

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, L.L.C., *et al.*,

Defendants.

Index No. 100416/2015

STIPULATION AND SETTLEMENT AGREEMENT

This Stipulation and Settlement Agreement (“Agreement”) is entered into among (i) the State of New York (the “State”); (ii) the City of New York (the “City”); (iii) relator ██████████ ██████████ (the “Relator”); (iv) Harbinger Capital Partners Offshore Manger, L.L.C. (“Offshore Manager”); (v) Harbinger Capital Partners GP LLC; (vi) Harbinger Capital Partners Special Situation Fund GP; and (vii) Philip Falcone (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. Harbinger Capital Partners Offshore Manager, L.L.C., 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 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 and City contend that they have civil claims against Offshore Manager under the NYFCA; and

WHEREAS, the State and City will file a Superseding Complaint under the NYFCA; and

WHEREAS, as a result of that investigation, the City contends that it has tax claims against Offshore Manager; and

WHEREAS, Offshore Manager failed to satisfy its separate obligation to pay Unincorporated Business Tax ("UBT") that it previously agreed to pay, and pursuant to § 11-532 of the New York City Administrative Code, the City filed two Warrants with the County Clerk for the County of New York (Warrant No. 013876006-S, docketed February 8, 2017 and Warrant No. 171397, docketed February 6, 2017), which were thereby entered as judgments in favor of the New York City Commissioner of Finance on behalf of the City against Offshore Manager in the amount of \$4,115,239.65, all of which remains outstanding and owed, plus interest to the date of payment ("Offshore Manager Judgment");

WHEREAS, Respondents have agreed to this Agreement in settlement of the violations alleged below and to avoid the time, expense, uncertainty, inconvenience, and distraction of protracted litigation of the claims, the Parties have determined and hereby agree that settlement is in their best interests, and the Office of the Attorney General and the Corporation Counsel of the City of New York have agreed to accept the terms of the Agreement; and

WHEREAS, Relator claims entitlement under State Fin. Law § 190(6) 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

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 this paragraph is hereinafter referred to as the "Covered Conduct."
 - i. For tax years 2004 through 2009, Offshore Manager did not apportion and allocate income to New York State for income tax purposes and did not withhold funds and pay estimated income taxes to New York State on behalf of its nonresident members.
 - ii. For tax years 2004 through 2007, Offshore Manager did not file City UBT returns and pay UBT to the City.
 - iii. In 2008, Offshore Manager caused statements to be made to the New York State Department of Taxation and Finance ("DTF") that did not disclose Offshore Manager's work in New York.
 - iv. In 2014, during an audit of Offshore Manager's partnership tax returns for tax years 2009 through 2011, conducted by DTF, independent and external accountants for Offshore Manager submitted inaccurate statements to DTF on behalf of Offshore Manager.

FINDINGS

2. The Office of the Attorney General and the Corporation Counsel of the City of New York make the following findings:

Offshore Manager's Actions Harmed the State and the City

3. Because it carried on its business in New York, Offshore Manager had an obligation under the New York State Tax Law to apportion and allocate income as taxable in New York State. In connection with the sale of Offshore Manager in 2009, the purchaser and its representatives received advice that apportionment to New York was required and thus was on notice that Offshore Manager had such an obligation. Offshore Manager apportioned and allocated none of its income to New York for tax years 2004 through 2009. As a result of Offshore Manager's apportionment and allocation of no income to New York, Offshore Manager's nonresident members did not pay the New York State personal income tax they owed and Offshore Manager did not pay millions of dollars in estimated taxes to New York State for those nonresident members, as it was required to do. Offshore Manager's actions also caused its New York residents to overstate the resident credit for paying taxes to Alabama and reduce the amount of income tax they paid to New York State.

4. Because it carried on an unincorporated business within New York City, Offshore Manager had an obligation under the Administrative Code of the City of New York to file City UBT returns, to allocate income to the City, and to pay UBT. But for tax years 2004 through 2007, Offshore Manager did not file UBT returns, allocate income to New York City, or pay the UBT it owed.

