



FEDERAL ELECTION COMMISSION

Washington, D.C. 20463

September 1, 2021

VIA EXPRESS MAIL AND EMAIL

Russell E. Marsh
 Wright Marsh & Levy
 300 S. Fourth Street
 Suite 701
 Las Vegas, NV 89101
russ@wmllawlv.com

RE: MUR 7355

Dear Mr. Marsh:

The Federal Election Commission (“Commission”) is the regulatory agency that administers and enforces the Federal Election Campaign Act of 1971, as amended (the “Act”). Based on a complaint filed by the Nevada State Democratic Party and William McCurdy III, the Commission on October 4, 2019, found reason to believe that an Unknown Respondent violated the Act by failing to report independent expenditures and failing to include disclaimers on billboard advertisements. *See* 52 U.S.C. §§ 30104(c), 30120(a); 11 C.F.R. §§ 109.10, 110.11.¹ The Complaint and the Factual and Legal Analysis, which formed the basis for the Commission’s finding, is attached for your information.

The Commission authorized the Office of the General Counsel to conduct an investigation concerning the source and cost of the billboard advertisements in question. During our investigation, we obtained information indicating that your client, Ahern Ad, LLC, produced and displayed the advertisements on billboard space that the company controlled, and that Ahern Ad, LLC, may be the Unknown Respondent as to which the Commission made findings. We are now preparing to make a recommendation to the Commission in connection with that information. Prior to making our recommendation, we offer a respondent an opportunity to provide in writing a response to the Complaint and the Commission’s Factual and Legal Analysis. Should your client choose to respond, you may also submit any materials — including documents or affidavits from persons with relevant knowledge — that you believe may be relevant or useful to the Commission’s consideration of this matter.

Your submission, if your client chooses to make one, must be submitted within 30 days of receipt of this letter. You should address any response to the Office of the General Counsel,

¹ A “reason to believe” finding is not a finding that any person violated the Act. Rather, it means that the Commission believes a violation may have occurred. *See* 52 U.S.C. § 30109(a)(2).

and the response should reference MUR 7355. After 30 days, we will prepare recommendations to the Commission, taking into account any response you submit in making our recommendations.

Please note that your client has a legal obligation to preserve all documents, records and materials relating to this matter. *See* 18 U.S.C. § 1519. This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that your client wishes the matter to be made public. Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.²

For your information, enforcement procedures and options are discussed in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at http://www.fec.gov/em/respondent_guide.pdf.

If you have any questions, please contact Delbert K. Rigsby, the attorney handling this matter, at (202) 694-1616 or dkrigsby@fec.gov.

Sincerely,

Charles Kitcher

Charles Kitcher
Associate General Counsel for
Enforcement

Enclosures:
Complaint
Factual and Legal Analysis

² The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

**BEFORE THE
FEDERAL ELECTION COMMISSION**

Nevada State Democratic Party
William McCurdy II, Chairman
2320 Paseo Del Prado
Suite B107
Las Vegas, NV 89102,

MUR # 7355

Complainant,

v.

Heller for Senate
Chrissie Hastie, Treasurer
PO Box 371907
Las Vegas, NV 89137

Respondents.

2019 MAR 28 PM 12:18
OFFICE OF
GENERAL COUNSEL

COMPLAINT

Complainant files this complaint under 52 U.S.C. § 30109(a)(1) against Heller for Senate, and Chrissie Hastie, in her official capacity as Treasurer (collectively “Respondents”) for violating the Federal Election Campaign Act of 1971, as amended (“the Act”), and Federal Election Commission (“FEC” or “Commission”) regulations, as described below.

FACTS

Senator Dean Heller currently serves as a Senator for the state of Nevada.¹ Heller for Senate is serving as Senator Heller’s principal campaign committee for his 2018 reelection campaign.² As is illustrated in the photographs set forth in Exhibit A, ten different advertisements in support of Senator Heller are being projected on an electronic billboard in Nevada without a proper disclaimer to identify the sponsor of the advertisements.³

¹ Meet Dean Heller, U.S. Senate, available at <https://www.heller.senate.gov/public/index.cfm/biography>.

² FEC Statement of Organization, Heller for Senate (filed Apr. 27, 2017).

³ Exhibit A, Electronic Billboards in Nevada in Support of Heller.

Displayed on at least one electronic billboard at a 76 gas station in Las Vegas, Nevada, ten different images are running on a loop, all featuring Senator Dean Heller's name and title on different Nevada-themed license plates.⁴ None of the ten advertisements include a disclaimer, or in any way indicate who paid for the communications. However, interspersed between the various advertisements featuring Senator Heller's name, there are different advertisements that explicitly say: "provided by 76" with the 76 gas station logo.⁵ Absent any disclaimer language on the Heller-specific advertisements, it appears that a corporate gas station is providing an impermissible in-kind contribution to Heller for Senate, in direct violation of Commission regulations.

