STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF MORTON	SOUTH CENTRAL JUDICIAL DISTRICT

Energy Transfer L.P., et al. Plaintiff, v. Greenpeace International, et al., Defendant.	Case No. 30-2019-CV-00180 **AFFIDAVIT OF JUSTIN BORG BARTHET**

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

Case No. 30-2019-CV-00180

AFFIDAVIT OF

Justin Borg Barthet

COMES NOW, Affiant JUSTIN BORG BARTHET who swears and affirms that the following is true and correct to the best of his personal knowledge under penalty of perjury:

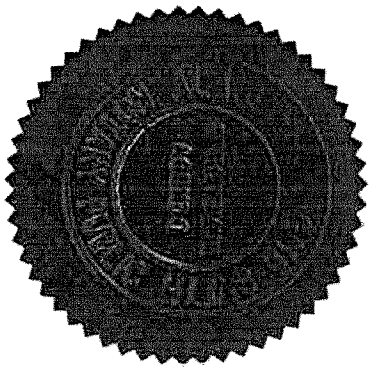
1. I appeared before Alasdair Angus Smith, Solicitor and Notary Public and affirmed the truth of my statement in the above captioned case to the best of my knowledge

Dated this 5th day of August 2025.

Justin Borg Barthet

At Aberdeen, Scotland

Subscribed and sworn before me by Justin Borg Barthet, a person who is known to me, this 5th day of August 2025.



Alasdair Angus Smith
Solicitor and Notary Public
Raeburn Christie Clark & Wallace LLP,
12-16 Albyn Place, Aberdeen, AB10 1PS, Scotland, UK
+44 (0) 1224 332400

Notary Public

Case No. 30-2019-CV-00180

Energy Transfer LP (formerly known as Energy Transfer Equity, L.P.); Energy Transfer Operating, L.P. (formerly known as Energy Transfer Partners, L.P.); and Dakota Access, LLC (Plaintiffs) v. Greenpeace International (also known as "Stichting Greenpeace Council"); Greenpeace, Inc.; Greenpeace Fund, Inc.; Red Warrior Society (also known as "Red Warrior Camp"); Cody Hall; Krystal Two Bulls (Defendants)

I, Justin Borg-Barthet, of the School of Law, University of Aberdeen, King's College, Aberdeen AB24 QUB, United Kingdom, hereby declare as follows:

1. I have been instructed by counsel for Greenpeace International Steven Caplow to answer certain questions relating to the laws of the European Union which have arisen in the above-captioned case.

2. I am the Head of School (Dean) and Professor of EU Law and Private International Law at the School of Law at the University of Aberdeen, where I am also the founder and convenor of the Anti-SLAPP Research Hub.

3. I am a co-author of the Model EU Anti-SLAPP Law, a member of the European Commission's Expert Group on SLAPP, and have advised committees of the European Parliament, the Scottish Parliament and Scottish Government, the United Nations Office of the High Commissioner for Human Rights, as well as the Coalition Against SLAPPs in Europe on Anti-SLAPP law. Further details, including a list of my publications, is available in my curriculum vitae, which is attached hereto.

4. The matters on which I have been asked to opine are as follows: (A) the purpose of Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (hereafter "the EU Anti-SLAPP Directive" or "the Directive"); (B) the nature and purpose of Article 17 of the EU Anti-SLAPP Directive concerning "jurisdiction for actions related to third-country proceedings"; (C) the competence of a court of the Netherlands to exercise jurisdiction to adjudicate the application of the

principles established in the EU Anti-SLAPP Directive; and (D) the treatment of comity in the law of the European Union.

5. In answering these questions, I have considered the following documents: (i) Notice of Plaintiffs' Emergency Motion for Anti-Suit Injunction in the above-captioned case, including Exhibits annexed thereto, (ii) the Second Amended Complaint in the above-captioned case, and (iii) the federal complaint in the District Court of North Dakota Western Division in Case 1:17-cv-00173-CSM brought by certain of the plaintiffs in the above-captioned case against certain of the defendants in the above-captioned case. I have also consulted the legislation and judgments cited hereunder, as well as a range of scholarly literature.

6. In consideration of the independent opinion proffered hereunder, I have received remuneration in the sum of £2500 from the defendants. I have not provided expert testimony in the United States of America over the past five years.

(A) The purpose of the EU Anti-SLAPP Directive

7. The EU Anti-SLAPP Directive was adopted on 11 April 2024 in response to a perceived need to protect public participation rights from abusive litigation. The Directive is a minimum harmonisation instrument. This means that the Member States of the European Union, including the Netherlands, must ensure that the standards of protection of public participation in their national laws meet the minimum standards in the Directive. They are free to exceed those standards, but they may not fall short of them (See Article 3).

