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[redacted]

RE*: State of New York for the City of New York ex rel Thomas C. Willcox v. Credit Suisse (USA) LLC et al.* , 100335/2016, on appeal, 2022-03942

Dear Ms [redacted]

Set forth below is a detailed letter containing a recommendation for the above-referenced case. Due to the complexity, a table of contents precedes the substance.

Contents

SUMMARY

This letter summarizes the activities of Atty X (whose actual name I have disclosed to you over the phone) and the City and the communications between Atty X and the undersigned ("Relator"), which communications I believe were done as part of a sham "investigation" of allegations of tax fraud against New York City in the amount about $30 million (and growing).

Before I explain in detail, I need to set forth several paragraphs of background.

In 2001, Relator, through unrelated litigation, discovery tax fraud in two transactions that closed in New York City in 1999.

In 2005, Relator sought to report this fraud to the IRS. However, the IRS had no office of whistleblower at the time. As explained in more detail below, Relator believes that the IRS obtained a recovery, then found some technical excuse to deny a reward. Finally, the IRS simply invoked confidentiality, and Relator's inability to seek an appeal in the Tax Court, to conceal the facts.

In 2011, New York State passed the tax amendments to its false claims act. Relator filed a complaint on behalf of New York State – he was unaware that New York City also had a corporate franchise tax. As Relator could not find an expert, the State declined to intervene, and Relator relied on obtaining limited discovery on the IRS to obtain his file, which he believed would prove the fraud in the transactions. Further, as a direct claim against the $46.5 million in fees was outside the qui tam statute of limitations, Relator had to rely on the "reverse false claims" theory. Under this theory, Relator contended each claim for a refund within the ten year limitations period was a implied failure to disclose the deficiency created by the tax fraud.

In 2015, the trial court dismissed and in 2016, the First Department affirmed, questioning the false claims theory and contending Relator's claims of tax fraud were speculative.

However, also in 2016, Relator discovered an international tax expert who produced a letter opining that the transactions at issue were structured to defraud the US and New York of taxes. Even further, the Relator discovered New York City had a corporate franchise tax like that of New York State. Therefore, in March 2016, Relator filed a second case, under the same theory the prior case. except seeking damages on behalf of New York City.

In October 2016, I called and emailed you about the case. Immediately after that, the Taxpayer Protection Bureau began the process of having the City prosecute the case.

In January 2017, the City formally took control of the case, with Atty X assigned to the investigation. However, rather than conduct a genuine investigation, under apparent instructions from the City, Atty X tried to "gaslight" Relator by pretending to investigate the case for two years. To achieve this, Atty X pretended to be in the process of obtaining documents, or substantively reviewing Relator's work product. Also, towards this goal, Atty X filed three status reports in July 2017, and January and July 2018, each of which mislead the court into believing the City's investigation was on going, when, in the fact, the City had, upon receiving

the case, determined it had no intention of pursuing it, and, even further, wanted to gaslight Relator into dropping it.

Atty X never showed Relator these *ex parte* status reports. However, the review of the emails and phone calls between the two attorneys, set forth below, demonstrate that not only did Atty X never truly investigate the claim, Atty X took best efforts to lead Relator into believing Atty X was so doing, in the hope Relator would simply abandon the claim.

Predictably, as the City was not a party to the case, the trial and appellate courts simply invoked the rulings of the prior case, the doctrines of res judicata and collateral estoppel against Relator and dismissed the case. In short, while the City failed to gaslight Relator into dismissing, it prevailed on its apparent backup, the circular reasoning that if it did not intervene in the case, it would be dismissed. A petition for leave to appeal to the New York Court of Appeals in pending.

This letter concludes that the City, having shown irreparable bias against Relator's case for what is now apparently $30 million in tax fraud against the City, should be excused from making any more decisions on the case.

Further, the Law Department should obtain from the IRS all documents related to the Relator's 2005-6 efforts to report the fraud. As an expert has opined, see below, if the banks paid any money to the IRS, that would be an admission the transactions were fraudulent and (irrespective of the results of Relator's case) the City could collect up to $30 million with ease in a direct action against the banks, and resolve the above-referenced litigation at the same time.

FACTS

I. Background Facts

A. The PSINet Litigation

1) In 2001-2002, Relator discovered that several Wall Street Banks (the "Banks" or "Defendants") defrauded the federal government and New York State of taxes stemming from two 1999 transactions (the "PSINet Transactions") both which closed in New York City, and from which the Banks earned $46.5 million in fees. However, 85% of the fees were earned in the US by US entities, then wired to the UK affiliates of these entities (which had a lower corporate tax rate at the time) and taxed there. See, Recommendation to IRS, SA 37-77 (these claims are hereinafter referred to as the "Tax Fraud Allegations".[1]

[1] This letter is supported by three appendices.
The first is a two Volume "Appendix" (cited as "A") which is the record on appeal for State of New York ex rel Thomas C. Willcox v. Credit Suisse Securities (USA) LLC et al, 140 A;.D.3d 622 (June 18th, 2016) ("*Willcox I*"), which was an appeal from The State Of New York Ex. Rel.

