

BEFORE THE FEDERAL ELECTION COMMISSION

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3 In the Matter of)
4) MURs 6391 and 6471 **CELA**
5 Commission on Hope, Growth)
6 and Opportunity)
7)
8
9

10 **THIRD GENERAL COUNSEL'S REPORT**

11
12 **I. ACTIONS RECOMMENDED**

13 We recommend that the Commission: (1) find reason to believe that the Commission on
14 Hope, Growth and Opportunity violated 52 U.S.C. §§ 30102, 30103, 30104, 30120(a)(3), and
15 30120(d)(2); (2) enter into pre-probable cause conciliation with the Commission on Hope,
16 Growth and Opportunity; (3) approve the attached Factual and Legal Analysis; (4)
17 and (5) approve the appropriate letter.

18 **II. INTRODUCTION**

19 The Commission previously found reason to believe that the Commission on Hope,
20 Growth and Opportunity ("CHGO") violated 52 U.S.C. § 30104 of the Federal Election
21 Campaign Act of 1971, as amended (the "Act"), by failing to report as electioneering
22 communications or independent expenditures several advertisements that it had disseminated
23 during the 2010 election cycle.¹ At that time, the Commission took no action with respect to
24 CHGO's alleged violations of 52 U.S.C. § 30102(a)(3) and (d)(2) by failing to include proper
25 disclaimers on its communications and 52 U.S.C. §§ 30102, 30103, and 30104 by failing to
26 organize, register, and report as a political committee.² The Commission also authorized an

¹ See Amended Certification, MURs 6391, 6471 (Sept. 16, 2014).

² *Id.*

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1 political committee. Therefore, we again recommend that the Commission find reason to believe
2 that CHGO violated 52 U.S.C. §§ 30102, 30103, 30104, 30120(a)(3), and 30120(d)(2) and enter
3 into pre-probable cause conciliation with CHGO.

4 III. RESULTS OF INVESTIGATION

5 A. Overview of Prior Investigative Efforts

6 During the initial stages of our investigation into the question of CHGO's media
7 spending, we sought to interview several officers of CHGO and issued requests for information
8 to others. On October 15, 2014, we contacted William B. Canfield III, who represented for part
9 of the investigation that he was CHGO's General Counsel.⁴ Canfield represented that the
10 disbursements reported in CHGO's tax filings accurately reflected the group's spending and
11 activities.⁵

12 On November 25, 2014, we contacted CHGO's President/Executive Director James S.
13 Powell, who stated that his role at CHGO was limited to writing and producing the
14 advertisements.⁶ He explained that Michael H. Mihalke, a principal at Meridian Strategies, LLC
15 ("Meridian"), was responsible for billing and invoicing the advertisements at issue.⁷ Powell and
16 Canfield, who was representing Powell during this interview, confirmed both that the

⁴ Report of Investigation of Telephone Contact with William Canfield, Esq. (Oct. 15, 2014) ("Canfield ROI"); Letter from William B. Canfield, General Counsel, Commission on Hope, Growth & Opportunity (Dec. 7, 2010).

⁵ Canfield ROI. CHGO's 2010 Form 990 disclosed \$4,801,000 in contributions and \$4,770,000 in expenses. CHGO's 2011 Form 990 disclosed \$31,000 as a starting balance and \$31,000 in expenses, resulting in a zero net balance.

⁶ Report of Investigation of Interview of James S. Powell at 1 (Nov. 25, 2014) ("Powell ROI, Nov. 2014").

⁷ *Id.* at 2.

1 advertisements identified in the Complaints were the only advertisements disseminated by
2 CHGO and that these advertisements represented all of CHGO's media spending.⁸

3 On December 10, 2014, we interviewed James Warring, Treasurer of CHGO and founder
4 of Warring & Company, LLC, the firm responsible for CHGO's accounting and tax filings.⁹
5 Warring produced documents that contained the figures disclosed as disbursements on CHGO's
6 2010 Form 990, including payments to Meridian totaling \$4.7 million in August, September, and
7 October 2010. We also attempted to interview Susi Cedillo, an employee of Warring &
8 Company, and Mihalke, but were informed by their respective counsel that they would only
9 answer questions pursuant to compulsory process. Accordingly, on May 27, 2015, we served
10 Interrogatories and Requests for Documents on these individuals, as well as the officers of
11 CHGO.¹⁰

12 Though Canfield, Warring, Cedillo, Powell, Mihalke, and Meridian all responded to our
13 Interrogatories and Requests for Documents to obtain information related to the CHGO
14 advertisements, none supplied information or produced any records that itemized CHGO's
15 spending on the advertisements at issue. Mihalke, however, produced several documents that
16 appeared to reflect at least partial production costs of the advertisements, and Warring and
17 Cedillo produced a number of CHGO financial and bank records.¹¹ Finally, Mihalke, Warring,

⁸ *Id.* at 2.

⁹ Report of Investigation of Interview of James D. Warring at 2 (Dec. 19, 2014).

¹⁰ Orders to Submit Answers to Questions and Subpoenas to Produce Documents to William B. Canfield III, James D. Warring, James S. Powell, Susi Cedillo, Meridian Strategies, LLC, and Michael H. Mihalke. (May 27, 2015).

