

## MEMORANDUM

TO: Arkansas Legislative Council  
Litigation Reports Oversight Subcommittee  
Sen. Jim Dotson, Co-Chair  
Rep. DeAnn Vaught, Co-Chair

FROM: Brad Young, Managing Attorney  
Arkansas Department of Finance & Administration

DATE: November 7, 2024

RE: *Asplundh Tree Expert, LLC v. Jim Hudson, in his Official Capacity as Secretary of the Arkansas Department of Finance and Administration*, Case No. 60CV-23-4090, in the Circuit Court of Pulaski County, Arkansas

REQUEST FOR REVIEW AND APPROVAL OF SETTLEMENT BY  
THE LEGISLATIVE COUNCIL OF THE ARKANSAS GENERAL ASSEMBLY  
Ark. Code Ann. § 10-3-312(d)

## SETTLEMENT AGREEMENT

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Asplundh Tree Expert, LLC (“Asplundh”) sued the Department opposing a sales and use tax assessment. The Department filed an answer denying all of Asplundh’s claims and denying Asplundh’s entitlement to any judicial relief.

As a result of the underlying audit, the Department assessed \$3,974,116.63 in additional taxes, \$0.00 in penalties, and \$2,377,456.01 in interest for the tax period April 1, 2015 through July 31, 2018.

The parties have reached a settlement agreement. A copy of the Settlement Agreement is attached. Based on additional information that Asplundh provided during the litigation, the Department has agreed to adjust the audit and to waive the remaining interest. Asplundh has agreed to pay \$382,500.00. After audit adjustments, the remaining amount of interest to be waived will be approximately \$276,922.23. If settlement is approved, the litigation will be dismissed per the terms of the settlement agreement.

The parties request that this matter be placed on the Legislative Council’s agenda for review at the earliest possible date.

## State Agency Litigation Notification Form

*Dear Agency Director:*

*Arkansas Code § 10-3-312 requires that any agency or institution that is not represented by the Attorney General shall notify the Director of the Bureau of Legislative Research of pending litigation so that the appropriate legislative committee may "determine the action that may be deemed necessary to protect the interests of the General Assembly and the State of Arkansas in that matter."*

*In order to submit a report regarding pending litigation pursuant to Arkansas Code § 10-3-312, please complete the following form for each pending lawsuit, along with a cover letter to the Director of the Bureau of Legislative Research, and submit to [desikans@blr.arkansas.gov](mailto:desikans@blr.arkansas.gov).*

<b>DATE REPORTING:</b>			
Agency:		Phone:	
E-mail:		Contact:	
<b>1. STYLE OF THE CASE BEING LITIGATED</b>			
<b>2. IDENTITY OF THE TRIBUNAL BEFORE WHICH THE MATTER HAS BEEN FILED (COURT)</b>			
<b>3. BRIEF DESCRIPTION OF THE ISSUES INVOLVED</b>			
<b>3A. OTHER DESCRIPTION INFORMATION</b>			
Docket Number			
Date Filed			
Defendant			
Defendant Attorney			
Plaintiff			
Plaintiff Attorney			
<b>4. ANY OTHER RELEVANT INFORMATION</b>			
<b>4A. OTHER RELEVANT INFORMATION</b>			
Case History			
Relief Sought			
Current Status			

## A.C.A. § 10-3-312

Current through all laws of the 2017 Regular Session and 2017 First Extraordinary Session, including changes and corrections by the Arkansas Code Revision Commission.

- Arkansas Code Annotated
- Title 10 General Assembly
- Chapter 3 Committees
- Subchapter 3-- Legislative Council

### 10-3-312. NOTIFICATION OF LAWSUITS AFFECTING STATE.

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- (a) In order that the General Assembly may take whatever steps it deems necessary concerning lawsuits which may affect the State of Arkansas, its officials, or its financial resources:
  - (1) The Attorney General shall notify the Director of the Bureau of Legislative Research who is the Executive Secretary to the Legislative Council as soon as possible after the Attorney General becomes involved in such litigation;
  - (2) **When any state agency or any entity which receives an appropriation of funds from the General Assembly becomes involved in litigation without representation by the Attorney General, the director or administrative head of the agency shall notify the Director of the Bureau of Legislative Research as soon as possible.**
- (b) The notice given by the Attorney General or by the director or administrative head of a state agency to the Director of the Bureau of Legislative Research shall include the style of the case being litigated, the identity of the tribunal before which the matter has been filed, a brief description of the issues involved, and other information that will enable the Legislative Council or the Joint Budget Committee to determine the action that may be deemed necessary to protect the interests of the General Assembly and the State of Arkansas in that matter.
- (c) Upon receipt of the notice, the Director of the Bureau of Legislative Research shall during the interim between legislative sessions transmit a copy of the notice to the cochairs of the Legislative Council and to the cochairs of the Joint Budget Committee during legislative sessions in order that those committees may schedule that matter upon their respective agendas at the earliest possible date.
- (d) During the interim between legislative sessions, the Legislative Council shall determine, and during legislative sessions the Joint Budget Committee shall determine, whether the General Assembly has an interest in the litigation and, if so, take whatever action deemed necessary to protect the General Assembly's and the state's interest in that matter.