B. Relator's Efforts to Report the Tax Fraud Allegations to the IRS

2) In 2005, Relator sought to report the fraud to the IRS. A 1009. In March 2005, he spoke on the phone with an Agent Robert Satz in New York City. JA 1009

3) Agent Satz said he had to check to determine that no preexisting audit was taking place on my allegations *Id.*

4) After Agent Satz confirmed as such, Relator traveled to New York and met with Agent Satz and other IRS Agents, providing the numerous documents in support of the claim. *Id.*

5) However, in April 2005, Relator received a form letter from the IRS denying the claim. A call to Agent Satz resulted in a request for more information.

6) Relator then made numerous calls trying to find an expert and ask the IRS for reconsideration. Relator happened to call a part time IRS Commissioner, who referred him to Paul Epstein of the IRS' DC International Division. The Relator prepared a comprehensive Recommendation for Mr. Epstein.

7) In December 2006, Congress passed a law creating the IRS Whistleblower office.

8) When Relator learned of this, Relator called Mr. Epstein, who said he had passed on the information to the New York Agent, who had obtained a recovery. However, he said my claim had been denied, due to the existence of a "pre-existing audit". A 10009.

9) Relator knew the New York Agents had not been truthful to Mr. Epstein, as they would not have met with Relator had a pre-existing audit had been taking place.

10) In June 2007, when I asked for reconsideration of this by the newly installed head of the Whistleblower office, a Mr. Whitlock, he replied that the prior denial had been "well - reasoned". A 845.

11) Relator had yet another reason for believing there had been a recovery.

Thomas C. Willcox, Plaintiff, v. Credit Suisse Securities (USA) LLC (Index No 2013-100135, July 22nd, 2016) ("*Willcox I Trial Court*")**.**

The Second is the "Supplemental Appendix" (cited as "SA"), which is the record on appeal for the ruling in State of New York for the City of New York ex. Rel. Thomas C. Willcox v. Credit Suisse Sec.(USA) LLC et al, 2022 NY Slip Op 6774 (November 29th, 2022, 1st Dep't) , ("*Willcox II*") which was the appeal from State of New York for the City of New York v. Credit Suisse Sec. (USA) LLC et al., Index No 100356/2016, June 22nd, 2020) (("*Willcox II Trial Court*").

The Third, "*New York City*" is a compilation of emails and telephone records between Attorney X , and other NYC attorneys, and the Relator, and related material during *Willcox II*, and some subsequent filings.

There are hundreds of pages of attachments in *New York City*. Rather than have them interrupt the narrative, I have inserted hyperlinks to the relevant ones (*i.e*, the work product I sent to Atty X) after the respective email (except for those which had been sent previously to Atty X).

12) Most notably, when the IRS denies a claim because there has been no recovery, it simply states so in plain language. A 846-849. Mr. Whitlock's vague conclusory language therefore stands in stark contrast to the IRS' typical practice when there is not recovery.

13) In 2011, New York passed the tax amendments to its false claims act ("NYFCA"), which had a ten-year statute of limitations.

14) In 2013, I filed, under seal, *Willcox I,* a qui tam complaint seeking on behalf of the State of New York, seeking treble damages for the fraud.

15) In the pleadings, I explained the nature of the fraud. See, A809-A825, esp A820-823.

16) New York State declined to intervene in the case.

17) I relied on surviving a motion to dismiss by detailing the fraud as well as possible and seeking limited discovery on the IRS for the documents related to my denied claim (the "IRS File"), which I believed would show the Defendants had committed fraud.

18) Also, while a direct action for the 1999 tax returns was barred by the NYFCA 10-year statute of limitations, see New York Finance Law § 189,[2] New York State has a three-year statute of limitations for negligence, Tax Law § 1147, which contains an exception for civil fraud of no statute of limitations. *Id.*

19) Therefore, I ultimately proceeded on the "reverse false claims" theory ("RFCT"). In this case, the theory meant that by submitting claims for refunds (or possibly even requests for a credit to the subsequent years tax obligations), was a false claim, because New York State would not pay the refund or permit the credit if the Defendants disclosed the deficiency created by the PSINet Transactions.

20) In July 2015, the New York Supreme Court dismissed the action on the grounds that permitting the application of the RFCT to the tax amendments would vitiate the statute of limitations. See, *Willcox 1,* fn 1, *supra.*

21) In early 2016, I noticed that New York City had a corporate franchise tax similar to that of New York State. NYC Administrative Code ("NYCAC") § 11-602(1)(a) Further New York City, like New York State, has no statute of limitations for civil tax fraud. NYCAC § 11-674(1). Therefore, I filed under seal a qui tam suit seeking $21 million damages under the RFCT for any refunds claimed by the Defendants from 2007—2016. SA11-SA43 *esp.* SA 125.[3]

22) Also, I noticed in the *New York Times* an article discussing a New York State qui tam case against Vanguard & Co for tax fraud. The Article interviewed Professor Reuven Avi-Yonah ("RAY"), an international tax expert. In response, I contacted RAY about obtaining an expert opinion on the Tax Fraud Allegations.

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[2] Here is a link to the entire New York False Claims Act.

