FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

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SUBJECT: MUR 6850 (Swallow)

RE: Office of the General Counsel's Notice to the Commission Following the Submission of Probable Cause Briefs

I. INTRODUCTION

On May 28, 2015, counsel for John Swallow received the Office of the General Counsel's ("OGC") notification that it was recommending that the Commission find probable cause to believe that Swallow knowingly and willfully violated 52 U.S.C. § 30122.[1] OGC included with this notification a General Counsel's Brief setting forth the factual and legal basis for its recommendation.[2] Respondent filed a Reply Brief on August 20, 2015, and the Commission held a Probable Cause Hearing on September 30, 2015.

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1 *See* Agency Procedure Following the Submission of Probable Cause Briefs by the Office of the General Counsel, 76 Fed. Reg. 63,570 (Oct. 13, 2011).

2 *See* 52 U.S.C. § 30109(a)(3); 11 C.F.R. § 111.16(a). OGC provided a copy of the General Counsel's Brief to the Commission on May 29, 2015.

Pursuant to the *Agency Procedure Following the Submission of Probable Cause Briefs by the Office of the General Counsel*, OGC is hereby notifying the Commission that it intends to proceed with the recommendation to find probable cause to believe that Swallow knowingly and willfully violated 52 U.S.C. § 30122 based on the factual and legal analysis set forth in the General Counsel's Brief. In addition, an analysis of the arguments presented in the Reply Brief and at the Probable Cause Hearing is provided below.

A copy of this Notice is being provided to counsel for Swallow at the same time that it is circulated to the Commission.

II. ANALYSIS

A. Swallow Violated the Statutory Prohibition Against Making a Contribution in the Name of Another When He Initiated the Scheme, Pressed Johnson to Fund It Through Intermediaries, and Took Action to Ensure Its Success.

The evidence obtained to date reflects that Swallow's initiation and instigation of the conduit contribution scheme at issue here falls squarely within the reach of the statutory provision that prohibits such conduct. As noted previously, Swallow not only conceived the idea of making reimbursed contributions to the Lee Committee, he identified Jeremy Johnson as an ideal person to execute the scheme and coached him on how to do so without running afoul of the Act's individual contribution limits.[3] To persuade Johnson that it would be in his interest to participate, Swallow noted Johnson's concerns about the criminal exposure of his poker-related businesses. He asserted that, although he could continue to support Johnson on the state level through his position and influence within the Utah Attorney General's Office,[4] if Johnson were to engage in the contribution scheme, Swallow would be in a position to provide similar access to Sen. Lee on the federal level — including influence over Lee's recommendation for the position of U.S. Attorney in the District of Utah.[5] And after Johnson agreed to participate,

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[3] *See* General Counsel's Brief at 4-12. As for Swallow's prior knowledge of Johnson's alleged engagement in financial schemes, Swallow twice toured Johnson's I Works headquarters less than two years after the Utah Division of Consumer Protection served the company with fifty-five counts of violations under the Telephone Fraud Prevention Act. *See* Investigative Committee Report at 46-47 (citing Swallow's deposition testimony).

[4] Johnson stated that Swallow told him: "You know I'm supporting you, and I'm supporting processing poker . . . you don't have to worry about anything on the state level." Recording 0397 at 51:43-52:06 (also explaining how his relationship with Swallow at that time revolved around poker and how Swallow played on his poker-related fears).

[5] Johnson stated that Swallow told him: "If the federal government comes after poker, you wanna head that off and this is how you do it . . . . I'm real close with Lee . . . . And we're gonna have this relationship with the U.S. Attorney . . . . That way if you have trouble with another U.S. attorney in another district . . . . if [the Utah U.S. Attorney] is on your team, then that's the end of it." *Id.* at 52:05-53:00. At the time when Swallow made these representations to Johnson, the position of U.S. Attorney was vacant and a nomination would be forthcoming. The position remained vacant until the 2011 confirmation of David Barlow, Sen. Lee's general counsel. Johnson said he would not have funded and executed the scheme but for Swallow's assurances regarding access to the U.S. Attorney. *See* Recording 0375 at 34:04-34:53.

The importance to Johnson of Swallow's assurances and the possibility of Swallow's assistance and intervention in law enforcement activities on both the state and federal sides are reflected in the circumstances that

Swallow actively engaged in the scheme himself when it appeared to be in danger of faltering. Swallow alerted Johnson that certain donors' checks had bounced and reminded Johnson of the urgency of those contributions. If, as the record evidence indicates, Swallow was fully aware that Johnson reimbursed the contributions of others, then he would have known that his e-mail alerting Johnson about those checks and promising to provide their names would cause the making of reimbursed contributions.[6]

B. 11 C.F.R. § 110.4(b)(1)(iii) is a Valid Regulation That is Within the Scope of the Commission's Regulatory Powers.

In the face of that showing, Respondent contends that the Commission's implementing regulation, 11 C.F.R. § 110.4(b)(1)(iii), is *ultra vires* because the Commission lacks the statutory authority to implement aiding and abetting or conspiracy violations and cites flaws in the Commission's notice and comment rulemaking procedures when promulgating the regulation in 1989.[7] The Respondent's attack on the validity of the regulation is misplaced for several reasons.

Johnson was confronting during the period in which Swallow proposed the conduit contribution scheme at issue here. In early 2010, a federal investigation loomed over the online poker industry including Johnson's business, Elite Debit, which processed online poker payments. In order to convince banks that online poker and poker payment processing was legal under state law and to attempt to hold off prosecutions by the federal government, industry representatives, through Johnson, sought to obtain a favorable opinion from the Utah Attorney General's Office. Investigative Committee Report at 51-54. Shortly before the conduit contribution scheme, Johnson sent Swallow (as Chief Deputy to the state's Attorney General, Mark Shurtleff) a draft legal opinion to Swallow's personal e-mail address, and Swallow arranged for a private meeting with industry representatives and Shurtleff. *Id.* Just a few weeks after the scheme, Johnson approached Swallow for a favorable legal opinion and received what the Utah House Special Investigative Committee describes as a "written nod toward the legality of poker payment processing in Utah." *Id.* at 54-60. The extraordinary access to the Utah Attorney General's Office that Swallow provided to Johnson on the issue of online poker was a main focus of the committee's investigation and is at the center of the state's prosecution of Swallow for public corruption and other charges. *Id.* at 43-60; Second Amended Information ¶¶ 12, 14-19, *State v. Swallow*, No. 141907718 (Utah 3rd Dist. Ct. May 20, 2015) ("Swallow Amended Information").

