

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2 In the Matter of)

America Coming Together, and,)
Carl Pope in his official capacity as)
Treasurer)

MUR 5403 and 5466

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

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4 **CONCILIATION AGREEMENT**

5 These matters, which include allegations transferred from two other matters designated as
6 MURs 5440 and 5612, originated with signed, sworn and notarized complaints filed with the
7 Federal Election Commission ("the Commission"). The Commission found reason to believe
8 that America Coming Together, and, Carl Pope, in his official capacity as Treasurer (collectively,
9 "ACT" or "Respondents"), violated 2 U.S.C. §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§ 102.5(a),
10 104.10, 106.1 and 106.6.

11 NOW, THEREFORE, the Commission and the Respondents, having participated in
12 informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree
13 as follows:

14 I. The Commission has jurisdiction over the Respondents and the subject matter of this
15 proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C.
16 § 437g(a)(4)(A)(i).

17 II. Respondents have had a reasonable opportunity to demonstrate that no action should
18 be taken in this matter.

19 III. Respondents enter voluntarily into this agreement with the Commission.

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1 IV. The pertinent facts in this matter are as follows:

2 **Background**

3 1. ACT was established in July 2003 as an unincorporated organization with federal and
4 nonfederal accounts pursuant to 11 C.F.R. § 102.5. ACT's federal account was registered with
5 the Commission as a non-connected political committee within the meaning of 11 C.F.R. §
6 106.6(a). ACT's nonfederal account filed disclosure reports with the Internal Revenue Service
7 under Section 527 of the Internal Revenue Code. 26 U.S.C. § 527. ACT decided in 2005 to
8 suspend ongoing active operations and its current intention is to wind down and terminate its
9 affairs upon the conclusion of this matter.

10 2. ACT was founded by individuals with substantial experience in grassroots
11 organizational activism and progressive public advocacy. Ellen Malcolm served as President of
12 ACT. Steve Rosenthal served as the Chief Executive Officer of ACT. Carl Pope served as the
13 Treasurer of ACT. Harold Ickes subsequently joined ACT as its Chief of Staff in May 2004 and
14 became President of ACT in February 2005 following Ms. Malcolm's resignation from that
15 position. According to ACT, its founders were variously motivated by one or more of the
16 following considerations: (1) concern about the Democratic Party's lack of ability to conduct
17 sufficient and effective voter contact, identification and registration without the non-federal
18 ("soft") money that had been available to national party committees in prior election cycles, but
19 was no longer available to them due to the enactment of the Bipartisan Campaign Reform Act of
20 2002 ("BCRA"), (2) concern about the ability of the Democratic Party's federal, state and local
21 candidates to compete, including in so-called "battleground" states whose electoral votes would
22 most likely decide the 2004 presidential election, and (3) interest in channeling non-federal funds

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1 that no longer could be donated to the Democratic National Committee into a pro-Democratic,
2 independent advocacy and voter mobilization effort that progressive activists rather than the
3 Democratic Party would control.

4 3. During its first eighteen months of existence during 2003 and 2004, ACT opened
5 approximately 90 offices, employed approximately 13,500 canvassers, recruited an additional
6 12,000 volunteers, and raised approximately \$137 million in connection with the 2004 elections.
7 Of this amount, approximately \$33.5 million of its receipts were federal funds and approximately
8 \$103.5 million were nonfederal funds. ACT raised funds both directly from donors and through
9 participation in a joint fundraising committee, Joint Victory Campaign 2004.

10 4. ACT's 2003-2004 activities centered on voter contact, voter registration and get-out-
11 the-vote activities in 17 "battleground" states. In each of these states, ACT's voter drive
12 communications, delivered by door-to-door canvassing, direct mail, email and telephone banks,
13 emphasized goals that included defeating President George W. Bush in his bid for re-election.
14 Many of ACT's voter drive communications also made generic references to supporting
15 "Democratic" or "progressive" candidates at all levels of government, and some referred to
16 specific nonfederal candidates. President Bush was the only candidate named in the vast
17 majority of ACT's communications. Democratic presidential candidate and then nominee
18 Senator John Kerry was the second most-frequently named candidate in these communications.

