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# New York Supreme Court

## Appellate Division—First Department

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THE PEOPLE OF THE STATE OF NEW YORK,  
by Letitia James, Attorney General of the State of New York,

**Appellate  
Case No.:  
2021-03657**

*Plaintiff-Respondent,*

– against –

SOTHEBY'S, INC.,

*Defendant-Appellant.*

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### NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICUS* AND FILE AN *AMICUS CURIAE* BRIEF

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PLEASE TAKE NOTICE that, upon the affirmation of Steven A. Engel, Esq., dated the 10 of January 2022, and attached hereto as Exhibit A, the undersigned will move this Court, at the courthouse thereof, located at 27 Madison Avenue, New York, NY 10010 on the 18 of January 2022, or as soon as counsel may be heard, for an order granting permission to the Chamber of Commerce of the United States of America to file an *amicus curiae* brief in support of Sotheby's, Inc.'s Brief in the above-referenced matter. A copy of the proposed brief is attached hereto as Exhibit B. A copy of the Notice of Appeal in this action is attached hereto as Exhibit C. A copy of the order sought to be reviewed is attached hereto as Exhibit D.

Dated: January 10, 2022



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# EXHIBIT A

**AFFIRMATION OF STEVEN A. ENGEL, ESQ., IN SUPPORT OF  
MOTION ON BEHALF OF THE CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE**

Steven A. Engel, an attorney duly admitted to practice before the courts of the State of New York, affirms the following to be true under penalty of perjury pursuant to N.Y. C.P.L.R. § 2106:

1. A copy of the brief is attached hereto as Exhibit B.
2. Amicus, the Chamber of Commerce of the United States of America (the “Chamber”), is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community.
3. The Chamber is interested in this dispute between a New York taxpayer and the Office of the New York Attorney General involving the scope of the Attorney General’s authority under the New York False Claims Act to police alleged violations of the New York Tax Law.

4. The Chamber believes the lower court's decision sets a dangerous precedent that threatens the rights of New York taxpayers by allowing the Attorney General to pursue liability under the New York False Claims Act without pleading facts necessary to establish a Tax Law violation.
5. The Chamber is well-suited to provide a unique perspective not fully reflected in Defendant-Appellant's briefing. The Chamber represents many New York taxpayers and has a strong interest in ensuring that the Attorney General adequately pleads New York False Claims Act claims and does not attempt to expand New York False Claims Act liability beyond its proper scope.
6. Appellant's and Respondent's counsel have been notified of this motion, and consent to it.

WHEREFORE, I respectfully request that the Court grant the motion to participate in this appeal as *amicus curiae*.

Dated: January 10, 2022



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*Attorney for Amicus Curiae  
The Chamber of Commerce of the  
United States of America*

# EXHIBIT B

To be Submitted by:  
STEVEN A. ENGEL

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# New York Supreme Court

Appellate Division—First Department

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THE PEOPLE OF THE STATE OF NEW YORK,  
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**BRIEF OF *AMICUS CURIAE* THE CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA  
IN SUPPORT OF DEFENDANT-APPELLANT**

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## **INTEREST OF AMICUS CURIAE**

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber is interested in this case because of its potential implications for businesses in New York that comply in good faith with settled interpretations of the New York Tax Law ("Tax Law"). The Attorney General's Complaint asserts that Sotheby's is liable under the New York False Claims Act ("NYFCA") for an allegedly false tax claim—yet fails to allege facts establishing a Tax Law violation. Sotheby's complied with the Tax Law's requirements, as interpreted by the New York Tax Department. Therefore, its tax records cannot possibly understate an obligation, much less be knowingly false, under the NYFCA. This Court should reject the notion that the Attorney General may threaten treble damages and penalties for a tax liability that does not exist.

The Attorney General's view of the NYFCA would fundamentally undermine the interests of the Chamber and its members in the predictable interpretation and enforcement of the Tax Law. Permitting the Attorney General to seek treble damages and penalties where there is no tax obligation would subvert the State's comprehensive tax regime, disrupt settled expectations, and harm the interests of the Chamber, its members, and all sellers that operate in New York.

### **SUMMARY OF ARGUMENT**

This case concerns whether the Attorney General may rely on the NYFCA to effectively expand the substantive obligations of a seller under the Tax Law. The Attorney General alleges that Sotheby's accepted false resale certificates from a customer and thus submitted false records in violation of the NYFCA. But the Complaint does not seek to recover for any violation of the Tax Law and is premised on a textbook example of circumstances where a company need not collect sales tax.

In New York, businesses who sell goods to customers for resale are not required to collect sales tax. If a customer submits a properly completed resale certificate to the seller, then the seller is relieved from any duty to collect and remit sales tax, so long as the certificate is accepted in good faith. *See* N.Y. Tax Law § 1132(c)(1). The Court of Appeals long ago made clear that merchants do not represent the enforcement arm of the State, and they therefore have no duty to investigate the accuracy of the customer's certificate or to dispel suspicions they

may have about their customers' business. *See American Cyanamid & Chemical Corporation v. Joseph*, 308 N.Y. 259, 262 (1955).

