



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 24 2013

Marc Elias, Esq.
Perkins Coie LLP
607 14th Street NW
Washington, DC 20005

RE: MUR.6383R
Ohio News Organization, *et al.*

Dear Mr. Elias:

On November 5, 2012, the Federal Election Commission ("Commission") notified you of a remand from the federal district court and supplement to the original complaint alleging that your clients, Fisher for Ohio (terminated) and Lee Fisher in his official capacity as treasurer, violated certain sections of the Federal Election Campaign Act of 1971, as amended.

Upon further review of the allegations contained in the complaint and supplement, information supplied by you and other respondents, and other available information, on May 20, 2013, the Commission voted to dismiss this matter. The Factual & Legal Analysis, which explains the Commission's finding, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003); Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

If you have any questions, please contact Allison T. Steinle, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "William A. Powers".

William A. Powers
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR: 6383R

RESPONDENTS: Ohio News Organization
The Akron Beacon Journal
The Toledo Blade Company
The (Canton) Repository
The (Cleveland) Plain Dealer
The Columbus Dispatch
The Cincinnati Enquirer
The Dayton Daily News
The (Youngstown) Vindicator
Fisher for Ohio (terminated) and Lee Fisher in his
official capacity as treasurer¹
Portman for Senate Committee and Natalie K.
Baur in her official capacity as treasurer

I. GENERATION OF MATTER

This matter was generated by a Complaint filed with the Federal Election Commission by Dan La Botz, alleging violations of the Federal Election Campaign Act of 1971, as amended, ("the Act") by the Ohio News Organization, the Akron Beacon Journal, the Toledo Blade Company, the (Canton) Repository, the (Cleveland) Plain Dealer, the Columbus Dispatch, the Cincinnati Enquirer, the Dayton Daily News, the (Youngstown) Vindicator, Fisher for Ohio (terminated) and Leo Fisher in his official capacity as treasurer, and Portman for Senate Committee and Natalie K. Baur in her official capacity as treasurer. This matter now comes to the Commission on remand from the United States District Court for the District of Columbia following its decision in *La Botz v. FEC*, 889 F. Supp. 2d 51 (D.D.C. 2012).

¹ Fisher for Ohio named Lee Fisher as its new treasurer on an amended Statement of Organization filed November 9, 2011. The committee was terminated on January 11, 2012.

II. FACTUAL AND LEGAL ANALYSIS

At issue in *La Botz* was the Commission's prior determination finding no reason to believe that the Respondents made or accepted corporate contributions by failing to use "pre-established objective criteria" to select Democrat Lee Fisher and Republican Rob Portman for three televised debates sponsored by the Ohio News Organization ("ONO") and its eight member newspapers in October 2010. The district court concluded that the Commission's finding was not "supported by substantial evidence" and "[t]herefore 'contrary to law.'" *Id.* at 63 (quoting 2 U.S.C. § 437g(a)(8)).

In light of the court's decision, and after further review, it appears that there is not substantial evidence in the record to provide reason to believe that the ONO failed to use its stated pre-established objective criteria in selecting debate participants. In addition, further pursuit of this matter would not be an efficient use of the Commission's limited resources. Accordingly, the Commission exercises its prosecutorial discretion and dismisses the allegations that the Respondents violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.13. *See La Botz*, 889 F. Supp. 2d at 63 n.6 (noting that the Commission's decision to dismiss the Complaint could have been based on prosecutorial discretion).

A. Procedural and Factual Background

Dan La Botz was the Socialist Party's candidate in the 2010 Ohio general election for United States Senate. On September 20, 2010, La Botz filed a Complaint with the Commission alleging that he was improperly excluded from a series of three televised debates. Compl. at 3-11. The debates were scheduled to be held in October 2010 between the major parties' candidates, Fisher and Portman. *Id.* at 3. These debates were sponsored by the ONO, a business

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1 association of eight incorporated Ohio newspapers.² *Id.* at 1-2. The Complaint asserts that the
2 ONO did not meet the standards set forth at 11 C.F.R. § 110.13 because it: (1) had no
3 pre-established criteria to determine which candidates participated in the debates; (2) used
4 nomination by a particular party as a sole objective criterion to include Fisher and Portman as
5 pre-selected candidates in the debates; and (3) failed to disclose the criteria to anyone outside the
6 ONO and its members, thereby denying candidates “the opportunity to meet the alleged criteria.”
7 *Id.* at 10-11. As a result, the Complaint alleges that the ONO and its members violated 2 U.S.C.
8 § 441b(a) by making an in-kind corporate contribution to Fisher and Portman and that the two
9 participants knowingly received a corresponding corporate contribution. *Id.* at 11.