19 5. Respondents contend that ACT targeted presidential election battleground states and
20 emphasized the positions of the presidential candidates in its communications for several
21 reasons. First, as a national organization whose public communications were prepared centrally
22 and spanned many states and localities, ACT could not produce and distribute written

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1 communications so tailored as to name the thousands of state and local progressive candidates in
2 all states, especially given the widely varying dates of the primary elections that would determine
3 the identities of state and local nominees. Second, this was the most effective way for ACT to
4 raise a range of issues that concerned voters about candidates for positions at all levels of
5 government and to bring to the polls voters who shared their values so they would vote for both
6 federal and nonfederal Democratic Party candidates up and down the ticket, as ACT regularly
7 urged them to do. Third, ACT believed that the disproportionate media attention to the
8 presidential race and the battleground states would amplify ACT's efforts there for the entire
9 Nation, and so influence voters in other states as well.

10 **Applicable Law**

11 6. A political committee that finances political activity in connection with both federal
12 and nonfederal elections must either establish a federal account and a non-federal account and
13 allocate shared expenses between those two accounts or conduct all activity from a single federal
14 account. 11 C.F.R. § 102.5(a)(1)(i)(2002). A federal account may contain only those funds that
15 are permissible in source and amount under federal election law, while the non-federal account
16 may contain funds that are not permissible under federal law, but are permissible under state or
17 local law. 11 C.F.R. §§ 102.5(a)(1)(i) and (a)(3). For example, the federal account of a political
18 committee could not accept contributions from any one individual of more than \$5,000/yr, and
19 also could not accept contributions from the general treasury funds of corporations or labor
20 organizations. See 2 U.S.C. §§ 441a(f) and 441b.

21 7. All disbursements, contributions, expenditures and transfers made by a nonconnected
22 political committee in connection with any federal election must be made from its federal

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1 account. See 11 C.F.R. §§ 102.5(a)(1)(i) and (a)(3). A political committee that allocates shared
2 federal and non-federal expenses must report each disbursement it makes from its federal account
3 or separate allocation account for joint federal and non-federal activity. 11 C.F.R. §
4 104.10(b)(4).

5 8. Expenditures or disbursements made by a nonconnected political committee with
6 federal and nonfederal accounts on behalf of one or more clearly identified federal candidates
7 and one or more clearly identified non-federal candidates must be attributed to each such
8 candidate according to the benefit reasonably expected to be derived. 11 C.F.R. § 106.1(a). In
9 the case of a publication or broadcast communication, the attribution shall be determined by the
10 proportion of space or time devoted to each candidate as compared to the total space or time
11 devoted to all candidates. *Id.*

12 9. Commission regulations in effect during the 2003-2004 election cycle required
13 non-connected committees to allocate both the cost of administrative expenses not attributable to
14 any clearly identified candidate and the cost of generic voter drives that do not mention any
15 specific candidate between federal and non-federal accounts based “on the ratio of federal
16 expenditures to total federal and non-federal disbursements made by the committee during the
17 two-year federal election cycle.” 11 C.F.R. § 106.6(c)(1) (2004).¹ This “funds expended” ratio
18 was to be estimated and reported at the beginning of each federal election cycle, based on the
19 committee’s federal and non-federal disbursements in a prior comparable election cycle or upon
20 the committee’s reasonable prediction of its disbursements for the coming two years. 11 C.F.R. §
21 106.6(c)(1) (2004).

¹ The Commission adopted new regulations, effective January 1, 2005, governing the allocation of joint federal and non-federal activity, which supplanted the regulations that governed ACT during the 2003-2004 election cycle.

