Appeal No. 24-4333

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWINOMISH INDIAN TRIBAL COMMUNITY,
a federally recognized Indian tribe,
Plaintiff-Appellee,

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
THE HONORABLE ROBERT S. LASNIK, JUDGE
CASE NO. 2:15-CV-00543-RSL

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that the Chamber of Commerce of the United States of America is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

/s/ *Michael von Loewenfeldt*
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STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29

The Chamber of Commerce of the United States of America submits this brief as amicus curiae supporting Appellant BNSF Railway Company's appeal from the judgment of the district court. Fed. R. App. P. 29(a)(4). Both parties consented to the filing of this amicus curiae brief, and this brief is timely filed. Fed. R. App. P. 29(a)(2), (a)(6).[1]

Amicus provides the following statements of interest pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D):

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly

[1] Amicus certifies that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the amici, their members, and their counsel—contributed money intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E).

files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in ensuring a fair and predictable legal environment across the United States. That interest includes ensuring that damages awarded for business-related torts are predictable and proportional to the alleged wrongdoing at issue.

INTRODUCTION

The American economy runs on millions of miles of rail, pipe, and cable, all of which cross land owned by innumerable persons subject to innumerable easements. The businesses who operate these channels rely on easements, negotiated with and granted by the public and private parties over whose land this immense movement of resources in commerce occurs. Landowners have the right to contract for access to their land, and no party should suffer an intentional trespass without reasonable compensation. But the remedy for trespass must not unduly punish or award the plaintiff a disproportionate windfall. An equitable award of disgorgement or for unjust enrichment must remain proportional to the profit derived from the trespass without unduly enriching the other party.

As the nation's largest business organization, the Chamber submits this brief to urge the Court to craft a rule of equity that will allow for full and fair resolution of easement-use disputes between landowners and operators of rail, pipe, and cable channels. The district court's order distorted fundamental principles of equity by imposing a penalty grossly disproportionate to the defendant's degree of trespass without consideration of the unjust enrichment to the plaintiff. If not reversed, the order will create perverse incentives to the detriment of

American consumers and employers who rely on efficient administration of the nation's infrastructure.

When a plaintiff seeks recovery for a defendant's unjust enrichment, equity requires that the court consider two bedrock principles: disgorgement of the profit from wrongdoing, and proportionality between the harm and the remedy. Here, the district court ordered disgorgement of almost all of the defendant's profits over a rail line for a trespass over land comprising less than half of one-thousandth of that line. The plaintiff was thus enriched in exponential disproportion to the amount of profit attributable to the defendant's misconduct, and the district court's theory of "but for" causation fails to account for all other easement holders along the line.

This Court should take this opportunity to return to first principles and ensure equity is done not only in the case at bar, but in future trespass actions throughout the Circuit. In doing so, it should consider the proportional approach to recovery adopted by the Western District of Wisconsin in a recent case presenting similar facts.

The Chamber encourages this Court to reverse and remand for a more narrowly tailored disgorgement limited to the proportional profit from the defendant's excess use of the 0.7-mile easement over the plaintiff's land.

ARGUMENT

I. Equity Requires a Balance Between Depriving a Wrongdoer of Unlawful Profits and Unjustly Enriching a Party That Was Not Actually Harmed

The equitable principles that underlie the issues on appeal are set forth in the Restatement (Third) of Restitution and Unjust Enrichment (2011)[2] and were recently reaffirmed by the Supreme Court in *Liu v. Securities & Exchange Commission*, 591 U.S. 71 (2020). Equity balances two equally important policies. First, "[a] person is not permitted to profit by his own wrong." Rest. 3d § 3. Thus, "[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity." *Liu*, 591 U.S. at 79. Disgorgement is intended to provide an adequate "incentive to lawful behavior." *See* Rest. 3d § 3 cmt. c.

But just as importantly, equity is not "an instrument for the punishment of simple torts." *Liu*, 591 U.S. at 84 (citation omitted). There is a "countervailing equitable principle that the wrongdoer should not be punished by paying more than a fair compensation to the person wronged." *Id.* at 80 (cleaned up). "The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as

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[2] All subsequent references to the Restatement or Rest. 3d in this brief are to the Restatement (Third) of Restitution and Unjust Enrichment (2011).

possible, the imposition of a penalty." Rest. 3d § 51(4). And critically, "[d]isgorgement does not impose a general forfeiture: defendant's liability in restitution is not the whole of the gain from a tainted transaction, but the amount of the gain that is attributable to the underlying wrong." Rest. 3d § 51 cmt. *i*. "Even against a conscious wrongdoer, restitution may be limited to avoid a liability for gains that are unduly remote . . . or disproportionate to the loss on which liability is based." Rest. 3d § 40 cmt. b.

