

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAKOTA ACCESS, LLC,)	
)	
Plaintiff,)	No. 16-cv-0482
)	
v.)	
)	
IOWA CITIZENS FOR COMMUNITY)	
IMPROVEMENT;)	
)	PLAINTIFF DAKOTA
ADAM MASON, Individually and in)	ACCESS, LLC’S BRIEF IN
His Official Capacity as State Policy)	SUPPORT OF MOTION FOR
Director for Defendant IOWA)	TEMPORARY
CITIZENS FOR COMMUNITY)	RESTRAINING ORDER
IMPROVEMENT;)	
)	
BOLD IOWA;)	EXPEDITED RELIEF
)	REQUESTED
ED FALLON, Individually and in His)	
Official Capacity as Director of)	
Defendant BOLD IOWA; and)	
)	
UNKNOWN PARTIES,)	
)	
Defendants.)	

Pursuant to Federal Rules of Civil Procedure 7 and 65(b), Plaintiff Dakota Access, LLC provides this Brief in support of its motion for Temporary restraining Order.

I. Background Facts

Dakota Access is a limited liability company dedicated to the construction of the Bakken Pipeline (“the Pipeline”). Compl. ¶¶ 1, 10. The Pipeline is an approximately 1,172-miles-long, 12-, 20-, 24-, and 30-inch-diameter crude oil pipeline

stretching from North Dakota to Illinois. *Id.* ¶10. In Iowa, the Pipeline will be located in Lyon, Sioux, O'Brien, Cherokee, Buena Vista, Sac, Calhoun, Webster, Boone, Story (pump station location), Polk, Jasper, Mahaska, Keokuk, Wapello, Jefferson, Van Buren and Lee Counties. *Id.* The Pipeline will provide capacity to transport as much as 450,000 barrels of oil a day from western North Dakota to existing pipeline infrastructure near Patoka, Illinois, where shippers will have access to markets and refineries on the East Coast and on the Gulf Coast. *Id.*

The Pipeline is necessary to accommodate oil production from the Bakken and Three Forks formations in North Dakota, which has resulted in a five-fold increase in daily oil production in North Dakota in the last six years. Upon completion, the Pipeline will have capacity to transport nearly half of the oil produced in North Dakota each day. *Id.* ¶ 11.

Dakota Access has entered into a series of permanent easements with Iowa land owners. *Id.* ¶ 12. The easement agreements permit Dakota Access the right to construct and maintain the Pipeline. *Id.* Dakota Access has also entered into other temporary leases to store materials and equipment during construction and owns certain property in fee related to the construction of the Pipeline (all land upon which Dakota Access has acquired property rights is hereafter generally referred to as "Easement Property"). *Id.*

Dakota Access has also obtained all the necessary federal, state, and local permits for construction in Iowa, including permits from the Iowa Utilities Board, the Iowa Department of Natural Resources, and the U.S. Army Corps of Engineers. *Id.*

¶¶ 13–16. In accordance with the permits and approvals obtained for the Pipeline, Dakota Access has commenced construction activities in Iowa. *Id.* ¶ 17. Dakota Access has incurred substantial expense in permitting and commencing construction on the Pipeline. *Id.* ¶ 16. The estimated total cost for construction of the Pipeline is \$3.8 billion. *Id.* ¶ 8. On July 31, 2016, over \$3 million worth of equipment being used to construct the Pipeline was destroyed by protestors who entered onto Dakota Access Easement Property and set fire to the large equipment. *Id.* ¶ 22; Affidavit of Joey Mahmoud ¶ 7.

Defendants are organizations and individuals who are protesting the construction of the Pipeline and have threatened unlawful action to halt Dakota Access’s construction activities in the vicinity of Boone and Story Counties. *Id.* ¶¶ 20–21. Specifically, Mason and Fallon circulated email correspondence on August 25, 2016, organizing a civil disobedience event for August 31, 2016, where the protesters threaten to break the law in their efforts to halt the Pipeline construction. *Id.* Their intention is to conduct a blockade action and demonstration at an undisclosed location near Pilot Mound, Iowa at 1:00 p.m., with attendees pledging to risk arrest. *Id.* Over 1,200 people have pledged to participate in and support the blockade. Defendants are asking their supporters to “physically stop pipeline construction.” (Affidavit of Joey Mahmoud, Bold Iowa Pledge of Resistance website, Ex. 4 at 3.)

