

# HARMON, CURRAN, SPIELBERG & WEISENBERG, LLP

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2004 FEB -9 A 11:00

January 16, 2004

Office of General Counsel  
Attn: AO Request  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

AOR2004-07

Dear Sir or Madam:

This request for an Advisory Opinion is submitted on behalf of MTV Networks, a division of Viacom International, Inc., pursuant to 2 U.S.C. § 437f and 11 C.F.R. § 112.1 regarding the conduct of a "Prelection," a mock Presidential election to be held shortly before the general election in November, 2004.

## THE REQUESTORS

Viacom, Inc. ("Viacom") is a leading global media company, with preeminent positions in broadcast and cable television, radio, outdoor advertising and online. With programming that appeals to audiences in every demographic category across virtually all media, the company is a leader in the creation, promotion and distribution of entertainment, news, sports, music and comedy. Viacom's well-known brands include CBS, MTV, Nickelodeon, VH1, BET, Paramount Pictures, Viacom Outdoor, Infinity, UPN, Spike TV, TV Land, CMT: Country Music Television, Comedy Central, Showtime, Blockbuster, and Simon & Schuster. Viacom is a publicly traded company.

Viacom International, Inc. ("Viacom International") is a wholly-owned subsidiary of Viacom. MTV Networks ("MTVN") is a division of Viacom International. MTVN owns and operates many of the most popular basic cable television programming services. MTV: Music Television ("MTV"), the world's most widely distributed television network, reaches more than 380 million subscribers in 166 countries and territories. Nickelodeon serves more than 161 million subscribers worldwide via localized channels, branded blocks and individual programs. VH1 reaches more than 100 million subscribers around the world. Spike TV is the first network for men and has more than 90 million subscribers in North America. Other services include CMT, Nick at Nite, TV Land, MTV2 and The Digital Suite from MTV Networks. Viacom recently acquired the remaining shares of Comedy Central, the only all-comedy network, which joined MTV Networks' collection of basic cable channels. MTVN is also involved in a variety of entertainment businesses that extend its brands, including films, books, online and consumer products.

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Viacom, Viacom International, MTVN, and their corporate affiliates are not owned or controlled by any political party political committee or candidate.

### CHOOSE OR LOSE BACKGROUND

In 2004, MTV is renewing its commitment to empowering America's young people in the political system with the return of Choose or Lose. Begun in 1992, Choose or Lose has dramatically increased youth awareness about the issues and elections that affect them most.

Choose or Lose is MTV's award-winning, year-long voter education and registration campaign that will consist of news programming, public service announcements, a comprehensive and interactive website, concerts, contests and grassroots events focusing on the issues pertaining to - and affecting - young people.

In 1992, MTV News went on the road with the candidates, covering the primaries and explaining the political process to MTV's audience. MTV's election reports ran up to twice as long as typical networks news stories. That year, Choose or Lose was credited with dramatically increasing voter turnout, helping lead to the highest voter turnout among 18-24 year-olds since 1972.

In 1996, MTV took to the streets with the Choose or Lose bus which toured some 80,000 miles through 48 states. More than 100 hours in air time was devoted to election issues relevant to young people.

And in 2000, Choose or Lose connected with America's youth like only MTV can by hitting the streets guerrilla-style with three teams of young reporters entirely new to the presidential campaigns.

In all, and working with Rock the Vote, Youth Vote Coalition and other partners, MTV has registered more than 3 million new young voters since Choose or Lose began almost twelve years ago.

In 2004, the primary mission for Choose or Lose is to get more than 20 Million 18 to 30 year olds to the polls in November. To do that, Choose or Lose will educate and empower them about their stake in the future of this country: listen to and amplify their views; get them informed about the political process and their potential power as a voting block; get them registered and committed to voting; and hold politicians' feet to the fire on the issues that matter most.

