

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL’S REPORT**

3 **MUR 7454**

4 COMPLAINT FILED: Aug. 3, 2018

5 NOTIFICATION DATE: Aug. 8, 2018

6 LAST RESPONSE FILED: Oct. 4, 2018

7 ACTIVATION DATE: Feb. 5, 2019

8

9 STATUTE OF LIMITATIONS:

10 May 30, 2023 – July 15, 2023

11 ELECTION CYCLE: 2018

12 COMPLAINANT:

Campaign Legal Center

13 RESPONDENTS:

Blue Magnolia Investments, LLC

Highway 76 LLC

DefendArizona and Benjamin Ottenhoff in his

official capacity as treasurer

17 RELEVANT AUTHORITY:

52 U.S.C. § 30122

52 U.S.C. §§ 30102, 30103, 30104

11 C.F.R. § 110.1(e), (g)

11 C.F.R. § 110.4(b)

21 INTERNAL REPORTS CHECKED:

Disclosure Reports

22 FEDERAL AGENCIES CHECKED:

None

23 **I. INTRODUCTION**

24 The Complaint in this matter alleges that two limited liability companies, Blue Magnolia
25 Investments, LLC (“Blue Magnolia”), and Highway 76 LLC (“Highway 76”) (collectively, the
26 “LLCs”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), in
27 connection with two separate \$100,000 contributions to an independent expenditure-only
28 political committee (“IEOPC”), DefendArizona and Benjamin Ottenhoff in his official capacity
29 as treasurer (“DefendArizona”). The Complaint alleges that the LLCs served as conduits for
30 unknown persons to make contributions in the name of another to DefendArizona and that the

1 LLCs failed to register and report as political committees after making the reported contributions
2 to DefendArizona.

3 The LLCs deny these allegations, but acknowledge that the contributions should have
4 been attributed differently: Blue Magnolia states that the incorrect reporting of the contribution
5 was an error, and it asserts that after receiving the Complaint, it requested that DefendArizona
6 amend its disclosure report to attribute the contribution to its single member; Highway 76 states
7 that it informed DefendArizona who the LLC's ultimate owners were before making the
8 contribution, but never received a request for additional information as to how the contribution
9 should be attributed. Blue Magnolia's contribution was eventually attributed to its single
10 member in an amended disclosure report, and Highway 76 received a full refund of its
11 contribution when it did not provide DefendArizona with any information as to the proper
12 attribution of the contribution. DefendArizona states that it had no knowledge that either
13 contribution came from any source other than the LLCs it identified on its disclosure reports.

14 For the reasons explained below, we recommend that the Commission find reason to
15 believe that DefendArizona violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 110.1(g)(2) and (4)
16 by failing to properly attribute the LLC contributions, and that Blue Magnolia and Highway 76
17 violated 11 C.F.R. § 110.1(g)(5) by failing to provide the required attribution information when
18 making their contributions. We also recommend that the Commission approve pre-probable
19 cause conciliation with DefendArizona and both LLCs as to these violations. We further
20 recommend that the Commission dismiss the allegations that Blue Magnolia and Highway 76
21 knowingly contravened the Act's prohibition on making contributions in the name of another and
22 failed to register and report as political committees.

1 **II. FACTUAL BACKGROUND**

2 DefendArizona is an IEOPC that registered with the Commission on February 1, 2018.¹
3 DefendArizona made \$1.9 million in independent expenditures supporting Martha McSally, a
4 2018 candidate for the U.S. Senate in Arizona, and made just over \$20 million in independent
5 expenditures opposing McSally's primary and general election opponents.² DefendArizona
6 reported receiving a \$100,000 contribution from Blue Magnolia on May 30, 2018, and a
7 \$100,000 contribution from Highway 76 on June 30, 2018.³ Following the receipt of the
8 Complaint in this matter, DefendArizona amended certain of its disclosure reports. On
9 September 11, 2018, DefendArizona amended its July 2018 Quarterly Report to attribute the
10 \$100,000 contribution from Blue Magnolia to Larry Van Tuyl.⁴ On August 29, 2018,
11 DefendArizona reported refunding the contribution from Highway 76, but did not amend its
12 disclosure reports to reflect the attribution of the Highway 76 contribution.⁵

13 Blue Magnolia was organized as an LLC in Delaware on April 24, 2018, and its
14 registered agent is the Corporation Trust Company, located at 1209 Orange Street, Wilmington,
15 DE.⁶ Blue Magnolia states that it has a single natural person member, Larry Van Tuyl, and that

¹ DefendArizona Statement of Org. (Feb. 1, 2018).

² DefendArizona, Spending, 2017-2018, *available at* <https://www.fec.gov/data/committee/C00668301/?tab=spending&cycle=2018>.

³ DefendArizona July 2018 Quarterly Report at 6, 7 (July 15, 2018).

⁴ DefendArizona Amend. July 2018 Quarterly Report at 6 (Sept. 11, 2018).

⁵ DefendArizona Oct. 2018 Quarterly Report at 35 (Oct. 15, 2018). DefendArizona asserts that it refunded the Highway 76 contribution because it "was unable to determine with certainty if the contribution could be retained within the applicable time period . . . set forth at 11 C.F.R. § 103.3(b)(2)." DefendArizona Resp. at 2 (Sept. 27, 2018).

⁶ Delaware Div. of Corps. Entity Search, "Blue Magnolia Investments, LLC."

