Note: Two names and associated identifying information have been temporarily redacted from the following document in the public file for FEC Matter Under Review 6920. This information is the subject of litigation and will remain redacted pending the resolution of the litigation or further order of the Court. *See Doe v. FEC, No. 17-02694 (D.D.C.)*.
BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

American Conservative Union, et al.

MUR 6920

THIRD GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

We recommend that the Commission: 1) find reason to believe that

and , in his official capacity as trustee, ( ) violated

52 U.S.C. § 30122 by making or assisting in the making of a contribution in the name of another;

and 2) authorize the Office of the General Counsel to file a civil suit for relief in United States District Court against and in his official capacity as trustee, for failure to comply

with the Commission’s Subpoena and Order to produce documents and answer interrogatories.

II. BACKGROUND

The Federal Election Commission (the “Commission”) received a Complaint alleging

that, on October 31, 2012, an Unknown Respondent made a $1.71 million contribution to Now or Never PAC in the name of American Conservative Union (“ACU”), in violation of

52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b). Based on ACU’s representation in its IRS Form 990 that the contribution to Now or Never PAC was “a political contribution received by the Organization and promptly and directly delivered to a separate political organization,” the

1 While other Respondents in this matter have agreed to varying amounts of tolling, the statute of limitations as to which has not tolled, will run on October 31, 2017.

2 If does not agree to toll, we anticipate sending out a probable cause to believe (“PCTB”) General Counsel’s Brief as to both Government Integrity LLC within the next week. This would allow the Commission to consider a possible PCTB determination prior to the expiration of the statute of limitations on October 31, 2017.

Commission found reason to believe that an Unknown Respondent made a contribution in the name of another.³

During the initial stage of its investigation, the Commission learned that Government Integrity, LLC ("GI LLC") wired $1.8 million to ACU on the same date ACU wired $1.71 million to Now or Never PAC, and that James C. Thomas, III, the treasurer of Now or Never PAC, also acted as the agent of GI LLC in wiring the funds to ACU. Based on this information, the Office of General Counsel ("OGC") notified GI LLC and Thomas of the Complaint and the Commission's findings as to Unknown Respondents. The Commission subsequently found reason to believe that GI LLC violated 52 U.S.C. § 30122 by making a contribution in the name of another, that Thomas knowingly and willfully violated 52 U.S.C. § 30122 by assisting in the making of, accepting, and misreporting a contribution in the name of another, and that Now or Never PAC violated 52 U.S.C. § 30122 by knowingly and willfully accepting and misreporting a contribution in the name of another.⁴

As set forth below, OGC has recently learned that provided GI LLC with the funds that GI LLC then immediately sent to ACU. The record establishes a reasonable inference that purpose for funding GI LLC was to make a contribution to Now or Never PAC. Based on this information, we recommend that the Commission find reason to believe that and

³ See Factual & Legal Analysis (Unknown Respondent), MUR 6920 (Feb. 7, 2017).
⁴ See Factual & Legal Analyses (Government Integrity LLC; Thomas; Now or Never PAC), MUR 6920 (July 13, 2017).
in his official capacity as trustee, violated 52 U.S.C. § 30122 by either making or assisting in making a contribution in the name of another.

III. FACTS

A. Relevant Parties

American Conservative Union is registered with the IRS as a social welfare organization under section 501(c)(4) of the Internal Revenue Code, and is not registered with the Commission as a political committee. ACU describes itself as the oldest and largest conservative grassroots organization in the United States. It received donations totaling $8,485,503 in 2012. ACU states that prior to its receipt of funds from GI LLC, it had a combined total balance of approximately $538,000 across its bank accounts. In 2012, ACU's executive director was Gregg Keller.

Now or Never PAC is an independent expenditure-only committee that filed its Statement of Organization with the Commission on February 21, 2012. Thomas, who is both an attorney and an accountant, has been Now or Never PAC's treasurer since its organization in 2012. During the 2012 cycle, Now or Never PAC raised $8,250,500 and reported $7,760,174 in independent expenditures. The group raised $540,000 during the 2014 cycle and reported $714,811 in independent expenditures. Now or Never PAC has been largely inactive since that time. It has not reported independent expenditures since then, and raised only $8,000 in 2016.
Axiom Strategies is a Missouri-based political consulting firm that has connections to both Now or Never PAC and GI LLC. Axiom Strategies provides political consulting services, including fundraising services, to Now or Never PAC. Axiom Strategies has “participated in [Now or Never PAC’s] operations and financial activities,” and Thomas’s terms of engagement with Now or Never PAC “expressly authorize” him to carry out the instructions of Axiom Strategies. Thomas represents that he primarily took direction from Axiom Strategies’ founder, Jeff Roe. Axiom Strategies reportedly also provided GI LLC with recommendations regarding the distribution of its funds.