II. Legal Analysis

A. The Court Should Enter a Temporary Restraining Order to Prevent Irreparable Harm to Dakota Access.

Rule 65(b) provides for a temporary restraining order without notice to the opposing party as follows:

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b). Ex parte temporary restraining orders are appropriate for brief durations to preserve the status quo pending a hearing in limited circumstances involving immediate and irreparable injury, loss, or damage to the applicant. *See Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974). It is well-settled in this circuit that temporary restraining orders are generally measured against *Dataphase* factors. *See Prudential Ins. Co. of Am. v. Inlay*, 728 F. Supp. 2d 1022, 1028 (N.D. Iowa 2010); *Doe v. Miller*, 216 F.R.D. 462, 468 (S.D. Iowa 2003). Under the *Dataphase* factors, *Dataphase Systems, Inc., v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc), the Court should grant the requested temporary restraining order in this case.

The *Dataphase* factors include: "(1) the movant's probability or likelihood of success on the merits, (2) the threat of irreparable harm or injury to the movant absent the injunction, (3) the balance between the harm to the movant and the harm that the injunction's issuance would inflict on other interested parties, and (4) the

public interest.” *Prudential Ins. Co.*, 728 F.Supp.2d at 1028 (citing *Dataphase*, 640 F.2d at 114). “No single *Dataphase* factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.” *Baker Elec. Co-op. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994). “At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Dataphase*, 640 F.2d at 113.

1. Dakota Access is likely to succeed on the merits of its underlying claims.

The Eighth Circuit has rejected any type of quantification of a moving party’s likelihood of success on the merits. *See PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007) (rejecting a requirement that moving party “prove a greater than fifty per cent likelihood that he will prevail on the merits”). Thus, this Court need not decide whether Dakota Access will ultimately prevail. Nonetheless, the likelihood of success is the most significant of the *Dataphase* factors. *See id.*

Dakota Access has filed a complaint seeking declaratory relief and a permanent injunction to prevent Defendants from interfering with Dakota Access’s legally obtained right to construct a Pipeline through Iowa. The Declaratory Judgment Act authorizes a court to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201. Dakota Access seeks a declaration that it has a legal right to construct the Pipeline pursuant to its easements and other agreements and that Defendants’ actions of interfering with and impeding Dakota Access’s

rights. Dakota Access also seeks an injunction precluding Defendants from interfering with Dakota Access's lawful right to construct the Pipeline.

Dakota Access has entered into a series of permanent easements with Iowa land owners that permit Dakota Access the right to construct and maintain the Pipeline. Dakota Access has also entered into other temporary leases to store materials and equipment during construction and owns certain property in fee related to the construction of the Pipeline. Dakota Access has obtained all the necessary federal, state, and local permits to allow the construction of the Pipeline through specified counties. Dakota Access has also obtained the necessary authorizations from the applicable state authorities, including the Iowa Utilities Board and the Iowa Department of Natural Resources. On July 25, 2016, Dakota Access obtained authorization from the United States Army Corps of Engineers, which permit is time limited.

Dakota Access has engaged in intensive coordination with the relevant federal, state and local agencies to get the Pipeline constructed in the least intrusive and most cost effective manner possible. The Iowa construction of the Pipeline spans approximately 1,295 parcels of property. The Pipeline engineers and managers in Iowa have developed and are executing an efficient plan and have in position work crews, inspectors, hundreds of pieces of heavy equipment, and thousands of sections of pipe throughout the state based on a thorough, parcel-by-parcel construction plan.

