

BEFORE THE FEDERAL ELECTION COMMISSION

2 In the Matter of)
3)
4 Big Tent Project Fund) MUR 7735
5 Jonathan Kott)

SECOND GENERAL COUNSEL'S REPORT

9 I. ACTIONS RECOMMENDED

10 We recommend that the Commission: (1) take no further action as to Big Tent Project
11 Fund (“Big Tent Project”); (2) dismiss the allegations that Jonathan Kott violated 52 U.S.C.
12 §§ 30102, 30103, and 30104, provisions of the Federal Election Campaign Act of 1971, as
13 amended (the “Act”), by failing to register Big Tent Project as a political committee and file
14 periodic disclosure reports; (3) approve the appropriate letters; and (4) close the file.

15 II. BACKGROUND

16 The Complaint alleged that Big Tent Project and its Executive Director, Jonathan Kott,
17 failed to register Big Tent Project as a political committee, file periodic disclosure reports, and
18 report independent expenditures as a political committee during the 2020 election cycle. In
19 support of these allegations, the Complaint stated that Big Tent Project reported \$4,819,713.56 in
20 independent expenditures opposing Bernie Sanders for the 2020 Democratic presidential
21 nomination and that Kott made media appearances explaining that the organization intended to
22 oppose Sanders and solicit contributions for independent expenditures.¹ However, Big Tent
23 Project has continued to deny that its major purpose was the nomination or election of federal
24 candidates pointing to the fact that, during the 2020 election cycle, its share of election-related
25 spending was below 50% of its overall spending.

1 Compl. ¶ 26-52 (May 7, 2020).

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1 On July 13, 2021, the Commission found reason to believe that Big Tent Project violated
 2 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as a political committee
 3 and report its independent expenditures as a political committee.² Separately, the Commission
 4 found reason to believe that Big Tent Project violated 52 U.S.C. § 30104(b)(4)(H)(iii),
 5 (b)(5)(A), and (g)(1) by failing to report independent expenditures made in early March 2020 in
 6 Michigan as a political committee.³ The Commission voted to take no action at that time as to
 7 Kott.⁴ The Commission also authorized the use of compulsory process.⁵

8 On August 9, 2021, the Office of General Counsel (“OGC”) notified Big Tent Project of
 9 the Commission’s reason-to-believe findings, provided it with a copy of the Factual & Legal
 10 Analysis (“F&LA”), and sent an informal Request for Written Answers and Production of
 11 Documents.⁶ On September 28, 2021, Big Tent Project filed a Response to the Commission’s
 12 reason-to-believe findings and submitted a Response to the Request for Written Answers and
 13 Production of Documents.⁷ Subsequently, OGC engaged in several rounds of voluntary
 14 discovery requests with Big Tent Project that yielded substantial information and documents
 15 across six additional rolling productions.

16 On June 15, 2023, OGC circulated a Memorandum to the Commission (“Subpoena
 17 Memorandum”) describing the status of the investigation.⁸ The record, including a ledger of

² Certification (“Cert.”) ¶ 1 (July 15, 2021); *see* Factual and Legal Analysis (“F&LA”) at 1.

³ Cert. ¶ 2.

⁴ *Id.* ¶ 3.

⁵ *Id.* ¶ 4.

⁶ RTB Notif. Letter (Aug. 9, 2021).

⁷ RTB Resp. (Sept. 28, 2021); Resp. to Request for Written Answers & Production of Documents (Sept. 28, 2021).

⁸ Memorandum to the Commission Regarding Circulation of Discovery Documents (June 15, 2023) (“Subpoena Memorandum”).

