UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Dakota Access, LLC Plaintiff, v. Dave Archambault II, Jonathan Edwards, Dana Yellow Fat, Valerie Dawn Wolfnecklace, Clifton Verle Hollow, Donald Dennis Strickland, Aaron Gabriel Neyer, and John and Jane Does, Defendants.	Court File No. 1:16-cv-00296 **Defendants Dave Archambault II and Dana Yellow Fat's Memorandum of Law in Support of Motion to Dissolve *Ex Parte* Temporary Restraining Order and In Opposition to Preliminary Injunction**

Introduction

On August 16, 2016, Plaintiff Dakota Access, LLC obtained an *ex parte* temporary restraining order against seven named individuals in connection with the construction of its Dakota Access oil pipeline (the "Pipeline"). These individuals included the Chairman of the Standing Rock Sioux Tribe, Dave Archambault II, and Standing Rock Tribal Councilmember Dana Yellow Fat.

Because "[d]ue process of the law . . . must give [parties] an opportunity to be heard respecting the justice of the judgment sought," *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884), *ex parte* orders are disfavored. "[O]ur entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 438–39 (1974). In order to implement the process parties are constitutionally due, Federal Rule of Civil Procedure 65(b) lays out stringent requirements for temporary restraining orders issued without notice. "The order expires at the time after entry—not to exceed 14 days—that

the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension." Fed. R. Civ. P. 65(b)(2). The parties here extended the order in the hopes that a settlement could be negotiated that would be acceptable to all parties, and due to scheduling conflicts.

Because it does not appear that a mutually acceptable agreement can be reached, the Court should dissolve the Order upon the September 20, 2016 hearing, because good cause does not exist to extend the order as this court lacks subject matter jurisdiction over Chairman Archambault and Councilman Yellow Fat,[1] Dakota Access has not asserted any claims upon which relief can be granted,[2] and Chairman Archambault and Councilman Yellow Fat do not consent to any extension.

Argument

A. Plaintiff Has Obtained a Mere "Obey-The-Law" Restraining Order, Which Is *Per Se* Improper Under the Specificity Requirements of Rule 65(d).

Restraining orders and injunctions are governed by Federal Rule of Civil Procedure 65(d), which requires that "every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." The specificity provisions "are no mere technical requirements." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Rather, the Rule is "designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed, to avoid the possible founding of contempt citations on an order that is too vague to be understood." *Calvin Klein Cosmetics Corp. v. Parfums de*

[1] *See* accompanying Motion to Dismiss of Chairman Dave Archambault II and Councilman Dana Yellow Fat and Memorandum of Law in Support of the same.
[2] *Id.*

Coeur, Ltd., 824 F.2d 665, 669 (8th Cir. 1987); *see also Swift & Co. v. United States*, 196 U.S. 375, 396 (1905) ("We cannot issue a general injunction against all possible breaches of the law."); *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435-436 (1941) ("the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation.").

The Eighth Circuit has long endorsed this prohibition on mere "obey-the-law" injunctions, because "[b]lanket injunctions against general violation of a statute are repugnant to American spirit." *Beatty v. United States*, 191 F.2d 317, 321 (8th Cir. 1951). Such injunctions "should not lightly be either administratively sought or judicially granted." *Id.* Under Rule 65(d), "an injunction which does little or nothing more than order the defendants to obey the law is not specific enough. . . . an injunction cannot be too vague and must give 'fair and precisely drawn notice of what the injunction actually prohibits.'" *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016); *see also Galloway v. Kan. City Landsmen, LLC*, No. 15-1629, 2016 U.S. App. LEXIS 15234, at *10 n.3 (8th Cir. Aug. 19, 2016) ("A further flaw in plaintiffs' statutory argument is that the injunction they obtained by consent—'Defendants are hereby ordered to comply with the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681c(g), at all their currently owned locations'—is invalid. '" (citing *Swift & Co.*, 196 U.S. at 401)); *Jake's, Ltd. v. City of Coates*, 356 F.3d 896, 901, 904 (8th Cir. 2004) ("the decree commanded Jake's to obey local laws. . . . This command to obey the law was overbroad under general equitable principles."); *Daniels v. Woodbury County*, 742 F.2d 1128, 1134 (8th Cir. 1984) ("While we certainly understand the trial court's desire to maintain flexibility, we nevertheless must conclude that an injunction which does little or nothing more than order the defendants

to obey the law is not specific enough. Such an injunction . . . [fails to] provides plaintiff or defendant with a clear idea of what conduct is prohibited.'"); *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1113 (8th Cir. 1969) (finding that a preliminary injunction stating that "[a]ll defendants separately and jointly are restrained from using or disclosing trade secrets and confidential technical information of plaintiff to any person, firm or corporation" is impermissibly vague).

