

FEB 08 2005

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION
999 E Street N.W.
Washington, D.C. 20463

2005 FEB -8 P 3:57

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5461

DATE COMPLAINT FILED: 6/3/04

DATE OF NOTIFICATION: 6/15/04

DATE ACTIVATED: 11/03/04

EXPIRATION OF STATUTE OF
LIMITATIONS: 05/10/09

STAFF MEMBER: Kimberly D. Hart

COMPLAINANT:

Markham Shaw Pyle

RESPONDENTS:

Fan_the_Vote.com, John Kerry for President
and Robert Farmer, in his official capacity
as Treasurer, MoveOn PAC and Wesley
Boyd, in his official capacity as Treasurer,
MoveOn.org Voter Fund and Neil Riff in his
official capacity as Treasurer

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 441e

2 U.S.C. § 441i

11 C.F.R. § 109.20

11 C.F.R. §§ 109.21(c), (d)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

MUR 5461 arose from a complaint filed on June 3, 2004 by Markham Shaw Pyle ("Complainant"). 2 U.S.C. § 437g(a)(1). The complaint alleged that a community of website users calling itself Fan The Vote ("FTV") has been created for the purpose of offering things of value in exchange for campaign contributions to John Kerry for President and Robert Farmer, as treasurer ("Kerry campaign") and MoveOn PAC and

25044111837

Wesley Boyd, as treasurer and MoveOn.org Voter Fund and Neil Riff, as treasurer (“MoveOn”¹) in violation of the Federal Election Campaign Act of 1971, as amended (“Act”) and regulations promulgated thereunder (“regulations”). In addition, the complaint asserts that FTV violated the Act by encouraging foreign nationals to evade the Act’s restrictions on making contributions.

For the reasons set forth below, this Office recommends that the Commission exercise its prosecutorial discretion and dismiss the complaint for lack of sufficient information to support reason-to-believe findings against the respondents on a coordination theory and contributions by foreign nationals.

II. FACTUAL AND LEGAL ANALYSIS

A. Statement of Facts

The complaint in this matter alleged that a “community of Livejournal.com”² users, calling itself, Fan The Vote, has been created for the purpose of offering things of value in exchange for campaign contributions either to the Kerry campaign and/or MoveOn in violation of the Act.” The complaint alleged that this arrangement is “conflating regulated and potential unregulated (soft money) contributions and creating an improper linkage between the Kerry campaign and MoveOn.” The complaint also

¹ The complaint named MoveOn.org as a respondent without making a distinction between MoveOn.org PAC and MoveOn.org Voter Fund, two separate entities that could have been the recipient of the contributions at issue. Accordingly, docket served both entities and their respective treasurers as respondents.

² The community states the following: “LiveJournal.com is a web-based service that allows its users to create and update online journals (LiveJournal or the Service). The Service can be updated through a web browser as well as by the use of a free downloadable clients (the Software). Once registered with LiveJournal.com, each user received his or her own journal space to post text, data, messages, or information concerning or linked to software, music, sound, photography, graphics, and video (The Content). The Content may reside on LiveJournal’s servers or on the servers of a third party.” *Fan_The_Vote.com*, “Description of Service”, paragraph II.

1 alleged that FTV is "encouraging foreign nationals to evade the restrictions on their
2 contributing to U.S. elections by arranging for contributions to be made in the name of
3 another, and all for things of value as consideration without known legal exceptions to
4 that prohibition on foreign nationals."

5 The FTV community website does not reveal the name of the individual who
6 created the community other than the use of a moniker, "Idlerat", and an email address of
7 idlerat@yahoo.com. In addition, none of the individuals who sponsored volunteer
8 activities in exchange for contributions to the Kerry campaign and/or MoveOn are
9 identified other than by their user names or email addresses.³

10 It appears that Idlerat came up with the initial concept for the community on or
11 about May 10, 2004. Idlerat states, in the initial posting on May 10, 2004, that the FTV
12 community is where "fen can come to volunteer their fannish services in exchange for
13 pledges to either John Kerry for President or MoveOn.org (or both, of course)". The
14 "Fan the Vote" concept appears to be a play on words to describe people who are fans of
15 particular books, movies, or television shows, particularly in the science fiction or fantasy
16 genres who want to support the Kerry campaign and/or MoveOn by offering to contribute
17 to the Kerry campaign and/or MoveOn in exchange for items created specifically for
18 them or; by offering specific items to others in exchange for contributions to the Kerry
19 campaign and/or MoveOn. Idlerat also provides suggestions, in its initial posting, for
20 potential projects to be offered in exchange for contributions such as "writing a drabble,
21 make an icon for everyone who sponsors you, offering to do a specific task for everyone

³ LiveJournal.com does note an exception to its general policy on privacy issues that states it will release specific information about the user or the user's account in order to comply with any valid legal process such as a search warrant, subpoena, statute or court order.