### HISTORY

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Acts 1987, No. 798, §§ 1, 2.

Arkansas Code of 1987 Annotated Official Edition  
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A.C.A. § 10-3-312 (Lexis Advance through all laws of the 2017 Regular Session and 2017 First Extraordinary Session, including changes and corrections by the Arkansas Code Revision Commission)

<b>ELECTRONICALLY FILED</b>
Pulaski County Circuit Court
Terri Hollingsworth, Circuit/County Clerk
2023-Jun-09 13:21:51
60CV-23-4090
C06D11 : 17 Pages

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS**  
**\_\_\_\_\_ DIVISION**

**ASPLUNDH TREE EXPERT LLC**

**PLAINTIFF**

**v. CASE NO.: \_\_\_\_\_**

**LARRY WALTHER, in his Official Capacity  
as SECRETARY, ARKANSAS DEPARTMENT  
OF FINANCE AND ADMINISTRATION**

**DEFENDANT**

**COMPLAINT**

Comes now Plaintiff, Asplundh Tree Expert LLC (“Asplundh”), by and through its counsel Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C for its Complaint against Larry Walther, in his Official Capacity as Secretary, Arkansas Department of Finance and Administration (“DFA”), and states as follows:

**I. PARTIES**

1. During the April 1, 2015 through July 31, 2018 tax periods, Asplundh was a Pennsylvania entity having its principal place of business in Pennsylvania, and was admitted to do business in Arkansas and was registered and in good standing with the Secretary of State of Arkansas. (On September 29, 2017, Asplundh converted from an S corporation to a limited liability company.)

2. Defendant, Larry Walther, is the Secretary of the Department of Finance and Administration, and is named as a defendant in his representative capacity on behalf of the Department in accordance with his general plenary authority as executive head of the Department

under Ark. Code Ann. § 25-8-101, and his specific duties with respect to suits and other proceedings concerning taxes administered by the Secretary, as set out in Ark. Code Ann. § 26-17-304.

## **II. PROCEDURAL HISTORY**

3. On or about September 25, 2018, the DFA began a sales and use tax audit of Asplundh which eventually encompassed the period April 1, 2015 through July 31, 2018.

4. The DFA's auditor reviewed Asplundh's support for the period January 2018 through July 2018 to generate her assessment for that period, and by procedural agreement of the parties used percentages derived from that data along with Asplundh's gross sales for the prior periods to compute the assessed amount of tax due for the previous period of April 1, 2015 through December 31, 2017.

5. On March 24, 2021, the DFA issued its Notice of Proposed Assessment.

6. On May 21, 2021, Asplundh timely filed a written protest to the DFA's Office of Hearings and Appeals.

7. On June 6, 2022, an administrative hearing was held before Administrative Law Judge Ray Howard of the Office of Hearing and Appeals.

8. On December 13, 2022, Judge Howard issued his Administrative Decision.

9. On March 8, 2023, the Secretary of the DFA by and through his appointed designee issued its Notice of Final Assessment in this matter. The Notice of Final Assessment is attached hereto as Exhibit 1.

### III. JURISDICTION AND VENUE

10. Ark. Code Ann. § 26-18-401 *et seq.* provides the taxpayer with the right to judicial relief from the hearing decision and final assessment. Asplundh has complied with all requirements of Ark. Code Ann. § 26-18-401 *et seq.* and this Complaint properly initiates this case in this Court.

11. Jurisdiction and venue are proper in this Court pursuant to the provisions of Ark. Code Ann. § 26-18-406(c). The matter shall be tried de novo. *Id.*

### IV. ALLEGATIONS OF FACT

12. Asplundh has entered into contracts with various utilities, including Black Hills Service Company, LLC, Entergy Corp., First Electric Cooperative Corp., and Petit Jean Electric Coop.

13. All of the activity at issue occurred pursuant to contracts with these four utilities.

14. Under these contracts, Asplundh trims away and removes trees and brush from encroaching on power lines, which activity is also known as distribution vegetation management services.

15. In Asplundh's industry, "brush" is a narrow diameter tree. It means a woody species of tree less than 4-8" in diameter, depending upon the relevant specification, that will eventually grow into a larger tree. Brush also refers to smaller branches of trees that were removed during Asplundh's tree trimming work. Brush is not bushes, shrubs, weeds or ground cover.

16. Asplundh provides services to its customers by two separate, contracted methods: (a) Time & Equipment basis, and (b) Line Mileage basis.

a. Time & Equipment work is when work is assigned to Asplundh by the utility on a task-by-task basis, and Asplundh performs that work on an hourly basis charging

for personnel time and equipment usage. The scope of the Time & Equipment work is normally set out in a work order.

- b. Line mileage work is when Asplundh performs specified contracted work on established “circuits” and bills a flat rate per mile for the contracted work. The relevant contract and its vegetation clearance specifications define the scope of work to be performed.

