IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

Energy Transfer Equity, L.P., *et al.*,

Plaintiffs,

v.

Greenpeace International, *et al.*,

Defendants.

CIVIL ACTION FILE
NO. 1:17-cv-00173

RUBY MONTOYA'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO RULE 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6)

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Defendant Ruby Montoya hereby moves this court, pursuant to Rule 12(b)(2) and (4) - (6), to dismiss in its entirety and with prejudice, the claims against her.

I. INTRODUCTION

Plaintiffs filed an amended Complaint on August 6, 2018 after this Court found claims in Plaintiff's original Complaint, regarding Greenpeace et. al, failed to state plausible RICO claims against them and "failed to comply with the basic rules of pleading." ECF No. 88. Plaintiffs amended their complaint and added a few people of color as additional defendants, including Montoya, in an attempt to bolster their implausible conspiracy theory. However, these amendments still fail to address the fatal deficiencies identified by this court and Plaintiffs amended Complaint still fails to comply with the basic rules of federal pleading. Furthermore, Plaintiffs failed to comply with the law and this court's order regarding perfecting service of Montoya.

Ruby Montoya is a lifelong resident of Arizona and has visited Iowa as a volunteer for the Des Moines Catholic Worker where she volunteers in their community shelter. Montoya Decl. ¶¶ 1-3. She is also a preschool teacher whose father is a well-known civil rights lawyer and mother is a nurse. She has been raised as a person of faith and conscience and has spent the majority of her young life engaged in community service and public interest activism. All alleged acts of Montoya claimed by Plaintiffs are alleged to have occurred in Iowa and South Dakota. Plaintiffs' Complaint is silent as to the reasons why Montoya should be

considered a member of the "enterprise" alleged by Plaintiffs other than stating she was a "press representative for Mississippi Stand." There is no allegation that Montoya was connected, in any way, with the "enterprise" aside from an apparent shared desire to stop the pipeline. Plaintiffs rely on the absurd notion that those who criticized the pipeline (e.g., Greenpeace), somehow "incited" the alleged actions of Montoya. *See e.g.,* Compl. ¶ 149. This "connection" is a far-cry from the requirement that Plaintiffs must show Greenpeace or other members of the alleged enterprise agreed to, directed, or controlled, the alleged acts of Montoya. Even assuming Plaintiffs allegations had some factual merit, the alleged acts of Montoya are separate and distinct from the enterprise alleged by Plaintiffs.

Montoya's alleged connection to the conspiracy, consists of allegations that Montoya and Jessica Reznicek carried out acts of property damage against DAPL in Iowa and South Dakota.[1] Plaintiffs allege Montoya was trained by unknown "members" of "Earth First!" ("EF!") "to plot, incite, and execute direct action and criminal sabotage against DAPL." Compl. ¶ 128. Despite this Court's order (ECF No. 94), Plaintiffs cannot seem to grasp the fact that EF! is not an organization and does not have "members." Plaintiffs have also failed to identify and serve these supposed unknown persons affiliated with EF!, despite being ordered by this Court to do so. On August 3, 2018, this court noted in its Order that it was "clear from Plaintiffs' voluminous filings of historical, irrelevant web postings that Plaintiffs did

[1] To note, neither Montoya or Reznicek have been indicted or otherwise charged for the criminal acts alleged by Plaintiffs.

not, at the time of filing, have evidentiary support for the specific allegations against EF!" ECF No. 94. Nothing has changed since that Order and Plaintiffs still lack evidentiary support for the allegations against EF! as well as the John/Jane Does allegedly affiliated with EF!.

The remainder of Plaintiffs allegations regarding other "predicate acts" are wholly inapplicable to Montoya, and Plaintiffs have failed to plead sufficient details to state a plausible claim against Montoya. As co-defendants have argued, "[t]he Amended Complaint fails, as the original pleading did, to allege how the enterprise was formed, how the common purpose was agreed upon, who (if anyone) was in charge, how decisions were made, or how the alleged enterprise members communicated a common illegal purpose. Instead, ETP asks the Court, once again, to presume that coordination and development must have occurred based on no more than rank speculation." ECF No. 103-1, at 15.