THE MTV PRELECTION

Through Choose or Lose, MTV proposes giving its audience an unusual voice in the presidential election through a national online vote. Millions of young people will be able to participate in the MTV Prelection and cast their vote for who they think should be President of the United States. Voting will occur over an extended period of time, probably more than several days, sometime around the end of September and early October. The results would be announced shortly thereafter, but not later than November 2<sup>nd</sup>, 2004.

Registration and Voting

To participate in the MTV Prelection, voters must register. Both voting and registration will be available online, through [www.chooseorlose.com](http://www.chooseorlose.com) and/or [www.mtv.com](http://www.mtv.com), and potentially via a toll-free telephone number. Participants must provide sufficient personally identifying information to enable third-party verification of their identity and registered address. Participants will be issued a unique user ID to help prevent multiple voting. The intent is to preserve the integrity of the election, rather than conduct a typical online poll with wholly unscientific results.

Registration and voting will be open to any U.S. resident or U.S. citizen over the age of 12. Participants will be offered the opportunity to register to vote using an online tool owned by Rock the Vote. In addition to allowing participation in the Prelection, this online tool will offer users who will be 18 years old or older on Election Day (November 2<sup>nd</sup>, 2004) the ability to print out and sign a completed voter registration form and will provide necessary information for submitting it to their state of residence. There may also be additional ways in which participating in the Prelection assists its participants in registering to vote in their state, such as providing free envelopes or stamps to send in their registration.

Registration and voting in the Prelection will be encouraged by offering incentives and prizes that will be awarded to participants at random. Registration for the Prelection will likely be available at the beginning of February and be ongoing throughout the year.

Promotion

Prelection registration and voting will be promoted via MTV's Choose or Lose on-air, online, and grassroots programming and initiatives. It will be integrated into a wide variety of on- and off-air initiatives planned by MTV and its Choose or Lose campaign partners, such as the Movie Awards, Video Music Awards, concert events, grassroots initiatives, and online. This integration may include on-air copy that encourages young people to go online and register, celebrities suggesting young people register and vote, incentives tied to registering and/or voting in the Prelection, emails, and cross-linking to other websites, among other things.

At a relevant point later in the campaign when major presidential candidates are determined, it is likely that the candidates' names and/or pictures will be used on-air to encourage the participation of young people in the Prelection.

Candidates

In recent elections, there have been scores of declared candidates for the Presidency, excluding those seeking the nomination of one of the major parties. In order to most fully and fairly achieve the educational purposes of the Prelection, MTV would prefer to rely upon the nonpartisan, objective criteria developed by the Commission on Presidential Debates to identify those candidates who have achieved a level of electoral support such that they realistically are considered to be among the principal rivals for the Presidency. These are:

1. Evidence of Constitutional Eligibility – the candidate must be at least 35 years of age; a Natural Born Citizen of the United States and a resident of the United States for fourteen years; and otherwise eligible under the Constitution.
2. Evidence of Ballot Access -- the candidate must qualify to have his/her name appear on enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2004 general election.
3. Indicators of Electoral Support – the candidate must have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination.

However, until both major parties have held their presidential nominating conventions, it will be impossible to apply these criteria. In order to permit advance planning and make voter education materials (discussed below) available in a timely manner, different criteria will be applied until both major party nominees are officially determined and have been able to formally qualify for ballot access. Therefore, as an alternative, MTV proposes eliminating that second criterion, and including only those candidates who are able to demonstrate the requisite electoral support of criterion 3, as well as the constitutional eligibility of criterion 1.

As another alternative, MTV would include in the Prelection the presumptive nominees of those parties which achieved over 15% support in the popular vote in the 2000 Presidential election, as well as any other candidate who meets criterion 3 above, a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination. "Presumptive nominee" would be defined as in AO 2003-23, as a candidate who at any point prior to the party's Presidential nominating convention has received enough pledged delegates to win nomination on the first ballot at the 2004 convention. The

pledged delegates must be registered with and certified by the appropriate officer of the national party committee.