[6] The Reply Brief speculates that the Lee Committee contacted Swallow so that he could reach out to Johnson regarding the bounced checks. Reply Brief at 15. However, the Lee Committee apparently did not keep records that connected Johnson to any contributions. General Counsel's Brief, Attach. 8 ¶¶ 6-13 ("McCauley Affidavit"). Rather, it appears more likely that Johnson told Swallow the donors' names and that Swallow monitored their contributions using his connections to the Lee Committee and, when four of the checks bounced, Swallow immediately contacted Johnson so that he could deliver four new contributions checks from the straw donors. This inference is bolstered by Swallow's refusal to answer interrogatories about this transaction.

[7] Reply Brief at 5; *see also* Probable Cause Hearing Tr. at 9:13–10:6. The Commission has cited the regulation numerous times in MURs and it has never been challenged. *See, e.g.*, MUR 6922 (Henke); MUR 6454 (Snapper); MUR 6223 (St. John); MUR 5948 (Critical Health Sys., Inc.); MUR 5849 (Cannon); MUR 5453 (Watts); MUR 5041 (Wuesthoff Memorial Hosp., Inc.); MUR 4748 (Moniot); MUR 4582 (Wahi, Bahl, and Ramamurthy); and MUR 4399 (Spice). Moreover, federal courts have cited the regulation as controlling law in a stipulated order and consent judgment against a respondent. *See* Order, *FEC v. Kazran*, Case No. 3:10-cv-1155-J-37 JRK (M.D. Fla. Feb. 29, 2012). As to Respondent's claim that the regulation is flawed under the Administrative Procedure Act's notice-and-comment procedures, the statute of limitations for a claim regarding the promulgation of a regulation more than twenty-five years ago has long since expired. 28 U.S.C. § 2401 (imposing six-year limitation period for any cause of action against the United States).

First, as explained, Swallow's conduct violates the Act regardless of the validity of the Commission's implementing regulation. For this reason, OGC has consistently recommended in this proceeding that the Commission find that Swallow violated the statute, not the regulation. Specifically, the language and purpose of 52 U.S.C. § 30122 prohibits engaging in a conduit contribution scheme — which by nature often will involve multiple participants to achieve its purpose. Section 110.4(b)(1)(iii) simply codifies the level of involvement that the Commission recognized falls within the scope of the statutory prohibition; it does not expand that scope. The Act provides, in pertinent part, that "[n]o person shall make a contribution in the name of another person." Courts have construed that prohibition and the meaning of the verb "to make" broadly, given both the central purpose of the prohibition in the statutory framework and the plain meaning of the term "to make" — that is, "to cause (something) to exist or come about; bring about . . . carry out, perform, or produce."[8] Indeed, as courts have noted about this specific statutory provision's breadth, "[w]hen people make something happen, they either do so directly or use instruments of one sort of another."[9] Accordingly, "[i]n common usage, one who causes something to happen or brings it about . . . 'made' it happen just the same as the person who executed the action."[10] This reading reflects a "common sense level" approach to interpreting the prohibition in light of its important purpose as a safeguard to prevent evasion of the individual contribution limits and disclosure requirements.[11]

Thus, in promulgating a regulation that specifically reaches those who "help or assist" a contribution reimbursement scheme, the Commission merely recognized that the scope of the statutory provision itself encompasses all persons who are involved in carrying out such a scheme. It is no surprise then, that in *FEC v. Rodriguez* — the district court decision that prompted the Commission to promulgate Section 110.4(b)(1)(iii) and supplied language for that regulation — the court specifically acknowledged that making a contribution in the name of another person under the statute includes knowingly assisting in the making of such a contribution.[12] And indeed, shortly after that district court proceeding the Commission reached

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8 *United States v. Boender*, 691 F. Supp. 2d 833, 838-39 (N.D. Ill. 2010) (citation omitted), *aff'd*, 649 F.3d 650, 660 (7th Cir. 2011); *see United States v. O'Donnell*, 608 F.3d 546, 552 (9th Cir. 2010) (explaining that language used in Section 30122 is "broad rather than specific" and noting that the text does specify a number of covered ways to "make a contribution"); *United States v. Suarez*, No. 5:13 CR 420, 2014 WL 1898579, at *2 (N.D. Ohio May 8, 2014) (recognizing that "the common meaning of 'make' is to 'cause something to exist'") (citation omitted); *United States v. Danielczyk*, 788 F. Supp. 2d 472, 480 (E.D. Va. 2011) (same), *rev'd on other grounds*, 683 F.3d 611 (4th Cir. 2012).

9 *Boender*, 691 F. Supp. 2d at 839.

10 *Danielczyk*, 788 F. Supp. 2d at 480.

11 *O'Donnell*, 608 F.3d at 550; *see id.* at 553 ("[T]he congressional purpose behind § [30122] — to ensure the complete and accurate disclosure of the contributors who finance federal elections — is plain."); *United States v. Whittemore*, 776 F.3d 1074, 1079 (9th Cir. 2015) (same); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (explaining that proscription of conduit contributions "would seem to be at the very core" of the Supreme Court's analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976)).

12 Final Order and Default Judgment, *FEC v. Rodriguez*, Case No. 86-687-Civ-T-10 (M.D. Fla. Oct. 28, 1988) (issuing default judgment that Rodriguez violated 52 U.S.C. § 30122 "by knowingly assisting in the making of contributions in the name of another"). The Commission adopted this language when it promulgated the

the same conclusion in a pending enforcement matter, determining that the statutory language of Section 30122 encompasses knowingly assisting others to engage in a contribution scheme.[13]

Since the Commission promulgated its implementing regulation identifying the Commission's interpretation of the reach of the statute, at least one court has declared that the regulation is entitled to deferential judicial treatment.[14] Furthermore, Congress had the opportunity to reject the Commission's interpretation of the statute as evidenced in its promulgation of Section 110.4(b)(1)(iii) when Congress amended the Act in 2002. To the contrary, Congress dramatically increased the civil penalty for a knowing and willful violation of Section 30122.[15]

Second, even if one argues that the regulation did expand the scope of Section 30122, it is well settled that federal agencies may "promulgate prophylactic regulations which are broad in scope in order to effectuate the purposes of the enabling legislation."[16] The Act enables the Commission to make regulations "as are necessary to carry out the provisions of this Act."[17] The validity of a regulation promulgated "to carry out the provisions" of a statute "will be sustained so long as it is 'reasonably related to the purposes of the enabling regulation.'"[18] Given the unique features of a conduit contribution scheme and the paramount importance of the prohibition, the Commission's promulgation of Section 110.4(b)(1)(iii) to carry out the purpose of Section 30122 was reasonable, since these types of schemes may necessitate the participation of multiple parties whose collective actions cause the reimbursement of contributions.

