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

ENERPLUS RESOURCES (USA) CORPORATION, a Delaware corporation, Plaintiff, vs. WILBUR D. WILKINSON, et al., Defendants	)	Case No. 1:16-cv-00103-DLH-CSM

PLAINTIFF ENERPLUS'S REPLY IN SUPPORT OF ITS SECOND MOTION FOR SUMMARY JUDGMENT

Plaintiff Enerplus Resources (USA) Corporation ("Enerplus") submits this Reply in Support of its Second Motion for Summary Judgment against Defendants Wilbur D. Wilkinson ("Wilkinson"), Reed A. Soderstrom ("Soderstrom," Wilkinson and Soderstrom are collectively hereafter referred to as "Wilkinson") and Ervin J. Lee ("Lee").

INTRODUCTION

Wilkinson's response in opposition to Enerplus's second motion for summary judgment ("Response") asserts – again – that Enerplus does not have standing to rely on the forum selection clause in the Settlement Agreement, ORRI Assignment and Division Orders because it has not provided "proof of its merger agreement and acquisition of Peak North Dakota, LLC." Response at 2. They also argue that Wilkinson "has repeatedly asked Plaintiff for documents" which evidence the existence of the merger. *Id.* at 2. Finally, they state that "Plaintiff postures this case as a simple 'overpayment' issue," and that "Plaintiff should not be afforded the right to Forum Selection of federal jurisdiction through a Settlement Agreement between Defendant and Peak without evidence that

establishes its actual Mineral Leasehold rights through proper BIA conveyance procedures has been completed [sic]." *Id.* at 3. As discussed below, they are wrong on all points.

ARGUMENT

A. Enerplus Has Standing To Pursue its Claims

Wilkinson's argument seems to be that Enerplus is barred from relying on the forum selection clauses in the Settlement Agreement, ORRI Assignment and Division Orders (collectively the "Settlement Documents") because it has not established that the rights and burdens of those agreements have been acquired by Enerplus. However, there are several reasons why Wilkinson's argument fails. First, the Certificate of Merger issued by the State of Delaware certifies the merger between Peak North Dakota, LLC ("Peak") and Enerplus. The parties have submitted this document to the Court on at least two occasions. (Dkt. # 10-5, 19-2.) This Certificate constitutes *prima facie* evidence of the merger between Peak and Enerplus. Once Enerplus demonstrates that there are no trial-worthy issues of material facts, the burden shifts to Wilkinson 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). As described in Enerplus's reply in support of its motion for preliminary injunction, (Dkt. # 10 at 5-7), its acquisition of Peak and subsequent merger of Peak into Enerplus entitles Enerplus to both the benefits and burdens of the Settlement Documents as a matter of North Dakota and Delaware law. Wilkinson's Response presents no facts to counter this evidence and no law that would support a different conclusion.

Second, in the Statement of the Case section of his appellate brief to the Eighth Circuit appealing this Court's Order granting a preliminary injunction, (Dkt. # 48), Wilkinson represented the following: "In December of 2010, Peak North and Enerplus had *merged* together into one entity." (Dkt. # 78-4 at 4.) Likewise, in his suit against Enerplus in Tribal Court, he alleged the following:

> On or about October 15, 2010, Defendant Enerplus acquired 46,500 net acres from Peak. The acquisitions Defendant acquired from Peak included the ["0.5% of 8/8ths overriding royalty interest"] obligations [Wilkinson] received from the October 4, 2010 Settlement Agreement.

(Dkt. # 10-1 at 2.)

These representations in both the Court of Appeals and the Tribal Court constitute judicial admissions that Enerplus acquired Peak's interest in the terms of the Settlement Agreement and the ORRI Assignment, including the benefit of the forum selection clause. *Missouri Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990) ("As a rule, "[a]dmissions in the pleadings . . . are in the nature of judicial admissions binding upon the parties, unless withdrawn or amended.") (internal citations omitted); *Nat'l Sur. Corp. v. Ranger Ins. Co.*, 260 F.3d 881, 886 (8th Cir. 2001) ("[F]actual statements in a party's pleadings are generally binding on that party unless the pleading is amended.") (internal citations omitted). Wilkinson's admissions constitute further evidence that Enerplus acquired the benefit of the forum selection clauses.

