

George Latimer  
County Executive

John M. Nonna  
County Attorney

November 4, 2021

Westchester County Board of Legislators  
County of Westchester  
800 Michaelian Office Building  
148 Martine Avenue  
White Plains, New York 10601

Re: Legislation authorizing the County Attorney to settle an action on behalf of the County of Westchester (the "County"), against Phoenix Transportation Services, Inc. ("Phoenix") and Platte River Insurance Company ("Platte River") in the action titled *Phoenix Transportation Services, Inc v County of Westchester*, Index No. 65145/2020 (Sup Ct, Westchester County) for the total amount of \$340,000, regarding breach of an obligation under a payment and performance bond, relating to a breach of an agreement by, and termination of an agreement with, Phoenix, dated September 1, 2017, for which Platte River is the Surety.

Dear Honorable Members of the Board:

Attached for your consideration is an Act, which if approved by your Honorable Board, will authorize the County Attorney to settle its claims against Phoenix and Platte River in the action titled *Phoenix Transportation Services, Inc v County of Westchester*, Index No. 65145/2020 (Sup Ct, Westchester County) for the total amount of \$340,000.

#### Background to the Litigation

##### *The Subject Contract*

On September 1, 2017, Phoenix and the County—acting by and through the Westchester County Department of Social Services ("DSS")—entered a five-year contract for the provision of bus services for the transportation of homeless preschool and school-aged children and children placed in court-directed custody and/or foster care (the "Subject Contract"). Platte River was the surety for the Subject Contract, issuing an annually renewable performance bond for \$441,017.83.

During the first two years of the Subject Contract, Phoenix performed without substantial incident. At the beginning of the 2019–2020 school year however, Phoenix's ability to perform the Subject Contract was severely compromised by its serious financial woes. On September 10, 2019, at around noon, Phoenix's owner met with DSS Commissioner Kevin McGuire and notified him that unless the County immediately remits payment for Phoenix's then-outstanding

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148 Martine Avenue, 6<sup>th</sup> Floor  
White Plains, New York 10601

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\*Please be advised that service by facsimile is not accepted.



August invoices, Phoenix would be unable to pick up the children it dropped off that morning. To stave off the countless issues associated with such a major failure, payment was processed as requested and Phoenix was able to perform for the remainder of September 2019. At the same time, DSS's Contracts Management & Compliance Unit and the Westchester County Attorney's Office's Contracts Bureau worked double time to locate available vendors who could provide county-wide bus service on essentially zero notice and set up emergency contracts (the "Emergency Replacement Contracts").

By October 1, 2019, the Emergency Replacement Contracts were in place. The day prior to those contracts going live, the Subject Contract was terminated for cause.

#### *Post-Contract Demands on the Surety*

Immediately after the Subject Contract was terminated, the County reached out to Platte River to demand reimbursement for the additional expenses it would incur as a result of the Emergency Replacement Contracts, which included higher per-route expenses than the Subject Contract. After ten months of back-and-forth, it became clear that Platte River interpreted the bond requiring reimbursement only in the event the County exceed the Subject Contract's not-to-exceed amount. As the worldwide COVID pandemic, which halted bus service in March 2020, the County did not exceed the budgeted amount.

#### The Subject Litigation

Before the County commenced an action against the Surety for non-payment, on November 23, 2020, Phoenix sued the County, former-Commissioner McGuire and Deputy Commissioner Rosa Boone for improperly terminating the Subject Contract. Phoenix was represented by Sanford Rosen, Esq. of ROSEN & ASSOCIATES, P.C., located at 747 Third Avenue, New York, NY 10017-2803.

On December 22, 2020, the County transferred the proceeding to the commercial division and the matter was assigned to the Honorable Gretchen Walsh.

On February 22, 2020, the County impleaded Platte River and asserted counterclaims against Phoenix. Platte River was represented by Marc Lepelstat, Esq., of CHIESA SHAHINIAN & GIANTOMASI, P.C., located at One Boland Drive, West Orange, NJ 07052. In their pleadings, the County asserted the full amount of damages it incurred during the 2019–2020 school year: \$460,959.48. As asserted against Platte River, that amount was capped at the penal sum of the performance bond: \$441,017.83. As against Phoenix, that amount was limited by Phoenix's complete inability to pay.