10 To support this allegation, La Botz provided September 2010 correspondence between
11 his attorney, Mark Brown, and the ONO’s attorney, Marion Little. *Id.*, Attach. 2, 9, 11-13. In
12 this correspondence, Little said that the ONO began to put together its proposal for the debates in
13 June 2010 and considered a number of objective criteria that led to the selection of Fisher and
14 Portman and the exclusion of La Botz — specifically, “front-runner status based on then-existing
15 Quinnipiac and party polling, fundraising reports, in addition to party affiliation.” *Id.*, Attach. 2.
16 The ONO, however, declined to answer any of Brown’s further questions concerning the criteria.
17 *Id.*, Attach. 11-13. La Botz also provided a September 8, 2010, e-mail from Bruce Winges,
18 editor and vice president of the *Akron Beacon Journal*, purportedly sent in response to an online
19 petition for La Botz’s inclusion in the debates. *Id.* at 6, Attach. 8. This e-mail stated that the
20 ONO generally followed the structure of the presidential debates, “which allows for only the
21 major party candidates to debate” and that including “third-party candidates” in debates “limits

² According to the Complaint, the ONO member newspapers are the *Toledo Blade*, the (Canton) *Repository*, the (Cleveland) *Plain Dealer*, the *Columbus Dispatch*, the *Cincinnati Enquirer*, the *Dayton Daily News*, the *Akron Beacon Journal*, and the (Youngstown) *Vindicator*. Compl. at 2.

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1 Ohioans' ability to hear answers from top candidates on issues critical to the state's future." *Id.*,
2 Attach. 8.

3 The ONO filed a Response asserting that the ONO and its members, as "broadcasters"
4 and "*bona fide* newspapers" that were not owned by any political parties, qualified as debate
5 "staging organizations" under 11 C.F.R. § 110.13(a)(2). ONO Resp. at 4. The Response further
6 asserted that the ONO began discussing debates in March 2010 and that its selection criteria
7 were pre-established and objective. *Id.* at 5-6. The ONO asserted that it "first ensure[d] the
8 eligibility of the candidates and then pare[d] down the field of candidates to the two
9 frontrunners" based on "polling, conversation with political reporters and sources regarding the
10 races in question, and financial disclosures," and that these criteria were consistent with the
11 criteria used by the Commission on Presidential Debates. *Id.* at 2-3, 5, Ex. A ¶ 6.³ The
12 Response claimed that the ONO formally invited Fisher and Portman to participate in the debates
13 on May 14, 2010, and the campaigns agreed to the series of debates on or about September 1,
14 2010. *Id.* at 4. The Response also included the sworn affidavit of Benjamin Marrison, editor of
15 the *Columbus Dispatch*, which reiterated much of the information in the ONO's Response,
16 including that the ONO established in advance a number of criteria in March 2010 for selecting
17 candidates based on eligibility, polling, conversations with reporters and sources, and financial
18 disclosures. Aff. of Benjamin Marrison (Oct. 21, 2010) (Attached to ONO Resp.).⁴

³ The Commission on Presidential Debates's criteria relies on evidence of constitutional eligibility, evidence of ballot access, and polling data results. ONO Resp., Ex. A.

⁴ Both Fisher for Ohio (terminated) and Lee Fisher in his official capacity as treasurer ("Fisher Committee") and Portman for Senate Committee and Natalie K. Baur in her official capacity as treasurer ("Portman Committee") also filed Responses. The Fisher Committee's Response, which was filed before it was terminated, argued that staging organizations have "significant leeway in how they structure debates" and the Commission has given broad discretion to staging organizations, including accepting "minimal descriptions of the criteria." Fisher Resp. at 1-3. The Response also argued that even if the ONO violated the Federal Election Campaign Act of 1971, as amended ("the Act"), the Fisher Committee was not liable for such a violation and did not know of the violation. *Id.* at 2-3.

1 On May 19, 2011, the Commission accepted the Office of the General Counsel's
2 ("OGC's") recommendation to find no reason to believe that the Respondents violated the Act.
3 The General Counsel's Report concluded that the ONO and its members were debate staging
4 entities under 11 C.F.R. § 110.13(a)(2), that the debates were not structured to promote any
5 candidate as prescribed in 11 C.F.R. § 110.13(b), and that it appeared that the ONO's selection
6 criteria were pre-existing and objective pursuant to 11 C.F.R. § 110.13(c). *See* GCR at 4-5,
7 MUR 6383 (Ohio News Org., *et al.*) (EPS Case Closure). OGC noted that the Commission had
8 previously considered "objective" factors to include the percentage of votes in a previous
9 election, level of campaign activity, fundraising ability, standing in the polls, and ballot access,
10 and that La Botz was not an established or frontrunner candidate. *Id.* at 5.