Third, while Wilkinson challenges Enerplus's standing in this case, his Tribal Court suit seeks, among other things, a decree that Enerplus "has not fully paid its obligation to Petitioner based on Petitioner's ORRI on the 119 Leases." (Dkt. # 10-1 at 3.) In other words, Wilkinson argues on the one hand that Enerplus is not a party to the settlement such that it can enforce the forum selection clause, but on the other hand, he has not only opposed the return of Enerplus's overpayment of overriding royalties under that settlement but he has also sued Enerplus in Tribal Court seeking more money under the settlement! He can't have it both ways. Having accepted the benefits from Enerplus of the settlement, he cannot avoid the burdens. *Graham v. First Nat. Bank of Dickinson*, N. D., 175 F. Supp. 81, 83 (D. N.D. 1959) ("It is likewise generally held that if a corporation, with knowledge of a contract, accepts the benefits thereof, it will be required to perform its obligations; acceptance of the benefits binds it to performance of the obligations."); *C. I. T. Corp. v. Hetland*, 143 N.W.2d 94, 100 (N.D. 1966) ("[T]o hold that the plaintiff in this case could take a conditional sales contract and be entitled to all of its benefits, but not be burdened with any of its obligations, would be a rank injustice.")

Fourth, Wilkinson made this same argument in his motion to dismiss, and in his opposition to Enerplus's motion for preliminary injunction. (Dkt # 10 at 4-6.) The Court rejected it, stating "Nor is there any merit to the defendants' argument that the merger of Peak North and Enerplus somehow invalidated the Settlement Agreement." (Dkt. # 48 at 8.) Nothing has changed.

Fifth, while Wilkinson claims that he made numerous requests for documents which Enerplus refused to provide, Wilkinson has served no discovery whatsoever in this case. If he wanted the documents, he could have and should have served document requests. The time for discovery has long passed.

Wilkinson's final argument is that Enerplus "has yet to show an injury because Plaintiff has yet to show it is a party to the Settlement Agreement to assert an injury." Response at 5. This is a remarkable claim in light of the proceedings in this case. Not only has Enerplus shown an injury resulting from both the overpayment of overriding royalties in connection with the Settlement Agreement in the amount of $2,961,511.15 and Wilkinson's refusal to repay that money, but the Court has already agreed that Enerplus was injured in at least that amount and granted summary judgment in favor of Enerplus on that very issue. (Dkt. # 75.) Thus, there is no dispute about the fact that Enerplus has been injured.

B. Wilkinson Waived any Rights he may have had to Tribal Court Jurisdiction

By signing the Settlement Agreement, Wilkinson agreed to this Court's jurisdiction and further agreed that he shall not "have the right to contest such jurisdiction or venue." (Dkt. # 1-3 at 9.)

Moreover, this case is about overpayments made by Enerplus, a nonmember of any tribe, to Wilkinson's attorney, Soderstrom, on land outside the outer boundaries of the reservation. Accordingly, under *Montana v. United States*, 450 U.S. 544, 565-66 (1981), the Tribal Court has no jurisdiction over this dispute in any event.

C. Enerplus Is Entitled to an Award of its Attorneys' Fees and Costs.

Once again, Wilkinson accepts the benefits of the Settlement Agreement but hopes to avoid the burdens. While the overpayment was Enerplus's mistake, that act did not cause Enerplus to incur fees and costs. Rather, the fees and costs were incurred when Wilkinson refused to return the overpayment, forcing Enerplus to fight in Tribal Court, this Court and the Eighth Circuit for the return of the money.

Wilkinson is bound by his promises with respect to both the forum selection clause and the attorneys' fees provision. *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)); *Hoge v. Burleigh County Water Management District*, 311 N.W.2d 23, 31-32 (N.D. 1981). 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.

CONCLUSION

For the reasons set forth here and in its opening brief, Enerplus requests the following: 1) 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; 2) 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; and 3) 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.

Dated this 10th day of May, 2017.

FOX ROTHSCHILD, LLC. BY:

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 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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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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