DTF's Audit of Offshore Manager

5. Beginning in July 2013, DTF conducted an audit of Offshore Manager for tax years 2009 through 2011. PricewaterhouseCoopers (“PwC”) represented Offshore Manager in that audit.

6. A letter dated December 10, 2014 from a representative of PwC to DTF (“the PwC Letter”) stated that Offshore Manager did not complete the allocation schedule in its New York State partnership tax returns because Offshore Manager “did not conduct business both in and out of NYS in any of years in the Audit Period [defined as tax years 2009 through 2011]” The PwC letter continued: “In 2009, all of the Taxpayer’s [Offshore Manager’s] revenue generating activity was completed in Alabama, where it maintained its offices and was commercially domiciled.”

7. In a footnote, the PwC Letter added the following: “Although the Taxpayer’s 2009 Form IT-204 shows a NYC address, and indicates rent in Section 10, Part 1, the property is actually leased by an affiliate of the Taxpayer and was only used for receiving mail during the year.” The PwC letter also stated: “Beginning in 2010, the Taxpayer moved its business activities from Alabama to NYS”

8. Contrary to the representations in the PwC Letter, in tax year 2009 and in earlier tax years since at least tax year 2002, Offshore Manager conducted business and engaged in the activity of investing and reinvesting capital from an office in New York City. This activity generated income in the form of incentive fees for Offshore Manager. In tax year 2009 until March 4, as in earlier tax years since at least tax year 2002, Offshore Manager invested and reinvested the capital of at least two of Offshore Manager’s funds, Harbinger Capital Partners

Master Fund I Limited and Harbinger Capital Partners Offshore Fund I, Ltd., from an office in New York City.¹

9. The office used by Offshore Manager in New York City was used for these investment and business purposes, not “only ... for receiving mail during the year,” as the PwC Letter had stated. Although some activities of Offshore Manager moved from Alabama to New York City in 2009, the activity of investing and reinvesting capital did not move, as this activity had been performed in New York City since at least tax year 2002 and continued to be conducted there until March 4, 2009.

10. For tax years 2004 through 2009, as an employee of an affiliate of Harbert Management Corporation based in Alabama, Mr. Falcone was not responsible for preparing or filing Offshore Manager’s tax returns and did not submit any statements to DTF on behalf of Offshore Manager.

11. The Office of the Attorney General and the Corporation Counsel of the City of New York find that Offshore Manager violated the Tax Law, the Administrative Code of the City of New York, and the NYFCA.

TERMS AND CONDITIONS

Admissions

12. As a term of this agreement, Offshore Manager admits the findings in Paragraphs 3 through 10.

¹ Harbinger Capital Partners Master Fund I Limited was formerly known as Harbert Distressed Investment Master Fund, Ltd. Additionally, Harbinger Capital Partners Offshore Fund I, Ltd. was previously known as the Harbert Distressed Investment Offshore Fund, Ltd. Its formation date was December 5, 2001. On May 7, 2002, the entity changed its name to Harbert Distressed Investment Offshore Fund, Ltd. In or around early 2006, the entity changed its name to Harbinger Capital Partners Offshore Fund, I, Ltd.

Settlement Amount

13. Offshore Manager will pay the sum of thirty million (\$30,000,000) in U.S. dollars (the “Settlement Amount”) to resolve the Action, the Office of the Attorney General’s investigation and claims that are the subject of a separate closing agreement (“Closing Agreement”) between Offshore Manager and the New York City Department of Finance (“NYCDOF”) to resolve claims for taxes, penalties, and interest under the New York City Administrative Code. The Closing Agreement shall be executed by Offshore Manager on or before the date of execution of this Agreement and shall be executed by NYCDOF upon receipt of full payment of the City’s Share as described in Paragraph 15. The Settlement Amount comprises damages sought by the State and City for alleged violations of the NYFCA, along with taxes, penalties, and interest under the New York City Administrative Code, tax, interest and penalties owed to the NYCDOF for unpaid UBT, 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 and City’s respective attorney’s fees and costs.