II. ARGUMENT

A. Claims Against Montoya Must be Dismissed for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2)

Plaintiffs assert personal jurisdiction over Montoya pursuant to 18 U.S.C. § 1965 and N.D.R. Civ. P. 4. "To survive a motion to dismiss [for lack of personal jurisdiction], the plaintiff must state sufficient facts in the complaint to support a reasonable inference that defendants may be subjected to jurisdiction in the forum state." *Steinbuch v. Cutler*, 518 F.3d 580, 595 (8th Cir. 2008). "[T]he party asserting jurisdiction bears the burden of establishing a prima facie case" of jurisdiction. *Id.* "The plaintiff's prima facie showing must be tested, not by the pleadings alone, but

by the affidavits and exhibits presented with the motions and in opposition thereto." *Denver v. Hentzen Coatings Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004). Plaintiffs have not and cannot meet their burden to establish personal jurisdiction over Montoya.

1. No personal jurisdiction over Montoya pursuant to 18 U.S.C. § 1965

Section 1965 provides, in part:

> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States….

However, there are limits to nationwide personal jurisdiction under Section 1965. *See Butcher's Union Local No. 498 v. SDC Invest, Inc.*, 788 F.2d 535, 539 (9th Cir. 1986) ("the right to nationwide service in RICO suits is not unlimited"). The statute, on its face, requires that the exercise of jurisdiction over out-of-state defendants serve the "ends of justice." The "ends of justice" requirement is, predictably, an ill-defined principle that takes on different meanings in different contexts. *Brown v. Kerkhoff*, 504 F. Supp. 2d 464, 494 (S.D. Iowa 2007). Courts have construed this provision according to the ordinary meaning of the words and the "purpose or object" of Congress in passing such legislation. *Butcher's Union* at 359. There is little agreement on the ordinary meaning of the term "ends of justice." However, the most basic expression of the meaning of the term and intent of Congress is to permit a single trial of "all members of a nationwide RICO conspiracy." *Id.* In this case, Plaintiffs have failed to adequately allege Montoya's

membership in or association with Plaintiffs paranoid, farcical, and manufactured conspiracy theory.

The claim to personal jurisdiction under 18 U.S.C. § 1965 over Montoya is premised upon Montoya's alleged connection to EarthFirst!, Jessica Reznicek, and unknown Does allegedly affiliated with the EarthFirst! (EF!) movement. As this Court has noted and as plaintiffs have admitted, EarthFirst! "is the name of a movement used by a number of different individuals and entities." ECF No. 88. EF! was dismissed from this action by this Court on August 22, 2018. ECF No. 99. Regarding the involvement of Does allegedly affiliated with EF!, this Court noted that, "[i]t is clear from Plaintiffs' voluminous filings of historical, irrelevant web postings that Plaintiffs did not, at the time of filing, have evidentiary support for the specific allegations against EF!." ECF No. 94. This Court also ordered Plaintiffs to identify and serve Does allegedly associated as, or representatives of, EF! within 30 days of August 22, 2018. ECF No. 99. Plaintiffs failed to comply with this order.

Plaintiffs still do not have such support and reference to EF! affiliated Does in connection to Montoya is, likewise, completely without evidentiary support. Contrary to Plaintiff's allegations, Montoya was not trained by EF! nor had she used the training manuals referred to in Doc. 95, ¶12. Decl. Montoya ¶7. Reznicek, as of the date of this Motion, has not been served. EF!, John and Jane Does allegedly affiliated with EF! and Reznicek are the only named individuals/entities allegedly connected to the conspiracy theory advanced by Plaintiffs. "[M]erely naming persons in a RICO complaint does not, in itself, make them subject to

