



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 20, 2017

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.).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT - 6 2017

VIA ELECTRONIC AND CERTIFIED MAIL

Chris Gober, Esq.
The Gober Group
P.O. Box 341016
Austin, TX 78734

RE: MUR 6920
Now or Never PAC
James C. Thomas, in his
official capacity as treasurer

Dear Mr. Gober:

On July 11, 2017, the Federal Election Commission found reason to believe that your client, Now or Never PAC and James C. Thomas, III in his official capacity as treasurer ("Now or Never PAC"), knowingly and willfully violated 52 U.S.C. §§ 30122 and 30104(b)(3)(A) by knowingly accepting a contribution in the name of another and misreporting that contribution. We have sent to you, under separate cover, the pre-probable cause conciliation offer approved by the Commission.

Although the Commission has offered to resolve this matter prior to a finding of probable cause, the Office of the General Counsel is also prepared to recommend that the Commission find probable cause to believe that Now or Never PAC knowingly and willfully violated 52 U.S.C. §§ 30122 and 30104(b)(3)(A). Therefore, we have enclosed a brief stating the position of the General Counsel on the legal and factual issues underlying this Office's probable cause recommendation while you consider possible resolution of this matter in pre-probable cause conciliation.

Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing

five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days. The Office of the General Counsel will not give extensions absent an agreement to toll the applicable statute of limitations.

You may also request additional information gathered by the Commission in the course of its investigation in this matter. *See* Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (June 15, 2011). We have enclosed documents supporting the analysis set forth in the General Counsel's brief.

In addition, you may also request an oral hearing before the Commission. *See* Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007) and Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. In this matter, a request for a probable cause hearing will require the Respondent to toll the applicable statute of limitations. *See* Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919, 64920 (Nov. 19, 2007). The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a post-probable cause conciliation agreement.

If you have any questions please contact Antoinette Fuoto, the attorney assigned to this matter, at (202) 694-1634.

Sincerely,



Lisa J. Stevenson
Acting General Counsel

Enclosures
General Counsel's Brief

1 federal committees for legal services,⁵ and has served as the treasurer of approximately twenty
2 Missouri political committees.⁶

3 In 2012, Thomas also provided legal and other professional services to GI LLC.⁷ GI
4 LLC is a Delaware limited liability company that was established in September 2012. GI LLC's
5 only known organizational purpose was to support conservative organizations and causes.⁸
6 Christopher W. Byrd, who died in 2014, served as the "sole manager and officer" of GI LLC in
7 2012.⁹ Byrd retained Thomas to prepare organizational paperwork, serve as attorney, and
8 perform various tasks on behalf of GI LLC.¹⁰ Thomas states that all tasks he performed for GI
9 LLC were conducted at the request and under the direction of Byrd.¹¹

10

11 , acting as trustee of ,

12 also funded GI

13 LLC, providing it with a \$2.5 million wire transfer in October 2012.¹³

⁵ See, e.g., Amended July Quarterly Report, Billy Long for Congress (May 6, 2010); Amended October Quarterly Report, Barnett for Congress (Jan. 28, 2011); Termination Report, Wink for Congress (Jan. 31, 2011); October Quarterly Report, Anders for Congress (Oct. 13, 2011); April Quarterly Report, Jay Jordan for Congress (Apr. 14, 2012).

⁶ See Missouri Ethics Commission Treasurer Search, available at http://mcc.mo.gov/MEC/Campaign_Finance/CF11_SearchComm.aspx (last visited Aug. 23, 2017).

⁷ Thomas Interrogatory Answers at 1, 3 (July 28, 2017).

⁸ *Id.* at 3.

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 1, 3.

¹¹ *Id.* at 1.

¹² *Id.* 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).

¹³ See Thomas Interrogatory Answers at 4.