GI LLC is a Delaware limited liability corporation that was established in September 2012. GI LLC’s only known organizational purpose was to support conservative organizations and causes. Christopher W. Byrd, who died in 2014, served as the “sole manager and officer” of GI LLC in 2012. Byrd retained Thomas to prepare organizational paperwork, serve as attorney and perform various tasks on behalf of GI LLC. Thomas states that all tasks he performed for GI LLC were conducted at the request and under the direction of Byrd.

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9 Axiom Interrogatory Answers at 2 (Sept. 1, 2017).
10 Thomas Interrogatory Answers at 7 (July 28, 2017).
11 Id. at 2.
12 GI LLC incorporated on September 10, 2012. See Delaware Secretary of State.
13 Thomas Interrogatory Answers at 3.
14 Id. at 1-2.
15 Id. at 1, 3.
16 Id. at 1.
17 In an August 24, 2017 telephone conversation with OGC,
funded GI LLC, wiring it $2.5 million only seven weeks after the LLC's formation.

B. Subpoena and Order to

On August 10, 2017, the Commission served through its trustee, with a Subpoena and Order requesting the production of documents and the answers to interrogatories regarding its role in the transaction and the source of the funds used to make a contribution to Now or Never PAC. The day before response was due, newly retained counsel requested an extension of seventeen days.

Because of statute of limitations concerns, OGC was unable to grant the request. Nonetheless, counsel for stated that would not respond to the Subpoena and Order until September 11, 2017. OGC explained that it considered to be in non-compliance, but informed counsel that non-compliance could be mitigated by providing the Commission with documents and information on a rolling basis, or by otherwise making partial productions prior to September 11, 2017. declined to do so and reiterated its intention to respond by September 11, 2017. Contrary to those representations, however, did not respond by September 11, 2017, and instead informed OGC the following day that it “cannot comply” with the Commission’s Subpoena and Order. urged that the Commission resolve GI LLC’s

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18 Thomas Interrogatory Answers at 2. A “nominee” is “[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.” Black’s Law Dictionary (10th ed. 2014).
19 See Thomas Interrogatory Answers at 4.
20
liability without obtaining further information from

2 OGC has informed and GI LLC of the need for further fact-finding—i.e., in the
form of Subpoena and Order response—as well as Commission approval,

C. Contribution to Now or Never PAC

On or very shortly before October 31, 2012, wired $2.5 million to GI LLC.\(^{22}\) On October 31, 2012, Thomas emailed consultants for Now or Never PAC, stating “[t]he 2.5 million is here. I am about to wire $1.8 million to American Conservative Union.”\(^{24}\) Later that same day and immediately after ACU’s receipt of $1.8 million from GI LLC, ACU wired $1.71 million to Now or Never PAC.

Contemporaneous emails among Thomas, Axiom Strategies consultants, and ACU’s Keller indicate that the parties agreed to the three-step transaction to effect a contribution in the name of another. For example, shortly after receiving confirmation of the wire transfer from GI LLC to ACU, Keller wrote to Thomas and Axiom consultants to state, “[w]ill take action

\(^{22}\) Letter from Mike Dry at 2 (September 12, 2017). Prior to that correspondence, made reference to significant privilege issues involved in this matter. OGC requested any non-privileged information and a privilege log. has not complied, and in its most recent letter, does not provide a reason for not complying with the Subpoena and Order.

\(^{23}\) See Thomas Interrogatory Answers at 4; Thomas Documents at JT2017-0003. It is unclear if GI LLC, which had only been formed the previous month, had any funds prior to receiving that transfer.

\(^{24}\) JT2017-0003.
immediately upon receipt." He followed up with that email minutes later, stating that he’d need wiring instructions,” presumably to transfer funds from ACU to Now or Never PAC.

