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

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

DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT

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

STATEMENT REGARDING AMENDMENT

Defendants submit this Amended Motion based on Plaintiffs' renewed assertion, through their counsel, that they have suffered $600,000 in damages to their "land surface and subsurface

caused by the oil spill." Exhibit 1, Plaintiffs' Complaint for Oil Spill submitted to the United States Department of the Interior Bureau of Indian Affairs on April 2, 2021. The original Motion raised a question of whether Plaintiffs had satisfied the amount in controversy required by 28 U.S.C. § 1332. Based on Plaintiffs' latest filing—provided to Defendants only *after* the original Motion was filed—confirming their damages claim in excess of the $75,000 diversity jurisdiction threshold, Defendants are prepared to accept Plaintiffs' representation (for purposes of this Motion) and to therefore file this Amended Motion without the prior jurisdictional argument.

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

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

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

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

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

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

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

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

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

9. The subsequent operative Second Amended Complaint purports to identify four "counts." The first claim alleges a North Dakota state law claim for breach of "NDCC ch. 38-11.1." Second Amended Compl. [Dkt. No. 24] at 3.

10. The second count alleges diversity jurisdiction (*id.* at 3), without stating an actual claim for relief. *Id*.

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

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

13. While Defendants maintain that Plaintiffs' Second Amended Complaint did not cure the issues they and the Court had identified, Defendants were mindful of the Court's prior holding that, if proven, the allegations of a release resulting in property damage, might give rise to a common law claim. [Dkt. No. 18]. Accordingly, Defendants answered the Second Amended Complaint. *See* Answer [Dkt. No. 25].

14. Since the Scheduling Conference held September 8, 2020, Plaintiffs have not actively prosecuted or participated in this litigation. *See* Exhibit 2, Declaration of Jeffrey Lippa ("Lippa Dec.") at 3.

15. For example, despite suggesting in earlier filings that Plaintiffs would retain "an independent consultant to estimate or assess the damages" [Dkt. No. 21], Plaintiffs failed to designate any expert witness by the December 15, 2020 deadline. Ex. 2, Lippa Dec. at 5.

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

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

18. Plaintiffs also ignored their obligation to respond to written discovery served by Defendants on January 27, 2021. Ex. 2, Lippa Dec. at 6-8; *see also* Exhibit 4, Defendants' First Set of Requests for Admissions, Interrogatories, and Requests for Production of Document (the "Discovery Requests").

19. Plaintiffs failed to timely serve responses within 30 days; indeed, no responses have ever been served. Ex. 2, Lippa Dec. at 6-8.

ARGUMENT

I. Summary Judgment is Warranted Because Plaintiffs Have Suffered No Damages.

A. Legal Standards

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

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

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

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

While it remains difficult to discern exactly what claims are being asserted against Defendants, it is axiomatic that damages are an essential element of any claim. *See, e.g.,*

N.D.C.C. § 38-11.1-04 (providing for an award of a sum of money "equal to the amount of damage"); *see also Kuntz v. Leiss,* 952 N.W.2d 35, 36–37 (N.D. 2020), citing *Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 55 (Ky. 2007) (stating that "in intentional trespass, in order to recover more than nominal damages, a property owner must prove actual injury"). Plaintiffs have failed to prove damages here for at least three reasons.

***First*,** Plaintiffs' operative Second Amended Complaint is devoid of an articulation of damages, and the record is similarly devoid of evidence. At most, Plaintiffs suggest that they are approximating their damages based on the OPA, 33 U.S.C. § 2702, which empowers the Environmental Protection Agency ("EPA")—not Plaintiffs—to pursue the enumerated administrative penalties.[1] This unsupported assertion of damages, based on what the EPA might collect in a civil enforcement action, is insufficient to survive summary judgment.

***Second*,** the uncontroverted evidence in the record establishes that the 2016 release resulted in no damages and was successfully remediated. Ex. 3, Peterson Report (any soils impacted by the September 20, 2016 release were removed and the small impacted area was successfully remediated).

***Third*,** Plaintiffs have elected not to participate in discovery requesting information regarding their damages. That written discovery included the following requests:

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

[1] Plaintiffs appear to be inappropriately using the federal civil penalty remedy for discharges into navigable waters as a proxy to somehow measure the damages they have otherwise failed support with evidence. Second Amended Compl. at 4 ("for the time being, Plaintiffs arrived at damage dollar amount according to the standard applied [by the government in enforcing] 33 U.S.C. § 2702").

> **INTERROGATORY NO. 11:** Provide a full and detailed description of **ALL** amounts which **YOU** are claiming as damages in this action, including, without limitation, actual damages, non-pecuniary losses (including pain and suffering), statutory damages and punitive damages, the amounts and methods of computation for each specific element of damages set forth above and **ANY** others which **YOU** are claiming, the total amount of financial losses and expenses **YOU** are claiming, and the identity of each and every **DOCUMENT** or other evidentiary material upon which **YOUR** computations of **ALL** amounts **YOU** are claiming as damages in this action are based. Also include in **YOUR** answer the identification of every **DOCUMENT** or other evidentiary material upon which **YOUR** computations of **ALL** amounts **YOU** are claiming as damages in this action are based.
>
> **REQUEST FOR DOCUMENTS NO 8:** Produce **ALL DOCUMENTS** related to your claim for money damages in this matter.

Ex. 4, Discovery Requests.

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

Accordingly, by operation of law, Plaintiffs have admitted they lack proof of damages. Fed. R. Civ. P. 36. Relatedly, Plaintiffs have come forward with no evidence to present this Court, nor are they entitled to present any evidence at this point due to their total failure to

respond to discovery, that would rebut the argument set forth herein that Plaintiffs have not suffered the damages necessary to sustain *any* claim for relief, regardless of theory.

CONCLUSION

Plaintiffs' case, premised upon an unsubstantiated allegation of damages arising out of a 2016 spill, is belied by the only evidence in the record, making summary judgment appropriate.

Respectfully submitted this 23rd day of April, 2021.

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

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2021, a true and correct copy of the foregoing **DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT** was served upon the following counsel of record:

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

ATTORNEYS FOR PLAINTIFFS

s/ Jeffrey M. Lippa
Jeffrey M. Lippa