UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

ENERGY TRANSFER EQUITY, L.P., *et al.*, Plaintiffs, v. GREENPEACE INTERNATIONAL, *et al.*, Defendants.	CIVIL ACTION FILE NO. 17-CV-00173-DLH **GREENPEACE INTERNATIONAL, GREENPEACE, INC. AND CHARLES BROWN'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND FOR LIMITED JOHN AND JANE DOE DISCOVERY**

Defendants Greenpeace International ("GPI"), Greenpeace, Inc. ("GP Inc.") (collectively "Greenpeace" or "Greenpeace Defendants"), and Charles Brown, oppose the motion for reconsideration of plaintiffs Energy Transfer Equity, L.P. ("ETE") and Energy Transfer Partners, L.P. ("ETP") (collectively, "Energy Transfer") for an order granting John and Jane Doe discovery ("Plaintiff's Motion"). *See* ECF No. 105.

PRELIMINARY STATEMENT

Plaintiff's Motion follows a familiar pattern: File first, and try to find factual support later. In this instance, Energy Transfer seeks to kill four birds with one stone: (1) relitigate the Court's earlier orders requiring Plaintiff to have an evidentiary basis before naming additional defendants (ECF Nos. 99, 100); (2) disrupt the briefing schedule on the remaining Defendants' motions to dismiss (ECF Nos. 101, 103); (3) obtain discovery of the Greenpeace Defendants despite the untenable nature of Plaintiff's allegations against them (and the purported Doe

Defendants); and (4) impose additional hardship on the Greenpeace Defendants, consistent with Energy Transfer's SLAPP goals. Its Motion should be rejected for a host of reasons.

First, Plaintiff ignores the procedural history of this case and the basis for the Court's August 22, 2018 Order requiring that Plaintiff identify and serve all Doe Defendants within 30 days or face dismissal of claims against these defendants (ECF No. 100). On April 3, 2018, the Court ordered that "if Plaintiff wants to pursue claims against Earth First!, it is responsible for serving it pursuant to the Federal Rules of Civil Procedure." ECF No. 81. In response, Plaintiff made no attempt to do so. ECF No. 99, at 2 (Plaintiff "took no action to effect service" on Earth First! from April 3 to July 25.[1] The Court then ordered that Plaintiff show cause why the Court should not dismiss the complaint as to Earth First! given Plaintiff's failure. ECF No. 86. In response, Energy Transfer made several frenzied but ultimately unsuccessful efforts at service, and simultaneously sought leave to amend and for limited discovery "concerning individuals and entities affiliated with Earth First!" ECF No. 89, at 9. The Court denied discovery but allowed amendment,[2] with a key caveat:

> Plaintiffs may amend their complaint to name any person or entity directly responsible for the acts complained of. Plaintiffs may also name any person or entity who directly provided monetary support to commit the acts complained of. Plaintiffs, however, must have evidentiary support for their factual contentions.

ECF No. 94, at 1. As such, the Court was not granting Plaintiff leave to amend the complaint in order to add new, *unnamed* defendants.

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[1] Indeed, the instant motion makes clear that all of Plaintiff's efforts to serve Earth First! since April 2018 all occurred after the Court issued its show cause Order. ECF No. 106, at 5-6.

[2] "A decision whether to allow a party to amend her complaint is left to the sound discretion of the district court and should be overruled only if there is an abuse of discretion," however, there is no abuse of discretion for denying a motion to amend where "there exists undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment." *Popoalii v. Correctional Med. Servs.*, 512 F. 3d 488, 497 (8th Cir. 2008) (citing *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998)). Here, given Plaintiff's failure to serve Earth First! and the dearth of plausible allegations in its original Complaint, it was entirely within this Court's discretion to require that Plaintiff only add parties that it could name, and for whom it could show some factual support for such parties' purported unlawful acts.

