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, Greenpeace International (aka "Stichting Greenpeace Council"); Greenpeace, Inc.; Greenpeace Fund, Inc.; Banktrack (aka "Stichting Banktrack"); Earth First!; and John and Jane Does 1-20, Defendants.	)	Case No. 1:17-cv-00173

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO MOVING DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiffs Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. (together, "Plaintiffs" or "Energy Transfer") respectfully submit this memorandum of law in opposition to defendants' motions to dismiss and transfer venue.[1]

PRELIMINARY STATEMENT

This Court has recognized that the protests in North Dakota over the Dakota Access Pipeline were neither peaceful, nor primarily about indigenous rights. Instead, months of clashes instigated by people with hidden agendas from outside of the jurisdiction wreaked havoc on the state. As this Court explained in *Dakota Access, LLC v. Archambault*, and reiterated in *Dundon v. Kirchmeier*:

> With respect to the assertion the movement has been a peaceful protest, one need only turn on a television set or read any newspaper in North Dakota. There the viewer will find countless videos and photographs of the "peaceful" protestors attaching themselves to construction equipment operated by Dakota Access; vandalizing and defacing construction equipment; trespassing on privately-owned property; obstructing work on the pipeline; and verbally taunting, harassing, and showing disrespect to members of the law enforcement community . . . To suggest that all of the protest activities to date have been "peaceful" and law-abiding defies commonsense and reality. …

Archambault, No. 1:16-cv-296, 2016 WL 5107005, at *2 (Sept. 16, 2016); *see also Kirchmeier*, No. 1:16-cv-00406, ECF No. 99 at 4 (Feb. 7, 2017). Indeed, those protests were not primarily about free speech or the exercise of First Amendment rights at all, but rather the perpetration of

[1] This memorandum of law is submitted in opposition to: (1) Greenpeace International and Greenpeace, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6) and Memorandum in Support (ECF No. 40-1 referred to herein as "GP Br."); (2) Defendant Greenpeace Fund, Inc.'s Memorandum in Support of its Motion to Dismiss (ECF No. 39 referred to herein as "GP-Fund Br."); (3) Defendant BankTrack's Motion to Dismiss Pursuant to Rules 12(b)(6) and 12(b)(2), and Memorandum in Support (ECF No. 37 referred to herein as "BT Br.").

References to "¶ __" are to paragraphs of the complaint dated August 22, 2017 (the "Complaint") (ECF No. 1).

mindless and senseless crimes by out-of-state protestors with political interests and hidden agendas aided by the commission of those crimes.

It is the damage flowing from criminal activity -- not the peaceful expression of free speech -- that Energy Transfer seeks to vindicate. The Complaint in this action alleges precisely that -- a group of out-of-state forces with political and business agendas (the Enterprise) intentionally instigated violent protests by disseminating knowingly false statements and planting radical eco-terrorists on the ground in North Dakota to create a worldwide spectacle upon which the Enterprise would build its illegal campaign to interfere with the project and Energy Transfer's business.

An integral part of the scheme was the Enterprise's repeated misrepresentations about the impact of the project on the environment and indigenous peoples. The statements are not protected by the First Amendment, as the Defendants contend, because they were not based on any reasonable foundation, and in some cases, were "supported" by fabricated evidence. These misrepresentations were intended to, and did, mobilize people from around the world to descend upon North Dakota. Once there, the protestors -- trained and led by eco-terrorists funded and directed by the Enterprise -- engaged in acts of violence and terrorism against law enforcement and Energy Transfer personnel and property.

Capturing scenes of clashes with law enforcement that the Enterprise had directed and incited, the Enterprise then widely disseminated video, articles, and letters that in turn prompted and otherwise supported cyber-attacks, tortious boycotts, and other illegal conduct designed to and, in fact, did interfere with the project and Energy Transfer's business. Signaling to the mobs on the ground that they had done their job well, members of the Enterprise proudly and publicly took credit for inflicting hundreds of millions in damages on Energy Transfer.

Based on the detailed allegations of illegal conduct set forth in the Complaint, Plaintiffs assert causes of action for racketeering claims under federal and North Dakota law, as well as state law claims for defamation, tortious interference, and conspiracy.

Defendants' motions seek to recast the Complaint's detailed allegations of intentional misrepresentations, fraud, tortious interference, and other illegal conduct as mere "advocacy" protected by the First Amendment. It is not Energy Transfer's intention to chill lawful, peaceful, and responsible free speech or protests by people who have differing political views or even oppose the use of fossil fuels. But as this Court has recognized, and as Defendants know, it is black-letter law that the First Amendment does not protect knowing and intentional misrepresentations, fraud, and the other tortious and illegal conduct alleged by the Plaintiffs.

On the underlying merits, Defendants' challenges to the sufficiency of the RICO claims are inapposite, incorrect, or incomplete. *First*, Defendants argue the Complaint fails to allege each Defendant's individual wrongdoing. While the Complaint details each Defendant's direct role in the illegal enterprise, no such showing is required here, because the Complaint alleges that Defendants acted in concert with one another in furtherance of a conspiracy to harm Energy Transfer. Each Defendant, therefore, is liable for all of the Enterprise's acts reasonably linked to the RICO enterprise. *Second*, the Complaint alleges the existence of an "enterprise" and direct and circumstantial evidence that gives rise to an inference of each Defendant's participation therein. *Third*, the Complaint adequately alleges hundreds of predicate acts, including violations of the Patriot Act, mail and wire fraud, and violations of other criminal statutes. *Fourth*, Defendants' challenges to proximate causation fail because the Complaint alleges Energy Transfer was the direct and, in fact, intended target and victim of the racketeering scheme and activity.

Defendants' challenges to the common law claims are similarly unavailing. Their blithe dismissal of the detailed allegations of calculated falsehoods as protected opinions are belied by their ubiquitous representations that their campaigns are based on "objective" "accurate" "facts." But even if the cloak of advocacy somehow transformed these statements into opinions, the law is clear that Defendants cannot escape liability where, as here, they fabricate evidence, rely on incomplete facts, ignore contradicting facts, or draw erroneous conclusions based on those facts.

Defendants' venue and jurisdiction challenges fare no better. There is a strong presumption in favor of Plaintiffs' choice of forum. This is especially true here, where Defendants intentionally directed their racketeering and other illegal activity toward disrupting lawful activity in North Dakota and thereby inflicted substantial injuries on Energy Transfer in North Dakota. Finally, because it is undisputed that BankTrack and Greenpeace International were validly served with process in the United States, these Defendants are subject to jurisdiction in this state under RICO's nationwide jurisdiction provision, or alternatively, under North Dakota's long-arm statute by virtue of the tortious acts committed in, and targeting, this State.

Accordingly, Defendants' motions should be denied in their entirety.[2]

STATEMENT OF FACTS

A. The Enterprise's Pattern and Practice of Fraud

Over the past several decades, numerous Environmental Non-Governmental

[2] Defendant Earth First! has not appeared or filed a motion to dismiss. Earth First Journal!, an affiliate of Earth First!, appeared as an amicus curiae and asserted that Earth First! cannot be sued because it is an unincorporated association. *See* ECF Nos. 50 & 51. *Askew v. Joachim Memorial Home*, however, recognizes that an unincorporated association holding itself out as a legal entity is estopped from denying its existence. 234 N.W.2d 226, 234 (N.D. 1975). Fed. R. Civ. P. 17(b)(3) also provides that an unincorporated association -- defined as "a body of persons acting together and using certain methods for prosecuting a special purpose or common enterprise" -- may be sued. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 258 (D.R.I. 2004).

Organizations ("ENGOs") putatively focused on the environment have been corrupted. These organizations have abandoned legitimate environmental action and instead regularly manufacture sensational and grossly misrepresented causes designed to further their political objectives and business agendas. A core group of these ENGOs, consisting of the worldwide Greenpeace associations, BankTrack, Earth First!, Sierra Club, RAN, Bold, and 350.org, regularly act in concert targeting well-known companies with outright lies about the putative environmental and cultural impacts of these companies' business dealings. The Enterprise then exploits these lies to generate sensational media attention to drive traffic and donors to their websites and to generate public sympathy for their political causes. The ENGOs intentionally collaborate to create an "echo chamber" providing a veneer of legitimacy for their misrepresentations. (¶¶ 38-41.)

These sophisticated international organizations also intentionally create the illusion that their "campaigns" are generated from independent grassroots actions by local "victims" who spontaneously rally around a cause that the ENGOs then, in turn, promote. In fact, these events are organized, funded, and produced by the ENGOs to create media attention from which they can promote their own business and political agendas. Wolfpacks of ENGOs regularly collaborate on these attacks, including "old-line" ENGOs like Greenpeace and radical and fringe eco-terrorists like Earth First! who promote and engage in direct actions involving violence, and property and business destruction. These ENGOs also shamelessly fabricate claims and "evidence" of misconduct by the companies they target. The public spectacles generated by their direct action create the basis to release streams of press releases and social media postings to disseminate their false claims to the general public. The purpose is to deploy the public to "get involved" by donating or taking direct action such as boycotting financial institutions or interfering with critical business relationships that the target company depends upon. (¶ 42.)

These groups have acknowledged that their campaigns are not based on facts, much less science. Instead, campaigns are chosen based on whether they are likely to create sensational headlines that will induce strong emotions, and thereby "pressure" (i.e. manipulate) the public at-large. To "emotionalize" and manipulate the public, these organizations utilize what Greenpeace's worldwide association internally refer to as "ALARMIST ARMAGEDDONIST FACTOIDS" which are presented as scientific facts but which the Greenpeace has conceded are really not facts at all, "do not hew to strict literalism or scientific precision," and are instead "hyperbole" and "heated rhetoric" that cannot be taken "literally." (¶ 43.) The Enterprise deployed this playbook against dozens of targets -- including Shell Oil, extractors of Canadian Tar Sand Oil, and producers of genetically modified organisms -- manufacturing lies, engaging in rampant property destruction, and endangering lives with eco-terrorist activities. (¶¶ 44-56.)

As a result of this pattern of fraud, deceit, and other illegal activities, Canadian authorities revoked Greenpeace's charitable status because its sensational claims "served no public purpose," and authorities in India are attempting to do the same, while investigating Greenpeace for fraud and tax evasion. (¶ 59.) Greenpeace's founder, Dr. Patrick Moore, has completely distanced himself from the organization, calling it a "monster" engaged in "extremism," "RICO," "wire-fraud," "witness tampering," and "obstruction of justice." (*Id.*)

B. The Campaign Against Energy Transfer

Since at least August 2016, the Enterprise has trained its sights on Energy Transfer and the then-nearly complete Dakota Access Pipeline ("DAPL"). (¶ 60.)

1. Energy Transfer – The Target Of The Enterprise's Scheme

Energy Transfer, a Texas-based pipeline operator engaged in liquid petroleum and natural gas transportation in North America, owns the largest pipeline system by volume in the United States, spanning nearly 72,000 miles. The Company has operated liquid petroleum and natural

gas pipelines safely since 1995 without serious environmental incident. (¶ 62.) On June 25, 2014, Energy Transfer announced the development and construction of DAPL to transport nearly a half-million barrels of domestically produced crude oil across four states daily. (¶ 66.)

2. The Enterprise

a. The Greenpeace Defendants

At the center of the illegal campaign against Energy Transfer is Greenpeace, a network of legally-distinct international, national, and regional associations and individuals operating under the Greenpeace banner. (¶ 38.) Greenpeace Inc. ("GP-Inc.") and Greenpeace Fund, Inc. ("GP-Fund") collectively known as "Greenpeace USA" together "control all Greenpeace operations in the United States" and "pursuant to a 'protocol' between [ ] all other Greenpeace entities worldwide, including but not limited to Greenpeace International, no Greenpeace operations are to occur in the United States without [GP-Inc's and GP-Fund's] consent." *United States v. Greenpeace, Inc., et al.*, Case No. 2:02-cv-00156, ECF No. 5 (C.D. Cal. Jan. 16, 2002). These defendants, along with defendant Greenpeace International ("GPI") and Enterprise members Greenpeace Japan, Greenpeace Netherlands, Greenpeace Switzerland, and Greenpeace personnel Annie Leonard, Perry Wheeler, and Mary Sweeters were directly involved in creating, planning, funding, managing, operating, and controlling the coordinated campaign against Energy Transfer, including by, among other things, underwriting the campaign, providing an internet platform to support, facilitate, and promote the campaign, developing the false and defamatory lies about Energy Transfer, and actively publishing and republishing those lies; issuing extortive threats to Energy Transfer's critical business relationships to sever ties with the Company or face crippling boycotts and other illegal attacks; funding, directing and inciting acts of violence and terrorism; and orchestrating cyber-attacks and telephonic and electronic threats to the physical safety of Energy Transfer executives. (¶¶ 38(a)-(f).)

b. BankTrack

Founded in 2003, BankTrack has a long history of working in concert with Greenpeace, and Enterprise members 350.org, Sierra Club, Earthjustice, Bold, and RAN in their disinformation campaigns, by among other things, threatening financial institutions to cease financing specific projects, companies, and sectors or risk becoming the target of "brand damaging campaigns." (¶¶ 38(j), 41-49.) Under the direction of its director Johan Frijins, BankTrack authored and aggressively disseminated the Enterprise's materially false and misleading information about Energy Transfer and DAPL to the financial institutions financing DAPL and Energy Transfer's other infrastructure projects, and demanded that each bank immediately withdraw funding from Energy Transfer or face crippling boycotts, divestment campaigns, and reputational damages. (¶ 38(j), 237-38, 245-47, 251-52, 255, 261-62, 275.) BankTrack widely disseminated these false and misleading letters on its website to galvanize the public to exert further pressure on the banks through direct actions. (*Id*.)

c. Earth First!

Earth First! is a radical eco-terrorist group that funds, trains, and engages in property destruction and other violent and illegal activity. (¶ 38(l).) Founded by a veteran of Enterprise members Sierra Club, RAN, and Greenpeace, Earth First! has deep ties to these organizations and regularly collaborates with them on their campaigns. The role of Earth First! is to orchestrate "direct actions" involving violent conflicts, acts of terrorism, and destruction of private and federal land. These public spectacles generate fodder for these putatively legitimate environmental organizations to trumpet via press releases and use as the basis to disseminate falsehoods supporting their plea to the general public to "get involved" by donating. Consistent with this history of collaboration, Earth First! worked in concert with Greenpeace and other Enterprise members to fund, direct, and incite acts of violence and terrorism on the ground in

North Dakota. Specifically, Earth First!, among other things, provided Red Warrior Camp with $500,000 in seed money and trained members of Red Warrior Camp in accordance with Earth First!'s "Direct Action Manual," a blueprint for vandalism and property destruction that Red Warrior used as a guide in its violent protests against DAPL. (¶¶ 38(l), 41-42.)

d. Other Enterprise Members

The Complaint details other members of the Enterprise who worked closely with Greenpeace, BankTrack, and Earth First! to: (i) disseminate false and misleading allegations about Energy Transfer with the express purpose of interfering with Energy Transfer's critical business relationships; (ii) create an echo chamber for the Enterprise's lies to foster a sense of legitimacy for the anti-DAPL campaign; (iii) incite large-scale acts of terrorism; and (iv) target Energy Transfer and its executives with cyber-attacks and death threats. (¶ 38(m)-(u).)

3. The Enterprise Launches The #NoDAPL Campaign

In response to dramatically increased production of gas from the Bakken and Three Forks Formation in North Dakota and a series of catastrophic crude oil rail incidents, on June 25, 2014, Energy Transfer announced the development and construction of DAPL -- a 1,172 mile underground pipeline -- to safely and cost-effectively transport nearly a half-million barrels of domestically produced crude oil across four states daily. (¶¶ 61-66.) For the next twenty-five months, Energy Transfer representatives conducted extensive analysis and planning to identify a pipeline route that would have the least impact on the maximum group of stakeholders and resources. (¶¶ 67-76.) Working closely with the United States Army Corp of Engineers ("USACE"), Energy Transfer engaged in design, permitting, consultation, and environmental survey work analyzing, among other factors, constructability, population centers, cost, and minimization of potential public, cultural, and environmental impacts. Throughout the two-year planning process, the pipeline was rerouted 140 times in North Dakota alone to avoid potential

cultural resources. Additionally, mitigation plans were implemented in coordination with the North Dakota State Historic Preservation Office ("SHPO"). (¶ 73.) The result of this extensive process was a route that tracked privately-held land and pre-existing utility lines, roadways, and infrastructure to ensure minimal environmental, cultural, and tribal impacts. (¶ 67.)

On July 25, 2016, USACE issued its Final Environmental Assessment ("EA") for DAPL with a Mitigated Finding Of No Significant Impact ("FONSI"), Nationwide Permit verification, and other authorizations for construction of the limited portions of DAPL that traverse federally regulated waters, paving the way for Energy Transfer to complete construction of the pipeline. (¶ 86.) After more than two years of silence while DAPL was being meticulously designed, publicly reviewed, and approved, and even though Energy Transfer engaged in outreach to all interested stakeholders, the Enterprise identified an opportunity to exploit the interests of the Native American tribes with property near the pipeline route as a publicity platform for an international media campaign. The Enterprise launched the campaign by filing a highly publicized lawsuit on behalf of the Standing Rock Sioux Tribe ("SRST") challenging the permit authorization for DAPL. (¶ 87.) Consistent with the Enterprise's playbook, the lawsuit was accompanied by a materially false and misleading press release alleging the pipeline "Threatens Livelihoods, Sacred Sites, and Water;" that the permitting process was "fast-tracked," "wrote off the Tribe's concerns," and creates an "existential threat" of an "inevitable" spill poisoning the Tribe's water supply. (¶ 88.)

4. The Enterprise Funds, Directs and Incites Violent Protests

To maximize publicity and drive donations to further their agenda, the Enterprise quickly expanded the campaign to ensure direct action against DAPL. Promising legal and financial support, the Enterprise urged SRST and other peaceful protesters to establish protest camps on private and federal land surrounding the pipeline route. The Enterprise then cynically planted

radical, violent eco-terrorists on the ground amongst the protestors, directly funded their operations, and publicly urged their supporters to do the same. (¶¶ 90-91, 106, 313-14.) Earth First! provided $500,000 of seed money to a core group of violent eco-terrorist infiltrators, who then formed what would be known as the Red Warrior Camp. Greenpeace also organized donation drives to fund, feed, and house Red Warrior Camp in ten cities across the country. (¶¶ 91, 106, 314, 319.) Red Warrior advertised their violent protests and used other illegal means to secure additional funding, including selling drugs bought with donated money to other protestors to finance their operations and line their own pockets. (¶¶ 13, 38(m).)

Using the blueprint set forth in Earth First!'s Direct Action Manual, Red Warrior Camp initiated direct action training for its own members and other protestors interested in engaging in violent conflict and directed, incited, and perpetrated acts of terrorism and destruction of private and federal lands. For example, on August 10, 2016, roughly 100 members of Red Warrior Camp, directed and funded by Earth First! and Greenpeace, entered onto Dakota Access property near Lake Oahe without permission and obstructed company workers from gaining access to the property. (¶ 93.) One protestor carried a 12-inch knife strapped to his hip and warned that any Dakota Access personnel who tried to enter the site would get "hurt." (*Id.*) Confrontations ensued on August 11 and 12, 2016, resulting in "mindless and senseless criminal mayhem," delayed pipeline construction, and evacuation of Dakota Access property. (¶ 94.)

The violence at the camps escalated in tandem with the Enterprise's misinformation campaign. While the Enterprise tried to pass off these criminal acts as local uprisings, this Court has acknowledged the "mindless and senseless criminal mayhem" was perpetrated by "out-of-state [protestors] who have political interests in the [ ] protests and hidden agendas . . ." *Archambault*, 2016 WL 5107005, at *2.

In late August 2016, the Enterprise, ostensibly on behalf of SRST, hired a consultant, Tim Mentz, to fabricate the existence of sacred sites along the pipeline route which the Enterprise used as a pretext to ignite a violent standoff between protestors and the Company and law enforcement based on the false and sensational lies that Energy Transfer's scheduled clearing, grading, and preparation of the pipeline-right-of-way over Labor Day desecrated fifty-three sacred sites. On August 30, Mentz gained access to private land directly north of the SRST reservation and purported to conduct a cultural survey of the land adjacent to the pipeline corridor, which Mentz understood would be the next segment of the pipeline slated for construction. (¶¶ 98-99.) Over the next three days, Mentz purported to identify a miraculous concentration of rare and high-value cultural resources in and around the pipeline corridor. (*Id.*) At no time during the three days Mentz purported to conduct these cultural surveys did Enterprise member Earthjustice inform Energy Transfer or USACE of these "rare" discoveries or request rerouting of the pipeline -- which Energy Transfer had implemented on multiple other occasions in response to tribal concerns or cultural surveys. Instead, with full knowledge of the construction schedule, Earthjustice sat on the "findings" until the Friday afternoon before Labor Day weekend, and only at the eleventh hour, informed counsel for USACE and Energy Transfer that that it would -- within the hour -- file a declaration setting forth Mentz's putative findings if Energy Transfer did not delay construction of the pipeline along Lake Oahe. (¶ 100.)

