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

ENERGY TRANSFER EQUITY, L.P., and ENERGY TRANSFER PARTNERS, L.P., Plaintiffs, v. GREENPEACE INTERNATIONAL (aka "STICHTING GREENPEACE COUNCIL"); GREENPEACE, INC.; GREENPEACE FUND, INC.; BANKTRACK (aka "STICHTING BANKTRACK"); CODY HALL; KRYSTAL TWO BULLS; JESSICA REZNICEK; RUBY MONTOYA; CHARLES BROWN; and JOHN AND JANE DOES 1-20, Defendants.	Cause No. 1:17-cv-00173 **DEFENDANT GREENPEACE FUND, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Defendant Greenpeace Fund, Inc. ("GP-Fund") brings this motion under Rule 12(b)(6) to dismiss in its entirety and with prejudice the First Amended Complaint of Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. (collectively, "Energy Transfer").

GP-Fund moves for dismissal of the entirety of Energy Transfer's First Amended Complaint on the basis that there are not sufficient

plausible allegations of conduct committed by GP-Fund and any alleged ties between GP-Fund and other alleged members of the enterprise are insufficient to state a claim upon which relief can be granted.

This Brief addresses the independent reasons why this Court should dismiss GP-Fund. In addition to these reasons for dismissal, GP-Fund fully joins Defendants Greenpeace International, Greenpeace, Inc., and Charles Brown's Memorandum in Support of Motion to Dismiss Amended Complaint (hereinafter Greenpeace Defendant's Memorandum) and incorporates their arguments herein by reference.

INTRODUCTION

Energy Transfer initially brought its Complaint in October 2017. GP-Fund, along with other Defendants, moved for its dismissal on the basis that its application of the RICO statute to environmental advocacy by Greenpeace and other defendants was an improper attempt to stifle the right to political protest. Upon review the 442-paragraph Complaint, this Court Ordered Energy Transfer to reconsider its claims and file an amended pleading with "concise and direct" allegations against Defendants or face dismissal. Doc. 88 at 5. Energy Transfer's First Amended Complaint fails to make such concise or direct allegations,

suffering from the same deficiencies identified by the Court in its Order regarding Defendants' Motions to Dismiss Energy Transfer's Complaint. Doc. 88.

In fact, Energy Transfer's allegations against GP-Fund are even more vague and unspecified in its First Amended Complaint than they were in its original Complaint. Other than as part of a section identifying all parties, GP-Fund is only mentioned twice in the entire 76-page complaint. First Amended Complaint, ¶¶ 7, 53. Neither of these allegations identify the who, what, when, or where of GP-Fund's alleged conduct to "authorize, under[write], and facilitate Greenpeace Inc.'s campaign against Energy Transfer," or to be "actively involved in the operation, control, and planning of the campaign with Greenpeace Inc. and other enterprise members." First Amended Complaint, ¶ 53.

These conclusory and unsupported allegations constitute the entirety of Energy Transfer's claims against GP-Fund. Energy Transfer simply lumps GP-Fund in with the other Greenpeace Defendants without any specific allegations of GP-Fund's involvement with the alleged conduct of the other Defendants. Such sparse allegations are not sufficient to support any cause of action against GP-Fund.

ARGUMENT

"The most basic requirement of pleading is '[simple], concise, and direct allegations.'" Doc. 88 at 2 (citing Fed. R. Civ. P. 8(d)(1)). In light of this requirement, this Court ordered Energy Transfer to file an amended complaint containing "concise and direct allegations" against each of the named Defendants and requiring Energy Transfer to "plead any allegations of fraud with particularity." Doc. 88 at 5.

A detailed review of Energy Transfer's First Amended Complaint reveals a complete failure to comply with this Court's request, especially in light of the civil RICO claims alleged against GP-Fund in this case, because "[c]ivil RICO is . . . the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). The extreme potential impact of these claims underscores the importance of "[flushing] out frivolous RICO allegations at the earliest possible stage of litigation." *Elsevier Inv. v WHPR, Inc.*, 692 F. Supp. 2d 297, 300 (S.D.N.Y. 2010); *see also Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006) (citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)). GP-Fund cross references Section A.1 of

Greenpeace Defendant's Memorandum for additional arguments and citations of authority on the applicable pleading standard.