Discovery closed on August 23, 2020, and a note of issue was filed that same day.

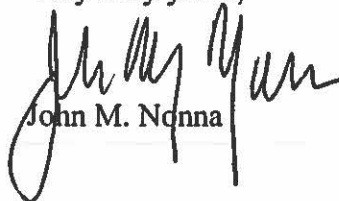
While both the County and Platte River were contemplating summary judgment motions, the Court delayed the issuance of a summary judgment schedule to accommodate a mediation between the parties scheduled for October 18, 2021, before Eugene Farber, Esq., of FARBER, PAPPALARDO & CARBONARI, located at 200 East Post Road, White Plains, NY 10601. The mediation—which was lengthy, extending from 9:30 AM to 7:17 PM—was ultimately successful, with the parties agreeing to the essential terms pending the approval of the Westchester County Board of Legislators. A stipulation of settlement signed by all parties—a copy of which is provided herewith for your reference—was filed the next day.

The Proposed Settlement

Under the proposed settlement, Platte River agrees to pay the County \$340,000, representing approximately 77% of the penal sum of the bond. In return for that sum, the County would agree to release and forever discharge Platte River and Phoenix from all liability related to the Subject Contract. While Platte River will retain the ability to pursue Phoenix and several individuals associated with Phoenix who personally guaranteed the bond, acceptance of the settlement will fully release the County from further litigation regarding this matter.

Accordingly, I request authority on behalf of the County to settle the County's claims against Platte River and Phoenix for the total amount of \$340,000.

Very truly yours,



John M. Nanna

JMN/stc

BOARD OF LEGISLATORS

COUNTY OF WESTCHESTER

Your Committee is in receipt of a proposed Act which, if approved by your Honorable Board, would authorize the County Attorney to settle an action on behalf of the County of Westchester (the “County”), against Phoenix Transportation Services, Inc. (“Phoenix”) and Platte River Insurance Company (“Platte River”) in the action titled *Phoenix Transportation Services, Inc v County of Westchester*, Index No. 65145/2020 (Sup Ct, Westchester County) for the total amount of \$340,000.

To provide some background to the subject litigation: On September 1, 2017, Phoenix and the County—acting by and through the Westchester County Department of Social Services (“DSS”)—entered a five-year contract for the provision of bus services for the transportation of homeless preschool and school-aged children and children placed in court-directed custody and/or foster care (the “Subject Contract”). Platte River was the surety for the Subject Contract, issuing an annually renewable performance bond for \$441,017.83.

During the first two years of the Subject Contract, Phoenix performed without substantial incident. At the beginning of the 2019–2020 school year however, Phoenix’s ability to perform the Subject Contract was severely compromised by its serious financial woes. As a result of several breaches by Phoenix, the County determined to terminate the Subject Contract effective September 30, 2019. The next day, the bus services that were covered by the Subject Contract were replaced by new vendors hired under emergency contracts (the “Emergency Replacement Contracts”).

Immediately after the Subject Contract was terminated, the County reached out to Platte River to demand reimbursement for the additional expenses it would incur as a result of the

Emergency Replacement Contracts, which included higher per-route expenses than the Subject Contract. After ten months, it became clear that Platte River would not reimburse the County absent litigation.

Before the County commenced an action against Platte River, on November 23, 2020, Phoenix sued the County for improperly terminating the Subject Contract. On February 22, 2020, the County impleaded Platte River and asserted counterclaims against Phoenix. In their pleadings, the County asserted the full amount of damages it incurred during the 2019–2020 school year: \$460,959.48. As asserted against Platte River, that amount was capped at the penal sum of the performance bond: \$441,017.83; as against Phoenix, that amount was limited by Phoenix’s inability to pay.

During a mediation held in the matter on October 18, 2021, the parties agreed to a proposed settlement, the terms of which require approval by the Westchester County Board of Legislators.

Under the proposed settlement, Platte River agrees to pay the County \$340,000, representing approximately 77% of the penal sum of the bond. In return for that sum, the County agrees to release and forever discharge Platte River and Phoenix from all liability related to the Subject Contract. While Platte River will retain the ability to pursue Phoenix and several individuals associated with Phoenix who personally guaranteed the bond, acceptance of the settlement will fully release the County from further litigation regarding this matter.