The Mentz declaration was not designed to reveal sacred sites, or prevent their destruction, but rather was intentionally crafted and timed to sandbag the Company on the eve of Labor Day weekend on a tract of land that was slated for construction the very next day. The Enterprise was well aware that there were no remaining intact cultural resources along the pipeline right-of-way. (¶ 101.) Aerial photographs of the right-of-way taken decades ago in

connection with the development and construction of the Northern Border pipeline, which tracks DAPL's route, demonstrate that most of the land surface within the right-of-way had been graded with heavy construction equipment and trenched decades ago. (*Id.*). Moreover, Energy Transfer had previously conducted cultural surveys at the very site Mentz purported to study -- the results of which were reviewed and affirmed by the North Dakota State Historic Preservation Office ("SHPO") and shared with SRST. (*Id.*) Most importantly, the cultural sites Mentz claimed were located inside the pipeline corridor were actually outside that corridor according to Mentz's own GPS coordinates. (*Id.*)

Nevertheless, the Enterprise knowingly disseminated these false and sensational charges as a catalyst to generate widespread hysteria and spur violent riots and protests throughout Labor Day weekend. (¶ 102.) On Saturday, September 3, 2016. the Enterprise falsely charged Energy Transfer with intentionally relocating DAPL construction workers from another location to clear and grade the site of Mentz's purported discovery of cultural resources, when in fact, the construction schedule had been shifted weeks prior to accommodate an annual international leaders' summit held in nearby Bismarck, North Dakota. (¶ 103.)

The Enterprise's plan had its intended effect. On Saturday, September 3, 2016, gathering protestors, led and directed by Red Warrior and incited by the false report that construction crews had purposely accelerated construction to destroy putative newly discovered sacred sites, marched along Highway 1806 and attacked DAPL construction crews working within the pre-existing pipeline right-of-way. (¶ 104.) The protesters quickly became violent, trampling a wire construction fence, stampeding with horses, dogs, and vehicles onto the construction site. Protesters threatened security personnel with knives, hit them with fence posts and flagpoles, and physically attacked private security personnel, resulting in hospitalizations. (*Id.*)

This violent conduct continued throughout October and November. On October 27, 2016, protestors led by Red Warrior trespassed on federal lands and Dakota Access property, and set fire to Energy Transfer's construction equipment, two bridges, and federal lands. (¶¶ 319-21.) Similarly, on November 20, 2016, a large group led by Red Warrior gathered at Backwater Bridge in North Dakota and attempted to cross the bridge to establish an encampment on Dakota Access property. (¶ 323.) Armed with weapons, Red Warrior sought to flank and attack police, ignited fires on and near the bridge, and threw grenades and flares at officers. (*Id.*)

In November 2016, SRST evicted Red Warrior Camp from the protest site because its violent agenda -- the Enterprise's agenda -- was contrary to the Tribe's interests. (¶ 322.)[3]

5. The Enterprise Manufactures and Disseminates Lies About DAPL

After ensuring violent elements from out-of-state were on the ground in North Dakota, the Enterprise sought to escalate conflict through a coordinated disinformation campaign that would incite additional direct action by out-of-state protestors. Beginning in August 2016 and continuing up until the filing of this action, the Enterprise disseminated sensational claims about DAPL -- untethered to any facts -- to manufacture a sense of crisis. The Enterprise then sought to harness this sense of crisis to drive violent protests and interfere with Energy Transfer's most important business relationships. The Enterprise's intentionally inflammatory and demonstrably

[3] The Complaint also alleges the Enterprise recruited, directed, and incited Mississippi Stand, Jessica Reznicek, and Ruby Montoya to engage in violent conflicts in North Dakota, including chaining themselves to construction equipment, blockading construction, and crawling into sections of pipeline with screwdrivers. (¶¶ 317-18, 38(l), (s).) On July 24, 2017, Reznicek and Montoya admitted that in response to Enterprise's misrepresentations concerning violations of "rule of law, indigenous sovereignty, land seizures, [and] state sanctioned brutality," they deliberately set fire to six pieces of Dakota Access machinery, resulting in their destruction, and later made multiple attempts to blowtorch sections of the pipeline, including in May 2017 when oil was already flowing. (¶¶ 324-27.) If Reznicek and Montoya had ignited the oil inside the pipeline, it would have exploded, endangering lives and causing environmental harm. (¶¶ 326.)

false claims were disseminated in high-profile press releases, reports, blog posts, and on social media. (¶¶ 117-278, 375 (Tables A-B), ECF Nos. 1-1 to 1-6 (setting forth author, publication, date, and defamatory statement).)

The Enterprise's barrage of false statements fell into six categories.

a. The Enterprise Misrepresents That DAPL Traverses SRST Tribal Treaty Lands

First, the Enterprise claimed (or created the widespread misperception) that the pipeline would be built across SRST land or that there still exists a legal dispute about whether the SRST holds title to some of the land at issue. (¶¶ 118-19.) In fact, the pipeline is located a half-mile north of the legal boundary of the SRST reservation, and proceeds beneath Lake Oahe. (¶ 120.) The 1.4 miles of land beneath and adjacent to Lake Oahe is not part of the SRST reservation, nor is it the sovereign land of any other Native American tribe. (¶ 121.) It is indisputably federally-owned property. (*Id.*) Moreover, the land on either side of the federally-owned Lake Oahe parcel is privately owned. (¶ 124.)

Any claim that portions of the public or private land is "unceded" tribal land ignores that the question of ownership has been conclusively resolved by the United States Supreme Court, which held in 1980 that the federal government exercised its Constitutional power of eminent domain and "effected a taking of tribal property." (¶ 125.) That Constitutional taking encompassed land north of the current legal boundary of the SRST reservation, including the privately owned parcel of land used for staging and construction. (*Id.*)

b. The Enterprise Misrepresents DAPL Will Poison Tribal Water

The Enterprise also falsely alleged DAPL will result in "[m]illions of people los[ing] access to a clean water supply, including the Standing Rock Sioux Tribe." (ECF No. 1-2.) The Enterprise's unfounded assertion is purportedly based on the notion that DAPL's operation will

inevitably result in a catastrophic oil spill. These claims misrepresent, distort, and omit the relevant science and facts which unequivocally demonstrate pipelines are the safest method to transport energy products and the risks of pipeline rupture are generally minimal, with an oil spill a highly unlikely occurrence occurring less than 0.001% of the time. (¶ 130.) Moreover, the risk of pipeline rupture and oil spill are even more remote with respect to DAPL, which was designed and constructed using the latest safety and environmentally protective technologies, and in strict compliance with federal safety requirements, safety codes, and industry best practices, including high-performance external coating over the entire pipeline to reduce the risk of external corrosion, horizontal directional drilling ("HDD") to install the pipeline deep below bodies of water without disturbing them, thicker walled pipe in certain areas, and advanced monitoring leak detection and remotely controlled isolation valves to prevent spills in the remote case of rupture. (¶¶ 131-145.)

c. The Enterprise Misrepresents DAPL Will Catastrophically Alter Climate

The Enterprise also exploited the mass interest and concern about climate change with the false charge DAPL is a "climate destroying project" that will result in increased greenhouse emissions. (¶ 141.) In fact, DAPL actually has a net positive impact on climate change by providing much-needed infrastructure for domestic oil production that would otherwise be transported by means that are less safe for the environment, such as rail, truck, and barge. (¶ 143.) Since DAPL became operational, oil-train traffic within North Dakota has decreased from daily traffic of 12 trains, or 1,200 cars, at similar oil production volumes, to 2 trains, or 200 cars with DAPL, thus decreasing greenhouse emissions. Without DAPL, more infrastructure for rail and trucking would be built to transport oil in production, increasing both carbon emissions and the risk of spill. (¶ 144.) Thus, analyzing a rail alternative to the Keystone XL Pipeline, the

Keystone XL Environmental Impact Analysis calculated a 27.8% to 41.8% increase in greenhouse gases compared to the proposed pipeline. (*Id.*)

d. The Enterprise Misrepresents Energy Transfer Used Excessive Force to Combat Peaceful Protests

The Enterprise also has falsely alleged that Energy Transfer "commit[ted] grievous human rights violations" against "peaceful" and "non-violent" protestors through "[i]ndiscriminate use of attack dogs, rubber bullets, concussion grenades, tazers and mace." (¶ 146.) However, the so-called "peaceful protests" were anything but peaceful, and the Enterprise deliberately infiltrated the protest campaigns with violent radicals to ensure that end. The State of North Dakota has publicly acknowledged that: "[t]he real brutality [was] committed by violent protesters who use[d] improvised explosive devices to attack police, use[d] hacked information to threaten officers and their families, and use[d] weapons to kill livestock, harming farmers and ranchers." (¶ 147.) As set forth above, this Court has likewise rejected the myth of peaceful protests. *Archambault*, 2016 WL 5107005, at *2.

Construction workers, private security officers, and law enforcement at DAPL worksites exercised extraordinary restraint in response to the violence, responding with force only when necessary to protect themselves or unarmed construction workers from harm. (¶¶ 154-55.)

e. The Enterprise Misrepresents DAPL was Routed and Approved Without Adequate Environmental Review or Consultation

The Enterprise misrepresented DAPL's approval "was rushed, lacked proper government-to-government consultation with [SRST]," was "rubber-stamp[ed]," and "approved without adequate environmental reviews." (¶ 159.) These claims have been rejected twice by the U.S. District Court of the District of Columbia. (¶ 160.)

On September 9, 2016, the U.S. District Court for the District of Columbia explained the facts "tell a different story" and in reality, "the Corps exceeded its [National Historic Preservation Act] obligations." (¶ 107.) The court detailed Energy Transfer's careful consideration of historic artifacts, noting the Company "prominently considered" the "potential presence of historic properties" in choosing the route for the pipeline, consulted past cultural surveys, and hired professionally licensed archaeologists to conduct "extensive new cultural surveys of its own." (¶ 109.) The court further noted Energy Transfer rerouted when the survey revealed previously unidentified historic or cultural resources, including "140 times in North Dakota alone to avoid potential cultural resources . . . ." (*Id.*)

The court also detailed efforts to consult with SRST, noting that despite "dozens of attempts to engage Standing Rock" the "Tribe largely refused to engage in consultations." (¶ 110.) Nonetheless, the court concluded USACE exceeded its consultation requirements because when it met with SRST, they "engaged in meaningful exchanges that in some cases resulted in concrete changes to the pipeline's route." (*Id.*) The court emphasized "the Corps took numerous trips to Lake Oahe with members of the Tribe to identify sites of cultural significance," "met with the Tribe no fewer than four times…to discuss their concerns with the pipeline," and re-routed the pipeline "in response to the Tribe's concern about burial sites." (*Id.*)

In a decision dated June 14, 2017, the same court rejected the Enterprise's false claims of inadequate environmental review, finding that USACE adequately considered viable alternatives to the route, the risks of spill, and impacts of a potential spill. (¶¶ 341-54.) The court held Energy Transfer properly rejected alternate routes, including the Bismarck route, because the route would cross through or close to wellhead source water protection areas, and, unlike the selected route, would have been co-located with existing utility or pipeline routes for only 3

percent of the route increasing the impact on cultural resources. (¶ 343.) The court also found the analysis of the risks of an oil spill was sufficient, noting that the EA "devotes several pages to discussing DAPL's 'reliability and safety,'" providing "the necessary content" to support its conclusion that the risk of a spill is low. (¶ 345.)

f. The Enterprise Misrepresents That Energy Transfer Intentionally Desecrated Cultural Resources

The most damaging, and wholly false, statements disseminated by the Enterprise were the claims that DAPL employees and personnel "deliberately desecrated documented burial grounds and other culturally important sites," "destroyed sacred Native Lands . . . ," and "religious and other historical sites." (¶ 212.)

Contrary to these claims, the DAPL route was planned to avoid sites that had been listed on or were eligible for the National Register of Historic Places. (¶ 213.) The Company specifically selected a route that crosses "brownfield" locations, or tracts of land already disturbed by previous infrastructure projects. Where DAPL crosses Lake Oahe the pipeline is co-located in parallel (but much deeper than) the Northern Border Pipeline, a 1,408-mile natural gas pipeline, as well as overhead power lines. (¶ 219.) HDD drilling at 90 to 115 feet below Lake Oahe makes construction extraordinarily unlikely to impact cultural or tribal resources, as geologic soils at those depths predate human occupation. (¶ 223.)

In North and South Dakota, Energy Transfer retained archeologists from three different, firms to conduct a cultural survey of a 400-foot corridor along the entire planned route – 200 feet on each side of the route. (¶¶ 214-15.) Energy Transfer surveyed nearly twice as many miles in North Dakota than the 357 miles that would eventually be used for the pipeline. (¶ 217.) When the surveys identified potential cultural resources, Energy Transfer modified the route to avoid

cultural resources. The Company also had a comprehensive Unanticipated Discovery Plan in the event construction encountered a cultural resource not detected by cultural surveys. (¶ 218.)

The Enterprise's claim that Energy Transfer deliberately desecrated documented historical resources has been disproven by the SHPO, which conducted cultural resource surveys of the 1.36-mile-long-corridor following the Enterprise's putative identification of cultural resources prior to Labor Day weekend. SHPO concluded the "inventory and inspection conducted . . . yielded no evidence of infractions . . . with respect to disturbance of human remains or significant sites." (¶ 225.)

6. The Enterprise Targets Energy Transfer's Financers and Investors

The Enterprise disseminated these falsehoods directly to Energy Transfer's most important business constituents, most aggressively targeting banks financing DAPL and Energy Transfer's other infrastructure projects. The Enterprise threatened the banks, demanding that they sever ties with the Company or face crippling boycotts and other illegal attacks. (¶227-78.)

The coordinated strategy to interfere with financing for the banks -- #DEFUNDDAPL -- was detailed in a series of articles beginning in September 2016. In the articles, the Enterprise exposed the financial institutions funding DAPL and other infrastructure projects, including DNB, Citibank, ING and Nordea, claiming the banks were "*attempting to make money on the guaranteed destruction of the planet.*" (¶¶ 227-32.)

On November 7, 2016, the Enterprise, led by BankTrack, drafted and signed a letter to DAPL financers demanding they exit their contracts. (¶¶ 237-38.) The letter, signed by Greenpeace USA, Sierra Club, Bold, RAN, and 350.org, falsely claimed that the "pipeline trajectory is cutting through Native American sacred territories and unceded Treaty lands" and misrepresented that Energy Transfer "deliberately desecrated documented burial grounds and

other culturally important sites," notwithstanding court rulings and independent investigations by the SHPO which directly refuted these allegations. (*Id.*)

The letter had its intended result. On November 17, 2016, DNB sold off its shares in Energy Transfer and vowed to reconsider its loans. (¶ 239.) Greenpeace USA immediately touted DNB's action, for which it took credit. (¶¶ 239-40). Nevertheless, Greenpeace and others, continued to publicly admonish DNB to divest from DAPL. (*See, e.g.*, ¶ 243.) On March 26, 2017, DNB sold its estimated $340 million share of the loan. (¶ 277.)

Between November 28-30, 2016, BankTrack, joined by GPI, Greenpeace USA, Greenpeace Netherlands, Sierra Club, Bold, RAN, and 350.org, separately wrote to the seventeen banks financing DAPL, including Citibank and ING, exhorting each bank to withhold further loan disbursements, demanding Energy Transfer halt construction, and, if Energy Transfer refused to do so, withdraw from the loan facility. (¶¶ 245-46.) The same week, Greenpeace Japan and 350.org Japan jointly wrote to the Japanese banks, Mizuho Bank, Sumitomo Mitsui, and Bank of Tokyo-Mitsubishi UFJ, "strongly demand[ing] that you immediately divest from the [DAPL]" and falsely alleging the "project infringes on the [Sioux peoples'] traditional territories and threatens the health of their waterways." (¶ 248.) The Enterprise monitored the financial institutions' responses, and when financial institutions did not immediately respond to the Enterprise's extortive demands, BankTrack, Greenpeace USA, and RAN threatened to "escalat[e] [] pressure on banks that refuse to engage," including by continuing their "brand-damaging campaigns" against the individual financial institutions. (¶ 249-52, 255.)

Like DNB, ING succumbed to the pressure of the campaign and divested its shares in the Company shortly after receiving the November 8 letter. (¶ 259.) Still, BankTrack and Greenpeace continued to publicly harass ING to stop financing DAPL. (¶¶ 261, 263.) On

February 16, 2017, a group of twenty Greenpeace activists "dug room for and planted 15 meters of super heavy pipe sections at the ING headquarters in Amsterdam." Greenpeace Netherlands published pictures via Twitter and vowed to extend the pipeline even further if ING did not change its position on the DAPL project. (¶ 269.) In direct response, ING implored the Enterprise that it had "openly distanced" itself from Energy Transfer, "sold our shares in the parent company" and "rejects any new funding requests." (*Id.*) In March 2017, ING sold its share of the loan. (¶ 275)

The Enterprise also reiterated their false and misleading accusations about Energy Transfer during in-person meetings with banks, including Nordea and Credit Suisse. For example, following the Enterprise's November 8 letter to Nordea, the Enterprise, through Greenpeace USA and Greenpeace Norway, began to single out Nordea, insisting that it "divest from the companies behind the Dakota Access pipeline immediately" because Plaintiffs engaged in "human rights abuses" and "violate[d] Indigenous rights." (¶ 243.) When Nordea did not immediately respond, the Enterprise escalated its campaign against Nordea. (¶ 254.) In mid-December, Nordea agreed to meet with Greenpeace. (¶ 276.) At the meeting, Greenpeace demanded that Nordea "put its foot down" with Energy Transfer and require that the "oil pipeline not go through the [SRST's] reservation land," even though it was undisputed that the pipeline did not traverse SRST land. (*Id.*) In February 2017, following the meeting with Greenpeace, Nordea divested its shares in Energy Transfer.

In response to the Enterprise's threats, Citibank, Mizuho, DNB, Credit Agricole, Natixis, BNP Paribas, and other financial institutions retained Foley Hoag LLP, as an independent human rights expert, to review the permitting process, including compliance with applicable laws related to consultation with Native Americans. (¶ 249-52.) Over four months, Energy Transfer was

forced to respond to numerous information requests and in-person interviews related to the investigation, resulting in legal fees and diversion of company resources. (*Id.*)

7. Cyber-attacks

Consistent with its pattern and practice, the Enterprise also intentionally incited the most unstable actors at their disposal to launch cyber-attacks against Energy Transfer. Simultaneous to its incitement of violent protests on the ground in North Dakota, in August 2016, Anonymous launched a campaign consisting of death threats, attempted denials of service, and harvesting attacks, including a September 8, 2016 video directly threatening Energy Transfer's CEO Kelcy Warren. (¶¶ 332-333.) The Enterprise escalated these attacks in October 2016 when Anonymous perpetrated a blitz of criminal cyber-attacks on Energy Transfer. (¶¶ 338-39.)

C. The District Court Found the Environmental and Cultural Review for DAPL Substantially Complied with NEPA and NHPA

Defendants purport to corroborate their false claims by pointing to the decision issued by the U.S. District Court of the District of Columbia to remand the EA for reconsideration. (GP Br. at 6.) This argument ignores that the District Court explicitly held that none of the grounds for remand represent "fundamental flaws in [the agency's] reasoning." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No.16-1534 (JEB), 2017 WL 4564714, at *8 (D.D.C. Oct. 11, 2017). The District Court explicitly held that USACE had "already gathered" the relevant information and data required on remand, including the risks of a spill and its impact of a spill on Lake Oahe's fish and wildlife. *Id.* at *5. Multiple aspects of the already-conducted analysis suggested the prior decision would be substantiated. *Id.* at *6-7.

D. The Enterprise's Post Suit Activities

The Enterprise's campaign against Energy Transfer is ongoing. Notwithstanding the Complaints' corrective disclosures rebutting the Enterprise's false and misleading allegations,

the Enterprise has continued to disseminate lies about Energy Transfer on each Enterprise member's website and on the website stopETP.org, which was jointly launched by Enterprise members, 350.org, Bold, Greenpeace USA, RAN, and Sierra Club. The coalition statement for StopETP.org restates the same already rebutted allegations that Energy Transfer "desecrate[ed] sacred sites and violat[ed] indigenous sovereignty," "enable[ed] violence against water protectors," "harm[ed] the climate," and "fail[ed] to comply with environmental laws and permits for existing pipelines." The statement also explicitly outlines the Enterprise's scheme to "target ETP's infrastructure projects in our communities, along with companies doing business with ETP, investors that finance ETP, and agencies who give permits to and fail to regulate ETP, until the company embraces a clean energy, fossil fuel-free future . . . ."

The Enterprise recently resorted to its typical publicity stunts by drafting and publicizing court-filings to generate renewed media attention. On January 11, 2018, Earth First! Journal served Plaintiffs with a safe harbor letter and a putative motion for sanctions, contending Earth First! -- the party it claims not to be -- lacks capacity to be sued. Demonstrating the true purpose of the motion, counsel for Earth First! Journal immediately published it on its website and disseminated copies to the press, in contravention of the spirit of the safe harbor rule.