I. Energy Transfer has not sufficiently pleaded claims against GP-Fund under federal RICO statutes because it has failed to identify the members of the alleged enterprise or GP-Fund's involvement in any alleged enterprise.

Energy Transfer alleges two federal RICO counts against GP-Fund. These are Count I (for violation of Section 1962(c) pertaining to conducting an enterprise through a pattern of racketeering activity, First Amended Complaint, ¶¶ 185–213) and Count II (for violation of 1962(d), conspiracy, First Amended Complaint ¶¶ 214–221). The allegations specific to these counts do not make any specific reference to GP-Fund individually, referring merely to "Defendants" and "Enterprise Members."

Energy Transfer's RICO claims require plausible allegations establishing (1) the existence of an enterprise engaged in interstate commerce, (2) GP-Fund's association with the enterprise, (3) GP-Fund's participating in the conduct of the affairs of the enterprise, and (4) GP-Fund's involvement in a pattern of racketeering activity. *See* Doc. 87 at 4. Energy Transfer's claim under section 1962(d) for conspiracy to violate RICO cannot stand unless it can establish a viable claim under

another RICO subsection, which, as briefed below, Energy Transfer has not done. *Bowman v. W. Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993).

Further, the Eighth Circuit requires that RICO elements must be pled with respect to each defendant individually. *Liberty Mut. Fire Ins. Co. v. Acute Care Chiropractic Clinic P.A.*, 88 F. Supp. 3d 985, 998 (D. Minn. 2015) (citing *Craig Outdoor Adver., Inc. v. Viacom Outdoor Inc.*, 528 F.3d 1001, 10027 (8th Cir. 2008)). Energy Transfer's failure to plead such allegations, with respect to GP-Fund as well as the alleged enterprise as a whole, subjects its First Amended Complaint to dismissal.

A. The allegations in the First Amended Complaint do not plausibly plead the existence of an enterprise.

The First Amended Complaint alleges that GP-Fund is part of an associated in fact enterprise consisting of an unknown and unidentified number of groups and individuals, one of which (Earth First!) has since been dismissed from this lawsuit. First Amended Complaint, ¶ 187 ("Defendants and Enterprise members were associated in fact and comprised an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c)").

The United States Supreme Court has held that an associated in fact enterprise must have (1) a common purpose, (2) relationships among the members of the alleged enterprise, and (3) enough longevity for the members to pursue the common purpose. *Boyle v. United States*, 556 U.S. 938, 946 (2009). To be "associated in fact," there must be "some sort of discrete existence and structure uniting the members in a cognizable group." *Nelson v. Nelson*, 833 F.3d 965 (8th Cir. 2016); *see also United States v. Turkette*, 452 U.S. 576, 583 (1981) ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages.").

To reiterate: "'Under longstanding Eighth Circuit precedent, an alleged RICO enterprise **must also have an ascertainable structure distinct from the conduct of a pattern of racketeering**.'" *Liberty Mut. Fire Ins. Co.*, 88 F. Supp. 3d at 1002 (quoting *Illinois Farmers Ins. Co. v. Mobile Diagnostic Imaging, Inc.*, No. 13-CV-2820, 2014 WL 4104789, at *14 (D. Minn. Aug. 19, 2014) (citing *Crest Const. II, Inc. v. Doe*, 660 F.3d 346, 354–355 (8th Cir. 2011))).

The Eighth Circuit has described this rule as requiring a district court to "'determine if the enterprise **would still exist were the**

predicate acts removed from the equation.'" *Crest Const. II*, 660 F.3d at 354–355 (quoting *Handeen v. Lemaire*, 112 F.3d 1339, 1352 (8th Cir. 1997)).

