No. _____

In The
# Supreme Court of the United States

SERAFIM GEORGIOS KATERGARIS,

*Petitioner*,

v.

CITY OF NEW YORK,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In 2021, Petitioner discovered that New York City had issued him a notice of violation in 2015. When he filed this lawsuit to challenge the constitutionality of the underlying penalty, the City invoked the federal common law mailbox rule to argue that the courts must presume that the City mailed the notice in 2015, and that Petitioner received it then, making the lawsuit untimely.

The mailbox rule presumes that a letter placed in the mail is promptly received. To trigger the presumption, the mailer provides evidence that he placed the letter in the mail. The burden then shifts to the addressee to rebut the presumption of receipt. Most circuits that have considered the issue hold that an addressee's sworn denial of receipt is sufficient to rebut the presumption and create a triable issue of fact. The Second Circuit, by contrast, holds that a sworn denial alone is insufficient rebuttal evidence. Unlike other circuits, the Second Circuit requires an addressee to produce other evidence of non-receipt—evidence that rarely exists. In addition to splitting with its sister circuits, the Second Circuit's approach is also at odds with the way evidentiary presumptions work under this Court's precedent and Federal Rule of Evidence 301. The Second Circuit's approach conflicts with these federal authorities because it derives from a state-law rule, not a federal standard.

The question presented is whether, under the mailbox rule, a sworn denial of receipt creates a triable question of fact that rebuts the presumption of receipt.

## RELATED PROCEEDINGS

U.S. District Court for the Southern District of New York:

*Katergaris* v. *City of New York*, No. 22-cv-7400. Judgment entered June 25, 2024.

U.S. Court of Appeals for the Second Circuit:

*Katergaris* v. *City of New York*, No. 24-1889. Judgment entered April 15, 2025.

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## PETITION FOR A WRIT OF CERTIORARI

Serafim Georgios Katergaris petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the circuit court, App. 1a–8a, is unreported but available as *Katergaris* v. *City of New York*, 2025 WL 1129197 (2d Cir. Apr. 15, 2025). The order of the district court, converting the government's motion to dismiss to a motion for summary judgment, App. 40a–43a, is unreported and has no citation (S.D.N.Y. July 17, 2023). The opinion of the district court, granting the government summary judgment, App. 9a–39a, is unreported but available as *Katergaris* v. *City of New York*, 2024 WL 3104629 (S.D.N.Y. June 24, 2024).

## JURISDICTION

The Second Circuit entered its opinion below on April 15, 2025. Justice Sotomayor granted a 30-day extension of the period for filing this petition, making it due on August 13, 2025. Petitioner timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND CODE PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment to the U.S. Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend XIV.

Two provisions of New York City law, N.Y.C. Admin. Code § 27-793 and 1 R.C.N.Y. § 103-01, are reproduced in the appendix to this petition. App. 46a–60a.

## INTRODUCTION

The mailbox rule is supposed to be nothing more than an inference of fact that allows courts to presume that mail typically gets to its intended recipient on time. Since its creation, it has not acted as an ironclad conclusion in the face of evidence to the contrary. Yet that is what the Second Circuit has transformed the rule into: a conclusion that the sender must win unless the supposed recipient can prove a negative. This approach conflicts with this Court's consideration of the mailbox rule, the Federal Rules of Evidence, and the approach taken by most courts of appeals that have reached the issue. The Second Circuit's approach erects a nearly irrebuttable presumption that a letter was received. It does so in the financial capital of the world, while Delaware, America's incorporated business capital, allows recipients to meaningfully challenge the presumption. The majority rule allows addressees to present conflicting evidence to a factfinder. The Second Circuit's rule does not. This Court should resolve the split.

## STATEMENT OF THE CASE

### A. Legal background

#### *1. Mailbox rule*

Though there is "no federal general common law," *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), as with most rules, there are exceptions. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (discussing the "federal common law"); see also *Tex. Indus. Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). One such exception is the longstanding federal common law mailbox rule. Under that rule, a "properly directed" letter that is "proved to have been either put into the post-office or delivered to the postman," is presumed to have "reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal* v. *Walker*, 111 U.S. 185, 193 (1884). It "is not a conclusive presumption of law," but rather a "mere inference of fact" that may be rebutted. *Id.* at 193–94. In the face of opposing evidence, the jury must determine whether the letter was received considering the "circumstances of the case." *Ibid.*

The presumption operates simply. A party triggers the rule's application by demonstrating that they mailed a letter. Evidence of mailing can come in the form of a receipt, such as what one receives when sending a letter by certified mail. *Santana Gonzalez* v. *Att'y Gen.*, 506 F.3d 274, 278 (3d Cir. 2007). It may also appear in a sworn statement from the mailer that they did, in fact, mail it. *Lupyan* v. *Corinthian Colls. Inc.*, 761 F.3d 314, 319–20 (3d Cir. 2014). Or a sworn statement by someone with personal knowledge of the

sender's regular mailing procedures. *Custer* v. *Murphy Oil USA, Inc.*, 503 F.3d 415, 420 (5th Cir. 2007). Once the presumption applies, the burden shifts to the party claiming non-receipt to rebut the presumption with their own evidence. In some circuits, a sworn denial of receipt by the supposed recipient raises a triable question of fact. The Second Circuit, by contrast, requires more than denial. This split is the heart of this petition.

*2. New York City boiler inspections*

New York City requires homeowners who heat their homes with boilers to have their boilers inspected annually by an approved inspector. N.Y.C. Admin. Code § 27-793(b)(1); 1 R.C.N.Y. § 103-01.[1] Following the inspection, the homeowner informs the City of its completion and provides a signed copy of the inspection report. N.Y.C. Admin. Code § 27-793(c)(1). All inspection reports must be filed with the City within 45 days of the inspection. 1 R.C.N.Y. § 103-01(c)(1).

A homeowner who fails to timely file a report faces a penalty of at least $1,000. 1 R.C.N.Y. § 103-01(f)(1). The City does not assess penalties for failure to file a boiler report soon after year's end, however. Rather, the City was 15 months behind for the year relevant to Petitioner, sending out notices of violation for failure to file a report in the 2013 calendar year in March 2015. C.A. JA-85, 179. This delay creates a problem for new purchasers, as violations do not appear in the

[1] The discussion of the code and rules, along with their text in the appendix, references those effective in April 2021, when Mr. Katergaris first learned of the boiler violation and sought relief from it. Some changes have occurred since.

title search or as a lien until the City issues the violation. So, someone who purchases a home from an owner who failed to file a report the previous year may discover this only after they have purchased the property—with the violation becoming theirs to resolve.

A homeowner could challenge the penalty by showing that they had the boiler inspected and filed the report on time, i.e., that the City made a paperwork error. 1 R.C.N.Y. § 103-01(f)(3). Even then, the decision to dismiss or uphold the penalty was at the City's sole discretion. *Ibid.* Alternatively, a homeowner could request that the City waive the penalties if they fall into one of a handful of specific, narrow circumstances, none of which apply here. 1 R.C.N.Y. § 103-01(f)(5). Waiver was not available for a regular owner like Petitioner. *Ibid.* Again, relief is available only under the City's unbridled discretion. No hearing or appeal is available. C.A. JA-51.

**B. Facts and procedural history**

1. Petitioner purchased a home with his then-wife on 132nd Street in Harlem in November 2014, which he sold in June 2021 (the "Property"). App. 62a. The home used to have a boiler for which the then-owner should have filed a boiler inspection report for the 2013 calendar year by early 2014. C.A. JA-56–57. The previous owner renovated the Property, including removing the boiler, before selling it to Petitioner. C.A. JA-57. While under contract to buy the Property, Petitioner and his then-wife reviewed the title report, which gave no indication of a missing inspection report for a boiler the house no longer had. C.A. JA-57. The sale closed without either new owner having any

knowledge that a previous owner had failed to file an inspection report the previous year. C.A. JA-57.

Several months later, in 2015, the City purportedly issued a notice of violation to Petitioner regarding the failure of the previous owner to file a boiler inspection report for the 2013 calendar year. C.A. JA-58. Neither Petitioner nor his then-wife ever received the notice of violation from the City. App. 64a. Rather, the first they learned of it was when they contracted to sell the Property to a third party in 2021. App. 63a, C.A. JA-60. Upon learning of the notice of violation, Petitioner sought to resolve it, first by requesting a waiver. The City refused: "Property is not tax exempt and new owner inherits any violations/potential violations issued before new ownership. See RCNY 103-01 for more info." C.A. JA-61. The City did not provide him with a hearing and gave him no opportunity to appeal. *Ibid*. Wanting to close on the sale of his house, Petitioner paid the violation under protest. *Ibid*. He asked several departments at the City to return his money and requested a hearing, but each time the City refused. C.A. JA-62–64.

2. Frustrated with the City's insistence that he pay for a violation for which he bore no responsibility and its refusal to provide any opportunity to challenge the penalty in front of a neutral arbiter or on appeal, Petitioner filed suit. He brought a putative class action under 42 U.S.C. 1983 that invoked the district court's federal-question and civil-rights jurisdiction under 28 U.S.C. 1331, 1343. The case raised one cause of action: a violation of the procedural component of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. C.A. JA-47–49.

Respondent moved to dismiss, arguing in part that Petitioner's suit was untimely, as it was not brought within three years of the March 3, 2015 notice of violation, the limitations period for civil rights claims in New York. Recognizing the need for facts, the district court converted the motion to one for summary judgment and sent the parties to conduct discovery on the issue of timeliness. App. 41a–43a.

Discovery showed that the City contracted out the mailing of boiler violations to a third-party contractor, Vanguard, which itself contracted out the mailing of boiler violations to yet another contractor, AST. C.A. JA-790–91. Indeed, the City was unaware that AST was involved in the mailing at all. In that regard, Respondent elicited testimony from a City employee and an employee of Vanguard, but no one from AST.

Respondent moved for summary judgment. It invoked the mailbox rule to argue that the three-year statute of limitations began to run in 2015, when the notice of violation was allegedly mailed, which made Petitioner's 2022-filed lawsuit untimely. It initially testified that Vanguard mailed out the notices itself, *e.g.*, C.A. JA-41, before shifting to a passive-voice description of the mailings without saying who made them, *e.g.*, C.A. JA-394. Vanguard testified that it was not present for AST's mailing, did not know anyone who was, and its testimony was based on generalized industry-wide practice rather than any personal knowledge of AST's policies and practices. C.A. JA-343–44, 362–63. It also heavily relied upon the fact that Petitioner's home did not have a mailbox at the time, while disregarding the fact that Petitioner did not report missing any mail while the building was without a mailbox.

This was enough for the district court. It determined that the City triggered the presumption by showing Petitioner's address on the list of violations to be sent and relying on the testimony from the City employee and Vanguard regarding how mail was sent. App. 26a–34a. The lack of testimony by the actual sender—AST—was of no import, nor was the lack of evidence about AST or its mailing practices concerning. App. 28a–31a.

The burden then shifted to Petitioner to rebut the presumption. This, the district court concluded, Petitioner failed to do. App. 34a–38a. First, it rejected his testimony[2] that he did not receive the notice of violation: "It is well-established in this Circuit that a recipient's mere denial of receipt is not sufficient to rebut the presumption of receipt." App. 35a. Next, it rejected Petitioner's other evidence supporting his claim that he did not receive it. For instance, hundreds of 2013 boiler violations, maybe 500, were returned to the City as undeliverable, where they were put into a box to be either archived or shredded (but not followed up on). C.A. JA-795. The district court waved this away as too small a number to matter. App. 37a. It did the same with Petitioner's remaining evidence: his history of paying fines on time, the prompt action he took as soon as he learned of the violation, and how he and his wife retrieved mail during this time. App. 35a–36a.

3. The court of appeals affirmed. It agreed that Respondent had triggered the mailbox rule's

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[2] Petitioner submitted a signed declaration under 28 U.S.C. 1746, which has the same force and effect as a sworn declaration. See App. 65a.

presumption and that Petitioner's evidence was inadequate to rebut that. App. 5a–6a. It reiterated the Second Circuit's "well-established approach to the mailbox rule" that the presumption cannot be rebutted by a "declaration of non-receipt." App. 7a–8a.

Given its conclusion that Petitioner's lawsuit was untimely, the court did not consider whether the City's lack of a hearing or appeal for boiler violations is consistent with due process.