17. Asplundh has two relevant work unit classifications: the Tree Trimming Division and the Brush & Mowing Division. Although referred to as “Divisions,” neither are company divisions of Asplundh. They are divided in this way for insurance purposes, because the Brush & Mowing Division uses heavy equipment in its work.

18. The Tree Trimming Division performs tree trimming and tree removals around power lines. It focuses on manual work that utilizes smaller equipment like chainsaws, unlike the heavy equipment that the Brush & Mowing division uses.

19. The Brush & Mowing Division is Asplundh’s heavy equipment division. It utilizes large equipment to trim trees around power lines and it also cleans up large tree and brush debris left after the Tree Trimming Division completes its work.

20. Work performed by either of Asplundh’s divisions may be termed Proactive or Reactive.

- a. Proactive means that the work is performed in a routine cycle that has been scheduled ahead of time.
- b. Reactive means that an issue with a tree arose on a circuit not currently being worked on, and so Asplundh specially had to go out and correct that issue. Reactive work is generally Time & Equipment work.

21. The invoices and supporting records for Time & Equipment work are different from the records for Line Mileage work. With Time and Equipment work, traditional invoices are provided to the client. Outside of the invoice, Time & Equipment work may be supported by employee time lists and equipment-used lists, since that is the basis upon how those contracts are paid: by how much time an employee spends and by what particular equipment was used. At times the backup support for Time & Equipment work is listed by job rather than separated out by individual invoice.

22. For Line Mileage work, the utility company pays Asplundh a fixed fee for work completed, doing so on a per-mile basis. Because it is paid on a per-mile basis and not on a Time & Equipment basis, it is irrelevant to the utility and to the contract which employees and which equipment was used, and Asplundh is therefore not required by the utility to generate and keep such support. Instead, the factor that generates the receivable is how many miles were completed of contracted work in a given week.

23. Take for example, Asplundh's contracting with Entergy. While some Line Mileage work is invoiced to the contracted utility, no invoice or other supporting material is provided to Entergy for Line Mileage work performed for Entergy. On a regular basis, the utility approves a spreadsheet called the Tracker, which lists out what mileage was completed for which route. The utility approves the mileage via that Tracker and then Asplundh receives payment for that service. While Asplundh generates an internal document to reflect that receivable for accounting purposes, that internal document is not provided to Entergy, and it only contains base information as to contract identification and amount of payment which is necessary for Asplundh to internally track that receivable.



### **The Relevant Contracts**

#### **A. The Black Hills Service Company, LLC Statements of Services**

24. In 2018, the services Asplundh performed for Black Hills Service Company were provided under two Statements of Services.

25. The first Statement of Services is titled No. 38957 and relates back to an Amended Master Services Agreement entered into between Black Hills and Asplundh effective December 18, 2012.

26. Under Sections B and C of Statement of Services No. 38957, the commencement date begins May 7, 2018 and extends through July 31, 2018.

27. On the last page of Statement of Services No. 38957, there's a map that identifies two trees to be removed.

28. In Section A of Statement of Services No. 38957, Requested Services, this requests that Asplundh "will clear remove both trees," "clean up trees and brush," and "grind the stumps."

29. The second Statement of Services is titled No. 38053 and relates back to the same Amended Master Services Agreement effective December 18, 2012.

30. Under Sections B and C of Statement of Services No. 38053, the commencement date begins in October of 2017 and extends through June 30, 2018.

31. In Section A of Statement of Services No. 38053, the Requested Services requests that Asplundh "shall clear side wall right of way," "owner field representative will determine locations to be hogged on right of way and leave property owners stand for them," Asplundh "shall restore all public and private right of way areas, and other land," and "restore all locations determined by Owner's field personnel."

32. In this industry, "hogged" means to clear only trees and brush.

33. In this industry, “restore” means to trim back trees and brush.

**B. The Entergy Contract**

34. The Entergy Systemwide Multipurpose Maintenance, Modification and Construction General Services Agreement dated June 1, 2002 is the master agreement between Entergy and Asplundh for the later Contract Orders issued by Entergy (inclusively, the “Entergy Contract”). Section 5 of the Entergy Contract states that work will be done pursuant to Contract Orders issued by Entergy to Asplundh.

35. Paragraph 1.1 of the Entergy Contract’s defines “affiliate” to mean Entergy including all of its affiliated companies. Entergy’s affiliated companies include Entergy Arkansas as well as Entergy Northern.

36. Entergy Arkansas, Inc. Contract Order dated December 15, 2016 (the “December 15 Contract Order”) governs work performed from December 15, 2016 through November 30, 2018. At Section 1.0 under Scope of Work it states that the December 15 Contract Order applies to various types of work including network Line Mile trimming and Reactive work. Reactive work is Time & Equipment work. The December 15 Contract Order governs both Line Mileage work and Time & Equipment Work.

37. The December 15 Contract Order sets forth under Section 1.16 that “All work shall be completed in accordance with” the “Distribution Vegetation Management Line Clearance Specifications.”

38. The Distribution Vegetation Management Line Clearance Specifications (“Clearance Specifications”) state in bold that “Work performed on all Contract Orders written for Distribution Vegetation Management shall conform to these Specifications.”

