SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF NEW YORK

STATE OF NEW YORK ex rel.

Plaintiff,

-against-

HARBINGER CAPITAL PARTNERS OFFSHORE MANAGER, LLC, et al.

Defendants.

Index No. 100416/2015

STIPULATION AND SETTLEMENT AGREEMENT

STIPULATION AND SETTLEMENT AGREEMENT

This Stipulation and Settlement Agreement ("Agreement") is entered into among (i) the State of New York (the "State"); (ii) relator and (iii) Harbert and (iii) Harbert Management Corporation ("HMC"), HMC Investors LLC, Raymond J. Harbert, Michael D. Luce, David A. Boutwell, Charles D. Miller, William W. Brooke, Joel B. Piassick, Sonja J. Keeton, Michael P. White, Carole B. Schafer, Raymond Jones Harbert Jr. Trust, Mary Kathryn Harbert Trust, John Murdoch Harbert II Trust, and HMC-New York, Inc. (collectively "Respondents"), through their authorized representatives. All of the above-named persons and entities are hereinafter collectively referred to as "the Parties."

PREAMBLE

WHEREAS, on or about March 25, 2015, Relator filed a *qui tam* action (the "Action") captioned *State of New York ex rel.*v. Harbert Management Corporation, Harbinger Capital Partners Offshore Manager LLC, et al., pursuant to the New York False Claims Act, N.Y. State Finance Law §§ 187 et seq. ("NYFCA"), alleging that the defendants named in the

Action knowingly made, used, or caused to be made or used, false statements that were material to their obligation to pay or transmit money to the State and to New York City (the "City"); and

WHEREAS, the Office of the Attorney General thereafter commenced an investigation in connection with the allegations of the Relator's complaint; and

WHEREAS, as a result of that investigation, the State contends that it has civil claims against certain Respondents under the NYFCA; and

WHEREAS, as a result of that investigation, the State contends that it has tax claims against certain Respondents under the laws of New York State; and

WHEREAS, Respondents contend that the tax law provisions at issue in this investigation are ambiguous and that they consulted with tax professionals and obtained advice supporting Respondents' tax positions; and

WHEREAS, to avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties have determined and hereby agree that settlement is in each of their best interests, and the Office of the Attorney General has agreed to accept the terms of the Agreement; and

WHEREAS, Relator claims entitlement under State Fin. Law § 190(6) and (7) to a share of the proceeds of this Agreement and to Relator's reasonable expenses, attorney's fees and costs; and

WHEREAS, the State has an ongoing investigation into other entities involved in the underlying conduct described herein; and

WHEREAS, this Agreement in no manner prejudices claims the State may have against other entities and the individuals associated with them (other than Respondents), concerning the underlying conduct, including any further investigation into such claims.

NOW THEREFORE, in consideration of the mutual promises and obligations of the Agreement, the Parties agree fully and finally to settle this Action pursuant to the Terms and Conditions below:

COVERED CONDUCT

- 1. The conduct described in the following Paragraphs 1 through 33 is hereinafter referred to as the "Covered Conduct."
- 2. A limited liability company is classified as a partnership for tax purposes. New York State Tax Law does not impose tax on the entity, but instead taxes individual partners' distributive share of partnership income derived from New York sources. A limited liability company is deemed to "carry on business" in New York and New York City if it maintains and operates an office, store, or other place in New York where its affairs are systematically and regularly carried on, or if it performs with regularity a series of transactions for profit in New York.
- 3. New York State taxes income from business that is carried on partly within and partly outside the State to the extent such income is derived from or connected with New York. New York City similarly imposes an unincorporated business tax ("UBT") on certain businesses within the City. Under Title 20 of the Codes, Rules and Regulations of the State of New York, Part 132.15(f), when businesses carry on business activities both inside and outside of the State or City, taxpayers are required to apportion income to the State for tax purposes to the extent of the business's "charges for services performed, by an employee, agent, agency or independent contractor chiefly situated at, connected by contract or otherwise with, or sent out from, offices, branches of the business, or other agencies, situated within New York State."
- 4. Such limited liability companies must submit an annual New York State Department of Taxation and Finance Partnership Return (Form IT-204) if they have a member who is a resident of New York State or to the extent they have income derived from or connected with New York

sources. In addition, a limited liability company carrying on business in New York City must submit UBT returns (Form NYC-204 or Form NYC-204EZ, as applicable).

- 5. In this case, a hedge fund investment manager called Harbinger Capital Partners

 Offshore Manager LLC ("Offshore Manager") did not apportion any income to New York State and

 New York City, even though its personnel made all significant trading decisions, as well as certain

 operational and marketing decisions, in an office in the New York City borough of Manhattan.

