SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111
TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

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DIRECT DIAL
202-371-7365
DIRECT FAX
202-661-0565
EMAIL ADDRESS
LNOBLE@SKADDEN.COM

February 17, 2009

Via Courier
Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Attn: Jeffrey S. Jordan

RE: MUR 6021 - The Ballot Project

Dear Ms. Duncan:

This responds to the letter from the Federal Election Commission ("FEC" or "Commission") notifying The Ballot Project of a complaint and supplement to the complaint filed by Ralph Nader ("Mr. Nader" or "Complainant"). For the reasons set forth below, we respectfully request that the Commission dismiss Mr. Nader's complaint because:

- Mr. Nader filed his complaint after The Ballot Project had been dissolved in the District of Columbia and beyond the two-year limitation period for bringing a claim after such dissolution.

- Both the Complainant and the FEC failed to comply with procedures mandated by the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431 *et. seq.* ("FECA or Act") and the FEC's own regulations.

- The complaint fails to provide "reason to believe" ("RTB") The Ballot Project violated any provisions of the Act.

Moreover, proceeding with a far-reaching investigation based on Mr. Nader's untimely complaint containing broad, conclusory and unsubstantiated allegations about a "conspiracy" that took place over four years ago would require that the Commission, as well as the subjects of the investigation, expend considerable resources—both in time and money—on what will likely be an ultimately futile task.

I. The Ballot Project No Longer Exists And Mr. Nader's Complaint Was Untimely.

The Commission should dismiss the complaint against The Ballot Project because it no longer exists and Mr. Nader did not bring this action within two years after The Ballot Project ceased to exist, as mandated by the laws of the District of Columbia.

The general rule in the District of Columbia is that notwithstanding statutory provisions to the contrary, when a corporation's existence comes to an end, no liability can be enforced against it. *United States v. Maryland & Virginia Milk Producers*, 145 F. Supp. 374, 375 (D.D.C. 1956). The D.C. Code provision dealing with dissolution of non-profit corporations provides the following exception to the general D.C. rule:

> The dissolution of a corporation ... shall not take away or impair any remedy available to or against such corporation, its directors, officers, or members for any right of claim existing, or any liability incurred, prior to such dissolution *if suit or other proceeding thereon is commenced within 2 years* after the date of such dissolution.

D.C. Code § 29-301.63 (emphasis added).

Thus, causes of action against a dissolved non-profit corporation, its directors, officers, or members – allegedly arising prior to the date of dissolution – must be asserted within two years of the corporation's dissolution.

The Ballot Project was a Section 527 organization incorporated as a non-profit corporation in the District of Columbia on May 19, 2004, to (among others things) ensure the integrity of the ballot process and compliance with state election laws, and to assess legal challenges to ballot qualifications of candidates seeking office. *See* Exhibit 1. Thereafter, The Ballot Project's status as a District of Columbia non-profit corporation was revoked by proclamation on September 12, 2005 pursuant to D.C. Code. § 29-301.86. *See id.*

Mr. Nader was required to bring any claims he had against The Ballot Project within two years after The Ballot Project's dissolution, which would have been prior to September 12, 2007. While all of Mr. Nader's claims against The Ballot Project rest upon events which allegedly occurred in 2004, prior to The Ballot Project's dissolution, his complaint was not properly filed until October 14, 2008, over three years after The Ballot Project was dissolved, and over one-year after any claims could be brought against the organization.[1] Accordingly, pursuant to D.C. Code § 29-301.63, Mr. Nader's right to file an FEC administrative complaint against The Ballot Project, and whatever right the FEC had to seek any remedy against The Ballot Project, expired two years after the corporation was dissolved.[2] Therefore, the Commission should dismiss Mr. Nader's complaint against The Ballot Project.

II. The Complaint And The Manner In Which It Was Processed Violated FECA And The Commission's Regulations.

Mr. Nader's complaint and the procedures followed by the FEC violated both FECA and the Commission's regulations, and accordingly, warrant the dismissal of this matter.

The original complaint in what is now MUR 6021 was filed with the FEC in Mr. Nader's name, but improperly signed by Oliver Hall, his lawyer, on May 30, 2008. The complaint is approximately 575 pages long, with approximately 100 pages of allegations and arguments and approximately 475 pages of exhibits. The exhibits consist of copies of newspaper articles, material apparently printed off the Internet and various filed reports. What the FEC refers to as a supplement to the complaint was filed on October 15, 2008, and consists of what purports to be a 100 page "Pennsylvania Grand Jury Presentment" and a 16 page cover memorandum. In sum, Mr. Nader's filings consist of close to 700 pages.

FECA guarantees respondents prompt notice of exactly what has been filed against them. Accordingly, 2 U.S.C. § 437g(a)(1) mandates that "[w]ithin 5 days after receipt of a complaint, the Commission *shall* notify, in writing, any person alleged in the complaint to have committed ... a violation." (emphasis added). This requirement is reinforced in the FEC's regulations, which specifically provide that the complaint must be included in the notice.

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[1] Even the first "complaint," which Mr. Nader failed to properly sign, was filed on May 30, 2008, seven months after the last day a claim against The Ballot Project could be filed under the laws of the District of Columbia.

[2] Of course, Mr. Nader did not have a private right of action under FECA against The Ballot Project when he filed the complaint in this matter. *See* 2 U.S.C. §437(g)(a)(8).