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regulation. *See* Explanation & Justification for 11 C.F.R. § 110.4, 54 Fed. Reg. 34,098, 34,104-05 (Aug. 17, 1989) ("E&J for Section 110.4").

13 At the time, this Office advised the Commission that although the conduct at issue occurred before the promulgation of Section 110.4(b)(1)(iii), the regulation merely codified a judicially-approved interpretation of Section 30122. First Gen. Counsel's Rpt. at 3 n.1, MUR 4177 (Davis). OGC recommended that the Commission find reason to believe that one of the conduits, Bonnie Brownlow Davis, also violated Section 30122 by knowingly assisting in the making of contributions in the name of another (she allegedly solicited other employees and was involved in the payment of reimbursements). *Id.* at 13. The Commission approved OGC's recommendation to enter pre-probable cause conciliation with Davis and took no further action against the other conduits. Certification at 2, MUR 4177 (Davis).

14 *Boender*, 691 F. Supp. 2d at 839.

15 Congress increased the civil penalty for a knowing and willful violation of 52 U.S.C. § 30122 from the standard 200 percent of the amount in violation to a range of 300 percent to 1,000 percent. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81, 108 (2002) (codified as amended 52 U.S.C. § 30109(a)(5)(B)).

16 *Shaker Med. Ctr. Hosp. v. Sec'y of Health & Human Servs.*, 686 F.2d 1203, 1209 (6th Cir. 1982) (citing *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 372-73 (1973)); *see United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (explaining that a prophylactic regulation, "because its mission is to prevent, typically encompasses more than the core activity prohibited").

17 52 U.S.C. § 30107(a)(8).

18 *Mourning*, 411 U.S. at 369 (citing *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 280-81 (1969)); *see also* E&J for Section 110.4 at 34,104 (explaining that the regulation implements Section 30122).

On this point, Respondent misconstrues the holding of the Supreme Court's decision in *Central Bank* in arguing that "it involved whether or not the aiding and abetting regulation at the [SEC] could be deemed valid law."[19] The Court actually held that a private plaintiff may not bring an aiding and abetting suit under the Security Exchange Act of 1934's general antifraud provision. It did not analyze whether a prophylactic regulation promulgated by an agency was valid.[20] Indeed, the SEC was not a party to the litigation. Moreover, even if the *Central Bank* decision had involved an agency regulation and thus were on similar footing to the present matter — and again, it is not — the Court in *Central Bank* confronted a statute that by its terms is far more restrictive than Section 30122, which broadly prohibits contravention of the contribution limits through schemes involving intermediaries and straw donors.[21]

Third, the Commission has recognized in prior MURs that the prohibition applies to a wide variety of types of schemes involving multiple participants with different roles. Further, the Commission has consistently enforced Section 30122 and Section 110.4(b)(1)(iii) against respondents who knowingly helped or assisted in the making of contributions that resulted from those schemes. That conduct has usually consisted of directing others to participate in the scheme as conduits and handling the payments.[22] By the same token, the record evidence here shows that Swallow directed someone to finance the scheme, monitored the payments, and indeed acted to ensure the scheme succeeded when he identified a problem with some of the payments.[23]

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19 Probable Cause Hearing Tr. at 6:9–7:3 (referring to *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

20 *Central Bank*, 511 U.S. at 191.

21 To be liable under the statute at issue in *Central Bank*, a person must commit a manipulative or deceptive act in connection with the purchase or sale of securities. *Id.* at 173. That requirement, in the view of the Court, forecloses liability on those who aid or abet a violation since they did not commit such an act. *Id.* Section 30122, however, extends to any person who "made" a contribution in the name of another, including through intermediaries and multi-person schemes, and courts have routinely interpreted that language broadly. Accordingly, Section 30122 does not foreclose liability on individuals such as Swallow who knowingly help or assist in making a conduit contribution by instigating and initiating that activity.

22 *See e.g.*, MUR 6922 (Henke) (directing others); MUR 6223 (St. John) (directing others; handling payments); MUR 5948 (CHS) (handling payments); MUR 5453 (Watts) (directing others; handling payments); MUR 4756 (Baldwin & Kreitzberg) (handling payments) MUR 4748 (Moniot) (directing others); MUR 4582 (Wahi, *et al.*) (directing others).

23 *Cf.* MUR 4748 (Moniot) (respondent "initiated the entire sequence of events" that led to the reimbursed contributions but did not herself fund the scheme or handle the payments).

We note also that Respondent struggles to avoid the application of *United States v. Whittemore*, 776 F.3d 1074 (9th Cir. 2015), to Swallow's conduct. Reply Brief at 6. In that matter, the Ninth Circuit concluded that making an unconditional gift is no defense to liability under Section 30122. *See* General Counsel's Brief at 4-5 n.10. Respondent's position entirely lacks merit. Among other things, there is no evidence that Swallow believed that Johnson customarily provided a wide range of family, friends, and business associates monetary gifts of $2,400 or more during the middle of the year, and the contention that *Whittemore*'s analysis of the reach of the statute should be disregarded because it post-dates Swallow's conduct is simply untenable. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").

C. Johnson's Recorded Statements Describing the Conduit Contribution Scheme are Sufficiently Specific and Credible to Proceed.

Respondent contends that Johnson's statements about Swallow cannot be trusted due to Johnson's deceitfulness, bias against Swallow, and his apparent willingness to offer up Swallow to advance his own interests.[24] At the outset, it is hardly unusual for the various participants in a multi-person scheme that seeks an illegal end to be deceitful in their own rights — indeed, it is Johnson's willingness to engage in fraudulent conduct that made him an ideal target and accomplice for Swallow. But after careful review of the available information regarding Johnson's past, his relationship with Swallow, and his efforts to avoid prosecution for both himself and Swallow, his statements describing Swallow's specific role in the conduit contribution scheme here are sufficiently corroborated and reliable to support a finding of probable cause to believe.

