

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VALERO ENERGY CORPORATION and
VALERO REFINING AND MARKETING
COMPANY,

Plaintiffs,

vs.

SETH I. DAVENPORT and LAW OFFICES
OF SETH I. DAVENPORT,

Defendants.

CIVIL ACTION NO.

**COMPLAINT FOR
DECLARATORY JUDGMENT
AND BREACH OF CONTRACT**

Valero Energy Corporation and Valero Refining and Marketing Company (together, “Valero”), through their attorneys, hereby allege against Seth I. Davenport and the Law Offices of Seth I. Davenport (together, “Defendants”), as follows:

THE PARTIES

1. Valero Energy Corporation (“VEC”) is a Delaware corporation with a principal place of business at One Valero Way, San Antonio, Texas.
2. Valero Refining and Marketing Company (“VRMC”) is a Delaware corporation with a principal place of business at One Valero Way, San Antonio, Texas.
3. The Law Offices of Seth I. Davenport is a New Jersey limited liability company and law firm with its principal place of business at 219 Changebridge Road, Montville, New Jersey.
4. Seth I. Davenport is a New Jersey resident, the sole member, and upon information and belief, the only lawyer associated with the Law Offices of the Seth I. Davenport.

5. Valero brings this action to challenge the legal fees claimed by Defendants in violation of a written fee agreement in connection with Defendants' representation of Valero in a property tax litigation.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship among the parties and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$75,000.00.

7. Venue properly lies in this District pursuant to 28 U.S.C. § 1391(b)(1)-(2) because Defendants reside within the District of New Jersey and a substantial part of the events giving rise to the within claim occurred in New Jersey.

FACTUAL ALLEGATIONS

A. Defendants' Representation of Valero In the Underlying Tax Appeal Litigation

8. Through subsidiaries, Valero is engaged in the petroleum refining business in the United States and abroad. VEC is the publicly traded ultimate parent and VRMC is a wholly owned subsidiary of VEC. Up until December 2010, Valero were parent companies of Valero Refining Company-New Jersey, ("VRC-NJ"). In September 1998, VRC-NJ purchased from Mobil Oil Corporation a refinery and related assets situated in the Township of Greenwich, County of Gloucester, State of New Jersey (the "Paulsboro Refinery").

9. Beginning in 1998, Defendants (or their predecessors) were retained to file and prosecute certain ad valorem tax appeals in connection with the Paulsboro Refinery. The initial billing arrangement was that Defendants would charge for their services on an hourly basis.

10. Between 1998 and 2010, Defendants or their predecessors filed tax appeals against the Township of Greenwich (the "Township") contesting the assessment of taxes on

the Paulsboro Refinery for each of the tax years between 1998-2010 (collectively, the “Tax Appeals”). The 1998 Tax Appeals were filed by Defendants in the name of Mobil Oil Corporation, but under the 1998 purchase agreement, VRC-NJ owned a partial interest in them and was jointly represented by the Defendants. The 1999-2010 Tax Appeals were brought by VRC-NJ. In each year, the VRC-NJ (or Mobil for 1998) paid the disputed taxes and sued for refund.

11. Defendants’ representation throughout the history of the Tax Appeals litigation included: filing complaints with the New Jersey Tax Court contesting the assessments of the Paulsboro Refinery, advising Valero on strategy and tactics, pursuing settlement discussions, engaging in discovery, appearing at sporadic case management conferences, and conducting depositions.

12. Although Defendants jointly represented Valero and Mobil in the 1998 Tax Appeal, Defendants had separate fee arrangements with Valero and Mobil.

