OGC 9887

New York State Democratic Committee

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RECEIVED
FEDERAL ELECTION COMMISSION
MAIL ROOM
91 JAN 18 AM 9:19

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
91 JAN 22 PM 3:47

January 14, 1991

Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Dear General Counsel:

As counsel to the New York State Democratic Committee (the "Committee"), I am writing to request an advisory opinion pursuant to 2 U.S.C. 437f. The Committee wishes to confirm that its reporting of the Committee's compensation arrangements with its commercial telemarketing fundraising agent complies with the Federal Election Campaign Act of 1971, as amended, and the Commission's rules and regulations.

1. <u>The Agreement</u>. The Committee has entered into an agreement (the "Agreement") with a commercial fundraising telemarketing organization (the "Telemarketer"). Pursuant to this Agreement, the Committee makes (a) its lists of current donors available to the Telemarketer for a "Current Donor" solicitation program and (b) its lists of households of registered Democratic voters available to the Telemarketer for a prospective donor or "Prospecting" solicitation program. The Telemarketer uses these lists to conduct telephone solicitation programs. Under the Agreement, the Telemarketer solicits, processes, and collects the contributions, verifies the accuracy of the contributor information and the eligibility of the contributions, and deposits eligible contributions into a custodial account (the "Account") in the Committee's name. The Telemarketer produces a monthly report setting forth details about its activities, including the number of calls it has made, and the number of hours it has expended performing services. The Telemarketer supplies the Committee with the information to comply with the reporting requirements of the Act, including the

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identity of all donors, the amounts contributed, and the amounts deducted from the Account as compensation to the Telemarketer.

2. The Telemarketer's Compensation. The Telemarketer is compensated in two ways, depending on which solicitation program the Telemarketer conducts.

First, with respect to the Current Donor solicitation program, the Telemarketer is paid by Telephone Cycle, or each full round of calls made from the list, which typically takes more than a month to complete. Under the Agreement, the Telemarketer's compensation for each Cycle is an amount not to exceed a specific hourly rate for each hour spent calling the list plus a fixed dollar amount for each pledge the Committee receives. All eligible funds received are placed in the Account. Each month during a Cycle, the Telemarketer remits to the Committee some portion of the contributions received. Over the life of the Cycle, the Telemarketer pays itself from the Account for the compensation due under the Agreement, though the amount the Telemarketer pays itself during any one month during the Cycle may be more or less than the amount of compensation due the Telemarketer for that particular month, depending on the amount the Telemarketer has remitted to the Committee. At the end of the Cycle, the Committee is liable to pay the Telemarketer any amounts due in compensation in excess of the total contributions received during the Cycle.

Thus, by way of hypothetical, the Current Donor program works as follows: Suppose that a Telephone Cycle lasts three months, during which the Telemarketer collects $100,000. If the total compensation due the Telemarketer during that Cycle is $60,000, then by the end of the Cycle the Telemarketer will have paid itself that amount from the Account and remitted the balance to the Committee. It might be that, during the first month of the three-month Cycle, the total collections equaled $40,000, and the total compensation due the Telemarketer equaled $30,000, but the Telemarketer remitted $20,000 to the Committee and paid itself $20,000; in the second month, total collections might equal $40,000, and total compensation due $20,000, and the Telemarketer will remit $10,000 to the Committee and pay itself $30,000; then in the final month, with total collections at $20,000 and compensation due $10,000, the Telemarketer will remit $10,000 to the Committee and pay itself $10,000. In short, the Agreement provides for the Telemarketer to be paid by Cycle, and not necessarily for every month within the Cycle.

Whether the Committee receives any money from the Current Donor program depends entirely on whether the Telemarketer receives contributions from Current Donors. There is no circumstance in which the Committee would receive funds in excess of the contributions received. The Telemarketer is paid full compensation for each Cycle regardless of whether sufficient funds are raised in the Cycle to cover that compensation.

Second, with respect to the Prospecting program, the Telemarketer is compensated in two ways. The Agreement gives the Telemarketer a one-half ownership interest (with the Committee) in the lists of new donors developed in the course of the program, which, with modest restriction, the Telemarketer is free to use on behalf of clients other than the Committee. In addition, the Agreement entitles the Telemarketer to a commission on contributions raised in the program; the commission may not exceed the total of an hourly rate times the number of hours spent on the Prospecting program plus a fixed dollar amount for each pledge received. The Telemarketer is not entitled to this commission unless and until the program yields contributions; the Telemarketer is paid solely out of the contributions it raises. The Telemarketer has no recourse against the Committee for such commissions, but, in the event of termination of the Agreement, the Telemarketer is entitled for up to five years to solicit the new donors in the Committee's name to collect any unpaid commissions.

By its nature, the start-up of the Prospecting program is inherently speculative, because the calls are made to prospects whose propensity to contribute is unknown. In refining a new donor list in this program, the Telemarketer will "earn" commissions regardless of the amount of contributions received, for its commission is calculated in part on an hourly rate for calls made whether or not the calls yield contributions. Thus, in the early stages of the program, the amount of commissions payable to the Telemarketer will exceed total contributions; eventually, as the new donor list is developed and solicited, contributions will exceed commissions and provide a margin to pay the commissions earned during the start-up phases. Nevertheless, in consideration of the Telemarketer's half ownership of the new donor list for use with other clients, the Agreement contemplates that the Telemarketer will remit to the Committee a portion of the contributions received before the Telemarketer is fully paid for all commissions earned in the program.