1 who pledges over a certain amount, auctioning off a single big item to the highest bidder
2 such as original art or signed copies of fic or committing to a long range goal of finishing
3 or adding to a WIP.”⁴

4 Idlerat makes it clear that the contributions are made directly to the Kerry
5 campaign and/or MoveOn. The FTV community website contains a direct link to the
6 Kerry campaign website for making contributions. The direct link allowed the FTV
7 community to automatically track the amount of contributions made to either entity as a
8 result of its efforts. However, the FTV community website did not have a direct link to
9 the MoveOn website. In fact, Idlerat specifically requested that all contributors to
10 MoveOn confirm the making of contributions to MoveOn so that FTV could keep a
11 manual count of the contributions made as a result of its efforts.

12 Idlerat, in a posting on May 13, 2004, states that it “consulted the FEC regulations
13 (including calling them for clarification) as well as the fundraising department of the
14 Kerry campaign in setting up the FTV community and that the general form of the
15 fundraiser raised no objections with the Kerry campaign representative.” Another one of
16 FTV’s postings indicates that a total of approximately \$6,500 was raised for the Kerry
17 campaign and a total of approximately \$300 was raised for MoveOn and other
18 organizations as a result of FTV’s fundraising efforts.⁵ A cursory review of the FTV
19 postings show that a majority of the individual transactions were well below the \$200
20 itemization threshold. The individual transaction amounts generally ranged from \$5 to

⁴ The FTV community users employ arcane jargon to describe some of the types of work being created.

⁵ The FTV posting does not specify the names of “other organizations” that may be included in the \$300 figure.

25044111840

1 \$50. The fact that the contributions were made directly to the Kerry campaign and/or
2 MoveOn seemingly precludes potential questions as to whether FTV was a "political
3 committee" under the Act.

4 The complaint also referred to a specific FTV posting as evidence of FTV's
5 encouragement of foreign nationals to evade the Act's prohibitions on contributions to
6 Federal campaigns. Idlerat, on May 11, 2004, posted a reminder to the FTV community
7 that the Kerry campaign and MoveOn could only take contributions from U.S. citizens
8 and permanent residents. Idlerat states in this posting "that if you're not a U.S. citizen or
9 permanent resident, but you really want something being offered, you can probably work
10 something out privately with the person offering with warning that it is illegal to take
11 money from someone else to give to a political campaign."

12 On December 17, 2004, the Kerry campaign filed a response to the complaint. In
13 its response, it refers to Idlerat's assertion that it contacted the fundraising department of
14 the Kerry campaign to inform of the fundraiser and received no objection as to the
15 general nature of the fundraiser from a Kerry representative. The response states
16 "although it has no record of any conversation taking place, there is nothing illegal about
17 a conversation in which a supporter explains to a Kerry fundraiser that individuals intend
18 to volunteer to write slash fiction as a means of encouraging individuals to contribute to
19 JKFP. JKFP had no more involvement in the content of Fan the Vote's website than did
20 the FEC official with whom idlerat allegedly consulted for clarification." Counsel for the
21 Kerry campaign requests that the complaint be dismissed because the complaint relies
22 entirely on conclusory allegations.

25044111841

25044111842

1 MoveOn⁶, in its response, states that “none of its officers, employees or agents
2 have any knowledge of the individuals operating this website, and prior to the receipt of
3 this complaint, none of them had any knowledge of the existence of the website.” The
4 response also states that if MoveOn received any contributions as a result of the FTV
5 website, it would have had no way to know that the contribution was received in
6 connection with the FTV website. MoveOn further asserts that “its website thoroughly
7 screens potential contributors in accordance with Commission guidelines that provide a
8 ‘safe harbor’ for committees that accept contributions over the Internet.”

