FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

SENSITIVE

In the Matter of	)	
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Kirk Shelmerdine Racing, LLC	)	**MUR 5563**

STATEMENT OF REASONS

COMMISSIONER BRADLEY A. SMITH
and
VICE CHAIRMAN MICHAEL E. TONER

On June 7, 2005, the Commission voted 4-2 to find reason to believe that Kirk Shelmerdine Racing, LLC violated 2 U.S.C. § 434(c) and (g), for failure to report independent expenditures in excess of $250.[1] We dissented and believe that the principles involved are important enough to spell out the reasons for our votes even at this relatively early stage of the proceedings.

I. FACTS

The basic facts are simple enough. Kirk Shelmerdine is the sole owner of Kirk Shelmerdine Racing, LLC ("KSR").[2] Long-time NASCAR fans will remember Mr. Shelmerdine as one of the greatest pit crew chiefs ever, working for, among others, the late Dale Earnhart, Sr. But his career as a driver has been less successful. KSR competes[3] in the NASCAR Nextel Cup Race Series, and it is not contested that his car is a "field filler," the term for an under-funded car with no realistic chance of victory in any race. First General Counsel's Report at 6. Indeed, as a driver, Shelmerdine has never finished higher than 26th in a Nextel or Winston Cup[4] race, and that was in 1994. His best finish in 2004 was 37th. *See* www.nascar.com/drivers/dps/kshelmer00/cup/index.html. It appears that not only is KSR "under-funded," but that it runs many races with few or no sponsors. In the spring of 2005, KSR was auctioning off sponsorship of the car for a 5 race series on E-Bay. No

[1] The Commission also decided by a vote of 6-0 to find no reason to believe that Kirk Shelmerdine Racing, LLC violated 2 U.S.C. § 441d.

[2] Because KSR is an LLC with a single natural person member, and has not elected to be treated as a corporation by the Internal Revenue Service pursuant to 26 C.F.R. §301.7701-3, it is treated by the Commission as a sole proprietorship.

[3] Or better put, attempts to compete – he has yet to qualify for a race in 2005. *See* http://www.nascar.com/races/cup/2004/27/data/results_official.html

[4] The Winston Cup is the predecessor to the Nextel series.

bids had been received. *See* http://search.ebay.com/shelmerdine_W0QQfromZR8QQfsooZ2QQfsopZ3QQsbrsrtZl, visited June 15, 2005.

In any event, it appears that in the late summer of 2004 it was rumored that President George W. Bush would appear at the Sylvania 300 race at New Hampshire International Speedway. Sensing something, Shelmerdine put decals reading "Bush Cheney '04" on the left rear quarter panel of his car. According to Florida Times-Union reporter Don Coble, Shelmerdine did this "because he feels so strongly about the election." Don Coble, *Left Turns and Right Leanings: NASCAR Drivers, Car Owners and Fans Trying to Help Bush Win Re-Election,* Florida Times-Union, at C-3, Oct. 29, 2004. Or maybe it was to "honor the president's scheduled visit." *Id.* In any event, Shelmerdine was quoted as saying, "I'm very much against liberal ways when it comes to politics. This was the way to make our little statement." *Id.* Shelmerdine, however, later told the Commission that, "I put the decals ... on the car solely because I thought that doing so would bring attention to the car and publicity for me and the car. It was not my intention, in any manner, to be a supporter of President Bush or to influence the Presidential election." For good measure, he added, "I am not a registered voter. I have never been actively involved in politics. I have not endorsed or aided any politician. I have never contributed any money or considerations of any kind to any politician, Political Action Committee, etc.... I repeat that I put the decals on the car to bring attention to myself and my race car." Respondent's Response to Complaint, Affidavit of Kirk Shelmerdine, dated Oct. 27, 2004.

