STATE OF NORTH DAKOTA **DISTRICT COURT**

COUNTY OF MORTON **SOUTH CENTRAL JUDICIAL DISTRICT**

ENERGY TRANSFER LP, *et al.,* Plaintiffs, v. GREENPEACE INTERNATIONAL, *et al.*, Defendants.	Case No.: 30-2019-CV-00180 **BRIEF IN SUPPORT OF GREENPEACE DEFENDANTS' MOTION FOR PARTIAL SUMMARY PARTIAL SUMMARY JUDGMENT ON SERVICE DELAY DAMAGES**

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[¶1] Plaintiffs demand nearly $100 million in damages from the Greenpeace Defendants because the federal government—not the Greenpeace Defendants—delayed the completion of the Dakota Access Pipeline ("DAPL"). Between July 2016 and February 2017, the United States Army Corp of Engineers ("USACE"), acting in conjunction with the United States Department of Interior and the United States Army, declined to grant Plaintiffs an easement to construct DAPL on federal land under Lake Oahe, North Dakota. Like other members of the public, Greenpeace Defendants have no authority to grant or withhold federal land easements. For years, Plaintiffs told anyone who would listen—including Congress, President Trump, and their investors—that the Obama Administration improperly interfered with the issuance of the easement, thereby delaying DAPL's completion by five months and supposedly causing upwards of $100 million in damages. If Plaintiffs in fact have a cognizable claim against the United States, their remedy is in the United State Court of Federal Claims. But Plaintiffs cannot present any evidence that the Greenpeace Defendants caused these service delay damages. To the contrary, the official documents establish that the United State government caused this delay by withholding the Lake Oahe easement. The Greenpeace Defendants are therefore entitled to partial summary judgment against the service delay damages identified in the Expert Report of David M. Leathers ("Leathers Report").

I. BACKGROUND

A. Plaintiffs Adopt an "Aggressive" Construction Schedule

[¶2] After pinning their financial projections on the hope that DAPL would begin full commercial service on January 1, 2017, Plaintiffs raced to complete construction by the end of 2016. *See* Decl. of Everett Jack ("Jack Decl.") Ex. 1, at 28:14-29:25, 33:9-34:17, 40:18-41:6; Ex. 2, at 12. [redacted]

[redacted]

[¶3] [redacted]

B. USACE Delays Completion of DAPL by Refusing to Grant an Easement

[¶4] Just as Plaintiffs' consultant predicted, USACE delayed completion of DAPL by nearly six months. On July 25, 2016, USACE approved the permits required for the Lake Oahe

crossing—but it did not grant the easement required to actually construct that section of the pipeline beneath federal lands. Jack Decl. Ex. 3, at 2.

[¶5] Two days later, the Standing Rock Sioux Tribe ("SRST") sued USACE, challenging its decision to issue the DAPL permits and seeking to enjoin further construction. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 24 (D.D.C. 2016). On September 9, 2016, the court denied the SRST's motion for a preliminary injunction. *Id.* at 37.

[¶6] However, just hours after the court's ruling, the federal government announced that it would defer granting the easement under Lake Oahe while USACE reassessed its previous permitting decisions, stating that there were "important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline." Jack Decl. Ex. 3, at 2-4 (explaining basis for withholding easement pending "additional review and analysis" by USACE); [redacted]

[¶7] Between September 2020 and January 2021, the government refused to permit DAPL construction on or under federal lands while USACE consulted with SRST and other tribal nations. *See* Jack Decl. Ex. 2, at 2; Jack Decl. Ex. 4, at 3-4. USACE also committed to undertake a comprehensive environmental review of the DAPL project. Jack Decl. Ex. 2, at 2-4.

[¶8] [redacted]

[redacted]

C. Plaintiffs' Contemporaneous Statements Confirm USACE Delayed DAPL's Completion

[¶9] [redacted] In December 2016, for example, Energy Transfer sent a memorandum to the Trump transition team explaining that the Lake Oahe crossing was the only section of DAPL left to complete:

> [DAPL is] connected from the beginning of the project in Stanley, North Dakota to its terminus in Patoka, Illinois except for one portion of the pipe: a 5,400 foot crossing of the Missouri River at Lake Oahe that encompasses only 1,094 feet of federal land on either side of the lake.

Jack Decl. Ex. 7, at 5; *see also* Jack Decl., Ex. 6, at 132:9-134:14. The memo traced the Lake Oahe delay to a specific official, Assistant Secretary of the Army for Civil Works Jo-Ellen

Darcy, Plaintiffs claimed had denied the easement at the behest of "the political apparatus within the Obama Administration": "[D]ue to overt political interference from the Obama Administration, the Army Corps has been instructed not to release a real estate document . . . in an effort to arbitrarily block the completion of the project." Jack Decl. Ex. 7, at 5-6, 18-20; [redacted]

In this December 2020 memo, Plaintiffs claimed Energy Transfer had:

> already incurred over $100 million in direct damages as a result of this extraordinary quasi-judicial political delay, and stands to lose over $300 million in lost commercial revenue by the time the project is ultimately completed assuming that the Trump Administration acts expeditiously to cause the Army to release the easement document.

