DISTRICT COURT, GARFIELD COUNTY, COLORADO109 8th Street, Suite 104 Glenwood Springs, CO 81601 **Plaintiffs:** IVO LINDAUER, SIDNEY and RUTH LINDAUER, and DIAMOND MINERALS, LLC, on behalf of themselves and all others similarly situated, vs. **Defendant:** TEP ROCKY MOUNTAIN LLC, f/k/a WPX Energy Rocky Mountains LLC, f/k/a Williams Production RMT Company LLC and f/k/a Williams Production RMT Company. Nathan A. Keever DUFFORD WALDECK Attorneys for Plaintiffs 744 Horizon Court, Suite 300 Grand Junction, CO 81506 Telephone: (970) 241-5500 Fax: (970) 243-7738 E-mail: dwmk@dwmk.com Attorney Reg. #: 24630	□ COURT USE ONLY □ Case Number: 06 CV 317 Courtroom:

SECOND MOTION TO ENFORCE COURT ORDER AND SETTLEMENT AGREEMENT AGAINST TEP ROCKY MOUNTAIN LLC

Representative Plaintiffs Ivo Lindauer, Sidney and Ruth Lindauer, and Diamond Minerals, LLC and Lindauer Class Member Jolley Potter Ranches Energy Co., LLC**,** on behalf of themselves and the other members of the Settlement Class herein, by and through their undersigned counsel, request that the Court issue an Order pursuant to C.R.C.P. 107(c) that requires Defendant to appear in person to show cause why it should not be held in contempt of the Settlement Agreement with Williams Production RMT Company ("Williams RMT Co."), together with this Court's Judgment

of March 20, 2009, which approved the terms of the Settlement.

C.R.C.P. 121 § 1-15 ¶ 8 Certification

Although pursuant to C.R.C.P 107 this Court may enter the requested show cause order *ex parte,* Class Counsel have elected to confer with counsel for Defendant and have been informed that the show cause order requested in this motion is OPPOSED.

Background

1. In October 2008, Representative Plaintiffs and Williams Production RMT Company entered into the Settlement in Case Number 2006 CV 317 filed in Garfield County, Colorado District Court. (Settlement Agreement, Oct 17, 2008, hereinafter "Settlement Agreement"). The Settlement was approved by this Court at a fairness hearing on March 20, 2009, and the Judgment was entered by this Court on that same day. (Judgment, March 20, 2009, hereinafter "Judgment")

2. The Judgment certified the Settlement Class, as defined in Section A thereof, pursuant to C.R.C.P. 23(b)(3). (Judgment, p. 1)

3. After Williams Production RMT Company entered into the Settlement, it changed its form to a limited liability company and changed its name to Williams Production RMT Company LLC on October 12, 2010. On January 19, 2012, Williams Production RMT LLC changed its name to WPX Energy Rocky Mountain, LLC. ("WPX").

4. Effective on or about October 1, 2015, WPX Energy, Inc., WPX's parent, transferred WPX to Terra Energy Partners LLC.

5. On April 22, 2016, WPX changed its name to TEP Rocky Mountain LLC ("TEP").

6. Since March 2009, Settlement Class Members have received royalty payments from the same, single entity bearing the following different names: Williams Production RMT Company, Williams Production RMT LLC, WPX, and TEP. (Exhibit A, Denomy Affidavit ¶5).

7. The Settlement Class Members, together with Williams, as its name has changed from time to time to become TEP, are required to comply with the terms of the Settlement.

8. The Settlement Agreement, and the Judgment approving the Settlement Agreement, are enforced as an order of this Court. *Miller v. EnCana Oil & Gas (USA), Inc.*, 405 P.3d 488, 493 (Colo. App. 2017). This Court has inherent authority and jurisdiction to enforce its prior decrees. *Id.* Where a court has either retained jurisdiction over the settlement agreement in the order or has incorporated the terms of the settlement in its order or judgment, the parties' obligation to comply with the terms of the settlement are made part of the court's order. *Id.* (*citing Kokkonen v. Guardian Life Insur. Co. of Am.*, 511 U.S. 375, 381 (US 1994). Pursuant to C.R.S.§13-1-114 (c), this Court is also expressly granted the "power to compel obedience with its lawful judgments and orders."

