matter of law, plaintiff has no standing to challenge the qualifications of a candidate for President of the U.S. and has no federal cause of action.

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<sup>1</sup> True and correct copies of these discovery requests are attached as Exhibit A hereto.

## II. Discussion

Rule 26(c)(1) authorizes the Court to enter a protective order to protect a party “from annoyance, embarrassment, oppression, or undue burden or expense,” including an order forbidding the discovery or specifying terms for discovery. “While the court should not automatically stay discovery because a motion to dismiss has been filed, ‘a stay is proper where the likelihood that such motion may result in a narrowing or an outright elimination of discovery outweighs the likely harm to be produced by the delay.’” *19<sup>th</sup> St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 349 (E.D. Pa. 2000), quoting *Weisman v. Mediq, Inc.*, 1995 WL 273678, 1995 U.S. Dist. LEXIS 5900 \*2 (E.D. Pa. 1995). “Where a pending motion to dismiss may dispose of the entire action and where discovery is not needed to rule on such motion, the balance generally favors granting a motion to stay.” *Weisman*, 1995 U.S. Dist. LEXIS at \*5.

In *Weisman*, in which this Court found that a motion to dismiss could be decided on the pleadings, and could be decided in a relatively short time period, the Court granted a stay of discovery. Similarly, in *Norfolk Southern Rwy Co. v. Power Source Supply, Inc.*, 2007 U.S. Dist. LEXIS 15306 (W.D. Pa. 2007), defendant filed a motion to dismiss based on lack of subject matter jurisdiction; plaintiff served interrogatories and document requests while that motion was pending. The court granted defendant’s motion for a protective order staying discovery, ruling that, “where, as here, an objection to the Court’s jurisdiction made under Rule 12 might compel the dismissal of an entire action, the Court finds that considerations of fairness and efficiency suggest the prudence of limiting discovery to those facts necessary to resolve the motion. Because the Parties in this matter have fully briefed the jurisdiction issue and await only the Court’s ruling,

discovery in this case shall be stayed and Defendant protected from the requests that Plaintiff has already propounded.” *Id.* at \*4.

In this case, as in *Weisman* and *Norfolk Southern Rwy.*, defendants’ pending motion to dismiss for lack of subject matter jurisdiction would dispose of the entire action. The motion does not involve any disputed issues of fact: defendants contend that, as a matter of law, plaintiff lacks standing to challenge the qualifications of a candidate for President and that there is no federal cause of action that could serve as a means for such a challenge. Thus, discovery is not needed in order to rule on the motion. In these circumstances, a stay of discovery is warranted and appropriate.

## CONCLUSION

For the reasons set forth above, the Court should grant the motion of defendants DNC and Senator Barack Obama for a protective order staying discovery pending a decision on their motion to dismiss.

Respectfully submitted,

Dated: October 6, 2008

/s/ John P. Lavelle, Jr.  
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Defendants	:

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**CERTIFICATION PURSUANT TO LOCAL RULE 26.1(F)**

Undersigned counsel for Defendants Democratic National Committee and Senator Barack Obama hereby certifies pursuant to Local Rule 26.1(f) that the parties, after reasonable effort, are unable to resolve the dispute that is the subject matter of Defendants' Motion for Protective Order Staying Discovery Pending Decision On Dispositive Motion.

Dated: October 6, 2008

/s/ John P. Lavelle, Jr.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, a true and correct copy of the foregoing  
**Defendant Democratic National Committee's and Defendant Senator Barack Obama's  
Motion for a Protective Order Staying Discovery Pending Decision on Dispositive Motion  
and Brief in Support thereof** was served by First Class U.S. Mail, postage prepaid, upon the  
following:

Philip J. Berg, Esquire  
555 Andorra Glen Court, Suite 12  
Lafayette Hill, PA 09867

Plaintiff

Dated: October 6, 2008

/s/ John P. Lavelle, Jr. \_\_\_\_\_

John P. Lavelle, Jr.