

**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.

**ENERPLUS RESOURCES (USA) CORPORATION'S
REPLY IN SUPPORT OF MOTION FOR COSTS AND ATTORNEY FEES**

Enerplus Resources (USA) Corporation (“Enerplus”) respectfully submits this Reply in support of its Motion for Costs and Attorney Fees.

I. BACKGROUND

Defendant Wilbur D. Wilkinson (“Wilkinson”) opposes Enerplus’s Motion for Costs and Attorney Fees. Wilkinson does not object, however, to Enerplus’s request for costs nor does he object to the number of hours that Lathrop & Gage (“Lathrop”) and Fox Rothschild (“Fox”) billed in this case and the Tribal Court case. His only arguments are that (i) the hourly rates charged were not reasonable, and (ii) fees should only be permitted for work done on jurisdictional issues. Wilkinson’s arguments are meritless.

II. ARGUMENT

A. THE HOURLY RATES CHARGED BY LATHROP & GAGE AND FOX ROTHSCHILD WERE REASONABLE.

Wilkinson contends that the hourly rates charged by Lathrop and Fox are unreasonably high as compared to the rates charged by attorneys practicing in North Dakota.

The Court addressed this very same argument when it granted Enerplus’s Motion for

Attorney Fees on Appeal. *See* Order Granting Plaintiff's Motion for Summary Judgment, Docket No. 91. There, the Court found that the hourly rates charged by Fox Rothschild were reasonable in light of the 15% discount that Fox applied to its fees. *See id.*, pp. 10-11.

The same reasoning applies here. Both Lathrop and Fox significantly discounted their fees with respect to time billed in this case and the Tribal Court case. Lathrop reduced its fees by 20%, resulting in hourly rates ranging from \$380 for partners Kent Sellers and Michael Abrams, to \$180 for associate Graham Boswell. Fox applied a 15% discount, resulting in hourly rates ranging from \$484.50 for partner Neal Cohen, to \$238 for associate Devin Daines.

Further, although Wilkinson disputes the rates charged by Lathrop and Fox as "far higher" than the prevailing rates in North Dakota, he has failed to come forward with any credible evidence whatsoever in support of a countervailing market rate in North Dakota for attorneys and paralegals of comparable skill, experience, and reputation.

B. ENERPLUS IS ENTITLED TO FEES FOR ALL WORK DONE IN THIS CASE AND THE TRIBAL COURT CASE.

Wilkinson argues that the Settlement Agreement "does not address overpayment through the payor's mistake" and therefore Enerplus's claim for equitable restitution for the return of the overpayment was not a claim "to enforce the terms and conditions" of the Settlement Agreement and/or Division Order. He argues that fees should be limited to reflect only the work done on the jurisdictional issues because that is the only dispute that arose from the Settlement Agreement.

Contrary to Wilkinson's position, Enerplus's claim for recovery of the overpayment was a claim "to enforce the terms and conditions" of the Settlement Agreement and/or Division Order. The payments that Enerplus made to Wilkinson were pursuant to the Settlement Agreement and Division Order. Although the Agreements do not expressly address "overpayment through the payor's mistake," (no one would reasonably expect there to be such a provision), the Agreements

do specifically address how much money Wilkinson was legally entitled to receive. Thus, the Settlement Agreement and Division Order specifically address Wilkinson's right to an amount certain, and Enerplus's efforts to retrieve from Wilkinson what he was not legally entitled to receive under the Agreements cannot be characterized as anything other than an action to enforce the payment provisions of the Settlement Agreement and Division Order. Accordingly, Wilkinson's argument should be rejected, and the Court should award Enerplus the fees it has requested.

III. CONCLUSION

For the forgoing reasons, the Court should **GRANT** Enerplus's Motion for Costs and Attorney Fees in its entirety and award Enerplus \$253,312.52 in costs and fees.

Dated this 11th day of December, 2017.

FOX ROTHSCHILD, LLP

/s/ Neal S. Cohen

Neal S. Cohen, Esq. (admitted *pro hac vice*)

1225 17th Street, Suite 2200

Denver, CO 80202

Tel: (303) 292-1200

Fax: (303) 292-1300

ncohen@foxrothschild.com

Counsel for Plaintiff,

Enerplus Resources (USA) Corporation

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2017, I electronically filed the forgoing **REPLY IN SUPPORT OF MOTION FOR COSTS AND ATTORNEY FEES** with the Clerk of Court for the United States District Court for the District of North Dakota by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Tabitha Addison
Tabitha Addison