Consistent with this holding, the current tax regulations make clear that the seller acts in good faith so long as it “has no knowledge” that the certificate is false. 20 N.Y.C.R.R. § 532.4(b)(2)(i). To ensure there is no ambiguity, the Tax Department’s regulations provide a specific example to demonstrate that “Ajax Company” would act in good faith upon receiving a certificate from “Brown Manufacturing” where Ajax’s accounting department was “not in a position to determine” the veracity of the certificate and “had no reason to question the [customer’s] claimed exempt status.” *Id.* This is so, even though Ajax had employees who went to the site of Brown’s business to install the equipment in question and may have acquired additional knowledge to suggest that the purchase was not tax exempt. *See id.*

The Attorney General’s Complaint does not allege that Sotheby’s breached this Tax Law standard. Instead, the Attorney General would hold Sotheby’s liable for violating the NYFCA because of the alleged knowledge of a Sotheby’s employee who was not responsible for accepting or submitting the company’s tax returns. Specifically, the Attorney General alleges that a Sotheby’s client representative knew that the customer made the purchases for his own collection, and that such knowledge should be attributed to Sotheby’s, even though the client representative

had no role in preparing Sotheby's tax records. Leaving aside the question of the standard of vicarious liability that may ordinarily apply to the employer's knowledge of a false claim under the NYFCA, the Attorney General's theory is fatally flawed because Sotheby's cannot submit a "false claim" under the NYFCA unless the tax record itself falsely understates Sotheby's tax obligation in the first place.

The Attorney General's NYFCA suit requires proof that the company submitted false records that understated its obligations to the government. *See, e.g., State ex rel. Seiden v. Utica First Ins. Co.*, 96 A.D.3d 67, 71–72 (1st Dep't 2012). The necessary requirement is that Sotheby's had an obligation to pay the sales tax, submitted a return omitting such obligation, and did so knowing that the record was false. Here, the Attorney General skips that critical step by relying on facts that do not support the inference that Sotheby's breached its obligation under the Tax Law. Without facts supporting such a violation, the Complaint simply fails to establish the necessary elements of obligation, falsity, and scienter under the NYFCA.

The Attorney General's theory would not only expand the NYFCA beyond its text, but also undermine the policies underlying the Tax Law. New York's Tax Law reflects a carefully crafted system of substantive and remedial obligations that balance the need for the effective collection of revenue against the burdens to be imposed on merchants in the State. The Tax Law obliges sellers to collect and remit sales tax in the ordinary course, but also permits them to rely on resale certificates



from their customers. Sellers who meet these obligations do not owe any additional taxes, even if it turns out that the customer has submitted a false certificate to avoid his own sales tax liability. In such a case, the Attorney General may pursue unpaid taxes against the customer—as happened in this case—but there is no remedy against the seller, who has complied with its requirements under the law.

In marked contrast with these established principles, the NYFCA is designed to penalize those who commit knowing fraud. To state a claim under the NYFCA, the Attorney General must allege that the defendant “knowingly” made or used a “false claim, record or statement” to avoid an obligation to pay the government. Where the alleged false record is a tax document, a plaintiff must establish that the defendant’s record understated the tax owed to the State. Imposing liability and significant treble damages and penalties under the NYFCA for records that do not violate the Tax Law would undermine the State’s tax regulatory scheme, create significant administrative confusion in New York, and convert the NYFCA from a statute aimed at preventing fraud to one that would retroactively expand a business’s substantive obligations and punish good-faith reliance on existing precedent.

### **STATEMENT OF FACTS**

Sotheby’s is an international auction house based in New York City; it also conducts private sales of fine arts, jewelry and collectibles. Compl. ¶ 20. According to the Complaint, between 2010 and 2015, Sotheby’s sold several pieces of art to a

collector who submitted resale certificates. *Id.* ¶ 58. Relying on those certificates, Sotheby's did not collect sales tax and did not include the transactions on the sales tax returns it submitted to the New York Tax Department ("Tax Department"). *Id.* ¶¶ 1, 78–79, 109, 156. But the collector allegedly did not intend to resell the artwork he purchased, and the complaint alleges (as further specified below) that Sotheby's knew that the resale certificates were false or recklessly disregarded their falsity. *Id.* ¶¶ 78–79, 153. The Attorney General alleges that Sotheby's thus violated the NYFCA by falsely understating its taxable sales "with at a minimum reckless disregard of the falsity of the returns." *Id.* ¶ 156.

The Complaint alleges that Sotheby's had actual knowledge based on interactions between a client manager and the customer. *Id.* ¶¶ 7, 12. The Attorney General alleges that the client manager knew or should have known that the customer did not intend to resell his purchases. *Id.* ¶¶ 118–20. But the Complaint specifically alleges that Sotheby's Client Accounting Department, not the client manager, is "responsible for the review and processing of resale certificates." *Id.* ¶ 45. The resale certificate stated that the customer was an art dealer, *id.* ¶ 8, and there is no allegation that the Client Accounting Department had actual knowledge that this was false. *See id.* ¶ 13. The Complaint likewise does not allege that the Sotheby's tax department, which is responsible for preparing the company's tax returns and submitted the customer's information to the State, operated other than in good faith.

*See, e.g., id.* ¶ 8. In other words, the Sotheby’s employees responsible for accepting the resale certificates and submitting the tax returns relied on the certificates without any knowledge that they were false.

## **ARGUMENT**

### **I. The Attorney General May Not Plead a NYFCA Violation Against Sotheby’s Without Alleging an Underlying Tax Law Violation**

The Attorney General cannot establish a NYFCA claim based on a false tax return without pleading facts that establish the underlying Tax Law violation. Absent a tax violation, the Attorney General has not pleaded that the defendant understated its “obligation” and submitted a “false” tax return, much less that the defendant has done so “knowingly.” N.Y. State Fin. Law § 189(1)(g). To hold otherwise would stretch the NYFCA beyond what its text can reasonably bear and would cause severe and adverse disruption to the administration of the Tax Law.

#### **A. To State a Reverse False Claim Under the NYFCA, the Complaint Must Allege that the Defendant Knowingly Submitted a Claim Understating Its Liability.**

The NYFCA applies to any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government.” *Id.* The penalty for knowingly making a false record or statement ranges between six and twelve thousand dollars, “plus three times the amount of all damages, including consequential damages, which the state or local government sustains because of the

act of that person.” *Id.* § 189(1)(h). In addition, a person who commits a Section 189(1) violation “shall also be liable for the costs, including attorneys’ fees, of a civil action brought to recover any such penalty or damages.” *Id.* § 189(3).

