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RIVER OAKS MARINE, INC., Plaintiff, v. THE TOWN OF GRAND ISLAND, TOWN BOARD OF THE TOWN OF GRAND ISLAND, MARTIN PRAST, Individually and as Supervisor of the Town of Grand Island, and MARION FABIANO, Individually and as Councilwoman and Acting Supervisor of the Town of Grand Island, Defendants.

89-CV-1016S

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

1992 U.S. Dist. LEXIS 18974

November 24, 1992, Decided
November 24, 1992, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff company filed suit against defendants, town, town board, and other officials, under 42 U.S.C.S. § 1983 for violation of its rights under U.S. Const. art. I, § 8, cl. 3 as well as under U.S. Const. amends. V and XIV arising from defendants' imposition of a moratorium banning removal of any soil substance from the town.

OVERVIEW: Following trial, the jury returned a special verdict finding that the Grand Island Natural Resources Moratorium, which prohibited the removal of soil substances, discriminated against interstate commerce and deprived the company of the economically viable use of its clay, thereby constituting a taking without just compensation. The jury awarded damages in the amount of $ 821,000.00. The company submitted a proposed judgment that included prejudgment interest on the award of damages in the amount of $ 298,919.43. The proposed award amount was based on interest calculated at the prime rate as established by 26 U.S.C.S. § 6621. Defendants took exception to the proposed judgment on the ground that it awarded prejudgment interest that defendants asserted was within the sole province of the jury in federal question cases and was now waived. The court awarded the company the prejudgment interest it requested. The court found that prejudgment interest was not included in the amount determined by the jury and that an award of prejudgment interest was necessary to compensate the company for the full economic worth of its property taken in violation of U.S. Const. amends. V and XIV.

OUTCOME: The court awarded the company the prejudgment interest it requested.

CORE TERMS: prejudgment interest, prime rate, adjusted, compounded, awarding, moratorium, compensate, general rule, rate of interest, annually, waived, owed, jury verdict, proposed judgment, federal question, citations omitted, calculation, inequitable, jury instructions, jury charges, compound interest, unconstitutional taking, causes of action, post-judgment, excavation, awardable, remanding, presumed, wronged, reply

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Torts > Damages > Interest > General Overview

[HN1] Prejudgment interest may be awarded when it is fair, equitable and necessary to compensate the wronged party fully.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Real Property Law > Inverse Condemnation > General Overview
Torts > Damages > General Overview
[HN2] Where the United States condemns and takes possession of lands before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount to be added.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Torts > Damages > Interest > General Overview
[HN3] Awards of prejudgment interest have been granted in federal question cases even where the laws are silent on the issue.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Torts > Damages > Interest > General Overview
[HN4] In addition to compensating parties, awards of prejudgment interest are governed by fundamental considerations of fairness. As such, the awarding of interest is not punitive but compensatory.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Torts > Damages > Interest > General Overview
[HN5] The Court of Appeals for the Second Circuit recently reviewed the criteria for awarding prejudgment interest. The analysis indicated that the Second Circuit interprets the United States Supreme Court decisions as repeatedly allowing awards of prejudgment interest as permissible under federal law. In determining the appropriateness of such an award, the district court should consider four factors: (i) the need to fully compensate the wronged party for the actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Torts > Damages > Interest > General Overview
[HN6] Prejudgment interest awards are at the sound discretion of the district court.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Torts > Damages > Interest > General Overview
[HN7] The Second Circuit has repeatedly acknowledged the district court's authority to award prejudgment interest in its sound discretion even in the absence of a statutory directive.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Torts > Damages > Interest > General Overview
[HN8] The decision to award prejudgment interest is within the discretion of the trial judge.

Torts > Damages > Interest > General Overview
[HN9] The rate of interest in federal causes of action is very much at the discretion of the district court.

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Attorney for Defendants: Theodore J. Burns, Hurwitz & Fine, 1400 Liberty Building, Buffalo, New York 14202.