 Rather than apportion income to the State and City, where key revenue-generating business activities

 were conducted, Offshore Manager apportioned all of its income to the lower-tax State of Alabama

 where no significant trading decisions were made.
- 6. HMC sponsored and organized the hedge fund now known as Harbinger Capital Partners Master Fund I Limited ("Harbinger Fund"). HMC is an investment management company, which has its corporate headquarters in Birmingham, Alabama. In or about June 2001, HMC hired Philip Falcone to be the Senior Managing Director for the Harbinger Fund.
- 7. Consistent with Mr. Falcone's experience, the Harbinger Fund focused on "distressed investments," which are securities and/or investments in companies that are in financial trouble or undergoing bankruptcy. The Harbinger Fund enjoyed dramatic growth between 2004 and 2008. The peak of Mr. Falcone's investment success was in 2007, when he doubled his investors' money, largely as a result of a high-profile investment shorting the subprime mortgage market.
- 8. Like other hedge funds, the Harbinger Fund had separate "feeder funds" for onshore and offshore investors. This matter concerns the Harbinger Fund's offshore feeder fund ("Offshore Feeder"). From 2002 to 2009, Offshore Manager was the investment manager of the Harbinger Fund and its Offshore Feeder and had the authority to buy and sell securities on behalf of these funds.

- 9. Offshore Manager was organized as a Delaware limited liability company. For tax years 2004-2009, the members of Offshore Manager included the following individuals and entities: HMC Investors, LLC; Raymond J. Harbert; Raymond Jones Harbert Jr. Trust; Mary Kathryn Harbert Trust; John Murdoch Harbert II Trust; William W. Brooke; Charles D. Miller; David A. Boutwell; Michael P. White; Michael D. Luce; Joel B. Piassick; and Carole B. Schafer (each of the foregoing referred to collectively as the "Alabama Resident Partners," as each of these referenced individuals resided in the State of Alabama); as well as Philip Falcone and other individuals.
- 10. In June 2002, Mr. Falcone was appointed Vice President of Offshore Manager, and became its Senior Portfolio Manager effective January 1, 2003. Mr. Falcone was appointed Senior Managing Director of Offshore Manager effective December 15, 2005. Mr. Falcone was the primary decision-maker for matters concerning the Harbinger Fund's investment strategy, day-to-day investment and securities trading, and portfolio construction activities.
- 11. Mr. Falcone worked out of a New York City office along with a group of traders, analysts, and investment professionals (the "New York Investment Team"), who reported to Mr. Falcone. Offshore Manager's founding Limited Liability Company agreement dated June 1, 2002, and 2003 and 2005 amendments to that agreement, identified Offshore Manager's New York City office as its principal office.
- 12. In addition to executing trades, Mr. Falcone and the New York Investment Team generated investment ideas, developed investment strategy, conducted due diligence on potential investments, interacted with players in the distressed investment community, developed return expectations on investments, and—for particular positions—selected the level of investment, and developed exit strategies for particular positions. All of this work was done in New York City. In addition, Mr. Falcone and the New York Investment Team also played an important role in investor

relations functions, including meeting with many existing and potential investors in New York City and drafting regular communications to investors about the Harbinger Fund.

- 13. It was never contemplated that Mr. Falcone should re-locate to Birmingham, Alabama, where HMC was based, in order to conduct these functions, or that he would be located anywhere but New York City.
- 14. In fact, from 2004 through and including 2009, key revenue-generating activity was conducted by Offshore Manager in New York City, where Mr. Falcone and the New York Investment Team invested the fund's assets from an office at 555 Madison Avenue in midtown Manhattan. In contrast, other Offshore Manager members and officers resident in Alabama provided certain executive oversight, and were primarily responsible for operational, fund-raising, accounting, investor relations and reporting, legal, compliance, and risk management functions on behalf of Offshore Manager and the Harbinger Fund.
- 15. A Harbinger Fund investor presentation noted that HMC "provides middle and back office support such as accounting, investor reporting, legal, compliance and risk management support." Another investor presentation highlighted that HMC's focus on back office functions reduced "distractions" to Mr. Falcone and the New York Investment Team. Similarly, Confidential Offering Memoranda discussing the Harbinger Fund provide, "HMC will provide the Fund with substantial infrastructure and support, thus allowing Mr. Falcone and the investment team to focus their energies on value creation for the Fund's Shareholders."
- 16. But the trading activity, without which no revenue would have been generated, occurred in New York City, where the man hired to conduct it lived.
- 17. The Harbinger Offshore Feeder paid performance fees to Offshore Manager, which served as a pass-through entity for the members of the Offshore Manager. These fees were paid

annually in lump sum in consideration for all services rendered by the Offshore Manager, in an amount equal to 20% of the Fund's net profits allocable during the year to each common share of the Feeder Fund (subject to prior period high water marks). If Mr. Falcone and the New York Investment Team's investments generated negative returns in any relevant year, there would be no net profits and no performance fee income.