section 1965(b)'s nationwide service provisions." *Butcher's Union Local No. 498* at 539. Because EF! has been dismissed, no EF!-affiliated John/Jane Does have been identified or served, Reznicek (whose connections to the "conspiracy" consist of EF!, Does, and Montoya) has not been served, and Plaintiffs have failed to adequately plead her connection to the "enterprise," there is no remaining connection of Montoya to the supposed conspiracy alleged by Plaintiffs. Montoya, therefore, cannot, on the face of Plaintiffs complaint, be considered a member of the alleged enterprise and personal jurisdiction over Montoya under 18 U.S.C. 1965 is, therefore, not in the interests of justice and would be inappropriate.

While the RICO statute carves out special rules for personal jurisdiction, application of those rules must still follow the due process requirements of the U.S. Constitution. In fact, several courts have rejected the broad RICO-conspiracy theory of jurisdiction because, alone, the theory fails to comport with basic due process requirements.[2] Furthermore, nationwide RICO personal jurisdiction requires the existence of a valid RICO claim. ECF No. 87 at 10. As noted below, Plaintiffs have failed to state a valid RICO claim against Montoya.

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[2] *Brown v. Kerkhoff,* 504 F.Supp.2d 464 (S.D.Iowa 2007); *Paolino v. Argyll Equities, L.L.C.,* 401 F.Supp.2d 712 (W.D.Tex.2005); *Silver Valley Partners, LLC v. De Motte,* 400 F.Supp.2d 1262 (W.D.Wash.2005); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.,* 307 F.Supp.2d 145 (D.Me.2004); *Steinke v. Safeco Ins. Co. of Am.,* 270 F.Supp.2d 1196 (D.Mont.2003); *Insolia v. Philip Morris, Inc.,* 31 F.Supp.2d 660 (W.D.Wis.1998); *Karsten Mfg. Corp. v. U.S. Golf Ass'n,* 728 F.Supp. 1429 (D.Ariz.1990); *Kipperman v. McCone,* 422 F.Supp. 860 (N.D.Cal.1976); *Mansour v. Super. Ct. of Orange County,* 38 Cal.App.4th 1750, 46 Cal.Rptr.2d 191 (1995); *Ashby v. State,* 279 Neb. 509, 779 N.W.2d 343 (2010); *Nat'l Indus. Sand Ass'n v. Gibson,* 897 S.W.2d 769 (Tex.1995); *Hewitt v. Hewitt,* 78 Wash.App. 447, 896 P.2d 1312 (1995).

2. Personal Jurisdiction over Montoya violates Due Process Requirements

Personal jurisdiction over Montoya, a resident of Arizona,[3] is inconsistent with due process requirements. Because North Dakota's long-arm statute grants "jurisdiction to the fullest extent permitted by the Constitution," the only question is whether the exercise of personal jurisdiction over the defendant comports with due process. *Anne Carlsen Ctr. for Children v. Gov't of U.S. Virgin Islands*, 356 F. Supp. 2d 1023, 1027-28 (D.N.D. 2005) (citations omitted).

The Due Process Clause requires sufficient "minimum contacts" between a nonresident defendant and the forum state such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 693 (8th Cir. 2003) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

"When determining whether personal jurisdiction over a party is consistent with due process, a court considers five factors: (1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relationship of those contacts with the cause of action; (4) the state's interest in providing a forum for its residents; and (5) the convenience or inconvenience to the parties." ECF No. 87, 10-11. Each factor weighs against conferring personal jurisdiction on Montoya. Montoya lacks minimum contacts with North Dakota, and personal jurisdiction over Montoya is inconsistent with due process requirements.

