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Christal
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CLIENT/MATTER NUMBER
999100-0100

March 20, 2020

VIA Email to: Christal Dennis (cdennis@fec.gov); CELA@fec.gov

Ms. Christal Dennis, Paralegal
Office of Complaints Examination and Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MUR 7636 – Response on behalf of Respondent
WeBuildtheWall, Inc.

Dear Christal:

On behalf of the WeBuildtheWall, Inc., Respondent in the above-referenced Matter Under Review (MUR 7636), please find attached the Response filed by Respondent in MUR 7628 on October 3, 2019. The claims and factual assertions in the Complaint filed in MUR 7636 are identical to those contained in the Complaint filed in MUR 7628.

Accordingly, the Response filed by the Respondent in MUR 7628 is hereby adopted and incorporated by reference in its entirety as the Response of WeBuildtheWall, Inc. to the Complaint filed in MUR 7636.

Please contact me if there are additional questions. Thank you.

Sincerely,

Cleta Mitchell, Esq., Counsel
WeBuildthe Wall, Inc., Respondent

Attachments

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CHICAGO
DALLAS
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LOS ANGELES
MADISON

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MIAMI
MILWAUKEE
NEW YORK
ORLANDO

SACRAMENTO
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
TALLAHASSEE

TAMPA
WASHINGTON, D.C.
BRUSSELS
TOKYO

SWORN AFFIDAVIT OF
BRIAN KOLFAGE, JR.

BEFORE THE FEDERAL ELECTION COMMISSION

State of Florida
Walton County

Matter Under Review 7628

Affidavit of Brian Kolfage, Jr.

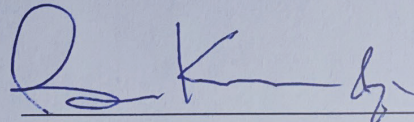
I, Brian Kolfage, Jr., am an adult citizen and a resident of the State of Florida. I hereby state and affirm as follows:

1. I am the founder and President of a social welfare grassroots nonprofit organization, WeBuildTheWall, Inc. ("WBTW").
2. The mission of WBTW is to mobilize citizen support and funding to build a wall along the southern border of the United States through private, voluntary donations, because the Congress of the United States has been, to date, unable and unwilling to address the serious crisis along our nation's southern border.
3. In January 2019, Kris Kobach, the Kansas former Secretary of State, agreed to serve as the General Counsel of the WBTW, a position which he still holds.
4. At the time Mr. Kobach was retained to serve as General Counsel of WBTW, he was not a candidate for office.
5. Mr. Kobach announced his candidacy for the US Senate on July 8, 2019.
6. I became aware in July 2019 that the Kobach Campaign had retained Stockton Strategies, LLC ("Stockton Strategies") to consult for the Kobach campaign.
7. Dustin Stockton, principle of Stockton Strategies, approached me in July 2019, to request permission to rent WBTW's email list for the sole purpose of soliciting contributions for the Kobach campaign and other clients of his LLC.
8. I agreed that the WBTW email list could be rented by Stockton Strategies for the limited purposes described by Mr. Stockton.
9. We arrived at the list rental price based on the following valuation and calculation: The market rate is approximately 1/10 cent per email record. The list contained approximately 295,000 records. The rental was only for the second half of 2019, with the understanding that there would be approximately one email solicitation to the list per month, for 6 months. The calculation was $6 \times 295,000 \times .001 = \$1,770$, which was rounded up to an even \$2,000.
10. The amount of \$2,000 more than covers both the rental any/all incidental costs attendant to the use of the list.

11. Stockton Strategies paid for the list rental via check payable to WBTW in the amount of \$2,000.
12. I have furnished a copy of the check, and proof of deposit of the check into WBTW's checking account which are attached to WBTW's Response to the FEC Complaint.
13. The preparation of the email soliciting contributions was handled by Stockton Strategies, and a text of the draft was sent to me and others working for WBTW.
14. The email at issue in the Complaint was not prepared or designed by me or by any other person on behalf of WBTW.
15. I understood from Mr. Stockton at the time that all emails to the WBTW list would be sent to me for review in advance of dissemination, and then would be disseminated to the rented list from an email address and server other than WBTW's.
16. Mr. Stockton bore full responsibility for proper formatting and the inclusion of disclaimers and other required verbiage in the emails.
17. I understood from Mr. Stockton that he was well-versed in the legal requirements regarding emails and solicitations made on behalf of political candidates.
18. The version of the email forwarded to me by Mr. Stockton prior to dissemination had no disclaimers or legal notices, but I had no knowledge of or obligation to review whatever legally required language applied to communications on behalf of clients of Stockton Strategies.
19. Mr. Stockton only showed me an early draft of the text that would go into the message, but nothing else.
20. Neither I nor any other persons at WBTW commented on or had input into the draft of the email message.
21. Mr. Stockton did not share with me any further drafts nor did he inform me that the email at issue in the Complaint was being sent.
22. WBTW's entire involvement in this matter was the agreement to rent the email list, to receive an advance review of substantive, non-legal content, and to receive payment for the list rental.
23. WBTW satisfied its contractual obligations with Stockton Strategies as described above.

