



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

APR 19 2016

Graham M. Wilson, Esq.  
Daniel Nudelman, Esq.  
Perkins Coie LLP  
700 13th Street, NW, Suite 600  
Washington, D.C. 20005

RE: MUR 6937

Dear Messrs. Wilson and Nudelman:

On May 7, 2015, the Federal Election Commission notified your clients, Braley for Iowa and Theresa L. Kehoe in her official capacity as treasurer ("Committee") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to the Committee at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on April 11, 2015, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

If you have any questions, please contact Marianne Abely, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink that reads "Stephen Gura". The signature is fluid and cursive.

Stephen Gura  
Deputy Associate General Counsel

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# FEDERAL ELECTION COMMISSION

## FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS:** NextGen Climate Action Committee and Rita Copeland in her official capacity as treasurer  
Braley for Iowa and Theresa L. Kehoe in her official capacity as treasurer

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### I. INTRODUCTION

This matter was generated by a Complaint alleging violations of the Federal Election Campaign Act, as amended (the "Act"), by NextGen Climate Action Committee and Rita Copeland in her official capacity as treasurer ("NextGen"), and Braley for Iowa and Theresa L. Kehoe in her official capacity as treasurer ("Committee"). Specifically, the Complaint alleges that NextGen made an in-kind contribution when it overpaid the Committee for its e-mail list of campaign supporters and donors in order to help the Committee retire its campaign debts. The Respondents assert that NextGen bought the e-mail list for fair market value after arm's-length negotiations with the Committee. Based on the circumstances presented in this case, the Commission exercises its prosecutorial discretion pursuant to *Heckler v. Chaney*<sup>1</sup> and dismisses the allegations that NextGen Climate Action Committee and Rita Copeland in her official capacity as treasurer violated 52 U.S.C. §§ 30116(a) and 30104(b); or that Braley for Iowa and Theresa L. Kehoe in her official capacity as treasurer violated 52 U.S.C. §§ 30116(f) and 30104(b).

### II. FACTUAL AND LEGAL ANALYSIS

From 2007 to 2015, Bruce Braley served as the U.S. Representative for Iowa's First Congressional District. On February 7, 2013, Braley announced his candidacy to succeed

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<sup>1</sup> 470 U.S. 821 (1985).

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retiring Senator Tom Harkin and registered Braley for Iowa as his principal campaign committee the following day.<sup>2</sup> On November 4, 2014, Republican Joni Ernst defeated Braley in the general election,<sup>3</sup> and the Committee reported \$93,577.96 in debts at the end of the campaign.<sup>4</sup>

NextGen Climate registered NextGen Climate Action Committee with the Commission as an Independent Expenditure-only Political Committee ("IEOPC") on July 22, 2013.<sup>5</sup> As an IEOPC, NextGen may solicit and accept contributions from individuals, corporations, and others in excess of the Act's limits.<sup>6</sup> During the 2014 election cycle, NextGen made independent expenditures totaling \$18,981,180 supporting and opposing candidates for federal office. Of that amount, NextGen spent \$781,326 promoting Braley and \$4.3 million opposing Ernst.<sup>7</sup>

After the 2014 campaign, NextGen bought the Committee's e-mail list for \$177,817.60. According to the Complaint, this purchase constituted a prohibited in-kind contribution because the transaction was merely an attempt by a Braley supporter, NextGen, to help him retire his campaign debt and thus was not commercially reasonable.<sup>8</sup> As proof of the alleged unreasonableness of the transaction, the Complaint relies on a newspaper article that describes

<sup>2</sup> Braley for Iowa, Statement of Organization (Feb. 8, 2013).

<sup>3</sup> See State of Iowa Winner List, 2014 General Election, Iowa Secretary of State Website, <http://sos.iowa.gov/elections/pdf/2014/general/Winnerlist.pdf>.

<sup>4</sup> See Braley for Iowa, 2014 Year-End Report.

<sup>5</sup> See NextGen Climate Action Committee, Statement of Organization (July 22, 2013).

<sup>6</sup> See Advisory Op. 2010-11 (Commonsense Ten).

<sup>7</sup> See NextGen Climate Committee, 48-Hour and 24-Hour Independent Expenditure reports, July 18, 2014 – November 2, 2014.

<sup>8</sup> Compl. at 1-3.