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For the reasons set forth above, it is advisable that the County Attorney be granted authority to settle the County's claims against Phoenix and Platte River for the total amount of \$340,000.

An affirmative vote of a majority of the Board is required to pass this Act.

Dated: November , 2021  
White Plains, New York

COMMITTEE ON

l:stc

AN ACT authorizing the County Attorney to settle an action on behalf of the County of Westchester (the "County"), against Phoenix Transportation Services, Inc. ("Phoenix") and Platte River Insurance Company ("Platte River") for the total amount of \$340,000, regarding breach of an obligation under a payment and performance bond, relating to a breach of an agreement by, and termination of an agreement with, Phoenix, dated September 1, 2017, for which Platte River is the Surety.

BE IT ENACTED by the Board of Legislators of the County of Westchester as follows:

Section 1. The County Attorney is hereby authorized on behalf of the County to settle its claims against Phoenix and Platte River in the action titled *Phoenix Transportation Services, Inc v County of Westchester*, Index No. 65145/2020 (Sup Ct, Westchester County) for the total amount of \$340,000, regarding breach of an obligation under a performance bond, relating to a breach of an agreement by, and termination of an agreement with, Phoenix, dated September 1, 2017, for which Platte River is the Surety.

Section 2. The County Attorney or his duly designated representative is hereby authorized to undertake all legal proceedings and prepare all documents necessary or desirable to accomplish the purpose of this Act.

Section 3. This Act shall take effect immediately.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

PHOENIX TRANSPORTATION SERVICES, INC.,

Plaintiff,

v.

COUNTY OF WESTCHESTER,

KEVIN M. MAGUIRE,  
Commissioner, Department of Social Services, and

ROSA W. BOONE,  
Deputy Commissioner, Department of Social Services

Defendants.

COUNTY OF WESTCHESTER,

Third-Party Plaintiff,

v.

PLATTE RIVER INSURANCE COMPANY,

Third-Party Defendant.

PLATTE RIVER INSURANCE COMPANY,

Second Third-Party Plaintiff,

v.

VINCENT GURGIGNO, and

MAURITS CROES,

Second Third-Party Defendants.

**STIPULATION  
OF SETTLEMENT  
AND DISCONTINUANCE  
OF ACTION**

Index No.  
65145/2020

Assigned Justice:  
Hon. Gretchen Walsh, J.S.C.

WHEREAS, on or about July 25, 2017, Plaintiff Phoenix Transportation Services, Inc. ("Phoenix"), along with Second Third-Party Defendants Vincent Gurgigno ("Gurgigno"); Maurits Croes ("Croes") and Marlaina Koller ("Koller") (Phoenix, Gurgigno and Koller are collectively referred to as "Indemnitors") executed a General Indemnity Agreement ("GIA") in favor of Third-



Party Defendant and Second Third-Party Plaintiff Platte River Insurance Company (“Platte River”), as Surety; and

**WHEREAS**, on or about September 1, 2017, Phoenix entered into a contract with Defendant and Third-Party Plaintiff County of Westchester (the “County”) to provide transportation services for homeless preschool and school age children and children placed in court directed custody and in foster care for the Westchester County Department of Social Services, Westchester County, NY (the “Contract”); and

**WHEREAS**, on or about September 1, 2017, Platte River, as Surety, executed an Annually Renewable Performance Bond # 41375197 (the “Bond”), in the penal sum of \$441,017.83, on behalf of Phoenix, as Principal, and in favor of the County, as Obligee, in connection with the Contract; and

**WHEREAS**, the original annual Bond period was September 1, 2017 to September 1, 2018; and

**WHEREAS**, Platte River issued Continuation Certificates extending the Bond period twice: (a) from September 1, 2018 to September 1, 2019; and (b) from September 1, 2019 to September 1, 2020; and

**WHEREAS**, in a letter dated September 27, 2019 (the “Termination Notice”) and sent to Phoenix on that date, the County stated that Phoenix was in default of the Contract; and

**WHEREAS**, in the Termination Notice, the County advised Phoenix that “in accordance with the Termination Clause...the County is terminating the [Contract] effective 11:59 PM Eastern Time on September 30, 2019;” and

