IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Energy Transfer LP (formerly known as Energy Transfer Equity, L.P.); Energy Transfer Operating, L.P. (formerly known as Energy Transfer Partners, L.P.); and Dakota Access LLC,

Petitioners,

vs.

The Honorable Judge James D. Gion, Judge of the District Court, South Central Judicial District, Morton County; Greenpeace International (also known as "Stichting Greenpeace Council"); Greenpeace, Inc.; Greenpeace Fund, Inc.; Red Warrior Society (also known as "Red Warrior Camp"); Cody Hall; and Krystal Two Bulls,

Respondents.

Supreme Court Case No. 20240116

Energy Transfer LP, et al. v. Greenpeace International, et al.
District Court Case No. 30-2019-CV-00180

JOINT MOTION TO RESTRICT ACCESS

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[¶1] Pursuant to North Dakota Rule of Administrative Procedure 41(4)(a), Respondents Greenpeace International; Greenpeace, Inc.; and Greenpeace Fund, Inc. (collectively, "Greenpeace Defendants") and Petitioners Energy Transfer LP; Energy Transfer Operating, L.P.; and Dakota Access LLC (collectively, "Energy Transfer") jointly move to restrict access to the following documents filed in this matter:

- Greenpeace Defendants' Response to Petitioners' Petition for Supervisory Writ
- Exhibit 40
- Exhibit 46
- Exhibit 55
- Exhibit 63
- Exhibit 64
- Exhibit 65
- Exhibit 67

[¶2] Attached as Exhibit 1 is a redacted version of the Greenpeace Defendants' Response to Petitioners' Petition for Supervisory Writ, which the Greenpeace Defendants request leave to file as a publicly accessible version.

[¶3] All of the listed documents have been designated either CONFIDENTIAL or HIGHLY CONFIDENTIAL under the stipulated Second Amended Protective Order entered by the District Court applicable to pre-trial proceedings below, and all of the redacted material reveals the content of documents with such designations. (Dkt. 1770). Under the Second Amended Protective Order, "CONFIDENTIAL Information or Items" is limited to "information . . . or tangible things that qualify for protection under North Dakota Rule of Civil Procedure 26(c)." The "HIGHLY CONFIDENTIAL Information or Items" designation is applicable:

> where the disclosing party in good faith believes the material warrants such designation due its extreme sensitivity, proprietary or personal nature. Highly Confidential Information may include, without limitation: information or material that is believed in good faith to be not only confidential, but also containing extremely sensitive, proprietary, and/or personal information (including, for example, trade secrets, closely-held methods and practices, and information the receiving party might use for purposes outside this litigation) that could be used to the material detriment of the producing party or, in the case of personal information, could cause embarrassment or invade privacy rights.

[¶4] Here, all of the listed items and documents underlying the redacted material were designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL on the grounds that they contain proprietary business information that should not be subject to public disclosure. North Dakota Rule of Administrative Procedure 41(4)(a)(3)(C) lists the fact that a record contains "proprietary business information" as a consideration supporting restriction of access. Accordingly, all parties jointly request that the Court grant this joint motion, restrict access to the listed filings, grant the Greenpeace Defendants leave to file Exhibit 1 as the publicly accessible version of the response to the Petition, and remove the unredacted response from the publicly available record.

Dated this 24th day of April, 2024.

/s/ Derrick Braaten

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CERTIFICATE OF COMPLIANCE

[¶5] I, Derrick Braaten, one of the attorneys of Braaten Law Firm, hereby certify that the foregoing complies with the page limitation in Rule 32, N.D. R. App. P., as it is a total of 7 pages (including the cover and this final page) .

/s/ Derrick Braaten
Derrick Braaten, ND Bar # 06394

CERTIFICATE OF SERVICE

[¶6] I, Derrick Braaten, hereby certify that on this 24th day of April, 2024 true and correct copies of the foregoing GREENPEACE DEFENDANTS' MOTION TO RESTRICT ACCESS was served upon the following persons via Public Portal eService:

Lawrence Bender	lbender@fredlaw.com
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[¶7] I further certify that the foregoing was served by e-mail to the following persons not eligible to be served via Public Portal eService:

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Exhibit 1

Energy Transfer LP, et al. v. Greenpeace International, et al.
State of North Dakota, County of Morton
South Central Judicial District
Trial Court Case No. 30-2019-CV-00180

Supreme Court Case No. 20240116

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GREENPEACE DEFENDANTS' RESPONSE TO PETITIONERS' PETITION FOR SUPERVISORY WRIT

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I. STATEMENT OF THE ISSUES

[¶1] Should the Court issue a supervisory writ where the District Court properly exercised its discretion to compel Plaintiffs to produce nonprivileged documents relevant to the parties' claims and defenses?

[¶2] Should the Court issue a supervisory writ where the District Court properly exercised its discretion to permit the deposition of a witness with unique personal knowledge relevant to the parties' claims and defenses?

II. STATEMENT OF THE CASE

[¶3] Plaintiffs' improperly invoke the Court's emergency superintending jurisdiction for two ordinary discovery decisions already and repeatedly resolved by the District Court and the Special Master.[1] After years of delay and no fewer than ***seven*** orders to provide the discovery at issue, Plaintiffs now ask this Court to entertain an interlocutory appeal of the District Court's discretionary decisions as to the relevance and proportionality of nonprivileged discovery. This case, scheduled for trial in July, has nearly three thousand docket entries involving innumerable discretionary determinations about the proper scope of discovery and evidence at trial. Review of these determinations is not the proper subject of a supervisory writ, particularly when, as here, they have already been subject to two levels of review.

[¶4] Plaintiffs' Petition seeks this Court's involvement on two discovery disputes. ***First***, Plaintiffs seek to withhold non-privileged documents related to the safety of Plaintiffs' Dakota Access Pipeline ("DAPL"), Plaintiffs' safety record, and Plaintiffs' reputation for

[1] The District Court appointed retired federal Magistrate Judge Karen Klein as a Special Master to decide all discovery motions subject to an appeal to the District Court. (E4). Special Master Klein held monthly hearings with the parties and decided over 20 discovery motions.

pipeline safety ("Pipeline Safety Documents"). Greenpeace, Inc.; Greenpeace International; and Greenpeace Fund, Inc. ("Greenpeace Defendants") requested these documents years ago, Plaintiffs collected and are ready to produce the documents, and they remain relevant to Greenpeace Defendants' defenses and Plaintiffs' claims and alleged damages notwithstanding Plaintiffs' selective withdrawal of certain allegations. Plaintiffs seek to exclude relevant discovery—for which there is zero burden to produce—because it does not accord with their view of how the case should be defended. The District Court did not abuse its discretion by rejecting Plaintiffs' attempt to evade their discovery obligations in a lawsuit they initiated.