JUDGES: SKRETNY

OPINION BY: WILLIAM M. SKRETNY

OPINION

DECISION AND ORDER

Plaintiff River Oaks Marine ("plaintiff") sued defendants Town of Grand Island, Town Board of the Town of Grand Island, Martin Prast, Individually and as Supervisor of the Town of Grand Island, and Marion Fabiano, Individually and as Councilwoman and Acting Supervisor of the Town of Grand Island ("defendants") under 42 U.S.C. § 1983 for violation of its rights under Article I section 8, clause 3 (the "Commerce Clause") as well as the Fifth and Fourteenth Amendments of the United States Constitution.

On June 19, 1992, following a two-week trial, the jury returned a special verdict finding that the Grand Island Natural Resources Moratorium, which prohibited the removal of soil substances from Grand Island, discriminated against interstate commerce and deprived plaintiff of the economically viable use of its clay, thereby constituting a taking without just compensation. **[*2]** Accordingly, the jury awarded damages to plaintiff in the amount of $ 821,000.00.

Following this Court's direction, plaintiff submitted a proposed judgment which included prejudgment interest on the award of damages accruing from June 19, 1989, the date excavation began, until July 22, 1992, the date of calculation nine days prior to plaintiff's proposed judgment, in the amount of $ 298,919.43, and from July 23, 1992 until the date judgment is entered at $ 233.84 per day. The proposed award amount is based on interest calculated at the prime rate as established by 26 U.S.C. § 6621, compounded annually. Plaintiff contends that such an award is necessary to make it whole and properly compensated.

Defendants take exception to plaintiff's proposed judgment on the ground that it awards prejudgment interest which defendants assert is within the sole province of the jury in federal question cases. Defendants further argue that plaintiff raised the issue before the jury which considered and rejected it or, alternatively, if plaintiff did not raise the issue prior to the jury verdict, it is now waived. In the event this Court awards prejudgment interest, defendants **[*3]** maintain that such interest would be best determined by the 52 week Treasury Bill rate as is used for the calculating of post-judgment interest. *See* 28 U.S.C. § 1961. Defendants further maintain that if this Court awards interest, it should be simple and not compound interest.

In support of its proposed judgment, plaintiff submits a Memorandum of Law in Support of its Request for Prejudgment Interest dated July 31, 1992 ("pl. memo"), and a Reply Memorandum dated August 25, 1992 ("pl.reply").

On August 20, 1992, defendants filed a Memorandum in Opposition to Plaintiff's Request for Prejudgment Interest ("def. memo").

In reaching its decision, this Court considered the above stated submissions and the assertions of the parties at oral argument on September 4, 1992.

For the reasons articulated below, plaintiff's request for compounded prejudgment interest at the prime rate is granted.

FACTS

This Court presumes familiarity of the facts by the parties and will reiterate only those facts that are pertinent to this Decision and Order.

Pursuant to Local Rule 13(d) and this Court's instructions, the parties submitted proposed jury charges. Plaintiff **[*4]**

included in its request a charge instructing the jury that they could include prejudgment interest in their award if they found such an inclusion appropriate. (Plaintiff's Proposed Jury Instruction, No. 23C.) At the final charge conference, which lasted several hours, both parties agreed to reserve the issue of prejudgment interest for resolution following a jury verdict. Accordingly, the request for prejudgment interest was not included in the charge to the jury [1] or on the special verdict form.

1 However, the jury was charged concerning plaintiff's duty to mitigate damages.

During summation, plaintiff's attorney requested that the jury award interest owed by plaintiff to Anastasi Trucking and Paving Company ("Anastasi"). The interest amounted to 1.5 percent on the unpaid balance of approximately 1.5 million dollars owed to Anastasi for their role in removing and storing plaintiff's clay. (Summation Transcript, *River Oaks Marine v. Town of Grand Island, et al.*, June 17, 1992, at 29).

On June 19, 1992, the **[*5]** jury returned a verdict finding that the defendants' imposition of a moratorium banning removal of any soil substances from Grand Island was discriminatory against interstate commerce in violation of the Commerce Clause and was an unconstitutional taking without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

DISCUSSION

The question before this Court is whether plaintiff is entitled to prejudgment interest and if so, at what rate should said interest be calculated.