[3] That $21 million was based on the interest calculator for New York City. However, NYC also charges double the amount of the tax as a penalty if the deficiency resulted from fraud. Therefore, the actual amount due (prior to trebling as a qui tam action) could be closer to $30 million. This is confirmed by using the New York State calculator. *NYC 76 et seq.*

23) In June 2016, the First Department affirmed the *Willcox* I trial court on the grounds (1) the complaint was "speculative" (2) the implied certification of theory of liability should not be applied expansively" and (3) any failure to disclose had to be "material". *Willcox I*, fn 1, *supra.*

24) Also in June 2016, RAY, *using the exact same facts presented to the First Department*, wrote a letter (the "Tax Fraud Opinion") reasoning that the PSINet transactions were structured to defraud the United States, New York State and New York City of taxes. SA 089-SA 208.

25) The Tax Fraud Opinion makes clear what any cursory review of the relevant documents at issue demonstrates: the PSINet Transactions were crudely structured so that the true principals in New York would do 85% of the work, and use their UK affiliates to do 15% of the fundraising overseas, but be the "initial purchasers" for the whole deal, so that the funds collected in New York City would be wired to the UK for taxation at a lower rate. The deal was so primitive the banks did not even obtain an opinion letter attesting to its lawfulness.

26) RAY also opined that a document useful to ultimate conclusions on the case would be the IRS File. SA 137, fn 12.

27) Further, RAY opined that "if your reporting to the IRS caused a recovery, then the Defendants would be bound by that recovery to owe state and city taxes". SA 142, fn 12.

28) Even further, in June 2016, the US Supreme Court issued the *Escobar* case,[4] which affirmed set forth a new standard for materiality under the US FCA (which is relied on by courts interpreting the NY FCA, see *Willcox I, fn 1, supra*).

29) In December 2016, the New York State AG moved to have the City handle *Willcox II.* The City assigned Atty X to be Relator's contact and to investigate the case.

30) On January 23rd, 2017, the court granted the State's order. NYC 2.

31) The court directed that City file *ex parte* (meaning they did not have to be shared with the Relator) status reports with the court every six months:

> The City of New York Law Department shall provide the Court with an under seal, *ex parte* report describing the status of its investigation of the matters raised in the *qui tam* complaint at six (6) month intervals from the date of this Amended Sealing Order until such time as the Court shall order that the seal be lifted and the government's time to make an election pursuant to N.Y. State Finance Law § 192(2)(c) be terminated . .

Id. 2-3.

32) This would mean such reports would be due on July 23rd, 2017, January 23rd, 2018, July 23rd, 2018, and so forth until the City determined what option it would take.

[4] *Universal* Health Servs., Inc., v. United States ex rel. Escobar, 579 US 176 (2016) which implicitly overruled the *Wilkins* and *Straus* cases cited in *Willcox I.*

C. The Duties and Options Faced by Atty X As Of the Issuance of the January 23rd, 2017, Order

33) Atty X had a duty to investigate the claims presented by the Relator. New York State Finance Law § 190.

34) The investigation would include the following issues:

a. What impact the rulings in *Willcox I* would have on the City's case.
b. What notice did the Defendants have that the PSINet Transactions were structured to evade US taxes? This would include, *inter alia,* a review of the *Willcox* I Ruling and reviewing the IRS File.
c. What was/is New York City's policy when a taxpayer with a preexisting deficiency makes a claim for a refund ("Refund Policy")? Or ask that an overpayment be applied to a subsequent year?
d. How many claims for refunds were made by the Defendants in the ten years prior the filing of the Complaint in March 2016?
e. What was the value of those claims?
f. What would the contents of the IRS File reveal about whether or not the Defendants committed fraud, and whether or not they paid the taxes at issue?

35) After performing such investigation, Atty X had three options:

a. File a motion to dismiss. However, the Relator is entitled to a hearing prior to obtaining such a dismissal.[5] The City would be hard pressed to explain why it wanted the case dismissed, in light of the Tax Fraud Opinion (and might further be asked why it had no apparent intention to file a direct action).

b. Issue a notice of declination, *see,* § 190(e).

c. Intervene in the case. *Id.* at *(c)*

However, Relator has set forth below the emails between Attorney X and Relator from January 2017 through Attorney X's informing Relator in January 2019 that the City would decline to intervene in the case. These emails demonstrate that Atty X took a fourth option. Such was based on the City's view, from the very start, that the Relator's case should be stopped by simply pretending to investigate for sufficient time so that Relator eventually gave up and dismissed the case.[6]

36) Thus, the City through Atty X took such option. That including filing false reports every six months with the claim it was actually investigating; when in fact it not only doing nothing but had also decided from the start it would "string along" the Relator for a year

[5] "The Government may dismiss [a qui *tam*] action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." NY FCA § 190(5) (b)

[6] However, the three options above would not achieve this goal: (1)Filing a motion to dismiss would put the City on record as opposing the case, and provide the Relator with a hearing at which he could present the merits of the case;(2) A prompt declination would have been a reasonable course of action; the City could simply invoke the rulings in Willcox I as a basis such a decision; (3) intervening would compel the City to move the case forward, would achieve the opposite of what the city wanted, to prevent the case from moving forward in any manner.

or two and gaslight Relator by claiming the City was actually investigating. This course of action, the City hoped, would eventually cause the Relator to abandon the case or, out of frustration, act improperly, so as to justify a motion to dismiss.

37) The fact that the City took this course of action can be shown through the emails exchanged between Atty X and the Relator during the relevant time period, as set forth below.

38) Such was a violation of the requirement that the City investigate the Relator's claims, among numerous other violations of New York State and City law.

