

**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
MOTION FOR COSTS AND ATTORNEY FEES**

Enerplus Resources (USA) Corporation (“Enerplus”) respectfully submits this Motion, pursuant to the Court’s November 2, 2017 Order Granting Plaintiff’s Motion for Summary Judgment (“Order”), Fed. R. Civ. P. 54(d), and D.N.D. Civ.L.R. 54.1, to recover its costs and attorney fees incurred in this case, including the appeals, and the Tribal Court case entitled *Wilbur D. Wilkinson v. Enerplus Resources Corporation*, Civil Action No. CV-2016-0079 (“Tribal Court Case”). As set forth in detail below, Enerplus seeks to recover its costs and fees in the amount of **\$253,312.52**.

I. BACKGROUND

In the Order, the Court concluded that Enerplus is entitled to reimbursement for all reasonable attorney fees, expenses, and costs associated with this case and the Tribal Court Case, pursuant to the terms of the Settlement Agreement and the Wilkinson Division Order.¹ The Court

¹ The Court also granted Enerplus’s Motion for Attorney Fees Incurred on Appeal, and ordered that the final fee award shall include \$36,933.77 for fees related to the appeal of the preliminary injunction. That amount is included in Enerplus’s total requested fee award of **\$253,312.52**.

directed Enerplus to submit an itemized statement of costs and attorney fees in accordance with D.N.D. Civ.L.R. 54.1. Pursuant to the Court's Order, this Motion itemizes the costs and fees incurred in this case and the Tribal Court Case, and specifically addresses the reasonableness of the costs and fees incurred. In sum, Enerplus incurred a total of \$216,378.75 in taxable costs, attorney fees, and expenses in this case and the Tribal Court Case.

II. ARGUMENT

A. Taxable Costs

Enerplus seeks to recover a total of \$1,345.00 in taxable costs incurred during this case and the Tribal Court Case.

The entitlement of a prevailing party in a lawsuit to recover its costs, other than attorney fees, is governed by Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920. In relevant part, Rule 54(d)(1) provides that such costs “should be allowed to the prevailing party” except where federal statute, the rules of civil procedure, or a court order “provides otherwise.” Fed. R. Civ. P. 54(d)(1). “A prevailing party is presumptively entitled to recover all of its costs.” *In re Derailment Cases*, 417 F.3d 840, 844 (8th Cir. 2005); *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 517 (8th Cir. 2006).

Under 28 U.S.C. § 1920, taxable costs include fees of the clerk and marshal, fees of the court reporter, fees and disbursements for printing and witnesses, fees for copies of necessary papers, docket fees, and compensation of court-appointed experts and interpreters. *Briscoe-Wade v. Carnahan*, 297 F.3d 781, 782 (8th Cir. 2009) (quoting 28 U.S.C. § 1920). In addition, *pro hac vice* fees are recoverable under § 1920. *Craftsmen Limousine Inc. v. Ford Motor Co.*, 579 F.3d 894 (8th Cir. 2009).

The following charts shows a summary of costs that are recoverable by Enerplus from Wilkinson pursuant to Rule 54(d)(1) and § 1920:

