



AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING
Meeting Date: March 5, 2019

Agenda Item 8A
Approvals: _____
City Manager [Signature]
Dept. Head _____
Attorney _____
Finance _____

Department: City Manager
Prepared By: City Attorney

Subject: OPIOID EPIDEMIC CONTINGENCY FEE AGREEMENT

Fiscal Impact: None. This item is required due to a change in strategy in the law firms representing the City. The City could realize an as yet unknown but potentially significant amount of money in litigation against pharmaceutical and other companies responsible for the growing opioid crisis. As this is a contingency fee agreement, there is no upfront cost to the City.

Background: The City Council previously approved a contingent fee agreement to assist the City in recovering some of the damages it has suffered as a result of opioid drug over prescriptions as identified by the CDC. Specifically, the City retained attorneys to pursue litigation in federal court against the manufacturers and distributors of opioids for their roles in creating the opioid epidemic.

Discussion: The litigation team handling the case has determined that the City's best avenue for recovery exists in state, not federal court. The litigation team has asked the City to execute a new retainer agreement with the California firms that will be lead on the case. This agenda item consists of a new contingency fee agreement prepared by attorneys for the California consortium. A copy of this agreement is included as Attachment 1.

Recommended

Action: STAFF RECOMMENDS THAT the City Council approve, and authorize the Mayor to execute, the attached Contingency Fee Agreement providing for a contingent fee agreement with respect to the litigation the consortium attorneys will pursue.

Attachments: Attachment 1. New Contingency Fee Agreement
Attachment 2. April 3, 2018 agenda report.

Notification: Not applicable.

ENGAGEMENT TO REPRESENT

RE: City of San Clemente, California civil suit against those legally responsible for the wrongful manufacture and distribution of prescription opiates and damages caused thereby.

1. SCOPE OF EMPLOYMENT: **City of San Clemente, California** (hereinafter "CLIENT"), by and through its City Council, hereby retains the law firms of ANDREWS & THORNTON, and ROBINS KAPLAN, (the "FIRMS") pursuant to the California Rules of Professional Conduct on a contingent fee basis, to pursue all civil remedies, against the manufacturers of prescription opiates and those in the chain of distribution of prescription opiates responsible for the opioid epidemic that is plaguing the City of San Clemente, including but not limited to filing a claim for public nuisance to abate, enjoin, recover and prevent the damages caused thereby. Any questions or inquiries about the case should be addressed to Joe Dunn, of ANDREWS & THORNTON. CLIENT consents to the participation of the following firms if no conflicts exist, including but not limited to conflicts pursuant to the California Rules of Professional Conduct:

ROBINS KAPLAN LLP
2049 Century Park East, Suite 3400
Los Angeles, CA 90067

ANDREWS & THORNTON
4701 Von Karman Ave., Suite 300
Newport Beach, CA 92660

2. ATTORNEY FEES: In consideration, CLIENT agrees to pay twenty percent (20%) of the total recovery (gross) in favor of the CLIENT as an attorney fee (the "Fee") whether the claim is resolved by compromise, settlement, or trial and verdict (and appeal)—provided that the Fee shall be subject to a lodestar crosscheck and shall be capped at the lodestar amount as enhanced by a multiplier of four (4). The gross recovery shall be calculated on the amount obtained before the deduction of costs and expenses. CLIENT grants the FIRMS an interest in a fee based on the gross recovery. If a court awards attorney fees, the FIRMS shall receive the greater of the gross recovery-based contingent Fee or the attorney fees awarded. **There is no fee if there is no recovery.** Attorney fees are calculated from gross award. After attorney fees are deducted, costs are deducted from client share.

The CLIENT acknowledges this Fee is reasonable given the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the likelihood this employment will preclude other employment by the FIRMS, the fee customarily charged in the locality for similar legal services, the anticipated (contingent) litigation expenses and the anticipated results obtained, the experience, reputation, and ability of the lawyer or lawyers performing the services and the fact that the Fee is contingent upon a successful recovery.