[¶5] ***Second***, Plaintiffs seek to overturn the District Court's decision to permit the deposition of Plaintiff Energy Transfer's former CEO and current Executive Chairman Kelcy Warren. The Greenpeace Defendants noticed Mr. Warren's deposition nearly two years ago, and both the Special Master and the District Court agreed that Mr. Warren has relevant personal knowledge that the Greenpeace Defendants are entitled to discover. The District Court was well within its discretion to deny Plaintiffs' protective order based on the apex doctrine, which, even if recognized, does not apply when, as here, an "apex" witness has direct and unique personal knowledge of the facts underlying the parties' claims and defenses. As with the Pipeline Safety Documents, Plaintiffs are not entitled to the extraordinary remedy of a supervisory writ merely because they disagree with the District Court's discretionary discovery decisions.

III. STATEMENT OF FACTS

A. Plaintiffs' Claims Against the Greenpeace Defendants

[¶6] Plaintiffs' operative complaint asserts a long series of claims—including defamation, tortious interference, and a variety of property torts—against the non-profit Greenpeace Defendants in connection with Plaintiffs' development and operation of DAPL.

Plaintiffs seek close to three hundred million dollars, including alleged reputational damage, and pray for treble damages, exemplary damages, and attorney's fees.

B. Indigenous Groups Oppose DAPL's Construction

[¶7] In 2014, responding to concerns about contamination of Bismark's water supply, Plaintiffs re-routed DAPL to cross under Lake Oahe near the Standing Rock Sioux Tribe ("SRST") reservation. (E40:51,n.179).[2] The re-route put Plaintiffs at odds with the SRST, which relies on Lake Oahe for its drinking water. The EPA "highlighted" the "potential impacts on the drinking water of the [SRST] Reservation," (E40:43), and [redacted]

C. The SRST Sues the USACE to Vacate the Environmental Assessment

[¶8] On July 25, 2016, USACE approved the permits required for the Lake Oahe crossing—but it did not grant the easement required to actually construct that section of the pipeline beneath federal lands. (E41:2:¶3). The Corp's permitting decision was accompanied by an Environmental Assessment ("EA") under NEPA. (*See* E42). The Tribe strongly objected on the grounds that the USACE had not furnished it with copies of pipeline safety data used for the EA. On July 27, 2016, SRST sued USACE in federal district court in Washington, DC. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'g.*, 1:16-cv-01534-JEB. SRST sought an order vacating all authorizations pending compliance with various federal statutes. (E41:3:¶4). The

[2] E1-39 refer to the Declaration of John T. Cox III in Support of Plaintiffs' Petition for Supervisory Writ. E40-67 refer to the Declaration of Adam Caldwell in support of this response.

Tribe's lawsuit expressed its "deep[] concern" about the risk of contamination to its water supply (E41:20-21:¶¶74-75), and asked the Court to vacate the EA. (E41:47:Prayer ¶8).

[¶9] On September 9, 2016, the US Army, along with Department of Interior (DoI) and Department of Justice (DOJ), issued a statement that because of the issues raised by SRST and other tribes, USACE would not authorize construction until it could reconsider its previous decisions regarding construction under Lake Oahe. (E42:2:¶7).

[¶10] On December 2, 2016, the USACE, SRST and DAL met to discuss "over 30 additional terms and conditions that could further reduce the risk of a spill or pipeline rupture." (E42:2:¶8). On December 4, 2016, the US Army released a memo advising that "the Army will not grant an easement to cross Lake Oahe as the proposed location based on the current record." (E42:3:¶12). Without an easement, DAL could not complete or operate the pipeline.

[¶11] Plaintiffs reject the idea that the US Army's stated concerns about pipeline safety was the real reason for the US Army to withhold the easement. Instead, according to Plaintiffs, the Greenpeace Defendants were the actual reason (and in fact the sole reason) the US Army withheld the easement under Lake Oahe. [redacted]

D. There Is a "High" Probability Plaintiffs Contaminated Lake Oahe

[¶12] In February 2017, the USACE granted DAL the easement to drill under Lake Oahe to complete the pipeline. (E40:55, n. 206). The process used to drill underground is called horizontal direction drilling ("HDD"). A key risk of HDD is that if the drill operates under excessive pressure, it can fracture the soil and create a pathway for the drilling fluid (and later oil leaks) to contaminate the Lake. The industry term for these leaks into a waterway is an "inadvertent return" or a "frac-out." The risk is not theoretical. In 2017, during the construction

of the Mariner East Pipeline in Pennsylvania, Plaintiffs' affiliates contaminated drinking water throughout the state through the loss of close to 3 million gallons of drilling fluid in over 30 incidents. (E43). After investigating, the State of Pennsylvania issued criminal charges. (E44).

[¶13] In North Dakota, Plaintiffs apparently used the same HDD contractor as Mariner East. Plaintiffs reported that they completed the project without any inadvertent returns, and the purported successful HDD under Lake Oahe was relied on by USACE. For example, in its draft Environmental Impact Statement, USACE reported: "No inadvertent returns (frac-outs)…. Or other incidents that impact natural resources occurred in the Project Area during HDD operations for the installation of the pipeline." (E45).

[¶14] However, the Greenpeace Defendants' experts found that [redacted]

E. Plaintiffs Postpone Loan Refinance Due to Uncertainty Over SRST Lawsuit

[¶15] In addition to their Lost Profits claim, Plaintiffs contend that nine statements by some Greenpeace Defendants (of the thousands and thousands posted) caused a delay in DAL's refinancing of a $2.5 billion construction loan. [redacted] Plaintiffs likewise seek to treble this amount. ("Refinance Delay Claim").

[¶16] Plaintiffs base their claim on pure speculation. It is not known if anyone at a financial institution even read any of the nine statements. Nor is there is any evidence that any financial institution relied or otherwise made any decision based on any of the nine statements. But even if arguendo such a statement had been read and relied on, it is not known (and it is highly doubtful) that the financial institution read and relied on just the few words challenged

by Plaintiffs and not the more extensive unchallenged statements regarding the risk of the pipeline to the Tribe's drinking water.

[¶17] Plaintiffs' theory [redacted] is that the alleged delay in the refinancing was caused by sophisticated financial institutions reading and making decisions involving more than a billion dollars based on an advocacy organization's web posting or letters co-signed by someone from Greenpeace. (E1:49-50;¶¶136-41). [redacted] The financial institutions' concern was not stray comments by someone from Greenpeace, but whether the federal district court would address the Tribes' pipeline safety claims by vacating the easement under Lake Oahe, which would prevent the shipment of oil and imperil repayment of the loans.

[¶18] With respect to both the Lost Profits Claim and the Refinance Delay Claim, without any evidence at all, Plaintiffs try to pin 100 percent responsibility on the Greenpeace Defendants. Meanwhile government records [redacted] establish that the real cause related to widespread consideration of pipeline safety by the USACE, the courts and financial institutions. [redacted] The issue presented here of course is not which parties' theory of the case is correct, but rather whether Plaintiffs should be allowed to continue to defy multiple court orders and suppress evidence that does not fit with Plaintiffs' case theory.