### Voter Education

A critical component of the Prelection will be to allow participants to become informed voters, both for purposes of the Prelection and, it is hoped, to carry forward to the election that will follow. The ChooseorLose.com web site will incorporate information on the participating candidates compiled by Project Vote Smart ([www.vote-smart.org](http://www.vote-smart.org)). Links will be provided to the candidates' own web sites, and likely to other nonpartisan sources of information available on the web.

Participating candidates will be encouraged in particular to address issues that young people say are important to them. Although there are no plans at this time to ask candidates to submit statements or position papers to MTV – for either on-air or online usage - they may be asked for such submissions at a later date. For example, candidates may be asked to be interviewed on air, or they may be provided given amounts of air time, to address specific issues that young people have selected via MTV research or polling. Transcripts of those interviews or candidate addresses may be available via the web. There may be interactive forums – both on-air and online – that allow Prelection participants to meet the candidates, learn about their positions, and voice their questions, concerns or opinions. Whatever specific method is adopted, each qualifying candidate will be accorded an equal opportunity to participate and make his/her views known. This would mean an equal amount of time to speak on air in a comparable time slot, or equal word limits for any candidate statements provided.

One key purpose of the Prelection is to encourage the candidates to devote time to addressing issues of particular concern to young voters. It is critical to the success of this project that Prelection voters be given the opportunity to learn for themselves about the candidates, so that the results truly demonstrate the inclinations of participating voters. MTV therefore recognizes that it is critical to be scrupulously even-handed, nonpartisan, and unbiased in the presentation of voter education materials.

### Voting

The actual voting in the Prelection will take place on line and potentially via the toll-free number during a period of time – probably longer than several days – around the end of September and early October 2004. The results would be announced shortly thereafter, but not later than November 2<sup>nd</sup>, 2004. Third-party verification, e-mail confirmation, and unique participant IDs will be used to ensure the integrity of the results.

### Results

While all U.S. residents and U.S. citizens over the age of 12 will be encouraged to register and vote in the Prelection, two different sets of results will be derived. First would be "total voters." This would be the total number of people that registered and

voted in the Prelection regardless of age, resident status, or confirmed address. Second would be “confirmed voters.” These would be U.S. citizens 18 to 30 years old who will have been verified (through a third party) to live at one certain address. Both sets of results will be published on the web, as well as announced on air.

MTV anticipates that the publication or announcement of the results of the voting in the Prelection will be reported in one of two ways.

First, the results might simply be reported as results, perhaps accompanied by some analysis to examine or explain the outcome. They will be reported as the vote of MTV’s audience, and not presented as an endorsement by the corporation.

Second, the results might be framed as an endorsement of a candidate by MTV News, much like the New York Times or Washington Post might endorse a candidate. However, in this instance, instead of using a traditional editorial board consisting of a news organizations’ editors, MTV would use its audience as the company’s editorial board.

Regardless of whichever of the two approaches above MTV chooses, Prelection participants will receive follow-up messages encouraging them to vote and to continue to educate themselves about the candidates. These messages will be sent to all participants who are eligible to vote in the election (i.e., not to those under 18 years old), and will not be tied in any way to how the participant voted in the Prelection. While they will not in any way be coordinated with any candidate or party, they may refer to the results and/or analysis of the Prelection.

With the exception of the possible announcement of an editorial endorsement, none of MTV’s communications in connection with the Prelection will include express advocacy. Activities will be coordinated with candidates only to the extent necessary to arrange logistics, such as setting up an on-air interview, obtaining voter education information, or providing to all candidates involved information highlighting the issues that MTV believes are of particular importance to young voters so the candidates may address them.

### QUESTIONS

Viacom, Viacom International, MTVN and MTV seek a ruling that none of the funds expended for the production or promotion costs of the Prelection will constitute a corporate contribution, expenditure, or electioneering communication. Specifically, requestors seek a ruling that the costs of the following elements may permissibly be paid with corporate funds:

1. Communications promoting and encouraging participation in the Prelection, whether made on air, via the web, or at events. Note that such communications may include reference to specific parties or candidates by, for instance, including a picture of all qualifying candidates or the logos of their parties.