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1 receipts and disbursements produced during informal discovery,⁹ reflects that Big Tent Project,
 2 which formed on February 12, 2020,¹⁰ operated until July 2020, during which time it raised
 3 \$12,197,500 and disbursed \$12,077.693.56, including \$4,819,713.56 on independent
 4 expenditures opposing U.S. Senator Bernie Sanders's campaign for the 2020 Democratic
 5 presidential nomination.¹¹ Big Tent Project's Ledger shows that through May 14, 2020, it had
 6 disbursed an aggregate \$9,327,693.56, of which \$4,966,393.56¹² (53.24%) was for what Big
 7 Tent Project self-described as "political expenditures."¹³ On May 8 and 11, 2020, Big Tent
 8 Project received two contributions totaling \$2.75 million.¹⁴ These were the last contributions
 9 that it received. On May 11, 2020, Big Tent Project was notified of the Complaint. On May 14
 10 and 15, 2020, Big Tent Project spent \$2.25 million in grants to 501(c)(3) charitable organizations
 11 that brought its proportion of spending on federal campaign activity to 41.12%.¹⁵

12 As noted in the Subpoena Memorandum, given Big Tent Project's unwillingness to
 13 provide additional information regarding its major purpose,¹⁶ OGC recommended that the
 14 Commission approve four subpoenas to complete the record.¹⁷ However, there were insufficient

⁹ Email from Adam Clark, Couns., Big Tent Project, to Thaddeus Ewald, Att'y, FEC (May 6, 2022, 6:49 PM), Attach. (Big Tent Project Ledger) [hereinafter Ledger].

¹⁰ Big Tent Project is a 501(c)(4) organization registered in Delaware. Compl. ¶¶ 5, 7, 8, 15 (citing news articles' descriptions of Big Tent Project); Resp. at 6 (July 24, 2020); *Entity Search*, STATE OF DEL. DIV. OF CORPS., <https://icis.corp.delaware.gov/Ecorp/NameReserv/NameReservation.aspx> (search Entity Name for "Big Tent Project Fund" or File Number for "7848378") (last visited Nov. 21, 2024).

¹¹ Subpoena Memorandum at 2-3.

¹² This total includes the \$4,819,713.56 in reported independent expenditures by Big Tent Project.

¹³ Ledger.

¹⁴ *Id.*

¹⁵ *Id.*; Subpoena Memorandum at 3.

¹⁶ See, e.g., Email from Thaddeus Ewald, Att'y, FEC, to Adam Clark & Lyn Utrecht, Couns., Big Tent Project (Feb. 13, 2023, 5:32 PM) (arguing "that the appropriate legal framework for conducting the major purpose analysis is an expenditure-only test over a set period of time").

¹⁷ Subpoena Memorandum at 2, 7.

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1 votes to approve these subpoenas.¹⁸ Instead, the Commission approved a more limited subpoena
 2 requesting that Big Tent Project explain the discrepancy between its July 24, 2020 representation
 3 in its Response to the Complaint that it had made approximately \$3.75 million in non-election-
 4 related expenditures as of July 24, 2020, and its May 6, 2022 representation in the Ledger that it
 5 had made \$7,111,300 in such expenditures as of July 3, 2020.¹⁹ The former would indicate that
 6 53.24% of Big Ten Project's overall spending was for election-related activities and the latter
 7 would indicate that the figure was 41.12%.

8 In its Response to the subpoena, which included a Declaration from Shelly Moskwa, Big
 9 Tent Project's accountant, Big Tent Project states that the amounts in its Ledger are correct,
 10 reflecting that it spent a total of \$12,077,693.60, including \$4,966,393.56 in for "political
 11 expenditure[s]" and \$7,111,300 for "primary Purpose expenditure[s]," *i.e.*, non-election-related
 12 spending, such that the former comprises about 41.12% of Big Tent Project's overall spending in
 13 2020.²⁰ Big Tent Project explains that when it submitted its initial Response on July 24, 2020, it
 14 had not fully analyzed all of its expenditures.²¹ We do not have any evidence to dispute these
 15 figures.

¹⁸ Cert. (Big Tent Project Fund, *et al.*: Circulation of Discovery Documents (Sept. 1, 2023)).