As it happens, President Bush did not attend the race after all, *see* Coble, *supra*, and Mr. Shelmerdine finished 42nd in a field of 43, completing 30 of the 300 laps before being disqualified for being "too slow." *See* http://www.nascar.com/races/cup/2004/27/data/results_official.html. Nevertheless, according to press reports, "Shelmerdine said that the decals proved to be so popular among fans, he decided to keep them on" for three more races. Coble, *supra*. We can never know exactly how many more fans noted the decals during the three laps that Shelmerdine ran before his clutch gave out at the Banquet 400 at the Kansas Speedway on October 10, 2004, but for Mr. Shelmerdine, the damage had already been done. It seems that one Sydnor Thompson[5] had seen enough. Concerned that "Bush-Cheney '04" decal would either corrupt the Bush Administration, or at a minimum create the appearance of corruption, Mr. Thompson filed a six page complaint, including a photo of the car, alleging that Mr. Shelmerdine's auto violated 2 U.S.C. §441d by failing to include a disclaimer stating who paid for the ad; 2 U.S.C. §434 by failing to report an independent expenditure; and 2 U.S.C. §441b for making an illegal corporate expenditure.[6]

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[5] Mr. Thompson is a Charlotte, North Carolina lawyer, and "Democratic activist." *See Car Nuts Take Over Building,* Charlotte Observer, at 2D, July 4, 2004. He is also a former Democratic officeholder and contributor to numerous Democratic candidates, including the 2004 Democratic Vice-Presidential nominee John Edwards. *See Greensboro's Saloons to Dry Up After Jan. 1,* Greensboro News and Record, at P2. Dec. 26. 2004); http://query.nictusa.com/cgi-bin/qind/.

[6] We note that the Office of General Counsel ("OGC") recommended that the Commission take no action on the 441d charge, because Commission regulations at 11 C.F.R. §110.11(f) exempt from the

The Commission has found RTB, and we dissent from that finding.

II. LAW

A. Shelmerdine's Expenditures Are Exempt As Business Expenditures

On the same day that the Commission voted RTB in this case, it voted "No RTB" in MURs 5474 and 5539 (hereinafter "MUR 5474"). These were complaints filed against filmmaker Michael Moore and a variety of other entities, claiming that the production, distribution, and promotion of the anti-George W. Bush film *Fahrenheit 9/11* constituted illegal corporate expenditures against President George W. Bush. In response, Moore and the corporations that funded his film argued, in the words of the Office of General Counsel ("OGC"), that, "their underlying purpose in creating and distributing the film was commercial in nature." MUR 5474, First General Counsel's Report at 13. OGC agreed, saying, "[b]ased on an analysis of the facts specific to this matter, this Office concludes that the film and its related enterprises are bona fide commercial activity, not independent expenditures under the Act." *Id.* However, OGC did not consider the applicability of the commercial exception when it came to Kirk Shelmerdine in MUR 5563.

In applying the commercial exemption to Fahrenheit 9/11 in MUR 5474, OGC noted that this exemption was not dependent on the content of the ads, i.e., on whether or not they expressly advocated the election or defeat of a candidate. *Id.* at 14. Relying on Advisory Opinions 1989-21 and 1994-30, OGC viewed treating expenditures as

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required disclaimer communications on which the inclusion of a disclaimer would be impractical. Oddly, to us, OGC did not recommend a "no reason to believe" finding on this violation, but instead merely suggested that the Commission "take no action." OGC reasoned that, "given that it would appear to be difficult to place a clearly readable disclaimer containing all the required information on the rear quarter panel of a racecar, this Office believes that it is not worth the expenditure of the Commission's limited resources to investigate whether it could have been accomplished successfully." First General Counsel's Report at 8-9. In any case, the Commission rejected the recommendation and instead found "No Reason to Believe" on the charge.

We also note that the complaint was filed on September 30, 2004, and the complainant admitted in his filing that even if a report was due under Section 434, it would not have been due until October 15, 2004. Complaint at 3-4. We are concerned that the Commission ought not to accept speculative complaints of this nature. *See* MUR 5467 Michael Moore et al., Statement of Reasons of Commissioners Smith and Toner, dated Aug. 2, 2004. Of course, one wonders why KSR did not immediately file the report to moot the complaint. But perhaps demonstrating its belief, as Mr. Shelmerdine stated in his affidavit, that the decals were not intended to influence the election, it did not

Finally, the complaint's third charge was that the decals constituted an illegal corporate expenditure, although the complainant admitted that he did not know if KSR was a corporation, *Id.* at 4, and OGC determined that it was not. First General Counsel's Report at 4-5.

