

STATE OF NEW YORK  
JOINT COMMISSION ON PUBLIC ETHICS

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540 Broadway  
Albany, New York 12207

IN THE MATTER OF DAVID N. ELLENHORN,  
Assistant Attorney General at the  
Office of the Attorney General.

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SUBSTANTIAL BASIS INVESTIGATION REPORT  
AND SETTLEMENT AGREEMENT

Case No. 13-161

WHEREAS, the Joint Commission on Public Ethics ("Commission") is authorized by Executive Law §94 to conduct an investigation to determine whether a substantial basis exists to conclude that a violation of the Public Officers Law has occurred, to issue a report of its findings of fact and conclusions of law, and to impose penalties for any violation;

WHEREAS, David Ellenhorn ("Respondent"), who was admitted to practice in 1961, has been employed by the Office of the Attorney General of the State of New York ("OAG") as Senior Trial Counsel from 2007 to the present. He previously served as an Assistant United States Attorney; as Chief Counsel to the New York State Commission of Investigations; and as a litigator in private practice;

WHEREAS, in 2005 the then-Attorney General brought a lawsuit under the Martin Act (N.Y. GBS. LAW § 352-c) on behalf of the State of New York against Maurice R. ("Hank") Greenberg and Howard I. Smith, former Chief Executive Officer and Chief Financial Officer of American International Group (People of the State of New York v. Greenberg, et. al., New York State Supreme Court, Index No. 401720/05) ["Matter"], and the Matter has continued under two subsequent Attorneys General to the present day;

WHEREAS, Respondent at all relevant times served as the lead attorney, and continues to serve as lead attorney, in the Matter;

WHEREAS, in April 2009, after attending the deposition of Warren Buffett in Omaha, Nebraska in the Matter, Respondent accepted an unsolicited offer from David Boies, Mr. Greenberg's counsel, to accompany him on a charter plane Mr. Boies was using to travel back to New York City;

WHEREAS, four years later, in December 2013, Mr. Greenberg, through different counsel not directly involved in the Matter, first raised this incident with the Commission. At that time, Mr. Boies was still representing Mr. Greenberg in the Matter;

WHEREAS, the Commission undertook an inquiry into Respondent's conduct, recognizing that, under certain circumstances, a State employee's acceptance of transportation from anyone other than his agency may violate provisions of the Public Officers Law or its attendant regulations;

WHEREAS, the regulations in effect at the time (19 NYCRR Part 930.6) provided, in general, that a State employee "may accept reimbursement for travel expenses from the federal government, other State or municipal government entities, non-State agency organizations or individuals for travel related to the covered individual's official duties under [specified] conditions," which include filing a written request in advance and receiving approval from the approving authority within the employing agency;

WHEREAS, the Commission interprets such regulations to apply not only where the cost of travel is actually reimbursed or otherwise paid for by a private party or other third party, but also where a private party provides transportation to a State employee, regardless of whether an additional expenditure is involved;

WHEREAS, Respondent has cooperated with the Commission in providing relevant and requested information and has waived notification in writing of possible violations pursuant to Executive Law §94(13)(a);

WHEREAS, Respondent and the Commission, the parties to this Settlement Agreement ("Agreement"), have agreed to resolve this matter in a manner that avoids additional administrative and/or adjudicatory proceedings;

WHEREAS, this Agreement reflects the resolution and conclusion of the Commission's inquiry into Respondent's travel in April 2009.

NOW THEREFORE, in consideration of the mutual covenants made herein, as the final settlement of this matter, the parties stipulate and agree that:

1. The following are the relevant facts relating to Respondent's travel:
  - a. On April 14, 2009, in his role as lead counsel on behalf of the State in the Matter, Respondent traveled from New York City to Omaha, Nebraska to attend a deposition of Warren Buffet on April 15, 2009. Respondent's travel arrangements were made by another employee in the OAG;
  - b. The deposition was conducted at the request of Mr. Greenberg's principal counsel, Mr. Boies of Boies, Schiller & Flexner LLP. In addition to Respondent and Mr. Boies, other attorneys representing Howard Smith traveled from New York to be present at Mr. Buffet's deposition;
  - c. On April 15, 2009, either during or shortly after the conclusion of the deposition, Mr. Boies, unsolicited, invited all the attorneys who were travelling back to New York City to accompany him on a charter plane he was utilizing for his travel. All the attorneys who were travelling back to New York City, including Respondent, accepted the offer. As a result, Respondent returned to New York sooner than if he had taken the commercial flight on which he was scheduled to travel. Mr. Boies incurred no additional cost because of Respondent's presence, and Respondent received no financial benefit;
  - d. No meals or alcoholic beverages were served on the flight;