8. The Directive draws on existing anti-SLAPP legislation from the United States of America and Canada. As with the statutes from which it takes inspiration, the Directive seeks to establish a balance between the claimant's right to due process and the respondent's right to public participation. To this end, the Directive does not alter substantive rights of the parties. Nor does it seek to curtail the right to bring legitimate claims in a national court, or to seek the enforcement of legitimate claims on a cross-border basis. Rather, the Directive is intended to enable national courts to address abusive litigation arising in a

national court and/or to provide remedies to the respondent by way of compensation.

9. The Directive applies to cross-border cases of a civil or commercial nature:

> "This Directive shall apply to matters of a civil or commercial nature with cross-border implications brought in civil proceedings, including procedures for interim and precautionary measures and counteractions, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the state for acts and omissions in the exercise of state authority (*acta iure imperii*). This Directive shall not apply to criminal matters or arbitration and shall be without prejudice to criminal procedural law." (Article 2)

Provided the case is classified as a private law claim according to the applicable law, the protections provided by the Directive will be available to the respondent. As noted hereunder, unless any of the exclusions in Article 2 apply, the court would not be constrained by the precise framing of the claim but need only satisfy itself that the matter in question concerns an act of public participation for anti-SLAPP protections to be available.

(B) The nature and purpose of Article 17 of the EU Anti-SLAPP Directive concerning "jurisdiction for actions related to third-country proceedings

10. Generally, the EU Anti-SLAPP Directive is concerned with the procedure and remedies available in a national court seised of claims which may impinge on the exercise of public participation rights. The legislator noted, however, that persons domiciled in the EU may be the subject of SLAPPs brought in non-EU jurisdictions, particularly where those jurisdictions do not have robust anti-SLAPP mechanisms in their own laws. Article 17 of the Directive therefore confers jurisdiction on the court in which the purported target of a SLAPP is domiciled to bring proceedings to seek compensation for damages and costs incurred in those foreign proceedings:

> "1. Member States shall ensure that, where abusive court proceedings against public participation have been brought by a claimant domiciled outside the Union in a court or tribunal of a third-country against a natural or legal person domiciled in a Member State, that person may seek, in the courts or tribunals of

> the place where that person is domiciled, compensation for the damage and the costs incurred in connection with the proceedings before the court or tribunal of the third-country.
>
> 2. Member States may limit the exercise of jurisdiction under paragraph 1 while proceedings are still pending in the third-country."

11. In order for Article 17 to be invoked, a court would first need to be satisfied that the matter before it concerns an act of public participation, which is defined as follows:

> "'public participation' means the making of any statement or the carrying out of any activity by a natural or legal person in the exercise of the right to freedom of expression and information, freedom of the arts and sciences, or freedom of assembly and association, and any preparatory, supporting or assisting action directly linked thereto, and which concerns a matter of public interest" (Art 4(1)).

12. A matter of public interest, which is one of the elements of the definition of public participation, is one "which affects the public to such an extent that the public may legitimately take an interest in it" (Art 4(2)). The Directive then provides an indicative list of matters of public interest, which includes protection of the environment or climate, as well as fundamental rights.

13. If the court is satisfied that the matter of which it is seised concerns an act of public participation in matters of public interest, it would then need to consider whether the definition of "abusive court proceedings" is satisfied. Unlike some anti-SLAPP statutes in the United States (e.g. California Code of Civil Procedure), the court of an EU Member State is not required to consider whether it is probable that the claim would succeed. Recital 29 of the Directive explains that a claim may be abusive for the purposes of the Directive even if, for example, a violation of the claimant's rights exists, but the quantum claimed is excessive. Indeed, elsewhere, the Directive distinguishes between remedies available in manifestly unfounded claims and those available also in other types of abusive claim (Article 11).

14. A court of an EU Member State would be required to consider whether the main purpose of the litigation is abusive by considering whether it is likely to result in "the prevention, restriction or penalisation of public participation",

whether it exploits an imbalance of power between the parties, and pursues unfounded claims (Article 4(3)).

15. In my estimation, the requirements in Article 4(3) are alternative, as opposed to a cumulative list of factors which the court must identify. In other words, the definition is satisfied if any of the following factors is identified: (i) the prevention, restriction or penalisation of public participation, (ii) exploitation of an imbalance of power between the parties, or (iii) pursuit of unfounded claims. This view is supported by the explanatory text in Recital 15 to the Directive which shows that the legislator intended an imbalance of power, for example, to be indicative of a SLAPP, as opposed to being a necessary feature:

> "SLAPPs are typically initiated by powerful entities, for example individuals, lobby groups, corporations, politicians, and state organs in an attempt to silence public debate. They often involve an imbalance of power between the parties, with the claimant having a more powerful financial or political position than the defendant. **Although not being an indispensable component of such cases [emphasis added]**, an imbalance of power, where present, significantly increases the harmful effects as well as the chilling effect of court proceedings against public participation. Where present, the misuse of economic advantage or political influence by the claimant against the defendant, along with the lack of legal merit, gives rise to particular concern if the abusive court proceedings in question are funded directly or indirectly from state budgets and are combined with other direct or indirect state measures against independent media organisations, independent journalism and civil society."