LEGAL ANALYSIS

Pursuant to FEC regulations, a "disclaimer" is "a statement that must appear on certain communications to identify who paid for them and, where applicable, whether the communications were authorized by a candidate."⁶ The question of whether a particular communication must include a disclaimer depends on who paid for the communication, what the communication says, and whether the communication qualifies as a "public communication" under 11 C.F.R. § 100.26.⁷

For these purposes, a "public communication" means "a 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" including "communications placed for a fee on another person's Web

⁴ *Id.*

⁵ *Id.*

⁶ Internet Communication Disclaimers, 76 Fed. Reg. 63,567 (Oct. 13, 2011).

⁷ 11 C.F.R. §§ 110.11(a)(1), 100.26.

site.”⁸ The phrase “general public political advertising” has been interpreted broadly by this Commission and Congress to “encompass[] all the terms explicitly included by Congress [in 11 C.F.R. § 100.26], in addition to other potential forms of general public political advertising not specifically listed.”⁹ Accordingly, under the FEC’s broad interpretation of “general public political advertisement”, electronic billboards would qualify as a public communication under 11 C.F.R. § 100.26.

As a public communication, if these electronic billboards were sponsored by a federal campaign committee like Heller for Senate, the communication must (i) make clear that it was paid for by a candidate’s authorized campaign committee, and (ii) present that information in a clear and conspicuous manner to give the reader adequate notice of the sponsor’s identity.¹⁰ On the other hand, if the ten advertisements were paid for by a corporate gas station, as the language “provided by 76” interspersed alongside the Heller-specific advertisements suggests, such a payment would constitute an impermissible corporate contribution under Commission regulations: “[a]ny corporation...is prohibited from making a contribution” as defined in FEC regulations, which provide that “anything of value made by any [corporation] for the purpose of influencing any election for Federal office is a contribution.”¹¹

The problem with the advertisements currently on display in Las Vegas is it is impossible to tell who paid for them – was it the corporate gas station, Heller’s federal campaign committee or a completely different entity? Either way, there is a clear violation of law here, either for failing to adhere to the disclaimer requirements of 11 C.F.R. §110.11 or for accepting an impermissible corporate contribution in violation of 11 C.F.R. § 114.2(b).

⁸ 11 C.F.R. § 100.26.

⁹ Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76,962 (Dec. 13, 2002).

¹⁰ 11 C.F.R. § 110.11(c)(1), (f)(1).

¹¹ 11 C.F.R. §§ 114.2(b), 100.52(a).

Because none of the ten images include language indicating who paid for the communications, the public has absolutely no information on who sponsored the advertisements in support of Dean Heller. Moreover, by allowing these advertisements to run alongside a similar advertisements that are explicitly “provided by 76” the obvious implication here is that a corporate gas station has paid for these advertisements in support of Heller.¹² Without additional disclaimer information to indicate that the gas station was *not* the sponsor of the advertisements – that is, without additional language on the Heller-specific advertisements that identifies who is the sponsor of those ads – the public is left to think that a corporate gas station is engaging in federal election activity, despite the clear rule prohibiting such engagement.

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¹² Exhibit A, Electronic Billboards in Nevada in Support of Heller.

REQUESTED ACTION

As we have shown above, it appears Respondents have violated the Act and Commission regulations either by failing to include proper disclaimer on ten different advertisements in support of Dean Heller or accepting an impermissible corporate contribution. Failing to provide the public with adequate notice of the identity of the communication's sponsor is a clear violation of law, as is accepting an impermissible corporate contribution if the ads were in fact paid for by a corporate gas station as is suggested in the attached images.¹³ Accordingly, we respectfully request that the Commission investigate these alleged violations, and that Respondents be enjoined from further violations and be fined the maximum amount permitted by law.

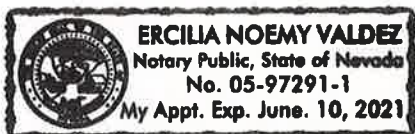
Sincerely,



Chairman William McCurdy II
Nevada State Democratic Party

STATE OF NEVADA)
)
County of Clark)

SUBSCRIBED AND SWORN to before me this 13th day of March, 2018.



