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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5563
DATE COMPLAINT FILED: 10/12/2004
DATE OF NOTIFICATION: 10/19/2004
DATE ACTIVATED: 2/14/2005

EXPIRATION OF STATUTE OF
LIMITATIONS: 9/19/2009

COMPLAINANT: Sydnor Thompson

RESPONDENT: Kirk Shelmerdine Racing, LLC

RELEVANT STATUTES
AND REGULATIONS: 2 U.S.C. § 434(c)
2 U.S.C. § 434(g)
2 U.S.C. § 441b(a)
2 U.S.C. § 441d(a)
11 C.F.R. § 100.22(a)
11 C.F.R. § 110.1(g)
11 C.F.R. § 109.10(b)(c)(d) and (e)

INTERNAL REPORTS CHECKED: Disclosure Reports and FEC Contributor Database

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

In this matter, complainant alleged that Kirk Shelmerdine Racing, LLC ("KSR") may have made an unreported independent expenditure or a prohibited corporate expenditure when KSR placed the logo "Bush-Cheney '04" on the rear quarter panel of a stock car that raced in the National Association for Stock Car Auto Racing ("NASCAR") Nextel Cup racing series. Complainant also alleges that the communication did not carry the required disclaimer. As discussed in more detail below, this Office recommends that the Commission find reason to

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1 believe that Kirk Shelmerdine Racing, LLC made an unreported independent expenditure and
2 authorize an investigation to discover the costs associated with the expenditure.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. Factual Background**

5 In 2004, the KSR team and Kirk Shelmerdine, as its driver, competed in 18 NASCAR
6 Nextel Cup races, earning a total of \$1,095,040. In four of its 18 races, it appears that KSR
7 displayed advertising on its racecar expressly advocating the reelection of President Bush. A
8 photograph on the website Shelmerdineracing.com shows what appears to be the Shelmerdine
9 #72 car. On the rear quarter panel, slightly above the tire the name "Bush" is displayed. To the
10 left of the tire is the name "Cheney." Directly below the name "Cheney" are the numbers "'04."
11 See Attachment 1.

12 Official results posted on NASCAR.com list "Vote for Bush" as the KSR racecar's
13 "primary" sponsor for the September 19, 2004 Sylvania 300 race, the September 26, 2004
14 MBNA America 400 race, the October 10, 2004 Banquet 400 race, and the October 24, 2004
15 Subway 400 race.¹ The first two races at issue were televised on TNT, while the other two were
16 broadcast on NBC. KSR earned a total of \$231,400 for these races.

17 In KSR's response, Kirk Shelmerdine submitted a sworn affidavit stating that he was
18 aware of rumors that President George W. Bush would attend the September 19, 2004 race at the
19 New Hampshire International Speedway. See Shelmerdine Affidavit at 1. He then decided to
20 "put the decals that are the subject" of the complaint on the car. He avers he did so for the sole

¹ Although NASCAR.com listed "Vote for Bush" as the "primary" sponsor for these races, the available photographs of the KSR car display names of business entities on various areas of the car, including "Fairfield Inn by Marriott" on its hood and "Freddie B's" directly below the "Bush-Cheney" logo in small lettering. We do not know whether advertising from these two business entities appeared on the car in all four races.

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1 purpose of attracting publicity for him and the car. *Id.* Mr. Shelmerdine avowed that it was
2 never his intention to be a supporter of President Bush or to influence the Presidential election;
3 he further stated he was not a registered voter, never made any political contribution, and never
4 publicly endorsed any politician. *Id.* According to Mr. Shelmerdine, the decals in question
5 “would cost and have a value of \$50 or less” and that, “[o]ut of an abundance of caution,” he had
6 “removed the decals in question from my race car and do not intend to use them anymore.”² *Id.*

7 One press article reported that even though President Bush canceled his appearance at the
8 September 19, 2004 Sylvania 300 race, Mr. Shelmerdine decided to keep the “Bush-Cheney”
9 decals on the car for subsequent races, citing fan interest. *See* Don Coble, *Left turns and right*
10 *leanings[:]* *NASCAR drivers, car owners and fans trying to help Bush win re-election*, The
11 Florida Times-Union, October 29, 2004. According to that article, the space where the decals
12 were placed “rents for as much as \$25,000 a race, but Mr. Shelmerdine feels so strongly about
13 the election he’s donated the space.” *Id.* The article quotes Mr. Shelmerdine as saying “I guess
14 politically, most people are to my left ... I’m very much against liberal ways when it comes to
15 politics. This was the way to make our little statement.” *Id.*

