



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 25, 2020

VIA ELECTRONIC MAIL

Robert J. Tucker, Esq.
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RE: MURs 6955 and 6983
New Day for America

Dear Mr. Tucker:

Based on complaints filed with the Federal Election Commission on August 13, 2015, and November 10, 2015, and information supplied by your clients, New Day for America and J. Matthew Yuskewich, in his official capacity as treasurer ("New Day"), the Commission, on April 23, 2019, found that there was reason to believe that New Day violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a), and 11 C.F.R. §§ 110.72 and 100.131, and instituted an investigation of this matter.

Based on the available record, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that New Day has violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a), and 11 C.F.R. §§ 100.72 and 100.131.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file a brief stating your position on the issues and replying to the brief of the General Counsel.¹ The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

¹ You may submit enforcement materials, such as reply briefs, to the FEC electronically at cela@fec.gov, or to the staff attorney assigned to the matter as applicable. Enforcement-related materials submitted only by mail will be deemed received when actually received by OGC staff, subject to delays due to the intermittent processing of mail. See https://www.fec.gov/resources/cms-content/documents/status_of_fec_operations_8-10-2020.pdf.

MURs 6955 and 6983 (New Day for America)
Letter Enclosing PCTB Brief
Page 2 of 2

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days and may require that your clients toll the running of the statute of limitations before granting such an extension.

You may also request additional information gathered by the Commission in the course of its investigation in this matter. *See Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011).

In addition, you may also request an oral hearing before the Commission. *See Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007) and *Amendment of Agency Procedures for Probable Cause Hearings*, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted. If you request a probable cause hearing, the Commission may request that you toll the statute of limitations in connection with that hearing. *Id.* at 64,920.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement. If we are unable to reach an agreement after 30 days, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty. See 52 U.S.C. § 30109(a)(6)(A).

Should you have any questions, please contact Assistant General Counsel Mark Shonkwiler at (202) 213-3067 or Staff Attorney Wanda Brown at (202) 694-1513.

Sincerely,

Lisa J. Stevenson /by CK

Lisa J. Stevenson
Acting General Counsel

Enclosure
Brief

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2 In the Matter of)
)
 New Day for America and) MURs 6955 & 6983
 J. Matthew Yuskewich in his official)
 capacity as treasurer)

3 **GENERAL COUNSEL'S BRIEF**

4
 5 **I. STATEMENT OF THE CASE**

6 New Day for America, a then-newly created Ohio non-profit corporation whose primary
 7 spokesperson was Ohio Governor John Kasich, spent \$823,809 between April and July 2015 on
 8 activities promoting Kasich's political views and record of public service while he was testing
 9 the waters for a 2016 presidential campaign. New Day's activities prior to Kasich's declaration
 10 of candidacy included spending: (1) \$218,500 on public opinion polling; (2) \$295,000 on
 11 political campaign consultants who interacted with and took video footage of Kasich, and
 12 (3) approximately \$200,000 on nineteen trips Kasich and his political entourage took to states
 13 that would later hold presidential primaries. After Kasich declared his presidential candidacy on
 14 July 21, 2015, New Day registered with the Commission as an independent expenditure-only
 15 committee ("IEOPC"), named J. Matthew Yuskewich as its treasurer, and spent more than \$11
 16 million dollars on independent advertising that expressly advocated either on behalf of Kasich or
 17 against his 2016 Republican Party primary election opponents.¹

18 Based on the Complaints, Responses, and available information, the Commission found
 19 reason to believe that New Day: (1) violated 52 U.S.C. §§ 30116 and 30118(a) in connection
 20 with making impermissible, excessive contributions for Kasich's testing-the-waters activities

¹ Mr. Yuskewich was also treasurer of Kasich for America, the principal campaign committee of John Kasich's 2016 presidential campaign.

1 prior to registering with the Commission as an IEOPC; (2) made prohibited and excessive in-
2 kind contributions in the form of coordinated communications in violation of 52 U.S. §§ 30116
3 and 30118(a); and (3) did not disclose those contributions in violation of 52 U.S.C. § 30104(b)
4 after registering with the Commission as an IEOPC.

5 The Commission's investigation was impeded by a lack of cooperation from involved
6 parties, including New Day and New Day's political consultant, as well as Kasich and various
7 Kasich 2015 travel companions, all of whom refused to comply fully with the Commission's
8 subpoenas. The lack of cooperation substantially reduced the extent to which New Day's
9 activities and its relationship with Kasich and the Committee were fully revealed. Specifically,
10 New Day and New Day's consultants refused to provide the Commission with details regarding
11 the public opinion polling, the political consulting work, and the activities undertaken on
12 Kasich's New Day-funded trips.²

13 New Day claims that it did not support Kasich's candidacy until after his July 21, 2015,
14 declaration of candidacy. Even so, New Day, Kasich, and the Committee did not submit
15 requested information regarding the public opinion polling, political consulting work, and travel
16 to presidential primary states. Although Kasich made explicit statements linking his New Day
17 funded travel to making a decision to declare his candidacy, New Day maintains that all of its
18 activities prior to Kasich's official candidacy declaration, were to promote Kasich's conservative
19 ideals and share his personal successes as Governor of Ohio, and not to promote his presidential
20 candidacy. New Day also maintains that it did not coordinate with Kasich regarding the

² New Day filed a Motion to Quash the Subpoena that the Commission authorized in August 2019, but refused the Office of the General Counsel's request to toll the applicable statute of limitations during the period in which the Commission lacked a quorum to rule on their motion. Following discussions regarding their objections, Respondents made a limited production that failed to provide the items required by the Commission's subpoena.

1 advertising campaign that used video footage from a June 2015 interview with Kasich conducted
2 by New Day's political consultants.

3 Despite New Day's assertions, the information reflects that New Day: (1) made
4 impermissible, excessive contributions for Kasich's testing-the-waters activities; (2) and made
5 prohibited and excessive in-kind contributions in the form of coordinated communications and
6 did not disclose those contributions. In addition, based on Respondents' failure to fully comply
7 with the Commission's subpoenas, the Commission is entitled to draw an adverse inference
8 regarding the information Respondents have refused to disclose.³

9 Accordingly, based on the available information, and New Day's failure to fully comply
10 with the Commission's subpoena, we are prepared to recommend that the Commission find
11 probable cause to believe that New Day: (1) violated 52 U.S.C. §§ 30116(f) and 30118(a) in
12 connection with making impermissible and excessive contributions for Kasich's testing-the-
13 waters activities; (2) made prohibited and excessive in-kind contributions in the form of
14 coordinated communications in violation of 52 U.S.C. §§ 30116 and 30118(a); and (3) did not
15 disclose those in-kind contributions in violation of 52 U.S.C. § 30104(b).

³ See *Int'l Union v. Nation Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). In the context of administrative law proceedings, the agency need not resort to enforcement of a subpoena in order to make the inference. *Id.* at 1339. "The adverse-inference rule, we said is a 'well recognized means available for vindicating [an agency's] power to require the production of relevant documents short of a subpoena enforcement proceeding.'" *Atlantic Richfield Company v. United States Department of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1985).

II. FACTUAL BACKGROUND

A. Formation of New Day for America

New Day was established as an Ohio non-profit corporation on April 14, 2015, and registered with the IRS as a section 527 organization.⁴ Available information indicates that Matthew Carle, the Executive Director of New Day, previously served on Kasich's gubernatorial staff as director of legislative affairs and ran Kasich's 2014 gubernatorial campaign.⁵

Kasich is featured in New Day's launch video, and appears to be its primary spokesperson.⁶ When it was founded, New Day launched a website that featured Kasich's picture and biography, and a video of Kasich announcing the creation of New Day and discussing a variety of policy goals.⁷ Kasich's complete statement is as follows:

Hi, I'm John Kasich, and I believe it's time for a new day for America. You know, it's time to put aside the petty differences that divide us and rediscover the values that we all share which have made America great. Values like personal responsibility, community, respect, courage, and of course, faith. There's so much more that brings us together than that divides us. When we remember that, we can come together and do what we all know

⁴ See Factual and Legal Analysis at 5, MURs 6955 and 6983 (New Day for America) ("New Day F&LA").