“The typical false claim involves the state paying out money because of a false claim.” *Seiden*, 96 A.D.3d at 71. But a “reverse false claim” under Section 189(1)(g), “involves money *owed* to the government rather than money *paid by* the government . . . .” *United States ex rel. Quartararo v. Catholic Health Sys. of Long Island Inc.*, Civ. No. 12-4425, 2017 WL 1239589, at \*8 (E.D.N.Y. Mar. 31, 2017) (emphasis in original) (describing reverse false claims under the federal False Claims Act and the NYFCA).<sup>1</sup> Such a claim is based on allegations that a person “uses a false record to avoid an obligation to pay the government.” *Seiden*, 96 A.D.3d at 71; *see also Cantrell v. New York Univ.*, 326 F. Supp. 2d 468, 470 (S.D.N.Y. 2004) (“An underreporting of monies owed to the government . . . is often referred to as a ‘reverse false claim.’”) (citation omitted). Because the NYFCA is a fraud statute, plaintiffs must plead their allegations with particularity and heightened detail. *See* N.Y. C.P.L.R. § 3016(b); *Seiden*, 96 A.D.3d at 72.

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<sup>1</sup> Because the NYFCA tracks the federal False Claims Act, New York courts rely on federal caselaw when interpreting the NYFCA. *See Weiner v. City of New York*, 190 A.D.3d 517, 518 (1st Dep’t 2021); *Seiden*, 96 A.D.3d at 71.

The New York legislature amended the NYFCA in 2010 to cover false “claims, records, or statements made under the tax law . . . .” N.Y. State Fin. Law § 189(4)(a). The legislature expanded NYFCA liability to include the Tax Law in order “to ‘provide an additional enforcement tool against those who file false claims under the Tax Law,’ and thus ‘deter the submission of false tax claims’ while also ‘provid[ing] additional recoveries to the State and to local governments.’” *People v. Sprint Nextel Corp.*, 26 N.Y.3d 98, 107 (2015) (quoting Letter from St. Dep’t of Tax. & Fin., Aug. 4, 2010 at 2, Bill Jacket, L 2010, ch. 379 at 13). There is no indication, however, that in expanding the NYFCA to include false tax records, the Legislature sought to expand the substantive scope of obligations under the Tax Law itself.

In prior cases involving false tax claims, plaintiffs, including the Attorney General, have alleged that defendants knowingly understated their Tax Law obligations. *See, e.g., Sprint Nextel Corp.*, 26 N.Y.3d at 107–08 (asserting cause of action under Tax Law for underpayment of sales tax); *State v. Post Integrations, Inc.*, 162 A.D.3d 592 (1st Dep’t 2018) (holding that the complaint alleged that defendants made false statements under the Tax Law); *People v. Starbucks Corp.*, 74 N.Y.S.3d 717 (Sup. Ct. N.Y. Cnty. 2018) (alleging facts supporting Tax Law violation). The pleadings in those cases left no doubt that the plaintiff believed that the defendant had violated the Tax Law.

The Complaint here contrasts markedly with these recent precedents because the Attorney General has neither included a standalone Tax Law cause of action nor pleaded facts supporting such a violation. The Complaint instead alleges facts that do not establish that Sotheby's had an obligation to remit sales tax in the first place.

**B. The Complaint Does Not Allege Facts Supporting a Violation of the Tax Law.**

The Attorney General's theory here departs from the well-established understanding of the Tax Law, which allows sellers to accept resale certificates without investigating their own customers. The Tax Law requires that sales tax be paid on "every retail sale of tangible personal property . . . ." N.Y. Tax Law § 1105(a). Sellers collect the tax from the purchaser "when collecting the price . . . to which it applies" and then remit the sales tax to the State. *Id.* § 1132(a)(1). Although the burden of paying the tax falls upon the purchasers, the Tax Law—in the interest of efficiency and ensuring the collection of the taxes owed—has long required that the sellers charge and collect the tax from the purchasers, and then remit those taxes themselves to the State.

Because the sales tax applies only to retail sales, however, the sellers are not obliged to collect sales tax from purchasers who buy with the intent to resell. In that case, the purchasers submit a "resale certificate," Form ST-120, to the vendor. *See* Tax Department, New York State and Local Sales and Use Tax, Form ST-120,

Resale Certificate, [https://www.tax.ny.gov/pdf/current\\_forms/st/st120\\_fill\\_in.pdf](https://www.tax.ny.gov/pdf/current_forms/st/st120_fill_in.pdf).

In executing the certificate, the purchasers must identify the business in which they are engaged, the products they principally sell, and the specific items to be purchased for resale. *See id.* The purchasers must also include their New York state vendor number or the parallel registration number from another jurisdiction, as applicable. *See id.* In executing the certificate, the purchasers acknowledge that they believe that facts stated in the certificate are true, and that they understand that willfully completing the certificate to evade the sales or use tax may be punished as a felony. *See id.*

The Tax Law makes clear that the submission of a resale certificate does not relieve purchasers from any obligations they may otherwise have to pay the tax, but that it does have that effect on the sellers, who need not collect or remit the customers' sales taxes—so long as the seller does not accept the certificate in bad faith, *i.e.*, with knowledge that it is false. N.Y. Tax Law § 1132(c)(1); 20 N.Y.C.R.R. § 532.4(b)(2). The Court of Appeals recognized long ago that this bad-faith exception is very narrow, because the New York Legislature did not intend to require sellers to investigate their customers in every instance where there was “reason for suspicion or belief that the sales were taxable . . . .” *American Cyanamid*, 308 N.Y. at 262.