2. Providing the above-described educational materials online or in community events across the country.
3. On-air interviews or provision of air time (in equal amounts to all qualifying candidates) to encourage informed participation in the Prelection.
4. Announcing and publicizing the results of the Prelection – whether or not they are framed as an endorsement by MTV News - on air, via the web, and through other fora.
5. Sending follow-up messages to Prelection participants that may refer to the results to encourage them to vote in the subsequent election.

### Analysis

Requestors believe that all of these activities and the project as a whole are exempted from the definitions of contributions, electioneering communications and expenditures by the corresponding media exceptions. The entire process is a form of commentary and reporting on the election process, intended to stimulate the interest of MTV's audience in the actual Presidential election.

The statutory definitions of “expenditure” and “electioneering communication” both include exemptions for news programming conducted by bona fide media companies.

The 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).

Similarly:

The term “electioneering communication” does not include a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate. 2 U.S.C. § 434(f)(3)(B)(i).

The associated regulations also set out these exemptions. *See* 11 C.F.R. § 100.132 and § 100.29(c)(2). The regulations further state a corresponding exception to the definition of “contribution.” 11 C.F.R. § 100.73.

In construing the statutory language, courts have not imposed rigid limitations on the definitions of “news story, commentary, or editorial.” Rather, the inquiry has been to determine first whether the entity in question is a genuine press entity, whether it is owned or controlled by any political party or candidate, and finally whether it was acting in its capacity as a press entity with respect to the conduct in question. *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1313 (1981).

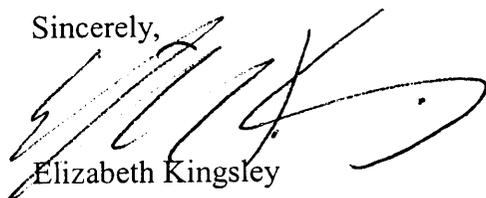
The Commission has quite recently recognized Viacom and another of its subsidiaries, Showtime Networks, as press entities covered by these exemptions. *See* AO 2003-34. Like its corporate sibling, MTV produces a wide array of cable television programming; it has a long record of public affairs programming directed toward the young people that make up the bulk of its audience, and encouraging their interest in the political process. It, too, is not owned or controlled by a political party, political committee, or candidate.

As AO 2003-23 demonstrates, like the courts, the FEC has not adopted a rigid definition of “commentary” in applying the press exemption to legitimate media outlets operating in their capacities as press entities. With the exception of the option of framing the Prelection results as an endorsement of MTV News by an editorial board comprised of its audience, MTV’s proposed Prelection does not, in fact, incorporate any editorial position of the network with regard to participating candidates. The only editorial opinions to be advanced are that elections matter, candidates should address the interests of young voters, and young people should educate themselves about the candidates and become involved in the electoral process. The opinions expressed will be those of the MTV audience. Nonetheless, providing this mechanism for an expression of opinion falls within the legitimate function of the press, and the project in its entirety should be found to be covered by the press exemption from the definitions of “contribution”, “expenditure” and “electioneering communications.” Certainly, reporting the results of the Prelection would unquestionably constitute traditional “reporting” intended to be covered by the press exemption.

In addition, even if it were not eligible for the media exemption, the Prelection should not in any case be found to constitute a contribution or expenditure, nor should those elements of it which may be broadcast be found to constitute electioneering communications. The project is an innovative attempt to stimulate interest in the national Presidential election among young people. Because of its novel nature, no specific regulations have been issued addressing the conduct of this activity. Nonetheless, it is structured to function as a nonpartisan effort that will increase awareness of the pending election, and provide incentives for the MTV audience to become educated about the candidates and their positions on issues of interest to them as voters. Each element of the Prelection project may be analogized to other activities that have been expressly permitted to be funded by corporations: debates (11 C.F.R. § 110.13), online voter education opportunities (AO 1999-25), conducting polling and publishing the results, traditional news coverage and commentary, and communications promoting candidate debates or forums (11 C.F.R. § 100.29(c)(4)).

