



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 2, 2022

By Email Only
cleta@cletamitchell.com

Cleta Mitchell, Esq.
Conservative Partnership Institute, Inc.
611 Pennsylvania Avenue, SE
Washington, DC 20003

RE: MURs 7628 and 7636
WeBuildTheWall, Inc.

Dear Ms. Mitchell:

On August 7 and August 15, 2019, the Federal Election Commission notified your client, WeBuildTheWall, Inc., of complaints alleging possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaints were forwarded to your client at that time.

Upon review of the available information, the Commission, on April 28, 2022, found reason to believe that WeBuildTheWall, Inc. violated 52 U.S.C. § 30118 by making a corporate contribution by renting an email list below market value to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official capacity as treasurer. The Factual and Legal Analysis, approved by the Commission on May 26, 2022, provides the basis for the Commission's finding and is enclosed for your information.

Please note that your client has a legal obligation to preserve all documents, records, and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter.¹

¹ See 18 U.S.C. § 1519.

MURs 7628 and 7636
Letter to Cleta Mitchell, Esq.
Page 2 of 3

If your client is interested in engaging in pre-probable cause conciliation, or has any questions, please contact Richard Weiss, the attorney assigned to this matter, at (202) 694-1021 or rweiss@fec.gov, within seven days of receiving this letter. During conciliation, you may submit any factual or legal materials that are relevant to the Commission's consideration of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, it may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days.² Conversely, if your client is not interested in pre-probable cause conciliation, the Commission may conduct formal discovery or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding. Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf.

In the meantime, this matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that your client wishes the matter to be made public. Please be advised that although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.³

We look forward to your response.

On behalf of the Commission,



Allen Dickerson
Chairman

Enclosures
Factual and Legal Analysis

² See 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A).

³ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* 30107(a)(9).

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: WeBuildTheWall, Inc. **MURs 7628 & 7636**

I. INTRODUCTION

The Complaints in these matters allege that WeBuildtheWall, Inc. (“WBTW”), a 501(c)(4) non-profit organization, made a prohibited in-kind corporate contribution to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official capacity as treasurer (the “Committee”) by sending an email on August 1, 2019, to the WBTW email list, displaying the WBTW logo, and soliciting contributions for the Committee, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The MUR 7628 Complaint also alleges that WBTW spent funds not subject to the limits, prohibitions, and reporting requirements of the Act to disseminate the email.² WBTW denies the allegations, asserting that it rented its email list to the Committee for \$2,000, which WBTW asserts was the fair market value for the list, and that any other violations are the result of vendor error.³ According to the information available to the Commission, an additional email was sent to the WBTW email list on July 18, 2019, soliciting contributions to the Committee.

As set forth below, the Commission finds reason to believe that the \$2,000 rental for the WBTW email list was significantly below fair market value and therefore constituted an in-kind corporate contribution to the Committee.

¹ MUR 7628 Compl. at 7-10 (Aug. 5, 2019); MUR 7636 Compl. at 4-5 (Aug. 13, 2019).

² MUR 7628 Compl. at 9.

³ WBTW Resp. at 1-2 (Oct. 3, 2019), MUR 7628.

II. FACTUAL BACKGROUND

WBTW is a 501(c)(4) non-profit organization that raises money to build portions of a wall on the USA-Mexico border.⁴ Kris Kobach serves as general counsel for WBTW, and it is a paid position.⁵ Kobach was a candidate for U.S. Senate in Kansas in 2020.⁶ Brian Kolfage is the President of WBTW.⁷ According to information available to the Commission, Dustin Stockton is a director of WBTW and President of Stockton Strategies, LLC (“Stockton Strategies”), a digital fundraising vendor retained by both the Committee and WBTW.⁸

On July 10, 2019, Stockton Strategies entered into an agreement to rent from WBTW, at a cost of \$2,000.00, use of its file of email addresses for purposes of prospecting contributions to Stockton Strategies’ candidate clients in 2019. The Committee reimbursed Stockton Strategies