9 **B. Analysis**

10 There are three central issues presented in this complaint. The first issue is
11 whether there was coordination between FTV, the Kerry campaign and MoveOn to have
12 individuals sponsor goods and services in exchange for contributions to the Kerry
13 campaign and/or MoveOn. The second issue is whether an improper linkage resulted
14 between the Kerry campaign and MoveOn by virtue of their alleged connection to FTV in
15 violation of the Act. The third issue is whether there was encouragement, on FTV’s part,
16 for foreign nationals to evade the restrictions imposed by the Act by making
17 contributions in the name of another.

18 As to the first issue, the complaint alleged that the FTV community was created
19 with the “assent and knowledge of the Kerry campaign” but makes no such assertion with
20 respect to MoveOn. The complaint cited to a specific posting on the FTV community to
21 support its allegation. Both the Kerry campaign and MoveOn, in their responses, deny

⁶ Both MoveOn PAC and MoveOn.org Voter Fund and their respective treasurers were included as respondents in this matter since the complaint merely referred to “MoveOn”. The same counsel represents both entities and filed one response on behalf of both entities.

1 any prior knowledge of or acquiescence to the fundraising efforts of FTV. The only
2 evidence offered in support of the allegation is a posting by Idlerat stating that the Kerry
3 campaign was informed of the general nature of its fundraising efforts and posed no
4 objections.

5 The Complainant appears to be alleging that the FTV website was a "coordinated
6 communication within the meaning of 11 C.F.R. § 109.21. In order to constitute a
7 "coordinated communication", a communication must meet a basic three-part test, as set
8 forth in section 109.21(a) of the regulations. 11 C.F.R. 109.21(a). First, the
9 communication must be paid for by a person other than the candidate, or the candidate's
10 authorized committee, or a political party committee, or an agent of any of the above.
11 Second, the communication has to meet one of the content standards contained in section
12 109.21(c) of the regulations. 11 C.F.R. § 109.21(c). Third, the communication has to
13 meet one of the conduct standards set forth in 109.21(d) of the regulations. 11 C.F.R.
14 § 109.21(d).

15 The FTV website seems to meet the first part of the test, in that it does not appear
16 to have been paid for by the Senator John Kerry, the Kerry campaign, the Democratic
17 National Convention, or any of their agents.⁷ However, it does not appear to meet either
18 the content or the conduct tests. All communications covered by section 109.21 must be
19 "public communications" as defined in section 100.26 of the regulations and
20 communications over the Internet are specifically excluded from the definition of "public

⁷ At this point, we are not aware of the extent of the costs, if any, associated with creating the FTV website.

25044111844

1 communication.”⁸ 11 C.F.R. §§ 100.26, 109.21. Moreover, the alleged conversation
2 between Idlerat and the Kerry representative does not appear to meet the conduct test.
3 The conduct standard that would appear to come the closest is the “substantial
4 discussion” standard set forth in section 109.21(d)(3) of the regulations. 11 C.F.R.
5 § 109.21(d)(3). However, “[a] discussion is substantial within the meaning of this
6 paragraph if information about the candidate’s or political party committee’s plans,
7 projects, activities, or needs is conveyed to a person paying for the communication, and
8 that information is material to the creation, production, or distribution of the
9 communication.” 11 C.F.R. § 109.21(d)(3). In the present case, there is no allegation
10 that the Kerry committee representative conveyed to “Idlerat” any information at all,
11 much less information about the Kerry campaign’s plans, projects, activities or needs.
12 The Kerry committee representative simply “did not object” to the general nature of
13 FTV’s fundraising plans. Under these circumstances, the communication plainly is not a
14 “coordinated communication” within the meaning of section 109.21, and it would not
15 seem appropriate to regard it as any other type of coordinated expenditure under section
16 109.20. 11 C.F.R. §§ 109.20, 109.21.

17 As to the second issue, the complaint alleged an “improper linkage” between the
18 Kerry campaign and MoveOn by virtue of FTV’s fundraising activities on behalf of both

⁸ In *Shays v. FEC*, 02-CV-1984, slip. op. at 32-48 (D.D.C. Sept. 18, 2004) (notice of appeal filed Sept. 28, 2004), the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court’s opinion. The content standard of the coordinated communication regulation included a reference to the definition of “public communication” which excluded communications over the Internet. Therefore, the Court also invalidated the Commission’s exclusion of Internet activity as a part of a “public communication”.