Again, a hypothetical can illustrate. Suppose that during the first phase of the Prospecting program the Telemarketer raises $300,000 in contributions but, because of the number of calls needed to raise that amount, the Telemarketer has "earned" a commission of $600,000. The Agreement entitles the Telemarketer to pay itself the $300,000 for commissions earned, but the Telemarketer has no recourse against the Committee for the remainder. As a result of the first phase, however, the Telemarketer now has a new donor list of which it owns a half interest and which it may use for other clients; it is also entitled, indeed obligated, to solicit the new donors for the Committee.

Suppose, then, that in this second phase of solicitations, the Telemarketer raises $300,000 while earning commissions of only $100,000 (because of the fewer number of calls needed to be made). The Agreement contemplates that the Telemarketer might remit $150,000 to the Committee (in increments on a monthly basis) and pay itself $150,000. At this point, in total, the Telemarketer has raised $600,000, "earned" $700,000, and been paid $450,000. With each new phase, the Telemarketer reduces the outstanding amount of unpaid earned commissions while remitting a portion of the contributions to the Committee; eventually, the Telemarketer will be paid all outstanding earned commissions out of the contributions it receives.

Again, as in the Current Donor program, there is no circumstance in which the Committee would receive funds in excess of total contributions. In effect, the Committee has "sold" a half interest in the new donor list in consideration for receiving funds out of contributions prior to the Telemarketer's being fully paid for the commissions earned during any one phase.

3. <u>The Committee's Reporting Practice</u>. The Committee reports the Telemarketer's compensation under each program in the month in which the expense is actually experienced, <u>i.e.</u>, when the Telemarketer actually deducts its compensation from the Account. The Committee treats the expense as a disbursement. We believe this treatment comports with 11 C.F.R. Part 104.

With respect to the Current Donor program, the Committee does not treat any of the funds it receives as a loan or a financing, and lists a debt or liability owing the Telemarketer only if, at the conclusion of the Cycle, (a) the compensation due the Telemarketer exceeds total contributions raised during the Cycle and (b) the Committee has failed to remit the difference to the Telemarketer within the reporting period. We believe this treatment is correct because the contractual arrangement essentially provides for the Telemarketer to be fully compensated by the close of each Cycle.

With respect to the Prospecting program, the Committee also does not treat any of the funds it receives as a loan or a financing, nor does the Committee treat as a debt or liability the amount of unpaid commissions which the Telemarketer may have earned during the reporting period. We believe this treatment, too, is correct, because the Telemarketer has no recourse to the Committee for those unpaid commissions, is not entitled to receive them unless the Telemarketer raises contributions to pay them, and provides funds to the Committee prior to such payment in consideration for half ownership in the new donor lists for use with other clients.

Nevertheless, owing to the novelty of our arrangements with the Telemarketer, we believe that an advisory opinion on our reporting practices is appropriate.

4. The Committee's Questions. Accordingly, we wish the Commission to opine whether our treatment of the Telemarketer's compensation and commissions conforms with the Act and the rules. Specifically, we wish to know:

a. May the Committee continue to report the Telemarketer's compensation and commission only as an expense in the reporting period in which the expense is actually experienced (i.e., when the Telemarketer actually deducts the same from the contributions it raises or, in the case of a deficit in the Current Donor program for a particular telephone Cycle, when the Committee pays the compensation to the Telemarketer)?

b. Assuming the Committee receives funds solely out of contributions raised, is there any circumstance under these arrangements in which the Telemarketer's remitting of contributions to the Committee may constitute a loan or financing arrangement which must be reported as such? For example, in the Prospecting program, if the Telemarketer gives funds to the Committee at a time when there remain unpaid but earned commissions, do these funds constitute a loan or financing until the Telemarketer is fully paid?

c. If the answer to Question b is other than an unqualified no, must the Committee pay the Telemarketer interest? If no interest is paid, is the non-payment of interest a contribution to the Committee?

d. If the answer to Question b is an unqualified no, is the Telemarketer's compensation arrangement nevertheless a contribution to the Committee to be reported as such? And if so, is the contribution to be reported as "returned" once the Telemarketer is fully compensated out of the funds raised?

We are available to answer your questions regarding the foregoing. We appreciate your consideration of our concerns.

Yours sincerely,

Gerard E. Harper

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 5, 1991

Gerard E. Harper
Counsel and Law Chair
New York State Democratic
Committee
60 East 42nd Street
New York, New York 10165

Dear Mr. Harper:

This responds to your letter dated January 14, 1991, on behalf of the New York State Democratic Committee ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to an agreement entered into with a telemarketing company ("the Telemarketer") for fundraising services.

You state that the Committee has entered into an agreement with the Telemarketer whereby the Telemarketer uses lists provided by the Committee to conduct telephone solicitation programs. One type of program involves the use of the Committee's lists of current donors. The other entails the use of lists of households of registered Democratic voters for a prospective donor or "Prospecting" solcitation program.

Under the agreement, the Telemarketer solicits, processes, and collects the contributions, verifies the accuracy of the contributor information and the permissiblity of the contributions, and deposits permissible contributions into a custodial account ("the Account") in the Committee's name. The Telemarketer produces a monthly report stating details of its activities including the number of calls it has made and the number of hours it has expended. In addition, the Telemarketer provides the Committee with the information necessary to comply with the Act, including the identity of all donors, the amounts contributed, and the amounts deducted from the Account as compensation for the Telemarketer.

