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FEDERAL ELECTION COMMISSION
SECRETARIAT

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**FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463**

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MURs: 5474 and 5539
Statute of Limitations: June 2009 – November 2009

MUR 5474

COMPLAINANT: Dale A. Clausnitzer

RESPONDENTS: Dog Eat Dog Films, Inc.; ABB 2004 PAC and Michael Archuleta, in his official capacity as treasurer; Committee to Re-Defeat the President and David A. Lytel, in his official capacity as treasurer; Michael Dobbins; Michael Moore; MoveOn.org Voter Fund; MoveOn.org PAC, and Wes Boyd, in his official capacity as treasurer

DATE COMPLAINT FILED: June 30, 2004
DATE OF NOTIFICATION: July 2, 2004
DATE ACTIVATED: September 27, 2004

MUR 5539

COMPLAINANT: Jeffrey S. Smith

RESPONDENTS: Fellowship Adventure Group, LLC; IFC Entertainment, LLC; Lions Gate Films, Inc.; Michael Moore; Harvey Weinstein; and Bob Weinstein

DATE COMPLAINT FILED: September 22, 2004
DATE OF NOTIFICATION: September 29, 2004
DATE ACTIVATED: October 14, 2004

RELEVANT STATUTES: 2 U.S.C. § 431
2 U.S.C. § 434(f)
2 U.S.C. § 441a
2 U.S.C. § 441b
11 C.F.R. § 100.16

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1		11 C.F.R. § 100.22
2		11 C.F.R. § 100.29
3		11 C.F.R. § 104.20
4		11 C.F.R. § 109.10
5		11 C.F.R. § 110.1
6		11 C.F.R. § 114.2
7		
8	INTERNAL REPORTS CHECKED:	Disclosure Reports
9		
10	FEDERAL AGENCIES CHECKED:	None
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1 **I. INTRODUCTION**

2 MURs 5474 and 5539 involve allegations relating to the film FAHRENHEIT 9/11, the
3 gravamen of which is that the film was a prohibited corporate expenditure and/or corporate
4 contribution. Both complaints are somewhat unclear but involve a number of respondents and
5 apparent theories of liability. In MUR 5474, the complaint alleges that Dog Eat Dog Films,
6 Inc. ("Dog Eat Dog") violated the ban against corporate financing of electioneering
7 communications by financing the film, websites and hyperlinks. Further, the complaint
8 alleges that Dog Eat Dog, the production company that produced the film, violated the
9 prohibition against corporate contributions and expenditures by using "corporate assets,"
10 which include the film, its promotional movie trailers, and certain websites, to "promote,
11 support, and attack clearly identified candidates."¹ Finally, the complaint alleges that Dog Eat
12 Dog made prohibited corporate contributions by providing "free or severely discounted" web
13 space to political committees through the use of hyperlinks from one of Dog Eat Dog's alleged
14 websites.²

15 In MUR 5539, the complaint alleges that the release and distribution of FAHRENHEIT
16 9/11 constituted an independent expenditure because the film expressly advocated the defeat

¹ Although the wording in the complaint suggests more than one clearly identified candidate, the complaint does not specifically refer to any candidates or elections other than President George W. Bush and the 2004 presidential election.

² The Commission received two supplements to the complaint in MUR 5474, but neither supplement changes the legal analysis contained in this report. One supplement alleges that Dog Eat Dog intended to broadcast the film on television. However, the complaint does not allege that Dog Eat Dog made or intended to make any disbursements in connection with any televised broadcast. Publicly available information indicates that Dog Eat Dog did not pay to broadcast the film on television. In fact, a third party, not a respondent in either MUR, apparently aired the film on a public access station without the consent of any of the respondents, and Moore and Fellowship Adventure Group have expressed their intention to sue the person responsible for the unauthorized broadcast. See Mike Reynolds, MULTICHANNEL NEWS, *IFC Sets Moore Special* (Oct. 25, 2004). The other supplement attempts to draw distinctions between this alleged violation and the Sinclair Broadcasting matter, MUR 5562.

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1 of President Bush and that by being fully or partially responsible for the film's release,
2 Michael Moore and other entities associated with the film made excessive and/or prohibited
3 contributions to unidentified candidates or committees. Dog Eat Dog and Moore argue that
4 FAHRENHEIT 9/11 is not an independent expenditure based on their assertion that the film does
5 not contain express advocacy.

6 This Office believes that the film, associated trailers, and Fahrenheit911.com are
7 either bona fide commercial activity or that they fail to qualify as independent expenditures.
8 Pursuant to either analysis, the respondents do not appear to have violated the Act or
9 Commission regulations. Therefore, we recommend that the Commission find no reason to
10 believe as to most of the respondents, dismiss the complaint as to several respondents, and
11 close the files.

12 II. FACTUAL SUMMARY

13 A. Background of the Film

14 FAHRENHEIT 9/11 is a feature-length documentary film with political themes critical
15 of the Bush administration's foreign and domestic policies. The film depicts President Bush,
16 Vice President Dick Cheney, members of the Bush Administration, and several Members of
17 Congress.³ Theaters across the United States began showing the film in June 2004. Michael
18 Moore, President of Dog Eat Dog, directed and produced the film under the auspices of Dog
19 Eat Dog, his production company. Miramax, a division of Disney Studio Entertainment,
20 reportedly financed the production of the film and then sold it to Fellowship Adventure Group

³ The Members of Congress who appear in the film include Senator Tom Daschle, Senator Byron Dorgan, Representative Tammy Baldwin, Representative John Conyers, Representative John T. Doolittle, Representative Richard Gephardt, Representative Porter Goss, Representative Jessie Jackson, Jr., Representative Mark Kennedy, Representative John Lewis, Representative Jim McDermott, Representative John Tanner, and Representative Maxine Waters.

