

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 **MUR 7355**

6 DATE COMPLAINT FILED: March 28, 2018

7 DATE OF NOTIFICATION: March 30, 2018

8 DATE OF LAST RESPONSE: April 24, 2018

9 DATE OF ACTIVATION: September 28, 2018

10
11 ELECTION CYCLE: 2018

12 EXPIRATION OF SOL: March 13, 2023

13
14 **COMPLAINANT:**

Nevada State Democratic Party

15 **RESPONDENTS:**

16 Heller for Senate and Chrissie Hastie in her official
17 capacity as treasurer

18 Unknown Respondent

19 **RELEVANT STATUTES AND**
20 **REGULATIONS:**

52 U.S.C. § 30104(c)

52 U.S.C. § 30120(a)

11 C.F.R. § 109.10

11 C.F.R. § 110.11

21
22
23
24 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

25
26 **FEDERAL AGENCIES CHECKED:**

None

27 **I. INTRODUCTION**

28 The Complaint alleges that Heller for Senate and Chrissie Hastie in her official capacity
29 as treasurer (“Heller Committee”) violated the Federal Election Campaign Act of 1971, as
30 amended (the “Act”), by failing to provide disclaimers on an electronic billboard with
31 advertisements expressly advocating Dean Heller’s election to the U.S. Senate or, in the
32 alternative, by accepting a corporate contribution from the gas station on whose property the

1 billboard was located.¹ The Heller Committee contends that it has no information regarding the
2 billboard and does not know who paid for it.²

3 Based on the available information and for the reasons set forth below, we recommend
4 that the Commission find reason to believe that Unknown Respondent violated 52 U.S.C
5 § 30120(a) and 11 C.F.R. § 110.11 by failing to include disclaimers on a billboard expressly
6 advocating Heller's election. We also recommend that the Commission find reason to believe
7 that Unknown Respondent violated 52 U.S.C § 30104(c) and 11 C.F.R. § 109.10 by failing to
8 report an independent expenditure. We recommend that the Commission take no action at this
9 time as to the allegations that the Heller Committee violated the Act pending an investigation to
10 identify who paid for the billboard. Finally, we recommend that the Commission authorize
11 compulsory process for use in the investigation, if necessary.

12 **II. FACTUAL BACKGROUND**

13 Dean Heller was a candidate for the U.S. Senate in Nevada in 2018, and Heller for Senate
14 is his authorized committee.³ At the time the complaint was filed, ten different rotating
15 advertisements supporting Heller were appearing on an electronic billboard at a 76 gas station in
16 Las Vegas, Nevada.⁴ The Complaint provides photographs of the billboard advertisements

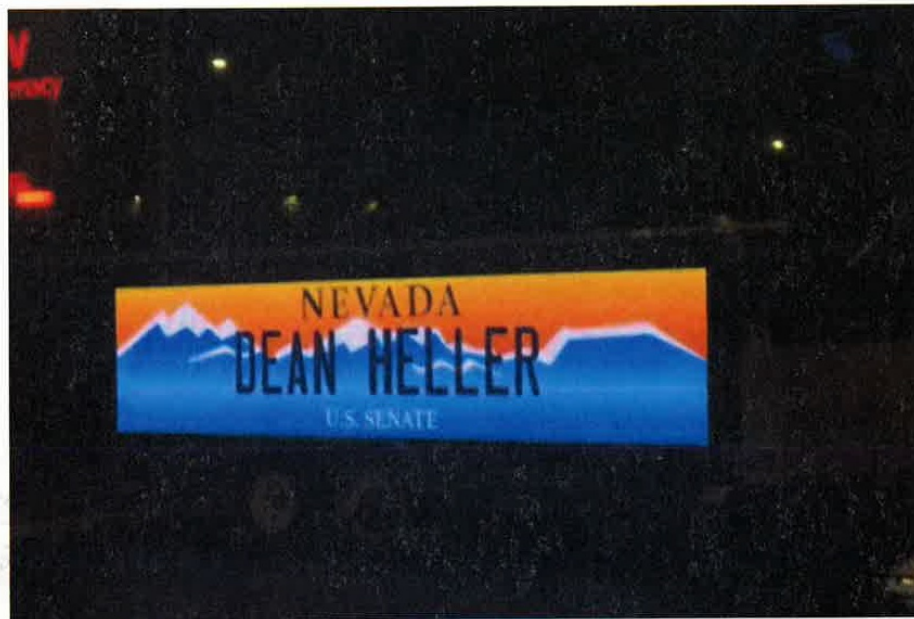
¹ Compl. at 1-2 (Mar. 28, 2018).

