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November 7, 2007

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5939

Dear Mr. Jordan:

The undersigned represent the respondents, MoveOn.Org Political Action and Wes Boyd, as treasurer, (hereinafter referred to collectively as "MoveOn"). This matter was generated by a complaint filed by David A. Keene, Chairman of the American Conservative Union on September 14, 2007. The complaint alleged that the New York Times Company made an in-kind contribution to MoveOn by charging less than its usual and normal charge for an advertisement that was published in the *New York Times* ("NYT") on September 10, 2007 (the "Ad"). Exhibit 1. The complainant acknowledged that it did not know the usual and normal charge – in fact, the complainant alleged a range for the normal and usual rate – but nevertheless alleged that the $64,575 reported charge was less than the NYT's usual and normal charge for similarly sized advertisements.

Even if the complainant's allegation were true that MoveOn paid less than the NYT's usual and normal rate, MoveOn denies that the rate it paid was a contribution, as that term is defined by the Federal Election Campaign Act, because the Ad was not "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(a), nor was it "in connection with any election," 2 U.S.C. § 441b(b)(2). Even if the Ad were a contribution in connection with an election, MoveOn denies that it received an improper corporate contribution because it paid $142,083, the reported usual and normal rate within the NYT's usual and normal billing cycle. Furthermore, even if the original quoted rate that formed the basis for the complaint was less than the usual and normal rate, in order to avoid any questions or the appearance of impropriety, MoveOn promptly paid the full price as soon as it discovered that there was a question whether the original quoted rate may have been erroneous. Thus, for the reasons stated more fully below, the Commission should find no reason to believe that any violation of the Federal Election Campaign Act or the Commission's regulations occurred and should close the file in this matter.

Facts

MoveOn is a non-connected multicandidate federal political committee as that term is defined at 2 U.S.C. § 431(4)(A) and 11 C.F.R. §§ 100.5, 106.6(a) 114 that both supports candidates and makes disbursements independent of candidates and political parties in connection with legislative issues. During September 2007, it worked with its media consultants, Fenton Communications and Zimmerman and Markman, to create and publish the Ad in the NYT on Monday, September 10, 2007. The Ad commented only on General Petraeus' expected testimony before various Congressional committees considering funding for and investigations of the conduct of the war in Iraq. No current candidates, political parties or future elections were mentioned, directly or indirectly, and the disbursement for the Ad was made independently of any candidate or political party. The Ad included the disclaimer that MoveOn paid for the Ad, and the Ad was not authorized by any candidate or candidate's committee.

On Friday September 7, 2007, Trevor FitzGibbon, a vice president of Fenton Communications, began negotiations with the NYT for a full page advertisement on the following Monday and indicated that MoveOn might be interested in buying additional advertising space. Rates were negotiated for advertisements on multiple days as well as for one advertisement on the following Monday. The NYT representative told him that there was space available on Monday, and they negotiated a rate of $64,575 net for a single advertisement on Monday. Fenton Communications has placed numerous advertisements in the NYT,, and pursuant to the NYT's published policy for such agencies and Fenton Communications' experience with the NYT, Fenton Communications expected to be invoiced monthly for any advertisements it places with payment due fifteen (15) days thereafter. Normally, Fenton Communications bills the advertiser, in this case MoveOn, and then Fenton Communications pays the NYT. See Declaration of Trevor Fitzgibbon Exhibit 2, and NYT policy Exhibit 3. In this instance, the invoice was paid through Zimmerman and Markman, the media consultant who created the newspaper advertisement. See Invoice attached as Exhibit 4.

The Ad generated, among other things, a controversy about the $64,575 rate initially negotiated with the NYT. On September 14, 2007, the American Conservative Union's chairman filed the complaint herein alleging that MoveOn received a lower rate than was available to other advertisers, and therefore the $64,575 rate constituted an illegal and excessive corporate in-kind contribution to MoveOn pursuant to 2 U.S.C. §§ 441a and 441b.

Until September 23, 2007, the NYT publicly defended the $64,575 rate it quoted for the Ad to many reporters of other media organizations as an appropriate rate for the Ad. *See, e.g.* newstories attached as Exhibit 5. CQ.com on September 19, 2007, see Exhibit 5, summarized the published news stories:

> But the New York Times dismisses the notion that the ad amounted to any sort of political contribution. While Catherine J. Mathis, the newspaper's vice president of corporate communications, said the Times does not publicly disclose the amount any one advertiser pays, she stated that MoveOn's fee "is the rate that we

would charge normally for that type of ad under those conditions. It would be available to other similar advertisers."

In a separate press statement on the subject, the New York Times explained, "Rates vary based on such factors as time of year, color, day of the week, section, volume of advertising placed by the advertiser, etc. We do not distinguish advertising rates based on the political content of the ad. In fact, the advertising department does not see the content of the ad before a rate is quoted." Added Mathis: "I think that's something that's getting lost here.

Therefore, MoveOn received continuous confirmation from these public statements that it had negotiated a usual and normal rate for the Ad.

However, on Sunday, September 23rd, Clark Hoyt, the New York Times public editor, published his personal conclusion of whether MoveOn.org had received preferential treatment from the NYT.