This litigation is intended to address a significant problem in the community. The litigation focuses on the manufacturers and wholesale distributors and their role in the diversion of millions of prescription opiates into the illicit market, which has resulted in opioid addiction, abuse, morbidity and mortality. There is no easy solution and no precedent for such an action against this sector of the industry. Many of the facts of the case are locked behind closed doors. The billion-dollar industry denies liability. The litigation will be very expensive, and the litigation expenses will be advanced by the FIRMS with reimbursement contingent upon a successful recovery. The outcome is uncertain, as it is in all civil litigation, with compensation contingent upon a successful recovery. Consequently, there must be a clear understanding between the CLIENT and the FIRMS regarding the definition of a "successful recovery."

Negotiability of Fees: The rates set forth above are not set by law but are negotiable between the FIRMS and CLIENT.

3. REPRESENTATION OF OTHER ENTITIES: CLIENT acknowledges that the FIRMS represent other governmental entities against the same defendants.
4. COSTS AND OTHER EXPENSES: THE FIRMS and/or the other law firms in association with the FIRMS, hereinafter referred to as the "Attorneys," shall advance all necessary litigation expenses necessary to prosecute these claims. Litigation expenses include but are not limited to those set forth in the table below. All such litigation expenses, including the reasonable internal costs of electronically stored information (ESI) and electronic discovery generally or the direct costs incurred from any outside contractor for those services, will be deducted from any recovery after the contingent fee is calculated. **There is no reimbursement of litigation expenses if there is no recovery. Costs advanced will be payable out of the CLIENT'S share of any recovery and will not affect the contingency rate or fees due to the FIRMS.** As this is complex litigation, the FIRMS reserves the right to add any additional counsel, law firms, consultants and experts; however, this will in no way increase the Fee as per the terms of this contract.

<i>Type of Expense</i>	<i>Amount of Charge</i>
Telephone Charges	At Cost
Routine In-house Word Processing	No Charge
In-house Photocopying	15 ¢ a page
Outside Photocopying	At Cost
Computerized Legal Research such as Westlaw or Lexis	At Cost
Computerized Litigation System Costs	At Cost

<i>Type of Expense</i>	<i>Amount of Charge</i>
Postage and Delivery Services	At Cost
Courier service or next day service such as Federal Express	At Cost
Mileage	50¢ per mile or the then prevailing IRS reimbursement rate
Travel, including but not limited to airfare (but not first-class airfare), hotels, automobile rental, taxis and meals (but not meals within 50 miles of the residence address)	At Cost
Experts and Consultants	At Cost
Court Reporters and Transcripts	At Cost
Filing Fees	At Cost
Exhibits and Other Trial Presentation Costs	At Cost

5. FEE SHARING WITH CO-COUNSEL: The division of fees, expenses and labor between the Attorneys will be decided by private agreement between the law firms and subject to approval by the CLIENT. Any division of fees will be governed by the California Rules of Professional Conduct, including: (1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the CLIENT; (2) the CLIENT has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation; (3) except where court approval of the fee division is required by law, the *written* closing statement in a case involving a contingent fee shall be signed by the CLIENT and each lawyer and shall comply with the terms of the California Rules of Professional Conduct; and (4) the total fee is *not clearly excessive*.
6. ABSOLUTE AND INDEPENDENT AUTHORITY OF CLIENT – The CLIENT at all times shall retain absolute and independent authority to decide the disposition of the case and personally oversee and maintain ultimate control of the litigation, including trial or settlement.
7. COMMUNICATIONS WITH CLIENT:
Upon conclusion of this matter, COUNSEL shall provide the CLIENT with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the CLIENT and the method of its determination. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if

applicable, the actual division of the lawyers' fees with a lawyer not in the same firm, as required in Rule 2-200(A)(1) and (A)(2) of the California Rules of Professional Conduct. The closing statement shall be signed by the CLIENT and each attorney among whom the fee is being divided.

8. REVIEW AND UNDERSTANDING OF THIS AGREEMENT: CLIENT acknowledges review and understanding of this agreement, having read its contents in its entirety, and CLIENT understands and agrees with all of its provisions. CLIENT acknowledges that the FIRMS and their employees or agents have made no promise or guarantee regarding the successful determination of CLIENT'S claim or causes of action or regarding the amount of recovery or the type of relief, if any, which CLIENT may obtain therefrom. The Attorneys and this Agreement make no such promises or guarantees. Attorneys' comments about the outcome of this matter are expressions of opinion only, and the Attorneys make no guarantee as to the outcome of any litigation, settlement or trial proceedings.

