FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

MEMORANDUM

TO: Commissioners
Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: August 3, 2004

SUBJECT: Concurring Statement of Reasons MUR 5467
By Chairman Bradley A. Smith and
Commissioner Michael E. Toner

The attached document is being circulated for a 48-hour review prior to public release. Absent objection, the Office of General Counsel will include this statement in the public record file in this case.

cc: Vincent Convery

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Michael Moore	)	
Lions Gate Entertainment Corp.	)	
Lions Gate Films Inc.	)	
Cablevision Systems Corp.	)	
The Independent Films Channel, LLC	)	MUR 5467
Fellowship Adventure Group, LLC	)	
Harvey Weinstein	)	
Bob Weinstein	)	
Showtime International, Inc.	)	
Viacom International Inc.	)	

CONCURRING STATEMENT OF REASONS
CHAIRMAN BRADLEY A. SMITH
COMMISSIONER MICHAEL E. TONER

A complaint filed on June 24, 2004 alleged that the above-named respondents were about to violate the Federal Election Campaign Act (FECA) because they had previously aired broadcast advertisements containing images of President Bush and other federal candidates, as part of their efforts to promote Michael Moore's controversial movie "Fahrenheit 9/11." The complaint alleged that if these broadcast advertisements were run after July 30, 2004, the electioneering communications provisions of FECA would be violated. *See* 2 U.S.C. §434(f)(3)(A) and 2 U.S.C. §441b(c)(1).

In a jointly filed response, several Respondents requested that the matter be dismissed because only Fellowship Adventure Group, LLC, IFC Films LLC and Lions Gate Films, Inc., (who are the film's distributors) control domestic advertising and marketing. As such, they bear sole responsibility for the content of any paid advertising. For their part, the distributors contend that they have no plans to air any advertisement within 30 days before the Republican National Convention or 60 days before the general election that would qualify as an electioneering communication, because no such advertisement will identify any federal candidate.

On July 28, 2004, the Federal Election Commission (FEC) voted unanimously to accept the recommendations of the Office of General Counsel (OGC) and dismiss the

allegations in MUR 5467. The OGC reasoned that the FEC cannot entertain complaints based upon mere speculation that someone might violate the law, and "the complaint cites no information from which from which a fair inference can be drawn that Respondents plan to broadcast . . . electioneering communications." *See* MUR 5467, First General Counsel's Report at 5. The OGC therefore recommended dismissal because the complaint "presents nothing more than idle, unsupported speculation." *Id.* at 6. We agree. We write here to stress the importance of this case as a matter of Commission policy not to entertain speculative complaints.

True, dismissing the case on this basis will be unsatisfactory to some. Were this case to proceed, a fundamental, substantive legal issue likely to be raised by the respondents would be whether or not the exemption from the electioneering communications provisions for the press applies to movie distributors. *See* 2 U.S.C. §434(f)(3)(B)(1).[1] But the impact of this defense would go far beyond the question of whether or not the respondents could run advertisements for the film that would otherwise constitute "electioneering communications." For one thing, if the press exemption does not apply to movies in the electioneering communications context, it almost certainly would not apply in other parts of the Act. Thus, a substantive finding that advertisements for the film are not protected by the press exemption of 2 U.S.C. §434(f) would suggest that the film and its advertising and distribution are also not protected by the general press exemption of 2 U.S.C. §431(9)(B)(i), which uses substantially identical language. In that case, if the film were deemed to expressly advocate the election or defeat of a federal candidate, its production and distribution would seem to entail numerous violations of the law, including the ban on corporate expenditures, 2 U.S.C. §441b, the ban on contributions by foreign nationals, 2 U.S.C. §441e, the disclosure provisions of 2 U.S.C. §441d, reporting requirements of 2 U.S.C. §434, and perhaps various organizational and registration requirements of 2 U.S.C. §§432 & 433.

But the issue goes further still. The argument that movies are not covered by the press exemption is based on a narrow reading of the statute, which refers in pertinent part specifically to, "a news story, commentary, or editorial distributed through the facilities of any broadcast station...;" 2 U.S.C. §434(f)(3)(B)(i), and, "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication... ." 2 U.S.C. §431(9)(B)(i). Films are not obviously covered by this language. But if the statutory language is to be interpreted so narrowly, it must be noted that books would not be covered either. Numerous books, then, would also be illegal, *see e.g.* Bill Press, *Bush Must Go: The Top Ten Reasons Why George Bush Doesn't Deserve a Second Term* or Ann Coulter, *High Crimes and Misdemeanors: The Case Against Bill Clinton*, and subject to government suppression under the campaign finance laws.

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[1] Historically the Courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product. See *Federal Election Commission v. Phillips Publishing, Inc.* 517 F. Supp. 1307 (1981) and *Readers Digest Association, Inc. v. Federal Election Commission*, 509 F. Supp. 1210 (1981). Thus, if film distribution is protected, so are ads for the film.

On July 20, 2004, the Commission received a formal petition for a rulemaking pursuant to 11 C.F.R. §200.2, suggesting that the Commission use its regulatory authority to provide an exemption for movies such as Moore's. This petition, filed by the law firm of Perkins Coie, seeks a separate exemption for the promotion of documentary films that might otherwise meet the requirements of an "electioneering communication" within the meaning of the FECA. However, without prejudging the issue, this may be difficult. The statute specifically prohibits the Commission from fashioning any exemption for electioneering communications that "promote, support, attack, or oppose" a federal candidate, *see* 2 U.S.C. §434(f)(3)(B)(iv), and it may be difficult to develop an acceptable definition of "promote, support, attack or oppose" that would not pull within its ambit a film such as Fahrenheit 9/11.

Thus, we understand the anxiety of those who would like the Commission to rule on the press exemption in this arena. However, in the instant matter, the Commission cannot and should not address this point because it was not before us. Over the years, there has sometimes been a tendency to file speculative complaints either for political purposes, or to promote particular visions of the law. We do not suggest that the complainant here had any motive beyond concern for the proper enforcement of the law. But it is important that the Commission reject all speculative complaints, whatever the motivations behind them, in order to preserve the integrity of the enforcement process and to focus its limited resources on actual violations of the law. Furthermore, it is important for the Commission, in deciding such a complex issue as the application of the press exemption, to have input through a respondent's brief,[2] or through an Advisory Opinion Request and the public comment that that procedure provides.

Notwithstanding the factual and legal posture of MUR 5467, we suspect that many people are concerned that leaving this matter unresolved for the time being might chill important political speech in an election season. However, the Supreme Court addressed this issue in *McConnell v. FEC*, noting that, "should [persons] feel that they need further guidance, they are able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the meaning of the law.'" 124 S. Ct. 619, 675 (citations omitted), quoting *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 580 (1973). The Commission is perfectly prepared to rule on the application of the press exemption when properly presented through an Advisory Opinion Request or in an enforcement action.

August 2, 2004

Bradley A. Smith /vw

Bradley A. Smith, Chairman

Michael E. Toner /vw

Michael E. Toner, Commissioner

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[2] It goes without saying that the respondents in this action are under no obligation to brief an issue not necessary to their defense.