



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	MUR 6415
)	
Kristi for Congress and Ted Husted,)	
in his official capacity as treasurer)	
Kristi Lynn Noem)	
)	

STATEMENT OF REASONS
Chair Cynthia L. Bauerly and Commissioner Steven T. Walther

This matter concerns the issue of whether South Dakota at-large congressional candidate Kristi Lynn Noem and her principal campaign committee, Kristi for Congress (“the Committee”), failed to include a disclaimer on the second of two separate and visually distinct political advertisements that appeared on the same page in several South Dakota newspapers – the first in support of Kristi Noem (the “Kristi ad”) and the second critical of President Obama and Speaker Pelosi (the “Obama/Pelosi ad”).¹

We agree with the analysis in the First General Counsel’s Report (“FGCR”), that the lack of a disclaimer on the Obama/Pelosi ad likely led readers to draw the inference that the Committee did not pay for that ad. We could not, however, support the Office of General Counsel’s (“OGC”) recommendation that the Commission exercise its prosecutorial discretion and dismiss the allegation that the Committee violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11.²

¹ A copy of the ads is attached.

² On November 15, 2011, we voted in Executive Session (1) to find reason to believe that the Committee failed to include a disclaimer on the Obama/Pelosi ad in violation of 2 U.S.C. § 441d and 11 CFR § 110.11; (2) to authorize OGC to conduct a limited investigation in order to determine the costs associated with the production and dissemination of the Obama/Pelosi ad; and (3) to authorize OGC to enter into pre-probable cause conciliation with an opening civil penalty proportionate to the costs associated with the production and dissemination of that ad. MUR 6415 (Kristi for Congress), Certification dated November 17, 2011. Vice Chair Hunter and Commissioners McGahn, Petersen, and Weintraub dissented. *Id.*

A vote on OGC’s recommendation to dismiss the allegations against the Committee failed by a vote of 1-5. Commissioner Weintraub voted affirmatively, while Commissioners Bauerly, Hunter, McGahn, Petersen, and Walther dissented. *Id.* A subsequent vote to find no reason to believe that the Committee violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 failed by a vote of 3-3 with Commissioners Hunter, McGahn, and Petersen voting in favor of the motion and Chair Bauerly and Commissioners Walther and Weintraub dissenting. *Id.*

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The Federal Election Campaign Act of 1971, as amended (“the Act”) and Commission regulations state that all public communications made by a political committee must include disclaimers.³ 2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(1). The Commission’s regulation specifies that a disclaimer must be printed in a “clear and conspicuous manner.” 11 C.F.R. § 110.11(c)(1). The regulation further provides that a disclaimer is not “clear and conspicuous” if the print is “difficult to read” or if the placement is “easily overlooked.” *Id.*

According to the complaint, the Committee placed “what appeared to be two political ads on one page” in South Dakota newspapers on September 30, 2010 and October 21, 2010. Complaint at 1. The Kristi ad, which took up approximately two-thirds of the page, was on a white background with black text and included the Kristi campaign’s logo, website and pictures of the candidate. In contrast, the Obama/Pelosi ad, which was located on the bottom third of the page, was separated from the first message by a solid black border and consisted of a black background with white text. Only the Kristi ad included a “Paid for by Kristi for Congress” disclaimer, which was placed in the bottom center of the top ad – as if to indicate the end of that first ad.

The Committee states that it paid for the full-page newspaper ad space as a single advertisement, Response at 1, which is not relevant to the issue of disclosure. In our view, the ad spaces, as printed, are more readily viewed as two separate and distinct ads. Each ad has a different font, a different size font, a different background, a different message, and a border around it physically separating one ad from the other. While the disclaimer placed within the Kristi ad complied with the requirements of the Act and Commission regulations, *see* 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11, the disclaimer on the Kristi ad cannot be viewed as “clear and conspicuous” with respect to the Obama/Pelosi ad. In fact, it was neither *clear* nor *conspicuous* in that respect. The disclaimer’s placement on the page – within the border around the Kristi ad and at the bottom center of that ad – appears to apply only to that ad, leaving no disclaimer at all in the Obama/Pelosi ad. Because the ads are so visually separate and distinct, convey contrasting and discrete content, and fail to include any identifier that the same committee paid for both ads, a reasonable viewer may have easily assumed that the two ads were paid for by different persons. FGCR at 4-5. In fact, the disclaimer’s placement gives the most logical impression that the Committee paid for the Kristi ad, but not for the Obama/Pelosi ad.