E. The Enterprise's North Dakota Activities

There can be no serious debate about the Enterprise's presence and effects in North Dakota. The campaign caused at least $33 million in damages to North Dakota taxpayers to respond to out-of-state violent protestors and their illegal activities. (¶ 355.) The very purpose of the Enterprise's campaign was to disrupt lawful activity in North Dakota. (¶ 358.) The Enterprise tied numerous false statements concerning DAPL and Energy Transfer to North Dakota and sent money and supplies to establish eco-terrorist encampments there. (*Id.*) These eco-terrorists harassed Energy Transfer construction workers and law enforcement, and

destroyed public and private property. (*Id.*) As a result, Energy Transfer has suffered damage in North Dakota, including costs of delayed construction, increased security costs, and costs associated with countering the Enterprise's disinformation campaign. (¶ 360.)

F. Damages

The Enterprise's campaign targeted Energy Transfer's lenders, investors, customers, and other business constituents, leading to damages the Enterprise publicly calculated to total "many hundreds of millions of dollars" including: (i) increased costs of financing (¶ 362); (ii) monetary damages from disruptions in DAPL construction caused by the violent attacks against Energy Transfer personnel and destruction of construction equipment and segments of pipeline (¶ 360, 364); (iii) increased cost of operations and lost revenue to investigate and mitigate the impact of the Enterprise's disinformation campaign, including increased legal fees and diversion of management's resources (¶¶ 366, 387); (iv) direct monetary damages resulting from the Enterprise's cyber-attacks, including costs of personal security measures in response to death threats and costs of mitigating attempted denials of service and harvesting attacks (¶ 365); and (v) damage to reputation, standing, goodwill, and brand. (¶ 363.)

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12, a complaint should be dismissed only where the facts alleged fail to state a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On a Rule 12 motion, the Court must "assume all factual allegations in the pleadings are true and interpret them in the light most favorable to the nonmoving party." *Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1033 (8th Cir. 2012) (quotation omitted). Additionally, the Court "may consider the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint in deciding a motion to dismiss under Rule 12(b)(6)." *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 990 (D. Minn.

2016) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). Viewed together, a plaintiff's factual allegations may be sufficient to survive a motion to dismiss "even if it strikes a savvy judge that actual proof of th[ose] facts [ ] is improbable, and 'that a recovery is very remote and unlikely.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Applying these standards, for the reasons set forth below, Defendants' motions should be denied in their entirety.[4]

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROTECT DEFENDANTS' RACKETEERING ENTERPRISE AND OTHER UNLAWFUL CONDUCT

Defendants desperately attempt to recast the Complaint's allegations of intentional misrepresentations and criminal conduct as "non-violent expressive speech activities" and "association," and argue that all Plaintiffs' claims must be dismissed on the grounds that Defendants' conduct is protected by the First Amendment. (*See* GP Br. at 11-25; BT Br. at 20-25; GP Fund Br. at 19.) But racketeering, enterprise, and conspiracy, as well as claims of fraud and other tortious and criminal activity, by definition, are not protected by the First Amendment. Once a plaintiff adequately alleges the elements of these claims, the conduct falls outside the scope of any constitutional protection.

[4] Defendants rely on *Resolute Forest Products, Inc. v. Greenpeace International*, 17-CV-02824-JST, 2017 WL 4618676 (N.D. Cal. Oct. 16, 2017). The *Resolute* decision is not binding here, and its legal conclusions do not apply to the allegations here, which are premised on destruction of federal and state land and arson and destruction of pipeline and pipeline equipment, as well as verifiably false statements of fact. The court in *Resolute* dismissed the claims, but permitted Resolute to re-plead. An amended complaint was filed in November 2017. The court has not ruled on the sufficiency of the amended complaint.

This Court has twice held the violent conflicts and acts of terrorism and destruction of federal and private lands perpetrated by "out-of-state [protestors] who have political interests in the [ ] protest[s] and hidden agendas . . ." are not protected by the First Amendment:

> The rights of free speech and assembly do not mean the Dakota Access pipeline protesters can trespass on public or private property, or protest on public bridges, streets, and highways without permission, whenever they choose to do so under the guise of such activity being a "peaceful and prayerful protest" . . . As previously noted, the rights of free speech and assembly do not mean, and have never meant, that everyone who chooses to protest against the Dakota Access pipeline may do so at any time, any place, and under any set of conditions they choose in total disregard of the law. To allow that to occur would result in anarchy and an end to the rule of law in civilized society.

Kirchmeier, No. 1:16-cv-00406, ECF No. 99 at 4, 34-35; *see also Archambault*, 2016 WL 5107005, at *2-3 ("[W]hile the pipeline demonstrators have the right to protest, *they certainly have no right to violate the law or commit illegal and unlawful acts while exercising their First Amendment rights*.") (emphasis added); *id.* at *2 (rejecting argument that holding defendants liable for criminal conduct would have a "chilling effect on [d]efendants' First Amendment rights," and noting that while this argument "certainly plays well in the press, . . . it is devoid of any reason or common sense").

Calculated falsehoods are also excluded from First Amendment protection. *See Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech.");[5] *Time Inc. v. Hill*, 385 U.S. 374, 390 (1967) ("Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and

[5] Defendants argue that charitable speech is *per se* protected by the First Amendment under the Supreme Court's decision in *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). But the Supreme Court's subsequent decision in *Madigan* rejected this, holding "[t]he Court's opinions in *Schaumburg* [ ] took care to leave a corridor open for fraud actions to guard the public against false or misleading [ ] solicitations." 538 U.S. at 617.

deliberately published should enjoy a like immunity."); *Donaldson v. Read Magazine*, 333 U.S. 178, 192 (1948) ("A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public."); *Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Pub., Inc.*, 978 F.2d 1065, 1070 (8th Cir. 1992) (First amendment tolerates sanctions against calculated falsehoods); *Streeter v. Emmons Cty. Farmers Press*, 222 N.W. 455, 457 (N.D. 1928) ("right to freely write, speak, and publish . . . opinions, which is guaranteed . . . by [North Dakota] Constitution, does not mean unrestrained license to publish false and libelous matter") (quotations and citations omitted).

If the interpretation of the First Amendment advanced by Defendants was correct, it would entirely deprive aggrieved parties of redress for intentional misconduct if the concerted activity involved speech in any way. Of course, the Supreme Court has rejected Defendants' construction of the First Amendment:

> [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against . . . agreements and conspiracies deemed injurious to society.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 503 (1949); *see also Goodwin v. United States*, 869 F.3d 636, 639 (8th Cir. 2017), *reh'g denied* (Sept. 28, 2017) ("Specific criminal acts are not protected speech even if speech is the means for their commission.") (citations omitted); *United States v. Hobgood*, 868 F.3d 744, 747 (8th Cir. 2017) (First Amendment does not protect "speech integral to criminal conduct"); *State v. Backlund*, 2003 ND 184, ¶ 25, 672 N.W.2d 431 ("freedom of speech does not extend to speech used as an integral part of conduct in violation of a valid criminal statute").

This principle applies specifically to activity that violates valid conduct-regulating statutes, such as RICO. *See United States v. Larson,* 807 F. Supp. 2d 142, 165 (W.D.N.Y. 2011) ("[T]he RICO conspiracy provision punishes conduct rather than mere association or speech -- namely, the intentional conduct of agreeing to further the criminal enterprise by committing predicate crimes" and, thus does not implicate the First Amendment); *Jund v. Hempstead,* 941 F.2d 1271, 1283 (2d Cir. 1991) (holding "[defendants] are not being punished for their advocacy or their political positions; they are being punished for a long standing coercive solicitation scheme."); *Smithfield Foods, Inc. v. United Food & Commercial Workes Int'l Union,* 585 F. Supp. 2d 789, 804-806 (E.D. Va. 2008) (affirming the validity of the federal RICO statute under First Amendment analysis); *Titan Int'l Inc. v. Becker,* 189 F. Supp. 2d 817, 827-830 (C.D. Ill. 2001) (racketeering scheme that involved "disseminat[ing] false information about plaintiffs to third parties" not subject to First Amendment review); *United States v. Philip Morris Inc.*, 304 F. Supp. 2d 60, 69-72 (D.D.C. 2004) (even truthful statements made in furtherance of a scheme to defraud are beyond the purview of the First Amendment); *Ne. Women's Ctr., Inc. v. McMonagle,* 868 F.2d 1342, 1348 (3rd Cir. 1989) (First Amendment did not bar RICO claims because the court is "not free to read additional limits into RICO once a plaintiff has made out all of the elements required for a finding of liability under the statute's explicit provisions.").

Although Defendants cling primarily to the idea that their conduct is protected by the First Amendment, they fail to cite a *single* case where a court has applied the First Amendment analysis to evaluate the viability of a civil action alleging fraud, misrepresentation, or any other systematic and calculated falsehood, including racketeering.[6] They do not cite any such case

[6] Every case Defendants cite concerns either nonviolent advocacy or truthful statements clearly distinguishing them from the calculated falsehoods and unlawful conduct here. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 444, 460-61 (2011) (involving statements made "in a peaceful manner,

because the Supreme Court has explicitly held the societal interest in free speech is simply not at play in cases involving criminal conduct and other fraudulent activities. *See Madigan,* 538 U.S. 600; *Time Inc.*, 385 U.S. at 389-90; *see also United States v. Larson*, 807 F. Supp. 2d at 166 ("one is not immunized from prosecution for . . . speech-based offenses merely because one commits them through the medium of political speech . . .) (internal quotations omitted).

Thus, the mere fact that speech figures in the alleged scheme does not render Plaintiffs' claims of coordinated racketeering impermissible under the First Amendment, particularly at the pleading stage. *See Larson*, 807 F. Supp. 2d at 165-166 ("[I]t is premature at this time to dismiss the indictment . . . on First Amendment grounds because there has been no evidence introduced to establish precisely what conduct -- protected or unprotected -- is at issue here. The mere inclusion of speech-related allegations . . . is not enough to deem the entire basis for defendants' . . . prosecution for extortion and conspiracy facially impermissible under the first amendment.").[7] Here, the claims alleged include elements that place them outside the ambit of

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in full compliance with the guidance of local officials"); *Thornhill v. Alabama*, 310 U.S. 88, 95, 104 (1940) (finding statements were "peaceful and truthful"); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417, 419 (1971) (distribution of leaflets "on all occasions conducted in a peaceful and orderly manner, did not cause any disruption . . . and did not precipitate any fights, disturbances or other breaches of the peace"); *Hollander v. CBS News Inc.*, 2017 WL 1957485, *3 (S.D.N.Y. May 10, 2017) (distinguishing news coverage from "speech furthering unlawful boycotts . . . or fraudulently soliciting money, or integral to a criminal scheme" which are actionable") (internal quotations omitted); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902-03, 915 (1982) (distinguishing protected "practices generally used to encourage support for the boycott [that] were uniformly peaceful and orderly," from "significant incidents of boycott-related violence," and holding "that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment"); *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290 (1981) (involving political campaign contributions; no allegation of false statements or violence); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (membership in NAACP; no allegations of false statements or violence).

[7] The vast majority of cases Defendants rely on are not decided at the pleading stage and thus apply standards of review inapplicable on this motion. *See, e.g., Snyder*, 562 U.S. 443 (post-jury trial); *Thornhill*, 310 U.S. 88 (post-criminal conviction); *Vill. of Schaumburg*, 444 U.S. 620 (summary judgment); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (post-trial); *Citizens*

First Amendment protection. Thus, the only question at this stage of the proceeding is whether Plaintiffs have properly alleged each element for all of their claims. Plaintiffs have met this burden with respect to each cause of action alleged in the Complaint.

II. THE FEDERAL RICO CLAIMS ARE PROPERLY PLED

The federal RICO statute makes it unlawful for "any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such an enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c).[8] RICO authorizes a private right of action for "[a]ny person injured in his business or property by reason of RICO's substantive provisions." *Id.* § 1964(c). To plead a RICO violation, a plaintiff must allege defendant: (1) conducted, (2) an enterprise, (3) through a pattern, (4) of racketeering activity, (5) resulting in damages to business or property. *See Handeen v. Lemaire*, 112 F.3d 1339, 1347-54 (8th Cir. 1997) (elements of § 1962(c) claim).[9]

Congress mandated that the RICO statute is to "'be liberally construed to effectuate its remedial purposes.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947). Consistent with this mandate, the Supreme Court has interpreted

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Against Rent Control/Coal. for Fair Hous., 454 U.S. 290 (summary judgment); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (post-contempt judgment).

[8] The statute also proscribes "any person who has received any income derived, directly or indirectly, from a pattern of racketeering" to "use or invest, directly or indirectly, any part of such income" in an "enterprise which is engaged in, or the activities of which affect interstate or foreign commerce." 18 U.S.C. § 1962(a). Finally, the statute makes it unlawful for any person to conspire to violate sections § 1962(a) or (c). *Id.* § 1962(d).

[9] To plead a violation of 18 U.S.C. § 1962(d), a plaintiff must establish that either "a defendant personally agreed to commit two predicate acts in furtherance of the enterprise or that a defendant agree[d] to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise." *United States v. Henley*, 766 F.3d 893, 908 (8th Cir. 2014) (internal citations omitted).

the RICO statute broadly and "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge v. Phoenix Bond and Indem. Co.*, 533 U.S. 639, 660 (2008) (declining to impose first-party reliance requirement); *Sedima*, 473 U.S. at 481 (neither prior conviction nor racketeering injury required); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252, 262 (1994) (rejecting claim that RICO requires an "economic purpose"); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244, 249 (1989) (declining to read "an organized crime limitation into RICO's pattern concept"); *Boyle v. United States*, 556 U.S. 938, 948 (2009) (rejecting argument that enterprise requires formal structural attributes).[10] The Eighth Circuit also has recognized that in the face of broad Congressional language, it is "beyond [the court's] authority to restrict the reach of the statute" if its elements are satisfied. *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982).

The Complaint sets forth each Defendant's participation in the illegal scheme to interfere with Energy Transfer's construction and operation of DAPL to further their business and political objectives and fraudulently raise funds to perpetuate their scheme. The Complaint also alleges that in furtherance of the scheme, the Enterprise: (i) funded, directed, and incited violent acts of terrorism, including destruction of federal land and arson of construction equipment and the pipeline itself in violation of the U.S. Patriot Act (¶¶ 90-91, 93-94, 102-04, 106, 147-52, 157-58, 313-31); (ii) aggressively published and disseminated false and sensational lies about Energy Transfer to the public and the Company's critical business constituents, including financers, investors, and customers (¶¶ 117-78); and (iii) directed and incited cyber-attacks and death

[10] The Supreme Court has rejected the types of narrow construction of RICO urged by Defendants -- the "stigmatizing" effect of being named as a RICO defendant, *Sedima*, 473 U.S. at 492, and the threat of "over-federalization" of traditional state-law claims, *Bridge*, 553 U.S. at 660. Where additional requirements are not supported by RICO's text, the Court is "not at liberty to rewrite RICO to reflect [defendants'] views of good policy." *Bridge*, 553 U.S. at 660.

threats against Energy Transfer executives (¶¶ 332-40), which have inflicted enormous damage on Energy Transfer's business and reputation (¶¶ 361-66). These allegations satisfy the elements of a RICO claim.

Defendants do not dispute that destruction and attempted destruction of the pipeline, construction equipment, and federal and private lands are actionable predicate acts. (*See* GP Br. at 48). Nevertheless, Defendants seek to side-step these well-pled allegations through the conclusory assertion their conduct is limited to "writing articles and letters." (GP Br. at 27; *see also* GP Br. at 39 ("[N]one of the [Patriot Act violations] are alleged to have been directly taken by Greenpeace or any Defendant.").)

As an initial matter, even if Defendants' conduct was limited to the dissemination of misinformation about Energy Transfer to third parties in furtherance of a scheme to defraud -- which it is not -- such conduct falls squarely within the Supreme Court's definition of mail and wire fraud:

> [S]uppose an enterprise that wants to get rid of [plaintiffs] mails misrepresentations about them to their customers and suppliers, but not to [plaintiffs] themselves. ***If [plaintiffs] lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business 'by reason of' a pattern of mail fraud*** . . .

Bridge, 553 U.S. at 649-50 (emphasis added).

But, in any event, the Complaint pleads the direct role of GPI, GP-Inc. and GP-Fund in funding, supporting, and inciting the violent protests and criminal activity that predated the writings they conceded they are responsible for -- including their role in devising the scheme to plant eco-terrorists in North Dakota and raise funds and supplies for Red Warrior to perpetrate the large scale attacks on construction sites, bombing and arson of federal and state lands, and other forms of property destruction (¶¶ 90-91, 93-94, 102-04, 106, 147-52, 157-58, 313-31). At this stage of the proceedings, these allegations must be accepted as true.

Moreover, it is black-letter law that as a member of a RICO enterprise that had the purpose of interfering with Energy Transfer's construction and operation of DAPL, each Defendant is liable for all the acts of their co-conspirators reasonably linked to the Enterprise's goals irrespective of whether they participated in the commission of the predicate act or had knowledge thereof. *See Salinas v. United States*, 522 U.S. 52, 63 (1997) (a RICO "conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense"); *see also id.* at 63, 64 ("[if] conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators " and "[e]ach is responsible for the acts of each other"). Thus, the focus is "not on the agreement to commit the individual predicate acts," but on "the agreement to participate in the enterprise through a pattern of racketeering activity." *Henley*, 766 F.3d at 908. "Proof of an express agreement is not required" to establish the existence of a RICO enterprise. *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995). Rather, an agreement to participate in an enterprise through a pattern of racketeering "may be shown wholly through the circumstantial evidence of [each defendant's] actions." *Id.*; *see also Handeen*, 112 F.3d at 1355.

Here, each Defendant agreed with their co-defendants and enterprise members to engage in the illegal scheme targeting Energy Transfer (*infra* § II.B.), and performed numerous overt acts in furtherance of that scheme (*infra* § II.D.), causing massive injury to Plaintiffs. Thus, each Defendant is legally responsible for the acts of its co-conspirators that are reasonably foreseeable within the scope of the conspiracy. *See, e.g.*, *Henley*, 766 F.3d at 909 (imputing liability to defendant for acts of co-conspirators where circumstantial evidence demonstrated agreement to participate in enterprise); *U.S. v. Foxx*, 544 F.3d 943, 952 (8th Cir. 2008) ("Once the evidence of a conspiracy has been established, even slight evidence connecting a particular defendant to the

conspiracy may constitute proof of the defendant's involvement in the scheme to render the defendant culpable.") (internal citations omitted).[11]

The Complaint pleads each element of RICO in accordance with the pleading standard.[12]

A. The RICO Claims Are Pled With Requisite Particularity

1. The Complaint Pleads Each Defendant's Direct Role in the RICO Enterprise

Defendants argue the RICO claims fail to meet Rule 9(b)'s pleading requirements because the Complaint "groups all Defendant[s] together" without identifying each defendant's individual wrongdoing. (*See* GP-Fund Br. at 9-10; *see also* GP Br. at 37.) These arguments misstate the law and ignore the Complaint's detailed factual allegations.

It is well settled that Rule 9(b)'s heightened pleading requirement only applies to those RICO predicate acts that sound in fraud. *See Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 919 (8th Cir. 2001); *see also Aragon v. Che Ku*, No. 16-cv-3907 (WMW/KMM), 2017 WL 4325601, at *3 n.2 (D. Minn. Sept. 28, 2017) (holding Rule 9(b) does not apply to predicate acts of alien trafficking and witness tampering); *Waldrup v. Countrywide Fin. Corp.*, No. 2:13-cv-08833-CAS(CWx), 2015 WL 93363, at *4 (C.D. Cal. Jan. 5, 2015) ("[W]here a plaintiff alleges claims grounded in fraudulent and non-fraudulent conduct, only the allegations of fraud are

[11] *See also U.S. v. Schlei*, 122 F.3d 944, 968 (11th Cir. 1997) ("Each party to a continuing conspiracy may be vicariously liable for substantive criminal offenses committed by a co-conspirator during the course and in furtherance of the conspiracy, notwithstanding the party's non-participation in the offenses or lack of knowledge thereof.") (citations omitted).