F. The Special Master and District Court Order Plaintiffs to Produce the Pipeline Safety Documents Five Times

[¶19] For nearly four years, while saying they will imminently prove their unsubstantiated allegations against the Greenpeace Defendants, Plaintiffs have engaged in

widescale obstruction of discovery. For years, the Greenpeace Defendants have been required to obtain multiple court orders because Plaintiffs refuse to allow even the most standard discovery, like depositions. The resulting thousands of docket entries, and repeated orders reaffirming the obligation of Plaintiffs to allow civil discovery of its legal claims has imposed a massive burden on the Greenpeace Defendants, the Special Master, the District Court, and now this Court.

[¶20] From the start, Plaintiffs stalled deposition and document discovery by filing a fusillade of protective orders motions—all of which were denied. (*See* E11; E47; E49; E49). These included unsuccessful efforts to block the Greenpeace Defendants from deposing any of their fact depositions or conducting 30(b)(6) depositions. Plaintiffs' similarly attempted (and failed) to thwart the production of documents subject to multiple orders compelling production—documents that have been collected and are ready to produce. Now, despite a memorandum opinion from the District Court affirming the Special Master's orders, Plaintiffs again seek to evade their obligation with this Petition.

2. The Special Master's Pipeline Safety Orders

[¶21] ***First Order:*** On July 8, 2020, forty months ago, the Greenpeace Defendants served discovery to obtain Plaintiffs' pipeline safety information. Plaintiffs' steadfast refusal to produce all relevant and responsive documents and to respond fully to interrogatories forced Greenpeace Defendants to file a motion to compel on March 15, 2022. (E4; E50).

[¶22] On November 16, 2022, after conducting a hearing, the Special Master issued an order granting the motion. (E50). After noting that "Energy Transfer resists the motion to the extent that it seeks documents for projects other than DAPL, for locations other than North Dakota, and for pipeline projects that are dissimilar in type from the DAPL project," the Special Master "agree[d] with Greenpeace that documents revealing Energy Transfer's safety record go to the issue of truth or falsity of some of the alleged defamatory statements ***and to the issue of***

Energy Transfer's reputation." (E50:2) (emphasis added). The Special Master also directed Greenpeace Defendants "to review [their] document requests to refine them to clarify what [they are] seeking and to narrow them ***where appropriate***," and directed "[t]he parties . . . to meet and confer in a sincere attempt to resolve this dispute." (E50:2) (emphasis added).

[¶23] Consistent with the directions in the November Order, the Greenpeace Defendants served a new set of requests on November 29, 2022, that focused narrowly on documents regarding spills and leaks from Plaintiffs' pipelines, Plaintiffs' reputation for pipeline safety, and financial analysis of the impact of spills and leaks on Plaintiffs' value and ability to attract capital. Plaintiffs produced only two types of documents in response to these requests: [redacted] Plaintiffs' selective productions did not include any analysis or correspondence, either internal or with third parties, about spills and safety compliance, or the impact of spills and safety failures on Plaintiffs' reputation and value. The parties raised this discovery dispute before the Special Master in hearings and submitted letter briefs on the issue.

[¶24] ***Second Order:*** The Special Master ruled on May 26, 2023, that further briefing was necessary to define the set of documents in dispute. (E53:1-2). Accordingly, the Greenpeace Defendants filed a second motion to compel on June 2, 2023, seeking production of the pipeline safety documents subject to certain limitations. (E54; E5).

[¶25] This led to the Special Master's July 8, 2023 Order, which rejected Plaintiffs' proposed selective production, determined that the Greenpeace Defendants' additional limitations

to its narrowed document requests "reasonably address" the scope of relevant documents, granted the second motion to compel, and ordered Plaintiffs to produce the documents. (E6:3-5).

[¶26] ***Third Order:*** Refusing to comply with the July 8 Order, Plaintiffs moved for an advisory opinion, asking the Special Master to decide if they would still be required to produce the pipeline safety documents if they amended their complaint and withdrew a subset of the 32 challenged statements regarding the risk of spills from DAPL to water supplies and the climate. (E7). [redacted] the Special Master denied this motion on September 30, 2023, finding an opinion would be impermissibly advisory. (E8). In response, Plaintiffs withdrew 23 of their 32 defamation claims, removing challenged statements that touched on DAPL's risk to water supplies and the climate. (E21).

[¶27] ***Fourth Order:*** Immediately after withdrawing these statements from their defamation claims and filing a motion to amend their complaint, Plaintiffs filed a motion seeking to modify the Special Master's July 8, 2023 Order, (E22), which Greenpeace opposed, (E55). Following a November 6, 2023 hearing, the Special Master denied Plaintiffs' motion on November 12, 2023. (E27). In that order, the Special Master found that Energy Transfer's general reputation for pipeline safety remains at issue on Plaintiffs' claim for tortious interference and relevant to the issue of damages. (E27:2). The Special Master also "refuse[d] to reward a party for delaying production of documents for nearly a year before finally dropping a claim in order to avoid its discovery obligation." (E27:2). The Special Master's conclusion in that order remains the case: "[t]he documents are long overdue and must be produced." (E27:2).

3. The District Court's *De Novo* Review and Final Pipeline Safety Order

[¶28] Unwilling to comply with the November 12 Order—the ***fourth*** to conclude Plaintiffs must produce the documents—Plaintiffs filed a motion for *de novo* review of the Special

Master's Order. (E56). On April 4, 2024, the District Court issued a Memorandum Opinion on Plaintiffs' motion for *de novo* review. (E32). This ***fifth*** order, based on the District Court's considered de novo review, affirmed the Special Master's Order, and noted Plaintiffs' continued representations to the Greenpeace Defendants that the documents were ready to be produced and ruled that the information in the documents was relevant to the parties' remaining claims. (E32:4).

G. Special Master and District Court Order the Deposition of Kelcy Warren

1. The Special Master Denies Plaintiffs' Motion for a Protective Order

[¶29] The Greenpeace Defendants noticed the deposition of Energy Transfer former CEO Kelcy Warren ***nearly two years*** ago, on June 16, 2022. (E13). Although Plaintiffs moved to postpone ***all*** depositions noticed at the time until after substantial completion document discovery, (E48; E57), they never argued that Mr. Warren's deposition should not be taken at all.

[¶30] [redacted]

[¶31] Plaintiffs then filed yet another motion for a protective order, this time to prevent Mr. Warren's deposition. (E10). Plaintiffs sought to shield Mr. Warren from testifying by invoking the "apex doctrine," a rule that North Dakota courts have not recognized and that courts apply only where top corporate executives lack personal knowledge of relatively minor claims.