39. Section 2.0.1, is titled Tree Removal, and states “Any woody species < 8 inches dbh inside ROW shall be removed. (“dbh” is the diameter of the tree at 4.5’ above ground).” The characters “< 8” means less than eight inches. The Clearance Specifications direct Asplundh to remove all woody species of tree in the Right of Way having a diameter of less than eight inches at a height of four and one half feet above the ground. Trees larger than that diameter are either trimmed or are considered for removal if they are a hazard to the power line.

40. Section 3.0.1 of the Clearance Specification states that “Brush and debris from public, private landscaped property and any ditch or drainage area shall be removed and disposed of on the day in which it was trimmed or in accordance with desires of the public authorities or property owners.” This refers to brush and debris from Asplundh’s tree trimming work.

41. In Section 3.0.2, it says that “chipped and/or shredded material, whenever possible, shall be blown into right of way.” Chipped and/or shredded material consists of trees that are chipped down to a size so that they would not be a tripping hazard—in other words, this material is chipped and left or blown into the right of way, not placed into beds.

#### **C. The First Electric Cooperative Corp. Contract**

42. The contract between Asplundh and First Electric Cooperative Corporation is reflected as a Services Agreement dated December 22, 2017. The First Electric Services Agreement provides for both Line Mileage tree trimming work and Time & Equipment tree trimming work on a Proactive and Reactive basis.

43. The First Electric Services Agreement sets forth various charges for Time & Equipment tree trimming work. Those charges begin with trees having a diameter of 8 inches.

44. The First Electric Services Agreement also sets forth charges for “Brush Removal (per linear ft. Handcutting)” and “Brush Pickup (Per linear ft.)” The First Electric Services Agreement does not call for bush, shrub, or ground covering removal.

45. Asplundh bid for and won a First Electric Services Bid Invitation, which governed the work Asplundh was to perform between January 1, 2018 and December 31, 2018.

46. The awarded Bid Invitation identifies “Special Conditions of Work to be Done.” It says “Clear, brush hog, side trim mechanically, chemically treat (six feet or shorter) and/or cut by hand, with a chainsaw, all necessary trees and brush per enclosed specifications.” It continues: “All debris shall be either chipped in maintained areas or brush hogged in unmaintained areas.” “Any dead brush over six feet in height shall be brush hogged.”

47. The awarded Bid Invitation sets forth at Section B certain Line Clearance Requirements. The Line Clearance Requirements take the place of the First Electric Services Agreement’s Work Standards when it comes to this Bid Invitation work.

48. The Line Clearance Requirements states “All fence rows with incompatible trees and brush within the thirty feet right of way shall be cut level and stumps treated with herbicide.” It says that “All distribution lines (except three phase) are to be horizontally trimmed (30) feet; (15) feet either side from center of right-of-way and vertically ground to full extension or (20) feet above the conductor, whichever is greater. Trees shall be trimmed as to provide a maximum clearance from primary conductors. Unless otherwise indicated by the Right-of-Way Supervisor, all trees at a minimum shall be trimmed back (15) feet below the lowest energized primary conductor.”

49. Under Section C Tree Removal of the Line Clearance Requirements it states that stumps capable of re-sprouting shall be treated with an approved herbicide, and down in Section

E. Use of Herbicides, it states that “use of herbicides is the preferred method for floor maintenance.”

50. Under the contract, “floor maintenance” refers only to trees including those small trees called brush. It is not referring to spraying bushes or shrubs or groundcover.

51. Where a line mileage contract with a utility required that herbicides be applied, Asplundh subcontracted that work out to a company called US Applicators, LLC.

52. Although Asplundh subcontracts out its herbicide duties under the various contracts, for First Electric, Asplundh did not subcontract out that work here and did not apply any herbicides itself.

53. Under Section D. Wood Waste Disposal, it provides “Brush and debris from public and private landscaped property shall be removed and disposed of on the day in which it was trimmed...” This refers to brush and debris from Asplundh’s tree trimming work.

54. That same section discusses chipped and or shredded material. Asplundh only chips and shreds trees and small diameter trees called brush.

55. Continuing on, that section states “Debris in unmaintained rights-of-way shall be brush hogged.” Debris refers to trimmings from trees and brush. Asplundh only brush hogs trees and brush.

56. With the First Electric Coop Line Mileage work, instead of sharing a Tracker, First Electric receives a monthly invoice which is supported at Asplundh by Weekly Production Sheets.

**D. The Petit Jean Electric Coop Contract**

57. Asplundh was awarded two of Petit Jean's Line Mileage circuits via a Bid Acceptance Letter for the period January 1, 2018 through November 30, 2018.

58. The Work Specifications provide the "Special Conditions of Work to be Done: Clear, side-trim (mechanically and/or cut by hand with chainsaw), or herbicide all necessary trees and brush per enclosed specifications."

59. Herbicide applications for Petit Jean Electric Cooperative were provided by US Applicators, LLC.

60. The Bid Invitation's Vegetation Management Distribution Line Clearance Specifications state that "Petit Jean Electric Cooperatives distribution lines are to be recleared using these standards. Brush will be cut from tree line to tree line or a minimum distance of 20 foot for single phase lines and a minimum of 30 foot on three phase lines where property owner refuses to permit brush to be cut from tree line to tree line."