I. *Prejudgment Interest*

With regard to the awarding of prejudgment interest, there are three tiers of analysis in the instant case: Is prejudgment interest available in § 1983 causes of action and, if so, does plaintiff's prior knowledge of the existence of the moratorium preclude awarding prejudgment interest? Can the award be made by a district court judge rather than a jury? And does the timing of plaintiff's request disqualify its claim to such an award? Each tier will be discussed in turn.

A. *Availability of Prejudgment Interest*

Plaintiff relies upon the recent Second Circuit decision, *Wickham Contracting Co. v. Local* **[*6]** *Union No. 3, IBEW*, which held that "notwithstanding the statute's silence on the subject of interest," [HN1] prejudgment interest may be awarded "when [it is] fair, equitable and necessary to compensate the wronged party fully." 955 F.2d 831, 835 (2d Cir.), *cert. denied*, 113 S. Ct. 394, 121 L. Ed. 2d 302, 61 U.S.L.W. 3302 (U.S. Oct. 19, 1992) (No. 91-1740). Plaintiff contends that such an award is necessary to properly compensate it for the loss of the use of its money resulting from the unconstitutional deprivation.

Defendants contend that plaintiff's acts before the commencement of the initial action make the award of prejudgment interest inequitable. Defendants argue that prejudgment interest should be denied because plaintiff developed its plans with knowledge of the existence of the moratorium and began excavation of the marina two months prior to the commencement of an action against defendants.

Although defendants do not dispute the availability of prejudgment interest as an award *per se*, the awarding of prejudgment interest in causes of action brought under 42 U.S.C. § 1983 has not been addressed by the Second Circuit, and **[*7]** is worthy of some discussion here as a case of first impression in this district.

There is sufficient case law supporting the availability of prejudgment interest awards in other federal question causes

of action. Specifically in takings cases, the law is long settled that just compensation includes prejudgment interest. *Jacobs v. United States*, 290 U.S. 13, 15-17, 54 S. Ct. 26, 27-28, 78 L.Ed. 142 (1933).

[HN2] Where the United States condemns and takes possession of lands before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount to be added.

Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306, 43 S. Ct. 354, 356, 67 L.Ed. 664 (1923).

Moreover, [HN3] awards of prejudgment interest have been granted in federal question cases even where the laws are silent on the issue. *See, e.g., id.; see also, Rodgers v. United States*, 332 U.S. 371, 373, 68 S. Ct. 5, 7, 92 L.Ed. 3 (1947) **[*8]** ("The failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest.") (citing *Billings v. United States*, 232 U.S. 261, 284-88, 34 S. Ct. 421, 425-27, 58 L.Ed. 596 (1914)).

[HN4] In addition to compensating parties, "awards of prejudgment interest are governed by fundamental considerations of fairness." *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77, 87 (2d Cir. 1980) (citing *Blau v. Lehman*, 368 U.S. 403, 414, 82 S. Ct. 451, 457, 7 L. Ed. 2d 403 (1962); *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969), *cert. denied sub nom., Muscat v. Norte & Co.*, 397 U.S. 989, 90 S. Ct. 1121, 25 L. Ed. 2d 396 (1970)). As such, the awarding of interest is not punitive but compensatory. *See Lodges 743 and 746, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corp.*, 534 F.2d 422, 447 (2d Cir. 1975), **[*9]** *cert. denied*, 429 U.S. 825, 97 S. Ct. 79, 50 L. Ed. 2d 87 (1976).

[HN5] The Court of Appeals for the Second Circuit recently reviewed the criteria for awarding prejudgment interest. *Wickham*, 955 F.2d 831. The analysis indicated that the Second Circuit interprets the United States Supreme Court decisions as repeatedly allowing awards of prejudgment interest as permissible under federal law. In determining the appropriateness of such an award, the district court should consider four factors: "(i) the need to fully compensate the wronged party for the actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Id.*, at 833 (citations omitted).