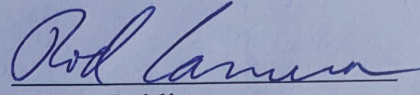
24. At no time did WBTW or I approve the use of WBTW's email server to deliver any of Stockton Strategies' email communications, but the minimal use of the WBTW server was adequately compensated by the payment to WBTW from Stockton Strategies.
25. The protocols for sending all emails to WBTW's email list for this or any purpose have been strengthened since this episode to ensure that no person going forward other than I or my designee is allowed to send any emails to WBTW's email list from WBTW's email address.
26. Insofar as the absence of the required campaign disclaimer on the email solicitation referenced in the Complaint, I reiterate that WBTW received payment at fair market value for the rental of its list to Stockton Strategies, that the email preparation and dissemination were *not* paid for by WBTW, and WBTW had no legal obligation or responsibility for legally required disclaimers on communications developed by and for clients of Stockton Strategies.
27. The email sent on behalf of the Kobach Campaign was not paid for by WBTW.
28. Upon learning after the fact of the dissemination of the email from WBTW's email address and server, I took immediate action to contact Mr. Stockton regarding the error, and advised Mr. Stockton that he should not have sent the email from WBTW's email address.
29. Mr. Stockton apologized for his error.
30. My corrective action with Mr. Stockton was taken prior to receipt of the Complaint in this matter.
31. I believe that I, on behalf of WBTW, have taken all reasonable steps to remedy the system that allowed this error to occur.
32. This error was inadvertent and there was no disbursement by WBTW to or on behalf of the Kobach Campaign.

The above and foregoing is true and correct to the best of my knowledge and belief.

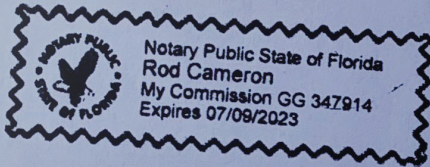

Brian Kolfage, Jr.

Brian Kolfage, Jr. appeared before me personally on this 3 day of October, 2019, and did swear and affirm under penalty of perjury that the above and foregoing statements are true and correct to the best of his knowledge and belief.

Notary S E A L


Notary Public

My Commission Expires: 7/9/23



**IN AND BEFORE THE
FEDERAL ELECTION COMMISSION**

In re:
WeBuildtheWall Inc

RE: MUR 7628

**RESPONSE TO COMPLAINT &
MOTION TO DISMISS COMPLAINT**

WeBuildtheWall Inc., (hereafter “Respondent”), files this Response and Objection(s) to the Complaint filed with the Federal Election Commission (“Commission” or “FEC”) by Common Cause and Paul Ryan (“Complainants”).

The Complaint alleges that Respondent committed a violation of the Federal Election Campaign Laws, Title 52 United States Code, Subtitle III, Chapter 301, Subchapter I (“the Act”) and the regulations promulgated thereunder by the Commission.

Respondent affirmatively states that it has committed no violation of the Act and the Complaint should be dismissed.

Factual Background of the Complaint

Complainants allege that Respondent sent an email to its email list, soliciting funds for the US Senate campaign of its General Counsel, Kris Kobach (“Kobach”), and that the email lacked the proper disclaimer to indicate that the email was paid for by the Kobach campaign (“Kobach Campaign”).

Per the sworn affidavit of Respondent’s President, Brian Kolfage, Jr., Mr. Kolfage was initially informed that the Kobach Campaign had retained Stockton Strategies, LLC (“Stockton Strategies”) to consult for the Kobach campaign in July 2019. At or about the same time, Stockton Strategies’ principal, Dustin Stockton, approached Mr. Kolfage, to request permission to rent Respondent’s email list for the sole purpose of soliciting contributions for the Kobach campaign and other clients of his LLC. Kolfage agreed that the email list could be rented by Stockton Strategies for that limited purpose. *See Affidavit of Brian Kolfage, Jr.*

Mr. Kolfage understood from Mr. Stockton at the time that all final emails would be sent to Mr. Kolfage for review in advance of dissemination, and then would be disseminated to the rented list from an email address and server other than Respondent’s.

Stockton Strategies agreed to bear the sole and full responsibility for including proper formatting, disclaimers, and other required verbiage in the emails. Mr. Stockton represented to

Mr. Kolfage that he was well-versed in the legal requirements regarding emails and solicitations made on behalf of political candidates.

