



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Patriots of America PAC, *et al.*)

) MUR 7874
)
)

**STATEMENT OF REASONS OF
COMMISSIONERS SHANA M. BROUSSARD AND ELLEN L. WEINTRAUB**

The Complaint in this matter centered on NASCAR sponsorships, a much flashier backdrop than that featured in most Commission complaints. But the legal issue was straightforward. Consistent with the recommendations of the Commission’s non-partisan Office of General Counsel (“OGC”), we voted to find reason to believe that the Respondents here failed to report an independent expenditure.¹

The Complaint here alleged that Respondents Patriots of America PAC and Henry Hank Foley in his official capacity as treasurer (“POA PAC”) and Dan Backer intentionally failed to accurately report an independent expenditure in the form of a NASCAR sponsorship on a car owned by Mike Harmon Racing. The sponsorship took the form of signage on a race car driven in a NASCAR race in June 2020 that expressly advocated the election of former President Donald Trump. The independent expenditure, said to be worth \$25,000, was allegedly purposefully undervalued at just \$9,500 to avoid having to report the expenditure to the

¹ A recent D.C. District Court opinion described “a low bar” for the reason-to-believe standard: “[T]he standard does not require ‘conclusive evidence’ that a violation occurred or even ‘evidence supporting probable cause’ for finding a violation.” Instead, the court held, the Commission needs “only a credible allegation.” Mem. Op. at 17, *CLC v. FEC & Correct the Record, et al.*, No. 19-2336 (D.D.C.) (Dec. 8, 2022) (internal citations removed). This holding is consistent with the standard the Commission has adopted for finding reason to believe the Act has been violated in an enforcement matter: when “a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.” *See* Fed. Election Comm’n, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007).

Commission.² Respondents deny the allegation and provide the affidavit of Mike Harmon, head of Mike Harmon Racing, who determined the \$9,500 valuation based on his “experience in the industry and the fact that the value of the sponsorship was last minute and limited.”³

OGC recommended that the Commission find reason to believe that (1) Dan Backer, POA PAC’s former treasurer and counsel⁴; (2) POA PAC; and (3) Henry “Hank” Foley in his official capacity as treasurer all violated the law by failing to file accurate reports with the Commission and failing to file a 48-hour report in connection with an independent expenditure aggregating \$10,000 or more – the NASCAR sponsorship.⁵

As it happens, this is not the Commission’s first lap around a NASCAR track. And Commission precedent provides specific guidance on how to determine the “fair-market value” of a NASCAR sponsorship. It is an objective standard that looks to the price of similar sponsorships for similar races.⁶ According to this method, the prevailing market rate for such a sponsorship was \$25,000.⁷ An unusually helpful indication of the fair-market value in this matter is that just a few months before, Patriots PAC of America, a similarly named predecessor

² Respondents acknowledge that the race car ad was “in all likelihood an independent expenditure.” Resp. at 4, MUR 7874 (Patriots of America PAC, *et al.*) (Apr. 2, 2021). The Act requires political committees and persons other than political committees to report their independent expenditures. *See generally* 52 U.S.C. § 30104. 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. *Id.* § 30104(g)(2); 11 C.F.R. § 104.4(b)(2). If the Harmon car sponsorship (and thus, POA PAC’s independent expenditure) had a fair-market value greater than \$10,000, POA PAC would have additionally been obligated to file a 48-hour Report 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.” 11 C.F.R. § 104.4(b)(2). The Act requires that these filings be accurate, and it obligates political committees and their treasurers not only to file the reports but also to ensure their accuracy. 52 U.S.C. § 30104(b); 11 C.F.R. § 104.14(d).

³ Harmon Aff. ¶6.

⁴ Backer was served as treasurer at the time the violation occurred. *See* Fed. Election Comm’n, Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 6 (Jan. 3, 2005) (stating “When a predecessor treasurer may be personally liable, the Commission could pursue the predecessor treasurer individually, and not substitute the successor treasurer for the predecessor treasurer individually.”) (citing *Kentucky v. Graham*, 473 U.S. 159, 167-68 n.7)).

