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September 30, 2004

Office of General Counsel
Federal Election Commission
999 E Street, Northwest
Washington, D. C. 20463

MUR # 5563

Re: Sydnor Thompson v. E. Kirk Shelmerdine, Kirk Shelmerdine Racing, LLC

Dear Sir or Madam:

Enclosed is the original Complaint for filing in the above-referenced case. Also enclosed is a copy of the first page of the Complaint which I ask that you please stamp "filed" "received" and return to me in the enclosed self-address, stamped envelope.

Thank you for your assistance in this matter.

Sincerely,


Sydnor Thompson

CST:bh

Enclosures

c: Ezra W. Reese, Esquire (with enclosure)

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SPARTANBURG, SC

**BEFORE THE
FEDERAL ELECTION COMMISSION**

Sydnor Thompson
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202,

Complainant,

v.

E. Kirk Shelmerdine
P.O. Box 1133
Welcome, North Carolina 27374; and

Kirk Shelmerdine Racing, LLC
468 Industrial Boulevard
Welcome, North Carolina 27374,

Respondents.

COMPLAINT

Complainant files this complaint against Kirk Shelmerdine Racing, LLC, and E. Kirk Shelmerdine, President (collectively, "Respondents"), for violations of the disclaimer, reporting and contribution provisions of the Federal Election Campaign Act and Federal Election Commission regulations, as described below.

The facts indicate that Mr. Shelmerdine and his company painted "Bush Cheney '04" on the rear quarter panel of Mr. Shelmerdine's race car, #72, that he races in the NASCAR Nextel Cup series. This independent expenditure includes no disclaimer, and Complainant believes that Shelmerdine has not reported the expenditure to the Commission. Moreover, because the car is owned by a limited liability corporation, Kirk Shelmerdine Racing LLC may have made corporate expenditures in violation of 2 U.S.C. § 441b(a) (2004) and 11 C.F.R. § 110.1(g)(3) (2004).

I. FACTS

Shelmerdine drives, and his company owns, car #72 in the series of NASCAR Nextel Cup races. Shelmerdine is a so-called "field filler," a term used to describe drivers who have no realistic chance of winning a race.¹ Shelmerdine has no commercial sponsor.

Respondents' sponsor is listed on NASCAR materials as "Vote for Bush."² Beginning at the Sylvania 300, held at the New Hampshire International Speedway on September 19, Respondents painted "Bush Cheney '04" on the left rear quarter panel of Respondents' Ford racing car. (See Attachment). No disclaimer appears below the communication. NASCAR Nextel Cup races are seen each week by tens of thousands of fans in person, and millions of television viewers.

II. LEGAL ARGUMENT

A. The Communication Does Not Have the Required Disclaimer

An independent expenditure is defined as an expenditure "expressly advocating the election or defeat of a clearly identified candidate," and which "is not made in concert or cooperation with or at the request or suggestion of" a candidate or candidate committee. 2 U.S.C. § 431(17). Independent expenditures are required to "clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." *Id.* § 441d(a)(3). Disclaimers "must be presented in a clear and conspicuous manner," and they must not be "difficult to read" or "easily overlooked." 11 C.F.R. § 110.11(c)(1).

Respondents' "Bush Cheney '04" is a clear example of express advocacy. *See id.* § 100.22. Assuming that Respondents did not work in concert or cooperation with, or at the

¹ See L. Spencer, *Put the Field Fillers Out to Pasture*, THE SPORTING NEWS, Apr. 5, 2004.

² See <http://www.nascar.com/drivers/dps/kshelmer00/cup/data/2004/index.html>.

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request or suggestion of, Bush-Cheney '04, Inc., the communication is an independent expenditure.³

As the attached picture attests, there is no clear and conspicuous disclaimer as required by 11 C.F.R. § 110.11. Complainant cannot identify any disclaimer at all; if one is printed, it is far too small to be clear and conspicuous on a message that is designed to be seen while moving at one hundred and eighty miles an hour. Respondents are therefore in violation of the disclaimer requirements under federal election law.

B. Respondents Have Not Reported the Independent Expenditure

Persons other than political committees that make independent expenditures aggregating in excess of \$250 in a calendar year must file with the Commission in accordance with the quarterly reporting schedule. *See* 11 C.F.R. § 109.10(b). Independent expenditures aggregating \$10,000 or more with respect to a given election must be reported to the Commission by the second day after the date on which the communication is publicly disseminated. *See id.* § 109.10(c).

Respondents have made an independent expenditure of \$10,000 or more. As the attached picture attests, the communication is a professionally painted message, designed to blend into the design of the rest of the car's exterior. The production costs of the communication were likely in the thousands of dollars. Moreover, the costs of owning and operating a race car in the Nextel Cup series should also be taken into account when calculating the cost of the independent expenditure. Respondents have surely spent in excess of \$10,000 to produce and disseminate this independent expenditure. Moreover, even if the independent expenditure did not cost \$10,000 or more, Respondents will be in violation of

³ Of course, if the Commission uncovers evidence of coordination with Bush-Cheney '04, Inc., the communication would constitute an in-kind contribution to that campaign committee.

federal election law if they do not report the independent expenditure by October 15, the next quarterly filing deadline.