| DATE ON INVOICE | ITEM | DESCRIPTION | COST |
|--------------------------|---------------|---------------------------------------|-------------------|
| 04/27/2016 | Court Filings | U.S. District Ct. Filing Fee | \$400.00 |
| 04/27/2016 | Court Filings | U.S. District Ct. Pro Hac Vice Fee | \$226.00 |
| 05/25/2016 | Court Filings | U.S. District Ct. Filing Fee | \$20.00 |
| 06/07/2016 | Court Filings | U.S. District Ct. Filing Fee | \$40.00 |
| 07/27/2016 | Court Filings | Ft. Berthold Dist. Ct. Admittance Fee | \$400.00 |
| 09/21/2016 | Court Filings | U.S. District Ct. Pro Hac Vice Fee | \$150.00 |
| Category Subtotal | | | \$1,236.00 |
| 09/21/2016 | PACER | Court Fee for Document Retrieval | \$32.10 |
| 10/17/2016 | PACER | Court Fee for Document Retrieval | \$4.10 |
| 12/13/2016 | PACER | Court Fee for Document Retrieval | \$6.10 |
| 01/13/2017 | PACER | Court Fee for Document Retrieval | \$0.40 |
| 02/13/2017 | PACER | Court Fee for Document Retrieval | \$3.90 |
| 04/20/2017 | PACER | Court Fee for Document Retrieval | \$2.40 |
| Category Subtotal | | | \$49.00 |
| 06/07/2016 | Photocopying | Necessary Copies from NDRIN | \$3.00 |
| 01/13/2017 | Photocopying | Necessary Copies | \$1.00 |
| 01/13/2017 | Photocopying | Necessary Copies | \$12.00 |
| 02/13/2017 | Photocopying | Necessary Copies | \$43.40 |
| 04/20/2017 | Photocopying | Necessary Copies | \$0.60 |
| Category Subtotal | | | \$60.00 |
| TOTAL COSTS | | | \$1,345.00 |

See Lathrop Invoices, attached as Exhibit A to the Declaration of Neal S. Cohen (“Cohen Dec.”); Fox Invoices, attached as Exhibit B to the Cohen Dec.; Cohen Dec. ¶ 24.

B. Reasonable Attorney Fees

Enerplus seeks to recover a total of \$211,990.52 in reasonable attorney fees incurred in this case and the Tribal Court Case.²

The starting point for determining a reasonable fee award is to calculate the “lodestar” amount. *See, e.g., City of Bismarck v. Thom*, 261 N.W.2d 640, 646 (N.D. 1977); *Duchscherer v. W.W. Wallwork, Inc.*, 534 N.W.2d 13, 16 (N.D. 1995). To calculate the lodestar, the Court must first determine a reasonable number of hours expended on the case. *Thom*, 261 N.W.2d at 646. Whenever possible, the Court’s findings as to the number of hours expended should be made upon contemporaneous records. *Id.*

Next, the Court must assign specific hourly rates based upon the attorney’s experience and reputation. *Id.* The hourly rate can be adjusted up or down based on objective evaluation of the complexity and novelty of the litigation and the corresponding degree of skill displayed by the attorney. *Id.* The product of the number of hours reasonably expended times a reasonable hourly rate — the lodestar figure — is presumed to be a reasonable fee. *See Duchscherer*, 534 N.W.2d at 17.

Calculation of the lodestar figure does not end the inquiry. The Court may adjust the presumptively reasonable amount of fees upwards or downwards based on other objective factors. *See id.* The factors listed in N.D.R. Prof. Conduct 1.5(a) guide a court in determining the reasonableness of an award of attorney fees.³ *See Heng v. Rotech Med. Corp.*, 720 N.W.2d 54

² Although the fee-shifting provision in the Settlement Agreement does not explicitly limit the recovery of attorney fees to “reasonable” attorney fees, North Dakota Rule of Professional Conduct 1.5(a) requires that a claim for attorney fees be reasonable. *See* N.D.R. Prof. Conduct 1.5(a) (a lawyer shall not make an agreement for, or change, or collect an unreasonable fee or an unreasonable amount for expenses).

³ The factors listed in Rule 1.5(a) include: (1) the time and labor required, the novelty and difficulty

(N.D. 2006). All factors should be considered and no single factor controls. *See T.F. James Co. v. Vakoch*, 628 N.W.2d 298, 305 (N.D. 2001).

