

Recd. 7/6/21 via
Via mail

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

L&D INVESTMENTS, INC., a West Virginia Corporation,
RICHARD SNOWDEN ANDREWS, III,¹
MARION A. YOUNG TRUST,
CHARLES A. YOUNG,
DAVID L. YOUNG and
LAVINIA YOUNG DAVIS, successors of
Marion A. Young,
CHARLES LEE ANDREWS, IV, and
FRANCES L. ANDREWS,

Plaintiffs,

v.

Civil Action No. 13-C-528-2
THOMAS A. BEDELL, Chief Judge

ANTERO RESOURCES CORPORATION,
formerly known as ANTERO RESOURCES
APPALACHIAN CORPORATION, et al.,

Defendants.

ORDER

**REFUSING PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES
AND COSTS UNDER THE COMMON FUND DOCTRINE**

Pending before this Court is *Plaintiffs' Request For Attorney's Fees And Costs Under The Common Fund Doctrine* filed herein on March 12, 2021 by and through legal counsel for Plaintiffs. Accompanying it is a copy of *Final Approval Order* entered on September 20, 2017 in Harrison County Circuit Court Civil Action No. 16-C-8-2 ~ *Meredith "Duane" Davis, Individually and on behalf of those similarly situated, Plaintiff, v. Ruskin Company, Defendant* as well as copies of *Internal Imp. Fund Trustees v. Greenough*,

¹ Upon Suggestion Of Death Of Plaintiff, Richard Snowden Andrews, Jr. filed on January 27, 2021.



7-2-2021
D. Komoro
H. Louker
J. Rubenstein
S. Massie
J. Pizzo
T. Miller
K. Bowers
A. Pomeroy
B. Bailey
M. Jones

105 U.S. 527, 15 Otto 527, 26 L.Ed. 1157(1881) and *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

Therein, Plaintiffs' legal counsel, *inter alia*, provides a Common Fund Doctrine history and application, upon which he argues and requests this Court award him reasonable attorney's fees (via percentage fee method) and proportionate litigation costs from "Unknown Heirs" proceeds heretofore paid into this Court's Registry by the Mineral Producer Defendants (and from any subsequent interest that might be awarded) ²

Response To Plaintiffs' Request For Attorney's Fees And Costs Under The Common Fund Doctrine was filed herein on March 29, 2021 by and through Michael A. Jacks, Esq., he having been *sua sponte* appointed Guardian *ad litem* ("GAL") by this Court under *Order* entered on January 27, 2021 for these "Unknown Heirs".

In his Response, such GAL raises several points in light of his court appointment for purposes of representing and protecting the interests of these "Unknown Heirs". He particularly points out this Court's September 15, 2020 *Omnibus Ruling Order* wherein it addressed Plaintiffs' legal counsel's attempt to file pleadings (i.e.: *Motion For Permission*) and represent such heirs.³

² At the time of such Request's filing, the "Unknown Heirs" funds currently deposited with this Court's General Receiver total \$2,229,526.72 Such total comprising various payments made by such Mineral Producer Defendants (Antero - \$2,109,240.88; CNX - 88,663.22; CGAS - \$29,567.64; and ECA - \$2,054.98) for such "Unknown Heirs" combined 13.7777% ownership interest of any mineral production from the Subject Property at the heart of this long fought litigation. As such, Plaintiffs requested attorney's fee and proportionate litigation costs, under application of the Common Fund Doctrine, is \$759,118.13 (without any interest calculation thereon and including \$15,942.56).

³ Further within that Order, this Court essentially found and concluded such counsel had not demonstrated any legal standing to represent or formally act herein as a fiduciary for such heirs via any established attorney-client or fiduciary relationship while also acknowledging Defendants' responsive pleadings to Plaintiffs' then pending motion being ruled upon all referencing the "common fund doctrine" and further asserting its inapplicability stating that it does not permit legal counsel to act on behalf of non-clients. (See *Omnibus Ruling Order*, at Pages 37 - 38 of 42). Having been so reminded, this Court revisited the formal record herein and such Defendants' collective pleadings in response to Plaintiffs' *Motion For Permission* as part of its review and deliberations on Plaintiffs' Request.

Further provided in his review, such GAL points to our State Supreme Court's common fund doctrine discussion in *Security National Bank v. Willem*, 155 W.Va. 1, 180 S.E.2d 46 (1971), for mature consideration and possible application.