⁵ *Ohio governor's race: Matt Carle will leave John Kasich's administration to run re-election campaign*, NORTHEAST OHIO MEDIA GROUP, Aug. 9, 2013, at http://www.cleveland.com/open/index.ssf/2013/08/ohio_governors_race_matt_carle.html. Other New Day employees include Jeff Polesovsky, Carle's deputy in the 2014 Kasich campaign, Dave Luketic, a "Kasich insider" who worked on the 2014 campaign and was the "architect" of Kasich's national tour to promote a balanced budget amendment, and Kasich aide Chris Schrimpf. See Henry J. Gomez, *John Kasich builds his 2016 team*, NORTHEAST OHIO MEDIA GROUP, May 5, 2015, at http://www.cleveland.com/open/index.ssf/2015/05/john_kasich_builds_his_2016_te.html.

⁶ New Day F&LA at 5-6, MURs 6955 and 6983 (describing Kasich's appearance in New Day's launch video).

⁷ MUR 6955 Compl. at 2 (Aug. 13, 2015). The video no longer appears on New Day's website, but is available at http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html (last visited July X, 2020). Available information does not show that Kasich has formed any similar group to advocate for issues when he was not contemplating a presidential run.

needs to be done. We can balance our nation's budget. We can create jobs by cutting taxes and streamlining regulations and, of course, reforming our tax code. We can help our fellow Americans who live in the shadows move up and lead self-sufficient lives and get smart about making healthcare affordable. And help make the world a safer place by spreading freedom and prosperity. Those are some of my thoughts, but I would like to hear what yours are, too. And I'd like to talk to you about them. And that's why I'm announcing that we've created the New Day for America committee. We're going to start getting around the country more, meeting and talking with more people, and see if by coming together we can put in motion the solutions that will get this great idea called America working the right way again. I hope you'll visit our website at NewDayforAmerica.com. While there, I hope you'll sign up to join our team. You can find out more. Take a moment to share your thoughts. You know, we're all in this together, and together we can bring a new day for America.

Once it registered with the IRS, New Day did not report that it supported or opposed any candidate for federal office, reporting instead that it discussed issues of general public importance and made only non-candidate related expenditures.⁸ In its 2015 Mid-Year Report to the IRS, New Day reported that it raised \$11,130,730, and spent \$823,809 from April 20, 2015, to June 30, 2015.⁹

On July 21, 2015, Kasich publicly announced his candidacy for President of the United States and filed a Statement of Candidacy with the Commission on July 23.¹⁰ Kasich for America and J. Matthew Yuskewich in his official capacity as treasurer (the "Committee")

⁸ The IRS Political Organization database contains reports for both New Day for America (EIN No. 47-3715808) and a separate New Day Independent Media Committee Incorporated (EIN No. 47-4140945) operating from the same address. *Compare* New Day for America, IRS Form 8871 (Apr. 20, 2015) *with* New Day Independent Media Committee Incorporated, IRS Form 8871 (June 29, 2015).

⁹ 2015 Mid-Year Report, Form 8872, Political Organization Report of Contributions and Expenditures, New Day for America (July 30, 2015).

¹⁰ John Kasich, Statement of Candidacy (July 23, 2015).

registered as Kasich's authorized committee for the presidential election on July 23.¹¹

On July 23, 2015, two days after Kasich announced his candidacy and the same day on which Kasich for America registered as Kasich's authorized committee, New Day registered with the Commission as an independent expenditure-only political committee ("IEOPC").¹² In its reports filed with the Commission, New Day ultimately reported raising an additional \$3,336,360.27 between July and December 2015 and \$11,765,822.89 in 2016.¹³ New Day reported making \$11,001,240.93 in independent expenditures supporting Kasich, following his declaration of candidacy, during the 2016 election cycle.¹⁴ New Day also reported spending funds opposing candidates who were competing with Kasich for the 2016 Republican nomination for President. Specifically, it reported spending \$86,645.54 opposing Donald Trump, \$31,470.82 opposing former New Jersey Governor Chris Christie, \$24,661.98 opposing Senator Ted Cruz, and \$21,237.30 opposing former Florida Governor Jeb Bush.¹⁵

A. Kasich's Activities Prior to Public Candidacy Announcement

Beginning in January 2015 through the date on which he publicly announced his candidacy for President on July 21, 2015, Kasich made numerous trips outside of Ohio, including several to key early presidential primary and caucus states.

¹¹ Kasich for America, Statement of Org. (July 23, 2015).

¹² See New Day for America, FEC Form 1, Statement of Org. (July 23, 2015).

¹³ See 2015 Amended Year-End Report, New Day for America (July 11, 2016); 2016 Year-End Report, New Day for America (Jan. 31, 2017).

¹⁴ See Independent Expenditures, New Day for America, 2015-16 <https://www.fec.gov/data/committee/C00581868/?tab=spending&cycle=2016>.

¹⁵ See *id.*

According to available information, New Day paid for Kasich to take the following nineteen trips in the two months prior to Kasich's declaration of his candidacy on July 21, 2015:

- California – May 13, 2015 (four-day trip);
- New York – May 18, 2015 (three-day trip);
- Georgia – May 26, 2015 (one-day trip);
- South Carolina – May 26, 2015 (two-day trip);
- Texas – May 27, 2015 (two-day trip);
- New Hampshire – June 4, 2015 (two-day trip);
- Nevada – June 11, 2015 (one-day trip);
- Utah- June 11, 2015 (two-day trip);
- North Carolina – June 15, 2015 (one-day trip);
- Michigan – June 15, 2015 (two-day trip);
- New Hampshire – June 16, 2015 (two-day trip);
- Washington, DC – June 19, 2015 (one-day trip);
- Illinois – June 22, 2015 (two-day trip);
- Illinois – June 23, 2015 (one-day trip);
- Iowa – June 23, 2015 (two-day trip);
- Washington, DC – July 7, 2015 (one-day trip);
- South Carolina – July 7, 2015 (two-day trip);
- Tennessee – July 8, 2015 (two-day trip);
- New Hampshire – July 12, 2015 (two-day trip).¹⁶

According to media reports, during these trips Kasich presented himself as the “pragmatic conservative seeking solutions,” advocated for a variety of nationwide policies,

¹⁶

Id. at 23-27.

MURs 6955 & 6983 (New Day for America)
 General Counsel's Brief
 Page 8 of 37

1 including a balanced budget amendment to the U.S. Constitution, and, in Tennessee, urged the
 2 Governor to expand Medicare; he also reportedly engaged in fundraising.¹⁷

3 Kasich's own public statements likewise show that he was considering a presidential run
 4 during this time. On May 17, 2015, Kasich appeared at a New America Foundation conference
 5 in Washington, DC, where he also interviewed on CNN. In that interview, Kasich, when asked
 6 whether he was running for President, responded that he "[didn't] know yet," but described how
 7 he was evaluating a potential candidacy.¹⁸ He explained:

8 I've taken a big step, for me, and created a political organization to
 9 accumulate more resources so I can travel more robustly and begin
 10 to think about infrastructure. And then once that's done, if I
 11 should be successful in raising . . . that seed money, then . . . the
 12 next step is to see if people like what I have to say. And then . . .
 13 find out around the country whether I can raise enough money to
 14 compete at least in the early states. If that works, then I'm likely
 15 to go forward.¹⁹

16 Because New Day was the only organization started by Kasich at the relevant time, the
 17 new "political organization" referenced in this statement appears to be New Day. Respondents
 18 have not denied this conclusion. Moreover, Kasich's statement to CNN about travel matches the
 19 above-described travel, which was funded by New Day, and expressly links such travel to his
 20 decision-making process with regard to his candidacy for President.

¹⁷ See, e.g., Robert Higgs, *John Kasich's travels: a timeline*, CLEVELAND PLAIN DEALER (Sept. 10, 2015), http://www.cleveland.com/open/index.ssf/2015/09/john_kasichs_travels_a_timelin.html (documenting Kasich's travels from January 2015 through his formal announcement in July 2015). The article specifically notes fundraising trips in California from May 13-15, 2015, and Dallas on May 29, 2015, but does not speak as to whether the fundraising was for New Day or was expressly for testing the waters.

