

60188

Date: January 5, 2018

To: Board of Acquisition and Contract

From: John M. Nonna
County Attorney

Re: Authority for the County to enter into an agreement with Napoli Shkolnik PLLC, pursuant to which it will initiate legal proceedings on behalf of the County against pharmaceutical companies and physicians with regard to the deceptive marketing of opioids in Westchester County, for a term commencing upon execution and continuing until the services are completed or the agreement is sooner terminated in accordance with its terms, provisions of the agreement, with the firm's compensation being paid on a contingency fee basis.

Authority is hereby requested from your Honorable Board for the County of Westchester (the "County") to enter into an agreement with Napoli Shkolnik PLLC (the "Firm"), pursuant to which the Firm will initiate legal proceedings on behalf of the County against pharmaceutical companies and physicians with regard to the deceptive marketing of opioids in Westchester County, on the terms specified in Exhibit 1, which is attached hereto and made a part hereof (the "Agreement").

As noted in Exhibit 1, the term of the proposed Agreement shall commence upon execution and continue until the services are completed or the proposed Agreement is sooner terminated in accordance with its terms.

As also noted in Exhibit 1, the Firm's compensation shall be paid on a contingency fee basis, which provides that the Firm shall receive:

- i. 7.5% of pre-complaint recovery;
- ii. 15% of recovery after ruling on a motion to dismiss;
- iii. 20% of recovery after close of pretrial discovery; and
- iv. 25% of recovery after a ruling on summary judgment.

In accordance with Section 7 of the County's Procurement Policy, the County received information from three (3) entities customarily performing the necessary legal services. The County's Board of Legislators interviewed two (2) of the entities; the County determined that it

was most advantageous to enter into the proposed Agreement with the Firm; and the County's Board of Legislators approved of the proposed Agreement with the Firm by Act 2017-221.

The proposed Agreement will serve a public purpose by providing the County with the resources necessary to commence and maintain legal proceedings against pharmaceutical companies and physicians in connection with the deceptive marketing of opioids in Westchester County, in furtherance of Act 2017-177 of the County's Board of Legislators.

The goal and objective of the proposed Agreement is to provide the County with the resources necessary to commence and maintain legal proceedings against pharmaceutical companies and physicians in connection with the deceptive marketing of opioids in Westchester County, in furtherance of Act 2017-177 of the County's Board of Legislators.

The goal and objective of the proposed Agreement is in the best interests of the County in terms of fiscal responsibility, as the Firm will only be paid on a contingency fee basis for all of the services to be performed under the proposed Agreement.

The goal and objective of the proposed Agreement will be tracked and monitored by the Office of the County Attorney.

I respectfully recommend the adoption of the attached Resolution.

JMN/TSA/bdm/nn

APPROVED BOARD OF ACQUISITION & CONTRACTS 01/17/2018 USA MEDICAL SECRETARY

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 agreement with Napoli Shkolnik PLLC (the “Firm”), pursuant to which it will initiate legal proceedings on behalf of the County against pharmaceutical companies and physicians with regard to the deceptive marketing of opioids in Westchester County, on the terms specified in Exhibit 1, which is attached hereto and made a part hereof (the “Agreement”); and be it further

RESOLVED, that, as noted in Exhibit 1, the term of the Agreement shall commence upon execution and continue until the services are completed or the Agreement is sooner terminated in accordance with its terms; and be it further

RESOLVED, that, as noted in Exhibit 1, the Firm’s compensation shall be paid on a contingency fee basis, which shall provide that the Firm shall receive:

- i. 7.5% of pre-complaint recovery;
- ii. 15% of recovery after ruling on a motion to dismiss;
- iii. 20% of recovery after close of pretrial discovery; and
- iv. 25% of recovery after a ruling on summary judgment.

; and be it further

RESOLVED, that the County Executive 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	9670		TBD

Budget Funding Year(s): N/A Start Date: Upon Execution End Date: Upon Completion of the work, or termination.

Funding Source Tax Dollars: N/A
 State Aid: _____
N/A Federal Aid: _____
 (must match resolution) Other: _____

Exhibit 1

SPECIAL COUNSEL AGREEMENT

THIS AGREEMENT, (together with the schedules, appendices, attachments and exhibits, if any, this "Agreement"), dated as of the date _____, ____, 2017 (the "Effective Date") that this Agreement is entered into by and between (i) the County of Westchester a municipal corporation of the State of New York having its primary office at 148 Martine Avenue, White Plains New York 10601 (the "County") and (ii) Napoli Shkolnik PLLC, with an office located at 400 Broadhollow Road, Melville, New York 11747 ("Counsel" or "Contractor").