## REASONS FOR GRANTING THE PETITION

The decision below further entrenches a conflict between the Second Circuit and the other appellate courts to have considered an issue of national importance for every financial institution, government office, and individual who sends and receives important documents in the mail: what evidence must a supposed recipient produce to rebut the mailbox rule's presumption of receipt? The courts of appeals for the Third, Sixth, Ninth, and Tenth circuits hold that denial of receipt is sufficient to defeat the presumption and create a factual question for the factfinder's consideration. This is also the case for several district courts within the First, Fourth, Fifth, Seventh, and Eighth circuits. By contrast, the Second Circuit holds that denial of receipt, on its own, is never enough to rebut the presumption.[3] That approach makes the

[3] In an unpublished, *per curiam* opinion concerning a bankruptcy court's dismissal of a *pro se* debtor's motion, the Eleventh Circuit held that "[t]he mere denial of receipt, without more, is insufficient to rebut the presumption." *In re Farris*, 365 F. App'x 198, 200 (2010). *Farris*, however, did not involve a *sworn* denial of receipt or a declaration under penalty of perjury under 28 U.S.C. 1746, and was merely "applying Georgia law." *Glenn*

presumption effectively irrebuttable and thus insurmountable, an outcome inconsistent with the letter and spirit of the Federal Rules of Evidence. This Court's intervention is warranted.

## I. The Second Circuit's approach to the mailbox rule makes it an outlier among the circuits.

The Second Circuit takes a uniquely harsh approach to the mailbox rule. All courts agree that a presumption of receipt arises upon proof that a letter was properly mailed. All courts also agree that this presumption is rebuttable. The Second Circuit, however, disagrees with its sister circuits as to whether a sworn denial of receipt suffices to rebut the presumption. This is addressed in Section A. The Second Circuit, unlike its sister circuits, demands more than a sworn denial of receipt to rebut the presumption. The reason for this is that the Second Circuit embraced New York state's rule, as Section B discusses. Sections C and D show how the New York and Second Circuit rule splits from the Third, Sixth, Ninth, and Tenth circuits as well as district courts within the First, Fourth, Fifth, Seventh, and Eighth circuits.

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*Constr. Co.,* v. *Bell Aerospace Servs., Inc.*, 785 F. Supp. 2d 1258, 1299 n.35 (M.D. Ala. 2011). It is thus unclear how the Eleventh Circuit would treat an addressee's sworn denial of receipt under the federal mailbox rule.

### A. A party triggers the mailbox rule with evidence that a letter was placed in the mail, shifting the burden of production to the addressee to rebut the presumption.

A presumption of receipt applies when evidence is provided that a letter was placed in the mail. Proof of delivery, such as that provided by a certified mail receipt, gives rise to a strong presumption. *Santana Gonzalez*, 506 F.3d at 279. Without proof of delivery, the sender must call upon other evidence, such as providing a sworn statement describing a business's customary practices relating to mail. *United States* v. *Hannigan*, 27 F.3d 890, 892–93 (3d Cir. 1994). Using circumstantial evidence like this requires an affiant to have personal knowledge. *Kyhn* v. *Shinseki*, 716 F.3d 572, 574 (Fed. Cir. 2013); see also Fed. R. Evid. 602 (requiring non-expert witnesses to have personal knowledge). Parties often accomplish this by providing an affidavit from an employee with personal knowledge of the company's mailing practices. See *Hannigan*, 27 F.3d at 894.

The personal knowledge requirement of the mailbox rule makes sense. It is well established that witnesses only testify about their personal knowledge. Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). "[T]he rule embodies one of the most fundamental tenets of a rational system of evidence law; testimony should be reliable and, thus, must be based on the perceptions of the witness rather than conjecture or second-hand information." 27 Wright &

Miller, Fed. Prac. & Proc. § 6021 (2d ed.); see also *ibid.* (stating that "the personal knowledge requirement is one of the oldest and most firmly established evidentiary principle[s], with roots in medieval law").

Once a party triggers the presumption, the burden of production then shifts to the addressee to rebut the presumption. Here, the Second Circuit diverges from its sister circuits, adopting a standard that also conflicts with the rules of evidence. In the Second Circuit, a party cannot rebut the presumption just by denying receipt. *Meckel*, 758 F.2d at 817. Instead, he must produce additional evidence of non-receipt. As set forth more fully below, (pp. 14–17), this approach departs from the other circuits to have considered the issue. And the issue is outcome-determinative. In the other circuits, litigants can persuade a factfinder that the alleged mailing was not received. In the Second Circuit, however, litigants never get that chance, and thus automatically lose when the issue of mailing is dispositive and they have no evidence beyond the denial of receipt. But first, a look to the source of the problem.

### B. The Second Circuit's outlier status in rebutting the presumption stems from its embrace of New York state law.

The Second Circuit's divergent approach to the mailbox rule began in 1985, when it announced that the "mere denial of receipt does not a raise a question of fact as to mailing." *Meckel* v. *Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985). Yet *Meckel* was explicitly a case about how the mailbox rule worked under "New York law," as reflected in "[o]ne recent New York

case." *Ibid.* (citing *Engel* v. *Lichterman*, 467 N.Y.S.2d 642 (N.Y. App. Div. 1983)). Initially, the Second Circuit recognized *Meckel* as simply describing New York law. *Leon* v. *Murphy*, 988 F.2d 303, 309 (2d Cir. 1993).

Nevertheless, the Second Circuit then grafted *Meckel*'s state-law mailbox rule onto the Circuit's federal mailbox rule, declaring that "[d]enial of receipt, without more, is insufficient to rebut the presumption." *Akey* v. *Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004). Relying on *Meckel* alone to announce the rule, the court dismissed the claims of those appellants who had provided "no evidence other than bare denials" that they had received notices of foreclosure proceedings. *Ibid.*

Yet New York state law does not reflect the approach taken by other states within the Second Circuit. "The trend in the Connecticut trial courts appears to be that an addressee's denial of receipt raises an issue of fact for the jury." *Capone* v. *Electric Boat Corp.*, No. 06-cv-1249, 2006 WL 3741116, at *4 (D. Conn. Dec. 19, 2006); accord *DiRenzo* v. *State Farm Fire & Cas. Ins. Co.*, No. HHB-CV-23-6080037-S, 2025 WL 39980, at *4 (Conn. Super. Ct. Jan. 3, 2025) ("[T]his court adopts the approach accepted by several Connecticut trial courts: that denial of receipt alone could be sufficient evidence to overcome the presumption of receipt established by the mailbox rule."). This leaves litigants in Connecticut state courts with the advantage of the majority rule and litigants in Connecticut federal courts with the disadvantage of New York's rule. See *Tanasi* v. *CitiMortgage, Inc.*, 257 F. Supp. 3d 232, 263 (D. Conn. 2017); *Britt* v. *Elm City*

*Cmtys.*, No. 17-cv-02159, 2019 WL 2452349, at *5–6 (D. Conn. June 12, 2019).

In any event, it is now "well-established in this Circuit that a recipient's mere denial of receipt is not sufficient to rebut the presumption of receipt." App. 35a; see also App. 7a ("[D]enial of receipt, without more, is insufficient to rebut the presumption." (quoting *Akey*, 375 F.3d at 235)). This categorical rule makes it "an outlier among circuits"—a fact the Second Circuit does not dispute. App. 7a.

### C. The Second Circuit's approach splits from the Third, Sixth, Ninth, and Tenth circuits.

The Second Circuit's rule is not the majority rule. Rather, it is in direct conflict with decisions from the Third, Sixth, Ninth, and Tenth circuits, each of which hold that a sworn denial of receipt raises a triable question of fact under the federal mailbox rule.

1.a. In *Lupyan* v. *Corinthian Colleges Inc.*, the Third Circuit considered whether an employer provided notice to an instructor that her medical leave was pursuant to the Family and Medical Leave Act, which imposed obligations and requirements on the employee's leave. 761 F.3d 314 (2014). The college asserted that it mailed the instructor a letter describing her FMLA rights, but the instructor denied ever receiving that letter or otherwise knowing that she was on FMLA leave.

The Third Circuit meticulously discussed the mailbox rule, including its history, its interaction with the Federal Rules of Evidence, its analysis by scholars,

and its treatment by other appellate courts. The court then turned to the parties' evidence, determining that the college weakly established the presumption but that the instructor effectively rebutted it by her affidavit contending that she did not receive it. *Id.* at 320–22. This, the court reasoned, was because a person in the instructor's position has "no way of establishing that they did not receive a disputed letter, other than to 'prove a negative.'" *Id.* at 322. With the presumption rebutted by the instructor's denial of receipt, the resulting dispute of material fact was left to the factfinder to resolve. *Ibid.*

b. The Sixth Circuit proceeds the same. At issue was whether a creditor timely filed a proof of claim for his products liability suit that was pending in state court when the company sought bankruptcy protection. *In re Yoder Co.*, 758 F.2d 1114 (6th Cir. 1985). The creditor filed a proof of claim about eight months after the deadline set by the bankruptcy court, which was provided in a notice that was purportedly mailed out to all creditors. The creditor's attorney (the addressee on the notice) testified that he did not receive it. *Id.* at 1120. This was sufficient to rebut the presumption: "Testimony of non-receipt, standing alone, would be sufficient to support a finding of non-receipt; such testimony is therefore sufficient to rebut the presumption of receipt." *Id.* at 1118.

c. So, too, the Ninth Circuit. In the days before dockets were accessible by computer, counsel relied on clerks' offices to alert them to new orders by mail. An attorney did not discover that the district court denied his client's motion for judgment notwithstanding the verdict until six weeks after the order was entered—placing him beyond the time to file an appeal

under the federal rules. *Nunley* v. *City of Los Angeles*, 52 F.3d 792 (9th Cir. 1995). Recognizing that "[n]on-receipt is difficult to prove conclusively," the court held that counsel's "specific factual denial of receipt had in fact rebutted the presumption." *Id.* at 796–97. Perhaps the attorney would lose when the factfinder carefully weighed the evidence, but that is how the evidence is to be considered, not "relying instead on an expansive view of the deflated presumption." *Id.* at 797.

d. And the Tenth Circuit. In response to a truck driver's complaint that his employer and union were discriminating against him based on his race, the Equal Employment Opportunity Commission sent the driver right-to-sue letters, the receipt of which triggered a 90-day deadline to file his Title VII claims. *Witt* v. *Roadway Express*, 136 F.3d 1424 (10th Cir. 1998). He stated in an affidavit that he received the letter regarding his employer in late January or early February (making his June-filed suit untimely), but that he did not receive the letter regarding his union "until the middle of March." *Id.* at 1429. Though the union provided a certified mail receipt indicating that the letter was mailed January 28, 1994, the court deemed the presumption rebutted by the driver's testimony and held that the conflicting evidence created "a credibility issue that must be resolved by the trier of fact." *Id.* at 1429–30.

Courts within these circuits routinely apply the majority rule. *E.g.*, *Czajkowski* v. *Allen*, No. 24-1097, 2024 WL 4404365 (10th Cir. Oct. 4, 2024); *Panzer* v. *Verde Energy USA, Inc.*, 507 F. Supp. 3d 606, 614 (E.D. Pa. 2020); *Jones* v. *Waypoint Res. Grp., LLC*, No. 19-cv-12851, 2021 WL 963935, at *3 (E.D. Mich. Mar.

15, 2021); *Madrigal* v. *Ferguson Enters., LLC*, No. 24-cv-00733, 2025 WL 1226669, at *2 (C.D. Cal. Apr. 18, 2025); *Amboh* v. *Kroger Co.*, No. 24-cv-00023, 2025 WL 841076, at *2–3 (D. Utah Mar. 18, 2025).

2. The majority rule finds support in two primary sources: this Court's decisions and the Federal Rules of Evidence. As this Court recognized more than a century ago, the determination that properly mailed letters were, in fact, received "is not a conclusive presumption of law, but a mere inference of fact," that, "when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, by the jury in determining the question whether the letters were actually received or not." *Rosenthal*, 111 U.S. at 193–94.

Federal Rule of Evidence 301 provides that the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption, but it does not shift the burden of persuasion, which remains on the party who had it originally. The rule embodies the "bursting bubble" theory of presumption under which rebuttal evidence destroys the presumption and leaves it with no probative effect. *Yoder*, 758 F.2d at 1119–20 (collecting citations); see also *Sheridan* v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1080–83 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part) (discussing the adoption of Rule 301 and agreeing with *Yoder*'s analysis); *Nunley*, 52 F.3d at 796 (stating that "a presumption disappears where rebuttal evidence is presented"). Rebuttal leaves the question to be decided as any ordinary question of fact. *Yoder*, 758 F.2d at 1119. The rule accords with this Court's longstanding approach to presumptions. *E.g.*, *Lincoln* v. *French*, 105

U.S. 614, 617 (1881) ("Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.").

3. Applying Rule 301 to the mailbox rule, the presumption of receipt is "rebutted upon a specific factual denial of receipt." *Nunley*, 52 F.3d at 796. This is true for two reasons. First, Rule 301 presumptions are "rebutted 'upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact.'" *Yoder*, 758 F.2d at 1118 (citation omitted); accord *Nunley*, 52 F.3d at 796. Thus, a specific factual denial of receipt suffices to rebut the mailbox rule's presumed fact of receipt because testimony of nonreceipt is evidence that would support a finding of nonreceipt. *Nunley*, 52 F.3d at 796 (citing *Yoder*, 758 F.2d at 1118).