1. Indicia of Johnson's Credibility as to Swallow's Participation.

Johnson's recorded statements, made during several interviews with Utah law enforcement officials and FBI agents, describe the scheme in great detail.[25] Those statements are sufficiently credible based on (1) their specificity; (2) their consistency with other information regarding Johnson's relationship with Swallow; (3) Johnson's implication of himself in a scheme that avoided detection for over two years; (4) Johnson's insistence that Swallow was careful to describe the reimbursements as "gifts" rather than as outright reimbursements; and (5) Johnson's incentive to provide investigators with truthful information as discussed below.[26]

In providing information to law enforcement agents, Johnson hoped that investigators would, in exchange, review and take action based on evidence that he prepared that he contended suggested the misconduct of a federal prosecutor involved in his unrelated criminal case.[27] Presenting false information about Swallow to the law enforcement officials he sought to

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[24] *Id.* at 9-14; Probable Cause Hearing Tr. at 10:7-12:20. The Reply Brief also speculates that the DOJ "turned their noses up at the idea of prosecuting" Swallow based on an assessment of Johnson's credibility. Reply Brief at 4-5. There is no available information to support that claim. In addition, Respondent asserts, without offering any support, that "Johnson had a strong incentive to construct a case against Mr. Swallow to gain favor with [federal] prosecutors." Reply Brief at 8; Probable Cause Hearing Tr. at 11:12–18. However, Johnson's recorded interviews were conducted by a state investigation that had no connection to Johnson's criminal proceeding. In fact, the U.S. Attorney's office conducting Johnson's criminal case was recused from the state's investigation. *See* Investigative Committee Report at 21 n.1; Recording 0001 at 2:37:50.

[25] During the recorded interviews, Johnson spoke with Troy Rawlings (Davis County Attorney), Scott Nesbitt (Utah Dep't of Public Safety Bureau of Investigation, Major Crimes Team), John Isakson (Special Agent, FBI), and Sanitha Ulsh (Special Agent, FBI). Those officials continue to rely on information provided by Johnson, as evidenced in the pending state charges against Swallow. *See, e.g.*, Swallow Amended Information at 6.

[26] We also note that Johnson would have subjected himself to potential criminal liability under 18 U.S.C. § 1001 if he lied about Swallow's involvement in the conduit contribution scheme to federal agents conducting an investigation, and that Johnson's attorney accompanied him for much of the interviews.

[27] Johnson claimed that Assistant U.S. Attorney Brent Ward and his staff threatened and intimidated witnesses, and threatened Johnson with the arrest of his friends and family. *See, e.g.*, Recording 0001 at 2:25:50.

persuade would have undermined the credibility of his information regarding that prosecutor. Further, the federal campaign finance allegations aside, Johnson had a significant amount of information about Swallow to offer.[28] And many of the topics Johnson discussed were ultimately cited in the state charging documents against Swallow.[29]

At the Probable Cause Hearing, Respondent referred to an ABC News report that recounts Johnson's apparent explanation that representatives from the online poker industry instructed him to hide illegal contributions and that he made the reimbursements using money from poker accounts.[30] Respondent cited to that article to undermine Johnson's credibility, but neither of those alleged facts contradicts Johnson's description of Swallow's initiation of the conduit contribution scheme. Furthermore, Johnson's reported claims in the news article are actually supported by his representations during the recorded interviews and, further, they are consistent with the motive that Swallow relied on when seeking to persuade Johnson to engage in the scheme.[31]

Respondent argues that a major source of Johnson's potential bias against Swallow stems from Swallow's facilitation of a $250,000 payment from Johnson to payday lending magnate Richard Rawle that Johnson hoped would forestall the FTC's investigation of Johnson's company, I Works.[32] We address this potential bias in the General Counsel's Brief, including that Johnson made an effort *to immunize* Swallow from prosecution in connection with that

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[28] *See id.* at 29:00 (Johnson allowing FBI agents to review his documents and e-mails while he leaves the room); *id.* at 2:56:00 (Johnson providing FBI agents with two gigabytes of digital information); *id.* at 3:04:00 (Johnson providing FBI agents with thumb drives and cellular phones). In addition, Johnson suggested that the agents acquire an e-mail server confiscated by the FTC in order to avoid chain of custody issues. *Id.* at 1:53:00. Presumably, Johnson was confident that information would be consistent with the statements he made during the interviews.

[29] *See, e.g.*, Swallow Amended Information ¶ 13 (Swallow's dealings with I Works while Chief Deputy); *id.* ¶¶ 14-19 (Johnson's access to the Utah Attorney General's Office through Swallow regarding the issue of online poker); *id.* ¶¶ 21-23, 26 (Swallow's involvement in the $250,000 payment to forestall the FTC's investigation of I Works); *id.* ¶ 25 (Swallow's use of Johnson's personal aircraft and luxury houseboat as Chief Deputy and while considering issues related to online poker); *id.* ¶ 29 (Swallow's offer to resolve Johnson's legal matter with the FTC in exchange for $120,000).

[30] Probable Cause Hearing Tr. at 18:23 – 19:13.

[31] Johnson stated, "the poker people were like in heaven over [the idea of securing access to a U.S. Attorney], and they wanted to do anything Swallow suggested to make, you know, to help make that happen." *See* Recording 0375 at 27:20-28:10. In addition, Johnson stated, "I was just giving 'em money from the poker people." *Id.* at 28:50-29:00; *see* General Counsel's Brief at 9 n.25 (discussing the possibility that Johnson reimbursed the contributions using funds derived from online poker transactions).

[32] Reply Brief at 3; Probable Cause Hearing Tr. at 11:4–11. Rawle owned the Check City chain of payday lending retail outlets and was Swallow's patron and former employer. Investigative Committee Report at 6-7. According to e-mail evidence, Swallow told Johnson that Rawle had a connection to "Harry Reid's guy" and that the cost of Rawle contacting him for this purpose "probably won't be cheap . . . they have been building capital for quite a while and this will be a serious withdrawal of capital." *Id.* at 132-33. For his efforts, Swallow received a $23,500 share of the $250,00 divided in two payments (each to a new entity established by Swallow for this purpose — P Solutions LLC). *Id.* at 135. The payment did not achieve the desired result. *See* Complaint, *FTC v. Johnson*, No. 2:10-2203 (D. Nev. Dec. 21, 2010).

payment by seeking to include Swallow in an immunity deal that would have been part of the plea agreement in his criminal matter.[33] Although Respondent contends — as he must — that this was merely a "diabolical" attempt to besmirch Swallow's image, the surmise that the effort to protect Swallow (along with members of Johnson's family and circle of friends) was in fact a byzantine gambit to discredit Swallow not only lacks factual support, it appears incredible on its face.[34]