The Telemarketer's compensation depends upon the type of solicitation program. Under the Current Donor Program, the Telemarketer is paid by Telephone Cycle, or each full round of calls made from the list. This typically takes more than a month, and, according to your hypothetical, may last as long as three months. The Telemarketer's compensation for each cycle is determined by a specific rate for each hour spent calling plus a fixed dollar amount for each pledge. All permissible funds are placed into the Account and, each month, the Telemarketer remits to the Committee a portion of the received contributions. During the Cycle, the Telemarketer pays itself the compensation due, although the amount paid during any one month may vary from the amount due for that particular month, "depending on the amount the Telemarketer has remitted to the Committee." At the end of the Cycle, the Committee must pay any amounts due in excess of the total contributions received during the Cycle. You state that the Telemarketer is paid full compensation for each Cycle, regardless of whether sufficient sums are raised in the Cycle to cover that compensation.

Under the Prospecting program, the Telemarketer is given a one-half ownership interest, with the Committee, in the list of new donors developed during the program which the Telemarketer, with modest restriction, is able to use on behalf of other clients. Additionally, the Telemarketer is entitled to a commission on contributions raised. This commission may not exceed the total of an hourly rate times the number of hours spent on the program plus a fixed amount for each pledge received. The Telemarketer is paid solely out of the contributions it raises and is not paid until the program yields contributions. The Telemarketer has no recourse against the Committee for such commissions but, if the agreement is terminated, the Telemarketer is entitled for up to five years to solicit the new donors in the Committee's name to collect any unpaid commissions.

You note the likelihood that, in the early stages, the amount of commissions payable will exceed total contributions. The Agreement nevertheless "contemplates" that, in consideration for the half interest in the new donor list usable for other clients, the Telemarketer will remit to the Committee a portion of the contributions before it is fully paid for all commissions.

You state that the Committee reports the Telemarketer's compensation under each program as a "disbursement" in the month in which the Telemarketer actually deducts its compensation from the Account. With respect to the Current Donor program, the Committee does not treat any of the funds it receives as a loan, and lists a debt owed to the Telemarketer only if, at the conclusion of the Cycle, the conmpensation due exceeds contributions raised during the Cycle and the Committee has not remitted the difference within the reporting period. With respect to the Prospecting program, the Committee does not treat any of the funds received or any unpaid commissions as a debt.

You ask questions pertaining to the reporting of the Telemarketer's compensation and commissions and whether the proposed arrangements result in contributions by the

Telemarketer.

The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c).

In view of the cited requirements, you will need to provide information as to a number of relevant factors referred to in the questions set out below.

(1) You state that the payments by the Telemarketer to itself may vary from month to month depending upon the amounts it has remitted to the Committee. Please state the factors that cause this variation, e.g., committee need at a certain time, projections of future pledges or contributions.

(2) State the time range of Cycles and the bases for the length of a particular Cycle. State whether such Cycles will conform to reporting periods under the Act. Compare the time periods for the Prospecting Program.

(3) State how the Telemarketer is paid full compensation regardless of whether sufficient funds are raised during the Cycle. State what happens if the Committee does not have sufficient other funds on hand.

(4) State how the Committee intends to place value on the list and how much the Committee anticipates the list will be worth. Your response should refer to the value placed on new donors and how many new donors will be needed.

(5) You state that, under the Prospecting program, the Telemarketer will eventually be paid all earned commissions out of the contributions it receives. State with particularity what this means. You should refer to the time periods involved and the bases for determining the rate at which the unpaid earned commissions are paid off while contribution funds are already going to the committee.

(6) State whether the agreement provides for the ability of either party to terminate either the Current Donor Program or the Prospecting Program. State the conditions upon which the parties may terminate and the steps thereafter taken to wind down the program.

In addition, please send a copy of the agreement referred to in your letter.

For your information and review, I am enclosing copies of Advisory Opinions 1988-17 and 1988-12.

Upon receiving your responses to the above questions and document request, this office and the Commission will give further consideration to your inquiry as an advisory opinion request. If you have any questions concerning the advisory opinion process, the enclosed opinions, or this letter, please contact the undersigned.

Sincerely,

Lawrence M. Noble
General Counsel

BY: N. Bradley Litchfield
Associate General Counsel

Enclosures

AOR 1211

New York State
Democratic Committee

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RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

91 MAY 21 AM 9:17

May 20, 91

May 16, 1991

N. Bradford Litchfield
Associate General Counsel
Federal Election Commission
Washington, D.C. 20463

AOR 1991-18

Dear Mr. Litchfield:

This letter responds to yours of February 5, 1991, in which, on behalf of the Commission, you seek additional information regarding the telemarketing fundraising program that is the subject of our request dated January 14, 1991 for an advisory opinion from the Commission.

We are grateful for your consideration of our request.

As you requested, I enclose a copy of the State Committee's contract with the telemarketing company setting forth the fundraising program. In the pages to follow, I provide answers to the questions appearing on page 3 of your February 5 letter. As a preliminary, however, I think it is important to stress that, in our judgment, the program at issue here is innovative, and far more akin to a "commissioned" event fundraising than to the programs and practices described in the advisory opinions enclosed with your letter. Because we believe that the program may raise novel issues for the Commission, issues that we feel our current reporting practices correctly address, we respectfully suggest that a face-to-face meeting with you or your staff may be the best way for us fully to explain how the program works and to answer all your questions about it.

Now to your questions in the order in which your letter lists them.