Should you require any further information regarding this request, please contact me.

Sincerely,



Elizabeth Kingsley



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

January 27, 2004

Elizabeth Kingsley, Esq.  
Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M Street, N.W.  
Suite 600  
Washington, DC 20036

Dear Ms. Kingsley:

This refers to your letter dated January 16, 2004, on behalf of Music Television ("MTV"), MTV Networks, Viacom, Inc., and Viacom International, Inc., concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to certain planned activities during the 2003-2004 election cycle.

Your request sets forth the following relevant facts: MTV will conduct a poll of U.S. residents and U.S. citizens over the age of 12 to determine their preference for the office of President of the United States in the 2004 general election. This poll is to be called the MTV Prelection. Two different sets of numbers will be derived from the Prelection: "total voters," meaning the total number of people who registered and voted regardless of age, resident status, or confirmed address; and "confirmed voters," meaning the total number of people who voted who are U.S. citizens 18 to 30 years old who will have been verified to live at one certain address. Both sets of numbers will be published on the internet and announced on the air.

You further state that the results might simply be reported as the vote of MTV's audience, or as an endorsement of a candidate by MTV News. In this latter instance, MTV would use its audience to function as its editorial board.

Prelection participants will receive follow-up messages encouraging them to vote and to continue to educate themselves about the candidates. These messages will be sent to all participants who are eligible to vote in the general election, regardless of whom they voted for in the Prelection. These messages may refer to the results and/or analysis of the Prelection, but will not in any way be coordinated with any candidate or party.

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made."

11 CFR 112.1(c). According to the regulations, the Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. *See* 11 CFR 112.1(d).

Further information is needed for your request to provide a complete description of the relevant facts. Please provide responses to the following questions:

- 1) Your request appears to focus on only presidential candidates and the 2004 presidential election. Will MTV or MTV Networks undertake any similar activities with respect to any other election for Federal office in the 2003-2004 election cycle?
- 2) Will MTV's corporate advertisers or corporate sponsors have any role in determining what issues candidates are asked to address, or who the recipient of MTV News' endorsement might be? What other role, if any, will MTV's corporate advertisers and/or sponsors play in the Prelection process?

Please send your responses to the questions presented above to the Commission's Office of General Counsel. Upon receipt of your responses, this Office will give further consideration to your inquiry. If you have any questions about the advisory opinion process or this letter, please contact Tony Buckley, an attorney in this Office, at 202-694-1650

Sincerely,

  
Rosemary C. Smith  
Acting Associate General Counsel

**HARMON, CURRAN, SPIELBERG & EISENBERG, LLP**

1726 M Street, NW, Suite 600 Washington, DC 20036

(202) 328-3500 (202) 328-6918 fax

February 5, 2004

Rosemary C. Smith  
Acting Associate General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
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Dear Ms. Smith:

This responds to your letter dated January 27, 2004, requesting additional information concerning my request for an advisory opinion on behalf of Music Television ("MTV"), MTV Networks, Viacom, Inc., and Viacom International, Inc. Specifically, you asked the following:

- 1) Your request appears to focus on only presidential candidates and the 2004 presidential election. Will MTV or MTV Networks undertake any similar activities with respect to any other election for Federal office in the 2003-2004 election cycle?
- 2) Will MTV's corporate advertisers or corporate sponsors have any role in determining what issues candidates are asked to address, or who the recipient of MTV News' endorsement might be? What other role, if any, will MTV's corporate advertisers and/or sponsors play in the Prelection process?
- 3) By follow-up phone call, you also inquired whether the corporate sponsors of the Prelection (or any of MTV's corporate sponsors or advertisers) would be named or acknowledged in any of the follow-up communications to Prelection participants described in our letter of January 16. Specifically, you mentioned any communications that either conveyed the Prelection results or an editorial endorsement by MTV.