¹⁸ Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/> (video embedded at link) (cited in Kasich F&LA at 14, MURs 6955 and 6983).

¹⁹ *Id.*

Further, CNN reported that “a source close to Governor Kasich told the media outlet that he is ‘very likely’ to run for President.”²⁰ The same story reported that Kasich told CNN that “If I can win, I’m likely to run.”²¹ In addition, when speaking at the New America Foundation conference, Kasich reportedly said that “[o]ne good thing about thinking of running for President is that I get invited to stuff like this, where I can talk about what I care about.”²²

On June 28, 2015, Politico published an article regarding Kasich’s activities and planned candidacy announcement on July 21, 2015, and it described exploratory steps that Kasich was taking to get to the announcement.²³ The article quotes Kasich advisers, stating that Kasich “combines establishment appeal with a conservative record,” and that qualifying for the August 6, 2015, Cleveland debate “will be tough, even with his announcement bump.”²⁴ Further, advisers are reported as saying that Kasich “will be positioned ‘in Jeb’s back right pocket’ — with establishment appeal, but slightly more conservative.”²⁵ Finally, the article quotes Kasich from a May 2015 appearance on ABC’s “This Week” where Kasich again linked his travels to exploring the viability of a presidential run when he said “I’ve been very pleased with what I’ve found out on the ground in New Hampshire, South Carolina, Michigan. . . . I hope people will help me, if they like my sort of unique voice in this whole thing, and we look at organization . . .

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO (June 28, 2015), <https://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517> (cited in Kasich F&LA at 4, MURs 6955 and 6983).

²⁴ *Id.*

²⁵ *Id.*

1 I [am] increasingly optimistic about all of this.”²⁶ The Politico article notes that, in that ABC
 2 appearance, Kasich called himself “the most experienced in the field,” and while he
 3 acknowledged that he was the underdog, he expressed hope about doing well in New Hampshire
 4 stating: “You know the way this system works. You know, you go to New Hampshire and you
 5 do well and you’re on a rocket ship.”²⁷

6 The Politico article also announced the date, location, and start time of Kasich’s expected
 7 July 21, 2015, candidacy announcement and named his Committee staff and described their past
 8 political experience. Finally, the article describes the schedule for what it described as his
 9 “announcement tour that included Iowa, New Hampshire, South Carolina and Michigan.”²⁸
 10 There is no information to suggest that Kasich or his representatives ever disputed this
 11 information or sought to have the record corrected.

12 Kasich, on one of his trips in April, appeared at the New Hampshire Republican Party’s
 13 “First in the Nation” Leadership Summit and stated that “‘America regains its strength’ if it can
 14 tackle its immigration problem, balance the budget, lower the corporate tax rate, and invest in
 15 infrastructure.”²⁹ The Complaint states that Kasich “asked attendees at the end of his appearance
 16 to ‘think about me, would you . . . don’t commit too soon . . . let us all have a chance to breath[e]
 17 and get out, and you know what I really look forward to, being out in your homes again, letting

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ MUR 6983 Supp. Compl. at 7-8 (March 30, 2016) (citing New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/new-hampshire-republican-leadership-summit-day-2>).

you get to know me and see me, that's what it's really all about, it's why I love New Hampshire”³⁰

B. New Day's Activities

New Day's initial Mid-Year disclosure report to the IRS reported that New Day received \$11,130,730 and spent \$823,809 between its founding on April 20, 2015 and June 30, 2015.³¹ New Day's Year End Report to the IRS disclosed that it received an additional \$3,981,570 and spent \$7,842,778 between July 1 and December 31, 2015.³² In its 2015 IRS disclosure reports, New Day disclosed that it routinely accepted donations that exceeded \$5,000, including some as large as \$1 million.³³

1. New Day Funded Travel Related to Kasich's Testing the Waters Activity

New Day also reported numerous disbursements both prior to and immediately after Kasich's July 21, 2015, announcement of his candidacy for which the purpose was described as polling, media consulting, phone banks, airfare, travel, and travel expense reimbursements.³⁴

³⁰ *Id.* at 8; *see also* New Hampshire Republican Leadership Summit, Governor John Kasich, C-SPAN at 24:45, <https://www.c-span.org/video/?325374-12/republican-leadership-summit-governor-john-kasich>.

³¹ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report at 1 (July 30, 2015). New Day Independent Media Committee Incorporated reported receiving \$600,000, but making no disbursements during June 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Mid-Year Disclosure Report (July 30, 2015).

³² New Day for America, IRS 2015 Form 8872 Year End Disclosure Report at 1. New Day Independent Media Committee Incorporated reported receiving \$1,948,100, but only making \$57,051 in disbursements between July and December 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Year End Disclosure Report.

³³ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year End Disclosure Report.

³⁴ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year End Disclosure Report.

During the months prior to Kasich's July 21, 2015 declaration of candidacy, New Day paid a total of \$218,500 to American Viewpoint Inc. for polling expenses.

- 6/1/2015 American Viewpoint, Inc. – Polling \$62,000
- 6/25/2015 American Viewpoint, Inc. – Polling \$79,000
- 6/25/2015 American Viewpoint, Inc. – Polling \$77,500

New Day refused to provide the Office of the General Counsel with complete information regarding their efforts on behalf of communications with Kasich and his agents, and as a result, the Commission has been deprived of additional information regarding whether this New Day funded polling was related to Kasich's prospective presidential campaign and whether the results of the polling were shared with Kasich and the Committee.

Similarly, during the months prior to Kasich's July 21, 2015 declaration of candidacy, New Day paid a total of \$295,500 to Strategic Perceptions Inc. for "Media Consulting" and "Media Production."

- 6/5/2015 Strategic Perceptions, Inc. – Consulting \$ 60,000
- 6/26/2015 Strategic Perceptions, Inc. – Production \$148,835
- 7/7/2015 Strategic Perceptions, Inc. – Consulting \$ 60,000
- 7/8/2015 Strategic Perceptions, Inc. – Consulting \$ 26,665

New Day did not provide complete information regarding their communications with Kasich, the Committee, and its agents. New Day and Strategic Perceptions, Inc. also refused to provide complete information regarding their communications with Respondents as to this consulting work. As a result, the Commission has been deprived of additional information regarding whether this New Day funded political consulting work was related to Kasich's presidential campaign and whether the work product was shared with Kasich and the Committee;

1 and whether this consulting work was the means by which New Day coordinated its later
2 advertising campaign with the Respondents.

3 During the months prior to Kasich's July 21, 2015 declaration of candidacy, New Day
4 paid over \$200,000 to various vendors and individuals for travel.³⁵ New Day and various
5 individuals who traveled with Kasich refused to provide complete information regarding their
6 communications with Kasich and the Committee as to the activities on these trips.

7 2. New Day Advertising Campaign

8 As noted above, New Day paid Strategic Perceptions, Inc. \$295,500 for media consulting
9 and media production prior to Kasich's declaration of candidacy. Although Respondents
10 acknowledge that Kasich filmed an interview with Strategic Perceptions in late June 2015 and
11 that this footage was used in New Day advertisements, they have refused to provide details about
12 these interactions.

13 On July 8, New Day purchased \$58,400 of television air time in a New Hampshire media
14 market.³⁶ New Day completed forms documenting two separate ad buys on July 8, with each
15 listing "John Kasich for the Republican Presidential Primary" as the "name of the legally
16 qualified candidate(s) the programming refers to"; the form for this television ad buy also states
17 that the advertisement includes a "candidate (Republican) discussing his values/beliefs."³⁷

³⁵ See Exhibit A, Expenditures disclosed in New Day's 2015 Mid-year Report of receipts and expenditures.

³⁶ MUR 6983 Supp. Compl. at 3.

³⁷ MUR 6955 Compl. at 2-3; MUR 6983 Supp. Compl. at 3 (citing FCC filings for advertisements run on two television stations).

