

OnBase I.D. # 85672

June 9, 2021

To: Honorable Members of the
Board of Acquisition and Contract

From: John M. Nonna
County Attorney

Re: Request for Authorization to Settle the Lawsuit entitled 105 Mt. Kisco Associates LLC, et al. v. Paul Carozza, et al. in the amount of \$42,500.00.

Attached for your consideration is a resolution which, if approved by your Honorable Board, would authorize settlement of the lawsuit entitled 105 Mt. Kisco Associates LLC, et al. v. Paul Carozza, et al.

This action was commenced on July 9, 2015, when the Plaintiffs filed a Complaint in the United States District Court for the Southern District of New York, against several defendants, including the Westchester County Department of Health (the "WCDOH"). The Complaint alleged causes of action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* and common law contribution and indemnification. More specifically, Plaintiffs claimed that WCDOH arranged for and/or transported for disposal hazardous substances at parcels of land located at 95, 105, and 107 Kisco Avenue, Mount Kisco, New York [Tax Parcel Identification Nos. 69.65-2-4 & 69.65-2-5] (the "Property"). The Property is owned by Plaintiff 105 Mt. Kisco Associates, LLC. Plaintiffs allege that the disposal of hazardous substances at the Property resulted in the contamination of soil, groundwater, and/or soil vapor associated with spills, discharges, releases and threatened releases of hazardous substances, including but not limited to radioactive materials in and around the Property.

The Complaint further alleges that WCDOH attempted remediation of a former uranium and radium processing facility, formerly owned and operated by defendant Canadian Radium and Uranium Corp., located at the Property and the parcel adjacent to the Property, which has a present day address of 103 Kisco Avenue in the Village of Mt. Kisco [Tax Map No. 69.73-1-8]. The Complaint further states that in attempting the remediation, WCDOH spread radioactive soil on 103 Kisco Avenue that contributed to the contamination on the Property.

On April 19, 2016, the County moved to dismiss the Complaint, in its entirety. By Decision and Order dated March 30, 2017, the United States District Court for the Southern District of New York dismissed with prejudice certain causes of action, including the causes of action for common law indemnification and contribution, the recovery of the costs of remediation actions, and those causes of action based on the allegation that WCDOH was a transporter of hazardous substances pursuant to CERCLA. However, the Court declined to dismiss Plaintiffs' cause of action alleging that WCDOH was liable as an "arranger."¹

The County and WCDOH deny responsibility for the alleged contamination and hazardous releases.

The Plaintiffs and the County and WCDOH have reached a proposed Settlement Agreement to resolve all remaining claims against WCDOH.

Pursuant to the proposed Settlement Agreement, in consideration for the Plaintiffs' execution of the Agreement and such other documents as are necessary to dismiss the action against WCDOH, the County shall pay to the Plaintiffs the sum of Forty Two Thousand Five Hundred (\$42,500.00) (the "Settlement Amount") within fifteen days of the effective date of the Settlement Agreement, payable to Knauf Shaw LLP as attorneys for the Plaintiffs. Further, the proposed Settlement Agreement directs that the Settlement Amount will be held in escrow by Knauf Shaw LLP until the dismissal of the Action, as defined below, has occurred:

Promptly after the effective date of the Settlement Agreement, the attorneys for the Plaintiffs shall take all necessary actions to initiate the dismissal with prejudice of all Environmental Claims arising out of, resulting from, or relating to the Property against WCDOH in the action in one of three ways:

- A. A global settlement of the Action among the Parties and defendants Paul Carozza, Village of Mt. Kisco, and the United States with mutual releases resolving all Environmental Claims relating to the Property among the remaining appearing parties to the action and a corresponding stipulation of dismissal of the action with prejudice filed with and so ordered by the Court pursuant to Federal Rule of Civil Procedure Rule 41(a)(1)(A)(ii); or
- B. A motion, to be joined by WCDOH, granting contribution protection in favor of WCDOH and the County pursuant to the Uniform Comparative Fault Act, including protection from indemnification claims and from CERCLA and common law contribution claims.

If the Action is not dismissed in accordance with this section, the Settlement Agreement shall be null, void and of no further force and effect and Plaintiffs will return to the County the Settlement Amount that is to be held in escrow.

¹ Under CERCLA, "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for the transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility... owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. §9607(a)(3).

The Plaintiffs are represented by Stagg, Terenzi, Confusione & Wabnik, LLP, 401 Franklin Avenue, Suite 300, Garden City, New York 11530. The County is represented by Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, 81 Main Street, Suite 306, White Plains, New York 10601.

Should Plaintiffs prevail, the County's financial liability is likely to be in the hundreds of thousands of dollars. Moreover, this case is only in discovery. While document production is largely complete, no depositions have been conducted. The legal expenses that would be required to litigate this suit through trial would significantly exceed the Settlement Amount. Indeed, finishing depositions and preparing a summary judgment motion alone will far exceed the Settlement Amount. Accordingly, this office recommends settling this matter.

JMN/cb

APPROVED BOARD OF ACQUISITION & CONTRACT - 06/10/2021 - 10:54 AM JPL SECRETARY

RESOLUTION

Upon the communication of the County Attorney, it is hereby

RESOLVED, that the County Attorney is hereby authorized to settle the lawsuit entitled 105 Mt. Kisco Associates LLC, et al. v. Paul Carozza, et al. in the amount of \$42,500.00 by payment from the County of Westchester to Knauf Shaw LLP as attorneys for Plaintiffs in the amount of \$42,500.00; and it is further

RESOLVED, that the County Attorney or his designee is authorized to execute any documents necessary to implement this resolution.

Original Agreement	\$	N/A
First Amendment	\$	N/A
This Amendment	\$	N/A
TOTAL	\$	N/A

Account to be Charged/Credited

Fund	Dept.	Major Program, Program & Phase Or Unit	Object/ Sub-Object	Trust Account	Dollars
615	59	0696/3910	4280/04	N/A	\$42,500.00

Budget Funding Year(s) 2015 Start Date 1/1/2015 End Date 12/31/2015
(must match resolution)

Funding Source Tax Dollars _____

State Aid _____

\$ 42,500.00 Federal Aid _____

(must match resolution) Other Self-Insurance Retention _____