The facts of the present case square well with the criteria articulated in *Wickham, supra.* The jury determined that damages were suffered by the plaintiff and as plaintiff was without the use of its property for three years, it would therefore **[*10]** be inequitable to ignore the economic time-value of the jury's award. Although 42 U.S.C. § 1983 is silent on the issue of prejudgment interest, the underlying purpose of § 1983 is to compensate for deprivations of constitutional rights. In the instant case, plaintiff is entitled to "just compensation" under the Fifth Amendment for the unconstitutional taking of its property. This Court is of the opinion that for compensation to be just, the awarding of prejudgment interest is an available and appropriate consideration.

Further, district courts sitting in New York and elsewhere have addressed the issue and found that prejudgment interest is appropriate in § 1983 cases. *See Orshan v. Macchiarola*, 105 F.R.D. 534, 541 (E.D.N.Y. 1985); *Golden State Transit Corp. v. City of Los Angeles*, 773 F. Supp. 204, 211-12 (C.D. Cal. 1991); *Gorelangton v. City of Reno*, 638 F. Supp. 1426, 1433 (D.Nev 1986); *DeLaCruz v. Pruitt*, 590 F. Supp. 1296, 1309 (N.D. Ind. 1984). The First Circuit has also held prejudgment interest appropriate **[*11]** in § 1983 actions. *See Hall v. Ochs*, 817 F.2d 920, 926 (1st Cir. 1987); *Furtado v. Bishop*, 604 F.2d 80, 97 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S. Ct. 710, 62 L.Ed. 2d 672 (1980).

In accord with the foregoing discussion, this Court holds that prejudgment interest is appropriate in § 1983 actions such as the instant case if the award is fair, equitable and necessary to fully compensate the wronged party.

Next, this Court must determine whether plaintiff's actions prior to excavation render plaintiff's recovery of

prejudgment interest inequitable. Throughout the litigation defendants have argued that plaintiff's knowledge of the moratorium should bar all or part of its recovery. However, defendants' position is inapposite to the jury verdict because the jury, having the benefit of all proof including plaintiff's prior knowledge of the moratorium, concluded in its special verdict that the moratorium effected a taking without just compensation. Moreover, the jury was specifically instructed that plaintiff had a duty to mitigate damages. Therefore, it must **[*12]** be presumed that the jury considered the plaintiff's conduct and awarded damages accordingly. For this Court now to refuse to award prejudgment interest based on plaintiff's prior knowledge of the moratorium would be to undercut the jury determination that plaintiff's conduct was not preclusive to compensation.

Based on the foregoing, this Court finds that prejudgment interest was not included in the amount determined by the jury and also finds that an award of prejudgment interest is necessary to compensate plaintiff for the full economic worth of its property taken in violation of the Fifth and Fourteenth Amendments to the Constitution.

B. *Awardable by District Court Judges*

Next, defendants contend that in federal question cases, considerations of prejudgment interest must be reserved for the jury and rely upon the Second Circuit cases of *Newburgh Land and Dock Co. v. Texas Co.,* 227 F.2d 732 (2d Cir. 1955) (holding that a jury must decide awards of prejudgment interest) and *Hertz v. Graham,* 292 F.2d 443 (2d Cir. 1961), *cert. denied,* 368 U.S. 929, 82 S. Ct. 366, 7 L. Ed. 2d 192 (1962) **[*13]** (following *Newburgh* and remanding the case for the sole purpose of submitting prejudgment interest question to jury). Defendants also cite a number of First Circuit cases wherein the court determined that the award of prejudgment interest in § 1983 actions must be decided by a jury. *Cordero v. de- Jesus Mendez,* 922 F.2d 11 (1st Cir. 1990); *Carey v. Bahama Cruise Lines,* 864 F.2d 201 (1st Cir. 1988); *Robinson v. Watts Detective Agency, Inc.,* 685 F.2d 729, (1st Cir. 1982), *cert. denied,* 459 U.S. 1105, 103 S. Ct. 728, 74 L. Ed. 2d 953 (1983); *Furtado v. Bishop,* 604 F.2d 80 (1st Cir. 1979); *Robinson v. Pocahontas,* 477 F.2d 1048 (1st Cir. 1973).