16 **B. Analysis**

17 **1. KSR made a non-corporate independent expenditure**

18 KSR’s advertising expressly advocating the reelection of President Bush was an
19 independent expenditure. An “independent expenditure” is defined as “an expenditure by a
20 person . . . expressly advocating the election or defeat of a clearly identified candidate . . . that is
21 not made in concert or cooperation with or at the request or suggestion of such candidate, the

² It appears that KSR removed the “Bush-Cheney ‘04” decal, as stated. NASCAR.com reports that Freddie B’s was KSR’s next sponsor in the final race in which the KSR car qualified, the November 14, 2004 Mountain Dew Southern 500

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1 candidate's authorized political committee, or their agents, or a political party committee or its
2 agents." 2 U.S.C. §431(17). E. Kirk Shelmerdine, the sole owner of KSR and its driver, in his
3 sworn affidavit in response to the complaint, stated that "[t]he placing of the decals was in no
4 way in concert or in cooperation with Bush-Cheney 2004, Inc., or any persons or organizations
5 that support President George W. Bush," Shelmerdine Affidavit at 1, and this Office has found
6 no information to the contrary.³

7 KSR is a limited liability company. The Commission's regulations establish two
8 alternative treatments for contributions by business entities that are recognized as limited liability
9 companies under the laws of the State in which they are established, depending on how the firm
10 elects to file with the IRS. 11 C.F.R. § 110.1(g)(1) and (g)(4). First, if the contribution is from
11 an LLC electing to file with the IRS as a corporation, then the LLC is considered to be a
12 corporation pursuant to 11 C.F.R. § 114. 11 C.F.R. § 110.1(g)(3). Second, if the contribution is
13 from an LLC with a single natural person member that does not elect to be treated as a
14 corporation by the IRS pursuant to 26 C.F.R. § 301.7701-3, it shall be treated as a contribution
15 from only that single member. 11 C.F.R. § 110.1(g)(4). Although the Commission's regulations
16 are phrased in terms of contributions, and we have found no other guidance, it appears that a
17 sole-proprietorship LLC that makes independent expenditures should be accorded the same
18 treatment.

19 In his affidavit, Mr. Shelmerdine states that he is the sole owner of KSR, and that the IRS
20 treats his company as a sole proprietorship because he did not elect for it to be treated as a
21 corporation. Shelmerdine Affidavit at 1. This assertion appears corroborated by filings with the

³ As noted, NASCAR.com listed "Vote for Bush" as the primary sponsor for the KSR car in the races in which it displayed the Bush-Cheney logo. Although Mr. Shelmerdine does not address this purported sponsorship, it appears that there is no separate entity called "Vote for Bush." We will explore this issue during our investigation.

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1 North Carolina Department of the Secretary of State that show that on April 1, 2002, E. Kirk
2 Shelmerdine formed KSR as a limited liability company, and by IRS guidance stating that if an
3 LLC has only one owner, the IRS will automatically treat it as if it were a sole proprietorship.
4 *See* <http://www.irs.gov/faqs/faq12-1.html>. Thus, it appears that the independent expenditure at
5 issue was attributable only to the single natural member of the LLC, which appears to be E. Kirk
6 Shelmerdine, the LLC's member and organizer. Therefore, this Office recommends that the
7 Commission find no reason to believe that Kirk Shelmerdine Racing, LLC violated 2 U.S.C.
8 § 441b.

9 **2. KSR failed to file timely a report of its independent expenditure**

10 Commission records do not reflect any independent expenditure filings by KSR during
11 2004. Every person (other than a political committee) that makes independent expenditures in an
12 aggregate amount or value in excess of \$250 during a calendar year must file with the
13 Commission a verified statement or report of such expenditures. *See* 2 U.S.C. § 434(c);
14 11 C.F.R. § 109.10(a).⁴ The timing and frequency of such filings depends on the value of the
15 expenditures and when they are made. *See* 11 C.F.R. § 109.10(b) (independent expenditures
16 aggregating \$250 or more are required to be reported in accordance with the quarterly reporting
17 schedule specified in 11 C.F.R. § 104.5(a)(1)(i) and (ii)); 2 U.S.C. § 434(g)(2)(A) and 11 C.F.R.
18 § 109.10(c) (independent expenditures aggregating \$10,000 or more with respect to a given

⁴ The contents of such verified reports and statements must include (1) the reporting person's name, mailing address, occupation, and the name of his or her employer, (2) the identification (name and mailing address) of the person to whom the expenditure was made, (3) the amount, date, and purpose of each expenditure, (4) a statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought, (5) a verified certification under penalty of perjury as to whether such expenditure was coordinated with a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents, and (6) the identification of each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure 11 C.F.R. § 109.10(e)

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1 election up to and including the 20th day before an election, must be reported within 48 hours of
2 the date on which the communication is publicly distributed); and 2 U.S.C. § 434(g)(1)(A) and
3 11 C.F.R. § 109.10(d) (independent expenditures aggregating \$1,000 or more made after the 20th
4 day, but more than 24 hours before the day of an election, must be reported within 24 hours
5 following the date on which the communication is publicly distributed).