Second, requiring ordinary people to provide significant evidence beyond denying receipt would "elevate[] the weak presumption intended by the mail box rule to a conclusive presumption that would be equivalent to an ironclad rule." *Lupyan*, 761 F.3d at 322; see also *Laborers' Int'l Union of N. Am., Loc. 578* v. *NLRB*, 594 F.3d 732 (10th Cir. 2010) (Gorsuch, J.) (describing the rule as a simple evidentiary presumption and not an "immutable legal command"); *Garrett* v. *Comm'r*, 110 T.C.M. (CCH) 498, at *12 (T.C. 2015) ("Concluding that an individual taxpayer's denial of receipt . . . is insufficient to rebut the presumption raised by the mailbox rule would, in most cases, cause the presumption to be conclusive.").

A party can say they did not receive a document, discuss their practice of opening mail, and perhaps

mention other mail they received at the critical time, but they face a difficult—if not impossible—task in establishing that they did not receive a particular letter. *E.g.*, *Nunley*, 52 F.3d at 796 ("Non-receipt is difficult to prove conclusively."); *Lupyan*, 761 F.3d at 322 (describing the supposed recipient's task of proving the negative of non-receipt as "next to impossible"). A court that requires extensive evidence to rebut the presumption "effectively erects an irrebuttable and insurmountable barrier" to the supposed recipient. *Nunley*, 52 F.3d at 796.

The Second Circuit's approach removes disputes about whether mail was received from the coverage of Rule 301. If the authors of Rule 301 wished to limit the rule only to factual disputes that were not about mailing, they could have done so. But they did not. Instead, Rule 301 was designed "to take the effect of presumption out of the hands of judges insofar as possible," by authors who did "not regard a presumption as conclusive of anything." 21B Wright & Miller, Fed. Prac. & Proc. § 5126 (2d ed.) (quoting 120 Cong. Rec. 1419, 1974 (remarks of Rep. Dennis)).

Instead of the presumption vanishing upon rebuttal, leaving the question to be decided as any other question of fact, the Second Circuit imposes a presumption so overwhelming that it essentially bars contradiction. It shifts the burden of proving the nonreceipt of a letter to the supposed recipient who is limited in the ways they can prove nonreceipt. This is the standard approach in the Second Circuit,[4] as well as

[4] See, *e.g.*, *Dunn* v. *Albany Med. Coll.*, 445 F. App'x 431 (2d Cir. 2011); *Isaacson* v. *N.Y. Organ Donor Network*, 405 F. App'x 552 (2d Cir. 2011); *Manigault* v. *Macy's E., LLC*, 318 F. App'x 6 (2d Cir. 2009); *Osele* v. *U.S. Atty. Gen.*, 190 F. App'x 96 (2d Cir.

district courts within the Second Circuit,[5] and it is untenable.

### D. The Second Circuit's approach differs from the district courts within the First, Fourth, Fifth, Seventh, and Eighth circuits.

The majority rule is followed by some lower courts in the First, Fourth, Fifth, Seventh, and Eighth circuits. See *Lamonica* v. *Fay Servicing, LLC*, 352 F. Supp. 3d 138, 140–41 (D. Mass. 2018) (holding that a bare denial of receipt presented a triable question of fact); *United States* v. *Diaz-Martinez*, 380 F. Supp. 3d 486, 499 (E.D. Va. 2019) (holding that "a sworn statement of non-receipt" means that the "issue of receipt

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2006); *Akey* v. *Clinton County*, 375 F.3d 231 (2d Cir. 2004); *Leon* v. *Murphy*, 988 F.2d 303 (2d Cir. 1993).

[5] *E.g.*, *Levin* v. *City of Buffalo*, No. 20-cv-1511, 2024 WL 869071 (W.D.N.Y. Feb. 29, 2024); *Smith* v. *Reardon*, No. 22-cv-0732, 2023 WL 3440167 (N.D.N.Y. Apr. 11, 2023); *Makhnevich* v. *Bougopoulos*, No. 18-cv-285, 2022 WL 939409 (E.D.N.Y. Mar. 29, 2022), aff'd, No. 22-936, 2024 WL 1653464 (2d Cir. Apr. 17, 2024); *Blank* v. *Beam Mack Sales & Serv., Inc.*, No. 20-cv-06092, 2021 WL 826738 (W.D.N.Y. Mar. 4, 2021); *Windward Bora LLC* v. *Baez*, No. 19-cv-1755, 2021 WL 7908011 (E.D.N.Y. Feb. 24, 2021); *Gustavia Home, LLC* v. *Rice*, No. 16-cv-2353, 2016 WL 6683473 (E.D.N.Y. Nov. 14, 2016); *Stein* v. *Am. Gen. Life Ins. Co.*, 34 F. Supp. 3d 224 (E.D.N.Y. 2014); *Dasrath* v. *Stony Brook Univ. Med. Ctr.*, No. 12-cv-1484, 2014 WL 1760907 (E.D.N.Y. Apr. 29, 2014); *Vargas* v. *Cap. One Fin. Advisors*, No. 12-cv-5728, 2013 WL 4407094 (S.D.N.Y. Aug. 15, 2013), aff'd, 559 F. App'x 22 (2d Cir. 2014); *Goodwin* v. *Solil Mgmt. LLC*, No. 10-cv-5546, 2012 WL 1883473 (S.D.N.Y. May 22, 2012); *Kaufman* v. *Columbia Mem'l Hosp.*, No. 11-cv-667, 2011 WL 5007988 (N.D.N.Y. Oct. 20, 2011); *Chesney* v. *Valley Stream Union Free Sch. Dist. No. 24*, No. 05-cv-5106, 2009 WL 936602 (E.D.N.Y. Mar. 31, 2009).

becomes one for the trier of fact"), aff'd, 808 F. App'x 204 (4th Cir. 2020); *In re Alsem Constr. LLC*, 750 F. Supp. 3d 694, 698–99 (E.D. La. 2024) (holding that a denial of receipt suffices to rebut the presumption of receipt and raise a triable question of fact that precludes summary judgment); *In re Schepps Food Stores, Inc.*, 152 B.R. 136, 140 (Bankr. S.D. Tex. 1993) ("*Yoder* simply restates the majority rule: when considering whether proper notice was given, denial of receipt raises a question of fact."); *Leventhal* v. *Schenberg*, 484 B.R. 731, 734 (N.D. Ill. 2012) (holding that "[d]enial of receipt . . . creates a question of fact," that the bankruptcy court properly resolved "after a full trial on the merits"); *Phillips* v. *Riverside, Inc.,* 796 F. Supp. 403, 408 (E.D. Ark. 1992) (rejecting *Meckel* to "instead follow the better rule" set forth in *Yoder*).

## II. The question presented is important and warrants review in this case.

The question presented is of real legal and practical importance. This case presents the question cleanly and is an ideal vehicle for this Court's review.

1. This Court first set out the mailbox rule more than a century ago in *Rosenthal*. The majority rule continues to track this Court's treatment of the presumption as "a mere inference of fact" and not "a conclusive presumption of law." 111 U.S. at 193. See also *Brady* v. *Cubitt*, 1 Dougl. 31, 40 (K.B. 1778) (discussing a presumption that, "like all others, may be rebutted by every sort of evidence"); *Tanner* v. *Hughes*, 53 Pa. 289, 290–91 (1867) ("A strong probability of its receipt may arise, and as a fact, in connection with the other circumstances, it was right to refer it to the jury. But in their hands it became not a *legal* presumption

binding on them as a rule of law but only a natural probability, as it is termed; that is an inference of fact of the probability of the actual receipt, by mail, of the letter containing the note, arising from all the circumstances in evidence."); *Breed* v. *First Nat. Bank of Cent. City*, 6 Colo. 235, 239 (1882) (discussing jury instructions regarding whether a letter was received to consider the supposed recipient's "testimony upon the question whether they were received by him"); 49 Lawyers Reports Annotated 467–70 (Burdett A. Rich & Henry P. Farnham, eds., 1914) (collecting cases about rebuttal of the presumption).

That approach makes sense and tracks with the many other areas of law where contradicting evidence is weighed by a factfinder. Facts are meaningful, and the hallmark role of courts is to weigh conflicting facts and determine who prevails. The other circuits understand this and routinely send to factfinders questions of whether a particular piece of mail was received by someone. This does not create an unwieldy burden on the courts or parties. Yet the Second Circuit has rejected that approach by refusing to consider sufficient the main source of rebuttal evidence that a letter was not received.

Perhaps a factfinder here would have found compelling Respondent's evidence of a third-party contractor's third-party contractor's mailing in the face of Petitioner's denial. Or perhaps the factfinder would have put more stock in the evidence that 500 letters were returned to the City as undeliverable and the City followed up on none of them. Or maybe the factfinder would have been moved, in either direction, by Petitioner's lack of a mailbox. Elsewhere, the

factfinder would have been trusted to evaluate all the competing evidence and reach their answer. *E.g.*, *Bd. of Trs. of Cal. Winery Workers' Pension Tr. Fund* v. *Giumarra Vineyards*, No. 17-cv-00364, 2018 WL 4510721, at *3–4 (E.D. Cal. Sept. 19, 2018) (deeming the addressee's testimony of non-receipt to be credible based on "his background, training, and experience, and his demeanor in Court" at trial). Yet not in the Second Circuit.

2. The divergence calls out for correction. Under the Second Circuit's rule, Petitioner is unable to challenge the merits of an unreviewable system of penalties that flies in the face of this Court's due-process precedents. If he lived on the west bank of the Hudson River, or in Pennsylvania, Nevada, or twenty other states within the circuits that have adopted the majority approach, he would be able to present the question of receipt to a factfinder. As he likely would in another twenty-one states where the district courts follow the majority rule. But because Petitioner lives in the Second Circuit, he needs more to overcome the presumption.

The importance of Petitioner's question is of real consequence for people in a wide range of circumstances. Those penalized by their government, as here. Those taking medical leave. Those suing their employers for violating federal law. Securities holders. Bankruptcy creditors. People facing foreclosure of their homes. People accused of owing taxes. This problem is acutely felt by those in the Second Circuit, home to New York City, the financial capital of the world. By contrast, supposed mail recipients in Delaware—an American business hub—have a real

opportunity to challenge whether they received a piece of mail. The Second Circuit's approach causes genuine harm and its clash with other circuits creates needless differences in the rules that guide Americans' ability to prove nonreceipt based entirely on where they live. The conflict calls out for this Court's intervention.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted on August 13, 2025,

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# APPENDIX

## TABLE OF APPENDICES

*Appendix A*

*Appendix A*

Summary Order of the United States Court of Appeals for the Second Circuit

April 15, 2025

*Appendix A*

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of April, two thousand twenty-five.

PRESENT: DENNIS JACOBS,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
*Circuit Judges.*

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*Appendix A*

SERAFIM GEORGIOS KATERGARIS,

*Plaintiff-Appellant,*

v. No. 24-1889-cv

CITY OF NEW YORK,

*Defendant-Appellee*

– – – – – – – – – – – – – – – – – – –

| | |
|---|---|
| FOR PLAINTIFF-APPELLANT: | William R. Maurer, Institute for Justice, Seattle, WA, Diana K. Simpson, Jared McClain, William Aronin, Institute for Justice, Arlington, VA |
| FOR DEFENDANT-APPELLEE: | Richard Dearing, Claude S. Platton, Hannah J. Sarokin, of Counsel, *for* Muriel Goode-Trufant, Corporation Counsel of the City of New York, New York, NY |

Appeal from a judgment of the United States District Court for the Southern District of New York (Paul A. Engelmayer, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

*Appendix A*

Serafim Georgios Katergaris appeals from a judgment of the United States District Court for the Southern District of New York (Engelmayer, *J.*) granting summary judgment in favor of the City of New York (the "City") and dismissing Katergaris's due process claims under 42 U.S.C. § 1983 arising out of violations and fines assessed against him by the Department of Buildings (the "DOB"). We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

Katergaris purchased the property at the center of this dispute (the "Property") in New York City in November 2014. At all relevant times, the City has required that owners of certain types of properties with low-pressure boilers file annual boiler inspection reports with the DOB. A property owner who fails to comply is subject to a $1,000 fine. As late as 2013, the Property had an active low-pressure boiler. A previous owner of the Property failed to file an inspection report for 2013 and in March 2015 the DOB issued a violation notice for the Property, which Katergaris had since purchased. The City maintains that it mailed a notice of the violation addressed to Katergaris at the Property in March 2015. Katergaris alleges that he never received the March 2015 notice and did not learn of the violation until 2021, when he sold the Property. Katergaris thereafter paid the fine "under protest" and, on August 30, 2022, commenced this lawsuit. App'x 720. The City moved to dismiss, arguing in relevant part that Katergaris's section 1983 claim was untimely. After converting the motion to dismiss to a motion for summary judgment and

allowing partial discovery, the District Court granted summary judgment in favor of the City.