SIGNED, this _____ day of _____, 2018.

_____, California

Accepted:

ROBINS KAPLAN LLP
2049 Century Park East, Suite 3400
Los Angeles, CA 90067

ANDREWS & THORNTON, AAL ALC
4701 Von Karman Avenue, Suite 300
Newport Beach, CA 92660

By _____

_____ Date

Anne Andrews
Lead Counsel



AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING
Meeting Date: April 3, 2018

Agenda Item 6-J
Approvals:
City Manager [Signature]
Dept. Head [Signature]
Attorney [Signature]
Finance [Signature]

Department: City Manager
Prepared By: Scott Smith, City Attorney

Subject: OPIOID EPIDEMIC CONTINGENCY FEE AGREEMENT

Fiscal Impact: Yes, the City could realize an as yet unknown but potentially significant amount of money in litigation against pharmaceutical and other companies responsible for the growing opioid crisis. As this is a contingency fee agreement, there is no cost to the City.

Background: The growing opioid epidemic has burdened state, county, and city governments around the country. According to the Centers for Disease Control and Prevention ("CDC"): "overdoses from prescription opioids are a driving factor in the 15-year increase in opioid deaths. The amount of prescription opioids sold to pharmacies, hospitals, and doctors' offices nearly quadrupled from 1999 to 2010, yet there had not been an overall changes in the amount of pain that Americans reported." Unfortunately, San Clemente has not been exempt from the effects of this well-documented over-prescription of opioids. The physical, mental, and economic costs to deal with the opioid crisis have mounted here as they have everywhere.

This item will assist the City in recovering some of the damages it has suffered as a result of opioid drug over prescriptions as identified by the CDC. Specifically, the City will retain attorneys to pursue litigation in California state court against the manufacturers and distributors of opioids for their roles in creating the opioid epidemic. The attorneys are experienced in this type of litigation as they are currently participating in a national consortium of states and local governments in litigation against the target defendants allegedly responsible for the opioid crisis. The engagement does not require the payment of attorneys' fees during the course of litigation. Any such payment will be out of the proceeds (if any) resulting from a trial or settlement of the proposed state court litigation.

Discussion: On October 26, 2017, the Department of Health and Human Services declared a public health emergency with respect to the opioid crisis. According to the National Institute of Health, pharmaceutical companies selling opioids in the late 1990s "reassured the medical community that patients would not become addicted to prescription opioid pain relievers." In response, pharmacies, hospitals, and doctors' offices around the country virtually quadrupled the amount of opioids they prescribed and dispensed to treat pain, despite the fact that Americans reported no overall increase during the same period in the pain they were suffering.

But notwithstanding the industry assurances, opioids proved to be highly addictive. Not surprisingly, then, the significant increase in the availability of powerful opioid

drugs – most typically oxycodone, hydrocodone, and methadone, but also including the illicitly manufactured opioid fentanyl – resulted in a substantial increase in the number of addictions and deaths around the nation from opioid misuse. The NIH reports that, in 2015, “more than 33,000 Americans died as a result of an opioid overdose [and in the] same year, an estimated 2 million people in the United States suffered from substance use disorders related to opioid pain relievers.”¹

The costs in human and economic terms have been enormous. Cities unfairly bear a significant portion of these costs in terms of providing emergency services, rehabilitation facilities, and community support programs, and other things. But the pharmaceutical industry which makes so much money from opioids does not then provide the funding needed by the cities to support those programs and services. This agenda item intends to offset some of that inequity.

A national consortium exists to fight against the opioid industry and obtain recompense for overburdened state and local governments. Led by a number of prominent consumer attorneys, the National Opioid Litigation Consortium has already filed litigation against opioid manufacturers and distributors in federal court and a number of state courts. Attorneys for the consortium have approached the City to represent it as a plaintiff in a new lawsuit to be filed in California state court against those allegedly responsible for the opioid epidemic. The litigation would likely involve claims for (1) negligence and negligent representation, (2) public nuisance, (3) violation of the Racketeer Influenced and Corrupt Organizations Act, and (4) violation of California's Unfair Advertising and Consumer Protection laws. Other causes of action may be added to the lawsuit. Because the proposed agreement is a contingent fee agreement, the engagement does not require the payment of attorneys' fees during the course of litigation. Any such payment will be out of the proceeds (if any) resulting from a trial or settlement of the proposed state court litigation.