¹⁹ See Cert. (Big Tent Project Fund: Subpoena for Documents and Written Answers (Memorandum from Commissioner Allen J. Dickerson dated December 8, 2023) (Dec. 11, 2023)). Pursuant to Commission Directive 74, we sent the document requests and questions to Big Tent Project informally with written notice that the Commission had authorized the issuance of a subpoena and provided Big Tent Project with two weeks to provide the information voluntarily. See cover letter from Jacob Tully, Att'y, FEC, to Lyn Utrecht and Adam Clark, Couns., Big Tent Project (Dec. 18, 2023).

²⁰ Resp. to Questions and Document Requests ¶ 1.d (Jan. 31, 2024) ("Discovery Resp."), Ex. A (Shelly Moskwa Decl. ¶¶ 6-7).

²¹ Discovery Resp. ¶ 1.d, Ex., Moskwa Decl. ¶¶ 4-6.

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1 The statute of limitations begins to run on February 12, 2025, for Kott and April 3,

2 2025, for Big Tent Project.²²

3 **III. DISCUSSION**

4 **A. The Commission Should Take No Further Action as to the Reason to Believe**
 5 **Findings that Big Tent Project Fund Failed to Register and Report as a**
 6 **Political Committee and Properly Report its Independent Expenditures as a**
 7 **Political Committee**

9 Big Tent Project's spending on federal campaign activity, *i.e.*, independent expenditures,

10 was 53.24% of its total spending between February 19, 2020, and May 11, 2020, when the

11 Complaint was filed.²³ Several days later, on May 14 and 15, Big Tent Project donated to

12 charitable organizations, bringing the amount spent on federal campaign activity to 41.12% of its

13 total spending.²⁴ Big Tent Project did not engage in any subsequent activity. Thus, it appears

14 that for a time during the 2020 election cycle, Big Tent Project's spending indicated a major

15 purpose of nominating or election federal candidates, but its overall spending during the election

16 cycle does not necessarily indicate such a purpose. Big Tent Project's Executive Director Kott

17 made media appearances indicating that the organization intended to oppose Sanders and solicit

18 contributions for independent expenditures, but we have no information regarding the group's

19 internal discussions, outreach to donors, or other non-public information that would shed

20 additional light on Big Tent Project's major purpose.²⁵

²² See Big Tent Project Fund Tolling Agreements dated August 27, 2021, and December 21, 2023. Kott did not execute a tolling agreement.

²³ F&LA at 8; Subpoena Memorandum at 5-6.

²⁴ RTB Resp. at 5.

²⁵ See First GCR at 4 (citing to Compl. ¶¶ 7-8, 10, 12-17, 19-20, referencing numerous news reports in which Kott states that Big Tent Project aimed to prevent Sanders from winning the Democratic presidential nomination in favor of a more moderate candidate); *see also* F&LA at 3 (recounting Kott's reported statements cited in the Complaint).

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1 As explained below, it is possible that Big Tent Project had the requisite major purpose to
 2 become a political committee by May 11, 2020, and should have registered with the Commission
 3 at that time — and thus its subsequent spending did not undo the political committee status that
 4 occurred by May 11, 2020. However, we lack complete information regarding Big Tent
 5 Project's major purpose which may indicate that when its spending on election activities reached
 6 above 50% of its total, this was not necessarily indicative of its major purpose but rather its
 7 spending several weeks later, where its spending on election activities was below 50%, was more
 8 reflective of its overall purpose.

9 Big Tent Project argues that because its overall spending on federal campaign activity
 10 was less than 50% of its aggregate expenditures, the Commission should determine that it is not
 11 a political committee.²⁶ As noted above, that does not necessarily resolve the situation since it is
 12 possible that, despite these final numbers, Big Tent Project did at some point in time have a
 13 major purpose of nominating or electing candidates. Yet, we lack a full understanding of the
 14 group's operations and intentions. Commission precedent and guidance state that “determining
 15 an organization's major purpose ‘requires the flexibility of a case-by-case analysis of an
 16 organization's conduct that it is incompatible with a one-size fits' all rule.’²⁷ A consideration of
 17 an organization's “overall conduct,” is material and relevant to the Commission's case-by-case
 18 analysis and best evaluated on a complete record.²⁸

²⁶ *Id.* at 7, n.32.