D. Communications Prior to July 23rd, 2017, Status Report

39) On February 8th, 2017, the Relator sought to begin a meaningful dialogue with Atty X, when he sent an email discussing the Tax Fraud Opinion, NYC 4, and attaching a draft complaint on behalf of New York City. The exact name of each of the Defendants is set forth clearly on the first page of the complaint. [7]

40) Also attached was a proposed affirmation on behalf of a New York City employee, which would set forth the total amount due on the transaction, the way in which NYC handles claims for refunds in the face of a pre-existing deficiency, and the number of refunds, and total in dollar amounts, claimed during the 10 years prior to the filing of the complaint.

41) On February 21, 2017, Attorney X responded, stating his office had just received a copy of the amended sealing order and asking to talk to Relator in the next week. NYC 4.

42) From February 28-March 15th, 2017, this exchange continued. NYC 24-25. Some discussion was made of the City's right to withhold funds in the face of a pre-existing deficiency, and what case law existed under the implied false certification theory. *Id.* 5-7.

43) On March 22nd, 2017, Relator emailed Attorney X, addressing these issues in detail. As to the question of whether the City uses the legal authority conferred by subsection 677(6) (discussed in the email), the Relator noted that "that is a question that has to be answered by whoever would sign the proposed affidavit I sent you." *Id.* 8.

44) This email also discussed the import of the *Escobar* ruling on the interpretation of the term "material". *Id.* 9.

45) Relator concluded the email by noting that the Tax Fraud Opinion recommended obtaining the IRS File for the information it would provide and provided a link for a "starting point" down that path. *Id.*

46) On May 10th, 2017, the Relator emailed Atty X again, noting that they had "talked a good bit about where we were going, but, to my recollection did not set a time for us to speak again", and asking for another discussion. *Id.* 10.

47) On May 12th, 2017, two days later, Atty X proposed a call yet a week later. *Id.*

48) From May 18th to May 22nd, 2017, this pattern continued. *Id.* 11-12.

[7] All lengthy, relevant and attachments to the Relator's submissions may be found via the hyperlinks at the bottom of the applicable email (unless previously so included in a prior hyperlink).

49) On June 29th, 2017, Atty X first requested the identity of each of the Defendants, by EIN or precise name. *Id.* 13.

50) On July 2nd, 2017, Relator provided the exact names of the Defendants, as well as copies of their 2001 tax returns, which had been filed in *Willcox I* to show a direct claim against the 1999 transactions was time barred. *Id.*

51) The next day, Attorney X asked for retransmission, which the Relator did. *Id.* 13-15.

52) On July 25th, 2017, Relator asked Atty X for a copy of the status report directed by the January 2017 Court Order. *Id.* 15.

53) Relator's summary of phone calls between him and Atty X show a long conversation on July 28th, then a series of short calls through September 28th, 2017. *Id. 15.*[8]

E. Communications Prior to the January 23rd, 2018, Status Report

54) On October 17th, 2017, the Relator emailed Atty X, stating he assumed the investigation was "continuing" and that Attorney X was obtaining the Defendants tax returns:

> I don't want to waste our time with phone calls asking that I be kept up to date when in fact your office investigation is just continuing As I have said before, I am operating on the assumption you have reviewed the defendants' New York City tax returns and are proceeding on the information based on that review.
> As I have also previously discussed, I have a distinct interest in learning the results in this inquiry,
> Unless I misunderstand, that information is critical to either a motion to dismiss (on the assumption that the information at issue shows the allegations at issue are meritless) or would, in the alternative, be attached to a complaint.
> It is my assumption that at some point you will seek to obtain that file, and that disclosure, as discussed above, will take place.
> Please let me know if the facts are otherwise.

Id. 16.

55) Atty X did not respond to the October 17th email.

56) Instead, in January 2018, Relator called Attorney X. *Id.*

57) On the same day, Attorney X emailed to confirm receipt of the Relator's voicemail, and that he would call the Relator on January 16th. *Id.*

58) On January 18th, 2018, the Relator told Attorney X he wanted to discuss "what would be reported to the court next week". *Id.* 17.

59) On January 19th, 2020, Attorney X and the Relator discussed via telephone the NYC actions over the past half year. Attorney X did not produce any work product. Rather he said he had not been able to find the tax returns of the Defendants and asked for the EINs of the Defendants.

60) On January 19th, 2018, the Relator reported the contents of the conversation with Attorney X to a colleague. The Relator noted in relevant part "I think he did nothing over the past few months". *Id.* 19. The Relator did note that Attorney X "seemed amenable to obtaining [the IRS File]." *Id*.

F. Communications Prior to the July 23rd, 2018 Status Report

[8] For an explanation of how this summary was generated, see SOF 74), *infra*. Relator has inserted the relevant portions of the spreadsheet of the phone calls to and from NYC at the relevant dates, highlighted in yellow.

61) On January 29th, 2018, the Relator emailed Attorney X the EINs of the defendants. *Id.* 20.

62) On February 9th, 2018, the Relator sent Attorney X a detailed memo the facts of his interactions with the IRS, and how the IRS file could be obtained, either before or after the complaint was filed. *Id.* 21.

63) On February 12th, 2018, the Relator emailed Attorney X a request to discuss the February 9th, 2018, memo. *Id.* 22.