MoveOn.org paid what is known in the newspaper industry as a standby rate of $64,575 that it should not have received under Times policies. The group should have paid $142,083.

Exhibit 5. Mr. Hoyt then addressed the issue of how this happened:

Eli Pariser, the executive director of MoveOn.org, told me that his group called The Times on the Friday before Petraeus's appearance on Capitol Hill and asked for a rush ad in Monday's paper. He said The Times called back and "told us there was room Monday, and it would cost $65,000." Pariser said there was no discussion about a standby rate. "We paid this rate before, so we recognized it," he said. Advertisers who get standby rates aren't guaranteed what day their ad will appear, only that it will be in the paper within seven days.

Id. Mr. Hoyt included in his report that others, such as the Giuliani campaign, have been quoted and received the same $64,575 rate as was quoted to MoveOn:

In the fallout from the ad, Rudolph Giuliani, the former New York mayor and a Republican presidential candidate, demanded space in the following Friday's Times to answer MoveOn.org. He got it -- and at the same $64,575 rate that MoveOn.org paid.

Bradley A. Blakeman, former deputy assistant to President Bush for appointments and scheduling and the head of FreedomsWatch.org, said his group wanted to run its own reply ad last Monday and was quoted the $64,575 rate on a standby basis. The ad wasn't placed, he said, because the newspaper wouldn't guarantee him the day or a position in the first section.

Id.

On Monday, September 24th, MoveOn decided to avoid any question of or the appearance of impropriety and requested an invoice from the NYT for $142,083. In response to MoveOn's request, the NYT initially sent an invoice through Fenton Communications, but only for $64,575, the negotiated rate. After another request, the NYT sent a revised invoice for $142,083, and MoveOn paid $166,179.24 to Zimmerman & Markman. Of this amount, $24,096.10 was for production and commission to Zimmerman and Markman, and $142,083.14 was to pay for the Ad.

LACK OF JURISDICTION

Although the complaint herein only involves the cost of the Ad, the content is relevant to the Commission's consideration because the Ad solely addresses the legislative issues currently being considered by Congressional committees of the conduct of and the funding for the on-going war in Iraq. Indeed, the Ad narrowly discusses only General Petraeus' expected testimony before those committees. The Ad makes no reference to any future or current election, candidate, or political committee. Thus, the Ad discusses a current non-election legislative issue without any express advocacy or the functional equivalent of express advocacy. The Ad does not name or otherwise refer to any federal or non-federal candidate, political party, or future election and does not promote, support, attack, or oppose any federal or non-federal candidate. The Ad was not broadcast or disseminated by cable or satellite communication devices, was not coordinated with any candidate or party committee, and it contains the disclaimer, "not authorized by any candidate or candidate's committee." Exhibit 1. Therefore, the amount paid for the Ad is not within the Commission's jurisdiction to regulate, and the complaint should be dismissed.

The term "contribution" is defined both as anything of value "made by any person for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8), and, in the case of a corporation, "in connection with any election to any political office," 2 U.S.C. § 441b(b)(2). The construction of these statutory provisions as they relate to advertisements has a long and tortuous regulatory and judicial history that is unnecessary to describe in detail here. The Commission is well aware of the most recent judicial declaration in the Supreme Court's decision in *Federal Election Commission v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*") and is in midst of a rulemaking to codify that holding. However the Court's holding bears emphasis as it relates to the Ad: "This Court has never recognized a compelling interest in regulating ads, like *WRTL*'s, that are neither express advocacy nor its functional equivalent." *Id.* at 2671. For ads that "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy." *Id.* at 2670. The Court concluded its decision with the admonition that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban -- the issue we *do* have to decide -- we give the benefit of the doubt to speech, not censorship." *Id.* at 2674 (emphasis in original).

The Ad does not meet the criteria to qualify as express advocacy as that term was described in *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) or the functional equivalent of express advocacy as described in *WRTL*. The Ad makes no appeal to the public to vote for or against any federal or non-federal candidate. The only reference to an election is the timing of a statement

made by someone who is not a candidate or holder of a federal office before the 2004 election. The Ad does not mention any current or future elections, nor does it mention any specific candidate by name. A fair reading of the Ad demonstrates that it exclusively addresses the issues of the conduct and the funding for the Iraq war. Because the election of a candidate is not discussed, nor is there any reference to a political party, under *WRTL*, the Ad is an example of "pure issue advocacy" that the Court contemplated was beyond governmental regulation. Of course, the Court noted in *WRTL* that an advertisement should only be found to be express advocacy if "the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667.

Even under the BCRA's definition of an electioneering communication, which was intended by Congress to be more inclusive than express advocacy, the Ad would not be subject to regulation. First, the definition of electioneering communication does not apply to advertisements in newspapers. 2 U.S.C. § 434(f)(3)(A)(i). Second, even if it did, the Ad would not be an electioneering communication because it does not "refer[] to a clearly identified candidate for Federal Office." 2 U.S.C. 434(f)(A)(i)(I). Nor is there any reference, even indirectly, to any candidate. 11 C.F.R. 100.29(b)(2).