This matter differs from previous enforcement actions involving disclaimers which the Commission dismissed as an exercise of prosecutorial discretion. Previously, the Commission has dismissed enforcement matters where either (1) a disclaimer was omitted due to *inadvertent error* followed by prompt remedial action; or (2) in cases in which the public could reasonably discern who was responsible for the advertisement from other information on the materials. *See, e.g.*, MUR 6316 (Pridemore for Congress); MUR 6118 (Bob Roggio for Congress); MUR 6329 (Michael Grimm for Congress); MUR 6278 (Joyce B. Segers). Neither of these circumstances is present here.

³ A “public communication” includes any communication “by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 11 C.F.R. § 100.26.

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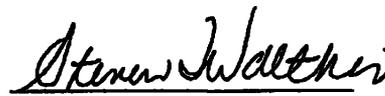
Here, the Committee did take the limited remedial measure of modifying an *online* version of the same two ads – by removing the borders that separated the two messages in the print ad and including a black printed border enclosing both messages within the same space. This belated action, however, suggests that the Committee recognized that the original disclaimer on the Kristi ad was legally insufficient in that it did not appear to also apply to the messages in the original Obama/Pelosi ad. See FGCR Attachment 2. In fact, because the design and layout of these two ads conceal the connection between the Committee and the ad critical of President Obama and Speaker Pelosi, it is more akin to the facts in MUR 6348 (David Schweikert for Congress), where we voted to move forward with an enforcement action because the disclaimer, through its placement and color contrast, appeared to be intentionally obscured.⁴

We do not believe a dismissal is appropriate under such circumstances and therefore voted to find reason to believe that the Committee violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11.

12/16/2011
Date


Cynthia L. Bauerly
Chair

12/16/11
Date


Steven T. Walther
Commissioner

⁴ In MUR 6348, for the reasons set forth in the Statement of Reasons of Chair Bauerly and Commissioners Walther and Weintraub, we, along with Commissioner Weintraub, voted to approve OGC's recommendation to find reason to believe that the Schweikert Committee violated 2 U.S.C. 441d(c) and 11 CFR § 104.20(c)(9) because the Schweikert Committee's mailer seemed plainly designed to conceal the disclaimer and thereby hide the connection between the Committee and the negative attack on a campaign opponent. See Statement of Reason of Chair Bauerly and Commissioners Walther and Weintraub, dated March 11, 2011. Commissioners Hunter, McGahn and Petersen dissented. See Certification in MUR 6348, dated February 1, 2011, available through the Commission's Enforcement Query System at www.fec.gov/em/mur.shtml.

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South Dakota has one voice in Congress.

It needs to be speaking for you.



Here on the ranch in South Dakota, we don't take a lot of polls. Or hold many caucuses. We do what needs to be done. That's what I'll do in Washington. Unlike my opponent, I'll vote to:

- Lower the national debt
- Vote against wasteful spending
- Repeal government mandated health care
- Work every day to create jobs

I believe government should serve the people - not the other way around. And I know how to balance a budget: I have worked as a farmer-rancher for 17 years and serve as a state representative, fighting to keep our state budget in shape.

My first vote won't be to make Nancy Pelosi Speaker.

KRISTI
NOEM *for Congress*

www.KristiForCongress.com

PAID FOR BY KRISTI FOR CONGRESS

WASHINGTON IS BROKEN

Washington is attacking our freedom, refusing to balance the budget and running up debt our children will have to pay off.

- X Fewer jobs
- X Government-run health care
- X Wasteful spending
- X Putting special interests ahead of small businesses

The truth is we don't have a voice in Congress right now, just a rubber stamp for the Obama-Pelosi big government agenda