(1) You state that the payments by the Telemarketer to itself may vary from month to month depending upon the amounts it has remitted to the Committee. Please state the factors that cause this

variation, e.g., committee need at a certain time, <u>projections of future pledges or contributions.</u>

Your question appears to relate to our description of the Current Donor program on page 2 of our February 5 letter. The short answer to your question is that the monthly payments are based on the Telemarketer's projections. To elaborate:

A Telephone Cycle in the Current Donor program consists of two steps: the actual telephone solicitation of the list, which typically consumes three weeks or so, and then the collection process, which may last six to eight weeks. Before each Cycle begins, drawing on its past experience with our list and others like it, the Telemarketer prepares estimates of the total amounts to be raised, the commissions to be earned in raising them, the net revenue to the Committee, and the time when the net revenues will likely be raised. The Telemarketer's distribution schedule -- that is, the amounts to be remitted to the Committee each month during the Cycle -- is based on these estimates, and in particular its projection of when and to what extent the solicitation will yield net revenues. The schedule provides for the Committee to receive income each month and for the Telemarketer to be paid all commissions by the end of each Cycle.

Because the distribution schedules are estimates, in some months the net revenue remitted to the Committee may exceed the actual difference between amounts raised and commissions earned; in such circumstances, the Telemarketer is paying the Committee before it pays itself. Equally so, in other months, that difference may exceed the sums remitted to the Committee; in that event, the Telemarketer retains the increment in the Committee's custodial account pending the month when the Telemarketer earns commissions equal to the increment. In the final month of the Cycle, any adjustments are made in the estimates to assure that the Telemarketer has received all earned commissions and the Committee all net revenues.

Simply put, the Telemarketer has contracted to provide a regular revenue stream to the Committee while earning its own commission over the life of the Telephone Cycle. The regular payments are based only on the Telemarketer's educated projection of the amount the Cycle is likely to yield at the point of distribution, and are adjusted by the Cycle's end to conform to actual results.

(2) State the time range of Cycles and the bases for the length of a particular Cycle. State whether such Cycles will conform to reporting periods under the Act. Compare the time periods for the Prospecting Program.

As noted above, a typical Current Donor telephone solicitation will consume about ten weeks: an average of three weeks of telephone appeal and seven weeks of collection. The basis for this is simply the amount of time each procedure usually takes to complete.

With respect to the Prospecting program, the initial telephone contacts were conducted beginning in the Fall of 1989 and concluding in the Spring of 1990. The first resolicitation of the newly created donors was conducted in the Spring of 1990.

The Telemarketer provides the Committee a full report of revenue and expenses on a monthly basis so that the Committee may conform to the reporting periods under the Act. All revenue raised and all commissions were reported as outlined in the Act based on the Telemarketer's report.

(3) State how the Telemarketer is paid full compensation regardless of whether sufficient funds are raised during the Cycle. State what happens if the Committee does not have sufficient other funds on hand.

On the Current Donor program, the Telemarketer's estimated distribution schedules always provide for the Telemarketer to be fully paid by the Cycle's end, and in our experience to date this has invariably occurred. Nevertheless, in the improbable event of a shortfall in revenues from any one Cycle which leaves the Telemarketer unpaid for that Cycle, then the Committee would be indebted to the Telemarketer in the amount of unpaid commissions. This debt, which would be immediately due and owing at the end of the Cycle, would be no different from any other debt that the Committee might incur by reason of some other activity. The Telemarketer would have the same recourse against the Committee as any other creditor. The telemarketing program is not the sole source of Committee funds, and the Committee would expect to satisfy any such debt from funds raised from other sources.

On the Prospecting program, the Telemarketer has no recourse against the Committee for unpaid commissions. Rather, the Telemarketer may continue to solicit from the lists generated in the Prospecting program until such commissions are paid. Although no one envisions a scenario in which the Telemarketer would not be fully paid in commissions through such solicitations, we do not regard that point as dispositive, because the Telemarketer also receives compensation in the form of the right to sell, license, or use the newly-generated lists for other customers.

(4) State how the Committee intends to place value on the list and how much the Committee anticipates the list will be worth. Your response should refer to the value placed on new donors and how many new donors will be needed.

We are advised that, based on past experience, the Committee may expect to receive each year a net return of between seven and ten dollars ($7 - $10) for each new donor developed as a result of the Prospecting program. To date, that program has generated over 45,000 new donors. To the Committee, the value of the newly-generated lists consists of the revenue stream from these contributors as well as the Committee's right to exploit the list through other means. The Committee anticipates that its use of the newly-generated lists in other fund-raising efforts will yield significant benefits for the Committee.

(5) You state that, under the Prospecting program, the Telemarketer will eventually be paid all earned commissions out of the contributions it receives. State with particularity what this means. You should refer to the time periods involved and the bases for determining the rate at which the unpaid earned commissions are paid off while contribution funds are already going to the committee.

In stating that the Telemarketer will eventually be paid all earned commissions out of the contributions it raises, we mean to say that the Telemarketer "earns" commissions only to the extent that the Telemarketer raises contributions to pay them. If the program fails to yield sufficient contributions to cover the Telemarketer's commissions, then the Telemarketer does not "earn" those commissions. Otherwise put, if the entire solicitation "costs" $200,000 but raises only $100,000, then the Telemarketer "earns" only $100,000.

The Telemarketer is able to remit proceeds to the Committee before fully paying itself the full amount of its earned commissions because, as in the Current Donor program, the Telemarketer's periodic estimates, based on its past experience, allow for a regular revenue stream to the Committee while the Telemarketer is fully paid over the life of the program. Thus, after the initial round of telephone calls "acquires" new donors, the Telemarketer re-solicits those donors up to three times each year. During the first year of the program, the Telemarketer remitted to the Committee the net revenues attributable to one of those three telephone rounds, even though the Telemarketer had not yet been fully paid for all commissions earned during the "acquisition" or start-up solicitations, because the Telemarketer's projections indicate that the unpaid commissions will be paid by the next round of calls.