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the list purchase as a "bailout" and as "odd" because it was allegedly the only such list acquired by NextGen after the 2014 elections.<sup>9</sup> Further, the Complaint suggests an ulterior motive by NextGen because the "massive infusion of funds" from the sale resolved "all" of Braley's campaign debt, thus enabling him to terminate his committee and move to Denver, Colorado, to join a law firm.<sup>10</sup> Finally, the Complaint claims that the e-mail list rental at issue in MUR 6775 (Ready for Hillary PAC) supports the proposition that NextGen overpaid for the Committee's e-mail list because in that matter, the Commission "approved the lease of a nationwide voter list for a lesser amount of \$133,841.70," making "the large amount paid for" the smaller Braley List above market value."<sup>11</sup>

Respondents deny the allegations and assert that they did not make or accept an unreported, impermissible in-kind contribution because the list was valued and sold at the "usual and normal charge" following an arm's-length negotiation between the parties. As detailed in the Responses, the Committee developed an e-mail list containing the names and other information of over 100,000 campaign donors and supporters.<sup>12</sup> At some point after the election, NextGen asked to purchase "the rights to use the list on an unlimited, ongoing basis."<sup>13</sup> After

<sup>9</sup> Compl. at 2-3, Ex. A. (Craig Robinson, *Braley's \$177,000 Bailout Courtesy of Tom Steyer*, THE IOWA REPUBLICAN (Apr. 22, 2015)). Disclosure reports indicate that, after the Complaint was filed, the NextGen Climate Committee disbursed \$9,800 to the Florida Democratic Party on June 24, 2015 for "list rental." See NextGen Climate Committee, 2015 July Monthly Report.

<sup>10</sup> *Id.*, Exhibit A.

<sup>11</sup> *Id.* at 3. Without providing any basis, the Complaint states that "presumably" the Braley e-mail list included voter data "for a single state." *Id.*

<sup>12</sup> Braley for Iowa Resp. at 1, Exs. A and B; NextGen Climate Action Committee Resp. at 2. The Committee paid its digital consultant, Well & Lighthouse, LLC, \$14,658 in September 2013 for expenses related to fundraising lists. Braley for Iowa, 2013 October Quarterly Report.

<sup>13</sup> Braley for Iowa Resp. at 1.

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removing duplicate names, the list contained 111,136 names, or "subscribers," and the Committee, in conjunction with its own list broker/digital consultant, Well & Lighthouse LLC ("Well & Lighthouse"), valued the list at \$177,817.60 based on a "blended rate" of \$1.60 per subscriber.<sup>14</sup> As the Respondents explain, the fair market value for the list was based on the Committee's original cost in building the list, the distribution of subscribers in terms of their past donation and "activity" history, and the past revenue performance of the list.<sup>15</sup> NextGen agreed to purchase the list for \$177,817.60 in February 2015.<sup>16</sup> During the same reporting period as the list purchase (the First Quarter of 2015), the Committee paid off its outstanding debts totaling \$97,577.96, while incurring \$46,646.46 in new debt.<sup>17</sup>

### III. ANALYSIS

The Act provides that no person shall make contributions to any candidate and his or her authorized committees with respect to any election for federal office which in the aggregate exceed \$2,600.<sup>18</sup> IEOPCs, such as NextGen, are prohibited from making direct or in-kind

<sup>14</sup> *Id.* at 1, Ex. A. The Committee's disclosure reports indicate that Well & Lighthouse provided a number of services to Braley's 2014 senate campaign, including digital media services, fundraising consulting, and fundraising lists, between September 2013 and November 2014.

<sup>15</sup> Braley for Iowa Resp. at 1, Ex. A.

<sup>16</sup> See NextGen Climate Action Committee, 2015 March Report; Braley for Iowa, 2015 April Quarterly Report. The Committee raised \$832.80 in contributions during this period and reported the e-mail list purchase under the category of "other receipts." *Id.* According to Braley for Iowa's most recent disclosure report, the Committee has debts totaling \$72,159.47. Braley for Iowa, 2015 October Quarterly Report, Schedule D.

<sup>17</sup> Braley for Iowa, 2015 April Quarterly Report, Schedule D at 30-31.

<sup>18</sup> 52 U.S.C. § 30116(a)(1)(A). Federal Election Commission website, Contribution Limit Chart for 2013-2014. <http://www.fec.gov/info/contriblimitschart1314.pdf>.

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contributions to federal candidates.<sup>19</sup> Federal candidates and their authorized committees may not knowingly accept an excessive or prohibited contribution.<sup>20</sup>

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."<sup>21</sup> The Commission's regulations provide that "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 for such goods or services.<sup>22</sup> The usual and normal charge for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution.<sup>23</sup> The regulations specifically include mailing lists as examples of such goods and services.<sup>24</sup>

The Commission has considered the question of whether the proceeds from the lease or sale of a list of supporters constitute a contribution in a number of Advisory Opinions and determined that such a lease or sale is not a contribution where the asset has a unique quality, was developed by the political committee in the normal course of its operations (and primarily for its own use) rather than as a fundraising vehicle, and had an ascertainable market value.<sup>25</sup> Specifically, in Advisory Op. 2002-14 (Libertarian National Committee), the Commission

<sup>19</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(a); *see supra* note 7.

<sup>20</sup> 52 U.S.C. §§ 30118(a) and 30116(f).

<sup>21</sup> 52 U.S.C. § 30101(8)(A)(i).

