



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

December 1, 2022

**Via Email**

[anoti@campaignlegalcenter.org](mailto:anoti@campaignlegalcenter.org)

Adav Noti  
Campaign Legal Center  
1101 14th Street NW, Suite 400  
Washington, DC 20005

RE: MUR 7636  
WeBuildTheWall, Inc.  
Kris Kobach  
Kobach for Senate and Elizabeth Curtis in  
her official capacity as treasurer

Dear Mr. Noti:

This is in reference to the Complaint you filed with the Federal Election Commission on August 13, 2019, concerning WeBuildTheWall, Inc. ("WBTW"), Kris Kobach, and Kobach for Senate and Elizabeth Curtis in her official capacity as treasurer (the "Committee"). The Commission found that there was reason to believe that WBTW violated 52 U.S.C. § 30118 by making a corporate contribution by renting an email list below market value to Kris Kobach and the Committee. The Commission also found reason to believe that Kris Kobach and the Committee violated 52 U.S.C. § 30118 by knowingly accepting the corporate contribution from WBTW and that the Committee violated 52 U.S.C. § 30104(b) by failing to report the in-kind contribution. On November 16, 2022, a signed joint conciliation agreement was accepted by the Commission regarding the 52 U.S.C. §§ 30118 and 30104(b) violations.

The Commission dismissed the allegations that Kobach and the Committee violated 52 U.S.C. § 30120(a)(1) and 11 C.F.R. § 110.11(a) by failing to include required disclaimers. The Commission also dismissed the allegation that Kobach and the Committee violated 52 U.S.C. § 30125(e)(1)(A) by receiving prohibited non-federal funds from WBTW. The Commission was equally divided on whether to find reason to believe that WBTW violated 52 U.S.C. § 30118 by making a corporate contribution by permitting usage of its corporate logo and that Kobach and the Committee violated 52 U.S.C. § 30118 by knowingly accepting it. There was also an insufficient number of votes to dismiss this allegation. If the Commission issues a Statement of Reason(s) on this issue, it will be provided. Accordingly, the Commission has closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702

MUR 7636 (WeBuildTheWall, Inc., *et al.*)

Letter to Adav Noti

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(Aug. 2, 2016). The Factual and Legal Analyses, which more fully explain the Commission's findings regarding 52 U.S.C. §§ 30118, 30104(b) and 30120(a)(1) and 11 C.F.R. § 110.11(a), are enclosed. A copy of the conciliation agreement is also enclosed for your information.

If you have any questions, please contact me at (202) 694-1021 or [rweiss@fec.gov](mailto:rweiss@fec.gov).

Sincerely,

*Richard Weiss*

Richard L. Weiss  
Attorney

Enclosures:

Conciliation Agreement

Factual and Legal Analyses

## BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Kris Kobach	)	MURs 7628, 7636 & 7992
Kobach for Senate and	)	
Elizabeth Curtis in her	)	
official capacity as treasurer	)	
WeBuildTheWall, Inc	)	
	)	

### CONCILIATION AGREEMENT

These matters were initiated by signed, sworn, and notarized complaints and pursuant to information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. The Commission found reason to believe that Kris Kobach, Kobach for Senate and Elizabeth Curtis in her official capacity as treasurer (the “Committee”), and WeBuildTheWall, Inc. (collectively, “Respondents”) violated 52 U.S.C. § 30118 of the Federal Election Campaign Act of 1971, as amended (the “Act”). The Commission also found reason to believe that the Committee violated 52 U.S.C. § 30104(b).

NOW, THEREFORE, the Commission and Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over Respondents and the subject matter of this proceeding, and this Agreement has the effect of an agreement entered pursuant to 52 U.S.C. § 30109(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this Agreement with the Commission.

IV. The pertinent facts and law in this matter are as follows:

1. Kris Kobach was a candidate for U.S. Senate in Kansas in 2020 and the Committee is his principal campaign committee.

2. WeBuildTheWall, Inc. (“WBTW”) is a 501(c)(4) non-profit organization incorporated in Florida.

3. Under the Act, corporations are prohibited from making a contribution to a candidate’s committee, and candidates and their committees are prohibited from knowingly accepting or receiving a prohibited contribution. 52 U.S.C. § 30118(a); *accord* 11 C.F.R. § 114.2(a). A “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). “Anything of value” includes all in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the usual and normal charge. 11 C.F.R. § 100.52(d)(1).