14. The Settlement Amount is divided into three portions: a portion paid to the State (“State’s Share”), a portion paid to the City, including the NYCDOF (“City’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).

15. Offshore Manager agrees to pay or cause to be paid the State’s Share and the City’s Share in the sum of twenty-three million and four hundred thousand dollars (\$23,400,000) in U.S. dollars as follows:

- a. \$13,500,000 in U.S. dollars to the City in two installments, by certified check or wire transfer pursuant to instructions provided by the City. Offshore Manager

agrees to pay the first installment of the City's Share in the amount of ten million, nine hundred twenty thousand dollars (\$10,920,000) within thirty days (30) of the Effective Date of this Agreement. Offshore Manager agrees to pay the second installment of the City's Share in the amount of two million, five hundred eighty thousand dollars (\$2,580,000) within one hundred and twenty days (120) of the Effective Date of this Agreement; and

- b. \$9,900,000 in U.S. dollars to the State in two installments, by wire transfer pursuant to instructions provided by the Office of the Attorney General. Offshore Manager agrees to pay the first installment of the State's Share in the amount of one million, nine hundred thousand (\$1,900,000) in U.S. dollars on or before June 30, 2019. Offshore Manager agrees to pay the second installment of the State's Share in the amount of eight million (\$8,000,000) in U.S. dollars on or before December 31, 2019.

16. In addition, Offshore Manager agrees to pay the Relator's Share of the Settlement Amount in the sum of six million and six hundred thousand dollars (\$6,600,000) in U.S. dollars in three installments. The payment of the Relator's Share shall be made through electronic transfer to a trust account for Relator, through Relator's counsel, in accordance with written instructions to be provided by Relator's counsel.

- a. Offshore Manager agrees to pay the first installment of the Relator's Share in the amount of three million, eighty thousand dollars (\$3,080,000) in U.S. dollars within thirty days (30) of the Effective Date of this Agreement.
- b. Offshore Manager agrees to pay the second installment of the Relator's Share in the amount of seven hundred twenty-seven thousand, six hundred ninety-two

dollars (\$727,692) in U.S. dollars within one hundred and twenty (120) days of the Effective Date of this Agreement.

- c. Offshore Manager agrees to pay the third installment of the Relator's Share in the amount of two million, seven hundred ninety-two thousand, three hundred eight dollars (\$2,792,308) in U.S. dollars on or before June 30, 2019.

17. On or before the Effective Date of this Agreement, Offshore Manager also agrees to pay the Offshore Manager Judgment and the interest that has accrued pursuant to §11-524 of the New York City Administrative Code since the docketing of the warrants. Such payment will be made by wire transfer pursuant to instructions provided by the City.

18. 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 Agreement.

19. To secure the payment of \$9,900,000 and \$13,500,000 respectively to the State and City described in Paragraph 15, Offshore Manager and Philip Falcone shall execute Affidavits of Judgment of Confession as follows:

- a. To secure the payment of \$9,900,000 to the State described by Paragraph 15, Offshore Manager and Philip Falcone shall each execute and deliver, at the time of the execution and delivery of this Agreement, an Affidavit of Judgment of Confession (each attached hereto as Exhibits A and B) in favor of the State of New York confessing judgment in the amounts of \$9,900,000 plus collection fees of twenty-two percent (22%) of any unpaid amount at the time of any subsequent default. The State agrees not to file these Affidavits confessing Judgment unless and until there has been a Default under this Agreement. The decision to execute

as to Respondents Offshore Manager, Philip Falcone, or some combination thereof shall be in the sole discretion of the State.