61. The Bid Invitation's Vegetation Management Distribution Line Clearance Specifications continues: "Three phase lines are to be cut are trimmed 40 feet wide, 20 feet either side from center of right of way. Single phase lines are to be cut or trimmed 30 feet wide, 15 feet either side, from center of right of way. Trees shall be trimmed ground to sky when possible. Trees shall be trimmed as to provide a maximum clearance from primary conductors unless otherwise indicated by a designated company representative. All trees shall be trimmed 12 feet below the lowest energized conductors (primary)."

62. Under Tree Removal, the same states that "all trees eight inches dbh capable of coming in contact with conductors or line equipment shall be removed by contractor."

63. Under Wood Waste Disposal, it says “Brush and debris ... shall be removed and disposed of on the day in which it was trimmed,” and “Chipped and/or shredded material shall be blown into a properly designed truck and hauled to dumping facilities....”

64. Under Mowing, it provides that “All brush mowed will be four (4) inches or less from the ground. All right of way trimmed, where not considered up kept areas will be mulched with mower. Exceptions will be allowed where terrain is too rough for mower.”

65. In the industry, a mower is not what someone might use to mow a lawn, and in fact cannot be used to mow a lawn. It is a forestry mulcher/mower, which is a piece of heavy equipment that grinds trees and brush into a smaller size so as not to be a chipping hazard.

66. With the Petit Jean Electric Coop Line Mileage work, instead of sharing a Tracker, First Electric receives a monthly invoice and attached Weekly Production Sheets.

**COUNT I. ASPLUNDH DOES NOT PERFORM THE TAXABLE SERVICE OF  
“LANDSCAPING”**

67. Asplundh realleges and incorporates by this reference the allegations and statements of fact made in paragraphs 1 through 66, above.

68. Arkansas Code Annotated § 26-52-301(3)(D)(i)(f) states that “landscaping” and “lawn care” services are subject to sales tax.

69. The DFA’s Notice of Final Assessment assessed Asplundh with additional sales tax upon a theory that Asplundh engaged in the taxable services of either “landscaping” or “lawn care.”

70. Arkansas Code Annotated § 26-52-301(3)(D)(ii)(a) clearly and unambiguously defines the term “landscaping” as “the installation, preservation or enhancement of ground covering **by planting** trees, bushes, shrubbery, grass, flowers and other types of decorative plants.” (emphasis added).

71. GR-9.2(c)(1) interprets the statute to further provide that “Landscaping does not include site preparation, cutting and filling, leveling, tree trimming or clearing a site of bushes and trees.”

72. Asplundh does not engage in the service of planting trees, bushes, shrubbery, grass, flowers and other types of decorative plants.

73. Asplundh does not engage in the taxable service of landscaping.

**COUNT II. ASPLUNDH DOES NOT PERFORM THE TAXABLE SERVICE OF  
“LAWN CARE”**

74. Asplundh realleges and incorporates by this reference the allegations and statements of fact made in paragraphs 1 through 73, above.

75. Arkansas Code Annotated Section 26-52-301(3)(D)(ii)(b) clearly and unambiguously defines the term “lawn care” as “the maintenance, preservation or enhancement of ground covering of nonresidential property and does not include planting trees, bushes, shrubbery, grass, flowers and other types of decorative plants.”

76. GR-9.2 interprets the statute. GR-9.2(c)(2), if relevant, further provides that “Lawn care includes the following: mowing or raking the yard, chemical spraying, fertilizing, weed control or weed-eating, maintaining the ground cover in beds by adding additional rock, gravel, tree bark or other material used to provide ground cover in beds or in other places in the area to be maintained, and general lawn maintenance. Tree trimming or tree removal is not lawn care.” The DFA’s Rule shows that trees are not ground cover.

77. Arkansas Code Annotated Section 26-52-301(3)(D)(ii)(b) is not ambiguous. Because no ambiguity exists in Section 26-52-301(3)(D)(ii)(b), the interpretation of its meaning



should be based solely on the clear meaning of its text; the DFA's interpretation via GR-9.2 should not be turned to for guidance here. *American Honda Motor Co., Inc.*, 610 S.W.3d at 638.

78. Regardless of whether the service is performed on a Time & Equipment basis or as Line Mileage, Asplundh's services are focused by contract upon removing encroaching trees and brush from power lines. The removal of trees and brush is not lawn care.

79. In Asplundh's industry, "brush" is a narrow diameter tree. It means a woody species of tree less than 4-8" in diameter, depending upon the relevant specification, that will eventually grow into a larger tree. Brush also refers to smaller branches of trees that were removed during Asplundh's tree trimming work. Brush is not bushes, shrubs, weeds or ground cover.