[¶32] Throughout this period, Plaintiffs produced ***no*** emails ***from*** Mr. Warren, even

though they produced emails showing he received emails in the regular course of business. As to the Energy Transfer witnesses whom Greenpeace has deposed, their testimony has revealed a glaring lack of knowledge of the relevant issues in this case. [redacted]

[¶33] The Special Master heard the motion, (E10), on November 6, 2023, and denied the motion in a November 12, 2023 Order. (E27). The Special Master's Order noted that "[t]his case is unique in that Mr. Warren, undoubtedly a high-level executive who generally would not be involved in day-to-day activities of the company, appeared to take a personal interest in the routing of the Dakota Access Pipeline project." (E27:2). The Special Master concluded that the apex doctrine does not preclude the deposition of Mr. Warren and that "Greenpeace should be given an opportunity to explore whether Mr. Warren was directing Energy Transfer's direction and its response to the protests" or whether Mr. Warren was merely a mouthpiece on those issues and other issues related to financing and political influence. (E27:3).

2. The District Court's Affirms in a *De Novo* Order

[¶34] Unwilling to accept the Special Master's decision, Plaintiffs sought *de novo* review by the District Court. (E28). In its April 4, 2024 memorandum opinion, the District Court affirmed the Special Master's Order again compelling Mr. Warren's deposition. (E32:3). Even assuming for purposes of Plaintiffs' Petition that the "apex doctrine" applied in North Dakota, the Court concluded that Energy Transfer still failed to demonstrate the extraordinary circumstances that would justify invoking the doctrine. (E32:3). Both the Special Master and the District Court agree: nothing precludes Mr. Warren's deposition, and the Greenpeace Defendants should have the opportunity to take his deposition.

IV. STANDARD OF REVIEW

[¶35] The Supreme Court's "authority to issue supervisory writs is discretionary; it cannot be invoked as a matter of right." *Roe v. Rothe-Seeger*, 2000 ND 63, ¶ 5, 608 N.W.2d 289, 291 (citations omitted). The Court "generally will not exercise supervisory jurisdiction 'where the proper remedy is an appeal merely because the appeal may involve an increase of expenses or an inconvenient delay.'" *Id.* (quoting *Fibelstad v. Glaser*, 497 N.W.2d 425, 429 (N.D. 1993)). The Court will "exercise our authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy." *Id.* (citing *State v. Hagerty*, 1998 ND 122, ¶ 6, 580 N.W.2d 139). "It is equally well-established that our original jurisdiction will not be exercised to vindicate mere private rights. . . . [T]he matter to be litigated must be publici juris or pertaining to the people and affecting the community at large." *Spence v. N. Dakota Dist. Ct.*, 292 N.W.2d 53, 58–59 (N.D. 1980).

V. ARGUMENT

[¶36] Plaintiffs' Petition is procedurally and substantively deficient. As a procedural matter, issuance of a supervisory writ is an extraordinary remedy available only in rare circumstances; it is not a mechanism for obtaining interlocutory review of routine district court discovery orders. Substantively, the District Court did not abuse its discretion by ordering Plaintiffs to comply with their discovery obligations in the lawsuit they chose to bring.

A. Supervisory Writs Should Issue Only in Extraordinary Circumstances, Not to Resolve Routine Discovery Disputes

[¶37] Plaintiffs' disappointment with the District Court's discovery orders does not provide a basis for issuing a supervisory writ. As explained above, "[s]uperintending jurisdiction enables this court to control a lower court, 'which though within its jurisdiction, is

by mistake of law, or willful disregard of it, doing a gross injustice and there is no adequate remedy by appeal,'" and this "extraordinary power" should be exercised "only under circumstances that are tantamount to a denial of justice." *Spence*, 292 N.W.2d 53, 58–59 (N.D. 1980) (quoting *State v. Lynch*, 138 N.W.2d 785, 787 (N.D. 1965)).

[¶38] In *Spence*, the Court declined to issue a supervisory writ to review discovery rulings because the parties' dispute over the scope of discovery "involves a private interest, and is not a matter which directly affects the interests of the public at large. It is a matter which concerns only the rights or interests of private parties which does not justify the exercise of our original jurisdiction." *Id.* at 59 (citing *State ex rel. Burgum v. N. Dakota Hosp. Serv. Ass'n*, 106 N.W.2d 545, at 547 (N.D. 1960) ("To be a matter involving public interest, something must be involved in which the public, the community at large, has an interest or a right which may be affected.")). Although such an order is not independently appealable, litigants "do have an adequate remedy at law in that they are entitled to appeal from an unfavorable judgment, and the order of the district court would be reviewable at that time." *Id.* at 59. As the Court explained, "[a] supervisory writ is not intended to be a substitute for appeal, nor is it intended to be used in lieu of other adequate remedies available under the law"; rather, a "pretrial discovery order" is an "interlocutory order" that "must be raised as an issue on a subsequent appeal from a judgment." *Id.* "To hold otherwise would destroy the concept of speedy administration of justice and 'trials would be subject to constant interruptions and delays in order that such rulings could be carried to the Supreme Court for review.'" *Id.* (quoting *Northwest Airlines v. State, Through Bd. of Equalization*, 244 N.W.2d 708, 710 (N.D. 1976). Thus, the Court concluded "that granting a supervisory writ in the instant case would encourage bifurcated trials and render the prohibitions against appeals from interlocutory orders nugatory." *Id.*

[¶39] The same is true here, and none of the cases Plaintiffs cite holds otherwise. To the contrary, ***every*** case Plaintiffs describe as involving a "discovery order" actually concerned the production of ***privileged*** documents—which are not at issue here. *See* Pet. at 16-17 (citing *Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 151–52 (N.D. 1996) (seeking information covered by medical peer review privilege); *Heringer v. Haskell*, 536 N.W.2d 362, 365 (N.D. 1995) (attorney-client privilege); *Reems on Behalf of Reems v. Hunke*, 509 N.W.2d 45, 47 (N.D. 1993) (attorney work product); *St. Alexius Med. Ctr. V. Nesvig*, 2022 ND 65, ¶ 7, 971 N.W.2d 878 (medical peer review privilege); *Troubadour Oil & Gas, LLC v. Rustad*, 2022 ND 191, ¶ 6, 981 N.W.2d 918) (attorney-client privilege and attorney work product). The production of privileged documents differs significantly from other discovery disputes in that "[r]eview on appeal from the final judgment comes too late if the 'cat'—the confidential information—is out of the bag and has been divulged to the court, the parties, and the public." *Heringer*, 536 N.W.2d at 365. But that concern is not present here, where the information at issue is not privileged and would be produced pursuant to a protective order. Plaintiffs' reliance on these cases is therefore misplaced.

[¶40] Plaintiffs improperly seek interlocutory review of two of the many discovery decisions made by the Special Master and subject to appeal to the District Court. District courts (and, in this case, Special Masters) are vested with discretion to decide discovery disputes and resolve evidentiary issues, and it is improper for Plaintiffs to treat an emergency writ as a shortcut to appellate review of those discretionary determinations.

B. Plaintiffs Cannot Show the District Court Abused Its Discretion Regarding the Pipeline Safety Documents

[¶41] The District Court properly exercised its discretion to affirm de novo the Special Master's ***fourth*** order compelling the production of the Pipeline Safety Documents that

Plaintiffs have been improperly withholding for over three years. As the District Court and Special Master each concluded, these documents are within the scope of discovery and Plaintiffs will not suffer undue burden from compliance with their long-outstanding discovery obligation.