Perhaps recognizing this requirement, Energy Transfer attempts to claim that "[t]he Enterprise has an existence beyond that which is merely necessary to commit predicate acts," First Amended Complaint, ¶ 188. But, beyond this conclusory statement, Energy Transfer has not alleged any set of facts that, even if taken as true, would establish the existence of an enterprise with an ascertainable structure distinct from the alleged pattern of racketeering. Even after being given the opportunity to amend their Complaint, Energy Transfer is unable to plausibly plead the existence of an enterprise as required by the Eighth Circuit's Federal RICO jurisprudence.

Indeed, it is likely impossible for Energy Transfer to allege even the existence of such an ascertainable structure due to yet another failing in the First Amended Complaint: the failure to define all members of the alleged enterprise.

As explained by the Eighth Circuit, where a RICO plaintiff has alleged an associated in fact enterprise, "such an informal association

must be 'a continuing unit that functions with a common purpose.'" *Nelson*, 833 F.3d at 968 (quoting *Boyle*, 556 U.S. at 948). Here, not only has Energy Transfer failed to adequately define an ascertainable structure that would indicate the existence of an associated in fact enterprise, the First Amended Complaint fails to allege the plausible existence of a "continuing unit."

The First Amended Complaint does not even identify all members of the purported associated in fact enterprise. For example, three of the entities that are, allegedly, part of the "continuing unit," Earth First!, Mississippi Stand, and Red Warrior Camp, are not entities at all, but rather movements, as recognized by this Court in its dismissal of Earth First! as a defendant in this case. Doc. 99. Further, the First Amended Complaint is littered with references to John and Jane Does, further obscuring the actual nature of the associated in fact enterprise alleged by Energy Transfer. *See e.g.* First Amended Complaint, ¶¶ 1, 10–18, 38–45.

Due to Energy Transfer's failure to even identify all members of the purported enterprise, it is impossible for GP-Fund to defend, or even fully understand, the "common purpose" with which these unidentified

groups are purportedly working. In other words, at least some aspects of a RICO claim are defined by the identities of the alleged members of the enterprise, especially where the plaintiff has alleged an association in fact. Therefore, any alleged associated in fact enterprise is necessarily and fundamentally changed depending on the alleged participants.

Here, not only are three of the purported enterprise members non-entities, there are up to twenty unnamed Doe Defendants that, to some extent or another, have been alleged as participants in the scheme. Accordingly, at minimum, before requiring GP-Fund to defend against "thermonuclear" RICO claims, Energy Transfer should be required to specifically define all entities that it suggests are members of the alleged enterprise.

B. Energy Transfer's First Amended Complaint fails to plausibly plead GP-Fund's participation in any alleged enterprise.

Given the failure to adequately identify even the alleged members of the enterprise, the First Amended Complaint necessarily also fails to allege how the enterprise was formed, how it existed separate from the alleged pattern of racketeering, what the common purpose, if any, was,

and how the various purported members controlled and managed the conduct of the enterprise. In particular, Energy Transfer has failed to plead facts showing GP-Fund's control or direction over any aspect of an alleged enterprise.

"In order to participate, directly or indirectly, in the conduct of such enterprise's affairs, one must have some part in directing those affairs." *Reves*, 507 U.S. 170 (1993). A party will only meet the statutory requirement if they exert control over the enterprise such that they "conducted or participated in the conduct of the enterprise's affairs, not just their own affairs." *Id.* at 184–185.

The First Amended Complaint only alleges that GP-Fund shares a director with Greenpeace, Inc. First Amended Complaint, ¶ 55. It does not make any specific allegation regarding GP-Fund's participation, direction, or control of "the enterprise's affairs," what those affairs are besides the alleged advocacy campaign against Energy Transfer, or GP-Fund's knowledge of any such enterprise.

Simply having a business relationship with or performing valuable services for an enterprise, **even with knowledge of the enterprise's illicit nature**, is not enough to subject an individual to

RICO liability. *See Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997).

Plaintiffs allege that GP-Fund funds some of Greenpeace Inc.'s activities in the United States and that GP-Fund "underwrote" the campaign against Plaintiffs. First Amended Complaint, ¶ 53. There is no identification of any funding of any campaign, nor is there any allegation that GP-Fund directs or controls how any alleged donation is used. Transferring money, without any role in directing the enterprise, is insufficient to sustain a RICO claim. *In re: Mastercard Intl. Inc.*, 132 F. Supp. 2d 468, 487 (E.D. La. 2001), aff'd, 313 F.3d 257 (5th Cir. 2002).

