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BEFORE THE FEDERAL ELECTION COMMISSION

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IN THE MATTER OF MICHAEL MOORE, LIONS GATE FILMS, WEINSTEIN BROTHERS, FELLOWSHIP ADVENTURE GROUP AND IFC ENTERTAINMENT,

*Respondents.*

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**RESPONSE TO COMPLAINT**

On behalf of Respondents Lions Gate Films, Inc. and IFC Films LLC ("Distributors"), the undersigned counsel hereby responds to the Complaint filed with the Federal Election Commission ("Commission") by Jeffrey S. Smith. This response is submitted pursuant to 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.6, and in accordance with the Commission's separate letters (dated September 29, 2004) to the Distributors.

Respondents respectfully request, for the reasons outlined below, that the Commission find no reason to believe that Respondents have violated or are likely to violate the Federal Election Campaign Act, as amended (the "Act"), and that the Commission take no action on the basis of the Complaint. Absent the existence of a violation of the Act, or facts indicating that a violation of the Act is likely to occur, the Commission should find no reason to believe that further proceedings are warranted in this matter.

**THE COMPLAINT**

The Complaint alleges that the film *Fahrenheit 9/11* (the "Film") violates the Act. Specifically, the Complaint states that the Film "is a diatribe of [sic] President George W. Bush and/or his policies and/or his Administration" (Cmplt. ¶ 2) and that the "release and distribution of 'Fahrenheit 9/11,' during a Presidential Election year," thus allegedly violate the Act by

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constituting an impermissible "independent expenditure," "contribution" and/or "gift" "expressly advocating" the defeat of a "clearly identified" candidate, as those terms are defined in the Act and Commission regulations. (Cmplt. ¶ 12) The Complaint provides no detail or factual support for its accusations.

In substance, the Complaint seeks to transform the federal election laws from valuable safeguards designed to promote transparency and a level playing field among candidates and special interests into tools of opacity and advantage that would undermine the ability of commercial media entities to produce and distribute critical commentary on issues of national significance. Consistent with the view that documentary films serve a valuable role in educating the public and in the dissemination of information of substantial value to the political process, the Film does not constitute an impermissible contribution or independent expenditure under the Act, as alleged in the Complaint. Consequently, the Commission should find no reason to believe that a violation of the Act has occurred, and should close the file in this matter.

### THE LAW

The Act prohibits corporations from making a "contribution or expenditure in connection with any election" for federal office. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a),(b).

The Act and Commission regulations define a "contribution or expenditure" to include any direct or indirect payment, subscription, loan, advance, distribution, deposit, gift of money or services, or anything of value made by any person to a candidate, campaign committee or political party or organization in connection with or for the purpose of influencing any election for federal office. 2 U.S.C. §§ 431(8)(A)(i); 441b(b)(2); 11 C.F.R. § 100.52(d)(1).

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Additionally, "independent expenditures," which are included in the general prohibition against corporate contributions found in 11 C.F.R. § 52(d)(1), are those expenditures "by a person for a communication expressly advocating the election or defeat of a clearly identified candidate" that are not made in coordination with the candidate's campaign or political party. 11 C.F.R. § 100.16(a).

The Act, Commission regulations and published decisions provide several exceptions from the general prohibition against corporate contributions or expenditures, including the 'media exception,' which excludes from the definition of "expenditure" any "news story, commentary, or editorial distributed by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication...unless the facility is owned or controlled by any political party, political committee, or candidate." 11 C.F.R. § 100.132. *See also* 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. § 100.73.

Similarly, the Commission has found a 'commercial activity' exception in cases presented to it for Advisory Opinions. *See, e.g.*, FEC Advisory Opinions 1994-30; 1989-21; and 1976-50.

## DISCUSSION

### 1. MOST OF THE RESPONDENTS ARE IMPROPERLY NAMED

On its face, the Complaint incorrectly identifies multiple Respondents.

IFC Films LLC, a Delaware limited liability company, is a licensed United States co-distributor of *Fahrenheit 9/11*. Although it is not named in the Complaint, it is a sister entity to IFC Entertainment, a Delaware limited liability company and a named Respondent with no

connection to the distribution of *Fahrenheit 9/11*. IFC Entertainment is not a licensed distributor of the Film, has not undertaken any activities to promote the distribution of this Film, and will not undertake any such activities in the future. Accordingly, IFC Entertainment should be dismissed from the present matter.