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1 10. Because ACT had not existed during any election cycle prior to 2003, it could only
2 predict the ratio of its federal/nonfederal disbursements to use for the allocation of administrative
3 and generic voter drive expenses not directly attributable to specific federal candidates. ACT
4 contends that it calculated its "funds expended" ratio based on the understanding that the
5 Commission's pre-2005 Part 106 regulations required the "federal expenditure" part of the ratio
6 to be comprised only of contributions to candidates and expenditures for communications that
7 expressly advocated the election or defeat of clearly identified federal candidates. ACT contends
8 that it made very few federal contributions and its communications included little express
9 advocacy concerning federal candidates within the meaning of the Act and the Commission's
10 regulations, and federal funds that ACT included in its calculation of the federal share of ACT's
11 "funds expended" allocation ratio under pre-2005 11 C.F.R. § 106.6 would have covered the cost
12 of such disbursements.

13 11. For most of the 2004 election cycle, ACT used an estimated initial federal-
14 nonfederal allocation ratio of 2% federal funds and 98% nonfederal funds for its administrative
15 and generic voter drive activities. ACT did not adjust its allocation ratio at the end of 2003, or at
16 the end of each of the first three quarterly reporting periods in 2004. In October 2004, ACT
17 adjusted this allocation ratio to 12% federal funds and 88% nonfederal funds. ACT subsequently
18 made a retrospective transfer from its federal to its nonfederal account in order to reflect the
19 adjustments, and ACT maintained the new ratio for the remainder of 2004.

20 **Impermissible Allocation of Candidate-Specific Voter Drive Expenses**
21 **as "Administrative Expenses" under 11 C.F.R. § 106**

22 12. ACT characterized slightly over \$100 million of its 2003-2004 disbursements as
23 "administrative expenses" and paid these costs with predominantly nonfederal funds pursuant to

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1 its claimed "funds expended" ratio. The disbursements ACT characterized as "administrative
2 expenses" included approximately \$70 million in costs for direct mail, telemarketing, and door-
3 to-door canvassing communications that, the Commission concludes, were disbursements made
4 on behalf of, and thus were attributable to, clearly identified federal candidates in a manner that
5 could only be paid for with federal funds under the Commission's pre-2005 allocation
6 regulations, and that were not eligible to be allocated as administrative expenses or as generic
7 voter drive expenses. See 11 C.F.R. § 106.6(b)(2)(i-iii) (2004).

8 13. ACT's voter drive communications contained messages which explicitly asked the
9 public for help in electing "progressive" or "Democratic" candidates at all levels of government,
10 frequently using the phrase "help elect progressive candidates from the White House to city hall"
11 that also contained specific references to President Bush and/or his opponent, Senator Kerry, that,
12 the Commission concludes, were required to be paid only with federal funds.

13 14. For example, Palm Pilots videos that ACT canvassers showed to undecided voters in
14 the state of Ohio included the following messages:

15 "Base 6/11/04"
16

Audio	Visual
It's been four years under George Bush.	<i>George Bush speaking. Text on screen: "It's been four years."</i>
270,000 children in Ohio have no health care.	<i>Young girl and boy. Text on screen: "270,000 children. No health care."</i>
African-American unemployment has skyrocketed to a 10-year high.	<i>Construction worker pulling on a chain. Text on screen: "African-American unemployment; 10 year high."</i>
650,000 African-Americans have lost their jobs.	<i>Construction workers walking together. Text on screen: "650,000 African-American lost their jobs across America."</i>
Ohio has gone backwards.	<i>Outline of the state of Ohio. Text on screen: "Ohio has gone backwards."</i>
We're America Coming Together. Please volunteer to move Ohio forward. Sign a pledge to vote or contact us to contribute at ohio.actforvictory.org . Your contribution will ensure	<i>Children playing on a playground. ACT logo and website address.</i>

that we can fight for jobs, health care and help elect progressive candidates from the White House to city hall.