The first advertisement, “Us,” which reportedly aired on July 8, includes video of Kasich speaking directly to the camera.³⁸ Kasich states:

We turned Ohio around. And we’ve created jobs and cut taxes and balanced our budgets. I spent 18 years on the Armed Services Committee with some of the finest defense minds in the world. I was one of the chief architects of balancing the budget, it’s the first time we did it since man walked on the moon, we haven’t done it since. It can happen again.

The advertisement ends with a voiceover stating “John Kasich’s for us.” The Commission has information indicating that the advertisement used footage from an interview with Kasich that was filmed in late June, 2015.³⁹

Days after Kasich announced his candidacy and New Day registered with the Commission as an IEOPC, on July 26 and August 5, New Day ran two additional advertisements featuring Kasich. The July 26 advertisement, entitled “Balancing the Budget,”⁴⁰ begins with a succession of images and sound clips of several Democratic and Republican presidential candidates and continues with the following script:

Female Announcer: No one running for president has balanced the federal budget for us but John Kasich.

Kasich: I spent ten years of my life fighting to balance the budget, not because it was about numbers, but it was about values. We

³⁸ MUR 6955 Compl. at 3. “Us” is available at <https://www.youtube.com/watch?v=NeaJIH70PxY> (last visited Aug. 8, 2020).

³⁹ See, e.g., Joint RTB Response at 17 (acknowledging Kasich’s participation in interview with New Day). Although we do not know the exact date on which the footage was filmed, in a July 21, 2015 interview, Fred Davis, a strategist for New Day, stated that he filmed multiple advertisements featuring footage of Kasich that were paid for by New Day, and that he had worked with Kasich for about two months. See MUR 6983 Supp. Compl. at 4. New Day reported making disbursements to Davis’s firm, Strategic Perception, Inc., on June 5, 2015 (\$60,000) and June 26, 2015 (\$148,835). See New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report.

⁴⁰ See “John Kasich – Balancing the Budget,” <https://www.youtube.com/watch?v=S5MHotEOO-4> (last visited Aug. 7, 2020).

1 don't have a right to live beyond our means, and make sure that
 2 our children pay the debt.

3
 4 Female Announcer: John Kasich helped balance the federal
 5 budget, turned around the Ohio economy, and has 18 years'
 6 experience on the Armed Services Committee. No one else comes
 7 close.

8
 9 Kasich: And I was willing to take beatings when I offered my own
 10 budget proposals for America because I believed in it. The most
 11 important thing in leadership is not what you say, it's what you do.

12
 13 Female Announcer: John Kasich's for us.

14
 15 The script for the August 5 advertisement, "John Kasich is for Us – National Security,"⁴¹

16 is as follows:

17 Female Announcer: [over images of President Obama and Hillary
 18 Clinton] Weakness, handwringing, inexperience. They're looking
 19 out for us?

20
 21 Kasich: You know, I spent 18 years on the Armed Services
 22 Committee with some of the finest defense minds in the world. I
 23 learned how we get the services to work together. And I'll never
 24 forget my experience meeting with soldiers out in the desert.
 25 There's no substitute for experience. [Caption reads: "John
 26 Kasich. President 2016."]

27
 28 New Day's "Balanced Budget" and "Us – National Security" ads appear to use footage

29 from the same interview as used in its "Us" ad, showing Kasich in a white shirt, without a tie,

30 under a dark blazer, speaking to camera while standing in front of French doors.

⁴¹ MUR 6983 Compl. at 2 (Nov. 10, 2015). See "John Kasich is for Us – National Security," https://www.youtube.com/watch?v=JYDpIaO_kF4. New Day filed an independent expenditure report for \$375,000 of "television advertising" in the New Hampshire market for August 4; this appears to have been for "John Kasich is for Us – National Security." See Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

C. Kasich for America's Earliest Reported Activities

As described above, Kasich formally announced his presidential candidacy on July 21, 2015, and filed a Statement of Candidacy on July 23, 2015.⁴² Kasich for America registered as Kasich's authorized committee for the presidential election on the same day.⁴³ The Committee's first disclosure report was the October 2015 Quarterly Report.⁴⁴ That report disclosed that the Committee began receiving contributions for the 2016 presidential primary election on July 3, 2015, and that it exceeded \$5,000 in contributions on July 13.⁴⁵ It also reflects that the Committee's first reported disbursement occurred on July 10, 2015, eleven days before Kasich publicly announced his candidacy.⁴⁶ The report disclosed a small number of disbursements between July 10 and July 21, mostly for expenses related to travel to New Hampshire, though it is not clear from the face of the reports when that travel occurred.⁴⁷ The Committee did not report receiving any in-kind contributions from New Day in this report, nor did it designate any disbursements as having been made for pre-candidacy testing-the-waters expenses.

New Day asserts that the Committee had a "stringent firewall policy" regarding coordination between it and New Day.⁴⁸ They have provided a copy of a legal memo from

⁴² MUR 6955 Committee Resp. at 3; John Kasich, Statement of Candidacy (July 23, 2015).

⁴³ MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Organization (July 23, 2015).

⁴⁴ 2015 Oct. Quarterly Rpt., Kasich for America at 9 (Oct. 15, 2015).

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 908.

⁴⁷ *See, e.g., id.* at 973, 986, 988, 1032, 1035 (disclosing disbursements for airfare, lodging, rental cars, and meals).

⁴⁸ Joint RTB Resp. at 14 (referencing attached memo, dated July 23, 2015, to the Committee on legal letterhead, with subject "Policy Prohibiting Coordination").

1 counsel to the Committee setting out that policy, which states that coordination was prohibited
2 between the two committees as of July 23, 2015, and states that a copy of the policy should be
3 provided to each employee and agent of the Committee.⁴⁹ There is no information concerning
4 any firewall to prevent coordination prior to July 23, 2015.

5 The Commission sought information from New Day, Kasich, and the Committee, via
6 both informal discovery and subpoena, specifically concerning the relationship between Kasich
7 and New Day, the New Day-funded trips, including the purpose of the trips, a description of any
8 meetings held during the trips, and discussions of the 2016 Republican Presidential nomination
9 during the trips, and sought provision of all documents relating to the trips. The Commission
10 also sought information relating to communications between New Day, Kasich, and the
11 Committee regarding such topics as its political polling and the filming of the interviews used in
12 New Day's later advertising campaign. New Day provided some limited information regarding
13 when trips were taken and where Kasich traveled, but failed to include details regarding the trips'
14 purposes, meetings, and matters discussed during such meetings. Neither Kasich nor any other
15 person who traveled with Kasich in Spring 2015 or who worked for the Committee or New Day
16 agreed to the Office of General Counsel's requests for interviews. Further, neither Kasich nor
17 any other person involved provided any documents relating to the filmed interview used to
18 prepare the New Day advertisements supporting Kasich's candidacy. Respondents refused to
19 provide any documents regarding New Day's or Kasich's communications with each other
20 regarding New Day's political polling or the filmed interview which produced footage used in
21 later New Day independent expenditures.

⁴⁹ *Id.* at 19.

1 **III. LEGAL ANALYSIS**

2
 3 An individual becomes a candidate under the Act if he or she receives contributions or
 4 makes expenditures in excess of \$5,000, or consents to another doing so on his or her behalf.⁵⁰
 5 The Commission's regulations create exemptions to the definitions of contribution and
 6 expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to
 7 conduct certain activities to evaluate a potential candidacy, *i.e.*, to “test the waters.”⁵¹ These
 8 exemptions exclude from the definition of “contribution” and “expenditure” those funds received
 9 and payments made solely to determine whether an individual should become a candidate.⁵² The
 10 regulations allow this limited exemption for activities directed to an evaluation of the feasibility
 11 of one's candidacy, though not for conduct signifying that a decision to become a candidate has
 12 been made.⁵³ Testing-the-waters activities include, but are not limited to, payments for polling,
 13 telephone calls, and travel, and only funds permissible under the Act may be used for such
 14 activities.⁵⁴ When an individual becomes a candidate, any such funds received or payments

⁵⁰ 52 U.S.C. § 30101(2); *see also* 11 C.F.R. § 100.3(a).