[12] Since Energy Transfer has sufficiently plead its federal RICO claims, it has likewise plead its North Dakota counterpart under N.D.C.C. § 12.1-06.1-03(2). *See Burr v. Kulus*, 564 N.W.2d 631 (N.D. 1997) (North Dakota RICO statute modeled after the federal RICO statute and contains similar language for a similar purpose). Moreover, Plaintiffs have adequately alleged probable cause that Defendants committed the predicate acts. *See Geraci v. Women's Alliance, Inc.*, 436 F. Supp. 2d 1022, 1043 (D.N.D. 2006) (Hovland, J.) (probable cause means "fair probability").

subject to heightened pleading requirements."). Thus, Rule 9(b) has no application to Plaintiff's RICO claims premised on violations of the Patriot Act, money laundering, and extortion.[13]

While Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake," the Eighth Circuit has held the requirements of Rule 9(b) must be interpreted "in harmony with the principles of notice pleading" set forth in Rule 8 and "does not necessitate anything other than notice of the claim." *Abels*, 259 F.3d at 920 (internal citations omitted). Thus, to satisfy Rule 9(b), a plaintiff need only plead the "who, what, where, when, and how of the alleged fraud." *Garrett v. Cassity*, No. 4:09-CV-01252-ERW, 2010 WL 5392767, at *17 (E.D. Mo. Dec. 21, 2010) (citation omitted). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

Applying the foregoing standards, federal courts routinely sustain RICO claims involving allegations directed against a group of defendants, where, as here, the Complaint identifies each defendant's individual role in the RICO scheme. *See, e.g.*, *Grant v. Turner*, 505 F. App'x 107, 112 (3d Cir. 2012) (vacating dismissal of RICO claims where, although defendants were grouped together for pleading purposes, they were "on notice of the precise misconduct with which they [were] charged") (citations omitted); *Garrett*, 2010 WL 5392767, at *17 ("Although Plaintiffs' . . . Complaint does contain a substantial number of allegations directed at defined groups such as the RICO Defendants . . . it also contains numerous allegations specifically highlighting [individuals'] involvement in the scheme to defraud."); *Alumax Mill Prod., Inc. v. Krzysztofiak*, No. 96 C 5012, 1997 WL 201555, at *3 (N.D. Ill. Apr. 17, 1997) (allegations attributing wrongdoing to enterprise were sufficient where plaintiff did not "merely lump[ ] defendants

[13] Even where mail and wire fraud are alleged, Rule 9(b) applies only to the RICO "racketeering activity" element of mail and wire fraud, and not to other elements. *See, Abels*, 259 F.3d at 919 (holding that district court erred in applying Rule 9(b) to pattern element).

together and generally complain[ ] of their actions," but "adequately apprised each defendant of their respective roles in the alleged scheme"). These holdings are in in accord with the well-settled principle that a plaintiff "need not plead fraud with complete insight before discovery is complete" since factual information concerning the fraud is peculiarly within defendant's knowledge and control. *Gunderson v. ADM Inv'r Servs., Inc.*, 230 F.3d 1363 (8th Cir. 2000) (citation and quotation marks omitted); *see also Abels*, 259 F.3d at 921 (same).

The Complaint satisfies Rule 9(b)'s requirements with respect to each Defendant. While GPI, GP-Inc., and BankTrack argue that Plaintiffs "make[] no effort to identify which purported enterprise member was responsible for a particular action" (GP Br. at 35), including failing to identify "the author of the reports," and the "fraud in the reports" (GP Br. at 44, BT Br. at 34-35), these arguments are belied by the detailed tables in the Complaint and accompanying appendices which set forth the author, publication title, date, and recipient of hundreds of false and misleading allegations about Energy Transfer and DAPL, each of which constitute a separate predicate act under RICO. (*See* ¶ 375 (Tables A and B); ECF Nos. 1-1 to 1-6.)

GP-Fund's contention that the Complaint is devoid of any allegations that GP-Fund created or published any false information about Energy Transfer or DAPL (GP Fund Br. at 12), is likewise without merit. The Complaint alleges GP-Fund was intimately involved in planning, approving, directing, and funding the activities in furtherance of the illegal scheme against Energy Transfer, including distributing approximately $6.5 million of the $16.8 million collected in 2015 to GP-Inc. to fund the illegal dissemination campaign, and together with GP-Inc. published dozens of false publications about Energy Transfer and DAPL under the collective name "Greenpeace USA." (¶ 38(b).) These allegations -- which must be accepted as true in this motion -- are consistent with GP-Fund's and GP-Inc.'s prior sworn admissions that the two

organizations collectively known as "Greenpeace USA," together "control all Greenpeace operations in the United States," and "pursuant to a 'protocol' between . . . all other Greenpeace entities worldwide, including but not limited to Greenpeace International, no Greenpeace operations are to occur in the United States without [GP-Inc and GP-Fund, Inc.'s] consent." *United States v. Greenpeace, Inc.*, Case No. CV-02-00156, ECF No. 5. Thus, each of the fraudulent statements published by Greenpeace USA constitutes a separate act of mail and wire fraud attributable to GP-Fund.[14]

2. Each Defendant is Liable for the Full Conduct of the RICO Enterprise

Defendants' assertion that the Complaint fails to put each defendant on notice of the individual claims asserted against them ignores the fundamental legal premise that as a member of the Enterprise, each defendant is responsible for all of the acts of the Enterprise reasonably linked to the RICO conspiracy. (*See supra* § II.) Thus, the failure to identify the specific misconduct of each defendant is immaterial here because each defendant is liable for the acts of its co-conspirators in furtherance of the conspiracy.

B. The Complaint Pleads a RICO Enterprise and Each Defendants' Participation in the Enterprise

The RICO statute defines an enterprise as "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has held the "very concept of an association in fact is expansive" and encompasses any "continuing unit that functions with a common purpose." *Boyle*, 556 U.S. at 944, 948.

[14] In light of these detailed allegations concerning GP-Fund's role in the Enterprise, its reliance on *In re MasterCard Int'l. Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468 (E.D. La. 2001), for the proposition that transferring money is insufficient to confer RICO liability is entirely misplaced. (*See* GP-Fund Br. at 11.) To the contrary, the court in *Mastercard* recognized that where, as here, the complaint alleges defendants exercised some control over the scheme, such allegations gives rise to RICO liability. *Id.* at 490 (internal citations omitted).

1. The Complaint Pleads A RICO Enterprise

Defendants challenge the sufficiency of the allegations of a RICO enterprise on two grounds. First, they argue the Complaint fails to plead a RICO enterprise separate and apart from the racketeering activity in which it was engaged. (BT Br. at 30.) Second, Defendants contend the enterprise lacks an ascertainable structure. (*See* GP Br. at 34-36, 38-39; BT Br. at 30-32.) Both arguments fail because neither requirement exists to plead a RICO enterprise.

Boyle -- the leading Supreme Court case addressing the statutory requirement of a RICO enterprise -- demonstrates the fatal flaws in Defendants' arguments. In *Boyle*, the Supreme Court held that while a complaint must plead the existence of an "enterprise" separately from the "pattern of racketeering activity," *the same evidence* may serve as proof for both elements. *Boyle*, 556 U.S. at 947 (evidence used to prove a pattern of racketeering activity and evidence establishing the existing of an enterprise "may in particular cases coalesce"); *see also Fladeland v. Satrom*, No. 2:12-cv-20, 2012 WL 12914319, at *2 (D.N.D. Oct. 26, 2012) (same); *Allstate Ins. Co. v. Linea Latina De Accidentes, Inc.*, 781 F. Supp. 2d 837, 844-45 (D. Minn. 2011) (allegation that enterprise was limited to engaging in predicate acts of racketeering were sufficient to allege an enterprise).

Boyle also rejected any requirement of "extratextual" formal structural attributes, including "hierarchical structure," "role differentiation," "unique modus operandi," "chain of command," "regular meetings," "rules and regulations," and method of decision-making. *Boyle*, 556 U.S. at 945, 948.[15] The Supreme Court held that "[w]hile the group must function as a

[15] *Crest Const. II, Inc. v. Doe*, 660 F.3d 346 (8th Cir. 2011), relied on by Defendants, does not impose a higher burden. While the Eighth Circuit in *Crest* quotes pre-*Boyle* cases, the Court has not had occasion to analyze the effect of *Boyle*'s abrogation of that precedent as the Complaint did not include *any* allegations to infer a continuing unit. *Nelson v. Nelson*, 833 F.3d 965 (8th Cir. 2016), is likewise factually distinguishable because the court held that none of the alleged activity "[was] done by, or attributable to, the group as a whole." *Id.* at 968.

continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence." *Id.*[16] Consistent with *Boyle*, the Eighth Circuit has held that evidence of a "continuing unit" may be circumstantial and may be satisfied through allegations that a group of individuals is functioning as an "informal or formal organization engaged in a course of conduct directed toward the accomplishment of the common purpose." *Henley*, 766 F.3d at 906 (citations omitted). [17]

The Complaint details the decades-long pattern and practice perpetrated by a core group of ENGOs -- including Greenpeace, BankTrack, Earth First!, Earthjustice, Sierra Club, RAN, Bold, and 350.org -- to further their collective business and political objectives and drive donations to perpetuate their illegal scheme.[18] The criminal activities and campaigns of misinformation executed by these Enterprise members have targeted, among others, Shell Oil, extractors of Canadian Tar Sand Oil, and producers of genetically modified organisms. (¶¶ 41-

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[16] *See also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 368 (3d Cir. 2010) ("To the extent our cases have interpolated additional requirements into the statute, they are abrogated by *Boyle*.").

[17] Participants associated with the enterprise may undergo changes without "loss of the enterprise's identity as an enterprise." *United States v. Kragness*, 830 F.2d 842, 856 (8th Cir. 1987); *Boyle*, 556 U.S. 938 (sustaining enterprise where "participants . . . included a core group, along with others . . . recruited from time to time").

[18] Allegations of the longstanding interpersonal relationships between these groups gives rise to an inference of an association in fact enterprise. *See Boyle*, 556 U.S. at 946 (structure is "pattern of relationships, as of status or friendship, existing among the members of a group or society") (citations omitted). (¶ 33(l) (founder of Earth First! was veteran of Sierra Club, RAN, and Greenpeace and responsible for forming Greenpeace's first direct action teams and collaborates with these groups); *see also* ¶ 33(p) (350.org lists Greenpeace, Sierra Club and RAN among its "friends and allies"); ¶¶ 33(q), 46-48 (Earthjustice (former legal arm of Sierra Club) names Greenpeace, Sierra Club, and RAN as "partners" in its "coalition[ ]" and collaborated with them against Shell).)

59.) These allegations raise an inference of a "continuing unit that functions with a common purpose." *Boyle*, 556 U.S. at 941 (affirming liability for enterprise whose core group was responsible for a series of thefts over 3 years, despite defendant's objections that group was "loosely and informally organized," did not have a "leader or hierarchy," and did not have "any long-term master plan or agreement"); *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263-64 (2d Cir. 1995) (jury could infer that two corporations engaged in manufacturing electromagnetic locks were members of an association-in-fact enterprise from their pattern of disseminating false and deceptive statements about a competitor's electromagnetic locks to obtain business); *United States v. Doherty*, 867 F.3d 47, 68 (1st Cir. 1989) ("The number of acts, their relationship, their having taken place over several years, and the consistent participation of the central figures in the scheme show a group of persons associated together for a common purpose of engaging in a criminal course of conduct.") (citation omitted).

Defendants argue the absence of allegations of "alleged communications between the enterprise members around the claimed common purpose" and "agreements between the members on any overall scheme or even particular course of action" precludes a finding that these parties functioned as a continuing unit. (GP Br. at 32-33.) The Eighth Circuit, however, has expressly rejected such restrictive pleading requirements, holding "a court cannot reasonably expect highly specific allegations before allowing at least a brief discovery period . . . [since] [t]he facts that would have to be alleged are known to the defendants, but the plaintiffs have not yet had a chance to find them out." *Abels*, 259 F.3d at 921. Rather, where, as here, "a plaintiff is not a party to a communication, . . . [w]e think it only fair to give them [the] benefit [of discovery] before requiring them to plead facts that remain within the defendants' private

knowledge." *Id.*[19] These principles are particularly applicable here where the allegations of coordinated conduct raise a strong inference that discovery will yield communications among Enterprise members. Indeed, it is inconceivable that the Enterprise members jointly drafted and disseminated letters to each of the banks financing DAPL without ever communicating.

2. The Complaint Pleads Each Defendant's Participation in the Enterprise

Defendants' assertions that the Complaint fails to plead their management or operation of the Enterprise are equally unavailing. (*See* GP Br. at 37, BT Br. at 32-33.) RICO liability under 1962(c) extends to all those "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Anyone who "participate[s] in the operation or management of the enterprise itself" is liable. *Handeen*, 112 F.3d at 1348 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)). To meet the operation and management test, a plaintiff need only allege that each defendant played "some part in directing the enterprise's affairs." *Darden*, 70 F.3d at 1543; *see also* BT Br. at 33 ("It is not necessary that a RICO defendant have wielded complete control over an enterprise," but had "some part in directing the enterprise's affairs.").

The Complaint properly pleads the specific division of functions performed by each Defendant. At the center of the illegal enterprise was the legally distinct association of Greenpeace entities which worked in concert with radical eco-terrorist organizations -- such as

[19] Defendants' reliance on *United States v. McArthur*, 850 F.3d 925, 934 (8th Cir. 2017), and *United States v. Kehoe*, 310 F.3d 579, 586 (8th Cir. 2002), to argue that "coordination" for purpose of alleging a continuing unit requires attributes such as "meetings," "common colors, signals, and symbols," and "hierarchical leadership structure" (GP Br. at 38), are inapposite because both decisions were issued post-conviction and were not decided on the pleadings before plaintiffs had an opportunity to present information uniquely held by defendants.

defendant Earth First! and Enterprise member Bold -- to fund, direct, and incite acts of violence and terrorism. These radical fringe groups -- directed and supported by Greenpeace -- created public spectacles which the putatively legitimate ENGOs such as Greenpeace, BankTrack, RAN, 350.org, Sierra Club, and others used as a basis to generate an international media campaign based on a parade of calculated falsehoods designed to interfere with their target's critical business relationships. (¶¶ 38(j), 237-38, 245-47, 251-52, 255, 261-62, 275.) On the end of the spectrum from the eco-terrorists, Earthjustice collaborates with these ENGOs to launch "legal challenges" that serve as an initial springboard and then platform from which the ENGOs operate their campaigns. (¶¶ 38(q), 46-53, 87-89, 116, 279-82.) These allegations are sufficient to demonstrate each Defendant's management of the Enterprise's affairs. *See Handeen*, 112 F.3d at 1351-52 (defendants participated in the "operation or management" of the enterprise by overseeing the enterprise's navigation of the legal system); *Meccatech, Inc. v. Kiser*, No. 8:05-cv-570, 2007 WL 3112452, *8-9 (D. Neb. Oct. 22, 2007) (each defendant's active participation in scheme to divert plaintiff's business to competitor satisfies conduct requirement).[20]

Defendants ignore the detailed allegations of each ENGO's long-standing roles within the Enterprise and attempt to dismiss Plaintiffs' claims of an orchestrated racketeering campaign targeting the development, construction, and operation of DAPL as "parallel conduct."

As an initial matter, these arguments are belied by the dozens of allegations that

[20] While GPI and GPI-Inc. tacitly concede that even without the other Enterprise members, the Complaint pleads that the network of Greenpeace entities acted as an association-in-fact enterprise, they argue that the parent/subsidiary relationship between these entities precludes a finding that the person and enterprise are distinct as required to plead a RICO enterprise. (GP Br. at n. 35.) This claim of a parent/subsidiary relationship is directly contradicted by the ubiquitous representations that Greenpeace is a network of *independent* non-profit legal entities" consisting of "26 national and regional Greenpeace organizations." (GP Br. at 5 (emphasis added); *see also* GP-Fund Br. at 4 ("GP-Fund is a *separate and distinct legal entity* from GP-Inc.") (emphasis added)).

Defendants and Enterprise members worked in concert with each other, including by among other things, jointly disseminating the false, defamatory, and misleading allegations to the banks financing DAPL with the specific intent of causing these banks to terminate their relationships with Energy Transfer. (¶¶ 228-78.)

Moreover, the appearance of "parallel conduct" was intentionally fostered by the Enterprise to create an "echo chamber" and provide a veneer of legitimacy to their misrepresented causes. To conceal their true operations, the Enterprise created the illusion that their "campaigns" were independent grassroots actions by individuals spontaneously rallying together for the promoted cause when, in fact, these events were organized, funded, and produced by the Enterprise to create sensational media attention, further their business and political interests, and drive traffic and donors to their websites. (¶ 41-42.) The impact of these collaborative efforts against Energy Transfer (with multiple enterprise members targeting the same financial institutions and repeating the same fraudulent statements) was far more effective than any single environmental group acting alone could have been. *See In re Ins. Brokerage*, 618 F.3d at 378 ("[I]f defendants band together to commit [violations] they cannot accomplish alone . . . then they cumulatively are conducting the association-in-fact enterprise's affairs, and not [simply] their own affairs.") (emphasis in original) (citation omitted).[21]

C. The Complaint Pleads a RICO Pattern

The Supreme Court instructs that the pattern element of RICO is satisfied by alleging "continuity of racketeering, or its threat, *simpliciter*." *H.J. Inc.*, 492 U.S. at 241; *see also* 18 U.S.C. § 1961(5) (a "pattern of racketeering activity" requires at least two acts of racketeering

[21] This case is distinguishable from *Craig Outdoor Advertising v. Viacom Outdoor, Inc.*, 528 F.3d 1001 (8th Cir. 2008), where the Eighth Circuit determined that the alleged enterprise members' adverse economic interests precluded a finding of an association-in-fact enterprise.

activity). Continuity, the Supreme Court explains, is "both a closed and open-ended concept," and thus a party alleging a RICO violation may allege: (i) closed-ended continuity by "proving a series of related predicates extending over a substantial period of time," which courts have interpreted as no less than two years; or (ii) open-ended continuity "by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business," and thus even where the alleged conduct spans less than two years, it poses "a specific threat of repetition extending indefinitely into the future." *See H.J. Inc.*, 492 U.S. at 242; *see also Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 769 (8th Cir. 1992) (interpreting minimum period for closed-ended continuity as two years). The Enterprise's racketeering activity satisfies the standards for both closed and open-ended continuity.

Allegations that a RICO defendant "'has been involved in multiple criminal schemes is highly relevant to the inquiry of continuity of the defendants' racketeering activity.'" *See Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 994-95 (8th Cir. 1989) (quoting *H.J. Inc.*, 492 U.S. at 238-39)). The Eighth Circuit has repeatedly found closed-ended continuity adequately alleged in cases involving multiple schemes where the predicate acts were alleged to have the same or similar purpose, results, methods of commission, or otherwise were interrelated by distinguishing characteristic and were not isolated events. *See, e.g., First Nat. Bank and Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1304 (8th Cir. 1991) (fraudulent charges by various ventures associated with defendant over three year period involving similarity of method, purpose, and results was sufficient to establish a pattern of racketeering activity); *Abels*, 259 F.3d at 919-20 (allegations that predicate acts were carried out with a common purpose, through common participants, and targeting common victims over three years were sufficient to allege a pattern of racketeering activity at pleading stage). This is true even under circumstances -- such

as those alleged here -- where the ongoing criminal activities targeted different victims and lacked precisely identical participants. *See Atlas*, 886 F.2d at 994-95 (pattern element satisfied where complaint alleged two separate criminal schemes involving different victims and participants but common purposes, methodology, and results).

Here, the Complaint details the Enterprise's "decades-long" pattern of criminal activity and campaigns of misinformation which have targeted "dozens" of legitimate companies with fabricated environmental claims and other purported misconduct, inflicting billions of dollars in damages, for which Energy Transfer is just the latest target. (¶¶ 41-59.) Consistent with the tactics employed against Energy Transfer, the Enterprise organized, funded, and prosecuted illegal schemes against, among others, Shell Oil, extractors of Canadian Tar Sand Oil, and producers of genetically modified organisms, by fabricating claims and "evidence" of misconduct on the part of these targeted companies, and orchestrating violent and destructive direct actions under the guise of "grassroots actions" by volunteers and local victims. (*Id.*) This racketeering activity -- which extended well beyond two years -- plainly constitutes close-ended continuity under controlling Eighth Circuit precedent. *See Atlas*, 886 F.2d at 994-95.[22]

Defendants dismiss the Enterprise's decades-long pattern of criminal activity as "unrelated events -- none involving DAPL," and attempt to circumscribe their racketeering activity to a period between August 2016 and April 2017, which Defendants argue lacks sufficient longevity or a significant threat of future activity required for closed or open-ended continuity, respectively. (GP Br. at 42, 43 n.39.) However, even if the pattern element of RICO focused exclusively on racketeering activity targeting Plaintiffs -- which it does not -- the

[22] *Primary Care Inv'rs, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215-1216 (8th Cir. 1993), cited by the Defendants, is factually distinguishable because the alleged pattern of racketeering activity only lasted between ten and eleven months.

Enterprise's ongoing campaign against Energy Transfer which continues to this day poses a threat of continued racketeering activity. The Enterprise's defamatory reports concerning Energy Transfer continue to be featured prominently on each Defendants' respective websites, and the Enterprise continues to target the banks financing Energy Transfer infrastructure projects with misinformation concerning the Company, including through the website stopETP.org.[23] This ongoing criminal activity constitutes an explicit threat of long-term criminal conduct which gives rise to an inference of open-ended continuity at the pleading stage. *See H.J. Inc.*, 492 U.S. at 242 ("Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case . . .").