Someone might incorrectly argue that *WRTL* does not apply to expenditures by MoveOn because MoveOn is registered as a Federal political committee, and a political committee's expenditures are presumed to be election related. The presumption arises from the Supreme Court's observation that a federal political committees' major purpose is the nomination or election of candidates to federal office. *See e.g. McConnell v. FEC*, 540 U.S. 93 169 n.64 (2003) ("[A] political committee's expenditures 'are, by definition, campaign-related.'") (internal citations omitted). However, in light of the Court's recent decision in *WRTL*, this argument is wrong for at least two reasons.

First, as Chief Justice Roberts clearly stated in *WRTL*, the First Amendment prohibits government regulation of speech that is neither express advocacy nor its functional equivalent – the intent and identity of the speaker is irrelevant to the Court's holding. *WRTL*, 127 S. Ct. at 2665-66 ("We decline to adopt a test for as-applied challenges turning on the speaker's intent to affect an election. . . .A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."). *Cf., MacIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995) ("Thus, even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' *City of Ladue* v. *Gilleo*, 512 U.S. 43, 56, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity.").

Second, the presumption that all political committee speech is election-related, by its very nature, is not an absolute truism because the Court recognizes that political committees may have one or more secondary non-electoral objectives. Of course, many Commission regulations explicitly recognize that federal political committees make expenditures for non-federal election related speech and participate directly in non-federal elections. Commission regulations permit federal committees to maintain both federal and non-federal accounts (11 C,F.R, § 102.5(a)) and provide for allocation between federal and non-federal funds for expenses that may have either a

direct, or indirect influence on federal elections. Thus, the Commission's allocation regulations recognize the existence of expenditures for non-federal election-related speech by political committees. Also, 11 C.F.R. §§ 106.6(a) and (f) acknowledge that non-connected political committees may make expenditures, including expenditures for public communications, that are not in connection with a federal election. Under the Commission's regulations, public communications may be made with funds from a non-connected political committees' federal account, non-federal account, or a combination of both accounts. These regulations explicitly require the use of federal funds for public communications *only if* a specific federal candidate or political party is identified in the communication or if the communication could be considered a "voter drive" activity. In this instance, no federal candidate or political party is identified in the Ad. The Ad does not reference any election or candidate, urge the public to vote or register to vote, or support or oppose candidates on a particular issue. In short, the Ad is not regulated by the Commission's allocation regulations at 11 C.F.R. § 106.6.

Since the Commission does not have jurisdiction over the content of the Ad, it may not regulate the amount paid for the advertisement. It is simply irrelevant whether the NYT charged MoveOn the usual and normal charge. Although, MoveOn does not maintain a non-federal account, it would not be precluded from accepting a non-federal in-kind contribution from the NYT for activities that are wholly outside the jurisdiction of the Commission.

In view of the above, the complaint should be dismissed because the Commission does not have jurisdiction to regulate either the content of or payment for the Ad.

NO CONTRIBUTION OCCURRED

Even if, *arguendo*, the Commission had jurisdiction over the payment for the Ad, the Commission should dismiss the complaint because MoveOn did not accept an in-kind contribution from the NYT. MoveOn paid the amount the complainant alleged was the usual and normal charge for the Ad within the usual and normal billing cycle. In fact, as soon as MoveOn learned of Mr. Hoyt's conclusion in the NYT, MoveOn decided to avoid any question or appearance of impropriety and pay the full amount described in Mr. Hoyt's article.

FECA generally prohibits corporations, such as the NYT, from making any contributions, either in cash or in-kind, in connection with a federal election. 2 U.S.C. § 441b(a). In-kind contributions include goods or services provided for free or at a discount from the normal charge for such items. 11 C.F.R. § 100.52(d)(1). A "commercial vendor" is any person "providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11 C.F.R. § 116.1(c). To determine whether a discount or service is in the ordinary course of business, the Commission considers (1) whether the vendor followed its own established procedures in extending the credit; (2) whether the vendor received prompt payment in full; and, (3) whether the credit was a "usual and normal practice" in the vendor's trade or industry. 11 C.F.R. § 116.3(c). In making these determinations, the Commission has consistently found that "the purchase of goods or services at a discounted rate does not constitute a contribution when the discounted items are made available

in the ordinary course of business and on the same terms and conditions offered to the vendor's other customers that are not political committees." Advisory Opinion ("AO") 2006-1.[1]

Within this framework, the alleged discount that MoveOn received for the Ad would be an improper contribution if it was not offered as a usual and normal business practice to other NYT customers. However, Freedoms Watch, a nonprofit advocacy group that initially called for an investigation into the Ad, has itself noted that it had also paid a similar rate for a full-page ad attacking Iran's President Mahmoud Ahmadinejad on the day when he gave a speech at Columbia University. Exhibit 5. In addition, as stated in the Facts above, Rudy Guiliani's campaign also paid a similar rate for a response ad that ran in that Friday's edition, September 14th. These transactions are evidence that the NYT did not give MoveOn an improper discount outside the ordinary course of business. *Id.* Although MoveOn is not familiar with the negotiations that took place in these instances, the only factor that led MoveOn to agree to pay $64,575 was the NYT salesperson negotiated that rate with MoveOn's media consultant. Exhibit 2. MoveOn is not familiar with the representations made to these other customers, or whether the NYT requires its sales staff to explicity notify a customer of the basis for the negotiated rate

