

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DAVID F. POLLOCK, *et al.*; on Behalf of
Themselves and All Others Similarly Situated,

Plaintiffs,

vs.

ENERGY CORPORATION OF AMERICA,

Defendant.

Civil Action No. 2:10-cv-01553-RCM

Magistrate Judge Robert C. Mitchell

**PLAINTIFFS' MOTION PURSUANT TO F.R.C.P. NOS. 60, 54 (d) (1)&(2) AND 23 (e),
TO AMEND JUDGMENT TO TAX POST-JUDGMENT INTEREST; (2) FOR
APPROVAL OF CORRECTED EXPENSE REPORT; (3) FOR APPROVAL OF 33⅓%
ATTORNEY'S FEE WITH REIMBURSEMENT OF EXPENSES; AND (4) FOR AN
ACCOUNTING OR, IN THE ALTERNATIVE, APPROVAL OF FORMULA FOR
DISBURSING NET JUDGMENT PROCEEDS TO CLASS MEMBERS**

Plaintiffs, by counsel, and pursuant to rules 23 (e), 54 (d) (1) & (2), and 60 of the Federal Rules of Civil Procedure, respectfully move this Court to (1) amend the judgment to tax post-judgment interest; (2) approve a corrected expense report; (3) approve a 33⅓% fee with reimbursement of expenses; and (4) order an accounting or, in the alternative, approve of a formula for disbursing the net judgment proceeds to the Class Members.

TAXATION OF POST-JUDGMENT INTEREST

1. This Court entered a judgment in favor of the class in the amount of \$1,148,018.44 [ECF No. 238]. 28 U.S.C. § 1961 allows for post judgment interest as follows:

[A] a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate any changes in it to all Federal judges.

2. 28 U.S.C. § 1961 provides further that “interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.”

3. This Court entered the above judgment amount against the defendant on March 31, 2015 in the base aggregate amount of \$911,922.16 “plus pre-judgment interest” [ECF 236], which totaled \$1,148,018.44 as of March 5, 2014 See [ECF No. 238].

4. For purposes of calculating post judgment interest, the appropriate interest rate at that time was is .22%; which provides for a per diem interest rate of \$69.19, considering the total amount of the judgment entered as set forth above.

5. 711 days have elapsed since judgment was entered on March 5, 2015 through February 13, 2017, and using the above per diem interest rate of \$69.19, post judgment interest in the amount of \$49,194.09 has accrued to date on the judgment. Plaintiffs request that this amount be taxed as post judgment interest, and the Court modify the original judgment amount of \$1,148,018.44 owed by ECA to Plaintiffs by adding the post judgment interest in the amount of \$49,194.09 for a total of \$1,197,212.53.

CORRECTED EXPENSE REPORT

6. Plaintiffs’ statement of expenses [ECF No. 253-6] inadvertently omitted one invoice of their expert, Julia D. Bodamer, in the amount of \$13,817.05. With this invoice included, Bodamer’s expert fees totaled \$47,105.20. See Bodamer Billing Statement (Exhibit 1). Additionally, The Law Firm of Caroselli Beachler & Coleman, LLC acquired additional costs in the amount of \$1,814.56 (Exhibit 2). This raises the total expenses advanced by counsel from \$56,565.46 to \$72,197.07.

ATTORNEYS FEE AND EXPENSES

7. After a Fairness Hearing held on June 29, 2015 with adequate notice to the class members, Plaintiffs' Application for Attorney Fees was granted and 30% of the total verdict amount was awarded for attorney fees and costs [ECF No.276]. Given the post-trial work that has occurred in this case since then, and the on-going efforts to collect and distribute the common fund, counsel request that the Court approve a 33 $\frac{1}{3}$ % fee plus reimbursement of expenses including additional costs incurred and submitted by Counsel for final prosecution of the case and in the administration of the settlement. This is consistent with the terms of the contingent agreement entered into between Plaintiffs' counsel and the class representatives [ECF No.253-3], and is substantially less than the 40% fee plus expenses approved by Judge McGlaughlin in the gas royalty class action of *Frederick v. Range Resources*, No. 11-0499 (W.D. Pa. 2011), a gas royalty case that settled without a trial and appeal. This case, by contrast, has been vigorously litigated over the course of six (6) years with almost 300 docket entries, a jury trial to verdict, and an appeal to the United States Court of Appeals for the Third Circuit.