Jack Decl. Ex. 7, at 5-6; *see also* Jack Decl. Ex. 6, at 136:16-137:8.

[¶10] [redacted]

[¶11] [redacted]

[redacted]

D. The Trump Administration Issues the Lake Oahe Easement and Plaintiffs Complete DAPL

[¶12] Plaintiffs' lobbying efforts succeeded. *See, e.g.*, Jack Decl. Ex. 10, at 239:2-240:8. Shortly after his inauguration, President Trump directed USACE to "review and approve [the DAPL easement] in an expedited manner." Jack Decl. Ex. 11, at 1; *see also* Jack Decl. Ex. 10, at 240:10-23. Due to this direct political intervention, USACE abruptly rescinded its previous decision and approved the easement on February 8, 2017.[1] Jack Decl. Ex. 12; *see also* Jack Decl. Ex. 6, at 131:5-18; Jack Decl. Ex. 10, at 239:2-240:8.

[¶13] [redacted]

Plaintiffs completed DAPL and began service in June 2017. Jack Decl. Ex. 1, at 31:24-34:17,

[1] In 2020, a federal court vacated the UCACE's decision to grant the easement and ordered USACE to prepare an Environmental Impact Statement (EIS). *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 471 F. Supp. 3d 71, 87-88 (D.D.C. 2020), *aff'd in part, rev'd in part*, 985 F.3d 1032 (D.C. Cir. 2021). The EIS process is ongoing. *See, e.g.*, Jack Decl. Ex. 10, at 248:14-249:15, 250:7-251:1 (describing vacature of easement and current EIS process).

136:18-137:20, 138:4-139:3, 139:11-140:13, 148:19-149:19; Jack Decl., Ex. 13; Jack Decl., Ex. 14 at 9.

E. Plaintiffs Sue the Greenpeace Defendants for the Construction Delay Caused by USACE

[¶14] None of the events described above involved the Greenpeace Defendants. *See, e.g.*, Jack Decl. Ex. 1, at 83:18-84:9 (testifying Plaintiff's consultant "saw no evidentiary proof" that Greenpeace Defendants were responsible for any delays). The Greenpeace Defendants have no authority to grant or deny an easement for construction on federal lands or otherwise control the federal government's actions. Nevertheless, Plaintiffs now claim that the Greenpeace Defendants caused the service delays that they attributed to the Obama Administration before filing this lawsuit. [redacted] USACE—not the Greenpeace

Defendants—caused "the five-month Project Delay," and Plaintiffs cannot present any evidence to the contrary.

II. LEGAL STANDARD

[¶15] The Court must grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c)(3). A party opposing summary judgment must "set out specific facts showing a genuine issue for trial." N.D.R. Civ. P. 56(e)(2). The party "may not rely merely on allegations or denials in its own pleading," *id.*, or:

> upon unsupported conclusory allegations, but "must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact."

Perius v. Nodak Mut. Ins. Co., 2010 ND 80, ¶ 9, 782 N.W.2d 355 (2010) (quoting *Beckler v. Bismarck Pub. Sch. Dist.* 2006 ND 58, ¶ 7, 711 N.W.2d 172 (2006)). When a defendant moves for summary judgment "with respect to an issue on which the nonmoving [plaintiff] bears the burden of proof," the defendant meets its burden simply by "'showing'—that is, pointing out . . . —that there is an absence of evidence to support the nonmoving party's case." *Black v. Abex Corp.*, 1999 ND 236, ¶ 18, 603 N.W.2d 182 (N.D. 1999) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Rule 56 "allows the defendant to put the plaintiff to its proof," and requires dismissal unless the plaintiff presents "competent admissible evidence which raises an issue of material fact." *Id.* ¶¶ 19, 23.

III. ARGUMENT

A. The Greenpeace Defendants' Alleged Conduct Did Not Cause Plaintiffs' Alleged Service Delay Damages

[¶16] The Greenpeace Defendants are entitled to partial summary judgment because Plaintiffs cannot present evidence to show that they caused Plaintiffs' alleged service delay damages—an essential element of each of Plaintiffs' claims. *See, e.g.*, *Krueger v. Grand Forks Cnty.*, 2014 ND 170, ¶ 37, 852 N.W.2d 354 (describing causation element of trespass to chattels and conversion claims); *Smith Enters., Inc. v. In-Touch Phone Cards, Inc.*, 2004 ND 169, ¶ 20, 685 N.W.2d 741 ("[I]n order to satisfy the fourth element [of a tortious interference claim], there must be proof the interference caused the harm sustained. In other words, ***but for*** the actions of [the defendant], [the plaintiff] ***would have*** obtained the actual economic benefit." (emphasis added)); N.D.C.C. §§ 32-43-01(2), 32-43-03(2) (limiting defamation damages to "provable economic loss," defined as "special, pecuniary loss caused by a false and defamatory publication").