D. Racketeering Activity Is Adequately Alleged

The federal RICO statute defines "racketeering activity" as the predicate acts set forth in 18 U.S.C. § 1961(1). As set forth below, the Complaint adequately alleges hundreds of predicate acts, including commission of acts of terrorism in violation of the U.S. Patriot Act; mail fraud in violation of 18 U.S.C. § 1341; wire fraud in violation of 18 U.S.C. § 1343; illegal interference with commerce in violation of 18 U.S.C. § 1951; illegal monetary transactions in violation of 18 U.S.C. § 1957 and violations of corresponding North Dakota statute criminalizing the same.[24]

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[23] Defendants' reliance on *Sebrite Agency Inc. v. Platt*, 884 F. Supp. 2d 912, 921 (D. Minn. 2012), to argue that Plaintiffs' Complaint fails to allege open-ended continuity is unavailing (GP Br. at 42), because the *Sebrite* court explicitly noted "all criminal activity ceased following [plaintiff's] discovery of the fraudulent scheme . . ." *Sebrite*, 884 F. Supp. 2d at 921.

[24] Allegations that Defendants concealed their fraudulently induced proceeds from their scheme to defraud adequately pleads the predicate act of money laundering. *United States v. Dugan*, 238 F.3d 1041, 1043 (8th Cir. 2001) (money laundering requires: (1) defendant conducted a financial transaction involving the proceeds of unlawful activity; (2) defendant knew the proceeds involved in the transaction were the proceeds of an unlawful activity; and (3) defendant intended to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity). The allegations of DDOS attacks and credential harvesting plead violations of the Computer Fraud And Abuse Act. *BHRAC, LLC v. Regency Car Rentals*, 2015 WL 3561671, *4 (C.D. Cal. June 4, 2015) (DDOS attack); *United States v. Yucel*, 97 F. Supp. 3d 413,

1. The Complaint Pleads Violations of the Patriot Act

The U.S. Patriot Act proscribes: (i) arson and bombing of property used in interstate commerce in violation of 18 U.S.C. § 844(i); (ii) arson and bombing of government property in violation of 18 U.S.C. § 844(f)(2)-(3); and (iii) depredation of United States property in violation of 18 U.S.C. § 1361.

Defendants Earth First!, GP-Fund, and GP-Inc. funded and provided supplies for Red Warrior Camp to infiltrate camps in North Dakota, train protestors in violent tactics, and lead violent attacks against Energy Transfer personnel and property in order to create public spectacles and generate further fodder for the putatively legitimate environmental organizations to broadcast. (¶¶ 90, 314, 319). Using the blueprint set forth in Earth First!'s Direct Action Manual, Red Warrior Camp initiated direct action training for its own members and other protestors interested in engaging in violent conflict and incited and perpetrated acts of terrorism and destruction of private and federal lands. (¶¶ 90-94, 104-06, 315.) Specifically, on October 27, 2016, a large group of protestors led by Red Warrior trespassed on federal lands and Dakota Access property, threw Molotov cocktails and homemade grenades at law enforcement, and set fire to Energy Transfer's construction equipment, two bridges, and federal lands. (¶¶ 319-21.) Likewise, on November 20, 2016, protestors led by Red Warrior attempted to cross Backwater

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421-22 (S.D.N.Y. 2015) (harvesting financial information). Finally, the Complaint's allegations that the Enterprise sought to obtain things of value including but not limited to Energy Transfer's right to operate its business free of interference and that they have done so by wrongful means, involving violence and threats, are sufficient to state a claim for extortion under the Hobbs Act. *See Raineri Const., LLC v. Taylor*, 63 F. Supp. 3d 1017, 1024-26 (E.D. Mo. 2014) (sustaining extortion claim where complaint alleged "defendants committed extortion through their attempts to obtain money and property from plaintiff . . . by causing plaintiff's employees, job applicants, and management to fear for their safety and by causing plaintiff's customers to cease business with plaintiff out of fear for the well-being of their businesses"); *see also United States v. Carlson*, 787 F.3d 939, 944 (8th Cir. 2015) (defendant intended to commit extortion by seeking to have property directed to "third party of the extortionist's choosing") (citation omitted).

Bridge in North Dakota and establish an encampment on Dakota Access property. Armed with weapons, Red Warrior attempted to flank and attack police officers, started numerous fires on and around the bridge, and threw grenades and flares at law enforcement. (¶ 323.)

The foregoing arson of pipeline equipment and federal lands violate 18 U.S.C. § 844(i), 18 U.S.C. § 844(f)(2), and 18 U.S.C. § 1361. *See United States. v. Mann*, 701 F.3d 274, 301-04 (8th Cir. 2012) (arson of car used for business purposes constitutes arson of property used in interstate commerce); *United States v. Hammond*, 742 F.3d 880, 881-82 (9th Cir. 2014) (burning federally owned land is a violation of 18 U.S.C. § 844); *United States v. Wilcox*, 50 F.3d 600 (8th Cir. 1995) (damaging trees on government lands constitutes depredation to federal property in violation of 18 U.S.C. § 1361). The Complaint thus pleads GP-Inc.'s, GP-Fund's, and Earth First!'s direct liability for these violations. In any event, because the Complaint pleads Defendants' conspiratorial agreement to harm Energy Transfer, all Defendants are liable for Red Warrior's violations of the Patriot Act in furtherance of the Enterprise. (*See supra* § II.)

2. The Complaint Pleads Violations Of Mail And Wire Fraud Statutes

The Complaint likewise pleads predicate acts of mail and wire fraud. The mail and wire fraud statutes make it unlawful to use the mails or wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. To plead a violation of the mail or wire fraud statute, the complaint must allege: "(1) a scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mails (or wires) would be used; and (4) use of the mails (or wires) in furtherance of the scheme." *United HealthCare Corp. v. Am. Trade Ins. Co., Ltd.*, 88 F.3d 563, 571 (8th Cir. 1996). The Eighth Circuit has held the mail and wire fraud statutes are "broad in scope," "the offense conduct may vary rather widely . . . and its fraudulent aspect is measured by a non-technical standard condemning conduct which fails to conform to standards

of moral uprightness, fundamental honesty and fair play." *Abels*, 259 F.3d at 918 (citation omitted).[25]

The Complaint alleges that Defendants devised a scheme to defraud to further their own environmental and political agendas. In furtherance of this illegal scheme, Defendants targeted well-known companies with manufactured and spectacular lies about the target's putative environmental and cultural impacts, which the Enterprise then exploited to generate sensational media attention and drive traffic and donors to their websites. This pattern of racketeering inflicted billions of dollars in damages on the target companies. (¶¶ 41-43.) The Complaint details the Enterprise's use of the mails and wires in furtherance of this scheme, including, among other things: (i) preparing false and misleading blog posts, articles, and press releases concerning Energy Transfer and the putative impact of DAPL and other Energy Transfer infrastructure projects; (ii) broadly disseminating the false and defamatory publications through defendants' websites, direct emails, and other internet platforms; (iii) communicating and coordinating with one another to effectuate the dissemination of false and misleading information necessary to perpetrate the scheme; (iv) disseminating false and misleading allegations directly to Energy Transfer's critical stakeholders through email, U.S. mail, and phone; (v) harassing Energy Transfer's investors and financers with extortive threats to terminate

[25] While Defendants argue that Plaintiffs must plead actual malice as an element of their federal RICO claim predicated on mail and wire fraud (GP Br. at 28-29), Defendants have not cited any authority imposing common law requirements on a federal statutory claim. Rather, Defendants' cases involve common law claims. Indeed, imposing an actual malice requirement on RICO claims is inconsistent with well-settled law that "misrepresentations of fact are not necessary to the offense" of mail and wire fraud. *Abels*, 259 F.3d 910. The Supreme Court has repeatedly refused to impose extratextual requirements on the RICO statute, even where defendants argue that such requirements are "necessary to prevent garden-variety disputes . . . from being converted into federal racketeering actions." *Bridge*, 553 U.S. at 660 (rejecting defendant's argument that the RICO claims were common law tortious interference claims).

their business relationship with Energy Transfer based on the Enterprise's lies; (vi) soliciting fraudulent charitable donations from the public based on false pretenses about Energy Transfer's environmental and putative impacts; and (vii) wiring fraudulently obtained funds to sustain the Enterprise's campaign against Energy Transfer and other corporate targets.

Such conduct constitutes mail and wire fraud under black-letter law. *See, e.g.*, *Bridge*, 553 U.S. at 647-48 (sustaining RICO claims predicated on mail and wire fraud where defendants' scheme to obtain valuable liens by submitting false information to the county officials resulted in direct harm to petitioners who lost the bid for valuable liens); *Feld Entm't Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 318 (D.D.C. 2012) (mail fraud was adequately alleged where animal rights group disseminated misleading fundraising materials misrepresenting plaintiff circus's elephant handling procedures to solicit donations); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001) (sustaining RICO claim alleging mail and wire fraud arising from defendants' dissemination of false information to lure away plaintiffs' customers and cause boycotts); *Texas Air Corp. v. Air Line Pilots Ass'n Int'l*, No. 88-0804,1989 WL 146414, at *5 (S.D. Fla. July 14, 1989) (holding union's "scheme [to] publicly disseminat[e] false information about [the airline's] safety and its treatment of employees" constituted predicate acts of mail and wire fraud); *Cement-Lock v. Gas Tech. Inst.*, 2006 WL 3147700 (N.D. Ill. Nov. 1, 2006) (use of wires to disseminate false statements to government agencies and financing sources constituted mail and wire fraud).[26]

[26] Citing *Kimberlin v. National Bloggers Club*, No. GJH-13-359, 2015 WL 1242763, at *9 (D. Md. Mar. 17, 2015), Defendants attempt to recast all the allegations in the Complaint as "garden-variety" defamation which defendants allege do not constitute predicate acts under RICO statute. Obviously, false claims made to support a scheme to defraud might equally support a defamation claim, but the claims are not mutually exclusive. Moreover, neither *Kimberlin*, nor any of the cases cited by defendants, alleged a disinformation campaign -- like the one here -- intended to cause harm to business or property through deceptive means. *See id.* (allegations that defendants

Defendants also argue the Complaint fails to allege Plaintiffs or "anyone else" were deceived by Defendants' misrepresentations, or that Defendants obtained property from the hands of Plaintiffs. (BT Br. at 34; GP Br. at 44-46.) Contrary to Defendants' contention, however, neither reliance nor a direct transfer of property from plaintiff to defendants are elements of mail and wire fraud.

As explained in *Bridge*, "[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, *even if no one relied on any misrepresentation*." 553 U.S. at 648 (emphasis added) (citation omitted). The Supreme Court recognized that reliance may help a plaintiff prove causation, but "the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action . . . does not transform reliance itself into an element of the cause of action." *Id.* at 659 (citation omitted). Thus, the Supreme Court held that the direct victim of a scheme to defraud may recover through RICO even if it was not the direct recipient of the false statements. *Id.* at 650; *see also United HealthCare Corp.*, 88 F.3d at 571 (it is "well settled that [detrimental reliance] is not required to prove mail or wire fraud").

In any event, the Complaint alleges that every constituency critical to Plaintiffs' business, including the banks financing Energy Transfer infrastructure projects, as well as, investors, shippers, and the public-at-large, relied on the Enterprises' disinformation, resulting in enormous damage to Plaintiffs. (¶¶ 227-78.) These allegations of third party reliance are sufficient under the applicable law. *See, e.g.*, *Bridge*, 553 U.S. at 656 (notion that first party reliance is an

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disseminated calculated falsehoods for the purpose of causing reputational harm); *Kimm v. Lee*, No. 04 Civ. 5724(HB), 2005 WL 89386, at *4 (S.D.N.Y. Jan. 13, 2005) ("Though [plaintiff] may well have suffered reputational injury as a result of the defendants' alleged acts, no one was 'induced to part with anything of value as a result.'").

element of a RICO claim is "contradicted by the long line of cases in which courts have permitted a plaintiff directly injured by a fraudulent misrepresentation to recover even though it was a third party, and not the plaintiff, who relied on the defendant's misrepresentation"); *Procter & Gamble*, 242 F.3d at 565 (defendant's attempts to lure away plaintiff's customers by disseminating false statements to those customers are actionable as mail and wire fraud); *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997) (affirming mail fraud conviction where defendant made false representations to regulatory agency but not directly to policyholders).

Moreover, the Eighth Circuit has consistently held that intent to obtain property is not required to fulfill the fraudulent intent element of a mail or wire fraud claim. *United States v. Ervasti*, 201 F.3d 1029, 1035 (8th Cir. 2000) ("'intent to defraud' means to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss of property or property rights, loss of an intangible right to honest services to another, *or* bringing about some financial gain to one's self or another to the detriment of a third party") (emphasis added) (citation omitted). Rather, "intent to harm is the essence of a scheme to defraud," and thus deception in order to "caus[e] some financial loss of property or property rights" satisfies the "intent to defraud" requirement. *Id.*

Citing *Cleveland v. United States*, 531 U.S. 12, 15 (2000) and *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), Defendants argue a scheme to defraud "must be intentionally directed towards obtaining from another property that is in their hands." (GP Br. at 44). But as numerous courts have explained since *Cleveland*, "*Cleveland* did not concern an 'obtainability' requirement. Instead, the *Cleveland* Court addressed the definition of 'property . . . . [T]he mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property.'" *United States v. Finazzo*, 850 F.3d 94, 107 n.14 (2d Cir. 2017); *United States v. Welch*, 327 F.3d 1081,

1108 n.27 (10th Cir. 2003) ("neither the mail nor wire fraud statute requires that a defendant 'obtain' property before violating the statute"). The mail and wire fraud statutes were "intended to cover any scheme or artifice to defraud one of his money or property, including [but not limited to] any scheme for obtaining money or property by means of false or fraudulent promises . . . a mail fraud violation may be sufficiently found where the defendant has merely ***deprived*** another of a property right." *United States v. Hedaithy*, 392 F.3d 580, 602 n.21 (3d Cir. 2004) (emphasis added) (citation omitted); *see also United States v. McMillan*, 600 F.3d 434, 447 (5th Cir. 2010) (a scheme to defraud "may be met by a variety of schemes, but the relevant form of the scheme in this case is the deprivation of money or property").

Consistent with these standards, in *Feld*, the court held that Ringling Brothers stated a RICO claim predicated on, among other violations, mail and wire fraud, against animal rights organizations, arising from the groups' use of the mails and wires to disseminate fraudulent fundraising materials. 873 F. Supp. 2d at 318. The fundraising materials misrepresented Ringling Brothers' elephant handling procedures and falsely stated the donations would be used to target those procedures, when in fact, the funds were used to bribe Ringling Brothers' elephant handler to participate in a sham lawsuit against Ringling Brothers, which resulted in direct harm to Ringling Brothers, including millions of dollars in fees to defend against the sham lawsuit. *Id.* The Court rejected as "incorrect as a matter of law" defendant's claims that "the mail and wire fraud claims fail because defendants did not 'obtain' for themselves the fees that [plaintiffs] paid to its attorneys to defend the ESA case," explaining "[m]ail fraud lies whether or not the perpetrator ends up with the victim's property or money." *Id.*

Here, the Complaint alleges that Defendants, working in concert with others, prosecuted a widespread disinformation campaign against Energy Transfer in order to interfere with Energy

Transfer's business relations and fraudulently induce millions of dollars in donations. Under *Bridge* and *Feld*, this conduct amounts to mail and wire fraud.

E. Proximate Cause Is Adequately Alleged

The "by reason of" requirement set forth in 18 U.S.C. § 1964(c) requires a showing that the defendant's violation was the proximate cause of the plaintiff's injury. *See Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). Proximate causation is a "flexible concept" used to assign "responsibility for the consequences of that person's own acts." *Bridge*, 553 U.S. at 654. Thus, a plaintiff merely needs to demonstrate that there is "some direct relation between the injury asserted and the injurious conduct alleged." *Id*. (quoting *Holmes*, 503 U.S. at 272 n.20, 268). The Complaint satisfies this standard.

1. Plaintiffs Are the Direct and Intended Victims of Defendants' Racketeering Scheme

Courts regularly sustain RICO claims where, as here, the complaint alleges Plaintiffs were the "primary and intended victims of [Defendants'] scheme to defraud." *Bridge*, 553 U.S. at 649-50; *Sandwich Chef of Tex. v. Reliance Nat'l Indem.*, 319 F.3d 205, 221-24 (5th Cir. 2003) (distinguishing cases in which plaintiff is not scheme's target nor suffers contemporaneous, specifically intended consequences from cases where plaintiff is target or suffers contemporaneous injury); *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 558-61 (5th Cir. 2000) (same).

Notwithstanding Defendants' unsupported arguments to the contrary, this standard applies equally to cases where the RICO defendants are alleged to have directed their scheme at third parties with the intention of injuring plaintiff. *See, e.g.*, *Bridge*, 553 U.S. at 649-50; *Sandwich Chef*, 319 F.3d at 221, 224 (proximate cause established where plaintiffs "contend they were the targets of a scheme to defraud accomplished by defrauding others" and that "risks of

injuries arose . . . as direct and contemporaneous results of the allegedly fraudulent predicate acts"); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3rd Cir. 1998) (plaintiff's contractual relationship with the third party "was a direct target of the alleged scheme"); *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969, 973 (S.D.N.Y. 1989) ("A plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived.").

Thus, if an enterprise makes misrepresentations about plaintiff to a third party, the plaintiff is injured by reason of the pattern of mail and wire fraud. *Bridge*, 553 U.S. at 649-50; *see also Procter & Gamble*, 242 F.3d at 565 (proximate causation adequately alleged where defendants directed a misinformation campaign about plaintiff to plaintiff's customers -- thereby causing a boycott of plaintiff's products -- because such misrepresentations were intended to, and did contemporaneously, injure plaintiff's reputation and business relationships); *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994) (sustaining RICO claims where plaintiff alleged defendants' false advertising caused it to lose customers).

The same result is compelled here. The Complaint pleads the Enterprise widely disseminated false and misleading allegations about Energy Transfer to the banks financing DAPL, investors, and the market generally with the specific intent that these critical market constituents would rely on these false representations and terminate their business relationships with Plaintiffs. (¶¶ 117-278.) Under *Bridge* and the long line of cases before it, these allegations satisfy the standard to plead direct injury as a result of the Enterprise's racketeering conduct. *Bridge*, 553 U.S. at 649-50; *see also Cement-Lock*, 2006 WL 3147700 (proximate causation adequately alleged where defendants made false statements to third parties, including

government agencies and financing sources, that were intended to, and did, directly interfere with monies plaintiff would have otherwise received).[27]

Notwithstanding the precedent establishing proximate cause is adequately alleged based on misrepresentations to third parties, Defendants argue the injuries sustained by Plaintiffs are too "attenuated" to be cognizable, as it would be "difficult[ ] [to] apportion[] between those allegedly caused by the Enterprise's actions and damages caused by independent, non-actionable factors," such as "the very public and ubiquitous criticisms levelled by environmental groups"[28] or the banks' "own due diligence assessments." (GP Br. at 50-52; *see also* BT Br. at 30.) This argument fundamentally misstates and misapplies the relevant law and, at best, raises questions of fact inappropriate for resolution on a motion to dismiss.

Courts have expressly rejected "the proposition that no RICO injury could ever be asserted unless it was ***solely*** attributable to the alleged unlawful activity." The fact that the Court "may at some point" need to apportion damages "does not mean that [Plaintiffs] lack[ ] standing

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[27] Defendants' reliance on *Hamm v. Rhone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941, 953(8th Cir. 1999) and *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) is misplaced since in both cases plaintiff was the "incidental" victim of defendants' racketeering scheme, and thus any injury to plaintiff was an unintended "passed-through" consequence of the defendants' racketeering activity. Indeed, *Hamm* actually supports Plaintiffs' claims here, as it confirms that commercial rivals targeted by a disinformation campaign are injured by reason of racketeering conduct. *See Hamm*, 187 F.3d at 953; *see generally Lewis v. Lhu*, 696 F. Supp. 723, 726 (D.D.C. 1988) (RICO claims based on defendants' "smear campaign" and damage it caused to plaintiffs' reputation and business); *SJ Advanced Tech. & Mfg. Corp. v. Junkunc*, 627 F. Supp. 572, 575-76 (N.D. Ill. 1986) (RICO claims based on defendants' misrepresentations about the continued viability of plaintiff's business).

[28] As evidence of "public and ubiquitous criticisms," Defendants point to articles by nonparties such as Food and Water Watch and Yes Magazine. (*See* GP Br. at 51). If the articles have any relevance, they further demonstrate that the conflict surrounding DAPL was manufactured by the Enterprise, since the Food and Water Watch article "Who's Banking On the Dakota Access Pipeline," was written using information from RAN, a core Enterprise member (¶¶ 228-30), and the Yes Magazine article "A Strategy to Stop the Funding Behind the Dakota Access Pipeline" was authored by Bill McKibben of Enterprise member 350.org. (*Id.* ¶ 231.)

to assert any RICO injury." *Feld*, 873 F. Supp. 2d at 322 (emphasis added); *see also In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633, 644 (3d Cir. 2015) (damages attributable to defendant's violation and to potentially other, independent factors is a question "for another day" and does not suggest lack of proximate causation).