1 entities. "Improper linkage" is not a term used in the Act or regulations, and it is unclear
2 precisely what the Complainant is trying to allege, or even if the Complainant has, on this
3 point, alleged a violation within the jurisdiction of the Commission. However, giving the
4 *pro se* Complainant every benefit of the doubt, we might assume that he is trying to
5 allege either that MoveOn made contributions to the Kerry campaign or vice versa in the
6 form of coordinated expenditures, or that MoveOn and the Kerry campaign are affiliated
7 because they both were the subject of FTV's fundraising efforts. However, the
8 Complainant alleges no facts that would show either a contribution from MoveOn to the
9 Kerry campaign or from the Kerry campaign to MoveOn. So, if the allegation is
10 "coordination", it is unsupported by any facts. In addition, committees and organizations
11 do not become affiliated under the Act simply because one independent actor may have
12 engaged in efforts to donate to both MoveOn and the Kerry campaign. Therefore, if the
13 allegation is "affiliation", it is based on a faulty legal premise.

14 In regard to the third issue, the complaint points to, as evidence that FTV
15 encouraged foreign nationals to evade the restrictions on their contributing to Federal
16 elections in violation of 2 U.S.C. § 441e, a posting by Idlerat on May 11, 2004.
17 However, the contents of the posting appear to be just the opposite of soliciting
18 contributions from foreign nationals or at the very least too ambiguous to constitute
19 solicitation on FTV's part. Idlerat, in his posting, clearly states that the Kerry campaign
20 and MoveOn can only accept contributions from U.S. citizens and permanent residents.
21 Idlerat's posting does suggest that a foreign national could possibly "work something
22 out" privately with the person offering something that the foreign national wants but also
23 contains an explicit warning that "it is illegal to take money from someone else to give to

1 a political campaign." Idlerat even suggests an example of "working something out"
2 which is a contribution by the buyer to the seller's favorite charity. There is simply no
3 factual support for the complaint's allegation.

4 **III. CONCLUSION**

5 The facts do not appear to support the complaint's allegations. The Commission
6 may find "reason to believe" if a complaint sets forth sufficient specific facts, which, if
7 proven true, would constitute a violation of the Act. *See* 11 C.F.R. § 111.4(a), (d). In
8 this matter, however, the complaint allegations are conclusory and speculative.
9 Notwithstanding the importance of coordination requirements and the restriction on
10 contributions by foreign nationals, this Office does not believe that attempting to pursue
11 this case any further would be a constructive use of limited Commission resources given
12 the extremely grassroots nature of the activity and the overwhelmingly *de minimis* nature
13 of the individual transactions. The amount of money potentially at issue (\$6,500 for the
14 Kerry campaign and \$300 for MoveOn) is relatively small when compared to the
15 amounts of contributions raised overall by the Kerry campaign and MoveOn. In addition,
16 proving a coordination theory and prohibited contribution theory with this set of facts
17 further suggests that exercising prosecutorial discretion is appropriate. In light of these
18 factors and the likely *de minimis* impact that these alleged contributions had on the
19 outcome of the election, this Office recommends that the Commission dismiss the
20 complaint and close the file.

21 **III. RECOMMENDATIONS**

- 22 1. Dismiss the complaint.
23
24 2. Approve the appropriate letters.
25

2504411846

3. Close the file.

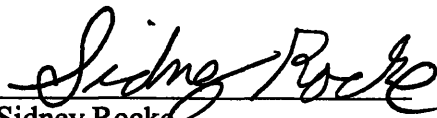
Lawrence H. Norton
General Counsel

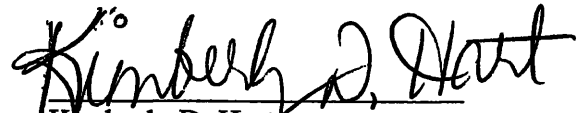
Rhonda J. Vosdigh
Associate General Counsel
for Enforcement

Date

2/6/05

BY:


Sidney Rocke
Assistant General Counsel


Kimberly D. Hart
Attorney

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

25

26

27

28

29

30

31

32

33

34

35

25044111847