

COURT OF APPEALS, STATE OF COLORADO

Court Address:
Colorado State Judicial Building
2 E. 14th Avenue, 4th Floor
Denver, CO 80203

Appeal From the District Court,
City and County of Denver, Colorado
Honorable Norman D. Haglund, Presiding
Case No. 05CV2753

Plaintiffs-Appellants:

RICHARD DEVER and DEVER FAMILY MINERALS,
LLC

v.

Defendant-Appellee:

ENCANA OIL & GAS (USA) INC.

Plaintiffs-Appellees:

RAYMOND and SALLY MILLER, BARCLAY FARMS,
L.L.C., JOAN ELAINE BREHON, JANETTE FOOTE,
NILES MILLER, U.S. BANK, N.A., as trustee for the
T.E. MCCLINTOCK TRUST, and WHITE RIVER
ROYALTIES, LLC, on behalf of themselves and all
others similarly situated.

COURT USE ONLY ▲

Case No. 2008CA2131

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AMENDED ANSWER BRIEF OF THE PLAINTIFFS AND THE CLASS

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The Plaintiffs and the Class submit this Amended Answer Brief in opposition to the Amended Opening Brief filed by Appellants Dever Family Minerals, LLC and Richard Thompson Dever (collectively, "the Devers"). The Plaintiffs and the Class ask this Court to affirm the district court's final judgment, which finally approved the Settlement Agreement between the Plaintiff Class and Defendant EnCana Oil & Gas (USA) Inc. ("EnCana").

ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in approving a Class Settlement Agreement which, as part of the forty million dollar settlement of the Class members' royalty underpayment claims through December 31, 2008, includes a release of any natural gas royalty underpayment claims which the Class members could have asserted on EnCana's natural gas production prior to January 1, 2008, and in rejecting the Devers' untimely objection to the release of the Class members' potential "decimal interest" claims, based on its express finding that each Class member's decimal ownership interest is necessarily intertwined with the calculation of the amount to be paid to each Class member pursuant to the Class Settlement?

2. Did the district court abuse its discretion in rejecting the Devers' untimely objection to the Plaintiffs' release of the Class members' potential "decimal interest" claims, where the Devers failed to identify any Class member who has a bona fide

decimal interest dispute with EnCana regarding royalties paid on natural gas production prior to January 1, 2008?

STATEMENT OF THE CASE

A. The Nature of the Case, Course of Proceedings, and Disposition in the Court Below.

This is a class action case in which eight named Plaintiffs, on behalf of themselves and a defined Class of royalty owners, asserted breach of contract claims against EnCana for royalty underpayments on natural gas produced by EnCana in Colorado. Record on Appeal, Vol. 1, pp. 2-39 [cited herein as (Vol. I, pp. 2-39)]. In their class action complaint which was filed in April 2005, Plaintiffs alleged that EnCana underpaid the royalties owed to the Plaintiffs and the Class under lease agreements and overriding royalty agreements (collectively, "the Royalty Agreements") which do not expressly authorize EnCana, in calculating royalties, to deduct the costs incurred to market natural gas after it is severed from the wellhead. (Vol. I, pp. 12-13, 30-32). The Plaintiffs alleged that EnCana has breached its contractual obligations to pay royalties to the Plaintiffs and the Class by failing to pay royalties based on the prices received by EnCana on the sale of the natural gas and natural gas liquids at the commercial market, pursuant to the Colorado Supreme Court's decision in *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001). (Vol. I, pp. 12-13, 30-32).

After six months of extensive discovery, contested briefing, and a two day evidentiary hearing, the district court granted the Plaintiffs' motion for certification of a C.R.C.P. 23(b)(3) Class, designated the named Plaintiffs as the Class Representatives, and appointed the Plaintiffs' attorneys as Class Counsel. (Vol. IV, pp. 1107-1128). In December 2007, a Notice of the certification of the Rule 23(b)(3) Class was mailed to approximately 6,000 members of the Class, including the Devers, which informed the Class members of their right to exclude themselves from the certified Class. (Vol. V, pp. 1182-1344). Approximately one hundred fifty Class members did elect to opt out of the Class. (Vol. V, pp. 1342-1344). The Devers did not elect to opt out of the certified Class.

In March 2008, the parties' attorneys, after engaging in extensive settlement negotiations, reached agreement on the terms of a Class Settlement. (Vol. V, pp. 1350-1354, 1419-1420). The Settlement included EnCana's agreement to pay forty million dollars to settle the Class members' claims for royalty underpayments on natural gas production through December 31, 2008, as well as EnCana's agreement to implement new methods for calculating royalties to the Class members on EnCana's natural gas production in Colorado after January 1, 2009. (Vol. V, pp. 1356-1369, 1421-1422).

On April 11, 2008, the district court entered its Order granting preliminary approval of the Class Settlement. (Vol. VI, pp. 1454-1461). A Notice of the proposed Class Settlement was mailed to approximately 6,500 Class members on May 2, 2008, which specifically informed the Class members about the terms of the Class Settlement, and their right to submit objections to the proposed Class Settlement. (Vol. VI, pp. 1490-1707). The Devers are the only two Class members who objected to final approval of the Class Settlement. (Vol. VII, pp. 1989-1991; Vol. VIII, pp. 2238-2288).

