**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NORTH DAKOTA**

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| EDWARD "SULLY" DANKS, SR., and GEORGIANNA DANKS, as Land Owners<br><br>Plaintiffs,<br><br>v.<br><br>SLAWSON EXPLORATION COMPANY, INC., and WHITE BUTTE OIL OPERATIONS, LLC,<br><br>Defendants. | ) | Case No. 1:18-cv-186-CSM |

**DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Defendants Slawson Exploration Company, Inc. ("Slawson") and White Butte Oil Operations, LLC ("White Butte," and collectively with Slawson, "Defendants"), by and through their undersigned counsel, hereby submit this Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(1), and respectfully request the Court issue an Order dismissing Plaintiffs Edward "Sully" Danks, Sr. and Georgianna Danks' (collectively, "Plaintiffs") Second Amended Complaint [Dkt. No. 24], for lack of subject matter jurisdiction. Alternatively, Defendants move for summary judgment, pursuant to Fed. R. Civ. P. 56, because Defendants have adduced no evidence of damages, which is an element of any claim they seek to assert. The only evidence in the record is Defendants' unrebutted expert report confirming that all soils impacted by the September 20, 2016 release were removed, and the small impacted area was successfully remediated. Plaintiffs have also been unable or unwilling to provide details or documentation of any claimed damages in discovery.

**STATEMENT OF UNCONTESTED MATERIAL FACTS, PURSUANT TO D.N.D. Civ. L. R. 7.1(A)(2)**

1. Plaintiffs initiated this suit against Defendants (first in Tribal Court of the Three Affiliated Tribes (the "Tribal Court") and now in this Court) under a 2010 Surface Damage, Access and Easement Agreement (the "2010 Agreement") for damages allegedly incurred in connection with a small release of oil that occurred and was remediated in 2016. *See* Compl. [Dkt. No. 1].

2. After being rebuked by the Tribal Court, which concluded that the 2010 Agreement had been replaced and superseded by the Plaintiffs' and Defendants' October 2, 2012 Surface Use and Damage Agreement (the "2012 Agreement"), wherein the parties agreed to a forum selection clause that provided for exclusive jurisdiction in the state and federal courts of North Dakota, Plaintiffs renewed their contract claim in this Court. *See* Tribal Court Order [Dkt. No. 9-1].

3. Because the lone assertion in Plaintiffs' Complaint—namely, an alleged breach of the 2010 Agreement—was untenable as a matter of law, Defendants moved to dismiss this action. *See* Motion to Dismiss [Dkt. No. 9].

4. In its Order dated October 16, 2019 [Dkt. No. 18], the Court agreed that the "plaintiffs released the 2010 Agreement and that it cannot be the subject of a claim for breach of contract." Order at 4.

5. At the same time, the Court determined that, if proven, the allegations of a release resulting in property damage, might give rise to another claim. *Id*. The Court therefore granted Plaintiffs leave to amend and expressly identify a viable legal theory and claim. *Id*.

6. Plaintiffs failed to do so. Instead, the Amended Complaint dated November 5, 2019 [Dkt. No. 19] merely removed the prior references to the 2010 Agreement. It did not specify whether Plaintiffs' claims arose in contract, tort, or by statute; and it failed to explain the basis of this Court's purported jurisdiction. *Id*.

7. Accordingly, Defendants' sought a more definite statement arguing, *inter alia*, that Plaintiffs' Amended Complaint failed to articulate a viable basis for this Court to exercise subject matter jurisdiction. [Dkt. No. 20].

8. Again, the Court agreed with Defendants and Ordered Plaintiff to provide a more definite statement in the form of a Second Amended Complaint. *See* January 22, 2020 Order [Dkt No. 23]. The Court required Plaintiffs to plead their claims in separate counts, to identify whether the claims were based in statute, contract, or common law, and to specify the basis for federal court jurisdiction. *Id*.

9. The subsequent operative Second Amended Complaint makes only a conclusory statement as to subject matter jurisdiction:

> The Court can take jurisdiction over this matter pursuant to N.D.C.C. ch. 38-11.1, et seq., 28 U.S. Code § 1652, and 33 U.S.C. § 2702 (Oil Pollution Act, OPA). The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S. Code § 1331. The district courts shall have jurisdiction pursuant to 28 U.S. Code § 1331, because this cause presents a federal question. Defendants have minimal contacts within the State and the Court can assume jurisdiction under International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Second Amended Compl. [Dkt. No. 24] at 1-2.