- e. Respondent did not seek approval from the OAG before accepting Mr. Boies's invitation. Mr. Ellenhorn was not aware that State regulations required State employees to seek approval from their agencies before accepting transportation from a private party;
  - f. Having not made his own travel arrangements and not knowing that his airline ticket was refundable, Respondent did not seek to have the OAG reimbursed for the unused return ticket and did not advise anyone authorized to approve his acceptance of transportation from a third party that he flew on the charter plane in lieu of using his return ticket.
2. Respondent admits that by his actions and inactions, described in Section 1, he violated then-applicable regulations (19 NYCRR Part 930.6), notwithstanding that he was unaware that the regulations governed such conduct.
  3. Respondent has recently taken the online ethics training provided by the Commission.
  4. The Commission has agreed to the terms of this Agreement based on, among other things, the representations made to the Commission by Respondent. To the extent that representations made by Respondent are later found by the Commission to be materially incomplete or inaccurate, Respondent shall be in breach of this Agreement, and the Commission shall have sole discretion to deem the Agreement null and void in its entirety, issue a new Substantial Basis Investigation Report, which may include additional charges against Respondent, and proceed with an enforcement action. As to any new Substantial Basis Investigation Report or enforcement action by the Commission pursuant to this paragraph: (1) Respondent waives any claim that such action is time-barred by a statute of limitations or any other time-related defenses, provided that such action would not have been time-barred if brought on or before the date of this Agreement; and (2) Respondent expressly acknowledges and agrees that the Commission may use any statements herein, or any other statements, documents or other materials produced or provided by Respondent prior to or after the date of this Agreement, including, but not limited to, any statements, documents, or other materials, if any, provided for the purposes of settlement negotiations or in submissions by Respondent or by counsel on behalf of Respondent, in any enforcement proceeding against Respondent relating to the allegations herein.
  5. Notwithstanding the provisions of this Agreement, Respondent understands and acknowledges that the Commission may investigate any future conduct by Respondent and take any appropriate action.
  6. Respondent waives the right to assert any defenses or any challenges to this Agreement, as well as any right to appeal or challenge the determination or conduct of the Commission relating to this matter in any forum.

7. This Agreement and any dispute related thereto shall be governed by the laws of the State of New York without regard to any conflict of laws principles.
8. Respondent consents to the jurisdiction of the Commission in any proceeding or action to enforce this Agreement.
9. It is understood that this Agreement is not confidential and will be made public within 45 days of its execution in accordance with Executive Law §§94(14) & (19).
10. Respondent agrees not to take any action or to make, permit to be made, authorize, or agree to any public statement denying, directly or indirectly, any finding in this Agreement or creating the impression that this Agreement is without factual basis. Nothing in this paragraph affects Respondent's: (a) testimonial obligations; or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the Commission is not a party. A violation of this Paragraph constitutes a breach of this Agreement by Respondent.
11. This Agreement constitutes the entire agreement between the parties and supersedes any prior communication, understanding, or agreement, whether oral or written, concerning the subject matter of this Agreement. No representation, inducement, promise, understanding, condition or warranty not set forth in this Agreement has been relied upon by any party to this Agreement.
12. Any amendment or modification to this Agreement shall be in writing and signed by both parties.
13. This Agreement shall become effective upon execution by the Commission or its designee.
14. In the event that one or more provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement.

15. By signing below, Respondent acknowledges reading this Agreement in its entirety, understanding all terms and conditions of this Agreement, and having done so, knowingly, voluntarily, and freely enters into this Agreement. Respondent was represented by counsel, Bruce Green, Esq.

Dated: July 23, 2014  
Letizia Tagliaferro  
Letizia Tagliaferro  
Executive Director  
New York State Joint Commission on Public Ethics

ACCEPTED AND AGREED TO  
THIS 18 DAY OF July, 2014

Respondent  
By: David N. Ellenhorn  
Name: David N. Ellenhorn

Approved: Daniel J. Horwitz  
Chair  
Paul Casteleiro  
Hon. Joseph Covello  
Mitra Hormozi  
Marvin Jacob  
Seymour Knox, IV  
Gary J. Lavine  
Hon. Mary Lou Rath  
David A. Renzi  
Renee R. Roth  
George Weissman

Absent: David Arroyo  
Michael A. Romeo, Sr.

Members