Thus, the Commission undertook to examine a complaint on which one claim was readily determined to be incorrect as a matter of law, one was based on factual speculation that turned out not to be true, and a third was, by the complaint's own admission, premature.

commercial activity as, "an alternative to treating a communication as an independent expenditure." *Id.* OGC noted that among the factors considered in AOs 1994-30 and 1989-21 (but apparently this is not an exhaustive list of possible factors, *see id.* at 14-15) were (1) whether the activity involved fund-raising or solicitation of contributions; (2) whether the activity was for 'genuinely commercial purposes and not for the purpose of influencing an election;' (3) whether any items sold were sold at the usual and customary charge; and (4) whether items were purchased for individual use.

In addition, in MUR 5474, OGC considered several other factors. It was noted that (1) "No available information indicates that any federal candidate or political committee received proceeds from sales...;" (2) there was "no information that the production or release of the film was coordinated with any candidate or political committee...;" (3) the respondents were not "owned, controlled, or affiliated with a candidate or political committee." *Id.* at 15.

During Commission discussion of MUR 5474, it was noted that because the production had a commercial purpose, it would be eligible for this business exemption even if *a* "major purpose" of the distributors – as opposed to *the* major purpose - were to influence the election. The Commission voted 6-0 to adopt OGC's recommendation regarding Fahrenheit 9/11 in MUR 5474 and find "no reason to believe."

Let us consider now these criteria for the commercial exemption, as applied to KSR's activity. As in MUR 5474, there is no information that respondents in MUR 5563 gave any proceeds or funds to a candidate or committee; there is no information that the respondents' actions were coordinated with a campaign or committee; and the respondents were not owned, controlled, or affiliated with a campaign.

That leads us to the criteria from the Advisory Opinions. The third and fourth criteria from these opinions would seem to be irrelevant, as KSR was not involved in selling campaign paraphernalia. The first criterion cuts in KSR's favor, as KSR's activity did not involve fund-raising or contributions. That leaves the second criterion – was the activity "for genuinely commercial purposes" or for the "purpose of influencing an election." But this is not entirely helpful – indeed, it seems merely to restate, rather than help to answer, the question the Commission was asked to decide. But we note that the Commission agreed in debating MUR 5474 that if respondent Michael Moore had a mixed motive, he would still be eligible for the commercial exception. This is important, because otherwise the finding that the commercial exception applied in that MUR would have been improper – respondent Michael Moore, at the least, was on record as repeatedly stating that his purpose was to defeat President Bush's re-election bid. *See e.g.* Martin Kasindorf and Judy Keen, *'Fahrenheit 9/11': Will it Change Any Voter's Mind?*, USA Today, June 24, 2004; Gus Reel, *Upon a Second Viewing of 'Fahrenheit 9/11,'* Oct. 29, 2004, available at www.MichaelMoore.com/words/mikeinthenews/index.php?id=266.[7] Thus, if we find

[7] We recognize that one could have found that the commercial exemption did not apply and still have found, on other grounds, that there was "no reason to believe" in MURs 5474 and 5539. But OGC

that one reason for Shelmerdine's decision to place "Bush Cheney '04" on his car was to attract attention to his business, he would meet the second criterion and be eligible for the commercial exemption.