Yet that is precisely what Energy Transfer chose to do. While it named several new individuals (none allegedly associated with Earth First!), it also attempted to include as parties twenty John and Jane Doe defendants, which it described – without any factual support – as follows:

> men and women operating and holding themselves out as members of Earth First!, unknown members and affiliates of Red Warrior Camp and other participants in the network of environmental groups targeting Energy Transfer and other legitimate organizations, as well as co-conspirators and/or aiders and abettors of the named Defendants in the scheme, enterprise, and misconduct alleged in this complaint, including, among others, cyber-hacktivists, environmental activists, and certain foundations directing funds to the Defendants.

ECF No. 95, ¶ 35. On the face of this allegation, these are not specific individuals whose identities are waiting to be uncovered: these are generalized categories of bogeymen that Energy Transfer seeks to lump together as part of its vast, imagined criminal conspiracy. In later dismissing the claims against Earth First!, the Court thus appropriately ordered that Plaintiff would have 30 days to identify and serve the Doe Defendants "allegedly associated as, or representatives of, EF!," who "appear so critical to Plaintiffs' claims." ECF No. 99, at 3; ECF No. 100. It is this Order (ECF No. 100) which Plaintiff seeks to have the Court reconsider.

Plaintiff now says that it should be allowed to employ "basic discovery" to fill the gaping holes in its claims against unknown "EarthFirst! Doe Defendants" who Plaintiff alleges, with no factual support, "provided $500,000 in seed money to Red Warrior Camp"; "coordinated with Greenpeace USA to provide training for protestors in camps in North Dakota"; and "in September and October 2016 organized and led in-person direct action training sessions for members of Mississippi Stand, including Jessica Reznicek and Ruby Montoya, in Lee County, Iowa." ECF No. 106, Mem. 9. But in demanding discovery to identify putative Doe Defendants, Energy Transfer fails to address the Court's reasoning for granting Plaintiff leave to amend the

complaint which, again, was to "name" persons "directly responsible" or who "directly provided monetary support" for the purported unlawful acts. Instead, Plaintiff recites bare allegations, with no "evidentiary support for their factual contentions." As the Court has noted, it is clear that "Plaintiffs did not, at the time of filing, have evidentiary support for the specific allegations against EF!" (ECF No. 94, at n.4) – yet its allegations about $500,000 in seed money and coordination of training, now shifted to Doe Defendants purportedly connected with Earth First!, remain unchanged from the original Complaint, with no further factual support.[3]

Indeed, Plaintiff's motion makes it clear that Plaintiff has no basis for taking discovery of Greenpeace to uncover the names of Doe Defendants. Other than the bare allegation about joint training, Plaintiff says that discovery is appropriate because the "Greenpeace Defendants admit to having established connections with Two Bulls and Hall" and "coordinated with Two Bulls and Hall to hold donation drives in ten cities across the country to fund, feed, and house Red Warrior at its Lake Oahe campsite." ECF No. 106, at 9-10. But Plaintiff has already *named* those two individuals as defendants, and Plaintiff provides no explanation as to why discovery of Greenpeace related to those individuals would somehow reveal the names of Doe Defendants "allegedly associated as, or representatives of," Earth First!.

Second, Plaintiff's Motion appears to be a strategic delaying tactic, purposefully filed just hours after the named and served defendants submitted their respective motions for dismissal (that is, allowing Plaintiff to see those defendants' arguments but with the goal of significantly extending Plaintiff's time to respond to same). *See* ECF Nos. 101, 102, 103, 104. Energy Transfer's reconsideration motion, and the timing of same, is intentionally disruptive of the

[3] Energy Transfer's claims that "[t]here is no question" that the putative Doe Defendants engaged in a criminal enterprise is an overstatement, to say the least. Indeed, claims that Doe Defendants "coordinated" with Greenpeace are not only unproven, but implausible, as set forth in Greenpeace's pending motion to dismiss the amended complaint. *See* ECF No. 103-1, Mem. at 10-20. As the Court has noted, Plaintiff has "had a year since filing this action to identify and serve Doe Defendants." ECF No. 100.

briefing schedule originally stipulated to by the parties and thereafter entered, with modification, by the Court. *See* ECF Nos. 97 & 98. Failing to plead plausible claims under RICO, or any fraudulent or tortious conduct, Energy Transfer now seeks to rebuild its hollow case with invasive discovery. The Plaintiff's tactics in this regard will impose unnecessary and substantial costs and fees on the defendants – all hallmarks of SLAPP litigation, as discussed further below.