- 18. For tax years 2002-2007, the Offshore Manager officers chiefly responsible for tax compliance were the Executive Vice President and Chief Administrative Officer ("Chief Administrative Officer"), and the Controller, both of whom worked in Alabama. As described below, Mr. Falcone acquired Respondents' interests in Offshore Manager in early 2009, before the tax return for 2008 was prepared and filed. Accordingly, for tax year 2008, personnel from both Alabama and New York were involved and provided input in tax compliance issues. For tax year 2009, personnel working in New York with Mr. Falcone were responsible for Offshore Manager's tax compliance.
- 19. The first year that the Offshore Manager had taxable income was 2004. In March 2005, as explained below, Offshore Manager determined that it would not apportion to New York State and City any of the performance fee income earned by Offshore Manager for tax purposes—a zero percent apportionment.
- 20. Offshore Manager made this decision not to apportion income to New York State and New York City even though it had raised this matter with tax professionals at Ernst & Young. Ernst & Young's reaction, described by the Chief Administrative Officer as an "initial reaction" in a March 11, 2005 email to other members of Offshore Manager, was that New York State and City taxes were owed. Offshore Manager continued to consult with Ernst & Young over a series of days,

but no other memorialized advice exists from this time period (of which the State is aware) about the tax positions at issue.

- 21. Offshore Manager made this decision even though its Chief Administrative Officer wrote that a zero percent apportionment to New York was "unsupportable," as he wrote on March 16, 2005, one week before the Offshore Manager tax returns were filed. At that time, the Chief Administrative Officer composed a sheet comparing the impact of different state tax apportionment positions Offshore Manager could take for performance fee income. The analysis, which Offshore Manager forwarded to Ernst & Young with a request for its recommendation, indicated that taking a tax position that apportioned zero percent to New York (and apportioned 100% to the lower-tax State of Alabama) could reduce taxes for Offshore Manager's members based in Alabama by more than 250%. Under a breakdown of the different apportionments, the Chief Administrative Officer wrote: "All AL unsupportable (future move LLC to AL?)."
- 22. Just hours later, the Chief Administrative Officer emailed the Controller of Offshore Manager, among others, stating that he was examining ways to make the performance fee income "all AL. income based on the LLC Agreement" and that "we may get aggressive in determining the LLC [Offshore Manager] is AL [Alabama]..."
- 23. On March 23, 2005, the Controller of Offshore Manager signed a New York State Partnership Return for the Offshore Manager for the 2004 tax year that apportioned zero percent of its performance fee income to New York State.
- 24. In addition, in that tax return, Offshore Manager responded to a section of the form that instructed it to "[l]ist all places, both in and out of New York State, where the partnership carries on business." Offshore Manager identified only an office address in Birmingham, Alabama in response. It did not identify the office at 555 Madison Avenue, New York, New York. In addition,

the return posed this question: "Did the partnership have any income gain, loss, or deduction derived from New York sources during the tax year?" Offshore Manager answered "no." The return also affirmatively indicated that Offshore Manager "has no nexus in New York State and has no income derived from New York sources."

- 25. In 2006, Offshore Manager filed tax returns for the 2005 tax year that again apportioned zero percent of the performance fee income to New York State. In this return, Offshore Manager again did not include the 555 Madison Avenue address when prompted to list all places where Offshore Manager carried on business. As it did in the prior year's return, in this return, Offshore Manager again answered, "no" to the question, "Did the partnership have any income gain, loss, or deduction derived from New York sources during the tax year?" The return also again indicated that Offshore Manager "has no nexus in New York State and has no income derived from New York sources."
- 26. Offshore Manager did not correct these tax filings and did not apportion income to New York, even as the Harbinger Fund became more and more successful, and the New York Investment Team grew even larger.
- 27. Offshore Manager did not file a New York State tax return for the 2006 and 2007 tax years. In its tax returns for the 2008 and 2009 years, Offshore Manager similarly apportioned zero percent of the performance fee income to New York State. In the return it filed for the 2008 tax year, Offshore Manager again did not identify the New York City office in response to the question seeking it to list all places, both in and out of New York State, where the Offshore Manager carried on business.