⁵¹ *See* 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985) (“Testing the Waters E&J”); *see also* Explanation and Justification to the Disclosure Regulations, House Doc. No. 95-44, Communication from the Chairman, FEC, Transmitting the Commission's Proposed Regulations Governing Federal Elections, at 40 (Jan. 12, 1977) (defining testing-the-waters payments).

⁵² 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* F&LA at 7, MUR 6775 (Hillary Clinton); F&LA at 8, MUR 6776 (Niger Innis); F&LA at 6, MUR 6735 (Joseph A. Sestak).

⁵³ *See* Advisory Op. (“AO”) 1981-32 at 4 (Askew); *see also* Testing the Waters E&J at 9,993.

⁵⁴ *See* AO 1981-32 at 3-4; *see also* F&LA at 4, MUR 6224 (Carly Fiorina); F&LA at 2, MUR 6533 (Haney); Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn and Weintraub at 1, MUR 5934 (Thompson) (“SOR”) (stating that, “[d]uring the ‘testing the waters’ period, the individual may, among other things, conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy.”); First Gen. Counsel's Rpt. at 3, MUR 5703 (Rainville) (“First GCR”) (stating that, “while an individual is ‘testing the waters,’ he or she may raise or expend funds otherwise permissible under the Act for activities such as conducting a poll, making telephone calls and traveling.”) *see also* Certification, MUR 5703 (Rainville) (June 22, 2006).

made in connection with testing-the-waters activity must be reported as contributions or expenditures on the first disclosure report filed by the candidate's authorized committee.⁵⁵

The Commission has stated that testing-the-waters activities are those “conducted to determine whether an individual should be a candidate.”⁵⁶ The Commission has concluded that traveling to speak with opinion makers and political and non-political groups for the purpose of deciding whether potential political support exists for a national campaign is testing-the-waters activity.⁵⁷ In MUR 5908 (Duncan Hunter), for example, the Commission found reason to believe that a candidate's spending on travel to early primary states “to publicize his Presidential campaign, and/or gauge support for his campaign” before declaring his candidacy, should have been reported as testing the waters or campaign expenses.⁵⁸ When evaluating whether a respondent had ceased testing the waters and begun a candidacy, the Commission has determined that expenditures relating to political strategy consulting and fundraising consulting could fall within permissible testing-the-waters activity.⁵⁹

⁵⁵ 11 C.F.R. § 101.3. A contribution includes any “gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing” any federal election. 52 U.S.C. § 30101(8)(A). “[A]nything of value” includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1).

⁵⁶ 11 C.F.R. §§ 100.72(a); 100.131(a); *accord* AO 1981-32 at 4.

⁵⁷ AO 1981-32 at 3-4.

⁵⁸ F&LA at 4-7, MUR 5908 (Hunter). The Commission took no further action in MUR 5908 after the investigation revealed that the leadership committee's excessive contributions to the candidate were likely *de minimis*. See SOR, Comm'rs Petersen, Hunter, McGahn, Walther, & Weintraub at 2-3.

⁵⁹ F&LA at 5-6, MUR 6224 (Carly Fiorina) (finding that a candidate's “pre-announcement spending and fundraising were consistent with ‘testing the waters’ activity”).

1 An individual who is testing the waters need not register or file disclosure reports with
 2 the Commission unless and until the individual subsequently decides to run for federal office.⁶⁰
 3 However, an individual who tests the waters must keep financial records and, when he or she
 4 becomes a candidate, all funds received or payments made in connection with testing the waters
 5 will be considered contributions and expenditures under the Act and must be reported as such in
 6 the first report filed by the candidate's principal campaign committee.⁶¹

7 All funds raised and spent for testing-the-waters activities are subject to the Act's
 8 limitations and prohibitions.⁶² The Act prohibits any person from making contributions to any
 9 candidate and his authorized political committee with respect to any election for federal office
 10 which, in the aggregate, exceed \$2,700 for the 2016 election cycle.⁶³ The Act also prohibits any
 11 candidate or political committee from knowingly accepting any excessive contributions.⁶⁴ The
 12 Act and Commission regulations prohibit corporations from making contributions to candidate
 13 committees in connection with a federal election.⁶⁵ The Commission has concluded that a 527

⁶⁰ 11 C.F.R. §§ 100.72 and 100.131; *see also* Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09"). The testing-the-waters exemption is not available to individuals who have made a decision to become a candidate. 11 C.F.R. §§ 100.72(b), 100.131(b). *See also* AO 2015-09 at 5; Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to evaluate a potential candidacy").

⁶¹ 11 C.F.R. § 101.3.

⁶² *See* 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Testing the Waters E&J at 9,993; F&LA at 3, MUR 6533 (Haney) ("All funds raised and spent for "testing the waters" activities are, however, subject to the Act's limitations and prohibitions.").

⁶³ 52 U.S.C. § 30116(a)(1)(A).

⁶⁴ *Id.* § 30116(f).

⁶⁵ *Id.* § 30118(a); 11 C.F.R. § 114.2(b); *cf.* 11 C.F.R. § 114.2, note to paragraph (b) (clarifying that corporations can make contributions to non-connected political committees); AO 2010-11 (Commonsense Ten) at 2-3 (concluding that corporations may contribute to independent expenditure-only political committees).

organization's "use of funds raised outside of the Act's limitations and prohibitions to pay for individuals' testing-the-waters activities would violate Commission regulations if those individuals decide to become candidates."⁶⁶

A. There is Probable Cause to Believe that New Day's Provision of Polling, Political Consulting, and the Payment of Travel Expenses Constituted Unreported Prohibited and Excessive In-Kind Contributions

The information shows that New Day, after its founding in April 2015, was exclusively focused on promoting Kasich's record and policy agenda, paid for testing-the-waters activities such as polling, political consulting and travel that allowed Kasich to solicit support for his yet to be officially announced presidential candidacy and develop and convey the policy positions that would be used in the campaign.⁶⁷ New Day made substantial disbursements for media consulting, phone banks, polling, airfare, travel, and travel expense reimbursements, all of which are payments for the types of expenses traditionally associated with testing-the-waters activities; the available information indicates that many, if not all, of these payments were made for activities directed to an evaluation of the feasibility of Kasich's candidacy, and with Kasich's consent and participation.⁶⁸

⁶⁶ AO 2015-09 (Senate Majority PAC and House Majority PAC) at 5 (concluding that 527 organizations' payment for testing-the-waters activities with soft money would violate 11 C.F.R. §§ 100.72(a) and 100.13(a)).

⁶⁷ MUR 6983 Supp. Compl. at 9, 5; *see also* Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER, Apr. 20, 2015, available at http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html (the creation of New Day "takes the Ohio Republican Party, which paid for Kasich's recent trips to the early primary states of New Hampshire and South Carolina, off the hook for his travel expenses."); Chrissie Thompson, *Kasich's 2016 fundraising starts, backed by 'super donor'*, THE CINCINNATI ENQUIRER, Apr. 20, 2015, available at <http://www.cincinnati.com/story/news/politics/elections/2015/04/20/john-kasich-fundraising-interpublic-philip-geier-john-sununu/26074359/>.

⁶⁸ *See supra*, nn. 32-35; Exhibit A; New Day's first FEC disclosure report, the 2015 Year-End Report, does not include any disbursements made prior to the date of Kasich's announcement. *See* New Day Amended 2015 Year-End Report (July 11, 2016).

1 The Kasich for America Committee's initial report to the Commission reflects that it
2 received \$40,050 in contributions and made \$19,180 in disbursements prior to July 21, but it
3 does not specifically designate any of these entries as in-kind contributions made to Kasich for
4 testing-the-waters activities, and the first reported disbursement occurred only 11 days prior to
5 Kasich's announcement of his candidacy.⁶⁹

6 While Kasich did not report making any payments for political polling prior to the
7 announcement of his candidacy, New Day paid \$223,000 to American Viewpoint Inc. for
8 "polling" in June 2015.⁷⁰ Both New Day and Kasich failed to produce Kasich's communications
9 with New Day, which would reveal whether or not this polling was related to testing the waters
10 for a Kasich candidacy and whether or not the polling results were shared with Kasich.