9. This Court expressly retained jurisdiction to implement and enforce the terms of the Settlement Agreement and has the power and authority to enforce its own orders.

a) Paragraph 5.2 of the Settlement Agreement provides that this Court "has continuing jurisdiction to enforce this paragraph." The Judgment also states, "This Court shall retain continuing jurisdiction of this action to address any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment." (Judgment, p. 8, ¶4).

b) The Settlement Agreement "establish[ed] certain rules to govern future royalty and overriding royalty payments so as to avoid or minimize disputes over royalty payments in the future." (Settlement Agreement, p. 2, ¶3).

c) Pursuant to paragraph 5.2 of the Settlement, Settlement Class Members are entitled to rely on the descriptions of future royalty payment methodologies set out in Section 4, together with representations set out in Section 5, of the Settlement Agreement.

d) Pursuant to paragraph 4.8 of the Settlement Agreement, "Williams and the Settlement Class Members shall be bound prospectively by the royalty methodology set forth in this Section 4 of this Settlement Agreement."

e) The Judgment also states: "This Court shall retain continuing Jurisdiction of this action to address any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment." (Judgment p. 8, ¶4).

f) The June 27, 2019 Order Granting Final Approval To Settlement Agreement and Final Judgment following the first Motion to Enforce filed in this matter, states "this Court shall retain continuing and exclusive jurisdiction to administer, implement, and enforce the Settlement Agreement, as well as the original Lindauer Settlement Agreement approved by this Court in 2009." Order at 4-5.

10. In Section 4 of the Settlement Agreement, the parties agreed on how residue gas deductions and certain aspects of Natural Gas Liquids royalty payments are to be calculated and paid to the Settlement Class Members after the effective date of the Settlement.

Breach of Section 4.4

11. Section 4.4 of the Settlement Agreement provides that TEP is prohibited from deducting processing expenses in excess of 1/3rd of the value of NGLs from Settlement Class Members receiving royalty payments under leases in Categories 1, 2, 3, 4, 5, 6, 7 and 10.

12. The 1/3rd limit was breached when at the end of June 2019, or shortly thereafter, TEP recalculated processing deductions for production year 2015. The amount of excessive deductions for processing costs ranged up to $44.00 per gallon for production months January 2015 through December 2015. (Exhibit A, Denomy Affidavit ¶15).

An Accounting is Necessary and Appropriate

13. Where the royalty owner brings a claim for royalty underpayment, and the lessee has control of the information necessary to calculate damages, the royalty owner is entitled to an accounting to facilitate an accurate calculation of damages. *Patterson v. BP America Prod. Co.*, 159 P.3d 634, 642 (Colo. 2006).

14. An accounting may be required in a remedial contempt order pursuant to C.R.C.P. 107 entered to enforce a prior court order. *Robinson v. Hossack*, 303 P.3d 656, 567 (Colo. App. 2013).

15. The Settlement Class Members have demonstrated that TEP has breached the Settlement and has not complied with the terms of the Judgment. TEP has exclusive access to and control over the data, information, calculations performed and allocations necessary to properly calculate and pay royalty to Settlement Class Members in accordance with the terms of the Settlement Agreement. (Exhibit A, Denomy Affidavit ¶17).

16. Without the undisclosed information that TEP has in its possession and control, the Settlement Class Members are not able to determine their share of the royalty underpayments. (Exhibit A, Denomy Affidavit ¶16).

17. TEP has the means and ability to provide the Court with an accounting showing the differences between the actual royalty payments and what is required by Section 4 of the Settlement Agreement. (Exhibit A, Denomy Affidavit ¶18). An accounting by TEP is necessary and appropriate to efficiently and effectively enforce this Court's prior Judgment and to enforce the Settlement.

Request for Show Cause Order and Hearing

22. Because the Court retained jurisdiction to enforce the Settlement and the Settlement Class has been certified in the Judgment, this Court has the power and authority to enter and to enforce orders to direct the parties to take actions to give effect to and enforce its own orders and judgments. *Miller v. EnCana, supra; Patterson v. BP, supra.*

23. C.R.C.P. 107 authorizes this Court to compel obedience with its lawful orders by means of a show cause order and to grant remedial sanctions for contempt, both direct and indirect.

24. As demonstrated above and in the supporting affidavit, the requirements of C.R.C.P. 107 are satisfied: 1) TEP has breached the Settlement and thereby has failed to comply with the lawful order of this Court, 2) TEP had knowledge of the Settlement and Judgment, 3) TEP has the present ability to comply with the terms of the Settlement, and 4) TEP has the present ability to provide this Court with a corrected accounting in which TEP re-computes the royalty payments owed to Settlement Class Members in the manner necessary to comply with the terms

of the Settlement.

