IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

ENERPLUS RESOURCES (USA) CORPORATION, a Delaware corporation,

Plaintiff,

Case No. 1:16-cv-00103-DLH-CSM

vs.

WILBUR D. WILKINSON, et al.,

Defendants.

PLAINTIFF ENERPLUS'S SECOND MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

Plaintiff Enerplus Resources (USA) Corporation ("Plaintiff" or "Enerplus") moves pursuant to Rules 56 and 57 for a second summary judgment against Defendants Wilbur D. Wilkinson ("Wilkinson"), Reed A. Soderstrom ("Soderstrom") and Ervin J. Lee ("Lee") to resolve all remaining issues in this case.

I. INTRODUCTION

To resolve a prior dispute, Wilkinson and Peak North Dakota, LLC ("Peak North"), predecessor in interest to Enerplus, and others entered a Settlement Agreement, Full Mutual Release, Waiver of Claims and Covenant Not to Sue (the "Settlement Agreement") on October 4, 2010. In the Settlement Agreement, Peak North agreed to assign to Wilkinson an overriding royalty interest in certain oil and gas leases in North Dakota located on allotted Indian lands within the exterior boundaries of the Fort Berthold Indian Reservation, with 10% of Wilkinson's overriding royalty interests assigned to his attorney at the time, Ervin Lee ("Lee").

Pursuant to the Settlement Agreement, Peak North, Wilkinson and Lee executed an Assignment of Overriding Royalty Interest dated October 4, 2010 by which Wilkinson and Lee received overriding royalty interest in oil and gas leases on lands located within the exterior

boundaries of the Fort Berthold Indian Reservation ("ORRI Assignment"). Wilkinson and Lee also executed Division Orders dated October 4, 2010 in conjunction with the Settlement Agreement and the ORRI Assignment ("Division Orders"). The Settlement Agreement, ORRI Assignment and Division Orders (referred to collectively as the "Settlement Documents") all have forum selection clauses stating that any disputes arising under the contracts and/or the transactions contemplated by the contracts be resolved in either State or Federal Court in North Dakota.

The Settlement Agreement and the Division Orders also contain fee-shifting provisions by which the parties agreed that the prevailing party in any action related to the Settlement Agreement is entitled to its attorneys' fees, costs and expenses from the other party.

Between September 2014 and October 2015, Enerplus overpaid the overriding royalties due to Wilkinson and Lee by $2,961,511.15 ("Excess Money"). The Excess Money was paid to Soderstrom in trust for Wilkinson and Lee. Enerplus demanded the return of the money. In response, Wilkinson filed suit against Enerplus in Three Affiliated Tribes Fort Berthold Reservation District Court ("Tribal Court") on February 29, 2016, asserting claims for an Accounting and for Quiet Title of the Overriding Royalty Interest ("Tribal Court Case").

Enerplus brought this action on May 4, 2016, asserting four claims: 1) for a permanent injunction enjoining Wilkinson from pursuing his claims in Tribal Court; 2) for a declaratory judgment that, among other things, the forum selection clauses preclude jurisdiction of the Tribal Court over any dispute arising from the Settlement Documents, that Enerplus is entitled to a refund of the Excess Money and that the prevailing party was entitled to its attorneys fees and costs; 3) equitable restitution of the Excess Money; and 4) an accounting.

Enerplus moved for a preliminary injunction to bar Wilkinson from prosecuting any lawsuits in Tribal Court arising from or related to the Settlement Documents, to prohibit the Tribal

Court from exercising jurisdiction over Enerplus in Wilkinson's case against it, and to require Soderstrom to transfer the Excess Money into the registry of the Court. The Court granted the motion and entered a preliminary injunction on August 31, 2016 (Dkt # 48 ("PI Order")).

On January 13, 2017, Enerplus moved for summary judgment on the issue of whether it was entitled to a refund of the Excess Money. The Court granted that motion and entered summary judgment on February 23, 2017 (Dkt. # 75 ("MSJ Order")).

The MSJ Order resolved the portion of the declaratory judgment claim to the extent Enerplus sought declarations regarding the Excess Money. It also resolved the claim for equitable restitution of the Excess Money, and rendered moot the claim for an accounting. All that remains is Enerplus's claim for a declaration that Wilkinson is precluded from litigating any disputes arising from the Settlement Documents in Tribal Court, that the Tribal Court is precluded from exercising jurisdiction over Enerplus, that Wilkinson is obligated to pay Enerplus's attorneys' fees and costs incurred in this case and in the Tribal Court Case, and Enerplus's claim for a permanent injunction. Enerplus now moves for summary judgment on those remaining claims.