11 Starting in January 2015, Kasich began traveling the country and speaking about his
12 policy positions on nationwide issues such as balancing the budget, tax reform and healthcare, as
13 well as his prospective candidacy. After its formation in April 2015, New Day became the entity
14 that paid for Kasich's travels. The available information indicates that Kasich's New Day-
15 funded travel in 2015 was directed to an evaluation of the feasibility of his candidacy.
16 Specifically, during this time, Kasich engaged in fundraising and made statements that were
17 widely reported in the press and not contested by Respondents indicating that he was considering
18 and evaluating a run for President.⁷¹

⁶⁹ See Kasich for America October 2015 Quarterly Report (Oct. 15, 2015).

⁷⁰ New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report.

⁷¹ Robert Higgs, *John Kasich's travels: a timeline*, CLEVELAND PLAIN DEALER, Sept. 10, 2015, available at http://www.cleveland.com/open/index.ssf/2015/09/john_kasichs_travels_a_timelin.html (documenting Kasich's fundraising and travels from January 2015 through his formal announcement in July 2015).

For example, CNN reported that Kasich said in late April that “If I can win, I’m likely to run,”⁷² and stated that “[o]ne good thing about thinking of running for President is that I get invited to stuff like this, where I can talk about what I care about.”⁷³ In that interview, Kasich specifically spoke about the steps he had taken — including the creation of a political organization “to accumulate more resources” in order to “travel more robustly” — and the steps he would need to take — including “infrastructure,” success in raising “seed money,” and assessment of whether “people like what I have to say” — when deciding whether he “would go forward” with a candidacy.⁷⁴ New Day’s payment, with Kasich’s apparent consent, for travel and other activities directed to an evaluation of the feasibility of Kasich’s candidacy is the basis for New Day’s liability under the Act,⁷⁵ because those payments and the associated circumstances indicate that they were for the purpose of helping Kasich test the waters, and became contributions when he became a candidate.

In addition to his statements to CNN about how he would evaluate his potential candidacy, Kasich, in New Hampshire, closed his speech at the Leadership Summit by both explaining that he was evaluating the feasibility of his own candidacy and asking attendees to do the same, stating:

. . . think about me, would you . . . don’t commit too soon . . . let us all have a chance to breathe and get out, and you know what I really look forward to, being out in your homes again, letting you

⁷² Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN, May 17, 2015, at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Testing the Waters E&J at 9,993.

get to know me and see me, that's what it's really all about, it's
 why I love New Hampshire.⁷⁶

Finally, in his interview on ABC's "This Week," Kasich tied his travel, funded by New Day, to his assessment of the feasibility of his potential candidacy when he described what he had "found on the ground" while traveling and expressed "hope people will help me, if they like my sort of unique voice in this whole thing."⁷⁷ Kasich, in the ABC interview, did not dispute the characterization of him as an underdog in the presidential race; instead, Kasich used the reference to his "underdog" status to assess the viability of his potential campaign if he were to do well in New Hampshire.⁷⁸ Traveling to engage in these unsubtle assessments of Kasich's potential candidacy indicate activities "conducted to determine whether an individual should be a candidate."⁷⁹

Further, Kasich's-New Day funded travel included stops in key early primary states including South Carolina (four times), New Hampshire (five times), and Iowa, which the Commission has concluded can be a factor in assessing whether payments for travel are for testing-the-waters activity.⁸⁰ In these early primary states, Kasich engaged in activities that included, among other things, holding news conferences, addressing Republican caucuses and

⁷⁶ New Hampshire Republican Leadership Summit, Governor John Kasich, C-SPAN at 24:45, <https://www.c-span.org/video/?325374-12/republican-leadership-summit-governor-john-kasich>.

⁷⁷ <https://abcnews.go.com/Politics/week-transcript-ohio-gov-john-kasich/story?id=31257546>.

⁷⁸ *Id.*

⁷⁹ 11 C.F.R. §§ 100.72(a); 100.131(a); *accord* AO 1981-32 at 4.

⁸⁰ *See supra*, Section II.A; *and see* F&LA at 4-7, MUR 5908 (Hunter) (finding reason to believe candidate's spending on travel to early primary states "to publicize his Presidential campaign, and/or gauge support for his campaign" before declaring his candidacy, should have been reported as testing the waters or campaign expenses).

chambers of commerce, holding private meetings, and speaking at the Republican Leadership Summit.⁸¹

New Day, in responses to the Complaint, reason to believe notifications, and the Commission's subpoenas, deny that these trips were for testing the waters, but refused to provide the sort of detailed information regarding the travel that would corroborate their assertions that these trips were not for the purpose of testing the waters for a presidential run. Although Respondents assert that Kasich's 2015 travel was instead for him to tell the story of Ohio's success and promote his political ideals.⁸² Respondents, however, fail to address the qualitative similarities and differences between Kasich's 2015 pre-declaration of candidacy travel, and Kasich's post-declaration of candidacy travel as a candidate. Absent supporting documentation and information, Respondents' assertion is unpersuasive and the Commission is entitled to infer that the information that would have been provided would be adverse to Respondents' position.⁸³ Respondents' argument does not take into account that the establishment of New Day and its role in arranging for and funding Kasich's 2015 trips itself establishes that Kasich's 2015 engagements substantially differed from his pre-2015 activity.

As discussed above, the available information indicates that Kasich spent the 2015 New Day-funded trips discussing potential candidacy and testing specific policy positions later used in his presidential candidacy. Kasich's multiple statements regarding his viability as a candidate, as well as the choice of the locations for these trips, indicate that Kasich was testing the waters for a presidential run. As a result, we are prepared to recommend that the Commission find probable

⁸¹ See *supra*, Section II.F&LA at 4-7.

⁸² New Day Response (June 14, 2019) at 3-7.

⁸³ See *supra*, n. 2.

1 cause to believe that New Day violated 52 U.S.C. §§ 30116 and 30118(a) and 11 C.F.R. §§
 2 100.72(a) by making prohibited and excessive in-kind contributions to John Kasich and Kasich
 3 for America in connection with funding testing-the-waters activities;

4 Additionally, New Day provided Kasich with digital and television messaging media
 5 from the New Day announcement video to the July 8 television advertisement buys.⁸⁴ Kasich
 6 was the face of New Day and it appears that New Day was formed as a vehicle for Kasich to
 7 present his platform of ideas for the country's future to assist in his assessment of whether to
 8 launch a candidacy after "see[ing] if people like what I have to say."⁸⁵ In Kasich's April 20,
 9 2015, video message announcing the formation of New Day, Kasich stated, "Those are some of
 10 my thoughts, but I would like to hear what yours are too, and I'd like to talk to you about them.
 11 And that's why I'm announcing that we've created the New Day for America committee."⁸⁶ He
 12 continued: "We're going to start getting around the country more, meeting and talking with
 13 more people, and see if by coming together we can put in motion the solutions that will get this
 14 great idea called America working the right way again."⁸⁷ In light of these statements and the
 15 close relationship between New Day and Kasich, which Respondents do not contest, the
 16 information shows that New Day funded Kasich's travel which was at least in part connected to
 17 his own potential candidacy. As Kasich came to the end of the testing-the-waters-period and
 18 towards his announcement of candidacy, New Day filmed an interview with Kasich and

⁸⁴ See *supra*, nn. 39-42 (and related text detailing New Day's July 8, 2015 ad buys); Exhibit A.

⁸⁵ Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>

⁸⁶ http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html.

⁸⁷ *Id.*

MURs 6955 & 6983 (New Day for America)
 General Counsel's Brief
 Page 27 of 37

1 contracted, on July 8, to distribute a television advertisement incorporating that interview
 2 footage; New Day acknowledged in an FCC filing that the advertisement was for the purpose of
 3 supporting Kasich's candidacy.⁸⁸

4 Moreover, in the course of arranging, paying for, and otherwise supporting Kasich's
 5 testing-the-waters activities, New Day paid for, in addition to direct travel cost expenses and
 6 reimbursements, and communication costs, the fees of consultants to assist Kasich.⁸⁹ The
 7 Commission has previously advised that employing "political consultants for the purpose of
 8 assisting with advice on the potential mechanics of constructing a national campaign
 9 organization" constitutes testing-the-waters activity.⁹⁰ To the extent any of Kasich's New Day
 10 funded travel was unrelated to his potential candidacy, at minimum the portion of his expenses

⁸⁸ See *supra*, nn. 39-42 (and related text detailing New Day's July 8, 2015 ad buys). Should the Commission find probable cause to believe that Kasich's candidacy began as early as late June 2015, see Section X, *infra*, the Commission need not include the costs of the production and distribution of the July 8 advertisement with the unreported testing-the-waters activity as it would be more properly assessed as an unreported contribution to a candidate.