1 "Health Care 6/11/04a"

Audio	Visual
<p>It's been four years...</p> <p>And 270,000 children in Ohio have no health insurance.</p> <p>Our seniors face skyrocketing prescription drug costs.</p> <p>And big insurance and drug companies reap record profits.</p> <p>Why?</p> <p>Because George Bush blocked re-importation of less expensive medicines from Canada.</p> <p>And Bush said "no" to guaranteeing price controls on health care costs.</p> <p>We're America Coming Together – Ohio.</p> <p>To help us improve health care: volunteer. Or contact us to contribute at ohio.actforvictory.org. Your contribution will ensure that we can fight for better health care and other important issues. And help elect progressive candidates from the White House to city hall.</p>	<p><i>George Bush speaking.</i></p> <p><i>Text on screen: "It's been four years."</i></p> <p><i>Woman comforting girl in hospital room.</i></p> <p><i>Text on screen: "270,000 children. No health insurance."</i></p> <p><i>Elderly woman and pills being sorted.</i></p> <p><i>Text on screen: "Skyrocketing Rx drug costs."</i></p> <p><i>Officials meeting in conference room.</i></p> <p><i>Text on screen: "Record profits for drug companies."</i></p> <p><i>Text on screen: "Why?"</i></p> <p><i>George Bush speaking.</i></p> <p><i>Text on screen: "Blocked medicines from Canada."</i></p> <p><i>George Bush waving as he walks away.</i></p> <p><i>Text on screen: "No controls on health care costs."</i></p> <p><i>Children playing on a playground.</i></p> <p><i>ACT logo and website address.</i></p>

2 "Iraq Priorities 6/11/04"

Audio	Visual
<p>George Bush.</p> <p>Cutting education and health care here in Ohio</p> <p>While spending tens of billions to re-build Iraq.</p> <p>Misplaced priorities...</p> <p>While our needs at home are unmet</p> <p>We're America Coming Together.</p> <p>Help us get America's priorities back on track. Please volunteer or contact us to contribute at ohio.actforvictory.org. Your contribution will ensure that we can fight for your priorities, and help elect progressive candidates from the White House to city hall.</p>	<p><i>George Bush.</i></p> <p><i>Young schoolgirl; woman comforting young girl in hospital.</i></p> <p><i>Text on screen: "Cutting education. Cutting health care."</i></p> <p><i>George Bush waving, while walking away.</i></p> <p><i>Text on screen: "Spending billions to rebuild Iraq."</i></p> <p><i>Empty classroom.</i></p> <p><i>Text on screen: "Misplaced priorities."</i></p> <p><i>Empty hospital hallway.</i></p> <p><i>Text on screen: "Our needs are unmet."</i></p> <p><i>Children playing on a playground.</i></p> <p><i>ACT logo and website address.</i></p>

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1 **“Job Loss 6/11/04”**

Audio	Visual
<p>In Ohio, we've lost 225,000 jobs.</p> <p>Why?</p> <p>Because the Bush Administration says outsourcing jobs is good for our economy.</p> <p>It's true.</p> <p>The same George Bush who cancelled the steel tariffs now says outsourcing jobs to India and China is good for our economy.</p> <p>We're America Coming Together - Ohio.</p> <p>To help us save jobs, volunteer or contact us to contribute at ohio.actforvictory.org. Your contribution will ensure that we can fight for jobs and other important issues and help elect progressive candidates from the White House to city hall.</p>	<p><i>Welder.</i></p> <p><i>Text on screen: "225,000 lost jobs."</i></p> <p><i>Text on screen: "Why?"</i></p> <p><i>George Bush speaking.</i></p> <p><i>Text on screen: "Says outsourcing jobs is good."</i></p> <p><i>Text on screen: "It's true."</i></p> <p><i>George Bush waving, while walking away.</i></p> <p><i>Text on screen: "Cancelled steel tariffs. Outsourcing jobs is good for our economy."</i></p> <p><i>Children playing on a playground.</i></p> <p><i>ACT logo and website address.</i></p>