25. To enforce the Judgment and the Settlement, the Representative Plaintiffs, on behalf of themselves and the Settlement Class Members, request that this Court:

A) Enter an order to show cause pursuant to C.R.C.P. 107 (c) in the form filed herewith, requiring TEP to show cause why it should not be held in contempt of the Judgment;

B) Schedule a one-day show cause hearing, not less than thirty (30) nor more than forty-five (45) days following the entry of the Order to Show Cause;

C) If appropriate, upon the conclusion of the show cause hearing, enter an order to enforce the Judgment and Settlement against TEP pursuant to C.R.C.P. 107 (a)(3), (a)(5), c) and (d)((2), which requires TEP to comply with the terms of Section 4 of the Settlement, and to prepare an accounting under the Court's supervision to determine the amount due to each Settlement Class Member as the result of royalty payments made during and after the production months of 2015 that have not complied with the requirements of Section 4 of the Settlement;

D) Grant the Settlement Class Members such other and further relief as this Court deems to be appropriate, including other relief permitted by C.R.C.P. 107, together with interest at the maximum rate permitted by law, together with reasonable costs and attorney fees; and

E) At the conclusion of such accounting, enter judgment in favor of the Settlement Class Members.

RESPECTFULLY submitted this __th day of April, 2020.

DUFFORD WALDECK

By: /s/ *Nathan A. Keever*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **SECOND MOTION TO ENFORCE COURT ORDER AND SETTLEMENT AGREEMENT AGAINST TEP ROCKY MOUNTAIN LLC** was served this __th day of February 2020, via the Colorado Courts E-Filing:

John F. Shepherd
Christopher Chrisman
Holland & Hart, LLP
555 Seventeenth Street, Suite 3200
P.O. Box 8749
Denver, CO 80201-8749

/s/
Paralegal

DISTRICT COURT, GARFIELD COUNTY, COLORADO 109 8th Street, Suite 104 Glenwood Springs, CO 81601 **Plaintiffs:** IVO LINDAUER, SIDNEY and RUTH LINDAUER, and DIAMOND MINERALS, LLC, on behalf of themselves and all others similarly situated, vs. **Defendant:** TEP ROCKY MOUNTAIN LLC, f/k/a WPX Energy Rocky Mountains LLC, f/k/a Williams Production RMT Company LLC and f/k/a Williams Production RMT Company. Nathan A. Keever DUFFORD, WALDECK, MILBURN & KROHN, L.L.P. Attorneys for Plaintiffs 744 Horizon Court, Suite 300 Grand Junction, CO 81506 Telephone: (970) 241-5500 Fax: (970) 243-7738 E-mail: dwmk@dwmk.com Attorney Reg. #: 24630	□ COURT USE ONLY □ Case Number: 06 CV 317 Courtroom:

AFFIDAVIT OF MARY ELLEN DENOMY

STATE OF COLORADO)
) SS
COUNTY OF GARFIELD)

I, MARY ELLEN DENOMY ("Affiant") being of lawful age and being first duly sworn, upon oath, do state and affirm as follows:

BACKGROUND

I, Mary Ellen Denomy, being first duly sworn, state from my personal knowledge as follows:

1. I am over the age of eighteen years and otherwise competent to make this affidavit and am not a party to this action.

2. I am a Certified Public Accountant with an MBA and a specialty in oil and gas accounting. For the last twenty years, most of my time has been spent on royalty review and verification, royalty taxation review, and royalty audits for numerous clients encompassing numerous oil and oil and gas companies governmental agencies across the United States.

3. I was accepted as an expert for the Settlement Class, in *Lindauer v. Williams Production RMT Company,* Case Number 06 CV 317. I have participated in this case, during the time of discovery, settlement, trial, and subsequent review of the accounting under the Settlement Agreement, and in the prior enforcement action filed in this matter.

4. I have reviewed the *Lindauer* Settlement Agreement ("Settlement"). The Settlement Class Members include TEP royalty owners in Garfield County, Colorado, with certain exclusions and opt outs.

5. Since the date of the approval of the Settlement, March 20, 2009, Settlement Class Members have received royalty payments form Williams Production RMT Company and Williams Production RMT LLC (referred to collectively as "Williams"), WPX Energy Rocky Mountain, LLC ("WPX"), Terra Energy Partners, LLC ("Terra") and TEP Rocky Mountain, LLC ("TEP").

6. I am advised that Williams, WPX and TEP constitute a single entity which changed names over time. To distinguish between the periods this entity has operated under its various names, I will sometimes refer to the names it used during the applicable period.

7. For the production months of October 2015, the date Terra acquired WPX through production month June 2016, royalty payments continued to be made to the Settlement Class Members under the name WPX. Beginning with the production month July 2016 royalty payments were made to the Settlement Class Members under the entity's new name TEP.

