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, v. 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-CSM **DEFENDANT GREENPEACE FUND, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant Greenpeace Fund, Inc. ("GP-Fund"), respectfully submits this Reply Brief in Support of its Motion to Dismiss ("Reply") in response to Energy Transfer Equity, L.P., and Energy Transfer Partners, L.P. (collectively "Energy Transfer") Consolidated Memorandum of Law in Opposition to Moving Defendants' Motions to Dismiss the Complaint (ECF No. 65) (hereinafter "Response"). Further, GP-Fund specifically adopts and incorporates by reference the Reply Brief of co-defendants Greenpeace International and Greenpeace, Inc., filed contemporaneously. GP-Fund respectfully requests that this Court grant GP-Fund's motion to dismiss.

I. Introduction

Energy Transfer has failed to bring a coherent cause of action against GP-Fund in this matter, and the arguments raised in its Response do not cure the deficiencies raised by the Defendants in the various motions to dismiss. The allegations contained within Energy

Transfer's Complaint fall far below the particularity threshold required by the heightened pleading standard for RICO[1] claims sounding in fraud under Federal Rule of Civil Procedure 9(b), *see Crest Construction II, Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011).

Under normal circumstances, some leeway may be given to a pleading containing such conclusory allegations, but here, where the very core of the First Amendment is implicated, the interests of justice require a strict adherence to the United States Supreme Court's decades-old determination that plaintiffs in such cases must meet a heightened burden, *see New York Times v. Sullivan*, 376 U.S. 254, 267–283 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374, 387–391 (1967), even above the plausibility pleading standard now viewed as a baseline requirement.

While the voluminous, four hundred and forty-two paragraph Complaint makes it difficult to distill the allegations Energy Transfer is actually leveling at the Defendants, a careful review illustrates that there is one theory that constitutes the lynchpin for the entire case: that Defendants published allegedly defamatory statements about Energy Transfer resulting in damages. Because Energy Transfer has failed to adequately plead the facts necessary to establish GP-Fund's liability for these defamatory statements, all allegations stemming from these defamatory statements fail.

Further, Energy Transfer's conclusory allegations in its Response reveal this lawsuit for what it is: an attempt to stifle advocacy and chill donations to public interest groups through the threat of virtually limitless RICO liability. The debate regarding oil and gas pipelines should happen in the court of public opinion, not in federal court. Respectfully, GP-Fund requests that this Court grant its motion to dismiss.

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962 *et seq*.

II. Argument

A. Energy Transfer has failed to state a claim for relief against GP-Fund.

1. Energy Transfer has not plausibly alleged GP-Fund's responsibility for a single defamatory statement.

As illustrated in the various motions to dismiss and reply briefs filed in this case, Energy Transfer's complaint is legally deficient. The United States Supreme Court requires that, "[t]o 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Eleventh Circuit Court of Appeals recently specifically addressed the importance of applying the plausibility pleading standard in cases where the underlying cause of action involves defamation, stating,

> [A]pplication of the plausibility pleading standard makes particular sense when examining public figure defamation suits. In these cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation. Indeed, the actual malice was designed to allow publishers the 'breathing space' needed to ensure robust reporting on public figures and events. Forcing publishers 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. Thus, a public figure bringing a defamation suit must plausibly plead actual malice in accordance with the requirements set forth in *Iqbal* and *Twombly*.

Michel v. NYP Holdings, 816 F.3d 686, 702 (11th Cir. 2016).

Further, as recognized by the Ninth Circuit, "where a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would be required." *Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd. of Culinary Works*, 542 F.2d 1076, 1082–1083 (9th Cir. 1976).

In summary, the threshold over which Energy Transfer must pass to plead a claim for relief in this case is not simply the plausibility pleading standard of *Iqbal*, but a heightened burden requiring specific allegations sufficient to vindicate the United States Supreme Court's recognition of "the sensitivity of First Amendment guarantees to the threat of harassing litigation," as a heightened pleading standard is just one of the barriers the Court has erected to safeguard those guarantees. *Franchise Realty Interstate Corp.*, 542 F.2d at 1082 (citing *New York Times*, 376 U.S. at 267–283 and *Time, Inc.*, 385 U.S. at 387–391).