In *American Cyanamid*, a chemical company sold several chemicals and acids to buyers in New York City with the knowledge that such products were not typically the kind of products that would be used for resale. *Id.* at 262. In each case, the buyer provided a resale certificate to the company, and the Court recognized that “petitioner did not know the exact uses, did not know that the resale certificates were inaccurate, and made no further investigation.” *Id.* The question then was whether the New York City Comptroller could properly charge the seller with bad faith, since the company had knowledge that gave it good reason to suspect that its customers were not resellers, but made no further inquiry.

The Court recognized that a vendor could not accept a resale certificate with actual knowledge of its falsity, but concluded that the Tax Law did not go any further than that. The sales-tax law, which “goes very far in burdening the vendor by making him an unpaid tax collector for the city, does not, expressedly or impliedly, put on him a duty of investigating or policing his own customers.” *Id.* at 263. The Court refused therefore to expand the Tax Law’s knowledge requirement to impose a duty to investigate. So long as the buyer in fact tendered the resale certificate, and so long as the vendor did not know the certificate to be false, the buyer was not obliged to collect the tax.

The Court of Appeals’ holding in *American Cyanamid* is embodied in current tax regulations, which make clear that a seller who accepts a resale certificate in



“good faith” “is relieved of liability for failure to collect the sales tax with respect to that transaction.” 20 N.Y.C.R.R. § 532.4(b)(2). The regulations instruct that “[a] certificate or other document is ‘accepted in good faith’ when a [seller] has no knowledge that the exemption certificate or other document issued by the [buyer] is false or is fraudulently presented.” *Id.* § 532.4(b)(2)(i).

The Tax Department regulations further provide, consistent with *American Cyanamid*, that private businesses do not serve as an enforcement arm of the government, and therefore cannot be expected to police Tax Law violations or to investigate their customers. To assist sellers in understanding the scope of these obligations, the regulations include specific examples, one of which tracks the facts alleged in this case.

Example 2 describes a sale by Ajax company to Brown Manufacturing of machinery and equipment that Brown could use either to produce or to distribute goods for sale. *Id.* Ajax must collect sales tax if Brown will use the equipment for production, but not if it will use the equipment for distribution, which is considered equivalent to a resale use. In the example, Ajax sends an installation crew to assemble the equipment on site, which would give those Ajax employees some information concerning Brown’s intended uses. Although Brown does not intend to use the equipment for production, it nonetheless submits an exemption certificate to

Ajax's accounts receivable department, and Ajax therefore does not collect sales tax from Brown. *Id.*

Example 2 provides that Ajax shall be deemed to have accepted the certificate in good faith, because “[t]he Ajax company’s Accounts Receivable Department . . . was not in a position to determine whether or not the machinery and equipment was really being used in the production of tangible personal property for sale and had no reason to question the claimed exempt status.” *Id.* This is true even though other Ajax personnel, the installation crew, had knowledge that would bear upon the question. When it comes to the Tax Law, the relevant knowledge is that of the accounting personnel who may rely upon their customer’s certification, and there is no free-floating duty to investigate a customer or a knowledge requirement extending to the company as a whole.

If the Attorney General were to proceed against Sotheby’s here under the Tax Law, then Example 2 should effectively preclude any claim. The Attorney General here alleges that one Sotheby’s employee had reason to question the good faith of the collector, but the accounting and tax personnel who accepted the certificate and submitted Sotheby’s tax documents did not. The Attorney General alleges that Sotheby’s acted “with at a minimum reckless disregard of the falsity of the returns,” Compl. ¶ 156, but that standard is not sufficient under the Tax Law. *American*

*Cyanamid*, 308 N.Y. at 262. Separate then from the NYFCA, the Attorney General does not allege facts that would support a separate violation of the Tax Law.

**C. Absent Facts Supporting a Tax Law Violation, the Complaint Fails to State a Claim.**

Because the NYFCA does not expand the substantive scope of a taxpayer's obligations, the Complaint cannot plead a NYFCA violation without establishing the underpayment of taxes in violation of the Tax Law. Absent facts supporting a Tax Law claim here, the Complaint cannot plead the necessary elements of a reverse false claim under the NYFCA: (1) an "obligation" to pay the government; (2) falsity; and (3) scienter.

**1. Absent Proof of a Tax Law Violation, the Attorney General Cannot Show that Sotheby's Had an "Obligation" to Pay the State Under the NYFCA**

This Court has recognized that a reverse false claim requires a showing that the defendant had "an obligation" to pay or transmit money to the government. *See Seiden*, 96 A.D.3d at 71. Indeed, the text of the statute explicitly requires "an obligation to pay or transmit money" to the State. N.Y. State Fin. Law § 189(1)(g). The Complaint here is premised upon Sotheby's supposed "obligation" to collect

and pay sales tax. Because the Tax Law imposes no such “obligation” in this case, the Attorney General fails to state a reverse false claim under the NYFCA.

The NYFCA defines “obligation” as “an established duty, whether or not fixed, arising . . . from statute or regulation . . . .”<sup>2</sup> N.Y. State Fin. Law § 188(4). Consistent with that definition, federal courts have recognized that “an ‘obligation’ refers to one existing at the time of the improper conduct to pay the Government funds . . . .” *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 506 (3d Cir. 2017); *see United States ex rel. Barrick v. Parker-Migliorini Int’l, Inc.*, 878 F.3d 1224, 1231 (10th Cir. 2017). So a duty to pay under the False Claims Act “must be formally ‘established’ before liability can arise.” *United States ex rel. Grubea v. Rosicki, Rosicki & Assocs.*, 318 F. Supp. 3d 680, 703 (S.D.N.Y. 2018) (citation omitted). Courts have similarly acknowledged that an “obligation” under the federal False Claims Act “must arise from some independent legal duty.” *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1195 (10th Cir. 2006).