Plaintiffs' Reply To The "Unknown Heirs" Response Regarding Plaintiffs' Application For Common Fund Fees And Costs was filed herein on April 8, 2021. Accompanying such Reply is a copy of *Order Regarding Plaintiffs' Counsels' Fees And Litigation Expenses And Class Representatives Award And Incentive Payments* entered on February 25, 2008 in Harrison County Circuit Court Civil Action No. 04-C-296-2 ~ *Lenora Pemine, et al, individuals residing in West Virginia, on behalf of themselves and all others similarly situated, Plaintiffs, vs. E.I. duPont de Nemours and Company, et al, Defendants.*

Upon this Court's proffer to respective legal counsel herein, a proposed *Order Granting Plaintiffs' Request For Attorneys' Fees And Costs Under The Common Fund Doctrine* was provided on June 11, 2021 by and through Plaintiffs' legal counsel.

Conclusion

This Court has fully reviewed Plaintiffs' legal counsel's pleadings and Guardian *ad litem* Response on behalf of these "Unknown Heirs" as well as considered their respective legal authority and argument proffered on this matter of Common Fund Doctrine applicability and award of attorney fees and costs as requested by such counsel from these "Unknown Heirs" royalty monies (and any awarded interested thereon) as held by this Court's General Receiver. It has also reviewed pertinent parts of the voluminous record herein as well as conducted its own legal research for final ruling purposes.

Having now fully deliberated thereon, this Court concludes that *Plaintiffs' Request for Attorney's Fees And Costs Under The Common Fund Doctrine* should be REFUSED upon such deliberation and further analysis provided *infra*.

Analysis

1. Plaintiffs' legal counsel seeks an award of reasonable attorney's fees and proportionate litigation costs from the royalty monies deposited with the General Receiver of this Court pursuant to prior Orders entered herein that account for unpaid royalties to the "Unknown Heirs" who have been determined to hold a combined 13.7777% ownership interest under the Andrews Lease at the heart of this litigation.

2. Such requested award is 1/3rd (33.3%) attorney's fee in the amount of \$743,175.57 (given the "Unknown Heirs" royalty funds deposited with the General Receiver in the amount of \$2,229,526.72 at the time of Plaintiffs' legal counsel's filing of his request under the Common Fund Doctrine) and proportionate costs of \$15,942.56 for a total request of \$759,118.13.

3. While this Court may, at best, commiserate with Plaintiffs' legal counsels' self-described 'General Custer without soldiers backing him up' persona in litigating this long-standing civil action against a much larger array of opposing legal counsel, it is hard-pressed to find such circumstances to be legally or even reasonably supportive to such an extent that will allow his requested award let alone fit within the parameters of a Common Fund Doctrine application.

4. The original Plaintiff in this instant litigation is L&D Investments, Inc., a West Virginia corporation, and initiated this civil action upon a *Complaint For Declaratory Relief, Quieting Of Title And Other Relief*. Upon subsequent Amended Complaints and further motion pleadings to join additional parties necessary for purposes of adjudicating

declaratory judgment and quieting title matters, identified parties' litigant were added as Defendants, many of whom were deemed owners of fractional interests of the Subject Property at the heart of this litigation, and some of whom subsequently became Plaintiffs upon further motion pleadings requesting party realignment.

5. Plaintiffs' legal counsel packages his right to such requested fees and costs as follows:

These recovered funds are now available to the "Unknown Heirs" due to Plaintiffs' counsel's efforts expended during the more than 7 years of hard fought and risky litigation in this matter which is still ongoing due to a second appeal...[and]... is premised on the equitable principle of the Common Fund Doctrine.

See Plaintiffs' Request, p. 2.

6. Plaintiffs' legal counsel essentially contends that "the Common Fund Doctrine clearly permits the granting of reasonable attorney's fees and proportionate litigation costs from the fund that has been recovered by the Plaintiffs for the benefit of the 'Unknown Heirs'. To Do otherwise would unjustly enrich the 'Unknown Heirs; for no equitable reason as they should contribute to that which they will receive from this litigation." (*Id.*, p. 6 following his interpretation of the Common Fund Doctrine application herein).

7. As previously determined by this Court in reviewing such Plaintiffs' legal counsel's pleadings with respect to other actions unilaterally undertaken to recover other royalty payments attributable to these "Unknown Heirs" which appear to have otherwise escheated elsewhere, such counsel was deemed to have acted in an impermissible way with respect such heirs.

8. This litigation, although encompassing a number of individuals finally deemed owners of various percentages of mineral interests in and underlying the Subject

Property at the heart of this litigation pursuant to the Andrews Lease, is not a class action undertaken or certified as a class action under Rule 23.

9. As such, this Court further finds instructive the Opinion in *Willem* wherein Syllabus Points 1 and 2 state:

'Except in rare instances, the power of a court to require one party to contribute to the fees of counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which enures [sic] to the benefit of all.' Point 2 Syllabus, Roach v. Wallins Creek Collieries Company, 111 W.Va. 1 (160 S.E. 860).