1. The Pipeline Safety Documents Are Relevant to the Parties' Claims and Defenses

[¶42] The North Dakota Rules permit the Greenpeace Defendants to obtain "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," and "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." N.D. R. Civ. P. 26(b)(1)(A). "Based upon this rule, discovery cuts a broad and deep path since information sought need not be admissible at trial, but only reasonably calculated to lead to the discovery of admissible evidence." *N. Dakota Dep't of Health v. Schleicher Land Co.*, No. 1804C00157, 2004 WL 6224546 (D.N.D. Jan. 22, 2004) (granting motion to compel, and holding plaintiff "will have to provide the requested information of recovery goals from other spills because it relates to fuel spills within our state").

[¶43] Following this standard, the District Court made clear in its rulings compelling both Plaintiffs and Defendants to produce documents that "[d]iscovery is intended to be broad," (E58:6:¶11), and "[t]he Court is to construe discovery 'liberally,'" (E59:3:¶6). And, until now, Plaintiffs have agreed, arguing that "a request for discovery will be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party." (E60:10-11:¶20). In fact, Plaintiffs have taken advantage of the broad scope of discovery to successfully move to enter Greenpeace facilities to inspect and photograph material that was

shown by sworn declaration to have no direct use or relevance, and that the Special Master acknowledged was "not critical and perhaps even tenuous." (E61:2).

[¶44] Before the Special Master and the District Court, Plaintiffs failed to show that the Pipeline Safety Documents "can have no possible bearing on the claim or defense of a party." Now, Plaintiffs must carry the even higher burden of showing that those determinations constituted an abuse of discretion. Plaintiffs fail under either standard because the Pipeline Safety Documents are relevant to multiple central issues in this case, including Plaintiffs' tortious interference claims, the damages they seek, and the Greenpeace Defendants' request for attorneys' fees.

[¶45] ***SAC Defamation Allegations:*** Despite Plaintiffs' recent abandonment of ***some*** of the statements in their defamation claims, the pipeline safety documents remain relevant to those claims. Even as revised, the SAC continues to tout the determination by USACE that the risk of spill from DAPL was "very low" to support Plaintiffs' claims that the Greenpeace Defendants engaged in a broad "misinformation campaign" and to undermine the legitimacy of Standing Rock protests, and thereby allegedly cause the US Army, DOJ, and DoI to delay the HDD under Lake Oahe, (E62:11:¶33; E62:15:¶44), [redacted] The Pipeline Safety Documents continue to be relevant to these allegations, as they directly bear on DAPL's environmental impact and the basis for the federal government's ongoing assessment of that issue.

[¶46] ***Tortious Interference Claim:*** In addition to defamation, Plaintiffs assert a tortious interference claim alleging the Greenpeace Defendants' statements (1) caused certain creditors to divest from the loan used to finance DAPL's construction and (2) caused Plaintiffs to delay their refinancing of that construction loan. [redacted]

[redacted]

[¶47] To prevail on their tortious interference claim, Plaintiffs must prove that the Greenpeace Defendants' statements were the but-for cause of the investment decisions made by these creditors and investors. *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 2001 ND 116, ¶ 33,628 N.W.2d 707, 716. North Dakota sets a stringent standard for this element, requiring plaintiffs to prove they would have obtained the economic benefit in the absence of the interference. *Bertsch v. Duemeland*, 2002 ND 32, ¶ 24, 639 N.W.2d 455, 462. "In other words, ***but for*** the actions of [the defendant], [the plaintiff] ***would have*** obtained the actual economic benefit." *Smith Enters., Inc. v. In-Touch Phone Cards, Inc.*, 2004 ND 169, ¶ 20, 685 N.W.2d 741, 747–48 (emphasis added).

[¶48] Here, the Greenpeace Defendants assert that the would-be investors were dissuaded from financing DAPL for other reasons, including spills and leaks from Plaintiffs' pipeline and Plaintiffs' ability, or lack thereof, to conduct operations safely and in compliance with applicable laws and regulations. Documentation of Plaintiffs' record on pipeline safety is directly relevant to the stringent causation inquiry. The Greenpeace Defendants are entitled to discovery into any other topics that a potential investor would have considered in evaluating its participation in the refinancing of the DAPL loan, including Plaintiffs' safety record and internal records to which financial institutions would have had access in conducting due diligence. It is not enough for Plaintiffs to "show[] a reasonable possibility" that they would have obtained the desired refinancing on earlier, better terms absent the Greenpeace Defendants' statements; rather,

they must show that they "*would* have obtained" the refinancing but for the statements. *Schneider v. Schaaf*, 1999 ND 235, ¶ 26, 603 N.W.2d 869, 876 (citations omitted).

[¶49] The requested pipeline safety documents are plainly relevant to the cause of would-be DAPL investors' decisions not to participate in the refinancing. Plaintiffs' abandonment of their claims regarding DAPL's threat to water supplies and the climate makes it more likely, not less, that the discovery will be likely to yield information relevant to the defense of Plaintiffs' remaining claims. [redacted]. Information about leaks, spills, and safety incidents involving DAPL or any of Plaintiffs' other pipelines would have been important to these investors in deciding whether or not to participate in the DAPL refinancing. [redacted]

[¶50] The Greenpeace Defendants have requested specific information about Plaintiffs' reputation for pipeline safety that would have been important and could have been known by investors and/or ratings agencies, including:

- Documents identifying all actions taken in relation to Plaintiffs' pipelines by any federal agency, not just PHMSA, which could include the U.S. EPA, DOT, NTSB and others, and all state or local agencies, including state attorneys general (RFP No. 92, mislabeled RFP No. 3).

- Documents regarding public relations, media, and lobbying efforts undertaken in relation to any spill or leak from Plaintiffs' pipelines (RFP No. 93).

- Documents identifying damages paid to Plaintiffs, landowners and/or government agencies in relation to spills and leaks from Plaintiffs' pipelines (RFP No. 95).

- Internal communications about disclosures to investors, insurers, lenders, regulators, impacted landowners or the public about any spill or leak from Plaintiffs' pipelines (RFP No. 96).

[¶51] These types of documents, including internal documents in Plaintiffs' sole possession—such as documents and communications about Plaintiffs' public relations campaigns to rehabilitate their reputation after spills, leaks, and explosions, or any internal documents or communications referencing the impact of these spills, leaks, and explosions on Plaintiffs' reputation—are directly relevant evidence of Plaintiffs' reputation among investors. This information bears directly on the stringent causation inquiry required by North Dakota tortious interference law, for Plaintiffs must demonstrate that investors declined to participate in refinancing the DAPL loan ***solely*** because of the challenged statements, and not because of any other factor that investors may have considered. Documents and communications bearing on Plaintiffs' reputation among investors due to pipeline leaks and spills are plainly relevant and should be produced.

