IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA (WESTERN)

JOANN CHASE ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ANDEAVOR LOGISTICS, L.P., ANDEAVOR, F/K/A TESORO CORPORATION, TESORO LOGISTICS, GP, LLC, TESORO COMPANIES, INC., and TESORO HIGH PLAINS PIPELINE COMPANY, LLC.	§	**Civ. No. 1:19-CV-00143-DLH-CRH**
	§	
Defendants.	§	

DEFENDANTS' AMENDED MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

Other Authorities

25 C.F.R.

Defendants, named as Andeavor Logistics L.P., Andeavor, f/k/a Tesoro Corporation, Tesoro Logistics, GP, LLC, Tesoro Companies, Inc., and Tesoro High Plains Pipeline Company, LLC (collectively referred to herein as "**Defendants**"), refile this Amended Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted (*see* Doc. 73) ("**Motion**")[1] directed at Plaintiffs' First Amended Class Action Complaint (Doc. 28) ("**Amended Complaint**" or "**FAC**"), filed January 25, 2019, which purports to add additional "Counts," but each is also subject to dismissal. Specifically, Plaintiffs' Amended Complaint purports to assert "Counts" for federal common law trespass (Count I), breach of easement agreement as to the 1993 Easement (Count II), imposition of a constructive trust based on unjust enrichment (Count III), and punitive damages (Count IV). In addition to failing on other grounds addressed in other concurrently filed briefs, each "Count" fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), as demonstrated herein.

First, Plaintiffs' Amended Complaint seeking relief for federal common law trespass does not state a cognizable claim for relief. Indeed, there is no recognized claim of federal common law trespass to land allotted to individual Indians, as alleged here. Therefore, even if Plaintiffs had asserted some other viable ground for subject matter jurisdiction to exist in this Court (and they have not)[2], Plaintiffs' federal common law trespass claim (and all other purported "Counts" alleged to be dependent upon such federal common law trespass claim[3]) should be dismissed for

[1] Defendants file this Motion concurrently with their Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 44-1), along with Defendants' other concurrently filed motions. Out of an abundance of caution and to avoid any argument that Defendants' additional independent grounds of dismissal should not be considered at the outset of this lawsuit, in the unlikely event that jurisdiction is found to exist, Defendants file this Amended Motion as alternative and additional independent grounds to dismiss Plaintiffs' lawsuit.

[2] *See* Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 74).

[3] *See, e.g.*, *infra* at n. 13.

the additional reasons set forth herein; namely, it fails to state a legally cognizable claim upon which relief can be granted.

Second, Plaintiffs purport to assert, as a separate "Count," a constructive trust on profits during the alleged trespass period, based on alleged unjust enrichment. However, a constructive trust is not an independent cause of action, but rather a remedy, as are punitive damages alleged in Count IV. As remedies, those "Counts" fail along with the federal common law trespass claim. Even the remedy of constructive trust, much less a "cause of action" for constructive trust, is not available here, because Plaintiffs have not alleged fraud or the existence of a pre-existing confidential or fiduciary relationship between the parties—fundamental prerequisites for imposition of the constructive trust remedy.

Finally, Plaintiffs Count II purports to allege a breach of contract claim based on the alleged breach of the 1993 Easement, seeking to enforce a contractual requirement that the parties restore the land upon termination of the right-of-way. This breach claim is fundamentally deficient and fails to state a claim for relief, including because Plaintiffs have not alleged (and cannot allege) that they are parties to the agreement on which they seek to sue and enforce—a fundamental element of a breach of contract claim. Indeed, it is the United States—not Plaintiffs—that is the party to the agreement and, therefore, Plaintiffs lack privity and have no standing or right to assert its breach.

Therefore, Plaintiffs' Amended Complaint, asserting claims for federal common law trespass, including the alleged accompanying remedies of unjust enrichment—imposition of constructive trust and punitive damages, and "breach" of easement, should be dismissed under Rule 12(b)(6). Because Plaintiffs have already amended their Complaint, and their amendments only served to further underscore the need to dismiss this lawsuit for failure to state a claim upon

which relief can be granted, Plaintiffs should not be granted leave to further amend as it would be futile.