²⁷ F&LA at 6-7 (quoting Political Committee Status, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) [hereinafter Supplemental E&J]).

²⁸ To determine an entity's “major purpose,” the Commission considers a group's “overall conduct,” including, among other factors, public statements about its mission, organizational documents, government filings (e.g., IRS notices), and the proportion of spending related to “Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).” Supplemental E&J, 72 Fed. Reg. at 5597, 5605.

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1 Other than several statements from Kott which focused on election activities, we do not
2 have a complete picture of Big Tent's overall purpose which would help to show whether Big
3 Tent Project was a political committee, specifically for the period during which its election-
4 related spending exceeded 50% of its overall spending. The proposed discovery would have
5 explored whether Big Tent Project initially had a major purpose of nominating or electing
6 candidates, and thus became a political committee, and then pivoted following its receipt of the
7 Complaint and once its electoral objective had been achieved. Or it is possible that Big Tent
8 Project did not intend to spend a majority of its funds on election activities and its primary goals
9 were not the nomination or election of federal candidates and thus when it did surpass 50% of its
10 spending on election activities, this was not reflective of its major purpose. Thus, the incomplete
11 record does not provide a sound basis for comprehensively evaluating Big Tent Project's major
12 purpose, for which the current record shows conflicting purposes.

13 Under these circumstances, we do not possess sufficient information to conclude that Big
14 Tent Project was a political committee. Although there may be indicators that Big Tent Project
15 was a political committee given the initial trend of its spending and final flurry of non-election-
16 related spending after the Complaint was filed, given the impending statute of limitations and
17 impracticality of further factfinding,²⁹ we recommend that the Commission in its discretion take
18 no further action as to the reason to believe findings that Big Tent Project violated 52 U.S.C.
19 §§ 30102, 30103, and 30104 by failing to register and report as a political committee and report
20 its independent expenditures as a political committee.³⁰

²⁹ As previously noted, the statute of limitations begins to run in February 2025 for Kott and April 2025 for Big Tent Project.

³⁰ See *Heckler v. Chaney*, 470 U.S. 821 (1985). In the alternative to the political committee allegations, the Complaint alleged that Big Tent Project violated 52 U.S.C. § 30104(c)(1) and (c)(2)(C) by failing to disclose contributors who gave for political purposes and who funded its independent expenditures and 52 U.S.C. § 30104(c)

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1 Separately, the Complaint alleged that Big Tent Project failed to report between \$35,124
 2 and \$47,758 in independent expenditures, whether as a political committee or non-political
 3 committee.³¹ The Commission found reason to believe that Big Tent Project violated 52 U.S.C.
 4 § 30104(b)(4)(H)(iii), (b)(5)(A), and (g)(1) by failing to report these independent expenditures,
 5 including failing to file 24-Hour Reports, as a political committee.³²

6 Big Tent Project initially did not dispute that it failed to report some independent
 7 expenditures and indicated it would file an amended 2020 April Quarterly.³³ However, in
 8 response to the reason-to-believe findings, Big Tent Project stated that it would not file an
 9 amended report because it had reviewed its records and could not find anything indicating that it
 10 had authorized the advertisements identified in the Complaint, that most of the advertisements
 11 did not run during the 24-Hour Reporting Period, and those that did were less than \$1,000.³⁴

12 Given the low amounts at issue and the representations from Big Tent Project that most,
 13 if not all were compliant with the Act's requirements, we also recommend that the Commission
 14 in its prosecutorial discretion take no further action as to the Commission's reason-to-believe
 15 findings that Big Tent Project violated 52 U.S.C. § 30104(b)(4)(H)(iii), (b)(5)(A), and (g)(1) by
 16 failing to report certain independent expenditures as a political committee.³⁵

and (g)(1) by failing to report independent expenditures as a person other than a political committee. Compl. ¶¶ 44-49. OGC recommended that the Commission find reason to believe as to these alternative allegations, *see* First GCR at 2, 16-23, but the Commission did not make any findings as to these alternative allegations. *See* Cert. (July 15, 2021); the F&LA referenced the Complaint's alternative allegations but did not address them.