Now or Never PAC, acting through its treasurer, Thomas, reported ACU as the source of the contribution in its post-general report. ACU’s Director of Operations later characterized the funds sent to Now or Never PAC as a “pass through” in an email asking Keller if ACU had to make its own filing with the Commission in connection with the transaction. In May 2014, apparently after an independent auditor reviewed its 2012 finances, ACU filed an Amended 2012 IRS Form 990 that disclosed the $1.71 million contribution to Now or Never PAC as “a political contribution received by the Organization and promptly and directly delivered to a separate political organization.”

None of the Respondents or witnesses have offered an explanation as to the reasons for the multistep structure of the transfers from GI LLC, from GI LLC to ACU, and from ACU to Now or Never PAC. As noted above, GI LLC’s sole officer, Christopher Byrd, is deceased. Thomas, who was GI LLC’s attorney, states that he was not a party to communications with ACU about what it would do with the GI LLC funds. Further, ACU has indicated that the personnel with knowledge of the transaction are no longer employed at ACU and former ACU Executive Director Keller has refused to comply with a Commission Subpoena and Order to answer interrogatories, which sought information regarding the transaction. Axiom #2017-0011.

ACU Document Submission at FEC000006. A Now or Never PAC consultant responded with instructions for wiring funds to Now or Never PAC.

ACU Second Document Submission, November 30, 2012 email from Melissa Bowman to Gregg Keller.

Compl. ¶¶ 15-17, Exs. B (Conlon & Associates Independent Auditor’s Report, Apr. 9, 2014) and C.

Id., Ex. C at Schedule O, Schedule C. ACU states that its auditors included that language without consulting with contemporaneous ACU staff, but does not affirmatively dispute its auditors’ characterization of the transaction.
Strategies acknowledges that it both recommended the transfer of funds from GI LLC to ACU and solicited the nearly simultaneous transfer of funds from ACU to Now or Never PAC.\footnote{See Axiom Interrogatory Answers at 4, 7.}

Axiom states, however, that it did not communicate with either Thomas or Byrd its belief that ACU would donate to Now or Never PAC.\footnote{See Id. at 7.}

**IV. LEGAL ANALYSIS**

**A. The Legal Standard**

The Act prohibits a person from making a contribution in the name of another.\footnote{52 U.S.C. § 30122; see also 11 C.F.R. § 110.4(b). The term “person” for purposes of the Act and Commission regulations includes partnerships, corporations, and other organizations. 52 U.S.C. § 30101(11); 11 C.F.R. § 100.10.}

The Commission has included in its regulations illustrations of activities that constitute making a contribution in the name of another:

- (i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made; or

- (ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.

Under Commission regulations, that prohibition extends to knowingly helping or assisting “any person in making a contribution in the name of another.”\footnote{11 C.F.R. § 110.4(b)(1)(iii).} The Commission has explained that the provision addressing such a contribution applies to “those who initiate or
instigate or have some significant participation in a plan or scheme to make a contribution in the name of another."^34

The requirement that a contribution be made in the name of its true source promotes Congress's objective of ensuring the complete and accurate disclosure by candidates and committees of the political contributions they receive.\(^{35}\) Courts have uniformly rejected the assertion that "only the person who actually transmits funds ... makes the contribution,"\(^{36}\) recognizing that "it is implausible that Congress, in seeking to promote transparency, would have understood the relevant contributor to be [an] intermediary who merely transmitted the campaign gift."\(^{37}\) Accordingly, the Act and the Commission's regulations provide that a person who provides funds to another for the purposes of contributing to a candidate or committee "makes" the resulting contribution.\(^{38}\)

**B. The Record Supports a Reasonable Inference that Made a Contribution in the Name of Another**

The undisputed facts demonstrate that transferred funds to GI LLC, that GI LLC then almost immediately forwarded part of those funds to ACU, that ACU used those funds to make a $1.71 million contribution to Now or Never PAC, and that Now or Never PAC reported the contribution as made by ACU. Contemporaneous emails among Thomas—who served both as agent of GI LLC and treasurer of Now or Never PAC—ACU, and consultants for Now or

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35 See, e.g., United States v. O'Donnell, 608 F.3d 546, 553 (9th Cir. 2010) ("[T]he congressional purpose behind [section 30122]—to ensure the complete and accurate disclosure of the contributors who finance federal elections—is plain.").

36 United States v. Boender, 649 F.3d 650, 660 (7th Cir. 2011).

37 O'Donnell, 608 F.3d at 554.

38 See, e.g., Boender, 649 F.3d at 660 ("[W]e consider the giver to be the source of the gift, not any intermediary who simply conveys the gift from the donor to the donee.").
Never PAC strongly suggest the parties entered into an agreement by which ACU would transfer funds to Now or Never PAC only after receiving those funds from GI LLC. Such an agreement is further supported by ACU’s later characterization of the funds as a “pass through,” as well as by its financial situation at the time of the transaction.