4. The Act requires committee treasurers to file reports of receipts and disbursements. 52 U.S.C. § 30104(a)(1); *accord* 11 C.F.R. § 104.1(a). Political committees are required to report the name and address of each person who makes a contribution aggregating more than \$200 per calendar year, or per election cycle for authorized committees, as well as the date, amount, and purpose of such payments. 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

5. The Committee rented WBTW’s 295,000-person email list, which consisted of past donors to WBTW, to solicit contributions to the Committee for a rate of \$2,000 — significantly below the usual and normal charge for comparable political list rentals.

6. On July 18, 2019, and August 1, 2019, the Committee sent emails to WBTW's email list from the WBTW server, announcing Kobach's candidacy, and soliciting contributions to the Committee.

7. Respondents contend that the Committee and WBTW believed, at the time of the rental, that the rental rate was consistent with market rates for non-candidate lists, but now agree that it was significantly below the usual and normal rate for comparable political list rentals.

V. Respondents committed the following violations:

1. Kris Kobach and the Committee violated 52 U.S.C. § 30118 by accepting an in-kind corporate contribution from WBTW in the form of a list rental below the usual and normal charge.

2. WBTW violated 52 U.S.C. § 30118 by making an in-kind corporate contribution to the Committee in the form of a list rental below the usual and normal charge.

3. The Committee violated 52 U.S.C. § 30104(b) by failing to report the in-kind corporate contribution from WBTW.

VI. Respondents will take the following actions:

1. Respondents will pay a civil penalty of Thirty Thousand Dollars (\$30,000) pursuant to 52 U.S.C. § 30109(a)(5)(A).

2. Respondents will cease and desist from violating 52 U.S.C. §§ 30118 and 30104(b).

VII. The Commission, on request of anyone filing a complaint under 52 U.S.C. § 30109(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this Agreement. If the Commission believes that this Agreement or any

requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This Agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this Agreement becomes effective to comply with and implement the requirements contained in this Agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written Agreement shall be enforceable.

FOR THE COMMISSION:

Lisa Stevenson  
Acting General Counsel

BY: **Charles  
Kitcher** Digitally signed  
by Charles Kitcher  
Date: 2022.11.18  
11:07:34 -05'00'

Charles Kitcher  
Associate General Counsel  
for Enforcement

11/18/22  
Date

FOR THE RESPONDENTS:

Michael H. Adams  
Michael Adams, Esq.  
Counsel for Kris Kobach  
and Kobach for Senate

November 3, 2022  
Date

Justin S. Weddle  
Justin Weddle, Esq.  
Counsel for WeBuildTheWall, Inc.

Nov. 1, 2022  
Date

**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”).<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.

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

<sup>2</sup> MUR 7628 Compl. at 9.

<sup>3</sup> 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.<sup>4</sup> Kris Kobach serves as general counsel for WBTW, and it is a paid position.<sup>5</sup> Kobach was a candidate for U.S. Senate in Kansas in 2020.<sup>6</sup> Brian Kolfage is the President of WBTW.<sup>7</sup> 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.<sup>8</sup>

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

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<sup>4</sup> 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>.

<sup>5</sup> *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.

<sup>6</sup> Kris Kobach, Statement of Candidacy (July 8, 2019).

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

<sup>8</sup> 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](mailto: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](mailto: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.<sup>9</sup>

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.<sup>10</sup> WBTW responds that because it rented its list to Stockton  
15 Strategies, it did not make an in-kind corporate contribution to the Committee.<sup>11</sup>

### 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

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<sup>9</sup> MUR 7628 Compl. at Ex. 1.

<sup>10</sup> MUR 7637 Compl. at 4-5.

<sup>11</sup> WBTW Resp. at 2-5, MUR 7628.

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Factual and Legal Analysis

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1 or receiving a prohibited contribution.<sup>12</sup> 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.”<sup>13</sup> “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.<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup>

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

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

<sup>13</sup> 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”).