Further, even ignoring the failures of the First Amended Complaint as to the elements of RICO, Energy Transfer fails to plausibly plead that the damages it alleges were proximately caused by the alleged pattern of racketeering conduct. The Eighth Circuit has held that RICO's proximate cause requirement is intended to prevent plaintiffs bringing claims based on attenuated chains of causation far removed from the alleged acts of racketeering conduct. *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000).

For all these reasons, GP-Fund respectfully requests that this Court dismiss Energy Transfer's § 1962(c) RICO claims with prejudice.

II. The First Amended Complaint fails to state a claim for relief under N.D.C.C. § 12.1-06.1-03(2).

Energy Transfer's claims against GP-Fund brought under the North Dakota RICO statutes should be dismissed for the same reasons that Energy Transfer's federal RICO claims should be dismissed. Claims brought under North Dakota's RICO statute still must be pled with particularity. Energy Transfer's allegations under North Dakota RICO statute closely track the allegations made under federal RICO. Importantly, there is no conduct attributable to GP-Fund. The items identified above in connection with Energy Transfer's federal claims apply equally to bar Energy Transfer's state law claim. *Neubauer v. FedEx Corp.*, 849 F.3d 400 (8th Cir. 2017).

III. The First Amended Complaint fails to state a claim for relief for Defamation because Energy Transfer fails to allege any defamatory statements made by GP-Fund and any alleged defamatory statements are protected speech.

Energy Transfer's claim for defamation (First Amended Complaint, ¶¶ 238-244) alleges generally that "Greenpeace Defendants knowingly and intentionally published false and injurious statements

about Energy Transfer." Energy Transfer alleges that these statements include six supposedly false categories of statements. First Amended Complaint, ¶ 239. These allegations must fail for three reasons: first, Energy Transfer has not established that GP-Fund is responsible for the allegedly defamatory statements; second, even if attributable to GP-Fund, the publications at issue are expressions of opinion protected by the First Amendment; third, Energy Transfer has not, and cannot, allege facts sufficient to establish that GP-Fund acted with actual malice in allegedly making the publications.

As a threshold matter, Energy Transfer has not, and cannot, establish that GP-Fund is responsible for publishing the allegedly defamatory statements. Despite acknowledging that GP-Fund and Greenpeace Inc. are "separate and distinct legal entities," First Amended Complaint, ¶ 55, Energy Transfer proceeds to mesh GP-Fund and Greenpeace Inc. together, naming this conglomeration "Greenpeace USA."

When addressing Energy Transfer's claims for defamation, this lack of particularity is especially troubling because only the party that takes a responsible part in publication of a defamatory statement can

be held liable for its publication. *Universal Commc'n Sys., Inc. v. Turner Broad. Sys., Inc.*, 168 F. App'x 893 (11th Cir. 2006) (per curium); *Buttons v. National Broadcasting Co.*, 858 F. Supp. at 1027; *Kahn v. iBiquity Digital Corp.*, No. 06 CIV. 1536 (NRB), 2006 WL 3592366, at *5 n.23 (S.D.N.Y. Dec. 7, 2006), aff'd, 309 F. App'x 429 (2d Cir. 2009).

By claiming that "Greenpeace USA" is responsible for the allegedly defamatory statements, Energy Transfer has ensured that GP-Fund cannot adequately defend the claims because it is impossible to know which statements, if any, Energy Transfer is alleging that GP-Fund published, and what statements were allegedly published by Greenpeace Inc. Further, to the extent Energy Transfer alleges that other Greenpeace entities received funding from GP-Fund to execute their campaign of publishing alleged defamatory statements, such allegations are insufficient to support a defamation claim. *Matson v. Dvorak*, 40 Cal. App. 4th 539, 549, 46 Cal. Rptr. 2d 880, 886-887 (1995) ("One whose only contribution to a political campaign is financial, and who is not involved in the preparation, review or publication of campaign literature, cannot be subjected to liability in a defamation action . . . ."). The First Amended Complaint contains no facts that GP-

fund had any oversight or control over any of the publications at issue. Without such facts, GP-Fund cannot be held liable for defamation for any publication made by other entities.