The record supports a reasonable inference that was the true source of the funds GI LLC funneled through ACU.

According to Thomas, an agent of GI LLC, the LLC’s only known purpose was to support partisan organizations and causes. Neither GI LLC nor claim, nor does the record show, that GI LLC conducts any other business. Instead, the only information in the record is that GI LLC acted as a transfer agent for contributions. The available facts do not indicate that GI LLC generated income, made investments, held assets, or had the means to wire $1.8 million without infusion of funds. Accordingly, there is reason to believe that with the purpose of making political contributions, and that is the true source of the funds GI LLC wired to ACU for the purpose of making a contribution to Now or Never PAC.

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39 See Thomas Interrogatory Answers at 3.

40 See Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 12, MUR 6485 (W Spann LLC, et al.), MURs 6487/6488 (F8, LLC, et al.), MUR 6711 (Specialty Investment Group, Inc., et al.), MUR 6930 (SPM Holdings LLC, et al.) (Apr. 1, 2016) (“Petersen, Hunter, Goodman SOR”) (“The Commission will look at whether, for instance, there is evidence indicating that the corporate entity did not have income from assets, investment earnings, business revenues, or bona fide capital investments, or was created and operated for the sole purpose of making political contributions. These facts would suggest the corporate entity is a straw donor and not the true source of the contribution.”); see also Statement of Reasons of Vice Chairman Steven T. Walther and Commissioners Ann M. Ravel and Ellen L. Weintraub at 4, MUR 6485 (W Spann LLC, et al.), MURs 6487/6488 (F8 LLC, et al.), MUR 6711 (Specialty Investment Group, Inc., et al.), MUR 6930 (Prakazrel "Pras" Michel, et al.) (Apr. 1, 2016) (“Walther, Ravel, Weintraub SOR”) (“An LLC cannot act on its own; it must do so at the direction of a person. Where an individual is the source of the funds for a contribution and the LLC merely conveys the funds at the direction of that person, the Act and Commission regulations require that the true source — the name of the individual rather than the name of the LLC — be disclosed as the contributor.”). Here, it was not the name of the conduit LLC that the recipient committee improperly disclosed, but a second intermediary, ACU.
Second, the temporal proximity between GI LLC’s formation and its contribution to ACU, viewed in the context of GI LLC’s purpose, suggests that it received $2.5 million from specifically to funnel funds through ACU to Now or Never PAC. GI LLC was formed in September 2012, only seven weeks prior to the October 31, 2012 transaction. As noted, we know of no other activities that GI LLC engaged in either prior to or after the October transaction. That funded GI LLC shortly after GI LLC’s formation suggests GI LLC was used to funnel funds to their ultimate recipient.

The timeline and structure of the transaction itself further supports an inference that may have been the true source of the funds at issue. funded GI LLC shortly after GI LLC’s formation, providing it with $2.5 million on or very shortly before the same day GI LLC wired $1.8 million to ACU, as evidenced by Thomas confirming to the other parties that “the $2.5 million is here” before executing GI LLC’s wire transfer to ACU. Additionally, that the contribution required a three-step transfer—from to GI LLC, from GI LLC to ACU, and finally from ACU to Now or Never PAC—suggests that the parties went through significant lengths to disguise the true source of the funds. Additionally, OGC has repeatedly asked both GI LLC and to provide an alternative explanation for the structure of the three-step transaction, and neither entity has done so.

Additionally, none of the information in the record overcomes the inference drawn from

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41 See Petersen, Hunter, Goodman SOR at 2 (“[T]o vindicate the purpose underlying section 30122 without violating First Amendment rights, the proper focus in these matters is whether the funds used to make a contribution were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act’s reporting requirements, making the individual, not the corporation or corporate LLC, the true source of the funds. Thus, in matters alleging section 30122 violations against such entities, the Commission will examine whether the available evidence establishes the requisite purpose.”); see also Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub (April 13, 2016) (writing that proof of subjective intent is not necessary to prove a violation of 52 U.S.C. § 30122).
the available facts, i.e., that made a contribution in the name of another.\textsuperscript{42} and GI LLC

have not addressed the provenance of the funds that GI LLC transferred to ACU; they do not

aver that the funds were not provided to the LLC for the purpose of making a contribution to

Now or Never PAC.