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1 (“Fellowship”).⁴ Fellowship, Lions Gate Films, Inc. (“Lions Gate”) and IFC Films, Inc.
2 (“IFC”) distributed the film, but Dog Eat Dog appears to retain the copyright. Following
3 completion of the film, Moore made conflicting public statements, sometimes indicating that
4 he hoped the film would influence the presidential election and at other times stating that he
5 regarded the film simply as a contribution to his body of work.⁵

6 B. Respondents

7 Although Moore and Dog Eat Dog have been the respondents most visibly associated
8 with this film in the public eye, the complaints identify a number of additional individuals and
9 entities as respondents. In MUR 5474, the complaint identifies the following entities and
10 individuals as respondents.

- 11 • Dog Eat Dog – Michael Moore’s production company, which was incorporated in
12 Delaware in 1989 and produced FAHRENHEIT 9/11. The complaint alleges that Dog
13 Eat Dog impermissibly used corporate assets to “promote, support and attack clearly
14 identified candidates” through its creation and promotion of FAHRENHEIT 9/11. These
15 corporate assets allegedly include Fahrenheit911.com and MichaelMoore.com.
16 Although the complaint alleges that Dog Eat Dog owns these websites, they appear to
17 be owned by Westside Productions, LLC (“Westside”). Moore and Kathleen Glynn,
18 his wife, own Westside, which is treated as a partnership for tax purposes.
19 MichaelMoore.com contains commercial and political content.⁶ The FAHRENHEIT
20 9/11 website promotes the film and provides a list of books as suggested reading.
- 21 • Michael Moore – a well-known film and documentary maker who produced and
22 directed FAHRENHEIT 9/11. He is one of two partners in Westside which owns and
23 operates MichaelMoore.com. The complaint in MUR 5474 does not make a specific

⁴ Miramax was not named as a Respondent in this matter. Only in preparing this Report did we learn of Miramax’s role in financing the production of the film.

⁵ In an interview at the Cannes Film Festival, Moore indicated that he wanted to “say something about the times in which we live.” In another interview he claimed that he did not set out to make a political film. Hanna Rosin and Mike Allen, THE WASHINGTON POST, ‘Fahrenheit 9/11’ Is a Red-Hot Ticket (June 24, 2004). In another interview, Moore expressed his hope that the film would encourage the Democratic Party’s voters to go to the polls on Election Day. Gabriel Snyder, DAILY VARIETY, Moore fires fresh salvo vs Mouse; Helmer touts long-legged ‘Fahrenheit’ (July 25, 2004).

⁶ Moore appears to have included political content on this site since 1998 and continues to add political content on a regular basis. Moore’s website provides hyperlinks to allow site visitors to navigate directly from Moore’s site to other websites.

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1 allegation against Moore, other than its claim that Moore intended to use corporate
2 assets of Dog Eat Dog, namely the film and the MichaelMoore.com website, to
3 oppose President Bush in the 2004 Presidential election.

- 4 • ABB 2004 PAC – a registered federal political committee that maintains the
5 NotBush.com website. The complaint identified ABB 2004 PAC as a respondent
6 solely because of the presence of a link to its website from MichaelMoore.com.
- 7 • The Committee to Re-Defeat the President – a registered federal political committee
8 which owns and operates redefeatbush.com and appears to use ReDefeatBush.com as
9 an alternate name. The complaint identified this committee as a respondent solely
10 because of the presence of a link to its website from MichaelMoore.com.
- 11 • MoveOn.org Voter Fund – a Section 527 organization that maintains
12 moveonvoterfund.org. The complaint identified MoveOn.org as a respondent based
13 upon the alleged presence of a link on MichaelMoore.com to a site maintained by
14 MoveOn.org, but the organization's response indicates that MoveOn.org is
15 improperly named and that the correct respondent is MoveOn.org Voter Fund. The
16 Voter Fund operates bushin30seconds.org which was at one time hyperlinked from
17 MichaelMoore.com.
- 18 • Michael Dobbins – maintains the stopbushin2004.com website. Complaint identifies
19 Dobbins as a respondent based on an alleged link on MichaelMoore.com to his
20 website.

21 MUR 5539 identifies the following entities and individuals, only one of which –

22 Michael Moore – was also named in MUR 5474 as a respondent.

- 23 • Michael Moore – The complaint alleges that Moore was fully or partially responsible
24 for the release of FAHRENHEIT 9/11 and that such release constituted a contribution in
25 violation of the Act's source prohibitions and contribution limitations.
- 26 • Fellowship Adventure Group – Fellowship is a limited liability company formed by
27 Harvey Weinstein and Bob Weinstein for the specific purpose of distributing
28 FAHRENHEIT 9/11. Fellowship elected partnership status for tax purposes. It is one
29 of three companies involved in the distribution of the film and movie trailers. The
30 complaint alleges that Fellowship was fully or partially responsible for the release of
31 FAHRENHEIT 9/11 and that such release constituted a contribution in violation of the
32 Act's source prohibitions and contribution limitations.
- 33 • Weinstein Brothers – The complaint used this phrase to refer to Harvey Weinstein and
34 Bob Weinstein of Fellowship. The complaint alleges that both men were fully or
35 partially responsible for the release of FAHRENHEIT 9/11 and that such release
36 constituted a contribution in violation of the Act's source prohibitions and
37 contribution limitations.

