

**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

**RESPONSE TO COURT’S ORDER
TO SHOW CAUSE, OR IN THE
ALTERNATIVE, MOTION FOR
LEAVE TO AMEND THE
COMPLAINT**

Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. (together, “Energy Transfer” or “Plaintiffs”) respectfully submit this response to the Court’s July 23, 2018 order to show cause as to why Earth First! should not be dismissed as a party to this action, or in the alternative for leave to conduct limited discovery or amend the Complaint to include Earth First! Journal, Daily Planet Publishing, and certain individuals associated with Earth First! as defendants.

INTRODUCTION

Defendant Earth First! possesses all the indicia of a legal entity: it has members, leaders, and decision-making processes; solicits funds; and has commenced three separate legal actions. It promotes its activities, tactics, and ideologies in publications and websites that bear its own name. Nevertheless, it self-servingly characterizes itself as a “philosophy,” has deliberately failed to incorporate, and denies its existence to authorities, so as to frustrate legal process and avoid liability for the harm caused by its eco-terrorist activities. Despite Plaintiffs’ diligent efforts to serve Earth First! through identified agents and the Secretary of State of North Dakota,

Earth First! has for months evaded personal service and disclaimed legal association with Earth First! Journal, its agent which publishes the Earth First! Direct Action Manual, and directed, operated, and managed Earth First!'s criminal activities targeting the Dakota Access Pipeline. Notwithstanding the foregoing, on July 27, 2018, Plaintiffs successfully served Earth First! through personal service on its agents Grayson Bauer Flory and Marion De Jong. Rule 4(m) of the Federal Rules of Civil Procedure mandates that where -- as here -- a defendant has deliberately evaded service, good cause exists to deem service effective outside of the prescribed time period.

Dismissal of the claims against Earth First! is particularly inappropriate here, where Earth First! -- in coordination with the Greenpeace Defendants -- continues to fund and orchestrate patterns of criminal activities designed to interfere with Energy Transfer's latest infrastructure projects, including the Bayou Bridge Pipeline. Consistent with the other activities of the Enterprise, Earth First! and its agents continue to coordinate closely with the Greenpeace Defendants which have escalated their interference with Energy Transfer's infrastructure projects to a "priority project of 2018." In furtherance of this shared objective, the Greenpeace Defendants recruited an individual dedicated solely to interference with Energy Transfer's projects, and sent agents to Louisiana to train on-the-ground protesters, incite, and fund direct actions against the Bayou Bridge Pipeline.

In the event this Court deems personal service on Grayson Bauer Flory and Marion De Jong insufficient to confer service on Earth First!, Plaintiffs respectfully seek leave to conduct limited discovery to identify alternative methods to serve Earth First!, or in the alternative, to amend the Complaint to add Earth First! Journal, Daily Planet Publishing (the entity which registered the trade name Earth First! Journal), and certain individuals associated with Earth

First! as defendants. In an effort to economize filings with the Court, Plaintiffs seek an opportunity to add these additional defendants when they amend in accordance with the Court's order dated July 25, 2018.

FACTUAL BACKGROUND

Founded in 1980 by leaders of various environmental nongovernmental organizations, for the past four decades Earth First!'s members have organized around common interests, goals, objectives, and stated purposes, chief among them, the commitment to further its anti-development agenda through anarchist political philosophy, including civil disobedience and criminal sabotage. (*See* ECF Nos. 68-3, 68-8.) Earth First! holds annual leadership conferences, known as "Organizers Conferences," where it sets strategic and tactical goals for the year, fundraises to achieve those goals, and uses those funds to, among other things, fund direct actions and meetings and gatherings throughout the year, drawing participants from around the world who share common interests and political and environmental values and ideals. (*See* ECF Nos. 68-4- 68-7.) Participants in the Organizers Conference serve in a leadership or representative capacity, including navigating "internal dynamics of Earth First!," organizing direct actions, and scouting locations for future gatherings and actions. (*See* ECF No. 68-4.) Panagioti Tsolkas, among others, is an Earth First! "organizer" with self-described "15 years of on-the-ground EF! organizing experience" in direct actions across the country. (Ex. 1.)¹ Tsolkas has been on the planning committee for at least four Earth First! Organizers Conferences, including for the years 2000, 2006, 2008 and 2011. (Ex. 2.)