[¶52] ***Damages:*** Plaintiffs also misunderstand the relevance of the pipeline safety documents to their remaining claims. Citing *Khokha v. Shahin*, 2009 ND 110, ¶ 11, 767 N.W.2d 159, 163, Plaintiffs argue the pipeline safety documents became irrelevant once they abandoned their claim based on statements about climate change and water safety. Pet. at 6. But *Khokha* is distinguishable, both legally and factually.

[¶53] First, *Khokha* only examined the issue of admissibility, not discoverability. *Khokha*, 2009 ND 110, ¶ 11, 767 N.W.2d at 163 ("[R]eputation evidence is permissible only if it affects the aspects of reputation that were defamed"). The case does not consider the scope of discovery, which was the only issue before the Special Master and District Court here.

[¶54] Second, *Khokha* only addresses the availability of *general* damages, whereas Plaintiffs here seek both general damages and special damages. General defamation damages compensate for injury to the plaintiff's reputation. *Moen v. Moen*, 256 N.W. 254, 256 (N.D. 1934). Special damages compensate for separate economic harms beyond injury to reputation. *Vanover v. Kansas City Life Ins. Co.*, 553 N.W.2d 192, 196 (N.D. 1996). Here, Plaintiffs seek special damages arising from the challenged statements and Greeenpeace's alleged protest-related conduct, under various theories, including that the statements and conduct delayed DAPL's completion, induced creditors to divest from DAPL's financing, and caused Plaintiffs to incur greater costs in refinancing DAPL, as discussed above. Accordingly, the pipeline safety documents are relevant to aspects of Plaintiffs' reputation that are still very much at issue in the case, including their reputation with lenders, potential investors, and federal officials. Plaintiffs cannot prove defamation absent a showing that the challenged statements were a "substantial factor" in causing the damages Plaintiffs seek. Restatement (Second) of Torts § 622A (1977). Conversely, the Greenpeace Defendants are entitled to refute Plaintiffs' special damages claim by putting on evidence that those lenders, investors, and officials based their decisions on causes other than the challenged statements, including Plaintiffs' poor record on pipeline safety.

[¶55] Finally, neither *Khokha* nor any other cited authority states that reputational discovery is strictly limited to the narrow topic of the allegedly defamatory statements. Additionally, any strict limit on reputation evidence in a defamation case would run afoul of U.S. Supreme Court holdings recognizing that the First Amendment prohibits the presumption of reputational damage absent actual malice, and requires plaintiffs to prove a defamatory statement caused "actual injury" to their reputations. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974). *Gertz* requires a broad inquiry into a defamation plaintiff's reputation. Accordingly, this

Court should permit discovery of all evidence pertaining to Plaintiffs' reputation, including into the pipeline safety documents.

[¶56] ***Attorneys' Fees:*** Plaintiffs' claims for defamation stemming from the statements about pipeline leaks and spills, and statements about climate change, were frivolous under N.D.C.C. § 28-26-01(2), which provides that courts shall "award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party." *Id.* "Frivolous claims are those which have such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in [that person's] favor." *Sagebrush Res., LLC v. Peterson*, 2014 ND 3, ¶ 15, 841 N.W.2d 705, 711-12 (citation omitted). Plaintiffs' defamation claims on pipeline safety and climate change were clearly not actionable in defamation because they were not statements of verifiable facts. The statements predicted that DAPL presented a threat because of the likelihood it would leak and impact climate change in the future. These forward-looking statements are predictions of future events and cannot be actionable in defamation. *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 18-21 (1990) (holding that falsity must be based upon whether the statements challenged as defamatory are provably false).

[¶57] Nevertheless, Plaintiffs asserted these frivolous claims, forced the Greenpeace Defendants to defend themselves for years while Plaintiffs obstructed discovery, filed countless discovery motions, and then finally dismissed the claims once it became clear they could not evade discovery. Plaintiffs never had any serious intent to pursue these claims. *Cf. Adams v. USAA Cas. Ins. Co*., 863 F.3d 1069, 1074 (8th Cir. 2017) (characterizing filing claims with no intent to actually litigate them in good faith as "inappropriate procedural gamesmanship"). The Pipeline Safety Documents—which bear directly on the propensity of Plaintiffs' pipelines to leak

and Plaintiffs' knowledge that the Greenpeace Defendants' statements were not defamatory—are plainly relevant to Plaintiffs' liability for attorney fees.

2. Producing the Pipeline Safety Documents Will Not Impose Any Undue Burden on Plaintiffs

[¶58] Although the basis for Plaintiffs' petition is that the purported burden of producing the Pipeline Safety Documents is disproportionate to their relevance, Plaintiffs fail to identify any burden they will incur if they comply with the District Court's order. As noted above, Plaintiffs do not claim the requested documents are privileged. [redacted] Plaintiffs need only produce the documents they have already collected and reviewed, as ordered by the Special Master and District Court.

[¶59] In response, Plaintiffs contend it would be unfair for them to be deemed to have "forfeit[ed]" their "burden arguments" merely because they completed their review and face no further burden. Pet. at 21 n.5. Plaintiffs fail to cite any authority for the proposition that either the District Court or this Court must imagine a burden where one does not exist. Indeed, Plaintiffs' inability to show that the extraordinary remedy of a supervisory writ is necessary to avert any further burden simply underscores the fact that a writ is not the proper method for obtaining review of standard discovery orders. After all, a "pretrial discovery order" is an "interlocutory order" that "must be raised as an issue on a subsequent appeal from a judgment," and "[a] supervisory writ is not intended to be a substitute for appeal[.]" *Spence*, 292 N.W.2d at 59.

[¶60] Plaintiffs conclude with a slippery slope argument that if Plaintiffs provide *this* discovery then Plaintiffs fear "Greenpeace will . . . simply respond by seeking to force even broader production." Pet. at 21-22. Plaintiffs do not explain how the Greenpeace Defendants could seek a "broader production" now that discovery has closed and this case is on the eve of trial. Nor does this "if you give a mouse discovery" argument show that the ordered discovery is unreasonable, only that some imagined future discovery might be.

[¶61] Because Plaintiffs failed to show that the Pipeline Safety Documents were irrelevant to the issues in this case or that they would suffer any undue burden from completing the ordered production, the District Court did not abuse its discretion by compelling Plaintiffs to produce those documents. Plaintiffs will not be able to show otherwise.

C. Plaintiffs Cannot Show the District Court Abused Its Discretion Regarding the Warren Deposition

[¶62] Plaintiffs also cannot prove the District Court abused its discretion by denying a protective order to bar the deposition of Mr. Warren. Rule 26(c) permits a court to enter a protective order limiting discovery only upon a showing of good cause, for the purpose of protecting a party "from annoyance, embarrassment, oppression, or undue burden or expense." N.D. R. Civ. P. 26(c)(1). Plaintiffs based their motion for a protective order on the apex doctrine, which North Dakota courts have not adopted. To start, Plaintiffs cannot show that the court abused its discretion by declining to block discovery based on a rule never before applied in this state. Further, even where the apex doctrine is recognized, trial courts have broad discretion to determine whether the party opposing discovery has carried its "heavy burden" of showing the doctrine applies. *Guttormson v. ManorCare of Minot ND, LLC*, No. 4:14-CV-36, 2016 WL 3853737, at *5 (D.N.D. Jan. 6, 2016).