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- 1 • Lions Gate Films – Lions Gate, a U.S. subsidiary of a Canadian corporation, was
2 responsible for the content of paid advertising for the film, including movie trailers.
3 It is also one of three companies involved in the theatrical distribution of the film.
4 The complaint alleges that Lions Gate was fully or partially responsible for the release
5 of FAHRENHEIT 9/11 and that such release constituted a contribution in violation of the
6 Act's source prohibitions and contribution limitations.

- 7 • IFC Entertainment – IFC is a corporation and one of three companies involved in the
8 theatrical distribution of the film and movie trailers. It is apparently responsible for a
9 portion of the theatrical distribution costs and receives an undisclosed percentage of
10 the box office proceeds from the film. The complaint alleges that IFC was fully or
11 partially responsible for the release of FAHRENHEIT 9/11 and that such release
12 constituted a contribution in violation of the Act's source prohibitions and
13 contribution limitations.

14 **III. LEGAL ANALYSIS**

15 The complaints in MUR 5474 and MUR 5539 allege that FAHRENHEIT 9/11 and its
16 associated movie trailers and websites promote, support and attack clearly-identified
17 candidates for public office, including President Bush. The first key question, then, is whether
18 FAHRENHEIT 9/11 and associated trailers and websites constitute electioneering
19 communications. This Office concludes that they are not because they were not distributed by
20 any of the respondents by broadcast, cable or satellite, did not air within the electioneering
21 communications period, or did not refer to a clearly identified candidate. *See* 11 C.F.R.
22 § 100.29.

23 Because they do not constitute electioneering communications, we next analyze
24 whether the costs associated with the film and associated movie trailers and websites
25 constitute independent expenditures, which corporations are prohibited from making and
26 partnerships and individuals must report over \$250. *See* 2 U.S.C. §§ 441a and 441b,

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1 11 C.F.R. §§ 109.10 and 110.1(g).⁷ We conclude that the respondents have not made
2 independent expenditures in connection with the film, movie trailers and Fahrenheit911.com
3 based on either of two separate and independent conclusions, one of which does not require
4 consideration of the content, while the other is based on an analysis of whether the film and
5 related enterprises contain express advocacy. First, the film, movie trailers, and the film's
6 official website represent bona fide commercial activity, which the Commission has
7 previously declined to regulate in appropriate cases. *See, e.g.*, AO 1994-30 (Conservative
8 Concepts). This conclusion can be reached without regard to the content of the film itself or
9 the trailers and official website. Alternatively, should the Commission wish to resolve this
10 matter based on the content of the film, movie trailers, and official website, this Office
11 concludes that their associated costs do not meet the definition of "independent expenditure"
12 because they do not appear to contain express advocacy.

13 With respect to MichaelMoore.com, which appears to have contained express
14 advocacy communications and is owned by an LLC that has elected partnership tax status,
15 Michael Moore appears to use this website as a personal blog rather than solely as a
16 commercial venture. Under Commission regulations, LLCs that elect partnership tax status
17 must report express advocacy communications aggregating in excess of \$250 in a calendar
18 year with respect to a given election. *See* 11 C.F.R. §§ 109.10(b), 110.1(g). Neither
19 complaint specifically alleges a violation of this regulatory requirement, and no information
20 has been presented indicating whether the costs associated with the express advocacy
21 material trigger the \$250 reporting threshold. Accordingly, given the context of the entire

⁷ The complaints do not allege coordination with a candidate, candidate's committee or party committee.

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1 material trigger the \$250 reporting threshold. Accordingly, given the context of the entire
2 matter under review, this Office makes no recommendation with respect to this website.

3 Finally, with respect to the hyperlinks from MichaelMoore.com, this Office concludes
4 that the hyperlinks do not constitute in-kind contributions because there is no information
5 available suggesting that (1) the hyperlinked sites sought or knowingly received hyperlinks
6 from MichaelMoore.com, (2) payment is customarily received from such hyperlinks, (3) the
7 value of the hyperlinks is significant, or (4) the hyperlinked sites received any benefit from the
8 hyperlinks. Thus, even if the hyperlinks were provided at a discount or free of charge, doing
9 so did not result in contributions.

10 **A. Whether the Film, Movie Trailers and Websites Constitute Electioneering**
11 **Communications**

12 Corporations are prohibited from making or financing electioneering
13 communications. *See* 2 U.S.C. § 441b and 11 C.F.R. § 114.2(b)(2)(iii). Individuals and
14 partnerships may make or finance electioneering communications provided the funds used are
15 not from prohibited sources and electioneering communications that aggregate over \$10,000
16 are reported to the Commission in accordance with 11 C.F.R. § 104.20. *See* 2 U.S.C. § 434(f)
17 and 11 C.F.R. §§ 114.14(b), 104.20(b). The Act defines “electioneering communications” as
18 broadcast, cable or satellite communications that: (1) refer to a clearly identified federal
19 candidate; (2) are publicly distributed within 60 days before a general or 30 days before a
20 primary election; and (3) are targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3)(A)(i)
21 and 11 C.F.R. § 100.29(a)(2). Federal regulations define “publicly distributed” for
22 presidential and vice presidential candidates to include communications that can be received
23 by 50,000 or more people anywhere in the United States from 30 days prior to the convention

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1 to the end of the convention. *See* 11 C.F.R. § 100.29(b)(3)(ii)(B). The regulations specifically
2 provide that communications over the Internet are not electioneering communications. *See* 11
3 C.F.R. § 100.29(c)(i). The film, theatrical trailers, and websites identified in the complaints
4 do not satisfy the definition of “electioneering communication” because they were not
5 distributed by broadcast, cable or satellite by any of the respondents. *See supra* note 2.

