

**PUBLIC NOTICE**  
**In association with Resolution No. 2021-262**

This notice is given pursuant to Tex. Gov't Code § 2254.1036.

- A. The City of Waco, Texas (“City”) intends to pursue claims for monetary damages, declaratory relief, and other legal remedies (“Damages”) against Netflix, Inc., Hulu LLC, Disney DTC LLC, and other video service providers (“VSPs”) as determined for non-payment of franchise fees as set forth under the Texas Video Services Providers Act, Tex. Util. Code Sec. 66 (the “Litigation”). The City’s desired outcome in pursuing the Litigation is to recover from the VSPs Damages owed to the City for failure to pay franchise fees and obtain an order requiring the VSPs to pay the franchise fees going forward, in addition to other relief allowed under the law. Therefore, there is substantial need for the legal services.
- B. The City wishes to engage the following three law firms (“Counselors”): McKool Smith, P.C., Ashcroft Sutton Reyes LLC, and Korein Tillery LLC. Details regarding their competence, qualifications and experience are attached at Exhibit 1.
- C. The relationship with the three Counselors would span from the time of engaging them in the Litigation until it is completed. The City has had no prior relationship with the Korein Tillery firm or the Ashcroft Sutton Reyes firm. The City was a member of a class of cities represented by McKool Smith and Mr. Wolens to recover municipal hotel occupancy taxes. The City was pleased with the representation provided by McKool Smith and Mr. Wolens.
- D. The legal services for which the Counselors are retained cannot be adequately performed by the attorneys and supporting personnel of the City. The City’s budget is strained and has limited resources for its legal department. The City Attorney’s office is engaged in hundreds of transactional matters and in overseeing, managing and litigating dozens of matters. In addition, the investigation, research, and litigation of the claims will require the expenditure of large sums of money and require the work of numerous attorneys, paralegals and others who are familiar with the VSPs’ wrongful actions and/or

inactions. Thus, the City does not have the resources it believes will be necessary to engage in protracted, time-consuming, and expensive litigation.

E. The legal services for which the law firms are retained cannot reasonably be obtained from attorneys in private practice under a contract providing for the payment of hourly fees without regard to the outcome of the matter for the following reasons:

(1) **TIME:** It is not economically feasible for the City to pay outside counsel on an hourly basis for what the City anticipates will require significant hours of attorney time and significant costs advanced in pursuing the relief the City expects to achieve.

The issues involved in the City's claim have not been adjudicated and determined since the Texas Video Services Providers Act was passed in 2005. As an unsettled matter of law, the VSPs will likely aggressively oppose all aspects of the Litigation. It will require the skill of attorneys who have familiarity with complex litigation. It is the City's experience that attorneys with this familiarity and experience have high billable hourly rates and are not receptive to taking on contingency fee cases such as this where recovery is not certain; doing so would preclude them from taking other cases on an hourly paid basis.

(2) **COMPLEXITY/DAMAGES:** Besides legal issues, determining damages may be complicated to calculate. Damages will be based, in part, on: 1) gross receipts of each VSP, with data going back thirteen years to 2007, and 2) individual subscriptions to residents of the City. It is unclear in what format the data is kept to determine gross receipts, but it is anticipated to be complex and difficult to understand. It will require experienced lawyers with the assistance of experts to decipher the data and determine a mathematical or formulaic calculation for each defendant for receipts generated over 13-plus years. Because there are at least three distinct defendants, it is likely that they have different business practices and ways of maintaining their data.

(3) **EXPENSES:** Finally, the Counselors the City requests to employ have agreed to advance expenses in the case, which are

likely to be significant given the need for experts in several fields and the general high expense of litigation. These expenses include but are not limited to: filing and service fees; costs of investigative services; travel expenses; deposition expenses and court reporter fees; outside trial services providers; expert witness fees; trial equipment rental and operation fees; preparation of exhibits and graphics; the costs of briefs and transcripts on appeal; and miscellaneous copying, postage, shipping, and courier expenses.