**WHEREAS**, in a letter dated September 27, 2019 and sent to Platte River on that date, the County asserted a claim under the Bond; and

**WHEREAS**, on November 6, 2019, Platte River made a demand on Phoenix, Croes and the other Indemnitors for additional collateral (the “Collateral Demand”) in the sum of \$269,656.83; and

**WHEREAS**, Phoenix and Croes have failed to satisfy the Collateral Demand; and

**WHEREAS**, on November 23, 2020, Phoenix filed its Complaint in this action (the “Action”) against the County and Defendants Kevin M. Maguire, as Commissioner, Department of Social Services, and Rosa W. Boone, as Deputy Commissioner, Department of Social Services (the County, Maguire, and Boone are collectively referred to as the “County Defendants”), in which Phoenix seeks judgment for various forms of relief in connection with the alleged wrongful termination of the Contract; and

**WHEREAS**, on February 22, 2021, the County filed an Answer with Counterclaims against Phoenix and a Third-Party Complaint for damages against Platte River for the penal sum of \$441,017.83; and

**WHEREAS**, on March 19, 2021, Platte River filed its Answer to the Third-Party Complaint, which contained Counterclaims against Phoenix; and

**WHEREAS**, on March 19, 2021, Platte River also filed a Second Third-Party Complaint against Second Third-Party Defendants Vincent Gurgigno and Maurits Croes.

**IT IS HEREBY STIPULATED AND AGREED**, by and among the parties to this litigation that any and all claims, counterclaims, and cross-claims which have been or could have been asserted in this litigation are settled and resolved pursuant to the following terms and conditions:

1. As soon as reasonably possible, the County Attorney will seek approval of this settlement by the Westchester County legislature and the County Attorney will use best efforts to obtain such approval.

2. Within ten calendar days after notification of approval by the Westchester County legislature, Platte River shall pay the County the sum of three hundred forty thousand and 00/100 dollars (\$340,000.00).

3. Subject to the approval of the Westchester County legislature and subject to receipt and full negotiation of the payment of three hundred forty thousand and 00/100 dollars (\$340,000.00), the County releases and forever discharges Platte River, Phoenix and Croes and their officers, directors, employees, agents, attorneys, affiliates, successors, predecessors, assigns from any and all claims, liabilities, liens, actions, causes of action, demands, rights, damages, judgments, debts, obligations and/or costs of any kind or nature, at law or in equity, which the County now has or may hereafter have, known or unknown, foreseen or unforeseen, from the beginning of the world to the date of this Agreement, which arise from or are in any way related to the Contract, the Bond and the Action.

4. Subject to the approval of the Westchester County legislature and subject to receipt and full negotiation of the payment of three hundred forty thousand and 00/100 dollars (\$340,000.00), Platte River releases and forever discharges the County Defendants and its respective officers, directors, employees, agents, attorneys, affiliates, lenders, successors, predecessors, and assigns from any and all claims, liabilities, liens, actions, causes of action, demands, rights, damages, judgments, debts, obligations and/or costs of any kind or nature whatsoever, at law or in equity, which Platte River now has or may hereafter have, known or

unknown, foreseen or unforeseen, from the beginning of the world to the date of this Agreement which arise from or are in way related to the GIA, Contract, Bond, and the Action.

5. Subject to the approval of the Westchester County legislature and subject to receipt and full negotiation of the payment of three hundred forty thousand and 00/100 dollars (\$340,000.00), Phoenix and Croes release and forever discharge the County Defendants and Platte River and their respective officers, directors, employees, agents, attorneys, affiliates, lenders, successors, predecessors, and assigns from any and all claims, liabilities, liens, actions, causes of action, demands, rights, damages, judgments, debts, obligations and/or costs of any kind or nature whatsoever, at law or in equity, which Phoenix and Croes now have or may hereafter have, known or unknown, foreseen or unforeseen, from the beginning of the world to the date of this Agreement which arise from or are in way related to the GIA, Contract, Bond, and the Action.


