LAW OFFICES
WEBSTER, CHAMBERLAIN & BEAN
1747 PENNSYLVANIA AVENUE, N.W
WASHINGTON, D C. 20006
(202) 785-9500
FAX. (202) 835-0243

ARTHUR L HEROLD
ALAN P DYE
EDWARD D COLEMAN
FRANK H NORTHAM
JOSEPH W HAZARD, JR
HUGH K WEBSTER
DAVID P GOCH
DAVID H REVES
CHARLES H WATKINS
HEIDI K ABEGG
DAVID H ABRAHAM
JOHN A STROUT
JAMES E WILSON, JR

GEORGE D WEBSTER (1921-1978)
CHARLES E CHAMBERLAIN (1917-2003)
OF COUNSEL
J GORMAN BEAN
KENT HARRISON BROWN

*NOT ADMITTED TO DC BAR

February 4, 2008

29044230834

Ms Mary Dove, Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2008 FEB -5 A 10 38

VIA Courier

Re MUR 5572

Dear Ms Dove

Enclosed please find ten reply briefs for filing in the above Matter Under Review

The Respondents also wish to request a hearing, the reasons which are more fully set out in the enclosed reply brief

Please do not hesitate to contact me if you have any questions

Sincerely,

Heidi K. Abegg

Heidi K Abegg

cc Office of General Counsel

LAW OFFICES
WEBSTER, CHAMBERLAIN & BEAN
1747 PENNSYLVANIA AVENUE, N W
WASHINGTON, D C 20006
(202) 785-9500
FAX (202) 835-0243

ARTHUR L HEROLD
ALAN P DYE
EDWARD D COLEMAN
FRANK H NORTHAM
JOHN W HAZARD, JR
ROBERT K WEBSTER
DAVID P BIDDY
DAVID H REMES
CHARLES H WATKINS
HEIDI E ABBEY
DAVID H ABRAHAMS
JOHN A STROUT
JAMES S WILSON, JR

GEORGE D WEBSTER (1911-1976)
CHARLES S CHAMBERLAIN (1917-2000)
OF COUNSEL
J COLEMAN BEAN
SENT' PATTERSON BOWMAN*

*NOT ADMITTED TO DC BAR

29044230835

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
David W Rogers	)	MUR 5572
	)	
Friends of Dave Rogers and Christian Winthrop, in his Official capacity as Treasurer	)	
	)	
Rogers for Congress n/k/a Special Operations Fund and Christian Winthrop, in his Official capacity as treasurer	)	

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2000 FEB -5 A 10:39

RESPONSE TO GENERAL COUNSEL'S BRIEF

I. INTRODUCTION

As counsel for Friends of Dave Rogers, Christian Winthrop (in his official capacity as treasurer), Special Operations Fund f/k/a Rogers for Congress, Christian Winthrop (in his official capacity as treasurer) and David W Rogers, we hereby provide a response to the General Counsel's Brief in this matter

We request a hearing on this matter and expect to address mailing lists and agreements between candidates and their campaigns, as well as the valuation of the list at issue

The Commission has faced the issue of candidates and their mailing lists on several occasions, and instituted a rulemaking (which was closed without action taken) on the subject to "provide candidates and political committees with more comprehensive guidance on commercial transactions involving mailing lists."[1] As Commissioner Smith noted, when the Commission enters into a rulemaking, "it is often in part an admission that the case-by-case regulatory approach we use in Advisory Opinions and MURs may not be working."[2]

The proposed rules contained a provision that would have expressly banned the conversion to personal use of the mailing list itself, such as by barring a candidate from retaining the proceeds of a mailing list rental or sale. The Commission also proposed requiring that mailing list rentals and sales be conducted at the "usual and normal charge," as well as the requirement that each such transaction be a "bona fide arm's length transaction." The rulemaking was closed without action taken on any of these provisions.

Over four years later, it is apparent that the regulated community still does not have good notice of what the rules are in this area, especially in light of unequivocal testimony in MUR 5181 that the exchange of signatures for the names of respondents is considered usual and normal in the direct mail industry. Additionally, several Advisory Opinions and at least two other MURs create a patchwork of enforcement that is not easily understood or applied.

