

TAB 14



City of Palmetto Agenda Item

Meeting Date

05-07-12

Presenter: **Mark P. Barnebey** Department: **City Attorney**

Title: **City of Palmetto Claim in regard to the BP Oil Spill**

ISSUE:

The City of Palmetto may have been damaged as a result of the massive oil spill at a BP Company drilling platform ("BP at spill"), which occurred in the Gulf of Mexico, such damages may include reduced sales tax receipts due to decreased tourist revenue. As a result, we have been contacted about retaining outside counsel to file suit to proceed against those claims. The time frame for filing such claims and any litigation is closing shortly.

This topic was originally presented to Commission on May 2, 2011 by Steve Heintz and Don Hinkle, an attorney participating in the consortium.

DISCUSSION:

Heinz & Becker has proposed to partner with a number of law firms to represent the City in this complex litigation. Under the terms of the proposed agreement, which is attached, all of the outside attorneys would be on a contingent fee basis and would be authorized to proceed upon a determination of a legally supportable claim. The nature of the litigation makes it advisable to hire outside counsel if it is to be pursued.

Budgeted Amount: Budget Page No(s): Available Amount: Expenditure Amount:

Additional Budgetary Information:

Funding Source(s): Sufficient Funds Available: Yes No Budget Amendment Required: Yes No Source:

City Attorney Reviewed: Yes No N/A Advisory Board Recommendation: For Against N/A Consistent With: Yes No N/A

Potential Motion/Direction Requested:

Staff Contact:

ENGAGEMENT AND CONTINGENCY FEE AGREEMENT

This AGREEMENT is made this ___ day of _____, 2012, by and between The City of Palmetto (“the Governmental Entity”) and Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A., a professional corporation located in Pensacola, Florida; Hinkle & Foran, P.A., a professional corporation located in Tallahassee, Florida; Weitz & Luxenberg, P.C., a New York professional corporation; Baron & Budd, P.C. a professional corporation located in Texas; and Beggs & Lane, PLLC, a professional corporation located in Pensacola, Florida.

(collectively “Special Counsel”).

EVENT CAUSING HARM:

On April 20, 2010, the *Deepwater Horizon* (a semi-submersible Mobile Offshore Drilling Unit) exploded in the Gulf of Mexico, resulting in the death of eleven persons and injury to many others. Over the ensuing four months, it is estimated that more than 200 million gallons of petroleum were released into the Gulf of Mexico.

HARM CAUSED:

As a result of the Deepwater Horizon Incident, commercial seafood harvesting in much of the Gulf of Mexico was federally forbidden, and petroleum products began washing ashore along and near the Florida seashore. As a result of these events, tourism within the area of the Governmental Entity was (and continue to be) significantly reduced; commercial entities and occupations of every kind have experienced (and continue to experience) large reductions in revenue; and the market value of real estate in the impacted areas have declined. Each of these damages, among many other forms of injury resulting from the Deepwater Horizon Incident, has caused (and continues to cause) loss of revenue to the Governmental Entity.

NEED FOR PRIVATE COUNSEL:

The Governmental Entity intends to pursue a cause of action against all parties potentially responsible for the Deepwater Horizon Incident (“Defendants”) to recover damages sustained (and to be sustained) by the Governmental Entity (“Litigation”). However, the Litigation likely will entail numerous complex factual and legal issues, and require the expenditure of substantial human and financial resources, the Governmental Entity is not in a position to expend or risk. Because of the immense allocation of resources necessary to properly undertake and pursue the Litigation, the Governmental Entity seeks to limit its exposure in such Litigation by retaining the services of Special Counsel to assist the Governmental Entity.

SCOPE OF SERVICES/CASE HANDLING:

Special Counsel are retained to provide legal services to the Governmental Entity for the purpose of seeking any and all damages that the Governmental Entity is entitled to recover from the Defendants as a result of the Litigation.

_____, as the chief legal officer for the Governmental Entity (“Government Counsel”), is charged with representing the Governmental Entity in legal proceedings with respect to which it has an interest and will retain final authority over all aspects

of the Litigation, and Special Counsel shall report to and abide by the directions of Government Counsel.

