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August 23, 2007

VIA FEDERAL EXPRESS

Thomasenia P. Duncan
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2007 AUG 24 A 10:22

Re: MUR 5928 (Kos Media LLC, DailyKos.com, Markos Moulitsas Zúniga)

Dear Ms. Duncan:

On behalf of Kos Media LLC, DailyKos.com and Markos Moulitsas Zúniga ("Respondents"), this letter is submitted in response to the complaint filed by John C. A. Bambenek ("the Complaint") and subsequently labeled MUR No. 5928. The Complaint should be immediately dismissed.

The Commission may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation. *See* 11 C.F.R. §§ 111.4(a), (d) (2004). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. *See* Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2001).

Under clearly established FEC regulations and the Commission's ruling in the Fired Up LLC Advisory Opinion request (AO 2005-16), it cannot seriously be disputed that DailyKos.com is protected under the press exception and does not qualify as a political committee. The costs which Kos Media LLC incurs in covering or carrying news stories, commentary, or editorials on DailyKos.com do not constitute "expenditures" or "contributions" under the Federal Election Campaign Act of 1971 and Commission regulations, and this complaint should be dismissed without further action by the Commission.

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I. FACTUAL BACKGROUND

Markos Moulitsas Zúniga ("Moulitsas") founded the website Daily Kos (<http://www.dailykos.com>) in on May 26, 2002.¹ In November 2004, Moulitsas transferred ownership to Kos Media, LLC, a limited liability corporation organized under the laws of the state of Delaware, of which he is the sole owner. The site is neither owned nor controlled by a political party, political committee, or candidate, but by Kos Media alone.²

Daily Kos has grown in those five years to the premier political community in the United States, with traffic of about 600,000 daily visits. Among the public figures posting diaries on the site are former President Jimmy Carter, Senate Majority Leader Harry Reid, Speaker of the House Nancy Pelosi, and dozens of other senators, congressmen, and governors.

The site is run by a staff of two – Moulitsas and a computer programmer. Fifteen volunteer contributing editors provide content for the front page of the site, but the overwhelming majority of the content of the site is contributed by its registered users. Over 130,000 citizens have registered as users of Daily Kos to lend their voice to a political discourse once the domain of the rich, connected, and powerful. Any registered user of Daily Kos can post his or her own content directly onto the website in the "diaries" section, offering his or her own reporting of news or editorial views on the issues of the day, and offer comments on the diaries posted by others. Sometimes, these diaries lead to calls to action, whether encouraging other readers of the site to make phone calls to elected officials, write letters to the editor of their local papers or to make political contributions to candidates for office.

Daily Kos derives its revenues from three sources: paid advertising which appear on the site's front page, premium site memberships which allow users to hide site advertising, and merchandise such as t-shirts and baseball caps.

II. LEGAL BACKGROUND

This matter is easily resolved under the Commission's traditional analysis of the press exception, as elaborated upon by the Fired Up advisory opinion and its recent rulemaking regarding the Internet. In sequence, this section reviews the traditional press exception analysis,

¹ The facts in this section are verified in the attached Affidavit of Markos Moulitsas Zúniga.

² Indeed, at instances too numerous to recite in full, the site has been deeply critical of the Democratic Party and its leadership. See, e.g., front-paged diaries by Moulitsas including "CT-Sen: Lieberman to campaign with Republicans today", <http://www.dailykos.com/storyonly/2006/8/24/12492/6043> (Aug. 24, 2006) ("Where is Schumer and Reid on this? They're betraying a weakness that I quite frankly had no idea existed. They're letting a non-Democrat sore loser walk all over them, and like abused puppies, they're just sitting there taking it. Amazing."); "Dems to run on the economy?", <http://www.dailykos.com/story/2006/9/22/104446/786> (Sept. 22, 2006) ("See, that's why I don't think we're going to win back the House or Senate. Because you can always trust Democrats to snatch defeat from the jaws of victory.... For the record, we heard this in 2002. We heard it in 2004. I gave the argument the benefit of the doubt those years. I think I actually bought it in 2002. But apparently our vaunted leadership in DC is incapable of learning lessons. "); "Some back story on the CBC/Fox debate", <http://www.dailykos.com/story/2007/3/30/1909/98632> ("Reading things like this, and it brings home just how corrupt and compromised the Democratic establishment truly is.")

press entity, its provision of news stories, commentary, and editorials on its websites falls within Fired Up's legitimate press function. Thus, because Fired Up is a press entity, and neither it nor its websites are owned or controlled by any political party, political committee, or candidate, the costs Fired Up incurs in covering or carrying a news story, commentary, or editorial on its websites are exempt from the definitions of "contribution" and "expenditure." The Commission notes that an entity otherwise eligible for the press exception would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* First General Counsel's Report, MUR (CBS Broadcasting, Inc.) ("Even seemingly biased stories or commentary by a press entity can fall within the media exemption.")