64) On March 9th, 2018, the Relator emailed Attorney X a complaint showing a joint federal state complaint, for a purpose the Relator cannot now recall, but likely related to the ease which Attorney X could obtain the IRS file. *Id.* 23.

65) On March 21st, 2018, the Relator emailed himself, commenting "called [redacted] today, expressed interest in getting case moving". *Id.* 24. From the phone log portion set forth on that page, it appears as if the call was made the following day. In any event, Atty X did not respond to the email.

66) On March 27th, 2018, the Relator emailed Attorney X, discussed the option of approaching the Senate Finance Committee to obtain the IRS File. *Id.* 25.

67) On April 2nd, 2018, the Relator emailed David Berick of the Senate Finance Committee, discussing obtaining the IRS File. *Id.* 26.

68) On April 11th, 2018, Attorney X responded to the April 2nd email, noting:

> The City of New York takes issue with the representations made in your email concerning conversations between us. In particular, contrary to your suggestion below, the City has not made an election in this case. The City reserves all rights.

Id. 29.

69) On May 15th, 2018, Relator emailed Atty X, discussing in detail efforts to obtain the file. *Id.* 30.

70) On May 24th, 2019, Atty X, in apparent response to a call from the Relator, emailed indicated he would be in touch "next week". *Id.* 31.

71) On June 4th, 2018, Relator emailed Atty X discussed more option to obtain the IRS file. *Id. 32.*

72) On July 3rd, 2018, Atty X and Relator exchanged scheduling emails. *Id.* 33.

73) On July 5th, 2018, the two had a telephone conversation in which Atty X indicated the City would likely not intervene in the case. *Id* 34.

74) On the same day, within two hours, the Relator emailed Atty X "a compilation of the emails and telephone conversations between us since we first communicated about this matter in early 2017." *Id. 36*[9]

[9] In fact, the log ended at May 23rd, 2018. Relator does not have a record of any subsequent phone calls between Atty X and Relator.

75) On July 15th, 2018, Relator emailed four documents to Atty X. *Id.* 37.

76) The first, a letter to Atty X, summarizes what the Relator believed to be the City's concerns, conveyed in the phone call of July 5th, (1) Resources, noting "[a]fter 18 months, it is clear to me the City is just not comfortable investigating this claim", (2) Defendants out of business and (3) time since 1999 transactions. The Relator sought to rebut these claims. *Id,* pointing out *inter alia*, all of the defendants were either in business or acquired by solvent firms and that the reverse false claims theory only sought funds for claims made within the ten-year limitations period. *Id.* 38-40.

77) On July 17th, 2018, the attorneys traded scheduling emails. *Id.* 41

78) On July 18th, 2018, the Relator emailed Professor Avi-Yonah to confirm the corporate franchise tax applied to the transactions, which he did the next day. *Id.* 42.

79) On July 19th, 2018, Relator emailed Atty X with his conclusions as to the corporate franchise tax. *Id.* 43.

80) On July 23rd, 2018, Relator emailed Atty X attaching a letter going into issues raised by Atty X in some detail. *Id*.

81) Relator commented that if Atty X moved to dismiss, Relator could respond that the Government "had not fully investigation the allegation". *Id.* 41. Atty X never responded to this allegation (other than to state in a telephone conversation Relator had no business judging the validity of the City's investigation).

82) Later that day, Atty X emailed back with the following response:

> Based on a quick reading of the law, it appears that for general corporation tax (GCT), there is a three-year statute of limitations under Ad Code 11-674(1). There is an exception where "a false or fraudulent return is filed with intent to evade tax." If there is evidence of intent that you have not already disclosed, we would be interested to see it.

Id. 42.

G. Communications Prior to the January 23rd, 2019, Notice of Declination

83) In response, the Relator extensively researched the whereabouts of the signatories to the Purchase Agreements for the PSINet transactions. The Relator determined that not only were all of them alive, but five of the seven appeared to have been working for the New York Affiliates at the time of the PSINet Transactions, indicating the New York Affiliates were the true principals in those debt issuances and should have paid taxes on them.

84) On August 3rd, 2018, Relator emailed this information to Atty X. *Id.* 43.

85) On August 12th, 2018, the Relator, having noticed that his Google Drive indicated he August 3rd to Atty X has not been opened, emailed Atty X, stating "I just hope the review is moving forward. *Id.* 44.

86) On September 4th, 2018, Relator emailed Atty X, "checking in to see the status of our investigation". *Id.*

87) On October 5th, 2018, with no confirmation Atty X was doing anything, Relator emailed Atty X, noting that NYC was investigating many dated transactions of President Trump.[10] *Id.* 47.

88) On November 12th, 2018, having received no response to the prior email, Relator emailed Atty X requesting an informal status report: "Following up on my phone call of last week, I am wondering if there has been any movement in this case." *Id.* 48, with Atty X responding, "[w]e are continuing to look into it". *Id.*

89) However, Atty X did not communicate in any manner with Relator any further in 2018.

90) In early 2019, Relator contacted Atty X via telephone (from Asia), at which time he informed Relator the City would not intervene. *Id.* 47-52.

91) Relator asked if the City could provide tax returns, a formal statement of the Refund Policy, a summary of refunds claimed during the Limitations period. Atty replied all would wait until after the Defendants filed a Motion to Dismiss.