[¶63] "In determining whether to allow an apex deposition, courts consider (1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." *Guttormson v. ManorCare of Minot ND, LLC*, 2016 WL 3853737, at *5 (quoting *Apple, Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012)); *see also In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 2:13-MD-02436, 2014 WL 3035791, at *3 (E.D. Pa. July 1, 2014) (analyzing "1) whether the executive has personal, superior, or unique knowledge on the relevant subject; and 2) whether the information can be obtained in a less burdensome way, such as through lower-level employees or other discovery methods."). Significantly,

> a party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied. Thus, it is very unusual for a court to prohibit the taking of a deposition altogether absent extraordinary circumstances. ***When a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition.*** A claimed lack of knowledge, by itself[,] is insufficient to preclude a deposition.

Guttormson, 2016 WL 3853737, at *5 (alteration in original) (emphasis added) (quoting *Apple, Inc.*, 282 F.R.D. at 263). In *Guttormson*, for example, the court rejected a request to forbid a CEO's deposition under the apex doctrine, granting instead the plaintiff's alternative request to limit the length of the deposition. *Id.* at *7.

[¶64] The Special Master and District Court correctly exercised their discretion to reject the application of the apex doctrine here. First, in the face of overwhelming evidence of Mr. Warren's direct involvement in the DAPL project, Plaintiffs could not meet their burden to show that Mr. Warren lacked firsthand knowledge of the claims at issue. Second, Greenpeace exhausted less intrusive methods of discovery by deposing other employees, who have

nonetheless disclaimed knowledge about key facts hundreds of times—only highlighting the need to depose Mr. Warren.

1. Mr. Warren Has Unique Firsthand Knowledge Relevant to Plaintiffs' Claims

[¶65] A trove of evidence, both available publicly and produced in this litigation, shows that Mr. Warren was directly involved in DAPL decision-making and has unique knowledge relevant to the claims at issue. Even without copies of his outbound emails—which Plaintiffs failed to produce—Greenpeace has identified dozens of documents suggesting Mr. Warren's direct involvement in the pipeline project. (E64:2:¶7). For example, Mr. Warren was included on dozens of key emails regarding "pipeline protests" and "pipeline security," and was the only recipient of some of those messages. (E64:2:¶7). Mr. Warren has made repeated public statements indicating his participation in key decisions regarding DAPL. Even to the extent other employees may have been involved in similar decisions and discussions, as CEO, Mr. Warren had unique decision-making authority that other employees did not share. *See In re Tylenol*, 2014 WL 3035791, at *3 (apex deposition was not precluded because documents showed "active[] involve[ment] in decision making regarding the marketing and product development" of products at issue in multidistrict litigation). As detailed below, this is exactly "the type of hands-on action" that justifies the deposition of a CEO. *Apple, Inc.*, 282 F.R.D. at 265 (citation omitted).

[¶66] ***Overall knowledge regarding DAPL.*** [redacted]

[redacted]

[¶67] ***Presence in North Dakota:*** Although Mr. Warren claims immunity from this Court's jurisdiction, he spent time in North Dakota specifically in connection with DAPL. Without his deposition, the full details of his time in North Dakota are not known. But a public video shows Mr. Warren thanking the people of North Dakota, from North Dakota. (E64:Ex. 3) (discussing television coverage of "Kelcy's visit to North Dakota"). Public sources show that Mr. Warren met with or planned to meet with North Dakota's governor. (E64:Ex. 4). [redacted]

[¶68] ***Pipeline planning:*** Mr. Warren had direct involvement in the routing and construction of the pipeline. [redacted] Publicly, Mr. Warren repeatedly maintained that Energy Transfer would not reroute or stop construction on DAPL in the face of protests and legal

action, indicating involvement in those decisions. (E64:Ex. 10-12). He also stated in a video interview that Energy Transfer "would never have built here" had it known it would face clashes with protestors, but that the Army Corps of Engineers endorsed that route. (E24:8) (collecting sources). In a later portion of the interview, Mr. Warren acknowledges that he should have "personally been more closely involved" and "had more communication with state government in North Dakota" than he did—suggesting that his admitted failure to properly manage the project is also potentially probative to the claims at issue. *Id.*

[¶69] ***Damages claims.*** There is overwhelming evidence showing that Mr. Warren has unique firsthand knowledge related to Plaintiffs' damages arguments and Greenpeace's defenses thereto. Mr. Warren made multiple statements, to both media outlets and investors, about the likelihood of obtaining the necessary easement after the election of Donald Trump, revealing specific knowledge about the DAPL timeline that undercuts Plaintiffs' claim that Defendants are solely responsible for construction delay damages. (E64:Ex. 26). An article indicates that Mr. Warren has knowledge of the "cost[s]" Energy Transfer incurred in "polic[ing]" statements about DAPL, which Plaintiffs are trying to recover from Greenpeace in this lawsuit. (E64:Ex. 13).

[¶70] Moreover, Mr. Warren has a history of bringing strategic lawsuits against public participation (known as "SLAPP suits") about topics of public concern (*see* E24:9), evidencing Plaintiffs' motives for bringing this lawsuit—which are relevant to their preexisting reputation, their claim for reputational damages, and whether Plaintiffs had a good-faith basis for asserting the claims they belated dismissed in order to avoid complying with their discovery obligations.

[¶71] ***Property destruction claims:*** Mr. Warren also has firsthand knowledge of who was purportedly responsible for the Standing Rock protests. Mr. Warren publicly blamed unspecified "anti-fossil fuel groups" for funding the protests, and Greenpeace is entitled to ask

him who those groups are. (E24:9) (collecting sources). [redacted] Defendants are entitled to probe Mr. Warren's knowledge on this point.