"Section 437g is as specific a mandate as one can imagine," and "the procedures it sets forth – procedures purposely designed to insure fairness not only to Complainants but also to respondents – must be followed." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). These provisions "bind" the FEC. *Id.* Here, the FEC failed in its duty to provide timely and appropriate service of the administrative complaint.

The FEC first notified The Ballot Project of the original filing on September 26, 2008, almost four months after it had been filed. It is true that it is sometimes unclear who is being named in a complaint, which requires the FEC to exercise some judgment, but this was not one of those cases as it pertains to The Ballot Project. While Mr. Nader did specifically name approximately 200 respondents and referred to an unknowable number of other "respondents" and unnamed John and Jane Does, The Ballot Project was discussed several times and was one of a handful of groups addressed in its own separate section of the complaint. Therefore, while there are numerous things that are unclear in the complaint (including the law he is applying), one of them is not whether Mr. Nader alleged The Ballot Project "committed such a violation." In this case, notice to a respondent close to four months late fails to comply with the FECA and the Commission's regulations. Accordingly, Mr. Nader's complaint must be dismissed.

This case is distinguishable from *FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87 (D.D.C. 2006), where the court held that the FEC's failure to provide timely notice of a complaint to a respondent was harmless error. *Id.* at 90-91. Unlike the instant case, in *Club for Growth*, notice of the complaint had been sent within five days to an individual who was both president of the Club for Growth, Inc. and treasurer of the Club for Growth PAC. *Id.* at 90. While the FEC had intended to notify the individual in his role of president of the corporation, the FEC addressed the letter to the same individual as treasurer of the PAC. *Id.* Even then, the FEC sent another letter using the appropriate title approximately two weeks later. *Id.* When Club for Growth argued that this did not comply with the notice requirements of FECA, the court agreed that the statue mandated notice within five days, but found on these facts that it was harmless error. *Id.* at 90-91.

In contrast, no attempt was made to notify The Ballot Project for four months. Then, when the notice was finally sent, it ignored the fact that it was based on an improper complaint. When the complaint's deficiency was pointed out to the FEC, it took additional time for the agency to contact Mr. Nader, have him sign the complaint and notify The Ballot Project of the properly filed complaint. This was not harmless error of the nature found in *Club for Growth*.

Congress mandated the requirements regarding the filing of a complaint and the notice to the respondents for a reason. It is now impossible to know all of the ways the failure to follow those rules, added to the four years Mr. Nader let pass before raising these claims, harmed The Ballot Project. We do know that it made an already old case four months older, pushed the notification into the month before the presidential election and effectively put another presidential election between any investigation and the election complained about. We also know it will make it more difficult for The Ballot Project to defend itself if an investigation proceeds. But, it is impossible to know for sure what relevant evidence would have been available in June, but is now beyond our reach because memories fade and documents may have been lost.[3]

This delay in serving the complaint, however, was just the tip of the procedural defect iceberg. When The Ballot Project finally received the complaint from the FEC, it was apparent on its face that Mr. Nader had failed to personally sign the complaint and have it notarized. Rather, Mr. Nader had his lawyer, Oliver Hall, sign the complaint on his behalf. This violated 2 U.S.C. § 437g(a)(1) and 11 C.F.R. 111.4(b)(2). But this did not release the FEC from the obligation to provide the named respondents with a copy of the complaint within five days, it only triggered additional statutory obligations on the part of FEC, and compounded the FEC's procedural errors. The Commission's regulations at 11 C.F.R. §111.5(b) provide that if a filing fails to meet the requirements for a properly filed complaint, which includes a personal notarized signature,

> the General Counsel *shall so notify the complainant and any person(s) or entity(ies) identified therein as respondent(s), within the five (5) day period* specified in 11 CFR 111.5(a), that *no action shall be taken* on the basis of that complaint. *A copy of the complaint shall be enclosed with the notification to each respondent.* (emphasis added).

Instead of complying with these provisions, the FEC continued to administratively process the defective complaint as if everything were in order. Four months later, The Ballot Project was finally served with the complaint and the standard notification letter about its opportunity to respond and how the Commission could move on to a vote to "reason to believe," which was the direct opposite of what the law required the FEC to tell respondents in this case. After we notified the

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[3] We acknowledge that the FEC has been cooperative in granting extensions of time necessitated by the schedule and nature of the complaint. However, these have not been given without cost as most of those extensions have required the waiver of the statute of limitations for the same amount of days for any claims for which the statute of limitations had not already passed.

Office of General Counsel of the deficiency in the complaint, we were notified by letter dated October 20, 2008, that Mr. Nader had refiled the complaint with a proper signature.

There is no question that the FEC accepted a complaint that did not comply with the law and then failed to follow both the statute and its own regulations regarding the handling of such a complaint including the notification of the respondents. This is not one minor procedural error, but raises the question of whether the FEC has the authority to ignore the commands found in FECA and its own regulations without consequence, turning them into mere "suggestions" to be followed if convenient.[4]

Given the four years that elapsed before Mr. Nader even filed his complaint, the failure of both the FEC and Mr. Nader to follow mandated procedures, the breadth and vagueness of the complaint, its sweeping allegations of a conspiracy and the lack of merit to the claims (as discussed below), the FEC should use its prosecutorial discretion and dismiss this matter before more resources are unnecessarily expended.[5]

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[4] To be clear, we are not alleging bad faith on the part of the FEC staff. It appears that Mr. Nader's initial complaint was filed during the approximately six month period when the Commission was operating with only two commissioners. This may have resulted in limitations on the staff's ability to make decisions and a serious backlog once new Commissioners were appointed. In addition, Mr. Nader's complaint can be read to require the notification of hundreds of respondents. However, regardless of the reasons for the FEC's failure to comply with a clear statutory mandate, The Ballot Project has been denied a fundamental component of due process because the FEC did not provide the timely and proper notice specifically required by FECA.