¹¹ Mihalke Resp. to Order to Submit Answers to Questions and Subpoena to Produce Documents to Michael H. Mihalke at 13-17 (June 26, 2015) ("Mihalke Resp."); Warring Resp. to Order to Submit Answers to Questions and Subpoena to Produce Documents to James Warring at 275-300, 366-382 (June 29, 2015) ("Warring Resp."); Cedillo Resp. to Order to Submit Answers to Questions and Subpoena to Produce Documents to Susi Cedillo at 13-38, 104-120 (July 6, 2015) ("Cedillo Resp."). Warring and Cedillo described their roles as providing bookkeeping

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1 and Cedillo produced several communications to donors or CHGO officers that contained
2 information relevant to CHGO's status as a political committee. None of the responses,
3 however, identified payments, either directly or through subvendors, for media placement,
4 despite CHGO's 2010 Form 990 listing \$4.3 million in media placement.

5 Given the responses and statements of the central fact witnesses to date, of the
6 individuals identified in subpoena responses as having worked with CHGO or Meridian, only
7 Scott Reed, the reported founder of CHGO, seemed likely at the time to possess information or
8 documents related to CHGO's spending on advertisements. When we contacted Reed on July 7,
9 2015, he indicated that his involvement with CHGO was limited.¹² Reed stated that he could not
10 recall being involved in the formation of CHGO and could not recall having any contact with
11 anyone involved with CHGO after its formation.¹³ When pressed, Reed stated that he had been
12 involved in discussions on the strategic placements of television ads for CHGO but could recall
13 no details of these discussions.¹⁴

14 As a result of these investigative activities, we had obtained information sufficient to
15 reasonably conclude (i) that CHGO had produced and placed the advertisements at issue; (ii) that
16 all of CHGO's disclosed spending related to the advertisements identified in the Complaints and
17 not other activity; (iii) that no additional vendors were involved in the placement of advertising;
18 (iv) that the Commission had been provided all relevant records in the possession of the central
19 fact witnesses involved in CHGO's operations; and (v) that no other responsive records would

and tax filing services and stated that they had no role with respect to CHGO's advertisements. Warring Resp. at 3; Cedillo Resp. at 3.

¹² Report of Investigation of Interview of Scott W. Reed at 2 (July 7, 2015).

¹³ *Id.*

¹⁴ *Id.*

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1 likely be available from those witnesses or others. Thus, because the expectancy value of
2 continuing the investigation appeared relatively low, while the record was adequate to seek to
3 resolve the specific reporting question for which the Commission authorized investigation — and
4 given the time available to effectively engage in conciliation efforts regarding that violation —
5 on July 28, 2015, we provided the Commission with a report summarizing our investigative
6 findings and recommending that the Commission find reason to believe that CHGO functioned
7 as a political committee and enter into pre-probable cause conciliation.

8 **B. Additional Efforts to Obtain Information Concerning Media Placements**

9 During the August 11, 2015 Executive Session, some Commissioners indicated that it
10 would nonetheless be useful to seek to obtain more information about the breakdown of CHGO's
11 2010 media spending. Consequently, the Commission did not act on our recommendations at the
12 time. We have since undertaken a number of additional investigative steps. First, we contacted
13 144 television stations in broadcast areas utilized by CHGO to obtain records in the stations'
14 political files that may have reflected CHGO's spending on the advertisements at issue.¹⁵ Of
15 these 144 stations, we were able to obtain records from three stations.¹⁶ Based on those three
16 responses, we determined that CHGO utilized a subvendor, New Day Media Services, LLC
17 ("New Day"), for its ad placement. Our further investigation uncovered no evidence that
18 Meridian itself made direct media purchases for the advertisements at issue.

¹⁵ We called TV stations in the broadcast areas of the CHGO advertisements at issue in this matter. Because we had been unable to obtain information about the areas in which the ads ran, we identified broadcast areas by using the congressional districts, as they were in 2010, within which the candidates featured in the ads ran for federal office.

¹⁶ Another 79 stations affirmatively had purged their records after the two-year Federal Communications Commission record retention requirement expired in 2012. A total of five stations indicated that they still possessed records related to our inquiry, but only three were willing to provide them without compulsory process or an in-person request.

1 Following the identification of this previously undisclosed subvendor in mid-August
2 2015, we interviewed Karen Boor, the owner and operator of New Day, on August 25, 2015.¹⁷
3 Boor explained that her firm develops media placement recommendations for her clients and
4 negotiates ad buy rates with stations.¹⁸ Boor then creates the ad buy plans for the client, and
5 upon approval by the client places the ad buy orders with stations, sends payments to the stations
6 for the ad buys, and confirms that the stations ran the ads.¹⁹ With regard to CHGO specifically,
7 Boor said that Mihalke gave her a set of markets, which she priced for Mihalke.²⁰ She stated that
8 Meridian paid New Day via wire transfer in advance of the CHGO-related media placements,
9 and New Day then made direct payments to broadcast stations for these placements.²¹ Boor said
10 that she believed she received a 10% commission for the CHGO-related media placements from
11 Meridian.²²

12 We also sought and obtained from Boor copies of New Day's bank records for September
13 through November 2010, which reflected wire transfers from Meridian to New Day in the
14 amount of \$3.2 million. These bank records included copies of checks that were written to
15 broadcast and cable stations for CHGO-related ad buys. From these records, we determined the
16 amounts that New Day spent on behalf of CHGO, via Meridian, on independent expenditures
17 and electioneering communications. To do this, we determined the broadcast area of each TV

¹⁷ Report of Investigation of Interview of Karen Boor (Aug. 25, 2015).