<sup>14</sup> 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).

<sup>15</sup> 11 C.F.R. § 100.52(d)(2).

<sup>16</sup> 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).

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

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

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

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<sup>17</sup> 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).

<sup>18</sup> WBTW Resp. at 2, MUR 7628.

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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."<sup>19</sup> 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."<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> Yet, this rate is still at least five times the

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<sup>19</sup> *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).

<sup>20</sup> MUR 7628 WBTW Resp., Kolfage Affidavit ¶ 9.

<sup>21</sup> 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).

<sup>22</sup> 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.<sup>23</sup> 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

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<sup>23</sup> See WBTW Resp. at 2, MUR 7628.

MUR 7628 & 7636 (WeBuildTheWall, Inc.)

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- 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.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Kris Kobach **MUR 7628, 7636 & 7992**  
 4 Kobach for Senate and Elizabeth Curtis  
 5 in her official capacity as treasurer

6 **I. INTRODUCTION**

7 The Complaints in these matters involve allegations that WeBuildtheWall, Inc.  
 8 (“WBTW”), a 501(c)(4) non-profit organization, made a prohibited in-kind corporate  
 9 contribution to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official  
 10 capacity as treasurer (the “Committee”) by sending an email on August 1, 2019, to the WBTW  
 11 email list, displaying the WBTW logo, and soliciting contributions for the Committee, in  
 12 violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).<sup>1</sup> The MUR  
 13 7628 Complaint also alleges that WBTW spent funds not subject to the limits, prohibitions, and  
 14 reporting requirements of the Act to disseminate the email.<sup>2</sup> The Committee denies the  
 15 allegations, asserting that it rented the WBTW email list for \$2,000, which they assert was the  
 16 fair market value for the list, and that any other violations are the result of vendor error.<sup>3</sup>

17 In Pre-MUR 628, the Committee filed a *sua sponte* Submission regarding an additional  
 18 email that was sent to the WBTW email list on July 18, 2019, soliciting contributions to the  
 19 Committee without the required disclaimer.<sup>4</sup> The Committee asserts that the omitted disclaimer  
 20 was the result of vendor error, the Committee discovered this earlier email while taking

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

<sup>2</sup> MUR 7628 Compl. at 9.

<sup>3</sup> Committee Resp. at 1 (Oct. 2, 2019), MUR 7628.

<sup>4</sup> Submission at 1 (Oct. 2, 2019), Pre-MUR 628.



“investigative and remedial action” with regard to the August 1, 2019, email, and it issued a corrected email containing a disclaimer within 24 hours of discovering the error.<sup>5</sup>

As set forth below, the Commission dismisses the disclaimer allegation. Also, 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 and unreported corporate contribution to the Committee.

## II. FACTUAL BACKGROUND

Kris Kobach was a candidate for U.S. Senate in Kansas in 2020.<sup>6</sup> WBTW is a 501(c)(4) non-profit organization that raises money to build portions of a wall on the USA-Mexico border.<sup>7</sup> Kobach serves as general counsel for WBTW, and it is a paid position.<sup>8</sup> Brian Kolfage is the President of WBTW.<sup>9</sup> Dustin Stockton is a director of WBTW and President of Stockton

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<sup>5</sup> *Id.* at 2-3.

<sup>6</sup> Kris Kobach, Statement of Candidacy (July 8, 2019). Kobach lost the primary election on Aug. 4, 2020. Kobach is now a candidate for Kansas Attorney General. Kris Kobach Campaign Finance Appointment of Treasurer Report, Kansas Governmental Ethics Commission (Apr. 28, 2021), [http://ethics.ks.gov/CFAScanned/StWide/2022ElecCycle/Treasurers/SW02KK\\_AT.pdf](http://ethics.ks.gov/CFAScanned/StWide/2022ElecCycle/Treasurers/SW02KK_AT.pdf).

<sup>7</sup> 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-ff1c-4468-952f-df2fb3f3b374&formatType=PDF>.

<sup>8</sup> *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>.

<sup>9</sup> *See* We Build The Wall Team, WEBUILDTHEWALL, <https://webuildthewall.us/ourteam/> (last visited Aug. 2, 2021).