² Resp. at 1-2 (Apr. 24, 2018).

³ *See* Dean Heller, Amend. Statement of Candidacy (Oct. 2, 2018); Heller for Senate, Amend. Statement of Organization (Oct. 2, 2018).

⁴ Compl. at 2.

- 1 which show images of Nevada vehicle license plates with varying backgrounds, all of which
2 look similar to the image below:⁵



- 3 These advertisements supporting Heller were interspersed with advertisements for free electric
4 vehicle charging that state “provided by 76” alongside the gas station’s logo.⁶

- 5 The Complaint does not identify the name or precise location of the 76 gas station that
6 hosted the billboard, stating only that it was located in Las Vegas.⁷ The Heller Committee
7 contends that it does not know who paid for the billboard and that the campaign did not authorize
8 the advertisements.⁸

⁵ *Id.*, Ex. A.

⁶ *Id.* at 1-2.

⁷ *Id.* at 1-5. There are approximately thirty 76 gas stations with Las Vegas addresses.

⁸ Resp. at 1-2.

1 **III. LEGAL ANALYSIS**

2 **A. Disclaimers**

3 The Complaint alleges that the Heller Committee violated the Act by failing to include
4 disclaimers on the electronic billboard advertisements.⁹ The Act requires that any person who
5 makes a disbursement for the purpose of financing communications expressly advocating the
6 election or defeat of a clearly identified candidate must include a disclaimer on any such
7 communication.¹⁰ If the communication is not authorized by a candidate or an authorized
8 committee, the disclaimer must clearly state the name and permanent street address, telephone
9 number, or World Wide Web address of the person who paid for the communication and state
10 that the communication was not authorized by any candidate or candidate's committee.¹¹
11 Disclaimers in printed materials must be presented in a clear and conspicuous manner and meet
12 specific requirements, such as being of sufficient type size to be clearly readable and being
13 placed in a printed box set apart from the other parts of the communication.¹²

14 Commission regulations likewise provide that “[a]ll public communications, as defined in
15 11 C.F.R. § 100.26 . . . that expressly advocate the election or defeat of a clearly identified
16 candidate” require disclaimers.¹³ A public communication includes a communication
17 transmitted through any “outdoor advertising facility” and “any other form of general public

⁹ Compl. at 1-3.

¹⁰ 52 U.S.C. § 30120(a); *see also* 11 C.F.R. § 110.11(a)(2).

¹¹ 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3).

¹² 52 U.S.C. § 30120(c); 11 C.F.R. § 110.11(c)(1)-(2).

¹³ 11 C.F.R. § 110.11(a)(2).

1 political advertising.”¹⁴ A communication contains express advocacy when, among other things,
2 it uses campaign slogans or individual words that in context can have no other reasonable
3 meaning than to urge the election or defeat of a clearly identified federal candidate.¹⁵

4 The electronic billboard required a disclaimer. First, the billboard is a public
5 communication because it is both an outdoor advertising facility and a general form of public
6 political advertising.¹⁶ Second, the billboard contains express advocacy.¹⁷ The phrase
7 “Nevada . . . Dean Heller . . . U.S. Senate” refers to a sitting Senator in Nevada who was a
8 candidate for reelection in November 2018. These words in context can have no other
9 reasonable meaning other than to vote for Heller.¹⁸

10 Based on the information provided in the Complaint, it appears that the communications
11 on the electronic billboard do not contain a disclaimer on any of the ten advertisements
12 supporting Heller.¹⁹ There is no information on the advertisements indicating who paid for them
13 or whether they were authorized by a candidate or candidate’s committee.²⁰ Accordingly, we
14 recommend that the Commission find reason to believe that Unknown Respondent violated

¹⁴ *Id.* § 100.26.

¹⁵ *Id.* § 100.22(a).

¹⁶ *Id.* §§ 100.26, 110.11(a)(2).

¹⁷ *Id.* §§ 100.22(a), 110.11(a)(2).

¹⁸ *Id.* § 100.22(a).

¹⁹ *See* Compl., Ex. A.

²⁰ *See id.*

1 52 U.S.C § 30120(a) and 11 C.F.R. § 110.11 by failing to include disclaimers on the electronic
2 billboard.²¹

3 **B. Independent Expenditure Reporting**

4 Based on the available information, the billboard appears to be an independent
5 expenditure. An independent expenditure is an expenditure by a person expressly advocating the
6 election or defeat of a clearly identified candidate that is not made in concert or cooperation with
7 or at the request or suggestion of such candidate, the candidate's authorized committee, or their
8 agents, or a political party or their agents.²² The Act provides that "every person (other than a
9 political committee) who makes independent expenditures in an aggregate amount or value in
10 excess of \$250 during a calendar year" must file a statement disclosing information about the
11 expenditures.²³

²¹ See Factual & Legal Analysis at 2, MUR 6642 (Christopher Kauffman) (finding reason to believe that unknown respondents violated the Act by providing insufficient disclaimers on a billboard); First Gen. Counsel's Rpt. at 5, MURs 6486/6491 (Mark Hicks) (recommending reason to believe that unknown respondents violated the Act by failing to include disclaimers on two billboards); Certification, MURs 6486/6491 (Apr. 24, 2012) (finding reason to believe that unknown respondents violated 2 U.S.C. § 441d (now 52 U.S.C. § 30120(a)).

²² 52 U.S.C. § 30101(17).

²³ 52 U.S.C. § 30104(c)(1), (2); 11 C.F.R. § 109.10(b), (e)(1)(i)-(v). In *CREW v. FEC*, the court vacated 11 C.F.R. § 109.10(e)(1)(vi), which addressed reporting by persons other than political committees that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year. 316 F. Supp. 3d 349 (D.D.C. 2018) (stay pending appeal lifted Sept. 18, 2018). After the court vacated the regulation, the Commission issued guidance requiring persons who made independent expenditures on or after September 18, 2018, to identify each person (other than a political committee) who made a contribution(s) to the reporting person during the reporting period whose contribution(s) had an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of such contribution(s) and use memo text to indicate which of these persons made a contribution in excess of \$200 to the reporting person for the purpose of furthering any independent expenditure. See *FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), FEC Press Release (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>. In this matter, it appears that the independent expenditures at issue were made around March 2018, *i.e.*, prior to the commencement of the reporting requirements contained in the Commission's guidance.

1 As previously discussed, the billboard contained express advocacy.²⁴ And though we do
2 not know who paid for the billboard, or know with certainty whether the Heller Committee had
3 any role in creating or paying for the billboard, the Heller Committee denies sponsoring or
4 authorizing the billboard. No other information currently in the record appears to refute this
5 denial. The Complaint hypothesizes that the 76 gas station in Las Vegas where the billboard
6 appeared may have paid for the billboard, noting as support for this theory that the Heller
7 advertisements were interspersed with 76's own advertisements. We were unable to identify,
8 notify, or solicit a response from the gas station because the Complaint does not specify the exact
9 location of the gas station,²⁵ but based on the Committee's denial it appears likely that a
10 "person" posted the billboard independently of the Heller Committee.²⁶

11 Further, based on general cost information for electronic billboards, the billboard at issue
12 here likely cost more than the \$250 independent expenditure reporting threshold.²⁷ Thus, it

²⁴ *See supra* p. 5.