- b. To secure the payment of \$13,500,000 to the City described by Paragraph 15, Offshore Manager and Philip Falcone shall each execute and deliver, at the time of the execution and delivery of this Agreement, an Affidavit of Judgment of Confession (each attached hereto as Exhibits C and D) in favor of the City of New York confessing judgment in the amounts of \$13,500,000 plus collection fees of twenty-two percent (22%) of any unpaid amount at the time of any subsequent default. The City agrees not to file these Affidavits confessing Judgment unless and until there has been a Default under this Agreement. The decision to execute as to Respondents Offshore Manager, Philip Falcone, or some combination thereof shall be in the sole discretion of the City.
20. To secure the payment of \$6,600,000 to the Relator described by Paragraph 16, Offshore Manager and Philip Falcone shall each execute and deliver, at the time of the execution and delivery of this Agreement, an Affidavit of Judgment of Confession (each attached hereto as Exhibits E and F), in favor of the Relator, confessing judgment in the amounts of \$6,600,000 plus collection fees of twenty-two percent (22%) of any unpaid amount at the time of any subsequent default. The Relator agrees not to file these Affidavits confessing Judgment unless and until there has been a Default under this Agreement. The decision to execute as to Offshore Manager, Philip Falcone, or some combination thereof shall be in the sole discretion of the Relator.
21. In consideration of the obligations of Respondents as set forth in this Agreement, and conditioned upon the Respondents' payment to the City pursuant to paragraph 15;

Respondents' initial payment to the Relator under paragraph 16, and Respondents' payment of the Offshore Manager Judgment pursuant to paragraph 17, the Relator, the State, and the City, within forty-five (45) days after the later of the Effective Date (defined below) of this Agreement or the satisfaction of the conditions described in this paragraph, shall file, pursuant to CPLR 3217(a), a Notice of Discontinuance with respect to the claims against Respondents, subject to the exceptions set forth in this Agreement. This dismissal is to be without prejudice. Within fifteen (15) days of receipt of the last of all of the payments as required herein, including the Offshore Manager Judgment, the Relator, the State, and the City shall file an Amended Notice of Discontinuance providing that the dismissal is with prejudice.

Future Tax Payments to New York State and New York City

22. Offshore Manager deferred, for tax purposes, certain incentive fee income that was earned by Offshore Manager in the period 2004 through 2009 (hereinafter the "Deferral"). Offshore Manager represents that the Deferral was received by Offshore Manager effective on January 1, 2018 and is taxable for the 2017 tax year.

23. Offshore Manager represents that the fair market value of the Deferral as of December 31, 2017, is no less than \$100 million.

24. For New York State and New York City tax purposes, Respondents agree to allocate and apportion 100% of the Deferral to New York State and New York City for personal income tax and UBT purposes on the tax returns required for 2017, and to pay the resulting taxes owed to the City and State. For the 2017 tax year, Respondents that are New York State residents agree not to claim any resident credit related to income earned from Offshore Manager. Respondents further agree that Offshore Manager will file UBT returns for the 2017 tax year, that Philip Falcone will file New York State personal tax returns for the 2017 tax year, and that

Respondents will cooperate with NYCDOF and the New York State Department of Tax and Finance in providing information necessary to determine Offshore Manager and Philip Falcone's income and expenses for 2017, such information to include but not be limited to, description of assets representing the deferred income, documentation of the source of the deferred income, the assets and payments received, ownership, direct and indirect, of the assets received, financial statements and liabilities related to those assets and appraisals of the assets received.

Releases

25. 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 Offshore Manager of the Settlement Amount and the Offshore Manager Judgment and subject to Paragraph 34 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 and City release each of HARBINGER CAPITAL PARTNERS OFFSHORE MANAGER, L.L.C., HARBINGER CAPITAL PARTNERS GP LLC, HARBINGER CAPITAL PARTNERS SPECIAL SITUATION FUND GP, and PHILIP AND LISA FALCONE and their respective owners, members, partners, heirs, and successors from any civil or administrative monetary claim the State or City 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 laws (excluding any tax law claims New York State might have for personal incomes taxes owed by Philip and Lisa Falcone for tax years 2004 to 2008 related to any resident credit claimed from income earned from Offshore Manager, which are specifically released).