⁸⁹ See, e.g., Joint RTB Resp. at 24- (listing Chris Schrimpf as person assisting Kasich and attending Kasich travel events paid for by New Day between May 26 and July 13, 2015); *Id.* at 50 (listing Schrimpf as press contact for Kasich travel event in July 2015); Exhibit A (listing monthly payments by New Day to Schrimpf for fundraising and consulting services).

⁹⁰ AO 1981-32 at 2-4 (concluding that hiring political consultants to assist with advice on the potential mechanics of constructing a national campaign organization and employing a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign were within the scope of the testing the waters exemption as long as the prospective candidate conducted the activities while continuing to deliberate his decision to become a candidate); see also F&LA at 5-6, MUR 6196 (Kennedy) (concluding that having discussions with political consultants to determine the viability of a potential candidacy and commissioning a poll to assess name recognition were within the testing the waters exemption).

related to assessing and promoting his potential candidacy would be allocable as testing the waters expenses.⁹¹

New Day, an Ohio corporation, was a prohibited source and was not permitted to make contributions to Kasich, including in-kind contributions made by funding travel for Kasich that were required to be reported by the Committee as contributions for testing-the-waters activities.⁹² Therefore, we are prepared to recommend that the Commission find probable cause to believe that New Day violated 52 U.S.C. §§ 30116(f) and 30118(a) by making excessive and prohibited in-kind contributions to Kasich and Kasich for America.

B. There Is Probable Cause to Believe that the New Day Advertisements Were Coordinated Communications That Resulted in Prohibited and Excessive In-Kind Contributions to Kasich and Kasich for America

The Act defines a “contribution” to include “any gift . . . or anything of value made by any person for the purpose of influencing any election for Federal office.”⁹³ IEOPCs are prohibited from making contributions to candidates and their authorized committees,⁹⁴ and it is unlawful for candidates, political committees, and their officers and employees to knowingly accept an excessive or prohibited contribution.⁹⁵

⁹¹ Cf. 11 C.F.R. § 106.3; AO 1986-06 (Fund for America’s Future) at 4-5 (concluding that multicandidate committee could fund potential candidate’s appearances on behalf of other candidates, a political party, and policies, but cautioning that committee would make and have to allocate those expenses as in-kind contributions if that individual made public statements referring to his possible intent to campaign for federal office or included activities such as “soliciting funds, holding meetings (which constitute more than incidental contacts) with individuals or the press regarding such a potential candidacy”).

⁹² See *supra*, n. 70.

⁹³ 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a).

⁹⁴ See 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

⁹⁵ 52 U.S.C. §§ 30116(f), 30118(a)

A “coordinated expenditure” — which is an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, a candidate’s authorized committee, or the agents of either — is also a contribution to the candidate.⁹⁶ A “coordinated communication” is one form of coordinated expenditure.⁹⁷ Thus, “[a]n independent expenditure-only political committee may not make contributions to candidates or political party committees, including in-kind contributions such as coordinated communications.”⁹⁸

Commission regulations provide a three-prong test to determine if a communication is a “coordinated communication.”⁹⁹ First, a person other than the federal candidate or the candidate’s authorized committee must pay for all or part of the communication.¹⁰⁰ Second, the communication must satisfy at least one content standard.¹⁰¹ Third, the communication must satisfy at least one conduct standard.¹⁰²

The Complaint alleges and the Commission found reason to believe that the three New Day advertisements featuring Kasich (“Us,” “Balancing the Budget,” and “John Kasich is for Us – National Security,” collectively, the “New Day Ads”) are coordinated communications and,

⁹⁶ 52 U.S.C. § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

⁹⁷ *See* 11 C.F.R. § 109.21(b).

⁹⁸ AO 2017-10.

⁹⁹ 11 C.F.R. § 109.21(a).

¹⁰⁰ *Id.* § 109.21(a)(1).

¹⁰¹ *Id.* § 109.21(a)(2), (c).

¹⁰² *Id.* § 109.21(a)(3), (d).

thus, prohibited and excessive in-kind contributions from New Day to the Committee.¹⁰³

Respondents argue that there was no coordinated communication because the only evidence to satisfy the conduct prong of the coordination test is Kasich's material involvement in the interview footage used in the New Day advertisements, which was filmed before Kasich became a candidate, and thus was not made "in cooperation, consultation or concert with" a candidate.¹⁰⁴

Here, each of the three New Day advertisements — "Us," "Balancing the Budget," and "John Kasich is for Us – National Security" — appears to be a coordinated communication. First, the ads were paid for by New Day, a third party, thereby satisfying the first prong of the coordination analysis. Second, all three ads satisfy the content standard as "public communications"¹⁰⁵ that contain express advocacy or its functional equivalent.¹⁰⁶ Under the Commission's regulations, a communication expressly advocates the election or defeat of a clearly identified federal candidate if it:

[u]ses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), 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

¹⁰³ MUR 6955 Compl. at 9-12; MUR 6983 Compl. at 3-7.

¹⁰⁴ Joint RTB Resp. at 14; MUR 6955 Committee Resp. at 7.

¹⁰⁵ "Public communication" includes "a communication by means of any broadcast, cable, or satellite communication" 11 C.F.R. § 100.26.

¹⁰⁶ *Id.* § 109.21(c)(3), (5).

posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'¹⁰⁷

A communication is also express advocacy if:

[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because — (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.¹⁰⁸

"Us," which aired in New Hampshire on July 8 (before Kasich's July 21 announcement event but after the June 28 Politico article), includes video of Kasich discussing his qualifications and experience "creat[ing] jobs," "cut[ting] taxes," "balanc[ing] our budgets," and serving on the Armed Services Committee ("John Kasich looked out for America"), before concluding, "John Kasich's for us." The advertisement discusses only Kasich's accomplishments and does not express any views on issues of public policy. The tagline "John Kasich's for us" appears to be the communication of a campaign slogan (akin to "Nixon's the One") which in context — paired with a recitation of Kasich's political experience and the absence of an identifiable issue beyond

¹⁰⁷ *Id.* § 100.22(a).

¹⁰⁸ *Id.* § 100.22(b); *see also* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 70 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates).

the qualifications of Kasich himself — can have no other reasonable meaning than to urge Kasich's election.¹⁰⁹

“Balancing the Budget” aired on July 26, 2015, five days after Kasich's announcement event on July 21, and three days after New Day's registration with the Commission as an IEOPC on July 23. It explicitly refers to Kasich as a candidate for President (“No one running for president has balanced the federal budget for us but John Kasich”), discusses his experience balancing the budget and serving on the Armed Services Committee, and compares him favorably to other candidates for President (“No one else comes close”), before concluding, “John Kasich's for us.” The phrase “John Kasich's for us” appears to be the campaign slogan (akin to “Nixon's the One”). In context, the slogan can have no other reasonable meaning than to urge Kasich's election.¹¹⁰

Likewise, the “John Kasich is for Us – National Security” advertisement discusses Kasich's qualifications for office in the context of the upcoming election, contrasting them with the “weakness, handwringing, [and] inexperience” of fellow candidate Hillary Clinton as well as President Obama, before closing with an image of Kasich over the caption “John Kasich. President 2016.” The caption is akin to the “magic words” enumerated in section 100.22(a)

¹⁰⁹ See Kasich F&LA at 21, MUR 6955 and 6983; *see also* 11 C.F.R. § 100.22(a); Factual and Legal Analysis at 8, MUR 5831 (Softer Voices) (Mar. 26, 2009) (identifying a slogan “centered on the candidate and referenc[ing] personal characteristics unrelated to any issue” as evidence of 100.22(a) express advocacy). As an express advocacy communication, the “Us” ad also satisfies the functional equivalent of express advocacy content standard, which “necessarily encompasses more than express advocacy.” Coordinated Communications, 75 Fed. Reg. 55947, 55954 (Sept. 15, 2010); *see also id.* at 55953 (providing example of communication that the Supreme Court determined was the functional equivalent of express advocacy).