- 28. Despite transacting business in New York City, Offshore Manager did not file required New York City UBT returns with the New York City Department of Finance from 2004 to 2007.
- 29. In late 2008, Mr. Falcone and the members of Offshore Manager in Alabama agreed to a separation agreement by which Mr. Falcone would assume sole ownership of Offshore Manager. In 2009, as part of the due diligence process necessitated by the separation, Mr. Falcone's outside advisors (including PricewaterhouseCoopers) indicated to various officers of Offshore Manager that members of Offshore Manager owed New York State non-resident income tax and that Offshore Manager owed New York City UBT on its performance fee income.
- 30. Offshore Manager's Alabama members paid Alabama state tax on their respective shares of performance fee income earned by Offshore Manager in 2008 and 2009, but did not pay New York State tax on that income. Offshore Manager secured written assurances that the Alabama-based members of Offshore Manager, even after the separation, would continue to be responsible for New York State taxes that had not been remitted in the event that their tax position was ever reviewed.
- 31. The contemplated separation was consummated in March 2009. In 2009, Offshore Manager continued to conduct revenue generating activities in New York. Furthermore, in 2009, as had been the case in previous years, Offshore Manager, and agents of Offshore Manager, conducted work from an office in New York City.
- 32. In sum, Offshore Manager's members in Alabama did not pay New York State income tax on hundreds of millions of dollars of performance fees generated by the Harbinger Fund. In addition, New York residents who received performance fee income—chiefly Mr. Falcone—paid lower New York State taxes as a result of a credit for tax these members paid to Alabama as a result

of the above described apportionment decision. As noted above, Offshore Manager also did not pay New York City's UBT for several years.

- 33. The same tax position which apportioned no income to New York despite transacting business in New York City was also taken by HMC Convertible Offshore Manager, LLC. As a result, certain Respondents who were also members of HMC Convertible Offshore Manager, LLC did not pay New York State income tax on performance fees generated by that entity.
 - 34. Respondents neither admit nor deny the Covered Conduct.

TERMS AND CONDITIONS

Settlement Amount

- 35. Respondents collectively will pay the sum of forty million, seventy-three thousand, eight hundred twenty-three (\$40,073,823) in U.S. dollars (the "Settlement Amount") to resolve the Action and the Office of the Attorney General's investigation and claims that are the subject of separate closing agreements ("Closing Agreements") that are to be executed within seven days of this Agreement, between certain of the Respondents and the New York State Department of Taxation and Finance ("NYDTF"). The specific amounts to be paid by all of the Respondents are prescribed in the Closing Agreements. The Settlement Amount is being paid in compromise of the damages sought by the State for alleged violations of the NYFCA, along with taxes, penalties, and interest under the New York Tax Law, the Relator's share, *i.e.*, the share to which the Relator is entitled under New York State Finance Law § 190(6), as well as the State's attorney's fees and costs.
- 36. The Settlement Amount is divided into two portions: a portion paid to the State ("State's Share"), and a portion paid to the Relator ("Relator's Share"). The Relator's Share is the portion to which the Relator is entitled under New York State Finance Law § 190(6).
- 37. Respondents agree to pay the State's Share of the Settlement Amount in the sum of \$31,257,582 in U.S. dollars as follows: (i) \$26,257,582, within thirty (30) days of execution of the

Agreement; and (ii) \$5,000,000.00 on or before June 15, 2017. Such payments will be made pursuant to instructions provided by the Office of the Attorney General.

- 38. In addition, the Respondents agree to pay the Relator's Share of the Settlement Amount in the sum of \$8,816,241 in U.S. dollars within thirty (30) days of execution of the Agreement. Such payment shall be made through electronic transfer to a trust account for Relator, through its counsel, in accordance with written instructions to be provided by its counsel.
- 39. Respondents agree that they will not claim, assert, or apply for a tax deduction or tax credit on any New York State or New York City tax return, for any portion of the amount due under this Agreement or the Closing Agreements.
- 40. In consideration of the obligations of Respondents as set forth in this Agreement, Relator and the State, within fifteen (15) days after the Effective Date (defined below) of this Agreement, shall file, pursuant to CPLR 3217(a), a Notice of Discontinuance with respect to the claims against individuals and entities identified in Paragraph 41 below who are named as defendants in the Action, subject to the exceptions set forth in this Agreement. The dismissal is to be without prejudice. Within fifteen (15) days upon receipt of all of the payment required by Paragraph 38 above, the Relator and the State shall file an Amended Notice of Discontinuance providing that the dismissal is with prejudice.