The calculation of the amount to be paid for the rental of the list was determined by mutual agreement of the parties as follows:

The market rate is approximately 1/10 cent per email record. The list contained approximately 295,000 records. The rental was only for the second half of 2019, with the understanding that there would be approximately one email solicitation to the list per month, for 6 months. The calculation was $6 \times 295,000 \times .001 = \$1,770$, which was rounded up to an even \$2,000.

Stockton Strategies paid for the list rental via check payable to Respondent in the amount of \$2,000. A copy of the check, and proof of deposit of the check into Respondent's checking account are attached to this Response. *See Exhibit A, Check Stub from Stockton Strategies Referencing Check for \$2,000; Exhibit B, Cancelled Check and Proof of Deposit.*

The preparation and dissemination of the email soliciting contributions for the Kobach Campaign at issue in the Complaint was solely controlled by Stockton Strategies. An initial draft text of the substantive portion of the email was sent to Mr. Kolfage and others working for Respondent. Neither Mr. Kolfage nor others at Respondent ever commented on the texted draft.

The draft version of the email forwarded to Mr. Kolfage by Mr. Stockton prior to dissemination contained no disclaimers or legal notices as it was an initial draft of only the substantive portions of the email but, in any case, Mr. Kolfage had no knowledge of or obligation to review legally required language for the Kobach Campaign.

Mr. Stockton only forwarded to Mr. Kolfage this early draft of the text that would go in the email message. Mr. Stockton did not relay to Mr. Kolfage any further drafts nor did Mr. Stockton inform Mr. Kolfage that the email at issue in the Complaint was actually being disseminated.

Respondent's entire involvement with respect to the email at issue in the Complaint (or any other email solicitations) was its agreement to rent the email list, accept an advance review of substantive non-legal content, and receive payment for the email list rental and attendant costs. At no time did Respondent approve the use of its email server to deliver any of Stockton Strategies' email solicitations for the Kobach Campaign or any other client.

The protocols for sending all emails to Respondent's email list for this or any purpose have been strengthened since this episode to ensure that no person going forward other than Mr. Kolfage or his designee is allowed to send any emails to Respondent's email list from Respondent's email address.

Insofar as the absence of the required campaign disclaimer on the email solicitation, Mr. Kolfage reiterates that the email preparation and dissemination was, in fact, paid for by the Kobach Campaign, which rented the list and paid its consultant to write and design the communication.

It was Mr. Stockton's responsibility in his role as consultant to the Kobach Campaign to prepare and disseminate the solicitation properly and to include the necessary disclaimers for federal campaign communications and solicitations.

Upon learning after the fact of the dissemination of the email from Respondent's email address and server, Mr. Kolfage took immediate action to contact Mr. Stockton regarding the error, and advised Mr. Stockton that he should not have sent the email from Respondent's email address and that it should not happen again. Mr. Stockton apologized for his error.

Mr. Kolfage's corrective actions were taken prior to receipt of the Complaint in this matter.

Mr. Kolfage, on behalf of Respondent, has taken all reasonable steps to remedy the system that allowed this error to occur. It was inadvertent and any cost(s) for the use of the email server were covered by the payment from Stockton Strategies for the use of the list.

No disbursements from WBTW were made and no unreimbursed use of WBTW resources occurred.

In summary, the facts as verified by Mr. Kolfage's sworn testimony and the documentation of payment attached to this Response all demonstrate that the allegations in the Complaint are false and Respondent WeBuildTheWall Inc has not violated any provision of the Federal Election Campaign Act.

Legal Arguments for Dismissal of the Complaint

Complainants allege that Respondent in this matter violated the provisions of 52 U.S.C. §30118, which prohibits corporate contributions to federal candidates¹. The factual allegations in the Complaint state: "On August 1, 2019, the *Daily Beast* reported that earlier that day Kris Kobach 'sent a fundraising appeal to an email list maintained by We Build The Wall, a 501(c)(4) advocacy group currently attempting to build a wall on the southern border using private funds. Kobach is on the group's advisory board and serves as its general counsel.' The fundraising appeal, attached to this complaint as an exhibit, indicates it was "From: Kris Kobach - WeBuildTheWall, Inc. info@webuildthewall.us". See Complaint, ¶¶9-10.

Complainants *presume* that WBTW made its email list available to the Kobach Campaign for free, which is not true.

¹ The Complaint alleges two additional violations of federal law applicable to candidates for federal office: 52 U.S.C. § 30125(e), which prohibits federal candidates from spending so-called "soft money" in connection with their election, and 52 U.S.C. § 30120(a), which requires certain email communications by political committees to include a "paid for by" disclaimer. Neither of these alleged violations are applicable to Respondent WeBuildTheWall Inc.