⁵ First Gen. Counsel’s Rep. at 22. Compl. at 7, MUR 7874 (Patriots of America PAC, *et al.*) (Feb. 2, 2021).

⁶ In MUR 5563 (Kirk Shelmerdine Racing, LLC), the Commission calculated the value of the independent expenditure in the form of a NASCAR sponsorship (*e.g.*, a Bush-Cheney ’04 decal) by looking to the market value for a similar sponsorship and examined comparable situations where the respondent had successfully obtained sponsorships for the rear quarter panel of his car in similar races. *See* First Gen. Counsel’s Rep. at 6, MUR 5563 (Kirk Shelmerdine Racing, LLC) (May 12, 2005) (“[T]he value [of the sponsorship] 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 [in the form of a sponsorship] on the normal and usual charge for the comparable commodity.”); Cert. ¶ 3 (June 7, 2005), MUR 5563 (approving OGC’s recommendations).

⁷ First Gen. Counsel’s Rep. at 2, MUR 7874 (Patriots of America PAC, *et al.*) (Nov. 8, 2022).

political committee run by the same group of people, had valued , and reported a similar sponsorship at a Daytona NASCAR race at \$25,000.⁸

As noted above, fair-market value is an objective standard requiring the Commission to rely on comparable valuations.⁹ Harmon’s subjective assertion regarding the value of the sponsorship in this matter is contradicted by objective facts, including a much higher valuation for a similar race between almost identical parties just several months before.¹⁰ Fair-market value does not fluctuate at anyone’s whim.

Further, Harmon’s statement that the value was based on the last-minute nature of the sponsorship simply does not hold up. The available information demonstrates that the June 2020 sponsorship was no more last-minute than the February 2020 Patriots PAC of America sponsorship valued at \$25,000.¹¹

The \$25,000 agreement for the Patriots PAC of America sponsorship was signed February 4, 2020 for an independent expenditure that would appear on a Mike Harmon Racing car in a NASCAR race on February 14 and 15, 2020 – ten days later. Harmon’s affidavit states that he agreed to the POA PAC sponsorship on May 31, 2020, for a race occurring *seven* days later, on June 6, 2020. Seven days is less than ten, yes, but Harmon’s statement was not the only evidence before the Commission.

Mike Harmon Racing tweeted the following on April 9, 2020¹²:

⁸ Compl. at Exh. 2. The available record before the Commission also provided external valuation for similar primary sponsorships. In reviewing this evidence, OGC concluded that “publicly available market information suggests that similar sponsorships in comparable races would not be valued at under \$10,000.” First Gen. Counsel’s Rep. at 16-17. *See also* Patriots PAC, 48-Hour Report of Independent Expenditures at 1 (Feb. 5, 2020), <https://docquery.fec.gov/pdf/788/202002059186465788/202002059186465788.pdf> (depicting payment of \$25,000 to Mike Harmon Racing for “Mobile Advertising (Carey Account)”; Patriots PAC, 48-Hour Report of Independent Expenditures at 1 (Feb. 15, 2020) [hereinafter Patriots PAC/Viens 48 Hour Report], <https://docquery.fec.gov/pdf/912/202002159186506912/202002159186506912.pdf> (depicting payment of \$25,000 to Mike Affarano Motorsports in the form of an in-kind Carey contribution described as “Racing deposit (In-Kind Carey Contribution from Timothy Viens)”).

⁹ *See, e.g.*, MUR 5563 (Kirk Shelmerdine Racing, LLC), *supra* n.6.

¹⁰ Compl. at Exh. 2.

¹¹ Patriots PAC of America was the predecessor entity to Respondent Patriots of America PAC (“POA PAC”). *See* Compl. at 3.

¹² Mike Harmon Racing (@mhrracing), TWITTER (Apr. 9, 2020, 2:25 PM), <https://twitter.com/chkracing/status/1248316173218873345> (last checked March 14, 2023). *See* First Gen. Counsel’s Rep. at 7.

