

Ahmadinejad's Coming War for Islamic Revival and Obama's Politics of Defeat; and Farewell Israel: Bush, Iran, and the Revolt of Islam. Farewell Israel was completed in 2007 and Atomic Jihad was completed in 2010.

Highway 61 Entertainment, LLC has produced the following investigative and revelatory musical history documentaries: Bob Dylan Revealed; Bob Dylan Never-ending Tour Diaries; Drummer Winston Watson's Incredible Journey; Rolling Thunder and the Gospel Years: Bob Dylan 1975-1981; Bob Dylan World Tours 1966-1974: Through the Camera of Barry Feinstein; 1966 World Tour: The Home Movies Through the Camera of Mickey Jones; and Bob Dylan's Jesus Years: Busy Being Born Again. Some of these documentaries have been collected into an anthology: Bob Dylan: The Unauthorized Documentaries. Highway 61 Entertainment, LLC also produces fictional accounts that are written and produced in the documentary format. These include Elvis Found Alive and Paul McCartney Really is Dead: The Last Testament of George Harrison.

After years of research and planning, Highway 61 Entertainment, LLC completed in April 2012, the production of the documentary Dreams From My Real Father. In July 2012, Gilbert established DFMRF, LLC under California law for the specific purpose of distributing and promoting Dreams From My Real Father. Gilbert is the manager of DFMRF, LLC. Affidavit ¶3.

Highway 61 Entertainment, LLC's website describes Dreams From My Real Father as follows:

At age 18, Barack Obama admittedly arrived at Occidental College a committed revolutionary Marxist. What was the source of Obama's foundation in Marxism? Throughout his 2008 Presidential campaign and term in office, questions have been raised regarding Barack Obama's family background, economic philosophy, and fundamental political ideology. Dreams From My Real Father is the alternative Barack Obama "autobiography," offering a divergent theory of what may have shaped our 44th President's life and politics.

In Dreams From My Real Father, Barack Obama is portrayed by a voiceover actor who chronicles Barack Obama's life journey in socialism, from birth through his election to the Presidency. The film begins by presenting the case that Barack Obama's real father was Frank Marshall Davis, a Communist Party USA propagandist who likely shaped Obama's world view during his formative years. Barack Obama sold himself to America as the multi-cultural ideal, a man who stood above politics. Was the goat herding Kenyan father only a fairy tale to obscure a Marxist agenda, irreconcilable with American values?

This fascinating narrative is based in part on 2 years of research, interviews, newly unearthed footage and photos, and the writings of Davis and Obama himself. Dreams from My Real Father

The Complaint also alleges that the Respondents' September 11, 2012 advertisement in the New York Post promoting Dreams From My Real Father is an independent expenditure. Count II of the Complaint alleges that, in making this independent expenditure, the Respondents violated 2 U.S.C. §§434(b) and (c) by failing to file a statement identifying persons who contributed more than \$200.00 and a certificate of independence. Complaint ¶ 57. Count IV the Complaint alleges that, in making this independent expenditure, Respondents violated 2 U.S.C. §441d(a)(3) by their failure to include FEC disclaimers on the New York Post advertisement. Complaint ¶ 58.

However, the Promotional DVDs and the Post Advertisement are not independent expenditures and no violation of FECA has occurred. Neither the Promotional DVDs nor the Post Advertisement are independent expenditures because the communications do not expressly support or advocate for a federal candidate. In addition, the Promotional DVDs and the Post Advertisement are not independent expenditures because they fall under the press exemption and further because they constitute *bona fide* commercial activity.

**The Promotional DVDs and the Post Advertisement
do not constitute independent expenditures.**

Under 11 CFR 100.16, the term *independent expenditure* is defined as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate."

Neither the Promotional DVDs (including the accompanying promotional material) nor the Post Advertisement contain any express advocacy communications. The Complaint does not cite to evidence of express advocacy language in any communication and Mr. Gilbert has affirmed there was none. Affidavit ¶5.

The Complaint and the February 14, 2014 supplement to the Complaint entirely fail to identify any language in the Dreams From My Real Father documentary or any associated promotional material (including the DVD sleeve or the New York Post advertisement) that constitute the requisite express advocacy that would trigger independent expenditure reporting.