¹⁸ *Id.* at 1.

¹⁹ *Id.*

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.*

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1 station to which Boor made a CHGO-related payment, and, inferring that ads were broadcast in
2 geographic areas consistent with the races featured in the ads, matched broadcast areas with the
3 specific advertisements at issue.²³ We then calculated the amount that New Day expended for
4 the placements of each of the fifteen advertisements at issue and, using our classification of the
5 advertisements as described in our First General Counsel's Report, the amount spent on
6 independent expenditures and electioneering communications.²⁴

7 **C. Evidence Obtained Concerning Media Production**

8 While we attempted to identify the amount spent by CHGO through subvendors on media
9 placement, we also sought to clarify the amount spent by CHGO on media production. Mihalke
10 had submitted invoices that appeared to relate to ad production costs from Verve Broadcast
11 Design ("Verve Broadcast").²⁵ On September 10, 2015, we contacted the individual identified
12 on the invoices, Michael Furr.²⁶ Furr stated that his firm specializes in pre- and post-production
13 of ads and broadcast design, creating commercials for political groups and corporate entities.²⁷

²³ In one instance, CHGO ran two ads featuring Alan Boyd in Florida, one of which was an independent expenditure, and the other of which was an electioneering communication. Data provided in the Complaints and that we also obtained from Kantar Media's Campaign Media Analysis Group ("CMAG"), however, indicated that those ads were aired two weeks apart. Based on this timing, we were able to identify those New Day checks related to the independent expenditure and those related to the electioneering communication. *See* MUR 6471 Supp. Compl. ¶¶ 16, 26; E-mail from Andrew Fitzgerald, CMAG at Kantar Media (Sept. 14, 2015 at 2:41 p.m.).

Five New Day checks totaling \$154,160.47 were written to National Cable Communications Media, Inc. ("NCC Media"). We contacted NCC Media for information regarding CHGO-related cable ad buys. NCC Media represented that it possessed no records related to CHGO but referred us to the five cable stations which had run the CHGO ads. Of these stations, two stations possessed records of CHGO-related ad buys. Based on the broadcast areas of the five cable stations, we were able to identify the ads run at each cable station.

²⁴ We also confirmed our determinations of the version of ads that TV stations ran and the dates of airing using data provided by CMAG, which compiled data on the same. *See* E-mail from Andrew Fitzgerald, CMAG at Kantar Media (Sept. 14, 2015, 14:41 EST).

²⁵ *See* Mihalke Resp. at 13-17.

²⁶ *See* Report of Investigation of Interview of Michael Furr (Sept. 10, 2015).

²⁷ *Id.*

1 He said that Meridian paid Verve Broadcast to produce and edit the CHGO-related ads at issue.²⁸
2 Furr explained that, once these ads were approved by the client, Verve Broadcast ensured that
3 each ad confirmed to the particular specifications of each station identified by Meridian and
4 transmitted these ads to individual stations through a company named Digital Generation, Inc.²⁹
5 Furr also stated that Powell supervised the media production work performed by Verve
6 Broadcast on CHGO-related ads.³⁰

7 Furr then provided us with additional invoices that Verve Broadcast had sent to Mihalke
8 but that had not been produced by Mihalke during the earlier investigation. From these
9 additional invoices, we determined that Meridian hired Verve Broadcast to produce three ads that
10 were not listed in the Complaints. These advertisements featured candidates in the 2010
11 elections from New York's 4th congressional district, Massachusetts' 4th congressional district,
12 and Arizona's 7th congressional district.³¹ We obtained copies of the CHGO advertisements for
13 the New York and Massachusetts elections.³² Both advertisements are versions of the
14 Collectible Coin advertisement described in the Complaints, with the New York ad criticizing
15 Carolyn McCarthy and endorsing Francis S. Becker, Jr. and the Massachusetts ad criticizing
16 Barney Frank and endorsing Sean Bielat in the congressional races of their respective districts.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ During our initial investigation, Canfield stated, and Powell agreed, that the advertisements listed in the Complaints constituted the entire universe of advertisements produced by CHGO. *See* Powell ROI, Nov. 2014.

³² In Powell's Responses to our Interrogatories, Powell indicated that he possessed copies of CHGO-related ads. In a follow-up interview that we conducted on September 10, 2015, Powell again represented that he has most, if not all, CHGO-related ads that he created. We have requested copies of all CHGO-related ads in Powell's possession. *See* Report of Investigation of Interview of James S. Powell (Sept. 10, 2015) ("Powell ROI, Sept. 2015").