Releases

41. Subject to the exceptions in the next Paragraph, in consideration of the obligations of Respondents set forth in this Agreement, conditioned upon the full payment by Respondents of the Settlement Amount and subject to Paragraph 51 herein (concerning bankruptcy proceedings commenced within ninety-one (91) days of the Effective Date of this Agreement or any payment to the State under the Agreement, whichever is later), the State releases HARBERT MANAGEMENT

CORPORATION, HMC INVESTORS, LLC, HMC-NEW YORK, INC., RAYMOND J. HARBERT, MICHAEL D. LUCE, DAVID A. BOUTWELL, CHARLES D. MILLER, WILLIAM W. BROOKE, JOEL B. PIASSICK, SONJA J. KEETON, MICHAEL P. WHITE, CAROLE B. SCHAFER, RAYMOND JONES HARBERT JR. TRUST, MARY KATHRYN HARBERT TRUST, and JOHN MURDOCH HARBERT II TRUST, and their respective current owners and members if any, from any civil or administrative monetary claim the State has or may have for the Covered Conduct under the New York False Claims Act, N.Y. State Fin. Law §§ 187 et seq., or any other law except the state or municipal Tax Law, save as provided in the Closing Agreements between certain of the Respondents and NYDTF.

- 42. This State does not release any entities not explicitly listed in Paragraph 41 of this Agreement. Among others, the State does not release any claims it has against Offshore Manager and Philip Falcone.
- 43. This Agreement specifically does not release any person or entity from any of the following liabilities:
 - a. Any civil, criminal, or administrative liability arising under state or municipal tax laws;
 - b. Any criminal liability;
 - c. Any civil liability that Respondents have or may have under any state statute,
 regulation, or rule not covered by this Agreement;
 - d. Any liability to the State (or its agencies) for any conduct other than the Covered Conduct;
 - e. Any liability based upon such obligations as are created by this Agreement;

- f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- g. Any liability for personal injury or property damage arising from the Covered Conduct;
- h. Any liability for failure to deliver goods or services due; and
- i. Any civil or administrative liability of individuals, except as provided for herein.
- 44. Nothing herein affects the obligations, duties or rights prescribed by the Closing Agreements contemporaneously executed by certain Respondents with NYDTF.
- 45. In consideration of the obligations of Respondents in this Agreement, conditioned upon the full payment by Respondents of the Settlement Amount, Relator, for itself, and for Relator's owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, fully and finally releases Respondents from, and covenants not to sue any of them with respect to, any civil monetary claim Relator has on behalf of the State or any local governments within the State for the Covered Conduct under the New York False Claims Act, N.Y. State Fin. Law §§ 187 *et seq.*, or any claim for redress on behalf of itself or any of Relator's owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, pursuant to N.Y. State Fin. Law § 191; provided, however, that nothing in this Agreement shall preclude Relator from seeking to recover Relator's expenses or attorney's fees and costs from the Respondents, pursuant to N.Y. State Fin. Law § 190. Relator does not release any claims against any person or entity that is not explicitly listed in Paragraph 41 of this Agreement. Among others, the Relator does not release any claims it has against Offshore Manager and Philip Falcone.
- 46. Respondents, for themselves and their respective owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, fully and finally

release the State, its agencies, officers, employees, servants, attorneys, and agents from, and covenants not to sue any of them with respect to, any claims (including claims for attorney's fees, costs, and expenses of every kind and however denominated) that Respondents have asserted, could have asserted, or may assert in the future against the State, its agencies, officers, employees, servants, attorneys, agents and assigns, related to the Covered Conduct and/or the State's investigation and prosecution thereof.

- 47. Respondents for themselves and their respective owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns fully and finally release Relator, Relator's owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns from, and covenant not to sue any of them with respect to, any claims (including claims for attorney's fees, costs, and expenses of every kind and however denominated) that Respondents have asserted, could have asserted, or may assert in the future against the Relator, Relator's owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, related to the Covered Conduct and/or Relator's and the State's investigations and prosecution concerning the Action.
- 48. The Relator, for itself individually, and for Relator's owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, fully and finally releases the State, its agencies, officers, employees, servants, attorneys, and agents from, and covenants not to sue any of them with respect to, any claims (including claims for attorney's fees, costs, and expenses of every kind and however denominated) that Relator has asserted, could have asserted, or may assert in the future against the State, arising out of the filing of claims against the Respondents or from any other claim for a share of the settlement proceeds from the Respondents. Relator accepts the payment described in Paragraph 38 in full settlement of any claims Relator may

have against the State for any claims against the Respondents. This Agreement does not resolve or in any manner affect any claims the State has or may have against Relator arising under State tax laws, or any claims arising under this Agreement.

- 49. Relator, and each of its owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, agree not to object to this Agreement and agree and confirm that this Agreement is fair, adequate, and reasonable pursuant to New York State Finance Law § 190(5)(b)(ii).
- 50. The State has agreed to the terms of this Agreement based on, among other things, the representations made to the Office of the Attorney General by Respondents and their counsel. To the extent that any material representations are later found to be inaccurate or misleading, this Agreement is voidable by the Office of the Attorney General in its sole discretion. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Agreement has been made to or relied upon by Respondents in agreeing to this Agreement. Respondents represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion.