WITNESSETH:

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

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

WHEREAS, the County 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 the 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 County in connection with investigating and if appropriate bringing an action against manufacturers, distributors, and physicians of prescription opiates. At a minimum Counsel shall provide the following services: work with County personnel to determine the costs that the County has incurred as a result of the over-prescription of opioids; determine the viable causes of action available to the County; and determine which if any manufacturers, distributors, and physicians should be targeted in a lawsuit. After such identification, and only as authorized by the County, Counsel will, on behalf of the County, bring a lawsuit against those parties identified by Counsel and agreed to by the County.
3. Payment. (a)(1) Amount of Consideration. There is no fee for this representation unless a monetary recovery acceptable to the County is obtained by Counsel in favor of the County, 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:

- i. 7.5% of pre-complaint recovery;
- ii. 15% of recovery after ruling on a motion to dismiss;
- iii. 20% of recovery after close of pretrial discovery; and
- iv. 25% of recovery after a ruling on summary judgment.

Such amounts shall be computed on the net sum recovered after deducting allowable expenses that have been advanced by Counsel and approved by the County in accordance with section 3(d) of this Agreement. In the event that any settlement, final judgment, or other resolution of the action results in a recovery to the County that is less than the amount of the costs incurred and/ or disbursements made by Counsel, the County 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 County 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.

(3) Any appearances before the County Board of Legislators, or any committee thereof for the purpose of the approval of this Agreement or any amendment thereto, are to be construed as part of the fee negotiation and approval process and Counsel agrees that no fee will be charged for any such appearances.

(b) Expenses and Disbursement. Counsel shall advance all administrative costs and expenses necessary for the effective investigation, development, and prosecution of the Services including, without limitation, court fees, process server fees, transcripts fees, expert witness fees, courier service fees, appellate printing fees, necessary travel expenses of attorneys to attend depositions, interview witnesses and the like, and other appropriate out-of-pocket expenses, as determined in the reasonable discretion of the County.

4. Independent Contractor. Counsel is an independent contractor of the County. Counsel shall not, nor shall any officer, director, employee, servant, agent or independent contractor of Counsel (a "Counsel Agent"), be (i) deemed a County employee, (ii) commit the County to any obligation, or (iii) hold itself, himself, or herself out as a County employee or Person with the authority to commit the County to any obligation. As used in this Agreement the word "Person" means any individual person, entity (including partnerships, corporations and limited liability companies), and government or political subdivision thereof (including agencies, bureaus, offices and departments thereof).
5. Ownership of Records. All County information provided to Counsel by the County shall remain the property of the County. All reports, documents or information created by Counsel on behalf of the County shall be deemed the property of the County. Upon the

County's request, completion of Services, or termination of this Agreement, all such County information, reports, documents or other records shall be returned to the County.

6. Service Standards. Regardless of whether required by Law: (a) Counsel shall, and shall cause Counsel Agents to, conduct his or her activities in connection with this Agreement so as not to endanger or harm any Person or property.

(b) Counsel shall deliver Services under this Agreement in a professional manner consistent with the best practices of the legal profession. Counsel shall take all actions necessary or appropriate to meet the obligation described in the immediately preceding sentence, including obtaining and maintaining, and causing all Counsel Agents to obtain and maintain, all approvals, licenses, and certifications ("Approvals") necessary or appropriate in connection with this Agreement.

(c) Counsel shall report to and keep the County Attorney fully and currently informed as to its activities under this Agreement at least monthly and more often if requested by the County.

(d) Counsel shall make no representations regarding the County's position on material issues, including, without limitation, settlement, County policies and/or past or future conduct of the county without prior consultation with the County Attorney.

(e) No claims of the County shall be compromised or settled without the prior approval of the County with the necessary approvals set forth in section 158.11(5) of the Laws of Westchester County and Counsel shall promptly inform the County of all offers of settlement and compromise in the matter.

(f) Counsel shall have no substantive communications with the press concerning the matter(s) covered by this Agreement, and any requests for information from the press concerning the matter(s) covered by this Agreement shall be referred to the County Attorney.

