

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION**

ENERGY TRANSFER EQUITY, L.P., <i>et al.</i> ,)	
)	
Plaintiffs,)	CIVIL ACTION FILE
)	NO. 17-CV-00173-DLH
v.)	GREENPEACE FUND’S
)	RESPONSE IN OPPOSITION TO
GREENPEACE INTERNATIONAL, <i>et al.</i> ,)	PLAINTIFF’S MOTION FOR
)	RECONSIDERATION AND FOR
Defendants.)	LIMITED JOHN AND JANE DOE
)	DISCOVERY
)	
)	
)	
)	

Defendant Greenpeace Fund, Inc., respectfully submits this Response to Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. (collectively, “Energy Transfer”)’s Motion for Reconsideration and for Limited John and Jane Doe Discovery (“Motion”), see ECF No. 105, and Memorandum in Support. See ECF No. 106. Greenpeace Fund incorporates the arguments made in co-Defendants Response in Opposition to Plaintiffs’ Motion for Reconsideration and for Limited John and Jane Doe Discovery, ECF No. 109.

SUMMARY

Energy Transfer’s request to conduct limited discovery against Greenpeace Fund should be denied for three reasons that, even if taken individually, are sufficient to deny the Motion: first, the Amended Complaint does not describe the Doe Defendants in sufficient detail to ensure that discovery would lead to identification; second, Energy Transfer does not allege a connection between the Doe Defendants and Greenpeace

Fund; and third, at this stage in the proceedings, a request to conduct limited discovery is simply a tactic to impose increased costs on Greenpeace Fund and circumvent the federal discovery rules.

Similarly, Energy Transfer's request that the Order requiring that all Doe Defendants be served within thirty days be reconsidered should be denied as this Court's Order complied with the plain language of Rule 4(m), Fed. R. Civ. P.

ARGUMENT

I. Energy Transfer should not be allowed to target Greenpeace Fund with immediate limited discovery.

The Eighth Circuit allows a court to dismiss unnamed defendants "when it appears that the true identity of the defendant[s] cannot be learned through discovery or the court's intervention." *Brown v. City of Bloomington*, 2018 WL 3614125 at *3, No. 15-11 (D.Minn. July 27, 2018). As used in this context, "court intervention" refers to the Court ordering named parties to identify unnamed parties, frequently in the context of correctional facilities being ordered to identify unnamed Doe defendants described in the complaint as correctional officers, and is not relevant here. *See e.g. Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985). In order to determine whether the true identity of the defendant can be learned through discovery, the court must consider whether the complaint made "sufficient specific factual allegations to permit that [individual] defendant to be identified after reasonable discovery." *Id.*

Energy Transfer argues that the "Doe defendants can likely be identified through basic discovery or court intervention." Greenpeace Fund disagrees.

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A. Energy Transfer has not alleged sufficient specific factual allegations to support its request for discovery targeted at Greenpeace Fund for the purpose of identifying the unnamed Doe defendants.

In order to establish that the Amended Complaint made “sufficient specific factual allegations” to permit the identification of individual Doe defendants after “reasonable discovery,” Energy Transfer references three factual allegations: (1) Earth First! Doe defendants provided \$500,000 seed money to Red Warrior Camp, (2) Earth First! Doe defendants coordinated with Greenpeace USA to provide training for protestors at camps in North Dakota, and (3) Earth First! Doe defendants organized and led in person direct action training sessions for Mississippi Stand (including Reznicek and Montoya). ECF No. 106, at 9.

These statements do not contain any allegations as to individual Doe defendants, but rather treat the Doe defendants as a group. These statements also do not reference any ability by Greenpeace Fund to determine the identity of the Doe defendants. Finally, these statements do not illustrate the scope of the “reasonable discovery,” or how that reasonable discovery targeted towards Greenpeace Fund would be used to ascertain the identities of the Doe defendants.

Accordingly, Energy Transfer has failed to establish that the Amended Complaint contains sufficient specific factual allegations to permit the identification of Doe defendants pursuant to discovery requests targeted towards Greenpeace Fund.

B. Energy Transfer has not established good cause to conduct immediate limited discovery against Greenpeace Fund.

As recognized by Energy Transfer, see ECF No. 106, at 10, a party may seek immediate discovery, prior to a Rule 26(f) conference, only if it establishes “good cause” to do so. *Loeffler v. City of Anoka*, No. 13-CV-2060, 2015 WL 12977338, at *1 (D. Minn.

Dec. 16, 2015). In order to establish good cause to conduct discovery prior to a Rule 26(f) conference, Energy Transfer recites a litany of Earth First!'s purported "calculated efforts to avoid detection." ECF No. 106, at 11. Energy Transfer then cites three cases that purportedly support immediate discovery under the facts of this case: *Arista Records, L.L.C. v. Does 1-54*, No. 4:08-CV-1289 (CEJ), 2008 WL 4104563, at *1 (E.D. Mo. Aug. 29, 2008) (hereinafter *Arista Records*); *Loeffler*, at *1; *Sapa v. Florence*, No. 4:15CV1787 CDP, 2016 WL 616687, at *1 (E.D. Mo. Jan. 11, 2016).

Energy Transfer's use of these cases to support its argument that it has established good cause to conduct immediate discovery against Greenpeace Fund is flawed.