LEADS TO CONCLUSION

1 On September 10, 2015, we conducted a follow-up interview with Powell, who stated
2 that he had worked with Verve Broadcast Design.³³ He said that he had worked on the
3 production and editing of the advertisements at issue, confirmed that he had developed ads for
4 the three additional districts that were not listed in the Complaints, and stated that CHGO ran all
5 of the ads that he created for CHGO.³⁴ Furthermore, Powell said that he received approximately
6 \$100,000 from Meridian for his ad production work, separate from his compensation as
7 President of CHGO.³⁵

8 **D. Evidence Concerning Consultants and Independent Contractors**

9 On September 15, 2015, we contacted Wayne Berman, who Mihalke had identified as a
10 consultant for CHGO in his Responses to our Interrogatories.³⁶ Counsel for Berman stipulated
11 that "Mr. Berman only offered informal and infrequent fundraising advice strictly on a volunteer
12 basis," that Berman did not engage in consulting work for CHGO, and that Berman had no role
13 in creating, producing, or distributing advertisements on behalf of CHGO.³⁷ Additionally,
14 counsel for Berman represented that Berman has no documents in his custody, possession, or
15 control related to CHGO's advertising or expenditures.³⁸

16 On September 21, 2015, we interviewed Kira Swencki.³⁹ During this interview, Swencki
17 confirmed that she had provided services to CHGO via Meridian relating to its Internet and new

³³ Powell ROI, Sept. 2015.

³⁴ *Id.* at 2.

³⁵ *Id.* Upon review of Meridian's bank records, we determined that Meridian paid \$113,797.49 to Powell.

³⁶ Mihalke Resp. ¶ 4.

³⁷ See E-mail from Elliot Berke, counsel for Wayne Berman (Sept. 16, 2015, 11:04 EST).

³⁸ *Id.*

³⁹ See Report of Investigation of Interview of Kira Swencki (Sept. 21, 2015).

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1 media production.⁴⁰ Swencki stated that she created PowerPoint presentations for CHGO; she
2 represented that she sent drafts of the PowerPoint presentations to Reed, who provided her with
3 edits and instructions.⁴¹ Swencki said that she also helped to create and manage a website for
4 CHGO.⁴² Swencki represented that she did very limited work relating to the production of
5 CHGO television ads, such as transmitting messages and occasionally assisting at the studio
6 where CHGO's ads were produced.⁴³ She confirmed that Powell did most of the creative work
7 and oversaw editing of the CHGO-related advertisements.⁴⁴

8 **E. Additional Evidence Relating to Meridian Strategies, LLC**

9 We conducted an interview of Michael H. Mihalke, principal at Meridian Strategies,
10 LLC, to obtain additional information regarding the Responses to the Interrogatories that
11 Mihalke submitted on June 26, 2015.⁴⁵ During this interview, Mihalke stated that Meridian
12 served as an exclusive vendor to CHGO and provided services to CHGO involving advertising
13 management, production, and placement for television and print ads, and Internet marketing,
14 general media consulting, fundraising, and strategy. Mihalke acknowledged that Meridian used
15 a variety of vendors for the work that it performed for CHGO. With regard to Meridian's work
16 with CHGO, Mihalke said that Powell provided creative and copyright services for television ad
17 production and that Kira Swencki provided services involving Internet and new media placement

⁴⁰ *Id.* Based on our review of Meridian's bank records, we determined that Meridian paid \$5,203 to Swencki for her CHGO-related work.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Report of Investigation of Interview of Michael H. Mihalke (Sept. 21, 2015).

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1 such as banner advertisements on websites.⁴⁶ He identified Karen Boor at New Day Media
2 Services as the only vendor hired by Meridian for the placement of CHGO-related television ads
3 and further confirmed that Meridian made no direct ad placements itself for CHGO. Mihalke
4 stated that he received a media placement commission of approximately \$300,000 for his
5 CHGO-related work. Mihalke also identified Verve Broadcast as the vendor that was involved
6 in most of the production work of the CHGO ads at issue and 20/10 Design & Marketing, Inc. as
7 a vendor that Meridian paid to produce new media, graphic design, and online advertisements for
8 CHGO.⁴⁷ Mihalke confirmed that he knew of no other person or entity that worked on the
9 CHGO-related ads.

10 During this interview, Mihalke described the relationship between CHGO and Meridian
11 with regard to the advertisements at issue. Mihalke stated that the CHGO board provided him
12 with the targets for strategic ads; Meridian then developed the plans for the ad buys and provided
13 these plans to the board. Mihalke said that Canfield and Reed approved the content, production,
14 and placement of all CHGO-related television ads.

15 Mihalke also confirmed that the only bank that Meridian used in 2010 was Bank of
16 America. In response to our request, on September 21, 2015, Mihalke voluntarily submitted
17 bank records for Meridian's bank account from September 2010 through November 2010, to
18 which CHGO transferred payments to Meridian and from which Meridian made payments to
19 vendors, sub-vendors, independent contractors, and subcontractors who performed work relating
20 to the advertisements at issue. With these records, we determined that CHGO had transferred

⁴⁶ Mihalke stated that he does not believe that any TV ads produced by Meridian for CHGO were run on the Internet in a paid capacity. *Id.* at 1.

⁴⁷ Mihalke said that Verve Broadcast performed the "lion's share" of the media production work for CHGO-related ads, but that he and Powell also wrote the ads. *Id.* at 2.

1 \$4.7 million to Meridian during the relevant period, and that Meridian had transferred \$3.2
2 million to New Day.