[¶17] To recover these alleged damages, Plaintiffs have the burden of proving (among other elements) that the Greenpeace Defendants' alleged conduct was the *actual* cause of the construction delay—that is, that the delay would not have occurred "but for" the specific alleged actions by the Greenpeace Defendants. *See, e.g.*, *Smith Enters.*, 2004 ND 169, ¶ 20, 685 N.W.2d 741. Plaintiffs must further prove that the Greenpeace Defendants were the *proximate* cause of the Greenpeace Defendants. The North Dakota Supreme Court has "specifically held that a plaintiff must present affirmative evidence of proximate cause, and may not establish causation solely by discrediting other possible causes" or "upon mere speculation." *Invs. Real Est. Tr. Props., Inc. v. Terra Pac. Midwest, Inc.*, 2004 ND 167, ¶ 9, 686 N.W.2d 140 (citing *Victory Park Apartments, Inc. v. Axelson*, 367 N.W.2d 155, 164 (N.D. 1985)). "[A] prima-facie case of

proximate cause has not been made and the plaintiff cannot recover" where "from the plaintiff's evidence it is as probable that the injury and damage . . . resulted from a cause for which the defendant is not responsible as it is that such injury and damage resulted from a cause for which the defendant would be responsible[.]" *Barbie v. Minko Const., Inc.*, 2009 ND 99, ¶ 11, 766 N.W.2d 458 (affirming grant of summary judgment where plaintiff failed to present non-speculative evidence of causation); *see also, e.g.*, *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (citing Restatement (Second) of Torts §§ 431, 433, 440-453) (applying "uniformly accepted principles of tort law" to hold plaintiffs could not establish proximate cause where defendant's conduct could only have caused injury through "a series of intervening events," including discretionary government decision). Plaintiffs cannot make either showing.

[¶18] The evidence shows that the federal government—not the Greenpeace Defendants—was the actual and proximate cause of the alleged delay by refusing to grant the easement required to complete the pipeline. As described above, USACE withheld the easement from July 2016 to February 2017, preventing Plaintiffs from completing the final section of DAPL. After Plaintiffs received the easement, they completed the pipeline without further delay and it entered service in June 2017. [redacted] Throughout this period, Plaintiffs stated both publicly and privately that the cause of the delay was political opposition by the Obama Administration and Assistant Secretary Darcy. More importantly, the government repeatedly explained the bases for its decision, which did not include the Greenpeace Defendants or any of the conduct Plaintiffs attribute to them.

[¶19] Although Plaintiffs now attempt to change course and blame DAPL's delayed Full Service Date on the Greenpeace Defendants, they cannot present any evidence—and fail to even allege any facts—to support that accusation. Plaintiffs' property tort claims, for example, allege the Greenpeace Defendants trespassed or converted property on a series of dates between August and November 2016. First Am. Compl. ¶¶ 69-73, 75-76, 80-82, Dkt. 100. These alleged incidents occurred *after* USACE had already begun to withhold the easement and ended long before USACE eventually released it. Thus, in addition to being both false and unsupported by any evidence, these allegations cannot show the Greenpeace Defendants' conduct had any impact on DAPL's completion date. The same is true for Plaintiffs' other claims, which similarly fail to establish any causal connection between the Greenpeace Defendants' alleged conduct and DAPL's delayed completion resulting from government's land use decisions.

[¶20] Regardless of any alleged conduct by the Greenpeace Defendants, DAPL could not have begun service on January 1, 2017, because the government still had not issued the easement by that date. Plaintiffs therefore cannot show that "but for" the Greenpeace Defendants' alleged conduct, the delay would not have occurred. Likewise, Plaintiffs cannot show that the delay is *more* attributable to conduct by the Greenpeace Defendants than "a cause for which the defendant is not responsible"—namely, the federal government's independent decision to withhold the easement. The Greenpeace Defendants cannot have proximately caused Plaintiffs' alleged service delay damages when that injury resulted from the federal government's discretionary decision to withhold the easement and reconsider its permitting decisions. [redacted] Absent

"affirmative evidence" that the Greenpeace Defendants actually and proximately caused those damages, Plaintiffs cannot recover them here.

[¶21] Because Plaintiffs cannot show that the Greenpeace Defendants caused Plaintiffs' alleged service delay damages, the Court should grant partial summary judgment against Plaintiffs' demand to recover those damages.

IV. CONCLUSION

[¶22] For all these reasons, the Greenpeace Defendants respectfully request that this Court grant partial summary judgment against Plaintiffs' demand for the service delay damages [redacted]

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