Enerplus engaged the services of Lathrop & Gage, LLP (“Lathrop”), and subsequently Fox Rothschild, LLP (“Fox”), to bring this case and defend it in the Tribal Court Case. Lathrop’s invoices indicate that two attorneys in the Denver, Colorado office and two attorneys in the Kansas City, Missouri office billed a total of 236.3 hours to these matters. *See* Ex. A to Cohen Dec.; Cohen Dec. ¶¶ 4, 5. The hourly rates of these individuals ranged between \$225 and \$475 per hour, based on their respective skill levels and degrees of experience. Cohen Dec. ¶ 10, 11. Fox’s invoices indicate that six individuals in the Denver, Colorado office billed a total of 423.4 hours to these matters. *See* Ex. B to the Cohen Dec.; Cohen Dec. ¶¶ 4, 5. The hourly rates of these individuals ranged between \$175 per hour and \$570 per hour, based on their respective skill levels and degrees of experience. Cohen Dec. ¶¶ 10, 12. Enerplus submits that the hourly rates of and the number of hours expended by each professional who worked on these matters were reasonable.⁴

1. Reasonable Hourly Rates

The reasonable hourly rate is calculated according to the prevailing market rate in the

of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

⁴ In fact, additional people at both Lathrop and Fox billed time to these matters, but in the interest of efficiency, those who billed less than 10 hours to the matters were excluded from this fee application. Cohen Dec. ¶ 5.

relevant legal community. *See Duchscherer*, 534 N.W.2d at 17. Although Lathrop's and Fox's rates may be slightly higher than those charged in smaller legal markets, the rates charged are reasonable given the degree of experience of Lathrop and Fox attorneys practicing in national law firms, as well as their ongoing relationship with Enerplus's Denver office.

Enerplus is a Delaware corporation with its principal place of business in Denver, Colorado. As a Denver-based company, Enerplus has maintained for many years an attorney-client relationship with Lindsay B. Larrick, an attorney in Lathrop's Denver office at the start of this dispute and currently a partner in Fox's Denver office. Cohen Dec. ¶ 9. Ms. Larrick and other attorneys at Lathrop, and then Fox, have assisted Enerplus in several related and unrelated matters. *Id.* Thus, it was natural for Lathrop, and then Fox, to represent Enerplus in this litigation.

The following individuals at Lathrop billed time on this matter at the following hourly rates:

- Kent Sellers, Partner (Kansas City) – \$475
- Michael Abrams, Partner (Kansas City) – \$475
- Lindsay B. Larrick, Partner, until July 2016 (Denver) – \$380
- Graham Boswell, Associate (Denver) – \$225

See Ex. A to Cohen Dec.; Cohen Dec. ¶ 11. These rates are consistent with rates charged by other national firms for similar services provided by lawyers of comparable skill, experience, and reputation. Cohen Dec. ¶¶ 13, 15, 16; Declaration of William Rudy ("Rudy Dec.") ¶¶ 6, 7. Mr. Sellers is a partner in Lathrop's Kansas City office with over 25 years of experience litigating in both state and federal court, specializing in motion practice and briefing, and arguing appellate matters. He clerked for the Honorable Joseph E. Stevens, Jr., United States District Court for the Western District of Missouri. His hourly rate of \$475 is well within the range of rates for partners

with similar experience and expertise practicing at national law firms in Kansas City, Missouri. Rudy Dec. ¶ 6.

Mr. Abrams is also a partner at Lathrop with 25 years of experience litigating oil and gas, business, and contract cases in both state and federal court. He has an active commercial litigation practice and has been lead counsel in several state and federal court cases. His hourly rate of \$475 is well within the range of rates for partners within similar experience and expertise practicing in national law firms in Kansas City, Missouri. *Id.* at ¶ 7.

Mr. Boswell is a mid-level associate with three years of experience in legal research and drafting. His hourly rate of \$225 is well within the range of other mid-level associates at national law firms. Cohen Dec. ¶ 16.

The following individuals in Fox's Denver office billed time on this matter at the following hourly rates:

- Neal S. Cohen, Partner – \$550 until June 2017, then \$570
- Lindsay B. Larrick, Partner – \$385
- Devin Daines, Associate – \$320 until December 2016, then \$280
- Maureen Carroll, Associate – \$325
- Erica O'Neill, Paralegal – \$175 until June 2017, then \$185
- Tara Blevins, Paralegal – \$210

See Ex. B to Cohen Dec.; Cohen Dec. ¶ 12. These rates are consistent with rates charged by other national firms for similar services provided by lawyers of comparable skill, experience, and reputation. Cohen Dec. ¶ 13. Mr. Cohen is a partner with over 30 years of experience in litigation and arbitration matters and has an active commercial litigation practice. He has also been lead counsel in several state court and federal district court cases. Mr. Cohen's rate of \$570 is within

the range of rates for partners with similar experience and expertise practicing at national law firms in Denver. Mr. Cohen handled the majority of these matters since Ms. Larrick moved to Fox in July 2016. *Id.* at ¶ 14.