In support of the contention that district court judges may decide upon the issue of prejudgment interest, plaintiff once again relies on the Second Circuit's decision in *Wickham* 955 F.2d at 834 and its precursors, which hold that such [HN6] awards are at the sound discretion of the **[*14]** district court. *Waterside Ocean Navigation Co. v. International Navigation, Ltd.,* 737 F.2d 150, 153 (2d Cir. 1984); *See also, Machinists,* 534 F.2d at 446. Plaintiff maintains that the First Circuit cases are not binding on this Court and both *Newburgh* and *Hertz* are no longer controlling given the clear disposition of the Second Circuit in *Wickham.*

This Court agrees. While acknowledging the First Circuit's position concerning the method of awarding post-award prejudgment interest, this Court is compelled to follow the weight of the Second Circuit decisions which favor such an award as in the discretion of the district court and awardable by a district court judge.

[HN7] The Second Circuit has "repeatedly" acknowledged the district court's authority to award prejudgment interest in its "sound discretion" even in the absence of a statutory directive. *Waterside,* 737 F.2d at 153 (citations omitted); *E.E.O.C. v. County of Erie,* 751 F.2d 79, 81 (2d Cir. 1984) ("the express statutory provision for the award of prejudgment interest is unnecessary") (citing *Rodgers,* 332 U.S. at 373, 68 S. Ct. at 6; **[*15]** *United Aircraft,* 534 F.2d at 446).

Moreover, although the power of a district court to award interest is discretionary, the Second Circuit has not hesitated to remand cases to the district courts for the addition of interest to jury verdicts. *See Waterside,* 737 F.2d 150 (remanding case for computation of post-award prejudgment interest following district court's denial); *Rolf v. Blyth, Eastman Dillon & Co.,* 637 F.2d 77 (2d Cir. 1980) (acknowledging the district court's discretion but remanding the case for reconsideration of prejudgment interest denial because it was "perplexed" by the lower court's reasoning for denial); *United Aircraft,* 534 F.2d at 447 (allowing district court "to reconsider its position on prejudgment interest" in light of their opinion). On remand, the amount of interest is decided by the district court judge without the presence of a jury. The Second Circuit has also modified district court judgments by the direct addition of prejudgment interest where the

district court failed to do so. *Roth v. Fabrikant Bros.,* 175 F.2d 665, 669 (2nd Cir. 1949). **[*16]**

Finally, defendants' narrow reliance upon *Newburgh* and *Hertz, supra,* is misplaced on two counts. First, both cases are distinguishable in that they apply state law and the discussion of federal law is therefore dictum. Second, it is quite clear that the Second Circuit's opinion has evolved in a different direction from *Newburgh* to the point where a "presumption" in favor of awarding prejudgment interest is at the discretion of the trial judge, as discussed *supra, Waterside,* 737 F.2d at 153; *see also Wickham* 955 F.2d 831.

Therefore, this Court finds that [HN8] the decision to award prejudgment interest is within the discretion of the trial judge.

C. *Did the Jury Consider Prejudgment Interest?*

Defendants allege that because plaintiff presented the issue of interest owed to Anastasi, plaintiff is now precluded from raising the issue of prejudgment interest because "it must be presumed that the jury considered this element of damages and included an amount for prejudgment interest in its verdict." (def.memo, at 9.)

In the alternative, defendants allege that if plaintiff did not raise prejudgment **[*17]** interest before the jury, the issue is now waived. *Robinson,* 685 F.2d at 742; *Plantation Key Developers v. Colonial Mortgage Co.,* 589 F.2d 164, 172 (5th Cir. 1979).