Any supposition regarding whether the original quoted rate was appropriate has been mooted by MoveOn's actual payment for the Ad, at the NYT's non-standby rate within a commercially reasonable time. *Id.* The complaint alleged that MoveOn should pay the "open rate for a full page black and white advertisement." *See* Complaint herein. On September 24, 2007, exactly two weeks after the Ad was published by the NYT and the day MoveOn received the invoice for the Ad, MoveOn paid $142,083. Exhibit 4. In addition, MoveOn's payment was within the period the NYT routinely allots to all of its similarly situated customers. Its policy stated on its web site states:

> Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

Exhibit 3. Since the negotiations were made through MoveOn's agents, Fenton Communications, NYT did not require any advance payment for the advertisement. It is normal and customary practice for the NYT and the newspaper industry not to require advance payment for newspaper advertisements with established customers. This is consistent with Mr. FitzGibbon's declaration that his company is billed monthly for the advertisements it places in the NYT for its customers. Exhibit 2. See also MUR 5132. Because MoveOn paid a non-discounted rate for the Ad fourteen (14) days after it was published, the payment for the Ad was

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[1] *See also, e.g.* AO 1996-17 ("if the terms and conditions under which the goods are provided are consistent with established practice in the commercial vendor's trade or industry in similar circumstances," there are no in-kind contributions); AO 1987-24 (hotel services discounts were "customary in the hotel industry for groups booking blocks of rooms, or holding banquets or other events," and thus, discounts which were offered "to political candidates on the same terms and conditions . . . as to other, non-political clients" were offered as part of a usual and normal business practice and were not improper corporate contributions); AO 1995-46; and, AO 1987-14.

within the normal and customary period for the payment of advertisements placed by others. Therefore, MoveOn did not receive an improper in-kind contribution outside the realm of the ordinary course of business.

In view of the above, even if the Commission finds that it has jurisdiction over the payment of the Ad, the complaint should be dismissed because MoveOn did not accept an in-kind contribution.

CORRECTED PAYMENT AFTER DISCOVERY

Even if, *arguendo*, the Commission considered the NYT's oral agreement to publish the Ad for $64,575 as an in-kind contribution, MoveOn still did not receive an illegal or excessive contribution. While there is a general prohibition against corporate contributions, a commercial vendor, such as the NYT, may extend credit to a political committee, provided that the credit is extended in the ordinary course of business and is substantially similar to extensions of credit given to nonpolitical debtors. 11 C.F.R. § 116.3(b). As described above, the NYT spokesperson stated publicly for almost two weeks after the Ad was published that $64,575 was the appropriate rate for the Ad. Thus, it was impossible for MoveOn to know that such rate may have been an improper rate until September 23rd when Mr. Hoyt published his report. Exhibit 5. 11 C.F.R. § 103.3(b)(1) permits a committee to correct improper contributions (that originally did not appear to be improper) within thirty (30) days of the discovery that the contribution was improper. Fourteen (14) days after the Ad was published, MoveOn, which had not yet received an invoice, requested an immediate invoice for the amount Mr. Hoyt determined was the correct rate. The NYT then sent an invoice for $64,575, but MoveOn paid $142,083 to the NYT on September 24th. Exhibit 3. At the request of Moveon, sent a revised invoice for the full amount paid by Moveon for the ad. Therefore, even under the complainant's incomplete understanding of the facts, MoveOn did not receive an improper in-kind contribution.

In view of the above, even if the Commission determines that it has jurisdiction over this matter, MoveOn paid for the advertisement, at a full, non-discounted rate, within a commercially reasonable time.

CONCLUSION

For all of the reasons described above, the Commission should find no reason to believe any violation of the law occurred, the complaint should be dismissed, and the Commission should close the file.

Respectfully submitted,

Joseph Sandler
Neil P. Reiff
Stephen E. Hershkowitz

Counsel to MoveOn.org and Wes Boyd, as treasurer

Exhibit One

GENERAL PETRAEUS OR GENERAL BETRAY US?

Cooking the Books for the White House

General Petraeus is a military man constantly at war with the facts. In 2004, just before the election, he said there was "tangible progress" in Iraq and that "Iraqi leaders are stepping forward." And last week Petraeus, the architect of the escalation of troops in Iraq, said, "We say we have achieved progress, and we are obviously going to do everything we can to build on that progress."

Every independent report on the ground situation in Iraq shows that the surge strategy has failed. Yet the General claims a reduction in violence. That's because, according to the *New York Times*, the Pentagon has adopted a bizarre formula for keeping tabs on violence. For example, deaths by car bombs don't count. The *Washington Post* reported that executions only count if you're shot in the back of the head — not the front. According to the Associated Press, there have been more civilian deaths and more American soldier deaths in the past three months than in any other summer we've been there. We'll hear of neighborhoods where violence has decreased. But we won't hear that those neighborhoods have been ethnically cleansed.

