FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

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

STATEMENT OF REASONS

OF

COMMISSIONER HANS A. von SPAKOVSKY

On August 1, 2006, the Commission voted 4-1 to send a Letter of Admonishment to Kirk Shelmerdine and Kirk Shelmerdine Racing, LLC ("KSR"), and to take no further action and close the file in this matter. I agree with my colleagues' decision to take no further action and close the file. However, I dissented because I do not believe that the Commission should issue a Letter of Admonishment under the present circumstances. I generally agree with the Statement of Reasons issued by Vice Chairman Toner and Commissioner Smith over a year ago, and I fully agree that this matter should have been dismissed pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), at that time. However, I write separately to explain my own views and emphasize that the array of opinions produced by this matter among the Commissioners has yielded a situation in which the precise nature of the Commission's admonishment lacks the clarity for which the Commission should always strive.

Four Commissioners apparently agree, at least in the abstract, that Mr. Shelmerdine made one or more independent expenditures of some value subject to Commission regulation.[1] As a result, the Commission is sending Mr. Shelmerdine a Letter of Admonishment reminding him that making an independent expenditure carries certain legal consequences. Having become acquainted with the Commission over the past two years through the burden and expense of responding to the Commission's investigation, Mr. Shelmerdine is surely already aware of this fact, making the Letter of Admonishment completely unnecessary and of no deterrent value.

[1] The Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("FECA") requires persons other than political committees who make independent expenditures aggregating in excess of $250 during a calendar year to file certain reports with the Federal Election Commission. *See* 2 U.S.C. § 434(c)(1). Additionally, General Counsel's Report #2 recommended finding reporting violations pursuant to 2 U.S.C. § 434(g)(1)(A), meaning OGC concluded the decal was an independent expenditure worth $1,000 or more.

Factual Background

The facts of this case are set forth in the General Counsel's Reports and the Statement of Reasons of Vice Chairman Toner and Commissioner Smith. However, they are important to the conclusions reached, so I briefly recount them here.

Kirk Shelmerdine is a professional stock car driver who races in the NASCAR Nextel Cup Series. He served as the crew chief for Dale Earnhardt from 1982-1992 before becoming a driver in his own right. In 2002, he established his own racing team, Kirk Shelmerdine Racing. In 2004, the year during which the Commission's scrutiny of Mr. Shelmerdine and KSR began, he qualified for and started 18 races, averaging 41st place (out of a field of 43).[2] In the years preceding and following 2004, Mr. Shelmerdine appeared in only a handful of races each year. As he has himself admitted, "I am considered to be a 'field filler' as my race cars and race team are under funded and have no realistic chance of winning a race. In fact, the race cars are not able to qualify and participate in every race." Respondent's Response to Complaint, Affidavit of E. Kirk Shelmerdine, Oct. 27, 2004.

Although Mr. Shelmerdine is best known for his work with Dale Earnhardt, he also garnered attention for placing a Bush/Cheney decal above one of his race car's rear tires during four races in 2004.[3] This single decal is the subject of the Commission's inquiry and the reason it has expended considerable time and resources investigating this matter.

According to the Commission's Office of General Counsel ("OGC"), KSR secured sponsorship for five early season races in 2004. Renegade Tobacco Company paid an estimated $12,500 (or $4,166 per race) attributable to space on the rear quarter panel for the Daytona 500 (February 15, 2004), the following week's Subway 400 (February 22, 2004), and the Carolina Dodge Dealers 400 (March 21, 2004). Mr. Shelmerdine did not appear in the Daytona 500, finished next to last after completing only 19 of 393 laps at the Subway 400, and finished in 39th place at the Carolina Dodge Dealers 400, completing 49 of 293 laps. *See* http://www.nascar.com/races/cup/archives/2004/03/. KSR then secured sponsorship from Second Chance Race Parts for two races. This sponsorship was not the product of the normal process by which one might expect professional sports sponsorships to arise, but rather, came about as part of a barter arrangement. Mr. Shelmerdine sought to purchase a damaged race car from Second Chance Race Parts. According to the seller, "I was asking $15,000 for the car initially, but knowing Kirk was operating on limited funds, I offered him the car for the $10,000 amount and said that he could place my decal on his car." *See* General Counsel's Report #2 at 4. OGC concludes that advertising

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[2] Mr. Shelmerdine's race car unfortunately did not finish any of these 18 races. In fact, he completed only 11.5% of the races' total laps. In his best showing, he completed over half of the laps and finished 37th. *See* http://www.nascar.com/drivers/dps/kshelmer00/cup/data/2004/index.html.