In short, Plaintiffs have not asserted any cognizable claim upon which relief can be granted. The original Complaint did not, the Amended Complaint has not, and further amendment cannot.

INTRODUCTION AND BACKGROUND

Plaintiffs, 48 individuals, filed their original Complaint on October 5, 2018 (Doc. 1), to which Defendants' moved to dismiss on various grounds including failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Docs. 17 and 19. On January 25, 2019, Plaintiffs filed an Amended Complaint (Doc. 28), purporting to add additional "Counts" (for breach of easement and punitive damages), which also fail to state a claim upon which relief can be granted, necessitating the timely filing of Defendants' Amended Motion to Dismiss. *See* Docs. 29, 30 (briefing scheduled stipulated by the parties and ordered by the Court), and 43 (Amended Motion to Dismiss). In its Order dated July 10, 2019, wherein the Court in the Western District of Texas granted Defendants' motion to transfer this case to the District of North Dakota, the Court denied Defendants' Amended Motion to Dismiss *without prejudice* to Defendants' refiling of the same, upon transfer of the case to this Court. *See* Doc. 67. Because the Court granted Defendants' motion to transfer, and the Court—at Defendants' request (*see, e.g.*, Doc. 43, at 2-3 n. 2, and Doc. 67)—addressed that motion to transfer prior to addressing any of Defendants' motion to dismiss grounds, the Court in the Western District of Texas never reached or considered Defendants' motion to dismiss grounds. *Id*. Instead, the Court noted that the issues raised in the Amended Motion to Dismiss "are best addressed by the receiving court after the transfer." *Id*. As such, Defendants now refile their Amended Motion to Dismiss here.

All 48 Plaintiffs assert that they are beneficial surface interest owners[4] in one or more of 35 allotted tracts at the Fort Berthold Reservation in North Dakota, over which Defendants' pipeline crosses. Plaintiffs purport to sue individually and on behalf of a putative class of individuals who also hold or have held a beneficial surface interest in land held in trust by the United States within the Fort Berthold Reservation. The Amended Complaint alleges that since expiration of a pipeline easement in 1993 (the "**1993 Easement**"), Defendants' pipeline has been trespassing on Plaintiffs' and the putative class members' individually allotted tracts. FAC ¶ 122.

Plaintiffs' Amended Complaint purports to assert a claim for "violations of the federal common law of trespass on Indian lands," pursuant to 25 U.S.C. § 345 (Actions for Allotment) & 323-328 (General Right-of-Way Act of 1948) and regulations promulgated under the Secretary of the Interior's authority pursuant to the Right-of Way Act. FAC ¶ 64 & Count I, at ¶¶ 121-129. Additionally, purportedly as separate "Counts," Plaintiffs allege (1) that the Court should impose a constructive trust[5] on the "revenues and profits" earned by Defendants "as a result of their trespass," based on "unjust enrichment"[6]; and (2) punitive damages as a result of "Defendants' actions in trespassing" on Plaintiffs' land. FAC, Counts III & IV, at ¶¶ 137-149.

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[4] For ease of reference, this Motion sometimes refers to Plaintiffs as "owners," "landowners," "beneficial owners," and the like. However, ownership is actually vested in the United States. *See e.g., Fredericks v. Mandel*, 650 F.2d 144, 145 (8th Cir. 1981); *see also* FAC ¶ 2-3 (recognizing that the tracts at issue are held in trust by the United States).

[5] Plaintiffs also allege, as part of Count III, "Unjust Enrichment—Imposition of Constructive Trust," that Defendants breached an alleged "duty of good faith and fair dealing," but Defendants owe no such duty to Plaintiffs, nor have Plaintiffs alleged facts supporting a requisite special relationship required for imposition of any such duty. FAC ¶ 144; *see infra* at 14.

