



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

BEFORE THE FEDERAL ELECTION COMMISSION

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

**STATEMENT OF REASONS OF VICE CHAIRMAN
ROBERT D. LENHARD AND COMMISSIONER ELLEN L. WEINTRAUB**

On August 1, 2006, the Commission voted 4-1 to admonish Kirk Shelmerdine Racing, LLC (“KSR”) for placing express advocacy on its stock car during National Association for Stock Car Auto Racing (“NASCAR”) races and failing to report the independent expenditures.

The matter arose as a complaint received on October 12, 2004 concerning KSR’s placing a “Bush Cheney ’04” logo on its race car for the NASCAR’s Nextel Cup racing series. The complaint alleged that KSR violated the Federal Election Campaign Act (“FECA”) by failing to include a disclaimer, failing to disclose the independent expenditure to the Commission, and perhaps by making an impermissible corporate expenditure.

KSR is the racing team of Kirk Shelmerdine, a professional NASCAR driver. KSR earns money both by competing in the races (Shelmerdine generated over \$1 million in prizes in 2004¹) and by selling advertising space on its car. Because its car is not a top finisher, KSR has been unable to secure consistent sponsorship.² Instead, KSR relies on selling the car’s advertising space piecemeal. It was on this advertising space that KSR put a “Bush Cheney ’04” logo during four races in the 2004 NASCAR Nextel Cup racing series, leading to the complaint.

The Commission found reason to believe that KSR failed to report these independent expenditures and authorized an investigation into the approximate value of the communications. After the Office of the General Counsel (“OGC”) completed its investigation of the fair market value of the expenditures, it recommended that the Commission enter into conciliation with KSR and seek a civil penalty. However, rather than enter into conciliation to recover a civil penalty, the Commission voted to send an admonishment letter to KSR.

¹ See <http://www.nascar.com/drivers/dps/kshelmer00/cup/index.html>.

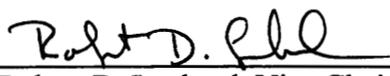
² While NASCAR lists “Vote for Bush” as the sponsor of KSR for some of the races at issue, there is no evidence that Bush Cheney ’04 was aware of KSR’s activities.

26044151517

We write separately in order to emphasize the guidance this case provides to the regulated community. First, this case reiterates the law on valuation of expenditures. Despite the evidence that KSR did not have a buyer for the advertising space on the particular days in which it placed the Bush Cheney '04 decals, the Commission rejected the view that the value of the expenditure was just the cost of what KSR spent to create and attach the decals to the stock car (approximately \$50³). Instead, the Commission approved OGC's measurement of the fair market value based on how much the sponsors who had advertised on KSR's stock car had paid for advertisements in similar locations on the car in similarly high-profile races.⁴

Second, in reaching the decision to admonish KSR rather than either seek a civil penalty or dismiss under *Heckler v. Chaney*, 470 U.S. 821 (1985), the Commission made clear that the agency continues to exercise its prosecutorial discretion based on multiple factors, rather than some simple monetary cutoff. The conclusion to admonish KSR rather than impose a civil penalty was based on several case-specific factors in addition to the financial value of the violation: (i) the minimal added deterrent value of a penalty here; (ii) that KSR would not repeat the violation, as evidenced by Shelmerdine's sworn statement; (iii) the violations were done by an individual acting alone rather than involving an organization; (iv) the respondent violated the law unintentionally and without knowledge of FECA's restrictions on the activity; and (v) the substantive seriousness of the violation was not great.

As a result of these factors, the Commission decided that seeking a civil penalty was unnecessary. Instead, an admonishment letter would properly dispose of the matter here and also ensure that any similar violation by KSR in the future would be met with a substantial penalty.


Robert D. Lenhard, Vice Chairman

11/17/06
Date


Ellen L. Weintraub, Commissioner

11/20/06
Date

³ See Affidavit of Kirk Shelmerdine.

⁴ The races where these logos appeared were televised to a nation-wide audience.

26044151518