STATEMENT OF UNDISPUTED FACTS

In granting summary judgment to Enerplus regarding repayment of the Excess Money, the Court has already made the following findings of fact:

1. Wilkinson, Lee and Peak North entered into a Settlement Agreement, Full Mutual Release, Waiver of Claims and Covenant Not to Sue (the "Settlement Agreement") on October 4, 2010. (Dkt. # 75 at 2-3.) Under the terms of the Settlement Agreement, Peak North was required to assign to Wilkinson a 0.5% of 8/8ths overriding royalty interest in certain oil and gas leases covering lands located within the exterior boundaries of the Fort Berthold Indian

Reservation ("FBIR") in North Dakota, with 10% of Wilkinson's overriding royalty interest assigned to Lee, Wilkinson's attorney at the time. *Id.* Brief of Appellants, Wilbur D. Wilkinson and Reed A. Soderstrom, U. S. Court of Appeals for the Eighth Circuit, Nov. 18, 2016 ("Wilkinson Appellate Brief"), p. 3, attached as Exhibit A to Declaration of Neal S. Cohen ("Cohen Decl.") filed with this motion. The Settlement Agreement is attached to the Cohen Decl. as Exhibit A-1.at 2-3. The Settlement Agreement contains a forum selection clause by which the parties agreed that "any disputes arising under this Agreement" be resolved in this Court. *Id.* at 3.

2. Pursuant to the Settlement Agreement, Peak North, Wilkinson and Lee executed an assignment to Wilkinson of a 0.45% of 8/8ths overriding royalty interest and to Lee of a 0.05% of 8/8ths overriding royalty interest ("ORRI Assignment") dated October 4, 2010, in certain oil and gas leases covering lands located within the exterior boundaries of the FBIR. The ORRI Assignment contains a forum selection clause by which the parties agreed that "any disputes arising out of or related to this" ORRI Assignment shall be resolved the State Courts of the State of North Dakota or an applicable Federal District Court sitting in North Dakota. *Id.*

3. Lee and Wilkinson executed Division Orders, also dated October 4, 2010, in conjunction with the Settlement Agreement and the ORRI Assignment ("Division Orders"). The Division Orders contain a forum selection clause by which the parties agreed that "any disputes arising out of or related to this" Division Order shall be resolved the State Courts of the State of North Dakota or an applicable Federal District Court sitting in North Dakota. *Id.* at 3-4.

4. In December of 2010, Peak North and Enerplus merged with Enerplus remaining as the surviving entity. *Id.* at 4. Also in December of 2010, Wilkinson filed suit against Lee for attorney misconduct and breach of the Settlement Agreement in the Tribal Court. The Tribal Court denied Lee's Motion to Dismiss for lack of jurisdiction and ordered that all future payments due from Peak North to Wilkinson and Lee be deposited into the trust account of Wilkinson's attorney

at that time, Soderstrom. The MHA Nation Supreme Appeals Court affirmed the Tribal Court's jurisdiction ruling on August 31, 2015, and reaffirmed its ruling on November 30, 2015. *Id.* at 4-5.

5. Between September 30, 2014 and October 30, 2015, Enerplus made monthly payments to Soderstrom's trust account for the benefit of Wilkinson and Lee in connection with certain wells totaling $2,991,425.25. However, the amount Enerplus should have paid into the trust account was $29,914.10. As a result of an error in the placement of the decimal point, Enerplus overpaid those fourteen payments by a total of $2,961,511.15. *Id.* at 4. The Court has granted Enerplus's motion for summary judgment, holding that Enerplus is entitled to have the Excess Money returned to it. *Id.* at 8-9.

6. Based on the forum selection clauses in the Settlement Documents, Enerplus moved for a preliminary injunction seeking the following: 1) to enjoin Wilkinson from prosecuting any lawsuits in Tribal Court arising from or related to the Settlement Documents; 2) to enjoin the Tribal Court from exercising jurisdiction over Enerplus in Wilkinson's Tribal Court case; and 3) for an Order requiring the Excess Money be deposited into the Court's Registry. The Court granted that motion and entered a preliminary injunction dated August 31, 2016. (Dkt. # 48.) Soderstrom has since transferred the Excess money into the Court's Registry. (Dkt. # 55.)

