

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
NORTHWESTERN DIVISION**

ENERPLUS RESOURCES (USA)  
CORPORATION, a Delaware corporation,

Plaintiff,

Case No. 1:16-cv-00103-DLH-CSM

vs.

WILBUR D. WILKINSON, et al.,

Defendants.

**DEFENDANTS WILBUR D. WILKINSON AND REED A. SODERSTROM'S  
RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS AND  
ATTORNEY FEES**

Defendant Wilbur D. Wilkinson and Reed A. Soderstrom respectfully submits this Response in Opposition to Plaintiff Enerplus Resources (USA) Corporation's ("Enerplus") Motion to Recover Costs and Attorney's Fees.

Enerplus seeks to recover its costs and fees in the amount of \$253,312.52 ("Excess Money"). This amount is the entirety of Enerplus' costs and fees from issues related to the breach of the Settlement Agreement and Wilkinson Division Order, and Enerplus' costs and fees related to its equitable restitution claim for the recovery of its overpayment to Wilkinson over the course of fourteen months.

The attorney fees requested are excessive and greatly exceed the average billing rates in North Dakota. Further, Enerplus may only be only entitled to costs and attorney fees related to enforcing the terms of the Settlement Agreement and not the costs and attorney fees related to its equitable restitution claim. Its equitable restitution claim to recover the Excess did not arise out of the Settlement Agreement or Division Order between Peak North and Wilkinson but rather

through Enerplus' own clerical error. Enerplus' costs and attorney fees should be denied or reduced to reflect only its work done to enforce the jurisdictional terms of the Settlement Agreement and Wilkinson Division Order and not on its work for return of the Excess Money.

## ARGUMENT

### A. Standard of Review

“Absent a countervailing statutory authorization, the ‘American Rule’ generally assumes that each party to a lawsuit bears its own attorneys fees.” *Duchscherer v. W.W. Wallwork, Inc.*, 534 N.W.2d 13, (N.D. 1995) (citing *Pennsylvania v. Delaware Citizens’ Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (*Delaware Valley I*); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)).

The predominant method for calculating awards of reasonably attorney’s fees is the lodestar method, which is determining the amount of reasonable fees multiplied by a reasonable hourly rate. *Duchscherer*, at 16-17; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A reasonable hourly rate is “one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys.” *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984) (internal citations and quotation marks omitted). The reasonable hourly rate is calculated according to the market rate in the relevant legal community. *Duchscherer*, at 17.

The burden of establishing the reasonableness of the hourly rate is on the fee applicant. *Blum*, 465 U.S. at 887 (holding that “the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney’s own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable

skill, experience, and reputation.”). The amount of damages recovered does not control the amount of reasonable attorney fees. *Duchscherer*, at 18.

**B. Plaintiff’s Claimed Hourly Rates Are Not Reasonable**

Plaintiff seeks attorneys’ fees that are based upon high hourly rates compared to rates in North Dakota. While Plaintiff has offered 20% and 15% discounts, the hourly rates are still very high. Plaintiff in this case has not carried its initial burden of producing evidence that attorneys of similar experience in North Dakota are billing clients at the hourly rates Plaintiff seeks. The rates claimed by out-of-state counsel are excessive under the circumstances and the attorney’s fees requested should be denied or greatly reduced.

Enerplus’ claimed hourly rates are significantly higher than the prevailing rates in North Dakota. Fee applicants must “produce satisfactory evidence in addition to the attorney’s own affidavits that the requested rates are in line with those in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum*, at 895-96, n. 11; *See also Warnock*, at 1027. Plaintiff has failed to meet this burden for the requested rates for its attorneys and paralegal.

Plaintiff’s submitted affidavits and Plaintiff’s motion acknowledge that the requested rates are far higher than prevailing rates in North Dakota. Average billing rates at North Dakota firms for partners are estimated at approximately \$300.00; for associates are \$200.00; and for paralegals \$90.00. Compare this with the \$385-\$570 range for partners; \$280-\$325 range for associates; and \$175-\$210 range for paralegals that Enerplus is asking for. Even with a 20% or 15% reduction, the rates are still excessively high.

Out-of-state counsel's status does not justify a rate higher than that of North Dakota attorneys with comparable experience. As such, Plaintiff's attorney's fees must be reduced to comport with the prevailing rates in the relevant legal market of North Dakota.

**C. Plaintiff's Claimed Hours Should be Reduced to Reflect Work Done Only on Jurisdictional Matters.**

Enerplus bases its claim for costs and attorney fees on the terms of the Settlement Agreement and the Wilkinson Division Order. *See* Exhibit B and D of Docket No. 1, respectively. The relevant parts of those documents state that venue and jurisdiction of any dispute arising from the Agreements will be the United States District Court for the District of North Dakota. Settlement Agreement ¶ 7; Division Order pg. 2. The only dispute that has arisen from the Settlement Agreement and the Wilkinson Division Order is the dispute over jurisdiction – Wilkinson first brought suit in Tribal Court, then Enerplus brought suit in this Court to enforce the terms of the Agreements. Enerplus' claim for equitable restitution for the return of the Excess Money is not covered by either of the Agreements.

Paragraph 16 of the Settlement Agreement states: "Contest or Violation of Agreement. In the event that any party hereto should find it necessary to resort to the courts and/or litigation to enforce the terms and conditions of this Agreement then the prevailing party in any such action or litigation shall be entitled to recover its attorney's fees, costs, and expenses through final judgment, including, without limitation, appeal from the other party."

The Settlement Agreement addresses jurisdictional matters, but does not address overpayment through the payor's mistake. Accordingly, Enerplus' attorney fees, costs, and expenses should be denied or in the alternative reduced to reflect only the work done on

enforcing the terms of the Settlement Agreement and not the work done for the return of the Excess Money.

### CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court deny Plaintiff's request for attorney's fees or in the alternative to significantly reduce Plaintiff's claimed attorney's fees to reflect only its work done related to enforcing the terms of the Settlement Agreement and Wilkinson Division Order and not its equitable restitution claim.

Dated this 4<sup>th</sup> day of December, 2017.

PRINGLE & HERIGSTAD, P.C.

BY: /s/ Reed A. Soderstrom  
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### CERTIFICATE OF SERVICE

I certify that on the 4<sup>th</sup> day of December, 2017, the following documents:

Defendants Response in Opposition to Plaintiff's Motion for Costs and Attorney Fees.

was filed electronically with the Clerk of Court through ECF and the ECF will send a Notice of Filing (NEF) to the following:

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/s/ Reed A. Soderstrom  
Reed A. Soderstrom