LECLAIRRYAN

October 5, 2010

Office of the Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Via Telefax (202) 208-3333

Re: Advisory Opinion Request 2010-25

Dear Commissioners:

RG Entertainment, Ltd. and Ray Griggs, joined by the other Requestors, respectfully submit these comments in response to Draft A and Draft B. In summary, Draft A correctly concludes that the Requestors qualify for the commercial vendor exemption. Draft B correctly concludes that RG Entertainment, Ltd. is a bona fide press entity qualified for the press exemption.

1. RG Entertainment, Ltd. is a Bona Fide Press Entity

Draft B correctly concludes that RG Entertainment, Ltd. is a bona fide press entity under the Federal Election Campaign Act and First Amendment. RG Entertainment is a bona fide filmmaker that holds itself out to the public as nothing other than a film production company. Its principal Ray Griggs is a legitimate filmmaker and member of the Directors Guild of America and Screen Actors Guild. The First Amendment clearly protects this film production company's right to make a political documentary.

Draft A offers only one reason for ignoring RG Entertainment's First Amendment right to make a documentary film: "RGE has produced only one documentary to date and has only a general intention to produce both dramatic films and political documentaries in the future ... [and] does not appear to intend to engage in, producing documentaries on a regular basis." (Draft A at 15).

The legal analysis proposed in Draft A entreats the Commission to walk down a very thin line, to begin recognizing or denying an otherwise legitimate press organization's First Amendment rights based upon its **choice of film genre**. According to Draft A's legal analysis, a bona fide film producer's decision to vary the genre of its films—from dramatic to comedic to documentary—removes First Amendment protection for the producer's artistic work.

First Amendment protection cannot hinge upon a bona fide film production company's choice of dramatic versus documentary genre to express a political message. Were that the test, then the

E-mail: Lee.Goodman@leclairryan.com
Direct Phone: 202.659.6730
Direct Fax: 202.775.6430

1101 Connecticut Avenue, NW, Suite 600
Washington, D.C. 20036
Phone: 202.659.4140 \ Fax: 202.659.4130

First Amendment would not have protected Norman Lear's decision to feature a debate between Archie Bunker and son-in-law Michael Stivic ("Meathead") over the merits of Nixon versus McGovern in *All In The Family*, because Lear's "track record" was production of situation comedies, not election-related commentary. A well-established novelist would have no First Amendment right to publish an election-related short story or magazine editorial, because the shift in genre would vitiate the author's constitutional right in any form other than a novel. Perhaps news writer Joe Klein did not enjoy First Amendment protection when he published his first political novel *Primary Colors* in January 1996. A folk song writer would lose First Amendment protection for a politically explicit rap. MTV would be straight-jacketed into exhibiting music videos[1] and HBO would be limited to exhibiting feature films. Walt Disney would have no First Amendment freedom to make a political documentary—even if it appealed to young viewers—because it was not a cartoon.[2]

Importantly, the cases where an organization's "track record" has mattered have involved avowedly political organizations attempting to comport themselves as traditional press entities for the first time in their existence. In *FEC v. MCFL*, the Supreme Court noted that MCFL was a political advocacy "entit[y] that happen[s] to publish newsletters" and that MCFL was not engaged in "the normal business activity of a press entity." 479 U.S. 238, 251 & n. 5 (1986). Likewise, when Citizens United first approached the Commission in 2004 seeking recognition of its rights as a press entity, the Commission was presented with an avowed political advocacy organization that was attempting to conduct its advocacy as a press entity. In other words, in both cases, political organizations with long "track records" of policy and electoral advocacy were attempting to become bona fide press entities.

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[1] When MTV sought an advisory opinion in 2004 for its Pre-Election program to register young voters, it represented that it first began political programming in 1992. Under the legal analysis of Draft A, MTV arguably violated 2 U.S.C. § 441b in 1992.

[2] Draft A also implies that the Commission should not recognize a filmmaker's First Amendment right to comment on public matters unless the filmmaker represents that the subject of its second (or third or fourth) production is political. This analysis would embroil the Commission in hair-splitting literary critiques of films (and by logical extension other literature) to determine whether the producer's other works are sufficiently "political" to justify First Amendment protection. The Commission would have to decide whether Charles Dickens' *Oliver Twist* constituted political commentary on the social and economic problems in Victorian society, or whether Winston Groom's *Forrest Gump* is a political editorial on conservative versus liberal paradigms, in order to afford First Amendment protection to the authors' political editorials. Although RG Entertainment has no political background, it does have actual experience making films with social messages. *Lucifer* was a short religious-themed film about good versus evil. According to some literary critics, *The Wind in the Willows* is a political allegory about social castes in England and a rebuke to urbanization in Edwardian England. But more fundamentally, RG Entertainment's decision to make a political documentary does not vitiate its status as a film production company or its First Amendment right to choose—and vary—the genres for its various films.