**Respondents and Respondents' promotional activities
are entitled to the press exemption.**

Under FECA, "[t]he term 'expenditure' does not include . . . 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). This exclusion is known as the "press exemption".

The FEC has historically conducted a two-step analysis to determine whether the media exemption applies. First, the FEC asks whether the entity engaging in the activity is a

press or media entity. Second, the FEC applies the two-part analysis presented in Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to establish:

- That the entity is not owned or controlled by a political party, political committee, or candidate; and
- That the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its "legitimate press function").

Respondents meet all of these requirements for the press exemption and therefore neither the Promotional DVDs nor the Post Advertisement are subject to the reporting and disclaimer requirements under FECA.

Respondents qualify as bona fide media entity(s).

FEC Advisory Opinion 2010-08 (Citizens United) concluded that for purposes of the media exemption under the definition of "expenditure" in 2 U.S.C. §431(9)(B)(i) and 11 CFR 100.29(c)(2), the term "news story, commentary, or editorial" includes documentaries. Page 5, Footnote 8. In so ruling, the FEC reasoned that the interpretation of the language "news story, commentary or editorial" contained in the definition of expenditure should follow the same definition of that language contained in the electioneering definition in 11 CFR 100.29(c)(2). See EXPLANATION AND JUSTIFICATION FOR FINAL RULES ON ELECTIONEERING COMMUNICATIONS, 67 FR 65190, 65197 (Oct. 23, 2002).

AO 2010-8 restated the FEC's position that whether an entity qualifies as a press entity is a facts and circumstances determination. For entities that produce and promote documentaries, the press exemption has been met only if the entity produces documentaries on a regular basis. In AO 2004-30, the FEC had ruled that Citizens United was not entitled to the press exemption for its documentaries because it had only produced two documentaries over the preceding sixteen years. In contrast, in AO 2010-08, the FEC ruled that Citizens United was now entitled to the press exemption because it had produced and distributed fourteen films in the years since 2004.

Whether the entity has a particular viewpoint is irrelevant to whether it is entitled to the press exemption. AO 2010-08 states that "an entity otherwise eligible for the press exemption does not lose its eligibility because of a lack of objectivity in a news story, documentary, or editorial." Page 6.

Under AO 2010-08, Respondents qualify for the press exemption as press entities. Gilbert, through his Highway 61 Entertainment, LLC production company, has produced a sizable number of documentaries, including (but not limited to) political and historical documentaries. Highway 61 Entertainment, LLC has produced documentaries with the regularity to be considered a press entity.

That DFRMF, LLC does not itself produce documentaries is irrelevant. In AO 2010-08, the FEC determined that a documentary produced or distributed by Citizens United's affiliated entities were treated as though produced and distributed by Citizens United for this purpose if Citizens United maintained control over the entities. Page 2, Footnote 1.

Respondents are not controlled, owned or affiliated with a political party, political committee or candidate.

Respondents also meet the criteria of the press exemption because they are not controlled, owned, or affiliated with a political party, political committee, or candidate. DFMRF, LLC or Highway 61 Entertainment, LLC are not controlled by a political party, political committee or candidate. Affidavit ¶6. Gilbert is not affiliated with a political party, political committee or candidate. Affidavit ¶7.

Respondents are engaging in a legitimate press function in promoting the documentary.

The FEC has stated there are two considerations in determining whether an entity, in conducting any particular activity, is engaging in its legitimate press function: (1) whether the entity's materials are available to the general public, and (2) whether they are comparable in form to those ordinarily issued by the entity. AO 2010-08, citing FEC v. Mass. Citizens for Life, 479 U.S. 238, 251 (1986) ("MCFL").

Highway 61 Entertainment, LLC's materials are publicly available for purchase on Highway 61 Entertainment, LLC's website. DFMRF, LLC's current contracts with various distribution channels allow the public to order a DVD from many websites. The documentary was also available on streaming services. Although these forms of distribution are not free to the public, AO 2010-08 notes that whether payment is required is not a determining factor in meeting this requirement.