The temporary restraining order in this case is nothing more than an "obey-the-law" injunction. It prohibits the Defendants from "unlawfully interfering in any way" with the construction of the Pipeline. For the majority of protesters who are not First Amendment scholars, the precise line between conduct that is protected by the First Amendment and that which risks violating the temporary restraining order is not clear. The temporary restraining order in this case represents precisely the type of "obey-the-law" order that the Eighth Circuit has repeatedly found *per se* invalid.

B. Plaintiff's Restraining Order Is Impermissibly Overbroad and Vague, and Wrongfully Chills Protected First-Amendment Conduct.

Peaceful marches and demonstrations are entitled to constitutional protection under the rights of free speech and assembly, even if they are intentionally and concededly for the purpose of bringing to light the conduct of a private company with a hope that such will damage that company's economic outlook. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The Order, however, improperly chills Chairman Archambault and Councilman Yellow Fat's ability to engage in precisely this protected exercise of their First Amendment Rights. "Unlawful interference" is not defined clearly enough to preserve the right of Chairman Archambault and Councilman Yellow Fat to lawfully assemble and to peacefully protest, "the hallmark of our democracy," without fear of violating the order. The Order is thus facially overbroad.

"The aim of facial overbreadth analysis is to eliminate the deterrent or chilling effect an overbroad law may have on those contemplating conduct protected by the First Amendment." *Republican Party v. Klobuchar*, 381 F.3d 785, 791 (8th Cir. 2004). "[W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding -- inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . It can only result in a deterrence of speech which the Constitution makes free." *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *cf. New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) ("[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable 'self-censorship.' . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.").

Like statutes and common law rules against libel, "[t]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). In fact, "Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. . . . We believe that these differences require a somewhat more stringent application of general First Amendment

principles in [the context of injunctions]. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994).

As a prior restraint, an injunction must "burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765-66 (1994). In calculating how much speech may be burdened, courts must recognize the existence of a "margin of error," or a buffer zone that guarantees that individuals who do "steer far of the unlawful zone" are not deterred from engaging in clearly protected activity. *Speiser v. Randall*, 357 U.S. 513 525–26 (1958).

Councilman Yellow Fat and Chairman Archambault wish to protest the destruction of their tribal heritage and threats to their drinking water up to the bounds of the First Amendment. However, the restraining order does not make clear precisely where that boundary lies. There is no "buffer zone." The Order, therefore, is likely to prevent them from engaging in protected speech out of caution—contempt of a federal court order is nothing to be taken lightly. Such a showing is enough. "[P]laintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute. Self-censorship can itself constitute injury in fact." *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). "The relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was 'objectively reasonable.' Reasonable chill exists when a plaintiff shows 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution.'" *Id.* (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

The chilling effect is especially heightened in the precise circumstances at issue in this case. The restraining order prohibits "unlawfully interfering in any way with the Plaintiff and its representatives' access." A peaceful protest on public land or roads near

the entrance to the construction site may well "interfere" with the construction workers, but is protected by the First Amendment.

Similarly, Defendants may be misled by the Plaintiff's characterization of their protests. The New York Times reported recently that "[t]he pipeline company said that it temporarily stopped work here this month while 'law enforcement works to contain *the unlawful protests*.'"[3] Likewise, Morton County Sheriff Kirchmeier recently told reporters that the entire demonstration had become "an unlawful protest."[4] It would not be at all surprising for Defendants seeking to engage in peaceful, constitutionally protected protest near the entrance to the construction site to rely on these statements and abstain. In these circumstances, there is an unacceptably high likelihood this Order will chill Defendants from engaging in protected First Amendment Speech.

During the pendency of this injunction, "each passing day may constitute a separate and cognizable infringement of the First Amendment." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994). Defendants Archambault and Yellow Fat agree with the Court that any violence committed during the course of the protests is to be condemned. To that end, Chairman Archambault has spent much of his time encouraging peaceful protest at the camps.[5] He is exactly who the Plaintiff should want able to speak and be present at the public protest sites without fear of contempt proceedings.

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[3] Jack Healy, *Occupying the Prairie: Tensions Rise as Tribes Move to Block a Pipeline*, NYTIMES (Aug. 23, 2016), *available at* http://www.nytimes.com/2016/08/24/us/occupying-the-prairie-tensions-rise-as-tribes-move-to-block-a-pipeline.html.

[4] *Id.*; Anthony Humes, *Construction on Dakota Access Pipeline Halted Due to Safety Concerns*, KFYRTV (August 17, 2016, updated September 6, 2016), *available at* http://www.kfyrtv.com/content/news/Construction-on-Dakota-Access-Pipeline-halted-in-the-interest-of-safety-390495412.html.

[5] For example, on August 16, Chairman Archambault issued a press release saying "protests regarding Dakota Access pipeline must be peaceful. There is no place for threats, violence, or criminal activity. This is simply not our way. So, the Tribe will do all

C. Even Absent First Amendment Concerns, Plaintiff is Not Entitled to a Restraining Order Because the Claims Will Not Succeed on the Merits, There Will Be No Irreparable Harm, and Such an Order Is Not In the Public Interest.