The statute of limitations for Katergaris's section 1983 claim, determined by New York law, is three years. *Shomo v. City of New York*, 579 F.3d 176, 181 (2d Cir. 2009). Federal law determines when the claim accrues, that is, "when the plaintiff knows or has reason to know of the injury." *Barnes v. City of New York*, 68 F.4th 123, 127 (2d Cir. 2023) (quotation marks omitted). The parties dispute whether Katergaris's claim accrued in March 2015, when the City claims it mailed notice of the violation, or in 2021, when Katergaris alleges he first learned of the violation.

Where a party "provides evidence that [mailings] were properly addressed and mailed in accordance with regular office procedures, it is entitled to a presumption that the notices were received." *Akey v. Clinton Cnty.*, 375 F.3d 231, 235 (2d Cir. 2004). Testimonial evidence of "office procedures, followed in the regular course of business, pursuant to which notices have been addressed and mailed," *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 92 (2d Cir. 2010), is sufficient to "establish[] prima facie evidence of the mailing and create[] a rebuttable presumption as to receipt," *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985).

We agree with the District Court that the City adduced sufficient testimonial and documentary evidence to establish the rebuttable presumption as to receipt by Katergaris. It is undisputed that the notice

was properly addressed to Katergaris at the Property. Moreover, Juan Ruiz, the DOB manager who oversaw the mailing of boiler inspection violation notices in March 2015, and Michael Muniz, an employee at Vanguard, the firm with which the DOB contracted to perform the March 2015 and other mailings, both testified about the process undertaken by the DOB and Vanguard to compile, review, send, and confirm violation notices. This and other evidence of communications between the DOB and Vanguard regarding the March 2015 mailing are sufficient to establish the presumption of receipt. *Ma*, 597 F.3d at 92.

Katergaris argues that this evidence is inadequate to establish the presumption of receipt because Vanguard subcontracted the process of printing notices, stuffing envelopes, and delivering them to the United States Postal Service to a third party, AST. Accordingly, he claims, neither Ruiz nor Muniz had personal knowledge that regular office procedures were followed in the mailing at issue in this case. *Meckel*, 758 F.2d at 817. We disagree. Muniz testified about his contemporaneous communications with AST during the printing process and described the procedures for printing, stuffing, troubleshooting, delivering to USPS, affixing postage, and confirming the mailing. *See id.* (observing that an affiant can have personal knowledge of regular mailing procedures even if he "did not work in the mailroom, go to the post office, state the procedures that were followed, [or] . . . personally do the mailing").

Katergaris alternatively argues that he rebutted the presumption of receipt by declaring that he did

not receive the mailing, that he generally pays or contests citations immediately upon receipt, and that he responded immediately when he did learn of the violation in 2021. It is true that rebutting the presumption does not require "direct proof that the routine office procedure was either not followed or carelessly carried out." *Id.* But "[d]enial of receipt, without more, is insufficient to rebut the presumption." *Akey*, 375 F.3d at 235. Moreover, we agree with the District Court that the additional circumstantial evidence Katergaris points us to is undercut by his admission that his mail retrieval system in March 2015 — featuring "a little plastic baggie" hanging from the fence into which mail might be "rolled-up" and "stuff[ed]" if it were not "thrown down in the lower entrance" or left outside "on the stoop" — was unreliable. App'x 276–78.

Katergaris asserts that in the context of mailed notices to appear for immigration proceedings, we have adopted a weaker presumption that should apply here and that his circumstantial evidence rebuts at least that lesser presumption. *Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156 (2d Cir. 2008), on which Katergaris relies, is inapposite. That case addresses issues specific to immigration proceedings and otherwise reaffirms the general approach employed across our cases. *Id.* at 159–60.

Katergaris also asks us to revisit our mailbox rule as being incompatible with Federal Rule of Evidence 301, effectively unrebuttable, and an outlier among circuits. But Katergaris cites no cases to support his argument that Rule 301 requires that a presumption

can be rebutted by a bare declaration of non-receipt. *See ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 150 (2d Cir. 2007) ("The summary judgment rule would be rendered sterile if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." (cleaned up)). Moreover, Katergaris mischaracterizes the stringency of our rule: "direct proof" that office procedures were not followed is not, under our rule, "the sole or exclusive means to rebut proof that notice was mailed." *Meckel*, 758 F.2d at 817. We decline Katergaris's invitation to abandon our well-established approach to the mailbox rule. *See United States v. Barrett*, 102 F.4th 60, 82 (2d Cir. 2024).

## CONCLUSION

We have considered Katergaris's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court
/s/ Catherine O'Hagan Wolfe

*Appendix B*

*Appendix B*

Opinion & Order of the United States District Court
for the Southern District of New York

June 24, 2024

*Appendix B*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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|---|---|
| SERAFIM GEORGIOS KATERGARIS,<br><br>Plaintiff,<br>-v-<br><br>CITY OF NEW YORK,<br><br>Defendant. | 22 Civ. 7400 (PAE)<br><br>OPINION & ORDER |

PAUL A. ENGELMAYER, District Judge:

Plaintiff Serafim Georgios Katergaris brings this putative class action under 42 U.S.C. § 1983, alleging that the system used by the City of New York (the "City") for assessing and reviewing fines for property owners who fail to file required inspection reports violates the owners' due process rights. Pending now are the City's motions (1) for summary judgment on the limited issue of timeliness, and (2) to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Court, finding Katergaris's sole claim time-barred, grants the City's motion for summary judgment, and dismisses this case.

*Appendix B*

## I. Statement of Facts

### A. Factual Allegations Underlying Katergaris's Due Process Claim

Katergaris is a resident of New York City who previously owned a home at 124 W 132nd Street (the "W 132nd St. Property" or the "Property"). Dkt. 28 ("FAC") ¶ 12. Katergaris purchased this property along with his then- (now ex-) wife in November 2014, and sold the property in June 2021. *Id.* ¶¶ 12–13.

The W 132nd St. Property had previously had an active low-pressure boiler, including during 2013. *Id.* ¶¶ 46–54. Under Title 1 of the Rules of the City of New York ("RCNY") § 103-01, owners of certain types of properties with low-pressure boilers must file annual low-pressure boiler inspection reports with the New York City Department of Buildings ("DOB"). *Id.* ¶¶ 18–20. A property owner who fails to comply with this requirement is fined $1,000. *Id.* ¶ 22; *see also* 1 RCNY § 103-0l(f)(l). DOB issues violations to property owners who do not file the required inspection report during a one-year inspection period. *Id.* ¶ 9.

In Katergaris's case, a previous owner of the Property who had been required to file an inspection report for the Property failed to do so for the 2013 annual cycle. *Id.* ¶¶ 46–48. The City first issued a violation for this omission in March 2015, some four months after Katergaris had purchased the Property. *Id.* ¶ 60. At the time of purchase, the Property no longer had a boiler, and had been converted into a two-bedroom home—a type of property for which boiler inspections

are not required in any event. Katergaris alleges that, in November 2014, when he and his then-wife purchased the property, they were unaware of the earlier violation. *Id.* ¶¶ 46–56.[1] And, as developed further below in the discussion of the City's motion for summary judgment, Katergaris alleges that he did not receive notice of the violation in March 2015, but first learned of it in 2021 when he went to sell the Property. *Id.* ¶¶ 60, 74–76.

After learning of the violation in 2021, Katergaris alleges, he requested a waiver from the DOB. *Id.* ¶ 79. The DOB denied Katergaris a waiver. *Id* Katergaris alleges that the process for requesting a waiver did not allow him to present arguments, evidence, witnesses, or exhibits, and that his waiver request was not decided upon by a neutral arbiter. *Id.* ¶ 80. He alleges that the City did not furnish him an opportunity to appeal the denial. *Id.* ¶ 81.

On June 9, 2021, to avoid issues with the sale of the Property, Katergaris paid the outstanding violation "under protest." *Id.* ¶ 82. Katergaris twice requested that the money he paid ($1,000) be returned to him, but the DOB denied his requests. *Id.* ¶¶ 87, 95. Katergaris also requested a hearing from the City's Office of Administrative Trials and Hearings, but this request too, was denied; Katergaris was directed to contact DOB instead. *Id.* ¶ 89.

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[1] The FAC states that, on November 19, 2014, the DOB's records "were updated to reflect that the Property did not have a boiler that required an annual inspection." FAC ¶ 56. The Katergarises closed on the property on or about November 12, 2014. *Id.* ¶ 53.

**B. Procedural History**

On August 30, 2022, Katergaris filed his initial Complaint. Dkt. 1. On December 5, 2022, the City filed a motion to dismiss. Dkt. 23. On January 17, 2023, after this Court issued an order directing Katergaris to oppose the motion or amend his complaint, Dkt. 25, Katergaris filed the First Amended Complaint, the operative complaint today. Dkt. 28 ("FAC"). Like the initial Complaint, the FAC brought a single claim, under Section 1983, alleging that DOB's practice of issuing fines to property owners violated due process, on the grounds that the property owners did not have a meaningful opportunity to contest the fines or appeal them. See FAC ¶¶ 1–2.

On January 31, 2023, the City filed a motion to dismiss the FAC. Dkt. 32. On February 14, 2023, Katergaris filed a response. Dkt. 33. On March 7, 2023, the City filed a reply. Dkt. 36.

The City's motion to dismiss included the argument that Katergaris's Section 1983 claim was untimely. It contended that the three-year statute of limitations began to run from the date that a notice of violation was mailed to Katergaris, which the City contended was in 2015. In support, the City filed a declaration of DOB-employee Juan Ruiz attesting to DOB's mailing procedures. *See* Dkt. 31. Because the declaration was outside the pleadings, it was not appropriate for consideration on a Rule 12 motion to dismiss. On July 17, 2023, the Court therefore converted the City's motion to dismiss—to the extent it was based on a claim of untimeliness—to a motion for

summary judgment, and directed the parties to conduct limited discovery as to the timeliness of the notice of violation. Dkt. 37. The Court set a briefing schedule for any limited motion for summary judgment on the timeliness issue, stating that, if necessary, it would also rule on the balance of the City's motion to dismiss at the time it resolved the City's summary judgment motion. *Id.*

Consistent with the schedule the Court set, on November 17, 2023, the City filed the instant motion for summary judgment, Dkt. 42, a memorandum of law and declaration in support with attached exhibits, Dkts. 44, 45 ("Def. Br."), and a Rule 56.1 statement, Dkt. 43. On December 1, 2023, Katergaris filed an opposition to the motion, Dkt. 47 ("Pl. Br."), declarations in support with attached exhibits, Dkts. 48-49, and a counter Rule 56.1 statement, Dkt. 50. On December 13, 2023, the City filed a reply, Dkt. 51 ("Def. Reply Br."), an additional declaration, Dkt. 52, and a response to Katergaris's counterstatement, Dkt. 53.

## II. The City's Summary Judgment Motion Based on Untimeliness

The Court here first reviews the evidence adduced during discovery bearing on the timeliness of Katergaris's claim. The Court then evaluates the City's motion for summary judgment on the grounds that the claim is untimely.

*Appendix B*

## A. Facts Adduced During Discovery[2]

Katergaris is a banker with 25 years' experience. Katergaris Dep. at 8. Before buying the W 132nd St. Property in November 2014, Katergaris, who during

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[2] The Court draws the following facts from the parties' submissions in support of and in opposition to defendant's summary judgment motion. These include the following: (1) the City's Local Rule 56.1 statement, Dkt. 43 ("Def. 56.1"); the declaration of Samantha Schonfeld in support of the motion, Dkt 44 ("Schonfeld Decl."), and attached exhibits, Schonfeld Decl., Exs. 1 ("Ruiz Dep."), 2 ("Katergaris Dep,"), 3 ("Muniz Dep."), 4; the declaration of Juan Ruiz in support of the motion, Dkt. 46 ("Ruiz Decl."), and attached exhibits; Katergaris's Local Rule 56.1 counter-statement, Dkt. 50 ("Pl. 56.1"); his declaration in opposition to the motion, Dkt. 48 ("'Katergaris Decl."), and attached exhibits; the declaration of Diana K. Simpson in opposition to the motion, Dkt. 49 ("Simpson Decl."), and attached exhibits; the City's Local Rule 56.1 counter-statement, Dkt. 53 ("Def. Reply 56.1"); and the declaration of Samantha Schonfeld in further support of the motion for summary judgment, and attached exhibits, Dkt. 52.