Most importantly, General Petraeus will not admit what everyone knows: Iraq is mired in an unwinnable religious civil war. We may hear of a plan to withdraw a few thousand American troops. But we won't hear what Americans are desperate to hear: a timetable for withdrawing all our troops. General Petraeus has actually said American troops will need to stay in Iraq for as long as ten years.

Today, before Congress and before the American people, General Petraeus is likely to become General Betray Us.

MoveOn.ORG
POLITICAL ACTION

Credit and Payment Terms

See the Credit Application page to establish credit with The Times. If credit is granted, The Times will establish a credit limit and applicable payment terms. Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

The advertiser and agency shall be jointly and severally liable to The Times for the payment. Cash discounts are not available.

The Times will not accept insertion orders containing disclaimers.

September 23, 2007

THE PUBLIC EDITOR; Betraying Its Own Best Interests

By CLARK HOYT

FOR nearly two weeks, The New York Times has been defending a political advertisement that critics say was an unfair shot at the American commander in Iraq.

But I think the ad violated The Times's own written standards, and the paper now says that the advertiser got a price break it was not entitled to.

On Monday, Sept. 10, the day that Gen. David H. Petraeus came before Congress to warn against a rapid withdrawal of troops, The Times carried a full-page ad attacking his truthfulness.

Under the provocative headline "General Petraeus or General Betray Us?" the ad, purchased by the liberal activist group MoveOn.org, charged that the highly decorated Petraeus was "constantly at war with the facts" in giving upbeat assessments of progress and refusing to acknowledge that Iraq is "mired in an unwinnable religious civil war."

"Today, before Congress and before the American people, General Petraeus is likely to become General Betray Us," MoveOn.org declared.

The ad infuriated conservatives, dismayed many Democrats and ignited charges that the liberal Times aided its friends at MoveOn.org with a steep discount in the price paid to publish its message, which might amount to an illegal contribution to a political action committee. In more than 4,000 e-mail messages, people around the country raged at The Times with words like "despicable," "disgrace" and "treason."

President George W. Bush called the ad "disgusting." The Senate, controlled by Democrats, voted overwhelmingly to condemn the ad.

Vice President Dick Cheney said the charges in the ad, "provided at subsidized rates in The New York Times" were "an outrage." Thomas Davis III, a Republican congressman from Virginia, demanded a House investigation. The American Conservative Union filed a formal complaint with the Federal Election Commission against MoveOn.org and The New York Times Company. FreedomsWatch.org, a group recently formed to support the war, asked me to investigate because it said it wasn't offered the same terms for a response ad that MoveOn.org got.

Did MoveOn.org get favored treatment from The Times? And was the ad outside the bounds of acceptable political discourse?

The answer to the first question is that MoveOn.org paid what is known in the newspaper industry as a standby rate of $64,575 that it should not have received under Times policies. The group should have paid $142,083. The Times had maintained for a week that the standby rate was appropriate, but a company spokeswoman told me late Thursday afternoon that an advertising sales representative made a mistake.

The answer to the second question is that the ad appears to fly in the face of an internal advertising acceptability manual that says, "We do not accept opinion advertisements that are attacks of a personal nature." Steph Jespersen, the executive who approved the ad, said that, while it was "rough," he regarded it as a comment on a public official's management of his office and therefore acceptable speech for The Times to print.

By the end of last week the ad appeared to have backfired on both MoveOn.org and fellow opponents of the war in Iraq -- and on The Times. It gave the Bush administration and its allies an opportunity to change the subject from questions about an unpopular war to defense of a respected general with nine rows of ribbons on his chest, including a Bronze Star with a V for valor. And it gave fresh ammunition to a cottage industry that loves to bash The Times as a bastion of the "liberal media."

How did this happen?

Eli Pariser, the executive director of MoveOn.org, told me that his group called The Times on the Friday before Petraeus's appearance on Capitol Hill and asked for a rush ad in Monday's paper. He said The Times called back and "told us there was room Monday, and it would cost $65,000." Pariser said there was no discussion about a standby rate. "We paid this rate before, so we recognized it," he said. Advertisers who get standby rates aren't guaranteed what day their ad will appear, only that it will be in the paper within seven days.

Catherine Mathis, vice president of corporate communications for The Times, said, "We made a mistake." She said the advertising representative failed to make it clear that for that rate The Times could not guarantee the Monday placement but left MoveOn.org with the understanding that the ad would run then. She added, "That was contrary to our policies."

Arthur Sulzberger Jr., the publisher of The Times and chairman of its parent company, declined to name the salesperson or to say whether disciplinary action would be taken.

Jespersen, director of advertising acceptability, reviewed the ad and approved it. He said the question mark after the headline figured in his decision.

The Times bends over backward to accommodate advocacy ads, including ads from groups with which the newspaper disagrees editorially. Jespersen has rejected an ad from the National Right to Life Committee, not, he said, because of its message but because it pictured aborted fetuses. He also rejected an ad from MoveOn.org that contained a doctored photograph of Cheney. The photo was replaced, and the ad ran.

Sulzberger, who said he wasn't aware of MoveOn.org's latest ad until it appeared in the paper, said: "If we're going to err, it's better to err on the side of more political dialogue. ... Perhaps we did err in this case. If we did, we erred with the intent of giving greater voice to people."