Third, Energy Transfer fails to present adequate grounds to impose premature discovery during the pendency of dispositive motions to dismiss.[4] As a threshold matter, Greenpeace (and Greenpeace Fund's) motions to dismiss are well-founded. Greenpeace believes that the Court will dismiss all or some of Plaintiff's claims, or certain defendants. In its motion, Greenpeace argues that Plaintiff's claims all fail in the face of well-recognized and essential First Amendment protections, as each of those claims is directed at Greenpeace's public advocacy. ECF No. 103-1. More specifically, Plaintiff's novel and wholly unsupported claims under the RICO statute cannot survive, because Energy Transfer has failed to plausibly plead a RICO "enterprise," that Greenpeace (or anyone else) "conducted" such an enterprise or engaged in a pattern of criminal activity, the commission of any cognizable predicate acts, or proximate cause. Plaintiff's defamation claims fail because the challenged statements constitute protected opinion, Plaintiff has not plausibly pled that the statements were made with actual malice, and many of those statements are privileged fair reports of official government proceedings.

If the Court grants Defendants' respective motions in full, there will be no need for discovery of the Greenpeace Defendants of any type; if it grants them even in part, such a ruling

[4] Notably, this Court's usual practice is to set a scheduling conference for purposes of outlining discovery schedules after motions to dismiss have been briefed and decided. *See Ballard v. Heineman*, 548 F.3d 1132, 1137 (8th Cir. 2008) (no abuse of discretion where district court stayed discovery during pendency of summary judgment motion); *Mau v. Twin City Fire Ins. Co.*, No. 1:16-cv-325, 2017 WL 3623794, at *2 (D. N.D. Aug. 23, 2017) (citing *Blair v. Douglas Cty.*, NO. 8:11CV349, 2013 WL 2443819, at *1 (D. Neb. June 4, 2013) (for "settled proposition that a court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

will narrow the scope of discovery. On the other hand, if the Court allows discovery to proceed, Energy Transfer will no doubt seek wide-ranging discovery of Defendants, which may include depositions of many employees and other individuals in multiple locations – even though neither the original Complaint nor the Amended Complaint has named a single Greenpeace employee other than Brown (who has attested that he has never traveled to North Dakota and was only recently hired by Greenpeace US). *See* ECF No. 103-2, Decl. of Charles Brown. Even if Plaintiff is only permitted narrow fact discovery limited to identifying Doe Defendants, such discovery is nevertheless likely to last for many months, as illustrated by Plaintiff's months-long effort to effectuate service of its original claims against EarthFirst!, and thus impose significant cost on the parties and non-parties. It is entirely appropriate for the Court to deny Plaintiff's request to take discovery pending resolution of dispositive motions that may extinguish the case, or at least significantly narrow the claims before the parties expend unnecessary and costly resources engaging in Plaintiff's fishing expedition to identify and name additional defendants.

By contrast, any prejudice to Energy Transfer would be minimal. There is little or no risk of the loss of key evidence here, especially as Energy Transfer's counsel already has sent letters to not just the named parties, but to alleged enterprise members as well, demanding that recipients retain all relevant documents. Declaration of Lacy H. Koonce, III, attached hereto, Ex. A. Also, should this court conclude, based on the claims pled, that Energy Transfer has no plausible RICO action against Greenpeace for its alleged involvement in "provid[ing] on-the-ground training for protestors at camps in North Dakota," (ECF No. 95, ¶ 75) there would be no additional harm to Energy Transfer in precluding irrelevant and unnecessary discovery to unveil such putative and heretofore unnamed "trainers."

