New York City Campaign Finance Board
100 Church Street, 12th Floor, New York, NY 10007
212.409.1800 | www.nyccfb.info

Summary of Final Board Determination

The Advance Group, Inc.

1 . **Cooperating in expenditures reported to be independent**
$15,000

The New York Campaign Finance Act (the "Act") defines "independent" activity as that in which a candidate or a candidate's committee "did not authorize, request, suggest, foster or cooperate." Admin. Code § 3-702(8). Expenditures made with the cooperation of a campaign may not be reported as independent. *See* Board Rule 13-05. Such expenditures are in-kind contributions, which must be accounted for and reported by campaigns. *See* Admin. Code § 3-703(6)(a); Board Rules 1-04(a), (g), 3-03(c), 4-01(c). In-kind contributions are considered both contributions and expenditures, subject to the contribution and expenditure limits. *See* Board Rules 1-08(f)(1),(3).

Pursuant to the Board Rules:

Factors for determining whether an expenditure is independent include, but are not limited to:

i) whether the person, political committee, or other entity making the expenditure is also an agent of a candidate;
ii) whether the treasurer of, or other person authorized to accept receipts or make expenditures for, the person, political committee, or other entity making the expenditure is also an agent of a candidate;
iii) whether a candidate has authorized, requested, suggested, fostered, or otherwise cooperated in any way in the formation or operation of the person, political committee, or other entity making the expenditure;
iv) whether the person, political committee, or other entity making the expenditure has been established, financed, maintained, or controlled by any of the same persons, political committees, or other entities as those which have established, financed, maintained, or controlled a political committee authorized by the candidate;
v) whether the person, political committee, or other entity making the expenditure and the candidates have each retained, consulted, or otherwise been in communication with the same third party or parties, if the candidate knew or should have known that the candidate's communication or relationship to the third party or parties would inform or result in expenditures to benefit the candidate; and
vi) whether the candidate, any agent of the candidate, or any political committee authorized by the candidate shares or rents space for a campaign-related purpose with or from the person, political committee, or other entity making the expenditure.

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Board Rule 1-08(f)(1). The Board considers various types of evidence of non-independent activity in evaluating third party expenditures, including without limitation common vendors and shared office space. *See* CFB Advisory Op. 2009-7 (Aug. 6, 2009) ("A.O. 2009-7").

The Act explicitly includes "agents" among those who can be subject to penalties, thus confirming that individuals and entities that are working on behalf of campaigns cannot avoid liability for violations of the Act and the Board Rules. *See* Admin. Code §§ 3-710.5(i), 3-711.

During the 2013 election cycle, The Advance Group ("TAG") served as the general consultant to, and therefore an agent of, the 2013 election campaigns of Laurie Cumbo and Mark Levine (collectively, the "campaigns"). The Cumbo campaign's payments to TAG, which comprised 51 percent of the campaign's primary election expenditures, included expenditures for a "management retainer" and "campaign management." The Levine campaign's payments to TAG included monthly fees for campaign consulting. A TAG employee was listed as one of the Cumbo campaign's CFB liaisons, and TAG president Scott Levenson was listed as one of the Levine campaign's liaisons. The scope of responsibilities listed in TAG's contract with the campaigns demonstrates that TAG acted as an agent of the campaigns.

TAG's contract with campaigns for which it serves as general consultant includes the following language:

> The Advance Group will serve as the general consultant to [Candidate]'s campaign. The Advance Group will provide the overall management and direction of the campaign - inclusive of strategic planning, targeting, message development, design of creative direct mail, production of television ads, automated phone calling, live phone calling and fundraising. As part of this agreement, [Candidate] and [his/her] campaign personnel shall be entitled to unlimited phone consultation and regular weekly meetings with senior members of The Advance Group during the contractual period.
>
> The Advance Group will work with [Candidate] and each of [his/her] key advisors to hire the day in/day out campaign management staff and closely supervise their work over the course of the campaign.