For me, two values collided here: the right of free speech -- even if it's abusive speech -- and a strong personal revulsion toward the name-calling and personal attacks that now pass for political dialogue, obscuring rather than illuminating important policy issues. For The Times, there is another value: the protection of its brand as a newspaper that sets a high standard for civility. Were I in Jespersen's shoes, I'd have demanded changes to eliminate "Betray Us," a particularly low blow when aimed at a soldier.

In the fallout from the ad, Rudolph Giuliani, the former New York mayor and a Republican presidential candidate, demanded space in the following Friday's Times to answer MoveOn.org. He got it -- and at the same $64,575 rate that MoveOn.org paid.

Bradley A. Blakeman, former deputy assistant to President Bush for appointments and scheduling and the head of FreedomsWatch.org, said his group wanted to run its own reply ad last Monday and was quoted the $64,575 rate on a standby basis. The ad wasn't placed, he said, because the newspaper wouldn't guarantee him the day or a position in the first section. Sulzberger said all advocacy ads normally run in the first section.

Mathis said that since the controversy began, the newspaper's advertising staff has been told it must adhere consistently to its pricing policies.

CQ Politics.com

MoveOn Ad Flap Likely to Be Replicated — On Both Sides — Through 2008

By CQ Staff Wed Sep 19 12:35 PM ET

By Emily Cadei, CQ Staff

First it was the fodder for an eruption of Republican outrage. Now the full-page ad that MoveOn.org ran in the New York Times on Sept. 10 slamming Army Gen. David Petraeus, the top commander of U.S. forces in Iraq, is the target of a campaign finance complaint with the Federal Election Committee (FEC).

In the complaint filed last Friday, the American Conservative Union (ACU), a conservative political action organization, has alleged that the New York Times had in effect made a contribution to MoveOn.org Political Action, the political action committee (PAC) of the liberal group, by charging a below-market rate for the ad. Under federal election law, PACs are prohibited from accepting individual donations in excess of $5,000 in a given calendar year. The law also bans corporations from making any kind of contribution to political campaigns or committees.

ACU Chairman David A. Keene, in documents filed with the FEC, cited media reports on the rate of a full-page black-and-white ad in the Times that ranged between $167,000 and $181,000. MoveOn.org has stated that it paid $65,000 for its Petraeus ad, which ran on the first of two days of congressional testimony in which the general strongly defended President Bush's troop "surge" policy in Iraq. The difference, according to Keene, "constitutes a corporate soft money contribution to a federal political committee" — something that, if deemed true, would be a violation of federal election law that could subject the participants to fines.

CQPolitics.com asked ACU spokesman Bill Lauderback if the complaint had anything to do with the content of the MoveOn ad, which portrayed Petraeus as "General Betray Us" and accused him of providing political cover to the president in his controversial prosecution of the Iraq war. Lauderback replied, "MoveOn.org has a constitutional right to say anything it wishes. It does not have the liberty, however, of violating federal law as it relates to the receipt of corporate contributions."

But the New York Times dismisses the notion that the ad amounted to any sort of political contribution. While Catherine J. Mathis, the newspaper's vice president of corporate communications, said the Times does not publicly disclose the amount any one advertiser pays, she stated that MoveOn's fee "is the rate that we would charge normally for that type of ad under those conditions. It would be available to other similar advertisers."

In a separate press statement on the subject, the New York Times explained, "Rates vary based on such factors as time of year, color, day of the week, section, volume of advertising placed by the advertiser,

etc. We do not distinguish advertising rates based on the political content of the ad. In fact, the advertising department does not see the content of the ad before a rate is quoted."

Added Mathis: "I think that's something that's getting lost here."

Neither the paper nor MoveOn should lose too much sleep over the complaint, said Thomas E. Mann, senior fellow in governance studies at the Brookings Institution, a Washington, D.C., think tank. "I see the ACU complaint as a way to keep the MoveOn.org ad in the news. It will almost certainly be dismissed by the FEC," Mann wrote in an e-mail response to a question by CQPolitics.

And developments such as the "viral" dissemination of campaign messages and video across the Internet and broadcast media, and the proliferation of political action groups — many of them organized under Section 527 of the Internal Revenue Code and thus permitted to accept large and unlimited "soft money" contributions — virtually ensure that the MoveOn dustup will be just one of many such controversies between now and November 2008.

Still, the conservative group's FEC complaint serves to prolong a repeated flogging of MoveOn's ad by the many on the ideological right. Conservatives are up in arms over the "Betray Us" pun, arguing that it impugned the integrity of an active-duty general and, by extension, the military as a whole.

The controversy drew in a number of national Republican candidates, who have sought to brand MoveOn as a liberal extremist organization and tried strenuously to tie the Democratic Party and its candidates — some of whom have received campaign money via MoveOn's fundraising activities — to the group's strong rhetoric.

The National Republican Senatorial Committee (NRSC), which orchestrates the GOP's national campaigns for control of the U.S. Senate, issued a press release immediately after the ad was published calling MoveOn a "Democrat front group" and calling on all Senate Democrats to "denounce this outrageous ad and return the campaign funds MoveOn.org has lavished on them."