Look at the left quarter panel of the model car:



...and the top of the graphic in the tweet:



This tweet, dated April 9, 2020, provides evidence undermining the Response’s claim that the reported value of the independent expenditure derived from a sponsorship agreement with Patriots of America PAC that first came about on May 31, 2020. And it leaves the Commission with a Complaint containing a very credible allegation¹³ that the Respondents failed to properly report the independent expenditure at issue here.

Other conflicting evidence lends support to the Complaint’s allegations. The Complainant alleged that the signature on the letter that placed the \$9,500 value on the independent expenditure was not Mike Harmon’s. The Complaint listed two bases for this allegation: (1) The Complainant “contacted a member of the Harmon Racing Team very familiar with Harmon’s signature. He confirmed that the signature ... produce[d] to her ... is not Harmon’s”¹⁴ and (2) the Complainant obtained another document with Harmon’s signature, which did not match.¹⁵ There was, at a minimum, a conflict in the evidence before the Commission in this matter sufficient to provide reason to believe that the Complaint had made out a credible allegation. The Commission should have so found.

¹³ See *CLC v. FEC & Correct the Record, et al.*, *supra* n.3, at 17.

¹⁴ Compl. at 6 (“Griffin doubted the validity of the form and Backer’s convoluted explanation. She subsequently obtained another document with Harmon’s actual signature on it. As is plainly obvious, the signatures do not match. Griffin later contacted a member of the Harmon Racing Team very familiar with Harmon’s signature. He confirmed that the signature ... produce[d] to her by Backer is not Harmon’s.”)

¹⁵ *Id.*

Finally, the complaint claimed that Dan Backer, the committee’s former treasurer and counsel, knowingly caused POA PAC to file the false FEC report regarding the independent expenditure.¹⁶ Longstanding Commission policy provides a high bar for holding a treasurer personally liable. The record needs to show 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.”¹⁷

At the reason-to-believe stage in this matter, the former treasurer’s conduct qualified.¹⁸ The Complainant, who was POA PAC’s co-chair at the time of the events in question, alleged that the former treasurer told her directly that he would be reporting the sponsorship as an in-kind contribution for \$9,500, “because otherwise the POA PAC could be investigated for accepting an ‘unreported independent expenditure,’” and 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.”¹⁹

The Commission should have taken this allegation, based on direct personal knowledge, included in a sworn complaint, as credible. The Response does not refute it, stating only that the former treasurer and counsel “advised [Complainant] Griffin about the law and reporting requirements related to independent expenditures.”²⁰

* * *

We agreed with OGC’s evaluation that the overall record supports the Complaint’s credible allegation that the June 2020 sponsorship was intentionally valued at less than the

¹⁶ *Id.*

¹⁷ Statement of Policy Regarding Treasurers in Enforcement Proceedings, 70 Fed. Reg. 3, 4 (Jan. 3, 2005). Seeking to hold Backer responsible in his personal capacity was particularly appropriate as he is a longtime member of the federal campaign-finance bar. Attorneys should be held to higher ethical and legal standards than the general public.

¹⁸ Cert. ¶1, MUR 7874 (Patriots of America PAC, *et al.*) (Feb. 9, 2023). Notably, “reason to believe” is a threshold determination that by itself does not establish that the law has been violated. *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, May 2012, *found at* http://www.fec.gov/em/respondent_guide.pdf. “Reason to believe” determinations indicate only that the Commission has found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred. *See* 72 F.R. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007).

¹⁹ Compl. at 6, MUR 7874 (Patriots of America PAC, *et al.*) (Feb. 2, 2021).

²⁰ Resp. at 2, MUR 7874 (Patriots of America PAC, *et al.*) (April 2, 2021).

prevailing market rate, and, accordingly, that the independent expenditure resulting from the sponsorship was greater than the \$9,500 at which the sponsorship was reported.²¹ The available information indicates that the Mike Harmon Racing sponsorship should have been valued at \$25,000, consistent with prior sponsorships and publicly available market data, and not at \$9,500 as Respondents contend. These are objective metrics. The Commission's no reason to believe finding departs from precedent and the Commission's objective standards.

March 21, 2023



Shana M. Broussard
Commissioner

March 21, 2023



Ellen L. Weintraub
Commissioner

²¹ *Id.* at 18.