26. 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, except as provided in Paragraph 25;
- b. Any criminal liability;
- c. Any civil liability that Respondents have or may have under any state or city statutes, regulations, or rules not covered by this Agreement;
- d. Any liability to the State (or its agencies) or City (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.

27. Nothing herein affects the obligations, duties or rights prescribed by the Closing Agreement executed by Offshore Manager with NYCDOF.

28. In consideration of the obligations of Respondents in this Agreement, conditioned upon the full payment by Offshore Manager of the Settlement Amount, Relator, for itself, and for

Relator's owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, releases each of HARBINGER CAPITAL PARTNERS OFFSHORE MANAGER, L.L.C., HARBINGER CAPITAL PARTNERS GP LLC, HARBINGER CAPITAL PARTNERS SPECIAL SITUATION FUND GP, and PHILIP AND LISA FALCONE, and their respective owners, members, partners, heirs, and successors, from, and covenants not to sue any of them with respect to, from 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.*; 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 or for seeking redress pursuant to N.Y. State Fin. Law § 191. Relator does not release any claims against any person or entity that is not explicitly listed in Paragraph 25 of this Agreement.

29. Respondents, for themselves and their respective owners, members, partners, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, fully and finally release the State and City, their agencies, officers, employees, servants, attorneys, and agents from 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 or City, their agencies, officers, employees, servants, attorneys, agents and assigns, related to the Covered Conduct and/or the State and City's investigation and prosecution thereof.

30. Respondents for themselves and their respective owners, members, partners, 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 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 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 and City's investigations and prosecution concerning the Action.

31. 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 and City, their agencies, officers, employees, servants, attorneys, and agents from 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 or City, 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 16 in full settlement of any claims Relator may have against the State or City for any claims against the Respondents. This Agreement does not resolve or in any manner affect any claims the State or City has or may have against Relator arising under State or City tax laws, or any claims arising under this Agreement.

32. Relator, and each of its owners, members, heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, agrees not to object to this Agreement and agrees and confirms that this Agreement is fair, adequate, and reasonable pursuant to New York State Finance Law § 190(5)(b)(ii).

33. The State and City have 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. These representations include, but are not limited, financial statements provided to the State and City on July 14, 2018 and August 15, 2018, pertaining to the financial condition of Offshore Manager and Mr. Falcone. 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 acknowledge that they have entered this Agreement freely and voluntarily and upon due deliberation with the advice of counsel.

Bankruptcy and Non-Payment

34. If within ninety-one (91) days after the Effective Date of this Agreement or of the date of any payment made under this Agreement, any of the Respondents or a third party commences against any of the Respondents 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, each of the Respondents agrees 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 or City, at their sole option, may rescind the releases in this Agreement insofar as they affect the State or City 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 or City 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 or City'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 or City 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 or City has a valid claim against Offshore Manager 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.

- c. Respondents acknowledge that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

35. In the event of the failure by Offshore Manager to make any or all payments of the Settlement Amount, including the State's Share, the City's Share, and the Relator's Share, when due according to Paragraphs 15 and 16, the State or City will provide written notice of the non-payment to the Respondents. Such notice shall be given to the person and address designated in Paragraph 46 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. Offshore Manager shall have an opportunity to pay the unpaid balance within ten (10) calendar days from the effective date of the notice. If Offshore Manager fails to pay the overdue unpaid balance of its payment obligations under this Agreement within ten (10) calendar days from the effective date of the notice of non-payment ("Default"), the State or City, in their sole discretion, may declare or do any or all of the following or may exercise, without limitation, any remedies available under law, including:

- a. The State and/or City 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. Pursue all available remedies to enforce this Agreement and for violations of the Agreement. In the event of a Default as described above, the Respondents agree not to contest any action to enforce this Agreement or any other collection action undertaken by the State and/or City pursuant to this Paragraph or pursuant to law, and the Respondents agree to pay the State and/or City all reasonable costs of collection and enforcement of this Agreement, including without limitations, attorney's fees, expenses and court costs; 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 and/or City reinstitutes such 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 and/or City after the written notification of Default to Respondents, 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.

