



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Kristi for Congress, et al.

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)
) MUR 6415
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**STATEMENT OF REASONS OF
COMMISSIONER ELLEN L. WEINTRAUB**

In this matter, the Office of General Counsel recommended that the Commission exercise its prosecutorial discretion to dismiss an allegation that a newspaper advertisement had an improper disclaimer. I voted to approve the General Counsel's recommendation.¹

Complainant alleged that Kristi Lynn Noem and her principal campaign committee, Kristi for Congress and its treasurer failed to include a disclaimer on a particular advertisement. The advertisement was a full page newspaper advertisement with two visually distinct messages. On top was a positive message promoting Kristi Noem for Congress, stating in part that she would vote to "[l]ower the national debt" and "create jobs" and against "wasteful spending" and "government mandated health care." The bottom third of the page, while using a different font and background color, sounded similar themes from a negative perspective, claiming "Washington is broken," in part because of "debt," "[f]ewer jobs," "Government-run health care," and "[w]asteful spending." A clear and conspicuous disclaimer appeared prominently in the middle of the page, towards the bottom of the positive message.

All public communications made by political committees must include a disclaimer. 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(a)(1).² For printed communications, the Act and Commission regulations specify that the disclaimer be of sufficient type size to be clearly readable, be contained in a printed box set apart from the other contents of the communications, and be printed with a reasonable degree of color contrast between the background and printed

¹ Chair Bauerly and Commissioner Walther voted to find reason to believe a violation occurred. Vice Chair Hunter and Commissioners McGahn and Petersen voted to find no reason to believe a violation occurred. See Certification, MUR 6415 (Kristi for Congress) dated Nov. 17, 2011.

² 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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statement. 2 U.S.C. § 441d(c)(1)-(3); 11 C.F.R. § 110.11(c)(2)(i)-(iii). The Commission's regulations also specify that a disclaimer notice must be "presented in a clear and conspicuous manner." 11 C.F.R. § 110.11(c)(1). A disclaimer is not "clear and conspicuous" if the print is "difficult to read" or if the placement is "easily overlooked." 11 C.F.R. § 110.11(c)(1).

Respondents contend that the advertisement was one full-page advertisement and that the disclaimer covered both messages. In my view, the application of the disclaimer to the bottom portion of the page could certainly have been made clearer. Indeed, it was clearer in the on-line version of the ad, in which there was no space between the two sections and a single border wrapped around both sections of the ad. A reader of the newspaper ad could have been confused as to whether the page constituted one ad or two. Thus, I could not find that there was *no* reason to believe the law had been violated. However, the bottom section echoed the issues presented above, and there was a prominent disclaimer in the center of the page.

I believe this matter is distinguishable from MUR 6348 (David Schweikert for Congress). There, the respondents hid the disclaimer in an image, the disclaimer text was written perpendicular to the rest of the ad's text, the statutory "box" requirement was not satisfied, and the color of disclaimer text blended into the background color of the image.³ That particular disclaimer plainly did not satisfy statutory requirements. 2 U.S.C. §§ 441d(c)(2) and (c)(3). In this matter (6415), the disclaimer complied with the statutory and regulatory requirements and was not deliberately hidden from sight – the ambiguity arose over whether the disclaimer applied to some or all of the page. Given this ambiguity, I agreed with the recommendation of the Office of General Counsel that pursuing this matter was not the best use of Commission resources.

For these reasons, I thought an exercise of prosecutorial discretion for the disclaimer allegation was appropriate. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

12/20/2011
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

³ See Statement of Reasons of Chair Bauerly and Commissioners Walther and Weintraub, MUR 6348 (Schweikert), at 2-3.

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