H. Communications after the January 23rd, 2019, Notice of Declination By The City

92) At that point, Relator faced the considerable task of doing all the work Realtor had hoped the City might have done: As the City had not provided Relator with its Refund Policy, Relator determined he should do a survey of what the 43 states that had income taxes had for their Refund Policies.

93) Therefore, Relator began the task of finding out the Refund Policy of the 43 states with income tasks, so that he could show the "standard of care" among taxing jurisdictions was that any preexisting deficiency would trigger an automatic withholding of any claim of refund by taxpayer.

94) On May 2nd, 2019, Relator filed his Notice of Intent of Intent to Proceed. *Id.* 53.

95) On May 15th, 2019, Relator sent an email to Atty X transmitting a letter showing that about 20 jurisdictions had promptly responded to requests and suggesting that such meant the City should have no reason to refuse to provide the information. *Id.* 54. On May 24th, 2019, Atty X responded, indicating he would respond after the holiday weekend. *Id.* 55.

96) On May 28th, 2019, the Relator emailed Atty X again, attaching a letter from the State of Illinois that outlined its Refund Policy in detail. *Id.* 56. On May 31st, 2019, Atty X responded he would be in touch "next week." *Id.*

97) On June 5th, 2019, Atty X transmitted a public portion of the DOF's website. *Id* 58.

98) On June 7th, 2019, Relator emailed Atty X, pointing out that the provision on the DOF's website had no relationship to the City's Refund Policy. *Id. 59.* Relator received no response.

[10] Apparently, Attorney X never opened this transmission. Google Drive sends Relator an electronic confirmation whenever a file transmitted through it is opened. The Relator never received such a transmission. NYC 72.

99) On June 26th, 2019, Relator retransmitted a summary of responses from other states providing their Refund Policies and asking "[w]ill the city of New York be making no reply to this?". *Id.* 60. Relator again received no response.

100) On September 25th, 2019, the Court entered an order unsealing the Complaint, the January 18th, 2019, Notice of Declination, and the order. *Id.* 61. Atty X consented to a change in the caption of the case. *Id.*

101) On September 26th, 2019, Atty emailed Relator, consenting to a change in the caption of the case and asking to be notified when the clerk had converted the action to electronic filing ("NYCEF"). *Id.* 62.

102) Attorney X never added the City as a "non party" to the NYCEF, which would had all filings automatically emailed to him.

103) In Mid-November 2019, Relator and Atty X had their last email exchange about the confidentiality of the notice of declination after the unsealing order. *Id.* 63-64.

104) On December 29th, 2019, Relator accidently cc'd Atty X on a personal email. *Id.* 64. Atty X did not acknowledge the error.

105) Once Relator completed his Refund Policy survey, he obtained two additional opinions from RAY as to the viability of the RFCT to tax refunds, and as to the fact that most of the signatories of the Purchase Agreements were employees was a further indication that the transaction at issue were fraudulent. Further the Relator obtained an opinion from a securities professor at the University of Michigan that the Defendants had sufficient scienter to sustain a NYFCA Claim and from a New York Ethics expert that failure to report the tax fraud would violate the New York Rules of Professional Responsibility.

106) On January 20th, 2021, Relator filed a Motion to Leave the Second Amended Complaint, which set forth all the above opinions. SA 209 – SA 283. However, Relator could not include any information regarding specific refunds claimed, due to Atty X's failure to provide them.

107) From February 27th, 2020, to June 15th, 2021, Relator forwarded electronic copies of various filings to Atty X. *Id.* 65-71. Sometimes, Relator followed up with a phone call. However, Atty X never responded to any of these efforts to communicate.

108) On March 19th, 2020, the Defendants filed their Motion to Dismiss ("MTD"). As the City was not deemed to be a party to the case, the Defendants invoked the doctrine of collateral estoppel and res judicata. *Id.* 10-13. Because the Relator could not reference specific examples of refunds claimed within the limitations period, the MTD uses the word "speculation" or derivations thereof, eight times in the brief.

109) On June 15th, 2021, the court dismissed the case, citing the doctrines of res judicata and collateral estoppel. *NYC* 67, *Willcox II, fn 1*

110) On December 8th, and December 10th, 2021, emails to Atty X were returned undeliverable. *Id.* 72-73.

111) Apparently, Atty X left the employ of NYC without either informing Relator or providing another attorney to contact.

112) The undersigned sought to call and email anther NYC Attorney but received no responses. *Id* 75.

113) On November 29th, 2022, the First Department affirmed the dismissal, citing the same grounds as the trial Court. *Willcox II,* fn 1, *supra.*

114) On December 29th, 2023, Relator filed a Motion for Leave to Appeal to the New York Court of Appeals.

115) At about the same time, the Relator called a lawyer in the City's Law Department, complaining again about Atty X's failure to communicate and his lack of notice of departure.

116) As a result of this call, on January 5th, 2023, Thomas Teague emailed me, cc'ing you, stating that I should contact you about this case.

117) On January 20th, 2023, the Defendants filed an opposition.

ANALYSIS

I. The City, through Atty X, took the approach of trying to wear down the Relator by dragging on its "investigation", having determined from the beginning it had no intention of intervening in the case.