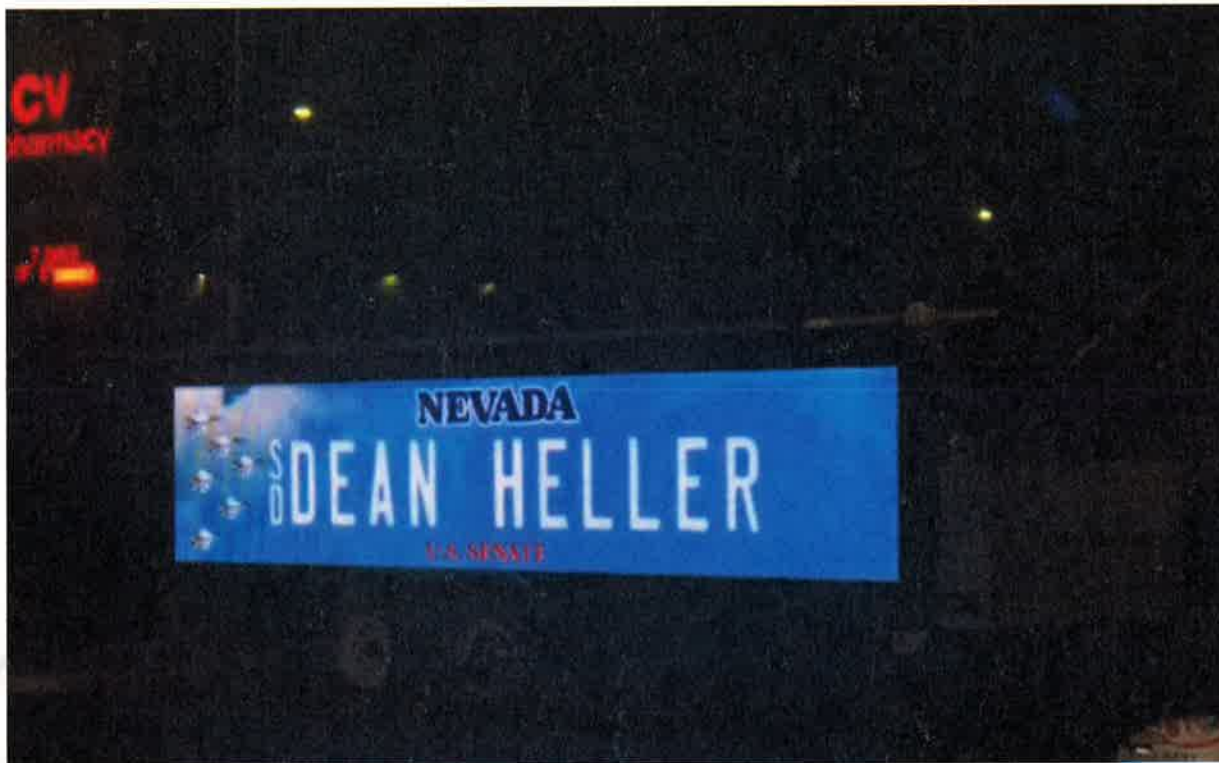

Notary Public

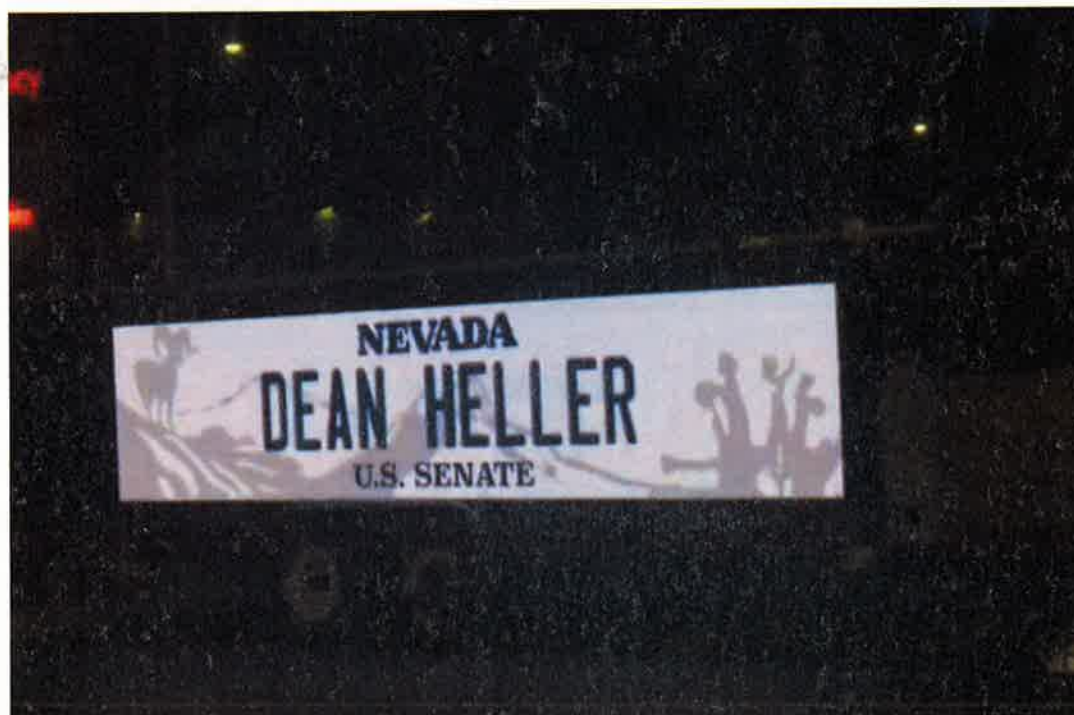