Even if taken as true, the Motion and the supporting declaration do not entitle Plaintiff Dakota Access to the Order this Court granted them. *Dataphase Sys., Inc. v. C L Sys., Inc.* prescribed the factors a court should consider prior to the issuance of an injunction: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). Here, each of the *Dataphase* factors weigh in favor of Chairman Archambault and Councilman Yellow Fat. Viewed in their totality, the factors thus cannot not weigh in favor of a restraining order.

The allegations against Chairman Archambault and against Councilman Yellow Fat do not support a "threat of irreparable" injury to Dakota Access. The moving party must show a significant risk that harm will occur—"[t]he 'mere possibility' that harm may occur before trial on the merits is not enough." *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 912 (D.N.D. 2013). The absence of such a showing is sufficient grounds to deny injunctive relief. *Id.* In the Court's Order temporarily restraining Defendants, the Court found Dakota Access would suffer two irreparable harms: the stripping of Dakota Access' lawful right to construct the Pipeline, and the threat of physical harm and the use of force of violence. Neither can support the restraining order.

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it can to see that participants comply with the law and maintain the peace." Standing Rock Sioux Tribe, *Statement of Dave Archambault II, Chairman of the Standing Rock Sioux Tribe*, FACEBOOK (Aug. 16, 2016), *available at* https://www.facebook.com/permalink.php?story_fbid=1336537363041197&id=402298239798452.

Dakota Access does not currently have a legal right to continue with construction of the Pipeline on Army Corps of Engineers land bordering and under Lake Oahe. On September 9, 2016, the United States Department of Justice, Department of the Army and Department of the Interior issued a joint statement revoking authorization to construct the Pipeline on that land pending reconsideration under the National Environmental Policy Act (NEPA) or other federal laws. The agencies also requested that Dakota Access cease all construction activity within twenty miles of Lake Oahe.[6] Because there is no right to do so, Defendants cannot "wrongfully strip Dakota Access of its right to engage in lawful construction of the Pipeline." (Order Granting Temporary Restraining Order at 9).

The other irreparable harm that the Court identified stemmed from "dangerous and unlawful behaviors which could lead to physical harm, including protestors throwing rocks and bottles." *Id.* But neither Plaintiff's Complaint nor the affidavit of Paul Olsen allege or detail any sort of violence whatsoever on the part of Chairman Archambault or Councilman Yellow Fat. Indeed, the affidavit does not mention Councilman Yellow Fat at all. Dakota Access is not entitled to a restraining order against Chairman Archambault and Councilman Yellow Fat based on irreparable harm potentially caused by the unlawful intentional acts of third parties. The first prong of *Dataphase* therefore weighs against the issuance of a restraining order.

As there is no threat of irreparable harm to the movant, it cannot outweigh the injury that the restraining order inflicts on Chairman Archambault and Councilman Yellow Fat. The chilling effect the order imposes on Defendants' First Amendment

[6] Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), *available at* https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing.

rights is substantial, as detailed *supra*. Thus the second *Dataphase* factor also undermines the case for a restraining order.

Third, there is no likelihood they will prevail on the merits. Plaintiff's claims against these Defendants fail to meet the $75,000 amount in controversy to create diversity jurisdiction.[7] This Court should dismiss all claims against Chairman Archambault and Councilman Yellow Fat for lack of subject matter jurisdiction under Rule 12(b)(1).

A noted above, Dakota Access does not currently possess a legal right to construct the Pipeline on Army Corps land adjacent to or under Lake Oahe.[8] Thus it will be unable to obtain a declaratory judgment in its favor.[9] Likewise, Dakota Access' claim of civil trespass fails even to allege wrongdoing by Chairman Archambault or Councilman Yellow Fat; they are not included in the Count.[10] Without any underlying cause of action against either Chairman Archambault or Councilman Yellow Fat, there is nothing for an injunction to remedy. Dakota Access will not prevail on the merits.

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[7] *See* accompanying Motion to Dismiss of Chairman Dave Archambault II and Councilman Dana Yellow Fat and the Memorandum of Law in Support of the same.
[8] Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), *available at* https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing.
[9] *See* accompanying Motion to Dismiss of Chairman Dave Archambault II and Councilman Dana Yellow Fat and the Memorandum of Law in Support of the same.
[10] *Id.*

Conclusion

There is a strong public interest in preserving the right to peaceful protest under the First Amendment. See, e.g., *Phelps-Roper v. Koster*, 713 F.3d 942, 947 (8th Cir. 2013) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."). An "obey-the-law" restraining order is not sufficiently descriptive to protect the First Amendment interests of the Chairman and the Councilman. It thus fails the Supreme Courts admonition that "the challenged provisions of the injunction [must] burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765-66 (1994). The *Dataphase* factors weigh heavily in favor of Chairman Archambault and Councilman Yellow Fat. The temporary restraining order against them should be dissolved.

For these reasons, Defendants Archambault and Yellow Fat respectfully request that the Court dissolve the ex parte temporary restraining order and deny the preliminary injunction.

Dated: September 15, 2016

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