Each of your questions are answered in turn below:

- 1) No. The activities described in our request will be confined to the 2004 presidential election. Neither MTV nor MTV Networks plans to undertake similar activities with respect to any other election for Federal office in the 2003-2004 election cycle.

**HARMON, CURRAN, SPIELBERG & EISENBERG, LLP**

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2) MTV's corporate advertisers and sponsors will have no role in determining what issues the candidates are asked to address or who the recipient of MTV News' endorsement might be.

Advertisers and sponsors may choose to run advertisements on MTV during Prelection programming, just as with any of its programming, but they will not be given the ability to control any of the content or other elements of that programming. Some corporate sponsors will use some of that paid time to encourage participation in the Prelection. In addition, MTV will solicit corporate sponsors who will be identified in various Prelection promotions and materials as sponsors of the project. However, as stated above, they will have no editorial input into the conduct of the Prelection.

MTV also has an agreement with Cingular to be a sponsor of the Prelection by providing its cellular customers with the ability to vote in the Prelection via text messaging. In addition to the activities described in the preceding paragraph, the company's role in the Prelection would include providing this text message service and jointly promoting the event. In exchange, the company would be recognized by MTV as a sponsor of the Prelection and its services would be mentioned as one of the ways that participants can vote. Again, the company would have no say in determining what issues candidates are asked to address or whom MTV might endorse.

This type of arrangement with a corporate sponsor is not a novel practice for MTV. For a number of years, MTV has regularly entered into similar promotional agreements in other contexts, both with Cingular and with other providers. For example, Cingular Wireless users have been given an opportunity to respond to up to 30 text message polling questions in order to qualify for a chance appear live and win a cash prize during MTV's Video Music Awards. Virgin Mobile users have had the opportunity to vote in an award category for the MTV Movie Awards; participants were given a chance to win a trip to the show. MTV Video Clash allows an audience vote to choose the next video shown on MTV. Two videos are put head-to-head, and viewers can vote online or via their Virgin Mobile phones.

Furthermore, this is a standard marketing arrangement with in the television news and entertainment industry. While MTV does not naturally have access to the details of contractual arrangements between other media companies and their sponsors, we are aware of several examples of similar arrangements to provide audience participation via text messaging or other wireless phone services. For instance, Fox's "American Idol" provides AT&T Wireless customers the opportunity to vote for contestants via text message. See <http://idolonfox.com/showinfo/index.htm> (Frequently Asked Questions). FX Network's "Todd TV" stars one man whose actual everyday decisions are determined by viewer polls. T-Mobile is a sponsor of the show, and its customers weigh in on Todd's actions via mobile text messages. See <http://imediconnection.com/news/2705.asp>. Fox Sports and Sprint have created Wireless Virtual Coach, which allows football audiences to vote on in-game and pre-game polling questions. [http://proteus.com/about/news/articles/n\\_092402.jsp](http://proteus.com/about/news/articles/n_092402.jsp). In short, MTV's arrangement with Cingular to act as a corporate sponsor and provide text message

**HARMON, CURRAN, SPIELBERG & EISENBERG, LLP**

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voting services for the Prelection is a standard type of marketing arrangement for this industry.

3) MTV may wish to acknowledge its corporate sponsors in follow-up communications to Prelection participants. We request a ruling as to the permissibility of doing so in:

- A) Messages that convey an editorial endorsement by MTV;
- B) Messages that report the results of the Prelection; or
- C) Messages that do not refer to an endorsement or the Prelection results but contain general nonpartisan encouragement to vote.

Please note that none of these subsequent communications would be paid for by any corporation or other entity other than MTV. In the event the Commission rules that it would be impermissible to identify Prelection sponsors in these follow-up messages, MTV will not do so.

Please contact me should you need any further information.

Sincerely,



Elizabeth Kingsley