1 all “income from this entity flows directly” to Van Tuyl.⁷ Blue Magnolia made a \$100,000
 2 contribution to DefendArizona on May 30, 2018, approximately five weeks after its formation.⁸
 3 Blue Magnolia provides no specific information regarding the source of these funds or any of its
 4 activities other than making this contribution. Upon receiving notice of the Complaint in this
 5 matter, Blue Magnolia asked DefendArizona to amend its disclosure reports to reflect that Blue
 6 Magnolia’s \$100,000 contribution must be attributed to Van Tuyl.⁹ Blue Magnolia asserts that
 7 when DefendArizona initially attributed the contribution solely to Blue Magnolia, “[t]his
 8 disclosure was done in error.”¹⁰

9 Highway 76 was organized as an LLC in Delaware on May 23, 2018, and its registered
 10 agent is also the Corporation Trust Company, located at 1209 Orange Street, Wilmington, DE.¹¹
 11 It asserts that it is a disregarded entity for federal tax purposes and that it has a single member,
 12 which is another tax-disregarded single-member LLC (“LLC 2”).¹² Highway 76 represents that
 13 LLC 2’s single member is, in turn, a third LLC (“LLC 3”) that is taxed as a partnership and has
 14 two members, both of which are trusts: the 2005-1 Bidwell Family Trust (“Trust 1”) and the

⁷ Blue Magnolia Resp. at 1 (Sept. 17, 2018). Van Tuyl serves as the Chairman of the Board of Directors for Berkshire Hathaway Automotive. Berkshire Hathaway Automotive, About Us, *available at* <https://www.berkshirehathawayautomotive.com/about/index.htm>. On October 30, 2018, Van Tuyl made a \$36,600 contribution to the Win Arizona Fund, a joint fundraising committee between McSally’s authorized committee, McSally for Senate, Inc., the Arizona Republican Party, and the National Republican Senate Committee, of which \$2,700 went to McSally for Senate. Win Arizona Fund Termination Report at 21 (Dec. 10, 2018); *see* McSally for Senate, Inc. Amend. 30-Day Post-Gen. Election Report at 4940 (Jan. 23, 2019).

⁸ Blue Magnolia Resp. at 1. It is unclear why Blue Magnolia asserts that it made the contribution on May 7, 2018, since DefendArizona’s disclosure report indicates that the contribution was received on May 30, 2018.

⁹ *Id.*, Attach. C.

¹⁰ *Id.* at 1.

¹¹ Delaware Div. of Corps. Entity Search, “Highway 76 LLC.”

¹² Highway 76 Resp. at 2 n.4 (Oct. 4, 2018); *id.*, Attach. 1 ¶¶ 3-4. The Response does not identify LLC 2.

1 2005-2 Bidwell Family Trust (“Trust 2”).¹³ According to Highway 76, Michael Bidwell is a
 2 trustee of both trusts and is the manager of LLC 1 and LLC 2.¹⁴ Highway 76 contends that as
 3 part of a broader business strategy by the Bidwell family, which the Response notes owns many
 4 businesses and investments, including the Arizona Cardinals professional football team,
 5 Highway 76 was “one of three LLCs created in 2018 for potential business transactions.”¹⁵
 6 Highway 76 did not provide any information regarding the source of the funds it contributed or
 7 its specific activities aside from making the contribution to DefendArizona.

8 Highway 76 states that after a consultant for DefendArizona approached Bidwell about
 9 making a contribution to the IEOPC, Bidwell authorized Highway 76 to make a \$100,000
 10 contribution to DefendArizona on June 30, 2018, approximately five weeks after its formation.¹⁶
 11 Highway 76 asserts that “for [internal] accounting purposes, Highway 76’s contribution was
 12 attributed to its sole member, and ultimately to the intermediate holding companies and two
 13 irrevocable family trusts in proportion to their ownership shares.”¹⁷ That attribution was not,
 14 however, reflected in DefendArizona’s disclosure reports filed with the Commission. Highway
 15 76 asserts that when making the contribution, it “conveyed” that it “was one of [the Bidwell]
 16 family’s businesses[,]” but that DefendArizona “did not immediately inquire about Highway
 17 76’s tax status or request attribution information.”¹⁸

¹³ Highway 76 Resp. at 2 n.4; *id.*, Attach. 1 ¶¶ 3-4. The Response does not identify LLC 3.

¹⁴ Highway 76 Resp. at 2 n.4; *id.*, Attach. 1 ¶¶ 3-4.

¹⁵ Highway 76 Resp. at 2-3; *id.*, Attach. 1 ¶¶ 2, 6.

¹⁶ Highway 76 Resp. at 3-4. *id.*, Attach. 1 ¶ 9.

¹⁷ Highway 76 Resp. at 4; *id.*, Attach. 1 ¶ 10.

¹⁸ Highway 76 Resp. at 4; *id.*, Attach. 1 ¶ 11.

1 The Complaint alleges that “the only information available” about Blue Magnolia and
2 Highway 76 “is that each entity was incorporated in Delaware and made a \$100,000 contribution
3 to DefendArizona approximately five weeks after being created[,]” and that the public record
4 thus “provide[s] no indication that Blue Magnolia or Highway 76 had accrued sufficient assets,
5 investment earnings, business revenues, or bona fide capital investments to make these
6 contributions without an infusion of funds provided to them for that purpose.”¹⁹ On this basis,
7 the Complaint alleges that the funds used to make the contributions attributed to Blue Magnolia
8 and Highway 76 came from other unknown persons, and were, in fact, contributions in the name
9 of another.