The emails set forth above, as supplemental by the Relator's partial phone log, show that the City never had any intention of an objective review of the case. First, in response to Realtor's 2-8-17 email, rather than requesting Relator email him the court's January 23rd order, Atty X waited until 2-21-17 to contact Relator, claiming it had taken his office almost a month to receive the Order. Statement of Facts ("SOF") 39) to 42). Next, after Relator sent the 3-22-17 email discussing various issues in detail, the lethargy of Atty X's response was observed in Relator's 3-10-17 email noting that for all the discussion, there had been no time set to speak again. SOF 43) to 46). Atty X continued to drag out any real progress, SOFs 47) to 48). Finally, as the deadline for the July 23rd, 2017, status report approached, on 6-29-17, Atty X finally requested "the identity of each of the Defendants, by EIN or precise name". SOF. 49). Relator provided the names. SOFs 50) to 51).

From 7-28 17 to 9-28-17, Relator and Atty X had one long call, and multiple short ones. SOF 53).

Relator was distinctly unimpressed with Atty X's approach to the purported "investigation"; almost a half year to finally request tax return names? However, Relator found it hard to believe that Atty X would falsely represent to the court that the City was continuing an investigation, when in fact it was not. Rather than make this accusation, on 10-17-17, Relator emailed Atty X, noting Relator's assumption that Atty X had "reviewed the defendants' New York City tax returns and are [sic] proceeding on the information based on that review." SOF 54). Atty X did not respond to this email.

Further confirming Relator's suspicions that the City was conducting a sham "investigation" in the hopes Relator would drop the case, Atty X did not contact Relator again until shortly before the January 23rd, 2018 status report was due. Even further, Relator had to commence the line of communication. SOF 56) to 59).

Unbelievably, Atty X tried to convince Relator that he had not been able to find the tax returns of the Defendants, and asked Relator to obtain the EINs of the Defendants. SOF 59). Relator knew Atty X representations as to making any efforts to obtain the relevant documents was false, as is reflected by Relator's email to a colleague commenting that Relator thought Atty X "did nothing over the past few months." SOF 60). The email further reflects that Atty X was seeking to shift the subject from the tax returns to the IRS File, as a way of distracting from the **one year failed mission** in obtaining the tax returns. *Id.*

From 2-9-18 through 5-24-18, the Relator emailed Atty X numerous emails, including two memos on how to obtain the IRS file, and an email to a Senate Finance Committee Staffer, David Berick. SOFs 67) to 71). The email to Mr. Berick indicated that Atty X had been chosen to "prosecute" the action on behalf of the City. SOF 67).

The only meaningful response Atty X had to all of these efforts is to make sure Mr. Berick did not construe Relator's words as meaning that the City had elected to intervene in the action. SOF 68).

On July 5th, 2018, Atty X told Relator X the City likely would not be intervening in the case. SOF 73). Relator's suspicions that the City was doing nothing in the hopes Relator would dismiss the case were confirmed, and within two hours, Relator emailed Atty X a compilation of all email and telephone conversations relating to the case, SOF 74), in what was apparently a futile effort to motive Atty X based on his clear record of inactivity.

Atty X then hedged a bit, raising lack of resources, the false claim the Defendants were out of business and time since 1999 transactions, as reasons the City did not want to intervene. On the 15th and 19th, Relator sent Atty X information as to the applicability of the corporate franchise tax and responding to the reasons Atty X raised as purported reasons not to intervene. SOF 75) to 80).

Later that day, shifting gears to yet another excuse, Atty X, conceding that there was no statute of limitations for a fraudulently filed return, and notwithstanding the Tax Fraud Opinion, raised the issue of whether the Relator had "evidence of intent". SOF 82). Such ignorance is consistent with the fact Atty X never interview RAY.

On 7-19-18. Atty X changed the subject as to whether or not the NYC corporate franchise tax applied to the transactions. SOF 78) to 80).

On 7-23-18, Atty X and Realtor traded emails, with Atty X asking for further evidence of fraud. On 8-3-18 Relator provided a detailed analysis, with a several hundred-page appendix transmitted via Google Drive. SOF 82) to 85).

As Google Drive provides a sender an electronic receipt when a transmission is opened, Relator took note when his appendix remained unopened, with no response when he asked Atty X if the "review was moving forward" SOF 86) or when he emailed Atty X in 10-18, noting that the City was going very far back on the Trump tax investigation. SOF 87). With the exception to one response that "[w]e are looking into it", SOF 87). Atty X neither communicated further with Relator nor opened the 5-3-18 transmission. Fn 10, p. 11.

In early 2019, Atty X informed Relator the City would not be intervening, SOF 90) to SOF **Error! Reference source not found.**, and made vague promises about providing tax returns, the City's tax Refund Policy and other documents after defendants made a motion to dismiss. Id.

Relator then began his state-by-state Tax Refund Policy survey, and, noticing that every jurisdiction quickly provided the information, sought (unsuccessfully) to get the City to produce the same, or explain why it refused to do so. SOF 92) to 99).

After the Court unsealed the complaint in 9-19, Atty X ceased to respond to any substantive emails or phone calls from Relator, through the dismissal of the case. SOF 102) to 109). Even further, Atty X, as part of his effort to isolate Relator so he would abandon the case, declined to notify Relator Atty X was leaving the office. SOF 100) to 111).

Finally, in December 2022, Relator telephoned a member of the Law Department, who forwarded Relator's concerns to the Taxpayer Protection Bureau, who, on January 5th, 2023, emailed me with instructions to contact you.