¹ References to Ex. __ are to the exhibits attached to the Declaration of Lauren Tabaksblat dated August 1, 2018.

Earth First! promotes its activities, tactics, and ideologies through numerous publications, including the Earth First! Direct Action Manual, Ecodefense: A Field Guide to Monkeywrenching, its own website, and a dedicated page on the website of Earth First! Journal. Moreover, Earth First! has commenced no fewer than three separate legal actions, including *Pueblo of Sandia, et al. v. United States*, 50 F.3d 856 (10th Cir. 1995); *Earth First v. Block*, 569 F. Supp. 415 (D. Ore. 1983); and *Animal Defense Council, et al v. Hodel*, 840 F.2d 1432 (9th Cir. 1988). (ECF No. 74.)²

Earth First! Journal (the trade name for Daily Planet Publishing, a Florida corporation) is the agent of Earth First! Earth First! Journal directs, operates, and manages Earth First!’s criminal activities, by among other things, raising funds for Earth First! through the Earth First! Direct Action Fund, which “assist[s] in planning, coordinating, and funding the frontline activists” who engage in property destruction, and monkeywrenching. (Exs. 3-5.) Additionally, the Journal publishes a quarterly newsletter and an online blog called the Earth First! Newswire, both of which disseminate information about direct actions and news about Earth First!, including news about the organization’s annual meetings and goals, and serve as essential forums for discussion between Earth First! members. (Ex. 6.) The Journal also publishes and disseminates the various “action resources” for Earth First! members, including the “Earth First!

² The *Pueblo of Sandia* complaint, filed in 1992, describes Earth First! as a “non-profit citizen organization dedicated to the protection and defense of the earth,” with “members” that often visit Las Huertas Canyon. (ECF 80-2 ¶ 16.)

Moreover, at least one court has recognized Earth First! is conducting itself as a legal entity. with “members” who engage in “direct action” and “monkeywrenching,” which includes “vandalism” and “damaging equipment”; members attend an “annual Earth First! Rendezvous” where they engage in “discussion circle[s]” or “consensus circles” to make decisions regarding their campaigns which are featured by the association’s publication, the Earth First! Journal, and the association’s fundraising entity, the Earth First! Direct Action Fund, both of which solicit donations for direct action and monkeywrenching on behalf of members of Earth First!. See *Highland Enterps., Inc. v. Barker*, 133 Idaho 330, 335 (Aug. 27, 1999).

Direct Action Manual” and “Ecodefense: A Field Guide to Monkeywrenching.” These manuals lay out techniques for vandalism and property destruction to stop infrastructure development, including tactics such as arson of heavy construction equipment, pouring sand into the gas tanks of construction equipment, slashing tires, using oxy-acetylene cutting torches to sabotage steel infrastructure, and using lockboxes and “sleeping dragons” to shut down construction sites and equipment. (Ex. 7-8.) Proceeds from sales of the manuals fund further direct actions. (Ex. 3-5.) Grayson Flory is the Vice President of Daily Planet Publishing, and serves as an editor of Earth First! Journal.³

Earth First! Journal directed, operated, and managed Earth First!’s activities in furtherance of the criminal campaign against the Dakota Access Pipeline by, among other things, funding and providing supplies to Red Warrior Camp and other on-the-ground protestors in North Dakota, disseminating its Earth First! Direct Action Manual and the Ecodefense: A Field Guide to Monkeywrenching to those protestors, and provided training in the violent and destructive tactics set forth therein. The “acetylene cutting torch” tactics detailed in the Earth First! Journal manual was employed by, among others, enterprise member Jessica Reznicek and Ruby Montoya of Mississippi Stand to torch several segments of the pipeline, resulting in millions of dollars in property damage and significant delay of construction activities. (Exs. 8, 9.) Earth First! Journal promoted Mississippi Stand’s destructive tactics and incited others to

³ Marion De Jong was the President of Night Heron Grassroots Activist Center, which formerly held the tradestyle for Earth First! Journal. (ECF No. 34 at 4.)

take similar action, by publishing images of damaged pipeline and equipment on its website, and featuring exclusive interviews with Reznicek and Montoya. (Exs. 9-12.)