On what basis would we find that Shelmerdine would not have a commercial purpose, whether exclusively or in addition to a political purpose? In MUR 5474, the counsel noted that the respondents were "in the business of making, promoting, and/or distributing films, and no information suggests that they failed to follow usual and normal business practices and industry standards...." MUR 5474, First GC Report at 15. Similarly, OGC notes that ads for the film appear to have been, "to encourage the purchase of tickets." *Id.* at 16. But surely Shelmerdine, and KSR, are in the business of stock car racing and, in that business, seek to draw attention and possible sponsorship to their car. Popularity with fans is a major help in drawing sponsorship. Shelmerdine has stated that his actions were motivated by a desire to help his business. This is hardly an implausible notion - we note that NASCAR fans could be expected to be enthusiastic about a driver who endorsed the Bush-Cheney ticket. *See* Coble, *supra* (noting that "NASCAR is using its collective influence to help George W. Bush win re-election;" that 30 of 31 drivers asked in one race indicated that they would vote for Bush; and that many NASCAR figures were campaigning for Bush); *see also* Billings Gazette, *Democrats Try to Focus on 'NASCAR Dad' Voters*, at http://zogby.com/Soundbites/ReadClips.dbm?ID=6445 ("President Bush is particularly popular with the NASCAR crowd, pollsters said," and, citing pollster John Zogby, noting that "most NASCAR types are Republican.") In MUR 5474, the Counsel noted approvingly that the film *Fahrenheit 9/11* grossed over $100 million. MUR 5474, First GC Report at 16. But in MUR 5563, Counsel seems to suggest that the fact that KSR grossed $231,400 for the races with its "Bush Cheney '04" decal was a vague sign of the magnitude of the offense, or of the ability of Shelmerdine to pay a fine, or maybe just an interesting if irrelevant fact – but certainly it is not mentioned to establish that Shelmerdine had any legitimate commercial purpose in mind. *Id.* at 2.

In short, when OGC suggests that there is no evidence that respondents in MUR 5474 "were motivated by anything other than making a profit," it is simply ignoring Michael Moore's own repeated public statements. Yet the case in MUR 5563 seems to hinge on a single statement by Shelmerdine, a statement which, unlike Moore's, was contradicted by his own later statements.

There is, of course, one other potential difference. Whatever their motives, the respondents in MUR 5474 were charging money for their activity – Shelmerdine, in contrast, did not charge for ad space for which he might normally have charged. Of course, we do not really know if *Fahrenheit 9/11* was vetted in accordance with normal business practices – while we know that the film did, eventually, turn a substantial profit, we do not know that the studios involved thought that it would when they decided to produce it; for all we know, they may have thought it would be a commercial bomb, but wanted to help defeat President Bush (just as, conversely, Shelmerdine thought that

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concluded that the commercial exemption alone would be sufficient, and the Commission found no reason to believe and dismissed the complaint solely on that basis.

putting "Bush Cheney '04" on his car would attract attention and sponsorship, but it did not).

It seems to us that if the Commission is going to get into the business of determining retroactively if business decisions made sense, we should only question such decisions where there are patent irregularities or deviations from any acceptable business practice. We certainly do not see that here. The Commission has no special expertise in how to market a struggling stock car racing team, and we are in no position to say that Shelmerdine's stated objective was patently contrary to any accepted business practice. Indeed, if KSR were otherwise unable to sell the ad space, as appears to have been the case,[8] it strikes us as quite a reasonable business move.

By taking it upon ourselves to create a business exception, and then making determinations about what constitute "usual and normal" business practices, we set ourselves up for arbitrary and irregular enforcement. In practice, we see this enforcement working against struggling businesses, such as KSR, which will have less of a track record and more of a need to try creative business strategies, and in favor of big, well financed operations. Thus, despite his oft-repeated statements that *Fahrenheit 9/11* was intended to help defeat George W. Bush, millionaire Michael Moore and the corporations that make large sums from his and other movies are free to indulge their desire to influence the election; struggling stock car driver Kirk Shelmerdine, on the other hand, is not even though unlike Michael Moore, Shelmerdine never even said that he wanted to re-elect President Bush.

B. Any Independent Expenditure Fell Below the $250 Reporting Threshold

Even if we did not find the business exception availing, we do not believe that Shelmerdine or KSR reached the $250 threshold to trigger reporting requirements.