Viewed from the proper perspective, the Telemarketer has assumed some financial risk by remitting revenues to the Committee, but this is a risk that the Telemarketer assumes in the ordinary course of its business based not only on its projections but, perhaps more important, on its perception of the value of its right to use, license or sell the newly generated lists for other purposes.

<u>(6) State whether the agreement provides for the ability of either party to terminate either the Current Donor Program or the Prospecting Program. State the conditions upon which the parties may terminate and the steps thereafter taken to wind down the program.</u>

Either party may terminate the agreement upon specific notice for any reason. In the event that termination occurs at a time when the Telemarketer has not fully been paid all commissions, then the Telemarketer has the right to continue soliciting the Prospecting list until such time as the

Telemarketer raises contributions to pay its earned commissions. In that circumstance, all reporting obligations on the Telemarketer remain in place.

We hope the foregoing answers your questions. We look forward to hearing from you.

Sincerely,

Gerard E. Harper

Gerard E. Harper

Enclosure

AMENDED AND RESTATED AGREEMENT

THIS AGREEMENT is made as of the 1st day of September 1990 ("Effective Date") between the New York State Democratic Committee (the "COMMITTEE") and Gordon and Schwenkmeyer, Inc., a California corporation ("GSI").

RECITALS

WHEREAS, the COMMITTEE and GSI are parties to an agreement dated August 22, 1989 relating to the provision of telemarketing services;

WHEREAS, the COMMITTEE and GSI wish to amend and restate such prior agreement in order, among other things, to clarify the parties' rights and obligations;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the COMMITTEE and GSI hereby agree as follows:

ARTICLE 1

TERM OF AGREEMENT

1.1 Term. This Agreement shall be effective for one year from the Effective Date and thereafter shall be automatically renewed for additional twelve-month periods unless (a) no later than thirty (30) days prior to the expiration of the Term either party gives written notice to the other party of its intention to terminate at the end of the Term or (b) either party terminates the Agreement in accord with section 1.2 of this Article.

1.2 Termination By Either Party. GSI or COMMITTEE shall have the right to terminate this Agreement for any reason on delivery of thirty (30) days' written notice.

1.3 Effect of Termination. Upon termination of this Agreement, GSI shall cease all activity on behalf of or in the name of the COMMITTEE, except that GSI shall perform all services necessary to collect all pledges completed prior to termination and may exercise its rights under section 4.4 of this Agreement. To the extent consistent with Article 4 of this Agreement, GSI shall be entitled to compensation for its fees and expenses incurred until termination and during the collection process for pledges made prior to termination.

ARTICLE 2

OBLIGATIONS OF GSI

2.1 General.

2.1.1 To the extent set forth in this Agreement, GSI shall serve as the COMMITTEE'S authorized commercial fundraising agent within the meaning of the Federal Election Campaign Act of 1971, as amended (the

"Act") and the rules and regulations promulgated by authority of the Act (the "Rules").

2.1.2 GSI will perform its services under this Agreement, including, without limit, the solicitation, deposit, recording, documenting, and reporting of all contributions, disbursements, expenditures and offsets in a manner which enables the COMMITTEE to comply with the Act, the Rules and the New York State Election law and any other applicable law or regulation which the COMMITTEE brings to the attention of GSI.

2.1.3 GSI shall perform services under this Agreement as an independent contractor and shall not be treated as an employee of the COMMITTEE for federal, state or local tax purposes or any other purpose. Except to the extent set forth in section 5.2 of this Agreement, this Agreement does not preclude GSI from representing, performing services for, or being employed by, other persons or companies.

2.2 The Solicitation Programs.

2.2.1 GSI shall undertake two telephone solicitation programs for the COMMITTEE: (a) a current donor program (the "Current Donor Program") based on lists of current telemarketing donors ("Current Donors") supplied to GSI by the COMMITTEE and (b) a prospecting program (the

"Prospecting Program") based on lists of active party members ("Membership Prospects") supplied to GSI by the COMMITTEE and on lists of registered Democratic voters ("Voting List Prospects") supplied to GSI by the COMMITTEE.

2.2.2 GSI shall use its best efforts to contact each Current Donor three times a year during a year (each round of contacts, a "Telephone Cycle") in which there is no senatorial, gubernatorial or presidential election in New York (a "Non-Election Year") and four times a year during a year in which there is a senatorial, gubernatorial or presidential election in New York (an "Election Year"), at such times as shall be agreed upon between GSI and the COMMITTEE.

2.2.3 In connection with the Prospecting Program, GSI shall use its best efforts to contact or attempt to contact Membership Prospects and Voting List Prospects and to identify donors to the COMMITTEE. GSI shall develop, as part of the Prospecting Program, a list of new donors for the COMMITTEE ("New Donors") and shall contact New Donors three times a year in a Non-Election Year and four times a year in an Election Year.