[3] Plaintiffs incorrectly claim that Montoya is a resident of Iowa. Pltf. Am. Compl. ¶ 33. Cf. Montoya Decl. ¶ 1.

i. Nature and Quality of Contacts

Plaintiffs' complaint fails to allege that Montoya directed any of her alleged efforts "at the residents of the forum state." "[T]he primary issue," under the "nature and quality of contacts" factor, "is whether the non-resident defendants 'have fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereignty." *Anne Carlsen Ctr. for Children* at 1029 (D.N.D. 2005) (citing *Gould v. P.T. Krakatau Steel*, 957 F.2d 573, 576 (8th Cir. 1992) (internal citations omitted). Here, there is nothing that indicates Montoya, even assuming the allegations are true, ever had fair warning that she would be brought before a court in North Dakota.

"Due process requires that the defendant 'have engaged in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588 (8th Cir. 2011) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). No such act is alleged by Plaintiffs and Plaintiffs have otherwise failed to make this showing as it relates to Montoya.

Plaintiffs' Amended Complaint fails to show Montoya had minimum contacts with the state. Montoya is a resident of Arizona and has temporarily lived in Iowa during the pendency of some of the allegations in this complaint. All alleged actions of Montoya occurred in Iowa and South Dakota. The complaint does not state that Montoya ever transacted business in North Dakota, took any actions within the

state, derived substantial revenue in the state, or was otherwise present in North Dakota.

ii. Quantity of Contacts

Plaintiffs have not alleged any contact—let alone continuous or systematic contact by Montoya with the State of North Dakota. Plaintiffs have also failed to adequately allege any connection of Montoya to EF! John/Jane Does or other named Defendants that allegedly had contacts with North Dakota.

iii. Relationship

Plaintiffs have failed to allege a relationship of the alleged actions of Montoya to North Dakota and have, instead, focused on alleged activities of Montoya that occurred in Iowa and South Dakota. Again, Plaintiffs claims depend on the tenuous and inadequately pled connection of Montoya to EF! affiliated John/Jane Does and Reznicek. While the pipeline traverses several states, including North Dakota, that is not enough to establish a relationship of Montoya to North Dakota to permit personal jurisdiction in this case.

iv. Interest of the Forum State

"The Eighth Circuit considers the first three factors in determining jurisdiction to be primary, and the remaining two factors be secondary." *Id*. at 6 (citing *Johnson v. Arden*, 614 F.3d 785, 794 (8th Cir. 2010)). Based on the Plaintiffs' allegations, North Dakota does not have an interest in this case. Plaintiffs are both Delaware Corporations with principal places of business in Dallas, Texas. Montoya

is a resident of Arizona and is not alleged to have committed any acts in North Dakota, avail herself of North Dakotas laws, or target residents of North Dakota.

v. Convenience of the Parties

For the reasons noted above, this factor does not weigh in favor of conferring personal jurisdiction on Montoya. As neither Plaintiffs nor Montoya are located in North Dakota, and the alleged connections of Montoya to the "enterprise" consist of one other Iowa resident (Reznicek) and other activities that occurred in Iowa or South Dakota, the convenient place for all parties to adjudicate these claims (assuming, for the sake of argument, they had merit) would be in Iowa or South Dakota.

Because North Dakota's long-arm statute does not provide any route to establishing personal jurisdiction over Montoya and Plaintiffs cannot show that Due Process requirements can be satisfied with respect to Montoya, this Court should dismiss claims against Montoya for lack of personal jurisdiction.

A federal court in a diversity action may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state and by the Due Process Clause. *Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1280 (8th Cir. 1991) citing *Falkirk Mining Co. v. Japan Steel Works,* 906 F.2d 369, 372–73 (8th Cir.1990). Additionally, without personal jurisdiction over Montoya, venue is necessarily improper in North Dakota and the Complaint must also be dismissed pursuant to Rule 12(b)(3). Again, for the reasons noted above, personal jurisdiction over Montoya would violate due process requirements.