1. The Value of the Expenditure Should be the Amount Spent

Shelmerdine states, and it is not argued otherwise, that the cost of the decals to Shelmerdine was "$50.00 or less." Shelmerdine Affidavit, First General Counsel's Report at 6. A simple reading of the statute regarding reporting requirements might lead us to conclude, "case closed." At the Commission, however, it is not so simple. The law defines an "expenditure" as, "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election to federal office." 2. U.S.C. §431(9)(A)(i). From this, the Commission has long taken the position that "value" is based not what the person making the expenditure actually paid, but on the value of the expenditure to the campaign. Thus, in this case OGC informs us, based on Mr. Coble's reporting in the Florida Times-Union, that the "value" of such a decal on Mr. Shelmerdine's race car may be "as much as $25,000 a race." First General Counsel's Report at 7.

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[8] *See* section B. 2. *infra*

We think that this method of calculation is wrong. First, we believe that the natural reading of the statute does not suggest that the value of an "expenditure" can be determined by anything other than what is actually spent. An "expenditure" can take the form of "money," or it can take the form of something else of "value," meaning that the spender cannot get around the law by providing in-kind services such as driving voters to the polls, running TV ads, or, perhaps, placing a candidate's name on a stockcar. But the statute does not suggest that "value" can be determined by anything other than what is actually spent.[9]

This plain reading of the statute is also more attuned to the purpose of the law. The purpose of the law, according to the "sober-minded Elihu Root," was, "to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth, from using their corporate funds, directly or indirectly, to send members of the legislature to these halls."[10] However, it takes no "great aggregation of wealth" to put a $50 decal on a car.

Furthermore, the Commission's approach invites irregular and arbitrary enforcement. Most obviously, the Commission does not value all such expenditures in this subjective fashion. *See e.g.*, MUR 4920 Ron Kind (the Commission did not determine the "value" to the Kind campaign of a large sign painted on a building based on the market value for outdoor advertising). During the Executive Session, it was asked if we would consider the value of a celebrity, such as Brad Pitt, placing a bumper sticker on his car, in the knowledge that it would probably be photographed and shown on various newspapers, magazines, and television broadcasts. The clear answer was "no." It was suggested that we would not value this type of express advocacy endorsement (on a car panel, no less, for those interested in factual similarities) because there is not a market by which to value such an action. But we believe this to be patently incorrect. There is a very clear and easily ascertainable market for celebrity endorsements. Major celebrities and especially sports figures regularly charge to place endorsements on their clothing and personal items. Nor is this an unlikely occurrence. To use a real world example, on at least one concert on Bruce Springsteen's 2004 "Vote for Change" tour, which aimed to rally support to defeat the President, rocker Michael Stipe of REM wore a Kerry for President t-shirt.[11] Yet we doubt that the Commission would value Stipe's t-shirt based on the market value for such an endorsement product.

Nor, we would point out, would such a bumper sticker endorsement, or Mr. Stipe's concert t-shirt, appear to qualify under the volunteer exemption of 11 C.F.R.

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[9] *See McConnell v. FEC*, 540 U.S. 93 (2003). *See also* Democracy 21, Campaign Legal Center, and Center for Responsive Politics, Comments on Notice 2005-10, Internet Communications, p. 8 (June 3, 2005) ("Campaign finance laws regulate money, not speech per se... Thus, if an individual stands on a soapbox in the town square and gives a speech containing express advocacy, he or she is not spending money, and is not subject to regulation under FECA.") On the other hand, on the logic of this case, it seems that while giving a speech from a soapbox may be OK, if you stand on a soapbox and hold up a decal reading "Bush-Cheney '04" ... Well, lines must be drawn.

[10] Elihu Root, Addresses on Government and Citizenship, p. 143 (1916).

[11] *See* http://www.jambase.com/headsup.asp?storyID=5656 ("Singer Michael Stipe left little doubt to what he was there for, dressed for the evening in a white suit highlighted by a John Kerry t-shirt.")

§100.74. That exemption would cover the endorsement itself, or the time politicking for Senator Kerry at the concert, just as it would cover Mr. Shelmerdine's time spent putting decals on his car or speaking to reporters about his disdain for "liberal ways." But if Mr. Shelmerdine's display of the decals is not covered as a volunteer exemption, we are uncertain as to why a bumper sticker, or a rock star's t-shirt worn before thousands of fans and featured on numerous websites, would be exempt. If all of this seems to border on the absurd – and we admit that we think it does – one might ask which action has a greater value to the campaign, and therefore, according to the logic of the law, poses the greater danger of corruption? We would guess that it is Mr. Pitt's hypothetical bumper sticker, or Mr. Stipe's very real t-shirt, not Mr. Shelmerdine's car decal.