Energy Transfer concedes that not a single allegedly defamatory statement is alleged to have been made or published by GP-Fund. Response, at 37–38. Yet, Energy Transfer attempts to retain GP-Fund as a Defendant in this case by claiming, without legal or factual support, that GP-Fund is responsible for any statement published by Greenpeace generally. Response, at 38, 69. Such a conclusion belies the principle that only those who are involved in creating the publication may be held responsible. *Universal Commc'n Sys., Inc. v. Turner Broad Sys., Inc.*, 168 F. Appx. 893 (11th Cir. 2006) (*per curiam*); *Buttons v. National Broadcasting Co.*, 858 F. Supp. 1025, 1027 (C.D. Cal. March 14, 1994); *Kahn v. iBiquity Digital Corp.*, 2006 WL 3592366, at *5 n.23 (S.D. N.Y. Dec. 7, 2006), aff'd, 309 F. App'x 429 (2d Cir. 2009). Contrary to Energy Transfer's analysis of these cases, they all involved claims that defendants should be liable for statements published by another party as Energy Transfer claims here.

Even if Energy Transfer has sufficiently pleaded that GP-Fund was involved in publication, it cannot meet the burden of showing that GP-Fund acted with actual malice. Energy Transfer attempts to cure this deficiency in their Complaint by using the Response to argue that actual malice may be proved with "circumstantial evidence," and that raising a "reasonable inference" of actual malice is enough to survive a motion to dismiss. Response, at 69–70. Energy

Transfer conjures support for this theory by arguing that the Defendants demonstrated actual malice by: (1) holding themselves out as experts (notably without reference to when or how the Defendants acted as experts, or who specifically held themselves out as an expert on behalf of the Defendants), (2) failing to fact check their statements (although Energy Transfer makes only conclusory statements arguing that the Defendants' statements were false, without detailing how or why), and (3) by omitting key facts from their statements (apparently arguing that Energy Transfer should be allowed to police statements issued by entities that disagree with their actions). Response, at 70–74.

And yet, fatal to Energy Transfer's above-referenced attempt to cure the Complaint's deficiencies is their own acknowledgment that "allegations of improper motive do not, standing alone, establish actual malice." Response, at 74. The conclusory allegations contained in the Complaint and the Response not only fail to meet even the baseline plausibility pleading standard required by the Supreme Court's jurisprudence, *see Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570), but also fall far below the heightened pleading standard the Supreme Court requires courts apply to complaints that attempt to infringe on the First Amendment rights of a defendant. *See New York Times*, 376 U.S. at 267–283 and *Time, Inc*, 385 U.S. at 387–391; *see also Franchise Realty Interstate Corp.*, 542 F.2d at 1082–1083.

Energy Transfer does not dispute that it is a public figure and, accordingly, because the entirety of the underlying cause of action arises from allegedly defamatory statements published to third parties, Energy Transfer must plead facts sufficient to satisfy the actual malice standard, which requires: (1) that Energy Transfer establish that each alleged statement is materially false, *see Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 521–525 (1991), and (2) that each defendant published each alleged statement with knowledge that it was false or subjective

awareness of its probably falsity, *see Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 & n.5 (1974), *Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal. 1985). Implicit in both elements is the requirement that each defendant must have the requisite level of fault for each alleged statement: if a defendant is not responsible for publishing a statement, it is not possible, let alone plausible, that the defendant published the statement with actual malice.

Completely absent from both the Complaint and the Response are any facts or allegations relating to GP-Fund's mental state. As the federal district court explained in *Masson*,

> [T]he requirement that the defendant's state of mind be proven is the cornerstone of the constitutional requisite that a plaintiff prove by clear and convincing evidence that the defendant acted with knowledge or reckless disregard of the trust . . . [In *New York Times v. Sullivan*] the Supreme Court has clearly held that the defendant must act with a requisite mental state.

Masson, 832 F. Supp. at 1370; *see also McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1302 (D.C. Cir. 1996). Energy Transfer's discussion of the threshold "actual malice" burden in its Complaint is contained within one paragraph which states, "The false and defamatory statements set forth herein concerning Energy Transfer were made and published with actual malice, as such statements were made by Defendants with knowledge of their falsity or reckless disregard for their truth." Compl., ¶ 426. At best, this is a "formulaic recitation of the elements of a cause of action," which the Supreme Court has made clear "will not do." *Twombly*, 550 U.S. at 555.

In summary, Energy Transfer has failed to state a claim against GP-Fund because they have failed to allege facts that make it plausible to infer (1) that GP-Fund published any false factual statement and (2) that GP-Fund published any actually false statement with the requisite mental state of actual malice. The lack of these allegations renders Energy Transfer's RICO claim deficient, as they constitute the prerequisite for the only illegal acts alleged to have

occurred in this case. This failure subjects the entirety of Energy Transfer's Complaint to dismissal.