13. Between 1998 and 2004, Defendants charged Valero and were paid \$1,131,528 in attorneys’ fees for work in the Tax Appeals litigation. Despite this expense, the then pending Tax Appeals appeared no closer to resolution or trial than they had at the beginning of the appeal process. While this delay appeared to be principally the result of backlog issues with the Tax Court, the complexity of the Tax Appeals, and the political unwillingness of the Township to engage in realistic settlement discussions, this did not change the fact that prosecution of the Tax Appeals seemingly involved a steady stream of cost, endless delay, and no near or medium term prospect of resolution. Defendants voluntarily agreed to address this mounting concern by deferring further billings pending trial. Defendants were not left penniless, however. While monthly billings ceased in early 2004, in 2010-11 Valero paid \$273,415 of Plaintiffs’ additional bills for the Paulsboro Refinery appeal. More importantly, Defendants

were engaged by Valero in a series of tax engagements for other assets. Ultimately, Defendants collected over \$5 million in legal fees from Valero in matters unrelated to the Tax Appeals.

14. Years elapsed. In December 2010, Valero sold the shares of VRC-NJ to PBF Energy. As part of the sale agreement, Valero retained all rights to act for VRC-NJ, the right to control the VRC-NJ Tax Appeals, and for purposes of the amounts involved in this case, the right to any refunds from the Tax Appeals.

B. The Conversion of Defendants' Billing Arrangement to a Contingency Basis

15. In mid-2013, nearly 15 years after Defendants' representation began, and about two and a half years after Valero had divested itself from the Paulsboro Refinery, Defendants approached Valero about converting the hourly arrangement to a contingent fee agreement based on future refunds from the Tax Appeals. The Defendants' initial proposal would forgive the Defendants' deferred hourly billings in exchange for a 38% fee, but the proposal made no allowance for deduction of expense incurred in the prosecution of the Tax Appeals.

16. Ultimately, a written contingency fee agreement on Defendants' letterhead dated October 3, 2013 was prepared by Defendants and executed by VEC in Texas, in October 2013 (the "Fee Agreement").

17. Under the Fee Agreement, the parties agreed that Defendants would be compensated on a 35% contingency for refunds from the Tax Appeals. Unlike the first draft, the Fee Agreement expressly provided that Defendants' contingency fee would be paid on refunds "after deduction therefrom an amount equal to the expense Valero incurred in litigating this matter." In accordance with the express terms of the Fee Agreement, Defendants agreed that "upon the execution of this agreement and subject to the terms and conditions hereof," Defendants agreed to "forgive any and all fees owed to [Defendants] by [Valero] that have

been accrued,” claimed to be \$1.2 million. This was in addition to the \$1,404,943 that had already been paid by Valero to Defendants up to that point during the Tax Appeals.

18. Under the express requirements of the New Jersey Rules of Professional Conduct, Defendants are contractually and ethically obligated to the terms of the fee agreement, as written. Defendants are not entitled to raise proposals that may have been previously discussed, but were not reduced to a written agreement.

C. The Tax Appeals Litigation Continues Until Valero Takes the Initiative and Achieves a Settlement

19. Years elapsed. In 2017, Defendants presented a resolution plan for the litigation of the Tax Appeals. This plan envisioned further expenditure on experts and consultants to hopefully drive the cases to trial. Valero, not Defendants, was responsible for paying all those expert and consulting fees. While Valero had concerns that, after nearly 20 years of fruitless litigation, further investment in the Tax Appeals may not be prudent, Valero continued to proceed with hopes that a settlement window might open.

20. In 2018, Valero conducted a further review of the case with Defendants and assessed the range and probabilities of various outcome scenarios. While the Tax Appeals had obvious merit, there were significant offsetting claims by the Township. More importantly, there were real issues with how the Township could be induced to meaningfully negotiate short of a full, lengthy trial, especially for any settlement figure that required significant bonding or might be tantamount to municipal bankruptcy. Valero authorized additional substantial expenditure in connection with certain real estate experts on the recommendation of Defendants. It was believed that this work could help force a more realistic assessment by the Township as to how its defensive position was weaker than it had believed.

21. In early 2019, there were discussions among counsel concerning a possible structured mediation to resolve the case. In May 2019, the Township, directly approached

Valero in an effort to arrange the mediation. Part of the proposal involved negotiations without outside counsel, on the basis that both Defendants and their counterparts for the Township had a long, difficult relationship and that their participation would be an obstacle to a full and frank settlement dialogue.