11 La Botz challenged the Commission's decision under 2 U.S.C. § 437g(a)(8), and the
12 district court held that the Commission's conclusion was contrary to law because it was not
13 based on substantial evidence. *La Botz*, 889 F. Supp. 2d at 62-63 (citing *Fla. Gas Transmission*
14 *Co. v. FERC*, 604 F.3d 636, 636 (D.C. Cir. 2010) ("The substantial evidence inquiry turns not on
15 how many discrete pieces of evidence the [agency] relies on, but on whether that evidence
16 adequately supports its ultimate decision.")). Specifically, in addressing whether the ONO's
17 criteria were pre-established, the court found that the Commission's decision seemed to rely
18 principally on Marrison's affidavit, which did not explain why he had first-hand knowledge of
19 the events and was written *post hoc* and not supported by any contemporaneous written policy.
20 *Id.* at 60-62. The court also noted that Wings's e-mail seemed inconsistent with the affidavit
21 because it suggested that the ONO used major party status as the sole selection criteria in 2010.

Likewise, the Portman Committee's Response argued that because the candidates had no involvement in organizing the debates, the candidates did not violate the Act. Portman Resp. at 1.

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1 *Id.* at 62. Without taking issue with the Commission's statement of the law regarding "objective
2 factors," the court concluded that the "current record does not provide reasoned support for the
3 position that ONO actually used these objective benchmarks to choose its debate participants."
4 *Id.* at 63-64. The court further noted that the Commission was not required to reach a different
5 position, and, given that La Botz would likely not have benefitted from any objective criteria and
6 the Commission has limited resources, that the Commission's decision to dismiss the Complaint
7 could have been based on prosecutorial discretion. *Id.* at 63 n.6. The court, however, could not
8 "conjure any retroactive justification" without an explanation from the Commission.⁵ *Id.*

9 **B. Legal Analysis**

10 The Act prohibits corporations from making contributions to federal candidates. 2 U.S.C.
11 § 441b(a). But funds used or provided "to defray costs incurred in staging candidate debates in
12 accordance with the provisions of 11 C.F.R. [§§] 110.13 and 114.4(f)" are not considered
13 contributions. *See* 11 C.F.R. §§ 100.92, 100.154. "Broadcasters (including a cable television
14 operator, programmer or producer), *bona fide* newspapers, magazines and other periodical
15 publications" are specifically permitted to stage candidate debates. *Id.* § 110.13(a)(2).

⁵ The Commission voted to accept the remand on November 1, 2012. La Botz, through counsel, filed a supplement to the Complaint after the *La Botz* decision, noting that the ONO's 2012 debates between Democrat Sherrod Brown and Republican Josh Mandel also did not include minor party candidates. Supp. Compl. at 1. La Botz was not a candidate in the 2012 election, but according to the supplement, the debates were announced on August 17, 2012, and La Botz did not receive "a [written] revised set of criteria" for the debates until September 18, 2012, nine days after the court issued its *La Botz* decision. *Id.* at 2, Attach. C. The supplement alleges that this establishes that the ONO used the same criteria it used in 2010 for the 2012 debates prior to September 18, 2012, which in turn demonstrates "a continuing course of conduct on the part of ONO of simply selecting the major-party candidates for its senatorial debates without giving any consideration to the other candidates." *Id.* at 2. The ONO filed a Supplemental Response, which argued that La Botz lacks any standing to raise new concerns about the 2012 debates since he was not a candidate in that election. ONO Supp. Resp. at 1-2. The ONO also asserted that La Botz, through counsel, informed the ONO of the *La Botz* decision on September 5, 2012, and that ONO promulgated a written policy after the court decision "with the hope of eliminating future complaints or issues," but used the same objective criteria in 2012 that it did in 2010. *Id.* at 2.

1 The Commission's debate regulations leave the structure of the debate to the discretion of
2 the staging organization. The only requirements are that: (1) the debate include at least two
3 candidates; (2) the organization does not arrange the debates in a manner that promotes or
4 advances one candidate over another; and (3) the criteria for candidate selection are objective
5 and pre-established. *See id.* § 110.13(b)-(c); Corporate and Labor Organization Activity;
6 Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14,
7 1995). The sole issue here is whether the ONO used objective and pre-established candidate
8 selection criteria to exclude La Botz from the debate.