2. Johnson Specifies That Swallow Directed Him to Reimburse the Contributions in Connection With Lee's 2010 Campaign.

Respondent also argues that Johnson repeatedly refers to the 2009 Shurtleff campaign but not to the 2010 Lee campaign when he describes how Swallow induced him to reimburse the contributions of others.[35] Respondent is mistaken. On the recordings, Johnson outlines the Shurtleff-related contribution scheme to explain how Swallow approached him to make a large contribution, how he offered to write a single check in that amount, how Swallow informed him of the individual contribution limits, and how Swallow told him the money could come from others if Johnson nominally made "gifts" to straw donors. However, that was not the only conduit contribution scheme that Swallow solicited Johnson to execute. Johnson is very clear that Swallow directed him to implement the same procedures when executing the subsequent Lee-related scheme. In fact, the inexperienced Johnson says that he asked Swallow if the limits also applied to Lee's campaign or if he could write a single check.[36] Johnson stated that he asked Swallow: "Is this the same thing? I can't just write a check? I gotta go out, and figure out,

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33 General Counsel's Brief at 19-20 n.58; *see* Recording 0001 at 1:16:00 (Johnson describing his plea negotiations and why he included Swallow on the immunity list). Swallow plainly stood to benefit from an immunity deal had Johnson's effort succeeded. Indeed, Swallow's state charging documents include significant information about the $250,000 payment. Swallow Amended Information ¶¶ 21-23, 26, 30-43.

34 Reply Brief at 3 n.14; Probable Cause Hearing Tr. at 12:12–20. In fact, the available information suggests that Johnson's efforts were legitimate. The available information indicates that Johnson agreed to plead guilty in the fall of 2012 and requested that prosecutors not target his friends and family. Johnson and prosecutors apparently negotiated the terms of a plea agreement over several months. In January 2013, during his plea colloquy, Johnson expressed concern that the immunity portion of the agreement did not list anyone by name or extend beyond the I Works matter. Transcript of Hearing on Change of Plea at 16-22, *United States v. Johnson*, 2:11-cr-501 DN (D. Utah Jan. 11, 2013). He mentioned his father-in-law as an example of someone who might be subject to a potential prosecution unrelated to the I Works matter and produced a list of names that included family, friends, and also Swallow. *Id.* at 21-22. The plea agreement ultimately failed due to an impasse with respect to the immunity issue. *Id.* at 23. During his recorded interviews, Johnson described his efforts to protect Swallow in great detail. *See* Recording 0001 at 1:10:20.

35 Reply Brief at 7; Probable Cause Hearing Tr. at 14:12 – 15:16.

36 Johnson exhibited a general unfamiliarity with the individual contribution limits for federal campaigns. He alternates between describing the limit as $2,400 and $2,500 — it was the former, *e.g., compare* Recording 0375 at 30:25 *with* Recording 0397 at 45:20, and he incorrectly described the Act's individual contribution limit as "no more than $2,400 per person, per quarter, per something." Recording 0375 at 30:25.

and get people money so that they pay the money?" to which Swallow allegedly replied, "Yeah, it's gotta be the same way, same rules."[37]

D. E-Mail Evidence Corroborates Johnson's Statements and Shows Swallow Acting in a Manner Consistent With Knowledge That Johnson Was the True Source of Certain Contributions.

1. The Lindquist Memo Corroborates Johnson's Statements.

The General Counsel's Brief relies on a memorandum from Lindquist and Associates to Steven Reich, special counsel for the Utah House Special Investigative Committee (the "Lindquist Memo"), as corroborative evidence of Johnson's recorded representations with law enforcement officials.[38] The Reply Brief asserts that, due to her desperation to "try to prove any claim" against Swallow, Lindquist falsely described (or invented) a series of e-mails between Swallow and Johnson in which Swallow told Johnson to "make donations by giving money to other people to donate."[39]

There is no information undermining Lindquist's investigative abilities or the reliability of the Lindquist Memo.[40] Nor did Lindquist's superiors ever suggest any reason to doubt the reliability of her work product.[41] In addition, several of the other e-mails described or mentioned

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[37] Recording 0397 at 53:10. Johnson made a similar statement in a prior interview. When Swallow approached him to raise money for Lee's campaign, Johnson said that he told Swallow he was exhausted from rounding up straw donors for Shurtleff's campaign but that he could "get you guys a check for 100 grand no problem." Recording 0375 at 30:02-30:40. Johnson said that Swallow told him: "No you can't do that . . . you can give people money as a gift and they can donate it if they want." *Id.*

The Commission should also not credit the claim that Swallow "had no reason to get involved in some scheme to have Johnson reimburse donors." Probable Cause Hearing Tr. at 16:20–22. A desire to ingratiate himself with a potential U.S. Senator alone may have been an adequate motive. Regardless, Swallow had an opportunity to provide information regarding his fundraising for the Lee Committee and the benefits he might have received from raising significant pre-primary money, but he chose not to comply with the Commission's subpoenas.

[38] *See* General Counsel's Report, Attach. 4. In a civil enforcement context, Respondent would likely argue that the Lindquist Memo constitutes prohibited hearsay. *See* Reply Brief at 1, 8 (describing the Lindquist Memo as "hearsay"). Several well-established exceptions to the prohibition against hearsay would permit the introduction of the Lindquist Memo to prove the contents of the e-mails that it describes.

[39] Reply Brief at 16; Lindquist Memo at 2. Respondent does not address the fact that Lindquist's supposed fabrication or mischaracterization of the e-mails closely matches Johnson's separate descriptions of the role he ascribes to Swallow.

[40] The Reply Brief speculates that Lindquist "has been saying to OGC staff she saw such emails in order to not contradict her narrative." Reply Brief at 16. We make no such claim with respect to our communications with Lindquist. General Counsel's Brief at 6-7.