10 The Complaint also alleges that “[t]here is no public record” of either LLC “conducting
11 any significant activities other than making contributions since their formation.”²⁰ As such, the
12 Complaint alleges that Blue Magnolia and Highway 76 met the legal standard for political
13 committee status, and therefore violated the Act by failing to register and report as political
14 committees.

15 **III. LEGAL ANALYSIS**

16 **A. Attribution of LLC Contributions**

17 1. LLCs Must Provide Accurate Attribution Information for Contributions, 18 and Political Committees Must Accurately Disclose LLC Contributions

19 Under the Act, all political committees, including IEOPCs, are required to file periodic
20 disclosure reports with the Commission, which accurately report all contributions received and

¹⁹ Compl. at 6 (Aug. 3, 2018).

²⁰ *Id.* at 9.

1 disbursements made.²¹ Contributions by an LLC that is disregarded for tax purposes and does
2 not have a single natural-person member are treated as partnership contributions, which must be
3 attributed to both the entity and to each of its members.²² Contributions by an LLC that has a
4 single natural-person member and is not taxed as a corporation, *i.e.*, a tax-disregarded entity,
5 must be attributed only to the LLC's single natural-person member.²³ Furthermore, when either
6 of these types of LLC makes a contribution, it must affirm to the recipient, at the time it makes
7 the contribution, that it is eligible to make a contribution and indicate how the contribution is to
8 be attributed.²⁴

9 The Commission's regulations concerning the attribution of LLC contributions apply on
10 their face to all LLC contributions irrespective of recipient.²⁵ These regulations uphold the Act's
11 reporting framework, which serves important transparency interests,²⁶ and inhibit attempts to
12 circumvent the Act's contribution source prohibitions and amount limitations, including

²¹ 52 U.S.C. § 30104(a), (b); 11 C.F.R. § 104.3(a), (b).

²² 11 C.F.R. §§ 110.1(e), (g)(2).

²³ 11 C.F.R. § 110.1(g)(4).

²⁴ 11 C.F.R. § 110.1(g)(5).

²⁵ See Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen at 2, 5, MUR 6969 (MMWP12, LLC, *et al.*) and MURs 7031 and 7034 (Children of Israel, LLC, *et al.*) (Sept. 13, 2018) (stating that "the Commission's existing attribution regulations at 11 C.F.R. § 110.1(g) apply to the reporting" of contributions by LLCs that are not taxed as corporations and that, "[b]y operation of the Commission's attribution rules, MMWP12's contributions should have been attributed to K2M and each of its owners, Mark and Megan Kvamme. Similarly, Children of Israel's contributions should have been attributed to Saul Fox."); Statement of Reasons of Vice Chair Ellen L. Weintraub at 2, MUR 6969 (MMWP12, LLC, *et al.*) and MURs 7031 and 7034 (Children of Israel, LLC, *et al.*) (July 13, 2018) ("Under Commission regulations, contributions from LLCs that are disregarded entities are not considered corporate contributions, but partnership contributions.") (citing 11 C.F.R. §§ 110.1(g)(2) and (4)).

²⁶ See, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) ("[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

1 prohibitions applicable to IEOPCs.²⁷ The Commission has recognized that because LLCs are a
2 product of state law and many states have very minimal LLC disclosure requirements, LLCs
3 must affirmatively provide attribution information when making political contributions so that
4 the recipient committees can accurately disclose those contributions to the public.²⁸

5 2. Blue Magnolia Did Not Provide Required Attribution Information

6 Blue Magnolia did not provide the required attribution information when it made a
7 contribution to DefendArizona. As an LLC that asserts it has not elected corporate federal tax
8 treatment and has a single natural person member, Blue Magnolia's \$100,000 contribution to
9 DefendArizona must be attributed only to its single member, Van Tuyl.²⁹ However,
10 DefendArizona attributed the contribution only to Blue Magnolia, and did not identify Van Tuyl
11 in its disclosure report.³⁰ Only after receiving notice of the Complaint did Blue Magnolia ask
12 DefendArizona to amend its disclosure report to accurately attribute the contribution to Van
13 Tuyl. Blue Magnolia acknowledges that the initial disclosure "was done in error," but does not
14 assert that it provided the required attribution information when it made the contribution.³¹
15 DefendArizona's Response indicates that Blue Magnolia's contribution did not raise any
16 questions and was therefore accepted, but does not clarify why the committee did not seek

²⁷ See 52 U.S.C. §§ 30116(a)(1), 30118(a); Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37,397, 37,398 – 37,399 (July 12, 1999) ("LLC E&J") (discussing role of LLC attribution rules in identifying prohibited contributions from foreign national or government contractor sources, concerns that apply to all LLC contributions, including contributions to IEOPCs).

²⁸ LLC E&J at 37,399 ("The Commission further notes that the recipient committee would have no way of knowing how to attribute a contribution made by an eligible multi-member or single member LLC, unless that information was provided.").

²⁹ Blue Magnolia Resp. at 2 (citing 11 C.F.R. § 110.1(g)(4)).

³⁰ See 11 C.F.R. §§ 104.3(a)(4), 110.1(g)(4).

³¹ Blue Magnolia Resp. at 2.