3 Upon questioning regarding an apparent discrepancy between the amount of funds that
4 CHGO had transferred to Meridian for media placement and the amount Meridian in turn
5 transferred to New Day for media placement, Mihalke stated that approximately \$1.1 million of
6 CHGO's funds remained unused when its ad placement runs ended. Mihalke represented that, as
7 ad placement proceeded, Meridian apprised CHGO of the amounts spent on ads. He said that, at
8 the time, he told Reed of the unused CHGO funds. Mihalke said that Reed told him that the
9 remaining funds would be evenly divided among Reed, Mihalke, and Wayne Berman to cover
10 costs of fundraising, and that this would be deemed a "fundraising commission." Mihalke
11 explained that his portion of these remaining funds was intended to cover his costs of serving as
12 the exclusive vendor for CHGO. Mihalke confirmed that his one-third allocation of the
13 remainder of CHGO funds was not related to the approximately \$300,000 commission that he
14 referred to earlier in the interview and were separate amounts that he received. Mihalke said that
15 the conversation between Reed and Mihalke regarding the division of these funds occurred after
16 the 2010 election and that the actual distribution occurred "sometime in the following year."⁴⁸

17 On September 22, 2105, we received a response from Bank of America to our subpoena
18 seeking Meridian's bank records.⁴⁹ These records confirmed our previous investigative findings

⁴⁸ The record remains unclear as to whether Wayne Berman received compensation from CHGO via a distribution of unused advertisement funds. *See supra* Part III.D. We note, however, that if Berman did receive compensation for his work for CHGO, then his statement that he acted only in a volunteer capacity would appear contradicted by the record. Similarly, Reed's characterization of his role in CHGO appears at odds with Mihalke's description of the work Reed performed.

⁴⁹ Subpoena to Produce Documents to Bank of America, N.A. for records pertaining to Meridian Strategies, LLC (Sept. 2, 2015).

1 regarding the vendors that Meridian used for its work on CHGO-related ads and the amounts
2 paid to these vendors.

3 **F. Conclusions Regarding CHGO's Media Spending**

4 During this further investigation, we identified CHGO's spending that was directly
5 related to independent expenditures. According to its IRS Form 990, CHGO disbursed \$4.77
6 million in 2010. Of this disbursement, CHGO transferred \$4.7 million to Meridian, with
7 \$4,319,825 allocated to media placement, \$275,000 allocated to media production, and \$105,175
8 allocated to advertising and technology. The Form 990 also identified a payment to Canfield in
9 the amount of \$50,000 and to Powell in the amount of \$20,000.

10 CHGO, through Meridian, spent approximately \$247,753 on media production and
11 \$3,812,031.34 on media placement for its advertisements. To determine CHGO's media
12 production expenses, we calculated the sum of the amounts that Meridian paid to Powell and
13 Verve Broadcast for production work on CHGO-related ads. To determine CHGO's media
14 placement expenses, we calculated the sum of the amounts that Meridian paid to New Day for ad
15 placement and to Mihalke for the media placement commission, as well as the portion of the
16 remaining CHGO funds that Mihalke accepted as a commission for his work with ad placement.

17 It appears that CHGO spent a total of \$2,933,631.34 on the production and placement of
18 ads that were independent expenditures, consisting of \$2,754,698.62 in media placement
19 expenses and \$178,932.72 in media production expenses. To calculate the aggregate amount for
20 independent expenditures, we calculated the sum of the amount that New Day paid to television
21 stations for placements related only to CHGO ads that we identified as independent
22 expenditures; the portions of the commissions paid to Boor at New Day and to Mihalke directly
23 related to independent expenditures; and the portion of production costs that were directly related

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1 to independent expenditures that we identified from the invoices provided by Mihalke and Verve
2 Broadcast.

3 Additionally, it appears that CHGO spent a total of \$1,126,153 on ads that we deemed
4 electioneering communications, consisting of \$1,057,332.72 in media placement expenses and
5 \$68,820.28 in media production costs. To calculate the aggregate amount for electioneering
6 communications, we calculated the sum of the amount that New Day paid to television stations
7 for placements related only to CHGO ads that we deemed electioneering communications or that
8 we could not definitively identify as independent expenditures; the portions of the commissions
9 paid to Boor at New Day and to Mihalke directly related to only these ads; and the portion of
10 production costs that were directly related to these ads that we identified from the invoices
11 provided by Mihalke and Verve Broadcast.

12 IV. ANALYSIS

13 A. Political Committee Status

14 On July 28, 2015, we recommended that the Commission find reason to believe that
15 CHGO violated the Act by failing to register and report as a political committee because it spent
16 over \$2 million on independent expenditures and electioneering communications and did not
17 appear to have engaged in any significant non-electoral activity.⁵⁰ As explained in further detail
18 below, the record evidence we have obtained during the course of our investigation continues to
19 support the conclusion that CHGO violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to
20 organize, register, and report with the Commission as a political committee in 2010.

⁵⁰ Second Gen. Counsel's Rpt. at 7-8.