The facts of this case perfectly illustrate the need for courts to balance these principles of equity. The defendant, BNSF, transported oil approximately 1,500 miles from North Dakota to Washington. In doing so, it exceeded its permitted usage of 0.7 miles of railway across the land of the Swinomish Indian Tribal Community, for which it paid about $2.5 million for the entire period of the trespass. For the defendant's approximately three-times overuse of this easement, which the district court found was an intentional trespass, the court ordered the company to pay nearly all (BNSF calculates it as 91%) of its profits from the entire journey taken by each shipment at issue—$394.5 million. 1-ER-20.

The district court's order fails to address the "countervailing equitable principle" required by *Liu*: avoiding unjust enrichment or the

penalty of a disproportionate award. *See Liu*, 591 U.S. at 80; *see also Babb v. Wilkie*, 589 U.S. 399, 413-14 (2020) ("[T]raditional principles of tort and remedies law" generally provide that "[r]emedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent [the tort]."). The court's order does not analyze any facts concerning what would be "fair compensation to the person wronged" or whether the profits from the entire route are "unduly remote" or disproportionate. 1-ER-4-20. The court thus appears to have only addressed one of the two equally important counterbalancing principles of equity that apply in circumstances such as this.

As a result, the plaintiff stands to be enriched with nearly all of the defendant's total profits from a 1,500-mile rail line as damages for a trespass over .04% of the distance traveled (.7/1500 miles) to earn the funds ordered disgorged. The remedy exceeds the proportion of the profit attributable to the 0.7-mile easement by a factor of over 2,200, and leaves the plaintiff in a far better position than if the defendant had complied with the limits in the easement. *Compare Inversiones y Procesadora Tropical Inprotsa, S.A. v. Del Monte Int'l GmbH*, No. 21-13059, 2023 WL 4534181, at *3 (11th Cir. July 13, 2023) (per curiam) (district court properly denied disgorgement where it would have put

the plaintiff "in a better position than if [the defendant] had complied with the agreement").

This inequitable result should be reversed.

II. The District Court's "But For" Analysis Incorrectly Treats Every Inch of a 1,500-Mile Journey as the Whole Journey

The United States is a nation of diverse resources and communities, and its economy depends on long-distance transportation of commodities and goods. As illustrated by this case, resources are commonly generated in one area of the country, transported to another for refinement or manufacturing, and then transported again to consumers. Much of that transportation occurs along three types of fixed channels: rail, pipe, and cable. There are nearly 140,000 miles of freight rail in the continental United States.[3] There are more than 2.6 million miles of pipeline transporting oil and natural gas.[4] There are

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[3] Ass'n of Am. R.Rs., *Freight Rail Facts & Figures* 3 (Oct. 2024), https://www.aar.org/wp-content/uploads/2023/04/AAR-Facts-Figures-Fact-Sheet.pdf.

[4] Pipeline & Hazardous Materials Safety Admin., U.S. Dep't of Transp., *General Pipeline FAQs*, https://www.phmsa.dot.gov/faqs/general-pipeline-faqs (last updated Nov. 6, 2018).

more than 180 million miles of electrical, telephone, and cable lines.[5] All of these conduits have one thing in common: When resources or products are transported from point A to point B via rail, pipe, or cable, every mile (and indeed every inch) of the conduit is necessary for the successful transportation from one end to the next.

Every portion of rail traveled by the defendant's trains from the North Dakota oil fields to Fidalgo Bay was separately the "but for" cause of the successful transport of that oil. The district court treated the 0.7 miles of track over the plaintiff's land as particularly important because it was a bottleneck in the route. But the defendant did not derive its profit by carrying its shipment for 0.7 miles, and the amounts it made from transporting oil 1,500 miles cannot be equitably squeezed into any few thousand feet of the track—beginning, middle, or end.

By comparison, the Western District of Wisconsin established a method of equitably allocating profits and expenses where goods are transported over a long distance and some of the path of travel is a trespass. *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v. Enbridge Energy Co.*, No. 19-cv-602, 2023

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[5] Scenic Am., *Undergrounding Utility Infrastructure*, https://www.scenic.org/why-scenic-conservation/energy-infrastructure-and-equity/undergrounding-utility-infrastructure/ (last visited Dec. 13, 2024).