Lions Gate Films Inc., incorrectly named in the Complaint as Lions Gate Films, is a Delaware corporation and is the other United States co-distributor of the Film.

**2. THE FILM DOES NOT CONSTITUTE AN “INDEPENDENT EXPENDITURE” WITHIN THE MEANING OF THE ACT**

As noted above, independent expenditures under 11 C.F.R. § 100.16(a) must satisfy two criteria. An independent expenditure must not be coordinated with a candidate’s campaign or political party, and must contain statements that constitute a form of express advocacy. *Id.* Under the Act and Commission regulations, the Film does not qualify as an independent expenditure.

**A. THE FILM IS NOT COORDINATED WITH A CANDIDATE’S CAMPAIGN OR PARTY**

If a communication is coordinated with a campaign, then it is deemed an in-kind contribution and not an independent expenditure. 11 C.F.R. § 109.20(b). In the case of *Fahrenheit 9/11*, the Distributors did not engage in any actions or conduct sufficient to establish coordination with a campaign or party. The Film was not produced or distributed at the request or suggestion of a campaign; and there was no material involvement of, nor substantial discussions with, a campaign or party in the decisions surrounding the Film’s content, audience, timing, and choice of media outlet. *See* 11 C.F.R. § 109.21(d).

**B. THE FILM IS NOT A FORM OF EXPRESS ADVOCACY**

The Complaint does not point to any part of the Film to support its claims of express advocacy or give any factual support for its allegations. While the Film includes criticism of the actions and policies of the current Administration, including President Bush, Vice President Cheney, and commentary regarding the actions of Members of Congress who are themselves candidates for federal office, the Film does not discuss the 2004 election in any way or expressly advocate the election or defeat of any candidate for federal office at the polls, either explicitly (i.e., in the form of statements such as "Defeat Bush" or "Vote for Kerry"), or indirectly.

The Film standing alone is not express advocacy within the meaning of the Act and Commission regulations, *see* 2 U.S.C. § 431(17); 11 C.F.R. § 100.16; 11 C.F.R. § 100.22, because it does not carry the unmistakable message or the call to action required for express advocacy. Instead, the Film raises issues about the policies of the current Administration. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.C.D.C. 1999) (stating that express advocacy must "in effect contain an explicit directive" which takes the form of an "action verb or its functional equivalent"). In this case, the Film contains no such unambiguous directive pertaining to the election or defeat of any candidate as required by the applicable law.

In fact, the Complaint fails to describe anything about the Film or about the Distributors' actions that allegedly constitute express advocacy.<sup>1</sup> Rather, the Complaint suggests (although again the Complaint is so vague and general that it is difficult to discern what the allegations are) that the very act of the Film's distribution in a commercial setting, and promotional activities designed to encourage theatergoers to view the Film, are themselves sufficient to constitute express advocacy in violation of the Act. Such a conclusion is improperly drawn and devoid of

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<sup>1</sup> It should also be noted that the Commission previously found no reason to believe that the Film's advertising and promotion efforts constituted impermissible electioneering communication under the Act (MUR 5467).

any support in the Act, Commission regulations, or prior precedent. To the contrary, it is clear that the Film does not expressly advocate the election or defeat of candidates for federal office.

**3. THE FILM DOES NOT CONSTITUTE AN IN-KIND CONTRIBUTION OF SOMETHING OF VALUE BY THE DISTRIBUTORS WITHIN THE MEANING OF THE ACT**

Were the Commission to consider the Film and its distribution to implicate, in some fashion, the express advocacy definition contained in the Act and Commission regulations, the Act, Commission regulations and prior Commission proceedings demonstrate that the Film falls within long-recognized exceptions to the corporate contribution ban, including the exception for commercial activity and the "media exception." Each of these tests and their applicability to the Film are described below.

**A. THE FILM SATISFIES THE COMMERCIAL ACTIVITY EXCEPTION TO THE CORPORATE CONTRIBUTION OR EXPENDITURE PROHIBITION**

Even if the Film were viewed by the Commission as containing elements of express advocacy, which it does not, the distribution of the Film itself is permissible as a commercial undertaking. In a series of Advisory Opinions over more than 15 years, the Commission has consistently found an exemption for independent expenditures that are essentially commercial, rather than political, in nature. *See, e.g.*, FEC Advisory Opinion 1994-30 at 7.