1 Axiom Strategies is a Missouri-based political consulting firm that has connections to
2 both Now or Never PAC and GI LLC. Axiom Strategies provides political consulting services,
3 including fundraising services to Now or Never PAC.¹⁴ Axiom Strategies has “participated in
4 [Now or Never PAC’s] operations and financial activities,” and Thomas’s terms of engagement
5 with Now or Never PAC “expressly authorize” him to carry out the instructions of Axiom
6 Strategies.¹⁵ Thomas represents that he primarily took direction from Axiom Strategies’ founder,
7 Jeff Roe. Axiom Strategies also reportedly provided advisory services to GI LLC, by making
8 “recommendations as to how GI LLC could distribute its funds.”¹⁶ Specifically, Axiom
9 Strategies recommended that GI LLC contribute funds to ACU, and also solicited ACU to make
10 a contribution to Now or Never PAC.¹⁷

11 American Conservative Union is registered with the IRS as a social welfare organization
12 under section 501(c)(4) of the Internal Revenue Code, and is not registered with the Commission
13 as a political committee. ACU describes itself as the oldest and largest conservative grassroots
14 organization in the United States. It received donations totaling \$8,485,503 in 2012.¹⁸ In 2012,
15 ACU’s executive director was Gregg Keller.

¹⁴ Axiom Interrogatory Answers at 2 (Sept. 1, 2017).

¹⁵ Thomas Interrogatory Answers at 7.

¹⁶ *Id.* at 2.

¹⁷ *See* Axiom Interrogatory Answers at 4, 7. Axiom Strategies states that it did not communicate its belief that ACU would donate to Now or Never PAC to either Thomas or Byrd. *Id.* at 7.

¹⁸ *See* Compl., Ex. C at Part I.

1 bank representative wiring instructions for the transfer of \$1.8 million from GI LLC to ACU.²⁴
2 Thomas states that he wired the funds to ACU at the direction of Byrd.²⁵ After authorizing the
3 transfer, Thomas emailed Keller, Roe, and Hoeller to confirm that the “[m]oney should be on its
4 way shortly.”²⁶

5 Shortly after receiving confirmation of the wire transfer from GI LLC to ACU, Keller
6 wrote to Thomas, Roe, and Hoeller to state, “[w]ill take action immediately upon receipt.”²⁷ He
7 followed up with that email minutes later, stating that he’d “need wiring instructions,”
8 presumably to transfer funds from ACU to Now or Never PAC.²⁸ Prior to its receipt of the wire
9 from GI LLC, ACU had a combined total balance of approximately \$538,000 across its bank
10 accounts.

11 Later that afternoon, at 1:34 pm, Roe emailed Thomas and Hoeller to inquire into the
12 status of the “acu dough,” stating “[w]e need the mo wire out...”²⁹ Thomas replied that he had
13 “just checked,” that the funds had not arrived, and “[i]f they have a federal wire number from

²⁴ Thomas Documents at JT2017-0015. Thomas states that he did not exercise independent authority or control over GI LLC’s funds, and that he believes the decision to wire \$1.8 million from GI LLC to ACU was made by Byrd. Thomas Interrogatory Answers at 3. He further states that Byrd did not provide any information to him regarding the reasons or circumstances for that decision. *Id.* Thomas asserts that he “was never informed of any prior arrangement or agreement between GI LLC and ACU that the funds would be used to finance a contribution to by ACU to Now or Never PAC.” *Id.* at 5.

²⁵ Thomas Interrogatory Answers at 4.

²⁶ Thomas Documents at JT2017-0007.

²⁷ Thomas Documents at JT2017-0011.

²⁸ Thomas Documents at JT2017-0013. Hoeller responded with instructions for wiring funds to Now or Never PAC.

²⁹ Thomas Documents at JT2017-0018. OGC’s review of Now or Never PAC’s disclosure records from October 31, 2012 found that “the mo wire” may be a reference to an advertising buy in support of Missouri Senate candidate Todd Akin. *See* Now or Never PAC 24/48 Hour Notice of Independent Expenditures, Schedule E (Oct. 31, 2012). Now or Never PAC spent \$803,775 in support of Akin on October 31, 2012. *Id.*

1 their end, I can back track it[.]”³⁰ Thomas followed up on that email twelve minutes later,
2 writing to Roe, Hoeller, and Keller to confirm that Now or Never PAC received the
3 \$1.71 million.³¹