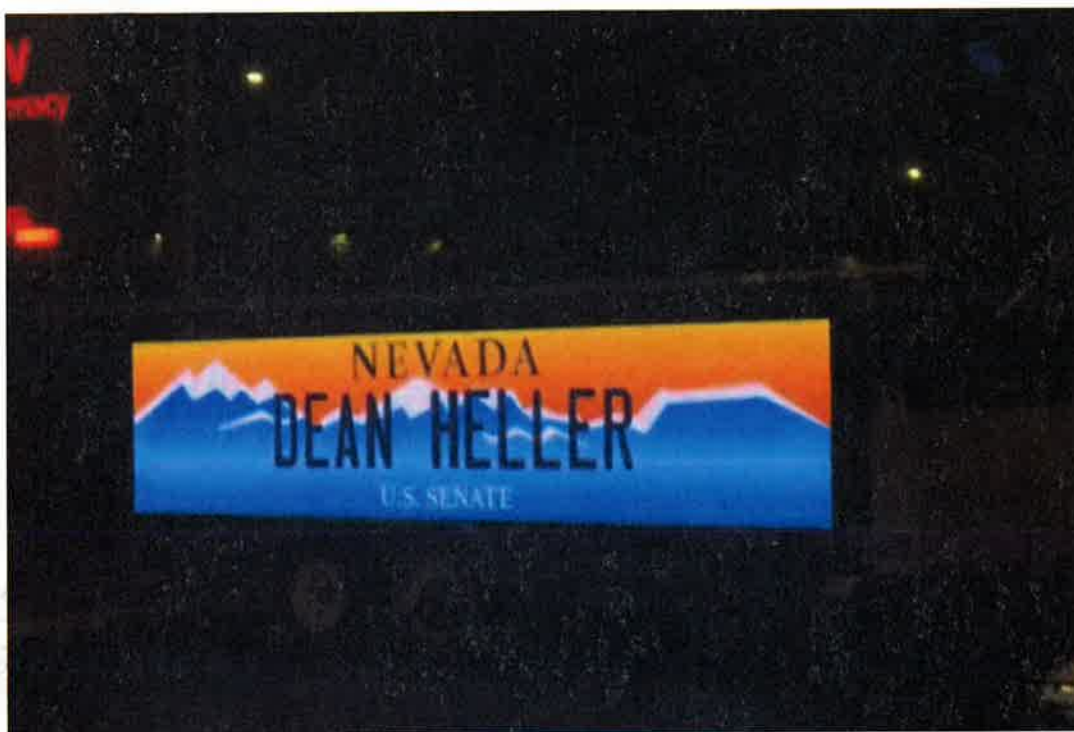
My Commission Expires: June 10, 2021

