

50600

Date: January 21, 2016

To: Board of Acquisition and Contract

From: Robert F. Meehan
County Attorney

Re: Authority to enter into an outside counsel retainer agreement with the law firm of Zwerling, Schachter & Zwerling, LLP to represent the County of Westchester (the "County") in connection with the institution of legal proceedings against certain online sellers of hotel accommodations in order to recover Westchester County's Room Occupancy Tax for a term commencing upon execution of the Agreement and terminating upon completion of services, payable on a contingency fee basis in the amount of 28.5% of the sum recovered after deducting allowable expenses.

In accordance with Section 158.11(2) of the Laws of Westchester County (the "LWC") by Act No 260-2015, approved on December 14, 2015, the Westchester County Board of Legislators (the "BOL") authorized the County, *inter alia*, to retain the law firm of Zwerling, Schachter & Zwerling, LLP (the "Law Firm") as outside counsel to represent the County in connection with the institution of legal proceedings against certain online sellers of hotel accommodations in order to recover Westchester County's Room Occupancy Tax. Under section 161.11(1) of the LWC, the authority of your Honorable Board is also required to authorize this contract.

As your Honorable Board may know, in 2011 Nassau County filed a lawsuit seeking to enforce its Hotel Tax Law against certain online sellers of hotel accommodations. The action is entitled *County of Nassau, on behalf of itself and all others similarly situated against Expedia, Inc., Hotels.com GP, LLC, Hotels.com, L.P., Hotwire, Inc., Travelnow.com, Inc., Travelport, Inc. (f/k/a Cendant Travel Distribution Services Group, Inc.), Trip Network, Inc. (d/b/a Cheaptickets.com), Internetnetwork Publishing Corp. (d/b/a Lodging.com), Orbitz, LLC, Orbitz Worldwide, Inc. (f/k/a Orbitz, Inc.), Travelocity.com, LLC (f/k/a Travelocity.com, Inc.), Travelocity.com LP, Site 59.com, LLC, Priceline.com, Incorporated, Travelweb, LLC, Lowest Fare.com, LLC (f/k/a Lowestfare.com Incorporated)*. The allegations are that the defendants purchased blocks of rooms at discounted rates; resold those rooms to individuals over the internet; and then paid local hotel taxes on the discounted block purchase and not on the amount paid by the end user/occupant. Similar to Nassau County's Hotel Tax Law, Westchester

County's hotel tax is calculated as 3% of the price that occupants pay to the defendant resellers. It is alleged that the online sellers collect the 3% hotel tax from the consumers based on the retail room rates but remit only the portion of the tax attributable to defendants' discounted block rate.

By order dated April 11, 2013, the Nassau Supreme Court granted Nassau County's motion for an order certifying the action as a class action to include all New York cities, counties, and other local government entities who have imposed hotel taxes since March 1, 1995, "except for those governmental entities which request exclusion from the class within 60 days after notice to all class members in the form to be approved by the court." The Court appointed the Law Firm, Special Counsel to Nassau County, as counsel for the class.

By Act No. 164-2013, the BOL authorized the County Attorney to take all actions necessary to participate in the aforementioned class action lawsuit. However, the Appellate Division, Second Department, subsequently reversed the Nassau Supreme Court's class certification order on the grounds that penalty provisions in Nassau County's hotel tax statutes precluded the certification of a class pursuant to CPLR Sec. 901(b).

At this stage, based on discussions with other New York counties with hotel/motel tax laws and the current posture of the Nassau County action, the Law Firm believes that intervention in the *Nassau v. Expedia, et al.* action, or alternatively, commencement of a new action, is a prudent option for Westchester County.

Accordingly, authority is now respectfully requested to enter into an outside counsel retainer agreement with the law firm Zwering, Schachter & Zwering, LLP, 41 Madison Avenue, New York, N.Y. 10010, to represent the County in connection with the institution of legal proceedings against certain online sellers of hotel accommodations in order to recover Westchester County's Room Occupancy Tax. The term of the Agreement will commence upon execution of the Agreement and shall terminate upon completion of services. In consideration for services rendered, the Law Firm would receive 28.5% of any monies recovered as a result of this suit, trial, settlement or otherwise, after deducting allowable expenses as defined in the retainer agreement.

The goals and objectives of this Agreement are to retain a law firm to assist the County in recovering revenue it is rightfully entitled to. The goals and objectives are in the best interests of the County in terms of fiscal responsibility because through the efforts of the Law Firm, the County will be able to recover revenue it would not otherwise be able to recover on its own. The goals and objectives will be tracked and monitored by attorneys from my office.

Accordingly, your favorable action on the annexed Resolution is most respectfully urged and recommended.

RFM/JPG/nm

RESOLUTION

Upon a communication from the County Attorney, be it hereby:

RESOLVED, that the County of Westchester (the “County”) is authorized to enter into an outside counsel retainer agreement with the law firm of Zwerling, Schachter & Zwerling, LLP (the “Firm”) to represent the County in connection with the institution of legal proceedings against certain online sellers of hotel accommodations in order to recover Westchester County’s Room Occupancy Tax, for a term commencing upon execution of the Agreement and terminating upon completion of services; and be it further

RESOLVED, that in consideration for services to be rendered, the Firm shall receive 28.5% of any monies recovered as a result of this suit, trial, settlement or otherwise, after deducting allowable expenses as defined in the retainer agreement; and be it further

RESOLVED, that the County Attorney or his duly authorized designee is hereby authorized to take such action and execute such documents as may be necessary and proper to effect the purposes hereof.

Account to be Charged/Credited

Fund	Dept	Major Program, Program & Phase Or Unit	Object/ Sub-Object	Trust Account	Dollars
101	52	1000	9034		TBD
101	18	1000	4923		TBD

Budget Funding Year(s) _____ Start Date ____ Upon Execution _____ End Date
 _____ Upon Completion _____
 (must match resolution)

Funding Source Tax Dollars_TBD _____
 State Aid _____
\$ TBD Federal Aid _____
 (must match resolution) Other _____