The NRSC also issued separate press releases calling on four Democratic Senate incumbents who are running for re-election in races to be held in 2008 — Tom Harkin of Iowa, Max Baucus of Montana, Mary L. Landrieu of Louisiana, and Mark Pryor of Arkansas — to condemn the ad, and targeted the same demand at Colorado Rep. Mark Udall, who is running for the Senate seat left open by retiring Republican Wayne Allard.

Republican presidential candidates also have gotten in on the action. Former New York City Mayor Rudolph Giuliani was the first to take a stand, accusing his hometown newspaper of giving MoveOn an advertising discount — and demanding the same rate for an ad of his own. It ran last Friday, decrying what he called "the Democrats' orchestrated attacks on General Petraeus."

Giuliani's top-tier rivals for the Republican nomination — former Massachusetts Gov. Mitt Romney, Arizona Sen. John McCain and former Tennessee Sen. Fred Thompson — also have been vocal in their criticism of the ad. Republicans also point to the amount of money MoveOn provides for Democratic campaigns: In the first six months of 2007, for example, MoveOn Political Action PAC channeled more than $533,000 in earmarked contributions from its individual members to Democratic candidates for federal office. Among presidential contenders, this included more than $30,000 to Illinois Sen. Barack

Obama, $24,000 to Ohio Rep. Dennis J. Kucinich, $18,000 to New Mexico Gov. Bill Richardson, $5,000 apiece to Clinton and Delaware Sen. Joseph R. Biden Jr., and $900 to Connecticut Sen. Christopher J. Dodd.

Democrats: 'Remember the Swift Boaters'

Whether this sound and fury signifies anything, however, depends on how well the Republicans are able to tie Democrats to MoveOn and its rhetoric. Under federal law, parties and candidates of both major parties are prohibited from coordinating their activity with independent interest groups, which in turn enables Democrats and Republicans alike to distance themselves whenever a faction raises a flap with negative advertising.

Controversy concerning the ties of parties to interest groups — and whether they are responsible for disowning what these groups say on their own — is not new. But it has become increasingly salient as independent political organizations have become more visible actors in seeking to influence election campaigns over the past decade.

"Are we seeing more [interest group activity] now than we used to? I think so," said Michael Malbin, executive director of the Campaign Finance Institute, a non-partisan campaign finance research organization. "These types of organizations are growing and expanding, with electoral arms and issue arms."

Malbin also noted that increased party polarization has led to closer ideological alignments between interest groups on the left with the Democratic Party and groups on the right with the Republicans. This, along with the power of Internet to facilitate political communications and fundraising, has raised the profile of groups such as MoveOn. But as these sorts of groups attract more attention, they also generate more conflict, for the tactics that work at a grass-roots level do not always translate well in the political mainstream.

Republicans have had to defend against allegations of ties to GOP-allied interest groups, most famously the Swift Boat Veterans For Truth, who gained widespread attention in the 2004 presidential election for attacking Kerry's record of military service during the Vietnam War. The Kerry campaign filed an FEC complaint against the group, alleging it had illegally coordinated campaign activity with the GOP and the Bush-Cheney campaign.

In the fall-out, Bush campaign legal adviser Benjamin Ginsberg was forced to resign after it was revealed he had also advised the Swift Boat Veterans. The FEC fined the Swift Boat group nearly $300,000 in 2006 for its failure to register as a political committee during the 2004 election, but did not find evidence of direct collusion with the Republican Party or the Bush campaign.

Few Republican politicians apologized for or denounced the behavior of independent groups in these previous instances, the notable exception being a condemnation of the Swift Boat ads by McCain — a former Vietnam prisoner of war — in which he called the attacks "terrible" and "very, very inappropriate." It's unlikely any Democrats will apologize this time around, either. Most have been mute on the subject, though Kerry did call the ad "over the top," and Senate Democratic Whip Richard Durbin of Illinois, said it used "a poor choice of words."

MoveOn has been unrepentant, publicly accusing two more public officials of "betrayal" this week. Its political action arm escalated the war of words with Giuliani with a 30-second ad calling the former mayor's lack of participation in the Iraq Study Group empaneled by Bush a "betrayal of trust." The ad is now featured on the organization's Web site, with plans to air it on Iowa television stations this week.

MoveOn Political Action uses the same "betrayal of trust" language in a television advertisement criticizing Bush and his "surge" strategy in Iraq, which it is preparing to air nationally.

The group did not respond to requests for comment regarding its advertising campaigns.

NY Times says discounting MoveOn ad was 'mistake'

September 24, 2007

NEW YORK (AP) – The New York Times' ombudsman says the newspaper violated its standards when it gave the liberal activist group MoveOn.org a $77,508 price break on a full-page advertisement targeting Gen. David H. Petraeus.

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The organization paid $64,575, instead of the standard $142,083, for the

ıd questioning the war in Iraq, public editor Clark Hoyt wrote in a column ıublished Sunday.

Times spokeswoman Catherine Mathis told Hoyt that an advertising ıales representative shouldn't have agreed to the discounted price. The ıd seemed to disregard internal advertising standards that ban ads ıvolving attacks of a personal nature, Hoyt wrote.

We made a mistake," she told Hoyt.