¹¹⁰ See 11 C.F.R. § 100.22(a); *see also* Factual and Legal Analysis at 8, MUR 5831 (Softer Voices) (Mar. 26, 2009) (identifying a slogan “centered on the candidate and referenc[ing] personal characteristics unrelated to any issue” as evidence of 100.22(a) express advocacy).

(such as “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge Kasich’s election.¹¹¹ All three communications thus constitute express advocacy.

Third, the conduct prong of the coordination test is satisfied if: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate, campaign, or political party committee, or the payor suggests the communication and the candidate, campaign or political party committee assents to the suggestion (the “request or suggestion” standard); (2) the candidate, campaign, or political party committee was materially involved in decisions regarding the communication (the “material involvement” standard); or (3) the communication was created, produced, or distributed after one or more substantial discussions between the payor and the candidate, campaign, or a political party committee involving information that is material to the communication (the “substantial discussion” standard).¹¹²

The Commission, at the reason to believe stage, properly rejected Respondents’ argument that Kasich could not meet the conduct prong because he not yet declared candidacy before the first of the New Day ads was produced and distributed, concluding that all three New Day Ads may satisfy the “material involvement” standard.¹¹³ As the Commission has previously concluded, a federal candidate’s appearance in footage created for an advertisement renders

¹¹¹ See 11 C.F.R. § 100.22(a); *see also* Factual and Legal Analysis at 13, MUR 5024R (Tom Kean, Jr.) (Apr. 13, 2005) (an advertisement featuring a candidate wearing a campaign button identifying him as a candidate (“Tom Kean Jr. for Congress”) followed by the word “NEVER” can have no other reasonable meaning than to urge the candidate’s defeat). New Day appears to have filed an independent expenditure report for “John Kasich is for Us – National Security.” See Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

¹¹² 11 C.F.R. § 109.21(d)(1)–(3). The conduct prong may also be satisfied in other ways, such as if the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication. *See id.* at § 109.21(d)(4).

¹¹³ *See* Kasich F&LA at 23, MUR 6955 and 6983.

1 “highly implausible” any claim that he or she was not “materially involved” in its creation.¹¹⁴
 2 Indeed, because the candidate would decide what statements to give on camera, this arrangement
 3 would inherently grant the candidate material involvement in decisions over the content of the
 4 eventual communications and, the Commission has noted, may also result from one or more
 5 substantial discussions with the person filming the communication.¹¹⁵ Therefore, because of his
 6 appearance in recorded interview footage incorporated in the New Day Ads, Kasich met the
 7 requirements of the “material involvement” standard, satisfying the conduct prong of the
 8 coordinated communications analysis. Although Respondents have argued that the interview
 9 footage was recorded before Kasich’s formal declaration of candidacy, as discussed above, there
 10 is information indicating that Kasich was already a candidate when he participated in the filming
 11 of the New Day advertisements. The filming appears to have occurred in late June 2015, which
 12 puts it around the time of the Politico article published on June 28 that is the latest point at which
 13 Kasich was already a candidate, as discussed above.¹¹⁶

14 Kasich’s apparent relationship with New Day provides further evidence he was either
 15 materially involved in decisions regarding the communications, or that his conduct satisfies the

¹¹⁴ Advisory Opinion 2003-25 (Weinzapfel for Mayor Committee) (“AO 2003-25”); *see also* Advisory Opinion 2004-01 (Bush-Cheney ’04 *et al.*) (“AO 2004-01”) (citing AO 2003-25)). After issuing these advisory opinions, the Commission amended the coordinated communication regulations to create a “safe harbor” for certain public communications in which federal candidates merely endorse other candidates or solicit funds for other persons. *See* 11 C.F.R. § 109.21(g); *see also* Coordinated Communications, 71 Fed. Reg. 33,190, 33,202 (Jun. 8, 2006) (superseding AO 2004-01 and AO 2003-25 to extent they apply to such communications). That regulatory revision is not relevant to the communications at issue here, which do not endorse other candidates.

¹¹⁵ AO 2003-25 at 6, n.5 (citing 11 C.F.R. § 109.21(d)(3)); *cf.* Kasich F&LA at 23, MUR 6955 and 6983 (concluding that the New Day Ads may have met the substantial discussion and request or suggest conduct standards as well as the material involvement standard).

¹¹⁶ *See supra*, n. 42.

request or suggestion, or substantial discussion standards of the Commission's regulations.¹¹⁷ As the public face of New Day, Kasich appears to have been heavily involved with the origination of New Day, as evidenced by his presence on the group's website and in the video announcing its creation. While Respondents have provided information that it had a "firewall" policy prohibiting coordination between the Committee and New Day as of July 23, 2015, Kasich was materially involved and had substantial discussions with New Day prior to that date, both during his testing-the-waters period and as a candidate. Thus, the existence of any firewall policy addressing subsequent activity does not bear on the earlier coordination that occurred.

Based on the available information, we are prepared to recommend that the Commission find probable cause to believe that New Day made prohibited contributions in the form of coordinated communications in violation of 52 U.S.C. §§ 30116 and 30118(a).

C. Where Activity Occurred Longer than Five Years Ago, the Commission Should Seek Equitable Remedies

Most of the New Day activity relating to Kasich's testing the waters expenditures and some its coordinated communications occurred more than five years ago. Even so, the Commission has previously pursued activity and violations of the Act which were more than five years old, and the nature of the violations here in the context of a presidential election and the strength of the information supporting them support doing so here too.¹¹⁸ While activity under the Act is subject to a five-year statute of limitations, pursuant to 28 U.S.C. § 2462, that statute limits the Commission's time to bring "an action, suit or proceeding for the *enforcement of any*

¹¹⁷ See New Day F&LA at 23, MUR 6955 and 6983.

¹¹⁸ See generally Conciliation Agreement, MUR 6538R (Americans for Job Security) (addressing equitable remedies).

civil fine, penalty, or forfeiture.”¹¹⁹ The agency’s ability to seek equitable remedies is not subject to such limitations.¹²⁰ Thus, regardless of whether the five-year statute of limitations invoked by the statute impedes the Commission’s ability to seek a civil penalty, it does not prevent the Commission from pursuing equitable remedies, including requiring disclosure of excessive and prohibited in-kind contributions.

IV. GENERAL COUNSEL’S RECOMMENDATIONS

1. Find probable cause to believe that New Day for America and J. Matthew Yuskewich, in his official capacity as treasurer, violated 52 U.S.C. §§ 30116 and 30118(a) and 11 C.F.R. §§ 100.72(a) by making prohibited and excessive in-kind contributions to John Kasich and Kasich for America in connection with funding testing-the-waters activities;
2. Find probable cause to believe that New Day for America and J. Matthew Yuskewich, in his official capacity as treasurer, violated 52 U.S.C. §§ 30116 and 30118(a) by making prohibited and excessive in-kind contributions to John Kasich and Kasich for America in connection with coordinated communications;

November 24, 2020
 Date

Lisa J. Stevenson/by CK
 Lisa J. Stevenson
 Acting General Counsel

Charles Kitcher
 Charles Kitcher
 Acting Associate General Counsel
 for Enforcement

¹¹⁹ 28 U.S.C. § 2462 (emphasis added).

¹²⁰ Compare *Citizens for Responsibility and Ethics in Washington v. FEC*, 209 F.Supp.3d 77, n.3 (D.D.C. 2016) (rejecting an argument that the FEC cannot pursue equitable remedies after five years on the basis that no “authoritative policy or rule” barring equitable enforcement was before the court); *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding that injunctive relief is not a penalty); *FEC v. Nat’l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995) (same).

MURs 6955 & 6983 (New Day for America)
General Counsel's Brief
Page 37 of 37

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Attachment:

Exhibit A: New Day for America Expenses