[6] Unjust enrichment is an essential element of a constructive trust remedy. *See, e.g., Schroeder v. Buchholz*, 622 N.W.2d 202, 206 (N.D. 2001. Plaintiffs have not, and cannot, assert a claim for unjust enrichment, separate from the request for imposition of a constructive trust during the trespass period. Indeed, the unjust enrichment allegations made in the Amended Complaint fail for the same reason as the overall constructive trust—it is part of a remedy, and not an independent cause of action. *See infra* at 13; *see, e.g., First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148, 154 (N.D. 1985) (affirming that, under North Dakota law, "the equitable ***remedy*** of unjust

But there is no federal common law trespass claim arising under 25 U.S.C. §§ 323-328, 345, or otherwise, as it relates to land allotted to individual Indians, as alleged here. Instead, the gravamen of Plaintiffs' suit is simply a tort claim based on state common law of trespass, not federal common law as alleged. Plaintiffs' separate "Counts," requesting imposition of a constructive trust and punitive damages, are actually remedies, not independent causes of action. And when the Court dismisses the trespass claim (the underlying claim that allegedly forms the basis for the dependent remedy), it must likewise dismiss the alleged accompanying remedies. *Plymouth Cty., Iowa v. Merscorp, Inc*., 774 F.3d 1155, 1159–60 (8th Cir. 2014) (where underlying claim fails, so too must the remedy).

Regardless, even if there had been a legally cognizable underlying claim asserted as a basis for a constructive trust remedy (and there has not been), the constructive trust remedy would still fail for a number of reasons[7], not the least of which is because Plaintiffs have not alleged fraud or the existence of a pre-existing confidential or fiduciary relationship between the parties—fundamental prerequisites for a constructive trust remedy.

Finally, in the Amended Complaint, Plaintiffs purport to add an "alternative" claim for breach of contract.[8] FAC ¶¶ 130-36. Specifically, Plaintiffs allege that "Defendants breached [the 1993] Easement by failing to 'restore the land to its original condition' and to 'reclaim the land'

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enrichment generally rests on the concept of quasi or constructive contract implied by law") (emphasis added). Regardless, Plaintiffs' Amended Complaint does not support unjust enrichment either (even if such a claim existed), because Plaintiffs' own pleading alleges that there is a contract that covers the subject matter of the dispute raised in the unjust enrichment/constructive trust allegations; namely the 1993 Easement, which would need to be enforced, if at all, by the appropriate party thereto (the United States, not Plaintiffs). *See infra* at 15-16; *First Nat. Bank of Belfield*, 367 N.W.2d at 154 (noting unjust enrichment requires "***the absence of an express or implied-in-fact contract***").

[7] *See, e.g., supra* n. 5.

[8] The claim is pled in the alternative to Plaintiffs' purported claim that the 1993 Easement was void *ab initio*.

as required by easement" upon cancellation or termination. *Id*, at ¶¶ 132-134. Plaintiffs' claim is fundamentally deficient and fails to state a claim for relief, including because Plaintiffs have not alleged that they are parties to the agreement allegedly breached. Because they are not. Tellingly, although Plaintiffs reference it throughout their Amended Complaint, they do not attach the agreement that forms the basis of their breach claim. The agreement[9] demonstrates on its face that Plaintiffs are not parties to it—a fundamental element of any breach of contract claim. *See* Doc. 23-2 at Ex. D (copy of 1993 Easement). To the contrary, the United States is the grantor party to the 1993 Easement. *Id*.

ARGUMENT AND AUTHORITIES

A Rule 12(b)(6) motion to dismiss is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Brown v. Mortgage Electronic Registration Sys., Inc*., 738 F.3d 926, 933 n.7, 934 (8th Cir. 2013) (agreeing "with the district court's sound reasoning that the facts pled do not state a cognizable claim" and therefore holding that dismissal pursuant to Rule 12(b)(6) was appropriate). To survive a motion to dismiss, Plaintiffs must present the Court with a complaint containing "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although legal conclusions can provide the framework of a complaint, they must be "supported by factual allegations." *Id.* at 679. A complaint "that offers 'labels and conclusions' or 'a formulaic

[9] Defendants request that, to the extent necessary, the Court take judicial notice of the contract that is the subject of Plaintiffs' Count II breach claim, and which is referenced in the Amended Complaint, but not attached. *See, e.g., Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (affirming that "matters outside of the pleadings may not be considered in deciding a Rule 12 motion to dismiss, [but] documents necessarily embraced by the complaint are not matters outside the pleading" including "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings"). The referenced agreement is already part of the Court's record in connection with the prior motions directed at the original complaint at the docket cite referenced herein.