ARGUMENT

I. PLAINTIFFS HAVE SERVED EARTH FIRST! PURSUANT TO THE FEDERAL AND LOCAL RULES

On July 27, 2018, Plaintiffs served Earth First! through personal service on Grayson Bauer Flory, vice president of Daily Planet Publishing, Inc., which operates the tradestyle, “Earth First Journal,” and who serves as an editor of the Journal. (*See* Ex. 13; ECF No. 34 at 4; ECF No. 80-1 ¶¶ 1, 4.) Plaintiffs also successfully served Marion De Jong, president of The Night Heron Grassroots Activist Center, Inc., which formerly held the tradestyle, “Earth First Journal.” (*See* Ex. 14; ECF No. 34 at 4.)⁴ These individuals and entities direct, operate and manage Earth First!’s direct actions, disseminate information regarding organizational activities, and raise funds for direct actions. (*See* Exs. 3-6; ECF Nos. 68-4- 68-7; 80-1 ¶¶ 1, 4.) Accordingly, Plaintiffs have effectively served Earth First! pursuant to the Federal Rules of Civil Procedure and the North Dakota Local Rules. *See* Fed. R. Civ. P. 4(h) (authorizing service on unincorporated association by following state law or “delivering a copy of the summons and of the complaint to an officer, a managing or general agent. . .”); N.D. R. Civ. P. 4(D) (service may be effectuated by, among other things, delivery of summons to “*agent, or partner, or associate . . . or to one who acted as an agent for the defendant with respect to the matter on which plaintiff’s claim is based and who was an agent of the defendant at the time of service*”) (emphasis added).

While service on Earth First! was not completed within the 90-day service period, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, where good cause exists for

⁴ While service on Mr. Flory and Ms. De Jong constitute effective service pursuant to N.D. R. Civ. P. 4(D), Plaintiffs have also endeavored to serve Peter Tsolkas. (Ex. 15.)

failure to effectuate service within the prescribed period, the district court should extend the time for service rather than dismiss the case with prejudice. *See Adams v. Allied Signal General Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1996) (citing Fed. R. Civ. P. 4(m) (“[I]f a plaintiff shows good cause for the failure [to timely serve] the court *shall* extend the period for service for an appropriate period”) (emphasis in original).)⁵ “A showing of good cause requires . . . good faith and some reasonable basis for noncompliance with the rules.” *Adams*, 74 F.3d at 887. The Eighth Circuit has held that “good cause” exists when “the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances” including, among other things, “defendant has evaded service of process or engaged in misleading conduct.” *Kurka v. Iowa Cnty, Iowa*, 628 F.3d 953, 957 (8th Cir. 2010). These are precisely the circumstances that exist here.

While Earth First! exhibits all of the indicia of a legal entity,⁶ it has intentionally declined to incorporate, frustrating efforts to hold them accountable for their conduct. And while Earth

⁵ *Allied Signal*, 74 F.3d at 887 held that no good cause existed to extend the deadline to serve where plaintiff “stubbornly” and “willful[l]y” ignored “reliable sources of corporate structure” and a sworn affidavit that service was not properly effectuated on an agent of defendant, and waited more than one year from the time that defendants filed a motion to dismiss for lack of service to seek limited discovery on service of process issues. By contrast, here Earth First! failed to incorporate with the intention of frustrating efforts to hold them accountable, leaving Plaintiffs without reliable corporate records. Nevertheless, Plaintiffs reasonably believed that service was properly effectuated through service on the North Dakota Secretary of State (who acknowledged and admitted service on behalf of Earth First!), and when that service was challenged, promptly responded by motion to declare service effective and a separate motion seeking discovery. At the same time, Plaintiffs also continued trying to serve Earth First! through its agents, which eventually were effective.

⁶ *See Askew v. Joachim Mem. Home*, 234 N.W.2d 226, 236 (N.D. 1975) (holding that whether an unincorporated association is doing business as a legal entity so as to render it capable of being sued is a fact-specific inquiry and setting forth probative factors to guide that inquiry); *see also* ECF No. 67 at 7-10 (setting forth evidence that Earth First! operates as a legal entity); ECF No. 74 (recognizing that Earth First!’s capacity to sue others should also render it capable of being sued); ECF No. 81 (recognizing Earth First!’s capacity to be sued, and directing Plaintiffs to serve in accordance with the Federal Rules).