1 information regarding the proper attribution of the contribution when Blue Magnolia failed to
2 provide such information.³²

3 Based on the available information, it appears that Blue Magnolia did not fulfill its
4 affirmative obligation to provide attribution information to DefendArizona at the time it made
5 the contribution, as required under 11 C.F.R. § 110.1(g)(5), and that DefendArizona, which did
6 not seek such information, failed to properly attribute the contribution to the LLC's single
7 natural-person member, Van Tuyl, as required under 11 C.F.R. § 110.1(g)(4). We therefore
8 recommend that the Commission find reason to believe Blue Magnolia violated 11 C.F.R.
9 § 110.1(g)(5) and that DefendArizona violated 52 U.S.C. § 30104(b) and 11 C.F.R.
10 § 110.1(g)(4), in connection with the making and reporting, respectively, of this contribution.

11 3. Highway 76 Did Not Provide Required Attribution Information

12 Highway 76 also does not appear to have provided DefendArizona with the required
13 attribution information. Highway 76 is a tax-disregarded LLC whose single member is another
14 tax-disregarded LLC (LLC 2), whose single member in turn is an LLC taxed as a partnership
15 (LLC 3) that has two living trusts as its members, Trust 1 and Trust 2. Under Commission
16 regulations, Highway 76's contribution must therefore be attributed to both Highway 76 and
17 LLC 2; LLC 2's contributions must in turn be attributed to LLC 2 and LLC 3; and LLC 3's
18 contributions must in turn be attributed to LLC 3 and its partners, Trust 1 and Trust 2, in
19 proportion to the partners' ownership of LLC 3.³³ The two trusts must each, in turn, attribute

³² DefendArizona Resp. at 1; *see also* 11 C.F.R. § 103.3(b)(1).

³³ 11 C.F.R. §§ 110.1(e), (g)(2); *see* First Gen. Counsel's Report at 12-13, MURs 7031 and 7034 (Children of Israel, LLC).

1 their share of the contribution to their trustees as the true contributors, per the trustees'
2 ownership share of the trusts.³⁴

3 In short, any Highway 76 contribution must be attributed to each of the intermediary
4 holding companies and to the trustees of Trust 1 and Trust 2, which did not happen; Highway
5 76's \$100,000 contribution to DefendArizona was attributed only to Highway 76. In its
6 Response, Highway 76's manager, Michael Bidwell, asserts that he "conveyed to
7 DefendArizona's local fundraising consultant that Highway 76 was one of the family's
8 businesses."³⁵ That information falls short of Highway 76's obligation to provide accurate and
9 complete attribution information under 11 C.F.R. § 110.1(g)(5). As a result, DefendArizona,
10 which did not seek attribution information from Highway 76, failed to properly report the
11 contribution under 11 C.F.R. § 110.1(g)(2).³⁶ We therefore recommend that the Commission
12 find reason to believe Highway 76 violated 11 C.F.R. § 110.1(g)(5), and DefendArizona violated
13 52 U.S.C. § 30104(b) and 11 C.F.R. § 110.1(g)(2), in connection with the making and reporting,
14 respectively, of this contribution.

³⁴ Advisory Op. 1999-19 at 2 (Chris Cohen for Congress) (Aug. 25, 1999) ("The Commission concludes that a contribution made from your *inter vivos* trust to the Committee is permissible and would be considered a contribution from you, rather than from the trust.").

³⁵ Highway 76 Resp. at 4; *id.*, Attach. 1 ¶ 11.

³⁶ Highway 76 did not provide the required attribution information even after receiving notice of the Complaint, indicating that Bidwell and DefendArizona's fundraising consultant "discussed the contribution after Highway 76 received a copy of the Complaint, but DefendArizona did not send a written request for information that Mr. Bidwell could refer to counsel." Highway 76 Resp. at 4. DefendArizona did not inquire whether Highway 76 was eligible to make a contribution or seek information regarding the proper attribution of that contribution, and although it reported refunding the full amount on August 29, 2018, it did not make that refund within thirty days of receiving the contribution. *See* 11 C.F.R. § 103.3(b)(1). DefendArizona also did not amend its reports to properly attribute the contribution, leaving the public record to indicate that the \$100,000 contribution was attributable only to Highway 76. *See* DefendArizona Resp. at 2; DefendArizona Oct. 2018 Quarterly Report at 35.

1 **B. Contributions in the Name of Another**

2 1. No Person May Furnish Another With Funds to Make a Contribution

3 The Act provides that a contribution includes “any gift, subscription, loan, advance, or
 4 deposit of money or anything of value made by any person for the purpose of influencing any
 5 election for Federal office.”³⁷ The term “person” for purposes of the Act and Commission
 6 regulations includes partnerships, corporations, and “any other organization or group of
 7 persons.”³⁸ The Act prohibits a person from making a contribution in the name of another
 8 person, knowingly permitting his or her name to be used to effect such a contribution, or
 9 knowingly accepting such a contribution.³⁹ The Commission has included in its regulations
 10 illustrations of activities that constitute making a contribution in the name of another:

- 11 (i) Giving money or anything of value, all or part of which was provided to
 12 the contributor by another person (the true contributor) without disclosing
 13 the source of money or the thing of value to the recipient candidate or
 14 committee at the time the contribution is made; or
- 15 (ii) Making a contribution of money or anything of value and attributing as the
 16 source of the money or thing of value another person when in fact the
 17 contributor is the source.⁴⁰

18 The requirement that a contribution be made in the name of its true source promotes
 19 Congress’s objective of ensuring the complete and accurate disclosure by candidates and
 20 committees of the political contributions they receive.⁴¹ Courts therefore have uniformly

³⁷ 52 U.S.C. § 30101(8)(A).

