

In the matter of

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

MUR 5461

STATEMENT FOR THE RECORD

**Chairman Scott E. Thomas
Vice Chairman Michael E. Toner
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Ellen L. Weintraub**

In MUR 5461, the Office of General Counsel recommended the Commission dismiss allegations that Fan The Vote, a community of website users that offered goods and services in exchange for contributions to John Kerry for President and MoveOn,¹ violated the Federal Election Campaign Act, as amended (“the Act”). On March 8, 2005, the Commission voted unanimously to adopt this recommendation. We voted for the ‘dismissal’ to avoid devoting additional staff time to this matter. However, we thought the more appropriate approach was for the Commission to find ‘no reason to believe’ the Respondents violated the Act.

This matter arose from a complaint alleging that: (1) Fan The Vote’s website was coordinated with John Kerry for President; (2) “an improper linkage” resulted between the Kerry campaign and MoveOn by virtue of their alleged connection to Fan The Vote; and (3) Fan The Vote encouraged foreign nationals to evade prohibitions of the Act by making contributions in the name of another. The Office of General Counsel’s review indicated convincingly that there was no evidence presented that would constitute a proper basis for finding reason to believe the respondents violated the Act on any of these grounds. First General Counsel’s Report, pp. 7-10.

¹ The complaint named MoveOn.org as a respondent without making a distinction between MoveOn.org PAC and MoveOn.org Voter Fund; accordingly, both entities were served as respondents. First General Counsel’s Report, p. 2, n. 1. The entities are referred to herein as “MoveOn.”

Specifically, with regard to the allegation of coordination, the Office of General Counsel properly stated that in order to constitute a “coordinated communication,” a communication must meet a three-part test set forth in 11 C.F.R. § 109.21. First General Counsel’s Report, p. 7. Pursuant to 11 C.F.R. § 109.21, a communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four “content” standards; and (3) satisfaction of one of six “conduct” standards. Applying that test, the Office of General Counsel stated that while the Fan The Vote website seems to meet the first part of the test, it does not appear to meet the second and third parts – the content and conduct tests. *Id.* The content test was not met because communications covered by section 109.21 must be “public communications” as defined in section 100.26 of the regulations and communications over the Internet are specifically excluded from that definition.² First General Counsel’s Report, pp. 7-8. The conduct test was not met because there was no allegation that any Kerry campaign representative conveyed to Fan The Vote “any information at all, much less information about the Kerry campaign’s plans, projects, activities or needs.”³ First General Counsel’s Report, p. 8. The Office of General Counsel concluded that “[u]nder these circumstances, the communication plainly is not a ‘coordinated communication’ within the meaning of section 109.21, and it would not seem appropriate to regard it as any other type of coordinated expenditure under section 109.20.” *Id.*

In construing the allegation of “an improper linkage” between the Kerry campaign and MoveOn, the Office of General Counsel stated it gave the “*pro se* Complainant every benefit of the doubt.” First General Counsel’s Report, p. 9. Accordingly, the Office of General Counsel assumed the Complainant was alleging either: (1) that MoveOn made contributions to the Kerry campaign or *vice versa* in the form of coordinated expenditures, or (2) that MoveOn and the Kerry campaign are affiliated because they both were the subject of Fan The Vote’s fundraising efforts. *Id.* The Office of General Counsel found the allegation to be without merit either way. Specifically, the Office of General Counsel concluded that there are no facts supporting an allegation of coordination. *Id.* The Office of General Counsel further concluded that MoveOn and the Kerry campaign would not become affiliated under the Act simply because one independent actor engaged in efforts to assist both entities. *Id.*

² In *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal filed*, No. 04-5352 (D.C. Cir. Sept. 28, 2004), the District Court invalidated the content standard of the coordinated communications regulation including the Commission’s exclusion of Internet activity from the definition of “public communication.” However, in a subsequent ruling, the Court explained that the “deficient rules technically remain ‘on the books,’” pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004).

³ The Office of General Counsel noted that the conduct standard most potentially relevant is the “substantial discussion” standard set forth in 11 C.F.R. § 109.21(d)(3), which is satisfied if a communication is produced after one or more “substantial discussions” about the communication between the person paying for the communication and an authorized committee. Pursuant to Section 109.21(d)(3), a “substantial discussion” is one in which material information about the candidate’s campaign plans, projects, activities or needs is conveyed to a person paying for the communication.

Finally, as to the allegation that Fan The Vote encouraged prohibited contributions from foreign nationals, the Office of General Counsel stated the alleged evidence – a posting on the Fan The Vote website – “appear[s] to be just the opposite of soliciting contributions from foreign nationals or at the very least too ambiguous to constitute solicitation on Fan The Vote’s part.” First General Counsel’s Report, p. 9. Therefore, the Office of General Counsel concluded “[t]here is simply no factual support for the complaint’s allegation.” First General Counsel’s Report, p. 10.

In instances such as this where the Commission has substantively analyzed a matter and there is no support for finding reason to believe the respondents violated the Act, the Commission should not simply ‘dismiss’ the matter. The record is much clearer if the Commission indicates that we made a substantive determination when, indeed, we have. Hence, we would have supported finding ‘no reason to believe’ that the respondents violated the Act.

4/8/05	/ s /
_____ Date	_____ Scott E. Thomas Chairman
4/12/05	/ s /
_____ Date	_____ Michael E. Toner Vice Chairman
4/8/05	/ s /
_____ Date	_____ David M. Mason Commissioner
4/8/05	/ s /
_____ Date	_____ Danny L. McDonald Commissioner
4/11/05	/ s /
_____ Date	_____ Ellen L. Weintraub Commissioner