Indeed, has refused to comply with the Commission's Subpoena and Order to

produce documents and interrogatory answers to shed further light on this matter. Given

refusal, the Commission may make an adverse inference regarding role in the subject of

the investigation.\textsuperscript{43} OGC requested that provide information regarding, inter alia,

purpose for transferring the funds to GI LLC, the source of its $2.5 million transfer to GI LLC,

and relationship with GI LLC. first refused to respond to the Subpoena and Order by

the Commission's due date, and instead stated that it would respond two weeks later. When that

day came, still had not responded, and waited an additional day to inform OGC that it

"cannot comply."

\textsuperscript{42} A factually similar matter provides a useful contrast: In MUR 6930, the sole member of an LLC that contributed to an independent-expenditure-only political committee provided a detailed, sworn affidavit averring that any funds held by the LLC were not provided to it for the specific purpose of making political contributions. Because the information in the record was sufficient to rebut the allegations, we recommended that the Commission make a no reason to believe finding. See First Gen. Counsel's Report at 8-10, MUR 6930 (Prakazrel "Pras" Michel, \textit{et al.}); The Commission was equally divided on that issue, however, and closed the file. See Certification, MUR 6930 (Prakazrel "Pras" Michel, \textit{et al.}) (Feb. 25, 2016); see also Walther, Ravel, Weintraub SOR.

\textsuperscript{43} See \textit{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. \textit{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.'" \textit{Atlantic Richfield Company v. United States Department of Energy}, 769 F.2d 771, 794 (D.C.Cir. 1985).
Accordingly, the Commission is entitled to draw an adverse inference from refusal to comply, and to conclude that made a contribution in the name of another to Now or Never PAC. This inference further bolsters the record’s information indicating that provided GI LLC with funds for the specific purpose of making a contribution in the name of another. We therefore recommend that the Commission find that and as trustee, violated 52 U.S.C. § 30122 by making a contribution in the name of another.

C. Alternatively, the Record Likewise Supports a Reasonable Inference that Assisted in Making a Contribution in the Name of Another

Even if currently unknown facts were to suggest that GI LLC, and not was the true source of the funds, the record provides a reasonable inference that assisted in making a contribution in the name of another. The Commission has noted that the regulation prohibiting assisting in the making of a contribution in the name of another applies to those who “initiate or instigate or have some significant participation” in making such a contribution.44

Further, has refused to respond to the Commission’s Subpoena and Order seeking information as to its relationship with and involvement in GI LLC, allowing the Commission to draw an adverse inference regarding the level of involvement and had in the activities of GI LLC.45 Such involvement suggests that as trustee, may have played a significant role in assisting GI LLC in making the contribution. Further, transferred funds to GI LLC on or very shortly before the same day GI LLC transferred funds to ACU, suggesting may


45 See supra, note 43.
have initiated or instigated the contribution to Now or Never PAC. Accordingly, we recommend
that the Commission find reason to believe that and as trustee, either made or
assisted in the making of a contribution in the name of another, in violation of

V. CIVIL SUIT AUTHORITY

On August 10, 2017, the Commission issued a legally enforceable Subpoena and Order
requesting the production of documents and answers to interrogatories to and . The
Commission's Subpoena and Order sought to learn additional information regarding role
in the transaction and the source of the funds. has refused to comply. is a significant
party in the current matter. It provided the funds used to make a contribution in the name of
another, and has represented that it may have information about GI LLC's activities that GI LLC
no longer possess. Accordingly, this Office recommends that the Commission authorize the
filing of a subpoena enforcement action in United States District Court against and
in his official capacity as trustee.

An administrative agency's subpoena or order will be enforced provided that it was issued for a proper
purpose, the information sought is reasonably relevant to the purpose, and the statutory procedures were observed.

See supra, Part III.B.

VI. RECOMMENDATIONS

1. Find reason to believe that and , as trustee, violated 52 U.S.C. § 30122 by making a contribution in the name of another or by assisting in the making of a contribution in the name of another;

2. Authorize the Office of the General Counsel to file a subpoena enforcement suit in United States District Court against and , as trustee;

3. Approve the Factual & Legal analysis;

4. Approve the appropriate letters;

5. Approve the use of compulsory process as necessary.

Lisa Stevenson
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9/15/17

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