B. All Claims Against Montoya Should be Dismissed for Insufficient Service of Process Pursuant to Rule 12(b)(5)

All claims against Montoya must be dismissed because plaintiffs failed to timely serve Montoya within the requirements of Fed. R. Civ. P. 4(m) and the Orders of this Court. Fed. R. Civ. P. 12(b)(5) provides for dismissal of a claim or claims if service of process was not timely made in accordance with FRCP 4 or was not properly served in the appropriate manner. Rule 4(m) requires a plaintiff to properly serve a defendant within 90 days of filing the complaint. Rule 4(m) provides: "If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time."

Plaintiff's First Amended Complaint was filed August 6, 2018. Montoya was "served" on January 5, 2019. Thus, 152 days passed from the time the complaint was filed until plaintiff "served" Montoya. Plaintiffs filed a motion on November 5, 2018 to extend the time to serve Montoya—91 days from the date the First Amended Complaint was filed. Plaintiffs' motion to the court was, thus, untimely. Nevertheless, on December 12, 2018, the Court granted the plaintiff's motion and gave plaintiffs until December 19, 2018 at 5:00PM to serve Montoya. ECF No. 117. Plaintiffs failed to serve Montoya within the timeline ordered by the Court. On December 19, 2018, Plaintiffs again moved this Court for an additional 45-day extension of time to serve Montoya and other defendants. As of the date this Motion is filed, the court has not ruled on plaintiff's second motion for an extension of time

and plaintiffs, therefore, did not receive sufficient leave from the court to extend the time-limit to serve Montoya.

The party making service is responsible for demonstrating the validity of service when a Rule 12(b)(5) objection is made. *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1387 (8th Cir. 1995). Plaintiff has not and cannot make that showing regarding "service" of Montoya. Because plaintiffs failed to comply with Rule 4(m) and failed to comply with the December 12, 2018 Order from the court to serve Montoya before 5:00PM on December 19, 2018, this court must dismiss the action against Montoya.

C. Claims Against Montoya Must be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(4) Due to Insufficient Process of Montoya

Plaintiffs' claims against Montoya should be dismissed pursuant to Fed. R. Civ. P. 12(b)(4) because, in addition to failing to comply with the service requirements of FRCP 4(m), plaintiffs attempted service of Montoya was deficient under Fed. R. Civ. P. 4(c). Under Rule 4, a Summons must contain a copy of the complaint. Fed. R. Civ. P. 4(c)(1). Here, Plaintiffs failed to serve Montoya with a copy of the complaint. Decl. Montoya, ¶5.

D. Complaint Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6) For Failure to State A Claim

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" as well as "'naked assertion[s]'

devoid of 'further factual enhancement" do not meet the plausibility standard. *Magee v. Trustees of Hamline Univ., Minn.*, 747 F.3d 532, 535 (8th Cir. 2014) (citations omitted). To survive a motion to dismiss under Rule 12(b)(6), the complaint "must contain facts with enough specificity 'to raise a right to relief above the speculative level.'" *U.S. ex rel. Raynor v. Nat'l Rural Utils. Coop.*, 690 F.3d 951, 955 (8th Cir. 2012) (citing *Twombly*, 550 U.S. at 555). Plaintiffs have failed to plausibly state any claim regarding Montoya and their allegations, especially those related to individuals alleged to be representatives of or affiliates of EF! are merely speculative.

1. Racketeer Influenced and Corrupt Organizations Act

Plaintiffs have failed to state a claim against Montoya under 18 U.S.C. § 1962(c)-(d).[4] As this Court has held, "[t]o plausibly allege a RICO violation, Energy Transfer must show the existence of an enterprise that was engaged in interstate commerce; [Defendant's] association with the enterprise; [her] participation in the conduct of the affairs of the enterprise; and that [her] participation was through a pattern of racketeering activity." ECF No. 87 at 4. "The requirements of § 1962(c) must be established as to each individual defendant," and the focus of § 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise." *Craig Outdoor*

[4] North Dakota's RICO statute, N.D. Cent. Code § 12.1-06.1-05, closely tracks the requirements of the same federal cause of action. As such, ETP's state law RICO claims fail against Montoya for the same reasons noted in this section. See, e.g., *Neubauer v. FedEx Corp.*, 849 F.3d 400 (8th Cir. 2017).

Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001, 1027 (8th Cir. 2008). Plaintiffs have not plausibly pled these elements.

i. Plaintiffs Failed to Adequately Allege the Existence of an Enterprise Involving Montoya

"'The existence of an enterprise at all times remains a separate element which must be proved by the' plaintiff in order to establish a RICO violation." *Viacom Outdoor, Inc.*, 528 F.3d at 1026 (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981). An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C 1961(4). Montoya is not a legal entity. Therefore, analysis of her alleged role in the enterprise must follow the analyses of courts addressing an association-in-fact enterprise. An association-in-fact enterprise, under RICO, "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946, (2009).

As this Court has noted, the common purpose of the alleged association was to stop construction of DAPL and to draw attention to the harms caused by said construction. ECF No. 87. However, this purpose was shared with millions of people in the U.S. and around the world, and achieving that extraordinarily broad purpose took measures that were as broad as the purpose itself. Advocating for the protection of the climate through a reduction in fossil fuel infrastructure is on its face constitutionally protected, and not a basis for a RICO claim. The acts allegedly

committed by Montoya and Reznicek are not reasonably or plausibly related to the activities of any other named defendant. Plaintiffs, while ignoring the terrorist activities of law enforcement and TigerSwan private security directed against DAPL water-protectors, attempt to paint Montoya and Mississippi Stand as purveyors of terrorism instead of Catholic Workers intent on protecting the public interest. This histrionic labeling is so commonplace from fossil fuel corporations like Energy Transfer, whose activities, to note, are condemning present and future generations to an unlivable planet, that it should lose all meaning. Nevertheless, "[t]o prevent application of RICO to every person who shares a common cause with extremists who act out criminally, RICO requires each person's predicate acts to rise to the level of participation in the management or operation of the enterprise." ECF No. 87, p. 5 (citing *Reves v. Ernst & Young*, 507 U.S. 170 (1993)). Plaintiffs have failed to adequately plead or demonstrate that the alleged acts of Montoya rose to a level of participation or management of the general enterprise. Nor have they alleged that any other named defendants had anything whatsoever to do with Montoya (or Reznicek). Montoya was a 26-year-old individual who did not know any of the named defendants (except Reznicek), was not employed by any of them, trained by them, nor in a position of leadership or control. Plaintiffs' attempts to equivocate the purpose of Montoya's alleged actions with all other named defendants besides Reznicek (and, likewise, Plaintiffs' failure to connect Reznicek with anyone but Montoya) fail to meet the basic pleading standards to establish a

common purpose under the requirements necessary to prove the existence of an enterprise.

Plaintiffs have failed to adequately allege a relationship of Montoya to other named Defendants, besides Reznicek. "The concept of 'associat[ion]' requires both interpersonal relationships and a common interest." *Boyle* at 946. Nothing in Plaintiff's complaint indicates that Montoya had any form of interpersonal relationship with any of the Greenpeace defendants, Cody Hall, Krystal Two Bulls, or Charles Brown. Montoya's association, then, is allegedly with 1) EF!, 2) unnamed (and likely non-existent) EF! individuals, and 3) Jessica Reznicek. EF!, as noted by this court, is an idea, not an organization and has been dismissed from this case.[5] Likewise, this court ordered Plaintiffs to identify and serve the John/Jane Does allegedly affiliated with EF! within 30 days of August 22, 2018. ECF No. 99. This order was later clarified upon Plaintiff's Motion to Reconsider, giving Plaintiffs 90 days to identify and serve the Does. ECF No. 112. Plaintiffs, as of this filing, have failed to identify and serve these Does. Plaintiffs have also failed to serve Reznicek within the time required and ordered by this Court.