³¹ Compl. ¶¶ 26-52.

³² Cert. ¶¶ 1-2 (July 15, 2021).

³³ Resp. at 2 n.1.

³⁴ RTB Resp. at 2-3.

³⁵ *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

1 **B. The Commission Should Dismiss the Allegations that Jonathan Kott Failed**
 2 **to Register Big Tent Project as a Political Committee and File Periodic**
 3 **Disclosure Reports**

5 The Complaint also alleges that Kott violated the Act by failing to register Big Tent
 6 Project as a political committee and by failing to file periodic disclosure reports. Kott is the
 7 Executive Director of Big Tent Project³⁶ and is the signatory on Big Tent Project's independent
 8 expenditure reports (FEC Form 5s) filed with the Commission.³⁷ The First GCR in this matter
 9 recommended that the Commission take no action at that time as to any allegations against Kott
 10 pending the proposed investigation that could yield additional information about Kott's
 11 involvement in Big Tent Project.³⁸ The Commission took no action as to Jonathan Kott.³⁹

12 In view of the no further action recommendations as to the reason to believe findings that
 13 Big Tent Project failed to register and report as a political committee and failed to report certain
 14 independent expenditures, and given that the record does not establish that had Big Tent Project
 15 been a political committee, Kott would have been the group's treasurer, there is no basis to
 16 pursue the same allegations as to Kott. Accordingly, we recommend that the Commission
 17 dismiss the allegation that Jonathan Kott violated 52 U.S.C. §§ 30102, 30103, and 30104 by
 18 failing to register Big Tent Project as a political committee and file periodic disclosure reports.

19 **IV. RECOMMENDATIONS**

20 1. Take no further action as to Big Tent Project Fund as to the reason to believe
 21 findings that Big Tent Project Fund violated 52 U.S.C. §§ 30102, 30103, and
 22 30104 by failing to register and report as a political committee and report its
 23 independent expenditures as a political committee;

³⁶ RTB Resp. at 1; *see also* Compl. ¶ 5 (citing Anna Palmer & Jake Sherman, *The Dem Ad Campaign Aimed at Taking Down Bernie*, POLITICO: PLAYBOOK (Feb. 19, 2020) <https://www.politico.com/newsletters/playbook/2020/02/19/the-dem-ad-campaign-aimed-at-taking-down-bernie-488357>).

³⁷ Big Tent Project, 2020 April Quarterly Report at 1 (Apr. 10, 2020).

³⁸ First GCR at 2.

³⁹ Cert. ¶ 3 (July 15, 2021).

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2 2. Take no further action as to Big Tent Project Fund as to the reason to believe
3 findings that Big Tent Project Fund violated 52 U.S.C. § 30104(b)(4)(H)(iii),
4 (b)(5)(A), and (g)(1) by failing to report certain independent expenditures as a
5 political committee;

6

7 3. Dismiss the allegations that Jonathan Kott violated 52 U.S.C. §§ 30102, 30103,
8 and 30104 by failing to register Big Tent Project Fund as a political committee
9 and file periodic disclosure reports;

10

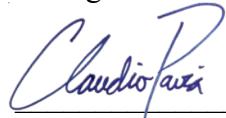
11 4. Approve the appropriate letters; and

12

13 5. Close the file effective 30 days from the date the certification of this vote
14 is signed (or on the next business day after the 30th day, if the 30th
15 day falls on a weekend or holiday).

16

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