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BEFORE THE FEDERAL ELECTION COMMISSION

2012 AUG 10 AM 11:00

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In the Matter of)

CELA)

DISMISSAL AND
CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM

SENSITIVE

MUR 6565)

Blaha for Congress and)

Jerry R. Hilderbrand as treasurer)

Robert B. Blaha)

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include without limitation an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended ("Act"), and developments of the law. It is the Commission's policy that dismissal of relatively low-rated matters on the Enforcement docket is warranted through the exercise of its prosecutorial discretion under certain circumstances.

The Office of General Counsel has scored MUR 6565 as a low-rated matter and has determined that it should not be referred to the Alternative Dispute Resolution Office. For the reasons set forth below, the Office of General Counsel recommends that the Commission exercise its prosecutorial discretion to dismiss MUR 6565.¹

In this matter, the Complainant, Gary Chacon, asserts that Robert B. Blaha, an unsuccessful candidate for Congress in Colorado's Fifth Congressional District, and his

¹ The EPS rating information is as follows:
Filed: May 29, 2012.

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1 campaign committee, Blaha for Congress and Jerry R. Hilderbrand in his official capacity as
2 treasurer (the "Committee") violated the disclaimer provisions for televised communications
3 under 2 U.S.C. § 441d(d)(1)(B)(ii) and 11 C.F.R. § 110.11(c)(3)(iii). According to the
4 Complainant, the advertisement at issue contains a disclaimer that is defective in two ways:
5 "1) The disclaimer does not run until the end of the ad because his logo fills up the screen in
6 the final second or two; and 2) . . . the FEC law and rules state that in addition to the written
7 'paid for' disclaimer . . . television ads must include written 'authorization' line [sic] similar
8 to what the candidate says." Compl. at 2. Specifically, the Complainant alleges that the
9 written portion of the disclaimer included in the aired television advertisement merely states
10 "Paid for and approved by Blaha for Congress," when it should also have included language
11 stating that the message had been "approved by X person." *Id.*

12 The Committee, which also responds on behalf of Blaha, maintains that its televised
13 campaign advertisements complied with the Act and Commission regulations. Resp. at 1.
14 Specifically, the Committee takes the position that its advertisements contain oral statements
15 of approval by Blaha. *Id.* With respect to its written disclaimer, the Committee asserts that
16 the written statements at the end of the commercials are "clearly readable," last at least four
17 seconds, and include a "reasonable degree of color contrast" between the background and the
18 disclaimer statements. *Id.* Finally, the Committee claims that, contrary to the Complaint, it is
19 not required under the Act or Commission regulations to include a written statement of
20 approval by the candidate. *Id.* Rather, a written statement of approval by the candidate's
21 Committee, rather than the candidate himself, is adequate under the Act. *Id.*

22 The Act requires that whenever a public communication is authorized and financed
23 by a candidate or his or her committee, the communication must include a disclaimer notice

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1 that clearly states the communication has been paid for by the authorized political committee.
2 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(b)(1). Furthermore, under the Act's "stand by your
3 ad" provisions,² a television communication paid for or authorized by a candidate's principal
4 campaign committee must include an oral statement by the candidate that identifies the
5 candidate and states that the candidate approved the communication. 2 U.S.C.
6 § 441d(d)(1)(B); 11 C.F.R. § 110.11(c)(3)(ii). A similar statement must also appear in writing
7 at the end of the communication in a clearly readable manner with a reasonable degree of
8 color contrast between the background and the printed statement, for a period of at least four
9 seconds. 2 U.S.C. § 441d(d)(1)(B)(ii); 11 C.F.R. § 110.11(c)(3)(iii).

10 Although the regulations do not define what "similar" means, the Commission has
11 interpreted the regulation to require a written statement of approval by the candidate himself
12 or herself at the end of the communication. *See, e.g.*, MUR 6070 (Lyle Larson) (written
13 television ad disclaimer "Paid for by Lyle Larson for Congress," was inadequate when it
14 failed to include a written statement indicating the candidate approved the communication);
15 MUR 5629 (Newberry) (television ads lacked written statements that the candidate approved
16 the communications as required by the Act).

17 Since we do not have access to the advertisement, we are unable to verify whether the
18 Blaha campaign's television advertisement ran a "clearly readable" written statement that
19 lasted at least four seconds and had the required content per 11 C.F.R. § 110.11(c)(3)(iii).
20 The Committee takes the mistaken position that "there is nothing in the FEC Code of
21 Regulations that states . . . television ads must include written 'authorization' line [sic]

² This is "colloquially known as a 'stand by your ad' requirement because it directly associates the candidate with the message he or she has authorized." Advisory Op. 2004-10 (Metro Networks).

1 similar to what the candidate says.” Resp. at 1. It is therefore likely that the Blaha
2 campaign’s television commercial failed to include a written statement of approval by the
3 candidate himself as required by the “stand by your ad” provisions.

4 On the other hand, it appears that the advertisement contained sufficient information to
5 clearly identify who paid for it, as well as an apparently adequate spoken message of approval
6 by the candidate. The Commission has traditionally dismissed cases such as this one, where
7 the candidate and his or her committee substantially complied with the Commission’s
8 disclaimer regulations, the communications apparently contained sufficient identifying
9 information to prevent the public from being misled as to who paid for them, and the
10 omissions were basically technical in nature. *See* MUR 5834 (Darcy Burner); *see also* ADR
11 347/MUR 5727 (Kaloogian/Roach) (when candidates failed to include written statements of
12 approval in televised campaign commercials, the Commission dismissed the cases or took no
13 further action).

14 Thus, in furtherance of the Commission’s priorities, relative to other matters pending
15 on the Enforcement docket, the Office of General Counsel believes that the Commission
16 should exercise its prosecutorial discretion and dismiss this matter, *see Heckler v. Chaney*,
17 470 U.S. 821 (1985), and approve the following recommendations:

18 **RECOMMENDATIONS**

- 19 1. Dismiss MUR 6565, pursuant to the Commission’s prosecutorial discretion.
20 *See Heckler v. Chaney*, 470 U.S. 821 (1985).
21
22 2. Remind Robert B. Blaha and Blaha for Congress and Jerry R. Hilderbrand in his
23 official capacity as treasurer of the requirements under 2 U.S.C.
24 § 441d(d)(1)(B)(ii) and 11 C.F.R. § 110.11(c)(3)(iii), which necessitate a written
25 statement of a candidate’s approval on televised campaign advertisements.
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3. Approve the attached Factual & Legal Analysis and the appropriate letters, and close the file.

Anthony Herman
General Counsel

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Date

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