Plaintiffs failed to connect the alleged predicate acts of Montoya, EF!, John/Jane Does, and Reznicek to any other named Defendant and, as pled, the alleged actions of these parties were separate and distinct from the alleged actions

[5] The fact that Plaintiffs failed to grasp this basic concept prior to filing their voluminous, overreaching complaint indicates a lack of factual basis for their claims and is further evidence that Plaintiffs' complaint is a frivolous attempt to intimidate and harass environmental activists.

of other Defendants. Plaintiffs also failed to connect Montoya to the alleged enterprise in their response to co-defendants Greenpeace and Brown's Motion to Dismiss. ECF No. 103 and 111 (Montoya is mentioned only twice in the Response). The alleged actions of the remaining named Defendants are not reasonably or plausibly related to the alleged actions of Montoya to show association-in-fact with the course of conduct allegedly taken by Montoya. Put differently, there is nothing to suggest that Montoya functioned as a "continuing unit" of the alleged ongoing structure. Verbally claiming solidarity with a political idea or concept is protected speech, regardless if ETP desires to silence its critics with bully tactics.

Plaintiffs attempt to connect John and Jane Doe EF! defendants with Montoya by stating that in September and October of 2016, these Does "held in-person direct action trainings for Mississippi Stand in Iowa[.]" Pltf. Am. Compl. ¶44. Plaintiffs fail to allege whether Montoya was ever even present at these supposed trainings or whether these "in-person" trainings ever involved training on how to "[burn] heavy construction equipment and [use of] oxy-acetylene cutting torches to cut holes into segments of the interstate pipeline." *Id.* Plaintiffs, throughout their complaint, use these unnamed Does in an attempt to manufacture an otherwise non-existent association or relationship amongst named defendants.

ii. Plaintiffs have not Adequately Plead or Shown Montoya's Association with the Enterprise

Because Plaintiffs cannot and have not adequately plead the existence of an Enterprise involving Montoya, Plaintiffs have failed to adequately plead Montoya's association with the Enterprise. At best, Plaintiffs have plead a separate association

consisting solely of Reznicek and Montoya related to alleged acts that took place in Iowa and South Dakota. Plaintiffs have not alleged any connection of Montoya to any other named defendants besides Reznicek.

The alleged association of Montoya with the Enterprise depends, then, on the association of Montoya and Reznicek with EF! John/Jane Does. Plaintiffs allege that Montoya was trained by EF! affiliated persons in September and October of 2016 "to plot, incite, and execute direct action and criminal sabotage against DAPL." Pltf. Am. Comp. ¶128. Defendant directly refutes that. Decl. Montoya ¶7. Plaintiffs fail to state the date or dates of these trainings, a specific location, and rely on conclusory statements about unknown individuals allegedly part of a nebulous 'movement' in an attempt to show association of Montoya with the "Enterprise." For these reasons, as well as the reasons noted above related to Plaintiffs' failure to adequately allege the existence of an enterprise, Plaintiffs have failed to adequately plead Montoya's association with the alleged enterprise.

iii. Plaintiffs Fail to Adequately Allege Montoya's Participation in the Management or Operation of the Enterprise

Plaintiffs have failed to allege that Montoya participated in the management or operation of the alleged enterprise. As noted above, and acknowledged by this court, "…RICO requires each person's predicate RICO acts to rise to the level of participation in the management or operation of the enterprise." ECF. No. 87. There is nothing in Plaintiffs' Complaint to suggest that Montoya or Reznicek participated in the management or operation of the Enterprise alleged by Plaintiffs. Montoya

was not a "press representative" of "Mississippi Stand."[6] Montoya Decl. ¶ 9. Even if she was, her association would clearly be a form of protected association and her statements made in that capacity, a form of protected speech. Montoya does not and has never had any control or access to any bank accounts affiliated with "Mississippi Stand." *Id.* Plaintiffs allegations regarding the participation in the management or operation of the Enterprise, while poorly plead, are limited to two allegations: 1) that Montoya's actions were a "direct response to the Enterprise's call to action" (Pltf. Am. Compl. ¶ 149) and 2) Montoya's call to "inspire others to act boldly." *Id.* As noted above, allegation (1) is not sufficient to meet the element of management or participation and (2) is protected speech that does not indicate any form of management or participation in the Enterprise.

