

**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’ REPLY
MEMORANDUM OF LAW IN
FURTHER SUPPORT OF MOTION
TO STRIKE**

Plaintiffs Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. (together, “Energy Transfer” or “Plaintiffs”) respectfully submit this reply memorandum of law in further support of Plaintiffs’ motion to strike Earth First! Journal’s motion for sanctions (ECF No. 64).

PRELIMINARY STATEMENT

Earth First! Journal does not dispute that it lacks standing to assert defenses on behalf of defendant Earth First! -- a party it claims not to be, and in fact contends does not exist at all. Rather, in response to Plaintiffs’ Motion To Strike Earth First! Journal’s Motion for Sanctions -- which irrefutably demonstrates that non-parties to a proceeding lack standing to exercise litigating rights or seek sanctions -- Earth First! Journal belatedly argues that it has standing to pursue sanctions on its own behalf by virtue of the fact that it was “forced” to participate in this proceeding and incur attorneys’ fees and costs when the North Dakota Secretary of State mailed a copy the summons and complaint in this action to an address associated with both Earth First! and Earth First! Journal.

As set forth in detail below, far from being “forced” to participate in this proceeding, Earth First! Journal intentionally injected itself into this litigation and cannot now seek to recover fees incurred in connection with that calculated decision. Nor should Earth First! Journal be permitted to intervene in this action for the sole purpose of seeking sanctions since the Federal Rules of Civil Procedure do not permit limited “special status intervenors.” Accordingly, Plaintiffs respectfully request the Court strike Earth First! Journal’s motion for sanctions (ECF No. 64) from its docket.

FACTUAL BACKGROUND

Plaintiffs commenced this action on August 22, 2017, alleging that defendant Earth First! worked in concert with other environmental nongovernmental organizations to carry out a fraudulent and illegal scheme to interfere with Energy Transfer’s development, construction, and operation of the Dakota Access Pipeline. (ECF No. 1.) Between August and September 2017, Plaintiffs made five separate attempts to serve defendant Earth First! through members or close affiliates. (*See* ECF No. 34 at 3-5). When none of those attempts were successful, Plaintiffs served Earth First! with the summons and complaint pursuant to N.D.C.C. § 10-01.1-13(3)(a). (ECF No. 35-11.) On October 1, 2017, the North Dakota Secretary of State acknowledged and admitted service on behalf of Earth First!. (ECF No. 15.) Thereafter, the North Dakota Secretary of State mailed a copy of the summons and complaint to Earth First! at the address listed on the website shared by Earth First! and Earth First! Journal. (*See* ECF No. 68-8 (“About Earth First!” Page on Earth First! Journal’s website).)

Rather than simply ignore the summons and complaint addressed to the putatively “separate and distinct” entity, Earth First!, on October 23, 2017, counsel for Earth First! Journal wrote to Plaintiffs’ counsel challenging Earth First!’s capacity to be sued and the effectiveness of

service on Earth First!. (ECF No. 35-16.) On November 20, 2017, Plaintiffs reiterated their intent to pursue claims against defendant Earth First! by filing a motion to declare service on Earth First! effective and asserting that Earth First! should be estopped from denying its legal existence. (ECF Nos. 33, 34 n.5.) Earth First! Journal again voluntarily interposed itself in this proceeding on behalf of defendant Earth First!, moving for leave to appear as a *non-party*, or in the alternative as an amicus curiae to oppose Plaintiffs' motion. (ECF No. 45.) Finally, on February 7, 2018, Earth First! Journal affirmatively moved for sanctions on behalf of defendant Earth First! and sought legal fees and costs incurred in connection with asserting defenses on Earth First!'s behalf, even though it is indisputably a non-party and made no effort to seek this Court's permission or authorization to file its motion for sanctions. (ECF No. 64.)

ARGUMENT

In support of its Motion to Strike, Plaintiffs demonstrated the Court's inherent authority to sanction "procedural improprieties" by striking motions that are not filed in compliance with the federal or local rules or court order. (*See* ECF No. 67.) Earth First! Journal does not dispute that it lacks standing or authority to exercise litigating rights on behalf of defendant Earth First!. (ECF No. 70 at 10-11.) Rather, in a last ditch effort to offer a shred of legal authority for its initial motion for sanctions, non-party Earth First! Journal belatedly argues that it had standing to bring that motion by virtue of the fact that it was forced to participate in this action, or alternatively, should be granted leave to intervene for the sole purpose of seeking sanctions. (ECF No. 70.) Both arguments are entirely without merit.