1 Political committees must register with the Commission and periodically disclose their
2 receipts and disbursements.⁵¹ The Act and Commission regulations define a "political
3 committee" as "any committee, club, association or other group of persons which receives
4 contributions aggregating in excess of \$1,000 during a calendar year or which makes
5 expenditures aggregating in excess of \$1,000 during a calendar year."⁵² In *Buckley v. Valeo*, the
6 Supreme Court held that defining political committee status "only in terms of [the] amount of
7 annual 'contributions' and 'expenditures'" might be overbroad, reaching "groups engaged purely
8 in issue discussion."⁵³ To cure that infirmity, the Court concluded that the term "political
9 committee" "need only encompass organizations that are under the control of a candidate or the
10 *major purpose of which is the nomination or election of a candidate.*"⁵⁴ Accordingly, under the
11 statute as thus construed, an organization that is not controlled by a candidate must register as a
12 political committee only if (1) it crosses the \$1,000 threshold and (2) it has as its "major
13 purpose" the nomination or election of federal candidates.

14 **1. CHGO Exceeded \$1,000 in Expenditures During 2010 and 2011**

15 CHGO made over \$1,000 in expenditures for independent expenditures that contain
16 express advocacy under 11 C.F.R. § 100.22 and thus surpassed the statutory threshold for
17 political committee status.⁵⁵ As described in our First General Counsel's Report, we determined

⁵¹ 52 U.S.C. §§ 30102, 30103, 30104.

⁵² 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

⁵³ 424 U.S. 1, 79 (1976).

⁵⁴ *Id.* (emphasis added).

⁵⁵ In determining whether an organization makes an expenditure, the Commission "analyze[s] whether expenditures for any of an organization's communications made independently of a candidate constituted express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("Supplemental E&J").

1 that the following advertisements that CHGO produced and distributed contain express advocacy
2 and are thus independent expenditures: four versions of "Song and Dance," seven versions of
3 "Collectible Coin," and two versions of "Make America Work."⁵⁶ As noted above, we have
4 determined that CHGO spent \$2,933,631.34 on media production and placement for
5 advertisements that constitute independent expenditures, thus surpassing the statutory
6 threshold.⁵⁷

7 **2. CHGO's Major Purpose Was the Nomination or Election of Federal**
8 **Candidates**

9 The evidentiary record also demonstrates that CHGO had as its major purpose the
10 nomination or election of federal candidates in 2010. Under the Commission's case-by-case
11 approach to the major purpose inquiry, the Commission considers the organization's "overall
12 conduct," including its disbursements, activities, and statements.⁵⁸ In past cases where the
13 Commission has determined that an organization was a political committee, it has generally
14 indicated that the organization's disbursements for federal campaign activity constituted the

⁵⁶ In the Second General Counsel's report, we found that six versions of "Collectible Coin" constituted independent expenditures. In our continued investigation, we found that CHGO in fact produced and placed at least two versions of "Collectible Coin" that had not been identified in the Complaints, featuring the candidates in the 2010 congressional races in New York's 4th congressional district and Massachusetts' 4th congressional district, despite the representation of other witnesses that there were no additional advertisements beyond those in the Complaints. We were able to determine the amount that New Day spent on placing the "Collectible Coin" version of the Massachusetts ad and have now included that figure in our calculations of independent expenditures.

⁵⁷ See *supra* Part III.F; 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5. We represent that CHGO spent "at least" \$2,933,631.34 on media production and placement for independent expenditures because we have excluded costs for media production and placement related to the two "Collectible Coin" versions of ads that CHGO distributed in New York and Massachusetts. While we are aware that the Massachusetts ad contains express-advocacy content and is therefore an independent expenditure, we were not able to obtain records establishing the amount spent just on placing this ad. With regard to the New York "Collectible Coin" advertisement, we have obtained a copy of the ad and conclude that it contains express advocacy like each of the other "Collectible Coin" advertisements, except the one featuring Walt Minnick (ID). We have not, however, been able to obtain information regarding the amount spent to air the McCarthy version of the advertisement.

⁵⁸ Supplemental E&J, 72 Fed. Reg. at 5597.

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1 majority of its spending for the relevant time period.⁵⁹ In particular, in assessing an
2 organization's major purpose, the Commission has previously considered how much the
3 organization spends for "federal campaign activity" as compared to "activities that [a]re not
4 campaign related."⁶⁰

5 Our investigation has confirmed that a significant majority of CHGO's spending in 2010
6 — \$4,059,784.33 out of a total of \$4.77 million in disbursements — was for versions of the
7 advertisements at issue in this matter. Each of CHGO's advertisements was either an express-
8 advocacy independent expenditure or an electioneering communication, both of which we
9 believe are indicative of major purpose. We thus conclude that 85% of CHGO's spending in
10 2010 involved federal campaign activity, which demonstrates that CHGO's major purpose was
11 to influence the election of federal candidates.

12 Though the Commission has not limited its consideration to spending on express-
13 advocacy communications when determining whether a group's spending indicates a major
14 purpose of federal campaign activity, CHGO qualifies as a political committee even if the
15 Commission were to consider the entity's spending on independent expenditures alone.⁶¹ As

⁵⁹ See MUR 6317 (Stewart, *et al*) (100% of disbursements made for one mailer); MUR 5754 (MoveOn.org Voter Fund) (approximately 68% of total disbursements over an election cycle were for advertisements); MUR 5753 (League of Conservation Voters 527, *et al.*) (about 71% of disbursements on federal campaign activity); MURs 5577 and 5620 (National Association of Realtors – 527 Fund) ("almost all" disbursements were for political advocacy campaigns); MURs 5511 and 5525 (Swiftboat Veterans and POWs for Truth) (91% of reported disbursements spent on advertisements attacking or expressly advocating Kerry's defeat); MUR 5487 (Progress for America VF) ("virtually all" of its disbursements were for federal campaign activity); MURs 5440 and 5427 (The Media Fund, *et al.*) ("vast majority" of advertisements mention Bush or Kerry).