WL 4043961 (W.D. Wis. June 16, 2023). *Bad River Band* involved a pipeline, not a railway, but it otherwise illustrates the same problem as this case (albeit with a proportionally more consequential trespass). The defendant transported 23 million gallons of crude oil and natural gas daily on a pipeline from Superior, Wisconsin, to Sarnia, Ontario. *Id.* at *2. The pipeline runs across 12 parcels of tribal land, totaling 2.33 miles. *Id.* at *17. The defendant had easements which expired, but it continued to use the pipeline and was found to have intentionally trespassed. The Western District of Wisconsin found that the profit from use of the trespassing pipe should be awarded as damages based on the relative length of that pipe compared to the overall line. *Id.* "[T]he 12 parcels (2.33 miles) were, on average, 0.36 percent of Line 5's 642 miles during the relevant years." *Id.* The court also ordered future damages on the same formula until the pipeline was moved. *Id.*

The Bad River Band was thus awarded $5,151,668 for past trespass through the pipeline over its land. The net profit for the entire pipeline during the same period was over $1.1 billion. *Bad River Band*, 2023 WL 4043961, at *17. Under the rationale of the district court here, the Bad River Band would have been awarded nearly $1 billion, not $5 million, despite only owning approximately one-third of one percent of the land on which the pipeline runs.

The district court's approach here not only illogically treats one very small part of the route as if it were the whole route, but it also creates several perverse incentives. First, it incentivizes any person who controls access to even a very small portion of a railway, pipeline, or cable to exercise holdout leverage and monopolistic rent-seeking. Here, for example, the plaintiff and defendant negotiated an easement for twenty-five train cars per day in each direction for $10,000 per year subject to adjustment going forward. 3-ER-413. The district court's order effectively awards the plaintiff a price of $1,461.11 per car.[6] This precedent would encourage all easement holders over this and other routes to demand a similar sum in the future, threatening to choke off all rail transport to critical destinations by demanding exorbitant and disproportionate prices for use of the rail across sub-fractional proportions of the route.

Certainly, a disgorgement for intentional trespass will often exceed the market price of access because, otherwise, there would be an incentive not to negotiate in advance. Rest. 3d § 40 cmt. b ("If liability in restitution were limited to the price that would have been paid in a voluntary exchange, the calculating wrongdoer would have no incentive to bargain."). But disgorgement must still bear some reasonable

[6] $394.5 million divided by 270,000 cars (AOB 10) is $1,461.11.

relationship to "fair compensation to the person wronged." *Liu*, 591 U.S. at 80 (quoting *Tilghman v. Proctor*, 125 U.S. 136, 145-46 (1888)). Treating 0.7 of a mile of a 1,500-mile route as if it were the whole route eliminates any such relationship, resulting in an award wholly disproportionate to what the plaintiff had earlier negotiated on a per-car basis for a smaller volume of access.

The district court's methodology also presents a second problem: illogical multiple recovery. Consider whether, along the 1,500-mile route, there may be other landowners who claim that the permissible use of their land under applicable easements has been exceeded. Because each part of the railway was necessary to move oil from point A to point B, if multiple landowners along the line were to claim trespass, each theoretically could claim their land was a "but for" cause of the whole line's profits, as the plaintiff does here. If the district court's ruling stands and there is a subsequent claim, the defendant could be subject to duplicative, triplicative, or even greater, potentially unlimited liability. Or, if not, perhaps the *plaintiff* Tribe itself could be subject to a claim for disgorgement of profits by another affected landowner. None of those problems would arise if, as in *Bad River Band*, each trespass were allocated profit based on its proportional share of the distance traveled. Each landowner with a potential trespass claim

would thus retain the right to secure equitable compensation for its harm without subjecting the responsible party to liability in gross excess of its measure of unjust enrichment.

As the Restatement notes, the existence of "but for" causation does not "compel the conclusion in every case that the proper measure of unjust enrichment is the whole of the defendant's traceable gains." Rest. 3d § 51 cmt. f. Profit made from wholly lawful transportation of a good across the rest of a railway, pipeline, or cable is too remote to be attributable to a trespass over some small part of that route. The remedy in cases like these should, as in *Bad River Band*, be limited to a rational apportionment of profit between the trespassing and non-trespassing portions of the route traveled.

CONCLUSION

It is equitable to ensure that wrongful gains from an intentional tort are disgorged so that an intentional trespasser cannot force his way into the same position he might have obtained through arms-length bargaining. Equity does not, however, support using an intentional trespass as a basis for punishing the trespasser by stripping him, not only of the net profits allocable to unauthorized use of another's property, but also of the significantly larger profits from lawful aspects of the same venture. The district court's award here fails to follow both

countervailing interests recognized in *Liu* and the Restatement, and crosses the line from disgorgement to punishment.

Respectfully Submitted,

Date: December 13, 2024

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