80. The services Asplundh performs are not taken to maintain, preserve, or enhance ground covering.

81. Asplundh performs and charges for the work contracted in the relevant contracts. Asplundh is not contracted to maintain ground cover. The utility contracts do not direct the maintenance, preservation or enhancement of "ground covering." Under the relevant contracts, low growing, planted, or landscaping materials are permitted to stay where they are. Asplundh does not maintain, preserve or enhance ground covering, and does not invoice for the maintenance, preservation or enhancement of ground covering.

82. In the industry, "mowing" and "mulching" means to use a large machine to chew up brush (woody species of tree with a diameter of less than 4-8") into reduced-sized pieces that are of a size so as to not be a tripping hazard. Mowing/mulching is not lawn mowing. Asplundh uses forestry mower/mulchers which cannot be used to mow a lawn or to maintain any ground covering. Any reference to a "mower" on an Asplundh invoice or its support refers to this heavy equipment, not to a lawn mower.

83. Mulching/mowing does not create the mulch you might find at a garden center. The output of mowing/mulching is not added to provide ground cover in beds or in other places in the area to be maintained. Mowing/mulching is not the maintenance of ground cover.

84. Asplundh does not engage in mowing or raking the yard, fertilizing, or maintaining the ground cover in beds by adding additional rock, gravel, tree bark or other material used to provide ground cover in beds or in other places to be maintained, and does not provide general lawn maintenance.

WHEREFORE, Asplundh respectfully requests that this Court:

1. Enter a finding that Asplundh did not engage in landscaping during the April 1, 2015 through July 31, 2018 tax periods.
2. Enter a finding that Asplundh did not engage in lawn care during the April 1, 2015 through July 31, 2018 tax periods.
3. Enter an order denying the DFA's Notice of Final Assessment.
4. Enter a finding that Asplundh owes no additional sales tax during the April 1, 2015 through July 31, 2018 tax periods.
5. Enter an order granting Asplundh's costs, in an amount to be determined after entry of the decision in this matter.
6. Enter an order granting Asplundh all other justiciable and proper relief.
7. In the alternative, enter an order that the DFA recalculate its assessment for the period April 1, 2015 through December 31, 2017 in accordance with the correct January 1, 2018 through July 31, 2018 assessment values as determined by the Court.

MITCHELL, WILLIAMS, SELIG,  
GATES & WOODYARD, P.L.L.C.  
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(501) 688-8800  
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/s/ Anton L. Janik, Jr.  
Anton L. Janik, Jr. (Ark. Bar No. 2007271)  
Devin Bates (Ark. Bar No. 2016184)

Attorneys for Asplundh Tree Expert, LLC



STATE OF ARKANSAS  
DEPARTMENT OF FINANCE AND ADMINISTRATION  
COLLECTION SECTION  
P.O. BOX 8090, LITTLE ROCK, AR 72203-8090

1759172008-L10544112-16 M.003  
ARF001759172008000001010100-19

March 08, 2023

**Sales and Use Tax**

ASPLUNDH TREE EXPERT LLC  
ATTN: C/O TAX DEPARTMENT

Letter ID: [REDACTED]  
Account ID: [REDACTED]  
Period Ending: July 31, 2018

RE: NOTICE OF FINAL ASSESSMENT

DEAR ASPLUNDH TREE EXPERT LLC:

A liability has been determined by the Director of the Department of Finance and Administration in the following amount for the filing period and tax account above:

Tax	Penalty	Interest	Payments	Balance
\$3,974,116.63	\$0.00	\$2,377,456.01	\$0.00	\$6,351,572.64

This is a Final Assessment and Demand for Payment in accordance with Ark. Code Ann. § 26-18-401. The balance above has been assigned to Revenue Division Collection Section.

Failure to make payment within ten days will result in a Certificate of Indebtedness (state tax lien) being filed with the Circuit Clerk.

Ark. Code Ann. § 26-18-101 et seq., authorizes the Director to impose penalties and interest against delinquent taxes, to file a Certificate of Indebtedness, and to direct legal action to levy upon real and personal property.

If you wish to request a copy of the information supporting this assessment, please contact a customer service representative in the Sales and Use Tax Section at (501) 682-7924 or fax to (501) 682-7667 or email [Sales.Tax@dfa.arkansas.gov](mailto:Sales.Tax@dfa.arkansas.gov). Provide your Account ID and the Letter ID shown above when you call or write about this letter.

To pay the balance of this final assessment, return the lower part of this notice with your remittance to the address on the payment voucher. If you have questions, please contact a customer service representative in the Collections Section during the hours of 8:00 AM - 7:30 PM at (501) 682-5000, toll free (800) 292-9829 or fax to (501) 682-3534. Provide your Account ID and the Letter ID (shown above) when you call or write us about this letter.