The relevant inquiry at the motion to dismiss stage is whether a plaintiff has "put forth allegations that raise a reasonable expectation that discovery will reveal evidence of proximate causation." *Avandia*, 804 F.3d at 644 (citation omitted); *Feld*, 873 F. Supp. 2d at 321 (third-party reliance for proximate causation "are not [yet] established, but they are alleged in the complaint, which is all that is required at the motion to dismiss stage"). The presence of intermediaries does not break the chain of causation where the primary and intended victim[ ] of the scheme to defraud" and the injury was the "foreseeable and natural consequence" of the fraudulent scheme. *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 51, 58-59 (1st Cir. 2013) (individualized decisions made by physicians who decided to prescribe medication "do not introduce . . . attenuation" into proximate cause because "defendants' scheme relied upon the expectation that fraudulent off-label marketing to doctors would induce them to act in a foreseeable fashion"); *see also Avandia*, 804 F.3d at 645 (same).

2. <u>The Complaint Alleges Direct and Cognizable Harm</u>

While Defendants attempt to recast all the damages arising from their Patriot Act violations and patterns of mail and wire fraud as "damage to reputation," which Defendants argue are not recoverable RICO damages, the Complaint specifically alleges concrete economic harm, including: (i) impaired or terminated business relationships with lenders, investors, and shippers; (ii) loss of prospective business relationships; (iii) impaired access and increased costs of financing; and (iv) increased cost of operations to investigate and mitigate the impact of the Enterprise's misinformation scheme, including increased legal fees and diversion of

management's resources and attention. (¶¶ 227-78, 361-63, 366.) These damages constitute cognizable RICO injuries. *See, e.g., Bieter Co. v. Blomquist*, 987 F.2d 1319, 1328-29 (8th Cir. 1993) (lost business opportunity is a cognizable RICO injury); *Sound Video Unlimited, Inc. v. Video Shack Inc.*, 700 F. Supp. 127, 136 (S.D.N.Y. 1988) (impaired credit relationship); *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (injury to "current and prospective business relations"); *Raineri Const., LLC v. Taylor*, No. 12-2297, 2014 WL 348632, *2 (E.D. Mo. Jan. 31, 2014) (interference with customer relationships and business operations); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal of Life Activists*, 945 F. Supp. 1355, 1383 (D. Or. 1996) (increased cost of doing business).[29]

In addition, the Complaint pleads injury to business and property caused by the Enterprise's violations of the Patriot Act, including arson, which alone inflicted millions of dollars in physical damage to construction equipment and the pipeline itself. (¶¶ 313-40.) The Enterprise's violent protests and criminal activities also resulted in lost revenue resulting from schedule delays, increased cost of construction and operations, increased cost of security to protect Plaintiffs' personnel, construction sites, and the 1,172 mile pipeline, as well as costs of investigation and remediation of the damage caused by these acts. (*Id.* ¶¶ 313-40, 364, 365). The property damage and damages sustained as a result of interference with Energy Transfer's construction and operation of the pipeline are recoverable damages. *See Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) ("actions that adversely affected [plaintiffs'] business, caused

[29] *City of Chicago Heights v. Lobue*, 914 F. Supp. 279 (N.D. Ill. 1996) and *In re Teledyne Defense Contracting Derivative Litigation*, 849 F. Supp. 1369 (C.D. Cal. 1993) cited by BankTrack, are in accord. In both cases, the court acknowledged that if the harm to business reputation resulted in "economic losses," those losses are injury to business or property under RICO. *See City of Chicago*, 914 F. Supp. at 285 (under the facts of the case only reputational harm is at issue); *In re Teledyne Defense*, 849 F. Supp. at 1372 (same).

resource damage, interfered with operations, caused grievous economic injury, economic loss, and property damage" are injury to business and property); *Raineri*, 2014 WL 348632 (interference with business operations and property damage are cognizable RICO damages).

Defendants ignore these well-pled allegations concerning the direct harm Energy Transfer suffered as the direct and intended victim of the Enterprise's illegal scheme -- which the Defendants themselves concede resulted in many hundreds of millions of dollars of damages -- and attempt to recast all of Energy Transfer's claims as seeking to recover injuries sustained by donors. (GP Br. at 50.) Citing *Kimberlin*, 2015 WL 1242763, Defendants argue any damages Energy Transfer suffered are duplicative of harm to donors and thus not recoverable. *Kimberlin*, however, is inapposite, because there the alleged harm to plaintiff's *reputation* was not a cognizable RICO injury, and thus, the only redressable injury arising from defendants' disinformation campaign was the harm to donors, which plaintiff did not have standing to pursue. *Id.* at *11-14.

By contrast, in *Feld*, the court held that Ringling Brothers had properly alleged standing and proximate causation to assert their RICO claims against animal rights organizations arising from the organizations' dissemination of fraudulent fundraising materials, which misrepresented Ringling Brothers' animal handling practices in order to induce donations. In rejecting defendants' arguments that the donors, not plaintiff, were the intended and foreseeable victim of defendants' wrongful conduct, the court held:

> The Supreme Court has held that [a] scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO, if the injury is not derivative of someone else's . . . Here, [plaintiff] claims that it was directly and contemporaneously injured as a result of the alleged fraud committed against the donors: the money defendants obtained via the alleged fraud was directly used to pay [plaintiff's elephant handler] for his participation in the [sham litigation against the circus]. Moreover, [plaintiff's] injury is not derivative of the alleged losses suffered by the donors. Instead, it claims an independent

> injury: lost revenue due to the necessity of defending the [litigation against the circus].

Feld, 873 F. Supp. 2d at 321; *see also Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 384 (2d Cir. 2001) (the concern of duplicative recoveries does not bar suit for "different classes of plaintiffs, each of which suffered a different concrete injury, proximately caused by the violation").

Here, in addition to the harm Energy Transfer suffered in its current and prospective business relationships by reason of the Enterprise's dissemination of false and misleading information to Energy Transfer's critical business constituents, the Complaint pleads Energy Transfer was directly injured by the fraud committed against donors because it was forced to expend monies defending against the Enterprise's baseless disinformation campaign. It is precisely these "independent injuries" inflicted on Energy Transfer -- the direct, intended, and foreseeable result of the Enterprise's campaign -- the Complaint seeks to redress.

III. THE NORTH DAKOTA COMMON LAW CLAIMS ARE PROPERLY PLED

A. The Defamation Claim Is Properly Pled

To plead defamation under North Dakota law, a plaintiff must allege a "false and unprivileged publication" that, *inter alia*, "[t]ends directly to injure the person in respect to the person's office, profession, trade, or business, . . . by imputing something with reference to the person's office, profession, trade, or business that has a natural tendency to lessen its profits" or "by natural consequence causes actual damage." N.D.C.C. §§ 14-02-02-04. Defendants argue that Plaintiffs have not pled any actionable false statements for which they are responsible or, in the alternative that Plaintiffs have not alleged that Defendants acted with the requisite actual

malice in publishing those statements. As set forth below, the Complaint alleges the elements for a defamation claim against each of the Defendants.

1. The Complaint Alleges Actionable and False Statements of Fact

Defendants recast all of the defamatory statements made in furtherance of their illegal campaign to interfere with the construction and operation of DAPL as protected "opinion." (*See* GP Br. at 11-13, 16-21; BT Br. 21-22, 38.) However, Defendants' entire argument rests on a faulty premise: that there is some talismanic significance to labeling a statement "opinion." The Supreme Court expressly rejected this idea -- and the precedent on which the Defendants rely -- nearly three decades ago in *Milkovich v. Lorain Journal Co.*, when it eschewed the "artificial dichotomy between 'opinion' and fact," finding free speech is adequately protected without categorical protection for opinions. 497 U.S. 1, 19-21 (1990); *see also Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 393-94 (8th Cir. 1996) (recognizing that *Milkovich* undermined the continuing viability of *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989) and *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986)).

The few post-*Milkovich* cases Defendants cite confirm that whether a statement is a protected opinion requires consideration of "the totality of the circumstances to determine whether the ordinary reader would have interpreted the statement as an opinion" or as "an assertion of objective fact." *Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc.*, 829 F.3d 576, 581 (8th Cir. 2016) (quotation and citation omitted). Irrespective of label or intent, a statement -- even one couched as "opinion" or "fair comment" -- is actionable defamation where, viewed in light of the surrounding circumstances, it can be reasonably understood to assert false facts. *See Milkovich*, 497 U.S. at 13-20; *see also Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F. Supp. 2d 598, 624 (N.D. Iowa 2006) ("[I]f a reasonable trier of fact could find that the so-called opinion could be interpreted as a false assertion of fact,

the statement is actionable for defamation."). Thus, "[t]he decisive question upon the objection that the complaint does not state a cause of action" for defamation is whether the statement at issue "is fairly susceptible of a construction which renders it defamatory, and therefore actionable." *Moritz v. Med. Arts Clinic, P.C.*, 315 N.W.2d 458, 460 (N.D. 1982). Here, as set forth below, when viewed in context, the false and misleading statements concerning Energy Transfer and DAPL set forth in the Complaint are fairly susceptible to a defamatory construction and thus -- even if found to be an opinion -- are actionable.

a. Defendants Hold Their Statements Out as Objective Facts

As an initial matter, Defendants' attempt to recast all their false and defamatory allegations as protected opinions is belied by their representations that their campaigns and publications are based on "objective," "accurate" facts resulting from "detailed investigations" and "rigorous analysis." Greenpeace USA informs visitors to its website that they "work with experts, scientists and researchers across the globe" and undertake "detailed investigations," and "provide [t]hat information to our members and the public *so we all have the facts* to make informed decisions." Greenpeace USA, How It Works – Investigate, http://www.greenpeace.org/usa/how-it-works/investigate/ (last visited Feb. 8, 2018) (emphasis added). BankTrack similarly purports to "conduct[] rigorous research and analysis . . . provid[e] objective, accurate information to all stakeholders, *including the banks we target*." *See* BankTrack, About Us – Guiding Principles, https://www.banktrack.org/page/guiding_principles (last visited Feb. 8, 2018) (emphasis added).

Thus, it is no answer for Defendants to claim that they are merely engaged in advocacy or contributing to the public discourse. This is not the standard, and if it were, parties could cloak any defamatory claims as a call to action and avoid liability. *See Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 722 (S.D.N.Y. 2014) ("[M]ere fact that [d]efendants

engage in advocacy does not give them blanket immunity to make false accusations.") Rather, contrary to Defendants' argument, courts regularly find that where, as here, a defendant purports to hold itself out as an expert or to be reporting facts, any argument that their statements "are non-actionable as pure opinion or rhetorical opinion or rhetorical hyperbole is unpersuasive at the motion to dismiss stage."[30] *Duffy v. Fox News Networks, LLC*, No. 14-CV-01545, 2015 WL 2449576, at *3 (M.D. Fla. May 21, 2015); *see also Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 285-86 (S.D.N.Y. 2016) (rejecting "opinion" defense and denying motion to dismiss where defendant held itself out as expert and indicated its statements were based on factual investigation); *Gross v. New York Times*, 623 N.E.2d 1163, 1169 (N.Y. 1993) (finding statement was actionable where it was made after "what purported to be a thorough investigation").

b. Defendants' Statements Are Not Protected Opinions

Moreover, the Supreme Court has long held even utterances characterized as "opinion" will support a defamation claim if the statement: (a) constituted an express statement of verifiably false facts; (b) implied statements of verifiably false facts; or (c) was based on

[30] Defendants, again, rely primarily on decisions at summary judgment or after trial. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (post-trial); *Watts v. United States*, 394 U.S. 705 (1969) (same); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (same); *Others First, Inc.*, 829 F.3d 576 (summary judgment); *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2002) (summary judgment); *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1060 (9th Cir. 1998) (same); *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995) (same); *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir. 1989) (same); *Deupree v. Iliff*, 860 F.2d 300 (8th Cir. 1988) (same); *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987) (same); *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (same); *Schuster v. U. S. News & World Report, Inc.*, 602 F.2d 850 (8th Cir. 1979) (same).

incorrect of incomplete facts. *See Milkovich*, 497 U.S. at 13-20. Applying this standard, Defendants' false and defamatory publications about DAPL are actionable in defamation.

For example, the Complaint alleges BankTrack, Greenpeace USA, and GPI jointly drafted letters to the 17 financial institutions funding DAPL misrepresenting that Energy Transfer personnel "deliberately desecrated documented burial grounds and other culturally important sites." (¶¶ 237-38, 245-47; *see also, e.g.*, ECF No. 1-6 (*e.g.* Greenpeace USA 2/7/2017 statement "construction has already desecrated sacred burial grounds and other historical sites nearby").) These are express statements of a verifiable false fact. Indeed, prior to the time that Defendants began disseminating these falsehoods in November 2016, the State Historical Society of North Dakota had already issued its September 2016 report conclusively finding the opposite: "[n]o cultural material was observed in the inspected corridor," "[n]o human bone or other evidence of burials was recorded in the inventoried corridor," and "no evidence of infractions . . . with respect to disturbance of human remains or significant sites." (¶ 225.) *See Stanley v. Carrier Mills-Stonefront Sch. Dist. No. 2*, 459 F. Supp. 2d 766, 774-75 (S.D. Ill. 2006) (school superintendent's comment to children and family services that daycare was "filthy" was verifiable by visiting the daycare); *see also Taylor Bldg. Corp. of Am. v. Benfield*, 507 F. Supp. 2d 832, 839 (S.D. Ohio 2007) (finding statement that home "isn't safe for human habitation" is verifiable statement of fact).[31]

[31] These statements therefore are distinguishable from the statements in the cases cited by Defendants which were obvious parody or explicitly acknowledged that they did not rest on fact. *See, e.g., Farah v. Esquire Magazine*, 736 F.3d 528, 530-40 (D.C. Cir. 2013) (involving disclaimer that article was satire); *Levin v. McPhee*, 119 F.3d 189, 196 (2d Cir. 1997) (dismissing defamation claims where defendants "emphasize[d] that the facts underlying [the subject of their allegedly defamatory statements] . . . remain unknown"); *Jacobus v. Trump*, 51 N.Y.S.3d 330, 343 (N.Y. Sup. Ct. 2017), *aff'd*, 64 N.Y.S.3d 889 (N.Y. App. Div. 2017) ("imprecise and hyperbolic political dispute *cum* schoolyard squabble").

Similarly, the Complaint details statements by BankTrack, Greenpeace USA, and GPI that the pipeline trajectory "is cutting through . . . unceded Treaty lands" and violating "Native land titles." (*See, e.g.*, ¶¶ 237-38, 245-47.) Whether DAPL crosses land subject to property rights, or in a way that violates tribal property or treaty rights, is verifiable by reference to property deeds, surveys, and U.S. tribal treaties, among other official and factual records. Moreover, any claim that such land is tribal land was conclusively rejected by the Supreme Court in 1980 when it determined that the United States had effected a Constitutional taking. (¶ 110.) In any event, such claims are not protected opinions for an additional reason--Defendants deliberately omitted the Supreme Court decision from its defamatory communication. *Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 949 (5th Cir. 1983), *abrogated on other grounds by Hiller v. Mfrs. Prod. Research Group of North America, Inc.*, 59 F.3d 1514 (5th Cir. 1995) ("it is not a defense to show that a statement . . . if taken alone, is literally true, when other facts are omitted which plainly refute the false impression of the partial statement"); *Toney*, 85 F.3d at 387 ("a defendant does not avoid liability by simply establishing the truth of the individual statement(s); rather, the defendant must also defend . . . the omission of certain facts").

Pointing to a handful of cherry-picked statements from certain cherry-picked publications which Defendants euphemistically recast in the most inoffensive manner possible, Defendants argue that their calculated lies about DAPL's impact on SRST's water supply are non-verifiable opinions because they merely suggest a "threat to water sources." (GP Br. at 17.) However, the Complaint pleads numerous examples where Greenpeace USA falsely represented that DAPL *will* result in "[m]illions of people los[ing] access to clean water supply, including the Standing Rock Sioux Tribe" and "jeopardize precious water downstream." (ECF No. 1-2 (*see, e.g.*,

Greenpeace USA 11/14/16 report by Perry Wheeler quoting Greenpeace USA campaigner Lilian Molina; Greenpeace USA 12/2/16 report by Perry Wheeler quoting Mary Sweeters.) These statements imply the verifiably false fact the pipeline will inevitably rupture and harm SRST's water, which is directly refuted by the allegations in the Complaint that an oil spill occurs less than 0.001% of the time, and the risk is even more remote with respect to DAPL, which was built using the latest environmentally protective technologies. (¶¶ 130-140.) Moreover, Greenpeace USA omits material facts, such as the fact that the SRST water intake was in the process of moving (and has since moved) 70 miles downstream from the Lake Oahe crossing, making an already unlikely spill even more unlikely to affect SRST. (¶ 139.)

2. Defendants Are Liable for All Misrepresentations Which They Had a Responsible Part in Publishing

While Defendants attempt to distract from their own wrongdoing by reiterating that 161 statements alleged in the Complaint were made by non-parties (*see* GP Br. at 4, 13-15), they concede at least "66 [of the defamatory] statements were made by the Greenpeace Defendants." (GP Br. 14.) They cite no authority -- nor can they -- that allows a defendant to escape liability for its own false statements merely because other speakers *also* made false statements.

While GP-Fund and GPI argue that they cannot be held liable for defamation because the Complaint does not allege either defendant authored any false and defamatory statements about Energy Transfer (GP Br. at 14 n.11, GP-Fund Br. at 17-18), it is long-settled that "every person who takes a responsible part in a defamatory publication -- that is, every person who, either directly or indirectly, publishes or assists in the publication of an actionable defamatory statement -- is liable for the resultant injury."[32] 50 Am. Jur. 2d Libel and Slander § 334; *see also*

[32] The cases cited by Defendants are inapposite because none involve allegations that defendants participated in the creation or distribution of the defamatory materials. *See. e.g., Universal Commc'n Sys., Inc. v. Turner Broad. Sys., Inc.*, 168 F. App'x 893 (11th Cir. 2006) (plaintiff

McCurdy v. Hughes, 248 N.W. 512, 513 (N.D. 1933) ("All persons who cause or participate in or aid or abet another in the publication of defamatory matter are liable in a civil action for damages."). A plaintiff makes such a showing where it alleges that "that [defendants], 'working together and in concert, wrote, printed, and caused [the defamatory material] to be published.'" *Varriano v. Bang*, 541 N.W.2d 707, 712 (N.D. 1996); *see generally Trudeau v. New York State Consumer Prot. Bd.*, No. 05-CV-1019, 2006 WL 1229018, at *10 (N.D.N.Y. May 4, 2006) (even where "not specifically 'published' by [defendant]," where "[p]laintiffs have alleged that [non-publishing defendant] did partake in the procurement, composition, or publication of defamatory statements," and non-publishing defendant's draft of statement was "very similar" it is "plausible that [non-publishing defendant] participated in the creation or publication of the statements at issue") (citations omitted).[33]

As set forth above, GP-Fund, together with GP-Inc. "control all Greenpeace operations in the United States," and consistent with this structure, worked in concert with one another to develop and publish the false and defamatory allegations about Energy Transfer under the collective banner "Greenpeace USA." (*See supra* § B.2.a; ¶¶ 38(b), (c), (g), (j), 212 n.8, Table B.)

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failed to allege defendant's participation in defamation); *Kahn v. iBiquity Digital Corp.*, No. 06 CIV. 1536, 2006 WL 3592366 at *5 n.23 (S.D.N.Y. Dec. 7, 2006) ("Clearly, a non-party's alleged defamation, without a link between that party and defendants, supports neither antitrust nor defamation liability here."); *Buttons v. Nat'l Broad. Co.*, 858 F. Supp. 1025, 1027 (C.D. Cal. 1994) (denying joinder of parties who were not alleged to have any responsibility for production or publication of defamatory statements).

[33] The cases cited by the Defendants are in accord. *See Matson v. Dvorak*, 40 Cal. App. 4th 539, 549 (1995) ("one who takes a *responsible* part in the publication is liable for the defamation.") (emphasis in original) (quotation omitted); *Karaduman v. Newsday Inc.*, 416 N.E.2d 557, 561 (N.Y. 1980) (considering, on summary judgment, whether plaintiff showed that defendants "published, participated in, authored or permitted the publication of" defamatory statements).

GPI's contention that it is not liable for statements published by Greenpeace USA is similarly unavailing. In addition to GPI's contribution of funds, the Complaint alleges that GPI is the "international coordinating body" for all 26 Greenpeace associations, and is "directly involved in the creation, management, control, and implementation of the associations' coordinated campaigns and associated fundraising," and in that capacity, "authorized, underwrote, and facilitated GP-Inc's campaign against Plaintiffs" and "was actively involved in the operation, control, and planning of the campaign with GP-Inc." (¶ 38(b), (c)). Thus, at minimum, GP-Inc., GP Fund, and GPI are liable for their joint publication of the 66 statements.[34] *Varriano*, 541 N.W.2d at 712.[35]

3. The Defamatory Statements Were Made With Actual Malice

A complaint pleads actual malice where it alleges that the defendant made the defamatory publication with "a reckless disregard for the truth," that is, "with a high degree of awareness of probable falsity." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (internal quotation omitted); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)

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[34] GP-Fund's assertion that it cannot be held liable for the publications authored by employees of Greenpeace USA is contrary to "traditional doctrines of respondent superior" which render publisher liable for knowing or reckless falsehoods of its staff writers. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253 (1974); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1089 n.34 (3d Cir.1988) (holding Time magazine liable for publications of its employee).