10. The Second Amended Complaint then purports to identify four "counts." The first claim alleges a North Dakota state law claim for breach of "NDCC ch. 38-11.1." *Id*. at 3.

11. The second count alleges diversity jurisdiction (*id.* at 3), pursuant to 28 U.S. C. § 1392 (which is not the diversity jurisdiction statute at all), without stating an actual claim for relief. *Id*.

12. Next, Plaintiffs again assert a state law claim, pursuant to "NDCC ch. 38-11.1." Confusingly, however, Plaintiffs suggest that the state statue is "enforceable through" 28 U.S.C. § 1652.[1] Plaintiffs also refer to the Oil Pollution Act ("OPA" or the "Act"), and state that "for the time being, Plaintiffs arrived at damage dollar amount according to the standard applied in 33 U.S.C. § 2702." Second Amended Compl. at 3-4.

13. Finally, Plaintiffs make yet another reference to NDCC ch. 38-11.1 in their fourth count, which appears to otherwise assert a common law claim for trespass or nuisance. *Id*. at 4.

14. While Defendants maintain that Plaintiffs' Second Amended Complaint did not cure the issues they and the Court had identified, and that there still is no clearly stated claims or properly identified basis for jurisdiction, Defendants were mindful of the Court's prior holding that, if proven, the allegations of a release resulting in property damage, might give rise to a common law claim. [Dkt. No. 18]. Accordingly, Defendants answered the Second Amended Complaint. *See* Answer [Dkt. No. 25].

15. Since the Scheduling Conference held September 8, 2020, Plaintiffs have not actively prosecuted or participated in this litigation. *See* Exhibit 1, Declaration of Jeffrey Lippa ("Lippa Dec.") at 3.

[1] As explained in more detail below, 28 U.S.C. § 1652 directs this Court, when sitting in diversity, to accept state court rulings interpreting state law. It is not an independent basis for subject matter jurisdiction.

16. For example, despite suggesting in earlier filings that Plaintiffs would retain "an independent consultant to estimate or assess the damages" [Dkt. No. 21], Plaintiffs failed to designate any expert witness by the December 15, 2020 deadline. Ex. 1, Lippa Dec. at 5.

17. Defendants nevertheless timely designated their expert report, in which a registered professional geologist examined the site contemporaneously with the spill, and observed that the release of "[a]pproximately three (3) barrels of fluids consisting of petroleum hydrocarbons and water sprayed from the backside of the Panzer 2-20MLH well, resulting in an area of impact approximately 50 feet offsite across an adjacent field (Figure 2). [Defendants] responded to the release by mowing the impacted off-site vegetation, collecting it, and disposing of it offsite." Exhibit 2, Expert Report of John D. Peterson ("Peterson Report").

18. Defendants' expert opines that any soils impacted by the September 20, 2016 release were removed and the small impacted area was successfully remediated. *Id*.

19. Moreover, Plaintiffs ignored their obligation to respond to written discovery served by Defendants on January 27, 2021. Ex. 1, Lippa Dec. at 6-8; *see also* Exhibit 3, Defendants' First Set of Requests for Admissions, Interrogatories, and Requests for Production of Document (the "Discovery Requests").

20. Plaintiffs failed to timely serve responses within 30 days; indeed, no responses have ever been served. Ex. 1, Lippa Dec. at 6-8.

## ARGUMENT

### I. Dismissal is Appropriate, Pursuant to Rule 12(b)(1), Because Plaintiffs Have Repeatedly Failed to Articulate a Viable Basis for Federal Court Jurisdiction

It is well-settled that lack of subject matter jurisdiction cannot be waived. It may be raised at any time by a party to an action, or by the court *sua sponte*. *See, e.g., Bueford v.*

*Resolution Trust Corp*., 991 F.2d 481, 485 (8th Cir. 1993), *citing* Fed.R.Civ.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Despite numerous opportunities to do so, Plaintiffs have failed to establish a viable basis for subject matter jurisdiction in this Court.