22. The mediation ultimately did not proceed as proposed for two reasons. First, Valero recognized that any settlement discussions that did not involve Mobil, now ExxonMobil, were likely to be unproductive. The Valero/Mobil shared claim for the 1998 Tax Appeal had significant and distinct value from the 1999-2010 Tax Appeals. ExxonMobil was also represented by Defendants. Given the limited financial resources of the Township, ExxonMobil's participation and an agreed apportionment between the Mobil and Valero cases would be essential in reaching an acceptable agreement that actually brought closure.

23. Second, mediation proved unnecessary. After consulting in detail with the Defendants, Valero met with the Township's authorized representative and had a full and frank discussion of the case. Valero advised ExxonMobil of the discussions. Eventually, the Township's representative made a substantial, fully authorized offer to Valero and ExxonMobil. While the amount was insufficient, it was the first time in two decades that a meaningful offer had ever emerged from the Township. Both Valero and ExxonMobil assessed the settlement dynamics, and separately discussed the cases with Defendants. Following additional meetings in Texas, a gross settlement of \$15 million for all Tax Appeals was agreed with the Township, and ExxonMobil and Valero came to an agreed split of the proceeds. The Township's payment was barely within the limits of the Township's bond financing ability, and, in the judgment of both Valero and ExxonMobil, the highest the Township could be induced to pay, short of further substantial cost and unknown years of further litigation.

24. In the run-up to settlement, Valero consulted heavily with Defendants, taking account of Defendants' views, but also recognizing that *twenty years* of non-progress needed to come to an end. In particular, Valero faced a significant amount of additional cost and time to trial, and after trial, possibly several additional years until judgment. (In fact, Defendants even advised Valero of a much less complex New Jersey Tax Court tax appeal where the judgment issued *ten years* after the case had been tried.) While Valero certainly felt the Tax Appeals had merit, there was no guarantee that the judgment from a lengthy, complex trial would meaningfully exceed what could be obtained in settlement. And any judgment in excess of the Township's political and economic ability to pay opened up prospects of further delay and potential municipal bankruptcy. Through Valero's negotiations, the settlement was reached and generated a total tax refund of \$10,758,904 (the "Tax Settlement") owed to Valero.

25. Defendants were fully aware that this Tax Settlement had been reached. In November 2019, Defendants prepared and executed the necessary stipulations and expeditiously procured final judgments for ExxonMobil and Valero from the Tax Court. Local bond financing to fund the Tax Settlement was expected in March or April of 2020, and Defendants kept Valero and ExxonMobil apprised of the Township's progress.

D. The Fee Dispute Between Valero and Defendants

26. As the bonding process progressed through January 2020, Valero collected historic expense data and provided a calculation of the fee owed to Defendants per the terms of the October 3, 2013 Fee Agreement. Defendants' first reaction was to deny that the Fee Agreement even provided for deduction of expense before calculation of the 35% contingency fee.

27. Confronted with the plain text of the Fee Agreement they drafted, Defendants then undertook to challenge the substantial expenses incurred by Valero in litigating the Tax

Appeals. Defendants disputed the \$1.4 million that Valero had previously paid to Defendants, as well as other documented amounts Valero incurred in litigating the Tax Appeals. Even including these incorrect adjustments, Defendants acknowledged their fee would be no more than \$3.3 million.

28. But then, Defendants began making fee claims bearing no relationship to the Agreement. These demands have ranged variously from \$10.5 million to \$4.2 million to \$4.6 million, all based on things nowhere to be found in the Agreement.

29. Faced with the prospect of the Tax Settlement funds being held in Defendants' trust account, Valero agreed, with a complete reservation of rights, to compensate Defendants pursuant to the terms of the Fee Agreement.

30. Specifically, after deducting expenses of \$3,451,447 from the Tax Settlement amount of \$10,758,904, Valero honored the terms of the Fee Agreement and paid Defendants 35 percent of the remaining \$7,307,458 or \$2,557,610. This contingency payment was in addition to the fees previously paid by Valero to Defendants totaling \$1,404,943. Thus, Valero has paid nearly \$4 million (i.e., \$3,962,553), or approximately 54% of the net Tax Settlement, to Defendants.