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Strategies, LLC (“Stockton Strategies”), a digital fundraising vendor retained by both the Committee and WBTW.<sup>10</sup>

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.”<sup>11</sup> The agreement between WBTW and Stockton Strategies was drafted by Kobach in his capacity as General Counsel for WBTW,<sup>12</sup> and Kobach was “asked his opinion concerning the list rental price.”<sup>13</sup> The WBTW list was only used for the Committee and not for any other Stockton clients.<sup>14</sup> The Committee reimbursed Stockton Strategies for the full \$2,000 rental price.<sup>15</sup> The Committee asserts it entered into an agreement with “Stockton’s company to perform fundraising services.”<sup>16</sup>

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<sup>10</sup> See Kobach and Committee Resp. to First Request for Information at 4 (July 27, 2020), Pre-MUR 628. Stockton Strategies, LLC is a digital fundraising vendor and Nevada corporation. Stockton Affidavit, Kobach and Committee Resp. Ex. 1 at 1-3. Stockton Strategies does not have a website.

<sup>11</sup> Stockton Affidavit ¶5. Despite Stockton’s representations that he was prospecting for multiple clients, a query of disbursements in the FEC database reveals payments to Stockton Strategies from only one federal committee client in 2019—the Committee. See FEC Contributor Database Query: [https://www.fec.gov/data/disbursements/?data\\_type=processed&recipient\\_name=stockton+strategies&two\\_year\\_transaction\\_period=2018&two\\_year\\_transaction\\_period=2020&two\\_year\\_transaction\\_period=2022](https://www.fec.gov/data/disbursements/?data_type=processed&recipient_name=stockton+strategies&two_year_transaction_period=2018&two_year_transaction_period=2020&two_year_transaction_period=2022); see also Kobach and Committee Resp. to First Request for Information at 2, Pre MUR 628 (indicating Stockton Strategies did not use the WBTW list for any other clients). Although it is possible Stockton had non-federal political committee clients, a search of state campaign finance disclosure records for Kansas, Nevada and Texas, the states Stockton was known to work in, do not reveal any payments to Stockton. See generally Kansas Secretary of State Campaign, Finance—Viewer, [https://kssos.org/elections/cfr\\_viewer/cfr\\_examiner\\_entry.aspx](https://kssos.org/elections/cfr_viewer/cfr_examiner_entry.aspx) (last visited Aug. 2, 2021); Nevada Secretary of State, Campaign Finance Disclosure, [https://www.nvsos.gov/soscandidateservices/anonymoussaccess/cbfdsearchuu/search.aspx#individual\\_search](https://www.nvsos.gov/soscandidateservices/anonymoussaccess/cbfdsearchuu/search.aspx#individual_search) (last visited Aug. 2, 2021); Texas Ethics Commission, Search Campaign Finance Reports, <https://www.ethics.state.tx.us/search/cf/> (last visited Aug. 2, 2021).

<sup>12</sup> Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

<sup>13</sup> Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628.

<sup>14</sup> Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

<sup>15</sup> *Id.*; see also *id.* at Exs. B-D.

<sup>16</sup> Kobach and Committee Resp. at 1 (referencing a July 15, 2019 fundraising agreement), MUR 7628. Stockton was also working on WBTW fundraising efforts at the same time. See Kobach and Committee Resp. to First Request for Information at 5, Pre-MUR 628.

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Stockton sent emails to WBTW’s 295,000-person email list on July 18, 2019, and August 1, 2019, from the WBTW server. The July 18 email was sent from “Brian Kolfage — WeBuildTheWall, Inc. [info@webuildthewall.us](mailto:info@webuildthewall.us)” and included the WBTW logo, an announcement supporting Kobach’s Senate candidacy, a solicitation for campaign contributions to Kobach’s campaign, and the email was signed by Kolfage. The Committee concedes that this email should have included a disclaimer, but did not.<sup>17</sup> The August 1, 2019, email was sent from “Kris Kobach — WeBuildTheWall, Inc. [info@webuildthewall.us](mailto:info@webuildthewall.us)” and contained the WBTW logo, and a letter, signed by Kobach as general counsel for WBTW, announcing his Senate candidacy and soliciting support and contributions.<sup>18</sup>