<sup>22</sup> 11 C.F.R. § 100.52(d)(1), 100.111(c)(1).

<sup>23</sup> *Id.* at § 100.52(d)(2), 100.111(e)(2).

<sup>24</sup> *Id.*

<sup>25</sup> *See* Advisory Op. 2002-14 at 2-4 (Libertarian National Committee); Advisory Op. 1981-53 at 2 (Frazier). *See also* Advisory Op. 1982-41 (Dellums); Advisory Op. 1981-46 (Dellums).

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concluded that the lease or sale of a mailing list was not a contribution to a political committee when the following conditions were satisfied: the list was developed by the political committee as a part of its political activities over a period of time and used primarily for its own political/campaign purposes; the sale or lease constituted a small percentage of the committee's use of the list; and the list, or the leased portion of that list, had to have an ascertainable fair market value, be sold or leased at the usual and normal charge in a *bona fide*, arm's-length transaction, and used in a commercially reasonable manner consistent with such an arm's-length transaction.<sup>26</sup>

The Responses assert that the list was (1) created for, and used by the Braley campaign in the ordinary course of campaign activities, (2) sold to NextGen for the usual and normal charge in a *bona fide*, arm's-length transaction, and (3) subsequently used by NextGen in a commercially reasonable manner.<sup>27</sup>

According to a Memorandum prepared after the Complaint in this matter was filed by the Committee's digital consultant, Well & Lighthouse, the list was compiled in the ordinary course of campaign activities — the Committee spent two years and \$400,000 building it, and it generated over \$2 million in contributions over that same period.<sup>28</sup> The signed Data Acquisition Agreement includes representations, warranties, and covenants regarding the fair market value of

<sup>26</sup> 2002-14 at 4-5 (Libertarian National Committee). These receipts are to be reported in the category of "Other Receipts." AO 2002-14 at 5.

<sup>27</sup> See AO 2002-14, at 2-5.

<sup>28</sup> Braley for Iowa Resp. Ex. A. at 2, 3.

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the Committee data.<sup>29</sup> Moreover, the Committee provides a detailed methodology for its determination of the list's fair market value.<sup>30</sup> NextGen purchased the list to facilitate programs it anticipated conducting in Iowa in connection with the upcoming 2016 presidential election.<sup>31</sup> Although it is unclear how NextGen may have used the list, it has conducted activities related to the 2016 Democratic Party primaries and caucuses, and Iowa hosts the first-in-the-nation caucus.<sup>32</sup> NextGen also claims to connect with potential volunteers and supporters through e-mail as well as social media.<sup>33</sup> Given these activities, it is reasonable to infer that NextGen used the list to reach supporters and volunteers in Iowa.

Finally, the Complaint's comparison to the e-mail list rental in MUR 6775 fails to

<sup>29</sup> Braley for Iowa Resp. at 1, NextGen Climate Committee Resp. at 2. The Data Acquisition Agreement was signed by the comptroller for the Committee on January 22, 2015 and NextGen Climate's Chief Financial Officer on February 9, 2015. Braley for Iowa Resp., Ex. B at 5.

<sup>30</sup> According to Well & Lighthouse's Memorandum, the "blended rate" of \$1.60 per name, which resulted in a valuation of \$177,817.60 for 111,135 names, was based on three primary factors: organizational costs, per name cost of e-mail acquisition on the open market, and recent activity and revenue performance of the list. Braley for Iowa Resp., Ex. A at 1, 3. The Memorandum states that the original cost to build the list was significant (\$1.63 per name) and provided the initial benchmark to value the entire list. The Memorandum asserts that the list was properly compared to retail or premium data costing between .50 - \$2.00 per subscriber because the Braley Committee's data was "geographically connected to the first Presidential primary" in Iowa and was, therefore, "unique" and "compelling." *Id.* Ex. A at 1, 2. Further, the Memorandum includes a chart outlining prices charged by six other data list vendors to further to support the \$1.63 retail/premium price assigned to the Braley data. *Id.* Ex. A at 2. The Memorandum also states that the ability of the Braley Committee to raise large amounts of money through the donors on the list demonstrated its "high-retail to premium" quality. *Id.* Ex. A at 3. And, the Memorandum asserts that the Committee's digital fundraising program from the donors on the list raised over \$780,000 for the campaign. *Id.*

<sup>31</sup> NextGen Climate Committee Resp. at 2

<sup>32</sup> See NextGen Climate Committee, 2015 Monthly Reports (March – Oct.). These disclosure reports indicate the committee has disbursed funds for polling, digital and print advertisements, billboards, data analytics, staff, events, travel, and consulting.

<sup>33</sup> NextGen Climate Committee Resp. at 2.

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Based on these circumstances, the Commission dismisses the allegations that the NextGen Committee made, and the Braley Committee received, an unreported, impermissible in-kind contribution in violation of 52 U.S.C. §§ 30104(b) and 30116.<sup>35</sup>

<sup>35</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).