In short, Atty X's "investigation" consisted of spending a year pretending to try to obtain the Defendant's tax returns, then a half year getting Relator to generate memos discussing how to obtain Relator's IRS File. After Relator sent Atty X a log of telephone calls and emails, Atty X apparently felt compelled to generate some emails with questions that could and should have been answered within the first few months of the investigation. Then, Atty X did not even bother to open the 500 pages of documentation Relator sent, and made every effort to isolate Atty X after the court unsealed the case.

Such behavior is not just disgraceful. Atty X deliberately obstructed a legal proceeding and filed three false reports with the court, claiming the City was continuing its investigation. The only possible purpose of making these false representations, as opposed to filing a notice of declination in the first quarter of 2017, was to try to get Relator to quit.

A true investigation would have obtained, in the first six months, the IRS File, defendants' tax returns, a detailed analysis of the impact of the *Escobar* case on the materiality issue and an interview with RAY. Further, it would have produced a complaint comparable to the Second Amended Complaint (with specific references to refunds paid within the 10 year Limitations Period included).

Such is clear evidence that Attorney X knew he did not need to file any more status reports. Instead, he had determined he would file a notice of declination in January 2019, so Attorney X simply stopped doing anything.

II. Had the City intervened in the case, the Relator would prevailed as the Defendant have been able to invoke the collateral estoppel and/or res judicata arguments', the defenses on which the Defendants relied

The Willcox II trial and appellate courts relied entirely on the doctrines of res judicata an collateral estoppel. *See*, *Willcox II*, fn 1, *supra*. They were able to take these positions specifically because the case law holds a governmental entity is not a party to a qui tam case.

Therefore, had the City intervened in the case, it had a substantial chance of prevailing in a $60 million lawsuit.[11]

III. The City Has Demonstrated Irreparable Prejudice To the Relator's Case And Should Be Disqualified From Making Any Future Decisions With Regard to It. The New York City Law Department Should Make All Future Relevant Decisions.

The above exchange of emails between Atty X and Relator demonstrate that the City was irreparably prejudiced against the Relator's case from the start, for reasons unexplained.[12] For whatever reason, to assist in the filing of false reports before the court and delay a judicial proceeding simply to wear out a litigant are unacceptable modes of behavior for an entity when evaluating a claim that could bring the City of New York millions of dollars in recovery. Therefore, the City itself should be disqualified, and its Law Department should assess and prosecute what remains of Relator's claims (and the direct claim the City has against the defendants, as described in the complaint,[13] which was presented to Atty X on February 21st, 2017, but never acted on, see *NYC* 4).[14]

IV. The City Should Obtain the IRS File.

As RAY noted, if the defendants paid a 1999 tax deficiency in 2006 based on Relator's submission, then the defendants would be bound to pay any City taxes that should have been paid at the same time.[15] Thus, the Law Department should, with little effort, be able to obtain

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[11] Damages would have been trebled. New York Finance Law § 189(h).

[12] Perhaps a clue could be found in the testimony of an IRS whistleblower before Congress in 2004, describing the shoddy treatment the IRS gave him when he tried to report Enron Tax Fraud. The whistleblower reported that the agents seemed mostly interested in going to work on Wall Street after they left the IRS, and had no interest in exposing Wall Street fraud. A 272 et seq.

[13] https://1drv.ms/u/s!Askt12G2pS2CjIF5eUfynLm2XKPWQA?e=mAG7ZH

[14] As noted above, if the IRS File shows that the Defendants paid the IRS, but did not pay the City or State (fairly certain they never paid the state because they never amended their State returns to reflect a 2006 payment, see A798-80 (1999 State tax returns produced by the Defendants to show a direct claim by Relator against them was time-barred.). If such direct claim could be resolved quickly, the defendants would likely insist that the qui tam case by the Relator against the City (and any future qui tam claims the Relator might bring against the defendants for claims based on New York State returns filed after 2013, which could not be extinguished by res judicata by this litigation since they could not have been brought) would be extinguished by the same settlement. This would permit Relator to receive a percentage reward, which he certainly deserves after nine years of pressing this case, with no assistance from any governmental entity.

[15]It is not clear why the IRS would not have reported the deficiency and payment to New York State, pursuant to certain IRS regulations requiring the same. It is possible that the same

a multi-million dollar recovery on behalf of the City – provided those who have opposed this claim for unknown ulterior motives are barred from participating in its prosecution.[16] Here is a proposed letter to the IRS requesting the file.

I would be pleased to review this letter with you at your convenience.

Sincerely,
/s/Thomas C Willcox
Thomas C Willcox

IRS agents in New York who negotiated the 2006 payment by the defendants gave the defendants a "sweetheart deal" by exchanging a substantial payment for the unpaid federal taxes which could be reported to IRS in DC, for a promise that the Agents would not report the payment to then New York AG Elliot Spitzer, known for his aggression against Wall Street.

[16] 26 USC §6103 prohibits the IRS from disclosing any taxpayer information, with strict penalties for non compliance. However, Subsection (d)(1) permits disclosure of "[r]eturns and return information with . . . shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws":

It is not clear if the City qualifies as a "State Agency". If not, the New York Attorney General may have to make the request.

If the letter cannot be obtained, the City could file a direct case against the defendants and obtain a release from defendants permitting disclosure of the IRS File.