Plaintiff responds that even though the interest owed to Anastasi was submitted to the jury for their consideration, this interest was recoverable as part of the damages actually incurred. *Bass Plating Co. v. Town of Windsor,* 639 F. Supp. 873, 881 (D. Conn. 1986). As such, the interest requested of the jury is alleged to be lost capital, and not to be confused with the prejudgment interest on damages which is presently requested. Plaintiff asserts that inasmuch as the issue of prejudgment interest was not presented to the jury, it cannot be presumed that the jurors considered it in their deliberations. *Stissi v. Interstate and Ocean Transport Co. of Philadelphia,* 590 F. Supp. 1043, 1049 (E.D.N.Y. 1984), *aff'd in pertinent part and remanded on other grounds,* 765 F.2d 370 (2d Cir. 1985). Furthermore, plaintiff contends that the issue was not waived because it was presented **[*18]** to this Court in a proposed jury charge, and both parties decided to address the issue later.

This Court agrees with plaintiff that the interest plaintiff requested during summation in connection with Anastasi is part of the actual damages suffered by plaintiff and prejudgment interest is a separate issue. Thus, this Court finds that plaintiff's claim was not disqualified by the presentation to the jury of interest owed to Anastasi.

Further, plaintiff did include a request for prejudgment interest in its proposed jury instructions. (Plaintiff's Proposed Jury Instruction, No. 23C.) This Court did not include such an instruction in its jury charge or on the special verdict form because *both* parties agreed at the charge conference to reserve the issue for post-trial resolution. This agreement was reached at the jury charge conference where the jury was neither present nor privy to the agreement. Therefore no presumption that the jury included prejudgment interest in its deliberations and calculations of award exists. *See Stissi,* 590 F. Supp. at 1049.

Thus, this Court finds that plaintiff neither raised the issue nor waived its right to request prejudgment **[*19]** interest.

Given this Court's determination that prejudgment interest is available in § 1983 cases, is awardable at the discretion of the district court, and was neither waived nor presented to the jury, this Court deems the award of such interest appropriate with regard to the facts and relative equities of the instant case.

III. *Calculation of the Interest Rate*

Having concluded that awarding prejudgment interest is appropriate, this Court must address the applicable rate of interest to be applied.

Plaintiff requests this Court to apply, as an exercise of its discretion, the adjusted prime rate, as established by 26 U.S.C. § 6621, to the present case. Plaintiff indicates that the prime rate has been implemented by district courts in this circuit and found appropriate by the Second Circuit. *County of Erie,* 751 F.2d at 82; *see also Danna v. New York Telephone Co.,* 755 F. Supp. 615, 617 n.3 (S.D.N.Y. 1991); *Orshan v. Macchiarola,* 629 F. Supp. 1014, 1018 (E.D.N.Y. 1986). Plaintiff maintains that the adjusted prime rate "more closely reflects **[*20]** market conditions and the true value of the investment opportunities River Oaks lost." (pl. reply, at 5.) Plaintiff further endeavors to show that such interest may be compounded annually to reflect economic reality. *Gorenstein Enterprises, Inc. v. Quality Care-USA,* 874 F.2d 431, 437 (7th Cir. 1989); *Golden State,* 773 F. Supp. at 219; *Danna,* 755 F. Supp. at 617.

While acknowledging that the Second Circuit has employed the adjusted prime rate of interest, defendants indicate that various rates have been applied by district and circuit courts in determining prejudgment interest and request that this Court apply the 52 week Treasury Bill rate as deemed appropriate by the Ninth Circuit. [2] *Western Pacific Fisheries, Inc. v. S.S. President Grant,* 730 F.2d 1280, 1288 (9th Cir. 1984); *see also Northrup Corporation v. Triad Intern. Marketing, S.A.,* 842 F.2d 1154 (9th Cir. 1988); *Golden State,* 773 F. Supp. 204. Defendants argue that the Treasury Bill rate is most appropriate considering the relatively stable market **[*21]** during the relatively short time period from the taking until present.

2 Defendants note a laundry list of rates including, "the Ten Year Treasury Bond Rate; the Ten Year Treasury Bond Rate adjusted for illiquidity; the T-Bill Rate, 90 day or 52 weeks; the prime rate; the adjusted prime rate; the IRS adjusted rate; the IRS actual rate; and the consumer price index." (def.memo, at 12)(citations omitted).