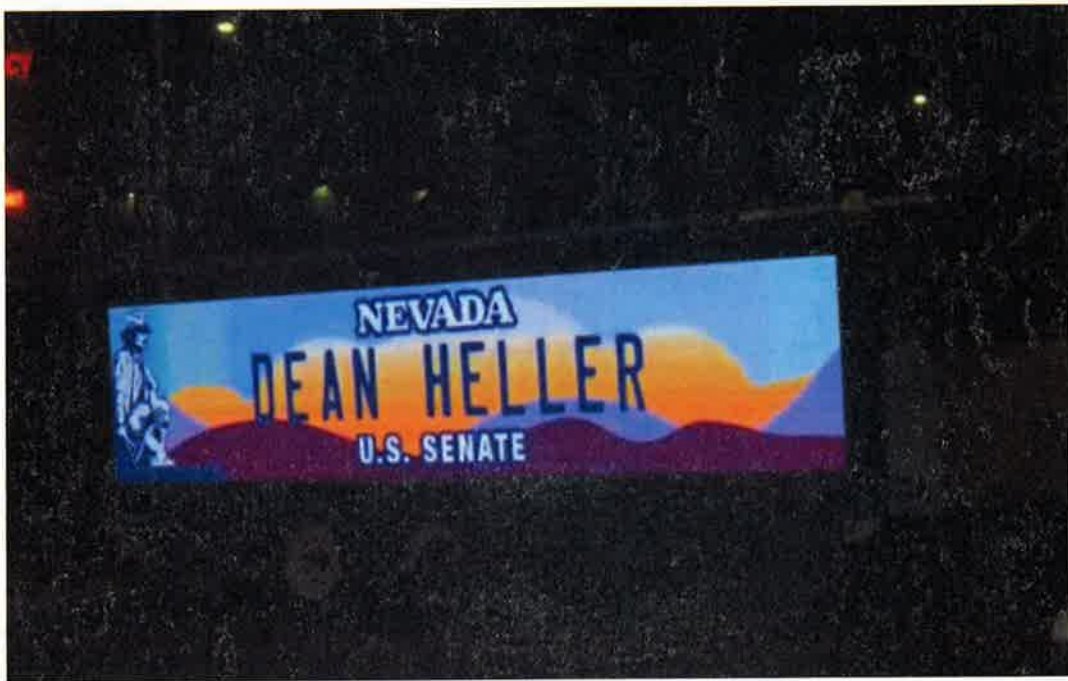
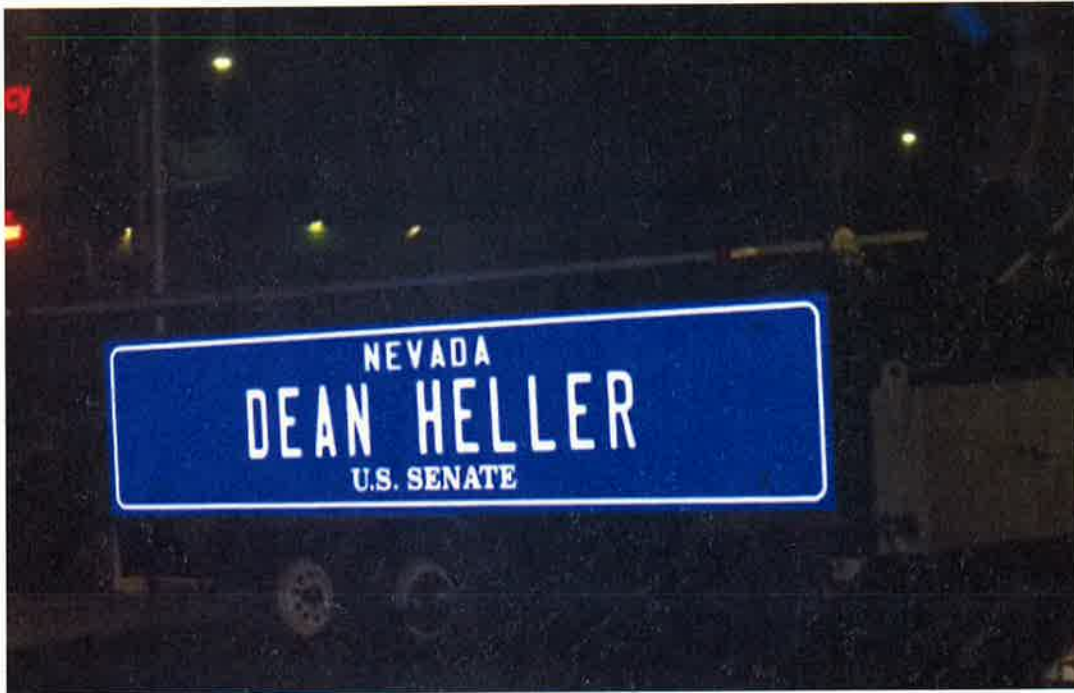
¹³ *Id.*