I. Earth First! Journal's Voluntary Appearance In This Proceeding Does Not Confer Standing To Seek Sanctions.

Earth First! Journal asserts that the North Dakota Secretary of State's service of the summons and complaint in this action on defendant Earth First! at an address associated with

Earth First! Journal forced Earth First! Journal to participate in this proceeding and incur legal fees and costs. Citing a host of cases where courts have conferred standing to seek sanctions when a non-party was forced to participate in a lawsuit to defend against claims asserted against them, Earth First! Journal argues that it has standing to seek sanctions in this action. (See ECF No. 70 at 10-11 (citing *Nyer v. Winterthur Int'l*, 290 F.3d 456, 459-60 (1st Cir. 2002) (non-party had standing to seek sanctions in connection with defending against proposed amended complaint naming them as defendant); *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987) (named defendant who was never formally served had standing to seek sanctions); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1170 (D.C. Cir. 1985) (nonparty witness had standing to seek sanctions in connection with defending against contempt proceeding arising from nonparty's refusal to consent to a videotaped deposition); *Shaw v. AAA Eng'g & Drafting, Inc.*, No. 95-00950, 2006 WL 988591, at *3 (W.D. Okla. Apr. 12, 2006) (non-party had standing to seek sanctions in connection with moving to quash subpoena issued to non-party); *Payman v. Lee Cty. Cmty. Hosp.*, No. 04-00017, 2005 WL 735886, at *2 (W.D. Va. Mar. 31, 2005) (nonparty had standing to seek sanctions in connection with defending against a default judgment subjecting the non-party to direct liability)).

Each of the cases Earth First! Journal purports to rely on is factually distinguishable from the circumstances here because Plaintiffs have not named Earth First! Journal as a defendant in this action, nor have they issued any subpoenas to Earth First! Journal or otherwise filed any motions or proceedings exposing Earth First! Journal to liability. Courts routinely hold that nonparties who are only indirectly implicated by the complaint's allegations -- such as Earth First! Journal -- lack standing to seek sanctions. See, e.g., *New York News, Inc. v. Kheel*, 972 F.2d 482, 486 (2d Cir. 1992) (finding that nonparty who was alleged to be a central participant in

RICO scheme lacked standing to move for Rule 11 sanctions as an aggrieved party); *Port Drum Co. v. Umphrey*, 852 F.2d 148, 151 n.3 (5th Cir. 1988) (same); *see also Nyer*, 290 F.3d at 459 (recognizing that “individuals that are either explicitly discussed in a complaint or entities that are indirectly implicated by a complaint’s allegations may not intervene in the litigation for the sole purpose of seeking Rule 11 sanctions”).

Thus, Earth First! Journal resorts to arguing that it was directly implicated in this action because service of the complaint on defendant Earth First! at an address associated with Earth First! Journal left Earth First! Journal employees “to wonder whether they might be held responsible for, and be required to defend the interests of,” Earth First!. (ECF No. 70 at 9-10.) Yet, Earth First! Journal has repeatedly asserted its “separate and distinct” existence from defendant Earth First! as a shield to challenge service on Earth First! and assist Earth First! in evading liability. Earth First! Journal should not now be allowed to use its relationship with defendant Earth First! as a sword to argue that it has standing to seek sanctions because it is exposed to direct liability in this proceeding, even though Plaintiffs have not sued Earth First! Journal.

Accordingly, far from being forced to participate in this action, Earth First! Journal intentionally interjected itself into this proceeding for the purpose of asserting defenses and seeking sanctions on defendant Earth First!’s behalf (not on its own behalf). Such voluntary participation does not confer standing under controlling precedent. *See, e.g., Kheel*, 972 F.2d at 486; *Port Drum Co.*, 852 F.2d at 151 n.3; *Nyer*, 290 F.3d at 459-60.¹

¹ To the contrary, a voluntary participant appears as an amicus curiae, which indisputably is not entitled to recover legal fees and costs in connection with that participation. *See Miller-*

II. Earth First! Journal May Not Intervene For The Purpose Of Seeking Sanctions.

Earth First! Journal's assertion that this Court may construe its motion as a "motion to intervene for purposes of seeking sanctions" (ECF No. 70 at 11), does not support an argument that it has any standing whatsoever to maintain the sanctions motion it filed. Earth First! Journal is not seeking to intervene as a party in this action. Rule 24 of the Federal Rules of Civil Procedure does not permit "limited special status intervenors" for the sole purpose of seeking sanctions. *Kheel*, 972 F.2d at 486 ("Rule 11 sanctions are an inappropriate interest in support of intervention as of right"); *see also Chester Water Auth. v. Susquehanna River Basin Comm'n*, No. 14-01076, 2014 WL 3908186, at *5 (M.D. Pa. Aug. 11, 2014) ("a non-party may not intervene solely for the purpose of seeking Rule 11 sanctions because such collateral procedural issues alone do not raise a legally protectable interest"); *accord Port Drum Co.*, 852 F.2d at 150 (Rule 11 does not confer "substantive rights"). Because Earth First! Journal concedes that it is seeking intervention in this action for the sole purpose of seeking sanctions (ECF No. 70 at 11), it cannot satisfy the elements of intervention under Fed. R. Civ. P. Rule 24.

CONCLUSION

For the foregoing reasons, Earth First! Journal's motion for sanctions is meritless and Plaintiffs' motion to strike should be granted.

DATED this 7th day of March, 2018.

FREDRIKSON & BYRON, P.A.

By: /s/Lawrence Bender
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Wohl Co. v. Comm'r of Labor and Industry of Mont., 694 F.2d 203, 204 (9th Cir. 1982) (denying amicus curiae's motion for fees because "[a]n amicus curiae is not a party to litigation").

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