2.2.4 In connection with both the Current Donor Program and the Prospecting Program (collectively, the "Solicitation Programs"), GSI shall:

(a) Prepare all materials to be used by phone solicitors in contacting Current Donors, Membership Prospects, Voting List Prospects and New Donors (collectively, the "Potential Contributors") and billing Potential Contributors for their pledges, such materials to be subject to, and submitted in advance for, the COMMITTEE's approval;

(b) Verify the accuracy of all telephone numbers and addresses for all Potential Contributors, provided, however, that GSI shall use the telephone numbers provided by the COMMITTEE in the first instance without verification;

(c) Secure bids and commitments for union commercial printing and services necessary to complete the materials to be used in the billing process;

(d) Arrange for telephone service for the phone bank;

(e) Hire, train and supervise phone bank supervisors, phone solicitors, billing clerks and necessary clerical support for the Solicitation Programs;

(f) Supervise the Solicitation Programs on a daily basis;

(g) Provide the COMMITTEE with any information required by the COMMITTEE in preparing the necessary financial and/or political/campaign reports and assist the COMMITTEE in preparing such reports, in any way as may reasonably be requested by the COMMITTEE including, but not limited to, the information set forth in section 2.4 of this Agreement; and

(h) Render all other services, acts or things reasonably necessary to carry out its responsibilities under this Agreement.

2.2.5 GSI agrees to devote the time necessary to complete performance of responsibilities described in this Agreement. GSI and the COMMITTEE shall agree upon the timing of each Telephone Cycle and the duration between the start and finish of each Telephone Cycle. GSI will bill Potential Contributors for their pledges three times.

2.2.6 GSI will determine the method, details and means of performing the responsibilities described in this Agreement after consulting with the COMMITTEE. GSI will consult with the COMMITTEE on a weekly basis on the progress of the Solicitation Programs.

2.2.7 GSI may, at GSI's expense, employ such assistants as GSI deems necessary to perform the services required of GSI by this agreement.

2.3 Deposit of Funds

2.3.1 Upon receipt of any contribution to the COMMITTEE, GSI will use its best efforts to determine that the contribution is eligible for deposit into the COMMITTEE's federal accounts within the meaning of the Act and the Rules, including, but not limited to, 11 C.F.R. Section 102.5. Such efforts by GSI shall include at the least a comparison of the contribution with the pledge card generated at the time of the solicitation.

2.3.2 In the event that GSI determines that a contribution to the COMMITTEE is not an eligible contribution within the meaning of the Act and the Rules, then, within five days of receipt of the contribution, GSI shall either (a) return the contribution to the donor with a solicitation of an eligible contribution or (b) deliver the contribution to the COMMITTEE for deposit into accounts not governed by the Act and the Rules.

2.3.3 In the event that GSI determines that the contribution is eligible for deposit into the COMMITTEE's accounts, then, within ten days of receipt of the contribution, GSI will deposit the contribution into an account or accounts in the COMMITTEE's name with GSI as custodian at a depository institution authorized to do business in the State of New York.

2.3.4 GSI will at all times maintain the COMMITTEE's accounts at a depository institution authorized to do business in the State of New York. In the event an institution is no longer so authorized, then, with prior notice to the COMMITTEE, GSI will immediately transfer the COMMITTEE's account(s) to one or more depository institutions authorized to do business in the State of New York, and provide the COMMITTEE with notice of the name(s) and address(es) of the new depository institution(s).

2.3.5 With the COMMITTEE's prior consent, which consent will not be unreasonably withheld, GSI may transfer the COMMITTEE's custodial accounts to any one or more depository institutions, provided that (a) such other or additional depository institutions be authorized to do business in the State of New York and (b) the COMMITTEE receive seven days' advance notice of the name and address of the institution(s).

2.3.6 GSI will not deposit any funds into the COMMITTEE's custodial account(s) except eligible contributions received in response to the Solicitation Programs, it being understood that GSI will maintain the accounts in compliance with the Act and the Rules, including, but not limited to, the Act's prohibition on commingling of funds.

2.3.7 GSI will not withdraw any funds from the custodial accounts except as authorized under Article 4 of this Agreement and then only by check or wire transfer.

2.4 <u>Recordkeeping and Reporting</u>.

2.4.1 With respect to each contribution received, GSI will maintain a contemporaneous and cumulative record, including the full name and address of the contributor, the amount contributed and the date the contribution was received. For each contributor who annually contributes, in a single contribution or in the aggregate, $200 or more, GSI will use its best efforts to obtain such contributor's occupation and employer (if any).

2.4.2 GSI will maintain a record of the name, address and purpose (as defined in 11 C.F.R. Section 104.3) of each disbursement and expenditure from the COMMITTEE'S account(s).

2.4.3 Within fifteen business days of the end of every month commencing November 1990, GSI will deliver to the COMMITTEE'S Treasurer the information maintained under sections 2.4.1 and 2.4.2 of this Agreement.

2.4.4 No later than seven business days prior to the date on which the COMMITTEE is required to file its reports under 11 C.F.R. Section 104.5., GSI will deliver to the COMMITTEE a report of receipts, disbursements and a summary of contributions and operating expenditures (including offsets made pursuant to Section 4.2 hereof), itemized in accordance with the reporting categories set forth in 11 C.F.R. Part 104, in order to assist the COMMITTEE in its reporting obligations under the Act and the Rules.

2.4.5 Within fifteen business days of the end of every month commencing November, 1990 GSI will deliver to the COMMITTEE'S Treasurer a statement (the "Monthly Service Statement") setting forth:

(i) gross income generated by the Solicitation Programs,

(ii) number of attempts to reach Potential Contributors,

(iii) number of contacts with Potential Contributors,

(iv) number of pledges from Potential Contributors,

(v) average amount of pledge,

(vi) total net income,

(vii) total cost of collections,

(viii) number of hours spent soliciting,

(ix) the names of Membership Prospects,

(x) the names of Voting List Prospects and new donors,

(xi) costs associated to new number purchase, and

(xii) fees offsettable by GSI under each of the Solicitation Programs.