recitation of the elements of a cause of action will not do.'" *Id.* at 678. "Factual allegations must be enough to raise a right to relief above a speculative level... on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Allegations of fraud must meet the even stricter standards of Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that "[i]n alleging fraud…, a party must state with particularity the circumstances constituting fraud… ." "Under Rule 9(b), a plaintiff must plead 'such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.'" *BJC v. Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007).

Plaintiffs' Amended Complaint must be dismissed, in its entirety, because it fails to state legally cognizable claims upon which relief can be granted.

A. Plaintiffs' Federal Common Law Trespass Claim Fails to State a Claim Upon Which Relief Can be Granted

Even if Plaintiffs had asserted some other viable ground for subject matter jurisdiction to exist in this Court (and they have not), Plaintiffs' alleged claim of "federal common law of trespass on Indian lands" (FAC at ¶ 64 & Count I, ¶¶ 121-129) fails to state a legally cognizable claim upon which relief can be granted. Specifically, for all of the reasons set forth in the concurrently-filed Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction, there is no federal common law trespass claim arising here, including under 25 U.S.C. §§ 323-328 (General Right-of-Way Act), 345 (Action for Allotments), or any regulation promulgated under the authority of the General Right-of-Way Act, as alleged. *See, e.g., U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1275 (8th Cir. 1987) (affirming dismissal of common law trespass claim asserted by member of the Turtle Mountain Band of Chippewa Indians and owner of allotment

held in trust by the United States within the reservation, holding that "trespass action, alleging that the Housing Authority interfered with her use of the property,… does not state a claim as an action for an allotment under 25 U.S.C. § 345"); *Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184, 189 (9th Cir. 1988) (relying on *Kishell* and affirming dismissal of trespass claim asserted by members of the Nez Perce Tribe and owners of allotted land held in trust by the United States on the Nez Perce Indian Reservation against an irrigation district, holding that "section 345, and its companion provision 28 U.S.C. § 1353[10], provide no subject-matter jurisdiction for such a tort claim."); *see also Marek v. Avista Corp.*, No. CV04-493 N EJL, 2006 WL 449259, at *4 (D. Idaho Feb. 23, 2006) (granting motion to dismiss common law trespass claim brought under section 345 and the federal laws governing requirements for granting and renewal of rights-of-way by owners of an allotment upon which an expired transmission and distribution line crossed, holding that "the claim is not based upon a specific protection of federal law but, instead, the law of trespass which is available to any landowner"); Plaintiffs' individual claim of common law trespass on allotted land is not based on any protection of federal law, but instead arises, if at all, under the common law of trespass available to any landowner under state law. *See id.*

To be clear, Plaintiffs bring this lawsuit as individual members of the Three Affiliated Tribes and as it relates to their individual beneficial ownership of surface interests in individually allotted tracts. *See, e.g.,* FAC ¶ 6 ("Plaintiffs are each individual beneficial owners of surface interests in allotted land at the Fort Berthold Reservation, over which Defendants' Pipeline runs."), ¶ 6 (referring to "allotted trust tracts"), ¶¶ 7-54 (asserting that each of the Plaintiffs and putative

[10] 28 U.S.C. § 1353 is the "recodification" of section 25 U.S.C. § 345's jurisdictional provision, and is addressed in the cases discussed herein along with section 345. *See, e.g., Scholder v. United States*, 428 F.2d 1123, 1126 (9th Cir. 1970). It is also cited by Plaintiffs as a basis for federal subject matter jurisdiction in the Amended Complaint. It fails to provide a basis for a federal common law trespass claim here for the same reasons that the section 345 counterpart fails.

