



RESOLUTION

RELATIVE TO AN AGREEMENT FOR COUNSEL SERVICES CONCERNING POTENTIAL OPIOID LITIGATION

CITY OF NASHUA

In the Year Two Thousand and Seventeen

RESOLVED by the Board of Aldermen of the City of Nashua that the Mayor or the City Corporation Counsel is authorized to enter into the attached Retainer Agreement for Counsel Services concerning potential litigation to recover expenditures by the City of Nashua incurred as a result of the over-prescription of opioids.

LEGISLATIVE YEAR 2017

RESOLUTION: R-17-120

PURPOSE: To authorize a retainer agreement for counsel services concerning potential recovery of costs incurred due to over-prescription of opioid drugs.

ENDORSERS: Mayor Jim Donchess

**COMMITTEE
ASSIGNMENT:**

FISCAL NOTE: As all expenses are to be covered by the retained counsel and fees will only be paid as a percentage of any recovery, there is no potential for a net expenditure by the City. There is potential for substantial recovery in amounts too uncertain to be estimated at this time.

ANALYSIS

This resolution authorizes the City to enter into a retainer agreement for services of counsel to first explore and then to pursue recovery of costs resulting from over-prescription of opioid drugs. The agreement is structured so that the City bears no risk and may recover substantial sums.

Approved as to form: Office of Corporation Counsel

By: 

Date: AUGUST 1, 2017

RETAINER AGREEMENT

THIS AGREEMENT, (this “Agreement”), dated as of May _____, 2017 (the “Effective Date”), that this Agreement is executed by the City of Nashua, New Hampshire, is entered into by and between the City of Nashua, New Hampshire (the “City”) and Napoli Shkolnik PLLC, with an office located at 360 Lexington Avenue, 11th Floor, New York, NY 10017 and Nixon, Vogelman, Barry, Slawsky & Simoneau P.A. (together, “Counsel”) (the City and Counsel shall be referred to collectively as the “Parties”).

WITNESSETH:

WHEREAS, the City wishes to determine the feasibility of bringing an action against the manufacturers and distributors of prescription opiates for damages to the City arising out of the fraudulent and negligent marketing and distribution of opiates in and to the City; and

WHEREAS, the City understands based upon the pendency of similar litigation pending in the United States that the City may have various viable causes of action under state law against such manufacturers; and

WHEREAS, the City desires to hire Counsel to perform the services described in this Agreement; and

WHEREAS, Counsel is eminently qualified and ready to provide the necessary services.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the parties agree as follows:

1. **Term.** This Agreement shall commence on the Effective Date and shall terminate upon completion of services, as hereinafter described, unless sooner terminated in accordance with the provisions of this Agreement.
2. **Services.** The services to be provided by Counsel under this Agreement shall consist of representing the City in connection with investigating and if appropriate bringing an action against manufacturers and distributors of prescription opiates. At a minimum Counsel shall provide the following services: work with City personnel to determine the costs that the City has incurred as a result of the over-prescription of opioids; determine the viable causes of action available to the City; and determine which if any manufacturers and distributors should be targeted in a lawsuit. After such identification, and only as authorized by the City, Counsel will, on behalf of the City, bring a lawsuit against those parties identified by Counsel and agreed to by the City.
3. **Payment.** (a)(1) Amount of Consideration. There is no fee for this representation unless a monetary recovery acceptable to the City is obtained by Counsel in favor of the City, whether by suit, settlement, or otherwise. Counsel shall advance all costs associated with prosecuting the litigation. Subject to paragraph (2), below, Counsel shall be paid on a contingency fee basis under which Counsel shall receive: 20% of

gross recovery if matter is resolved pretrial or 25% if the matter is resolved at or after trial, after the reduction of costs advanced by our firm. Counsel offered the City representation on an hourly basis but the City declined.

Such amounts shall be computed on the net sum recovered after deducting allowable expenses that have been advanced by Counsel. In the event that any settlement, final judgment, or other resolution of the action results in a recovery to the City that is less than the amount of the costs incurred and/ or disbursements made by Counsel, the City shall not be required to pay Counsel any more than the sum of the full recovery.

(2) No monies shall be paid to Counsel for any work performed, costs incurred or disbursements made by Counsel in the event no recovery to the City has been obtained by Counsel. In the event of a loss at trial due to an adverse jury verdict or a dismissal of the lawsuit by the court, no monies shall be paid to Counsel for any work performed, costs incurred or disbursements made by Counsel. In such an event, neither party shall have any further rights against the other.