Further, attributing statements to "Greenpeace Defendants," generally, is not sufficient to meet Energy Transfer's pleading standard. As the *Resolute* court articulated in dismissing a very similar Complaint brought against the Greenpeace entities, this lack of specificity fails to meet the burden of pleading actual malice by a party. *Resolute Forest Prod., Inc.*, 2017 WL 4618676 at *7 ("When there are multiple actors involved in an organizational defendant's publication of a defamatory statement, the plaintiff must identify the individual responsible for publication of a statement, and it is that individual the plaintiff must prove acted with actual malice.") (internal citations omitted); *New York Times v. Sullivan*, 376 U.S. 254, 287 (1964).

Because Energy Transfer's allegations do not assert that GP-Fund was responsible for the publication of any alleged defamation by other parties or entities, dismissal of the defamation claim against GP-Fund is warranted.

Even if Energy Transfer has alleged facts sufficient to establish GP-Fund's responsibility for publication of any alleged defamatory materials, Energy Transfer must prove that GP-Fund acted with malice to prevail on a claim for defamation (and necessarily on its claims for RICO based on the predicate act of defamation and its Tortious Interference Claim). This argument is more fully developed in the Greenpeace Defendant's Memorandum in Support of Motion to Dismiss Amended Complaint, and those arguments are hereby incorporated by reference. *See* Section A.3 of Greenpeace Defendants' Memorandum.

In short, Energy Transfer does not allege any facts demonstrating malice on behalf of GP-Fund. Energy Transfer simply concludes that "such statements were made by Greenpeace Defendants with knowledge of their falsity or reckless disregard for the truth." First Amended Complaint, ¶ 241. This is insufficient. Courts have routinely dismissed cases requiring malice containing no plausible allegations regarding such malice. *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir. 2012); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 761-62 (D. Md. 2015) (dismissing complaint that "does nothing more than deliver a bare recitation of the legal standard for malice."). Energy

Transfer's allegations do not and cannot support a claim of actual malice against any Defendant, including GP-Fund.

Finally, Plaintiffs' defamation claim is barred by the First Amendment. As more fully set forth in the Greenpeace Defendants' Memorandum in Support of their Motion to Dismiss, GP-Fund similarly asserts: (1) Energy Transfer's claims implicate the First Amendment; (2) Energy Transfer's defamation claim is based on protected speech; and (3) Energy Transfer fails to state a claim for defamation. GP-Fund cross-references Section A.3 of Greenpeace Defendant's Memorandum for additional support of these arguments.

IV. Energy Transfer fails to state a Tortious Interference with Business claim against GP-Fund.

Tortious interference with business, a judicially created tort in North Dakota, requires "(1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an independently tortious or otherwise unlawful act of interference by the interferer; (4) proof that the interference caused the harm sustained; and (5) actual damages to the party whose relationship or expectancy was disrupted." *Warp Speed Torque Drive, LLC v. M.A.C. Inc.*, No. 3:13-CV-45, 2014 WL 11531617, at *5 (D.N.D. Aug. 29, 2014).

The requirement of an "independently tortious" act means that a plaintiff must "prove that the defendant's conduct would be actionable under a recognized tort." *Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1057-58 (D.N.D. 2006) (citing *Trade 'N Post, LLC v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 720 (N.D. 2001)). Even if defamation is alleged as that act, tortious interference requires the pleading and proving of four elements in addition to defamatory statements in order to constitute an independent tort. *Atkinson*, 462 F. Supp. 2d at 1058-59. Energy Transfer has not sufficiently pleaded such a tortious act.

Energy Transfer's sweeping claim for Tortious Interference with Business is so overly broad it is impossible to define. For example, in addition to allegations related to existing business relations, Energy Transfer alleges interference with "prospective" creditors and investors, as well as "existing and prospective long-term capacity transportation shippers." First Amended Complaint, ¶¶ 245–251. Energy Transfer does not provide factual support for its allegations relating to these prospective business partners, nor does it provide any supporting factual background behind the allegations relating to "transportation shippers."