A message left by The Associated Press with Mathis was not returned Monday.

MoveOn.org said in a statement it would wire the difference in the ad ates to the Times on Monday.

While we believe that the $142,083 figure is above the market rate paid by most organizations, out of an abundance of caution we have decided to pay that rate for this ad," said Eli Pariser, MoveOn's political action executive director.

Pariser added that MoveOn negotiated a price it thought was the Times' normal rate. "There is no evidence of any kind that the error in quoting of ates was in any way based on the content of the advertisement or the identity of its sponsor," Pariser said.

The full-page ad was printed in the Times' Sept. 10 editions, the day that Petraeus appeared before Congress to warn against a rapid withdrawal of military forces in Iraq. The ad's headline -- "General Petraeus or General Betray Us?" -- questioned his honesty and said he was constantly at war with the facts" in giving positive assessments of the war.

The ad infuriated conservatives, dismayed many Democrats and ignited charges that the liberal Times aided its friends at MoveOn.org with a steep discount in the price paid to publish its message," Hoyt wrote.

Hoyt said he was asked to investigate the ad rate by FreedomsWatch.org, which advocates a strong national defense and a powerful fight against terrorism, because it said it wasn't offered a similar ate.

Pariser told Hoyt his group had called three days before the ad ran and asked to place it, and was told the ad would cost $65,000.

We paid this rate before, so we recognized it," Pariser told the Times.

Freedom's Watch president Bradley A. Blakeman praised Hoyt for criticizing the paper's ad policy, and said it had paid a similar, reduced ate for an ad blasting Iranian President Mahmoud Ahmadinejad's Monday appearance at Columbia University.

That full-page ad, headlined "Ahmadinejad is a terrorist," appeared in Monday's editions.

MORE:

Pro-Bush Group Airs Ads Denouncing Liberal Anti-Petraeus Ad

Friday , September 14, 2007

Associated Press

WASHINGTON —

A political group supporting President Bush's Iraq war strategy with a multimillion-dollar ad campaign is airing a new TV ad denouncing a liberal group's sharp criticism of Gen. David Petraeus.

The campaign is the second rollout of ads by the group, Freedom's Watch, and capitalizes on Democratic Party unease over a newspaper ad run this week by MoveOn.org, one of the leading anti-war voices among liberal activists.

• Click here to see the advertisement that Freedom's Watch plans to run (.pdf).

The MoveOn ad appeared Monday in The New York Times on the morning of Petraeus' first appearance before Congress to testify about conditions in Iraq. The ad accused Petraeus of "cooking the books" for the White House. "General Petraeus or General Betray Us?" it asked, playing off his name.

The ad has become a rallying point for Republicans, who have demanded that Democrats disavow it.

Some Democrats have voiced concern. On Monday, Sen. John Kerry, D-Mass., called the ad "over the top."

The Freedom's Watch ad states: "Name calling, charges of betrayal it's despicable. It's what MoveOn shamefully does — and it's wrong. America and the forces of freedom are winning. MoveOn is losing. Call your Congressman and Senator. Tell them to condemn MoveOn."

"It's not surprising that a White House front group like Freedom's Watch would come after us," said Eli Pariser, executive director of MoveOn.org Political Action. Pariser defended the MoveOn ad, saying, "when you have the Bush administration spinning the facts about what is happening in Iraq, that's a betrayal of trust."

Bradley A. Blakeman, president of Freedom's Watch, said MoveOn was employing "outrageous tactics."

"To question the character and patriotism of brave men and women who combat terrorism everyday is too much, it's in poor taste and it will not go unchallenged," he said.

Freedom's Watch also plans to respond to MoveOn with a print ad in The New York Times, and has demanded the same $65,000 rate that the liberal group paid for its full-page ad. Freedom's Watch spokesman Matt David said his organization paid "significantly more" for another full-page ad Tuesday on the 9/11 anniversary.

That ad, however, was a more expensive full-page color ad, compared to MoveOn's, which was black and white. The rate also would have been higher if Freedom's Watch asked for a specific date and placement of the ad. David said The New York Times did not offer Freedom's Watch the $65,000 rate.

Catherine Mathis, vice president of corporate communication at the Times, said she could not discuss specific advertisers, but said the rate for a special advocacy, full-page, black and white, standby ad is $64,575. At that rate, an advertiser can request that an ad run on a specific date, but cannot be guaranteed such placement.

"The rates are certainly things that have many different variables in them," she said.

Freedom's Watch launched a $15 million advertising blitz last month to pressure lawmakers, including Republicans, whose backing of the war was seen as wavering.

The group is financed by former White House aides and Republican fundraisers and was organized as a nonprofit organization under IRS rules. It is not required to identify its donors or the amounts they give.

Among those who have been publicly identified with the effort are billionaire Sheldon Adelson, a fundraiser for Bush and chairman and CEO of the Las Vegas Sands Corp., and conservative philanthropist John M. Templeton Jr. of Bryn Mawr, Pa. Both men have been major contributors to conservative causes.

Also backing Freedom's Watch are top Republican donors Anthony Giola, Mel Sembler and Howard Leach, all former ambassadors in the Bush administration. Former White House Press Secretary Ari Fleischer is a founding member.