Sincerely,

Rob Allen  
Manager  
[Collections.Research@dfa.arkansas.gov](mailto:Collections.Research@dfa.arkansas.gov)

**EXHIBIT**

**1**

Detach payment voucher and mail with your check



Department of Finance & Administration  
Payment Voucher

Make your check payable to "Department of Finance & Administration". Write your Account ID on the check. Mail payment and this voucher to:

DEPARTMENT OF FINANCE &  
ADMINISTRATION  
P.O. BOX 8090  
LITTLE ROCK, AR 72203-8090

Taxpayer Name: ASPLUNDH TREE EXPERT LLC

Account ID: [REDACTED]  
Period Ending: July 31, 2018  
Amount Due: 6,351,572.64

Amount Paid:

\$

ELECTRONICALLY FILED Pulaski County Circuit Court Terri Hollingsworth, Circuit/County Clerk 2023-Jul-20 11:13:57 60CV-23-4090 C06D11 : 10 Pages
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**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
ELEVENTH DIVISION**

**ASPLUNDH TREE EXPERT LLC**

**PLAINTIFF**

**v.**

**CASE NO.: 60CV-23-4090**

**LARRY WALTHER, IN HIS OFFICIAL CAPACITY  
AS SECRETARY OF THE ARKANSAS DEPARTMENT  
OF FINANCE AND ADMINISTRATION**

**DEFENDANT**

**ANSWER**

Now comes Larry Walther, Secretary of the Arkansas Department of Finance and Administration (“Department”), and files this, his Original Answer:

**I. PARTIES**

1. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1.

2. The Department admits the allegations in paragraph 2.

**II. PROCEDURAL HISTORY**

3. The Department admits the allegations in paragraph 3.

4. The Department admits the allegations in paragraph 4.

5. The Department admits the allegations in paragraph 5.

6. The Department admits the allegations in paragraph 6.

7. The Department admits the allegations in paragraph 7.

8. The Department admits the allegations in paragraph 8.

9. The Department admits the allegations in paragraph 9.

### III. JURISDICTION AND VENUE

10. The text of Ark. Code § 26-18-401 *et seq.* speaks for itself. The Department admits the remainder of the allegations in paragraph 10.

11. Paragraph 11 contains a conclusion of law to which no response is required. However, to the extent a response is deemed necessary, the Department denies the allegations in paragraph 11.

### IV. ALLEGATIONS OF FACT

12. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12.

13. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13.

14. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16.

17. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18.

19. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20.

21. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22.

23. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25.

26. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26.

27. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27.

28. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28.

29. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29.

30. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30.

31. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31.

32. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32.

33. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

34. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

35. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37.

38. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

39. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

41. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.



42. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42.

43. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43.

44. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44.

45. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45.

46. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46.

47. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47.

48. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48.

49. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49.

50. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50.

51. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51.

52. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52.

53. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53.

54. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54.

55. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55.

56. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 56.

57. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

58. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58.

59. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

60. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60.

61. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61.

62. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62.

63. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63.

64. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64.

65. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65.

66. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

#### **COUNT I**

67. The Department realleges and incorporates by reference the responses made in paragraphs 1 through 66, above.

68. The text of Ark. Code Ann. § 26-52-301(3)(D)(i)(f) speaks for itself.

69. The text of the Notice of Final Assessment speaks for itself.

70. The text of Ark. Code Ann. § 26-52-301(3)(D)(ii)(a) speaks for itself.

71. The text of Arkansas Gross Receipts Tax Rule GR-9.2(c)(1) speaks for itself.

72. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 72.

73. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 73.

#### **COUNT II**

74. The Department realleges and incorporates by reference the responses made in paragraphs 1 through 73, above.

75. The text of Ark. Code Ann. § 26-52-301(3)(D)(ii)(b) speaks for itself.

76. The text of Arkansas Gross Receipts Tax Rule GR-9.2(c)(2) speaks for itself.

77. The text of Arkansas Gross Receipts Tax Rule GR-9.2(c)(2) and *American Honda Motor Co., Inc. v. Walther*, 2020 Ark. 349, 610 S.W.3d 633, speaks for itself.

78. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 78. Pleading affirmatively, the Department denies that plaintiff does not provide the taxable service of lawn care.

79. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 79.

80. The Department denies the allegations in paragraph 80.

81. The Department denies the allegations in paragraph 81.

82. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 82.

83. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 83. Pleading affirmatively, the Department denies that plaintiff does not provide the taxable service of lawn care.

84. The Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 84. Pleading affirmatively, the Department denies that plaintiff does not provide the taxable service of lawn care.

85. The paragraph that begins with the word “WHEREFORE,” including its numbered subparts, contains a request for relief to which no response is required. However, to the extent a response is deemed necessary, the Department denies the allegations in the “WHEREFORE” paragraph and subparts and denies that plaintiff is entitled to the requested relief.

86. The Department denies each and every material allegation contained in the plaintiff’s complaint that the Department has not specifically admitted.

87. To the extent any of the headings in the complaint contain allegations that require response, the Department denies the allegations contained in those headings.


88. The Department asserts the affirmative defenses of waiver, estoppel, and failure to mitigate.

### **PRAYER**

FOR THESE REASONS, Defendant, Larry Walther, Secretary of the Arkansas Department of Finance and Administration, prays that the Court deny the Plaintiff's Complaint in all respects and for all other just and proper relief to which the Department may be entitled.