In addition, the following facts are undisputed:

7. The Settlement Agreement also contains a fee shifting provision that entitles the prevailing party to its attorneys' fees and costs. *See* Brief of Appellants, Wilbur D. Wilkinson and Reed A. Soderstrom, U. S. Court of Appeals for the Eighth Circuit, Nov. 18, 2016 ("Wilkinson Appellate Brief"), p. 3, attached as Exhibit A to Declaration of Neal S. Cohen ("Cohen Decl.") filed with this motion. The Settlement Agreement is attached to the Cohen Decl. as Exhibit A-1,

at ¶ 16. The Wilkinson Division Order contain an indemnity provision that obligates Wilkinson, as the Interest Owner, to hold Peak North, the Payor, harmless against all claims, etc., including "the Interest Owner's repayment to Payor for any and all attorney's fees or judgments incurred in connection with any suit . . . which affects the Owner's interest." The Wilkinson Division Order is attached to the Cohen Decl. as Exhibit A-2.

Enerplus now moves for summary judgment declaring that Wilkinson is precluded from pursuing any claims arising from or related to the Settlement Documents in Tribal Court, that the Tribal Court is precluded from exercising jurisdiction over Enerplus for any claims arising from or related to the Settlement Documents, and that Wilkinson is obligated to pay Enerplus reasonable attorney's fees and costs incurred in connection with this case and the Tribal Court Case in which claims arising from or related to the Settlement Documents were asserted.

ARGUMENT

I. Standard of Review.

Summary judgment must enter where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of material fact is 'genuine' if it has a real basis in the record ... [and] [a] genuine issue of fact is 'material' if it 'might affect the outcome of the suit under the governing law.'" *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) and quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The basic inquiry for purposes of summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so

one-sided that one party must prevail as a matter of law." *Quick v. Donaldson Co., Inc.,* 90 F.3d 1372, 1376 (8th Cir. 1996) (citation omitted).

Summary judgment procedure is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Id.* at 396 (quoting with approval *Celotex Corp. v. Catrett,* 477 U.S. 322, 327 (1986)). Although the evidence is to be viewed in favor of the non-movant, if the movant demonstrates that there are no trial-worthy issues of material facts, the burden then shifts to the non-movant to "set forth specific facts sufficient to raise a genuine issue for trial." *Quinn v. St. Louis Cnty.,* 643 F.3d 745, 750 (8th Cir. 2011); *Wingate v. Gage Cnty. Sch. Dist., No. 34,* 528 F.3d 1074, 1078-79 (8th Cir. 2008).

II. Enerplus Is Entitled to a Declaratory Judgment that the Forum Selection Clauses in the Settlement Documents Preclude Tribal Court from Exercising Jurisdiction over Enerplus, Preclude Wilkinson from Asserting any Claims in Tribal Court that Arise from the Settlement Documents and that Wilkinson is Obligated to Pay Enerplus's Reasonable Attorney's Fees.

A. Applicable Standard

Declaratory judgments are governed by Fed. R.Civ. P. 57 and 28 U.S.C. § 2201. Declaratory judgments are appropriate under the following circumstances: "There must be a concrete dispute between parties having adverse legal interests, and the declaratory judgment plaintiff must seek 'specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be in a hypothetical state of facts.'" *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Works of Am.,* 687 F.3d 1076, 1081 (8th Cir. 2012) (*citing Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (U.S. 1937)).

Here, there are at least two clear and concrete disputes and substantial controversies between Enerplus, on the one hand, and Wilkinson, on the other hand. The first is over this Court's jurisdiction and the enforceability of the forum selection clauses. In its Complaint, Enerplus

brought a claim for injunctive relief asking the Court to enter an order enjoining Wilkinson from bringing claims arising from the Settlement Documents in Tribal Court and enjoining the Tribal Court from exercising jurisdiction over Enerplus and such claims. (Dkt. # 1.)

The second controversy involves Enerplus's payment of the Excess Money. Enerplus asserted claims for a declaration that it is owed the Excess Money, (Dkt # 1 at 9, 13-14), and for equitable restitution of the Excess Money. (Dkt. # 1 at 9-11, 13-14.) Wilkinson and Soderstrom denied the allegations supporting those claims. (Dkt. # 8 at 3.) In addition, Enerplus moved for summary judgment seeking the refund of the Excess Money, (Dkt # 62), which Wilkinson and Soderstrom opposed. (Dkt # 70.)