As set forth above, Plaintiffs allege only that:

> The Court can take jurisdiction over this matter pursuant to N.D.C.C. ch. 38-11.1, et seq., 28 U.S. Code § 1652, and 33 U.S.C. § 2702 (Oil Pollution Act, OPA). The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S. Code § 1331. The district courts shall have jurisdiction pursuant to 28 U.S. Code § 1331, because this cause presents a federal question. Defendants have minimal contacts within the State and the Court can assume jurisdiction under *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

Second Amended Compl. [Dkt. No. 24] at 1-2.

Plaintiffs' conclusory assertions of jurisdiction do not withstand scrutiny, and dismissal, pursuant to Fed. R. Civ. P. 12(b)(1), is appropriate.

As an initial matter, Plaintiffs' suggestion that this Court has subject matter jurisdiction pursuant to a state statute—N.D.C.C. § 38-11.1-01 *et seq.*—is specious. The North Dakota statute was created "to protect the public welfare of North Dakota," by requiring mineral developers to pay damages to surface owner in certain circumstances where the surface owner has sustained losses "caused by drilling operations." N.D.C.C. § 38-11.1-01; N.D.C.C. § 38-11.1-04. Nothing in the statutory scheme provides for federal court jurisdiction. Indeed, even if it wanted to, the North Dakota legislature is not empowered to create federal subject matter jurisdiction. *See, e.g, Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Congress decides what cases the federal courts have jurisdiction to consider"); *see also Kontrick v. Ryan*, 540 U.S. 443, 444

(2004), *citing* U.S. Const., Art. III, § 1 ("Only Congress may determine a lower federal court's subject-matter jurisdiction").

The five additional allegations of jurisdiction in the Second Amended Complaint are equally flawed.

***First***, Plaintiffs' reliance on 28 U.S.C § 1652 is misplaced. That statute states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." The so-called Rules of Decision Act does not provide an independent basis for subject matter jurisdiction, it merely directs that a federal court exercising diversity jurisdiction must follow a state supreme court's interpretation of that state's own law, for example. *See, e.g., Dairy Farmers of America, Inc. v. Bassett & Walker Intern., Inc.*, 702 F.3d 472, 475 (8th Cir. 2012) (28 U.S.C § 1652 directs federal court "to follow the Missouri Supreme Court's interpretation of Missouri law.").

***Second*,** setting aside for the moment the fact that the OPA, 33 U.S.C. § 2702 empowers the Environmental Protection Agency—not Plaintiffs—to pursue the enumerated administrative penalties, [2] Plaintiffs' attempt to invoke the OPA as a basis for subject matter jurisdiction in this case is doubly flawed. For one thing, there is no record evidence supporting Plaintiffs' naked assertion the small release at issue impacted *any water at all*. To the contrary, Defendants' expert report—based on its on-site observations in 2016—establishes that the release was limited to "an

[2] Plaintiffs prior filings concede they have no idea what their claimed damages are, and instead appear to be inappropriately using the federal civil penalty remedy for discharges into navigable waters merely as a proxy to somehow measure the damages they otherwise concede they cannot quantify. Second Amended Compl. at 4 ("for the time being, Plaintiffs arrived at damage dollar amount according to the standard applied [by the government in enforcing] 33 U.S.C. § 2702").

area of impact approximately 50 feet offsite across an adjacent field." Ex. 2, Expert Report of John D. Peterson. The report provides a map showing the impacted area; it does not implicate any water—navigable or otherwise. *Id*. at Figure 2. For another, even assuming the Act allows private parties to recover damages, its application is limited to contamination of "navigable waters or adjoining shorelines" resulting from oil spills. *See* [Dkt. No. 23], *citing* 33 U.S.C. § 2702. The OPA defines "navigable waters" to be the waters of the United States, including the territorial sea. 33 U.S.C. § 2701 (21). Even if the release somehow impacted groundwater or, as Plaintiff insists, a creek that eventually "flows into the Missouri River, or Lake Sakakawea, which are both navigable water ways" (Second Amended Compl [Dkt. No. 24] at 2), that is too attenuated, as a matter of law, for the OPA to apply. *See, e.g., Chevron U.S.A. Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 816 (D. Md. 2015), *citing Rice v. Harken Exploration Co*., 250 F.3d 264, 270 (5th Cir. 2001) (holding that "ground waters are not protected waters" under the Act); and *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 963, 965 (7th Cir. 1994) ("just because [it] may be hydrologically connected with surface waters," and even though it may eventually reach streams, lakes, and oceans," it is not regulated" under the Act).[3]