[5] The FEC is not the only forum in which Mr. Nader is attempting to adjudicate his now four-year old claims. Separate lawsuits were filed in the Superior Court of the District of Columbia, the United States District Court for the Eastern District of Virginia and the United States District Court for the District of Columbia, which deal with many of the same events, two specifically naming The Ballot Project and/or officers associated with the organization. As a result of Mr. Nader's attempts to bring the same allegations in numerous forums, there are now three separate cases in federal court in which Mr. Nader's claims have been dismissed and are now all on appeal to the D.C. Circuit. *See* Nader v. Democratic National Committee, No. 07-2136, 555 F. Supp. 2d 137 (D.D.C. May 27, 2008); Nader v. McAuliffe, No. 08-0428 (D.D.C. Jan. 7, 2009); Nader v. Democratic National Committee, No. 08-589 (D.D.C. Dec. 22, 2008). The Ballot Project is a defendant in the case dismissed on May 27, 2008, three days before Mr. Nader filed his initial improperly signed complaint with the FEC.

III. The Complaint Fails To Provide Reason To Believe The Ballot Project Violated FECA.

While the Complaint seems to be alleging that some or all of the 200 or so named "respondents," together with other unnamed individuals (or sometimes with generic "Democrats") committed some or all of the activities noted, the allegations against The Ballot Project rest on three propositions. First, The Ballot Project helped finance and coordinate both successful and unsuccessful challenges to the validity of Mr. Nader's attempt to gain access to the ballot in certain states; second, this activity was for the purpose of influencing a federal election and, therefore, the costs involved constituted contributions and expenditures under FECA, and third, this was part of a nationwide "conspiracy" coordinated with the Democratic National Committee and the Kerry-Edwards presidential campaign. The result, according to Mr. Nader, is that The Ballot Project made prohibited contributions to the Kerry-Edwards presidential campaign, made prohibited corporate expenditures and became a political committee under FECA, thereby violating several provisions of the Act. As will be shown, the complaint's "evidence" supporting the alleged violations is mainly conjecture based on newspaper stories and public filings. By contrast, the attached affidavits from the organization's former officers, who have direct knowledge of The Ballot Project's activities in 2004, clearly show that Mr. Nader's core allegations about The Ballot Project are factually incorrect. *See* Exs. 2-5.

A. The Standard for Finding Reason to Believe a Violation has Occurred.

The Commission may not open an investigation into a matter unless it first finds reason to believe a person has committed a violation of the Act. 2 U.S.C. § 437g(a)(2). As explained by the Commission, a RTB finding is appropriate "where the available evidence in the matter is at least sufficient to warrant conducting an investigation." *Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007). But, where:

> A violation has been alleged, but the respondent's response ... convincingly demonstrates that no violation has occurred; [a] complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible; or ... fails to allege a violation of the Act, [a finding of] no reason to believe is appropriate.

Id.

The Commission has further held that a finding of RTB should not be made unless the complainant sets forth specific facts that, if true, would constitute a violation of FECA, and that "[a] complainant's unwarranted legal conclusion from asserted facts, will not be accepted as true." *Statement of Reasons of Commissioners Mason, Sandstrom, McDonald, Smith, Thomas and Wold*, MUR 5141 (Mar. 11, 2002). And where the facts alleged are not based on the complainant's personal knowledge, the complainant must identify "a source of information reasonably giving rise to a belief in the truth of the allegations." *Id.*

Against these standards, the allegations in MUR 6021 are not sufficient to establish a violation of the Act by The Ballot Project. The attached affidavits of the officers of the Ballot Project show that the core assertions regarding the organization's activities are based on unsupported factual allegations and unwarranted legal conclusions made without any factual or legal basis. The fact that the complaint now comprises some 700 pages of material, names hundreds of respondents, and refers to an unknown number of other alleged "conspirators," cannot hide that the factual allegations made are either so vague (*e.g.* referring to generic "respondents") as to be useless or, where specific, are not supported by the evidence.

B. Mr. Nader's Allegations

The complaint identifies as respondents close to 200 named individuals, lawyers, law firms and organizations (Compl. at pp. 20-43), as well as:

> [A]ny other group or individual who unlawfully contributed to the Democratic Party's effort to deny Ralph Nader and Peter Miguel Camejo ballot access in any state as candidates for President and Vice President of the United States in the 2004 General Election, including all John Doe and Jane Doe DNC or Democratic Party employees who contributed to that effort, and all law firms and individual lawyers who unlawfully contributed legal services or resources in proceedings to challenge Nader-Camejo nomination papers in any state (collectively the "Respondents").

Compl. at 2.

According to the complaint, these respondents, known and unknown, "conspired on behalf of the Democratic Party and the Kerry-Edwards Campaign to prevent Nader-Camejo from running as candidates for President and Vice President of the United States during the 2004 General Election." *Id.* at 8. Mr. Nader also alleges that "expenditures and services rendered in connection with the legal or

administrative proceedings they initiated to challenge Nader-Camejo's nomination papers in 18 states, and anything else of value they contributed to their coordinated nationwide effort" were subject to the Act's limitations, prohibitions and reporting requirements. *Id.*

The complaint further alleges that as part of this nationwide conspiracy, "[r]espondents also established a Section 527 organization called The Ballot Project." *Id.* at 4. And that, "[t]he DNC retained several Respondent law firms, and coordinated with The Ballot Project to recruit dozens more." *Id.* at 6.