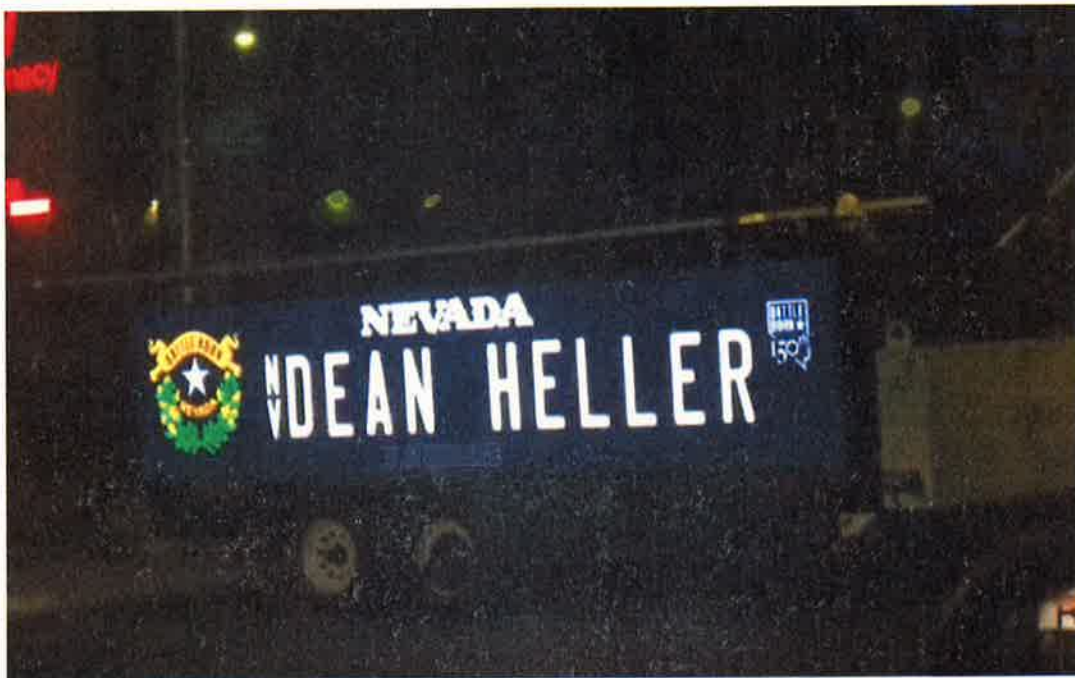
Exhibit A

Electronic Billboards in Nevada in Support of Heller

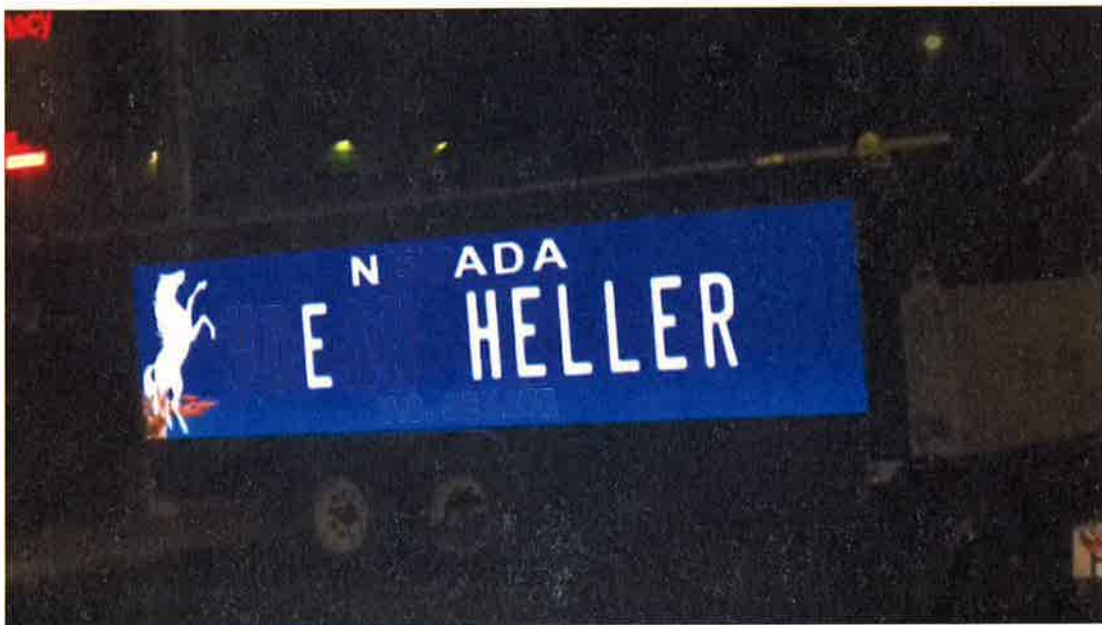
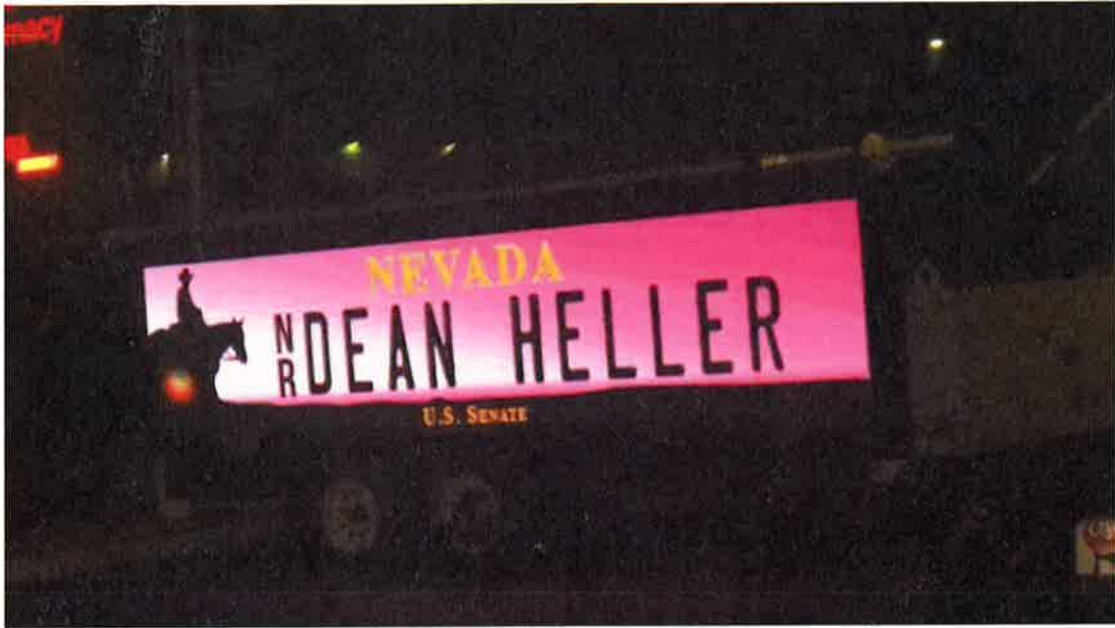












FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Unknown Respondent

MUR 7355

I. INTRODUCTION

The Complaint in this matter alleges that Heller for Senate and Chrissie Hastie in her official capacity as treasurer (“Heller Committee”) failed to provide disclaimers on an electronic billboard identifying the U.S. Senator from Nevada Dean Heller or, in the alternative, accepted a corporate contribution from the gas station on whose property the billboard was located.¹ Based on the information in the record and for the reasons set forth below, the Commission finds reason to believe that Unknown Respondent violated 52 U.S.C § 30120(a) and 11 C.F.R. § 110.11 by failing to include disclaimers on a billboard expressly advocating Heller’s election. The Commission also finds reason to believe that Unknown Respondent violated 52 U.S.C § 30104(c) and 11 C.F.R. § 109.10 by failing to report an independent expenditure.