In *Arista Records*, the plaintiffs had "identified the [fifty-four John Doe] defendants by a unique Internet Protocol ("IP") address assigned to each defendant on the date and time of the alleged infringing activity," and sought limited discovery against a third-party Internet Service Provider ("ISP"), Charter Communications, Inc. *Arista Records*, at *1. The ISP was "able to match an IP address to a particular subscriber by reviewing its subscriber activity logs. These activity logs are typically retained by the ISP for a limited period of time; therefore, plaintiffs [sought] immediate discovery before the information [was] permanently destroyed." *Id.* The Court found that plaintiffs had established good cause because (1) they had shown irreparable harm from the alleged infringing activity, (2) there was no prejudice to the defendants, (3) the information sought was only available for a limited period of time, and (4) the necessity of the identification of Doe defendants to move the case forward. *Id.*

Arista Records illustrates the level of specificity that warrants limited immediate discovery aimed at identifying Doe defendants. There, the plaintiff had established the ability of a third party to identify each individual Doe defendant and had presented evidence that corresponded with each individual Doe defendants alleged bad acts. Even when taken as true, the allegations by Energy Transfer do not rise to this level of specificity. At most, Energy Transfer has alleged activity conducted by an undifferentiated group of Doe defendants, without identifying facts specific to any of the twenty Doe defendants, but has alleged no specific connection to Greenpeace Fund (or, indeed, any Greenpeace entity).

Similarly, the second case cited, *Loeffler v. City of Anoka*, does not support Energy Transfer's position. In *Loeffler*, plaintiffs sought to identify the lone remaining Doe defendant in the case, "Defendant Duluth Officer to be Named Later." *Loeffler*, at *1. Plaintiffs were attempting to conduct "jurisdictional discovery" against the Minnesota Department of Public Safety to force the release of the name of the officer that had accessed the plaintiff's drivers license information. *Id.* The Court found good cause to order discovery because (1) there was a single, unnamed Doe defendant remaining in the case, (2) the only way the plaintiff could identify the Doe defendant was pursuant to subpoena, (3) any prejudice to the Minnesota Department of Public Safety, was "minimal because it [had] already produced a redacted [version of the information sought]," and (4) the plaintiff had limited her discovery requests in an appropriate manner. *Id.*

Here, not only are there twenty unnamed Doe defendants in the case, but Energy Transfer has not established, or even alleged, two facts that were critical for the *Loeffler*

court: first, that the only way Energy Transfer can ascertain the identities of the Doe defendants is through discovery aimed at Greenpeace Fund; and second, Energy Transfer has not described, in any manner, the limited discovery that it seeks leave to conduct.

Further, the third case cited, *Sapa v. Florence*, also does not support Energy Transfer's position. In *Sapa*, the plaintiff brought a copyright infringement action and sought identification of the defendant's physical address for service from another Internet Service Provider, this time Yahoo, Inc. *Sapa*, at *1. The Court noted that disclosure of the information sought by plaintiff comported with applicable federal law, and that the information sought would allow the defendant to obtain a physical address for service. *Id.*

Here, again, Energy Transfer has not identified the nature of the discovery requests it asks for leave to serve on Greenpeace Fund, nor has it alleged facts related to the likelihood that, if those discovery requests are served on Greenpeace Fund, they will result in information that will lead to the service of the twenty Doe defendants.

Finally, Energy Transfer completely ignores one threshold issue addressed by both *Arista Records* and *Loeffler*: the question of prejudice to Greenpeace Fund. Here, there will be an unquestionable and intense prejudice to Greenpeace Fund should Energy Transfer be allowed to conduct immediate discovery. Such discovery would impose costs in an attempt to chill Greenpeace Fund's First Amendment rights, and force Greenpeace Fund to continue to defend expensive and groundless claims by Energy Transfer while Greenpeace Fund's motion to dismiss is pending. This would be a fishing expedition; not an appropriate use of discovery. In light of this clear prejudice

to Greenpeace Fund, and the lack of clarity in the motion to conduct immediate discovery, and the fact that Energy Transfer has not established that discovery pointed towards Greenpeace Fund is the only way in which the identities of the Doe defendants can be ascertained, the prejudice to Greenpeace Fund in having to participate in as of yet undefined pre-Rule 26(f) conference discovery outweighs the prejudice to Energy Transfer in denying said motion.

In summary, Energy Transfer has failed to establish good cause to conduct immediate discovery in this case and its motion regarding the same should be denied.

II. Energy Transfer has failed to plead allegations specific enough to permit the identification of the unnamed Doe Defendants through discovery.

As more fully set forth in co-Defendants' Response in Opposition, neither the Complaint nor the Amended Complaint include allegations specific enough to permit the identity of the unnamed Doe Defendants through discovery. Greenpeace Fund incorporates co-Defendants' analysis of the case law cited by Energy Transfer by reference, see ECF 109, at 7. Energy Transfer should not be allowed to rely on mere speculation as the basis to conduct warrantless discovery against Greenpeace Fund.

CONCLUSION

For all of these reasons, Energy Transfer's Motions for Reconsideration and for Limited John and Jane Doe Discovery should be denied.

RESPECTFULLY SUBMITTED this 17th day of September, 2018.

By /s/ Matt J. Kelly
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