In determining whether the Attorney General adequately pleaded an obligation under the NYFCA, the Court must first look to Sotheby’s “established duty” under the relevant “statute” or “regulation . . . .” N.Y. State Fin. Law § 188(4); *see Starbucks*, 74 N.Y.S.3d at 725–26. But as discussed *supra*, Sotheby’s

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<sup>2</sup> The federal False Claims Act includes the same definition. 31 U.S.C. § 3729(b)(3).

would have an obligation under the Tax Law to collect and remit taxes only if it had actual knowledge that the collector's resale certificates were false. N.Y. Tax Law § 1132(c)(1); 20 N.Y.C.R.R. § 532.4(b)(2).

By failing to plead facts establishing such knowledge, the Attorney General has failed to establish an "independent legal duty" giving rise to an "obligation" under the NYFCA. *See Conagra*, 465 F.3d at 1195. Absent those facts, the Attorney General fails to establish the requisite "duty to pay" under the NYFCA, *see Grubea*, 318 F. Supp. 3d at 703, and thus cannot establish a statutory duty sufficient to invoke an obligation under the NYFCA.

**2. Absent Proof of a Tax Law Violation, the Attorney General Cannot Show that Sotheby's Tax Returns were "False"**

The Attorney General's failure to allege a violation of the Tax Law also means that the Complaint has not alleged that Sotheby's submitted a "false" record. The *False Claims Act* requires a showing that the defendant relied on "a false record or statement" to understate its obligation to pay money to the State. N.Y. State Fin. Law § 189(1)(g). But absent a showing that Sotheby's inaccurately stated the taxes it was obliged to collect under the Tax Law, there can be no "false" statement at all. *Cf. Thulin v. Shopko Stores Operating Co.*, 771 F.3d 994, 1000 (7th Cir. 2014) (no falsity where defendant's statement complied with Medicaid regulations); *United States ex rel. Hockman v. Nackman*, 145 F.3d 1069, 1075 (9th Cir. 1998) (no falsity

where defendant's conduct conformed to government's guidance); *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 608 (8th Cir. 1992) (statement is not false under FCA when it is consistent with Medicare regulations); *cf. United States ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88, 94 (3d Cir. 2009) (recognizing that plaintiff may plead falsity under FCA by alleging knowing and willful violations of the Anti-Kickback Act).

Although this conclusion flows from the text of the statute, it also reflects how the Court of Appeals approached the same question in *Sprint Nextel Corp.* There, the Attorney General alleged that Sprint violated the NYFCA by “knowingly submit[ing] false tax statements . . . .” 26 N.Y.3d at 108. In evaluating the NYFCA claim, the Court's analysis turned heavily upon the underlying tax law question. The Court considered the plain language of the Tax Law and the prevailing regulatory interpretations, closely considering whether the Attorney General had alleged that Sprint's tax records falsely understated its obligation. *Id.* at 110. The Court ultimately concluded that the Attorney General had adequately alleged that Sprint underreported its taxable sales. *Id.* at 113. The falsity of the records under the NYFCA was premised entirely on Sprint's alleged Tax Law violation. *Id.* at 110–13.

In contrast with *Sprint Nextel Corp.*, the Attorney General here does not allege a Tax Law violation and in fact asserts a theory that runs directly contrary to the Tax

Department's prevailing regulatory interpretation. *See supra* at 13–15. The Attorney General therefore has not established that Sotheby's resulting tax returns were "false" within the meaning of the NYFCA.

### **3. Absent Proof of a Tax Law Violation, the Attorney General Cannot Show Scienter**

The Attorney General fails to plead that Sotheby's acted with the requisite scienter under the NYFCA because, absent a Tax Law violation, Sotheby's tax returns could not have been "knowingly false." The NYFCA defines "knowingly" under the statute to require a showing of actual knowledge of falsity, reckless disregard for the truth, or deliberate ignorance. N.Y. State Fin. Law § 188(3)(a)(i)–(iii). But that scienter is applied to the falsity of the tax records in question. If the allegations do not establish a Tax Law violation, then Sotheby's tax returns could not have been false and, a fortiori, Sotheby's could not have known them to be so.

A record cannot be "knowingly false" when it is entirely true. Here, Sotheby's complied with the Tax Law because the resale certificates relieved it of any obligation to collect and remit the sales tax. Although the Sotheby's customer may have submitted those resale certificates fraudulently, that fraud cannot be imputed to Sotheby's. The accounting department accepted the resale certificates in good faith, and that was all the Tax Law requires. *See* N.Y. Tax Law § 1132(c)(1); 20 N.Y.C.R.R. § 532.4(b)(2); *American Cyanamid*, 308 N.Y. at 262. Since the

Attorney General fails to allege that Sotheby's submitted false records, then Sotheby's plainly could not have known them to be false.

The Attorney General seeks to plead scienter by conflating Sotheby's knowledge of its tax obligations with the knowledge of non-tax employees concerning whether the customer was a reseller. *See, e.g.*, Compl. ¶¶ 10, 70, 72. But no matter whether the knowledge of the client manager may be vicariously attributed to Sotheby's for some purposes under the law, it plainly cannot be attributed to Sotheby's under the Tax Law because the client manager did not prepare the company's accounting and tax records. *See supra* at 6–7.

Because the Attorney General fails to plead falsity with respect to Sotheby's tax returns, Sotheby's cannot have “known” them to be false. Accordingly, the Complaint fails to allege that Sotheby's acted with the scienter necessary to violate the NYFCA.

**D. Permitting the Attorney General to Pursue NYFCA Claims Without an Underlying Tax Law Violation Would Threaten to Significantly Disrupt Businesses in New York.**

The Attorney General's position would impose onerous investigative obligations on businesses, undermining the well-wrought regime that obliges businesses to collect sales taxes in the normal course, but allows them to rely in good



faith on their customers' resale certificates. The position would also subvert years of caselaw and the historical enforcement of the NYFCA.