³⁸ *Id.* § 30101(11); 11 C.F.R. § 100.10.

³⁹ 52 U.S.C. § 30122.

⁴⁰ 11 C.F.R. § 110.4(b)(2)(i)–(ii).

⁴¹ *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

1 rejected the assertion that “only the person who actually transmits funds . . . makes the
2 contribution,”⁴² recognizing that “it is implausible that Congress, in seeking to promote
3 transparency, would have understood the relevant contributor to be [an] intermediary who
4 merely transmitted the campaign gift.”⁴³ Consequently, both the Act and the Commission’s
5 implementing regulations provide that a person who furnishes another person with funds for the
6 purpose of contributing to a candidate or committee “makes” the resulting contribution.⁴⁴ This is
7 true whether funds are advanced to another person to make a contribution in that person’s name
8 or promised as reimbursement of a solicited contribution.⁴⁵ Because the concern of the law is
9 the true source from which a contribution to a candidate or committee originates, we look to the
10 structure of the transaction itself and the arrangement between the parties to determine who, in
11 fact, “made” a given contribution.

— is plain.”) (emphasis added); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (rejecting constitutional challenge to Section 30122 in light of compelling governmental interest in disclosure).

⁴² *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011).

⁴³ *O’Donnell*, 608 F.3d at 554; *see also Citizens United*, 558 U.S. at 371 (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”); *Doe v. Reed*, 561 U.S. 186, 199 (2010) (“Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.”).

⁴⁴ *See Boender*, 649 F.3d at 660 (holding that to determine who made a contribution “we consider the giver to be the *source* of the gift, not any intermediary who simply conveys the gift from the donor to the donee.” (emphasis added)); *O’Donnell*, 608 F.3d at 550; *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) (“The Act prohibits the use of ‘conduits’ to circumvent . . . [the Act’s reporting] restrictions.” (quoting then-Section 441f)).

⁴⁵ *O’Donnell*, 608 F.3d at 555. Moreover, the “key issue . . . is the *source* of the funds” and, therefore, the legal status of the funds when conveyed from a conduit to the ultimate recipient is “irrelevant to a determination of who ‘made’ the contribution for the purposes of [Section 30122].” *United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015) (holding that defendant’s “unconditional gifts” to relatives and employees, along with suggestion they contribute the funds to a specific political committee, violated Section 30122 because the source of the funds remained the individual who provided them to the putative contributors).

1 2. Close Temporal Proximity and a Lack of Public Information Regarding an
2 LLC's Activity May Support a Reasonable Inference that the LLC was
3 Not the True Contributor

4 The Complaint's allegations that Blue Magnolia and Highway 76 were used to make
5 contributions by other persons are supported by the fact that each entity purported to make a
6 \$100,000 contribution in its own name approximately five weeks after being formed, and by the
7 lack of public information regarding the LLCs' activities or evidence indicating that each LLC
8 could make such a contribution without an infusion of funds provided to it for that purpose.

9 When an LLC purports to make a political contribution in close temporal proximity to its
10 formation date, without evidence of activity or any specific information regarding the
11 provenance of its funds, the circumstances may support a reasonable inference that the LLC was
12 provided funds for the purpose of making a contribution, *i.e.*, that the LLC was used as a conduit
13 to mask the identity of the true contributor. However, in determining whether such an inference
14 is supported, the Commission should consider the overall record, including the amount of the
15 contribution, the LLC's stated purposes and activity, and whether other information, such as the
16 attribution of the LLC contribution, suggests an attempt to circumvent the Act's disclosure
17 requirements.⁴⁶

18 In previous LLC conduit contribution cases, we have recommended finding reason to
19 believe, after considering all available information, where the overall record indicated that the
20 LLC was likely not the true source of the contribution.⁴⁷ By contrast, we have not recommended

⁴⁶ See also Section III.A, *supra*, regarding the proper attribution of LLC contributions.

⁴⁷ This Office recommended finding reason to believe an LLC had made conduit contributions in two cases where the contributions were made *the day after* the LLC or entity was created. See First Gen. Counsel's Report at 8-9, MURs 7014, 7017, 7019, and 7090 (DE First Holdings, *et al.*) (also recommending, at 12-13, reason to believe finding where an LLC made two \$250,000 contributions sixteen days and twenty-two days, respectively, after its formation, and vaguely offered only that it was formed as a "for-profit LLC"); First Gen. Counsel's Report at 10-11,

1 finding reason to believe in cases where the overall record — including, *e.g.*, evidence that the
 2 LLC engaged in commercial activity and had the ability to make the contributions at issue with
 3 its own income, a sworn statement attesting that the LLC had not received outside funds to make
 4 the contribution, and information suggesting that the LLC was not being used to circumvent the
 5 Act's disclosure requirements — indicated that the LLC in question was not used as a conduit.⁴⁸

6 3. Blue Magnolia

7 The Complaint infers from the absence of evidence of any Blue Magnolia activity other
 8 than the making of the contribution that the LLC did not have the means to make a \$100,000
 9 contribution approximately five weeks after its creation and, therefore, that Blue Magnolia was

MUR 6969 (MMWP12, LLC, *et al.*). Likewise, in MUR 6995, this Office recommended finding reason to believe an LLC made conduit contributions where it ambiguously stated that it had plans to do business in the future and purported to make a \$100,000 contribution two weeks after being formed. *See* First Gen. Counsel's Report at 9-10, MUR 6995 (Right to Rise, *et al.*). In MUR 6968, this Office recommended finding reason to believe an LLC made a \$150,000 conduit contribution to an IEOPC approximately seven weeks after it was formed, on a record that also linked that LLC to a company whose executive officers made contributions in their own names to the IEOPC and a multicandidate PAC that supported the same candidate. *See* First Gen. Counsel's Report at 9-10, MUR 6968 (Tread Standard, LLC, *et al.*). In MURs 7031 and 7034, this Office recommended finding reason to believe an LLC made conduit contributions where the LLC's manager acknowledged that it was created for the specific purpose of making donations to charities, nonprofit organizations, and political committees, and over a nine-month period, the LLC made contributions totaling \$884,000 to multiple political committees. *See* First Gen. Counsel's Report at 10-11, MURs 7031 and 7034 (Children of Israel, LLC, *et al.*). In each of these cases, the Commission split 2-2 on the recommendation to find reason to believe under 52 U.S.C. § 30122. Certification, MURs 7014, 7017, 7019, and 7090 (DE First Holdings, *et al.*) (May 10, 2018); Certification, MUR 6969 (MMWP12, LLC, *et al.*) (June 7, 2018); Certification, MUR 6995 (Right to Rise, *et al.*) (May 8, 2018); Certification, MUR 6968 (Tread Standard, LLC, *et al.*) (May 8, 2018); Certification, MURs 7031 and 7034 (Children of Israel, LLC, *et al.*) (June 7, 2018).

⁴⁸ *See* First Gen. Counsel's Report at 9-10, MURs 7013 and 7015 (IGX, LLC, *et al.*) (recommending finding no reason to believe an LLC made a \$500,000 conduit contribution five months after its formation on a record that included, *inter alia*, press articles that indicated that the LLC was a legitimate business that had already funded several film projects, one with a named director and another shown at the SXSW film festival); First Gen. Counsel's Report at 8-9, MUR 6930 (Prakazrel "Pras" Michel, *et al.*) (recommending finding no reason to believe a single member LLC made conduit contributions on evidence including, *inter alia*, a declaration from the LLC's single member); *but see* Indictment, *United States v. Prakazrel Michel et al.*, Case No. 1:19-CR-148 (D.D.C. May 3, 2019) (charging LLC's single member, Michel, with four counts, including the making of false records in a federal investigation, in relation to alleged conduit contributions and Michel's declaration filed with the Commission). In both of these cases, the Commission split evenly on the recommendation to find no reason to believe under 52 U.S.C. § 30122. Certification, MURs 7013 and 7015 (IGX, LLC, *et al.*) (Apr. 10, 2018); Certification, MUR 6930 (Prakazrel "Pras" Michel, *et al.*) (Feb. 23, 2016).

1 provided funds for the purpose of making a contribution to DefendArizona. Blue Magnolia's
2 Response did not clarify whether it engaged in any income-generating activity or explain the
3 provenance of the funds used to make the contribution.

4 Notwithstanding this lack of information, however, certain parts of the record suggest
5 that Blue Magnolia's single member, Van Tuyl, may not have used the LLC to circumvent the
6 Act's disclosure requirements by concealing his identity. For example, after receiving the
7 Complaint, but well before the 2018 general election, Blue Magnolia requested that
8 DefendArizona amend its disclosure report to attribute the LLC's contribution to Van Tuyl,
9 which the committee did on September 11, 2018.⁴⁹ Van Tuyl also contributed in his own name
10 to the authorized committee of McSally, the only candidate that DefendArizona supported,
11 which suggests that, in at least one other instance, Van Tuyl did not attempt to avoid the Act's
12 disclosure requirements.

13 The temporal proximity between Blue Magnolia's formation and the contribution, in
14 conjunction with the lack of public information regarding Blue Magnolia's activities (including
15 the source of funds used to make the contribution) "could still be viewed as suggestive"⁵⁰ that
16 Van Tuyl used the LLC to mask a contribution from himself or another unknown source.
17 However, in light of Blue Magnolia's acknowledgement that the contribution was improperly
18 reported, the pre-election amendment of DefendArizona's report to reflect the reattribution of the
19 contribution,⁵¹ and the recommendation to find reason to believe that Blue Magnolia violated the

⁴⁹ Blue Magnolia Resp., Attach. C; DefendArizona Amend. July 2018 Quarterly Report at 6 (Sept. 11, 2018).

⁵⁰ First Gen. Counsel's Report at 11, MURs 7013 and 7015 (IGX, LLC).

⁵¹ In MURs 7014, 7017, 7019, and 7090 (DE First Holdings, *et al.*), an IEOPC that received a \$1 million contribution on December 24, 2015, amended its disclosure report on July 15, 2016, to change the attribution of the contribution from DE First Holdings, a Delaware statutory trust taxed as a corporation, to Vivek Garipalli, who

1 LLC attribution requirements — a finding that would not require investigation prior to
2 conciliation — we recommend that the Commission conciliate the violation supported by the
3 existing record, and exercise its prosecutorial discretion to dismiss the allegation that Blue
4 Magnolia violated 52 U.S.C. § 30122.⁵²