Additionally, Energy Transfer does not allege how interference with both existing and prospective creditors, investors, and transportation shippers results in fantastic damages of "no less than $300 million." First Amended Complaint, ¶ 251. The lack of factual allegations connecting the alleged interference with the claimed damages leaves GP-Fund with no choice but to speculate as to which alleged damages were caused to existing business relations, and which Energy Transfer attributes to prospective business relations.

In light of this Court's Order requiring Energy Transfer to not only file an amended complaint containing "concise and direct allegations," but to "plead any allegations of fraud with particularity," the factual basis for Energy Transfer's Tortious Interference with Business claim appears almost intentionally obscured, and forces GP-Fund to defend against a claim that is, at minimum, not adequately pleaded.

Disregarding Energy inability to prove that GP-Fund committed an independently tortious, or otherwise unlawful, act of interference, its claim further fails because North Dakota law requires that Energy Transfer prove that the alleged interference "caused the harm sustained." *Warp Speed Torque Drive, LLC*, at *5. In other words, Energy

Transfer must prove that GP-Fund's "interference" caused $300 million in damage to Energy Transfer's business relations with existing and prospective creditors, investors, and "transportation shippers." Even when taken as true, the allegations within the First Amended Complaint fail to establish this critical element of Interference with Business.

To illustrate, Energy Transfer alleges that "Greenpeace USA" sent several letters to various entities from November 2016 through April 2017 related to financing. Energy Transfer also alleges that it was damaged in excess of $300 million. However, Energy Transfer has not, and cannot, substantiate the key link between these letters and the alleged damages: that the recipients of those letters acted to Energy Transfer's detriment based on the letters sent by "Greenpeace USA."

Energy Transfer has alleged no facts to support this. Further, this Court rejected this theory in Energy Transfer's allegations against Bank Track. Doc. 87, at 9. Energy Transfer has not identified any communication sent by GP-Fund. Because Energy Transfer simply identifies GP-Fund and other Greenpeace entities as "Greenpeace USA," it is impossible for GP-Fund to determine whether Energy Transfer is alleging that GP-Fund, itself, sent letters in November 2016 through

April 2017, or whether Energy Transfer is attributing that conduct to other purported members of "Greenpeace USA."

In summary, in spite of this Court's Order requiring that Energy Transfer "plead any allegations of fraud with particularity," Energy Transfer has failed to provide factual support for its allegation that GP-Fund participated in a "campaign of misinformation designed to fraudulently induce the termination of these relationships." First Amended Complaint, ¶ 158.

For all of these reasons, Energy Transfer's claim for Interference with Business should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim.

V. Energy Transfer has failed to allege facts sufficient to establish standing to bring a claim for criminal trespass and has failed to allege facts sufficient to state a claim for criminal trespass under North Dakota law.

1. Energy Transfer has not alleged sufficient facts to establish standing to bring a claim of Criminal Trespass against GP-Fund.

Energy Transfer has failed to properly plead the facts required to establish standing to bring a claim for criminal trespass against GP-Fund.

In order to maintain a trespass claim, a party must hold a "sufficient property interest in the surface estate." *Sagebrush Resources, LLC v. Peterson*, 2014 ND 3, ¶ 5, 841 N.W.2d 705.

Here, the First Amended Complaint does not identify, even with modest precision, the nature, or even existence, of Energy Transfer's property interest in the surface estate over which GP-Fund and other defendants are alleged to have trespassed.

Second, given Energy Transfer's complete failure to identify their property interest in the surface estate, it is impossible for GP-Fund to determine whether the criminal trespass allegations relate to land owned in fee by Energy Transfer or land utilized by Energy Transfer pursuant to an easement.