[3] Those races were the Sylvania 300 (September 19, 2004), the MBNA America 400 (September 26), the Banquet 400 (October 10), and the Subway 500 (October 24). Together, these races totaled 1,467 laps; Mr. Shelmerdine's car finished just under 10% of those laps (156).

space filling the rear quarter panel of Mr. Shelmerdine's race car was sold to Second Chance Race Parts for $5,000 ($2,500 per race for two races), and that it is appropriate to use this figure in determining the rear quarter panel's fair market value.

Any number of widely differing conclusions might be drawn from these facts. One conclusion that is inescapable, however, is that the Second Chance Race Parts sponsorship did not come about through traditional avenues, and it is not at all clear that Second Chance Race Parts would have become a KSR sponsor independent of the car transaction. Would Second Chance Race Parts have paid $5,000 in cash to advertise on Mr. Shelmerdine's car, or was it simply doing Mr. Shelmerdine a favor and lowering the price of the damaged car? Whatever the answer, the facts strongly suggest that there was not much of a market – if any – for the advertising space in question.

Theories Offered

At issue is the value of Mr. Shelmerdine's Bush/Cheney decals and whether they qualify as "independent expenditures" subject to reporting requirements under federal campaign finance law.

In the First General Counsel's Report, OGC recommended that the Commission find reason to believe that KSR made an unreported independent expenditure because of the placement of this one decal and authorize an investigation to determine the associated costs involved. OGC advanced a valuation theory in which the decal displayed on Mr. Shelmerdine's race car was valued "based on what an independent sponsor would have paid to place such advertising in the same location on KSR's car in a NASCAR Nextel Cup series race." First General Counsel's Report at 6. While I was not on the Commission at the time, the Commission voted 4-2 to accept OGC's recommendations, with Vice Chairman Toner and Commissioner Smith dissenting.

Vice Chairman Toner and Commissioner Smith explained their dissent in a separate Statement of Reasons. They suggested two theories by which no violation of the law occurred. First, the costs involved were exempt from the law because they represented *bona fide* commercial activity and a legitimate business expense, similar to the costs at issue in MURs 5474 and 5539.[4] *See* Statement of Reasons of Commission Bradley A. Smith and Vice Chairman Michael E. Toner in MUR 5653, Kirk Shelmerdine Racing LLC, at 3-6. Alternatively, they suggested that the question of valuation should be determined simply by the amount spent by KSR on the decals, *i.e.*, the decal's actual cost. *See id.* at 6-9.

[4] MURs 5474 and 5539 involved complaints filed against Michael Moore and a variety of other entities involved with the production, distribution, and promotion of the anti-George W. Bush film, *Fahrenheit 9/11*. These complaints were dismissed based on OGC's conclusion that "the film ands its related enterprises are bona fide commercial activity, not independent expenditures under the Act," and the costs involved were not for "the purpose of influencing an election." MURs 5474 and 5539, First General Counsel's Report at 13.

In the Second General Counsel's Report, OGC reported that it had determined that the value of the displayed decal was $3,500 per race, or $14,000 total. This figure was reached by averaging the cost per race paid by the two KSR sponsors noted above.

The response to the Second General Counsel's Report was far from uniform. One Commissioner considered OGC's analysis of the value of the decal's placement to be reasonable, but was willing to simply close the file on this matter because the amount in question is relatively low and further enforcement would not serve a deterrent purpose. One or more Commissioners believed that OGC substantially undervalued the activity in question. Other Commissioners, including me, believed that OGC's valuation approach substantially overvalued that activity and that the Commission's investigation of the placement of a single campaign decal was a poor use of the Commission's time and resources.