2.4.6 Within five business days of GSI's receipt thereof, GSI will deliver to the COMMITTEE'S Treasurer a copy of each bank statement issued by the depository of any account established under 2.3 of this Agreement, including copies of all canceled checks.

2.5. Confidentiality.

2.5.1 With respect to all information received from the COMMITTEE or its agents during the Term, GSI shall:

(a) Hold such information in strict confidence and not disclose such information to any person or entity or use such information for any purpose other than in performance of the Solicitation Programs;

(b) Segregate, avoid commingling and otherwise provide adequate physical security for all such information and materials;

(c) Ensure that any person granted access to such information is familiar with and complies with the terms of this Section 2.5; and

(d) Upon demand of the COMMITTEE or upon termination of this Agreement, whichever is earlier, promptly return to the COMMITTEE or, upon the COMMITTEE'S request, destroy all material received hereunder, including copies in any form whatsoever, or other tangible evidence or impressions of such information and shall thereafter make no further use thereof.

2.5.2 The provisions of this section 2.5 shall survive the termination of this Agreement.

ARTICLE 3

OBLIGATIONS OF THE COMMITTEE

3.1 Responsibilities of the COMMITTEE. The COMMITTEE shall provide GSI with lists of Current Donors, Membership Prospects and Voting List Prospects with their phone numbers and addresses (if available).

ARTICLE 4

COMPENSATION AND EXPENSES

4.1 <u>Compensation</u>.

4.1.1 As compensation for its services rendered in conducting the Prospecting Program, GSI is entitled (a) to joint ownership of the Lists of New Donors referred to in Section 2.2.3 of this Agreement and (b) to withhold from contributions it solicits and receives on behalf of the Committee a commission not to exceed:

(i) twenty-four dollars $24.00 for each hour spent phoning Member Prospects, Voting List Prospects and New Donors; and

(ii) one dollar and fifty cents $1.50 for each pledge received from a Potential Contributor.

4.1.2 GSI shall be entitled to the commissions set forth in section 4.1.1 only to the extent that GSI raises money through the Prospective Program. Absent the COMMITTEE's written consent, GSI shall not be entitled to withhold any commissions except those specified in section 4.1.1. GSI shall have no recourse to the COMMITTEE for any commissions which GSI may incur in the Prospecting Program, and such amounts shall not be debts or obligations of the COMMITTEE. GSI's sole and exclusive recourse shall be to withhold its commissions from contributions it solicits and receives, including from solicitations pursuant to Section 4.4 hereof.

4.1.3 As compensation for its services in conducting the Current Donor Program, GSI is entitled to withhold from the contributions it solicits and receives on behalf of the Committee, during each Telephone Cycle, an amount not to exceed:

(i) twenty-eight dollars ($28.00) for each hour spent phoning Current Donors; and

(ii) one dollar and fifty cents ($1.50) for each pledge received from a Current Donor.

4.1.4 At the end of each Telephone Cycle in the Current Donor Program, the COMMITTEE shall be liable to pay GSI the amount of compensation due GSI under section 4.1.3. to the extent that such amount is not covered by the contributions received during such Cycle.

4.2 Time for Payment.

(a) GSI may, from time to time, withhold its compensation under section 4.1 of this Agreement from the contributions it solicits provided that:

(i) the amount to be offset and the time period to which such offset relates is disclosed to the COMMITTEE in the Monthly Service Statement and itemized as required for any report submitted under section 2.4.3 of this Agreement;

(ii) the amount offset is no greater than the amount of compensation accrued under Section 4.1 hereof as of the date of the Monthly Service Statement last submitted to the COMMITTEE.

(b) GSI's failure to submit an amount to be offset in a Monthly Service Statement shall not constitute a waiver of GSI's right to offset its compensation from contributions it solicits for such services hereunder.

4.3 Right of Negotiation. It is expressly understood that GSI may from time to time remit contributions to the COMMITTEE in advance of GSI's withholding of all the compensation due GSI. In entering into this Agreement, the parties each believe and rely on the belief that the remitting of such contributions to the COMMITTEE shall not be deemed a loan or advance to the COMMITTEE, nor the unpaid compensation due GSI a debt or liability of the COMMITTEE, for any purpose whatsoever, including without limit, for the purposes of compliance with the reporting provisions of the Act and the Rules. In the event that it is later determined by any governmental agency that such contributions do constitute a loan or advance, or the unpaid compensation a debt or liability, then (a) the parties shall negotiate in good faith to modify the provisions of sections 4.1 and 4.2 to avoid such a result consistent with law and (b) GSI's rights under the following section 4.4 shall be subject to renegotiation and shall not be operative pending the outcome of such renegotiation, the object of which shall be to modify that provision in accord with the parties' prior expectations. In the event such a governmental determination is made after termination of this Agreement, and while GSI is pursuing its rights under section 4.4, then GSI shall immediately cease such activities pending renegotiation of its rights.

4.4 Right to Continue Solicitation

4.4.1 Subject to the provisions of section 4.3 of this Agreement, if, at the time of termination of this Agreement, GSI has not fully withheld its compensation for which section 4.1.1 of this Agreement provides, then for a period no longer than five years after the termination, GSI may continue to solicit donations in the name of the COMMITTEE and GSI may retain moneys obtained from such solicitations, until GSI has recovered in full for its services rendered hereunder.

4.4.2 It is understood that, in exercising its rights under this section, GSI may add to the amount of its compensation due any sums incurred by it for the continued solicitation provided for this section, including all fees and costs which GSI may have withheld pursuant to Article 4 hereof had this Agreement not been terminated.