The Dreams From My Real Father documentary also meets the "comparable in form" test imposed by AO 2010-08 and MCFL. The documentary is similar in style and production to both those political and non-political documentaries produced by Highway 61 Entertainment, LLC. All of Highway 61 Entertainment, LLC's documentaries (including Dreams From My Real Father) are produced in-house. In particular, AO 2010-08 focused on whether Citizens United paid for its documentaries to be broadcast. Highway 61 Entertainment, LLC did not pay to air Dreams From My Real Father on broadcast television; instead, DFMRF, LLC's and Gilbert's ever-present goal was to enter into a contract whereby a broadcaster or theatrical distributor would pay DFMRF, LLC to air or distribute the documentary.

AO 2010-08 states that "Courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product." It cites Phillips Publ'g, 517 F. Supp. 1308 (D.D.C. 1981) at 1313 (citing Reader's Digest, 509 F. Supp. 1210 (1981) at 1215) for this proposition. The facts of AO 2010-08 specifically contemplated that the press entity had both sold DVDs and provided free DVDs to a mass audience (in that case, as a newspaper insert in five newspapers in Florida, Nevada, and Ohio).

Both the Promotional DVDs and the Post Advertisement were undertaken to promote the Dreams From My Real Father documentary. The distribution of free copies of the documentary on DVD was intended to create publicity for the documentary and to create requisite consumer demand for the documentary which would lead to a theatrical release or a broadcast of the documentary. This promotional tactic is consistent with other independent filmmakers' promotional strategies to get their films to a larger audience. The FEC concluded

that Citizens United was entitled to the press exemption when engaging the same approach. AO 2010-08, Page 2.

The Post Advertisement is clearly an advertisement to promote the underlying documentary.

Respondents' promotional activities represent *bona fide* commercial activity.

The FEC has further recognized an exception to the application of FEC regulations for communications with an underlying commercial purpose and lack of political purpose. In AO 1994-30, the FEC concluded that an entity whose principal business was the manufacture, advertising and sale of assorted political paraphernalia, such as t-shirts, bumper stickers, and hats containing express advocacy, would not constitute an expenditure by the entity. In reaching this conclusion, the FEC examined the totality of the circumstances, including: (1) whether the sales of the merchandise involve fundraising activity or solicitations for political contributions; (2) whether the activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election; (3) whether the items are sold at the vendor's usual and normal charge; and (4) whether the purchases are made by individuals for their personal use. The FEC stated that the content of the messaging is not a factor in whether messaging is a *bona fide* commercial activity.

The FEC found no reason to believe that the production and promotion of Fahrenheit 9/11 by Michael Moore and his production company Dog Eat Dog Films, Inc. constituted an independent expenditure in violation of FECA. See MUR 5474 and 5539 (June 8, 2005). The First General Counsel's Report in MUR 5474 and 5539 (the "Report") asserted that the promotion and distribution of Fahrenheit 9/11 was not subject to FECA because they consisted of *bona fide* commercial activity. The Moore's Fahrenheit 9/11 documentary contained criticism of President Bush and was released and promoted during the 2004 presidential campaign. Moore himself made statements at the time of release and in promoting the film about opposing the incumbent president. Nonetheless, it was considered *bona fide* commercial activity.

The Respondents' efforts in promoting the documentary, including the Promotional DVDs and the Post Advertisement, were made for a *bona fide* commercial purpose. As to the first factor, no federal candidate or political committee received proceeds from the sales of the Dreams From My Real Father or from Gilbert, DFMRF, LLC or Highway 61 Entertainment, LLC. Affidavit ¶8.

As to the second factor, (whether the activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election), the Respondents distributed and promoted their film as a profit-making activity. Respondents solicited investors based on this premise. Affidavit ¶4.

As part of their business, Respondents must promote their documentaries. Respondents promoted Dreams From My Real Father in a variety of ways. For instance, just as many conventional film promoters often do, Respondents' purchased newspaper advertising (including the Post Advertisement) to advertise the existence and the availability of the film to potential customers. This promotional activity is in keeping with the *bona fide* commercial nature of Respondents' business.