Here, by contrast, a legitimate film production company has produced its first political film. That is very different from the efforts of political organizations MCFL and Citizens United presenting themselves as the "press" for the first time. RG Entertainment has devoted its regular film production facilities to do what it exists to do—produce a film—and RG Entertainment is distributing the film through bona fide film marketing and distribution companies in movie theatres open to the general public under the express production credit of RG Entertainment and Ray Griggs. These are the factors the Supreme Court considered in *FEC v. MCFL*, 479 U.S. at 250 (1986). The Supreme Court did not say that Walt Disney is precluded from making it first political documentary.

Moreover, RG Entertainment is not before the Commission seeking recognition of its First Amendment right to produce political literature significantly different from its ordinary line of publication. It has not, for example, paid to broadcast a 30-second television advertisement or to mass mail election brochures exhorting people to vote. Instead, it has devoted its ordinary resources to do what it exists to do—produce a film the American public will buy tickets to watch.

Draft A also suggests that First Amendment rights turn on RG Entertainment's ability to point to specific political documentaries it intends to produce in the future and that The Wind in the Willows is too non-political for RG Entertainment to receive First Amendment protection when it markets I WANT YOUR MONEY. This analysis punishes smaller, independent filmmakers for (1) their choice to produce dramatic films and (2) their limited financial resources. A well-funded advocacy organization like Citizens United simply has greater financial resources to put several political films into production at one time, while a film producer with limited resources must make one film at a time. The First Amendment does grant the wealthy filmmaker greater protection than the less wealthy one.

In Advisory Opinion 2005-16 (FiredUp!), the requestors had no bona fide background or experience as a press organization. They were political operatives and a former Senator. They established a brand new website and represented to the Commission that they had published only "two postings" of original journalistic articles on the new website. They made no representations about the volume or content of future original journalistic postings, except that they would be "unabashedly progressive." The Commission recognized FiredUp! as a bona fide press entity notwithstanding this very limited "track record" and the absence of any specifics on future articles. Similarly, it was not clear that Flower & Garden Magazine had any demonstrable "track Record" of publishing political editorials in MUR 3660.

For these reasons, Draft B presents the correct legal analysis with respect to the press exemption.

2. The Requestors' Are Entitled to An Opinion Regarding the Commercial Vendor Question

Although Draft B proposes the correct analysis with respect to the press exemption, it declines to provide an opinion responsive to the Requestors' request for an opinion regarding their entitlement to the commercial vendor exemption.

The Requestors have asked the Commission whether the activities described in their request qualify for the commercial vendor exemption. This issue is distinct from the question regarding the press exemption and raises unique legal and factual issues. Pursuant to 2 U.S.C. § 437f(a)(1), the Requestors are entitled to receive the Commission's written advisory opinion on this question so that they can comport their conduct with the Commission's opinion.

The only reason Draft B provides for declining to answer this question is that the commercial vendor question is "moot" in light of recognition of the press exemption. This overstates the press exemption. Recognition of the press exemption is conditional upon a press entity's engagement in traditional press activity. For example, the Commission recognized MTV's qualifications for the press exemption for a new Pre-Election program in 2004 to engage young voters in the upcoming presidential election, but declined to extend the press exemption to a get-out-the-vote drive by MTV.

Here, RG Entertainment and the MEISA marketing agents need to know whether—in addition to the press exemption—they qualify for the commercial vendor exemption so long as they market and distribute the film for profit. In the event some aspect of their marketing efforts may inadvertently cross a line—as MTV was deemed to have done—the commercial vendor exemption would operate as an independent legal ground for compliance with the Federal Election Campaign Act. For this reason, the Requestors have presented a fair question for an advisory opinion and deserve an answer.

Request to Appear

Undersigned counsel respectfully requests the opportunity to appear at the Commission's meeting on October 7 to answer any questions.

Sincerely,

Lee E. Goodman

cc: Office of General Counsel (via telefax)
Hon. Matthew S. Peterson, Chairman
Hon. Cynthia L. Bauerly, Vice Chairman
Hon. Caroline C. Hunter, Commissioner
Hon. Donald F. McGahn II, Commissioner
Hon. Steven T. Walther, Commissioner
Hon. Ellen L. Weintraub, Commissioner