The contract further states that TAG will, *inter alia*: "develop a plan that will lay out a road map for building the foundation of the campaign"; "be responsible for planning and implementing the candidate's fundraising strategy"; "create a targeted voter contact plan that seeks to secure [a] winning vote"; "help determine budget priorities and needs for the campaign, and develop a cash flow plan"; "determine the spending options for the . . . campaign"; "design, create, and purchase materials to meet the needs determined by [TAG]"; "design[], produce[], and implement[]" the campaign's direct mail plan; "write and design all other campaign literature, palm cards, and posters"; "define and develop the message of all press events, press releases and news stories"; and "be responsible for planning, targeting and message development of the candidate's automated and/or live phone calling plan."

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During the same election cycle, TAG also served as the general consultant to New Yorkers for Clean, Livable and Safe Streets, Inc. ("NYCLASS"). A contract between NYCLASS and TAG, which, by its terms, covers a two-year period beginning August 13, 2012,[1] states that TAG was responsible for conducting "day-in-day-out activities" on behalf of NYCLASS, including, *inter alia*, "manag[ing] an electoral program consisting of endorsements and independent expenditures for the 2013 Mayoral/City Council races" and "oversee[ing] and manag[ing] NYCLASS staff[.]" At the time NYCLASS reported making independent expenditures to benefit the campaigns, NYCLASS was located in the TAG office, its political director was TAG president Scott Levenson, and its communications director was TAG then- communications director Chelsea Connor. Sixty-six percent of the expenditures NYCLASS reported to the New York State Board of Elections for the 2013 primary election were to TAG. NYCLASS's Independent Expenditure Disclosure System ("IEDS") account was established, and its filings submitted to the CFB, by TAG's then-director of lobbying and government relations, Jamin Sewell ("Sewell").

The relationships between the campaigns and TAG, and between NYCLASS and TAG, met the criteria delineated in Board Rule 1-08(f)(1)(v) (the "Rule"): the entity making the expenditure (NYCLASS) and the candidates (Cumbo and Levine) had "each retained, consulted, or otherwise been in communication with the same third party" (TAG), and "the candidate[s]" – which, pursuant to Board Rule 1-02, includes any agent of the candidate – "knew or should have known" that the "campaign[s'] communications with or relationship" to TAG "would inform or result in expenditures" made by NYCLASS to benefit their campaigns. As a result, expenditures by NYCLASS in support of the campaigns could not be and were not independent of the campaigns.

Sewell, who had frequent communication with CFB staff in his capacity as the submitter of NYCLASS's IEDS filings and as the IEDS contact for a different organization, was informed by CFB staff in August 2013 that, based on TAG's relationship with NYCLASS, expenditures by NYCLASS on behalf of campaigns advised by TAG would not be considered independent. On September 3, 2013, Sewell filed an authorized representative form on behalf of NYCLASS, signed by NYCLASS executive director Allison Feldman, with the CFB for the purpose of disclosing NYCLASS's independent spending in the 2013 elections. On September 8, Sewell submitted an IEDS filing for NYCLASS, reporting independent expenditures for campaign literature on behalf of the Cumbo campaign in the amount of $7,618 and on behalf of the Levine campaign in the amount of $8,436. By submitting this filing, NYCLASS, by its agent TAG, represented itself as an independent entity making expenditures that were not authorized, requested, fostered, suggested, or cooperated in by the campaigns.

On September 9, CFB staff sent letters to NYCLASS and to the Campaigns citing the Rule and noting that, based on the above information, it appeared that the campaigns and NYCLASS had relationships with TAG that the Rule deemed non-independent. The letters further reminded

[1] The contract was subsequently terminated in late 2013. The parties entered into a new contract, limited to lobbying services only, in January 2014; NYCLASS terminated that contract on May 16, 2014.