This agenda item consists of a contingency fee agreement prepared by attorneys for the National Opioid Litigation Consortium. A copy of this agreement is included as Attachment 1.

Environmental

Review:

Adoption of this item would not, in itself, in any way impact or alter the physical environment. Accordingly, this action is exempt from environmental review under State CEQA Guidelines sections 15061(b)(3) (the general-rule exemption).

¹ See NIH Report.

Recommended

Action: STAFF RECOMMENDS THAT the City Council approve, and authorize the Mayor to execute, the attached Contingency Fee Agreement providing for a contingent fee agreement with respect to the litigation the consortium attorneys will pursue in California state court on behalf of the City against pharmaceutical and other companies alleged to be responsible for the opioid crisis.

Attachments: Attachment 1. Contingency Fee Agreement

Notification: Not applicable.

ENGAGEMENT TO REPRESENT

RE: City of San Clemente, California civil suit against those legally responsible for the wrongful manufacture and distribution of prescription opiates and damages caused thereby.

1. SCOPE OF EMPLOYMENT: City of San Clemente, California (hereinafter "CLIENT"), by and through its City Council, hereby retains the law firms of ANDREWS & THORNTON, SKIKOS CRAWFORD SKIKOS & JOSEPH, LLP, and ROBINSON CALCAGNIE, INC. (the "FIRMS") pursuant to the California Rules of Professional Conduct on a contingent fee basis, to pursue all civil remedies, against the manufacturers of prescription opiates and those in the chain of distribution of prescription opiates responsible for the opioid epidemic that is plaguing the City of San Clemente, including but not limited to filing a claim for public nuisance to abate, enjoin, recover and prevent the damages caused thereby. Any questions or inquiries about the case should be addressed to Joe Dunn, of ANDREWS & THORNTON. CLIENT consents to the participation of the following firms if no conflicts exist, including but not limited to conflicts pursuant to the California Rules of Professional Conduct:

ANDREWS & THORNTON
2 Corporate Park, Suite 110
Irvine, CA 92606

SKIKOS CRAWFORD SKIKOS & JOSEPH, LLP
One Sansome Street, Suite 2830
San Francisco, CA 94104

ROBINSON CALCAGNIE, INC.
19 Corporate Plaza
Newport Beach, CA 92660

2. ATTORNEY FEES: In consideration, CLIENT agrees to pay twenty percent (20%) of the total recovery (gross) in favor of the CLIENT as an attorney fee (the "Fee") whether the claim is resolved by compromise, settlement, or trial and verdict (and appeal)—provided that the Fee shall be subject to a lodestar crosscheck and shall be capped at the lodestar amount as enhanced by a multiplier of four (4). The gross recovery shall be calculated on the amount obtained before the deduction of costs and expenses. CLIENT grants the FIRMS an interest in a fee based on the gross recovery. If a court awards attorney fees, the FIRMS shall receive the greater of the gross recovery-based contingent Fee or the attorney fees awarded. **There is no fee if there is no recovery.** Attorney fees are calculated from gross award. After attorney fees are deducted, costs are deducted from client share.

The CLIENT acknowledges this Fee is reasonable given the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal

service properly, the likelihood this employment will preclude other employment by the FIRMS, the fee customarily charged in the locality for similar legal services, the anticipated (contingent) litigation expenses and the anticipated results obtained, the experience, reputation, and ability of the lawyer or lawyers performing the services and the fact that the Fee is contingent upon a successful recovery.

This litigation is intended to address a significant problem in the community. The litigation focuses on the manufacturers and wholesale distributors and their role in the diversion of millions of prescription opiates into the illicit market, which has resulted in opioid addiction, abuse, morbidity and mortality. There is no easy solution and no precedent for such an action against this sector of the industry. Many of the facts of the case are locked behind closed doors. The billion-dollar industry denies liability. The litigation will be very expensive, and the litigation expenses will be advanced by the FIRMS with reimbursement contingent upon a successful recovery. The outcome is uncertain, as it is in all civil litigation, with compensation contingent upon a successful recovery. Consequently, there must be a clear understanding between the CLIENT and the FIRMS regarding the definition of a "successful recovery."

Negotiability of Fees: The rates set forth above are not set by law but are negotiable between the FIRMS and CLIENT.