6 Although independent expenditures are reportable if the aggregate “amount or value,” *see*
7 2 U.S.C. § 434(c), exceed the specified amount, this is an unusual case where the “amount” of
8 the independent expenditure may be substantially different from its “value.” Where such
9 differences occur, and the value can be determined in the marketplace in the same manner as for
10 an in-kind contribution, it appears appropriate to base the aggregate total of the independent
11 expenditure on the normal and usual charge for the comparable commodity.

12 As noted, in his affidavit, Mr. Shelmerdine states that “[t]he decals that were placed on
13 the car would cost and have a value of \$50.00 or less.” However, while it is possible that the
14 decals may have cost KSR an “amount” less than \$250, it appears that their “value” could have
15 been considerably more based on what an independent sponsor would have paid to place such
16 advertising in the same location on KSR’s car in a NASCAR Nextel Cup series race.

17 To assess the potential value of the space taken by the Bush-Cheney decals on the
18 Shelmerdine car, it is necessary to understand Mr. Shelmerdine’s place in NASCAR Nextel Cup
19 racing. Mr. Shelmerdine drives what is known as a “field-filler”—that is, an underfunded car
20 with no realistic chance of winning any races. *See* Brant James, *NASCAR fills up on scrappy*
21 *teams*, St. Petersburg Times, March 14, 2004; *See also* Shelmerdine Affidavit at 1. Because Mr.
22 Shelmerdine does not appear in every race, and because his car, like that of other “field-fillers,”
23 is substantially less likely to complete races for which he does qualify, he cannot command

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1 anything like the \$15-\$18 million a year "primary sponsorship" fees or \$200,000 a year
2 "associate sponsorship" fees realized by Nextel Cup superstars such as Jeff Gordon and Dale
3 Earnhardt Jr.⁵ See Al Levine, *Liquor sponsors to stress moderation*, Atlanta Journal-
4 Constitution, February 20, 2005.

5 Nevertheless, and as noted, one press account reported that the rear quarter panel on the
6 KSR car "rents for as much as \$25,000 a race." See Don Coble, *supra*. KSR apparently attracted
7 "primary" sponsors in the 14 races in which "Vote for Bush" was not listed as its "primary"
8 sponsor—including one race after it removed the "Bush-Cheney" decals, perhaps indicating that
9 the space in which Mr. Shelmerdine placed the decals was not space he was otherwise unable to
10 sell. For those 14 races, KSR relied on a combination of five different "primary" sponsors,
11 including Freddie B's, a sports bar based in Winston-Salem, North Carolina that sponsored or co-
12 sponsored nine of the 14 races. NASCAR.com identifies the other four sponsors as: (1) Tucson,
13 a cigarette brand made by the Renegade Tobacco Company based in Mocksville, North Carolina
14 that sponsored or co-sponsored three races early in the season; (2) 2nd Chance Race Parts, a North
15 Carolina based company that sell used parts and cars to racing teams; (3) LR Lyons and Son
16 Transportation; and (4) Fairfield Inn by Marriott. See NASCAR.com. We presently do not know
17 how much each of these sponsors paid KSR for displaying advertising on various locations on its
18 racecar, but plan to discover this information as part of the investigation described below.⁶

⁵ In 2004, the KSR racecar qualified to compete in only 18 of the 36 Nextel Cup races, and did not finish any of those races <http://www.nascar.com/drivers/dps/kshelmer00/cup/data/2004/index.html>.

⁶ From January 28, 2005, KSR auctioned an associate sponsorship for a starting bid of \$100,000 on Ebay See Jeff Gluck, *NASCAR SPOTLIGHT Sponsorship up for grabs on Ebay*, Myrtle Beach Sun-News, February 4, 2005. Additionally, KSR auctioned a one-race sponsorship of the so-called "TV panel," which is typically included as part of a primary sponsorship package, for \$7,500. However, no bids for these sponsorships were ever made. *Id* The available information does not show that KSR included the rear quarter panel in any of its sponsorship bids.

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At any rate, even if the panel in question did not rent for \$25,000 a race, it may well have been available for substantially more than \$250 in the aggregate, and if that was so, KSR's failure to report statements of its independent expenditures may have violated 2 U.S.C. § 434(c). Moreover, the space may have been available for more than \$10,000 a race, in which case KSR's failure to file reports of independent expenditures within 48 hours (or 24 hours for the last race) may have violated 2 U.S.C. § 434(g); or, even if it was available for less than \$10,000 but more than \$1,000, KSR's specific failure to file a report within 24 hours of the Subway 400 race, which was run October 24, 2004, may have violated 2 U.S.C. § 434(g). Therefore, we recommend the Commission find reason to believe that Kirk Shelmerdine Racing, LLC violated 2 U.S.C. § 434(c) and (g).