**1. Allowing the Attorney General's NYFCA Claim to Proceed Absent a Tax Law Violation Would Impose Onerous Obligations on Businesses**

For decades, New York courts and the Tax Department have affirmed the principle that vendors may accept resale certificates from customers in good faith without investigating the sincerity of the customer's tax exemption claim. The law places the burden on a purchaser to accurately determine and declare its tax obligation to a vendor. Businesses throughout the State have structured their operations based on these well-established principles.

As discussed above, the Court of Appeals in *American Cyanamid* confirmed over 65 years ago that a vendor lacks the obligation to investigate the veracity of resale certificates. The Court noted that the Tax Law is "to be construed in favor of the taxpayer and against the taxing authority, and the burdens [it] impose[s] are not to be extended by implication." *American Cyanamid*, 308 N.Y. at 263; *see also Quotron Sys. Inc. v. Irizarry*, 48 N.Y.2d 795, 797 (1979).

New York courts have similarly relied on *American Cyanamid* for decades. *See, e.g., Saf-Tee Plumbing Corp. v. Tully*, 77 A.D.2d 1, 4 (3d Dep't 1980) (a "vendor should not be required to police or investigate his customers"); *RAC Corp. v. Gallman*, 39 A.D.2d 57, 60–61 (3d Dep't 1972) ("[T]his sales tax has been

categorized as a special tax whose provisions, in circumstances such as these, must be strictly construed in favor of the taxpayer . . . . The vendor is not required to police or investigate his customers.”). And so has the Tax Department. *See Carolyn Mazzenga, CPA*, TSB-A-01(1)S, 2001 WL 124978, at \*4 (N.Y. Dep’t Tax. Fin. Jan. 10, 2001) (when a vendor “accepts a resale certificate in good faith, it is under no duty to investigate or police its customers or to debate the taxability of the sales with such customers”). If vendors now may face NYFCA liability for accepting resale certificates based on a broader set of circumstances than under the Tax Law, then vendors would have no choice but to alter their operations to investigate their customers.

Imposing this obligation on vendors would not only be highly disruptive to settled expectations, but it would be made much worse because the NYFCA is a punitive statute as well as a compensatory one. The Attorney General here not only seeks to expand liability under the Tax Law by implication, in contravention of *American Cyanamid*, but to do so by relying on a statute that threatens “three times the amount of all damages,” plus additional penalties, and includes attorneys’ fees. N.Y. State Fin. Law § 189(1)(h). Exposing businesses to such onerous penalties would seriously disrupt established practices. If the New York Legislature wants to require vendors to investigate their customers, then it has the prerogative to amend the Tax Law. But unless and until the Legislature changes the law, the Attorney

General should not be permitted to penalize vendors under the NYFCA where the vendor has accepted resale certificates in good faith.

**2. The Attorney General’s NYFCA Claim Would Subvert the Tax Department’s Regulatory Authority and Undermine the State’s Tax Enforcement Mechanism**

The Attorney General’s NYFCA claim also threatens to interfere with businesses’ ability to rely on the Tax Department’s interpretation of the Tax Law. The Court of Appeals has recognized that “[i]nterpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.” *Moran Towing & Transp. Co. v. New York State Tax Comm’n*, 72 N.Y.2d 166, 173 (1988) (citation omitted). Understandably, then, businesses look to the Tax Department’s regulations to understand their obligations under the Tax Law.

As discussed above, the Tax Department’s regulations and guidance concerning the sales-tax regime are detailed and include specific examples to assist taxpayers in understanding their obligations. *See* 20 N.Y.C.R.R. § 532.4(b)(2)(i). Under the Attorney General’s view, however, the Attorney General—and private qui tam plaintiffs—could assert NYFCA claims that do not align with Tax Department regulations. Permitting case-by-case adjudication on such a NYFCA

theory would undermine businesses' ability to rely upon the Tax Department's authoritative guidance on the scope of their obligations, to the detriment of predictability and fundamental fairness. *See United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 702 (4th Cir. 2014) ("When an agency has broad powers to enforce its own regulations . . . allowing FCA liability based on regulatory non-compliance could short-circuit the very remedial process the Government has established to address non-compliance with those regulations.") (citation and quotation marks omitted).

In addition, permitting NYFCA claims absent a Tax Law violation would further undermine taxpayers' ability to rely upon administrative remedies when it comes to interpretive disagreements with the Tax Department. *See* N.Y. Tax Law §§ 601–1150. These administrative procedures have been carefully crafted to balance the differing interests of taxpayers and the State in resolving such a dispute through each step.

Notably, the Tax Law contains a detailed administrative scheme that permits a fair adjudication where the taxpayer adopts a reasonable interpretation of the Tax Law that differs from the Tax Department. *See* 101 N.Y. Jur. 2d Taxation and Assessment § 1917 (recognizing that "[q]uestions regarding sales and use tax liability are generally resolved either by the assessment of tax" or by the taxpayer's "filing of an application for a refund of taxes"). This administrative process allows

the Tax Department to pursue alleged underpayments while protecting taxpayers' right to take a reasonable, good faith position different from the Tax Department's. *See, e.g.*, N.Y. Tax Law §§ 1138, 1139.

For example, where the Tax Department determines that a taxpayer failed to collect sales tax due, it can “assess, determine, revise and readjust” the taxes imposed. *Id.* § 1142(6). A taxpayer who disagrees with the Tax Department's assessment may either seek a refund, *id.* § 1139, or appeal to the Division of Tax Appeals. *Id.* § 1138(a)(1). If the taxpayer is unhappy with the Division of Tax Appeals' decision, it may seek review by the Tax Appeals Tribunal, *id.* §§ 1138(4), 2006(7), 2008(1), and ultimately in the courts. *Id.* § 2016; N.Y. C.P.L.R. § 7803. This administrative process allows the Tax Department to recover taxes owed while protecting taxpayers who erroneously, but reasonably, assess their obligations under the Tax Law. *See, e.g.*, N.Y. Tax Law § 1145(a)(1)(iii) (reducing Tax Law penalties when underpayment is “due to reasonable cause,” not “willful neglect”).