Moreover, Plaintiff's reliance on cases holding that an action may proceed against a party whose name is unknown if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery are inapposite here because the claims are not specific enough to survive Defendants' Rule 12(b)(6) motions and the motion for discovery is prematurely brought before resolution of those motions. The cases cited by Plaintiff make the failings of their pleadings all the more stark. For example, *Estate of Rosenberg by Rosenberg v. Crandall*, 56 F.3d 35, 37 (8th Cir. 1995), *see* ECF No. 106, Plaintiff's Motion 8, 10, was a *Bivens* action brought by the estate of a federal prison inmate claiming damages for deliberate indifference to serious medical needs, which named the Warden and Associate Warden as defendants, and named six Doe Defendants who were employed by the prison, but as yet unknown to the plaintiff. Specific allegations that the Doe Defendants engaged in medical malpractice and other tortious conduct were detailed, and the prospect of identifying the alleged tortfeasors who oversaw the decedent's mistreatment sufficiently concrete, that the Eighth Circuit reversed dismissal. In the present case, Energy Transfer has pleaded nothing but speculation as to the identities and alleged criminal conduct of an inchoate group of Doe Defendants, which does not satisfy the standard in this Circuit – again, as demonstrating by the very cases Energy Transfer cites – for forestalling dismissal to obtain discovery. *See also Cantrell v. Reed*, 256 F. App'x 863, 864 (8th Cir. 2007) (reversing dismissal where allegations were specific enough to allow prison Officer Doe to be identified through discovery and where plaintiff "had pending a motion to substitute Sergeant Oates for Officer Doe."); *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985) (excessive force claim specifically alleging four named defendants, together with single John Doe officer, went to plaintiff's apartment and Doe imposed "excruciating pain" on plaintiff); *Smith v. Planned Parenthood of St. Louis Region*, 327 F. Supp.

2d 1016, 1020-21 (E.D. Mo. 2004) (complaint alleging "specific reference to one or more unnamed Planned Parenthood physicians, an 'agent' of Planned Parenthood named S. Conway–D'Souza, and one or more unidentified 'agents' of Planned Parenthood," who *pro se* plaintiff alleged, with specificity, committed medical malpractice).

Fourth, Plaintiff's effort to impose discovery burdens on the Defendants before the Court can determine or analyze the First Amendment implications of this matter, *see* ECF No. 87, Order at 2 n.8, furthers the Plaintiff's goal of chilling Defendants' speech. Meritless SLAPP suits like this one are designed to impose costs on free speech, expression and advocacy. Thus, courts have recognized the importance of speedy pre-trial dispositions in libel actions, particularly ones as here involving public figures who have to plausibly plead actual malice.

> [W]hen examining public figure defamation suits … there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation…. Forcing [speakers] to defend inappropriate suits through expensive discovery proceedings in all cases would constrict the breathing space in exactly the manner the actual malice standard was intended to prevent. The costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether.

Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir 2016) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964)) (rejecting defamation plaintiff's claim that defamation suits involving public figures should not be dismissed without first conducting discovery as "completely out of line with the current state of the law" post-*Iqbal/Twombly*). *See also Herbert v. Lando*, 441 U.S. 153, 178 (1979) (Powell, J., concurring) ("I write to emphasize the additional point that, in supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interests as well as the private interests of the plaintiff."); *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013) ("summary proceedings are essential in

the First Amendment area because if a suit entails long and expensive litigation, then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails") (internal quotations omitted). Here too, the Court should deny Energy Transfer's opportunistic request to engage in costly discovery.

This 14th day of September, 2018.

Respectfully submitted,

/s/ *Lacy H. Koonce, III*

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