II. FACTUAL BACKGROUND

Dean Heller was a candidate for the U.S. Senate in Nevada in 2018, and Heller for Senate is his authorized committee.² At the time the complaint was filed Dean Heller’s campaign appeared to be using the following image as their official logo:³

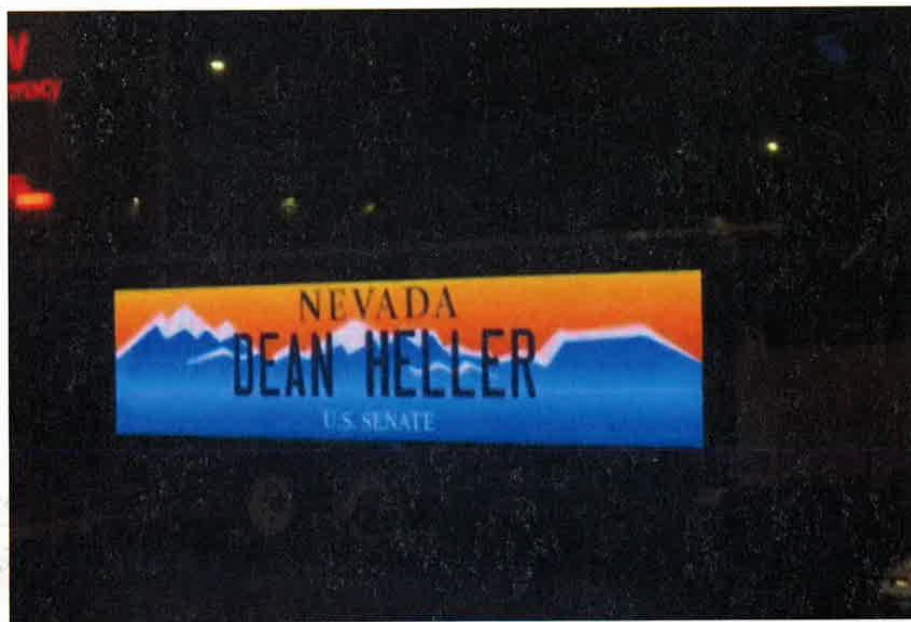
¹ Compl. at 1-3 (Mar. 28, 2018).

² See Dean Heller, Amend. Statement of Candidacy (Oct. 2, 2018); Heller for Senate, Amend. Statement of Organization (Oct. 2, 2018).

³ See Wayback Machine, Internet Archive (search for “DeanHeller.com”).



According to the Complaint, ten different rotating advertisements supporting Heller were appearing on an electronic billboard at a 76 gas station in Las Vegas, Nevada.⁴ The Complaint provides photographs of the billboard advertisements which show images of Nevada vehicle license plates with varying backgrounds, all of which look similar to the image below:⁵



⁴ Compl. at 2.

⁵ *Id.*, Ex. A.

These advertisements identifying Heller were interspersed with advertisements for free electric vehicle charging that state “provided by 76” alongside the gas station’s logo.⁶ The Complaint does not identify the name or precise location of the 76 gas station that hosted the billboard, stating only that it was located in Las Vegas.⁷ Nor does the Complaint provide the time frame during which the billboards identifying Heller were displayed, or the duration of each display.

III. LEGAL ANALYSIS

A. Disclaimers

The Complaint alleges that the Heller Committee violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by failing to include disclaimers on the electronic billboard advertisements.⁸ The Act requires that any person who makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate must include a disclaimer on any such communication.⁹ If the communication is not authorized by a candidate or an authorized committee, the disclaimer must 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 was not authorized by any candidate or candidate’s committee.¹⁰ Disclaimers in printed materials must be presented in a clear and conspicuous manner and meet specific requirements, such as being of sufficient type

⁶ *Id.* at 1-2. It is not known whether the billboard made additional displays besides those identifying Heller and those advertising for free electric vehicle charging.

⁷ *Id.* at 1-5. There are approximately thirty 76 gas stations with Las Vegas addresses.

⁸ Compl. at 1-3.

⁹ 52 U.S.C. § 30120(a); *see also* 11 C.F.R. § 110.11(a)(2).