36. Notwithstanding the notice provisions of Paragraph 46, no notice of non-payment shall be required to be provided to Respondents in the event of the failure by Offshore Manager to make any or all payments required in the Closing Agreement or to pay in full the Offshore Manager Judgment with interest to date of payment, and the City may exercise, without limitation, any remedies available under law to enforce the Closing Agreement and/or collect the Offshore Manager Judgment.

37. In the event of the failure by Offshore Manager to make payment of the Relator's Share when due according to Paragraph 16, 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 46 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. Offshore Manager shall have an opportunity to pay the unpaid balance within ten (10) calendar days from the effective date of the notice. If Offshore Manager fails to pay the overdue unpaid balance of its payment obligations for the Relator's Share under this Agreement within ten (10) 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

38. 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, the City, 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, the City, or Relator, the Respondent will testify in subpoena hearings, depositions, and/or at trial. Each Respondent also agrees to make available to the State, the City or Relator, upon reasonable notice, documents or other materials relevant to any such investigation or litigation. Each Respondent represents and warrants, through the signatures below, that the terms and conditions of this Agreement are duly approved, and that execution of this Agreement is duly authorized. 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.

39. Offshore Manager shall not take any action or make any statement denying, directly or indirectly, the propriety of this Agreement or expressing the view that this Agreement is without factual basis. Nothing in this Paragraph affects Respondents' testimonial obligations or their rights to take legal or factual positions in defense of litigation or other legal proceedings to which the State or City is not a party.

40. The Agreement and all its terms shall be construed as if mutually drafted with no presumption of any type against any Party that may be found to have been the drafter.

41. Except as provided in Paragraphs 28, 35, 37, and 49 above, each Party shall bear its own legal and other costs incurred in connection with this matter.

42. 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.

43. 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 or the Corporation Counsel of the City of New York, 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 and the Corporation Counsel of the City of New York.

44. 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.

45. Any failure by the State or City 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 and/or City, 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 the Relator and/or Respondents. 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.

46. 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, Esq.
Assistant Attorney General
Office of the New York Attorney
General
Taxpayer Protection Bureau
28 Liberty Street, 21st Floor
New York, NY 10005
(212) 416-8819

If to the City of New York:

Sabita Krishnan, Esq.
Senior Counsel
Affirmative Litigation Division
New York City Law Department
100 Church Street, 20th Floor
New York, NY 10007
(212) 356-2273

If to Relator:

Neil Getnick, Esq.
Getnick & Getnick, LLP
521 Fifth Avenue
New York, NY 10175
(212) 376-5666

Jordan Thomas, Esq.
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
(212) 907-0700

If to Respondents:

Marc Kasowitz, Esq.
Kasowitz, Benson, Torres & Friedman
1633 Broadway
New York, NY 10019
(212) 506-1700

Matthew Dontzin, Esq.
Dontzin Nagy & Fleissig LLP
980 Madison Avenue
New York, NY 10075
(212) 717-2900

47. Except for written notices as provided in Paragraphs 35 and 37 of Offshore Manager's non-payment issued by the State, City, or Relator, the sending and receipt of which shall be governed by the provisions in Paragraphs 35 and 37 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.

48. In any subsequent investigation, civil action, or proceeding by the City or State to enforce this Agreement, or for violations of the Agreement, Respondents expressly agree and acknowledge that any statute of limitations or other time-related defenses are tolled from and after the effective date of this Agreement, and that the City or State may use statements, documents or other materials produced or provided by the Respondents prior to or after the effective date of this Agreement.