6 With regard to the movie trailers, it is unclear whether the complaint’s reference to
7 “movie trailers” includes ads for the film broadcast on television or whether the reference was
8 limited to those shown in theaters. If referring to the television ads, this Office is not aware of
9 any that clearly identified a federal candidate and aired within the electioneering period, which
10 began 30 days before the Republican National Convention on August 30, 2004, or 60 days
11 before the 2004 General Election on November 2, 2004. *See* 11 C.F.R. §§ 100.29, 104.20 and
12 114.2(b)(2)(iii). Indeed, the television ads aired after July 30, of which this Office is aware,
13 did not contain images of or references to specific federal candidates. Therefore, the
14 broadcast advertisements, to the extent they were included in the complaint, would not appear
15 to satisfy the definition of “electioneering communication.”⁸

16 Accordingly, this Office recommends that the Commission find no reason to believe
17 that Dog Eat Dog Films, Inc., Lions Gate Films, and IFC Entertainment violated the Act by
18 making or financing electioneering communications. This Office further recommends that the
19 Commission find no reason to believe that Michael Moore, Harvey Weinstein, Bob Weinstein,

⁸ In MUR 5467, the Commission determined that allegations that future broadcast advertisements for the film FAHRENHEIT 9/11 would violate the corporate ban on electioneering communications were too speculative at that time because the respondents unequivocally denied that they intended to run any ads containing images of President Bush or other Federal candidates within the applicable electioneering communications periods.

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1 and Fellowship Adventure Group violated the Act by failing to report electioneering
2 communications.

3 **B. Whether the Film, Trailers and Websites Constitute Independent**
4 **Expenditures**

5 Under the Act, the term "independent expenditure" means an expenditure by a person
6 expressly advocating the election or defeat of a clearly identified federal candidate, and not
7 made in concert or cooperation with or at the suggestion of a candidate, party, or agent.
8 *See* 2 U.S.C. § 431(17); 11 C.F.R. § 100.16. Under the Commission's regulations, express
9 advocacy exists where a communication uses phrases such as "vote for the President," "re-
10 elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in
11 context have no other reasonable meaning than to urge the election or defeat of one or more
12 clearly identified candidates, such as posters, bumper stickers, or advertisements that say,
13 "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" *See* 11 C.F.R. § 100.22(a);
14 *see also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL")
15 ("[The publication] provides in effect an explicit directive: vote for these (named) candidates.
16 The fact that this message is marginally less direct than "Vote for Smith" does not change its
17 essential nature."). Express advocacy also exists where communications contain an
18 "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning"
19 and about which "reasonable minds could not differ as to whether it encourages actions to
20 elect or defeat" a candidate when taken as a whole and with limited reference to external
21 events, such as the proximity to the election. *See* 11 C.F.R. § 100.22(b).

22 The potential liability of certain respondents depends upon whether the film, trailers
23 and websites constitute independent expenditures. Individuals, partnerships and political

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1 committees are permitted to make unlimited independent expenditures but must report such
2 expenditures pursuant to 11 C.F.R. §§ 109.10(b), 104.3(b)(3)(vii)(A) and 104.4(a) and (b).
3 Corporations are prohibited from making independent expenditures. *See* 2 U.S.C. § 441b(a);
4 11 C.F.R. § 114.2(a). A limited liability company is treated as a corporation under the Act if
5 it has publicly traded shares or if it has elected to be treated as a corporation with the Internal
6 Revenue Service. *See* 11 C.F.R. § 110.1(g)(3). Otherwise, a limited liability company is
7 treated as a partnership and may make expenditures or contributions to political committees
8 subject only to the reporting requirements and contribution limits applied to partnerships.
9 *See* 11 C.F.R. § 110.1(g)(2).

10 **1. The Film, Movie Trailers and Fahrenheit911.com**

11 The film, trailers and Fahrenheit911.com appear either to be bona fide commercial
12 activity or lack the express advocacy that would have qualified them as independent
13 expenditures. Disbursements associated with the production of the film appear to have been
14 made entirely by Miramax, a division of Disney Studio Entertainment, which later sold the
15 film to Fellowship.⁹ Disbursements associated with the theatrical release of the film and
16 movie trailers appear to have been made by Fellowship, IFC, and Lions Gate. Both IFC and
17 Lions Gate are corporations. Fellowship, a limited liability company formed by Harvey and
18 Bob Weinstein, has chosen partnership status for tax purposes. According to their responses,
19 Michael Moore and Dog Eat Dog made no disbursements of their own in connection with the
20 production and theatrical release of the film; the film was financed entirely by others.¹⁰

⁹ Miramax and Disney Studio Entertainment are not named respondents in either complaint. In light of the recommendations in this report, no purpose would be served by internally generating Miramax and Disney as respondents.

¹⁰ Moore Response to MUR 5474 at 2.