In Advisory Opinion 1994-30, the Commission considered the case of a vendor unconnected to a political committee that sought to market to consumers t-shirts and other items emblazoned with words and images expressly urging support for individual candidates (including phrases such as "X for Congress," "Y for Senate," "Vote Republican" and "Vote Democratic"). The Commission concluded that the vendor fell within the commercial activity exemption, despite the express advocacy displayed on the shirts, in view of the vendor's

assertions that (i) its shirt sales did not entail any campaign fundraising or solicitations; (ii) the activity was solely profit-oriented and not undertaken for the purpose of influencing an election; and (iii) the purchasers of the shirts would often do so for reasons other than political advocacy (e.g., political memorabilia collectors). *Id.* at 7. Moreover, the Commission stated that the vendor could target its marketing efforts at consumers with a particular political ideology without compromising its commercial activity exemption. *Id.* at 7-8.

In contrast, in AO 1989-21, a similar t-shirt vendor unconnected to any political committee was denied a commercial activity exemption because it proposed to donate ten percent of the proceeds of the shirt sales to the respective candidates' campaign committees. The Commission reasoned that such a donation would effectively make the vendor a fundraising agent for the campaign committees and dilute the commercial purpose of the sales. *Id.* at 3-4.

The Commission has identified four factors that it considers in determining whether an otherwise prohibited independent expenditure would qualify for the exemption for entrepreneurial activity, as follows:

1. Whether the sales by the company involved any fundraising activity or solicitations for political contributions;
2. Whether the company engaged in the activity for genuinely commercial purpose;
3. Whether the items were sold by the company at its usual and normal charge; and
4. Whether the items were purchased by individuals for their personal use in political expression.

*Id.* at 5-6 (citing FEC Advisory Opinion 1989-21 at 5-6).

Applying the same four factors identified in AO 1989-21 to the recent production and distribution of the Film, the Distributors easily qualify for the commercial activity exemption. Specifically, none of the proceeds from the Film have been given to any campaign or party; the Distributors are in the business of regularly producing, promoting and distributing films, including documentaries; and the actions undertaken by the Distributors in releasing the film to the public were entirely consistent with their profit motive. The fact that the Film was released during an election year should not disqualify it from an appropriate exception to the corporate contribution prohibition. To the contrary, the specific timing of the Film's release directly served the Distributors' profit interests given the content of the Film.

In addition, the Film was marketed to the public through normal distribution channels for successful motion pictures, including widespread theatrical release on standard commercial terms. Given the widespread critical acclaim, tremendous box office success, and significant media attention given to this success, the commercial aspects of the Film's distribution are clear.

**B. THE FILM SATISFIES THE MEDIA EXCEPTION TO THE CORPORATE CONTRIBUTION OR EXPENDITURE PROHIBITION**

Even were the Commission to find, *arguendo*, that the Film and its distribution contained express advocacy and further determine that the circumstances surrounding the Film's distribution failed to satisfy the well-recognized test for the commercial activity exception, the Act, Commission regulations and decisions, and court rulings make clear that media companies such as the Distributors are exempt from certain provisions related to contributions and expenditures that would otherwise be prohibited. Media entities are permitted to air programs and commentary that contain express advocacy, provided they do so in furtherance of their press function. *See, e.g.*, 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. 100.73; 11 C.F.R. 100.132; FEC Advisory Opinion 2004-30; *Reader's Digest Ass'n Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981).

Determining whether or not the media exemption covers the Film is a two-step process. First, the Commission must decide whether or not the Distributors of the Film qualify as press entities. Then, if the Distributors are deemed valid press entities, the Commission determines whether or not the Distributors acted as press entities when promoting and distributing the Film. 11 C.F.R. §§ 100.73, 100.132.