Prior to joining Fox as a partner in July 2016, Ms. Larrick was a partner at Lathrop with over ten years of experience representing clients involved in regulatory and oil and gas matters at that time. She routinely advises Enerplus on matters both related and unrelated to this litigation. In these cases, she assisted Mr. Sellers, Mr. Abrams, and Mr. Cohen, including with the development of Enerplus's successful Motions for Summary Judgment. *Id.* at ¶ 15. Ms. Larrick's hourly rate of \$385 falls well within the range of partners with similar experience and expertise at national law firms. *Id.*

Mr. Daines is a mid-level associate with several years of experience in legal research and drafting. His hourly rate of \$320, which was then discounted to \$280, is within the range of other mid-level associates at national law firms. *Id.* at ¶ 17.

Ms. Carroll is a mid-level associate who replaced Mr. Daines when he left Fox in April 2017. She clerked for 4 years for Chief Judge Krieger of the U. S. District Court for the District of Colorado before joining Fox in 2017. She has several years of experience in legal research and drafting. Her hourly rate of \$325 is within the range of other mid-level associates at national law firms. *Id.* at ¶ 17.

2. Reasonable Hours Expended

The amount in controversy in this litigation amounts to nearly \$3 million in overpayments made by Enerplus to Mr. Wilkinson. The hours spent on this matter were necessary to preserve Enerplus's right to enforce the terms of the Settlement Agreement in district court and recover the approximately \$3 million owed to it. Cohen Dec. ¶¶ 7, 8.

The professionals (including attorneys and paralegals) who worked on this matter billed a total of 659.7 hours over the course of 19 months. *See* Exs. A, B to Cohen Dec.; Cohen Dec. ¶ 5. A review of Lathrop's and Fox's invoices shows that competent handling of this matter required discovery, legal research and development of arguments, drafting and editing of several pleadings and motions, including a motion for preliminary injunction and two motions for summary judgment, and travel to the Court for hearings. *Id.* at ¶ 7. The hours expended were reasonable and necessary to provide a complete and successful prosecution of this case and defense of the Tribal Court Case. *Id.*

Finally, Enerplus's success and the quality of work produced by Lathrop and Fox weigh in favor of finding that the number of hours expended was reasonable. *Id.* at ¶ 8.

3. *Lodestar Calculation and Reduction*

Below is a summary of the hours expended and expense for each individual who billed time in this case and the Tribal Court Case:

| LATHROP | HOURS BILLED | FEES |
|---------------------------|---------------------|--------------------|
| Kent Sellers | 87.2 | \$41,420 |
| Michael Abrams | 27.1 | \$12,872.50 |
| Graham Boswell | 81.1 | \$19,963 |
| Lindsay B. Larrick | 40.9 | \$15,542 |
| Lathrop Subtotal | | \$89,797.50 |
| Less Discounts | | \$16,031 |
| Total Lathrop Fees | | \$73,766.50 |
| FOX | HOURS BILLED | FEES |
| Neal S. Cohen | 163.1 | \$90,199 |
| Lindsay B. Larrick | 54.8 | \$21,098 |
| Devin Daines | 39.3 | \$11,592 |
| Maureen Carroll | 54.9 | \$17,842.50 |

| | | |
|---|------|---------------------|
| Erica O'Neill | 43.6 | \$7,668 |
| Tara Blevins | 67.7 | \$14,217 |
| Subtotal | | \$162,616.50 |
| Less Discounts | | \$24,392.48 |
| Total Fox Fees | | \$138,224.02 |
| TOTAL FEES INCURRED IN THIS CASE AND THE TRIBAL COURT CASE | | \$211,990.52 |

The product of the total number of hours worked times the specified hourly rates is \$252,414.00. This figure represents the lodestar amount.