4 Now or Never PAC reported receiving \$1.71 million from ACU in its 2012 post-general
5 election disclosure report. Thomas, the treasurer of Now or Never PAC, acknowledges that he
6 “assumed that this contribution may have consisted in part of funds ACU had previously
7 received from GI LLC[.]”³² Thomas further acknowledges that he “may have erred” in reporting
8 ACU as the true source of the \$1.71 million contribution to Now or Never PAC.³³

9 ACU’s Director of Operations later characterized the funds sent to Now or Never PAC as
10 a “pass through” in an email asking Keller if ACU had to make its own filing with the
11 Commission in connection with the transaction.³⁴ In May 2014, apparently after an independent
12 auditor reviewed its 2012 finances,³⁵ ACU filed an Amended 2012 IRS Form 990 that disclosed
13 the \$1.71 contribution to Now or Never PAC as “a political contribution received by the
14 Organization and promptly and directly delivered to a separate political organization.”³⁶ ACU
15 has not affirmatively disputed its auditors’ characterization of the transaction. None of the
16 parties or witnesses involved have offered an explanation for the multi-step structure of the
17 transaction.

³⁰ *Id.*

³¹ Thomas Documents at JT2017-0020.

³² Thomas Interrogatory Answers at 5. Thomas asserts, however, that he believed that “ACU’s disposition of the funds was the product of its own independent decisionmaking[.]” *Id.*

³³ *Id.* at 9. Thomas claims that “excessive personal and professional demands on his time and attention” may have caused his reporting error, but states that his error was not knowing and willful. *Id.*; *see also id.* at 8.

³⁴ ACU Second Document Submission, November 30, 2012 email from Melissa Bowman to Gregg Keller.

³⁵ Compl. ¶¶ 15-17, Exs. B (Conlon & Associates Independent Auditor’s Report, Apr. 9, 2014) and C.

³⁶ *Id.*, Ex. C at Schedule O, Schedule C.

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1 **III. LEGAL ANALYSIS**

2 The undisputed record demonstrates that consultants for Now or Never PAC, and
3 Thomas, as treasurer of Now or Never PAC, arranged for a multi-step transfer of funds that
4 resulted in Now or Never PAC receiving a \$1.71 million contribution in the name of another.
5 Accordingly, there is probable cause to believe Now or Never PAC knowingly and willfully
6 accepted and then misreported the contribution made in the name of another.

7 **A. There is Probable Cause to Believe that Now or Never PAC Knowingly Accepted**
8 **and Misreported a Contribution in the Name of Another**
9

10 The Federal Election Campaign Act of 1971, as amended (the "Act"), prohibits any
11 person from making a contribution in the name of another person, knowingly permitting his or
12 her name to be used to effect such a contribution, or knowingly accepting such a contribution.³⁷
13 The requirement that a contribution be made in the name of its true source promotes Congress's
14 objective of ensuring the complete and accurate disclosure by candidates and committees of the
15 political contributions they receive.³⁸ Courts have uniformly rejected the assertion that "only the
16 person who actually transmits funds . . . makes the contribution,"³⁹ recognizing that "it is
17 implausible that Congress, in seeking to promote transparency, would have understood the
18 relevant contributor to be [an] intermediary who merely transmitted the campaign gift."⁴⁰
19 Accordingly, the Act and the Commission's regulations provide that a person who gives funds to

³⁷ 52 U.S.C. § 30122.

³⁸ 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.").

³⁹ *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011).

⁴⁰ *O'Donnell*, 608 F.3d at 554; see also *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.").

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1 another for the purpose of contributing to a committee “makes” the resulting contribution.⁴¹ If
2 an intermediary merely plays a “ministerial role” in transmitting a contribution, the contribution
3 should not be attributed to the intermediary but instead to the original source.⁴²

4 The Act also requires political committees such as Now or Never PAC to file regular
5 disclosure reports.⁴³ Committees, through their treasurers, must disclose itemized breakdowns of
6 receipts, including the name and address of each person who has made any contribution in an
7 aggregate amount or value in excess of \$200 within the calendar year, together with the date and
8 amount of any such contribution.⁴⁴ In addition, if a committee treasurer discovers after receipt of
9 an apparently legitimate contribution that it was made in the name of another, the treasurer must
10 refund or disgorge the contribution within 30 days.⁴⁵

