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.	)	**PLAINTIFF ENERPLUS'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**
WILBUR D. WILKINSON, et al.,	)	
Defendants.	)	

Plaintiff Enerplus Resources (USA) Corporation ("Plaintiff" or "Enerplus") submits this reply in support of its motion for summary judgment against Defendants Wilbur D. Wilkinson ("Wilkinson"), Reed A. Soderstrom ("Soderstrom") and Ervin J. Lee ("Lee") (collectively, "Defendants").

INTRODUCTION

Enerplus seeks to recover $2,961,511.15 in erroneous overpayments to Wilkinson, Soderstrom and Lee on an overriding royalty interest ("ORRI") in connection with a settlement of litigation between, among others, Wilkinson and Peak North Dakota, LLC ("Peak North") ("the Overpayments"). Defendants Wilkinson's and Soderstrom's Response in Opposition to Plaintiff's Motion for Summary Judgment ("Response Brief") does not dispute the Overpayments.

Instead, they make two arguments, neither of which is factually nor legally supportable. First, they claim that Enerplus's Motion for Summary Judgment is brought "before discovery has even begun." Response Brief at 2. In fact, the discovery period ended January 31, 2017, 2 days

before the Defendants filed their Response Brief. During the discovery period, Defendants served no discovery whatsoever prior to that deadline.

Second, they argue again that Enerplus does not have standing to bring its claim because Enerplus has not proven that there was a "valid conveyance of the Lease on Indian lands." *Id.* Defendants' standing argument is misdirected. Whether or not there was a valid conveyance of the Lease, there is no dispute that one party, Enerplus, made mistaken Overpayments to another party, Soderstrom/Wilkinson, and as a result Enerplus is entitled to the return of that money.

Accordingly, summary judgment here is proper.

ARGUMENT

I. During the Three Month Discovery Period to which Defendants Agreed, they Took No Discovery Whatsoever.

Defendants argue that "discovery has only just started." Response Brief at 3. In fact, discovery is over.

The parties submitted a stipulated Joint Scheduling/Discovery Plan on November 2, 2016 ("Discovery Plan"). In that Discovery Plan, the parties agreed that they "shall have until January 31, 2017 to complete fact discovery and to file discovery motions." *Id.*, ¶ 3. The Court adopted the Discovery Plan on November 9, 2016. [Dkt # 58.] At no time prior to January 31, 2017 did Defendants serve on Enerplus any written discovery requests or deposition notices. Thus, Defendants had a full and fair opportunity to take the discovery they wanted but chose instead to do nothing. Having wasted their opportunity to take discovery, they are in no position now to oppose summary judgment on the grounds that they need discovery.

Indeed, Circuit Courts have uniformly refused to defer ruling on summary judgment motions where opponents to such motions have failed to pursue their discovery rights. *Oklahoma ex rel. Doak v. Acrisure Bus. Outsourcing Servs., LLC*, 529 Fed.App'x. 886, 892-93 (10th Cir. 2013) (affirming the denial of a motion to defer a ruling on summary judgment for further discovery where the discovery deadline had already passed, the affidavit in support of the motion failed to describe the steps taken to obtain the facts, and where the movant "had procedures available to him to obtain the information but never conducted any discovery."); *Scosche Indus., Inc. v. Visor Gear, Inc.*, 121 F.3d 675, 682 (Fed. Cir. 1997) ("A party cannot forestall summary judgment by arguing that it has not had an opportunity to complete its discovery when it has not pursued its discovery rights with vigor.") (citations omitted); *Convertino v. U.S. Dept. of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012) (finding that a Rule 56 motion "requesting time for additional discovery should be granted 'almost as a matter of course unless the non-moving party has not diligently pursued the discovery of the evidence.'") (emphasis added) (quoting *Berkeley v. Homes Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995)); *California Union Ins. Co. v. Am. Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990) (noting that, while district courts have discretion to continue a motion for summary judgment if a party needs to discover essential facts, they do not abuse that discretion by denying further discovery where the party failed to diligently pursue discovery in the past) (citations omitted).

Here, Defendants' failure to pursue any discovery during the discovery period precludes them from opposing summary judgment on that basis.

II. There is No Dispute as to Enerplus's Standing to Recover Its Mistaken Overpayment.

As discussed more fully in Enerplus's Motion for Summary Judgment, the law in North Dakota, as well as in most other jurisdictions, is clear: where a plaintiff "in good faith and by mistake of fact, parted with money to which defendant was not entitled either legally or morally [,] an implied promise on defendant's part to repay such money [arises] immediately upon the payment by plaintiff of the last check." *James River Nat. Bank of Jamestown v. Weber*, 124 N.W. 952, 954 (N.D. 1910).

Defendants do not dispute that Enerplus made the mistaken Overpayments. Nor do they dispute the $2,961,511.15 amount of the Overpayments, or that they received the Overpayments, or that they are not entitled to keep the Overpayments. Accordingly, Enerplus has standing to seek the return of that money.

Nonetheless, Defendants pursue the wholly irrelevant argument that "Enerplus has not proven a valid conveyance of this lease in question." Response Brief at 4-5. Defendants made this same argument in its Motion to Dismiss, claiming that Enerplus "[a]ssigned Defendant Wilkinson's interests in violation of the lease agreement." [Dkt. # 10 at 3.] The Court denied that motion, [Dkt. # 48 at 3], holding the following: "Nor is there any merit to the defendants' argument that the merger of Peak North and Enerplus somehow invalidated the Settlement Agreement." *Id.* at 8. Defendants' argument about standing is simply a red herring and wholly irrelevant to the merits of Enerplus's summary judgment motion.

CONCLUSION

For all of the foregoing reasons, Plaintiff, Enerplus Resources (USA) Corporation, respectfully requests that this Court enter an Order that the Overpayments held in the Court's Registry be paid to Enerplus.

Dated this 14th day of February, 2017.

FOX ROTHSCHILD, LLC. BY:

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 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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/s/ Erica L. O'Neill