---

[1] Mailing Lists of Political Committees, Notice of Proposed Rulemaking, 68 Fed. Reg. 52,531, 52,532 (Sept. 4, 2003).
[2] Statement of Reasons of Commissioner Bradley Smith in MUR 5181 at 7.

The Respondents continue to believe that the best place to resolve these continuing issues is in a rulemaking, rather than through enforcement actions, which lead to unclear rules that are not necessarily uniformly applied The Commission's "decisions in the past applying these rules have not been a model of clarity "[3] Continuing this lack of clarity, the General Counsel's Brief continues to apply ad-hoc standards as well as a previously rejected test for determining fair market value

II. DISCUSSION.

At the outset, it should be noted that § 439a, which deals with conversion of campaign assets to personal use, is difficult to apply to situations involving mailing lists and, as discussed below, leads to an absurd result Mailing lists are developed and enhanced through the efforts of *both* a principal campaign committee and the candidate In this respect, a mailing list is unlike any other principal campaign committee asset that could be converted to personal use (i e , monetary funds) The rules should not be applied blindly and without regard to the nature of the transaction

The General Counsel appears to have abandoned, in part, a previous assertion that the original ownership interest of the mailing list lay solely with Mr Rogers' principal campaign committee As the General Counsel's Brief notes on page 3, Mr Rogers provided an initial list to his campaign committee, which continued development of the list However, the General Counsel's Brief completely ignores the fact that a Memorandum of Understanding gave Mr Rogers co-ownership of the list The General

[3] Statement of Reasons of Commissioner Bradley Smith in MUR 5181 at 2

Counsel's Brief also takes issue with the sufficiency of the consideration provided by Mr Rogers for his co-ownership of the list

A. Co-Ownership.

Mr Rogers' right to ownership and his right to rent and sell a copy of his co-owned list is within the standard business practices of fundraising mail agreements between agencies and signers of letters for campaign committees [4] As the Commission is aware, it is a common practice for candidates and officeholders to lend their names and/or likenesses to their campaigns, parties or other political committees for fundraising solicitations, in return for an ownership interest in the list of names of those responding to their mailings These commercially reasonable types of transactions have previously been reviewed and approved by the Commission [5]

It appears that the General Counsel is attempting to apply both standards ("usual and normal charge" and "bona fide arm's length transaction") from its proposed rulemaking in this MUR It is possible for a candidate and his campaign to determine what is a fair market value and enter into an agreement based on that value The fact that the two parties are somehow related, e g , a candidate and his authorized committee, should not prevent the transaction if it is for a usual and normal charge If there was a fair exchange, it should not matter what the relationship between the parties was The treatment of a mailing list agreement between a candidate and his campaign should be

[4] For example, Senator Hillary Clinton has signed letters on behalf of her national party committee *See* Comments of National Republican Senatorial Committee Regarding Notice of Proposed Rulemaking regarding Mailing Lists of Political Committees, dated September 28, 2003 at 6
[5] *See, e g*, Advisory Opinions 1981-46 and 1982-41

treated in the same way as a transaction between a candidate and his party or other political committee

In MURs 4382/4401 and 5181, the Commission received evidence that these kinds of transactions and practices are widespread and customary In MUR 5181, John Ashcroft and his leadership PAC, Spirit of America, entered into an agreement giving Ashcroft personal ownership of the lists in return for the leadership PAC's use of his name and likeness in its activities Ashcroft also entered into an agreement with his campaign committee, which provided that the campaign could use Ashcroft's mailing list for 5 years, with the resulting "work product" (the list of responses) becoming the joint property of the campaign and Ashcroft personally The respondents in MUR 5181 presented sworn, unrebutted testimony that established the fact that in many cases, in exchange for their name, the candidate or officeholder obtains the work product that results from the use of his or her name [6] The Commission has approved similar types of transactions [7]