The NYFCA, on the other hand, targets knowing fraud. Unlike the State's tax enforcement regime, the NYFCA punishes knowingly false statements or records, not reasonable mistakes under the Tax Law. N.Y. State Fin. Law § 189(1)(g). Indeed, the legislative history of the statute expressly recognizes this difference between New York's tax enforcement system and NYFCA liability, saying that the legislature's objective in extending the NYFCA to false tax claims was “to authorize

actions under the False Claims Act alleging tax fraud . . . .” Assembly Mem. in Support, Bill Jacket, L 2010, ch. 379 at 5. Here, even if the Attorney General adequately pleaded a Tax Law violation, that violation was the result of a reasonable mistake, not fraud. *See* 20 N.Y.C.R.R. § 2392.1(g)(2)(i) (providing that Tax Law violations based on a “misunderstanding of fact or law” are subject to reduced penalties). The NYFCA is not the appropriate mechanism for enforcing the Tax Law in cases, like this one, where any potential Tax Law violation is not based on a knowing falsity or fraud.

The Attorney General has not alleged that Sotheby’s has violated the Tax Law. But to the extent that there was any argument in that regard, the company would ordinarily be able to rely upon administrative remedies to adjudicate its responsibility. *See Sprint Nextel Corp.*, 26 N.Y.3d at 113 (“[t]he FCA is certainly not to be applied in every case where taxes were not paid”). The Attorney General’s position would deprive Sotheby’s of that opportunity by forcing the company to defend an NYFCA action prior to availing itself of the administrative remedies available to taxpayers.

### **3. The Attorney General’s NYFCA Action Seeks Larger Penalties for Less Culpable Conduct**

The Attorney General’s effort to pursue a NYFCA claim without facts alleging an underlying violation of the Tax Law would have the counter-intuitive

result of allowing the Attorney General to pursue harsher penalties for less culpable conduct. As discussed above, the Tax Law permits accepting resale certificates absent “actual knowledge” of falsity. N.Y. Tax Law § 1132(c)(1); 20 N.Y.C.R.R. § 532.4(b)(2). Yet the Attorney General may satisfy the NYFCA’s “knowledge” requirement by pleading not just actual knowledge, but also reckless disregard or deliberate ignorance. N.Y. State Fin. Law § 188(3)(a)(i)–(iii). Thus, when it comes to resale certificates, the NYFCA effectively requires a lower scienter than the Tax Law. Indeed, that is likely why the Attorney General has pleaded only a NYFCA claim and not one premised under the Tax Law.

But that lower scienter requirement does not translate into lower penalties. The NYFCA is a punitive statute, which seeks to deter and punish fraud. *See, e.g., United States v. Sforza*, 326 F.3d 107, 113 (2d Cir. 2003) (“The FCA does allow . . . for the deterrence of fraud by including treble damages.”). Thus, the NYFCA imposes significantly harsher penalties—treble damages—than the Tax Law. *Compare* N.Y. State Fin. Law §§ 189(1)(h), (3) *with* N.Y. Tax Law § 1145(a)(1)(i)–(iii). In Sotheby’s case, for example, had the State pursued the unpaid sales taxes under the Tax Law, it would be entitled, at most, to the tax due, plus a thirty-percent penalty and interest. N.Y. Tax Law § 1145(a)(1)(i)–(ii).

The New York Legislature plainly did not intend to impose higher penalties for reckless conduct under the NYFCA than it did for actual knowledge under the

Tax Law. This discrepancy, however, disappears if the Attorney General must plead facts establishing an actual violation of the Tax Law to recover for false tax claims under the NYFCA. In such a case, the Attorney General may rely upon the NYFCA to recover for those who knowingly or recklessly submit false tax claims in violation of the Tax Law, and it may rely upon the Tax Law for the more typical cases where a taxpayer fails to pay the full amount of required taxes. This is plainly how the New York Legislature intended the NYFCA to interact with the Tax Law, and the Attorney General should not be able to evade its requirements here.

### **CONCLUSION**

The Chamber respectfully submits that the lower court's decision should be reversed.



Dated: New York, NY  
January 10, 2022

Respectfully submitted,



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Steven A. Engel

Peter J. McGinley (*application for  
admission pro hac vice pending*)

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## **PRINTING SPECIFICATIONS**

The foregoing brief was prepared on a computer and meets the following printer specifications pursuant to 22 N.Y.C.R.R. § 1250.8(j):

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# EXHIBIT C

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

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	:	Index No. 452192/2020
THE PEOPLE OF THE STATE OF NEW YORK,	:	
by LETITIA JAMES, Attorney General of the	:	Honorable Andrew Borrok
State of New York,	:	IAS Part 53
Plaintiff,	:	
	:	
- against -	:	<b>NOTICE OF</b>
	:	<b><u>APPEAL</u></b>
SOTHEBY'S, INC.,	:	
Defendant.	:	
	:	
	:	

-----X

PLEASE TAKE NOTICE that Plaintiff hereby appeals to the Appellate Division of the Supreme Court for the First Judicial Department from the decision and order of the Supreme Court, New York County, dated September 27, 2021, insofar as that decision and order denied Plaintiff's motion to dismiss.