Citations to a party's Rule 56.1 statement incorporate by reference the documents cited therein. Where facts in a party's Rule 56.l statement are supported by testimonial or documentary evidence, and are denied by a conclusory statement by the other party without citation to conflicting testimonial or documentary evidence, the Court finds such facts true. *See* S.D.N.Y. Local Rule 56.1(c) ("Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party."); *id.* at 56.l(d) ("Each statement by the movant or opponent . . . controverting any statement of material fact[] must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).").

his life has purchased approximately a dozen properties himself or as a member of an LLC, had lawyers check whether there were any outstanding liens on the Property. Katergaris Dep. at 11. At the time of the purchase, Katergaris lived in England. His then-wife moved into the W 132nd St. property upon the purchase; Katergaris moved in about six months later, in May 2015. Def. 56.l ¶¶ 49–50. During those six months, Katergaris stayed at the Property when he visited New York, which he did, among other times, on a three-to-four day stay in March 2015. *See id.* ¶ 49; *see also* Def. Reply 56.1 ¶ 49.

### 1. DOB's Procedures for Mailing Notices of Violation

DOB's procedure for issuing and mailing notices of violation for property owners who fail to file low-pressure boiler inspection reports is as follows.

First, DOB processes all inspection reports that are filed for a given inspection period. *Id.* ¶ 11. DOB then compiles a list of properties for which it did not receive a required inspection report. *Id.* From this, DOB creates a list of the owners of the properties with such delinquencies. *Id.* ¶¶ 11–13; see also Pl. 56.1 ¶¶ 12–13. DOB then exports a list of properties and owners and sends that file to a vendor, Vanguard Direct ("Vanguard"), to mail out violation notices. Def. 56.l

¶ 14.[3] Vanguard has done such work for DOB since 2001. *Id.*

Upon receiving the list, Vanguard uses a DOB template to produce sample violation notices, which it sends to DOB for review. *Id.* ¶ 15. Upon DOB's approval, Vanguard mass-produces notices of violation and "arranges for these DOB notices of violation to be mailed out to property owners via U.S. Postal Service First-Class mail." *Id.* ¶ 16. Vanguard subcontracts with a separate company, AST Document Solutions ("AST"), which physically mails out the notices. Pl. 56.1 ¶ 28; *see also* Def. Reply 56.1 ¶ 28. Although it is not clear when Vanguard began subcontracting with AST, or who at DOB knew about AST and when, all agree that at all times relevant here, AST was in charge of mailing out the notices on behalf of Vanguard. *See* Pl. 56.1 ¶ 29; Def. Reply. 56.1 ¶ 29. AST sent notices of violations by first-class mail, which does not produce a delivery receipt. Pl. 56.1 ¶ 40.

In this capacity, AST would run a "CAS certification slash," in which the addresses to be used for the mailing would be validated and then "pre-sorted." Muniz Dep. at 52. Pre-sorting entails placing the mail in order by zip code before delivering it to the post office. *Id.* at 52. After pre-sorting, AST used machinery to stuff the envelopes for mailing. *Id.* at 44–45, 48. At various points in this production process, these

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[3] Katergaris notes that neither DOB nor Vanguard had put these mailing policies in writing, but he does not dispute that these procedures were, in fact, in place. *See, e.g.*, Pl. 56.1 ¶¶ 27, 34.

mailings would be counted to ensure that the correct number were mailed out. *Id.* at 46. Sometimes, items of mail would be damaged in the inserting process. In that instance, the damaged mailings would be re-printed and an individual at AST would manually put them back into the pre-sort order. *Id.* at 48–49.

When the mailings were ready to go out, AST would fill out a USPS Form 3600 to present to the USPS upon delivery. *Id.* at 55–56. The USPS Form 3600 is "basically an affidavit or a form that describes what is being delivered and accepted to [and by] USPS." *Id.* at 56. USPS would then accept or reject (in whole or part) the mailing, process the items to be mailed, and deposit them into the mail stream. *Id.* at 51, 58–62.

For large-batch mailings like the notices at issue here, AST, through Vanguard, sent out the letters under DOB's permit with USPS, As such, postage was not manually applied. Rather, the mail would be sent out, affixed with DOB's permit number, and the correct postage amount would later be charged to DOB's account. *Id.* at 27–29.

After AST deposited a mailing with USPS, it would provide a confirmation to Vanguard, by phone or email; Vanguard in turn would confirm the mailing with DOB. *Id.* at 33–34. Some time after receiving that confirmation from AST, Vanguard would also receive a completed Form 3600 from AST as part of the normal procedures for closing out mailing projects. *Id.* at 55.

Once mailings were sent out, any notices that could not be delivered were returned to the DOB, the address of which is listed on the envelopes as the return address. *Id.* at 51–52; Ruiz Dep. at 27. The returned notices would go to DOB's mailing unit; the City's 30(b)(6) representative did not recall whether these mailings were then archived or shredded. Ruiz Dep, at 30–31. The City would not then take additional steps to attempt to deliver the returned notices to the property owner addressees. Ruiz Dep. at 31. After receiving confirmation of the mailing, however, DOB would "reflect the violations on each property's publicly accessible profile on DOB's Business Information System ('BIS') website." Def. 56.1 ¶ 18.

**2. The Mailing of the 2015 Notice of Violation to Katergaris**

Although Katergaris claims to have been unaware that a low-pressure boiler ever existed at the W 132nd St. Property, he does not dispute that (1) during the 2013 inspection cycle period the Property had such a boiler, (2) the then-property owner had been required to file an inspection report for this boiler, and (3) DOB's records reflect that no such report was filed for that cycle. *See* Pl. 56.1 ¶ 19. DOB accordingly registered a violation of the inspection report filing requirement for the W 132nd St. Property.

In early 2015, DOB set into motion the process for mailing notices of violation for the 2013 inspection cycle. Def. 56.1 ¶ 20. The W 132nd St. Property appeared on DOB's final spreadsheet listing properties for which the required inspection report had not been

filed; the owner for this address was noted as "Serafim Georgios Katergaris." *Id.* ¶ 20; *see also* Ruiz Decl., Ex. A. The DOB then exported the spreadsheet to a text file to send to Vanguard.

On March 16, 2015, DOB employee Juan Ruiz ("Ruiz") emailed Vanguard employees Mike Muniz ("Muniz") and Aska Asgher ("Asgher"), notifying them that DOB would be mailing a total of 17,919 notices, and asking Vanguard to put together a sample notice for each borough for DOB's review. Def. 56.1 ¶ 21. Muniz provided the requested samples the next day, March 17, 2015. Muniz sent 50 samples for DOB approval, which included samples for the first and last violations on the spreadsheet, and samples from all five boroughs. Ruiz Decl., Ex. B.

In 2015, Vanguard was working with AST to send out DOB notices. *See* Muniz Dep. at 20 (noting that the AST representative at the time, Joel, is no longer employed by AST). Muniz testified that Vanguard followed the procedures set out above when processing DOB's 2015 mailing of notices of violation, including in its dealings with AST. Muniz Dep. at 45–46.[4]

On Monday, March 23, 2015, Ruiz reached out to Muniz to confirm with Vanguard that the notices had been sent the previous Saturday. Ruiz Decl., Ex. B.

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[4] During the 2015 cycle, some notices of violation were damaged during the insertion process; AST notified Vanguard of this and reprinted the damaged pieces for mailing. *Id.* Two items in the 2015 batch did not qualify for presort with the USPS, and thus were sent separately with postage arranged separately. Neither appears to have related to Katergaris. *Id.* at 61–62.

Muniz responded that he was "checking with operations on a confirmation"; he soon followed up, telling Ruiz that "[t]he mailing was delivered Saturday, but not into the mail stream until today. [Vanguard] did also deliver some reprinted pieces that were damaged during inserting to the post office [that day, March 23, 2015]." Ruiz Decl., Ex. B. With this confirmation in hand, DOB posted the violations to the BIS website. In addition, after confirming over email that the mailing had been sent out, Vanguard received the completed Form 3600 from AST, covering the 2015 mailings. Muniz Dep. at 33.[5]

Ruiz estimated that, of the approximately 18,000 notices that went out in 2015, no more than 500 would have been returned to the DOB as undeliverable. Ruiz Dep. at 28. The record does not reflect which particular notices in 2015 were returned as undeliverable.

Katergaris attests that neither he, nor his then-wife, received a notice of violation in the mail at the Property in 2015. Pl. 56.1 ¶ 51. He testified that his then-wife's practice had been to collect mail delivered to the Property and set it aside for him, and to tell him when mail had come for him. *Id.* ¶ 50. He testified that he always collected the mail set aside for him when he visited the Property. *Id.* ¶¶ 50–51. He testified that his ex-wife did not check the mail every day, because she "traveled quite a bit," mainly for work.

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[5] During discovery, Vanguard obtained the Form 3600 from AST. Pursuant to its standard procedure for destruction of records after seven years, Vanguard had disposed of its records from the 2015 mailing. Muniz Dep. at 13–15.

Katergaris Dep. at 12. But, Katergaris testified that he presumes that, on her return, his then-wife would collect mail that had been delivered while she was away. *Id.* at 14. The evidence does not address whether or not Katergaris's then-wife, who was not deposed, was traveling in March 2015. *Id.* at 12 (Q: "Okay. Was she traveling in or around March of 2015?" A: "I don't remember. I don't recall. She's the ex-wife.").

The W 132nd St. Property did not have a mailbox in 2015. *Id.* at 13. Instead, "[s]ome mail would be left in a little plastic bag hanging on the gate. Some would be thrown down in the lower entrance. Sometimes it'd be left on the stoop." *Id.* Katergaris did not recall problems receiving mail at the property, or any instance in which he expected mail at the W 132nd St. Property but did not receive it. *Id.* at 14–15.

Katergaris states that he did not learn that there had been a notice of violation for 2013 until 2021, when he was selling the Property and his lawyers notified him that the violation had been reported on the purchaser's title report. Katergaris Decl. ¶ 6. At that time, he testified, "because [he] wanted the sale of the Property to go through, [he] paid the violation under protest on June 9, 2021." *Id.* ¶ 21. After making that payment, Katergaris continued to "pursue the issue with the [C]ity," on the ground that, having not owned the Property in 2013, he had not been responsible for the 2013 boiler annual inspection report. *Id.* ¶ 22.

**B. Legal Principles Applicable to Summary Judgment Motions**

To prevail on a motion for summary judgment, the movant must "show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The movant bears the burden of demonstrating the absence of a question of material fact. In making this determination, the Court must view all facts "in the light most favorable" to the non-moving party. *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008).

If the movant meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). Rather, to survive a summary judgment motion, the opposing party must establish a genuine issue of fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(l)(A); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009).

"Only disputes over facts that might affect the outcome of the suit under the governing law" will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In

determining whether there are genuine issues of material fact, a court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)).

**C. Discussion**

In pursuing summary judgment on Katergaris's due process claim, the City argues that his claim was untimely. *See* Def Br. at 5–15. A three-year limitations period applies to Section 1983 violations that occurred in New York, *Gleason v. McBride*, 869 F.2d 688, 691 (2d Cir. 1989) (citing *Owens v. Okure*, 488 U.S. 235, 251 (1989)), and Katergaris commenced this lawsuit on August 30, 2022, Dkt. 1, making his claim untimely if it accrued before August 30, 2019. The City argues that the claim accrued in 2015 when, it contends, a notice of violation was mailed to Katergaris pursuant to DOB standard procedure. *See* Def. Br. at 6. Katergaris contends, however, that the claim did not accrue until 2021 when, he claims, he first learned of the violation. *See* Pl. Br. at 1.

"Federal law governs the question of when a federal claim accrues notwithstanding that a state statute of limitations is to be used." *Morse v. Univ. of Vt.*, 973 F.2d 122, 125 (2d Cir. 1992). A federal Section 1983 claim "accrues when the plaintiff knows or has reason to know of the harm." *Eagleston v. Guido*, 41 F.3d 865, 871 (2d Cir. 1994). Here, when Katergaris knew or had reason to know of the alleged due process

violation turns on whether, in 2015, he had notice of violation by mail.

In considering that question, the Second Circuit applies a common law "mailbox rule." Under that rule, where a party "provides evidence that [mailings] were properly addressed and mailed in accordance with regular office procedures, it is entitled to a presumption that the notices were received." *Akey v. Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004) (quoting *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985)).[6] Where a party produces enough evidence to trigger this presumption of receipt, the burden of proof shifts to the party claiming non-receipt to rebut the presumption and show that a genuine issue of material fact exists as to receipt of the mail in question. *See Meckel*, 758 F.2d at 818 (citing Fed. R. Civ. P. 56(e)).