[¶72] Relatedly, Mr. Warren is familiar with allegations of pipeline property destruction and had decision-making authority in Energy Transfer's efforts to implement private security around the pipeline site. Mr. Warren has publicly shared his animus toward protestors, stating while onstage at a conference that those who destroyed public property should be "removed from the gene pool." (E24:10) (collecting sources). [redacted]

[¶73] ***Defamation and tortious interference claims.*** Finally, Mr. Warren has personal knowledge about the alleged falsity of the statements that form the basis of Plaintiffs' defamation claim, as well as facts related to Plaintiffs' tortious interference claim. He has repeatedly and publicly characterized the statements as "lies" and "misinformation," (E64:Ex. 15), indicating that he has personal knowledge of the allegations at the heart of his lawsuit. He similarly claimed that DAPL did not "encroach[] on lands of Standing Rock Sioux" and stated that "[w]e were never on any Indian property." (E24:10-11) (collecting sources). As to DAPL's threat to clean water, Mr. Warren has all but acknowledged that those statements were well-founded. In one interview, he stated: "[W]e're not going to have a leak. I can't promise that, of course[.]" *Id.* And in another interview, when asked about the possibility of leaks, he acknowledged: "I'm not gonna win that argument with you because pipelines do leak. It's rare." *Id.* [redacted]

[¶74] Plaintiffs' own legal authority undermines the application of the apex doctrine here. The apex doctrine is typically applied to large companies in cases where the senior executives—the apex of the company—were far removed from the facts at issue. Plaintiffs cite *May v. Delta Air Lines* to contend that a CEO should be protected by the apex doctrine. But *May* involved both a much smaller claim and a much larger company. May was a pro se plaintiff who sued Delta for disability discrimination and sought to depose Delta's CEO. No. 21-CV-710 (ADM/ECW), 2021 WL 6883457, at *1 (D. Minn. Nov. 30, 2021). Delta has over 90,000 employees—tens of thousands more than Energy Transfer has—and a CEO is unlikely to have

firsthand knowledge about an instance of alleged discrimination. (E24:12). Other cases applying the apex doctrine similarly found that top executives did not have sufficient knowledge about the small claims at issue to justify taking their depositions. *See, e.g.*, *Benson v. City of Lincoln*, No. 4:18CV3127, 2023 WL 5627091, at *7 (D. Neb. Aug. 31, 2023); *Garcia v. Primary Health Care, Inc.*, No. 4:20-CV-00391-JAJ-SBJ, 2022 WL 1697965, at *5 (S.D. Iowa Jan. 31, 2022); *Sellers v. Deere & Co.*, Nos. C12-2050, C12-2072, C-12-2063, C12-2064, 2014 WL 59928, at *3 (N.D. Iowa Jan. 7, 2014). By contrast, DAPL was a huge project, and Mr. Warren and other senior Energy Transfer executives were involved in making key decisions.

[¶75] Similarly, Plaintiffs rely on *United States ex rel. Galmines v. Novartis Pharms. Corp.*, Civ. A. No. 06-3213, 2015 WL 4973626 (E.D. Pa. Aug. 20, 2015), and *Computer Acceleration Corp. v. Microsoft Corp.*, No. 9:06-CV-140, 2007 WL 7684605 (E.D. Tex. June 15, 2007). In *Galmines*, the court observed that the party seeking to depose the CEO "ha[d] not specifically tied any information sought from [the CEO] to any material matter in the case," where the party had pointed to just one email and one PowerPoint slide purportedly showing the CEO's involvement in relevant facts. 2015 WL 4973626, at *2. In *Computer Acceleration Corp.*, the plaintiff sought to depose Bill Gates of Microsoft, but the court found that emails showed only Mr. Gates's general involvement, contrasted with Mr. Warren's hands-on decision-making on DAPL. *See* 2007 WL 7684605, at *1.

2. The Greenpeace Defendants Exhausted Other Avenues of Discovery

[¶76] Below, Plaintiffs contended that the Greenpeace Defendants needed to depose other Energy Transfer employees before deposing Mr. Warren. However, a party seeking to depose a high-level executive is "not required to depose every lower-level employee with knowledge before deposing [the high-level executive]." *Speed RMG Partners, LLC v. Arctic Cat Sales Inc.*, No. 20-CV-609 (NEB/LIB), 2021 WL 5095281, at *6 (D. Minn. Mar. 12, 2021).

Nevertheless—as Plaintiffs' motion demonstrates—Greenpeace ***did*** exhaust less intrusive methods of discovery by deposing other corporate executives, which only served to highlight (1) that top executives like Mr. Warren had unique, firsthand knowledge regarding DAPL and (2) that these executives—including Plaintiffs' Rule 30(b)(6) designees—claimed to have astonishingly large gaps in their knowledge of the facts underlying Plaintiffs' claims. Mr. Warren's deposition is necessary to fill those gaps.

[¶77] In their original motion, Plaintiffs claimed that conducting the other scheduled depositions would obviate the need for Mr. Warren's testimony. Due to Plaintiffs' successful obstruction of Mr. Warren's deposition, the parties have now concluded all other depositions in this case—yet, the need for Mr. Warren's testimony remains. Over the course of dozens of depositions, the witnesses that Plaintiffs claimed would have all necessary information in fact repeatedly disclaimed knowledge about the Greenpeace entities' involvement in the Standing Rock protests, in false statements, and in investors' decisions not to participate in the DAPL loan. [redacted].

[redacted]

[¶78] [redacted] Sitting for a single deposition would not undermine his ability to serve as Energy Transfer's Executive Chairman, and any burden would be outweighed by the key information he possesses about the facts at issue. *See In re Tylenol*, 2014 WL 3035791, at *3 (finding that deposition of senior officer "with responsibilities that appear directly relevant to the issues in this case" was not unduly burdensome). Defendants have tried and failed to obtain key information from lower-level employees. They are entitled to depose Mr. Warren and ask him about the relevant facts.

[¶79] In sum, Mr. Warren took "personal interest" in the project, and through his deep personal involvement and senior position has unique person knowledge. (E:27:2). No other person can fully know, no less provide, admissible testimony about his thoughts, decisions, analysis, personal interactions, and statements. In addition, as the Special Master correctly recognized, Mr. Warren "authored no emails about the Dakota Access project, because, according to Energy Transfer's counsel, he simply does not communicate by email." (E:27:3). Mr. Warren's information is not available through contemporaneous written communications. Greenpeace can ***only*** access Mr. Warren's knowledge through his deposition, and they have been significantly harmed by Plaintiffs' unjustifiable delay in producing Mr. Warren for his deposition.

VI. CONCLUSION

[¶80] For all these reasons, Greenpeace respectfully requests that this Court deny Petitioners' Petition for Supervisory Writ.

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CERTIFICATE OF COMPLIANCE

[¶81] I, Derrick Braaten, one of the attorneys of Braaten Law Firm, hereby certify that the foregoing complies with the page limitation in Rule 32, N.D. R. App. P., as it is a total of 38 pages (including the cover and this final page) .

s/ Derrick Braaten
Derrick Braaten, ND Bar # 06394

CERTIFICATE OF SERVICE

[¶82] I, Derrick Braaten, hereby certify that on this 19th day of April, 2024 true and correct copies of the foregoing Greenpeace Defendants' Response to Petitioners' Petition for Supervisory Writ was served upon the following persons via Public Portal eService:

Lawrence Bender	lbender@fredlaw.com
John T. Cox III	TCox@gibsondunn.com

[¶83] I further certify that the foregoing was served by e-mail to the following persons not eligible to be served via Public Portal eService:

Court Clerk for the District Court of North Dakota	08clerk@ndcourts.gov
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Court Recorder for Judge Gion, for the District Court of North Dakota, County of Morton	TCulver@ndcourts.gov
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s/ Derrick Braaten
Derrick Braaten, ND Bar # 06394