It follows that other factors, including whether the claim is founded or otherwise, are not in and of themselves determinative of the question of whether the claim is a SLAPP.

16. Furthermore, although the reference to the claimant's "main purpose" may appear to require the national court to engage in an inquiry into the subjective intent of the claimant, Article 4(3) is framed with reference to further objective indicators of abuse contained in a non-exhaustive list:

> (a) the disproportionate, excessive or unreasonable nature of the claim or part thereof, including the excessive dispute value
> (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;
> (c) intimidation, harassment or threats on the part of the claimant or the claimant's representatives, before or during the

proceedings, as well as similar conduct by the claimant in similar or concurrent cases;
(d) the use in bad faith of procedural tactics, such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith.

In the context of proceedings concerning damages arising from a third-country SLAPP, such as those at issue in the above-captioned case, it is noteworthy that the court of an EU Member State would not be required to engage in an inquiry into whether the exercise of jurisdiction by the court of the third-country was legitimate according to the the law of that court. Nor is the court of an EU Member State required to second guess the third-country court's decision according to the applicable law in those foreign proceedings. Instead, the EU court would look to the circumstances of the case in the round (including, for example, with reference to relevant extra-curial activity which might amount to intimidation or harassment), to consider whether those circumstances are indicative of proceedings which have the purpose of suppressing public participation.

(C) The competence of a Netherlands to exercise jurisdiction to adjudicate the application of the principles established in the EU Anti-SLAPP Directive

17. The application of Article 17 of the Directive is necessarily the exclusive prerogative of the court of the State in which the defendant is domiciled. This is both a consequence of the fact that anti-SLAPP laws are principally procedural devices governed by the law of the court in which they are being heard, and because Article 17 is both a procedural rule conferring jurisdiction and a mechanism to enable the court of an EU Member State to protect public participation rights. It follows that Article 17 (and the Directive as a whole) cannot have extraterritorial application in the sense of being capable of application by a non-EU court.

18. Furthermore, in the absence of an anti-SLAPP law in North Dakota, it appears that a defendant in North Dakota proceedings would not have had an opportunity to invoke anti-SLAPP provisions in that jurisdiction. It follows that a defendant would only be able to invoke those provisions elsewhere, and that

they would do so on the basis of an inquiry which could not have been conducted in a North Dakota court.

(D) The treatment of comity in the law of the European Union.

19. Finally, I turn to the question of how international comity is treated in the private international law of the European Union. This part of my evidence considers comity both as applied as a principle in the private international law instruments of the European Union, and how the general treatment of comity is reflected in the structure of Article 17 of the EU Anti-SLAPP Directive.

20. Jurisdiction, recognition and enforcement of judgments in civil and commercial matters are harmonised in the European Union through Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Hereafter I refer to this instrument as "the Brussels Ia Regulation".

21. The Brussels Ia Regulation creates a unified system of jurisdictional rules among EU member states which accord jurisdiction to specified courts, and which, save in exceptional circumstances, require all other courts subsequently seised of a claim to stay proceedings. This rule is motivated by a need to ensure the orderly conduct of proceedings and to avoid conflicting judgments. As noted by the Court of Justice of the European Union in its judgment in Case C-159/02 *Turner v Grovit*, the system is based on "mutual trust" between the courts of the European Union's member states. "Mutual trust" goes further than comity because it operates in a highly integrated treaty system in which courts are bound by the same laws and form part of a common European judicial area. Nevertheless, in common with comity, it is a product of trust in and deference to the decisions of a foreign court.

22. The Brussels Ia Regulation does not permit anti-suit injunctions as between courts of the Member States of the European Union. This is because the injunction is viewed not merely as a restraint on the party to whom it is addressed, but an "interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the [Regulation]" (*Turner v Grovit*, para 27).

23. Similar concerns for international comity are built into the Anti-SLAPP Directive's provisions on jurisdiction in relation to third-country proceedings. Drafting proposals had included language which would have required national courts to adopt particularly aggressive measures to restrain proceedings in third-country courts. These provisions were replaced with language in Article 17 which allows national courts to defer to the exercise of jurisdiction by a foreign court. These legislative choices are to be understood with reference to a continental European legal tradition which is anxious to avoid interference with the exercise of jurisdiction by a court seised of a claim, whether that court is situated in the European Union or elsewhere. In other words, both the text of the Directive and its legislative history indicate significant regard for predictability in international litigation, and nervousness around restraint of foreign proceedings which would disturb comity among courts.