2. This Court should dismiss the claims against GP-Fund now because, with each passing day, GP-Fund faces an escalating penalty resulting from Defendants' exercise of First Amendment rights.

As illustrated above, GP-Fund is not alleged to have published any of the allegedly defamatory statements at issue in this case. In that regard, when the allegations within the one hundred and eighty-seven pages of the Complaint are distilled to the operative facts, Energy Transfer's claims against GP-Fund are revealed as little more than "an unadorned, the-defendant-unlawfully-harmed me accusation." *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 570). Energy Transfer's Complaint is predicated on precisely the type of conclusory allegations that are not only prohibited by the Supreme Court's holding in *Iqbal*, but also paint a troubling picture of Energy Transfer's motive and purpose behind bringing this lawsuit due to its potential to chill constitutionally protected speech.

The United States Supreme Court has encouraged district courts to dismiss this type of questionable legal proceeding early, asking courts to examine the statements at issue in such a case, in light of the circumstances under which they were made, and then enforce the line "between speech unconditionally guaranteed and speech [that] may legitimately be regulated." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984).

While there are no allegations regarding any advocacy conducted by GP-Fund, its alleged transfer of money to GP-Inc. is similarly protected by the First Amendment. Energy Transfer's claim against GP-Fund is therefore subject to early dismissal for failure to plead any facts to plausibly state a claim for relief based on its alleged transfer of money.

Further, in light of *Resolute Forest Products, Inc. et al v. Greenpeace International, et al*, __ F. Supp. 3d __, 2017 WL 4618676 (N.D. Cal. October 16, 2017), a case with astonishingly similar allegations brought against the Greenpeace Defendants by Energy Transfer's counsel (allegations so similar that many of the statements in the complaint, including a request for $300 million dollars in damages, were identical) and the impact of this case on the First Amendment rights of the Defendants, it appears relevant to reiterate the warning issued by the California Supreme Court in *Baker v. Los Angeles Herald Examiner*,

> The threat of a clearly non-meritorious defamation action ultimately chills the free exercise of expression. There comes a time when the finality of litigation is almost as important as the decision therein. In the preservation of the free exercise of speech, writing and the political function, the early termination of [the] lawsuit is highly desirable. We should discourage attempts to recover through the judicial process what has been lost in the political process.

42 Cal.3d 254, 268–269 (Cal. 1986) (internal citations omitted).

B. Energy Transfer has not alleged sufficient facts to demonstrate that GP-Fund is a member of the supposed RICO conspiracy or that GP-Fund's actions were the proximate cause of Energy Transfer's alleged damages.

Energy Transfer's Response characterizes the RICO claims against GP-Fund as follows:

> The Complaint alleges GP-Fund was intimately involved in planning, approving, directing, and funding the activities 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."

Response, at 38. As a result of these alleged activities, Energy Transfer concludes that "each of the fraudulent statements published by Greenpeace USA constitutes a separate act of mail and wire fraud attributable to GP-Fund." Response, at 38. As Energy Transfer's summary of GP-Fund's alleged involvement indicates, the RICO claim raised against GP-Fund, as well as all Defendants, sounds in fraud.

It is well established that where a RICO claim is based in fraudulent acts, the claim is subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b); this requirement has been consistently affirmed by the Eighth Circuit Court of Appeals. *See Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995) (citing *Flowers v. Continental Grain Co.*, 775 F.2d 1051, 1054 (8th Cir. 1985)); *Crest Const. II, Inc.*, 660 F.3d at 353. Specifically, Rule 9(b) requires stating "with particularity the circumstances constituting fraud or mistake." To state a claim under Rule 9(b), Energy Transfer must state the time, place, and specific content of the false representations, as well as the identities of the parties to the misrepresentation. *Crest Const. II, Inc.*, 660 F.3d at 353–354 (citing *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011). Further, Energy Transfer must identify the specific role of each defendant in the scheme. *Id.*

As a threshold matter, the Complaint specifically references GP-Fund in only three of its four hundred and forty-two paragraphs, Compl. ¶¶ 1, 34, 38 (a)–(d), (g), (j). To allow these sparse allegations to satisfy Rule 9(b) would completely read any "heightened" pleading requirement out of the Rule.