Defendants have made it clear that they intend to willfully and knowingly trespass on Dakota Access's easements in an effort to physically interfere with and

impede Dakota Access's rights to construct its Pipeline through Boone County and Story County, Iowa by engaging in civil disobedience, including a blockade, and seeking to get arrested in the process. Defendants have organized hundreds of individuals who have indicated a willingness to be arrested in their efforts to stop construction of the Pipeline by engaging in a planned blockade and demonstration on August 31, 2016.

Defendants have no lawful basis for their attempts to impede Dakota Access's ability to construct the pipeline or to trespass on its easements, as deflected in Defendants' call to volunteers to commit to being arrested as part of the civil disobedience demonstration and blockade. As recognized in the emails used to organize the obstructionist efforts, Defendant Adam Mason consider the planned blockade as "the next step in our fight to stop the Bakken Pipeline" as "a big one." (Affidavit of Joey Mahmoud, Exhibit 2.) Defendants also use the success of their counterparts in North Dakota to encourage additional volunteers to participate. (*See* Affidavit of Joey Mahmoud, Exhibit 2, Aug. 25, 2016 email from Adam Mason of Iowa CCI, encouraging others by noting that "over the course of the last two weeks--our native sisters and brothers of the Lakota/Dakota Standing Rock Sioux have used arrests to successfully blockade the Bakken Pipeline on their reservation in North Dakota, where The number of supporters swelled to 5,000.")

Dakota Access has every reason to believe that Defendants will carry out the planned civil disobedience and blockade on August 31, 2016. Over \$3 million worth of equipment was destroyed by arson on July 31, 2016 when protesters entered onto

Dakota Access Easement Property in Mahaska County, Iowa and set fire to four pieces off large equipment. (Affidavit of Joey Mahmoud ¶ 7.)

Given these facts, as established by the accompanying affidavits, Dakota Access has shown a substantial likelihood of success in the merits of its Declaratory Judgment claim seeking a declaration that Plaintiff Dakota Access has a legal right to construct the Pipeline through Iowa without physical interference and/or actual obstruction of construction by Defendants.

Judge Hovland from the District of North Dakota recently entered a temporary restraining order against several individuals who interfered with Dakota Access's efforts to construct the Pipeline through parts of North Dakota. (See August 16, 2016 Order, *Dakota Access v. Archambault, et al.*, No. 1:16-cv-296, Dkt. 7, attached as Attachment A.) Judge Hovland "found a strong likelihood of success on Dakota Access' claims" for Declaratory Judgment (Attachment A, Order at 8), which claims are similar to those asserted here. Plaintiff Dakota Access has clearly satisfied the first *Dataphase* factor, which is the most significant factor. See *PCTV Gold, Inc.*, 508 F.3d at 1143; see also *Continental Resources, Ltd. V. Langed*, 2015 WL 686965 at **4-5 (D.N.D. Feb. 18, 2015) (entering temporary restraining order to prevent interference with plaintiff's contractual right to develop oil and gas under specific property).

2. Defendants Will Cause Irreparable Harm to Plaintiff Absent a Temporary Restraining Order.

The second *Dataphase* factor considers whether Defendants will cause irreparable harm to Plaintiff if not enjoined. The fact that Plaintiff may assert a valid

damages claim for lost profits caused by Defendants' actions does not preclude issuance of a temporary restraining order. *See, e.g., Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991) (finding the recovery of damages would not "fully compensate Glenwood Bridge for being denied its right to bid on a legal contract"). Not only will Defendants' actions result in significant additional costs to Dakota Access of hundreds of thousands of dollars per day that the Pipeline construction is stalled, Dakota Access's authorization to construct in certain areas is limited temporally by the United States Army Corps of Engineers. Thus, Defendants' actions of delaying the construction will require Dakota Access to pursue additional time-consuming and costly repermitting and reauthorization activities, assuming such permits and authorizations can be extended.