class members are individual members who own beneficial interests in individually allotted tracts), ¶ 64 (alleging that the present suit involves "rights of allottees in their trust allotments"), ¶ 70 (distinguishing between land allotted to individual Indians at issue here and tribally owned land), ¶ 79 (distinguishing the individually allotted tracts at issue here from the lands held in trust for the Tribe, and alleging that "consent was not obtained from a majority of the beneficial owners of the individually allotted tracts that the Pipeline crosses"), ¶ 86 (alleging that "the individual allotted interest holders" were not informed that the easements to operate the Pipeline across "Plaintiffs' land" had expired), ¶ 88 (alleging "the individual allottees" were not contacted to initiate negotiations), ¶ 90 (distinguishing between land owned by the Three Affiliated Tribes and "60 acres of land beneficially owned by members of the putative class, including Plaintiffs"), ¶¶ 102-120 (describing the putative class as individual owners of beneficial surface interests in allotted tracts), ¶ 124 (alleging "a continuing trespass upon Plaintiffs' land"), and ¶¶ 117-123 (seeking a constructive trust due to alleged trespass to "Plaintiffs' properties").

It has long been the law that there is no legally cognizable federal common law rights at all as it relates to land allocated to individual Indians, as distinguished from ***tribal*** rights to lands. *Oneida Indian Nation of New York v. County of Oneida ("Oneida I")*, 414 U.S. 661, 676-77 (1974) (expressly affirming the holding in *Taylor v. Anderson*, 234 U.S. 74 (1914) that suits concerning lands allocated to individual Indians, as opposed to tribal rights to land, do not state claims arising under the laws of the United States);*Marek*, 2006 WL 449259, at *4 (individual claim of common law trespass on allotted lands is not based on any protection of federal law); *see also Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343, 1348 (N.D. Cal. 1995) (reiterating Supreme Court decision in *Oneida I* holding "the identities of the parties to an action is a significant factor in determining the federal interest… since the determination of whether federal interest exists

controls the applicability of federal common law…;" requiring the Court look "to whether the party is an Indian tribe or an individual member of the tribe," and holding "actions involving an Indian tribe as a party claiming a possessory right in land arising under federal law should be adjudicated by the federal courts," but "***actions which involve individual members of tribes where the underlying action does not involve an Indian tribe's possessory rights should be adjudicated by state courts***.") (emphasis added) (citing *Oneida I*, 414 U.S. at 676-77; *Chuska Energy Co. v. Mobil Expl. & Producing N. Am., Inc*., 854 F.2d 727, 730 (5th Cir. 1988)).

Indeed, in affirming dismissal ***pursuant to Fed. R. Civ. P. 12(b)(6)*** of federal common law claims asserted by individual Native Americans concerning "lands allocated to individual Indians, not tribal rights to lands," the Eighth Circuit in *Wolfchild v. Redwood Cty*., 824 F.3d 761, 767 (8th Cir.), *cert. denied sub nom., Wolfchild v. Redwood Cty., Minn.*, 137 S. Ct. 447 (2016) specifically recognized and discussed this important distinction. Indeed, the court expressly based its holding dismissing federal common law claims on the distinction between a tribe's aboriginal right of occupancy and lands allocated to individual Indians, finding that the individual Indian allottees there (like Plaintiffs here) had fundamentally misinterpreted *Oneida I* and *II* in believing they as individual Indians had federal common law rights similar to a tribe:

> In the *Oneida* litigation, the Supreme Court addressed the question of whether "an Indian tribe may have a live cause of action for a violation of its possessory rights" to aboriginal land that occurred 175 years earlier. *Oneida II*, 470 U.S. at 229–30, 105 S. Ct. 1245, 84 L. See Cohen's Handbook of Federal Indian Law § 16.03(3)(c) (Nell Jessup Newton ed., 2012) Ed. 2d. The Supreme Court concluded a tribe "could bring a common-law action to vindicate their ***aboriginal*** rights." *Id.* at 236, 105 S. Ct. 1245 (emphasis added). In so holding, the Supreme Court directly distinguished cases regarding "lands allocated to ***individual*** Indians," concluding allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction. *Oneida I*, 414 U.S. at 676–77, 94 S. Ct. 772, 39 L. Ed. 2d (emphasis added). Thus, federal common law claims arise when a ***tribe*** "assert[s] a present right to possession based... on their ***aboriginal*** right of occupancy which was not terminable except by act of the United States." Id. at 677, 94 S. Ct 772.