"Denial of receipt, without more, is insufficient to rebut the presumption." *Akey*, 375 F.3d at 235. Rather, where the presumption has been established

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[6] The parties spar over whether the federal or New York State iteration of this presumption applies. *See* Pl. Br. at 5–8; Def. Reply Br. at 2–3. There is limited daylight between these standards. Heeding the Second Circuit's guidance, the Court applies the federal standard, while considering New York cases as persuasive but not controlling authority as to the same. *See, e.g.*, *Leon v. Murphy*, 988 F.2d 303, 309 (2d Cir. 1993) (applying federal mailbox rule to Section 1983 claim, but citing New York case law applying state-law equivalent, because, "[e]ven if New York law is not regarded as controlling on this issue, moreover, we find these authorities persuasive on the facts of this case"); *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 92–93 (2d Cir. 2010) (applying federal presumption of receipt).

based on the existence of regular mailing procedures, "in addition to denial of receipt . . . [there must be] some proof that the regular office practice was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable." *Meckel*, 758 F.2d at 817. Such may take the form of "circumstantial evidence rebutting proof of mailing," *id.* Regardless of the form of evidence, the party opposing the presumption must establish "specific facts" supporting a conclusion of non-receipt to defeat the presumption once established, *see In re Great Atl. & Pac. Tea Co., Inc.,* 618 B.R. 57, 67 (S.D.N.Y. 2020), *aff'd sub nom.*, *Great Atl. & Pac. Tea Co., Inc. v. Nat'l Union Fire Ins. Co.*, 850 Fed. App'x 811 (2d Cir. 2021).

The Court considers first whether the City has triggered the presumption and second whether Katergaris has adduced evidence sufficient to rebut it.

**1. The City's Evidence Triggers the Presumption of Receipt**

The City has adduced sufficient admissible evidence both that the mailing to Katergaris was properly addressed and that it was sent pursuant to normal office procedures, so as to trigger a presumption of receipt.

First, it is undisputed that the mailing was properly addressed with the correct address that the City had on file: "124 W 132nd Street, New York, NY 10027-7802." Def. 56.1 ¶ 20 ("An excerpt of DOB's final Excel sheet of low-pressure boilers for which an annual inspection report was not received for the

2013 cycle included 'Serafim Georgios Katergaris' at the [W 132nd St. Address]"); Pl. 56.1 ¶ 20 (not disputing this fact). Thus, there is competent evidence that the notice of violation was properly addressed.

Second, the City has adduced sufficient evidence that the mailing was sent in accordance with regular office procedures. In his deposition testimony and sworn declaration, DOB's Federal Rule of Civil Procedure 30(b)(6) representative, Ruiz, attested to DOB's annual process of compiling a list of properties for which there had been no inspection report filed and matching these properties to the property owners. *See, e.g.*, Ruiz Dep. at 56–57, 63–64; Ruiz Decl. ¶¶ 6–8. Ruiz further attested to DOB's internal processes for assuring the accuracy of this list and its process for sending the list to its mailing vendor Vanguard, which produced sample notices for further DOB review. Ruiz Decl. ¶¶ 6–11. Ruiz also attested to DOB's process for reviewing and approving these samples; for directing Vanguard as to the day on which the mailings were to be sent by Vanguard via first-class mail; and for confirming with Vanguard via email that the mailings had been completed. *See* Ruiz Dep. at 25. Ruiz testified that DOB would then post the violations on its public website. Importantly, both Ruiz and Vanguard's witness, Muniz—each of whom personally participated in this process for 2013 violations—attested that these procedures were followed in 2015. The City also produced emails corroborating this testimony. *See, e.g.*, Ruiz Decl. ¶¶ 14–20; Muniz Dep. at 23.

That evidence, viewed in totality, is sufficient to establish that regular office procedures for mailing notices of violations existed in 2015 and were followed in connection with the notice of violation the City prepared for Katergaris. *See, e.g.*, *Bronia, Inc. v. Ho*, 873 F. Supp. 854, 859-60 (S.D.N.Y. 1995) (presumption of receipt triggered by testimony from office personnel as to normal office procedures, despite the lack of firsthand knowledge as to specific mailing at issue); *Ma*, 597 F.3d at 92 (presumption of receipt triggered where "the record establishes office procedures, followed in the regular course of business, pursuant to which notices have been addressed and mailed"); *In re East Coast Brokers and Packers, Inc.*, 961 F.2d 1543, 1545 (11th Cir. 1992) (testimony setting out specific office procedures such as that the "[employees] make a photo copy and it goes to the receiver" established presumption of receipt). Accordingly, the City is entitled to a presumption that Katergaris received the 2015 notice of violation.

Katergaris's arguments to the contrary fail. First, he asserts that the City has not come forward with any evidence from an affiant with "personal knowledge" of DOB's "customary mailing practices." Pl. Br. at 8 (quoting *Guerra v. Consol. Rail Corp.*, 936 F.3d 124, 136-37 (3d Cir. 2019)). He bases this claim on the observation that the City has not offered testimony "from the company that actually conducted the mailing"—AST *Id.* at 9. He thus argues that, to trigger the mailbox rule and the associated presumption of receipt in a case where a party used a third-party vendor to perform the physical mailing at issue, the party must come forward with a witness with

personal knowledge of that third-party's mailing practices. *See id.* at 8–11.

The case law does not support such a requirement. Rather, it is sufficient to establish mailing in accordance with normal office procedures to submit an affidavit or testimony from an individual who oversees these procedures. That those procedures entail the participation of employees of both the party and a third-party vendor does not render such testimony inadequate. *See, e.g.*, *In re Adler, Coleman Clearing Corp.*, 204 B.R. 99, 104–05 (S.D.N.Y. 1997) (affidavit from trustee overseeing mailing of claim packages sufficient to establish presumption even where mailing procedures included use of third-party vendor to assemble, print, and mail such packages and where no affidavit or evidence from third-party vendor was submitted); *BASF Corp. v. Norfolk Southern Ry. Co.*, No. 04 Civ. 9662, 2008 WL 678557, at *5 & n.13 (S.D.N.Y. Mar. 10, 2008) (presumption of receipt established on basis of normal office procedures where last step in mailing procedure was that mail was "carried to the main [company] mailroom in Atlanta for handling and disbursement"); *In re E. Coast Brokers & Packers, Inc.*, 961 F.2d at 1545–46 (evidence of regular office procedures sufficient to trigger presumption where it showed that notices were put together and sent out to regulatory authority and the recipient at the same time, with the "girls in the office" in charge of "carry[ing] out the rest").

Here, the City's affiants–an employee of the City and an employee of its third-party vendor, Vanguard—have each attested to personal knowledge of

the normal office procedures used by their respective employers at the relevant time for the types of mailings in question. Vanguard's Muniz, in particular, testified to his personal familiarity not only with Vanguard's procedures, but with the bulk of the mailing practices that its vendor, AST, used, and that these were followed during the period at issue. *See, e.g.*, Muniz Dep. at 27–29 (attesting that AST would mail out notices on the DOB's postal account and permit number, such that USPS would charge DOB postage after the fact rather than requiring that a unique postal charge appear on each envelope). The case law requires only personal knowledge of DOB's regular office mailing procedures. The City has produced such evidence here, triggering the presumption of receipt.

*Mason v. Midland Funding LLC*, 815 Fed. App'x 320 (11th Cir. 2020), on which Katergaris relies, does not assist his cause. The Eleventh Circuit there held that a declaration from an affiant-employee of the company Bluestem did not evince the required personal knowledge of normal office mailing procedures where the mailing in question was actually carried out by two contracted third parties. *Id* at 327. In so holding, the Circuit emphasized that Bluestem's affiant not only did not "work for either of the third parties that supposedly completed the mailing" but he also "never attested that he reviewed any of [the third parties'] records showing that the [mailing] was in fact sent to [the appellant]." *Id.* Here, in contrast, there is testimony not only from DOB, but from Muniz, an employee of third-party Vanguard, who attested to Vanguard's mailing procedures based on personal knowledge. *See generally* Muniz Dep. And

both Muniz, on behalf of Vanguard, and Ruiz, on behalf of the City, attested to having reviewed records or received contemporaneous communications confirming that Vanguard and AST had mailed out the batch of notices—including that destined for Katergaris. *See, e.g.*, Muniz Dep. at 33 (testifying that he received confirmation from AST that the 2015 mailing had been sent and communicated this to the DOB); Ruiz Dep. at 25 (testifying that Vanguard would confirm with Ruiz when mailings had been sent out). Muniz further testified that, in addition to receiving an informal confirmation from AST to this effect, he later, in the regular course of business, received a USPS Form 3600 from AST confirming that the 2015 mailing had been placed in the mail stream with the USPS. Muniz Dep. at 33. Thus, relative to *Mason*, where the defendants "rel[ied] solely on the [single] declaration to show" that an item had been placed in the mail, the City here produced a greater breadth and depth of evidence supporting the same.[7] That entitles the City to a presumption of receipt.

Katergaris next argues that any presumption of receipt here should be a weak one, and that a "strong" presumption of receipt is available only where the mailing party utilized certified mail as opposed to the

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[7] To the extent that Katergaris reads *Mason* more sweepingly—to demand testimony from an employee of each third-party vendor involved in the mailing process before the presumption is triggered—that out-of-circuit unpublished opinion is not consistent with the Second Circuit caselaw above.

first-class mail used here. Pl. Br. at 12–13.[8] But the Second Circuit has only ever vaguely endorsed such a distinction, and even then only in the immigration context. There, the Circuit has held that a "strong" presumption of receipt as adopted by the Board of Immigration Appeals applied only in the case of certified mail, but that "even in the context of regular mail, a presumption of receipt is proper so long as the record establishes that the notice was accurately addressed and mailed in accordance with normal office procedures." *Lopes v. Gonzales*, 468 F.3d 81, 84 (2d Cir. 2006) (citing *Matter of Grijalva*, 21 I & N Dec. 27 (BIA 1995)). If anything, this holding reaffirms that the default common-law mailbox rule, and the relative strength of the presumption it erects, does not depend on the use of certified mail.

Indeed, the Second Circuit has never drawn such a line in applying the general common law mailbox rule, *see id.* at 85 (noting Circuit's "own holding . . . outside the immigration context," that in the context of regular mail, a "presumption of receipt exists where a piece of mail is 'properly addressed and mailed in accordance with regular office procedures'" (quoting *Akey*, 375 F.3d at 235)). It has not adopted the reasoning of the Third Circuit decision on which Katergaris relies, either, under which a "weaker" presumption applies where the sender's regular procedures

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[8] Katergaris also briefly critiques the City's process for dealing with notices returned by mail. That process, however, is not germane to whether the City has triggered a presumption of receipt but to whether Katergaris has rebutted it. The Court considers that issue in the section below.

entailed the use of first-class mail. *See* Pl. Br. at 12–13 (citing *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314, 319 (3d Cir. 2014)).; *cf. Ma*, 597 F.3d at 92 (applying normal presumption of receipt where mailing sent by regular mail); *Baldwin v. United States*, 921 F.3d 836 (9th Cir. 2019) (analyzing whether statutory/regulatory regime in tax context, which provides presumption of receipt only in the case of certified mail, displaced common-law mailbox rule, which applies to documents sent by regular mail); *see also In re Greenberg*, 526 B.R. 101, 108 (E.D.N.Y. 2015) (rejecting a similar argument based on *Lupyan).*

Further, there is a sound basis for not extending this distinction to the mailings at issue. In some contexts, it would not be "expecting too much to require businesses" or other senders "that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt." *Lupyan*, 761 F.3d at 322. But the context at issue here is relatively quotidian. DOB is a government entity (not a profit-making concern) that annually sends out some 20,000 violation notices concerning low-pressure boilers alone. Katergaris has not explained why it is reasonable to demand that DOB, to secure the presumption of receipt in this context, be obliged to send out these notices by the more expensive and cumbersome process of certified mail. Nor has he identified caselaw conditioning the presumption of receipt on a governmental entity's having used certified mail for such workaday communications. *See, e.g.*, *O'Toole v. U.S. Secy of Agric.*, 31 C.I.T. 79, 88 n.13 (2007) ("[I]t bears noting that a close reading of the case law on the mailbox rule suggests that the rule's

application in particular areas of the law is, in certain respects, colored by policy or other considerations specific to those individual areas of law."). The presumption instead has its basis on the empirical likelihood of receipt where reasonable mailing procedures have been followed. *Cf. Rosenthal v. Walker*, 111 U.S. 185, 193 (1884) (impetus for mailbox rule was the "inference of fact" based "on the probability that officers of the government [*i.e.*, the post office] will do their duty and the usual course of business").

Accordingly, this Court, having found the presumption of receipt to apply, will give it the same weight the Second Circuit has uniformly given it outside the immigration context.