At the August 1, 2008 hearing to consider final approval of the Class Settlement, the Devers were permitted to present evidence and arguments in support of their objections. (Final Fairness Hearing Transcript, p. 6, l.18 - p. 8, l.15 [cited herein as Tr. p. 6, l.18 - p. 8, l.15]; Vol. XI, pp. 2870-2896). The district court, after considering the evidence and arguments presented at the final approval hearing, as well as the parties' and the Devers' briefs on the Class Settlement issues, issued its findings of fact and conclusions of law, which finally approved the Class Settlement Agreement as being fair, reasonable and adequate, and which overruled the Devers' objections to the Class Settlement. (Vol. XI, pp. 2870-2896).

The district court entered its final judgment on August 26, 2008. (Vol. XI, pp. 2870-2896). The Devers filed their Notice of Appeal on October 10, 2008. (Vol. VII, pp. 3375-3380).

B. Statement of the Relevant Facts.

1. The Claims Asserted by the Plaintiffs and the Class.

In their original and first amended complaints, the Plaintiffs alleged that EnCana breached the applicable Royalty Agreements by failing to pay royalties based upon the prices received by EnCana on its sale of natural gas and natural gas liquids at the commercial market. (Vol. I, pp. 2-20, 22-39). The Plaintiffs requested damages for past royalty underpayments, and also requested that the district court enter a declaratory judgment determining the appropriate methods for EnCana's calculation of future royalty payments to the Plaintiff Class. (Vol. I, pp. 15-16, 33-34).

2. The Discovery Conducted by Class Counsel.

For more than six months after the original complaint was filed, Class Counsel engaged in extensive discovery relating to both class certification issues and the claims on the merits. (Vol. V, pp. 1415-1417). This discovery included an extensive review of thousands of royalty agreements, review of voluminous documents produced by EnCana relating to EnCana's production and marketing of the natural gas and natural gas liquids at issue, and analysis of the electronic data detailing EnCana's

methods for calculating royalties paid to the Class members. (Vol. V, pp. 1415-1417). Class Counsel also took extensive depositions of fourteen witnesses, primarily employed by EnCana, on various issues relating to natural gas marketing, royalty accounting, and EnCana's natural gas production operations in Colorado. (Vol. V, pp. 1415-1417).

After the district court entered its class certification Order (Vol. IV, pp. 1107-1128), EnCana produced electronic data detailing EnCana's monthly royalty calculations and payments for all of its statewide production from May 1999 through June 2006, covering approximately twenty-eight different production areas in Colorado, 4,500 wells, and more than 6,000 royalty owner accounts. (Vol. V, pp. 1419-1420). Class Counsel and their accounting expert, Don Phend, analyzed that data, as well as third party purchaser invoices for the natural gas sold by EnCana. (Vol. V, pp. 1419-1420). Utilizing this data, Mr. Phend prepared royalty underpayment damage estimates for the Class based on the Plaintiffs' contention that the commercial market for the natural gas and natural gas liquids sold by EnCana was at or beyond the tailgate of a processing plant or at the entry to a mainline transmission pipeline. (Vol. V, pp. 1419-1420). The electronic royalty payment data produced by EnCana was periodically updated through December 2007. (Vol. XI, p. 2874).

3. The Parties' Negotiation of a Class Settlement Agreement.

In June 2007, the parties' attorneys exchanged correspondence regarding proposals for a Class Settlement, which addressed both compensation to the Class on the claim for past royalty underpayments, and a royalty calculation methodology for future royalty payments to the Class. (Vol. V, p. 1420). In November 2007, the parties and their attorneys also engaged in a formal mediation conference. (Vol. V, p. 1420; Vol. VII, p. 1744). The parties, however, were unable to agree to a Class Settlement at the mediation session, and made no further progress regarding settlement in 2007. (Vol. V, p. 1420; Vol. VII, p. 1744).

In February 2008, after the Class Notice had been mailed to the Class members, and the opt out period had expired, the parties' attorneys resumed their settlement discussions, in a further effort to reach a mutually acceptable Class Settlement. (Vol. V, pp. 1421-1422). As a result of those discussions, in March 2008 the parties were able to reach agreement regarding the terms of a Class Settlement, which included EnCana's agreement to pay forty million dollars to settle the Class members' claims for royalty underpayments on EnCana's natural gas production through December 31, 2008. (Vol. V, pp. 1421-1422). On May 2, 2008, EnCana paid the forty million dollars into an interest bearing escrow account. (Vol. XI, p. 2875).

EnCana and the Class also reached agreement regarding the methods for EnCana's calculation of royalty payments to the Class on the natural gas produced and sold by EnCana on and after January 1, 2009. (Vol. V, pp. 1421-1422; Vol. XI, p. 2875). The terms of the future payment method are specifically described in Paragraph 10 of the parties' Settlement Agreement. (Vol. V, pp. 1363-1366, 1421-1422). The agreed upon methods for EnCana's calculation and payment of future royalties are substantially more favorable to the members of the Class than the methods which EnCana has been utilizing to pay royalties to the Class during the last several years. (Vol. V, p. 1422; Vol. XI, p. 2875). Plaintiffs' accounting expert calculated the economic benefit of the future royalty calculation methods to the Class members, by comparing EnCana's existing royalty payment methodology to the future royalty payment methods which EnCana has agreed to use after January 1, 2009. (Vol. VII, pp. 1761-1764). He determined that the present value benefit to the Class members resulting from the implementation of the future royalty payment methodology is approximately forty-four million dollars. (Vol. VII, pp. 1761-1764; Tr. p. 103, l.2 - 106, l.24). Thus, the Class Settlement has a total economic benefit of approximately eighty-four million dollars, in present value. (Vol. VII, pp. 1761-1764).