Preferred Approach

From the First General Counsel's Report, OGC proceeded on the theory that Mr. Shelmerdine's decals were independent expenditures. As noted above, my colleagues accepted this theory as well. The implications of this theory are worth considering since they determine the results in this matter. An "independent expenditure" is an expenditure by a person for a communication that expressly advocates the election or defeat of a clearly identified candidate that is not coordinated with a candidate or party committee. *See* 2 U.S.C. § 431(17); 11 CFR 100.16. The amount of the "expenditure" for purposes of the Act is typically calculated in terms of how much the person spent to make the communication. However, as OGC noted in the First General Counsel's Report, "[a]lthough independent expenditures are reportable if the aggregate 'amount or value,' *see* 2 U.S.C. § 434(c), exceeds the specified amount, this is an unusual case where the 'amount' of the independent expenditure may be substantially different from its 'value.' Where such differences occur, and the value can be determined in the marketplace in the same manner as for an in-kind contribution, it appears appropriate to base the aggregate total of the independent expenditure on the normal and usual charge for the comparable commodity." First General Counsel's Report at 6. Vice Chairman Toner and Commissioner Smith persuasively rejected this approach in their earlier Statement of Reasons. *See* Statement of Reasons of Commissioners Bradley A. Smith and Vice Chairman Michael E. Toner in MUR 5653, Kirk Shelmerdine Racing LLC, at 6-8. Although the theory is never expressly stated, OGC's approach amounts to an attempt to determine how much Mr. Shelmerdine would have to pay *himself* to purchase the unsold advertising space on his *own* car for the purpose of displaying the Bush/Cheney decal, an absurd exercise for which there is no precedent and no legal basis under the applicable law. OGC's market valuation theory is clumsy at best, and entirely inapt at worst.

As noted above, I generally agree with the views expressed previously by Vice Chairman Toner and Commissioner Smith. As they explained, Mr. Shelmerdine had a legitimate business purpose in placing the Bush/Cheney decal on his own race car. This conclusion is well supported by the facts. Mr. Shelmerdine stated, "I put the decals that

are the subject of this complaint 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." Affidavit of E. Kirk Shelmerdine, October 27, 2004. This conclusion indicates that the commercial exemption recommended by OGC in MURs 5474 and 5539 was applicable here, although OGC did not recommend applying the theory in this case. It also lends support to the view that OGC's approach overvalued the decal. If it was Mr. Shelmerdine's intention to attract publicity for his race team, it makes more sense to think that that he removed the advertising space in question from the market and used it himself, rather than that he sold it to himself.[5] If the space was not sold, or was not even for sale, then attempts to determine a fair market value based on how much a commercial advertiser would have to pay are futile and invalid.

Beyond the valid objections previously raised by Vice Chairman Toner and Commissioner Smith, I have serious concerns with the demonstrably faulty methodology used by OGC in determining the fair market value of Mr. Shelmerdine's advertising space. OGC selected the five instances in which the advertising space on the rear quarter panel was actually sold, averaged the cost, and declared that figure to be the space's fair market value. Rather than finding "fair market value," OGC's approach simply tells us the average cost to advertise on Mr. Shelmerdine's car based on those instances in which the space was sold. This in no way gives us the "normal and usual charge" that OGC claimed to be seeking. First General Counsel's Report at 6. The "normal and usual charge" would seem to be $0.00, **since in 31 of the NASCAR season's 36 races (or 86% of the time), Mr. Shelmerdine was unable to sell advertising on the rear quarter panel.**

OGC's valuation method amounts to hand-picking the five hottest days of the summer, and declaring their average to be the average temperature for June, July, and August. If one accepts OGC's basic premises, then one must determine "fair market value" across the full NASCAR season, and take into account **all** 36 races, something OGC pointedly failed to do. Mr. Shelmerdine only secured sponsorship for five of those races. One cannot validly ignore 31 known data points in producing a "fair market value" figure. Of course, if one were to divide Mr. Shelmerdine's total rear quarter panel advertising revenue for the 2004 season ($17,500) by 36 races, he would get an average sale price of $486.11, not $3,500.[6]

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[5] If Mr. Shelmerdine removed the advertising space from the market and used it himself, then any valuation above the cost of the decal constitutes potentially lost revenue. The statute regulates "expenditures," not foregone revenue.