31. In accordance with the Fee Agreement, Defendants are not entitled to any payments above which they have already been paid, to wit, and at most, \$3,962,553.

32. Despite the clear terms of the agreement, Defendants continue to demand entitlement to an additional amount in excess of \$1.1 million.

33. As part of its good faith dealing with Defendants, and having already paid nearly \$4 million to Defendants, Valero agreed to escrow \$1,102,000 of the Tax Settlement with the undersigned to be held in trust pending resolution of the within action.

34. Valero respectfully files the within action and seeks, *inter alia*, a declaratory judgment that Defendants are not entitled to any additional fees, and that they are only entitled to what they have already been paid pursuant to the Fee Agreement, namely, at most \$3,962,553, and that the amounts held in escrow may be unconditionally released to Valero.

COUNT ONE
(Declaratory Relief Against Defendants)

35. Valero repeats and incorporates by reference the allegations set forth above as if set forth at length herein.

36. In accordance with 28 U.S.C. §§ 2201, 2202, and N.J.S.A. 2A:16-51 et seq., there is a present and actual dispute and justiciable controversy between Valero and Defendants regarding the extent to which Defendants would be compensated pursuant to the parties' Fee Agreement.

37. Valero has paid Defendants a total of \$3,962,553.

38. Valero does not have access to the additional funds from the Tax Settlement, which currently are being held in escrow, because Defendants continue to assert that they are entitled to additional compensation.

39. Valero is entitled to a declaration that it has no obligation to pay Defendants more than what Valero has already paid to Defendants for their services.

40. Valero is further entitled to a declaration that it may take the remaining funds from the Tax Settlement that are currently being held in escrow.

41. Finally, in the event that the Fee Agreement is determined to be unreasonable, Valero is entitled to a declaration that Defendants are required to return to Valero certain or all of the fees previously paid.

COUNT TWO
(Breach of Contract)

42. Valero repeats and incorporates by reference the allegations set forth above as if set forth at length herein.

43. Valero entered into a Fee Agreement contract with Defendants under which the parties agreed that, among other things, Valero would compensate Defendants on a contingency fee basis, rather than an hourly fee basis.

44. As part of this contract, the parties expressly agreed that Defendants would forgive, and that Valero would not have to pay Defendants for, any and all hourly fees that Defendants had purportedly accrued up until the date of the parties' contract, such that Defendants would be compensated entirely on a contingency fee basis.

45. Valero performed any and all of its obligations under the contract, including making all required payments to Defendants in accordance with the contract.

46. Defendants breached their express and implied contractual obligations to Valero by demanding that they be paid more than the parties agreed.

47. As a direct and proximate result of Defendants' breach of the contract, Valero has and will continue to sustain significant and substantial damages.

RELIEF REQUESTED

WHEREFORE, Valero requests judgment against Defendants and that Valero be awarded the following relief:

- a. A judgment for breach of contract awarding Valero incidental and consequential damages, loss of use damages, compensatory damages, pre-judgment interest, reasonable attorneys' fees, disbursements and court costs, and such further relief as the court deems proper and just;

- b. A declaratory judgment that Valero has no obligation to pay Defendants more than the \$3,962,553 that Valero has already paid to Defendants for their services;
- c. A declaratory judgment that Valero may take the remaining funds from the Tax Settlement totaling \$1,102,000 and that are currently being held in escrow; and/or, an entitlement to a refund of all or certain of the fees already paid to Defendants if the Court determines that the Fee Agreement is unreasonable;
- d. An award of attorney's fees and costs incurred in connection with Valero's dispute with the Defendants and the prosecution of this action; and
- e. For other such relief as the Court may deem just and proper.

Dated: Basking Ridge, New Jersey
May 18, 2020

Kennedys CMK LLP

/s/ Christopher R. Carroll

Christopher R. Carroll, Esq.

Anand Dash, Esq.

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Attorneys for Plaintiffs

Valero Energy Corporation and

Valero Refining and Marketing Company

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE