



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7874
Patriots of America PAC, *et al.*)
)

**STATEMENT OF REASONS OF CHAIR DARA LINDENBAUM, VICE CHAIRMAN
SEAN J. COOKSEY, AND COMMISSIONERS ALLEN J. DICKERSON AND
JAMES E. “TREY” TRAINOR, III**

The Complaint in this matter alleges that Patriots of America PAC and Henry “Hank” Foley in his official capacity as treasurer (“POA PAC”), along with its former treasurer Dan Backer,¹ violated the Federal Election Campaign Act of 1971, as amended (“the Act”) by misreporting the value of a free NASCAR car sponsorship provided to the PAC as an in-kind contribution. Respondents reported the value of the in-kind contribution as \$9,500 when, according to the Complaint, Respondents knew that the true value of the sponsorship was \$25,000. This undervaluation allegedly caused Respondents to file a false quarterly disclosure report and to fail to file a 48-hour independent expenditure disclosure report.² Respondents deny the allegations, attaching sworn affidavits reflecting that \$9,500 was the correct valuation of the sponsorship.³

The Office of General Counsel (“OGC”) concluded that the sponsorship had a value of \$25,000 and, as a result, recommended that the Commission find reason to believe that Backer and POA PAC violated 52 U.S.C. § 30104(b) and (g) by misreporting the sponsorship and by failing to file a 48-hour independent expenditure report.⁴

¹ Foley was POA PAC’s treasurer from February 18, 2020, until April 14, 2020, when Backer was named treasurer. Backer remained the committee’s treasurer until February 3, 2021, when Foley became treasurer again. Thus, Backer was the treasurer during the period when the alleged violations occurred, and is also named as a Respondent in his individual capacity. *See* First General Counsel’s Report (“FGCR”) at 1 n.1 (Nov. 8, 2022), MUR 7874 (Patriots of Am. PAC, *et al.*).

² FGCR at 1–3. This Statement of Reasons explains why we declined to adopt the reason-to-believe (“RTB”) recommendations of the Office of General Counsel (“OGC”). *See, e.g., Dem. Cong. Campaign Comm. v. Fed. Election Comm’n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987). We do not address allegations relating to OGC’s no RTB recommendations.

³ *See* Resp. (Apr. 2, 2011), Timothy Viens Aff. ¶¶ 10–11 (Apr. 2, 2021), Mike Harmon Aff. ¶ 6 (Apr. 2, 2011).

⁴ FGCR at 19.

We disagreed. Because we concluded that the allegations were sufficiently refuted by the available evidence, we voted to find no reason to believe that Respondents violated the Act.⁵

I. Factual Background

POA PAC is a hybrid PAC founded in 2020 by, among others, racecar driver Timothy Viens.⁶ Its apparent purpose was to promote the re-election of President Donald Trump through car advertisements at various NASCAR races.⁷ One such race was the NASCAR Xfinity Series Race in Atlanta, Georgia on June 6, 2020. According to Viens’s affidavit, “Shortly before June 6, 2020, [Viens] spoke with Mike Harmon of Mike Harmon Racing and asked whether he would consider making a last-minute in-kind sponsorship contribution to Patriots of America PAC.”⁸ Harmon confirms this in his own affidavit, and further notes that “[t]he sponsorship was to display an advertisement in support of the re-election of President Trump and Vice President Pence on a race car participating in the [race].”⁹ The car ultimately displayed “Trump 2020” decals on both the rear quarter and the “TV panel” of the vehicle.¹⁰

Viens and Harmon had arranged the sponsorship without the knowledge of POA PAC’s then-treasurer Backer or POA PAC’s full board of directors.¹¹ After learning of the sponsorship, Backer advised that the sponsorship had to be reported to the Commission as an in-kind contribution.¹²

The sworn Complaint and the sworn affidavits attached to the Response are not consistent on the value of the independent expenditure. The Response states that POA PAC asked Harmon to complete an in-kind contribution form, and in doing so, Harmon valued the sponsorship at \$9,500.¹³ Harmon attested that he determined this value based on his decades of experience with NASCAR racing, the “last minute and limited” nature of the sponsorship, and “the potential for future business and race sponsorships with either [POA] PAC or other private, non-political commercial opportunities.”¹⁴ Harmon also stated that he “routinely offer[s] such discounts in the

⁵ Certification at 2 (Feb. 9, 2023).

⁶ FGCR at 6 & n.21.

⁷ *Id.* at 4.

⁸ Resp., Viens Aff. ¶ 7; *see also* FGCR at 7.

⁹ Resp., Harmon Aff. ¶¶ 2–3; *see also* FGCR at 7.

¹⁰ Resp., Ex. B.

¹¹ FGCR at 7–8, 13; Resp., Viens Aff. ¶¶ 8–9, Harmon Aff. ¶ 4.

¹² FGCR at 8; *see also* Resp., Veins Aff. ¶ 9, Harmon Aff. ¶ 5.

¹³ FGCR at 8–9; Resp., Harmon Aff. ¶¶ 5–6.

¹⁴ Resp., Harmon Aff. ¶¶ 6–7.

normal course of [his] business operations.”¹⁵ POA PAC reported the in-kind contribution with a value of \$9,500 on its July 2020 Quarterly Report.¹⁶

On the other hand, the Complaint alleges that Backer stated that he would value the sponsorship at \$9,500 “because otherwise the POA PAC could be investigated for accepting an ‘unreported independent expenditure.’ [Backer] also told her that by listing the amount as being under \$10,000, the PAC would be in compliance with quarterly reporting requirements because if the contribution was over \$10,000 it triggered more immediate reporting requirements.”¹⁷

The Complainant in this matter—a former co-chair and board member of POA PAC¹⁸—stated that she objected to this valuation because “she knew racing teams typically charged substantially more for advertising.”¹⁹ The basis for this asserted personal knowledge was Complainant’s awareness that a similarly named but distinct political committee, Patriots PAC of America (“Patriots PAC”), reported two \$25,000 independent expenditures to place Trump 2020 branding on vehicles scheduled to race in the Daytona 500 in February 2020 with Harmon Racing and Mike Affarano Motorsports.²⁰ Ultimately, the Mike Affarano Motorsports vehicle was disqualified and Viens received a credit.²¹ Somewhat confusingly, the Complaint alleges that Viens used the Mike Affarano Motorsports \$25,000 credit to purchase the June 6 sponsorship from Harmon Racing.²² Viens, however, attests that the credit was not “used in connection with any additional election-related activity.”²³ Based on the foregoing, the Complaint alleges that the valuation of \$9,500 must have reflected an intentional undervaluation of the Atlanta Xfinity sponsorship.²⁴

II. Legal Analysis

An “independent expenditure” is an expenditure—*i.e.*, a “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 for Federal office”²⁵—by a person expressly advocating the election

¹⁵ *Id.* at ¶ 7.

¹⁶ FGCR at 2 & n.4; *see also* POA PAC, 2020 July Quarterly Report at 7–8 (July 15, 2020), *available at* <https://docquery.fec.gov/pdf/327/202007159249869327/202007159249869327.pdf>.

¹⁷ FGCR at 8 (quoting Compl. at 6).

¹⁸ *Id.* at 8, 10.

¹⁹ *Id.* at 8–9 (quoting Compl. at 5).

²⁰ *See, e.g., id.* at 4–6, 8–9; Compl. at 5.

²¹ FGCR at 8.

²² Compl. at 5.

²³ Resp., Viens Aff. ¶ 5.

²⁴ *See* Compl. at 6.

²⁵ 52 U.S.C. § 30101(9)(A).

or defeat of a clearly identified federal candidate that is not coordinated with a candidate, a candidate's authorized committee or their agents, or a political party committee or its agents.²⁶ The Act requires political committees and other persons to report their independent expenditures.²⁷ A political committee that makes independent expenditures aggregating \$10,000 or more for an election in any calendar year, up to and including the 20th day before an election, must report these expenditures within 48 hours.²⁸ These 48-hour reports must be filed by the end of the second day "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated."²⁹ The reported value of an in-kind contribution "shall be equal to the usual and normal value on the date received."³⁰ The Act requires that these filings be accurate, and it obligates political committees and their treasurers not only to file reports but also to ensure their accuracy.³¹

Here, the Commission has the unenviable task of assessing the usual and normal value of a sponsorship in a market that fluctuates based on myriad factors, including the racing vehicle, the driver, the race, the likelihood of repeat business, and whether the sponsorship was "last minute," among many others. The assessment is further complicated because the parties have submitted conflicting sworn statements.³² The most credible of these statements is the affidavit of Mike Harmon who assessed the value of the sponsorship at \$9,500. Harmon is a non-respondent third party who voluntarily submitted an affidavit under penalty of perjury. It is axiomatic that Harmon is the only one with direct knowledge of how the sponsorship was valued given that he personally valued the sponsorship. In his affidavit, Harmon credibly explains that he valued the sponsorship at \$9,500 based on his specialized knowledge of the NASCAR racing industry, the timing of his agreement to donate the ad space, the amount he typically charges under like circumstances, the potential for future business, and his routine business practices.³³

By contrast, the Complaint assesses the value of the sponsorship at \$25,000 based on indirect knowledge and inference. For example, while Backer's statements to Complainant, if true, show that he was aware that reporting an independent expenditure over \$10,000 could trigger a Commission investigation of POA PAC for failing to file a 48-hour report, the Complaint offers no evidence that Backer caused Harmon to undervalue the sponsorship to avoid a Commission investigation. Further, the Viens affidavit refutes the Complaint's suggestion that Viens's \$25,000 credit with Mike Affarano Motorsports was used to pay for the Harmon Racing sponsorship at

²⁶ *Id.* § 30101(17); 11 C.F.R. § 100.16.

²⁷ *See generally* 52 U.S.C. § 30104.

²⁸ *Id.* § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

²⁹ 11 C.F.R. § 104.4(b)(2).

³⁰ *Id.* § 104.13(a)(1).

³¹ 52 U.S.C. § 30104(b); 11 C.F.R. § 104.14(d).

³² Complaints filed with the Commission must be sworn. 52 U.S.C. § 30109(a)(1).

³³ Resp., Harmon Aff. ¶¶ 6–7.

issue.³⁴ The Complaint primarily relies on the fact that Harmon Racing valued ad space on a racing vehicle at \$25,000 in February and \$9,500 in June. Plainly, numerous factors could account for that difference in valuation other than malfeasance, as illustrated by the factors Harmon assessed in determining the sponsorship's value. After weighing the credibility of the sworn statements, we voted to reject OGC's recommendation to find reason to believe that POA PAC violated the Act.

For similar reasons and in light of the heightened *mens rea* required to hold treasurers individually liable,³⁵ we also voted to reject OGC's recommendation to find reason to believe that Backer violated the Act in his personal capacity.³⁶

* * *

For the foregoing reasons, we voted to find no reason to believe that the Respondents violated 52 U.S.C. § 30104(b) and (g) and 11 C.F.R. §§ 104.4(b)(2) and 104.14(d) by failing to file accurate reports with the Commission and failing to file a 48-hour report in connection with the dissemination of an independent expenditure exceeding \$10,000.



 Dara Lindenbaum
 Chair

March 14, 2023
 Date



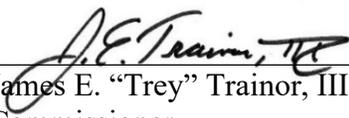
 Sean J. Cooksey
 Vice Chairman

March 14, 2023
 Date



 Allen Dickerson
 Commissioner

March 14, 2023
 Date



 James E. "Trey" Trainor, III
 Commissioner

March 14, 2023
 Date

³⁴ Resp., Viens Aff. ¶ ("The funds I personally paid to Mike Affarano Motorsports for this sponsorship were not later used in connection with any additional election-related activity.")

³⁵ The Commission has issued a Statement of Policy under which it will decline to hold a current or former treasurer personally liable in an enforcement matter unless the available information suggests that the treasurer "knowingly and willfully violated an obligation that the Act or regulations specifically impose on a treasurer or where a treasurer recklessly failed to fulfill duties imposed by law, or where the treasurer has intentionally deprived himself or herself of operative facts giving rise to the violation." Statement of Policy Regarding Treasurers in Enforcement Proceedings, 70 Fed. Reg. 3, 4 (Jan. 3, 2005).

³⁶ Certification at 2.