11 The record establishes probable cause to believe that Now or Never PAC participated in
12 the arrangement of a multi-step transfer of funds which resulted in a contribution in the name of
13 another designed to evade reporting the true source of the funds. Consultants for Axiom
14 Strategies, who worked for Now or Never PAC, both recommended to GI LLC that it provide
15 funds to ACU and solicited the corresponding transfer of funds from ACU to Now or Never
16 PAC. Pursuant to those suggestions from Now or Never PAC’s agents, the dual transfers were
17 executed within a short period over the course of a single day. And, without the transfer from GI
18 LLC, ACU would have lacked the funds needed to make a \$1.71 million federal contribution.

⁴¹ 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.”).

⁴² See *O'Donnell*, 608 F.3d at 550.

⁴³ *Id.* § 30104(b).

⁴⁴ *Id.* § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(3)-(4).

⁴⁵ 11 C.F.R. § 103.3(b)(2); see MUR 5643 (Carter's Inc.) (informing recipient committee of its obligation to refund or disgorge illegal contribution); Advisory Op. 1996-05 (Jay Kim for Congress) (allowing for disgorgement of illegal contributions to U.S. Treasury as an alternative to refunding contributions).

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1 Accordingly, there is probable cause to believe that Now or Never PAC entered into an
2 agreement by which it would receive a contribution from ACU with the funds ACU received
3 from GI LLC. The existence of such an agreement is consistent with ACU's Director of
4 Operations' later characterization of the contribution as a "pass through." Such an agreement is
5 further confirmed by ACU's amended tax filing in which it characterized the \$1.71 contribution
6 to Now or Never PAC as "a political contribution received by the Organization and promptly and
7 directly delivered to a separate political organization."⁴⁶

8 Contemporaneous emails documenting the transactions likewise provide probable cause
9 to believe that Now or Never PAC knowingly accepted a contribution in the name of another.
10 Thomas, while serving as Now or Never PAC's treasurer, wired \$1.8 million from GI LLC to
11 ACU, and very shortly later on the same day, ACU used those funds to wire \$1.71 million to
12 Now or Never PAC. Axiom Strategies, while serving as Now or Never PAC's consultants,
13 directed the multi-step transfers. Correspondence from the morning of the transaction
14 demonstrates that Thomas and Axiom Strategies consultants had knowledge of and participated
15 in the planned multi-step arrangement when Thomas wired \$1.8 million from GI LLC to ACU.
16 Prior to executing the transfer, Thomas received an email from ACU's banking representative,
17 forwarded to him by Axiom Strategies consultant Jeff Roe, referencing an "outgoing wire" that
18 ACU was to authorize once the funds arrived. Thomas and Axiom Strategies, as agents of Now
19 or Never PAC, were aware that ACU would prepare an outgoing transfer upon receipt of the
20 funds from GI LLC, demonstrating Now or Never PAC's knowledge that ACU was not the true
21 source of the contribution it received later that day.

⁴⁶ Compl., Ex. C at Schedule O, Schedule C.

1 Now or Never PAC's knowledge of an agreement is further supported by correspondence
2 received from ACU later in the day. Immediately after Thomas authorized the wire from GI
3 LLC to ACU, ACU's executive director Gregg Keller wrote to Thomas and Axiom Strategies
4 consultants to confirm that he would "take action immediately upon receipt." ACU's
5 communications stating that it would take "action" upon receipt of GI LLC's wire transfer
6 provide probable cause to believe that ACU's transfer of funds to Now or Never PAC was
7 contingent upon it receiving funds from GI LLC, and that Now or Never PAC entered into an
8 agreement by which GI LLC made a contribution to Now or Never PAC in the name of ACU.
9 Though Thomas states that he was unaware of such an explicit agreement among the parties, this
10 claim is unavailing in light of his receipt of emails discussing the multiple steps carried out in
11 order for Now or Never PAC to receive a portion of the funds that GI LLC provided to ACU.