***Third*,** while Plaintiffs' statement that 28 U.S.C. § 1331 generally provides district courts with jurisdiction over federal questions is accurate, Plaintiffs fail to identify any such federal

[3] It is also noteworthy that Plaintiff failed to respond to the following written discovery: "**REQUEST FOR ADMISSION NO. 5:** Admit that there are no navigable waters or adjoining shorelines on Plaintiffs' property where the spill is alleged to have occurred." Ex. 3. The Court can and should, therefore, conclude the lack of navigable water has been admitted and conclusively established. *See, e.g., Quasius v. Schwan Food Co.*, 596 F.3d 947, 950–51 (8th Cir. 2010).

question here. The only federal question identified is based on the OPA, which—for the reasons set forth above—is untenable.[4]

***Fourth*****,** *International Shoe* sets forth the standard for personal jurisdiction (which is not disputed). 326 U.S. 310 (1945). The case is not a basis for subject matter jurisdiction in this case.

***Fifth and finally***, elsewhere in their Second Amended Complaint, Plaintiffs appear to suggest that diversity jurisdiction also exists, pursuant to 28 U.S.C. § 1392 (a)(1). Second Amended Compl. at 3. Again, Plaintiffs are simply wrong. Section 1392 is not the diversity statute at all. And even under 28 U.S.C. § 1332, diversity of citizenship has not been established here, where there has been a wholesale failure to adduce any evidence of damages to meet the amount in controversy threshold. The only record evidence related to damages is Defendants' expert report opining that the small release "has been remediated and no impacted soil remains..." Ex. 2, Peterson Report.

But more than that, Plaintiffs have failed to respond to written discovery aimed at identifying Plaintiffs' claimed damages. That discovery included the following requests:

> **REQUEST FOR ADMISSION NO. 1:** Admit that the **YOU** have sustained no damages as a result of the oil spill on the surface of Plaintiffs' property described in the **COMPLAINT**.
>
> **REQUEST FOR ADMISSION NO. 2:** Admit that the **YOU** have sustained less than $75,000 in damages as a result of the oil spill on the surface of Plaintiffs' property described in the **COMPLAINT**.
>
> **INTERROGATORY NO. 11:** Provide a full and detailed description of **ALL** amounts which **YOU** are claiming as damages in this action, including, without

[4] Plaintiff also failed to respond to the following written discovery: "**REQUEST FOR ADMISSION NO. 3:** Admit that Defendants have not violated any statute." Ex. 3.

> limitation, actual damages, non-pecuniary losses (including pain and suffering), statutory damages and punitive damages, the amounts and methods of computation for each specific element of damages set forth above and **ANY** others which **YOU** are claiming, the total amount of financial losses and expenses **YOU** are claiming, and the identity of each and every **DOCUMENT** or other evidentiary material upon which **YOUR** computations of **ALL** amounts **YOU** are claiming as damages in this action are based. Also include in **YOUR** answer the identification of every **DOCUMENT** or other evidentiary material upon which **YOUR** computations of **ALL** amounts **YOU** are claiming as damages in this action are based.
>
> **REQUEST FOR DOCUMENTS NO 8:** Produce **ALL DOCUMENTS** related to your claim for money damages in this matter.

Ex. 3, Discovery Requests.

Rule 36 provides that a request for admission is "admitted" unless the party serves a written answer or objection within 30 days. Fed. R. Civ. P 36(a)(3). When a matter is admitted, it is "conclusively established" for purposes of the action, "unless the court, on motion, permits the admission to be withdrawn or amended." *Id*. at 36(b). Similar—if not more severe—sanctions are warranted under Fed. R. Civ. P. 37, for Plaintiffs total failure to respond to interrogatories. *See, e.g., Laclede Gas Co. v. G. W. Warnecke Corp*., 604 F.2d 561, 565 (8th Cir. 1979) (sanctions include dismissal). And Plaintiffs' failure to respond to requests for production means they cannot adduce new documentary evidence of damages at this point, in response to this Motion, for example. *See, e.g.,* Fed. R. Civ. P. 37(c) (party failing to produce documents is not allowed to use that information on a motion). In light of the clear and total failure to participate in discovery, Plaintiffs cannot establish the amount in controversy required for this Court to exercise diversity jurisdiction.