¹⁰ 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3).

size to be clearly readable and being placed in a printed box set apart from the other parts of the communication.¹¹

Commission regulations likewise provide that “[a]ll public communications, as defined in 11 C.F.R. § 100.26 . . . that expressly advocate the election or defeat of a clearly identified candidate” require disclaimers.¹²

A communication expressly advocates the election or defeat of a clearly identified candidate under 11 C.F.R. § 100.22(a)¹³ when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,”; or “‘vote Pro-Life’ or ‘vote Pro-Choice’ accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice”; or uses campaign slogans or individual words, “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as

¹¹ 52 U.S.C. § 30120(c); 11 C.F.R. § 110.11(c)(1)-(2).

¹² 11 C.F.R. § 110.11(a)(2).

¹³ The term “clearly identified” means “the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your Congressman,’ or the ‘the incumbent,’ or through an unambiguous reference to his or her status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of Georgia.’” 11 C.F.R. § 100.17 (emphasis omitted).

posters, bumper stickers, advertisements, etc., which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’”¹⁴

A public communication includes a communication transmitted through any “outdoor advertising facility” and “any other form of general public political advertising.”¹⁵

Here, the electronic billboard required a disclaimer. First, the billboard is a public communication because it is both an outdoor advertising facility and a general form of public political advertising.¹⁶ Second, the billboard’s display communicates a campaign slogan.¹⁷ Accordingly, the billboard contains express advocacy under section 100.22(a).

Based on the photographs provided in the Complaint, it appears that the communications on the electronic billboard do not contain a disclaimer on any of the ten advertisements supporting Heller.¹⁸ There is no information on the advertisements indicating who paid for them or whether they were authorized by a candidate or candidate’s committee.¹⁹ Accordingly, the

¹⁴ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as “Smith for Congress” and “Bill McKay in ’94,” have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294-95 (July 6, 1995).

¹⁵ *Id.* § 100.26.

¹⁶ *Id.* §§ 100.26, 110.11(a)(2); *see also* Factual & Legal Analysis at 3, MUR 6642 (Christopher Kauffman).

¹⁷ *Id.* § 100.22(a).

¹⁸ *See* Compl., Ex. A.

¹⁹ *See id.*

Commission finds reason to believe that Unknown Respondent violated 52 U.S.C § 30120(a) and 11 C.F.R. § 110.11 by failing to include disclaimers on the electronic billboard.²⁰

B. Independent Expenditure Reporting

The billboard appears to be an independent expenditure. An independent expenditure is an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized committee, or their agents, or a political party or their agents.²¹ The Act provides that "every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year" must file a statement disclosing information about the expenditures.²²

Because the electronic billboard expressly advocates the election of a clearly identified federal candidate, payment to display it constitutes an independent expenditure.²³ Accordingly it

²⁰ See Factual & Legal Analysis at 2, MUR 6642 (Christopher Kauffman) (finding reason to believe that unknown respondents violated the Act by providing insufficient disclaimers on a billboard).

²¹ 52 U.S.C. § 30101(17).

²² 52 U.S.C. § 30104(c)(1), (2); 11 C.F.R. § 109.10(b), (e)(1)(i)-(v). In *CREW v. FEC*, the court vacated 11 C.F.R. § 109.10(e)(1)(vi), which addressed reporting by persons other than political committees that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year. 316 F. Supp. 3d 349 (D.D.C. 2018) (stay pending appeal lifted Sept. 18, 2018). After the court vacated the regulation, the Commission issued guidance requiring persons who made independent expenditures on or after September 18, 2018, to identify each person (other than a political committee) who made a contribution(s) to the reporting person during the reporting period whose contribution(s) had an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of such contribution(s) and use memo text to indicate which of these persons made a contribution in excess of \$200 to the reporting person for the purpose of furthering any independent expenditure. See *FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), FEC Press Release (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>. In this matter, it appears that the independent expenditures at issue were made around March 2018, *i.e.*, prior to the commencement of the reporting requirements contained in the Commission's guidance.

²³ See 52 U.S.C. § 30101(17).

appears that Unknown Respondent should have filed the appropriate independent expenditure report and should have disclosed the information required.

The Commission does not know who paid for the billboard, or know with certainty whether the Heller Committee had any role in creating or paying for the billboard. The Complaint hypothesizes that the 76 gas station in Las Vegas where the billboard appeared may have paid for the billboard, noting as support for this theory that the Heller advertisements were interspersed with 76's own advertisements. The Commission was unable to identify, notify, or solicit a response from the gas station because the Complaint does not specify the exact location of the gas station, but based on information possessed by the Commission, it appears likely that a "person" posted the billboard independent of the Heller Committee.

Further, based on general cost information for electronic billboards, the billboard at issue here likely cost more than the \$250 independent expenditure reporting threshold. Thus, it appears that an independent expenditure report was required. However, no independent expenditures reports related to the Heller billboard were ever filed. Accordingly, the Commission finds reason to believe that Unknown Respondent violated 52 U.S.C § 30104(c) and 11 C.F.R. § 109.10 by failing to report an independent expenditure.²⁴

²⁴ See Factual & Legal Analysis at 3-4, MUR 6642 (Christopher Kauffman) (finding reason to believe that unknown respondent violated the Act by failing to report an independent expenditure).