As provided herein, Special Counsel is authorized to take all appropriate legal action to prosecute the Litigation and participate in settlement negotiations with approval of Government Counsel. Government Counsel will monitor, review and participate as counsel in the prosecution of all aspects of the Litigation. Special Counsel shall consult in advance with, and obtain the prior approval of, Government Counsel concerning all substantive matters related to the Litigation, including, but not limited to, the pleadings and dispositive motions, discovery and selection of consultants and experts. Special Counsel shall provide Government Counsel with copies of all material correspondence, pleadings, and discovery requests and responses related to the Litigation. Special Counsel shall communicate with the Government Entity departments through Government Counsel unless alternative arrangements are made in advance between Special Counsel and Government Counsel. Special Counsel shall provide sufficient resources, including attorney time and capital for payment of expenses to prosecute the Litigation faithfully and with due diligence. Legal services under this Agreement shall be performed only by competent personnel under the supervision and in the employment of Special Counsel or retained by Special Counsel as consultants with the prior approval of Government Counsel. Special Counsel agrees to maintain contemporaneous expense records. Special Counsel shall upon request submit expense records to Government Counsel setting forth all expenses incurred on behalf of the Governmental Entity in pursuing the Litigation.

CONTINGENT FEE:

For such professional services, the Governmental Entity agrees to pay Special Counsel attorneys' fees and costs incurred. The attorneys' fees shall be a 20% contingency fee for resolution of any final settlement claim payments processed through the Gulf Coast Claims Facility (or similar administrative process); or for resolution of any compensation recovered through a legal proceeding filed in state and/or federal court (whether such recovery occurs as a result of settlement, judicial award and/or jury award). All fees will be calculated on the total gross amount recovered before reduction of costs and expenditures. The firm of Heintz & Becker will act as local counsel and receive 10% of the fee payable to Special Counsel.

In the event that a court-awarded fee is collected which exceeds the contingency fee percentages as set forth above, the court-awarded fee shall apply in lieu of the above amounts. This employment is upon a contingent fee basis and unless a recovery is made there will be no obligation by the Governmental Entity to pay attorneys' fees to Special Counsel.

COSTS:

This employment is on a contingent basis and, unless a recovery is made, there will be no obligation by the Governmental Entity to pay costs incurred by Special Counsel. If a recovery is made, then the Governmental Entity will be responsible for all costs and expenses incurred in the handling of the Governmental Entity's case, in addition to the attorneys' fees noted above. However, the Governmental Entity's responsibility for paying costs shall not exceed the gross recovery amount.

Costs shall include, but not be limited to, cash and non-cash expenditures for filing fees; subpoenas; depositions; witness fees; in-house and outside investigation services; expert witness fees; Multi-District Litigation (MDL) assessments; Lexis/Nexis/Westlaw and other computer research and on-line service costs; photographs; in-house and outside photocopies; facsimiles; long-distance telephone calls; postage and federal express, UPS and other overnight service charges; mediation fees; travel costs; out-of-town hotel, food and transportation charges; in-house and outside trial exhibits; in-house and outside multi-media services; and all other costs necessary for performance of legal services.

In addition to the above listed individual costs, Special Counsel also charges common benefit costs to the Governmental Entity in cases where Special Counsel represents multiple clients in similar litigation (such as this case involving BP oil disaster). Common benefit costs are costs expended by Special Counsel for the common benefit of a group of clients. For example, if a deposition of a defendant expert witness is taken in one case, and this deposition can be used for and/or benefit the claims of many other clients, Special Counsel classifies these costs as common benefit costs. Similarly, if Special Counsel spends \$30,000 to hire an expert to reach an opinion on a topic affecting many clients, then instead of charging the entire \$30,000 to the first client who utilizes this expert, Special Counsel spreads the costs among all clients in the group. Thus, if Special Counsel has 1,000 clients being represented in similar litigation, each client is charged \$30 of the expert fee instead of the first client being charged \$30,000. By using this common benefit cost system, no one client has to solely bear the costs which actually benefit the group as a whole, and many of the most substantial costs of litigation can be shared equally by all.

Common benefit costs include any and all costs which can benefit a group of clients. For example, to the extent charges benefit a group of clients, common benefit charges may include postage, faxes, telephone, copies, experts, investigation, computer research, transportation, and many of the costs incurred in actually trying one client's case before a jury.

All costs advanced on behalf of the Governmental Entity, whether individually and/or common benefit, shall bear interest at the prime rate as published by the Wall Street Journal until such time as the costs are paid by the Governmental Entity. Unless a recovery is made there will be no obligation by the Governmental Entity to pay costs or interest incurred by Special Counsel.

NATURE OF RELATIONSHIP:

The Governmental Entity acknowledges that by this Agreement, Special Counsel are retained as attorneys and that neither Special Counsel nor their members or employees become officers or employees of the Governmental Entity. Special Counsel shall be deemed at all times to be independent contractors and shall be wholly responsible for the manner in which they perform the services required of them by the terms of this Agreement. Special Counsel shall be liable for any act or acts of their own, or their agents or employees, and nothing contained herein shall be construed as creating the relationship of employer and employee between the Governmental Entity and Special Counsel or their agents and employees.