[41] Steven Reich, one of the lead attorneys from Akin Gump who served as special counsel to the Utah House Special Investigative Committee, told OGC that the investigation concluded once Swallow announced his resignation in late November 2013, but Lindquist endeavored to pursue her investigation and raise new issues. Lindquist viewed and described the e-mails just a few days after the investigation ended. However, neither Reich nor John Fellows, General Counsel for the Utah House and a staff member of the Utah House Special Investigative Committee, provided any negative information about Lindquist's investigative abilities or the veracity of the

in the Lindquist Memo have been confirmed by official sources as authentic and accurate.[42] And although Respondent focuses entirely on Lindquist in its critique, there was a second signatory on the Lindquist Memo — Richard H. Casper, an attorney working in collaboration with Lindquist & Associates.[43] Respondent has offered no information that would question his work ethic or credibility.[44]

Respondent also argues that since the e-mails described in the Lindquist Memo relate to a prior conduit contribution scheme in connection with the 2009 Shurtleff campaign, they have no relevance to the allegations in this matter.[45] This assertion ignores the probative value of that evidence both as intrinsic evidence of the scheme and Swallow's relationship with Johnson, and as corroboration of the specific representations that Johnson made in his recorded series of interviews with law enforcement personnel — including that Swallow approached Johnson to make contributions to Shurtleff's campaign and that Swallow told Johnson to reimburse the contributions of others.[46]

As to the existence of the e-mails themselves, the Utah House Special Investigative Committee may not have collected them because the investigation had formally ended, they were not germane since they occurred before Swallow served as Chief Deputy), or because they involve federal violations unrelated to the state corruption examined by the committee. The investigators similarly viewed but apparently did not collect the other e-mails described in the memo, including those we have substantiated. But none of this means the e-mails did not then exist or are not still accessible.

Moreover, Respondent had the opportunity to demonstrate that the e-mails did not exist or were mischaracterized, but he refused to answer the Commission's subpoenas and questions concerning that topic. The Commission should therefore draw an adverse inference from that

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evidence she developed. Moreover, the committee specifically acknowledged in its final report that "Lindquist and Associates . . . . proved tenacious and committed in their pursuit of information for the Committee." Acknowledgement, Investigative Committee Report.

42 *Compare* Lindquist Memo pg. 2, ¶ 4 *with* Investigative Committee Report, Ex. 12; *compare* Lindquist Memo pg. 2, ¶ 7 *with* Investigative Committee Report at 57; *compare* Lindquist Memo pg. 2, ¶ 9 *with* Swallow Amended Information ¶ 20; *compare* Lindquist Memo at 2 *with* Swallow Amended Information ¶ 21.

43 Rich Casper, LINKEDIN, https://www.linkedin.com/pub/rich-casper/36/525/975 (last visited Oct. 10, 2015) (explaining that, as a contractor for the Utah House Special Investigative Committee, he "conducted interviews, obtained and analyzed records, documents and data, and summarized various aspects of the investigation" for the committee's staff including Akin Gump attorneys).

44 Furthermore, under the Utah Rules of Professional Conduct, Casper was under an obligation not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "engage in conduct that is prejudicial to the administration of justice." Utah R. Prof'l Conduct R. 8.4. The Reply Brief does not advance any information to explain why Casper would have jeopardized his law license by falsifying information regarding Swallow's involvement in a conduit contribution scheme.

45 Reply Brief at 7-8; Probable Cause Hearing Tr. at 15:13–22.

46 Any information about the Shurtleff-related scheme is directly relevant to understanding the Lee-related scheme since Johnson specified that the two schemes were "essentially the same thing." Recording 0397 at 51:00.

refusal. Indeed, such an inference would be all the more appropriate given Swallow's apparent destruction of electronic evidence — for which he has since been criminally charged — the profound scope of that spoliation of electronic evidence, and its highly suspicious timing.[47] As we have noted, Swallow caused or ordered the deletion of personal and official e-mail, office calendar entries, and all data on two office computers.[48] He also claims that he lost a hard drive containing copies of data from his two office computers, that the hard drive of his home computer crashed, that he lost a campaign-purchased iPad, and that his personal cell phone malfunctioned.[49] These activities, all in 2012 or early 2013, occurred after a recorded meeting in which Swallow and Johnson discussed the incriminating nature of Swallow's electronic correspondence.[50]

Moreover, the inference that Swallow intentionally destroyed or disposed of these items in an effort to thwart an official investigation into his conduct is supported by parallel attempts to falsify documentary evidence. Swallow allegedly fabricated evidence (on several occasions) related to the $250,000 payment from Johnson to Rawle that Swallow facilitated specifically to conceal his role in that affair and his connection to Johnson.[51] In addition, per Johnson's suggestion at the same meeting, Swallow purchased a prepaid cellular phone (or a "burner") which does not leave a digital footprint.[52]

Respondent further emphasizes Karen Beck-Redd's apparent bias against Swallow and in favor of Johnson to suggest that the Lindquist Memo's description of e-mails in her possession is not reliable.[53] Beck-Redd was Johnson's personal assistant, charged with handling the scheduling of his luxury houseboat and planes. As such, she would not have first-hand knowledge of the activities represented in those e-mails. Rather, Beck-Redd was merely a custodian of certain electronic documents belonging to Johnson. She confirmed in a recorded interview with FBI agents that she provided Lindquist with access to those documents during the

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47 Swallow Amended Information ¶¶ 31-32, 35, 38, 40-43.

48 *See* Investigative Committee Report at 156-57.

49 *Id.*

50 *Id.* at 122. At the recorded April 2012 meeting, Johnson indicated that the FBI was investigating his business dealings and that investigators might catch wind of Johnson's dealings with Swallow, emphasizing that the FBI would be far more interested in "roast[ing] a public official." *Id.* at 137. Johnson recalled the content of some of their e-mails to which Swallow replied: "Wow . . . . No wonder they're after me . . . . [I]f the FBI thinks what it looks like on paper . . . then they're going to come hot after me." *Id.* at 139. During that conversation, Swallow and Johnson specifically discussed the need to delete e-mails related to the $250,000 payment in connection with the FTC investigation. *Id.* at 143-44.

51 *Id.* at 13-14; *see also* Swallow Amended Information ¶ 32 (Swallow "retroactively created two invoices for services rendered to Rawle . . . purportedly justifying the November 2010 and April 2011 payments of $8,500 and $15,000 [to Swallow from Johnson's $250,000 payment]"); ¶ 43 (Swallow "retroactively created his day planner entries for the calendar years 2010 and 2011, to reflect his supposed work on" a consulting project).

52 Investigative Committee Report at 15-16.

53 Reply Brief at 16-17. Probable Cause Hearing Tr. at 13:8 –14; 14:5–11.

meetings recounted in the Lindquist Memo.[54] Thus, any bias that Beck-Redd might have had against Swallow and her loyalty to Johnson are inconsequential to the veracity of the Lindquist Memo.

2. The Cited E-Mails Between Swallow and Johnson Are Consistent with Swallow's Knowledge that Johnson Was the True Source of Contributions and Demonstrates Swallow's Active Participation in the Scheme.