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NYCLASS and the campaigns that reporting a non-independent expenditure as independent would be a violation of the Charter and Board Rules subject to penalties for which NYCLASS and its authorized representative would be jointly and severally liable, and that non-independent expenditures made by NYCLASS on behalf of the campaigns would be considered in-kind contributions and subject to the contribution and expenditure limits of the Act.

On October 1, 2013, CFB staff sent each campaign a Notice of Alleged Violations and Recommended Penalties ("Penalty Notice") outlining the alleged violations and the corresponding recommended penalties arising from the expenditures made by NYCLASS. On October 10, each campaign informed CFB staff that it would contest the alleged violations and recommended penalties and requested a formal hearing before an Administrative Law Judge.

Also on October 1, 2013, CFB staff sent NYCLASS two Penalty Notices – one for each campaign – outlining the alleged violations and the corresponding recommended penalties arising from the expenditures made by NYCLASS. On October 10, NYCLASS informed CFB staff that it would contest the alleged violations and recommended penalties and requested a formal hearing before an Administrative Law Judge.

On October 18, 2013, CFB staff sent TAG copies of the Penalty Notices it had sent to the campaigns and informed TAG that it would be added as a party to the actions as an agent of the campaigns, and that staff would recommend that a portion of each campaign's penalty liability be allocated to TAG. On October 29, TAG informed CFB staff that it would contest the recommended penalty allocation and requested a formal hearing before an Administrative Law Judge.

On March 3, 2014, CFB staff served each campaign, as well as co-respondents NYCLASS and TAG, with an OATH petition containing alleged violations and recommended penalties against each party. On April 14, both campaigns waived their rights to adjudication before OATH and stated that they would not contest CFB staff's recommendations to the Board.

On May 21, the Board issued two Final Board Determinations, one for each campaign, assessing penalties. The Board found that NYCLASS's expenditures were not independent of the campaigns, due to the parties' relationships with TAG. Because the campaigns received the benefit of NYCLASS's expenditures, the Board determined that the campaigns had accepted and failed to report an over-the-limit contribution from a prohibited source, *i.e.* a corporation, and assessed a penalty of $250 plus the amount of the expenditures. The total penalty issued to the Cumbo campaign was $7,868, while the total penalty issued to the Levine campaign was $8,686.

On December 5, 2014, NYCLASS waived its right to adjudication before OATH and stated that it would not contest CFB staff's recommendation to the Board.

On December 11, the Board assessed penalties against NYCLASS of $16,054 ($7,618 for Cumbo and $8,436 for Levine, in each instance representing the amount of the expenditure) for cooperating in expenditures reported to be independent, and $10,000 ($5,000 per campaign) for material misrepresentation for reporting expenditures as independent when they were not.

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On January 5, 2015, CFB staff served TAG with an amended OATH petition naming TAG as the only remaining party to the action. On September 24, 2015, TAG waived its right to adjudication before OATH and stated that it would not contest CFB staff's recommendation to the Board.

TAG asserts that nothing it did in performing services for its campaign clients or its

independent spender clients caused those clients to know, or should have caused them to know, that their communications and relationships with TAG would inform or result in third party expenditures to benefit the campaigns.

Based on the nature of TAG's relationships with the campaigns and with NYCLASS, the Board determined that no expenditures made by NYCLASS on behalf of the campaigns could be independent, and that both TAG and the campaigns knew or should have known that TAG's relationships with both parties would result in such non-independent expenditures. While the Act subjects a candidate's agent to civil penalties for the agent's violation of the Act or Board Rules, the Charter provisions and Board Rules governing independent expenditures do not provide for similar liability for violations by agents of independent spenders. *See* Charter § 1052(a)(15); Admin. Code §§ 3-710.5, 3-711(1); Board Rules 1-02, 13-01 *et seq.*; Final Determination No. 2003-2 (Aug. 26, 2003). For this reason, the Board assessed penalties against TAG only as an agent of the campaigns, even though TAG also acted as an agent of NYCLASS.

The Board assessed a penalty of $15,000 for these violations.