In addition to the irreparable harm in the significant additional costs and permitting issues identified above, Defendants have encouraged their 1,200 supporters to follow the actions of their "Native allies in North Dakota [who] are making tremendous sacrifices as they stand strong to stop the Bakken Pipeline." (Affidavit of Joey Mahmoud, Ex. 1, Text of Ed Fallon Email.) As found by Judge Hovland, the North Dakota protestors carried knives in their demonstrations, chained themselves to fences, threw rocks and damaged vehicles carrying employees and contractors working to construct the Pipeline. (Attachment A, North Dakota Order at 9-10.) Given the significant vandalism that has already occurred in Mahaska County, Iowa, where protestors set fire causing \$3 million dollars in damage to equipment being used to construct the Pipeline, Dakota Access has

established a significant threat of irreparable harm if Defendants are not enjoined. Cf. *Osthus v. Ingredion, Inc.*, No. 16-CV-38-LRR, 2016 WL 4098541, at *5 (N.D. Iowa July 28, 2016) (noting that cases involving threats of physical harm are proper for preliminary injunctive relief).

3. The Balance of Harms favors Issuing the Limited Temporary Restraining Order

The proposed restraining order is limited in time, only until a hearing can be held, and limited in scope. Defendants seek to engage in their rights to protest, but they have no right to interfere with Dakota Access's legal rights, as defendants recognize in their efforts to secure supporters who are willing to be arrested for unlawful actions. Defendants' rights to engage in protests—without physically interfering or actually obstructing Dakota Access's lawful construction activities—will not be impeded by the limited nature of the proposed order. See *Schenck v. Pro-Choice Network Of W. New York*, 519 U.S. 357, 382 (1997) (affirming preliminary injunction requiring fifteen foot buffer zones around abortion clinic doorways and driveways, and explaining: "The ban on 'blocking, impeding, and obstructing access' was therefore insufficient by itself to solve the problem, and the fixed buffer zone was a necessary restriction on defendants' demonstrations."). As Judge Hovland found in the North Dakota injunction, "the temporary restraining order Dakota Access seeks will [not] harm the Defendants in any significant way." (Attachment A, Dkt. 7, North Dakota Order at 10.)

4. Public Interest favors issuing the TRO.

The limited nature of the proposed restraining order furthers public policy by only enjoining Defendants from engaging in unlawful activity while protecting Plaintiff's lawful activities. Certainly public policy encourages protecting companies and their contractors and employees from physical harm or obstruction while engaging in lawful business activities.

III. The Court Should Issue the TRO Ex Parte.

Direct Access has a process server arranged to immediately serve notice on all named Defendants with the Summons, Complaint, Motion for Temporary Restraining Order, Brief in Support of Motion for a Temporary Restraining Order, all supporting Declarations, as well as the any Order of this Court granting the Temporary Restraining Order. Because of Defendants' threats and the short timeframe in which they have planned to undertake the actions Dakota Access seeks to restrain, a temporary restraining order should be issued *ex parte*, and a hearing should be set with respect to whether the restraining order should be converted to a preliminary injunction be scheduled at the convenience of the Court.

IV. CONCLUSION

The balance of equities clearly favor entering the limited temporary restraining order to protect Plaintiff and its contractors and employees and allow them to continue their lawful and rightful construction of the Pipeline without direct interference or obstruction by Defendants.

WHEREFORE, Plaintiff Dakota Access, LLC prays the Court enter a Temporary Ex-Parte Injunction immediately (before August 31, 2016) restraining and enjoining Defendants from physical presence within twenty-five (25) feet of Plaintiff's Easement Property, except in instances when an individual subject to this injunction owns property within twenty-five (25) feet of Easement Property or when an individual is on public property that is within twenty-five (25) feet from Easement Property; from physical contact, abuse, threats or harassment of Dakota Access's or its contractors' employees, agents or representatives; and from Defendants interfering, impeding, or attempting to prevent Dakota Access from constructing its Pipeline on Plaintiff's Easement Property, including actions by Defendants to prevent Dakota Access from accessing its Easement Property (i.e. blocking public roads, etc.), and upon hearing enter a permanent injunction. Plaintiff further requests that the Defendants named in their official capacities be immediately required to disseminate any Order issued by the Court to their respective organizations and membership lists within four (4) hours of personal service of this Order and provide proof of that email and the list of recipients at or before a hearing as set by the Court.

/s/ Samuel E. Jones

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