Wolfchild, 824 F.3d at 767-68 (emphasis in original). The court in *Wolfchild* could not have been more clear in dismissing ***pursuant to Rule 12(b)(6)*** the purported federal common law trespass asserted by individual Indians.

Plaintiffs also incorrectly allege that a federal common law trespass claim arises because the action relates to land originally granted by the United States, and includes "ongoing guarantees and protections" afforded by federal statutes and regulations, specifically the General Right-of-Way Act of 1948, 25 U.S.C §§ 323-328, and regulations promulgated thereunder at Part 169 of Title 25 of the Code of Federal Regulations.[11] FAC ¶ 65. This allegation, added in the Amended Complaint, is equally flawed and facially insufficient to support a federal common law trespass claim under the Supreme Court test articulated in *Oneida I,* and cases interpreting it. Plaintiffs' common law trespass claim does not arise under the General Right-of-Way Act or regulations promulgated under either; it arises, if at all, under state law, not federal common law. Indeed, even where the underlying right to possession of land arises under federal law, "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress. ***Once patent issues,[12] the incidents of***

[11] The General Right-of-Way Act was added to Plaintiffs' jurisdictional allegations in the Amended Complaint supposedly to support a federal common law trespass claim (they do not). FAC at ¶¶ 64-65. The General Right-of-Way Act delegates authority to the Secretary of the Interior to grant rights-of-way. Under the Act, the Secretary is authorized to prescribe all necessary regulations for the purpose of administering the provisions of sections 323 to 328 of title 25. *See generally* 25 U.S.C. §§ 323-328. Those regulations are published at part 169 of title 25 of the Code of Federal Regulations.

[12] Trust allotments are issued by "patent." 25 U.S.C. § 348 (current codification of The Dawes Act) ("Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause **patents to issue** therefor in the name of the allottees, which **patents** shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, **in trust** for the sole use and benefit of the Indian to whom such allotment shall have been made") (emphasis added).

ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for arising under jurisdiction merely to allege that ownership or possession is claimed under [Federal law]." *Oneida I*, 414 U.S. 661, 675 (1974) (citations and internal quotations omitted) (emphasis added); *see also Marek*, 2006 WL 449259, at *2 (rejecting plaintiffs' argument that their claims arose under federal law "because allotments are creatures of federal statute" and "any right-of-ways granted or not sought would have to meet the requirements of federal law," and holding that the distinction described in *Oneida I* hinges on whether the claimed right of possession ***sought to be enforced*** arises from state law or federal law, and for common law trespass, the claim "seeks remedies for the individuals as landowners not based on any grant, treaty or statute of federal origin," but on state law alone).

Therefore, because Plaintiffs here, individual members of a tribe, have not and cannot assert a legally cognizable trespass claim arising under the federal common law, this Court should dismiss Count I, Plaintiffs' federal common law claim for continuing trespass, as well as all other purported "Counts" allegedly dependent upon such federal common law trespass claim; specifically, "Count III" for "unjust enrichment—imposition of constructive trust" and "Count IV" for "punitive damages.[13]

[13] Plaintiffs assert "Counts" for "unjust enrichment – imposition of constructive trust" ("Count III") and "punitive damages" ("Count IV") which Plaintiffs admit are dependent upon their trespass claim. *See* FAC ¶¶ 137-145 (asserting the "unjust enrichment – imposition of constructive trust "Count" and alleging, for example, "[t]here is no justification for Defendants' enrichment and Plaintiffs' impoverishment through Defendants' trespass" and "[t]o prevent Defendants' unjust enrichment, Plaintiffs are entitled to a constructive trust imposed on all benefits gained by Defendants as a result of their trespass, including all costs saved or avoided due to the trespass"), 146-149 (asserting the "punitive damages" claim and alleging, for example, "Defendants' actions in trespassing on Plaintiffs' protected trust land and their efforts to conceal their trespass… were taken willfully, wantonly, and with malice," "Defendants' trespass on Plaintiffs' properties was intentional and was not in good faith," and "[a]s a result of Defendants' conduct, and to deter future trespasses on protected federal trust land, Plaintiffs are entitled to punitive damages.").