As outlined above, the Promotional DVDs were distributed directly to households in an attempt to encourage theater companies or television broadcasters to purchase the film for a wider showing. The film industry is a high-risk, high-reward industry--had its strategy been successful, DFMRF, LLC would have generated outsized returns for its investors, just as the films The Passion of the Christ and Fahrenheit 9/11 returned large returns for their investors. The fact that DFMRF, LLC's admittedly high-risk strategy was not successful is not evidence of the underlying intent of the parties and should not be grounds for imposing requirements under FECA.

As to whether the items are sold at the vendor's usual and normal charge (the third factor), Highway 61 Entertainment, LLC sold DVDs of Dreams From My Real Father at retail prices on its website. DFMRF, LLC made DVDs available at retail through its distribution deal with MVD Entertainment. As to whether the purchases are made by individuals for their personal use (the fourth factor), Respondents have no knowledge as to why any particular purchase of a DVD documentary was made, but have no indication that consumer purchases of the documentary DVD were motivated by anything other than personal interest or for personal use.

Respondents' activities in producing and promoting the Dreams From My Real Father documentary closely follow the facts in MUR 5474 and 5539. Respondents are clearly in the business of making, promoting and distributing documentary films, as evidenced by their long list of prior and subsequent films on a variety of topics.

In short, the commercial factors set forth in AO 1994-30 demonstrate that the documentary and accompanying promotional activity qualify and must be treated as *bona fide* commercial activity.

The suspension of Highway 61 Entertainment, LLC's business registration was a mistake and is immaterial to the allegations contained in the Complaint.

The Complaint references the suspension of Highway 61 Entertainment, LLC's business registration and the timing of the formation of DFMRF, LLC shortly before the Promotional DVDs were first distributed. The Complaint concludes, on that evidence, that there is "reasonable justification" to suspect that someone other than the Respondents provided funds to DFMRF, LLC for a political purpose.

These two events are irrelevant to the analysis of whether Respondents' communications were independent expenditures. Highway 61 Entertainment, LLC's business registration was "suspended" by a mistaken action of the California Franchise Tax Board, because of miscommunication with the California Franchise Tax Board about Highway 61 Entertainment, LLC's tax status. The Respondent has not received confirmation that the error was corrected. However, the mistake was confirmed by a letter from George Lippert, the Respondents' accountant, to the California Franchise Tax Board. See Attachment B. DFMRF, LLC was organized to distribute the Dreams From My Real Father documentary. It is common in the film industry to separate production and distribution activities and to create a separate entity for distribution, as did Michael Moore in distributing Fahrenheit 9/11.

The Respondents have reasonably relied on prior advisory opinions and closed enforcement matters as precedent for their activities.

In determining their course of action, the Respondents relied on the FEC advisory opinions and closed enforcement matters cited in this response. In particular, the Respondents relied on the conclusion set forth in AO 2010-08, pertaining to whether Citizens United is entitled to the press exemption. Respondents acted in compliance with the holdings in those cases and conducted their activities accordingly.

The FEC itself has encouraged organizations and individuals to look to its closed enforcement matters, as well as its advisory opinions for guidance as to how the FEC applies the legal principles of FECA. See Political Committee Status, 72 Fed. Reg. 5,595-02, 5,604.

Equity demands that the FEC follow its precedents and not assess penalties against Respondents where the Respondents have reasonably relied on prior FEC guidance. Respondents' facts follow closely to the facts contained in AO 2010-08, which included the free distribution of DVD copies of documentaries during a presidential campaign, that to further investigate or penalize Respondents would constitute an arbitrary and capricious action by the FEC.

Conclusion

The allegations of the Complaint are false. The Promotional DVDs (and accompanying items) and the Post Advertisement do not constitute independent expenditures. The Promotional DVDs and the Post Advertisement did not contain express advocacy in support of or in opposition to a candidate, the Respondents and the Promotional DVDs and the Post Advertisement qualify for the press exemption from the application of FECA as independent expenditures, and the Promotional DVDs and the Post Advertisement are consistent with *bona fide* commercial activity exempt from FECA regulation. Accordingly, there is and was no

violation of FECA. Respondents respectfully request that the FEC find no reason to believe that a violation has occurred as to the Complaint, dismiss the Complaint, and close the MUR.

Respectfully Submitted,



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