- F. The advance of expenses is risky because, under the terms of the legal services agreement, expenses are reimbursed only out of any recovery. Because the City has limited funds to advance for litigation expenses, it is especially in the City's interest, and that of its residents, to have attorneys advance those expenses and only be reimbursed by the City out of any recovery if the City is successful. Entering a contingent fee contract for legal services is in the best interest of the residents of the City because it will allow the City to recoup franchise fees owed the City since approximately 2007 and obtain a declaratory judgment ordering the VSPs to pay the fees in the future. Franchise fees recovered in the Litigation will be used to support other essential City services. Retaining counsel who will advance expenses in the litigation will allow the City to use those funds instead to support necessary city services.

# **EXHIBIT 1**

**McKOOL SMITH P.C.**

McKool Smith was founded in 1991 with offices in Dallas, Austin, Houston, Marshall, Los Angeles, and New York. It represents clients in complex commercial litigation, insurance recovery, intellectual property, bankruptcy, and white-collar defense matters.

In the past 15 years, the firm has secured 12 nine-figure jury verdicts and 15 eight-figure jury verdicts. It has also won more VerdictSearch and The National Law Journal “Top 100 Verdicts” than any other law firm in the country. Recent recognitions include:

Recognized by BTI Consulting as one of ten “Awesome Opponents,” the firms most feared by senior in-house counsel, in its annual Litigation Outlook Report (2019-2020).

Ranked a “Tier 1” law firm for bankruptcy, commercial, securities, banking & finance, intellectual property, patent, real estate, and regulatory enforcement litigation by U.S. News & World Report - Best Law Counselors (2020).

Ranked as a leading firm for Commercial Litigation, Insurance Policyholder Litigation, and Securities Plaintiff Litigation by Chambers USA (2020).

Ranked as a “Highly Recommended” Litigation Firm and Plaintiff Firm by Benchmark Litigation (2020).

Awarded “Insurance Group of the Year” by Law360 (2020).

Recognized as a “Texas Powerhouse Firm” by Law360 (2019).

Awarded “Trial Group of the Year” by Law360 (2018).

Steven Wolens is a principal at McKool Smith. He has practiced law since 1976. He received a B.A. with distinction from Stanford University in 1973, and a J.D. from Southern Methodist University Law School in 1976. He represents clients in complex class-action claims and commercial litigation. He is peer-reviewed as an AV rated lawyer by Martindale Hubbell.

In certifying a class action on behalf of 173 Texas cities in *City of San Antonio v Hotels.com*, the district court found “With regard to adequacy of counsel, the Court must determine whether class counsel has the qualifications, experience and training to litigate the case to its conclusion...The lead attorneys in this case are Steven Wolens and Gary Cruciani. Both attorneys have a wealth of experience in complex litigation, including substantial class action experience.” *City of San Antonio v. Hotels.com*, No. SA-06-CA-381-OG, 2008 WL 2486043, at \*8 (W.D. Tex. May 27, 2008).

For 24 years, he served as a member of the Texas Legislature and authored landmark legislation covering partnerships and limited liability corporations, ethics reforms, antitrust laws, and electric deregulation. Texas Monthly magazine named him one of the “Ten Best Legislator” in the state on six separate occasions. He currently serves on the Texas Ethics Commission, which he chaired from 2017–2019.

## **ASHCROFT SUTTON REYES LLC**

Ashcroft Sutton Reyes LLC (d/b/a/ Ashcroft Law Firm) was founded in 2008 by former U.S. Attorney General, Governor, and Senator John Ashcroft. Together with the select group of seasoned, respected, and experienced senior executives he recruited to join him—many of whom helped to lead the U.S. Department of Justice during a significant time in our nation’s history following the attacks on 9/11—the Ashcroft Firm has earned a reputation for integrity and a track record for accelerating successful resolutions of even the most complex matters.

In addition to General Ashcroft, the Ashcroft Firm is comprised of the former U.S. Attorney for the Western District of Texas, former Deputy Assistant to the President of the United States, former member of the Executive Administration of the Texas Attorney General's Office, former Assistant United States Attorney, former Deputy Associate Attorney General and Chief of Staff in the U.S. Department of Justice, former General Counsel and Assistant General Counsel to the Special Inspector General for Iraq Reconstruction, former Assistant General Counsel to the Governor of Texas, and several other highly skilled and experienced attorneys, all of whom know and understand government.

The Ashcroft Firm’s attorneys are litigators who have led multi-plaintiff lawsuits against formidable foes, like the federal government, other states, and local government entities. Ashcroft attorneys have appeared in federal and state courts throughout the United States and internationally, ranging from the Supreme Court of the United States to municipal courts in Texas.