⁴ WBTW Articles of Incorporation, Florida Dept. of State, Div. of Corporations. (Dec. 12, 2018). Brian Kolfage is the only listed director on the original Articles of Incorporation. *Id.* Prior to the formal incorporation of WBTW, Kolfage reportedly created a GoFundMe campaign called, “We The People Will Build the Wall” in December 2018 to raise money for the federal government to build a border wall on the USA-Mexico border. *See* Abigail Hess, *A GoFundMe Campaign Raised \$20 million For A Border Wall—Now All Of The Funds Will Be Returned*, Jan. 11, 2019, CNBC, <https://www.cnbc.com/2019/01/11/gofundme-that-raised-20-million-for-border-wall-will-return-funds.html>. However, Kolfage reportedly subsequently determined the federal government would not be able to accept the money, at which point Kolfage created WBTW and gave contributors the choice of a refund or to have their contribution transferred to WBTW. *Id.* WBTW has four directors: Brian Kolfage (President), Amanda Shea (Secretary/Treasurer), Kris Kobach (Director), and Dustin Stockton (Director). WeBuildTheWall, Inc., 2019 Florida Not For Profit Corporation Annual Report at 1 (July 15, 2019), <http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=domnp-n19000000009-98698443-58d3-4b71-ad00-e2e2f8f17ffc&transactionId=n19000000009-2a1c88f1-ff1e-4468-952f-df2fb3f3b374&formatType=PDF>.

⁵ *See* 2019 Kobach for Senate Financial Disclosure at 7; *see also* Jonathan Shorman, *et al.*, *As Kobach Pursues U.S. Senate, Border Wall Group He Represents Leaves Anger In Its Wake*, THE WICHITA EAGLE, July 21, 2019, <https://www.kansas.com/news/politics-government/article232855972.html>; *see also* WBTW Resp. at 1.

⁶ Kris Kobach, Statement of Candidacy (July 8, 2019).

⁷ *See* WBTW Resp. at 1, MUR 7628; *see also* We Build The Wall Team, WEBUILDTHEWALL, <https://webuildthewall.us/ourteam/> (last visited Aug. 2, 2021).

⁸ Stockton Strategies does not have a website.

1 for the full \$2,000 rental price. According to information available to the Commission the
2 Committee entered into an agreement with Stockton’s company to perform fundraising services.

3 Stockton sent emails to WBTW’s 295,000-person email list on July 18, 2019, and
4 August 1, 2019, from the WBTW server. The July 18 email was sent from “Brian Kolfage —
5 WeBuildTheWall, Inc. info@webuildthewall.us” and included the WBTW logo, an
6 announcement supporting Kobach’s Senate candidacy, a solicitation for campaign contributions
7 to Kobach’s campaign, and the email was signed by Kolfage. The August 1, 2019, email was
8 sent from “Kris Kobach — WeBuildTheWall, Inc. info@webuildthewall.us” and contained the
9 WBTW logo, and a letter, signed by Kobach as general counsel for WBTW, announcing his
10 Senate candidacy and soliciting support and contributions.⁹

11 The MUR 7628 Complaint alleges that WBTW made an in-kind corporate contribution to
12 the Committee by sending the August 1, 2019, email to the WBTW list. The MUR 7636
13 Complaint alleges that WBTW violated the corporate facilitation prohibition by using its logo
14 and resources to send the email.¹⁰ WBTW responds that because it rented its list to Stockton
15 Strategies, it did not make an in-kind corporate contribution to the Committee.¹¹

16 **III. LEGAL ANALYSIS**

17 The MUR 7628 Complaint alleges that the use of the WBTW email list constituted a
18 prohibited in-kind corporate contribution. Corporations are prohibited from making a
19 contribution to a candidate’s committee, and candidates are prohibited from knowingly accepting

⁹ MUR 7628 Compl. at Ex. 1.

¹⁰ MUR 7637 Compl. at 4-5.

¹¹ WBTW Resp. at 2-5, MUR 7628.

MUR 7628 & 7636 (WeBuildTheWall, Inc.)