ACCOUNTING OR APPROVAL OF FORMULA

8. On July 27, 2015, this Court entered an Order that stated: "It is hereby ordered that the calculation of the judgment's distribution to the class is held in abeyance pending the resolution of the cross appeals submitted by the parties to the Court of Appeals for the Third Circuit."

9. The "cross appeals" referred to above were finally resolved when the Third Circuit issued its order dated December 5, 2016, which denied Defendant's motion for re-hearing of its order and opinion dated October 24, 2016.

10. Plaintiffs wish to calculate the distribution of the royalty owners' share carefully and correctly as required by F.R.C.P. no. 23. Simply dividing the royalty owners' share by the number of class members will not suffice because (1) a lease with a single shallow well is not entitled to the same damages as a lease with one or more highly productive Marcellus shale wells and (2) the decimal interest of each royalty owner in a given well or lease will vary depending on each royalty owner's interest in the well or lease and whether the well or lease is part of a Unit consisting of several wells and leases.

11. By Order dated September 30, 2013 [ECF No. 145] , this Court certified two subclasses of "Lessors" where ECA had improperly deducted charges from their respective royalty payments for "interstate pipeline services" (sub-class one), and charges for "transportation" (sub-class two) during the time period between November 22, 2006 and March 26, 2012.

12. Plaintiffs and class counsel have a duty to distribute the net judgment proceeds to the certified class members in a manner which is "fair reasonable, and adequate" F.R.C.P. 23 (e) (2).

13. In order to meet that duty, the Plaintiffs would like Defendant ECA, who has the capability to do so, to state the precise dollar amount of transportation charges and marketing fees that were deducted from each class member's gas royalties during the above stated damage period so that, to the extent possible, each class member's distribution from the net judgment fund can be proportionally and rationally tied to each class member's actual damages.

14. In the alternative, Plaintiffs would at least need to know the amount of the each class members' respective decimal share of each respective lease, in order to more fairly calculate each Lessor/class member's individual dollar share of the common fund. ECA has total control of that information. Since the actual amount of damage to each class member, (i.e. the dollar amounts

for improper deductions for interstate Pipeline services and/or marketing) would be based upon their respective decimal share of each applicable lease, then it is logical and fair to base in whole or in part, each class members' respective share of the common recovery fund, on their respective decimal shares.

15. The Plaintiffs respectfully submit that this would better meet the mandates of F.C.R.P. 23 (e) (2), which mandate that the distribution be "fair, reasonable, and adequate".

16. If the Court does not require ECA to assist in either of the methods just described, Plaintiffs respectfully request that the Court approve distribution of the net judgement proceeds fund to each class member under the following pro-rata formula:

The current proposed gross judgment amount of \$1,197,211.53, minus \$399,070.51 (33 1/3% attorneys' fees) minus \$72,197.07 (expenses) ÷ Number of class members in each sub-class = each class member's respective share.

WHEREFORE Plaintiffs respectfully move this Court for the relief set forth herein.

Respectfully submitted,

BY: /s/ David A. McGowan

David A. McGowan, Esquire
Pa. I.D. No. 52010

CAROSELLI BEACHLER & COLEMAN LLC
20 Stanwix Street, 7th Floor
Pittsburgh, PA 15222
(412) 391-9860 – Telephone
(412) 391-7453 – Fax
Email: dmcgowan@cbmclaw.com

- and -

Robert C. Sanders, Esquire
LAW OFFICE OF ROBERT C. SANDERS
12051 Old Marlboro Pike
Upper Marlboro, MD 20772
Tel. (410) 371- 2132
Email: rcsanders@rcsanderslaw.com

Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on this date via the Court's CM/ECF system, thereby causing a copy to be served on all parties listed in the Court's CM/ECF registry for this case.

Dated: February 13, 2017

BY: /s/ David A. McGowan

David A. McGowan, Esquire
Pa. I.D. No. 52010

CAROSELLI BEACHLER & COLEMAN LLC
20 Stanwix Street, 7th Floor
Pittsburgh, PA 15222
(412) 391-9860 – Telephone
(412) 391-7453 – Fax
Email: dmcgowan@cbmclaw.com