**2. Katergaris Has Failed to Adduce Evidence Sufficient to Rebut the Presumption of Receipt**

Katergaris has failed to come forward with evidence of his non-receipt of the notice sufficient to give rise to a genuine issue of material fact. In claiming to be able to rebut the presumption, Katergaris principally relies on three categories of evidence: (1) his testimony denying receipt and describing his practice of paying fines on time; (2) his testimony as to procedures he used to access mail delivered to his W 132nd St. address in 2015; and (3) the City's procedure for handling notices returned as undeliverable. Viewed separately or together, these do not enable him to carry his burden here given the triggering of the presumption.

First, Katergaris's denial of receipt does not raise a genuine issue of material fact as to the fact of receipt. It is well-established in this Circuit that a recipient's mere denial of receipt is not sufficient to rebut the presumption of receipt. *Ma*, 597 F.3d at 92 (citing *Akey*, 375 F.3d at 235). Katergaris offers scant evidence in support: his claim to have paid earlier citations or tickets on time, Katergaris Decl. ¶ 19, and the fact that, on learning of the outstanding boiler violation in 2021, he paid the fine, *id.* ¶¶ 20–21. Katergaris's general and unsubstantiated attestations, which likely could be given by the large majority of persons denying receipt of mail, are insufficient without more to rebut the presumption of receipt. *See, e.g.*, *In re Robinson*, 228 B.R. 75, 82 (E.D.N.Y. 1998) ("The federal courts in New York . . . 'hold quite uniformly that an affidavit of non-receipt is insufficient to rebut the presumption of receipt.'" (quoting *In re Malandra*, 206 B.R. 667, 673 (E.D.N.Y. 1997)); *Leon*, 988 F.2d at 309 (where only evidence to rebut the presumption of receipt established via affidavits as to regular office procedures were denials by the plaintiff and his wife that they received the mailings, the presumption stood); *cf. Ghounem v. Ashcroft*, 378 F.3d 740, 745 (8th Cir. 2004) (sworn statement denying receipt, coupled with defendant's documented history of appearing for same type of hearing for which he claimed to not have received notice, and defendant's lack of benefit to gain by failing to appear, sufficient to rebut presumption of receipt). And his payment of this fine, which appears to have been necessary to enable him to complete the sale of the Property, does not speak to

whether he would have paid the fine in 2015 had he received the notice of violation.

Second, Katergaris's account of his and his then-wife's whereabouts, and their practices with respect to mail at the W 132nd St. Property in March 2015, makes it, if anything, less plausible that the 2015 notice of violation went undelivered—as opposed to having been overlooked or not responded to. As Katergaris testified, he was generally *not* living at the Property in March 2015, save for monthly visits lasting several days, meaning his then-wife was in charge of collecting the mail and setting it aside for him. Pl. 56.1 ¶¶ 50–51. But Katergaris testified that his ex-wife also frequently travelled for work, and the couple did not have anyone collect their mail in her absence. Katergaris Dep. at 12, 14. And Katergaris did not adduce any testimony from his ex-wife. Thus, his account of her practices with respect to handling incoming mail—including whether she was rigorous or not in reviewing and maintaining it—is largely hearsay, and to the extent not, entitled to limited weight. Katergaris also did not adduce any evidence as to his ex-wife's whereabouts during March 2015.

Further undermining his case on this issue, Katergaris admitted that the Property in 2015 lacked a mailbox, such that mail delivered to it would apparently be left in any number of places, including hung on the Property's fence in a baggy, or on the front stoop. Katergaris Dep. at 13. This portrait of sloppy, if not collegiate, practices with respect to incoming mail is at odds with the inference Katergaris seeks to raise of a system of receiving, collecting, and

responding to mail so rigorous and orderly that it would have been improbable for a delivered mailing to have gone unacted-upon.

Finally, Katergaris has not alleged any specific facts concerning the City's process for mailing notices in 2015 to make application of the presumption of receipt unreasonable. He notes that the City admitted that some 500 of the approximately 18,000 notices sent in 2015 were returned to the DOB as undeliverable, and the DOB has not proven that the notice mailed to Katergaris was not among the returned notices. Pl. Br. at 12–13.

That argument does not follow. There is no basis to infer that the mailed notice to Katergaris was among the fewer than 3% of notices estimated to have been returned. On the contrary, it is undisputed that Katergaris's envelope was correctly addressed. It is also undisputed that Katergaris's notice was among those sent out on the DOB's USPS permit, such that insufficient postage could not have interfered with its delivery. And Katergaris himself disclaimed that he had any actual problems with receiving mail at the W 132nd St. address. *See* Katergaris Dep. at 14–15. Moreover, given the tiny share of mailings that were returned, Katergaris's reliance on the purely theoretical possibility that his was among them would undermine the concept of a presumption. On the record at hand, a finder of fact would not have any non-speculative basis to find the presumption of receipt rebutted. *See e.g.*, *Shao Ling-Zhang v. Gonzales*, 230 Fed. App'x 57, 58 (2d Cir. 2007) (judge did not abuse discretion in finding that "uncorroborated claim of

mailbox vandalism" failed to rebut presumption); *In re FKF 3, LLC*, 501 B.R. 491, 501 (S.D.N.Y. 2013) (presumption of receipt unrebutted where opponent did not set forth specific facts to substantiate possibility that properly addressed notice was accidentally delivered to different tenant at building); *In re Great Atlantic & Pacific Tea Co., Inc.*, 618 B.R. at 67 (general allegations lacking "any specific instances of misdelivery or non-delivery or the relevant circumstances" did not rebut presumption); *cf. BASF Corp.*, 2008 WL 678557, at *5 ("Plaintiff provides no proof that there was a breach in procedure or carelessness on the part of the sender as the standard requires.").

The Court accordingly holds that Katergaris has failed to adduce evidence sufficient to rebut the presumption of receipt in this case. Given the unrebutted presumption that he received the notice of violation in 2015, Katergaris's claim based on that notice accrued in 2015, such that the three-year limitations period had long since expired by the time Katergaris filed this lawsuit in 2022.

## CONCLUSION

For the foregoing reasons, the Court grants the City's motion for summary judgment and dismisses this case as time-barred. In light of this ruling, the Court does not have occasion to address the City's other arguments for dismissal.

The Clerk of Court is respectfully directed to terminate all pending motions and close this case.

*Appendix B*

SO ORDERED

/s/ Paul A. Engelmayer
Paul A. Engelmayer
United States District Judge

Dated: June 24, 2024
New York, New York

*Appendix C*

*Appendix C*

Order of the United States District Court
for the Southern District of New York

July 17, 2023

*Appendix C*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| SERAFIM GEORGIOS KATERGARIS,<br><br>Plaintiff,<br>-v-<br>CITY OF NEW YORK,<br><br>Defendant. | 22 Civ. 7400 (PAE)<br><br>ORDER |

PAUL A. ENGELMAYER, District Judge:

Plaintiff Serafim Georgios Katergaris ("Katergaris") brings a due process claim under 42 U.S.C. § 1983 against defendant City of New York (the "City") based on its procedures for imposing fines on property owners for violations of boiler inspection ordinances. Dkt. 28 ("First Amended Complaint" or "FAC"). The City has moved to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6), in part on the ground that Katergaris's § 1983 claim is time-barred by the three-year statute of limitations for such claims. *See* Dkt. 32. The City argues that its violation notice was mailed to Katergaris on March 3, 2015, starting the running of the three-year limitations period. *Id.* at 4–5. In support, the City has filed a declaration of New York City Department of Buildings ("DOB") employee Juan Ruiz setting out the

DOB's procedures for mailing boiler-related violation notices. *See* Dkt. 31. If Ruiz's account is credited, the City argues, Katergaris is presumed under the "mailbox rule" to have received the DOB's mailing, and absent evidence defeating this presumption, the limitations period ran in March 2018, years before this suit was filed in August 2022. *See* Dkt. 1; Dkt. 32 at 4–5.

Where a defendant submits materials outside the pleadings for consideration on a Rule 12(b)(6) motion to dismiss, the Court must either convert the motion to one for summary judgment under Rule 56 or exclude the additional materials and decide the motion based solely upon the FAC. *See* Fed. R. Civ. P. 12(d). "[A] district court acts properly in converting a motion for judgment on the pleadings into a motion for summary judgment when the motion presents matters outside the pleadings, but the rule requires that the court give sufficient notice to an opposing party and an opportunity for that party to respond." *Hernandez v. Coffey,* 582 F.3d 303, 307 (2d Cir. 2009) (citation omitted).

Such is the case here. On Katergaris's pleadings and cognizable associated materials, the Court cannot resolve the City's potentially dispositive limitations defense. The availability of that defense turns, or may turn, on facts not cognizable on a motion to dismiss, including facts relating to the City's procedure for mailing, documenting, and tracking violation notices

and the circumstances surrounding Katergaris's receipt of the violation notice. Accordingly, with respect to the issue of timeliness **only,** the Court converts the City's motion to dismiss to one for summary judgment. The Court directs that (1) the parties conduct discovery on the issue of timeliness by August 7, 2023; (2) any motion for summary judgment by the City on this ground be filed by August 14, 2023; (3) any response by Katergaris to the City's motion be filed by August 21, 2023; and (4) any reply by the City be filed by August 24, 2023. The Court will thereafter rule on the summary judgment motion on this ground, and, if warranted, the other ground(s) raised in the City's motion to dismiss.

SO ORDERED.

/s/ Paul A. Engelmayer
Paul A. Engelmayer
United States District Judge

Dated: July 17, 2023
New York, New York

*Appendix D*

*Appendix D*

Judgment of the United States District Court
for the Southern District of New York

June 25, 2024

*Appendix D*

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - X

SERAFIM GEORGIOS KATERGARIS,

Plaintiff, 22 **CIVIL** 7400 (PAE)

-against- **JUDGMENT**

CITY OF NEW YORK,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated June 24, 2024, the Court has granted the City's motion for summary judgment and has dismissed this case as time-barred. In light of this ruling, the Court does not have occasion to address the City's other arguments for dismissal; accordingly, the case is closed.

**Dated:** New York, New York
June 25, 2024

**DANIEL ORTIZ**
**Acting Clerk of Court**

**BY: K. MANGO**
**Deputy Clerk**

*Appendix E*

# *Appendix E*

N.Y.C. Admin. Code § 27-793

*Appendix E*

**§ 27-793 Boilers.**

(a) Acceptance tests. Boilers shall not be placed in operation upon completion of construction until they have been inspected and tested and an equipment use permit has been issued by the commissioner. All final inspections and tests for boilers shall be subject to the provisions for controlled inspection as provided in subchapter one of this chapter, except that such inspections and tests shall be made by a qualified boiler inspector in the employ of the department or a duly authorized insurance company as provided in section two hundred four of the labor law. Equipment having a Btu input of not more than three hundred fifty thousand Btu per hour shall be exempt from this requirement.

(b) Periodic boiler inspections.

(1) Except as provided in paragraph two of this subdivision, all boilers, as defined in section two hundred four of the labor law, excepting those boilers listed in subdivision five of such section of the labor law, shall be inspected at least once a year by duly authorized insurance companies or other qualified inspectors in the manner set forth in rules and regulations promulgated by the commissioner. Such inspections shall also include the chimney connectors described in article three of subchapter fifteen of this chapter. All boiler inspectors who perform periodic

inspections pursuant to this subdivision shall be qualified under section two hundred four of the labor law and rules and regulations promulgated by the commissioner of labor.

(2) Each owner of a high-pressure boiler, as defined in sections 26-160 and 27-795 of this code, may choose to have the annual boiler inspection conducted by the department or by a duly authorized insurance company.

(c) Owners annual statement.

(1) The owner of each boiler that is subject to periodic inspection shall file an annual written statement with the commissioner, specifying:

a. The location of each boiler.

b. Whether or not the owner, agent, or lessee has had the boiler inspected by a duly authorized insurance company or other qualified inspector in accordance with the requirements of subdivision (b) of this section, setting forth the name and address of the insurance company or other qualified inspector, the date of inspection, and the policy number covering the boiler.

(2) If the periodic boiler inspection has been performed by a duly authorized insurance company or other qualified inspector pursuant to subdivision (b) of this section, the annual statement shall be

accompanied by a signed copy of the report of each boiler inspection, on such forms and in such manner as required by the commissioner.

(3) The statement shall be filed within thirty days after installation of a boiler. Thereafter, it shall be filed on or before the last day of December of the year of each annual inspection.

(d) Removal or discontinuance notice. The owner of a boiler that is removed or discontinued from use shall file a written notice of such removal or discontinuance with the commissioner within thirty days of the date of removal or discontinuance.

(e) Failure to file statements and notices. If an owner of a boiler shall fail to file any statement or notice required under this section, such owner shall be liable for a civil penalty pursuant to section 26-125 of this code.

(f) Additional inspections. In addition to the inspections required by subdivisions (a) and (b) of this section, the commissioner may make such additional inspections as required to enforce the provisions of this code. No fee shall be charged for such additional inspections.