²⁵ Compl. at 1-4. As noted above, there are approximately thirty 76 stations in Las Vegas. *See supra* note 7.

²⁶ Resp. at 2. As an alternative to alleging that the Heller Committee failed to include disclaimers on the billboard, the Complaint alleges that the Heller Committee violated the Act and Commission regulations by accepting a corporate in-kind contribution from the gas station where the billboard was located. Compl. at 2. Such a violation would only occur if the expenditures were coordinated with Heller, the Heller Committee, or their agents. Because we conclude that the available information shows that the billboard was likely an independent expenditure, we make no recommendation regarding this allegation pending an investigation to identify who paid for the billboard; rather, we recommend that the Commission take no action at this time with regard to the Heller Committee. If an investigation shows that the billboard was a coordinated communication, we will analyze the Heller Committee's reporting obligations and liability and make appropriate recommendations.

²⁷ Previous matters indicate that costs for electronic billboards far exceed the \$250 reporting threshold. For example, the Commission ascertained that individuals paid \$10,500 for two billboards in Texas in 2011 and \$3,000 for a single billboard in Minnesota in 2012. *See* Second Gen. Counsel's Rpt. at 2, MURs 6486/6491 (Mark Hicks); Second Gen. Counsel's Rpt. at 1, MUR 6642 (Christopher Kauffman). Further, available pricing information from two outdoor advertising companies that service Las Vegas are consistent with those costs. Lamar Advertising Company offers electronic billboards in Las Vegas for \$4,500 to \$12,500 for four weeks. *See* <http://www.lamar.com/LasVegas/InventoryBrowser> (select "digital" under products tab). Clear Channel offers electronic billboards (also known as digital billboards) in Las Vegas for \$8,820 to \$33,360 for four weeks. *See* <http://clearchanneloutdoor.com/how-to-buy/rates/> (rates available in downloadable National Rate Card Excel file).

1 appears that an independent expenditure report was required. However, no independent
 2 expenditures reports related to the Heller billboard were ever filed. Accordingly, we recommend
 3 that the Commission find reason to believe that Unknown Respondent violated 52 U.S.C.
 4 § 30104(c) and 11 C.F.R. § 109.10 by failing to report an independent expenditure.²⁸

5 **IV. PROPOSED INVESTIGATION**

6 The investigation would focus on identifying the individual or entity that paid for the
 7 electronic billboard, ascertaining the costs of the billboard, and confirming whether the billboard
 8 was coordinated with any candidate or committee. We recommend that the Commission
 9 authorize the use of compulsory process for use in the investigation, as necessary.

10 **V. RECOMMENDATIONS**

- 11 1. Find reason to believe that Unknown Respondent violated 52 U.S.C. § 30120(a)
 12 and 11 C.F.R. § 110.11;
- 13 2. Find reason to believe that Unknown Respondent violated 52 U.S.C. § 30104(c)
 14 and 11 C.F.R. § 109.10;
- 15 3. Take no action at this time as to Heller for Senate and Chrissie Hastie in her
 16 official capacity as treasurer;
- 17 4. Approve the attached Factual and Legal Analysis;
- 18 5. Authorize compulsory process; and

²⁸ See Factual & Legal Analysis at 3-4, MUR 6642 (Christopher Kauffman) (finding reason to believe that unknown respondent violated the Act by failing to report an independent expenditure); First Gen. Counsel's Rpt. at 9-10, MURs 6486/6491 (Mark Hicks) (recommending reason to believe that unknown respondent violated the Act by failing to report an independent expenditure); Certification, MURs 6486/6491 (Apr. 24, 2012) (finding reason to believe that unknown respondent violated 2 U.S.C. § 434(c) (now 52 U.S.C. § 30104(c)).