4.4.3 If GSI exercises its rights under this Agreement, then GSI shall continue to comply with sections 2.2.3 through 2.2.7, 2.3, 2.4 and 6.5 of this Agreement as if the Agreement were still in full force and effect. Without limiting the foregoing, it is understood that the COMMITTEE shall have a joint ownership interest in, and be entitled to all information relating to, the list of New Donors created in the exercise of GSI's rights under this section 4.4.

4.4.4 This section 4.4 shall survive the termination of this Agreement.

ARTICLE 5

OWNERSHIP OF LISTS

5.1 Ownership of Lists Provided by the COMMITTEE. Lists of Current Donors, Membership Prospects and Voting List Prospects provided to GSI by the COMMITTEE pursuant to this Agreement shall remain the property of the COMMITTEE and may not be used by GSI for any purpose other than the Solicitation Programs.

5.2 Ownership of Lists Created by GSI. Lists of New Donors developed by GSI from the lists of Member Prospects and Voting List Prospects shall be jointly owned by GSI and the COMMITTEE; provided, however, that GSI must receive consent from the COMMITTEE to solicit these lists in a contested primary in the State of New York other than a presidential primary and must inform the COMMITTEE in writing when using the lists for all other solicitations.

ARTICLE 6

GENERAL PROVISIONS

6.1 Notices. Any notices to be given under this Agreement by either party to the other may be effected either by personal delivery or by telecopy in writing or by mail, registered or certified, postage prepaid with return receipt requested. Notices shall be sent or delivered to the parties at the addresses appearing at the end of this Agreement, but each party may change the address by written notice in accordance with this section 6.1. Notices delivered personally or by telecopy will be deemed given upon receipt; mailed notices will be deemed given two (2) days after mailing.

6.2 Partial Invalidity. If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will nevertheless continue in full force without being impaired or invalidated in any way.

6.3 Assignment. Neither this Agreement nor any duties or obligations under this Agreement shall be subject to assignment by GSI without the express prior written consent of the COMMITTEE. In the event of an assignment by GSI to which the COMMITTEE has given consent, GSI's assignee shall agree in writing with the COMMITTEE to assume, perform, and to be bound by the covenants, obligations, and agreements contained in this Agreement. Subject to the foregoing, this Agreement shall be binding on the successors and assigns of the respective parties.

6.4 Change in Control. Notwithstanding anything in this Agreement to the contrary, if GSI undergoes a change of control during the Term of this Agreement, then, within ten (10) days of such change of control, GSI shall give written notice of the same to the COMMITTEE, which in its sole discretion may terminate this Agreement within thirty (30) days of receipt of such notice. Upon termination pursuant to this section, the provisions of section 1.3 of this Agreement shall apply.

6.5 Books and Records. Upon reasonable notice, at any reasonable time during working hours, GSI shall (a) permit the COMMITTEE or agents or representatives of the COMMITTEE, at the COMMITTEE'S expense, to examine the records and books of account of GSI in order to verify the information contained on the Monthly Service Statement or any other report delivered to the COMMITTEE, (b) permit the COMMITTEE to have its independent auditors examine the records and books of account of GSI, twice each year, in order to verify any information submitted by the COMMITTEE under the Act, the Rules or the NYSEL and (c) permit the Treasurer of the COMMITTEE, or the Treasurer's designee, to inspect any and all contributions received by GSI to determine their legality and eligibility under the Act, the Rules and the NYSEL and to require the return of any contributions, it being understood that the Treasurer shall make such a determination in his or her sole discretion and that such Treasurer's determination shall be binding on GSI.

6.6 Governing Law and Jurisdiction.

6.6.1 The laws of the State of New York shall govern the validity of this Agreement, and the interpretation and construction of its term and conditions as well as of the rights and duties of the parties under this Agreement.

6.6.2 Any claim arising out of this Agreement shall be litigated only in the federal or state courts within the State of New York, and GSI agrees to subject itself to the personal claim jurisdiction of such courts in the event of any such claim. GSI shall not invoke any action by the COMMITTEE under this Agreement to assert that the COMMITTEE is subject to the personal jurisdiction of any court order than the federal or state courts within the State of New York, and shall be liable to the COMMITTEE for all attorneys' fees and costs incurred by the COMMITTEE in opposing the assertion of personal jurisdiction over the COMMITTEE in any forum outside the State of New York.

6.6.3 The provisions of this Section 6.6 shall survive the expiration or termination of this Agreement.

6.7 Authorization to Sign. The parties hereby represent and warrant that the persons executing this Agreement are authorized to execute this Agreement and are authorized to obligate the respective parties to perform this Agreement.

6.8 Entire Agreement. This Agreement supersedes any and all agreements, either oral or written, between the parties with respect to rendering of services by GSI to the COMMITTEE and contains all of covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this Agreement acknowledges that no representatives, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any other party, which are not embodied herein, and that no other agreement, statement or promise not contained in this Agreement shall be valid or binding. This Agreement may be signed in counterparts. Any modifications of this Agreement will be effective only if it is in writing signed by the party to be charged.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth above.

GORDON & SCHWENKMEYER, INC.
550 North Continental Boulevard
Suite 180
El Segundo, California 90245

By Mike Gordon
MIKE GORDON, PRESIDENT

NEW YORK DEMOCRATIC PARTY
60 East 42nd Street
Suite 1801
New York, New York 10065
Attention: Treasurer

By ______________________

FEDERAL EMPLOYER ID NO: 13-0628260