(g) Fees. Every owner of a boiler in use and inspected by a duly authorized insurance company shall pay to the department an annual fee for each boiler in the amount prescribed by section 26-213 of

*Appendix E*

Title 20-6 of the administrative code to cover the city's administrative and supervisory costs involved. The fee shall be payable at the time of the filing of the statement required by this subdivision.

*Appendix F*

1 R.C.N.Y. § 103-01

*Appendix F*

**THE RULES OF THE CITY OF NEW YORK**

**Current through rules effective April 21, 2021.**
[ALP S-060]

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## § 103-01 Low Pressure Boiler Inspection and Filing Requirements, Penalties and Waivers.

(a) *Scope.* This rule implements Article 303 of Title 28 of the New York City Administrative Code ("Administrative Code") by specifying the low pressure boiler annual inspection requirements, the processes through which the department shall regulate the filings of low pressure boiler annual inspection reports and shall issue penalties and waivers for failure to file and/or late filing, and the penalties for failure to file and/or untimely filing of a written notice of removal or disconnection of a low pressure boiler.

(b) *References.* See §§ 28-201.2.2, 28-202.1 and Article 303 of Title 28 of the Administrative Code and 1 RCNY § 101-07.

(c) *Definitions.* For the purposes of this section, the following terms shall have the following meanings:

(1) *Filing deadline.* For the low pressure boiler annual inspection report or any part of that report, forty-five (45) days from the inspection date.

(2) *First Test.* An inspection of a newly installed or replaced boiler required for the department to approve its use and operation.

(3) *Inspection cycle.* January 1st through December 31st of the calendar year for which the report is being submitted. Annual inspections must be at least six (6) months apart.

(4) *Late filing.* An inspection report or any part of that report filed after the forty-five (45) day filing deadline but in no event more than twelve (12) months from the date of the inspection.

(5) *Owner.* Any person, agent, firm, partnership, corporation or other legal entity having a legal or equitable interest in, or control of, the premises and/or boiler.

(6) *Removal or disconnection.* Removal or discontinuance, pursuant to § 28-303.8 of the Administrative Code.

(7) *Waiver.* Removal of the obligation to pay a penalty associated with a violation. A waiver does not result in dismissal of the violation.

(d) *Owner's responsibilities.*

(1) *Inspection and report filing.* An owner must comply with the inspection requirements and

must file low pressure boiler annual inspection reports pursuant to Article 303 of Title 28 of the Administrative Code and in accordance with 1 RCNY § 101-07.

(2) *Notification.* An owner shall notify the department's Boiler Division within thirty (30) days of the owner's change of address or sale of the premises housing the boiler. The owner must reference the department's boiler number in all correspondence.

(3) *New owner.* A new owner is responsible for inspection in the year that he or she purchases the building, only if he or she purchases the building on or before June 30 of that year.

(e) *Acceptance of filings.* Inspection reports filed after the forty-five (45) day filing deadline but within twelve (12) months of the inspection date will be considered late filings and will be subject to the appropriate civil penalties as set forth in subdivision (f) of this section. Reports filed after such twelve (12) month period will be considered expired. In such cases, owners will be subject to the appropriate civil penalties for failure to file an inspection report, as set forth in subdivision (f) of this section, and the department will require a new inspection to be performed for the current inspection cycle and a new report filed in accordance with this section.

(f) *Civil penalties, low pressure boiler annual inspection report.*

(1) *Failure to file.* An owner who fails to file the low pressure boiler annual inspection report or any part thereof for each boiler, pursuant to Article 303 of Title 28 of the Administrative Code and this section, shall be liable for a civil penalty of not less than one thousand dollars ($1000.00) per boiler. In accordance with 1 RCNY § 101-07, a low pressure boiler annual inspection report not filed within twelve (12) months from the date of the inspection shall be deemed expired and shall not be accepted by the department.

(2) *Late filing.* An owner who submits a late filing, but who provides proof that the inspection took place within the inspection cycle for which the report was due, shall be liable for a civil penalty of not less than fifty dollars ($50.00) per month, per boiler, commencing on the day following the filing deadline and ending on the date of submission of a complete report, including a late filing of the boiler certificate of affirmation. The total penalty shall not exceed six hundred dollars ($600.00) per boiler. For the purposes of this paragraph, "proof" shall mean a notarized affidavit from the approved boiler inspector who conducted the inspection with his or her seal stating that the inspection was completed within the inspection cycle for which the report was due.

(3) *Challenge of civil penalty.* An owner may challenge the imposition of any civil penalty authorized to be imposed pursuant to this subdivision by providing written proof of a timely and complete inspection and filing to the department. Challenges shall be made in writing within thirty (30) days from

the date of service of the violation by the department and sent to the office/unit of the department that issued the violation. The decision to dismiss or uphold the penalty shall be at the sole discretion of the department. Examples of such proof shall include, but are not limited to, the following:

(i) A copy of the boiler inspection report for the inspection performed during the applicable inspection cycle and a copy of the front and back of the canceled check or money order to the department for the boiler inspection report fee; or

(ii) The department-assigned transmittal number for the electronic disk filing report.

(4) *Extension of the filing deadline.* An owner may request an extension of the filing deadline in order to correct low pressure boiler defects and file a certification that identified defects have been corrected in accordance with 1 RCNY § 101-07, upon submission of proof that the request is based on extraordinary circumstances and/or that the delay in correction is beyond the owner's control, not including financial or administrative hardship. The request shall be made prior to the expiration of the filing deadline and shall be made on such forms and in such manner as required by the commissioner.

(5) *Waiver of penalties.* An owner may request a waiver of penalties assessed for violation of § 28-303.2 of the Administrative Code, § 27-793 of the 1968 Building Code and/or related rules enforced by the department. Requests shall be made in writing.

*Appendix F*

(i) *Owner status.*

(A) *New owner.* A new owner may be granted a waiver of penalties contingent upon the department's acceptance of the owner's proof that transfer of ownership to the new owner occurred after penalties were incurred. Such a waiver is limited to one of the following circumstances:

*((a))* The new owner has obtained full tax exemption status from the New York City Department of Finance; or

*((b))* The new owner submits proof to the department (such as a certificate from the Department of Housing Preservation and Development) that he or she took title to the property as part of an economic development program sponsored by a government agency.

(B) *Government ownership.* An owner may be granted a waiver of penalties upon submission of official documentation from a government entity affirming that the premises was owned in its entirety by the entity during the period for which a waiver is requested.

(C) *Bankruptcy.* An owner may be granted a waiver of penalties upon submission of a copy of a bankruptcy petition, together with proof that either the department or the New York City Law Department was served with a "Notice of Bar Date".

(ii) *Device status.* An owner may be granted a waiver of penalties contingent upon the department's acceptance of proof of the following:

(A) *Removed or disconnected.* That the low pressure boiler was removed from the building or disconnected prior to the inspection cycle for which the report was due. In the event that proof of removal or disconnection has not yet been entered into the department's database at the time of the request for a waiver, the owner shall submit to the department a copy of the Self-Certification of Removed or Existing Boiler(s) form.

(B) *New or replaced.* That the First Test was performed during the inspection cycle for which the report was due.

(C) *Work in progress.* That there is work in progress for the replacement or installation of a new boiler or burner or a major renovation requiring that the boiler or burner be deactivated during the work.

(iii) *Building status.* An owner may be granted a waiver of penalties contingent upon the department's confirmation of the following:

(A) *Demolished.* That the full demolition of the building occurred prior to the inspection cycle for which the report was due and that such demolition was signed-off by the department and/or that a new building permit has been issued for the property.

(B) *Sealed or vacated.* That the building was ordered to be sealed or vacated by a government agency (e.g. Department of Buildings, Department of Housing Preservation and Development, Fire Department of New York or Office of Emergency Management) or by court order prior to the expiration of the inspection cycle for which the report was due.

(g) *Civil penalties, written notice of removal or disconnection of a low pressure boiler.* Failure to file a written notice of removal or disconnection (a Self-Certification of Removed or Existing Boiler(s) form) in accordance with § 28-303.8 of the Administrative Code, or filing of such form past thirty (30) days of the date of the removal or disconnection of a low pressure boiler shall be deemed a lesser violation and shall subject the owner to penalties as set forth in this subdivision.

(1) *Failure to file.* An owner who fails to file such notice within twelve (12) months from the date following thirty (30) days from the removal or disconnection, shall be liable for a civil penalty of not less than five hundred dollars ($500.00) per boiler.

(2) *Untimely filing.* An owner who files such notice past thirty (30) days from the date of removal or disconnection, but within twelve (12) months from such date, may submit an untimely filing and shall be liable for a civil penalty of not less than fifty dollars ($50.00) per month, per boiler commencing on the day following the date the notice was due and ending on the date of submission of the notice. The total penalty

shall not exceed five hundred dollars ($500.00) per boiler.

(3) *Challenge of civil penalty.* An owner may challenge the imposition of any civil penalty authorized to be imposed pursuant to this subdivision by providing proof of a timely filing to the department. Challenges shall be made in writing within thirty (30) days from the date of service of the violation by the department and sent to the office/unit of the department that issued the violation. The decision to dismiss or uphold the penalty shall be at the sole discretion of the department. An example of such proof shall include, but is not limited to, the following: a stamped and dated copy of a Self-Certification of Removed or Existing Boiler(s) form filed with the department, which may be supported by a copy of the front and back of a canceled check(s) to the department for the fee for the filing of a Self-Certification of Removed or Existing Boiler(s) form.

(h) *Fees.* Fees for filings related to boilers shall be as set forth in 1 RCNY § 101-03 and Table 28-112.7.2 of the Administrative Code.

*Appendix G*

*Appendix G*

Declaration of Serafim Georgios Katergaris
in Support of Opposition to Defendant's
Motion for Summary Judgment

Filed December 1, 2023

*Appendix G*

**United States District Court**
**For The Southern District of New York**

| | |
|---|---|
| SERAFIM GEORGIOS KATERGARIS,<br><br>*Plaintiff*,<br><br>v.<br><br>CITY OF NEW YORK,<br><br>*Defendant*. | Case No. 1:22-cv-07400-PAE |

## DECLARATION OF SERAFIM GEORGIOS KATERGARIS

I, Serafim Georgios Katergaris, declare as follows:

1. I am an adult, over the age of 18, a resident of New York, and the named Plaintiff in the above-captioned civil action.

2. I, along with my then-wife, owned a home at 124 West 132nd Street, New York, NY 10027 (the "Property"), from November 2014 through June 2021.

3. The Property did not have a boiler when I purchased it, and I never installed a boiler. Accordingly, the Property never had a boiler while I owned it.

4. Nevertheless, when the Property was under contract for sale to a third party in 2021, I discovered for the first time that the City had issued a notice of violation for failing to file an annual inspection report for the boiler for the 2013 calendar year (the "Notice of Violation").

5. I never received the Notice of Violation for the Property from the City or a vendor of the City, in 2015, or at any other time.

6. I learned of and later received a copy of the Notice of Violation for the Property in 2021, from my lawyers after it showed up on the purchaser's title report on the Property.

7. The first time that I learned of the Notice of Violation for the Property was in 2021.

8. The Notice of Violation was dated March 3, 2015, and it indicated that it covered the 2013 calendar year.

9. I did not own the Property in 2013, so I could not have filed a boiler annual inspection report covering the 2013 calendar year.

10. When we purchased the property in November 2014, I was living in England.

11. My then-wife moved into the Property in December 2014, and I would stay at the Property a few times per month whenever I was in New York.

12. My then-wife lived at the Property full time in March 2015.

13. I stayed at the Property three days in March 2015.

14. From the time when my then-wife moved into the Property to the time I moved there in May 2015, my then-wife would collect any mail that came from where the Postal Service left it outside the Property.

15. My then-wife and I spoke every day, and she would tell me whenever any mail came addressed to me. She would then set my mail aside for me to collect on my next visit to the Property. My then-wife would have never thrown any of my mail away.

16. On the days that I stayed at the Property, I would collect the mail.

17. At no point in March 2015, or any other time, did either of us receive the Notice of Violation in the mail from the Department of Buildings.

18. As far as I know, there were no other letters mailed to me in March 2015 that I did not receive.

19. Any time I received a citation or ticket, including for errant trash or a motor-vehicle violation, I would pay it or contest it immediately.

20. Upon learning in 2021 of the Notice of Violation, I responded immediately, trying to resolve the issue.

21. Because I wanted the sale of the Property to go through, I paid the violation under protest on June 9, 2021.

22. After paying the violation under protest, I continued to pursue the issue with the City. I explained that I was not responsible for the 2013 boiler annual inspection report, at which point I discovered that the City provided no process for me to challenge the Notice of Violation. Because this isn't right, I filed suit.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2023.

/s/ Serafim Georgios Katergaris
Serafim Georgios Katergaris