As we explain in the General Counsel's Brief, on June 14, 2010, one of the companies operated by Johnson's associates for his benefit issued a check to Sole Group LLC for $14,400 — the exact amount needed to fund six contributions for $2,400. And, on the same day, Sole Group issued six checks for $2,400 to six individuals each of whom contributed to the Lee Committee within the next few days.[55] On June 21, 2010, Swallow e-mailed Johnson regarding "those checks" and promised to "forward you the names."[56]

On their face, the June 21 E-mails indicate that Swallow knew certain contributions were connected to Johnson and that Swallow assumed Johnson could cause the nominal contributors to quickly resubmit new checks with sufficient funds to remedy their bounced checks.[57] Swallow did not inquire why checks from four out of the approximately twenty purported Johnson donors bounced or whether those individuals, despite not having $2,400 in their bank accounts, would be capable of actually contributing the maximum amount in short order. If indeed Swallow initiated and instigated the scheme, however, those e-mails would demonstrate that Swallow actively participated in the scheme to cause the reimbursement of contributions.

The Commission asked Swallow about this exchange and for any relevant documents that might have revealed the promised follow-up information. He refused to provide any such information. Consequently, the Commission should draw an adverse inference that Swallow would have provided answers and documents confirming his participation in the scheme.

The Reply Brief argues that Johnson's reply to Swallow stating that he might have "pushed a few people too hard," actually supports the theory that Swallow did not have knowledge of the reimbursements.[58] The more likely explanation, however, is that Johnson

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54 *See* Recording 0389 at 1:19:20; General Counsel's Brief at 6-7 n.17. Beck-Redd (and, for that matter, Lindquist) would have exposed herself to potential liability under 18 U.S.C. § 1001 had she lied about those e-mails to federal agents conducting an investigation.

55 General Counsel's Brief at 11-12.

56 *Id.* OGC is not privy to any of the possible follow-up correspondence due to Swallow's assertion of the Fifth Amendment privilege against self-incrimination to the Commission's Subpoena to Produce Documents.

57 The Reply Brief misinterprets our analysis when it states that "OGC suggests that this email exchange *demonstrates* that Mr. Swallow knew that the donors from whom Johnson was soliciting contributions were being reimbursed by Johnson." Reply Brief at 15. (emphasis added). We state that the e-mail exchange is *consistent* with such knowledge. General Counsel's Brief at 19.

58 Reply Brief at 15 n.69.

referred to the short amount of time that he gave some of his straw donors to deposit their reimbursement checks.[59] In fact, Johnson claimed that he admonished Swallow for pushing him to execute his reimbursements too quickly, leading to the conduit's insufficient funds.[60]

E. The Utah House Special Investigative Committee is a Reliable Source of Information Regarding Swallow's Relationship with Johnson, Destruction of Evidence, and Pattern of Concealing the Sources of Campaign Money.

The Utah House Special Investigative Committee ("Special Investigative Committee") is a key source of information for the General Counsel's Brief. The committee made relevant findings with respect to (1) Swallow's solicitation of large campaign contributions from Johnson on the state level; (2) the extraordinary access to the Utah Attorney General's Office that Swallow provided to Johnson, especially on the issue of online poker; (3) Swallow's pattern of concealing the sources of campaign contributions during his attorney general campaign; (4) Swallow's efforts to help Johnson with his poker processing operations; and (5) Swallow's destruction and falsification of evidence related to his dealings with Johnson.

The Reply Brief generally accuses the committee and its investigation of being "tainted," without providing any credible support.[61] Incredibly, the Reply Brief further claims that the national law firm that the committee retained felt "great pressure to come up with something" (i.e., falsify or manufacture evidence) to justify the significant cost of the investigation.[62] The Reply Brief also speculates that investigators might have conjured evidence to prove their worth to the investigation and "justify [their] own existence."[63] There is no information to support any of these assertions.

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[59] Recording 0375 at 32:40-33:05. In the case of the straw donors to whom Johnson specifically referred when making this statement, they provided contributions checks to the Lee Committee on or before June 12, 2010, but did not receive their reimbursement checks until June 14, 2010. *See* General Counsel's Brief, Attach. 6 (contribution checks); Attach. 10 (reimbursement checks).

[60] *See* Recording 0397 at 47:42-48:23.

[61] Reply Brief at 16; Probable Cause Hearing Tr. at 12:21–24. Indeed, the membership of the Special Investigative Committee was purposely bipartisan, as were the two prosecutors that charged Swallow at the state level. *See* Robert Gehrke and Lee Davidson, *House GOP OKs Swallow Investigation On Way to Possible Impeachment*, SALT LAKE TRIB. (June 19, 2013) (on the committee's bipartisan composition, one state representative remarked, "The committee has got to be bipartisan to ensure the integrity of the oversight and to send a clear message to the public that this is authentic"); Robert Gehrke, Salt Lake, Davis Prosecutors Also Investigating Swallow, SALT LAKE TRIB. (May 16, 2013) (the prosecutors explained a joint investigation was necessary to conduct a truly "bipartisan analysis" and avoid the "perception of any partisanship").

[62] According to the Special Investigative Committee, that high cost was due in part to Swallow's own efforts to obstruct the investigation. Investigative Committee Report at 29-30.

[63] Reply Brief at 2, 16.

F. There is No Information that an Alleged Political Conspiracy Undermined Official Investigations or That Johnson Was a Participant.

The Reply Brief insinuates that the "long knives" of a "political assassination" conspiracy contaminated the bipartisan Special Investigative Committee and several other investigations of Swallow.[64] However, Respondent misdescribes the affidavit provided with the Reply Brief.[65] Quite simply, the affidavit provides no information indicating that any of Swallow's opponents spread false information about him. If the affidavit offers anything relevant to this proceeding, that relevancy is limited to the affiant's assessment, based on first-hand knowledge, that Swallow was part of Utah's corruption problem and the affiant's account of Swallow's threat to bury a grand jury investigation.

The Reply Brief also makes an entirely unsupported assertion that Johnson was "a central component in the political assassination" conspiracy and speculates that Johnson might have fabricated Swallow's involvement in the conduit contribution scheme to advance an alleged plot to install Sean Reyes as attorney general.[66] There is no information that links Johnson to any such political conspiracy, even assuming its existence. Indeed, the affidavit makes only a passing reference to Johnson's alleged involvement: an apparent "plan at that time" to use Johnson as a source for negative information about Swallow.[67] But there is no explanation about the timing, circumstances, or content of the requested information and, most importantly, there is no indication that Johnson actually participated or that the negative information the plan sought to obtain would have been false.