B. Constructive Trust and Punitive Damages Are Not Independent Causes of Action; They are Remedies

Plaintiffs' purported cause of action for "unjust enrichment—imposition of constructive" trust likewise fails, as a matter of law, to state a legally cognizable claim upon which relief can be granted. A constructive trust is a remedy, not an independent cause of action. *See McMerty v. Herzog*, 710 F.2d 429, 431 (8th Cir. 1983) (reiterating that, under North Dakota law, a "constructive trust is an equitable remedy") (citing *Weigel v. Rippley*, 283 N.W.2d 123, 129 (N.D. 1979)); *Spagnolia v. Monasky*, 660 N.W.2d 223, 229 (N.D. 2003) (recognizing a "constructive trust is an equitable remedy") (citing *Schroeder v. Buchholz*, 622 N.W.2d 202, 205-206 (N.D. 2001) (affirming a constructive trust is an equitable remedy).

It is also fundamental that punitive damages, alleged in Count IV as being a result of "Defendants' actions in trespassing" on Plaintiffs' land (FAC, ¶¶ 147-148), are likewise a remedy as opposed to independent cause of action. *See Riebe v. Riebe*, 252 N.W.2d 175, 178 (N.D. 1977) (recognizing that, under North Dakota law, "no punitive damages may be allowed unless there are also compensatory damages"); *Stockwell v. Brinton*, 142 N.W. 242 (N.D. 1913) ("Exemplary damages are merely incidents of a cause of action to recover damages for some real or substantial loss, and can never constitute the basis of a cause of action independent of such claims").

Because a constructive trust and punitive damages are remedies as opposed to independent causes of action, the constructive trust and punitive damages remedies must be dismissed along with the underlying cause of action that allegedly forms the basis for the dependent remedy—in this case alleged federal common law of trespass. *Plymouth Cty., Iowa v. Merscorp, Inc.*, 774 F.3d 1155, 1159–60 (8th Cir. 2014) (where underlying claim fails, so too must the remedy).

C. Regardless, a Constructive Trust is Unavailable Here

Regardless, even if there had been a legally cognizable underlying claim asserted as a basis for a constructive trust remedy (and there has not been), the remedy of constructive trust is only available in limited circumstances when plaintiff has established the constructive trust based upon a breach of a pre-existing confidential or fiduciary relationship or fraud. *See McMerty v. Herzog*, 710 F.2d 429, 431 (8th Cir. 1983) (the constructive trust remedy is imposed when property is acquired by fraud or breach of a fiduciary duty) (citing *Weigel v. Rippley*, 283 N.W.2d 123, 127-28 (recognizing that, under North Dakota law, a constructive trust must be based on fraud or breach of a pre-existing confidential or fiduciary relationship, and must be established by clear and convincing evidence)); *Spagnolia*, 660 N.W.2d at 229 (holding that "[a] constructive trust has two essential elements [including] a confidential relationship") (citing *Schroeder*, 622 N.W.2d at 205).

Here, Plaintiffs have not even alleged fraud, or the existence of a pre-existing confidential or fiduciary relationship between the parties. *See, e.g.*, FAC, at ¶¶ 137-149 (asserting Plaintiffs' "Count III" for constructive trust without any allegation of fraud or a pre-existing confidential or fiduciary relationship); *see also* FED. R. CIV. P. 9(b); *BJC v. Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007) (Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby).

Within the constructive trust "Count," the Amended Complaint also purports to allege breach of a "duty of good faith and fair dealing," but such a duty does not arise here, and Plaintiffs' have not alleged any facts to suggest that it does. FAC ¶ 144; *Dalan v. Paracelsus Healthcare Corp.*, 640 N.W.2d 726 (N.D. 2002) (recognizing that, under North Dakota law, the doctrine of an implied covenant of good faith and fair dealing has only been applied to insurance contracts).

Accordingly, Plaintiffs' allegations do not, and cannot, entitle them to "unjust enrichment—imposition of constructive trust" and, therefore, the "Count" cannot stand. Plaintiffs Count III for "unjust enrichment—imposition of constructive trust" fails to state a claim upon which relief can be granted, and should be dismissed.