In response, Wilkinson and Soderstrom filed a Special Answer objecting to the jurisdiction of this Court and asserting that the Tribal Court has proper jurisdiction. They filed Affirmative Defenses repeating the same positions. (Dkt. # 8.) In addition, they filed a motion to dismiss this case in which they challenged this Court's subject matter jurisdiction. (Dkt. # 10.)

B. Enerplus Is Entitled to a Declaration Precluding Tribal Court Jurisdiction

Enerplus seeks a "declaration that the forum selection clauses contained in the [Settlement Documents] are valid and enforceable terms of the contracts between Plaintiff and Wilkinson, which operate to preclude and prohibit the Tribal Court from exercising jurisdiction over any dispute arising in connection with the [Settlement Documents] and/or activities and transactions associated therewith." (Dkt.# 1 at 12-13.)

It is well established in the Eighth Circuit that parties may waive tribal court jurisdiction and compliance with the tribal exhaustion doctrine through a forum selection agreement. "By this forum selection clause, the Tribe agreed that disputes need not be litigated in tribal court." *FGS Constructors Inc. v. Carlow,* 64 F.3d 1230, 1233 (8th Cir. 1995). In *FGS,* this Court reversed the district court's grant of a motion to dismiss the claims of FGS on the grounds of the tribal exhaustion doctrine, holding as follows:

> We do not agree with the district court's determination that FGS must first exhaust its remedies in the tribal court. The contracting parties agreed that a plaintiff could sue either in the federal district court of South Dakota (a court of competent jurisdiction) or in the tribal court. By this forum selection clause, the tribe agreed that disputes need not be litigated in tribal court.

Id. That rule applies even more strongly here, where the parties did not include Tribal Court as a possible forum.

In granting the preliminary injunction, the Court considered all four factors it is required to consider under *Dataphase Systems, Inc. v. C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), and correctly concluded the following: "The tribal exhaustion doctrine does not apply when the contracting parties have included a forum selection clause in their agreement." (Dkt. # 48 at 9.) The Court went on to note that it is "clear from the record that every party to the dispute agreed to the forum selection clauses at issue." *Id.* The Court's conclusion, based on and consistent with *FGS*, stated that "exhaustion of tribal court remedies is not required when a valid forum selection clause provides for disputes to be litigated elsewhere." *Id.* The Court then recognized that "the public has an interest in protecting the freedom to contract by enforcing contractual rights and obligations." *Id.* at 11.

For these reasons, Enerplus is entitled to a declaratory judgment that the forum selection clauses in the Settlement Documents preclude the Tribal Court from exercising jurisdiction over any dispute arising from those Settlement Documents, and preclude Wilkinson from asserting in Tribal Court any claims arising from, and related to the Settlements Documents.

C. Enerplus Is Entitled to a Declaratory Judgment that Wilkinson is Obligated to Pay Enerplus's Reasonable Attorney's Fees and Costs

Enerplus seeks a "declaration that Wilkinson is required to indemnify Plaintiff for all costs and attorneys' fees that Plaintiff Incurs in this Action and in the Tribal Court Case arising from the Settlement

Agreement, the ORRI Assignment, the Wilkinson Division Order, and/or transactions, activities and/or terms associated therewith." (Dkt.# 1 at 13.)

The general rule in North Dakota law is that "parties to a contract are bound by its provisions." *Martin v. Allianz Life Ins. Co. of N Am.*, 1998 ND 8, 1 19, 573 N.W.2d 823, 828 (N.D. 1998) (quoting *Cornellier v. Am. Cas. Co.*, 389 F.2d 641, 644 (2d Cir. 1968)). That rule applies equally to fee-shifting provisions in contracts. *See Hoge v. Burleigh County Water Management District*, 311 N.W.2d 23, 31-32 (N.D. 1981).

Wilkinson agreed in the Settlement Agreement that the prevailing party is entitled to recover its attorneys' fees and costs from the other party. In the Wilkinson Division Order, Wilkinson agreed to indemnify Enerplus for the attorneys' fees and costs Enerplus incurred. Accordingly, Enerplus is entitled to a declaration that Wilkinson must pay the attorneys' fees and costs Enerplus has incurred in this case and the Tribal Court Case.