49. If a court of competent jurisdiction determines that Respondents have breached this Agreement other than by failing to pay amounts owed under the Agreement, the remedy for which is described above in Paragraphs 35 and 37, Respondents shall pay to the Office of the Attorney General, the Corporation Counsel of the City of New York, 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.

50. 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.

51. 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.

52. This Agreement is effective on September 11, 2018 (the “Effective Date”), subject to Offshore Manager’s payment of the Offshore Manager Judgment and accrued interest to the City on or before September 10, 2018. Facsimiles and .pdfs of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

53. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

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

THE STATE OF NEW YORK

Dated: 8/28/18

BARBARA D. UNDERWOOD
Acting New York State Attorney General

BY: 
Thomas Teige Carroll

Bureau Chief
Office of the New York Attorney General
Taxpayer Protection Bureau
28 Liberty Street, 21st Floor
New York, New York 10005
(212) 416-6012

THE CITY OF NEW YORK

Dated: _____

ZACHARY W. CARTER
Corporation Counsel of the City of New
York

BY: _____
Gail Rubin

Chief
Affirmative Litigation
Corporation Counsel
100 Church Street, Room 20-83
New York, New York 10007
(212) 356-2030

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

THE STATE OF NEW YORK

Dated: _____

BARBARA D. UNDERWOOD
Acting New York State Attorney General

BY: _____
Thomas Teige Carroll

Bureau Chief
Office of the New York Attorney General
Taxpayer Protection Bureau
28 Liberty Street, 21st Floor
New York, New York 10005
(212) 416-6012

THE CITY OF NEW YORK

Dated: 9/7/18

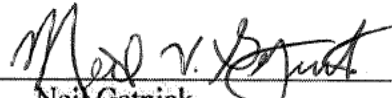
ZACHARY W. CARTER
Corporation Counsel of the City of New
York

BY: Gail Rubin
Gail Rubin

Chief
Affirmative Litigation
Corporation Counsel
100 Church Street, Room 20-83
New York, New York 10007
(212) 356-2030

[REDACTED]
Dated: 9/4/18

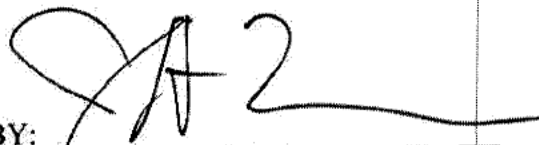
BY:


Neil Getnick

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

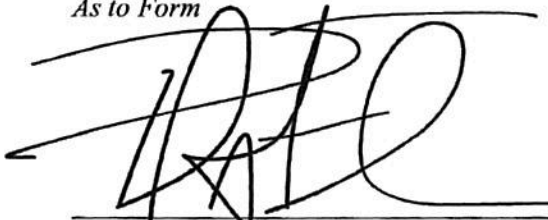
RESPONDENTS

Dated: 9/7/2018


Matthew S. Dontzin

Dontzin Nagy & Fleissig LLP
Attorney for Respondents
As to Form

Dated: 9/7/2018




Philip Falcone
Respondent

Dated: 9/7/2018



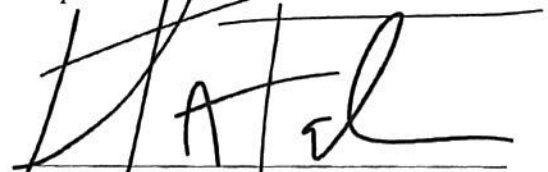
Harbinger Capital Partners Offshore Manager,
L.L.C.
Respondent

Dated: 9/7/2018



Harbinger Capital Partners GP LLC
Respondent

Dated: 9/7/2018



Harbinger Capital Partners Special Situation Fund
GP
Respondent