Where an attorney renders legal services in behalf of clients by whom he is employed, the mere fact that such services are beneficial to another party to the case or cases in the court in which such legal services are rendered does not entitle the attorney to recover an attorney fee from the other party who was benefited by the performance of such services. The general rule is that the creation of a relationship of attorney and client by contract, expressed or implied, is essential to the right of an attorney to recover compensation from one for whose benefit the attorney claims to have rendered legal services.

10. Expounded upon therein, that Court further provided:

A contract of employment, expressed or implied, is necessary in order to render one liable to pay for the services of an attorney. Principles relating to attorneys' fees based upon an implied contract are discussed in 7 C.J.S. Attorney and Client s 175, page 1041. A portion of that discussion, appearing on pages 1042 and 1043, is as follows:

'Thus, where there is even slight proof of an employment of the attorney by the client, the fact that the latter stood by without objection and allowed the attorney to render valuable services in his behalf will estop him to deny the fact of employment. The acquiescence must be such as presumes volition on the part of the person sought to be charged, however, and there is no acquiescence where he has no choice but to avail himself of the efforts made by the attorney.

'On the other hand, it does not always follow that, because one receives the benefit, directly or indirectly, of the services of another, the law implies a contract to pay therefor. Thus, where the attorney, in carrying on the action does so for his own benefit and not for the nominal party to the action, the fact that such nominal party knows of his course and does not object will not make him liable for fees; nor does a tacit acceptance of an attorney's services raise a promise to

pay therefor, when the services were rendered after a distinct refusal of defendant to avail himself of, or pay for, such services. So, where one of several parties, all of whom are equally interested in a cause, employs an attorney to conduct the case for him, and the benefit of such services from the nature of the case extends to all the other interested parties, the other parties, merely by standing by and accepting the benefit of such services without objection, do not become liable for the attorney's fees. In such case it is held that liability cannot be imposed on the theory of unjust enrichment. These rules are particularly applicable where the other parties benefited are minors. If, however, the parties not directly employing the attorney, after becoming aware that he looks to them for his compensation, fail to make objection or to declare their nonliability, they are liable.¹

Id. at 14-15, at 54-55.

11. This Court recognizes that *Willem* involved multiple attorneys in litigation on testamentary bequests and beneficiaries who were not all represented by legal counsel. While certainly not identical to this instant matter, the parallels are convincingly similar such that it deems any Common Fund Doctrine application to this instant matter for purposes of awarding Plaintiffs' legal counsel additional attorney's fees and costs to be inappropriate and untenable.⁴

12. Plaintiffs' legal counsel's United States Supreme Court case authority proffered in arguing support of the Common Fund Doctrine being applicable to these "Unknown Heirs" or their heirs, devisees, successors, trustees, or agents (who are named Defendants in this civil action and not Plaintiffs) and their royalty monies heretofore paid into this Court's General Receiver by the Mineral Producer Defendants) only reflects such doctrine's viability in litigation involving trust fund commonality (*Greenough*) and in directing independent, supplemental, lower court proceedings for consideration of

⁴ Plaintiffs' legal counsel is, himself, a part of Plaintiff, L&D Investments, Inc., which purchased via quitclaim deeds, what has ultimately been determined in this litigation to be a 14/225th or 6.222222% ownership interest of the minerals underlying the Subject Property which further provided standing to initiate and maintain this civil action.

allowing reasonable counsel fees and litigation expenses for one vindicated claimant from bond proceeds of similarly situated trusts (*Sprague*). Further case authority involves only a variety of class actions. All of which is quite distinguishable from the litigation circumstances herein and, accordingly, insufficiently support awarding his request relief.

13. Simply stated, this Court finds and concludes this instant litigation is not a 'common fund case' or otherwise sufficiently suited for exercising its equitable authority as might be applied to the instant circumstances herein so to award Plaintiffs' legal counsel is requested attorney's fee and proportionate advanced costs.

Rulings

Accordingly, this Court hereby **ORDERS** that *Plaintiffs' Request For Attorney's Fees And Costs Under The Common Fund Doctrine* be and is **REFUSED**.

Having so ruled, this Court *sua sponte* hereby **ORDERS** that Plaintiffs and their legal counsel be and are **GRANTED** an objection and exception thereto as they may respectively deem necessary for any further proceedings.

Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, this Court hereby **ORDERS** entry of this Order be and is a final Order upon an express determination that there is no just reason for delay and upon an express direction for refusal of *Plaintiffs' Request For Attorney's Fees And Costs Under The Common Fund Doctrine*.

Finally, this Court **DIRECTS** the Clerk of this Court to provide and/or otherwise send certified copies of this Order to the following:

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Morgantown, WV 26505
Guardian ad litem for Unknown Heirs

ENTER: July 1, 2021



THOMAS A. BEDELL, Chief Judge