In MURs 4382/4401, the Commission "obtained through discovery strong evidence that these kinds of transactions and practices are widespread and customary in the commercial mailing list industry" [8] In MURs 4382/4401, Senator Robert Dole and a third party entered into an agreement to provide Senator Dole with the names of individuals who responded to the letters he signed on behalf of the organization In support of the respondents' position, the organization submitted statements from

[6] *See* Affidavit of Joanna Boyce Warfield dated June 5, 2003, *see also* Oliver Deposition at 45-46, 60
[7] *See, e g*, Advisory Opinions 1981-46 and 1982-41
[8] Statement of Reasons of Commissioners Mason and Toner in MUR 5181 at 6-7

numerous experts in the direct mail industry that demonstrated that such transactions are considered usual and normal in the direct mail industry [9] The testimony in these MURs did not indicate that a one time use was a universal or exclusive rule [10] Additionally, at least one other MUR (MUR 5160) and one publicly-reported federal ethics disclosure indicate that joint ownership of mailing lists is not unprecedented [11]

In addition to deciding to whom the leadership PAC's list could and could not be rented, Ashcroft "controlled" the content of the PAC's direct mail solicitations by passing along edits to the direct mail vendor [12] The Commission ultimately concluded that the mailing list exchanges that were the gravamen of the initial complaint in MUR 5181 did not violate the law [13]

Although Mr Rogers entered into a Memorandum of Understanding with his campaign committee, with each side thinking and acting for themselves, the General Counsel's Brief dismisses this agreement As has been the case in at least one other enforcement action, the General Counsel dismisses the bona fide agreement which provided for co-ownership without citing to an impartial expert who could render an opinion [14] And, as noted in testimony during the public hearing on the Commission's

[9] MURs 4382/4401, General Counsel's Report #2 at 15
[10] Statement of Reasons of Commissioners Mason and Toner in MUR 5181 at 8
[11] Edward Walsh, *Rogan Finds List is One Way to Profit from Loss*, Wash Post (Dec 13, 2002) at A43
[12] *See* General Counsel's Brief in MUR 5181 at 13
[13] Statement of Reasons of Commissioners Mason and Toner in MUR 5181 at 3
[14] *See* Statement of Reasons of Commissioner Smith in MUR 5181 at 8

proposed rules on mailing lists, at least one witness has testified that candidates should be able to exercise personal ownership over their lists [15]

In light of the above, it is clear that Respondents in this MUR were not on notice that co-ownership of a mailing list would result in the conversion to personal use of the mailing list "Based on the unrebutted testimony offered by the respondents in this MUR that the exchange of Senator Ashcroft's signature for ownership of responsive names was commercially reasonable, the apparently arm's length exchanges in this and other Commission proceedings which involved joint ownership of lists, and evidence in other enforcement matters and our rulemaking record that a variety of exchange practices are routine in the direct mail industry, we concluded that Senator Ashcroft's agreements with SOA and Ashcroft 2000 were fair market value exchanges "[16]

Furthermore, there is no legal distinction between a candidate and his campaign co-owning a mailing list and a candidate/officeholder entering into a co-ownership agreement with his leadership PAC or with a non-profit organization The Commission attempts to distinguish the MURs and Advisory Opinions cited above on the basis that they did not involve a candidate taking a personal ownership interest in a list developed and owned by his/her own principal campaign committee However, contrary to the General Counsel's assertion, in MUR 5181, Senator Ashcroft *did* license mailing lists he

[15] *See* Transcript, Candidate Travel, Multi-Candidate Committee Status, Biennial Contribution Limits, and Mailing Lists Public Hearing (Oct 1, 2003) at 68-69 (testimony of Robert F Bauer)
[16] Statement of Reasons of Commissioners Mason and Toner in MUR 5181 at 9

owned to his principal campaign committee in return for the expanded and updated list that reasonably could be expected to be generated by his re-election campaign [17]