AO 2005-16 at 6. By a 6-0 vote, the Commission thus affirmed Fired Up's status as a press entity.³

D. The 2006 Rulemaking Affirms Fired Up

The FEC affirmed the Fired Up advisory opinion in its 2006 rulemaking regarding the Internet. *See* Final Rules, Explanation and Justification of "The Internet: Definitions of 'Public Communication' and 'Generic Campaign Activity' and Disclaimers," 71 Fed. Reg. 78589 (published April 12, 2006). In explaining the expanded definition of "press entity" to include the Internet, the Commission stated as follows:

The Commission has decided to revise 11 C.F.R. 100.73 and 11 C.F.R. 100.132 to clarify that the media exemption applies to media entities that cover or carry news stories, commentary, and editorials on the Internet, just as it applies to media entities that cover or carry news stories, commentary, and editorials in

³ In a brief concurrence, former Commissioners Thomas and McDonald expressed concern regarding "a number of strong connections — historical and financial" between Fired Up and the Missouri Democratic Party. Still, after a review of the various materials on the Fired Up sites as well as its representation that Fired Up would have as its sole business the distribution of news stories, editorials and commentaries, they agreed with the Commission's conclusion. To the extent that the constitution of Fired Up's leadership presented any concern, Kos Media LLC presents no such issue.

The Commissioners also noted, similarly to what Mr. Bambenek's contentions, that Fired Up "indicated that it 'intends to endorse, expressly advocate, and urge readers to donate funds to the election of Democratic candidates for federal, state, and local office'; that its site 'contains links to Democratic and progressive organizations' and that it 'intends aggressively to support progressive candidates and causes at all levels.'" Still, even according to these more skeptical Commissioners, "we can see no indication from Fired Up's activities that its major purpose has been other than to conduct the dissemination of news and commentary over the Internet," and thus found the press exception to apply, not political committee status.

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traditional media, such as printed periodicals or television news programs. The Commission is also clarifying that the media exemption protects news stories, commentaries, and editorials no matter in what medium they are published. Therefore, the Commission has added "website" to the list of media in the exemption and is also adding "any Internet or electronic publication" to address publication of news stories, commentaries, or editorials in electronic form on the Internet. In so doing, the Commission recognizes that the media exemption is available to media entities that cover or carry news stories, commentaries, or editorials solely on the Internet, as well as to media entities that cover or carry news stories, commentaries, and editorials solely in traditional media or in both traditional media and on the Internet.

71 Fed. Reg. 78608. The Commission further held that "as a matter of law that the media exemption applies to the same extent to entities with only an online presence as to those with an offline component as well," that "bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities," and affirmed its previous conclusion that "the media exemption applies without regard to whether programming is biased or balanced."

Moreover, the Commission affirmed the precedent established by AOs 1980-109 (James Hansen) and 1982-44 (DNC/RNC) in maintaining that "press entities do not forfeit the press exemption if they solicit contributions for candidates," citing in a footnote various recent instances in which media entities had solicited contributions for Federal candidates. 71 Fed. Reg. 18609 at n. 56. Finally, the Commission concluded that the presence or absence of alleged coordination between a press entity and a candidate or political party was irrelevant to determining whether the Act's press exemption applies. 71 Fed. Reg. 18609-18610.

III. DAILY KOS IS ENTITLED TO THE PRESS EXCEPTION

Based on the Fired Up advisory opinion and the Commission regulations, it simply is beyond peradventure that Daily Kos qualifies as a press entity. Indeed, Commissioner Ellen Weintraub recognized as such in an article published by Salon.com on July 9, 2005, prior to both the Fired Up advisory opinion and the completion of the Internet rulemaking process, when she noted that "People like Red State [a prominent conservative blog] or Kos clearly fall under the media exemption."⁴ The Commission's decisions in the Fired Up advisory opinion and subsequent regulations affirm this conclusion.

As a website that engages in news, commentary and editorial which is not owned or controlled by a party, political committee or candidate, Daily Kos stands squarely within that precedent. Indeed, there is nothing which Daily Kos does which Fired Up did not also do at the time of its advisory opinion. Therefore, under 2 U.S.C. § 437f(c)(1)(B) and 11 C.F.R. §

⁴ Zachary Roth, "Beware of the Halli-bloggers!" (July 9, 2005), available online at http://dir.salon.com/story/news/feature/2005/07/09/fec_bloggers/index.html.

112.5(a)(2), Respondents have been entitled to rely in good faith upon the Fired Up advisory opinion, as persons involved in transactions or activities "indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered," and in fact Respondents cannot be the subject of FEC sanction for such activities. 2 U.S.C. § 437f(c)(2), 11 C.F.R. § 112.5(b).