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1 Available information indicates that Westside, a partnership, paid for costs associated with
2 Fahrenheit911.com, and is the only entity potentially liable under the Act for possible
3 violations stemming from this website.

4 As discussed below, available information indicates that Fellowship, IFC, Lions Gate
5 and Westside paid the costs associated with the creation and distribution of the film, trailers
6 and website in connection with bona fide commercial activity and not for the purpose of
7 influencing an election. This information can serve as an independent basis for the
8 Commission to find "no reason to believe" without addressing the content of this feature-
9 length film or its trailers and official website. *See, e.g.*, Advisory Opinion 1994-30
10 (Conservative Concepts). Alternatively, because FAHRENHEIT 9/11 does not appear to
11 contain express advocacy under either standard set forth in 11 C.F.R. § 100.22, a
12 straightforward independent expenditure analysis of the content of the film, movie trailers
13 and Fahrenheit911.com can also be the end of the Commission's inquiry.¹¹

14 **a. Bona Fide Commercial Activity**

15 Dog Eat Dog, Moore, Fellowship, IFC and Lions Gate argue that the film should be
16 exempt from regulation because their underlying purpose in creating and distributing the film
17 was commercial in nature. Based on an analysis of the facts specific to this matter, this
18 Office concludes that the film and its related enterprises are bona fide commercial activity,
19 not independent expenditures under the Act.

¹¹ Although certain respondents claim that the media exemption applies to FAHRENHEIT 9/11, the film does not meet the second statutory criterion of the exemption due to the manner in which the film was distributed. The Act exempts from the definition of expenditure "any news story, commentary, or editorial *distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication*, unless such facilities are owned or controlled by any political party, political committee or candidate." 2 U.S.C. § 431(9)(B)(i) (emphasis added). Theatrical release of a film does not qualify as distribution through a broadcasting station, newspaper, magazine or other periodical publication.

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1 An analysis of whether the feature-length film, movie trailers and Fahrenheit911.com
2 are bona fide commercial activity does not turn on their content. *See* AO 1994-30
3 (Conservative Concepts). In the context of candidate-related merchandise, for example, the
4 Commission has explained that whether certain commercial activity results in an expenditure
5 or contribution is very fact-specific and depends upon an examination of a number of factors,
6 including (1) whether the sales of the merchandise involve fundraising activity or
7 solicitations for political contributions; (2) whether the activity is engaged in by the vendor
8 for genuinely commercial purposes and not for the purpose of influencing an election; (3)
9 whether the items are sold at the vendor's usual and normal charge; and (4) whether the
10 purchases are made by individuals for their personal use. *See* AO 1994-30 and 1989-21
11 (Create-a-Craft). Application of these factors to evaluate whether certain communicative
12 activity is commercial, rather than political, provides the Commission an alternative to
13 treating a communication as an independent expenditure. *See, e.g.*, AO 1994-30.

14 In AO 1994-30, the Commission concluded that an entity whose principal business
15 was the manufacture, advertising and sale of assorted political paraphernalia, such as t-shirts,
16 bumper stickers, and hats containing express advocacy, would not make a prohibited
17 corporate expenditure or contribution by selling those items. To reach this conclusion, the
18 Commission examined the totality of circumstances, including the facts that no portion of the
19 sales proceeds would be transferred to candidates or political committees and that the venture
20 would be strictly profit-oriented and not for the purpose of influencing a federal election.
21 Further, there was no suggestion that the vendor would charge less than the usual and normal

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1 charge for the items. Given the specific circumstances presented, Conservative Concepts'
2 focus on candidates who have a conservative ideology was not dispositive.¹²

3 Like the activity considered in AO 1994-30, the totality of circumstances presented by
4 the film FAHRENHEIT 9/11 and its related enterprises suggests that Fellowship, IFC, and Lions
5 Gate were engaged in bona fide commercial activity. No available information indicates that
6 any federal candidate or political committee received proceeds from sales of distribution
7 rights or tickets to the film.¹³ There is also no information that the production or release of
8 the film was coordinated with any candidate or political committee, within the meaning of 11
9 C.F.R. §§ 109.20 and 109.21, or that Fellowship, IFC, and Lions Gate are owned, controlled,
10 or affiliated with a candidate or political committee.

11 Additionally, no information suggests that film audiences were charged less than the
12 usual or normal charge to see the film,¹⁴ and available information indicates that Fellowship,
13 IFC, and Lions Gate distributed the film for genuinely commercial purposes rather than to
14 influence a federal election. *See* 2 U.S.C. § 431(9)(A). These respondents are in the business
15 of making, promoting, and/or distributing films, and no information has been presented to
16 suggest that they failed to follow usual and normal business practices and industry standards

¹² The Commission noted that “[c]ompanies often determine to direct their business activities toward one type of political orientation. . . . Nevertheless, it does not, by itself, negate the merely commercial nature of an activity.” AO 1994-30.

¹³ This fact differs from the conduct or proposed conduct deemed unlawful in MUR 1166/1180 (Franklin Mint), AO 1988-17 (Election Concepts, Inc.), AO 1989-21 (Create-a-Craft), and AO 1976-50 (Logo 7, Inc.) in which the vendors transferred or proposed transferring a portion of sale proceeds to candidate committees or political committees.