Because subject matter jurisdiction is lacking, the Court should dismiss Plaintiffs' Second Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(1).

## II. Summary Judgment is Warranted Because Plaintiffs Have Suffered No Damages.

Even if the Court believes jurisdiction is proper, summary judgment is warranted based on Plaintiffs' failure to adduce any evidence of its claimed damages.

### A. Legal Standards

Summary judgment is appropriate when there is no genuine issue of material fact. *See, e.g., Rayburn v. Scull Construction Service, Inc*., 2017 WL 8682355, at *1 (D.N.D. 2017). While summary judgment can be characterized as an extreme remedy, it promotes judicial economy by preventing trial when no genuine issue of fact remains. *Id*.

"[T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*, "[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. *Id*. quoting *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988). It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. *Id*. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. *Id*. If the respondent fails to carry that burden, summary judgment should be granted. *Id*.

Importantly, if facts that are admitted under Rule 36 are "dispositive" of the case, then it is proper for the district court to grant summary judgment. *Rayburn*, 2017 WL 8682355, *citing Moosman v. Joseph P. Blitz, Inc.,* 358 F.2d 686, 688 (2d Cir. 1966).

### B. Plaintiffs' Cannot Prove the Required Element of Damages.

While it remains difficult to discern exactly what claims are being asserted against Defendants, it is axiomatic that damages are an essential element of any claim. *See, e.g.,* N.D.C.C. § 38-11.1-04 (providing for an award of a sum of money "equal to the amount of damage"); *see also Kuntz v. Leiss,* 952 N.W.2d 35, 36–37 (N.D. 2020), citing *Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 55 (Ky. 2007) (stating that "in intentional trespass, in order to recover more than nominal damages, a property owner must prove actual injury"). As explained above, Plaintiffs cannot prove damages here for at least three reasons.

***First*,** Plaintiffs' Second Amended Complaint is devoid of an articulation of damages, let alone evidence. At most, Plaintiffs suggest that they are approximating their damages based on what the EPA might collect in a civil enforcement action under the OPA. Second Amended Compl. at 4; *see also* fn 2 *supra*. This type of unsupported assertion of damages is insufficient to survive summary judgment.

***Second*,** the uncontroverted evidence in the record establishes that the 2016 release resulted in no damages and was successfully remediated. Ex. 2, Peterson Report (any soils impacted by the September 20, 2016 release were removed and the small impacted area was successfully remediated).

***Third*,** Plaintiffs have elected not to participate in discovery requesting information regarding their damages. *See* pp 9-10 *supra*. They have failed to respond, for example, to the following:

> **REQUEST FOR ADMISSION NO. 1:** Admit that the **YOU** have sustained no damages as a result of the oil spill on the surface of Plaintiffs' property described in the **COMPLAINT**.

Ex. 3, Discovery Requests.

Accordingly, by operation of law, Plaintiffs have admitted their lack of damages. Fed. R. Civ. P. 36. Relatedly, Plaintiffs have come forward with no evidence to present this Court, nor are they entitled to present any evidence at this point due to their total failure to respond to discovery, that would rebut the argument set forth herein that Plaintiffs have not suffered the damages necessary to sustain *any* claim for relief, regardless of theory.

## CONCLUSION

Plaintiffs' action, premised upon an unsubstantiated allegation of damages arising out of a 2016 spill, fails to establish subject matter jurisdiction in this Court over entirely state-law claims. Moreover, any suggestion of damages in the Second Amended Complaint is belied by the only evidence in the record, making summary judgment appropriate if subject matter jurisdiction exists.

Respectfully submitted this 4th day of April, 2021.

*s/ Jeffrey M. Lippa*
Robert Thompson III (*pro hac pending*)
Jeffrey M. Lippa
**GREENBERG TRAURIG, LLP**
1144 15th Street, Suite 3300
Denver, CO 80202
Telephone: 303-572-6500
Facsimile: 303-572-6540
Email: thompsonIII@gtlaw.com
lippaj@gtlaw.com

**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of April, 2021, a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** was served upon the following counsel of record:

Donald G. Bruce
**BRUCE LAW OFFICE**
P.O. Box 674
Belcourt, ND 58316
Telephone: (701) 477-8755
Email: michif0@yahoo.com

**ATTORNEYS FOR PLAINTIFFS**

*s/ Jeffrey M. Lippa*
Jeffrey M. Lippa