9 Objective selection criteria are "not require[d] [to contain] rigid definitions or required
10 percentages." *See* FGCR at 19, MURs 4956, 4962, 4963 (Union Leader Corp., et al.). To
11 qualify as "objective," the criteria need not "be stripped of all subjectivity or be judged only in
12 terms of tangible, arithmetical cut-offs. Rather, it appears that they must be free of 'content
13 bias,' and not geared to the 'selection of certain pre-chosen participants.'" *Id.* at 23. Major party
14 status can be a factor considered by a staging organization so long as it is not the only factor.
15 11 C.F.R. § 110.13(c); 60 Fed. Reg. at 64,262. Both polling data and financial disclosures are
16 considered objective criteria. *See La Botz*, 889 F. Supp. 2d at 63-64; *Buchanan v. FEC*, 112 F.
17 Supp. 2d 58, 74 (D.D.C. 2000) (concluding that polling data is objective); *Ark. Educ. Television*
18 *Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) (citing lack of financial support as an objective
19 indicator).

20 The ONO's stated debate selection criteria of "first ensur[ing] the eligibility of the
21 candidates and then par[ing] down the field of candidates to the two frontrunners" based on
22 polling, conversations with political reporters and sources regarding the races, and financial

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disclosures, ONO Resp. at 2-3, 5, Ex. A ¶ 6, were acceptably “objective.” *La Botz*, 889 F. Supp. 2d at 63-64.

To establish that the criteria were set in advance of selecting debate participants, staging organizations “must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants.” 60 Fed. Reg. at 64,262. The Commission has advised, but has not interpreted its regulations to require, organizations to document the objective criteria used to select candidates and provide it to candidates. *Id.* Reducing criteria to writing and providing it to candidates would afford staging organizations a ready basis to demonstrate that they had established their criteria in advance. But written criteria are not the only acceptable method of proof under Commission precedent. Rather, “undocumented affirmative statements submitted by or on behalf of respondents” will suffice so long as “the evidence shows that the criteria were used in a manner consistent with the media organization’s affirmative statements.” See FGCR at 26, MURs 4956, 4962, 4963 (Union Leader Corp., *et al.*).⁶

The ONO did not provide a contemporaneous written standard for its 2010 debates, so the Commission must examine the record to analyze whether the ONO did in fact establish its stated selection criteria in advance and employ those criteria in organizing the events.

Marrison’s sworn affidavit states that the ONO used pre-established criteria. Marrison Aff. ¶¶ 6, 8, 12. But, as the district court noted, Marrison’s statement is not entirely consistent with Winges’s e-mail asserting that the ONO used major party status as the sole selection

⁶ See also MUR 6493 (Fox News Channel, *et al.*) (finding no reason to believe that a violation occurred where staging organization’s published criteria did not specify that it would not take into account online poll results); MUR 5395 (Dow Jones Co., *et al.*) (finding no reason to believe that a violation occurred where staging organization stated that its criteria was “reasonable, appropriate and journalistically sound” and non-partisan, but provided no other documentation or information).

1 criterion. *La Botz*, 889 F. Supp. 2d at 61-62. Marrison, who is editor of the *Columbus Dispatch*,
2 does not explain why or how he had first-hand knowledge of the events; his affidavit was written
3 after the fact and is not supported by any contemporaneous written policy. *Id.* (citing *Ponte v.*
4 *Real*, 471 U.S. 491, 509 (1986) (“The best evidence of why a decision was made as it was is
5 usually an explanation, however brief, *rendered at the time of the decision.*” (emphasis in
6 original))). Thus, given the shortcomings of Marrison’s affidavit, Wings’s e-mail — which lists
7 a possibly contradictory set of criteria “allow[ing] for only the major-party candidates to debate”
8 — would suggest that the ONO may not have used pre-established objective criteria.

9 Yet it is unclear whether Wings had any more personal knowledge about the selection
10 criteria than Marrison: they each appeared to hold equivalent positions at two member
11 newspapers of the ONO. It is also possible that Wings may have misunderstood the ONO’s
12 criteria, given that he also mistakenly stated that the Commission on Presidential Debates looked
13 only to major party status. *See* Compl., Attach. 8; *supra* note 3. And the Complaint does not
14 provide context for the e-mail — which appears to be part of a larger e-mail chain not included
15 in the Complaint — other than that it was sent in response to an online petition. Accordingly, the
16 e-mail, although contemporaneous, does not conclusively establish that the ONO used major
17 party status as the sole selection criteria in 2010, any more than the Marrison affidavit
18 conclusively establishes the contrary.