4. **No Conflict Representation.** During the term of this Agreement, Counsel shall not represent any party whose interest is or may be adverse to or in conflict with, or whose interest may appear to be adverse to or in conflict with the City, nor shall it commence any action or proceeding, or act as Counsel in any action or proceeding that is adverse to the City or any City officer or employee, without the City's prior written consent.
5. **Tax Advice.** The City understands that Counsel will not provide any advice regarding the tax consequences of accepting money from a settlement or award. THE CITY SHOULD CONTACT A TAX PROFESSIONAL REGARDING ANY TAX CONCERNS REGARDING ANY SETTLEMENT PRIOR TO THE SETTLEMENT.
6. **Termination.** Counsel expressly reserves the right to withdraw its representation at any time upon reasonable notification to the City, subject to applicable ethical rules, if any. Should the City terminate Counsel, Counsel shall continue to be entitled to its legal fees on any and all sums recovered as a result of the claims.
7. **Appeals.** The above contingency fee does not contemplate any appeal. Counsel is under no duty to perfect or prosecute any such appeal until a satisfactory fee arrangement is made between the Parties and is reduced to writing regarding costs and attorneys' fees.
8. **Counterclaims.** The above contingency fee does not contemplate Counsel's representation of the City against any claims made by a person against the City. Counsel is under no duty to defend or prosecute any such claim or counterclaim until a satisfactory fee arrangement is made between the Parties and is reduced to writing regarding costs and attorneys' fees.

9. **Statute of Limitations.** The City understands that the Statute of Limitations period for the case must be investigated and that this Agreement is made subject to that investigation as well as an investigation of the entire case. The City understands that statutes of limitation may have run on the case and agrees to hold Counsel harmless in the event the applicable statutes of limitation have run for any reason.
10. **No Guarantee of Final Outcome.** No attorney can accurately predict the outcome of any legal matter. Accordingly, Counsel makes no express or implied representations as to the final outcome of the matter(s) contemplated by this Agreement.
11. **Approval Necessary For Settlement.** No claims of the City shall be compromised or settled without the prior approval of the City and Counsel shall promptly inform the City of all offers of settlement and compromise in the matter.
12. **Control of the Litigation.** Under the terms of this agreement, the City shall retain direct authority over all aspects of this litigation. It is solely within the discretion of the City to proceed to litigation and resolve the litigation.
13. **Association of Other Attorneys.** Counsel may, at its own expense, use or associate with other attorneys in the representation of the City. The City understands that Counsel is a Professional Limited Liability Company with a number of attorneys. Several of those attorneys may work on the City's case.
14. **New York Law To Apply.** This Agreement shall be construed under and in accordance with the laws of the State of New York and the rights, duties and obligations of the City and of Counsel's representation of the City and the laws of the State of New York shall govern regarding anything covered by this Agreement.
15. **Arbitration.** Any and all disputes, controversies, claims or demands arising out of or relating to (i) this Agreement; (ii) any provision of this Agreement; (iii) the provision of services by Counsel to the City; and (iv) the relationship between the Parties, whether in contract, tort or otherwise, at law or in equity, for damages or any other relief, shall be resolved by binding arbitration pursuant to the Federal Arbitration Act in accordance with the Commercial Arbitration Rules then in effect with the American Arbitration Association. Any such arbitration proceeding shall be conducted in New York County, New York. This arbitration provision shall be enforceable in either federal or state court in New York County, New York, pursuant to the substantive federal laws established by the Federal Arbitration Act. Any party to any award rendered in such arbitration proceeding may seek a judgment upon the award and any Supreme Court in New York County, New York having jurisdiction may enter that judgment.
16. **Legal Construction.** In case any one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable, such invalidity, illegality, or unenforceability shall not affect any other provisions hereof, and this

Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

17. **Prior Agreements Superseded.** This Agreement constitutes the sole and only agreement of the Parties hereto and supersedes all prior understandings or written or oral agreement between the Parties respecting the within subject matter, if any.

SIGNED AND ACCEPTED ON THIS _____ day of _____, 2017

THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE FEDERAL ARBITRATION ACT	
On Behalf of the City of Nashua, New Hampshire:	Napoli Shkolnik PLLC
Signature:	Signature:
Address:	Nixon, Vogelmann, Barry, Slawsky & Simoneau P.A.
Phone:	Signature:
Email:	