Energy Transfer acknowledges that, at minimum, Rule 9(b) requires that the "who, what, where, when, and how of the alleged fraud" must be pleaded. Response, at 36 (citing *Garrett v. Cassity*, 2010 WL 5392767, at * 17 (E.D. Mo. Dec. 21, 2010)). And yet, Energy Transfer has completely failed to meet this requirement. The complaint contains no alleged facts regarding (a) fraudulent statements made to potential GP-Fund donors; (b) statements GP-Fund made while fundraising; (c) what donors have been defrauded; (d) which donations have been fraudulently obtained; (e) an intent by GP-Fund to defraud donors; or (f) whether any donations have been used for any purpose other than as promised. Without these baseline allegations, Energy

Transfer's Complaint falls short of the standard required by Rule 9(b), F. R. Civ. P. More importantly, without this information, GP-Fund is not on notice of the true contours of Energy Transfer's claim against it.

1. The act of donating to GP-Inc. does not render GP-Fund a member of a supposed RICO conspiracy.

The only allegations in the Complaint specific to GP-Fund involve claims that GP-Fund was involved with fundraising and distributing money to GP-Inc. Compl., ¶ 38; Response, at 37. Energy Transfer's claims that such activity can subject GP-Fund to liability under RICO is directly contradicted by the principles recognized in *In re MasterCard Intl., Inc., Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D. La. 2001) and *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997) that transferring money or having a business relationship with an enterprise is not enough to subject an entity to RICO liability.

Energy Transfer argues that their claim is different from that in *In re Mastercard* because they have alleged that GP-Fund was "intimately involved in planning, approving, directing, and funding" the alleged activities by the Enterprise. Response, at 38, FN 14. But these are exactly the allegations that either do not exist in Energy Transfer's Complaint or are wholly conclusory in nature.

Energy Transfer has failed to allege any action by GP-Fund that could constitute directing or planning any activities alleged to be part of the illegal scheme. Further, the Complaint contains no facts regarding this alleged coordination with GP-Inc., much less any coordination with any other defendants or non-party members of the enterprise.

Rather, Energy Transfer relies on a stipulated judgment from 2002, entered in a different case involving different parties, to stand for the proposition that GP-Fund directs the activities of

GP-Inc. This stipulated judgment is not applicable to the allegations at issue in the Complaint and is irrelevant to this Court's analysis of the Complaint under the 12(b)(6) standard. The Complaint makes no specific allegation regarding GP-Fund's alleged control over the use of funds disbursed to GP-Inc. or any control over the activities of GP-Inc. The Complaint contains no allegation of any action taken by GP-Fund to plan, coordinate, direct, or generally be involved with any activity of the alleged enterprise.

Extending liability for the torts of an advocacy group to anyone who has donated to that group would be a gross infringement of the First Amendment. GP-Fund, a separate non-profit entity from GP-Inc., may make grants to other nonprofits engaged in advocacy without being subject to RICO liability.

2. Energy Transfer's Complaint fails to adequately allege proximate cause, and dismissal of its RICO claims is proper.

Energy Transfer's attempt to use its Response to cure the Complaint's deficiencies regarding the RICO requirement that a plaintiff demonstrate that the defendant's violation was the "proximate cause" of the plaintiff's injury is unavailing. Energy Transfer argues that proximate cause is a "flexible concept," and that plaintiffs merely need to demonstrate a direct relation between the asserted injury and the injurious conduct. Response, at 54. In support of this theory, Energy Transfer argues that a fraudulent scheme to disseminate false and misleading allegations to third parties constitutes a sufficient demonstration of proximate cause to support a RICO claim. Response, at 56–57.

Regardless of how far Energy Transfer attempts to skew the definition of proximate cause in RICO cases, one fact remains that demonstrates the futility of this argument: the logical result of Energy Transfer's theory is that it is the third parties, not Energy Transfer, that would

have been defrauded if the allegations were true (and they are not) and that the Defendants' acts would be the proximate cause of damages suffered by those third parties. Further, Energy Transfer does not bridge the causal gap between statements to the general public and the type of harm it allegedly suffered. If such harm did exist, it would constitute reputational damage and is, therefore, not cognizable under a RICO claim. For these reasons, Energy Transfer has failed to adequately plead proximate cause and its RICO cause of action should be dismissed for failure to state a claim.

III. CONCLUSION

Energy Transfer's attempt to group GP-Fund with the other parties in this lawsuit is deeply flawed and contains insufficient factual allegations to state a claim. GP-Fund respectfully requests that this Court dismiss the Energy Transfer's claims with prejudice.

RESPECTFULLY SUBMITTED this 30th day of March, 2018

By */s/ Matt J. Kelly*
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CERTIFICATE OF SERVICE

This is to certify that on the 30th day of March, 2018, I have served all parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

/s/ Matt J. Kelly
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