The MUR 7628 Complaint alleges that WBTW made an in-kind corporate contribution to the Committee by sending the August 1, 2019, email to the WBTW list and failing to include a required disclaimer identifying who paid for the solicitation.<sup>19</sup> The MUR 7636 Complaint alleges that WBTW violated the corporate facilitation prohibition by using its logo and resources to send the email.<sup>20</sup> The Committee responds that it did not receive a contribution from WBTW, but instead paid for the use of WBTW’s email list by reimbursing Stockton Strategies for the \$2,000 list rental.<sup>21</sup> The Committee asserts that Stockton was responsible for failing to include the disclaimer and using the WBTW email server,<sup>22</sup> and Stockton admits he was at fault.<sup>23</sup> The

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<sup>17</sup> Submission at 1-2, Pre-MUR 628.

<sup>18</sup> MUR 7628 Compl. at Ex. 1.

<sup>19</sup> *Id.* at 2, 7, 10.

<sup>20</sup> MUR 7637 Compl. at 4-5.

<sup>21</sup> Kobach and Committee Resp. at 1, MUR 7628.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> Stockton Affidavit ¶¶ 8-9.

1 Committee further responds that once it became aware that the emails lacked a disclaimer, it  
 2 issued corrected emails containing a disclaimer.<sup>24</sup>

### 3 **III. LEGAL ANALYSIS**

#### 4 **A. Disclaimer Allegations**

5 The MUR 7628 Complaint alleges that the August 1, 2019, email failed to include a  
 6 required disclaimer identifying who paid for the solicitation.<sup>25</sup> The Committee acknowledges  
 7 that its August 1 email — as well as its July 18, 2019, email — failed to include a disclaimer.<sup>26</sup>  
 8 The Act and Commission regulations require a disclaimer whenever a political committee makes  
 9 a disbursement for the purpose of financing any public communication through any broadcast,  
 10 cable, satellite communication, newspaper, magazine, outdoor-advertising facility, mailing, or  
 11 any other type of general public political advertising.<sup>27</sup> If a communication requiring a  
 12 disclaimer is paid for and authorized by a candidate, a candidate’s authorized committee, or its  
 13 agents, the disclaimer must clearly state that the communication was paid for by the authorized  
 14 committee.<sup>28</sup>

15 A disclaimer was required in this case because the Committee’s July 18, 2019, and  
 16 August 1, 2019, emails were “electronic mail of more than 500 substantially similar  
 17 communications” sent by a political committee.<sup>29</sup> Respondents do not contest the allegation that

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<sup>24</sup> Kobach and Committee Resp. at 2, MUR 7628.

<sup>25</sup> MUR 7628 Compl. at 2, 7, 10.

<sup>26</sup> Submission at 1-2, Pre-MUR 628.

<sup>27</sup> 52 U.S.C. §§ 30101(22), 30120; *see also* 11 C.F.R. §§ 100.26, 110.11.

<sup>28</sup> 52 U.S.C. § 30120(a)(1); *see also* 11 C.F.R. § 110.11(b)(1).

<sup>29</sup> 11 C.F.R. § 110.11(a)(1).

1 the emails required a disclaimer.<sup>30</sup> Rather, Respondents blame the error on Stockton Strategies,  
 2 which they describe as a vendor.<sup>31</sup> The Commission has generally not pursued disclaimer  
 3 violations that resulted from inadvertent vendor error.<sup>32</sup> In this case, Stockton Strategies appears  
 4 to be a vendor and Stockton asserts in his sworn affidavit that it was his inadvertent error.<sup>33</sup> The  
 5 Committee also sent corrected emails including a proper disclaimer shortly after the emails  
 6 issued and before their formal notification of the MUR 7628 Complaint.<sup>34</sup> Under these  
 7 circumstances, the Commission dismisses the disclaimer allegations.

## 8 **B. Alleged In-Kind Contributions**

9 The MUR 7628 Complaint alleges that the use of the WBTW email list constituted a  
 10 prohibited in-kind corporate contribution. Corporations are prohibited from making a  
 11 contribution to a candidate's committee, and candidates are prohibited from knowingly accepting  
 12 or receiving a prohibited contribution.<sup>35</sup> A "contribution" includes "any gift, subscription, loan,  
 13 advance, or deposit of money or anything of value made by any person for the purpose of

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<sup>30</sup> Kobach and Committee Resp. at 2, MUR 7628.