WBTW received payment of \$2,000 for the use of its email list by clients of Stockton Strategies, including the Kobach Senate campaign. See Exhibits A, B, and C, attached to this Response. The calculation of the rental payment confirms that the parties made every effort to ensure that the amount was a reasonable, fair market value for the list rental and usage. *See Affidavit of Brian Kolfage, Jr.*

The FEC has considered the issue of whether a 501(c)(4) nonprofit corporation is legally permitted to rent its email supporter / donor list(s) to federal candidates and others for political purposes under the provisions of the Federal Election Campaigns Act (“FECA” or “the Act”).

In Advisory Opinion 2010-30, Citizens United, a 501(c)(4) nonprofit corporation asked the Commission whether renting its “email subscriber list to Federal candidates, authorized committees, political party committees, or other political committees in the manner [described in the request] violate the prohibition against corporations coordinating expenditures with a Federal candidate, authorized committee, or political party committee”.

The Commission responded saying that as long as the email list was rented for fair market value, the rental of an email list to a federal candidate / campaign by a 501(c)(4) nonprofit corporation does not violate the Act.

The Commission specifically found that “... the rental of Citizens United’s email subscriber list to Federal candidates and political committees ...would not result in a corporate expenditure by Citizens United so long as Citizens United is renting its email list for the usual and normal charge”.

In this instance, WBTW did not rent its list directly to the Kobach campaign, but was aware that Stockton Strategies in its capacity as the general consultant to the Kobach campaign, was renting the list for use by the Kobach campaign and possibly other clients of Stockton Strategies. See Affidavit of Brian Kolfage, Jr., President of WeBuildTheWall Inc.

The sole question before the Commission insofar as Respondent WeBuildTheWall Inc is concerned is whether WBTW made an expenditure of corporate resources for or on behalf of the Kobach Campaign.

The answer is no. WBTW received payment for the rental of its list and any incidental use of WBTW resources. In fact, the parties rounded upward the calculation of the list rental which more than covered any incidental costs of the use of the list. When the email for the Kobach Campaign was sent in error from WBTW’s server, the cost of the error was zero, as any minimal use of resources could be deemed covered in the payment WBTW received from Stockton Strategies.

WBTW did not give its list to either the Kobach Campaign or its consultant for free or for less than market value. There was a considered and thoughtful inquiry regarding the list valuation and costs for its rental. *See Affidavit of Brian Kolfage, Jr.*

Because WBTW was paid for the use of its lists, there was no expenditure by WBTW on behalf of the Kobach Campaign.

“Expenditure” is defined in the Act and Commission regulations as any “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. 431(9)(A); 11 CFR 100.111(a). Commission regulations state that “[u]nless specifically exempted . . . the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for the goods or services is an expenditure.” 11 CFR 100.111(e)(1). “Usual and normal charge” is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 CFR 100.52(d)(2).

As the Commission noted in AO 2010-30, “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.”

Because there was no corporate expenditure by WBTW related to the email at issue in the Complaint, there was also no corporate contribution from Respondent WBTW to the Kobach Campaign.

The Complaint must be dismissed.

Respectfully submitted,



Cleta Mitchell, Esq.
FOLEY & LARDNER, LLP
3000 K Street, NW #600
Washington, DC 20007
cmitchell@foley.com
(202) 295-4081 (direct)

Counsel to Respondent
WeBuildTheWall Inc.

Date: October 3, 2019

Exhibit A

Check Stub from Stockton Strategies for
\$2,000 List Rental Payment to
WeBuildTheWall Inc.

2004

Stockton Strategies

We Build the Wall Inc
 Date 7/15/2019 Type Bill Reference

7/15/2019
 Discount
 Check Amount

Original Amt.
 2,000.00

Payment
 2,000.00
 2,000.00

2,000.00

Nevada State Bank List Rental

www.checksforless.com 800-245-5775 Order # 2841194-1

2004

Stockton Strategies

We Build the Wall Inc
 Date 7/15/2019 Type Bill Reference

7/15/2019
 Discount
 Check Amount

Payment
 2,000.00
 2,000.00

Balance Due
 2,000.00

Original Amt.
 2,000.00

2,000.00

Nevada State Bank List Rental

www.checksforless.com 800-245-5775 Order # 2841194-1

EXHIBIT B

Cancelled Check for \$2,000

List Rental Payment

to

WeBuildTheWall Inc

Nevada State Bank

Stockton Strategies

1000 Beck St #251
Reno, NV 89509

94-771224

7/15/2019

**PAY TO THE
ORDER OF**

****2,000.00**

Two Thousand and 00/100*

DOLLARS

We Build the Wall Inc
PO Box 1248
Columbus, MS 39703

MEMO

AUTHORIZED SIGNATURE

ENDORSE HERE

X

CREDIT TO ACCOUNT
WITHIN NAMED PAYEE

ABSENCE OF ENDORSEMENT GUARANTEED
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