IV. A Permanent Injunction Is Appropriate.

A permanent injunction is appropriate where a party establishes the following: 1) its success on the merits; 2) that it faces irreparable harm; 3) that the harm to it outweighs any possible harm to others; and 4) that an injunction serves the public interest. *Community of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church*, 634 F.3d 1005 (8th Cir. 2011).

As discussed above, summary judgment declaring that the forum selection clauses in the Settlement Documents preclude Wilkinson from pursuing claims in Tribal Court arising out of or related to the Settlement Documents and precluding the Tribal Court from exercising jurisdiction over Enerplus in connection with any dispute arising out of or related to the Settlement Documents is appropriate. Thus, the first element is satisfied.

Enerplus will suffer irreparable harm if Wilkinson is not enjoined from pursing his claims in Tribal Court, and if the Tribal Court is not enjoined from exercising jurisdiction over disputes arising from the Settlement Documents. As the Court held when granting the preliminary injunction,

> the irreparable harm the Plaintiffs will suffer is being forced to engage in expensive and time-consuming litigation in a forum it did not bargain for while being deprived of the benefits of the Excess Money which Defendants clearly have no right to keep. These harms are real and ongoing and, given the Court's finding of a strong likelihood of success on the merits, the Court finds Enerplus has clearly demonstrated it will suffer irreparable harm if a preliminary injunction is not granted.

(Dkt. # 48 at 10.)

Given the fact that the Court has already considered and granted summary judgment regarding the Excess Money, the irreparable harm Enerplus would suffer is even greater now if it were forced to engage in expensive and time-consuming re-litigation of issues in a forum it did not bargain for, especially since those issues have already been decided. And given the fact that Enerplus is entitled to a declaratory judgment precluding the exercise of Tribal Court jurisdiction, as discussed above, Enerplus will clearly suffer irreparable harm if a permanent injunction is not granted.

The harm Enerplus would suffer in the absence of a permanent injunction outweighs any harm Wilkinson would suffer if a permanent injunction were granted. First, after the Court granted the preliminary injunction, Wilkinson and Soderstrom appealed to the Eighth Circuit. That matter is still pending. Thus, Wilkinson and Soderstrom have had a full and fair opportunity to litigate the jurisdictional issues in this Court. Wilkinson also had a full and fair opportunity to litigate the Excess Money issues. Second, Wilkinson has no valid basis to object to this Court's jurisdiction and the enjoining of Tribal Court jurisdiction because he agreed to it in the Settlement Documents.

Moreover, the other parties to this action will suffer no harm from the requested injunction because the crux of the dispute is between Wilkinson and Enerplus.

Last, the public interest is best served by the grant of a permanent injunction because, as the Court concluded, "the public has an interest in protecting the freedom to contract by enforcing contractual rights and obligations. See PCTV Gold, 508 F.3d at 1145." ((Dkt. # 48 at 11.)

CONCLUSION

Accordingly, Enerplus requests summary judgment declaring that Wilkinson is precluded from asserting in Tribal Court any claims arising out of or related to the Settlement Documents and declaring that the Tribal Court is precluded from exercising jurisdiction over Enerplus in connection with any claims arising out of or related to the Settlement Documents.

In addition, Enerplus requests summary judgment declaring that Wilkinson is obligated to pay the reasonable attorneys' fees and costs incurred by Enerplus in this case and in the Tribal Court Case.

In addition, Enerplus requests the entry of a permanent injunction enjoining Wilkinson from asserting in Tribal Court any claims arising out of or related to the Settlement Documents and enjoining the Tribal Court from exercising jurisdiction over Enerplus in connection with any claims arising out of or related to the Settlement Documents.

In addition, filed herewith is Enerplus's motion to dismiss its Accounting claim because the Court's MSJ Order regarding the Excess Money renders that claim moot.

Therefore, with the grant of the foregoing summary judgment, all remaining issues are resolved and Enerplus requests a final judgment in its favor on all claims.

Dated this 13th day of April, 2017.

FOX ROTHSCHILD, LLC. BY:

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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REED A. SODERSTROM, *PRO SE*

I further certify that a copy of the foregoing was sent to the following email address and deposited in the U.S. mail, postage prepaid, addressed as follows:

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/s/ Erica L. O'Neill