¹⁴ This Office has no information that the theatrical release included discounts that would not be considered customary in the movie industry (e.g., senior citizen discounts, matinee discounts, etc.). The only discount or giveaways we are aware of concern copies of the DVD version of FAHRENHEIT 9/11 that were made available to customers for free by a small number of independent video stores. Although Michael Moore was reportedly involved in encouraging these giveaways, we have no information suggesting that Michael Moore or any of the other named respondents paid for the giveaways. In any event, neither complainant supplemented his complaint to raise this issue.

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1 in connection with FAHRENHEIT 9/11. Further, the transactions between Miramax,
2 Fellowship, Lions Gate and IFC appear to have been profit-making, arm's-length commercial
3 transactions in which these entities bought and sold a product that they are typically in the
4 business of buying and selling. Miramax, for example, appears to have been reimbursed
5 entirely for the money it spent financing the production of the film, and the film reportedly
6 grossed \$119.2 million in ticket sales, far surpassing the \$6 million Fellowship paid to
7 acquire the film from Miramax. Although the commercial success of a film does not
8 establish that it was produced for a genuinely commercial purpose, the repeated exercise of
9 rights to the film by Miramax, Fellowship, IFC and Lions Gate indicates the requisite profit
10 motive for transactions undertaken in the context of bona fide commercial activity. No
11 information has been presented to negate this conclusion. Indeed, even if energizing voters
12 was a welcome consequence from Moore's perspective, as some press accounts suggest (*see*
13 *supra* n. 5), this Office has no information that those who made disbursements related to the
14 production and distribution of the film were motivated by anything other than making a
15 profit.

16 For similar reasons, this Office concludes that disbursements made by Fellowship,
17 IFC, and Lions Gate for the production and dissemination of television and theatrical movie
18 trailers promoting FAHRENHEIT 9/11 constitute bona fide commercial activity. The purpose
19 of these trailers appears to have been to encourage the purchase of tickets, and no information
20 has been presented to the contrary. *See* AO 1994-30.

21 Disbursements made by Westside to operate Fahrenheit911.com would also appear to
22 be bona fide commercial activity. This site has a commercial orientation and appears to be
23 designed to encourage the purchase of movie tickets or other items related to the film.

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1 In short, a constellation of factors suggests that Fellowship, IFC, Lions Gate and
2 Westside's involvement in the film, trailers and Fahrenheit911.com may be treated as bona
3 fide commercial activity, rather than political activity resulting in an independent
4 expenditure.

5 **b. Lack of Express Advocacy**

6 As an alternative to analyzing the film and its related enterprises in terms of its status
7 as bona fide commercial activity, the question becomes whether expenditures associated with
8 the production and distribution of the film constitute independent expenditures because they
9 contain express advocacy. *See* 2 U.S.C. § 431(17)(a); 11 C.F.R. § 100.16. The complaint in
10 MUR 5474 claims that the film contains "political advocacy"; however, given the arguments
11 raised in the complaint, this Office assumes that the complainant meant express advocacy.
12 The complaint in MUR 5539 alleges that the film "constitutes 'a communication advocating
13 the defeat of a clearly identified candidate', namely George W. Bush." Neither complaint
14 identified any specific statement or image in the film to support the argument that the film
15 contains express advocacy. Rather, the complaints make general statements about the
16 political content, with one categorizing the film as a "diatribe" against President Bush. In
17 response to these complaints, Fellowship, IFC, and Lions Gate acknowledge that the film has
18 political content but argue that the film does not contain express advocacy.

19 While FAHRENHEIT 9/11 contains a great deal of political content and criticism, and
20 leaves no doubt about Moore's discontent with the policies and practices of the Bush
21 Administration, the film does not expressly advocate the defeat of President Bush or the

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1 election or defeat of any other clearly identified candidate.¹⁵ In fact, the film's criticism is
2 wide-ranging: it targets the Bush Administration, Republican and Democratic members of
3 Congress, and the mainstream media; it also challenges the results of the 2000 Presidential
4 election, military recruitment policies, federal budget priorities, the Patriot Act, and the
5 prosecution of the war in Iraq; it criticizes the federal government's response (and that of
6 President Bush) to the attacks of September 11; and it suggests ties between the Bush
7 Administration and companies profiting from the war.

8 In this two-hour film, only two comments refer in some manner to future elections,
9 but this Office believes that they are not express advocacy under either 11 C.F.R.
10 §§ 100.22(a) or 100.22(b). In a scene filmed in a Veterans' hospital, a wounded soldier says
11 that he was a Republican but now plans to do everything that he can to make sure that the
12 Democrats "win control." The soldier does not indicate whether he is referring to the White
13 House or Congress or both, and does not refer to a clearly identified federal candidate. In
14 another scene, the mother of a soldier killed in Iraq reads her son's last letter to his family in
15 which, shortly after referring to President Bush by name, he writes: "I really hope they don't
16 re-elect that fool, honestly." Notwithstanding the use of the term "re-elect," taken in context,
17 reasonable minds could differ as to whether this statement expressly advocates the election or
18 defeat of a particular candidate or whether, for example, it appears in support of the film's
19 anti-war theme to illustrate one soldier's anguish as a result of the war.¹⁶

¹⁵ A DVD of the film is available in the Secretary's office for viewing should any of the Commissioners wish to do so.

¹⁶ The Explanation and Justification for 11 C.F.R. § 100.22 make clear that the regulation was intended to treat communications that include express electoral advocacy as express advocacy even when the communications at issue happen to include issue advocacy as well. *See* 60 Fed. Reg. 35,292 at 35,295. However, for reasons previously stated, we do not believe the film contains express advocacy.

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1 Further, there is no allegation or information that the movie trailers (whether shown in
2 theaters or broadcast on television or satellite) or Fahrenheit911.com contained express
3 advocacy. To the extent we are aware of the promotional advertisements that included
4 images of federal candidates, we are aware of none that encouraged voters to take electoral
5 action or referred to an election at all. *See* 11 C.F.R. § 100.22. Accordingly, this Office
6 concludes that the costs associated with producing and disseminating the movie trailers and
7 operating the film's official website do not constitute independent expenditures.

8 Therefore, because FAHRENHEIT 9/11, its associated trailers, and Fahrenheit911.com
9 do not contain express advocacy, the disbursements associated with the production and
10 release of the film and its related enterprises do not constitute independent expenditures.

11 2. MichaelMoore.com

12 The complaint in MUR 5474 alleges that MichaelMoore.com is a "corporate asset" of
13 Dog Eat Dog and attaches examples from the website of what purports to be express
14 advocacy. The complaint claims that this "political advocacy" amounts to a "prohibited
15 corporate contribution" by Dog Eat Dog. Moore and Dog Eat Dog argue that
16 MichaelMoore.com does not contain express advocacy.

17 MichaelMoore.com, which contains commercial and political material, appears to be
18 the personal website of Michael Moore. The commercial material on this website includes
19 promotional material for his films and books, which would appear to constitute bona fide
20 commercial activity. The political material appears to include personal blogs by Moore since
21 1998, some of which focus on the 2004 Presidential Election.¹⁷ By way of example, Moore

¹⁷ Moore posted on an irregular schedule. Some postings were added on a daily basis while on other days he posted more than one document. Some days and weeks passed without the addition of any new documents, but Moore posted at least one each month.

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1 reproduced campaign graphics from the Kerry-Edwards campaign on his site's homepage and
2 invited site visitors to "Click it. Print it. Post it."¹⁸ Similarly, the biography posted on
3 Moore's website indicates, "Michael currently spends his time reading, gardening, and
4 removing George W. Bush from the White House."¹⁹ Moore also wrote, "Vote for the man
5 who would be willing to give America his right frontal lobe. Vote Bush."²⁰ Some of this
6 material would appear to expressly advocate the election or defeat of a clearly identified
7 candidate and none of it has anything to do with commercial activity. *See* 11 C.F.R. § 100.22.
8 Accordingly, disbursements to post and maintain express advocacy communications on
9 MichaelMoore.com would constitute independent expenditures subject to the source
10 prohibitions and reporting requirements of the Act. *See* 2 U.S.C. § 431(17).

11 In this respect, it is significant that Westside, an LLC that has elected partnership
12 status with the IRS, not Dog Eat Dog, owns MichaelMoore.com. As such, the website is not
13 subject to the corporate ban on independent expenditures. An expenditure by an LLC that
14 elects to be treated as a partnership by the IRS is considered an expenditure from a
15 partnership. *See* 11 C.F.R. § 110.1(g)(2). Partnerships are permitted to make expenditures
16 but must report independent expenditures with respect to a given election aggregating in
17 excess of \$250 in a calendar year. *See* 11 C.F.R. § 109.10(b). Neither Westside, nor its
18 owners, Moore and his wife, Kathleen Glynn, have reported independent expenditures in this
19 election cycle reflecting the costs associated with express advocacy contained on the website.

¹⁸ *See* 2 U.S.C. § 441a(a)(7)(B)(iii) which provides that the financing of the dissemination, distribution, or republication of any written or graphic material shall be considered to be an expenditure.

¹⁹ Press Resources, *Michael Moore Biography*, at <http://www.michaelmoore.com/press/bio.php> (visited on Oct. 12, 2004).

²⁰ *It Takes Real Courage to Desert Your Post and Then Attack A Wounded Vet*, at www.michaelmoore.com/words/message/index.php?messageDate=2004-08-29 (last visited Sept. 30, 2004).

1 No information has been presented regarding the costs associated with creating and
2 posting express advocacy material on MichaelMoore.com, and it is unclear whether the costs
3 exceed the \$250 reporting threshold. Given the context of the entire matter under review,
4 including that neither complaint specifically alleges this possible reporting violation and this
5 Office is recommending "no RTB" or dismissal on all other allegations, this Office does not
6 recommend taking any action with respect to this website.

7 **C. Contributions Allegedly Resulting from Hyperlinks**

8 The complaint in MUR 5474 alleges that Dog Eat Dog's free or discounted hyperlinks
9 from MichaelMoore.com to the websites of MoveOn.org, ABB 2004 PAC, the Committee to
10 Re-Defeat the President, and Michael Dobbins constituted prohibited corporate contributions.
11 The complaint further alleges that these organizations shared Moore's agenda in defeating
12 Bush and, in accepting this free or discounted web space, they accepted prohibited corporate
13 contributions.

14 The respondents whose websites were hyperlinked from MichaelMoore.com – ABB
15 2004 PAC, MoveOn.org Voter Fund, and Michael Dobbins – claim that they made no
16 payments to Moore for the link and did not receive any financial benefit in return.²¹ These
17 respondents state that they did not seek a hyperlink from MichaelMoore.com, have no control
18 over which sites choose to comment on and/or hyperlink to their web pages, and did not know
19 about the existence of the hyperlinks before the complaint in MUR 5474 was filed.
20 Additionally, Dobbins, the only individual respondent whose site was identified in the

²¹ The Committee to Re-Defeat the President has not filed a response in this matter. Its disclosure reports do not indicate any payment to or from Michael Moore or Westside.