7. 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 County, nor shall it commence any action or proceeding, or act as Counsel in any action or proceeding that is adverse to the County or any County officer or employee, without the County's prior written consent.
8. Termination. Counsel expressly reserves the right to withdraw its representation at any time upon reasonable notification to the County, subject to applicable ethical rules, if any. Should the County terminate Counsel, Counsel shall continue to be entitled to its legal fees on any and all sums recovered as a result of the claims.
9. Indemnification: Defense: Cooperation: Insurance.

In addition to, and not in limitation of the insurance requirements contained in Schedule "A" entitled "Standard Insurance Provisions", attached hereto and made a part hereof, the Attorney agrees:

(a) Counsel shall indemnify, defend and hold harmless the County, its officers, employees, and agents (the "Indemnified Parties") from and against any and all liabilities arising out of or in connection with malpractice or negligent acts under this Agreement by Counsel or Counsel Agent, provided, however, that the Counsel shall not be responsible for that portion, if any, of a Loss that is caused by the negligence of the County.

(b) Counsel shall, upon the County's demand and at the County's direction, promptly and diligently defend, at Counsel's own risk and expense, any and all suits, actions, or proceedings which may be brought or instituted against one or more Indemnified Parties for which Counsel is responsible under this Section and, further to Counsel's indemnification obligations, Counsel shall pay and satisfy any judgment, decree, loss or settlement in connection therewith.

(c) Counsel shall, and shall cause Counsel Agents to, cooperate with the County and the County Attorney in connection with the investigation, defense or prosecution of any action, suit or proceeding in connection with this Agreement, including the acts or omissions of Counsel and/or Counsel Agent in connection with this Agreement.

(d) The provisions of this Section shall survive the termination of this Agreement.

10. All Legal Provisions Deemed Included: Severability: Supremacy. (a) Every provision required by Law to be inserted into or referenced by this Agreement is intended to be a part of this Agreement. If any such provision is not inserted or referenced or is not inserted or referenced in correct form then (i) such provision shall be deemed inserted into or referenced by this Agreement for purposes of interpretation and (ii) upon the application of either party this Agreement shall be formally amended to comply strictly with the Law, without prejudice to the rights of either party.

(b) In the event that any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

(c) Unless the application of this subsection will cause a provision required by Law to be excluded from this Agreement, in the event of an actual conflict between the terms and conditions set forth above the signature page to this Agreement and those contained in any schedule, exhibit, appendix, or attachment to this Agreement, the terms and conditions set forth above the signature page shall control. To the extent possible, all the terms of this Agreement should be read together as not conflicting.

(d) Each party has cooperated in the negotiation and preparation of this Agreement. Therefore, in the event that construction of this Agreement occurs, it shall not be construed against either party as drafter.

11. **Section and Other Headings.** The section and other headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.
12. **Role of Special Counsel:** The County will remain in control of the litigation, including decisions regarding settlement and resolution of any action. It is the role of Counsel to assist the County in the litigation.
13. **Entire Agreement .** This Agreement represents the full and entire understanding and agreement between the parties with regard to the subject matter hereof and supersedes all prior agreements (whether written or oral) of the parties relating to the subject matter of this Agreement.

APPROVED BOARD OF ACQUISITION & CONTRACT ADMINISTRATION
MAY 2018
LISA MRISAJ, SECRETARY

IN WITNESS WHEREOF, Counsel and the County have executed this Agreement as of the Effective Date.

NAPOLI SHKOLNIK PLLC

By: _____

Name: _____

Title: _____

Date: _____

WESTCHESTER COUNTY

By: _____

Name: _____

Title: _____

Date: _____

Approved by the County Board of Legislators on the ____ day of _____, 2017

Approved by the County Board of Acquisition and Contract on the ____ day of _____, 2017

Approved as to form and manner of execution this
_____ day of _____, 2017;

Assistant County Attorney

APPROVED BOARD OF ACQUISITION & CONTRACT - 01/11/2016 - LISA MARIJAJ, SECRETARY

SCHEDULE "A"
STANDARD INSURANCE PROVISIONS

(Firm/Attorney)

1. Prior to commencing work, the Firm shall obtain at its own cost and expense the required insurance from insurance companies licensed in the State of New York, carrying a Best's financial rating of A or better, and shall provide evidence of such insurance to the County of Westchester, as may be required and approved by the Director of Risk Management of the County. The policies or certificates thereof shall provide that thirty days prior to cancellation or material change in the policy, notices of same shall be given to the Director of Risk Management of the County of Westchester by registered mail, return receipt requested, for all of the following stated insurance policies. All notices shall name the Firm and identify the Agreement.