This is particularly important to GP-Fund's ability to defend itself from these allegations as, in North Dakota, easements grant only nonexclusive use of the land they describe and, accordingly, without a specific clause in the easement granting authority to exclude individuals from the property, Energy Transfer would not have the authority to exclude individuals from the property covered by the easement or to prosecute a claim against GP-Fund for any alleged act of

trespass that may have occurred. *See Riverwood Commercial Park, LLC v. Standard Oil Co.*, 2005 ND 118, ¶ 11, 698 N.W.2d 478 ("[t]he major distinction between a lease and an easement or license is that a lease confers exclusive use and possession of the property against the world, including the landowner, whereas an easement or license merely grants a right or permission to nonexclusive use of the land for a specific, limited purpose"); *see generally Lee v. North Dakota Park Service*, 262 N.W.2d 467 (N.D. 1977).

Given the lack of any information regarding Energy Transfer's interest in the relevant surface estate, its criminal trespass claim must be dismissed.

2. The First Amended Complaint does not allege facts sufficient to state a claim for Criminal Trespass against GP-Fund.

In North Dakota, the offense of Criminal Trespass is codified at §§ 12.1-22-03.1–3, 5 N.D.C.C. Energy Transfer has not identified which specific subsection they are accusing Defendants of violating, and each of the four contain different elements and different resulting penalties. Without such basic identification, it is impossible for GP-Fund to defend against these claims.

Even assuming Energy Transfer had identified which theory of criminal trespass it is alleging against GP-Fund, Energy Transfer does not, and cannot, allege facts that indicate GP-Fund ever entered onto Energy Transfer's property. To illustrate, Count VII states that "As set forth above, Defendants willfully entered Energy Transfer's property without consent or privilege." First Amended Complaint, ¶ 253. However, the First Amended Complaint does not contain a single allegation that specifically references GP-Fund's participation in the actual trespass acts in the vicinity of the Standing Rock protest. *See* ¶¶ 120–122, 125, 133, 141–142, 144, 146–148, 155–156.

For all of these reasons, Energy Transfer has alleged a frivolous claim of criminal trespass against GP-Fund. This claim should be dismissed, with prejudice, and GP-Fund respectfully asks this Court to grant the attorneys' fees and costs incurred in defending against this claim.

G. The First Amended Complaint fails to state a claim for common law civil conspiracy against GP-Fund.

Energy Transfer includes a claim for civil conspiracy under North Dakota law, Am. Compl. ¶¶ 243-248, which requires "a combination of two or more persons acting in concert to commit an unlawful act or to

commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another and an overt act that results in damage[s]." *Kuhn v. Chesapeake Energy Corp.*, No. 1:123-cv-086m 2012 WL 4442798, at *5-6 (D.N.D. Sept. 25, 2012). "To constitute a concerted action, the plaintiffs [need] to present evidence of a common plan to commit a tortious act, the participants knew of the plan and its purpose, and the participants took substantial affirmative steps to encourage the achievement of the result." *Ward v. Bullis*, 748 N.W.2d 397, 408 (N.D. 2008). For all the reasons briefed above, Energy Transfer has not plausibly pled a cognizable underlying tort, that the defendants were acting in concert to commit such a tort, that they agreed to any common plan, or that Energy Transfer was damaged.

CONCLUSION

Energy Transfer's First Amended Complaint against fails to meet its obligation under the *Iqbal* and *Twombly* plausibility standard and Rule 9(b) to sufficiently plead a cause of action against GP-Fund or any Defendant. Energy Transfer fails to make any allegations of actionable conduct by GP-Fund, and its attempted grouping of GP-Fund with the

conduct of other defendants and non-parties, without any facts to support the existence of a RICO enterprise, does not satisfy Energy Transfer's pleading obligation. For these reasons, and those briefed by Co-Defendants, GP-Fund respectfully requests dismissal of Energy Transfer's Complaint with prejudice.

RESPECTFULLY SUBMITTED this 4th day of September, 2018.

By */s/ Matt J. Kelly*
Matt J. Kelly
TARLOW STONECIPHER
WEAMER & KELLY, PLLC
1705 West College Street
Bozeman, MT 59715
(406) 586-9714
mkelly@lawmt.com
Attorneys for Greenpeace Fund, Inc.