19 The Marrison affidavit and the Wings e-mail, however, are not the only communications
20 in the record that describe the criteria used by the ONO. The Complaint itself includes a
21 September 14, 2010, letter from Little — the ONO’s counsel — to Brown, which states that the
22 ONO considered “front-runner status based on then-existing Quinnipiac and party polling,

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1 fundraising reports, in addition to party affiliation.” Compl., Attach. 2. That letter appears to be
2 the first time that the ONO formally notified La Botz of the criteria used for the debate.

3 In sum, as the court notes, the record contains inconsistent statements concerning the
4 ONO’s criteria.⁷ But a Commission investigation to determine the ONO’s criteria would not be
5 straightforward. To conclusively determine the nature and timing of the criteria employed by the
6 ONO would require an extensive examination of the ONO’s debate planning process. Because
7 the ONO did not provide contemporaneous written criteria and the record does not otherwise
8 reflect that the ONO reduced its criteria to writing in advance of the debates, we would need to
9 review the ONO’s internal communications, including those of all eight constituent media
10 entities, to determine whether the ONO employed pre-established criteria in 2010.⁸ The single
11 ambiguous item in the record that supports the allegation in the Complaint does not, in the
12 Commission’s view, warrant undertaking such a resource-intensive review and would be an
13 inefficient use of the Commission’s limited resources.⁹

⁷ Another potential inconsistency relates to when the ONO applied its criteria. The ONO’s Response stated that the ONO formally invited Fisher and Portman to participate in the debates on May 14, 2010, and then “again analyzed the criteria to ensure that the frontrunners remained the same” in June, July, and August 2010. ONO Resp. at 2-3, 5; Marrison Aff. ¶ 6. But the September 14, 2010, letter from Little to Brown stated that the ONO “began to put together its proposal for the instant debate” in June 2010, the month following the date that the ONO’s Response claims that the candidates were invited. Compl., Attach. 2.

⁸ The Commission notes that the ONO has since promulgated a written selection criteria policy, which presumably will be applied to future debates, in an effort to “eliminat[e] future complaints or issues.” ONO Supp. Resp. at 2.

⁹ In addition, as the district court noted, it appears that La Botz likely would have been excluded under any pre-established objective standard that the ONO would have been willing to adopt in 2010, including the specific criteria stated in the ONO’s Response. See *La Botz*, 889 F. Supp. 2d at 57 n.1, 63 n.6 (noting that the court had “serious doubts” whether La Botz would have qualified for the debates under any objective standard). Fisher and Portman became the nominees of their respective parties on May 4, 2010, and the Quinnipiac poll from June 2010 indicated that Fisher and Portman were the only candidates of any political affiliation in the general election receiving over one percent of voter interest, with “someone else,” including both La Botz and the two other candidates, Eric Deaton and Michael Pryce, receiving on average less than one percent of voter interest. ONO Resp. at 3, Ex. B. Other polls reflected similar results. See http://www.realclearpolitics.com/epolls/2010/senate/oh/ohio_senate_portman_vs_fisher-1069.html. Further, Fisher and Portman established campaign committees in February and January 2009, respectively. In contrast, at the time he filed his Complaint, La Botz had filed a Statement of Candidacy, but had not filed a Statement of Organization establishing a campaign committee.

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1 Accordingly, the Commission exercises its prosecutorial discretion and dismisses this
2 matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985); *see also* Statement of Policy Regarding
3 Commission Action in Matters at the Initial Stage of the Enforcement Process, 72 Fed. Reg.
4 12,545, 12,546 (Mar. 16, 2007) ("The Commission will dismiss a matter when the matter does
5 not merit further use of Commission resources, due to . . . the vagueness or weakness of the
6 evidence.").

In fact, La Botz did not formally set up a campaign committee until October 9, 2010, and subsequently filed only one financial disclosure report, the 2010 October Quarterly, prior to the 2010 general election. La Botz's campaign reported raising and spending approximately \$13,000 on his candidacy; Fisher and Portman raised \$6,161,139 and \$11,156,508 respectively during the 2010 election cycle. Deaton and Pryce, the two other general election candidates, raised contributions totaling \$6,412 and \$6,448 respectively.

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