D. Plaintiffs' Breach of Easement Claim is Fatally Deficient for Lack of Privity

Plaintiffs' Count II breach of easement claim is fundamentally deficient in that Plaintiffs have not even alleged that they are a party[14] to the agreement upon which they seek to sue, a fundamental prerequisite of any breach of contract claim. *See, e.g., Spagnolia v. Monasky*, 660 N.W.2d 223, 229 (N.D. 2003) (reiterating that, under North Dakota law, "***parties to a contract*** have a 'remedy at law for enforcement of the contract or damages flowing from any contractual breach.'") (emphasis added). Because they are not. Because Plaintiffs are not parties to the agreement upon which they purport to sue, and have not even alleged that they are, they have no claim for relief under it. *Id*.

To be clear, the United States (by and through the BIA) is the party to the agreement, and therefore the proper party to enforce its provisions. The regulations promulgated under the Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, make clear and confirm that the BIA controls any investigation of potential right-of-way violations, and the BIA accordingly makes the decision

[14] Plaintiffs have likewise not pled that they are third party beneficiaries under the agreement upon which they attempt to sue. FAC, ¶¶ 130-36. Because they are not. Indeed, based on the express language on the face of the agreement that is the subject of Plaintiffs' claim of breach, there is no clear and unequivocal expression of the contracting parties' intent to create a third party beneficiary, *i.e.*, an intent to grant Plaintiffs the right to be the claimant in the event of a breach. *See, e.g.*, N.D.C.C. § 9-02-04 (requiring a contract to be made ***expressly*** for the benefit of a third person); *First Fed. Sav. & Loan Ass'n of Bismarck v. Compass Investments, Inc.*, 342 N.W.2d 214, 218 (N.D. 1983) (even "the mention of one's name in an agreement does not give rise to a right to sue for enforcement of the agreement where that person is only incidentally benefited); *see also* Doc. 23-2 at Ex. D (copy of 1993 Easement, which does not even mention any of the Plaintiffs by name).

whether it will pursue action. Moreover, the regulations provide that the responsibility for investigating compliance with rights-of-way is expressly delegated by Congress to the BIA, not individual Indian landowners. 25 C.F.R. § 169.402 (prescribing investigative responsibilities only to the BIA and the tribe). Of course, this is expected and imminently reasonable, since it is the United States who is the party to the right-of-way easement, not the individual Indian landowners. If an individual Indian landowner suspects a right-of-way has been violated, their recourse is to notify the BIA, which will "initiate an appropriate investigation." 25 C.F.R. § 169.402(a)(1). The regulations allow the Indian landowners to negotiate remedies with respect to right-of-way violations, 25 C.F.R. § 169.403(b), but ultimately it is up to the BIA to decide what to do about a violation of a right-of-way. *See* 25 C.F.R. § 169.404. In the case of the situation being alleged by Plaintiffs—a holdover as to Indian trust land after expiration of a right-of-way—the individual Indian landowners are not permitted to pursue the action or remedies. 25 C.F.R. § 169.410; *see* Defendants' Amended Motion to Dismiss for Failure to Exhaust Administrative Remedies (Doc. 77), filed concurrently herewith, for a full discussion. Instead, the United States, the grantor party under the right-of-way easement, has the sole authority, including based on input from the Indian landowners, to decide whether to treat such matters as a trespass, and if so, what actions, if any, to take and what remedies, if any, to seek. *Id*.

For the reason that the Plaintiffs have not alleged they are parties to the agreement on which they seek to sue (nor are they), Plaintiffs' Count II, breach of easement, fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), and must be dismissed.

CONCLUSION

For each of the reasons set forth herein, pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court should dismiss the Amended Complaint, in its entirety, for failure to state a claim upon which relief can be granted.

Dated: August 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 7, 2019, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Western District of Texas, using the ECF System of the court and certify that I have served via the Court's ECF System on all counsel of record or otherwise in compliance with Federal Rule of Civil Procedure 5(b)(2).

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