Mr. Bambenek's fanciful allegations nowhere mention the press exception, and bear no relationship to how the Commission actually approaches these matters. His arguments regarding the "self-identified purpose" of the site do not square with the Commission's approach, which is to look at what the site *does*. See AO 2005-16 at 5 ("An examination of Fired Up's websites reveals ..."); Concurring Opinion of Commissioners Thomas and McDonald in AO 2005-16 at 4 ("we can see no indication from Fired Up's activities that its major purpose has been other than to conduct the dissemination of news and commentary over the Internet.") Indeed, if the sole test of "purpose" was to look at self-serving mission statements, it would lead to the absurd result of true political committees escaping FEC scrutiny by simply providing false explanations as to their purported goals. It was for that reason that Moulitsas, through the undersigned counsel, advocated the FEC's approach to its draft Fired Up advisory opinion:

A robust application of the press exception provides the broadest, most flexible protection possible short of an outright Congressional exemption of the Internet from campaign finance regulation. We favor the press exception because it provides clearest signal to participants that their activities will not be chilled by the threat of investigation or subpoena. With that protection for their commentary and activism, innocent users cannot accidentally fall into political committee status or having their incorporated status being subject to some nebulous "purpose" test.

IV. CONCLUSION

As a press entity, Respondents' site-related expenditures qualify neither as contributions or expenditures under the Act, and thus Respondents do not fall into political committee status. Respondents have not violated the law, nor have the millions of citizens who go online each month – whether on Respondents' site or others – to learn about political affairs; read news, commentary and editorial on same; and provide their own through platforms like Daily Kos. Such sites fulfill through technology what FECA, BCRA and the Commission's regulations attempt via law, by magnifying the power of each citizen's voice to equal that of wealthy contributors, PACs and large corporations. Chilling such speech, or even leaving the door open for future frivolous complaints like Mr. Bambenek's, is neither consonant with the language of the statutes and regulations, nor the important public policy goals which they reflect, nor proper deference to this Commission's advisory opinion process under 2 U.S.C. § 437f(c).

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Mr. Bambenek's complaint should be dismissed, and the Commission should find no reason to believe Respondents have violated federal election law.

Sincerely,

COZEN O'CONNOR



By: Adam C. Bonin

ACB/bdw

cc: Markos Moulitsas Zúniga

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BEFORE THE FEDERAL ELECTION COMMISSION

In re Kos Media, LLC, et al

MUR 5982

AFFIDAVIT OF MARKOS MOULITSAS ZÚNIGA

State of California :

County of Alameda :

I, Markos Moulitsas Zúniga, being duly sworn, depose and state as follows under oath:

1. I founded the website Daily Kos (<http://www.dailykos.com>) in on May 26, 2002.

2. In November 2004, I transferred ownership of the site from myself to Kos Media, LLC, a limited liability corporation organized under the laws of the state of Delaware, of which I am the sole owner.

3. Kos Media LLC owns Daily Kos and two similarly structured websites which hosts discussions of other topics –Street Prophets (<http://www.streetprophets.com> – for progressive people of faith), and Mother Talkers (<http://www.mothers-talkers.com> – on modern motherhood).

4. Daily Kos is not owned nor controlled by a political party, political committee, or candidate. It is solely owned by Kos Media, and I am the sole owner of Kos Media.

5. The site is run by a staff of two – myself and Jeremy Bingham, a computer programmer.

6. Kos Media derives its revenues from three sources: paid advertising which appear on the site's front page, premium site subscriptions which allow users to hide site advertising, and merchandise such as t-shirts and baseball caps.

7. Daily Kos has grown in the last five years to the premier political community in the United States, with traffic of about 600,000 daily visits. Among the public figures posting diaries on the site are former President Jimmy Carter, Senate Majority Leader Harry Reid, Speaker of the House Nancy Pelosi, and dozens of other senators, congressmen, and governors.

8. Fifteen volunteer contributing editors provide content for the front page of the site, but the overwhelming majority of the content of the site is contributed by its registered users.

9. Over 130,000 citizens have registered as users of Daily Kos to lend their voice to a political discourse once the domain of the rich, connected, and powerful. Any registered user of Daily Kos can post his or her own content directly onto the website in

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the "diaries" section, offering his or her own reporting of news or editorial views on the issues of the day, and offer comments on the diaries posted by others.

10. Sometimes, these diaries lead to calls to action, whether encouraging other readers of the site to make phone calls to elected officials, write letters to the editor of their local papers or to make political contributions to candidates for office.

11. With regards to any other sources of revenue, I will reiterate what I have stated before in other forums. I am not a consultant now, nor have I consulted since 2004, nor do I want to return to that profession. No politician, campaign, issue group, nor any other organization has ever directly or indirectly paid me for providing content on Daily Kos, nor would I entertain such offers in the future. I deeply value the editorial independence of Daily Kos and Kos Media, and intend to preserve it into the future.

BEFORE ME, the undersigned Notary, Jacob Menough, on this 22nd day of August, 2007, personally appeared Markos Moulitsas Zúñiga, known to me to be a credible person and of lawful age, who being by me first duly sworn, on his oath, who deposes and stated the above.

[signature of affiant]

Markos Moulitsas Zúñiga
Kos Media LLC
PO Box 3327
Berkeley, CA 94703

Subscribed and sworn to before me, this 22nd [day of month] day of August [month], 2007. By Markos C. Alberto Moulitsas

[signature of Notary]

Jacob Menough
[typed name of Notary]

NOTARY PUBLIC

My commission expires: August 3rd, 2008.