5 4. Highway 76

6 For similar reasons, the overall record suggests, but does not clearly establish, that
7 Highway 76 was used as a conduit to make a contribution to DefendArizona. As with Blue
8 Magnolia, the Complaint infers from the absence of public information regarding Highway 76's
9 activities other than the making of the contribution that the LLC did not have the means to make
10 a \$100,000 contribution approximately five weeks after being formed and, therefore, that
11 Highway 76 was provided funds for the purpose of making this contribution to DefendArizona.
12 Notwithstanding this lack of public information, in its Response, Highway 76 contends that its
13 manager, Michael Bidwell, informed DefendArizona that the LLC was owned by the Bidwell
14 family, and that it was “one of three LLCs created in 2018 in preparation for potential business
15 transactions.”⁵³ Highway 76 represents that by mid-2018, the business deals that it was created
16 to facilitate “had progressed to the point where brokers, attorneys, and other professional
17 advisors were actively working on deals and discussing potential terms and conditions with third

acknowledged that he transferred funds to DE First Holdings for it to make the contribution. *See* First Gen. Counsel's Report at 4-5, MURs 7014, 7017, 7019, and 7090 (DE First Holdings, *et al.*).

⁵² *See Heckler v. Chaney*, 470 U.S. 821 (1985). We did not separately notify Van Tuyl as a Respondent in this matter after learning of his identity, in light of our recommendation to dismiss the allegations under Section 30122 and the fact that the remaining allegations relate only to the LLC, not its member. *See* 52 U.S.C. §§ 30102, 30103, 30104 and 11 C.F.R. § 110.1(g)(5).

⁵³ Highway 76, Attach. 1 ¶ 6.

1 parties” and that “[d]etailed proposals have been made” even if “definitive agreements have not
2 yet been reached[.]”⁵⁴

3 Bidwell’s statements regarding Highway 76’s role in potential business deals are
4 ambiguous and do not clarify the provenance of the funds provided to DefendArizona.⁵⁵
5 Furthermore, Bidwell’s assertions regarding Highway 76’s commercial purpose are not
6 corroborated by documentary evidence; there is no public information concerning any business
7 activity (or any activities other than the making of contributions) by Highway 76. The temporal
8 proximity between Highway 76’s creation and the contribution at issue “could still be viewed as
9 suggestive”⁵⁶ that Bidwell used the LLC to mask a contribution from himself or another
10 unknown source, and it is unclear how the LLC obtained the \$100,000 that it purported to
11 contribute. However, in light of the LLC’s acknowledgement that the contribution was
12 improperly reported, DefendArizona’s reported refund of the contribution, and the
13 recommendation to find reason to believe that Highway 76 violated the LLC attribution
14 requirements — a finding that would not require investigation prior to conciliation — we
15 recommend that the Commission conciliate the violation supported by the existing record, and
16 exercise its prosecutorial discretion to dismiss the allegation that Highway 76 violated 52 U.S.C.
17 § 30122.⁵⁷

⁵⁴ Highway 76 Resp. at 3, *id.*, Attach. 1 ¶¶ 6-7.

⁵⁵ An LLC can be used for a commercial purpose *and* as a conduit for a contribution in the name of another. *See, e.g.*, First Gen. Counsel’s Report at 16, MUR 6711 (Specialty Investment Group, Inc., *et al.*).

⁵⁶ First Gen. Counsel’s Report at 11, MURs 7013 and 7015 (IGX, LLC).

⁵⁷ *See Heckler*, 470 U.S. 821. We did not separately notify Michael Bidwell as a Respondent in this matter after learning of his identity, in light of our recommendation to dismiss the allegations under Section 30122 and the fact that the remaining allegations relate only to the LLC, not its manager. *See* 52 U.S.C. §§ 30102, 30103, 30104 and 11 C.F.R. § 110.1(g)(5).

1 **C. Political Committee Status**

2 The Act defines a political committee as “any committee, club, association, or other
3 group of persons” that receives aggregate contributions or makes aggregate expenditures in
4 excess of \$1,000 during a calendar year.⁵⁸ Notwithstanding the threshold for contributions and
5 expenditures, an organization will be considered a political committee only if its “major purpose
6 is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).”⁵⁹ Political
7 committees are required to register with the Commission, meet organizational and recordkeeping
8 requirements, and file periodic disclosure reports.⁶⁰

9 The Complaint alleges that Blue Magnolia and Highway 76 were required to register and
10 report as political committees, arguing that these LLCs were both conduits *and* political
11 committees.⁶¹ Although both LLCs facially appear to have made a contribution that would
12 satisfy the statutory threshold for political committee status, the available information regarding
13 each LLC’s “major purpose” is unclear because the record does not reflect how each entity’s
14 federal campaign activity — making a \$100,000 contribution — compares to its other activity, if
15 any. Blue Magnolia represents that its income “flows directly” to its single member, Larry Van

⁵⁸ 52 U.S.C. § 30101(4)(A).

⁵⁹ Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

⁶⁰ *See* 52 U.S.C. §§ 30102, 30103, 30104.

⁶¹ In previous matters where a Complainant has raised this allegation and the record indicated that the LLC in question may have been a conduit, rather than the true contributor, this Office has recommended taking no action on the political committee allegation pending an investigation of the conduit allegation, because if the LLC was a conduit, then it did not “make” any contributions and therefore did not meet the statutory threshold for political committee status. *See, e.g.*, First Gen. Counsel’s Report at 12, MUR 6968 (Tread Standard, LLC, *et al.*). Here, by contrast, we are not recommending that the Commission find reason to believe that either Blue Magnolia or Highway 76 was used as a conduit.