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1 complaint, states that his website is a forum for his personal expression only. These
2 respondents ask the Commission to dismiss the complaint.

3 MichaelMoore.com is owned by Westside, not Dog Eat Dog, and, therefore, any
4 contribution resulting from the hyperlinks would be subject to the Act's contribution limits for
5 partnerships, not the ban on corporate contributions. A review of MichaelMoore.com reveals
6 that it provides numerous hyperlinks to sites maintained by organizations – political
7 committees, media organizations, government agencies, humanitarian organizations, military
8 support – and individuals.²²

9 The provision of free or discounted advertising services may be regarded as an in-
10 kind contribution in certain circumstances. *See* 11 C.F.R. § 100.52(d). Through Advisory
11 Opinions, the Commission has explained that the receipt of complimentary services would
12 result in the receipt of an in-kind contribution if the free or discounted services were not made
13 available to others on equal terms.²³ Further, in the specific context of hyperlinks, the
14 Commission has reasoned that the provision of a hyperlink from a website free of charge may
15 result in an in-kind contribution if the website owner ordinarily charges others for such
16 services. *See* AO 1999-17 (Governor George W. Bush for President Exploratory Committee,
17 Inc.). Here, the complaint provided no information regarding whether Westside charged
18 others for the hyperlinks from MichaelMoore.com or otherwise treated others differently from

²² The site contains a section titled "links" which features a "link of the week," through which site visitors may navigate easily to other sites, including sites maintained by political committees. Hyperlinks are also provided from other portions of the website to allow site visitors to obtain additional information from news organizations, governmental offices, and other sources about issues raised on Moore's site. Although the site invites visitors to suggest links for inclusion on the site, respondents indicated that they did not seek the placement of hyperlinks on Moore's site and that no funds were exchanged to provide the hyperlinks.

²³ *See, e.g.*, AO 1994-10 (Franklin National Bank) (the bank provided discounted or free banking services to political committees); AO 1989-14 (Anthony's Pier 4 Restaurant) (the restaurant provided discounted catering

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1 the respondents. Nevertheless, the respondents deny that they even knew about the hyperlinks
2 and the costs associated with providing the hyperlinks were probably minimal and not likely
3 to have exceeded the \$250 reporting threshold.²⁴

4 Furthermore, with respect to Michael Dobbins, as an individual, he would not appear
5 to be potentially subject to liability for receiving free or discounted hyperlinks from
6 MichaelMoore.com.

7 IV. CONCLUSION

8 Based upon the foregoing, in MUR 5474, this Office recommends that the
9 Commission find no reason to believe that Dog Eat Dog Films, Inc. and Michael Moore
10 violated the Act in connection with production and theatrical release of the film, FAHRENHEIT
11 9/11, or the associated movie trailers, websites, or hyperlinks. This Office further
12 recommends that the Commission find no reason to believe that Michael Dobbins,
13 MoveOn.org Voter Fund, ABB 2004 PAC and Michael Archuleta, in his official capacity as
14 treasurer, and the Committee to Re-Defeat the President and David A. Lytel, in his official
15 capacity as treasurer, violated 2 U.S.C. § 441a(f) in connection with the hyperlinks from
16 MichaelMoore.com. This Office further recommends that the Commission dismiss the
17 complaint as to MoveOn.org, MoveOn.org PAC and Wes Boyd, in his official capacity as
18 treasurer, because the complaint incorrectly identified them as having been hyperlinked from
19 MichaelMoore.com.

services to political committees); and AO 1987-24 (Hyatt Corporation) (Hyatt provided discounted or complimentary hotel services to political committees).

²⁴ In 2001, the Commission observed that the costs of providing a hyperlink are often negligible or nonexistent. Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, Notice of Proposed Rulemaking, 66 Fed. Reg. 50,358 at 50,363.

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1 In MUR 5539, this Office recommends that the Commission find no reason to believe
2 Michael Moore, Harvey Weinstein, Bob Weinstein, Fellowship Adventure Group, LLC, IFC
3 Films, LLC, and Lions Gate Films, Inc. violated the Act in connection with the production and
4 theatrical release of the film.

5 **V. RECOMMENDATIONS**

6 **A. In MUR 5474:**

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1. Find no reason to believe that Dog Eat Dog Films, Inc. and Michael Moore violated the Act in connection with the complaint filed in MUR 5474.
2. Find no reason to believe that Michael Dobbins, MoveOn.org Voter Fund, ABB 2004 PAC and Michael Archuleta, in his official capacity as treasurer, and the Committee to Re-Defeat the President and David A. Lytel, in his official capacity as treasurer, violated the Act.
3. Dismiss the complaint as to MoveOn.org and MoveOn.org PAC and Wes Boyd, in his official capacity as treasurer.
4. Approve the appropriate letters.
5. Close the file.

B. In MUR 5539:

1. Find no reason to believe that Michael Moore, Bob Weinstein, Harvey Weinstein, Fellowship Adventure Group, LLC, Lions Gate Films, LLC, and IFC Films violated the Act in connection with the complaint filed in MUR 5539.
2. Approve the appropriate letters.

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3. Close the file.

5/25/05
Date

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