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3 15. The Commission concludes that ACT could not allocate approximately \$70 million

4 in voter drive costs because they were directly attributable to clearly identified federal candidates

5 under 11 C.F.R. 106.6, and that ACT was required to pay such costs either with 100% federal

6 funds or to allocate such costs between identified federal and nonfederal candidates under 11

7 C.F.R. 106.1. The Commission further concludes that, based on the content of the

8 communications, the proper allocation of the approximately \$70 million in candidate-specific

9 expenses under Section 106.1 would have required ACT to use a substantially higher proportion

10 of federal funds than ACT's estimated or adjusted "funds expended" ratio.

11 16. Respondents contend that ACT made these disbursements with the good faith belief

12 that virtually all of them did not involve express advocacy on behalf of or in opposition to federal

13 candidates or constitute contributions to federal candidates. Respondents contend that they

14 predicated this belief on their understanding, informed by legal advice, of the legal definition and

15 scope of "express advocacy" under Supreme Court and other appellate case law and the

16 Commission's regulatory and enforcement policies and practices regarding "express advocacy."

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1 Respondents contend that, because of this good faith belief, they did not view most of their
2 disbursements as being directly attributable to a particular candidate, and thus believed that such
3 expenses could be allocated pursuant to ACT's "funds expended" ratio under Section 106.6.

4 **Failure to Use Sufficient Federal Funds for**
5 **Allocable Administrative and Voter Drive Expenses**

6 17. ACT properly characterized approximately \$30 million in disbursements as
7 "administrative expenses" or "generic voter drive expenses," but, the Commission concludes,
8 due to the improper calculation of its "funds expended" ratio, failed to use sufficient federal
9 funds to pay for these activities. The Commission concludes that, by using an incorrectly
10 calculated "funds expended" ratio of 2% federal and 98% nonfederal funds (later adjusted to
11 12% federal and 88% nonfederal funds) for administrative and generic voter drive expenses,
12 ACT used only \$3.4 million in federal funds and \$26.4 million in nonfederal funds for these
13 allocated expenses.

14 18. To calculate the appropriate allocation ratio to apply to administrative and generic
15 voter drive expenses, the Commission's regulations in effect at the relevant time required the use
16 of the "funds expended" method, based on the ratio of federal expenditures to total federal and
17 nonfederal disbursements made by the committee during the two-year federal election cycle. *See*
18 11 C.F.R. § 106.6(c) (2004). In calculating the amount of federal expenditures, which serves as
19 the numerator of the ratio, a committee must include only amounts contributed to or otherwise
20 spent on behalf of specific federal candidates, sometimes referred to as direct support for federal
21 candidates. *See id.* Similarly, in calculating the amount of total federal and nonfederal
22 disbursements, which serves as the denominator of the ratio, a committee must include only

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1 disbursements that constitute such direct support for specific federal and non-federal candidates,
2 and not overhead or other generic costs. *See id.*

3 19. The Commission concludes that ACT's allocation ratio failed to account for millions
4 of dollars of federal expenditures that constituted direct support for John Kerry (often due their
5 opposition to the candidacy of George Bush), causing it to severely understate the federal portion
6 of the "funds expended" ratio that it used. The Commission concludes that the proper
7 calculation of the ratio under Section 106.6 would have required ACT to use a substantially
8 higher proportion of federal funds than that actually used pursuant to ACT's claimed ratio. In
9 fact, based on a review of a sample of ACT's disbursements, the Commission concludes that
10 ACT should have used a federal to nonfederal "funds expended" ratio of at least 90% federal and
11 10% nonfederal funds, and that ACT should have paid \$30 million of administrative and generic
12 voter drive expenses with approximately \$27 million in federal funds and approximately \$3
13 million in nonfederal funds.

