

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 SUMMA RESOURCE HOLDINGS
5 LLC,

6 Plaintiff,

7 v.

8 CARBON ENERGY LIMITED,

9 Defendant.

Case No. 15-cv-05334-TEH

**ORDER RE: SUPPLEMENTAL
BRIEFING IN LIEU OF APRIL 18,
2016 HEARING**

10 This matter is currently set for oral argument on the Motions to Dismiss and Strike
11 filed by Defendant Carbon Energy Limited. In lieu of oral argument, IT IS HEREBY
12 ORDERED that each party shall file a supplemental brief of no more than fifteen pages by
13 April 22, 2016, addressing the following questions:

14
15 **For Both Parties:**

- 16 1. Will Plaintiff be able to collect judgment if the case proceeds in Queensland and
17 Plaintiff prevails? Why or why not?
18 2. Why does Plaintiff's choice of remedy inform whether Plaintiff has adequately
19 alleged a breach of contract claim? See Mot. at 11 (Docket No. 16); Opp'n at 4
20 (Docket No. 17). Answer under Queensland law.

21 **For Plaintiff:**

- 22 3. Do you dispute Defendant's contention that Australia is an adequate alternative
23 forum? If so, is the dispute only on the basis of Defendant's refusal to waive statute
24 of limitations defenses?
25 4. Please address Defendant's arguments that (1) the statute of limitations has not yet
26 expired on the majority of Plaintiff's claims, and (2) the statute of limitations has
27 already expired on the Fourth Cause of Action (Intentional Interference with
28 Prospective Economic Advantage). See Carbon Supp. Brief at 9 (Docket No. 26).

- 1 5. Please address Defendant’s argument that the Foreign Judgments Act of 1991 does
2 not explicitly allow United States courts’ judgments to be registered for
3 enforcement in Australia. See Carbon Supp. Response at 12 (Docket No. 31).
- 4 6. Please address Defendant’s argument that the claims of conversion, breach of
5 fiduciary duty and unfair competition are “based on an alleged contractual
6 obligation under the Agreement to issue Tranche 4 and 5 shares,” and therefore
7 Queensland law should apply to those claims. See Carbon Supp. Brief at 1.
- 8 7. Regarding proof of falsity: why isn’t it possible that Carbon wanted to promote the
9 sale of its securities as ADRs and intended to pursue the Summa projects? In other
10 words, why are these mutually exclusive?
- 11 8. Please address Defendant’s argument that Rule 9(b) applies to the breach of
12 contract claim because the claim “describes fraudulent conduct.” Mot. at 9.

13 **For Defendant:**

- 14 9. Please address Plaintiff’s contention that Peter Swaddle, Andrew Dash and Jeff
15 Nitsch could not necessarily be compelled to testify in Queensland merely because
16 they reside “somewhere in Australia.” See Summa Supp. Response at 11 (Docket
17 No. 30).
- 18 10. Please address Plaintiff’s argument that litigating the case in California will not be
19 inconvenient for Carbon because Carbon makes multiple trips to the United States
20 and has established an office in New York. See Summa Supp. Brief at 11 (Docket
21 No. 27).

- 22 11. On page 6 of Defendant’s Motion to Dismiss, Defendant states:

23 The Agreement did not require Carbon Energy to explain or
24 justify any decision to provide or not provide notice of
25 Achievement of a Milestone under clause 8.1, or to explain or
26 justify its Best Endeavours under clauses 8.4 or 8.6. The
27 Agreement did not allow Summa to unilaterally declare or
deem Carbon Energy not to have used Best Endeavours or
otherwise to have failed to meet its obligations under clauses
8.4 or 8.6.

28 If this statement is true, how would Plaintiff ever be able to allege a breach?


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. Does Defendant argue that all Breach of Contract claims that involve intentional conduct would be held to the standard under Fed. R. Civ. P. 9(b) as opposed to 8(a)? In other words, it appears impossible for Defendant to breach an obligation to notify Plaintiff of Milestone Events or an obligation to use Best Endeavours without engaging in some type of fraudulent conduct.

Accordingly, the hearing on Defendant’s Motions to Dismiss and Strike is hereby VACATED pursuant to Civil Local Rule 7-1(b), and the matter shall be taken under submission upon receipt of the parties’ supplemental briefing.

IT IS SO ORDERED.

Dated: 04/18/16



THELTON E. HENDERSON
United States District Judge