⁶⁰ Supplemental E&J, 72 Fed. Reg. at 5605; First Gen. Counsel's Rpt at 27.

⁶¹ In the Commission's 2001 and 2004 rulemaking proceedings, certain proposals to determine major purpose based on (1) assessing only "independent expenditures" or (2) requiring a mathematical majority (over 50%) of campaign activity to be "independent expenditures" were considered, but not adopted. See Definition of Political Committee: Advance Notice of Proposed Rulemaking, 66 Fed. Reg. 13,681, 13,682, 13,685 (Mar. 7, 2001); Political Committee Status: Notice of Proposed Rulemaking, 69 Fed. Reg. 11,736, 11,745-46 (Mar. 11, 2004); Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and

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1 explained above, CHGO spent \$2,933,631.34 on the production and placement of express
2 advocacy advertisements. Using only this amount, it appears that CHGO's express advocacy
3 spending amounted to 61% of its confirmed total of \$4,801,000 that it spent over the entire
4 course of its organizational lifetime.⁶²

5 We have determined that, under any analysis, CHGO's expenditures reflect that express
6 advocacy was a major purpose of the group—even when resolving any doubts regarding the
7 purpose of the unused funds in favor of CHGO. For instance, if we were to remove from both
8 the express advocacy expenditures and the total expenditures calculations of the amounts of the
9 unused CHGO funds that, according to Mihalke, Reed distributed to Berman and himself to
10 cover fundraising costs, it appears that CHGO's express advocacy spending amounted to 76% of
11 its total of \$3,864,906 that it spent over the course of its organizational lifetime. And if the
12 entire amount of the unused CHGO funds eventually distributed to Mihalke, Reed, and Berman
13 were excluded from the calculation of costs related to independent expenditures — a calculation
14 which would fail to account for Meridian's role as CHGO's exclusive media vendor and Reed's

Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004); *see also* Factual and Legal Analysis, MUR 5831 (Softer Voices) (finding reason to believe organization had requisite major purpose based on the overall circumstances, including the organization's public statements, website materials, and all five advertisements supporting Santorum, even though only two contained express advocacy); Conciliation Agreement, MUR 5753 (League of Conservation Voters) (LCV 527s spent funds on the "Environmental Victory Project," a "significant portion of which" was express advocacy, and on advertisements and mailers "which referred to clearly identified Federal candidates, a limited portion of which contained" express advocacy); Conciliation Agreement, MURs 5577, 5620 (National Association of Realtors – 527 Fund) (activities indicating major purpose include communications "that clearly identified nine federal candidates and touted their accomplishments"). Rather than adopt a bright line test for political committee status, the Commission instead adopted the broader understanding of the term as described in the *Buckley* and *MCFI* opinions. *See* Supplemental E&J, 72 Fed. Reg. at 5597 (limiting "political committee" status to those organizations whose "major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)").

⁶² For purposes of demonstrating that CHGO's major purpose was to influence the election of federal candidates under any formulation of the major purpose test, we use the \$4,801,000 that it spent over 2010 and 2011, the entire duration of its existence, rather than the \$4.77 million spent in 2010. The minimal spending undertaken in 2011 does not materially change the proportion of CHGO's spending on independent expenditures.

1 role in approving the placement of CHGO's advertisements — CHGO's express advocacy
2 spending would still be 56% of its total spending during its organizational lifetime.

3 Regardless of how CHGO's major purpose is evaluated, one thing is clear — a definite
4 majority of CHGO's spending was on activities that reflect the major purpose of influencing
5 federal elections. Moreover, as stated in the Second General Counsel's Report, several of
6 CHGO's internal documents explicitly state that the group's purpose was to influence the
7 election of federal candidates. The Commission has stated that it will consider "public
8 statements as well as internal documents about an organization's mission" — including
9 statements in organizational planning documents, statements made to prospective donors
10 detailing the organization's goals, and fundraising solicitations — in construing the major
11 purpose of an organization such as CHGO.⁶³ Thus, CHGO's own internal documents
12 corroborate what its external spending demonstrates: that its major purpose was to influence the
13 election of federal candidates.

14 Accordingly, we recommend that the Commission find reason to believe that CHGO
15 violated 52 U.S.C. §§ 30102, 30103, and 30104, by failing to organize, register, and report as a
16 political committee.

17 **B. Independent Expenditure and Electioneering Communications Reporting**
18 **Violations**

19 In addition to filing a Statement of Organization and regular disclosure reports with the
20 Commission as a political committee, CHGO was required to file 24- and 48-hour independent

⁶³ Second Gen. Counsel's Rep. at 11 (citing Supplemental E&J at 5605).