First! maintains its own website and has a dedicated page on the website for Earth First! Journal, Earth First! fails to include an address or contact information for the organization, and, incredibly, disclaims any legal connection to Earth First! Journal -- the entity that publishes Earth First!'s Direct Action and Ecodefense Manuals, instructing members on how to engage in precisely the type of conduct at issue in this action, organizes those activities, and funds them.

Nevertheless, immediately following the commencement of this action, Plaintiffs made five separate attempts to serve Earth First! through three identified members, Grayson Bauer Flory, Marion De Jong, and Peter Tsolkas, and its agent Earth First! Journal. (ECF No. 34 at 3-5.) But Earth First!'s role in the activities set forth in the highly publicized complaint put the identified agents on notice of the lawsuit, driving them underground, and rendering Plaintiffs' efforts to serve Earth First! unsuccessful. Thereafter, Plaintiffs attempted to serve Earth First! by letter to the North Dakota Secretary of State, who acknowledged and admitted service on behalf of Earth First! (ECF Nos. 15, 35-11), and mailed a copy of the admission of service, summons, and complaint to PO Box 964, Lake Worth, Florida 33460, an address affiliated with Earth First!'s agent, Earth First! Journal. (ECF No. 35-12.) Although Earth First! Journal wrote to Plaintiffs challenging service on Earth First! (ECF No. 35-16), Plaintiffs reasonably believed proper service was effected because Earth First! Journal is an agent of Earth First! (ECF No. 34.) Accordingly, Plaintiffs promptly moved for a declaration of effective service or, in the alternative, additional time to serve Earth First! through an alternative method of service to be determined by the Court. (*Id.*) While the motion was pending, Plaintiffs requested that the Court schedule a Rule 16(b) conference so that the parties could proceed with discovery (ECF No. 47), which Plaintiffs believed would uncover additional information regarding Earth First! including the names and location of additional agents that could be properly served. The Court

denied Plaintiffs' motion for effective service, and in the alternative, for an alternative method of service, but extended Plaintiffs' time to serve Earth First! in accordance with the Federal rules. (See ECF Nos. 74, 81.) Pursuant to the Court's directive, Plaintiffs again sought to serve Earth First! through service on an agent, associate, or individual acting as an agent, and successfully did so on July 27, 2018.

Under these circumstances, good cause exists to deem service effective outside of the prescribed time period. See *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987) (good cause where plaintiff "demonstrated some diligence and a reasonable effort to effect service"); *Rhodes v. Haynes*, 2008 WL 352395, *2 (E.D. Mo. Feb. 7, 2008) (deeming service effective outside of the prescribed time period because there was no substantial prejudice from plaintiff's delay and because of "the flexibility encouraged by the language of the rule itself").⁷

II. IN THE ALTERNATIVE, LEAVE SHOULD BE GRANTED TO CONDUCT LIMITED DISCOVERY OR TO AMEND THE COMPLAINT

In the event the Court finds Mr. Flory's or Ms. De Jong's status as agents of Earth First! insufficient to effectuate service pursuant to Fed.R.Civ.P. 4(m) and N.D.R. Civ.P. 4(D), Plaintiffs respectfully renew their request for leave to conduct limited discovery concerning individuals and entities affiliated with Earth First!, its organization structure, leaders, managers, and organizers, and members involved in the campaign against Energy Transfer. Courts have

⁷ Even absent good cause, this Court has discretion to extend the time for service. See *Kurka v. Iowa Cnty, Iowa*, 628 F.3d 953, 957 (8th Cir. 2010) (setting forth relevant factors). All factors weigh in favor of extending Plaintiffs' time to serve here. First, Earth First!'s agents have notice of the lawsuit by virtue of the highly publicized complaint, and their relationship with Earth First! Journal. Second, there will be no delay occasioned by an amendment because, Plaintiffs will be filing an amended complaint pursuant to the Court's July 25, 2018 order, and discovery has not commenced. Third, any delay in service was caused by Earth First!'s own evasion of service. Fourth, Plaintiffs have demonstrated its good faith by diligently attempting service, seeking additional time to effect service, seeking discovery, and seeking alternative methods to effect service.