14 20. Respondents contend that they acted in reliance on the advice of legal counsel and
15 under the good faith belief that ACT had complied with the requirements of the applicable
16 provisions of the FECA and applicable regulations in calculating their "funds expended" ratio.
17 Indeed, the Commission has made no findings or conclusions that respondents committed any
18 knowing and willful violations of the law, and the Commission acknowledges respondents'
19 assertions of reliance and good faith.

20 V. Solely for the purposes of settling this matter expeditiously and avoiding the cost
21 and time of further proceedings, including litigation (in particular, in ACT's view, in light of
22 ACT's decision in 2005 to suspend ongoing active operations and its current intention to wind

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1 down and terminate its affairs); and, without admitting or denying each specific basis for the
2 Commission's findings, without any admission with respect to any other proceeding, and with no
3 finding of probable cause by the Commission, ACT agrees not to contest the Commission's
4 conclusions above that ACT and Carl Pope, in his official capacity as treasurer, violated 2 U.S.C.
5 §§ 434, 441a(f), 441b(a) and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to properly
6 attribute and report allocated expenditures directly attributable to specific candidates, by failing
7 to properly allocate and report shared administrative activities, and by using nonfederal funds
8 raised without regard to applicable limits and prohibitions to pay for the federal share of such
9 allocated expenses.

10 VI. Respondents will take the following actions:

11 1. Respondents will pay a civil penalty to the Federal Election Commission in the
12 amount of \$775,000.00 pursuant to 2 U.S.C. § 437g(a)(5)(A).

13 2. Respondents will cease and desist from violating 2 U.S.C. §§ 434, 441a(f), 441b(a)
14 and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to attribute and report expenditures
15 made for multiple candidates, by failing to allocate and report shared administrative activities,
16 and by using prohibited funds to pay for the federal share of those expenses.

17 VII. The Commission, on request of anyone filing a complaint under 2 U.S.C.
18 § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance
19 with this agreement. If the Commission believes that this agreement or any requirement thereof
20 has been violated, it may institute a civil action for relief in the United States District Court for
21 the District of Columbia.

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1 VIII. This agreement resolves all matters with respect to Respondents arising from
2 MURs 5403, 5440, 5466 and 5612, and, except as provided in Section VII above, the
3 Commission will take no further inquiry or action regarding the allegations made and activities
4 described in those matters as to possible violations of the FECA. Further, the Commission will
5 take no action with respect to those allegations and activities against the Joint Victory Campaign
6 2004 (a joint fundraising committee utilized by ACT), or any officer, director, employee of or
7 contributor to ACT or Joint Victory Campaign 2004 during 2003 and 2004.

8 IX. This agreement shall become effective as of the date that all parties hereto have
9 executed same and the Commission has approved the entire agreement.

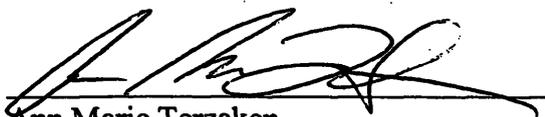
10 X. Respondents shall have no more than 30 days from the date this agreement becomes
11 effective to comply with and implement the requirements contained in this agreement and to so
12 notify the Commission.

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1 XI. This agreement constitutes the entire agreement between the parties on the matters
2 raised herein, and no other statement, promise, or agreement, either written or oral, made by
3 either party or by agents of either party, that is not contained in this written agreement shall be
4 enforceable.

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6 FOR THE COMMISSION:

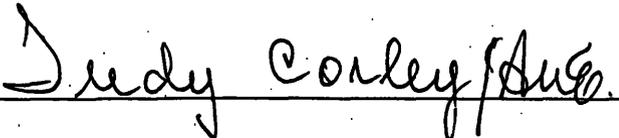
7 Thomasenia P. Duncan
8 General Counsel

9 BY: 
10 Ann Marie Terzaken
11 Acting Associate General Counsel
12 for Enforcement

8/24/07
Date

13
14 FOR THE RESPONDENTS:

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16 

17 
18 America Coming Together and
19 Carl Pope in his official capacity as Treasurer
20

August 20, 2007
Date

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