Bankruptcy and Non-Payment

51. If within ninety-one (91) days of the Effective Date of this Agreement or of any payment made under this Agreement, any of the Respondents or a third party commences any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of its or their debts, or seeking to adjudicate any of the Respondents as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for any of the Respondents or for all or any substantial part of its or their assets, Respondents agree as follows:

- a. Respondents' obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Respondents shall not argue or otherwise take the position in any such case, proceeding, or action that: (i) their obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) they were insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment of the Settlement Amount; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Respondents.
- b. If any of the Respondents' obligations under this Agreement are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the State, at its sole option, may rescind the releases in this Agreement insofar as it affects the State and bring any civil and/or administrative claim, action, or proceeding against Respondents for the claims that would otherwise be covered by the releases provided above, and Respondents agree that (i) any such claims, actions, or proceedings brought by the State are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and Respondents shall not argue or otherwise contend that the State's claims, actions, or proceedings are subject to an automatic stay; (ii) they shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceedings that are brought by the State within 60 calendar days of written notification to Respondents that the releases have been rescinded pursuant to this Paragraph, except to the extent such defenses

were available on the Effective Date of the Agreement; and (iii) the State has a valid claim against Respondents in the amount of treble damages plus penalties under the New York False Claims Act, and may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

- Respondents acknowledge that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.
- 52. In the event of the failure by Respondents to make any or all payments of the Settlement Amount, including the State's Share and the Relator's Share, when due according to Paragraphs 37 and 38 the State will provide written notice of the non-payment to the Respondents. Such notice shall be given to the person and address designated in Paragraph 63 by (i) delivery in person, (ii) a nationally recognized next-day courier service, or (iii) first class, registered or certified mail, postage prepaid. Notice so given shall be effective upon (i) receipt, or (ii) on the fifth (5th) day following mailing, whichever occurs first. Respondents shall have an opportunity to pay the unpaid balance within five (5) calendar days from the effective date of the notice. If Respondents fail to pay the overdue unpaid balance of its payment obligations under this Agreement within five (5) calendar days from the effective date of the notice of non-payment ("Default"), the State, in its sole discretion, may declare or do any or all of the following:
 - a. The State may declare the entire Settlement Amount, less any payments already made, immediately due and payable, with unpaid amounts bearing the Default rate of interest at the interest rate set forth in New York Civil Practice Law and Rules § 5004 beginning as of the date of Default until payment of the remaining Settlement Amount is made in full; and/or

- b. Rescind its agreement to this Agreement as to Respondents and pursue all available remedies to enforce this Agreement. In the event of a Default as described above, the defaulting Respondent(s) agree(s) not to contest any action to enforce this Agreement or any other collection action undertaken by the State pursuant to this Paragraph, and the defaulting Respondent(s) agree(s) to pay the State all reasonable costs of collection and enforcement of this Agreement, including attorney's fees and expenses; and/or
- c. Rescind its agreement to this Agreement as to Respondents and reinstitute an action or actions against Respondents in this Court. In the event the State reinstitutes this action, the Respondents: (1) expressly agree not to plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims which (i) are filed by the State after the written notification to Respondents that this Agreement has been rescinded, and (ii) relate to the Covered Conduct, and (2) further waive and will not assert any defenses Respondents may have to any civil or administrative action relating to the Covered Conduct.
- 53. In the event of the failure by Respondents to make payment of the Relator's Share when due according to Paragraph 38, the Relator will provide written notice of the non-payment to Respondents. Such notice shall be given to the person and address designated in Paragraph 63 by (i) delivery in person, (ii) a nationally recognized next day courier service, or (iii) first class, registered or certified mail, postage prepaid. Notice so given shall be effective upon (i) receipt, or (ii) on the fifth (5th) day following mailing, whichever occurs first. Respondents shall have an opportunity to pay the unpaid balance within five (5) calendar days from the effective date of the notice. If

Respondents fail to pay the overdue unpaid balance of its payment obligations for the Relator's Share under this Agreement within five (5) calendar days from the effective date of the notice of non-payment ("Relator's Share Default"), the Relator, in its sole discretion, may declare or do any or all of the following:

- a. The Relator may declare the entire Relator's Share, less any payments already made, immediately due and payable, with unpaid amounts bearing the Default rate of interest at the interest rate set forth in New York Civil Practice Law and Rules § 5004 beginning as of the date of Relator's Share Default until payment of the remaining Relator's Share is made in full; and/or
- b. Institute an action or actions against Respondents in this Court to collect the unpaid amounts of the Relator's Share plus applicable interest. Respondents agree not to contest any action to enforce this Agreement with respect to the Relator's Share or any other collection action undertaken by the Relator pursuant to this Paragraph, and Respondents agree to pay the Relator all reasonable costs of collection and enforcement of this Agreement, including attorney's fees and expenses.