Section 4.4 of the Settlement

8. Section 4.4 of the Settlement provides in the pertinent part regarding Natural Gas Liquids ("NGLs"):

> With respect to all Royalty Instruments, Williams will account for the value of the NGLs extracted form the gas (using the methodology described in paragraph 2.3). With respect to all

> Royalty Instruments except those in Categories 8, 9, 11, 12 and 13 on Exhibit A, in accounting for the value of the NGLs extracted from the gas, Williams shall be permitted to deduct 50% of the amount allowed as a processing deduction under the regulations of the Mineral Management Service (the processing deduction will be limited to those costs incurred within a processing plant and will not exceed 1/3 of the value of the NGLs, since the MMS limit on processing costs is 2/3 of the value of the NGLs), but under no circumstances shall Williams be entitled to take any other Deduction when making such calculation.

9. Section 4.4 sets out three limitations on NGL processing costs, which can be deducted from royalty paid to the Settlement Class Members. First, deductible processing costs cannot exceed 50% of the amount allowed as processing deduction under the regulations of the Minerals Management Service (now known as the Office of Natural Resources Revenue ("ONRR"). Second, processing deductions are limited to costs incurred within a processing plant. Third, the limit of the processing deductions cannot exceed 1/3rd of the value of the NGLs.

10. In June 2019 or soon thereafter, TEP deducted additional processing costs from the Settlement Class Members over and above the processing costs originally deducted from the original royalty payments for every month for the period January 2015 through December 2015.

11. The value of NGLs are determined at the tailgate of the plant. (MMS, United States Department of the Interior, Oil and Gas Payor Handbook, Vol. III, Product Valuation, § 7.1.1 pg 7-2) (Ethane, propane, butane and natural gas liquids are all NGLs and are valued as one product (NGLs) at the plant). (Attachment 1).

12. Calculation of value of NGLs: I have calculated the value of the NGLs at the tailgate of the processing plant by adding up the NGL product values reported on the remittance statements of Settlement Class Members and subtracting the cumulative NGL costs for transportation, fuel and fractionation reported on the applicable remittance statement. The costs of NGL transportation, fuel and fractionation are incurred downstream from the processing plant. After accumulating the totals for each of the above items for the months January 2015 through December 2015 (the months adjusted by TEP's June, 2019 processing cost adjustments), I then divided each of the totals by the total number of gallons reported as sold from the remittance statements. The per gallon gross value less the per gallon costs calculates the netback value of the NGLs at the tailgate of the processing plant.

13. After calculating the netback value of the NGLs at the tailgate of the processing plant, I then calculated the total cost per gallon of the processing

costs charged at the plant. This was done by adding up all the NGL processing costs that were deducted from the original royalty payment plus the additional processing costs deducted in June 2019. The total of the two processing charges was then divided by the total gallons to determine the processing cost per gallon.

14. The last step in determining compliance with the third limitation was to divide the processing cost per gallon by the netback price per gallon. I then determined the percentage of the processing cost compared to the netback price per gallon. I then applied the 1/3rd limitation to the netback price paid to the Settlement Class Members and compared it the actual processing cost deducted from the royalties. I completed this process for several Settlement Class Members that encompass various categories from the original *Lindauer Class Settlement.* These additional June 2019 processing cost deductions were taken by TEP from numerous Lindauer Class Members.

15. After reviewing over 230 wells of the Potter Jolley Ranches Energy CO., LLC's wells that cover various areas, I have found that, with rare exceptions, almost every month for every well has been overcharged for the processing costs. Some of the months and wells were charged exorbitant processing charges that exceeded the netback income by more than 1000%, with some of the costs per gallon being charged up to $44.00 per gallon. These new and exorbitant processing charges that have now been deducted by TEP have caused many of the Class Settlement Members to not be able to receive any income for many months this year. TEP has kept all of the royalty income of many of the Settlement Class Members to cover these new processing costs, which are far in excess of the deductions allowed costs per the *Lindauer Settlement Agreement.* I have attached the spreadsheet of the calculations for the wells owned by Potter Jolley Ranches as part of this Affidavit as Attachment 2.

16. The overcharged deductions total over $10,000.00 to Potter Jolley Ranches alone. I am unable to determine the cumulative amount of damages due the Settlement Class Members as a result of the breach of the *Lindauer Settlement Agreement, Section 4.4*, as I do not have access to all of the parties that are affected by this breach, but it is apparent that the damages are significant.

17. TEP has exclusive access to and control over the data, information, calculations performed and allocations necessary to properly calculate and pay royalty to the Lindauer Settlement Class Members in accordance with the terms of the Lindauer Settlement Agreement.

18. TEP has the means and ability to provide the Court with an accounting showing the differences between the actual adjusted royalty payments and what is required by Section 4 of the Lindauer Settlement Agreement and to render an accounting to the court.

DATED this ___ day of February 2020.

_____
Mary Ellen Denomy

VERIFICATION

Subscribed and sworn to before me this ____ day of February 2020, by Mary Ellen Denomy.

WITNESS MY HAND AND OFFICIAL SEAL.
My commission expires:

_____
Notary Public