1 expenditure⁶⁴ and electioneering communications⁶⁵ reports with the Commission in connection
2 with its expenditures for the advertisements.⁶⁶

3 As explained above, we determined that CHGO spent at least \$2,933,631.34 on
4 independent-expenditure ads and at least \$1,126,153 on electioneering-communication ads.
5 These amounts surpass the thresholds for required 24- or 48-hour notices. CHGO placed its
6 independent expenditures through Meridian and New Day from September 24, 2010 to
7 November 2, 2010.⁶⁷ The 24 or 48-hour reports for CHGO's independent expenditures were
8 thus due between September 26, 2010 and November 3, 2010. Moreover, because CHGO made
9 independent expenditures during both the third and fourth quarter of 2010, it was also required to
10 file aggregate independent expenditure reports on October 20, 2010 and January 31, 2010.⁶⁸
11 These quarterly reports would capture the same independent expenditures as would have been
12 required to be filed in the 24 or 48-hour reports, albeit at a later date and in the aggregate for that

⁶⁴ Under the Act, a person (including a political committee) that makes independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours, before the date of an election, must file a report describing the expenditures within 24 hours. 52 U.S.C. § 30104(g)(1). A person (including a political committee) that makes independent expenditures aggregating \$10,000 or more at any time up to and including the 20th day before the date of an election must file a report describing the expenditures within 48 hours. *Id.* § 30104(g)(2).

⁶⁵ Additionally, under the Act, a person (including a political committee) who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year shall, within 24 hours of each disclosure date, report such electioneering communications to the Commission. *Id.* § 30104(f)(1); 11 C.F.R. § 104.20.

⁶⁶ Previously, the Commission found reason to believe that CHGO violated 52 U.S.C. § 30104 by failing to report the advertisements at issue in this matter.

⁶⁷ The 2010 General Election was held on November 2, 2010.

⁶⁸ 11 C.F.R. § 109.10(b). Accordingly, the Commission could pursue a civil penalty for the 48-hour reports related to the September 2010 IEs or instead for failing to file the quarterly report due October 20, 2010. The Commission would not pursue both violations, as doing so would be considered double counting. Under either reporting theory, the appropriate civil penalty—125% of an Administrative Fine—would be the same. Thus, whether relying on the 48-hour notice violation, or the failure to file an October Quarterly Report, the civil penalty would be \$150,000 for CHGO's failure to report its September 2010 IEs. The only material distinction is the relevant limitations date for the quarterly report does not accrue until October 20, 2015.

1 quarter. The record also indicates that CHGO's first electioneering communication was
2 distributed on October 6, 2010. Therefore, CHGO was required to file its first 24-hour report for
3 electioneering communications on October 7, 2010.⁶⁹

4 Accordingly, we recommend that the Commission find reason to believe that CHGO
5 violated 52 U.S.C. § 30104(g) and (f) by failing to file required independent expenditure and
6 electioneering communications reports.

7 **C. Disclaimer Violations**

8 As explained in further detail in the First and Second General Counsel's Reports, which
9 are incorporated herein, CHGO failed to include proper disclaimers stating that its
10 communications were not authorized by any candidate or candidate's committee.⁷⁰ CHGO also
11 failed to include proper audio disclaimers on each of its advertisements.⁷¹ Accordingly, we
12 recommend that the Commission find reason to believe that the Commission on Hope, Growth
13 and Opportunity violated 52 U.S.C. §§ 30120(a)(3) and 30120(d)(2).

14
15 We recommend that the Commission authorize conciliation prior to a finding of probable
16 cause to believe. We recognize that a number of factors unique to this case may suggest the
17 limited likelihood of resolving this matter through conciliation in advance of a probable cause
18 finding. It appears that CHGO terminated as an entity with the IRS and has no funds available

⁶⁹ As a political committee, CHGO would have been required to file 2010 October Quarterly, 2010 Pre-General, 2010 Post-General, and 2010 Year-End Reports. See 11 C.F.R. § 104.4. Even if the Commission does not find that CHGO was required to file reports as a political committee, CHGO would have been required to file an October Quarterly Report and a Year-End Report detailing its express-advocacy expenditures. See 11 C.F.R. § 109.10.

⁷⁰ First Gen. Counsel's Rpt. at 21-22.

⁷¹ *Id.* at 22-23.

1 for conciliation. Moreover, after our discussions with witnesses who formed and ran CHGO, it
2 appears that none may be willing to take responsibility for the entity at this point. Nonetheless,
3 we recommend seeking to conciliate, given that we have adequate time to attempt conciliation as
4 to all of the relevant violations and do not believe that it will require any significant effort to
5 determine whether CHGO may be interested in engaging in meaningful conciliation discussions.

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THIRD GENERAL COUNSEL'S REPORT

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1 **VI. RECOMMENDATIONS**

- 2 1. Find reason to believe that the Commission on Hope, Growth and Opportunity
3 violated 52 U.S.C. §§ 30102, 30103, 30104, 30120(a)(3), and 30120(d)(2);
- 4 2. Enter into pre-probable cause conciliation with the Commission on Hope, Growth and
5 Opportunity;
- 6 3. Approve the attached Factual and Legal Analysis;
- 7 4.

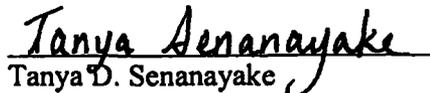
5. Approve the appropriate letter.

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5 9/24/15
6 Date


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