[35] Additionally, as a member of the alleged conspiracy, Greenpeace is liable for the defamatory statements of its co-conspirators, whether or not Greenpeace itself published the statements. *See, e.g., Bridge C.A.T. Scan Associates v. Ohio-Nuclear Inc.*, 607 F. Supp 1187, 1191 (S.D.N.Y. 1985) (where the complaint alleges defendant "was a member of a conspiracy, and acted in concert with the other [ ] defendants, in an attempt to smear the reputation of [plaintiff] and its widely distributed products" through "dissemination of allegedly libelous statements to the public and customers," defendant "is liable for the acts of other members of the claimed conspiracy as if they were his own," even where plaintiff is not himself alleged to have disseminated or published the false statements); *Sheppard v. Freeman*, 67 Cal. App. 4th 339, 349 (1998) ("liability for libel may be imposed on a conspiracy theory," where plaintiff alleged defendants engaged in a conspiracy to defame him).

(defining actual malice as the publication of a statement "with knowledge that it was false or with reckless disregard of whether it was false or not").

Direct evidence of actual malice is not required. Rather, a "plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Harte-Hanks*, 491 at 668. "[A]ll relevant circumstances surrounding the transaction may be shown . . . including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating . . . ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights, ..." *Herbert v. Lando*, 441 U.S. 153, 164 n. 12, 170 (1979) (recognizing plaintiff will "rarely be successful in proving awareness of falsehood from the mouth of the defendant himself"). For this reason, the actual malice inquiry raises questions of fact that are not properly resolved at the pleading stage, as evidenced by the cases on which Defendants attempt to rely. *See Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 79 (N.D. 1991). Thus, where, as here, the complaint raises "a reasonable inference" that defendant knowingly made a false statement or recklessly disregarded the truth of that statement, "it is not appropriate to dismiss the complaint for failure to plead malice." *Chastain v. Hodgdon*, 202 F. Supp. 3d 1216, 1221 (D. Kan. 2016) (citing *McDonald v. Wise*, 769 F.3d 1202, 1220 (10th Cir. 2014)).

The Enterprise's *modus operandi* was to target well-known companies with false, misleading, and sensational claims that are untethered to facts or science, but crafted instead to "emotionalize" issues for the sole purpose of furthering business and political objectives and driving donations to perpetuate their fraudulent scheme. Defendants' actual malice in disseminating these false statements is demonstrated by virtue of the fact that Defendants hold themselves out to the public as "experts" conveying "facts" based on "investigations," "research," and "science," but Defendants either did not take even the minimum steps to

investigate any of the statements about Energy Transfer or, worse, they did undertake such investigations and nevertheless decided to make statements that were patently false, based upon fabricated evidence, materially omitted facts, undisclosed contradicting facts, or erroneous conclusions based on those facts to support their sensational claims.

Defendants claim that they are "experts" who conduct "research" and "investigations" yet, as purported experts, their statements that DAPL traverses tribal territory was either knowingly false, or recklessly disregarded the facts that the pipeline's route through North Dakota is privately owned, and where the pipeline crosses federally owned land, that crossing is located approximately one-half mile north of the legal boundary of the SRST reservation, as is evident from any map of the region. (¶¶ 120, 124.) Moreover, any claim that any land DAPL crosses is tribal territory was conclusively rejected by the Supreme Court in 1980. (¶ 125.)

BankTrack and Greenpeace also absolutely failed to fact check, or ignored the facts, when they repeatedly misrepresented that Energy Transfer intentionally desecrated cultural resources notwithstanding the numerous facts evidencing the falsity of those statements. Among other things, Defendants' statements ignore that the route was co-located with the Northern Border pipeline, and thus any cultural resources that may have once existed were graded and trenched in connection with construction of the Northern Border Pipeline 40 years ago, and no cultural resources were identified along the right of way, including by SRST, when expansions to the Northern Border Pipeline were made in the 1990s. (¶¶ 213-23.)

Nevertheless, Defendants, including BankTrack, GP-Fund, GP-Inc., and GPI deliberately disseminated the knowingly false and misleading allegations that Energy Transfer graded over purported cultural resources. (*See, e.g.*, 212 n. 8, ECF 1-6.) Such an "intent to avoid the truth . . . can satisfy the actual malice standard" and evidence recklessness. *Harte-Hanks Commc'ns*,

491 U.S. at 667, 667 n.39; *see also Peoples Bank & Tr. Co. of Mountain Home v. Globe Int'l Pub., Inc.*, 978 F.2d 1065, 1070 (8th Cir. 1992) (defendant's "purposeful avoidance of the truth" supported finding actual malice); *Am. Dental Ass'n v. Khorrami*, No. 02-cv-3853, 2004 WL 3486525, at *11 (C.D. Cal. Jan. 26, 2004) (finding actual malice could be inferred from, *inter alia*, fact that "[d]efendant purposefully avoided the truth in making the [s]tatements, and that there was ample information from other sources available to him that would have raised doubts as to the truth of the Statements").[36]

Despite the fact that this knowledge was at their disposal, Defendants, working in concert with Enterprise member Earthjustice, went further and engaged Mentz to fabricate evidence and GPS coordinates, outside the pipeline corridor suggesting that cultural resources were in fact being desecrated. (¶¶ 91-106.) The publications about such purported desecration on the eve of Labor Day weekend were used to manufacture the violent conflict led by eco-terrorists that Defendants had placed on the ground near the construction area. (*Id.*)[37]

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[36] Greenpeace's contention that their defamatory publications are protected because they provide the reader with hyperlinks to sources purportedly relied upon is without merit. (GP Br. at 24.) As an initial matter, this argument fails to address the dozens of false and defamatory statements set forth in the Complaint which were not accompanied by any citations. (*See, e.g.*, ECF 40-18 Tab 15 (stating, without citation, "peaceful, nonviolent encampment . . . have meet met with extreme violence . . . from Energy Transfer Partners and their private security"); Tab 20 (stating without citation that Energy Transfer "deliberately desecrated documented burial grounds and other culturally important sites; with citation only to BankTrack website "the pipeline trajectory is cutting through . . . unceded Treaty lands"). Moreover, the law is clear that simply citing sources purporting to support false statements does not permit an author to manufacture First Amendment protection for its defamatory statements. *See Milkovich*, 497 U.S. at 18-19 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact."); *Am. Dental Ass'n*, 2004 WL 3486525, at *12 ("One cannot fairly argue [the defendant's] good faith or avoid liability by claiming that he is relying on the reports of another if the alters statements or observations are altered or taken out of context."); (blind reliance on biased sources can support evidence of actual malice).

[37] *See generally Nero v. Mosby*, 233 F. Supp. 3d 463, 478, 493-95 (D. Md. 2017) (allegation that defendants knew truth by virtue of their involvement in underlying events was "adequate to

This manufactured conflict became the basis for the publication of a host of new knowingly false statement by Defendants -- that Energy Transfer security personnel and law enforcement had acted as aggressors against peaceful protestors over Labor Day weekend and thereafter. (*See, e.g.*, ¶¶ 146, 237-39, 245-47, ECF 1-4.) Even if the Greenpeace and BankTrack Defendants could divorce themselves from the initial funding and training of Red Warrior Camp -- the indisputably violent faction of protestors on the ground -- by early September, Greenpeace was actively and publicly raising funds for the group, while simultaneously disseminating the false claims that the violence was prompted by Energy Transfer and law enforcement. (*See, e.g.*, ¶¶ 106, 115, 146, 237-39, 245-47, ECF 1-4.) Defendants' malice is highlighted by the fact that they consistently represented that private security forces were the aggressors against peaceful protestors throughout the first half of 2017 (*see, e.g.*, ¶ 146 n.4 (4/24/2017 Greenpeace USA falsely alleging "human rights abuses we've seen from Energy Transfer Partners and its security team"); ECF 1-4 (2/2/2017 BankTrack statement "Private security services acting for [Energy Transfer] . . . repeatedly used violence against the Standing Rock Sioux tribe and their supporters on the ground"), even after the SRST ejected Red Warrior Camp from the Protest site for their violent conduct inconsistent with tribal interests. (¶ 322.)

There are additional examples of Defendants' knowledge of the falsity of their claims. Defendants consistently published statements that Energy Transfer desecrated cultural resources even after a September 21, 2016 investigation by State Historical Preservation Society of North Dakota revealed that there was no evidence of cultural resources at this location (¶¶ 225-26). Defendants never retracted their statements and continued to publish and disseminate them to the

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present a plausible claim that at least some of defamatory . . . statements were made with knowledge that they were false or made with reckless disregard of whether they were false").

public and Energy Transfer's critical business constituents throughout November 2016 and continuing through the present, including on each Defendant's respective website and on the website stopETP.org. (*See, e.g.*, ¶¶ 236-37, 245-47; *supra* § D.).

Evidence of malice is further evidenced by the fact that defendants' false and defamatory statements omitted key facts. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) (preconceived story line may evidence reckless disregard for the truth); *Stokes v. CBS Inc.*, 25 F. Supp. 2d 992, 1004-05 (D. Minn. 1998) (finding evidence of reckless disregard for the truth where defendant's purported "investigation" supporting false assertions was a "rush[] to judgment" allowing preconceived storyline to "set the agenda," dismissed plausible alternative theories, ignored potentially exculpatory evidence, and "focused on developing and gathering evidence against [plaintiff]"). Defendants' false claim that DAPL is poisoning tribal water deliberately omits, *inter alia*, that the SRST water intake was in the process of moving (and has since moved) 70 miles downstream from the Lake Oahe crossing, making an already unlikely spill even more unlikely to impact SRST's water. (¶ 139.)

Finally, although allegations of improper motive do not, standing alone, establish actual malice, they do provide further support for an overall inference of actual malice. *See, e.g.*, *Jones v. Scripps Media, Inc.*, No. 16-CV-12647, 2017 WL 1230481, at *12 (E.D. Mich. Apr. 4, 2017) (allegations of defendant's motive to do harm and personal animus toward plaintiff added plausibility to plaintiff's allegation that misstatements were intentional"); *Pacquiao v. Mayweather*, 803 F. Supp. 2d 1208, 1214 (D. Nev. 2011) (actual malice sufficiently alleged where complaint stated that "[defendants were] motivated by ill-will, spite, malice, revenge, and envy . . . [and] set out on a course designed to destroy [plaintiff]"). The Complaint pleads that BankTrack and the Greenpeace Defendants worked in concert with one another and other

Enterprise members to target Energy Transfer's key financing relationships, seeking to coerce project financers to de-fund DAPL. (*See, e.g.*, ¶¶ 237-39, 243-50.) Evidencing their improper motives, Greenpeace, BankTrack, and other Defendants lauded the successes of their misinformation campaign and leveraged their illegal behavior to heighten their public profile and benefit their own organizations. (*See, e.g.*, ¶¶ 240, 243, 245-47, 255, 261.)[38]

4. Defendants' Statements Are Not Protected By Judicial Privilege

Nor can Defendants escape liability by cloaking their statements as "fair reports" protected by judicial privilege. (GP Br. 25-26). It is black-letter law that the fair report privilege does not *per se* protect summaries of proceedings; rather, it is a qualified privilege that only protects "a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof." N.D.C.C. § 14-02-05(4).

Greenpeace's statements do not fairly or accurately report on any official proceedings. As an initial matter, while Defendants cherry-pick a handful of statements in a handful of reports which they allege are protected by the judicial privilege, the mere reference to an official proceeding does not insulate the entire publication. *See White v. Fraternal Order of Police*, 909 F.2d 512, 527-28 (D.C. Cir. 1990) (only communications that conveyed "a report . . . or summary of . . . an official document or proceeding" were privileged and remaining statements were not protected). Moreover, the failure to attribute reported facts to the "official proceedings" is fatal, as the authorities cited by Greenpeace confirms. *Id.* at 528 (declining to extend privilege to statements without attribution). Thus, Greenpeace's *ex post facto* characterization of its false

[38] *Campbell v. Citizens for an Honest Government, Inc.*, cited by Defendants, does not compel a contrary conclusion: there, the Eighth Circuit specifically noted that "the ultimate conclusion [as to actual malice] may be supported by evidence of a defendant's motive," but affirmed a jury verdict for defendant because the defamatory statements were not false. 255 F.3d 560, 569 (8th Cir. 2001).

and misleading allegations concerning Energy Transfer as summaries of official proceedings does not convert the misrepresentations into protected statements. *See, e.g.*, ECF 40-18 at Tab 2 (stating that "[t]his pipeline would travel through the Standing Rock Sioux Tribe's ancestral lands," without any attribution to an official proceeding, then separately reporting on the SRST Lawsuit); &Tab 3 (stating without attribution that "construction crews have reacted [to protestors] with aggression and violence").[39]

But, even assuming *arguendo* that the false and misleading allegations could be characterized as privileged reports of judicial or official government proceedings where, as here, the statement may be irrelevant or so extraneous or so intemperate" they "lose [their] qualified privileged character." *Emo v. Milbank Mut. Ins. Co.*, 183 N.W.2d 508, 514 (N.D. 1971). This is particularly applicable here, where many of the false and misleading allegations directly *contradict* the results of official proceedings, including the *SRST* litigation. *See, e.g.*, ECF 40-18 at Tab 29 (DAPL "violates the sovereignty of the Standing Rock Sioux Tribe [and] the Environmental Protection Act . . . .").[40]

Finally, even if the "fair report" privilege were somehow applicable -- which it is not -- the question of whether Greenpeace has abused the qualified privilege or made the statements with actual malice are "questions of fact" not appropriate for disposition on a motion to dismiss.

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[39] Moreover, Greenpeace has not acted "without malice," as required for the privilege to attach. *See* N.D.C.C. § 14-02-05 (qualified privilege applies only to statements made "without malice").

[40] Greenpeace does not -- because it cannot -- claim that any of its defamatory statements were made "in any legislative or judicial proceeding," and thus concedes no absolute privilege applies. N.D.C.C. § 14-02-05(2); *Emo*, 183 N.W.2d at 514 (statements are not absolutely privileged unless they are made in the context of "judicial acts before some judicial tribunal" or "some form of governmental process"). Even absolutely privileged statements lose their privileged status when made outside of the absolutely privileged context. *See Wagner v. Miskin*, 2003 ND 69, ¶ 14, 660 N.W.2d 593.

Soentgen, 467 N.W.2d at 79 ("[g]enerally, actual malice and abuse of a qualified privilege are questions of fact" appropriate for disposition at the later summary judgment stage).[41]

B. The Complaint States A Claim For Tortious Interference

To plead a claim for tortious interference under North Dakota law, the complaint must allege: "(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; [42] and (5) actual damages to the party whose relationship or expectancy was disrupted." *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 2001 ND 116, ¶ 36, 628 N.W.2d 707.

As this Court recognized in upholding plaintiff's tortious interference claim in *Atkinson v. McLaughlin*, "plaintiff need not prove an independent tort to establish an independently tortious act. Rather, the plaintiff must prove that the defendant's conduct would be actionable under a recognized tort." 462 F. Supp. 2d 1038, 1058 (D.N.D. 2006) (Hovland, J.) (quotation omitted). Here, Plaintiffs have alleged a viable and timely defamation claim against each of the Defendants, *see supra* Section III.A, as well as unlawful racketeering conduct, including in violation of N.D.C.C. § 12.1-06.1-03(2), *see supra* Section II. Accordingly, drawing all

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[41] Defendants' attempt to invoke their purported reliance on "reputable sources" as absolving them from all liability fails for similar reasons. (GP Br. at 24; BT Br. at 24.) As a threshold matter, "a defamatory statement isn't rendered non-defamatory merely because it relies on another defamatory statement." *Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002) (reversing dismissal of defamation claim). Moreover, Defendants do not – because they cannot -- contend that all of their defamatory statements were the result of reliance on reputable source. In any event, reliance and the reputability of such sources is a question of fact that is not properly resolved at the pleadings stage. *See id.*

[42] The Complaint alleges tortious interference with business, which, in contrast to tortious interference with contract, does not require proof of either a contract or a breach thereof. BankTrack's sole objection to the tortious interference claim -- that it does not allege "a breach" -- is thus as irrelevant. (*See* BT Br. at 37-38.)

inferences in Plaintiffs' favor, as the court must at this stage, the Complaint alleges sufficient facts to state a claim for tortious interference. *See generally Ragland v. Blue Cross Blue Shield of N. Dakota*, 1:12-cv-080, 2012 WL 5511006, at *3 (D.N.D. Nov. 14, 2012) (Hovland, J.) ("reasonable inferences may be drawn from the Plaintiffs' allegations to support each element of a claim of interference in business advantages at this stage").[43]

IV. VENUE IS PROPER IN THIS FORUM

Defendants do not dispute that venue is proper in this District. (GP Br. at 55 (declining to seek a transfer of venue pursuant to 28 U.S.C. § 1392(b)(2).) To the contrary, Defendants concede the substantial connection between Plaintiffs' claims and the forum: "Greenpeace does not, of course, dispute that DAPL runs through this judicial district, that protest activities occurred here, and that advocacy efforts focused on challenging construction of DAPL." (GP Br. at 55; *see also supra* § E).) Nevertheless, in a transparent attempt at forum shopping, Defendants seek to invoke this Court's discretionary authority to transfer the case to the District Court of Columbia pursuant to 28 U.S.C. § 1404(a) so Defendants can avail themselves of the D.C. anti-SLAPP statute. (GP Br. at 56-61.) Defendants have failed to meet the heavy burden to justify a change of venue.[44]

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[43] The Complaint also alleges a claim for civil conspiracy under North Dakota law, the element of which are: "(1) [t]wo or more persons, and for this purpose a corporation is a person; (2) [a]n object to be accomplished; (3) [a] meeting of minds on the object or course of action; (4) [o]ne or more unlawful or overt acts; and (5) [d]amages as the proximate result thereof." *In re N. Dakota Pers. Injury Asbestos Litig. No. 1*, 737 F. Supp. 1087, 1096 (D.N.D. 1990). As set forth in Section II above, the Complaint plausibly alleges Defendants' common plan, concerted action, and unlawful acts, including violations of state and federal law.

[44] Even if there was a basis to transfer this case to the District of Columbia -- which there is not -- the D.C. anti-SLAPP statute would have no application here because "the governing law 'does not change following a transfer of venue under [28 U.S.C.] § 1404(a),' . . . [rather] the transferee court must pretend, for the purpose of determining the applicable state rules of decision, that it is sitting in the [state of the transferor court]." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 153-54 (quoting *Ferens v. John Deere Co.*, 494 U.S. 516, 530 (1990)). Moreover, while

A. This Court Should Defer to Plaintiffs' Choice of Venue

It is well-settled that a plaintiff's choice of forum is entitled to considerable deference. *See Dakota W. Bank of N. Dakota v. N. Am. Nutrition Cos., Inc.*, 284 F. Supp. 2d 1232, 1235 (D.N.D. 2003). Accordingly, this Court has repeatedly held that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum *should rarely be disturbed*." *DakColl, Inc. v. Grand Cent. Graphics, Inc.*, 352 F. Supp. 2d 990, 1003 (D.N.D. 2005) (emphasis added) (citing *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991)).

B. Defendants Have Not Met Their Heavy Burden to Demonstrate that a Transfer of Venue Is Appropriate

Notwithstanding this well-established precedent, Defendants argue the convenience of the parties, the convenience of the witnesses, and the interests of justice warrant transfer to the District of Columbia where the SRST litigation is pending. These arguments have no merit.

Yet, "change of venue, although within the discretion of the district court should not be freely given." *Zidon v. Pickrell*, 344 F. Supp. 2d 624, 633 (D.N.D. 2004) ("Courts are in the business of deciding cases, not playing procedural hockey among available districts at the whim of dissatisfied parties."). The moving party, "bears the heavy burden of showing why a change of forum is warranted." *R.D. Offutt Co. v. Lexington Ins. Co.*, 342 F. Supp. 2d 838, 841 (D.N.D. 2004); *Pac. W. Site Servs., Inc. v. Vesci*, 2013 WL 12084960, at *7 (D.N.D. Aug. 19, 2013).

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there is no basis to apply Washington D.C. substantive law to this case (*see infra*), even if this Court determined that D.C. law does apply, Defendants would not be able to avail themselves of the D.C. anti-SLAPP statute, because the D.C. Circuit has explicitly held the statute does not apply to any claims asserted in federal court. *See Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-36 (D.C. Cir. 2015) ("Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules."); *see also Democracy Partners v. Project Veritas Action Fund*, No. CV 17-1047, 2018 WL 294531, at *14 (D.D.C. Jan. 4, 2018) (citing *Abbas* and refusing to apply D.C. Anti-SLAPP Act).