[6] The First General Counsel's Report indicates that Mr. Shelmerdine had other sponsorship during the 2004 racing season, although apparently those sponsors did not purchase advertising space on the rear quarter panel that is at issue. See First General Counsel's Report at 7. General Counsel's Report #2 notes that "KSR sold advertising space on different locations of the stock car piecemeal to several different entities." General Counsel's Report #2 at 2. NASCAR.com indicates that during the 2004 season, Freddie B's, TUCSON, L.R. Lyons & Son Transportation, and Fairfield Inn by Marriott all sponsored Mr. Shelmerdine's car for one or more race. It would have been appropriate to take into account these other sponsorships in some manner to determine the fair market value of advertising on Mr. Shelmerdine's car.

As this case amply demonstrates, "fair market value" is not always easy to determine. This is a basic function of the complexity of the "market" concept. While some markets are stable over a given period of time, others fluctuate significantly, or barely exist.[7] OGC's valuation approach may be appropriate for determining the value of advertising space on the cars of NASCAR's biggest stars. They are known commodities who appear in every race and (typically) sign long-term sponsorship contracts. If you compared the contracts of NASCAR's established superstars, you would be comparing nothing but "apples" and your comparison would in all likelihood yield a fair estimate of the relatively stable per race cost of advertising on a star's car. With respect to NASCAR's non-stars, whose sponsorship markets are more likely to fluctuate from race to race, or hardly exist at all, the situation is very different. There are many additional factors that must be taken into account. Obviously, sponsorship is less valuable on the cars that attract less television exposure. And what is the value of advertising space on a car that in all likelihood will not qualify for the race (and not be seen by anyone)? Regardless of how much Mr. Shelmerdine's rear quarter panel brought in ad revenue on those few occasions when it was sold, it is simply not the case that the highest possible value estimate (which OGC's approach yields) must always be attributed to the advertising space in question. This approach ignores the fact that the entire reason Mr. Shelmerdine was able to place a decal on his car was **because he was unable to sell the space.**

With respect to advertising space on Mr. Shelmerdine's car, there is no consistent, predictable "fair market value." As demonstrated, sometimes that space sold for as much as $4,166 per race, but most of the time it was not sold at all. Both the facts and simple logic suggest that the fair market value for Mr. Shelmerdine's advertising space varied substantially from race to race depending on a variety of circumstances. I do not suggest that I know – or could even determine – the actual "fair market value" of the advertising space at issue, but I am confident that it is far lower than OGC believes.

Even assuming for the sake of argument that OGC's valuation approach was appropriate here, this case is a candidate for dismissal pursuant to the Commission's authority under *Heckler v. Chaney*. In a recent matter involving an individual who raised approximately $13,000 for the "Kerry-Edwards Blount County Campaign," the Commission voted for dismissal (despite likely contact with the Kerry-Edwards

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OGC, however, did not do so. Rather, OGC's approach treats the rear quarter panel as a market unto itself, rather than approach the issue in terms of an advertising market that consists of the entire race car.

[7] The Commission's efforts to determine "fair market value" in situations where the market is very limited have not produced clear guidance for the regulated community. For example, the Commission has determined that mailing lists may be sold or rented at "fair market value" without any reportable event occurring (*i.e.*, no contribution is made so long as the price is consistent with the list's fair market value), so long as the list (i) has an ascertainable fair market value, (ii) is rented or sold at the usual and normal charge in a bona fide, arm's length transaction, and (iii) is used in a commercially reasonable manner. *See* Advisory Opinion 2004-14 (Libertarian National Committee). The Commission did not explain how to ascertain the list's fair market value, even though the problem had recently revealed itself in MUR 5181 (Spirit of America PAC). Compare the Statement of Reasons of Chairman Weintraub and Commissioners Thomas and McDonald in MUR 5181, and the separate Statement of Reasons of Chairman Weintraub, with the Statement of Reasons of Commissioners Mason and Toner.

campaign, and certain contact with state and local Democratic party officials). As noted in the Statement of Reasons I joined in that matter, "the Commission now has, in effect at OGC's recommendation, a $13,000 threshold for pursuing . . . independent expenditures . . . . In the future, the Commission should not pursue enforcement actions for activity below this threshold." *See* Statement of Reasons of Chairman Toner and Commissioners Mason and von Spakovsky, in MUR 5651, Joseph Gallagher.