consistently authorized early discovery where, as here, permitting limited discovery of information would enable a plaintiff to effect service on defendants. *See, e.g., Loeffler v. City of Anoka*, 2015 WL 12977338, at *1 (D. Minn. Dec. 16, 2015) (granting early discovery so plaintiff could confirm defendant's identity and effect service of process); *Sapa v. Florence*, 2016 WL 616687, *1 (E.D. Mo. Jan. 11, 2016) (granting limited discovery to identify appropriate party for service where defendant was concealing his/her identity and location).

In the alternative, Plaintiffs respectfully request leave to amend the Complaint to add Earth First! Journal, Daily Planet Publishing, and individuals identified as agents of Earth First! as defendants. Pursuant to Fed.R.Civ.P 15(a)(2) leave to amend a complaint should be freely granted unless there is a good reason for denial. *See also Voigt v. Coyote Creek Mining Company, LLC*, 2016 WL 3920045, at *3 (D.N.D. July 15, 2016) (granting leave to amend where "case is still in its infancy, the changes are by no means frivolous"). Here, Earth First! Journal, the tradestyle for Daily Planet Publishing, directed, operated, and managed the Enterprise's criminal campaign against the Dakota Access Pipeline and Energy Transfer by, among other things, funding and providing supplies to Red Warrior Camp and other on-the-ground protestors in North Dakota, disseminating its Earth First! Direct Action Manual and the Ecodefense: A Field Guide to Monkeywrenching to those protestors, and provided training in the violent and destructive tactics set forth therein. The "acetylene cutting torch" tactics detailed in the Earth First! Journal manual was employed by, among others, enterprise member Jessica Reznicek and Ruby Montoya of Mississippi Stand to torch several segments of the pipeline, resulting in millions of dollars in property damage and significant delay of construction activities. (Exs. 8-9.) Earth First! Journal promoted Mississippi Stand's destructive tactics and

incited others to take similar action, by publishing images of damaged pipeline and equipment on its website, and featuring exclusive interviews with Reznicek and Montoya. (Exs. 9-12.)

Earth First! Journal's orchestration of acts of violence targeting Energy Transfer's infrastructure projects is ongoing. Its website features "action resources" to commit vandalism and property destruction, which have in recent weeks been successfully employed against the Bayou Bridge pipeline and Mariner 2 pipeline in Pennsylvania. (Exs. 16-17.) Earth First! Journal prominently features the ensuing damage caused by these tactics on its website and promotes "further sabotage" and "proliferation of more action like these." (*Id.*) Its activities are closely coordinated with Earth First! -- which held a 2018 Organizers Conference to plot direct action against the Bayou Bridge Pipeline -- and the Greenpeace Defendants which escalated interference with Energy Transfer's infrastructure projects as its "priority project of 2018," and recruited an employee dedicated exclusively to this endeavor. (Ex. 18.)

By order dated July 25, 2018, this Court directed Plaintiffs to "file an amended complaint containing concise and direct allegations against each named defendants." (ECF No. 88 at 5.) In an effort to economize filings with the Court, Plaintiffs seek an opportunity to add these additional defendants when they amend in accordance with the Court's order dated July 25, 2018.⁸

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that good cause exists to allow Plaintiffs to proceed with their claims against Earth First!, or in the alternative for Plaintiffs to

⁸ Leave to amend to add Earth First! Journal would not be prejudicial because Earth First! Journal has been on notice of the lawsuit since as early as October 2017. *See Mock v. Tharaldson Co.*, 2000 WL 34031790, at *3 (N.D. Iowa Jan. 26, 2000) (granting leave to amend complaint to add proper defendant where "defendant has notice of the complaint from [plaintiff's] previous attempts to serve [the] complaint" and thus "defendant will not be prejudiced by an amendment").

pursue limited discovery or amend their Complaint to add additional defendants in connection with the amendment being filed pursuant to the Court's July 26, 2018 Order.

DATED this 1st day of August, 2018.

FREDRIKSON BYRON P.A

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