In this case, Mr Rogers had prior ownership of the initial list and could create a joint ownership interest in the list This situation is legally indistinguishable from a candidate signing letters on behalf of another campaign committee or party committee in exchange for receiving the names of those individuals that respond to their signature [18] The fact that the committee involved is the candidate's principal campaign committee does not change the valuable consideration provided by the candidate in providing his signature and stories for use in fundraising and acquiring names To do otherwise would result in a donation by a candidate of a previously developed mailing list and subsequent efforts by the candidate to enhance this list without any return on the candidate's investment of the list, his signature and his time and effort There is no reason to treat the candidate's efforts of enhancement of the list differently merely because the committee happens to be his/her principal campaign committee

The Commission bases its argument in part on the fact that a candidate cannot profit from the sale of his own committee's mailing list simply because he "lent" his name or likeness to the committee, especially since the committee would not need or be seeking the candidate's name or likeness unless he had decided to run for federal office Under this approach, what is the candidate's property is unfairly deemed to be the

[17] List License Agreement between Ashcroft 2000 and Mr Ashcroft, effective Jan 1, 1999, *see also* Statement of Reasons of Commissioners David M Mason and Michael E Toner in MUR 5181 at 11
[18] It is believed that in 2003 alone, Senator Hillary Clinton signed letters on behalf of her national party committee in anticipation of receiving the names of those that responded to the letter over her signature

principal campaign committee's merely because the candidate is running for federal office Such an approach would violate 2 U S C § 432(b)(3), 2 U S C § 439a, and 11 C F R § 110 10(b) by treating the financial or property interests of Mr Rogers and his principal campaign committee as identical If the Commission were to treat property (a mailing list in this case) that is personally owned by Mr Rogers per se as the sole property of his principal campaign committee, the Federal Election Campaign Act's segregated fund and personal use rules would be vitiated

While it may be presumed that a candidate would lend his name and likeness to his principal campaign committee to further his efforts in getting elected, it does not necessarily follow that a candidate would automatically give his principal campaign committee all of the rights to his name and likeness For example, a candidate that has significant life experience may wish to not use some of those experiences to solicit money for and acquire names for his campaign He may decide instead to use these experiences to write a tell-all book However, if the candidate does choose to share these experiences with his campaign, it does not destroy the valuable consideration inherent in the information In exchange, the candidate should be permitted to receive joint ownership in the names developed from the use of this information

B. Usual and Normal Charge/Fair Market Value.

The General Counsel's Brief spends quite a few pages discussing the lack of valuable consideration provided by Mr Rogers, as well as the alleged significant development of the list by the campaign Neither of these arguments sufficiently support

the General Counsel's claim that § 439a was violated, and in fact, leads to an absurd result A candidate that donates a mailing list he owns to his principal campaign committee at less than the usual and normal charge makes a contribution of some value to his campaign that must be reported *See* 2 U S C § 431(8)(A)(i), 11 C F R § 110 7(a)(1)(iii)(A) & (B) Yet, in this case, while Mr Rogers is permitted to make a contribution (his mailing list) to his campaign, he is not permitted to receive something of value (enhanced list) in exchange without violating § 439a

Like MUR 5181, original ownership in the mailing list lay with Mr Rogers, not with his principal campaign committee Mr Rogers created the list of 500 to 1,000 names As in MUR 5181, the list was then enhanced through the efforts of Mr Rogers, who drafted, edited and provided content for the direct mail pieces As an individual, Mr Rogers' story as a Navy SEAL, his sacrifice for his country, and his service to the cause of America's freedom, were an essential part of creating any list of value [19] These stories of war combat and his work as a Navy SEAL were vital consideration to the creation of the fundraising appeals and the creation of the list Instead of using these experiences to fundraise for another organization, Mr Rogers provided these stories to his campaign committees

Mr Rogers testified that each of the fundraising letters told a story At the beginning of his campaign, he wrote down some of the compelling stories and then later, Mr Rogers and some of the employees from the fundraising firm would go out to dinner

[19] Lists of authorized candidates are usually started from a candidate's personal list and thereafter enhanced through the candidate's own efforts Comments of Ryan, Phillips, Utrecht & MacKinnon in response to Notice of Proposed Rulemaking 2003-17, dated September 25, 2003 at 3

and he would sit and tell stories all night Mr Rogers testified that they went to dinner about 10 or 12 times [20] Mr Rogers testified that he has done some interesting things that no one else has done, and that those experiences became part of the letters [21]