OGC valued Mr. Shelmerdine's decals at $14,000. For the reasons set forth above, I believe this significantly overvalues Mr. Shelmerdine's activity. Were OGC to modify its analysis only modestly, to take into account even some of the factors noted above that I believe were overlooked or ignored, Mr. Shelmerdine's activity would likely be valued at less than $13,000. And unlike the respondent in MUR 5651, Mr. Shelmerdine was not involved with any campaign committee, did not solicit contributions, did not make expenditures on political paraphernalia for distribution, and was not in contact with local and state party officials or a presidential campaign. The Commission voted to dismiss the complaint in MUR 5651 without an admonishment, but voted for admonishment in this matter, where Mr. Shelmerdine's statements about his limited political involvement are undisputed: "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, Oct. 27, 2004. After his experience with the Commission (and his legal expenses) over the placement of one campaign decal on his own car, I have no doubt that Mr. Shelmerdine's avoidance of involvement in voting, politics, and the election process, will be even greater.

Finally, the fact that the result in this matter serves none of the generally cited purposes of the Act, or Commission regulation in general, strongly suggests that the law has been misapplied here. There is no likelihood that Mr. Shelmerdine's decal had the potential to "corrupt" President Bush or create the "appearance of corruption" in our political process if it went unreported to the Commission. Mr. Shelmerdine's failure to report his supposed "independent expenditure" did no harm to the overall transparency of the campaign finance system, because media accounts of Mr. Shelmerdine's decal reached far more people than would have ever seen a disclosure report. The source of whatever funds were spent was a sole proprietorship, an individual, so the money spent was not "dirty" corporate money, or any other form of non-Federal funds. Mr. Shelmerdine is not a political committee with an ongoing duty to accurately report its activity. The amount in question of any potential violation (if you take that view) was not so great that the integrity of the Commission would have been compromised by a simple dismissal. And the resolution of this matter serves no deterrent purpose, since it is almost certain that the Commission will never hear from Mr. Shelmerdine again.

Conclusion

It is well past the time to close this matter. In fact, the Office of General Counsel should have recommended *against* finding reason to believe that a violation of the law had occurred and recommended the dismissal of this frivolous complaint that wasted the Commission's time and resources. I support the Commission's dismissal of this matter. I would not, however, admonish Mr. Shelmerdine for violating any federal campaign finance law for the reasons outlined in this Statement of Reasons.

I would be remiss if I did not conclude this Statement of Reasons by congratulating Mr. Shelmerdine on his showing at the Daytona 500 this past February. After surprising many simply by qualifying for the event, Mr. Shelmerdine completed the race and finished 20th in the field of 43. It should be noted, given the OGC's valuation method in this matter, that Mr. Shelmerdine raced in the Daytona 500 "without a major sponsor, without a full-time crew and without much of a chance."[8] A fan of Dale Earnhardt donated the tires on which Mr. Shelmerdine drove.[9] And in a very familiar story, "Richard Childress donated an engine in exchange for getting his Childress Vineyards logo on the quarter-panel of Shelmerdine's Chevrolet."[10]

September 29, 2006

Hans A. von Spakovsky
Commissioner

[8] From the Associated Press, available at http://cbs.sportsline.com/print/autoracing/story/9249683 or http://www.boston.com/sports/other_sports/autoracing/articles/2006/02/19/wallace_cleared_to_race_in_daytona_500/.

[9] Dale Earnhardt, of course, was killed on the final lap of the 2001 Daytona 500.

[10] From the Associated Press, available at http://cbs.sportsline.com/print/autoracing/story/9249683 or http://www.boston.com/sports/other_sports/autoracing/articles/2006/02/19/wallace_cleared_to_race_in_daytona_500/. (Dale Earnhardt drove for Richard Childress Racing.)