2. Plaintiffs have not plausibly pled Conspiracy Claims in violation of RICO

Plaintiffs' claims regarding Conspiracy in violation of RICO fail for many of the same reasons the RICO claims themselves fail. Plaintiffs have failed to show any specific agreement between Montoya and any other named defendant besides Reznicek to commit the acts alleged. While ETP claims that Greenpeace and other Defendants have agreed with co-defendants to incite and commit acts of sabotage despite having no contact, "the factual basis for the claims appears intentionally obscured." ECF No. 88, p. 3. Plaintiffs rely on the same conclusory statements in

[6] To note, Plaintiffs have made the same careless mistake regarding "Mississippi Stand" as they did with Earth First!. Mississippi Stand is the name of a non-hierarchical protest campaign that anyone could use, not an entity with any structure or leadership.

their RICO claims to support their Conspiracy claims. Plaintiffs failed to plead that any named defendants besides Reznicek had any actual knowledge of the illegality of Montoya and Reznicek's alleged actions. Allegations that EF! Journal republished the news about Montoya's actions is protected speech and is not a sufficient allegation to support the conspiracy claims. Likewise, Plaintiffs failed to plead with any specificity that any named defendant oversaw and, aside from Reznicek, coordinated the commission of the alleged acts of Montoya. Plaintiffs proclaim with no specificity as to time or place, that Does operating as Earth First! provided training and manuals to Reznicek and Montoya. Montoya has never read the manuals referred to in Plaintiffs' Complaint and has not attended any trainings by individuals claiming to represent Earth First! Montoya Decl. ¶ 7. While unrelated to their conspiracy claims, Plaintiffs seem to imply that Montoya's alleged use of the "Ecodefense manual" in her alleged use of an "oxy-acetylene cutting torch to cut holes into the interstate pipeline" supports their Conspiracy claim. Pltf. Am. Compl. ¶ 196. No such instructions exist in the manual cited by Plaintiffs. Plaintiffs are required to state with more specificity that agreement to commit predicate acts occurred, not simply that there was "agreement." *Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir. 1991). ETP has failed to adequately allege any agreement between Montoya and any person or entity other than Reznicek.

III. CONCLUSION

It is clear that ETP named Montoya in the Amended Complaint in an attempt to bolster its implausible claims against previously named defendants and

otherwise continue on its course of including "irrelevant hyperbole" in its filings with this court. It is also clear from the face of the complaint that there is no connection of Montoya to any other named defendant other than Reznicek. Reznicek's connection, likewise, is only to Montoya. Their alleged actions are separate and distinct from any purpose or action of other named defendants. ETP's allegations regarding the connection of John/Jane Does "operating as Earth First!" to support the association of Montoya to the Enterprise lack specificity and factual support. As a resident of Arizona, who is alleged to have committed predicate acts in Iowa and South Dakota, personal jurisdiction over Montoya in this case would violate the due process rights of Montoya. For the foregoing reasons, the claims against Defendant Ruby Montoya should be dismissed, and/or service upon her should be quashed.

Dated January 28, 2019

Respectfully Submitted:

/s/ Lauren C. Regan
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Eugene, OR 97401
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*Application for Admission to the Bar of the United States District Court for the District of North Dakota is forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2019, I served all parties a copy of RUBY MONTOYA'S MOTION TO DISMISS, MEMORADUM IN SUPPORT OF MOTION TO DISMISS, and DECLARATION OF RUBY MONTOYA in accordance with directives from the Court Notice of Electronic Filing which was generated as a result of electronic filing.

/s/ Lauren C. Regan
Lauren C. Regan
Of Counsel for Defendant Ruby Montoya