The General Counsel attempts to rebut this valuable consideration by claiming that Mr Rogers' life story has no unique value because he was never offered money for the rights to a book or a movie and never attempted to sell the rights to his name and life story, and has never been compensated in any way for the use of his name and life story [22] However, the fact that an individual has not attempted to sell his/her life story does not strip it of its value To find otherwise is to require any candidate signing a letter to have previously marketed his or her life story in order to be able to provide valuable consideration for the arrangement

The General Counsel focuses only on the efforts of the principal campaign committee in developing and enhancing the list What is missing from this discussion (and which could easily be explored during a rulemaking on the subject) is the value that the candidate provides to the development and enhancement of the list While the committee may engage in the mechanics of enhancing the list, it is the unique nature and sweat equity of the candidate that ultimately results in enhancement of the list Individuals donate to a principal campaign committee because they like the candidate and because his message resonates with them Only through the hard work of the candidate himself do the contributions even come in the door The success of the principal

[20] Deposition Transcript of Mr Rogers at 70
[21] *Id*
[22] General Counsel's Brief at 9

campaign committee ultimately rests on the candidate As a result of the candidate's sweat equity and unique contributions to his campaign, joint ownership is not "self-dealing" but a recognition of the valuable contributions of the candidate

The "development" of the list in this case is no different than other cases, which have been approved by the Commission This case is no different than a candidate signing a letter for his or her political party committee or other political committee, and receiving in return, the names of responders In those cases, the letters are developed and lists rented with assets of the political party or political committee, not with the assets of the candidate/officeholder It is even likely that a candidate could sign a letter for his political party committee which is mailed out using a list comprised of millions of individuals, which list had been developed over the course of several years at great expense Yet, that situation is no different from the one at hand Focusing the inquiry on the expense and time involved in creating the mailing list would effectively prevent nearly any individual from providing enough valuable consideration to receive the names of responders

The General Counsel's Brief does not advance a reasonable, empirically sound method of evaluating the fair market value of the list The Commission has never suggested that the costs incurred in developing a mailing list have any relevance in determining the market value of the list [23] In 1999, the Commission explicitly rejected a proposal to value a supporter list on a cost basis, concluding, "Fair market value of a list is not determined by the cost but rather by what someone is willing to pay for the use of

[23] Statement of Reasons of Commissioners Mason and Toner in MUR 5181 at 9-10

the list."[24] Therefore, all of the amounts alleged to have been paid to vendors for development of the list are irrelevant, especially those sums having nothing to do with list development.[25]

It is also irrelevant, as the General Counsel's Brief states, that Mr. Rogers did not spend any funds in developing the initial list.[26] Indeed, the General Counsel approvingly notes the work of Mr. Rogers' *volunteers* who further developed the list.[27]

III. CONCLUSION.

Because Mr. Rogers co-owned the mailing list, there was no conversion of campaign property to personal use. Therefore, Mr. Rogers was permitted to rent or sell the lists and receive income in exchange for this arms-length rental or sale. Having shown that no violation of § 439a occurred, Mr. Rogers, Friends of Dave Rogers, and Special Operations Fund respectfully request that the Commission not find probable cause to believe that violations have occurred and that the Complaint be dismissed.

Very truly yours,

Alan P. Dye

Heidi K. Abegg

Heidi K. Abegg

[24] *Id.* at 10 (quoting Final Audit Report on Dole for President, Inc. (June 3, 1999) at 31).
[25] General Counsel's Brief at 4 and n. 7 (including costs for "direct mail," "direct mail creatives," "direct mail production," "direct mail caging," "direct mail printing," "mail," or "mail services").
[26] General Counsel's Brief at 3.
[27] General Counsel's Brief at 4 and 8.

29044230847

Attorneys for Friends of Dave Rogers,
Special Operations Fund, and David Rogers