Factual and Legal Analysis

Page 4 of 8

1 or receiving a prohibited contribution.¹² A “contribution” includes “any gift, subscription, loan,
2 advance, or deposit of money or anything of value made by any person for the purpose of
3 influencing any election for Federal office.”¹³ “Anything of value” includes all in-kind
4 contributions, including the provision of goods or services without charge or at a charge that is
5 less than the usual and normal charge.¹⁴ The Commission’s regulations define “usual and
6 normal charge” as “the price of those goods in the market from which they ordinarily would have
7 been purchased at the time of the contribution.”¹⁵ Finally, the Act requires committee treasurers
8 to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C.
9 § 30104.¹⁶

10 As a corporation, WBTW is prohibited from making contributions to candidates for
11 federal office. If the \$2,000 list rental price is the usual and normal charge for this list, then
12 WBTW would have made no contribution to the Committee. As set forth below, the available
13 information indicates that the \$2,000 list rental price was substantially below the usual and

¹² See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

¹³ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30118(b)(2) (“‘contribution or expenditure’ . . . includes any direct or indirect payment . . . gift of money, or any services, or anything of value”).

¹⁴ See 11 C.F.R. § 100.52(d)(1); *see also* Advisory Opinion 2010-30 (Citizens United) (holding, “so long as Citizens United does not rent its list to Federal candidates, authorized committees, political party committees, or other political committees for less than the usual and normal charge, the rental of the list will not constitute a corporate expenditure by Citizens United.”); First Gen. Counsel’s Rpt. at 5 & Cert. ¶1, MUR 5682 (Bachmann for Congress) (finding the respondent assigned an appropriate valuation to a mailing list where the respondent had consulted with a “reputable list broker” regarding the “proper fair market value” of the list).

¹⁵ 11 C.F.R. § 100.52(d)(2).

¹⁶ 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a); *see also* 52 U.S.C. § 30104(b) (contents of the required reports).

1 normal charge for the list’s rental; therefore, WBTW appears to have made an in-kind corporate
2 contribution.¹⁷

3 According to WBTW, the market rate for its email list containing 295,000 addresses was
4 1/10 of a cent per email per use (for six uses).¹⁸ By contrast, according to information available
5 to the Commission, the Committee believed that the agreed-upon market rate was 2/3 of a cent
6 per email (with no number of uses stated). WBTW does not explain how it determined 1/10 of a
7 cent per email address per use (for six uses) was the appropriate “market rate.”

8 The list consisted of “all individuals who had made any donation, of any amount, to
9 WBTW throughout its history” including the original “GoFundMe donors,” whose combined
10 donations totaled \$25 million for the border wall campaign. Thus, the list was not an untested
11 roster of potentially interested persons, but a list of people who had actually donated money for a
12 specific cause. Further, the factual context suggests that the list is also political in nature. The
13 list use agreement between Stockton Strategies and WBTW stated that the list was to be used by
14 Stockton Strategies in conducting fundraising on behalf of political candidates who support the
15 construction of border fencing on the United States — Mexico border by the federal government.
16 The email list consisted of persons whose previous donations indicate an interest in the same
17 specific political issue — border security — as the candidates on whose behalf Stockton
18 Strategies would fundraise. Moreover, Kobach had been part of WBTW since its formation, the

¹⁷ See Factual & Legal Analysis at 5-6, MUR 5939 (MoveOn.org Political Action, *et al.*) (concluding the available information suggests that the \$64,575 rate initially agreed upon by MOPA and The Times was less than the usual and normal price of \$142,083 for an advertisement guaranteed to run on a particular day; the difference between these two figures, \$77,508, would have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the higher rate of \$142,083 on September 24, 2007). A candidate acts as an agent of an authorized Committee. See 52 U.S.C. § 30102(b)(2).

¹⁸ WBTW Resp. at 2, MUR 7628.

solicitation emails identified candidate Kobach as WBTW's general counsel, and it appears that Kobach was the only candidate for which Stockton used the list.

The Commission has deemed transactions permissible when the price is "determined by the market's view of the value of the list."¹⁹ WBTW, however, did not provide any justification for how the market rate for the WBTW list was determined, but rather, Kolfage simply stated the "market rate is approximately 1/10 of a cent per email record."²⁰ In previous matters, detailed factual records have been provided to establish a market rate and prove that a bargained-for exchange occurred. WBTW has not provided a detailed factual record.²¹

A review of publicly available information regarding list rental prices reveals a wide range, depending on the nature of the list, but the Commission could find no price comparable to the rate that WBTW charged the Committee. As one example, one of the least expensive rates in the 2020 election cycle was offered by a company called Excelsior Strategies, which was renting 1,000 email addresses of Trump supporters for \$35.²² Yet, this rate is still at least five times the

¹⁹ *Id.*; see also Factual & Legal Analysis at 27-28, MURs 4382/4401 (Dole for President) (finding the exchange of a mailing list for Dole's signature endorsement was not a bargained for exchange and that the committee failed to establish the signature was something of equal value); Advisory Opinion 2012-31 at 4 (AT&T) (concluding the rate structure of text messaging services to political committees "reflects commercial considerations and does not reflect considerations outside of a business relationship."). The Commission reiterated these considerations in numerous Advisory Opinions. See Advisory Opinion 1994-10 (Franklin National Bank); Advisory Opinion 2012-28 (CTIA II); Advisory Opinion 2012-26 (m-Qube II); see also Advisory Opinion 1981-46 at 2 (Dellums) (determining whether a transaction involving the exchange of mailing lists between a candidate committee and another entity results in a contribution, is based on whether the transaction involved a "a bargained-for exchange of consideration in a commercial transaction).

²⁰ MUR 7628 WBTW Resp., Kolfage Affidavit ¶ 9.

²¹ See Factual & Legal Analysis at 7, MUR 5181 (Ashcroft 2000) (concluding that the available information failed to establish whether the exchange at issue was a bargained-for exchange of equal value based in part on the committee's failure to provide any information regarding the value of the mailing list and the use of then-Senator Ashcroft's signature or an explanation as to how the items can be considered items of equal value).

²² Kenneth Vogel and Maggie Haberman, *Now For Rent: Email Addresses And Phone Numbers For Millions Of Trump Supporters*, N.Y. TIMES, Oct. 13, 2018, <https://www.nytimes.com/2018/10/13/us/politics/trump-political-data.html>.

1 WBTW rate. Moreover, the WBTW list rental was not for only one use, but for either six uses,
2 according to WBTW's Response, or unlimited use over a six-month period, according to the list
3 rental agreement.²³ Given this information, the \$2,000 list price appears to be significantly lower
4 than any comparable market rate.

5 In addition, the presence of Kobach and Stockton on both sides of the transaction raises
6 further questions about its commercial reasonableness. Information available to the Commission
7 indicates that Kobach drafted the agreement in his capacity as WBTW's general counsel and was
8 asked his opinion concerning the list rental price, and Kobach agreed that \$2,000 was within the
9 market range and was appropriate, given the untested nature of the non-political list. Ultimately,
10 Kobach received the rented email list for that price, as the Committee was the only entity that
11 used the list, and the Committee reimbursed Stockton Strategies for the entire rental price.
12 Further, Stockton was a director of WBTW and the President of Stockton Strategies, which was
13 retained by both WBTW and the Committee, and Stockton was involved on both sides of the
14 transaction.

15 Additional factors cast doubt on the commercial reasonableness of the list rental
16 agreement. The July 10 agreement between WBTW and Stockton Strategies and another
17 relevant agreement, dated July 15, between Stockton Strategies and the Committee regarding the
18 email list, are unsigned. Information available to the Commission indicates that although the
19 agreements are unsigned, it was the intention of the parties for the agreements to be binding.

20 In summary, the available information indicates that the \$2,000 rental price was
21 significantly below market rate, Respondent has been unable to articulate how the rate was

²³ See WBTW Resp. at 2, MUR 7628.

MUR 7628 & 7636 (WeBuildTheWall, Inc.)

Factual and Legal Analysis

Page 8 of 8

- 1 determined, and WBTW and Kobach were on both sides of the rental transaction. Therefore, the
- 2 Commission finds reason to believe that WBTW made an in-kind corporate contribution.