3. REPRESENTATION OF OTHER ENTITIES: CLIENT acknowledges that the FIRMS represent other governmental entities against the same defendants.
4. COSTS AND OTHER EXPENSES: THE FIRMS and/or the other law firms in association with the FIRMS, hereinafter referred to as the "Attorneys," shall advance all necessary litigation expenses necessary to prosecute these claims. Litigation expenses include but are not limited to those set forth in the table below. All such litigation expenses, including the reasonable internal costs of electronically stored information (ESI) and electronic discovery generally or the direct costs incurred from any outside contractor for those services, will be deducted from any recovery after the contingent fee is calculated. **There is no reimbursement of litigation expenses if there is no recovery. Costs advanced will be payable out of the CLIENT'S share of any recovery and will not affect the contingency rate or fees due to the FIRMS.** As this is complex litigation, the FIRMS reserves the right to add any additional counsel, law firms, consultants and experts; however, this will in no way increase the Fee as per the terms of this contract.

<i>Type of Expense</i>	<i>Amount of Charge</i>
Telephone Charges	At Cost
Routine In-house Word Processing	No Charge
In-house Photocopying	15 ¢ a page
Outside Photocopying	At Cost

<i>Type of Expense</i>	<i>Amount of Charge</i>
Computerized Legal Research such as Westlaw or Lexis	At Cost
Computerized Litigation System Costs	At Cost
Postage and Delivery Services	At Cost
Courier service or next day service such as Federal Express	At Cost
Mileage	50¢ per mile or the then prevailing IRS reimbursement rate
Travel, including but not limited to airfare (but not first-class airfare), hotels, automobile rental, taxis and meals (but not meals within 50 miles of the residence address)	At Cost
Experts and Consultants	At Cost
Court Reporters and Transcripts	At Cost
Filing Fees	At Cost
Exhibits and Other Trial Presentation Costs	At Cost

5. FEE SHARING WITH CO-COUNSEL: The division of fees, expenses and labor between the Attorneys will be decided by private agreement between the law firms and subject to approval by the CLIENT. Any division of fees will be governed by the California Rules of Professional Conduct, including: (1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the CLIENT; (2) the CLIENT has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation; (3) except where court approval of the fee division is required by law, the *written* closing statement in a case involving a contingent fee shall be signed by the CLIENT and each lawyer and shall comply with the terms of the California Rules of Professional Conduct; and (4) the total fee is *not clearly excessive*.

6. ABSOLUTE AND INDEPENDENT AUTHORITY OF CLIENT – The CLIENT at all times shall retain absolute and independent authority to decide the disposition of the case and personally oversee and maintain ultimate control of the litigation, including trial or settlement.

7. COMMUNICATIONS WITH CLIENT:

Upon conclusion of this matter, COUNSEL shall provide the CLIENT with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the CLIENT and the method of its determination. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyers' fees with a lawyer not in the same firm, as required in Rule 2-200(A)(1) and (A)(2) of the California Rules of Professional Conduct. The closing statement shall be signed by the CLIENT and each attorney among whom the fee is being divided.

8. REVIEW AND UNDERSTANDING OF THIS AGREEMENT: CLIENT acknowledges review and understanding of this agreement, having read its contents in its entirety, and CLIENT understands and agrees with all of its provisions. CLIENT acknowledges that the FIRMS and their employees or agents have made no promise or guarantee regarding the successful determination of CLIENT's claim or causes of action or regarding the amount of recovery or the type of relief, if any, which CLIENT may obtain therefrom. The Attorneys and this Agreement make no such promises or guarantees. Attorneys' comments about the outcome of this matter are expressions of opinion only, and the Attorneys make no guarantee as to the outcome of any litigation, settlement or trial proceedings.

SIGNED, this _____ day of _____, 2018.

_____, California

Accepted:

ANDREWS & THORNTON
2 Corporate Park, Suite 110
Irvine, CA 92606

SKIKOS CRAWFORD SKIKOS & JOSEPH, LLP
One Sansome Street, Suite 2830
San Francisco, CA 94104

ROBINSON CALCAGNIE, INC.
19 Corporate Plaza
Newport Beach, CA 92660

By _____

_____ Date

Anne Andrews
Steve Skikos
Lead Counsel