1. Convenience of the Parties

Defendants argue convenience of the parties favors transfer to the District of Columbia because "none of the parties reside [in North Dakota], whereas two of the five defendants -- GP Inc. and GP Fund -- are located in Washington, D.C." (GP Br. at 56.) This Court, however, has repeatedly held that "when a plaintiff will need to travel regardless of venue, but a defendant will not have to travel if venue is transferred, then the convenience factor weighs in favor of neither forum." *Pac. W. Site Servs.*, 2013 WL 12084960, at *8 (*quoting Herschbach v. Herschbach*, 667 F. Supp. 2d 1080, 1087 (D.N.D. 2009)). This is consistent with the long-standing principle that courts should not grant a transfer pursuant to 28 U.S.C. 1404(a) where "the effect is simply to shift the inconvenience to the party resisting the transfer." *Id.*[45]

2. Convenience of the Witnesses

Nor does convenience of the witnesses favor transfer. The convenience-of-witnesses analysis encompasses consideration of the number of non-party witnesses, the location of all witnesses, and the "relative ease of access to sources of proof" generally. *Hammann v. 1-800 Ideas.com, Inc.*, 455 F. Supp. 2d 942, 962 (D. Minn. 2006) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). "The party with the longest list of potential witnesses who reside in their respective district will not necessarily prevail, rather, the Court must examine the

[45] Citing *In re Apple, Inc.*, 602 F.3d 909, 913 (8th Cir. 2010), Defendants argue that where a plaintiff is not headquartered in the forum, this serves to lessen the deference afforded to plaintiff's choice of venue. (*See* GP Br. at 56.) However, *In re Apple* is factually distinguishable because in contrast to the circumstances here, the Eighth Circuit found there were "no relevant connection between [the parties], potential witnesses *or the dispute [and the forum]*." 602 F.3d at 913; *see, e.g., Libertarian Party of S. Dakota v. Krebs*, 312 F.R.D. 523, 527 (D.S.D. 2016) (distinguishing *In re Apple* and refusing to transfer where parties had connection to original venue).

materiality and importance of the anticipated witnesses' testimony and then determine their accessibility and convenience to the forum." *R.D. Offutt Co.*, 342 F. Supp. 2d at 842.

The majority of the witnesses the Defendants have identified do not reside in either North Dakota *or* Defendants' preferred forum. (GP Br. at 57-58). Nor do the Defendants contend that any witnesses -- let alone any material witnesses -- are unwilling or unable to appear before this Court. *See Zidon*, 344 F. Supp. 2d at 634-35 (denying transfer motion where defendant failed to show witnesses were unwilling or unable to travel). In any event, the unwillingness or unavailability of a witness to travel to this District is not dispositive because "testimony can be presented by videotape or live by a teleconference video linkup." *Pac. W. Site Servs.*, 2013 WL 12084960, at *8 (unwillingness of out-of-state witness to travel does warrant transfer).

By contrast, Plaintiffs intend to call in-state witnesses to testify, including about the violent protests, destruction of the pipeline and other overt actions taken to harm Plaintiffs, its business, and property in North Dakota. Thus, the convenience of the witness analysis mitigates against transfer. *Zidon*, 344 F. Supp. 2d at 634-35 (where plaintiff's witnesses reside in the state, defendants' witnesses reside outside the putative transferee venue, and "[n]either party has suggested witnesses would be unwilling or unable to travel to either venue . . . , this factor weighs in favor of a North Dakota venue.").

3. Interests Of Justice

The interests of justice likewise militate against transfer. When assessing the interests of justice, the court may consider (1) judicial economy, (2) the plaintiff's choice of forum, (3) comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law." *MBI Energy Servs. v. Hoch*, No. 1:16-CV-329, 2017 WL 2986371, at *2 (D.N.D. Feb. 28, 2017).

The first two factors heavily weigh against transfer. First, "judicial economy favors [Plaintiffs'] choice of venue since this Court has already invested resources into this case by virtue of addressing Defendants' motion to dismiss." *Larson Mfg. Co. of S.D. v. Conn. Greenstar, Inc.*, 929 F. Supp. 2d 924, 938 (D.S.D. 2013).[46] Likewise, as set forth above, deference afforded plaintiff's choice of forum weighs against transfer. *See supra* § IV.A.

Nor do the conflict of law issues or the advantages of having a local court determine questions of local law favor a transfer of venue. While Defendants argue for application of District of Columbia law (GP Br. at 60, 61 n.55), because -- as Defendants concede -- a substantial part of the events or omissions giving rise to this case occurred in this judicial forum, including the violent protests and acts of arson and destruction of federal lands, construction equipment and the pipeline itself, North Dakota has the most significant relationship with the events in this case and its law governs irrespective of whether this case is ultimately litigated. *BNSF Ry. Co. v. Progress Rail Servs. Corp.*, No. 3:13-CV-80, 2016 WL 7496873, at *5 (D.N.D. Aug. 16, 2016) (applying North Dakota substantive law where "most important facts," including "[illegal conduct,] occurred in North Dakota, putting North Dakota property and persons at risk" and "North Dakota citizens were involved in investigating the [conduct], in the ensuing clean-up, and in reparations").[47] However, even *assuming arguendo*, that the substantive law of the District of Columbia did govern Plaintiffs' claims, this consideration is "entitled to little

[46] While Defendants point to the pending SRST litigation as a putative connection to the District of Columbia, they cite no authority to warrant a transfer based on a tangential litigation involving different parties. *Cf. Marietta Campbell Insurance Group, LLC v. Jefferson-Pilot Life Insurance Company*, No. 2:07-CV-32, 2007 WL 3197311 (D.N.D. Oct. 26, 2007) (transfer granted where a parallel action between the *same parties* was pending); *Herschbach v. Herschbach*, 667 F. Supp. 2d 1080, 1088 (D.N.D. 2009) (transfer was appropriate to consolidate actions).

[47] By contrast, Defendants only identify three contacts between this litigation and the District of Columbia: two defendants reside there, certain defamatory statements originated there, and a tangentially relevant litigation is in process there. (GP Br. 60.)

significance in the court's decision" as to *transfer*. *Houk v. Kimberly-Clark Corp.*, 613 F. Supp. 923, 932 (W.D. Mo. 1985). This is because "courts can just as easily apply the law of another state as easily as their own." *Oien v. Thompson*, 824 F. Supp. 2d 898, 907 (D. Minn. 2010); *Dakota W. Bank*, 284 F. Supp. 2d at 1236 (where case "does not involve complex or novel questions of [state] law," the court is "capable of navigating the issues and interpreting the applicable [out-of-state] law" in the event such law applies).

While Defendants argue the extensive coverage of the DAPL protests in North Dakota may be an obstacle to selecting an impartial jury, as set forth in detail in the Complaint, however coverage of the DAPL opposition has been extensive nationwide. *See Hubbard v. White*, 755 F.2d 692, 695 (8th Cir. 1985) (affirming denial of motion to transfer on the basis that "[o]ur search of the record does not reveal that plaintiffs' motion [to transfer venue] was accompanied by materials that demonstrated the alleged prejudicial publicity."). Finally, Defendants' own case law shows that travel costs alone do not support a transfer. *See Marietta Campbell Ins. Grp.*, 2007 WL 3197311, at *3 ("Travel may be slightly more affordable and flexible in and out of . . . metropolitan areas, but overall, the convenience of parties and witnesses appears to be more or less equal in either forum.").[48]

V. THE COURT HAS PERSONAL JURISDICTION OVER THE INTERNATIONAL DEFENDANTS

GPI and BankTrack argue for dismissal of all the claims asserted against them on the basis they are not subject to personal jurisdiction in this Court. (*See* GP Br. 54-55; BT Br. 8-20.) These arguments have no merit.

[48] Likewise, transfer to the Northern District of California is improper for all the reasons set forth above, as well as, because the Defendants do not identify a single contact between that forum and the parties, witnesses, or conduct alleged in the Complaint. (GP Br. at 55, n.46.)

At the pleading stage, plaintiff "need only make a prima facie showing of jurisdiction." *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th Cir. 1991). The Court must view jurisdictional facts "in light most favorable to [Plaintiffs] . . . ." *Atkinson v. McLaughlin*, 343 F. Supp. 2d 868, 872 (D.N.D. 2004) (Hovland, J.). Because it is undisputed that BankTrack and GPI were validly served with process in the United States, these defendants are subject to jurisdiction under RICO nationwide jurisdiction, or alternatively, under North Dakota's long-arm statute or Rule 4(k)(2).

A. <u>This Court Has Personal Jurisdiction Under the Federal RICO Statute</u>

The RICO statute confers jurisdiction in any federal district court that has personal jurisdiction over at least one of the defendants. *See* 18 U.S.C. 1965(a). Once a plaintiff has established personal jurisdiction over at least one defendant under § 1965(a), RICO's nationwide service of process provision confers jurisdiction over "RICO defendants residing abroad" so long as they are "served with process within the United States" and the "ends of justice" are met. 18 U.S.C. 1965(b); *see also Armstrong v. Am. Pallet Leasing Inc.*, 678 F. Supp. 2d 827, 850 (N.D. Iowa 2009); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 86 F. Supp. 2d 137, 140 (E.D.N.Y. 2000) (collecting cases).[49]

Here, it is undisputed that the requisites of sections 1965(a) and (b) are met. GP-Inc. and GP-Fund concede this Court has personal jurisdiction over them, and this is sufficient to satisfy section 1965(a), particularly in view of the Complaint's allegations as to their numerous contacts

[49] *Nocando Mem Holdings, Ltd. v. Credit Commer5cial De France, S.A.*, No. Civ.A.SA-01-1194-XR, 2004 WL 2603739, at *8 (W.D. Tex. Oct. 6, 2004) relied on by BankTrack is inapposite, as that case did not involve personal service on a foreign defendant, but rather service on a foreign defendant's *agent*, which rendered § 1965(b) inapplicable. Likewise, *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1182 (C.D. Cal. 1998) is unavailing because defendants were not served in the United States but in France pursuant to the Hague Convention.

with this forum. (*See, e.g.*, ¶¶ 355-60.) Moreover, Plaintiffs effected service on BankTrack's director, Michelle Chan, and GPI's director, Ravi Rajan, in the United States (ECF Nos. 17, 20), and BankTrack concedes that they were validly served with process in the United States. (BT Br. at 11). Thus, this Court may exercise personal jurisdiction over BankTrack and GPI. *Herbstein v. Bruetman*, 768 F.Supp. 79, 81 (S.D.N.Y. 1991) (exercising RICO jurisdiction over Argentinian corporation whose director was served in Illinois).[50]

Nevertheless, BankTrack and GPI argue that the exercise of jurisdiction pursuant to RICO's nationwide jurisdiction provision would run afoul of the "ends of justice" because Plaintiffs have not shown "there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." (BT Br. at 12.) However, the existence of another forum where all defendants are subject to suit is not dispositive of the "ends of justice" inquiry. Rather, it has long been held the "ends of justice" analysis is a flexible concept uniquely tailored to the facts of each case. *See Kaplan v. Reed*, 28 F. Supp. 2d 1191, 1204 (D. Colo. 1998) (ends of justice analysis considers numerous factors of which "the availability of an alternative forum is but one"); *Southmark Prime Plus, L.P. v. Falzone*, 768 F. Supp. 487, 491 (D. Del. 1991) ("Several factors can be considered by a court in making this 'ends of justice' determination under § 1965(b).").[51]

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[50] "[W]here, as here, a federal statute authorizes nationwide service of process, 'the exercise of personal jurisdiction is compatible with due process as long as the defendants have sufficient minimum contacts with the United States.'" *Golub & Assocs., Inc. v. Long*, No. 4:09CV92 JCH, 2009 WL 690118, at *2 (E.D. Mo. Mar. 11, 2009) (quoting *Gatz v. Ponsoldt*, 271 F. Supp. 2d 1143, 1153 (D. Neb. 2003)).

[51] Even if the existence of an alternative forum were a dispositive consideration, Plaintiffs still have shown that the ends of justice require this Court's exercise of jurisdiction. *Southmark Prime*, 768 F. Supp. at 491 (because "it is unlikely that all the defendants are subject to venue in one district under §§ 1965(a) and 1391 . . . ." "the ends of justice would be significantly advanced if the Court exercised its discretion under § 1965(b)"); *see also Ark. Blue Cross & Blue Shield v. Philip Morris, Inc.*, No. 98 C 2612, 1999 WL 202928, at *2 (N.D. Ill. Mar. 31, 1999)

Among those factors relevant to the "ends of justice" are "the amount of time already spent by the litigants pursuing their claims in a plaintiff's chosen forum, the age of the case and the court's familiarity with the issues, whether dismissal or transfer of the case would result in extraordinary delay to the plaintiff, and whether defendants have retained competent local counsel." *Kaplan*, 28 F. Supp. 2d at 1204. Applying these factors, courts regularly find that the ends of justice require exercising jurisdiction over foreign defendants under section 1965(b) where proceeding elsewhere would delay the case, particularly where defendants are already "well represented" in that court. *See, e.g., Am. Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd.*, 755 F. Supp. 1292, 1305 (E.D. Pa. 1990) (exercising jurisdiction over five-month-old case where transfer would cause further delay and defendants were "well represented"); *Miller Brewing Co. v. Landau*, 616 F. Supp. 1285, 1290-91 (E.D. Wis. 1985) (similar). The same conclusion is required here. This action was commenced over six months ago. During that time, BankTrack and GPI retained counsel familiar with the law and rules in North Dakota and have filed motions to dismiss under North Dakota law. The transfer of the case would only serve to further delay resolution of this case on the merits.[52]

BankTrack and GPI make no showing to the contrary. Instead, they argue the Court should not exercise jurisdiction under RICO because Plaintiffs fail to state a RICO claim. (*See* BT Br. at 13). As set forth above (*supra* § II), these arguments are wholly without merit. But in any event, "a Rule 12(b)(2) motion to dismiss, [ ] is not a proper motion for such an attack on

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(ends of justice required exercising jurisdiction pursuant to 1965(b) where defendants "reside[d] in several states and overseas, and it is unlikely that another district would have personal jurisdiction over all of them").

[52] *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, cited by BankTrack, is readily distinguishable because it involved multiple conspiracies which could be divided into separate suits, and thus did not contravene Congress's intent to bring all members of a nationwide RICO conspiracy before a court in a single trial. 788 F.2d 535, 538-39 (9th Cir. 1986).

[the legal sufficiency of] the RICO claims." *See Armstrong*, 678 F. Supp. 2d at 850; *see also Meganathan v. Signal Int'l L.L.C.*, No. 1:13-CV-497, 2014 WL 11512241, at *4 (E.D. Tex. July 3, 2014) ("Questions of whether the complaint sufficiently pleads violations of the RICO statute should not be raised in a motion under Rule 12(b)(2) challenging personal jurisdiction.").

B. This Court Has Jurisdiction Under North Dakota's Long-Arm Statute

The Court may also exercise personal jurisdiction over BankTrack and GPI under North Dakota's long-arm statute. *See* Fed. R. Civ. P. 4(k)(1)(A). The North Dakota long-arm statute provides for jurisdiction over "a person who acts directly or by an agent" by, *inter alia*, "committing a tort within or outside this state causing injury to another person or property within this state; [or] committing a tort within this state, causing injury to another person or property within or outside this state." N.D. R. Civ. P. 4(b)(2).

Here, the Complaint alleges GPI committed torts within the state when it directed, funded and supported radical eco-terrorist organizations such as Red Warrior Camp to infiltrate protest camps, train protestors in violence and property destruction, and perpetrate large scale attacks against Energy Transfer personnel and property in North Dakota. The commission of these tortious acts in the state subjects GPI to jurisdiction under North Dakota's long-arm statute.

However, even if GPI's and BankTrack's allegations were limited to "speech activities that took place outside' the state, as these Defendants allege (GP Br. at 55; BT Br. at 9, 13-18), the exercise of jurisdiction is proper based on Defendants' intentional acts calculated to create an actionable event in this State. *See Rodenburg v. Fargo-Moorhead Y.M.C.A.*, 2001 ND 139, ¶ 19, 632 N.W.2d 407, 415-16 (jurisdiction proper if "the defendant has 'purposefully directed' his activities" at residents of North Dakota and "the litigation results from alleged injuries that arise out of or relate to those activities) (citation omitted).

Defendants concede their putative "advocacy efforts focused on challenging construction of DAPL" in North Dakota. (*See* GP Br. at 55). Moreover, the Complaint pleads these defamatory statements were ubiquitously disseminated to incite violence on the ground in North Dakota, interfere with the financing of Energy Transfer's infrastructure project in this State, and otherwise cause harm to Energy Transfer in North Dakota. The Complaint likewise pleads the substantial harm Energy Transfer sustained in this State as a result of Defendants' unlawful activities including delayed construction costs, increased security costs, and costs to mitigate the campaign of misinformation.[53] The intentional dissemination expected or intended to cause injury in this State has long been held to be a basis for the exercise of long-arm jurisdiction. *See Atkinson*, 343 F. Supp. 2d at 877-878 (exercising jurisdiction over Cambodian residents whose defamatory statements "directly targeted" North Dakota with the intent of "foster[ing] debate" in North Dakota and the subject matter of the statements "relate[d] to North Dakota"); *see also Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, 855 N.W.2d 614, 629 (exercising jurisdiction where focus of alleged fraudulent scheme was in North Dakota); *Zidon*, 344 F. Supp. at 632 (exercising jurisdiction over defendant where focus of defamatory statements was North Dakota, "'brunt of the injury' would be felt in North Dakota," and defendant specifically targeted North Dakota).[54]

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[53] This case bears little resemblance to *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010), on which BT and GPI attempt to rely. (*See* BT Br. 19). *Johnson* involved a single purportedly defamatory comment about plaintiff that was posted on a third-party internet message board, which the Court found only targeted only plaintiff and not this state.

[54] This Court may also exercise jurisdiction over GPI or BankTrack based on the contacts of their co-conspirators -- including GP-Inc., GP-Fund or Earth First! -- in this state which are not disputed on this motion. *In re N. Dakota Pers. Injury Asbestos Litig.*, 737 F. Supp. at 1098-99 (finding jurisdiction over Canadian defendant based on co-conspirators' North Dakota activities). Here, such jurisdiction is proper because Plaintiffs have alleged their conspiracy claims against BankTrack and GPI, as well as the overt acts committed in North Dakota by their co-conspirators. *Cf Alexander WF, LLC v. Hanlon*, No. 4:14-CV-068, 2015 WL 12803715, at *6

C. This Court Has Jurisdiction Pursuant to Rule 4(k)(2)

Even if the Court were to conclude that BankTrack and/or GPI is not subject to long-arm jurisdiction in this state, it should nevertheless exercise jurisdiction over them pursuant to Federal Rule of Civil Procedure 4(k)(2) which confers jurisdiction over foreign defendant who lack substantial contacts with any single state, but have sufficient contacts with the United States as a whole to satisfy due process standards. *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1293-94 (Fed. Cir. 2012). Courts have "adopted a burden-shifting mechanism so that 'if the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).'" *Id.*

Here, Plaintiffs' federal RICO claims arise under federal law, and Defendants do not identify a state court of general jurisdiction. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 4890594, at *17 (N.D. Cal. Oct. 30, 2017). Thus, where -- as here -- the Complaint alleges minimum contacts with the United States (*see supra*; *see also* BT Br. at 12 n.6 (conceding BankTrack sent defamatory letters about Energy Transfer to New York and California)), the exercise of jurisdiction is proper pursuant to Rule 4(k)(2). *S.E.C. v. Carrillo*, 115 F.3d 1540, 1545-46 (11th Cir. 1997) (targeting U.S. citizens through phone, mail, internet, and in person constitutes minimum contacts for purposes of Rule 4(k)(2)).[55]

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n.3 (D.N.D. Feb. 19, 2015) (Hovland, J.) (finding plaintiff failed to allege participation of corporate officers in their individual capacities).

[55] If the Court finds that the Complaint fails to allege jurisdiction over GPI or BankTrack, this Court should grant limited jurisdictional discovery. *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 710 (8th Cir. 2003) (Plaintiffs "must be permitted to have the opportunity to establish the[relevant] facts through jurisdictional discovery."); *Pudlowski v. The St. Louis Rams, LLC*, 829 F.3d 963, 964–65 (8th Cir. 2016) ("Discovery is often necessary because jurisdictional requirements rest on facts that can be disputed.").

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss and transfer venue should be denied in their entirety. To the extent the Court grants Defendants' motions in whole or part, such dismissal should be without prejudice and with leave to amend.[56]

DATED this 8th day of February, 2018.

FREDRIKSON BYRON P.A

/s/ Lawrence Bender

By: Lawrence Bender, ND Bar# 03908
Danielle M. Krause, ND Bar# 06874

1133 College Drive, Suite 1000
Bismarck, ND 58501
Telephone: 701.221.8700
Fax: 701.221.8750

KASOWITZ BENSON TORRES LLP

By: Michael J. Bowe (admitted *pro hac vice*)
Jenifer S. Recine (admitted *pro hac vice*)
Lauren Tabaksblat (admitted *pro hac vice*)

1633 Broadway
New York, NY 10019
Telephone: 212.506.1700

Attorneys for Plaintiffs Energy Transfer Equity, L.P., and Energy Transfer Partners, L.P.

[56] The Federal Rules of Civil Procedure instruct that "[t]he court should freely give leave to [amend a pleading] where justice so requires." *See* Fed. R. Civ. P. 15(a).