Additionally, defendants argue that in the absence of a statute or contract to the contrary, interest is not to be compounded as a "general rule". *Cherokee Nation v. United States,* 270 U.S. 476, 490, 46 S. Ct. 428, 433, 70 L.Ed. 694 (1926); *Stertz v. Gulf Oil Corporation,* 616 F. Supp. 136, 137 (E.D.N.Y. 1985), *vacated and remanded on other grounds,* 783 F.2d 1064 (Temp. Emer. Ct. App. 1986). Defendants also note that in one of the cases cited by plaintiff to support the application of the prime rate **[*22]** award, simple, not compound interest was applied. *Orshan,* 629 F. Supp. at 1018. As such, defendants conclude that the use of the adjusted prime rate compounded annually would leave the plaintiff in a position more favorable than if the event had not taken place.

As both parties correctly agree, [HN9] the rate of interest in federal causes of action is very much at the discretion of the district court. *County of Erie,* 751 F.2d at 82; *E.E.O.C. v. Wooster Brush Company Employees Relief Ass'n,* 727 F.2d 566, 579 (6th Cir. 1984); *Orshan,* 629 F. Supp. at 1017. Furthermore, awards of interest at the prime rate have been found to be reasonable and not an abuse of discretion. *County of Erie,* 751 F.2d at 82; *Danna,* 755 F. Supp. at 618 (citing *General Facilities, Inc. v. National Marine Service,* 664 F.2d 672, 674 (8th Cir. 1981)). The Honorable David G. Larimer, presiding in this district, recently noted that although the Second Circuit has "not expressly endorsed any particular" rate of **[*23]** prejudgment interest, awards made at the prime rate were "not inconsistent with prior case law." *Cefali v. Buffalo Brass Co., Inc.,* 748 F. Supp. 1011, 1025 (W.D.N.Y. 1990) (citing *Katsaros v. Cody,* 744 F.2d 270, 281 (1984), *cert. den. sub nom. Cody v. Donovan,* 469 U.S. 1072, 105 S. Ct. 565, 83 L. Ed. 2d 506 (1984)). [3]

3 The *Cefali* court does note, however, that the Second Circuit's endorsement of the prime rate is not at the exclusion of other rates of interest. 748 F. Supp. at 1025.

This Court acknowledges the use of various rates of interest in other courts, but finds the most appropriate rate, both in deference to the Second Circuit and the facts of the instant case, to be the adjusted prime rate. At the time of defendants' unconstitutional taking, plaintiff's business venture was struggling under the burden of start-up costs. It stands to reason that proceeds from **[*24]** the sale of the clay could have been invested back into the business. Such use of the money is

clearly representative of the risk associated with the expectation of a higher yield than if plaintiff had merely placed the proceeds in a bank or invested them in relatively risk free ventures as those embodied by the Treasury Bill rate.

Further, the adjusted prime rate is a better reflection of the marketplace and more closely akin to full compensation. In short, the adjusted prime rate is simply a "good indicator of the value of money." *County of Erie,* 751 F.2d at 82 (citation omitted). [4]

4 The *County of Erie* court reviewed the rationale behind the implementation of the adjusted prime rate:

The adjusted prime rate, established periodically by the Secretary of the Treasury, is equivalent to the "average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System." 26 U.S.C. § 6621(c). It is the rate to be "paid by taxpayers on tax deficiencies, and by the government on tax overpayments," S.Rep. No. 1357, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Ad. News 7478, 7479, and was established by Congress for use by the Internal Revenue Service in place of the prior flat rate because "it is sensitive to money market conditions and is widely known and accepted as a good indicator of interest rates generally." *Id.* at 7497.

751 F.2d at 82.

[*25] Having determined that interest is to be awarded at the adjusted prime rate, the only remaining issue is whether said interest ought to be compounded.

Within this circuit, there appears to be some discord among the district courts as to whether interest awarded should be simple or compounded. While the Southern District has compounded prejudgment interest awarded at the prime rate, the Eastern District has applied simple interest. *See Danna,* 755 F. Supp. at 617; *c.f. Orshan,* 629 F. Supp. at 1018. Neither court indicated its respective rationale.