<sup>31</sup> *Id.*

<sup>32</sup> See Factual & Legal Analysis at 8, MUR 6846 (DeFazio for Congress) (dismissing disclaimer violation due to vendor error, noting that the respondent took remedial action and that the Commission has declined to pursue cases based on vendor error); Factual & Legal Analysis at 7, MUR 5991 (U.S. Term Limits) (same).

<sup>33</sup> Stockton Affidavit ¶ 9.

<sup>34</sup> *Id.* ¶¶ 11-12; see also Submission at 3, Pre-MUR 628. Respondents did issue corrective emails, but only after the Common Cause Press Release regarding their Complaint in MUR 7628. See Common Cause Press Release dated Aug. 2, 2019 at 3:46 PM Eastern Standard Time, <https://www.commoncause.org/press-release/doj-fec-complaints-filed-against-kris-kobach-we-build-the-wall-inc-for-illegal-campaign-solicitation/> (last visited: Aug. 2, 2021). The corrected emails went out just minutes after the press release. See Submission at Ex. 5, Pre-MUR 628. The correction email for the August 1 email has a time stamp of Aug. 2, 2019 at 3:28 PM Central Time. Considering the time zone differences this email was sent 18 minutes after the Common Cause press release. See *id.* The correction email for the July 18 email has a time stamp of Aug. 2, 2019 at 3:09 PM. Considering the time zone differences this email was sent 23 minutes after the press release.

<sup>35</sup> See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

influencing any election for Federal office.”<sup>36</sup> “Anything of value” includes all in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the usual and normal charge.<sup>37</sup> The Commission’s regulations define “usual and normal charge” as “the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution.”<sup>38</sup> Finally, the Act requires committee treasurers to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C. § 30104.<sup>39</sup> Political committees are required to report the name and address of each person who makes a contribution aggregating more than \$200 per calendar year, or per election cycle for authorized committees, as well as the date, amount, and purpose of such payments.<sup>40</sup>

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

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<sup>36</sup> 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”).

<sup>37</sup> *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).

<sup>38</sup> 11 C.F.R. § 100.52(d)(2).

<sup>39</sup> 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).

<sup>40</sup> 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

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the list's rental; therefore, WBTW appears to have made, and the Committee appears to have accepted, an in-kind corporate contribution, and the Committee failed to report it.<sup>41</sup>

According to information available to the Commission, WBTW believes the market rate for its email list containing 295,000 addresses was 1/10 of a cent per email per use (for six uses). By contrast, the Committee states that the agreed-upon market rate was 2/3 of a cent per email (with no number of uses stated).<sup>42</sup> The Committee asserts that the rate was a fair price since the list did not consist of known contributors to any political campaign and had not yet been tested as a fundraising list for any political campaign.<sup>43</sup>

The Committee's descriptions of the list as untested and non-political are questionable in light of the following facts. The list consisted of "all individuals who had made any donation, of any amount, to WBTW throughout its history" including the original "GoFundMe donors," whose combined donations totaled \$25 million for the border wall campaign.<sup>44</sup> Thus, the list was not an untested roster of potentially interested persons, but a list of people who had actually donated money for a specific cause. Further, the factual context suggests that the list is also political in nature. The list use agreement between Stockton Strategies and WBTW stated that the list was "to be used by Stockton Strategies in conducting fundraising on behalf of political

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<sup>41</sup> 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).

<sup>42</sup> Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

<sup>43</sup> *Id.*; see also Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628 (noting that \$2,000 was an appropriate price due to the *untested nature* of the non-political list).

<sup>44</sup> *Id.*; see also *supra* note 7. WBTW also rented the list out to Ranch Property Marketing and Management to sell WBTW branded merchandise in exchange for 15% of total sales. See Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628.