6. Subject to approval of the settlement by the Westchester County legislature and subject to payment of the three hundred forty thousand and 00/100 dollars (\$340,000.00), this action is discontinued as follows:

- a. Any and all claims by Platte River and Phoenix against the County Defendants are discontinued with prejudice and without costs.
- b. Any and all claims by the County against Platte River and Phoenix are discontinued with prejudice and without costs.
- c. The claims of Platte River against Phoenix and the individual indemnitors, Vincent Gurgigno and Maurits Croes, are discontinued without prejudice and without costs.

*[Remainder of Page Intentionally Left Blank]*

7. This stipulation may be executed electronically and in counterparts.

Dated: White Plains, New York  
October 18, 2021

By:   
Sean T. Carey  
Sr. Assistant County Attorney, of Counsel  
Westchester County Attorney's Office  
*Counsel for County of Westchester,  
Kevin M. McGuire, and Rosa W. Boone*  
148 Martine Avenue, 6th Floor  
White Plains, NY 10601

Dated: White Plains, New York  
October 18, 2021

By: \_\_\_\_\_  
Sanford Rosen  
ROSEN & ASSOCIATES, P.C.  
*Counsel for Phoenix Transportation Services, Inc.  
and Maurits Croes*  
747 Third Avenue  
New York, NY 1017-2803

Dated: White Plains, New York  
October 18, 2021

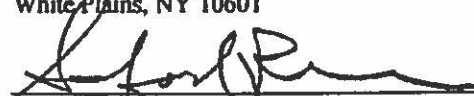
By: \_\_\_\_\_  
Marc R. Lepelstat  
CHIESA SHAHINIAN & GIANTOMASI PC  
*Counsel for Platte River Insurance Company*  
One Boland Drive  
West Orange, NJ 07052

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Dated: White Plains, New York  
October 18, 2021

By: \_\_\_\_\_  
Sean T. Carey  
Sr. Assistant County Attorney, of Counsel  
Westchester County Attorney's Office  
*Counsel for County of Westchester,  
Kevin M. McGuire, and Rosa W. Boone*  
148 Martine Avenue, 6th Floor  
White Plains, NY 10601

Dated: White Plains, New York  
October 18, 2021

By:   
Sanford Rosen  
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*Counsel for Phoenix Transportation Services, Inc.  
and Maurits Croes*  
747 Third Avenue  
New York, NY 1017-2803

Dated: White Plains, New York  
October 18, 2021

By: \_\_\_\_\_  
Marc R. Lepelstat  
CHIESA SHAHINIAN & GIANTOMASI PC  
*Counsel for Platte River Insurance Company*  
One Boland Drive  
West Orange, NJ 07052

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Westchester County Attorney's Office  
*Counsel for County of Westchester,  
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October 18, 2021

By: \_\_\_\_\_  
Sanford Rosen  
ROSEN & ASSOCIATES, P.C.  
*Counsel for Phoenix Transportation Services, Inc.  
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New York, NY 1017-2803

Dated: White Plains, New York  
October 18, 2021

By:   
\_\_\_\_\_  
Marc R. Lepelstat  
CHIESA SHAHINIAN & GIANTOMASI PC  
*Counsel for Platte River Insurance Company*  
One Boland Drive  
West Orange, NJ 07052

# FISCAL IMPACT STATEMENT

SUBJECT: Settlement of Action Against Surety

NO FISCAL IMPACT PROJECTED

## OPERATING BUDGET IMPACT

(To be completed by operating department and reviewed by Budget Department)

A)  GENERAL FUND       AIRPORT       SPECIAL REVENUE FUND (Districts)

### B) EXPENSES AND REVENUES

Total Current Year Cost      \$ 0

Total Current Year Revenue \$ 340,000.00

Source of Funds (check one):       Current Appropriations

Transfer of Existing Appropriations       Additional Appropriations       Other (explain)

Identify Accounts: 101-22-8900-8900-9340

Potential Related Operating Budget Expenses:      Annual Amount \$ \_\_\_\_\_

Describe: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Potential Related Revenues:      Annual Amount \$ \_\_\_\_\_

Describe: The County will be settling an action to receive \$340,000.  
\_\_\_\_\_  
\_\_\_\_\_

Anticipated Savings to County and/or Impact on Department Operations:

Current Year: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Next Four years: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Prepared by: Sean T. Carey

Title: Senior Assistant County Attorney

Department: Law

Reviewed By: 

Budget Department

11/4/21

If you need more space, please attach additional sheets.