Defendants rely on the Eastern District of New York in *Stertz, supra,* for the proposition that, as a "general rule, . . . absent a contract or statute to the contrary, compound interest should not be allowed." 616 F. Supp. at 137. This "general rule" is drawn directly from *Cherokee,* 270 U.S. at 490, 46 S. Ct. at 433.

Defendants do not read the general rule from *Cherokee* in the context of the entire opinion. Compound interest is excluded from the date of judgment **[*26]** (in *Cherokee,* the treaty), however, it does not speak to the issue of prejudgment interest except to indicate that it would be inequitable to assess interest on prejudgment interest after a judgment has been rendered. *Cherokee,* 270 U.S. at 487-96, 46 S. Ct. at 432-36. Indeed, most courts have construed *Cherokee* as applicable to post-judgment interest. *See United States v. Sioux Nation,* 448 U.S. 371, 396, 100 S. Ct. 2716, 2731, 65 L. Ed. 2d 844 (1980); *Devex Corp. v. General Motors Corp.,* 749 F.2d 1020, 1025 (3rd Cir. 1984), *cert. denied sub nom. Technograph, Inc. v. General Motors Corp.,* 474 U.S. 819, 106 S. Ct. 68, 88 L. Ed. 2d 55 (1985); *In re Trucknell,* 94 Bankr. 277, 278 n.1 (Bankr. D.Conn. 1989); *Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp.,* 201 F. Supp. 679, 683 (S.D. Tex. 1960); *United States v. 125.71 Acres,* 54 F. Supp. 193, 194 (W.D. Penn. 1944), *aff'd* 299 F.2d 692 (5th Cir. 1962); **[*27]** *United States v. Northern Pac. Ry. Co,* 51 F. Supp. 749, 750 (E.D. Wash. 1943). *Cherokee's* prohibition against compounding interest is not violated when applied to prejudgment interest. The doctrine is only abrogated when post-judgment interest is applied to a prejudgment award.

Furthermore, at least as far *Cherokee* applies to interest awarded under U.S.C. § 1961, the rate requested by defendants, the general rule against compounding interest awards has been overruled sub silentio by the Federal Courts Improvement Act of 1982. Pub. L. No. 97-164, 96 Stat. 25, § 302 (April 2, 1982)(amending 28 U.S.C. § 1961 to compound interest annually). *See Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 831-32, 110 S. Ct. 1570, 1574, 108 L. Ed. 2d 842 (1990).

It is the opinion of this Court that for such compensation to be just in the instant case, compounded prejudgment interest should be awarded from the time of the taking until the entering of this judgment.

CONCLUSION

Precepts of basic fairness dictate that plaintiff, having been denied the use of and potential gain from its property, **[*28]** be made whole for its loss which includes prejudgment use as embodied by monetary interest. Without an adjustment for interest the award is not the full equivalent of the property and plaintiff is not fully compensated. Moreover, to withhold prejudgment interest in the instant case would send a message that could be misinterpreted to allow and potentially encourage parties to stall and lengthen court proceedings, thereby further devaluing the worth of a prevailing party's property interest over time.

Whereas prejudgment interest is considered part of compensation under federal common law, and in accord with both the discretion afforded this Court and the weight of Second Circuit authorities, this Court shall grant plaintiff's application. The post-verdict award of prejudgment interest is granted at the adjusted prime rate, compounded annually, for the aforementioned reasons.

ORDER

IT HEREBY IS ORDERED that plaintiff's request for prejudgment interest through July 22, 1992, the date of plaintiff's calculation, in an amount of $ 298,919.43 is GRANTED.

FURTHER, that plaintiff is entitled to recover $ 29,230.00, which amount reflects prejudgment interest from July 23, 1992 to **[*29]** November 24, 1992, the date of entry of this order.

FURTHER, that the Clerk of the Court for the Western District of New York shall enter final judgment in favor of the plaintiff in the total amount of $ 1,149,149.43, which includes interest to date.

SO ORDERED.

Dated: November 24, 1992

Buffalo, New York

WILLIAM M. SKRETNY

United States District Judge