The Ballot Project is specially named in Counts I and III of the complaint. Count I alleges that:

> Because the DNC, 18 state or local Democratic Parties, the Kerry-Edwards Campaign, The Ballot Project, at least 95 lawyers from 53 law firms, and an unknown number of DNC and state Democratic Party employees jointly engaged in an effort to deny Nader-Camejo ballot access and prevent them from participating as candidates in the 2004 presidential election, and because Respondents collectively spent nearly $1 million and solicited more than $2 million more in unreported and illegal corporate in kind contributions and expenditures for this purpose, the FEC should find these Respondents in violation of 2 U.S.C. §§ 434, 441a and 441b.

Id. at 93. Count III alleges that "[b]ecause ... The Ballot Project ... had a major purpose of supporting or opposing particular candidates in a federal election, and ... raised and spent far in excess of the $1,000 threshold amount for this purpose," it was a political committee, which did not register or file reports with the FEC and did not "compl[y] with the Act's limitations and prohibitions on contributions.... [and] therefore violated 2 U.S.C. § 432, § 434, § 441a and §441b." *Id.* at 98.

The supplement to the complaint, filed on October 15, 2008, primarily consists of a copy of a "Pennsylvania Grand Jury Presentment" dealing with alleged violations of state law regarding an alleged challenge to the nominating papers of a Senate candidate who ran in 2006. Mr. Nader argues that this document not only supports his earlier complaint, but is also evidence of possible "knowing and willful" violations of the law regarding alleged activity in the 2006 election. The Ballot Project is not alleged to have had any involvement in this election and there are no claims made against The Ballot Project in this supplement to the original complaint.

Cutting through the smoke, dust and noise contained in the complaint, both counts naming The Ballot Project[6] appear to rest on the following assertions regarding its activities in 2004:

(1) It raised and spent funds "for the purpose of influencing" a federal election and therefore received contributions and made "expenditures" pursuant to 2 U.S.C. §§431(8) and (9);

(2) It raised more than $1,000 in contributions and/or made in excess of $1,000 in expenditures; and

(3) Its major purpose was the election or defeat of a federal candidate.

If these allegations are true, according to the complaint, then The Ballot Project made and received contributions that did not comply with the Act's limitations and prohibitions and became a political committee pursuant to 2 U.S.C. § 431(4), and as such, failed to register with the FEC and file required reports. On the other hand, if the complaint fails to allege specific facts supporting these propositions, as opposed to indulging in conjecture and making conclusory statements, or the respondent provides evidence refuting the complainant's unsupported allegations, then the FEC must find the complaint fails to provide RTB The Ballot Project violated the Act.

C. The Law: Political Committees, Expenditures and Major Purpose

While liberally salted with conclusory references to "political committees," "expenditures," "major purpose" and "for the purpose of influencing" a federal election, the complaint barely acknowledges that these terms have specific and constitutionally mandated definitions and fails to connect the factual allegations to those definitions. But once those definitions are applied to the complaint, it is clear that this matter should be dismissed. In fact, as will be shown, any action other than dismissal would be facially inconsistent with the Commission's recent dismissal of MUR 5541 (The November Fund) and the Statement of Reasons ("SOR") issued on January 22, 2009, by those Commissioners who refused to pursue that matter.

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[6] Mr. Nader occasionally resorts to making allegations about "Democrats," "respondents" or those involved in the "conspiracy." *See, e.g.*, Compl. at 43 ("After the Democrats' defeat in the 2000 election, Respondents decided...."); *id.* at 44 ("The leaders and organizers of the conspiracy...."). Rather than guess to whom Mr. Nader is referring when he merely uses those open-ended references, we will focus on those allegations specifically mentioning The Ballot Project.

As relevant here, FECA defines a "political committee" as any group of persons which receives contributions or makes expenditures aggregating in excess of $1,000 per year. 2 U.S.C. § 431(4). The terms "contribution" and "expenditure" are defined as including "anything of value ... made for the purpose of influencing any election to federal office...." 2 U.S.C. § 431(8) and (9). When the constitutionality of FECA was challenged in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court addressed the serious concerns about the vagueness and breadth of these definitions since they triggered the application of FECA's disclosure requirements, limits and prohibitions. In the Court's view, these definitions could lead to the application of FECA to organizations undertaking activity protected by the First Amendment and not presenting the same dangers of real or apparent corruption that existed when money was being directly spent on electing or defeating candidates. *Id.* at 26-27, 45; *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2671-74 (2007).

To avoid constitutional problems, the Court held that the term "political committee" applies to only those groups that make or receive contributions or expenditures in excess of $1,000 *and* who have as their "major purpose" the influencing of federal elections. *Buckley*, 424 U.S. at 79. Further, the Court said that if a communication is undertaken independently of a candidate or party committee, it would only be considered an expenditure subject to the Act if the communication contains express advocacy of the election or defeat of a clearly identified federal candidate. *Id.* at 79-80. If an organization spends money on activities that do not involve express advocacy communications, those funds will only be considered expenditures subject to FECA if they are for the purpose of influencing a federal election and are coordinated with a candidate or political party.

The *Buckley* analysis resulted in a 33 year debate (so-far) over exactly what activity will trigger an organization becoming a political committee subject to FECA. *Compare Buckley*, 424 U.S. at 79-80, *with McConnell v. FEC*, 540 U.S. 93, 194-202 (2003), *and Wisconsin Right to Life*, 127 S. Ct. at 2671-74. The latest round began after the Supreme Court in *McConnell* upheld all of the major provisions of the Bipartisan Campaign Reform Act of 2002. In 2004, the FEC issued a Notice of Proposed Rulemaking seeking comment on whether it should amend its regulations to, among other things, define and provide guidance regarding the meaning of "major purpose," "expenditure" and "political committee." 69 Fed. Reg. 11,736 (Mar. 11, 2004). After holding a hearing and receiving public comments, the FEC issued final rules on several related topics, but declined to further define a "political committee." In so doing, it rejected the proposal that a group's status as a "527" political organization under the Internal Revenue Code was relevant to determining the organization's major purpose and status as a political committee under FECA. 69 Fed. Reg. 68,056 (Nov. 23, 2004). According to the FEC's Explanation and Justification,

> [t]he 'major purpose' test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status. The Commission has been applying this construct for many years without additional regulatory definitions, and it will continue to do so in the future.

Id. at 68,065.

However, the FEC did adopt a new regulation addressing when a donation will be considered a "contribution" under FECA which, in turn, could trigger political committee status. This rule, found at 11 C.F.R. §100.57(a), provides that,

> anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

Id. at 68,066. The FEC's explanation of why it declined to further define political committee and did not rely on the organization's 527 status was rejected by the court in *Shays* v. *FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006). Rather than attempting to further define political committee, the FEC revised the Explanation and Justification to explain that it would handle the issue on a case-by-case basis and why it was inappropriate to rely on an Internal Revenue Code classification to decide political committee status under FECA. 72 Fed. Reg. 5,595 (Feb. 7, 2007). The agency's action was again challenged in court, though this time the court found the explanation met the standards of the Administrative Procedures Act. *See Shays v. FEC*, 511 F. Supp. 2d 19, 29 (D.D.C. 2007).

At the same time, the FEC resolved several enforcement cases where it found that certain groups active during the 2004 elections should have registered as political committees. Each case differed, but the FEC generally relied upon public communications expressly advocating the election or defeat of federal candidates, fundraising where it was stated that all or a portion of the funds would go to supporting or opposing federal candidates, and other evidence the FEC deemed relevant. *See, e.g.*, MURs 5365 (Club for Growth), 5440 (The Media Fund), 5487 (Progress for America Voter Fund), 5511 and 5525 (Swift Boat Veterans and POWs for Truth), 5754 (MoveOn PAC), 5542 (Texans for Truth) and 5568 (Empower Illinois).

However, the FEC's approach to determining when an organization became a political committee changed substantially on October 21, 2008, when the Commission voted to close the file in *MUR 5541 (The November Fund)* after two 3-3 votes on whether to accept or reject a conciliation agreement approved by the respondent.[7] Given the Commission's stated commitment to developing the law defining a political committee through a case-by case approach, the Statement of Reason by Vice Chairman Petersen and Commissioners Hunter and McGahn resulted in new guidelines regarding what evidence was relevant to determining whether an organization is a political committee.[8]

While the SOR contains a wide ranging discussion of the application of FECA, several of the factors it relies on in its approach to determining political committee status are relevant here. First, it requires that the Commission determine whether the organization made expenditures or received contributions in excess of $1,000, before it begins to examine the organization's major purpose. If the organization does not meet this threshold, it cannot be classified as a political committee. Moreover, the SOR makes it clear that there are not four Commissioners who believe that how the organization solicited the funds is relevant, especially when those solicitations took place prior to the enactment of 11 C.F.R. § 100.57. In addition, according to the SOR, if the Commission reaches the point where it has to determine an organization's major purpose, the Commission should limit its review to the organization's formal documents and official activities. Evidence of subjective intent, such as statements made on Web sites or to the press is of little evidentiary value. Likewise, whether the organization is registered as a 527 organization is irrelevant to the determination of whether it is a political committee. Rather, the approach taken in *MUR 5541* focuses on whether the official activities of the organization can be objectively classified as contributions or expenditures under

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[7] The FEC had already found RTB a violation had occurred, conducted an investigation and authorized its staff to attempt to negotiate a settlement with the respondents. The staff and the respondents then reached a settlement agreement, subject to the final approval of the Commission. It was at this point that three Commissioners, who had not been on the Commission during the prior proceedings, refused to approve the settlement because they did not agree with the interpretation of the law under which a violation had been found.

[8] While it normally takes four commissioners to adopt a new rule or reverse or modify a previously adopted interpretation, this is a unique situation. Had the Commission promulgated a regulation that provided specific guidance on the definition of a political committee, that regulation would still have the force of law as it would have been the last rule on the subject approved by four votes. However, the Commission rejected that approach and instead announced the rules would be developed case-by-case and, in that way, the regulated community would come to understand how the law applied. Thus, the last official Commission action adopted by four votes was to direct the regulated community to look to the resolution of enforcement actions for guidance. MUR 5541 is the most recent guidance.

FECA and, if they can and exceed $1,000, whether the major purpose of the organization, as reflected in official documents, is the election or defeat of a federal candidate.

D. The Complaint Does Not Allege Facts that Support a Finding that The Ballot Project Made Expenditures or Received Contributions under FECA.

1. Mr. Nader Fails to Allege that The Ballot Project Engaged in Express Advocacy.

The allegations in Mr. Nader's complaint regarding The Ballot Project boil down to a series of claims about its alleged role in providing guidance and financial assistance to those seeking to ensure that the presidential campaign of Ralph Nader complied with state law when it sought to have Mr. Nader's name placed on the 2004 presidential election ballot. Nowhere in the complaint is it specifically alleged, or is there any evidence presented, that The Ballot Project paid for any newspaper, television, or radio ads, or any other public communications, that expressly advocated the election or defeat of Mr. Nader or any federal candidate. More importantly, the attached affidavits of the officers of The Ballot Project expressly deny The Ballot Project engaged in any such activity. *See* Exs. 2-5.

The closest Mr. Nader comes is in sweeping allegations, such as the following:

> Respondents launched a nationwide communications campaign intended to convince Nader-Camejo supporters to vote for Kerry-Edwards. Respondents hired political consultants and pollsters, produced advertisements and press materials, and paid to broadcast these advertisements on television, radio and other media outlets throughout the country. Respondents also established two websites to publicize their efforts, www.thenaderfactor.com and www.upforvictorv.com.

Compl. at 8-9.

However, Mr. Nader fails to explain which "Respondents" he is referring to, though a few sentences later he alleges these unspecified "Respondents" funded and coordinated their communications campaign" through two 527 organizations, neither of which is alleged to be The Ballot Project. *Id.* at 9. Nevertheless, Mr. Nader ends that section of his complaint with the statement that "[t]hese groups, like The Ballot

Project and Respondents' fourth 527 group, Americans for Jobs, therefore violated FECA's provisions governing political committees."[9]

Despite the attempts at guilt by vague association and confusion, the Complainant does not make any specific or credible allegations, or present evidence, that The Ballot Project received or expended funds for public communications expressly advocating the election or defeat of any federal candidate. In fact, such activity never took place. *See* Exs. 2-5.

2. The Ballot Project's Ballot Access Activities Were Not "For the Purpose of Influencing an Election."

Complainant's argument that The Ballot Project made and received contributions and expenditures as defined by the Act appears to be based on the organization's work supporting legal challenges to Mr. Nader's eligibility to have his name on some state ballots. According to Mr. Nader, the FEC has held "that an attempt to deny a candidate ballot access for the benefit of a competing candidate is an effort to influence an election." Compl. at 3; *see also id.* at 92. In support of this argument, Mr. Nader cites Advisory Opinion 1980-57:

> [A] candidate's attempt to force an election opponent off the ballot so that the electorate does not have an opportunity to vote for that opponent is as much an effort to influence an election as is a campaign advertisement derogating that opponent.

Compl. at 3.

Mr. Nader is correct that the FEC has held that funds raised and spent by a candidate to challenge his or her opponent's access to the ballot may be considered to be for the purpose of influencing the candidate's election. As such, according to the FEC, they are contributions and expenditures under FECA and must comply with the limits and prohibitions of the Act. However, the Commission does not treat all money raised in connection with ballot access challenges as falling within the limits

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[9] This is just one of many examples where Mr. Nader begins by referring to the activities of "respondents" in general, then throws in an allegation about the specific activity of one named respondent, and somehow reaches the conclusion that a third named respondent has violated the law. This *ad hoc* style of randomly linking parties, allegations, and law makes this complaint difficult to address, and further, shows why it is insufficient to sustain a finding of reason to believe a violation occurred. The Commission cannot find RTB and launch an intensive investigation based on a complaint that sprays a combination of general and specific allegations in the direction of named and unnamed individuals and organizations and then asks the targets to respond to every allegation and the Commission to sort out who Mr Nader is alleging did what.

and prohibitions of the Act. In AO 1996-39, the Commission ruled that funds raised and spent by a candidate to *defend* against a challenge to the sufficiency of her nominating petitions to qualify for the Republican primary election ballot would not be treated as contributions or expenditures for purposes of the Act, provided the funds are not raised or spent by a political committee. *See also* AO 1982-35 (funds can be raised outside of FECA to challenge constitutionality of a party rule).

(a) An Interpretation of FECA that Treats the Funding of a Challenge to Ballot Access Differently from the Funding of the Defense is Unconstitutional.

As a preliminary matter, the FEC's distinction between funding a ballot access challenge and the defense of that challenge is unconstitutional.[10] There is no constitutionally sufficient justification for requiring a candidate to use funds raised under the Act's limitations and prohibitions to advance a claim that an opponent's ballot access efforts have not complied with state law, while allowing the opponent defending against that challenge to use money raised outside of those same limitations and prohibitions. *See Davis v. FEC,* 128 S. Ct. 2759, 2774 (2008) ("imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment"). Put more simply, it is impossible to see how asserting a claim that the signatures on your opponent's ballot petitions are fraudulent is for the purpose of influencing an election, while your opponent's effort to assert the validity of those very same signatures is not for the purpose of influencing an election. This problem is only compounded when it is not a candidate, but independent organizations and individual citizens, who are bringing the challenge in an attempt to seek compliance with state laws.

If the funding of ballot access litigation is for the purpose of influencing an election, then the only constitutionally recognized justification for regulating that funding is the potential real and apparent corruption arising from large unregulated contributions. *Buckley,* 424 at 26-27, 45-47; *McConnell,* 540 U.S. at 136, 143-53. But there is nothing inherently less potentially corrupting in funding the defense of a charge of ballot access fraud then in funding the efforts to expose such fraud. Therefore, in light of the First Amendment concerns most recently recognized by the

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[10] Note that the constitutional concern is over the FEC's interpretation of FECA, and not any provision of the statute. The Act does not draw any distinction between the prosecution and defense of a ballot access challenge.

Court in *Davis*, the Commission should clarify that the analysis in AO 1996-39 applies equally to both sides of a ballot access challenge, and that funds raised and expended for that purpose, and not deposited in the account of a political committee, are not "for the purpose of influencing" a federal election under FECA. If the FEC wishes to otherwise reconcile the apparent inconsistencies in the Advisory Opinions, it should do so through the rulemaking process. However, to avoid the unconstitutional application of the law, the FEC should dismiss Mr. Nader's complaint.

(b) The FEC's Distinction Between Bringing and Defending a Ballot Access Challenge Does not Apply to Those Acting Independently of a Candidate.

Even if the FEC decides that the analysis in AO 1980-57 is not rendered invalid in light of AO 1996-39 and the Supreme Court's opinion in *Davis*, AO 1980-57, on its face, applies only to funds a *candidate* raises to challenge an opponent's ballot access. Ever since *Buckley*, the law has recognized the fundamental difference between activity undertaken independently of a candidate and that which is coordinated with his or her campaign. Funding ballot access litigation undertaken independently of a candidate is far more removed from being for the purpose of influencing a federal election than was the funding of activity of the candidate in AO 1996-39 who was defending her place on the ballot. Therefore, if the complaint fails to allege facts that, if true, would result in specific activity of The Ballot Project being coordinated with the Kerry-Edwards campaign, then the FEC must find no reason to believe a violation has occurred. Despite Mr. Nader's frequent references to a "conspiracy" and the respondents "coordinating" their activities, his allegations fall far short of supporting a finding that there is reason to believe a violation has occurred. This is buttressed by the attached affidavits of the former officers of the organization that deny that the Ballot Project's activities were undertaken at the direction request, or suggestion of, or in conjunction or concert with, the Kerry-Edwards campaign, the DNC or any state or local party committee. *See* Exs. 2-5.

(c) The Complaint Fails to Allege any Credible Evidence that The Ballot Project Coordinated Any Activities with the Kerry-Edwards Campaign or the DNC.

Mr. Nader goes to great lengths to try to create the perception that all of the respondents, named and unnamed, including the Kerry-Edwards campaign, the

Democratic National Committee, the 527 groups such as The Ballot Project, and Democrats at the national, state and local levels, were coordinating as part of a "conspiracy" to keep him off the Ballot in 2004. Throughout the complaint, Mr. Nader uses written slight-of-hand to distract the reader as he slides from generic references to "respondents" or groups of people (e.g. Democrats or Kerry supporters) to specific people and organizations, at the same time making a specific factual allegation, but rarely making it clear who he is alleging actually did what. This may be a time-honored form of making a political attack, but it does nothing to make his case under FECA.

The concept of coordination applies to working with a candidate or political party committee. *See* 2 U.S.C. §441a(a)(7)(B)(i) & 11 C.F.R. §109.20(A). There is nothing in FECA that prevents individuals and groups, including 527 organizations, from exercising their First Amendment rights of speech and association by sharing information, discussing ideas and even agreeing on the best approach to an activity. The only issue is whether each participant's activities stay within the bounds of FECA. An activity one person or group can undertake on their own does not automatically become illegal if they discuss it with others and seek their advice, even if others agree to pursue the same course. Even a discussion with a candidate will not turn an activity into a contribution unless the activity is for the purpose of influencing a federal election.[11] Moreover, participants subsequently making expenditures under FECA does not, without more, implicate any of the others who shared information and strategy but did not make expenditures under the Act.

Considered in this light, Mr. Nader's allegations fall far short of what is needed to justify an investigation, as what he alleges to be facts are not evidence of unlawful activity. Rather, they are conclusions of law, unsupported by the evidence cited. For example, much of the complaint, as it relates to The Ballot Project, alleges that the organization assisted in locating lawyers who would represent voters seeking to challenge the sufficiency of Mr. Nader's efforts to obtain ballot access, and that The Ballot Project provided financial support for these efforts. As noted above, an independent group providing support for a ballot access challenge does not create a presumption that it did so for the purpose of influencing an election. Indeed, the central purpose of The Ballot Project was to help ensure the integrity of the ballot

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[11] For example, even Mr. Nader would not suggest that a coalition of groups battling breast cancer could not meet with a senator who has been a leader on this issue, and who is also running for president, to discuss strategy and exchange ideas for raising public awareness of the need for regular cancer screening. Nor do we believe he would suggest that everything those groups do from that point forward is coordinated with the senator.

process and compliance with state election laws, as well as to assess legal challenges to the ballot qualifications of candidates seeking public office. *See* Exs. 2-5.

The most specific the complaint gets regarding supposed "coordination" and The Ballot Project are allegations that:

> the leaders of Respondents' conspiracy met privately to discuss their plans on July 26, 2004, at the Four Seasons Hotel in Boston. DNC consultant Robert Brandon organized the meeting and, on information and belief, the DNC paid for it. Approximately three dozen people attended, including The Ballot Project President Toby Moffett, The Ballot Project Director Elizabeth Holtzman and Democratic consultant Stanley Greenberg.

Compl. at 44 (footnotes omitted).[12] The complaint asserts that at the meeting, the participants "discussed polling, research, and strategy to undermine the Nader-Camejo Campaign in key states where they believed it would adversely affect Democratic candidates John Kerry and John Edwards most." *Id.*

Aside from the unsupported allegation that the DNC paid for the meeting, the other allegations, even if true, only establish that there was a meeting at the Four Seasons Hotel in Boston which was attended by Democrats, which may have included officers of The Ballot Project. Even assuming for these purposes that the allegations regarding what went on inside this "secret" meeting are true, all Mr. Nader has done is to allege that the attendees shared information and discussed strategy. Surely independent groups and organizations, exercising their constitutional rights to freedom of speech and assembly, can "meet" and have "discussions" without raising any presumption that the act of doing so constitutes "coordination" with a specific candidate as proscribed by the FECA. Indeed, Mr. Nader does not reference any evidence that The Ballot Project somehow "coordinated" its activities with any campaign or candidate, or any other organization or individual.

Moreover, Mr. Nader's sole support for the allegation that the DNC paid for the meeting is in footnote 69, which states: "FEC records indicate that the DNC paid

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[12] Contrary to assertions in the complaint, Mr. Brandon was not a "DNC consultant" in 2004. In fact, he has not worked for or been paid by the DNC or any other committee since 1994 when he worked on health care.

the Four Seasons $78,808 from July 15, 2004 to Nov. 19, 2004 for 'Lodging, Catering, Food & Beverage'." All this "evidence" supports is that the DNC was renting rooms and paying other expenses at a hotel in Boston, the site of the Democratic National Convention, which is hardly surprising. It does not constitute evidence of an alleged connection between the alleged meeting and the DNC, the Kerry Campaign, or any other entity.

Countering these conclusory and speculative allegations are the attached affidavits of the officers of The Ballot Project in 2004. These affidavits clearly establish that the July 24, 2008 meeting was not sponsored, coordinated or paid for by the DNC or the Kerry-Edwards campaign. Nor, to the best of the affiants' knowledge, were representatives of the DNC or the Kerry campaign in attendance. *See* Exs. 2-5. In fact, the "meeting" was not actually a meeting, but a briefing by a pollster that was open to the general public. *Id.*

Similarly, without any factual support, Mr. Nader takes the fact that The Ballot Project worked with Florida counsel to challenge Mr Nader's inclusion on the Florida ballot, and that the Florida State Democratic Party also brought its own suit as evidence of coordination. Compl. at 54-57. But as the affidavits show, not only did The Ballot Project and the Florida Democratic Party not coordinate, but they had divergent approaches and interests. *See* Exs. 2-5.

This exaggeration or unjustified speculation is a constant pattern in Mr. Nader's complaint. However, the affidavits make it clear that The Ballot Project was not coordinating with The Kerry-Edwards campaign, the DNC, or any of the state party committees. *See* Exs. 2-5.

3. There is No Reference to any Relevant Evidence that The Ballot Project's Purpose Was to Influence a Federal Election.

Finally, since Mr. Nader fails to reference any relevant evidence that any of The Ballot Project's activities were undertaken for the purpose of influencing an election, the FEC has no reason to examine The Ballot Project's major purposes. *See* MUR 5541, Statement of Reason by Vice Chairman Petersen and Commissioners Hunter and McGahn. Moreover, the alleged public statements by certain officers of The Ballot Project regarding their subjective intent are irrelevant to determining the organization's major purpose, as is its status as a 527 organization, or how it solicited

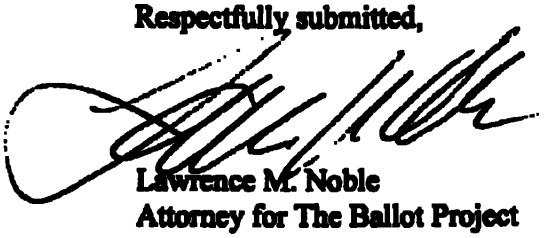
contributions. *Id.* In these proceedings, the only questions relevant to determining the organization's purpose are the activities it undertook and its official statement of purpose. A review of the complaint – in light of the relevant law – clearly demonstrates that it fails to meet the threshold for establishing reason to believe that The Ballot Project violated the law.

IV. Conclusion

For all the foregoing reasons, the Commission should find no reason to believe that The Ballot Project violated any provisions of the Act. In the alternative, the Commission should exercise its prosecutorial discretion and dismiss this matter and close the file. This matter deals with activities that took place over four years ago, The Ballot Project ceased to exist under the law of the District of Columbia over two years before the complaint was filed, and the complaint and its initial processing was fatally flawed.

Even if the FEC could overcome these obstacles, there is a serious overarching question regarding the constitutionality of the manner in which the FEC treats funds raised for litigating ballot access issues. Beyond that, an intrusive and time consuming investigation of these activities will surely accomplish little beyond needlessly draining the time and resources of the FEC and anyone forced to attempt to provide evidence regarding what happened over four years ago. Mr. Nader's four year delay in filing the complaint, plus the additional delay he caused by not initially filing a proper complaint, makes it virtually impossible for the FEC to undertake and complete an investigation and take all of the other steps necessary to resolve this matter before the statute of limitation passes on these baseless allegations. Accordingly, Mr. Nader's complaint should be dismissed.

Respectfully submitted,



Lawrence M. Noble
Attorney for The Ballot Project