Respectfully Submitted,

Arkansas Department of Finance and  
Administration  
Office of Revenue Legal Counsel  
P.O. Box 1272, Room 2380  
Little Rock, AR 72203  
(501) 682-7030

By: 

Bradley B. Young

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**CERTIFICATE OF SERVICE**

On July 20, 2023, I served a copy of this document on the following person(s) by electronic transmission:

Anton L. Janik, Jr.

AJanik@mwlaw.com

Devin Bates

DBates@mwlaw.com

MITCHELL, WILLIAMS, SELIG,


GATES & WOODYARD, P.L.L.C.

425 West Capitol Avenue, Suite 1800

Little Rock, Arkansas 72201

(501) 688-8800

*Attorneys for plaintiff*

  
Bradley B. Young

### SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into as of October 11, 2024 by and between Jim Hudson, in his official capacity as Secretary of the Arkansas Department of Finance and Administration (the "Department") and Asplundh Tree Expert, LLC ("Asplundh") (collectively, the "parties"). Asplundh is the plaintiff, and the Department is the defendant, in Case No. 60CV-23-4090, *Asplundh Tree Expert LLC v. Jim Hudson, in his Official Capacity as Secretary of the Arkansas Department of Finance and Administration*; in the Circuit Court of Pulaski County, Arkansas (the "lawsuit"). The terms of this Agreement are authorized by law, including Ark. Code § 26-18-705(b) of the Arkansas Tax Procedure Act.

1. Asplundh will dismiss the lawsuit with prejudice, with each party bearing that party's own attorneys' fees and costs. The parties shall split the cost of mediation 50/50.

2. In full and final settlement of the Department's sales and use tax assessment issued to Asplundh for the tax period April 1, 2015 through July 31, 2018, Asplundh will pay the Department a total of \$382,500.00.

3. Upon receipt of payment, the Department will fully, finally, and forever waive, discharge, and release all claims against Asplundh, together with its parents, subsidiaries, affiliates, officers, directors, shareholders, members, managers, owners, employees, benefit plans, representatives, insurers, receivers, assigns, attorneys, and agents (collectively "Releasees") with regard to Asplundh's sales and use tax liability for the tax period April 1, 2015 through July 31, 2018 and will forever waive, discharge, and release all claims against Asplundh for interest related to the sales and use tax assessment for the tax period ending July 31, 2018. The Department acknowledges that it issued no penalty in its assessment.

4. This Agreement will be submitted for approval to the Arkansas Legislative Council. The parties agree to work cooperatively and to use their best efforts to secure approval from the Legislative Council. The parties understand and agree that such legislative approval is a condition precedent to the enforceability of this Agreement. Pursuant to Ark. Code § 26-18-303(b)(5), Asplundh authorizes disclosure of this Agreement as may be required to obtain approval from the Legislative Council.

5. Within thirty (30) calendar days from the date that Asplundh received written notice of the acceptance of this Agreement by the Legislative Council, which notice the Department may provide via email to Asplundh's legal counsel, Asplundh will remit to the Department the funds described by paragraph 2 above, and file a motion to dismiss the lawsuit with prejudice in the Circuit Court of Pulaski County, Arkansas.

6. The parties understand and agree that this is a compromise settlement of disputed claims. Nothing in the terms of this Agreement constitutes an admission of liability or fault by either party.

7. This Agreement will become effective immediately upon approval by the Legislative Council.

8. By the later of ninety (90) calendar days after the date that Asplundh receives written notice of the acceptance of this Agreement by the Legislative Council, which notice the Department may provide via email to Asplundh's legal counsel, or by June 1, 2025, Asplundh agrees that for the period identified in a relevant invoice, Asplundh shall specifically break out on its vegetation management invoices for services performed in the State of Arkansas:

- Chemical application;
- Any use of a brushhog head;
- Any use of a bushhog head;
- Any use of a brown tree cutter;
- Any use of a batwing mower; and
- Any use of a skidsteer with a flat deck.

9. Each party recognizes that this is a legally binding contract and acknowledges and agrees that it has had the opportunity to consult with legal counsel of its choice. In any construction to be made of this Agreement, the parties agree that the Agreement shall not be construed against the party who drafted the language of the Agreement that is in dispute.

10. This Agreement constitutes the entire agreement of the parties and amends and replaces, in its entirety, the Mediation Settlement Agreement executed by the parties on September 25, 2024.

SIGNED this 11th day of October, 2024.

**Asplundh Tree Expert LLC**



By: Randal L. Haines

Title: Senior Vice President

**Department of Finance &  
Administration**

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_  
Arkansas Department of Finance and  
Administration



8. By the later of ninety (90) calendar days after the date that Asplundh receives written notice of the acceptance of this Agreement by the Legislative Council, which notice the Department may provide via email to Asplundh's legal counsel, or by June 1, 2025, Asplundh agrees that for the period identified in a relevant invoice, Asplundh shall specifically break out on its vegetation management invoices for services performed in the State of Arkansas:

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SIGNED this 11th day of October, 2024.

**Asplundh Tree Expert LLC**

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

**Department of Finance &  
Administration**

*Charles S. Collins*

By: Charles S. Collins

Title: Commissioner of Revenue  
Arkansas Department of Finance and  
Administration