Dated: New York, NY  
September 30, 2020

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# Supreme Court of the State of New York

## Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

<b>Case Title:</b> Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance	
THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York  <div style="text-align: center;">- against -</div> SOTHEBY'S, INC.		Date Notice of Appeal Filed	
		For Appellate Division	
<b>Case Type</b>	<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration  <input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<b>Filing Type</b>	
	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review	
<b>Nature of Suit:</b> Check up to three of the following categories which best reflect the nature of the case.			
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input checked="" type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input checked="" type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Informational Statement - Civil

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: <b>Supreme Court</b>	County: <b>New York</b>
Dated: <b>09/27/2021</b>	Entered: <b>September 27, 2021</b>
Judge (name in full): <b>HON. ANDREW BORROK</b>	Index No.: <b>452192/2020</b>
Stage: <input checked="" type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.	
This appeal is taken from the decision and order denying Defendant-Appellant's motion to dismiss the complaint.	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The decision and order of the Supreme Court should be reversed on the following grounds:

1. The Supreme Court erred in failing to hold that there can be no liability under the False Claims Act where the complaint failed to adequately allege an obligation to collect sales tax
2. The Supreme Court erred in failing to hold that the complaint failed to adequately allege falsity
3. The Supreme Court erred in failing to hold that the complaint failed to adequately plead vicarious liability

**Party Information**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	SOTHEBY'S, INC.	Defendant	Appellant
2	THE PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK	Plaintiff	Respondent
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## Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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E-mail Address:

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E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):



# EXHIBIT A

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

-----X  
: Index No. 452192/2020  
THE PEOPLE OF THE STATE OF NEW YORK, :  
by LETITIA JAMES, Attorney General of the : Honorable Andrew Borrok  
State of New York, : IAS Part 53  
Plaintiff, :  
: **NOTICE OF**  
- against - : **ENTRY**  
SOTHEBY’S, INC., :  
Defendant. :  
:   
-----X

PLEASE TAKE NOTICE that there is annexed hereto a true copy of a decision and order that was entered in the office of the Clerk of New York County on September 30, 2021.

Dated: New York, NY  
September 30, 2021

KRAMER LEVIN NAFTALIS & FRANKEL LLP  
Attorneys for Plaintiff

By /s/ Barry H. Berke  
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New York, NY 10005  
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# EXHIBIT A

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

PRESENT: HON. ANDREW BORROK PART 53

*Justice*

-----X

THE PEOPLE OF THE STATE OF NEW YORK, BY  
LETITIA JAMES, ATTORNEY GENERAL OF THE STATE  
OF NEW YORK

Plaintiff,

- v -

SOTHEBY'S, INC.,

Defendant.

-----X

INDEX NO. 452192/2020  
MOTION DATE 12/18/2020  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for DISMISS.

The motion to dismiss must be denied because it is predicated on the mistake that Sotheby's, Inc. (Sotheby's) would not face liability under the False Claim Act (the FCA; State Finance Law, Art. 13 § 188[3][a][ii]) when it allegedly not only willfully turned a blind eye to whether an auctioned item was purchased for resale by bifurcating the Client Accounting Department (which reviewed the resale certificates and was not in a position to know if the resale certificates were accurate) from other Sotheby's employees who had the client relationships and possessed actual knowledge (State Finance Law, Art. 13, §§ 188[3][i] and [ii]) that the resale certificates were, in fact, false but also by actively conspiring with the collector to knowingly conceal or knowingly and improperly avoid and decrease the obligation to pay or transmit money to the State through the use of false resale certificates:

[A]ny person who:

(h) knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or *conspires to do the same*;

(FSA, § 189[1][h] [emphasis added]).

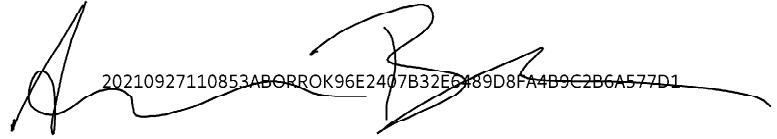
To wit, among other things, the well pled complaint alleges that certain Sotheby's employees recommended the use of and "even partially completed" resale certificates for their clients and requested that Client Accounting "zero out" sales tax from all invoices associated with the purchases with these false resale certificates (NYSCEF Doc. No. 1, ¶¶ 56, 64-66, 110-112). It is of no moment that the tax statute may also impose penalties because, on the record before the court, nothing suggests that liability for the presentation of false resale certificates in connection with the failure to collect certain sales tax was limited to liability under the tax law. In addition, it is unequivocal that Sotheby's has an obligation to collect sales tax unless a proper resale certificate is presented. Moreover, Sotheby's cannot disclaim liability merely because only 29 of its over 1000 employees are alleged to have had actual knowledge of the conceit, particularly because it is the Key Client Manager and the Senior Specialist who would have had, and, as alleged, did have, actual knowledge of the false resale certificates, as, among other facts alleged in the complaint, they viewed the collector's purchases on display for personal use at his apartment (*id.*, ¶¶ 139-140). Finally, the complaint sufficiently alleges that Sotheby's taxable sales were falsely stated because they excluded sales with the false resale certificates (*id.*, ¶¶ 156-57). The court has considered Sotheby's remaining arguments and considers them unavailing.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the defendant is directed to file an answer within 20 days of this decision and order; and  
it is further

ORDERED that the parties appear for a preliminary conference in Part 53, by remote means, on October  
26, 2021 at 11:30 AM.



20210927110853ABORROK96E2407B32E6A89D8FA4B9C2B6A577D1

9/27/2021  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

# EXHIBIT D

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NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART 53

*Justice*

-----X

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OF NEW YORK

Plaintiff,

- v -

SOTHEBY'S, INC.,

Defendant.

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INDEX NO. 452192/2020  
MOTION DATE 12/18/2020  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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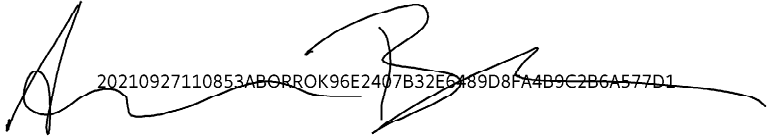
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9/27/2021  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>			