Similarly, the Commission has not sought to determine the "value" of billboards erected on property, even though a ready market exists for determining such value. *See e.g.*, MUR 5156, Morton et al. ("Muleshoe 4"). Were a world class chef to host a fund-raising dinner for a candidate, we assume that the value of the food served, for determining whether the expenditure would be exempt pursuant to 11 C.F.R. §100.77, would be determined based on its cost to the host, not its "value" to the campaign – that is, not on what it would cost the campaign to cater the same event through the chef's restaurant, even though the thought of a delectable meal prepared by a top chef might entice food lovers to attend and to open their wallets in ways they otherwise would not.

In short, the Commission's approach invites arbitrary enforcement of the law in ways that do nothing to stem "corruption" or "the appearance of corruption."

2. Even Pursuant to an Opportunity Cost Analysis, the Value was Likely Below $250.

Even if we were to analyze the value of the decals as OGC recommends, we doubt that they reach the $250 threshold for reporting. According to the Sporting News, during the week of June 6, 2005, as the Commission voted to find RTB on this matter, Kirk Shelmerdine Racing was auctioning on E-Bay, the on-line auction site, the primary sponsorship of Mr. Shelmerdine's car for a 5 race series. The Sporting News, *To Know List: 7 Tomato Cans That Could Beat Mike Tyson Silly*, June 24, 2005, at 2. "Primary Sponsorship" includes not merely a quarter panel, but the hood, both quarter panels and the TV panel, plus driver and crew uniforms, pit signs, and all equipment, plus souvenir rights, plus four pit passes good for the entire race week-end at each race. According to the Sporting News, the high bid was $5798.99. *Id.* Apparently, the bid was not accepted, for the next week KSR was again attempting to auction primary sponsorship on E-Bay, but this time with a minimum bid of $50,000. Four days into the auction, no bids had been received.[12] We also note that the article relied upon by OGC for the $25,000 value

[12] Unfortunately, we have no citation for this, and auctions, once completed, are deleted from the E-Bay site. However, Commissioner Smith did visit the site on or about June 7, 2005. Meanwhile, the First General Counsel's Report notes that in January, 2005, KSR attempted to auction off "associate" sponsorship on E-Bay for $100,000, and also to auction off the TV panel for one race, for $7500. No bids were received. First General Counsel's Report at 7, n.6.

estimate also reported that, "Shelmerdine's Ford has gone without significant sponsorship all season." Coble, *supra.*

Not only do these events suggest that Mr. Shelmerdine gave up no income to put "Bush Cheney '04" on his car, but they point up the invitation to arbitrary valuation inherent in the Commission majority's approach. Shelmerdine may in fact have a list price of $25,000 for his rear quarter panel – we don't know – but it does not appear that he actually receives anything close to that amount, suggesting that the market does not value the panel so highly, and raising doubts about its value to the Bush/Cheney campaign. We find it odd that OGC felt it not worth the time to investigate whether or not one can fit a disclaimer on a rear quarter panel decal, but thought it was worth investigating the "value" of the decal to the Bush campaign. In any case, we think that the evidence is strong that the market value of Shelmerdine's rear quarter panel was approximately $0, give or take $249.

III. CONCLUSION

We would have found "No Reason to Believe," pursuant to the business exception and due to the minimal amount spent. At a minimum, this case should have been dismissed pursuant to *Heckler v. Cheney,* as not worth the Commission's time. At bottom, we think that Kirk Shelmerdine's decision to put $50 of decals on his car poses no threat to democracy or to the nation's campaign finance laws. Unfortunately, the Commission seems determined to swat this fly with a sledgehammer.

Michael E. Toner
Vice Chairman

8/8/05
Date

Bradley A. Smith

8-8-05
Date

Bradley A. Smith
Commissioner