To compensate for their slightly higher rates, as well as any inefficiencies in attorney work product, Lathrop and Fox each applied 20% and 15% reductions, respectively, to their invoiced amounts, totaling \$40,423.48. *Id.* at ¶ 21. Enerplus therefore seeks to recover the discounted amount totaling \$211,990.52. *Id.*

C. Reasonable Expenses

In addition, Enerplus incurred \$3,043.23 in out-of-pocket expenses during the course of this litigation. Pursuant to the Order, the Settlement Agreement, and the Wilkinson Division Order, Enerplus is entitled to recover its costs and expenses incurred during the course of this litigation from Wilkinson. Generally, out-of-pocket expenses that are normally charged to a fee paying client, including fees for online research, delivery services, attorney travel, and private process servers, are reimbursable as part of an award of attorney fees. *See Ludlow v. BNSF Ry. Co.*, 788 F.3d 794, 805 (8th Cir. 2015) (recovery for online legal research); *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1036 (8th Cir. 2008) (recovery for attorney travel and private process server expenses); *LexMac Energy, L.P. v. Macquarie Bank Limited*, 2014 WL 11516245 (D. N.D. Feb. 19, 2014).

Below is a summary of the out-of-pocket expenses incurred by Enerplus during the course of this litigation, excluding those costs that are taxable pursuant to Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920 (discussed in Section A above). These additional expenses were reasonably and necessarily incurred as part of this litigation and were billed directly to Enerplus. Cohen Dec. ¶¶ 23. Thus, they are recoverable by Enerplus.

| DATE ON INVOICE | ITEM | DESCRIPTION | COST |
|--------------------------|----------------|---|-------------------|
| 06/20/2016 | Courier | Delivery Services | \$72.02 |
| 07/07/2016 | Courier | Delivery Services | \$15.38 |
| 08/12/2016 | Courier | FedEx to Ft. Berthold Dist. Ct. | \$18.25 |
| 12/30/2016 | Courier | FedEx to Reed A. Soderstrom | \$18.65 |
| 04/20/2017 | Courier | FedEx to U.S. Dist. Ct. | \$14.96 |
| Category Subtotal | | | \$139.26 |
| 10/17/2016 | Travel | N. Cohen - Travel to Bismarck for Hearing | \$908.92 |
| 06/21/2017 | Travel | N. Cohen - Travel to Minneapolis for Oral Argument | \$761.25 |
| Category Subtotal | | | \$1,670.17 |
| 01/13/2017 | Research | Westlaw | \$7.84 |
| 04/20/2017 | Research | Westlaw | \$91.46 |
| 06/21/2017 | Research | Westlaw | \$292.73 |
| Category Subtotal | | | \$392.03 |
| 04/20/2017 | Process Server | Service of Process on 4 Defendants in N.D. (Including 2 on Tribal Land) | \$841.77 |
| Category Subtotal | | | \$841.77 |
| TOTAL COSTS | | | \$3,043.23 |

See Exs. A, B to Cohen Dec.

D. Total Fee Award Requested by Enerplus

Enerplus requests a total award of costs and attorney fees in the amount of **\$253,312.52**. This amount represents \$1,345.00 in taxable costs, \$211,990.52 in reasonable attorney fees, and

\$3,043.23 in out-of-pocket expenses incurred in this case and the Tribal Court Case, as well as \$36,933.77 in reasonable attorney fees incurred on appeal.

III. CONCLUSION

For the forgoing reasons, Enerplus respectfully requests that the Court grant this Motion for Attorney Fees and Expenses and enter an Order awarding Enerplus **\$253,312.52** in costs and attorney fees, as well as any other such relief as the Court may find just and appropriate.

Dated this 21st day of November, 2017.

FOX ROTHSCHILD, LLP

/s/ Neal S. Cohen

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2017, I electronically filed the forgoing **MOTION FOR ATTORNEY FEES AND EXPENSES** 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