3. The alleged disclaimer violation

This Office recommends that the Commission take no action with respect to allegations that Kirk Shelmerdine Racing LLC violated 2 U.S.C. § 441d. While persons making expenditures to finance communication expressly advocating the election of a clearly identified candidate must ordinarily include a disclaimer,⁷ Commission regulations except from this requirement skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable. 11 C.F.R. § 110.11(f). Given that it would appear to be difficult to place a clearly readable disclaimer containing all the information required on the rear quarter panel of a racecar, this

⁷ Such a disclaimer must clearly state the name of the person who paid for the communication and indicate whether the communication was authorized by any candidate or candidate's authorized committee. 2 U.S.C. §§ 441d(a), 431(8)(a), *see also* 11 C.F.R. § 110.11. Communications not authorized by a candidate or authorized committee of candidate must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee. 11 C.F.R. 110.11(b)(3).

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Office believes that it is not worth the expenditure of the Commission's limited resources to investigate whether it could have been accomplished successfully.

IV. PROPOSED DISCOVERY

V. RECOMMENDATIONS

1. Find reason to believe that Kirk Shelmerdine Racing, LLC violated 2 U.S.C. § 434(c) and (g).
2. Find no reason to believe that Kirk Shelmerdine Racing, LLC violated 2 U.S.C. § 441b(a).
3. Take no action with respect to allegations that Kirk Shelmerdine Racing, LLC violated 2 U.S.C. § 441d.
- 4.

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5. Approve the attached Factual and Legal Analysis.

6. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

Date

5/12/05

BY.

Lawrence L. Calvert Jr.
Deputy Associate General Counsel
for Enforcement

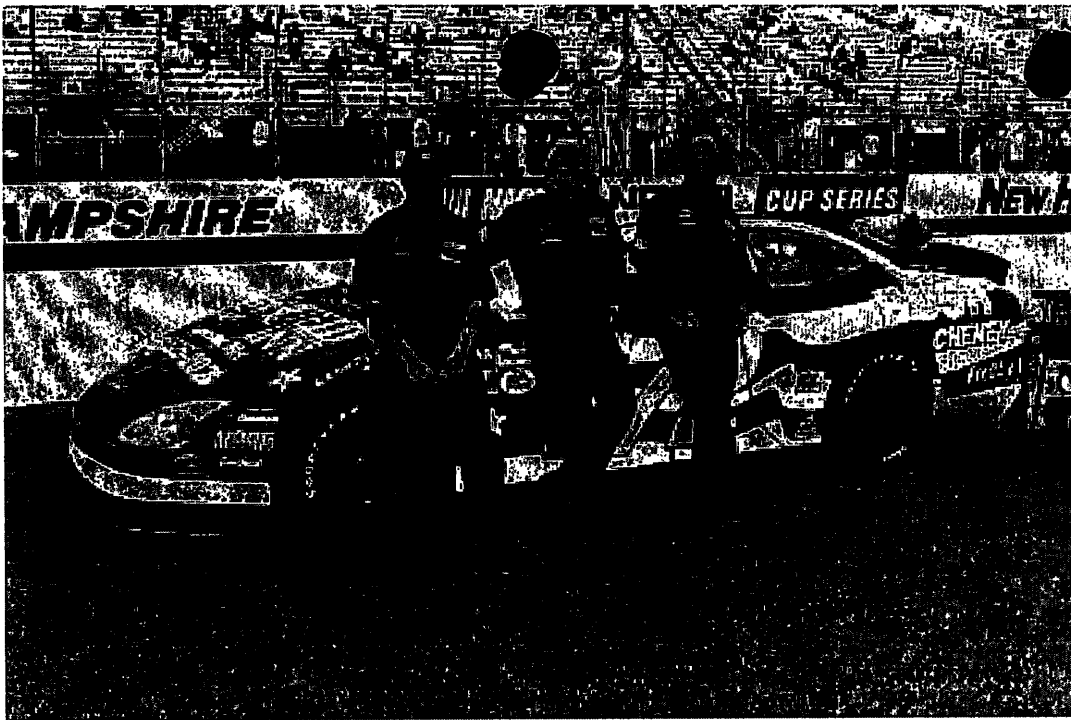
Susan L. Lebeaux
Assistant General Counsel

Roy Q. Lockett
Attorney

Attachments

1. Photograph of the Shelmerdine "Bush-Cheney" Car
2. Factual and Legal Analysis

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