ASSIGNMENT:

This Agreement may not be assigned by Special Counsel. Special Counsel are expressly employed because of their unique skills, ability and experience and therefore it is understood that

no substitution or assignment maybe made unless the Governmental expressly approves such substitution or assignment.

SUBCONTRACTING:

Special Counsel are prohibited from subcontracting this Agreement or services unless such subcontracting is agreed to in writing by the Governmental Entity. No party on the basis of this Agreement shall in any way contract on behalf of or in the name of the other party of this Agreement. Any violation of this provision shall confer no right on any party and shall be void.

CONFIDENTIALITY:

Special Counsel understand and agree that, in the performance of this Agreement, Special Counsel may have access to private or confidential information, which maybe owned or controlled by the Governmental Entity or any officer or employee thereof and that such information may contain proprietary or confidential details, whose disclosure to third parties may be damaging to the Governmental Entity or prohibited by law. Special Counsel agree that such information shall be held in confidence and used only in performance of the Agreement and shall not be furnished to others by Special Counsel except as authorized by the Governmental Entity or as required by law.

RETENTION OF CLIENT FILE:

The Governmental Entity understands that Special Counsel will only retain the Governmental Entity's file for a period of six years after the case is completed. After the six-year period, the entire file will be discarded, and Special Counsel will not retain a copy of any portion of the file. Thus, it is the Governmental Entity's responsibility to seek the return of all original documents immediately after the case is completed, and to request a copy of any portions of the file the Governmental Entity wishes to retain. If the Governmental Entity waits more than six years to request the file, then no portion of the file will be in existence at that time.

FORUM AND CHOICE OF LAW:

Any actions arising out of this Agreement shall be governed by the laws of Florida.

MODIFICATION:

This Agreement shall not be modified, nor may compliance with its terms be waived, except by written instrument executed and approved by Special Counsel and the Governmental Entity (or its designee).

LEGAL CONSTRUCTION:

In case any provision, or any portion of any provision, contained in this Agreement shall for any reason be held to be invalid, illegal and/or unenforceable in any respect, such invalidity, illegality and/or unenforceability shall not affect the validity and/or enforceability of any other provision or portion thereof, and this Agreement shall be construed as if such invalid, illegal and/or unenforceable provision or portion thereof was never contained herein.

ENTIRE AGREEMENT:

This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions.

RECEIPT OF DOCUMENTS:

The undersigned Governmental Entity has, before signing this contract, received and read The Statement of Client's Rights and understands each of the rights set forth therein. The undersigned Governmental Entity has signed the statement and received a signed copy to refer to while being represented by Special Counsel.

Signed this _____ day of _____, 2012.

APPROVED BY:

THE GOVERNMENTAL ENTITY

By: _____ Date: _____

HEINTZ & BECKER

By: _____ Date: _____

HINKLE & FORAN, P.A.

By: _____ Date: _____

LEVIN, PAPANTONIO, THOMAS, MITCHELL, RAFFERTY & PROCTOR, P.A.

By: _____ Date: _____

BARON & BUDD, P.C.

By: _____ Date: _____

BEGGS & LANE, RLLP

By: _____ Date: _____

WEITZ & LUXENBERG, P.C.

By: _____ Date: _____

STATEMENT OF CLIENT'S RIGHTS

Before you, the prospective the Governmental Entity, arrange a contingency fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer but as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with one (1) lawyer, you may talk with other lawyers.
2. Any contingent fee contract must be in writing and you have three (3) business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within three (3) business days of signing the contract. If you withdraw from the contract within the first three (3) business days you do not owe the lawyer a fee, although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for the work the lawyer has done.
3. Before hiring a lawyer, you the client have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyers' actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.
4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different Special Counsels will represent you, at least one lawyer from each Special Counsel must sign the contingent fee contract.
5. If your lawyer intends to refer your case to another lawyer, or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contact that includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interest. Also, The Florida Bar contends that each lawyer is legally responsible for the acts of the other lawyers involved in the case.
6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask

reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money that you might have to pay to your lawyer for costs, and liability you might have for attorney's fees, costs, and expenses to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. This statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement, you need not pay any money to anyone, including your lawyer. You also have the right to have every lawyer or Special Counsel working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

If at any time, you, the client, believe that your lawyer has charged an excessive or illegal fee, you, the client, have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 850-561-5600, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit, unless your fee contract provides for arbitration. You can request, but may not require, that a provision for arbitration (under Chapter 682, Florida Statutes, or under the fee arbitration rule of the Rules Regulating The Florida Bar) be included in your fee contract.

APPROVED BY:

THE GOVERNMENTAL ENTITY

By: _____ Date: _____

HEINTZ & BECKER

By: _____ Date: _____

HINKLE & FORAN, P.A.

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