12 Notwithstanding knowledge that ACU was not the true source of the funds, Now or
13 Never PAC accepted the \$1.71 million contribution, and later misreported that contribution in
14 the 2012 post-general election disclosure report filed with the Commission. Accordingly, this
15 Office is prepared to recommend that Now or Never PAC violated 52 U.S.C. §§ 30122 and
16 30104(b)(3)(A) by knowingly accepting a contribution in the name of another and failing to
17 accurately report that contribution.

18 **B. There is Probable Cause to Believe that Now or Never PAC Acted Knowingly and**
19 **Willfully**

20 The Act prescribes additional monetary penalties for violations that are knowing and
21 willful.⁴⁷ A violation of the Act is knowing and willful if the "acts were committed with full
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⁴⁷ See 52 U.S.C. §§ 30109(a)(5)(B), 30109(d).

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1 knowledge of all the relevant facts and a recognition that the action is prohibited by law.”⁴⁸ This
2 standard does not require proving knowledge of the specific statute or regulation the respondent
3 allegedly violated.⁴⁹ Instead, it is sufficient to demonstrate that a respondent “acted voluntarily
4 and was aware that his conduct was unlawful.”⁵⁰ This may be shown by circumstantial evidence
5 from which a respondent’s unlawful intent reasonably may be inferred.⁵¹ For example, a
6 person’s awareness that an action is prohibited may be inferred from “the [person’s] elaborate
7 scheme for disguising . . . political contributions.”⁵²

8 The available evidence demonstrates probable cause to believe that Thomas and Axiom
9 Strategies consultants, as agents of Now or Never PAC, acted in a knowing and willful manner
10 in accepting and misreporting the contribution. First, as treasurer for Now or Never PAC,
11 Thomas was familiar with the Act’s requirements for making and accepting contributions.
12 Thomas, an attorney, has served as the treasurer of Now or Never PAC since 2012, when the
13 group filed its Statement of Organization. He is also the treasurer of at least one other federal
14 committee, has received disbursements from multiple federal committees for legal services, and

⁴⁸ 122 Cong. Rec. 12,197, 12,199 (May 3, 1976).

⁴⁹ *United States v. Danielczyk*, 917 F. Supp. 2d 573 (E.D. Va. 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a violation is willful, government needs to show only that defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated)).

⁵⁰ *Id.* (citing jury instructions in *United States v. Edwards*, No. 11-61 (M.D.N.C. 2012), *United States v. Acevedo Vila*, No. 08-36 (D.P.R. 2009), *United States v. Fieger*, No. 07-20414 (E.D. Mich. 2008), and *United States v. Alford*, No. 05-69 (N.D. Fla. 2005)).

⁵¹ *Cf. United States v. Hopkins*, 916 F.2d 207, 213 (5th Cir. 1990) (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)). *Hopkins* involved a conduit contributions scheme, and the issue before the Fifth Circuit concerned the sufficiency of the evidence supporting the defendants’ convictions for conspiracy and false statements under 18 U.S.C. §§ 371 and 1001.

⁵² *Id.* at 214–15. As the *Hopkins* court noted, “[i]t has long been recognized that ‘efforts at concealment [may] be reasonably explainable only in terms of motivation to evade’ lawful obligations.” *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

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1 has served as the treasurer of approximately twenty state political committees.⁵³ Consultants for
2 Axiom Strategies likewise have been active in political fundraising. Given this experience, there
3 is probable cause to believe that Now or Never PAC had the requisite knowledge that federal
4 campaign finance law required it to disclose the true source of all contributions, and that it was
5 illegal to make, assist in making, or accept a contribution in the name of another. Although
6 aware of the Act's disclosure requirements, Now or Never PAC accepted a contribution in the
7 name of another and misreported that contribution.

8 **IV. CONCLUSION**

9 Based on the foregoing, the Office of the General Counsel is prepared to recommend that
10 there is probable cause to believe that Now or Never PAC and James C. Thomas, III in his
11 official capacity as treasurer, knowingly and willfully violated 52 U.S.C. § 30122 by knowingly
12 accepting a contribution in the name of another, and knowingly and willfully violated
13 52 U.S.C. § 30104(b)(3)(A) by failing to accurately report that contribution.

⁵³ See *supra*, Part II.A.

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