Additional Terms

54. To the extent further investigation or litigation relating to the Covered Conduct proceeds against individuals or entities that are not Parties to or released by this Agreement, each Respondent agrees to be available, upon reasonable notice, to meet with attorneys or other representatives of the State or of Relator either in person or by telephone, and to answer questions related to issues concerning the Covered Conduct. Each Respondent agrees that to the extent such investigation or litigation proceeds, if so requested or demanded by the State or Relator, the Respondent will testify in subpoena hearings, depositions, and/or at trial. Each Respondent also

agrees to make available to the State or Relator, upon reasonable notice, documents or other materials relevant to any such investigation or litigation.

- 55. Respondents represent and warrant, through the signatures below, that the terms and conditions of this Agreement are duly approved, and that execution of this Agreement is duly authorized.
- 56. For purposes of construction, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and therefore shall not be construed against any Party for that reason in any subsequent dispute.
- 57. Except as provided in Paragraph 35 above, or in the separate agreement executed contemporaneously herewith by Respondents and Relator regarding his/her claim for expenses or attorney's fees pursuant to N.Y. State Fin. Law § 190, each Party shall bear its own legal and other costs incurred in connection with this matter.
- 58. The undersigned counsel and any other signatories represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.
- 59. This Agreement constitutes the complete agreement between and among the Parties, and may not be amended except by an instrument in writing signed on behalf of all the Parties to this Agreement.
- 60. This Agreement shall be binding on and inure to the benefit of the Parties to this Agreement and their respective successors and assigns, provided that no Party, other than the Office of the Attorney General, may assign, delegate, or otherwise transfer any of its rights or obligations under this Agreement without the prior written consent of the Office of the Attorney General.
- 61. In the event that any one or more of the provisions contained in this Agreement, other than provisions concerning payment and release, 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.

- 62. Any failure by the State to insist upon the strict performance by Respondents and/or Relator of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and the State, notwithstanding such failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Agreement to be performed by any or all of the Parties. Any failure by Relator to insist upon the strict performance by Respondents of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and Relator, notwithstanding such failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Agreement to be performed by any or all of the Respondents.
- 63. All communications from any Party concerning the subject matter of this Agreement shall be addressed as follows:

If to the State of New York: Justin Wagner

Assistant Attorney General

Office of the New York Attorney General

Taxpayer Protection Bureau 120 Broadway, 22nd Floor New York, NY 10271

(212) 416-8819

If to Relator: Neil Getnick

Getnick & Getnick, LLP 521 Fifth Avenue New York, NY 10175

(212) 376-5666

Jordan Thomas

Labaton Sucharow LLP

140 Broadway

New York, NY 10005

(212) 907-0700

If to Respondents:

Charles S. Leeper Drinker Biddle & Reath, LLP 1500 K Street, NW Washington, DC 20005 (202) 842-8877

- 64. Except for written notices of Respondents' non-payment issued by the State or Relator, the sending and receipt of which shall be governed by the provisions in Paragraphs 52 and 53 respectively, all communications from any Party to another Party concerning this Agreement shall be sent by United States mail with return receipt requested or overnight delivery service with signature required to the signatory counsel for each Party, unless such communications are sent by email and a reply is written without objection to the electronic means of communication.
- 65. If a court of competent jurisdiction determines that Respondents have breached this Agreement, Respondents shall pay to the Office of the Attorney General and/or to Relator the cost, if any, of obtaining such determination and of enforcing this Agreement, including, without limitation, legal fees, expenses, and court costs.
- 66. Any headings, titles and subtitles contained in this Agreement are solely for the purpose of reference, are not part of the agreement of the Parties, and shall not in any way affect the meaning or interpretation of this Agreement.
- 67. This Agreement shall be governed by the laws of the State of New York without regard to any conflict of laws principles. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement will be the Supreme Court of the State of New York, New York County, and all Respondents agree that they will submit to the personal jurisdiction of that Court for such purposes, without regard to their present or future location.

- 68. This Agreement is effective on the date of signature of the last signatory of the Agreement (the "Effective Date"). Facsimiles and .pdfs of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.
- 69. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitutes one and the same agreement.

IN WITNESS WHEREOF, the Agreement is executed by the Parties hereto.