1 candidates who support the construction of border fencing on the United States—Mexico border  
 2 by the federal government.”<sup>45</sup> The email list consisted of persons whose previous donations  
 3 indicate an interest in the same specific political issue — border security — as the candidates on  
 4 whose behalf Stockton Strategies would fundraise. Moreover, Kobach had been part of WBTW  
 5 since its formation, the solicitation emails identified candidate Kobach as WBTW’s general  
 6 counsel, and it appears that Kobach was the only candidate for which Stockton used the list.

7           The Commission has deemed transactions permissible when the price is  
 8 “determined by the market’s view of the value of the list.”<sup>46</sup> In previous matters, detailed factual  
 9 records have been provided to establish a market rate and prove that a bargained-for exchange  
 10 occurred. The Committee here has not made a similar showing.<sup>47</sup>

11           A review of publicly available information regarding list rental prices reveals a wide  
 12 range, depending on the nature of the list, but the Commission could find no price comparable to  
 13 the rate that WBTW charged the Committee. As one example, one of the least expensive rates in  
 14 the 2020 election cycle was offered by a company called Excelsior Strategies, which was renting

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<sup>45</sup> Kobach and Committee Resp. to First Request for Information, Pre-MUR 628 at Ex. B.

<sup>46</sup> *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”).

<sup>47</sup> 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).



1 1,000 email addresses of Trump supporters for \$35.<sup>48</sup> Yet, this rate is still at least five times the  
2 WBTW rate. Moreover, the WBTW list rental was not for only one use, but for either six uses,  
3 or unlimited use over a six-month period, according to the list rental agreement.<sup>49</sup> Given this  
4 information, the \$2,000 list price appears to be significantly lower than any comparable market  
5 rate.

6 In addition, the presence of Kobach and Stockton on both sides of the transaction raises  
7 further questions about its commercial reasonableness. The Committee initially indicated that  
8 Kobach “did not participate” in the decision to rent WBTW’s email list to Stockton Strategies,  
9 although the Committee asserts that Kobach drafted the agreement in his capacity as WBTW’s  
10 general counsel.<sup>50</sup> Subsequently, the Committee indicated Kobach “was asked his opinion  
11 concerning the list rental price,” and Kobach “agreed that \$2,000 was within the market range  
12 and was appropriate, given the untested nature of the non-political list.”<sup>51</sup> Ultimately, Kobach  
13 received the rented email list for that price, as the Committee was the only entity that used the  
14 list, and the Committee reimbursed Stockton Strategies for the entire rental price.<sup>52</sup> Further,  
15 Stockton was a director of WBTW and the President of Stockton Strategies, which was retained  
16 by both WBTW and the Committee, and Stockton was involved on both sides of the transaction.

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<sup>48</sup> 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>.

<sup>49</sup> Kobach and Committee Resp. to First Request for Information at Ex. B, Pre-MUR 628.

<sup>50</sup> Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

<sup>51</sup> Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628.

<sup>52</sup> *Id.*; Kobach and Committee Resp. to First Request for Information at 3, Exs. B-D, Pre-MUR 628.

1 Additional factors cast doubt on the commercial reasonableness of the list rental  
2 agreement. Although Respondents have provided copies of the July 10 agreement between  
3 WBTW and Stockton Strategies and the July 15 agreement between Stockton Strategies and the  
4 Committee, the agreements are unsigned.<sup>53</sup> The Committee responds that although it never  
5 signed the agreement, it was the intention of the parties for the agreements to be binding.<sup>54</sup>  
6 Further, Respondents could not provide any dated documented communications regarding the list  
7 rental agreement; they state that all such communication were oral.<sup>55</sup>

8 In summary, the available information indicates that the \$2,000 rental price was  
9 significantly below market rate, the Committee has been unable to articulate how the rate was  
10 determined, and WBTW and Kobach were on both sides of the rental transaction. Therefore, the  
11 Commission finds reason to believe Kobach and the Committee knowingly received an in-kind  
12 corporate contribution from WBTW, and the Committee failed to report it.

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<sup>53</sup> Kobach and Committee Resp. to First Request for Information at 3, Ex. A-B, Pre-MUR 628.

<sup>54</sup> Kobach and Committee Resp. to Second Request for Information at 1, Pre-MUR 628.

<sup>55</sup> *Id.* at 2.