C. Respondents May Have Violated the Prohibition on Corporate Expenditures

It is unlawful for any corporation to make a contribution or expenditure in connection with a federal election. *See* 2 U.S.C. § 441b(a). Limited liability companies are treated as corporations if they elect to be treated as a corporation by the Internal Revenue Service. *See* 1 C.F.R. § 110.1(g)(3).

Kirk Shelmerdine Racing is a limited liability company which owns and manages the race car hosting the independent expenditure. Complainant does not know how it has elected to be treated by the Internal Revenue Service. If it has elected to be treated as a corporation, then the independent expenditure would constitute an illegal corporate expenditure.

III. REQUESTED ACTION

As we have shown, the respondents have violated the Federal Election Campaign Act. Accordingly, we request that they be enjoined from further violations, be required to repay their illegal contributions and be fined the maximum amount permitted by law.

Sincerely,



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STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

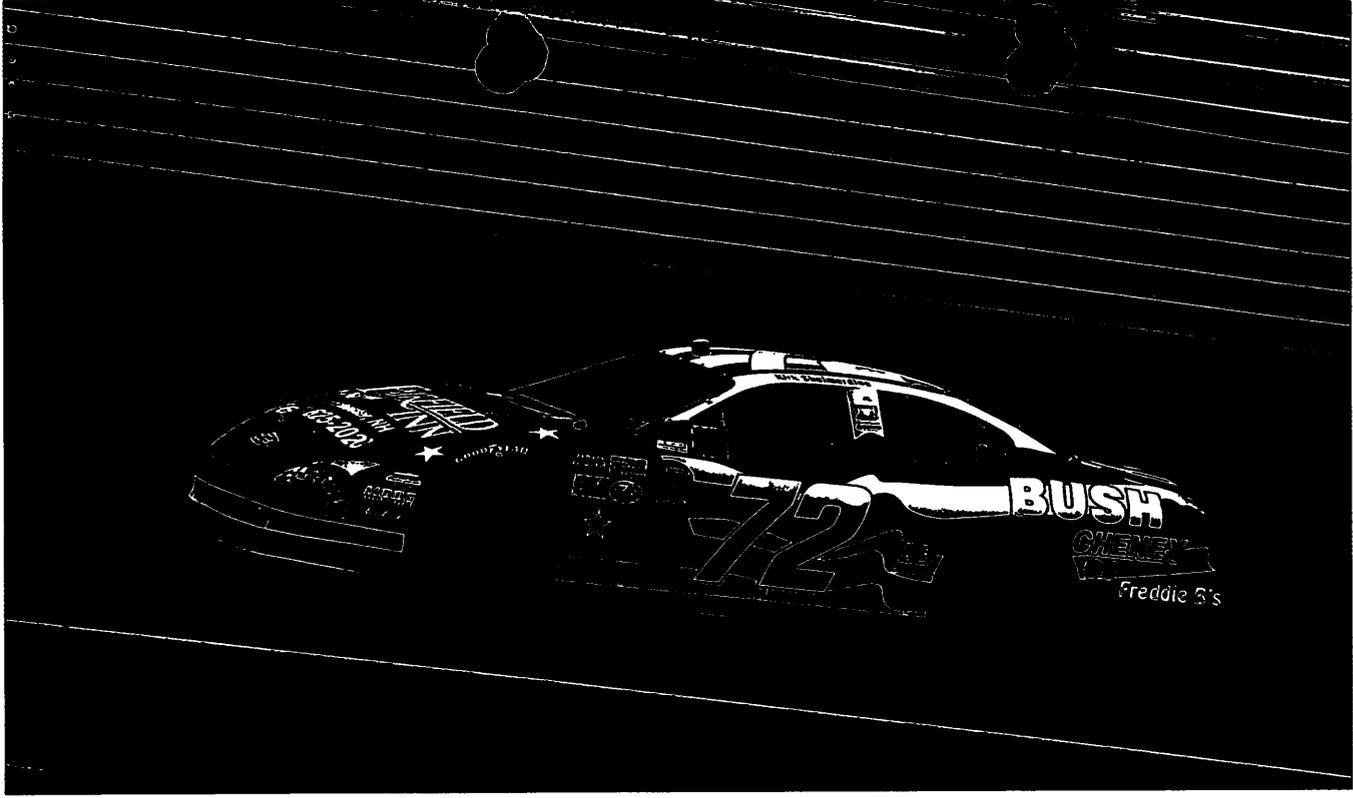
SUBSCRIBED AND SWORN to before me this 30th day of Sept., 2004.

Betty W. Helton
Notary Public

My Commission Expires:

1-22-2008

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