G. The Commission Should Draw Adverse Inferences from Swallow's Assertion of the Fifth Amendment Privilege Against Self-Incrimination.

In June 2015, the statute of limitations expired for potential federal criminal charges arising out of Swallow's conduct in this matter. In an effort to maintain his assertion of the Fifth Amendment privilege against self-incrimination in response to the Commission's subpoenas, Respondent argues that Swallow's silence is necessary because of a "fear that some bald-faced lie will lead to a trumped-up criminal charge" against Swallow based on his truthful statements.[68]

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64 *Id.* at 2.

65 The affiant, Robert Joseph, is a whistleblower who spent over a decade trying to convince Swallow and Shurtleff to investigate corruption in the Salt Lake City Police Department. *See* Reply Brief, Attach. 1 ("Robert Joseph Affidavit") ¶¶ 11-29. Joseph states that Swallow, who served as a bishop in Joseph's church, "attempted to use his ecclesiastical position to get [Joseph] to drop the Grand Jury investigations," and threatened that Joseph "would never find employment in the State of Utah and suggested [Joseph's] best option was to leave the state." *Id.* ¶ 24. In light of his assessment that Swallow was part of Utah's corruption problem, Joseph said that he agreed to help Swallow's political opponents. *Id.* ¶¶ 7, 29-35.

66 Reply Brief at 3, 14.

67 Robert Joseph Affidavit ¶ 42.

68 Reply Brief at 4; Probable cause Hearing Tr. at 29:20–30:4. Respondent hypothesizes the existence of a "hungry new prosecutor" who might be "willing to rely on shaky evidence." Reply Brief at 4.

As a legal matter, the assertion of the privilege to preempt an unspecified, illegitimate prosecution for providing truthful testimony would entirely undermine the Commission's investigatory powers; the same argument has therefore been rejected by federal courts for precisely that reason on many prior occasions.[69] Indeed, Swallow's attempt to evade the Commission's subpoenas on this ground would eviscerate compulsory process as to any witness inclined to follow suit. The Commission's interest in performing its statutory duty to enforce the Act significantly outweighs Swallow's interest in asserting the privilege in this administrative proceeding, where there is no specific contention that a truthful statement will tend to expose him to further criminal liability. Swallow's assertion deprives the Commission of valuable information that might be determinative in its search for the truth.[70] The Commission should therefore reject the argument as well, and should appropriately draw the inferences that naturally follow from Swallow's silence in the face of the Commission's detailed questions and document requests.[71]

The Reply Brief also argues that there is not sufficient independent evidence to justify an adverse inference in this matter.[72] However, there is information from multiple sources indicating that Swallow engaged in the scheme alleged here. The most comprehensive evidence comes from Johnson's recorded representations to Utah law enforcement officials and FBI special agents, in which he recounts at length Swallow's involvement in the scheme. Moreover, an investigator viewed and described e-mails from Swallow to Johnson with instructions to reimburse contributions to Shurtleff's 2009 campaign. The substance of those e-mails corroborates Johnson's separate, independent representations. In addition, e-mails between Swallow and Johnson in connection with Lee's 2010 campaign reflect that Swallow alerted Johnson to four bounced contribution checks from Johnson's straw donors. Those e-mails tend to further support Johnson's representations, as they demonstrate that Swallow acted in a manner consistent with knowledge that Johnson was the true source of the contributions. Given these independent sources of evidence concerning Swallow's alleged conduct, Swallow's refusal to

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69 In the context of subpoenas to testify before a grand jury, courts routinely uphold contempt orders when witnesses refuse to testify based on an imagined fear that truthful statements might be used as the basis for a later perjury or false statements charge. *See, e.g.*, *In re Grand Jury Subpoena*, 97 F.3d 1090, 1094 (8th Cir. 1996); *In re Grand Jury Proceedings*, 819 F.2d 981, 983 (11th Cir. 1987) (recognizing that the witness's argument "would provide practically all potential grand jury witnesses with a fool-proof escape from testifying simply by claiming that the grand jury or a prosecutor might disagree with their version of the truth."); *In re Poutre*, 602 F.2d 1004, 1005 (1st Cir. 1979) (recognizing that the witness's argument "would frustrate completely the investigative function of the grand jury and would involve the court in the wholly inappropriate and virtually impossible task of probing the witness's veracity and sincerity before he has testified . . . .").

70 *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (quotations and citations omitted) ("[I]n a civil proceeding, the parties are on a somewhat equal footing, one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding. Thus, not allowing the negative inference to be drawn poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth.").

71 *See Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Int'l Union (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.").

72 Reply Brief at 18.

answer the Commission's particularized requests counsels in favor of drawing the obvious inference that truthful answers would likely have been adverse to Swallow.[73]

The Reply Brief also argues, without supplying any legal authority, that an adverse inference from Swallow's assertion of the privilege is impermissible given the "quasi-criminal" nature of a knowing and willful enforcement action.[74] However, the Commission's enforcement actions are entirely separate from the criminal remedies available under the Act — the penalty is monetary in nature and subject to mandatory conciliation. There is clear legal precedent for making an adverse inference in the context of a knowing and willful civil enforcement action.[75] Furthermore, the Commission has previously drawn adverse inferences against respondents to support a probable cause to believe finding regarding knowing and willful violations of 52 U.S.C. § 30122.[76]

III. RECOMMENDATION

Find probable cause to believe that John Swallow knowingly and willfully violated 52 U.S.C. § 30122.

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73 *See Baxter*, 425 U.S. at 318 (explaining that an adverse inference is appropriate when parties in a civil action refuse to testify in response to probative evidence).

74 Reply Brief at 18.

75 In an analogous situation involving a state's enforcement of the Telephone Consumer Protection Act ("TCPA") as applied to campaign-related robocalls, a district court made an adverse inference that the defendant had knowledge of the TCPA and other regulatory requirements and, as a result, that the defendant knowingly and willfully violated the statute resulting in potential treble damages. *See Md. v. Universal Elections, Inc.*, 862 F. Supp. 2d 457, 464 (D. Md. 2012), *aff'd*, 729 F.3d 370 (4th Cir. 2013).

76 MUR 5504 (Karoly); *see also* MUR 5444 (Nat'l Democratic Congressional Comm.) (adverse inference in support of a reason to believe finding for other knowing and willful violations of the Act).