THE STATE OF NEW YORK	
Dated: 4pril 3 2017	ERIC T. SCHNEIDERMAN New York State Attorney General
	BY: Thomas Teige Carroll
	Bureau Chief Office of the New York Attorney General Taxpayer Protection Bureau 120 Broadway, 22nd Floor New York, New York 10271 (212) 416-6012
Dated:	BY:Neil Getnick
(9)	Tion Council
	Getnick & Getnick, LLP
	521 Fifth Avenue
	New York, NY 10175
	(212) 376-5666
	Attorney for Relator
	BY: Jordan Thomas
	Joidan Homas
	Labaton Sucharow LLP 140 Broadway

New York, NY 10005

(212) 907-0700 Attorney for Relator IN WITNESS WHEREOF, the Agreement is executed by the Parties hereto.

THE STATE OF NEW YORK	
Dated:	ERIC T. SCHNEIDERMAN New York State Attorney General
	BY: Thomas Teige Carroll
	Bureau Chief Office of the New York Attorney General Taxpayer Protection Bureau 120 Broadway, 22nd Floor New York, New York 10271 (212) 416-6012
Dated: 4217	BY: Meil V. Loyub
	Getnick & Getnick, LLP 521 Fifth Avenue New York, NY 10175 (212) 376-5666 Attorney for Relator
	BY: Jordan Thomas
	Labaton Sucharow LLP 140 Broadway New York, NY 10005 (212) 907-0700 Attorney for Relator

IN WITNESS WHEREOF, the Agreement is executed by the Parties hereto.

THE STATE OF NEW YORK	
Dated:	ERIC T. SCHNEIDERMAN New York State Attorney General
	BY: Thomas Teige Carroll
	Bureau Chief Office of the New York Attorney General Taxpayer Protection Bureau 120 Broadway, 22nd Floor New York, New York 10271 (212) 416-6012
Dated: 4/1/17	BY:Neil Getnick
	Getnick & Getnick, LLP 521 Fifth Avenue New York, NY 10175 (212) 376-5666 Attorney for Relator
	A2
	BY: Jordan Thomas
	Labaton Sucharow LLP
	140 Broadway New York, NY 10005
	(212) 907-0700
	Attorney for Relator

RESPONDENTS (page 1 of 3) Dated: 25 of 04/03/2017	Charle Co (27 pre
. ,	Charles S. Leeper
	Drinker Biddle & Reath, LLP Attorney for Respondents
Dated:	
	Harbert Management Corporation Respondent
Dated:	HMC Investors, LLC Respondent
	Tesponeen.
Dated:	
	HMC-New York, Inc. Respondent
Dated:	Raymond J. Harbert Respondent
Dated:	

David A. Boutwell

Respondent

RESPONDENTS (page 1 of 3) Dated: Charles S. Leeper Drinker Biddle & Reath, LLP Attorney for Respondents John W. McCullough Dated: 25 of 04/03/2017 **EVP & General Counsel** Harbert Management Corporation Respondent John W. McCullough Dated: 25 of 04/03/2017 **EVP & General Counsel** HMC Investors, LLC Respondent John W. McCullough Dated: 25 of 04/03/2017 **EVP & General Counsel** HMC-New York, Inc. Respondent Dated: 25 04 04 03 2017 Respondent

David A. Boutwell *Respondent*

Qa. Boutvelf

Dated: 25 of 04/03/2017

RESPONDENTS (page 2 of 3) Dated: 3/30/2017

William W. Brooke
Respondent

Dated: 25 of 04/03/2017

Joel B. Piassick Respondent

Dated: 23 of 04/03/2017

Sonja J. Keeton Respondent

Dated: 25 of 04/03/2017

Charles D. Miller *Respondent*

Dated: 25 of 04/03/2017

Carole B. Schafer
Respondent

Dated:

Michael P. White Respondent

RESPONDENTS (page 2 of 3)

Dated:	
	William W. Brooke
	Respondent
Dated:	
	Joel B. Piassick
	Respondent
Dated:	
	Sonja J. Keeton
	Respondent
Dated:	(I) 1 5 MIII
	Charles D. Miller Respondent
	Kespanaeni
Devel	
Dated:	Carole B. Schafer
	Respondent
Dated: 23 of 04/03/2017	
Dated. 35 07 04/03/3017	Michael P. White
	Respondent

RESPONDENTS (page 3 of 3)

Dated: 25 of 04/03/0017

Michael D. Luce

Respondent

Dated: 25 of 04 03 2017

Raymond Jones Harbert Jr. Trust

Respondent

Dated: as of 04/03/2017

Mary Kathryn Harbert Trust

Respondent

Dated: 25 of 04 03 2017

John Murdoch Harbert II Trust

Respondent