The definition of "press entity" has evolved and expanded in both the courts and Commission proceedings to include not only cable organizations (see 61 Fed. Reg. 18049 (April 24, 1996)), but also entities that primarily or frequently share information through a variety of media, including the Internet, e-mail and text messages. *Cf., e.g., Reader's Digest Ass'n*, 509 F. Supp. 1210; *Mass. Citizens for Life*, 479 U.S. 238 (1986). *See, e.g.,* FEC Advisory Opinions 1996-16; 2000-13; 2003-34; 2004-7. Furthermore, the Act does not require that a press entity devote itself entirely to communicating news. For example, C-SPAN qualifies as a press entity, but so do Showtime, MTV, and even Wal-Mart. *See* FEC Advisory Opinions 1996-48; 2003-34; 2004-7; and FEC MUR 5315. Most significantly for this Complaint, prior Commission opinions have stated on more than one occasion that news stories, commentary and editorials covered by the media exemption include documentary films. *See e.g.,* FEC Advisory Opinion 2004-30, n.9 (citing the FEC's Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65190, 65197).<sup>2</sup>

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<sup>2</sup> Like newspapers and television networks, companies that distribute documentary films perform a worthy societal function when they educate citizens about important current events and encourage them to think seriously about political issues. In this regard, film companies are very similar to book companies in that they take an individual's work, a book or a film, and through their regular commercial activity make those books and films available to the public. In its rulings, the Commission has recognized the fact that film companies and documentary films are part of the "other media" Congress sought to protect when it designed the media exemption. *See* H.R. Rep. No 93-1239, 93d Cong., 2d Sess. at 4 (1974). Similarly, the FEC in its explanation and justification for new rules regarding electioneering communications concluded that explicit exemptions for documentaries, educational programming or entertainment programming were unnecessary because the FEC interprets "news story, commentary, or editorial" to include documentaries and educational programming. 67 Fed. Reg. 65190, 65197 (Oct 22, 2002)

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The Distributors of the Film are regularly engaged in the business of producing and distributing films of all kinds, including documentaries, and are paid by theaters to show their products, including the Film. For example, Respondent Lion's Gate Films has distributed feature length films for more than a decade. Over the past few years, Lions Gate's theatrical distribution has averaged between 15 to 18 films per year, including documentaries. These theatrical releases are in addition to more than ninety films Lions Gate releases per year outside of theaters, in other formats such as videocassette and DVD. Recently, Lions Gate has distributed films such as *Girl With a Pearl Earring* and *Saw*, as well as the documentaries *Control Room* and *Mr. Death: The Rise and Fall of Fred A. Leuchter, Jr.* For its part, IFC Films LLC, in the business of distributing films since 2000, distributes approximately twelve films per year and has distributed such films as *Y Tu Mama Tambien* and *My Big Fat Greek Wedding*, as well as documentaries including *Touching the Void* and *Metallica: Some Kind of Monster*. Under the Act and Commission regulations, distribution of the Film is appropriately viewed as subject to the media exception to the Act's prohibition on corporate contributions and independent expenditures.

Finally, the media exception has long been recognized by Congress, the courts and the FEC. *See, e.g.,* 2 U.S.C. § 431(9)(B)(i); H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974); *Reader's Digest Ass'n*, 509 F. Supp. 1210; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *McConnell v. FEC*, 540 U.S. 93 (2003); 11 C.F.R. §§ 100.73, 100.132; MURs 5006, 5090, 5117, 5110, 5162, 5315; AOs 1980-90, 1980-109, 1982-44, 1996-16, 2003-34, 2004-7. Consequently, any attempt to restrict the availability of the media exception would run counter to

longstanding court decisions, FEC decisions and statutory authority, and would also raise significant constitutional concerns. *Id.*<sup>3</sup>

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<sup>3</sup> One of the many reasons for the media exemption is to avoid constitutional free speech problems with the campaign finance statutory scheme. *See e.g., McConnell*, 540 U.S. 93, 208 (2003). Were the Commission to find that the Film did constitute express advocacy, which it does not, and to find that the distribution of the Film did not fit within the media exemption or the commercial activities exemption, which it does, Commission action to penalize the Film's distribution would run directly counter to the protections inherent in the First Amendment to the United States Constitution. *See id.*; *see also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Reader's Digest Ass'n*, 509 F. Supp. 1210; MURs 5110, 5315.

**CONCLUSION**

For the foregoing reasons, Respondents request that the Commission find that there is no reason to believe that a violation of the Act has occurred or will occur with respect to the allegations of the Complaint, and close the file in this matter.

Date: November 12, 2004

Respectfully submitted,

By:  \_\_\_\_\_

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