If at any time any of the policies required herein shall be or become unsatisfactory to the County, as to form or substance, or if a company issuing any such policy shall be or become unsatisfactory to the County, the Firm shall upon notice to that effect from the County, promptly obtain a new policy, submit the same to the Department of Risk Management of the County of Westchester for approval and submit a certificate thereof. Upon failure of the Firm to furnish, deliver and maintain such insurance, the Agreement, at the election of the County, may be declared suspended, discontinued or terminated. Failure of the Firm to take out, maintain, or the taking out or maintenance of any required insurance, shall not relieve the Firm from any liability under the Agreement, nor shall the insurance requirements be construed to conflict with or otherwise limit the contractual obligations of the Firm concerning indemnification. All property losses shall be made payable to and adjusted with the County.

In the event that claims, for which the County may be liable, in excess of the insured amounts provided herein are filed by reason of Firm's negligent acts or omissions under the Agreement or by virtue of the provisions of the labor law or other statute or any other reason, the amount of excess of such claims or any portion thereof, may be withheld from payment due or to become due the Firm until such time as the Firm shall furnish such additional security covering such claims in form satisfactory to the County of Westchester.

2. The Firm shall provide proof of the following coverage (if additional coverage is required for a specific agreement, those requirements will be described in the "Special Conditions" of the contract specifications):

(a) Workers' Compensation. Certificate form C-105.2 or State Fund Insurance Company form U-26.3 is required for proof of compliance with the New York State Workers'

Compensation Law. State Workers' Compensation Board form DB-120.1 is required for proof of compliance with the New York State Disability Benefits Law. Location of operation shall be "All locations in Westchester County, New York."

Where an applicant claims to not be required to carry either a Workers' Compensation Policy or Disability Benefits Policy, or both, the employer must complete NYS form CE-200, available to download at: <http://www.wcb.ny.gov>

If the employer is self-insured for Workers' Compensation, he/she should present a certificate from the New York State Worker's Compensation Board evidencing that fact (Either SI-12, Certificate of Workers' Compensation Self-Insurance, or GSI-105.2, Certificate of Participation in Workers' Compensation Group Self-Insurance).

(b) Employer's Liability with minimum limit of \$100,000.

(c) Commercial General Liability Insurance with a minimum limit of liability per occurrence of \$1,000,000 for bodily injury and \$100,000 for property damage or a combined single limit of \$1,000,000 (C.S.1), naming the County of Westchester as an additional insured. This insurance shall include the following coverages:

- (i) Premises - Operations.
- (ii) Broad Form Contractual.
- (iii) Independent Contractor and Sub-Contractor.
- (iv) Products and Completed Operations.

(d) Automobile Liability Insurance with a minimum limit of liability per occurrence of \$1,000,000 for bodily injury and a minimum limit of \$100,000 per occurrence for property damage or a combined single limit of \$1,000,000 unless otherwise indicated in the contract specifications. This insurance shall include for bodily injury and property damage the following coverages:

- (i) Owned automobiles.
- (ii) Hired automobiles.

(iii) Non-owned automobiles.

(e) The Firm's Professional Liability. The Firm shall provide proof of such insurance. (Limits of \$1,000,000 per occurrence/\$3,000,000 aggregate).

3. All policies of the Firm shall be endorsed to contain the following clauses:

(a) Insurers shall have no right to recovery or subrogation against the County of Westchester (including its employees and other agents and agencies), it being the intention of the parties that the insurance policies so effected shall protect both parties and be primary coverage for any and all losses covered by the above-described insurance.

(b) The clause "other insurance provisions" in a policy in which the County of Westchester is named as an insured, shall not apply to the County of Westchester.

(c) The insurance companies issuing the policy or policies shall have no recourse against the County of Westchester (including its agents and agencies as aforesaid) for payment of any premiums or for assessments under any form of policy.

(d) Any and all deductibles in the above described insurance policies shall be assumed by and be for the account of, and at the sole risk of, the Firm.