Additionally, the Ashcroft Firm provides legal and consulting services to world-leading clients, including Fortune 500, nation states, elected officials, multi-national corporations, and corporate executives. The Ashcroft Firm regularly leads large entities (government and private) through a large range of regulatory matters including issues involving the FCPA, FATCA, OFAC, SOX, ITAR, FCA, the FAR and the Bank Secrecy Act (Anti- Money Laundering).

Ashcroft attorneys have tried countless civil and criminal cases to verdict in state and federal courts throughout the country. The legal experience and efforts of Ashcroft attorneys has resulted in governmental entities recovering billions for contractual breaches, theft, tax evasion, waste, fraud, and abuse.

## **KOREIN TILLERY LLC**

Korein Tillery — based in Chicago and St. Louis — is one of the country’s most successful plaintiffs’ complex-litigation firms, representing a broad array of clients in high-stakes lawsuits and delivering over \$18 billion in verdicts and settlements over the last 16 years. The National Law Journal has consistently deemed Korein Tillery to be one of the country’s top plaintiffs’ firms by naming it to its “Plaintiffs’ Hot List” seven times in the past 16 years. In 2014 and 2015, Korein Tillery was named by the NLJ as a member of its top 50 Elite Trial Lawyers.

Since 2007, Korein Tillery has represented Missouri municipalities in litigation that sought to recover unpaid license taxes. In suits against wireless and wireline carriers, Korein Tillery

recovered hundreds of millions of dollars of license tax revenues—both retrospectively and prospectively—for more than 350 cities throughout Missouri. Korein Tillery has recovered more than \$1 billion for Missouri municipalities. As a result of their work in these cases, the Missouri Lawyers Weekly recognized Korein Tillery partners with awards in the “largest plaintiff wins” category in 2007, 2009, 2010, 2015, and 2017. On two separate occasions corporate defendants have secured state legislation banning the litigation. In both instances Korein Tillery has successfully challenged the legislation as unconstitutional in the Supreme Court of Missouri. *See, e.g., State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589 (Mo. 2012).

Steven Berezney is a partner in Korein Tillery’s St. Louis office. He received his J.D. from the University of Illinois in 2003, where he served as Editor-in-Chief of the Law Review. After graduation, Mr. Berezney served as a judicial law clerk for Judge Laura Denvir Stith of the Supreme Court of Missouri.

While in private practice at Husch Blackwell, Mr. Berezney was part of the team that won a \$1 billion judgment that, at the time, was the fourth largest patent infringement jury verdict in U.S. history, according to Bloomberg. *Monsanto Co. v. E.I. DuPont de Nemours & Co.*, 4:09-cv-00686-ERW (E.D. Mo. Aug. 1, 2012). At Korein Tillery, Mr. Berezney managed and litigated all aspects of multi-billion-dollar cases in federal trial and appellate courts against Wall Street investment banks arising from misrepresentations made about residential mortgage-backed securities. Mr. Berezney played a significant role in obtaining over \$5 billion in recoveries. Mr. Berezney has also been part of the team litigating Sherman Act price fixing conspiracy claims raised against 16 investment bank defendants in *In re: Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13-cv-07789-LGS (S.D.N.Y.), resulting in \$2.3 billion in recoveries to date.

Garrett Broshuis received his J.D. from Saint Louis University, where he graduated valedictorian and served as Editor-in-Chief of the Law Journal. Before law school, Mr. Broshuis played six years as a pitcher in the San Francisco Giants’ organization, working at all levels of minor league baseball.

Since joining Korein Tillery, Mr. Broshuis has represented minor league baseball players in a novel case seeking to increase the players’ pay, which recently had its class action status affirmed and expanded by the Ninth Circuit Court of Appeals. *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 922 (9th Cir. 2019). He also represents classes of Missouri municipalities in several actions against Fortune 500 and other large companies.

Mr. Berezney and Mr. Broshuis are both responsible for litigating the first known filed lawsuit (in Missouri) seeking to require streaming companies to pay franchise fees to municipalities. They are litigating similar cases in Indiana and Georgia.

This notice is being posted at Waco City Hall and on the City of Waco official website on the 30th day of April 2021 at 1:55 PM.



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**Esmeralda Hudson, TRMC**  
**City Secretary**