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1 Tuyl, but it has not provided any specific information regarding its activities aside from its
2 contribution to DefendArizona.⁶² As such, the record does not indicate that Blue Magnolia
3 engaged in any activity aside from the \$100,000 contribution that it made to DefendArizona,
4 suggesting that it may have had a “major purpose” of nominating or electing federal candidates.
5 Highway 76 asserts that it was one of several LLCs created for potential Bidwell-family business
6 transactions that were being negotiated in 2018. On that basis, Highway 76 contends that it was
7 “organized and operated for commercial purposes — not for purposes of electing or defeating
8 federal candidates.”⁶³ Although nothing in the record confirms or undermines Highway 76’s
9 representations that it is a commercial entity and “part of a complex, multi-level business
10 structure[,]”⁶⁴ these general statements do not dispel the allegation or specifically address how its
11 \$100,000 contribution to DefendArizona compares to its other financial activity.

12 Nevertheless, we recommend that the Commission focus on conciliating the attribution
13 violations, as discussed above. With respect to the LLCs’ past activity, Blue Magnolia
14 acknowledges that it is a single-member LLC and its owner, Van Tuyl, now has been publicly
15 identified in DefendArizona’s disclosure reports. Highway 76’s complex ownership structure
16 has also been clarified in its Response to the Complaint in this matter, and it will likely be further
17 clarified through conciliation and become part of the public record when the case file is made
18 public. As for the LLCs’ future activity, finding reason to believe the LLCs violated their
19 affirmative obligations under 11 C.F.R. § 110.1(g)(5) and conciliating that violation would also

⁶² Blue Magnolia Resp. at 1.

⁶³ Highway 76 Resp. at 11.

⁶⁴ *Id.* at 10.

1 provide for the disclosure of any future political contributions made by these LLCs, since under
2 that rule, these LLCs must provide the appropriate attribution information to the recipients of any
3 future contributions they make, as outlined above.⁶⁵

4 In consideration of the foregoing, including the recommendation to find reason to believe
5 the LLCs violated the LLC attribution requirements, we recommend that the Commission
6 proceed to conciliation on the attribution allegations.⁶⁶

7 We therefore recommend that the Commission exercise its prosecutorial discretion to
8 dismiss the allegations that Blue Magnolia and Highway 76 violated the Act's registration and
9 reporting requirements for political committees.⁶⁷

⁶⁵ See *supra* Section III.A; see also Advisory Op. 2009-02 at 3 (True Patriot Network, LLC) (Apr. 17, 2009) (concluding that “expenditures by a single member LLC, like contributions, are attributable solely to the LLC’s single member”).

⁶⁶ The potential lack of clarity from the Commission on whether and when a single-member LLC is a “group of persons” within the scope of the “political committee” definition could be another reason to support dismissing the allegation. Highway 76 asserts that it is “not a ‘group of persons’” under the Act’s definition of “political committee.” Highway 76 Resp. at 11. Previous General Counsel’s Reports have noted that if an LLC that makes a contribution in its own name “is a *single-member* LLC, it might not meet the statutory definition of a political committee[.]” First Gen. Counsel’s Report at 12 n.42, MUR 6968 (Tread Standard LLC, *et al.*) (emphasis in original). Similarly here, it is “unclear whether a single-member LLC” like Highway 76 “could even qualify as a political committee” under the Act. First Gen. Counsel’s Report at 14 n.53, MUR 6969 (MMWP12, LLC, *et al.*). It is even less clear how a single-member LLC with a *natural person* member that does not elect to be treated as a corporation, such as Blue Magnolia, could constitute a “group of persons” under the Act, since under Commission regulations, this type of LLC is treated as a “pass through” for reporting purposes and its contributions must be attributed only to its single member. See 11 C.F.R. § 110.1(g)(4); LLC E&J at 37,399 (“Because of the unity of the [natural person] member and the [single-member] LLC in this situation, it is appropriate for attribution of the contribution to pass through the LLC and attach to the single member under these circumstances.”); see also Advisory Op. 2009-02 at 4 (“The Commission recognizes, however, that should circumstances change such that [the LLC] could be construed as a “group of persons,” [it] may need to consider whether it also would be a political committee under [the Act and Commission regulations].”).

⁶⁷ *Heckler*, 470 U.S. 821.

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4 **V. RECOMMENDATIONS**5 1. Find reason to believe that Blue Magnolia Investments, LLC violated 11 C.F.R.
6 § 110.1(g)(5);

7 2. Find reason to believe that Highway 76 LLC violated 11 C.F.R. § 110.1(g)(5);

8 3. Find reason to believe that DefendArizona and Benjamin Ottenhoff in his official
9 capacity as treasurer violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 110.1(g)(2)
10 and (4);11 4. Dismiss the allegation that Blue Magnolia Investments, LLC violated 52 U.S.C.
12 § 30122;

13 5. Dismiss the allegation that Highway 76 LLC violated 52 U.S.C. § 30122;

14 6. Dismiss the allegation that Blue Magnolia Investments, LLC violated 52 U.S.C.
15 §§ 30102, 30103, and 30104;16 7. Dismiss the allegation that Highway 76 LLC violated 52 U.S.C. §§ 30102, 30103,
17 and 30104;

18 8. Approve the attached Factual and Legal Analyses;

19 9. Enter into pre-probable cause conciliation with the Respondents;

20 10. Approve the attached Conciliation Agreements; and

