IN THE IOWA DISTRICT COURT FOR POLK COUNTY

WOLF CARBON SOLUTIONS US, LLC, *Petitioner*, v. **IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,** *Respondent*.	**CASE NO. EQCE088016** **PETITIONER'S RESISTANCE TO SIERRA CLUB OF IOWA'S MOTION TO INTERVENE** **(*EXPEDITED CONSIDERATION REQUESTED*)** **(*ORAL ARGUMENT REQUESTED*)**

COMES NOW, Petitioner Wolf Carbon Solutions US, LLC ("WCS") with this Resistance to Sierra Club of Iowa's Motion to Intervene ("Sierra's Motion") in the above-captioned action, stating the following:

INTRODUCTION

This litigation concerns whether or not the Iowa Utilities Board ("IUB") may release mailing list information (the "List") provided to it by WCS, voluntarily and with the expectation of confidentiality, to third parties in a manner that would violate Iowa and Constitutional law. WCS has sought to maintain the confidentiality of the List so as to comply with Iowa's Open Records Act, the Iowa Trade Secrets Act, well-established common law standards of governmental release of information, as well as to prevent interference with prospective contractual relations and business advantage, and violations of constitutionally protected associational rights under the United States Constitution. *See* Petition, at ¶¶ 29-138 (Filed Sept. 7, 2022). This action is currently pending before this Court and a trial scheduling conference is slated for November 16, 2022 — just days from now. *See* Order, p. 1 (Filed Oct. 7, 2022).

Although this case has been proceeding for approximately two months, and has been well-reported about in local news media, the Sierra Club of Iowa ("Sierra") is just now moving to intervene in this action claiming it is entitled to intervention as a matter of right, or alternatively, by permissive means. *See* Sierra's Motion, at ¶¶ 5-6. Sierra is not entitled to intervene in this action as a matter of right under IOWA R. CIV. P. 1.407(1), nor is it entitled to intervene in this action permissively under IOWA R. CIV. P. 1.407(2). For the reasons discussed below, Sierra's Motion should be denied. Further, certain assertions contained in Sierra's filings are false and misleading. Those assertions will be rebutted in the briefing below, as well as in the accompanying Motion to Strike filed in conjunction with this Resistance and the Affidavit of WCS representative Nick Noppinger.

ARGUMENT

I. SIERRA CANNOT INTERVENE AS A MATTER OF RIGHT.

In order to intervene as a matter of right under IOWA R. CIV. P. 1.407(1), a movant must: (a) Make a timely application; ***and*** (b) Have a statutory or otherwise unconditional right to intervene; ***or*** (c) Claim an interest in property or a transaction that is not adequately protected by existing parties. Sierra can satisfy none of these elements for intervention as of right. *See, e.g.*, *Entergy Gulf States Louisiana v. E.P.A.*, Case No. 14-1827, 2015 WL 13942409, at *4 (E.D. La. Mar. 5, 2015) (denying a Sierra Club motion to intervene because "[i]f the applicant for intervention fails to establish any one of the [civil rule] requirements, then he may not intervene as of right.").

First, Sierra's Motion is not timely. *See, e.g.*, *Miller v. Commercial Contractors Equip., Inc.*, 711 N.W.2d 893, 906 (Neb. Ct. App. 2006) ("Intervention should not be allowed where the party seeking to intervene had an opportunity to intervene at an earlier time, yet delayed in doing

so."). This action has been pending since September 7, 2022. The trial scheduling conference for this matter is only days away. *See* Order, p. 1 (Filed Oct. 7, 2022). Putative intervenors are not allowed to wait until the last minute to upset the orderly administration of an ongoing legal action. *See Interest of S.C.-H*, Case No. 18-1173, 2019 WL 478645, at *4 (Iowa Ct. App. Feb. 6, 2019) (noting that a case had been ongoing before a prospective party sought to intervene "on the eve of" ongoing proceedings "to express an interest" in the underlying controversy.). *See also CE Design Ltd. v. King Supply Co.*, Case No. 09 C 2057, 2012 WL 2976909, at *7 n.7 (N.D. Ill. Jul. 20, 2012) ("we are not persuaded that the Insurer's motion to intervene would be timely...We do not see a reason for the Insurers to have waited nearly three months to move to intervene..."); *Surety Admin'rs, Inc. v. Samara*, Case No. 04-05177, 2006 WL 1737390, at *4 (E.D. Penn. Jun. 20, 2006) ("HIC has essentially waited until the proverbial 'eve of trial' to file its application to intervene.").

The Court has discretion to grant (or not) a motion to intervene in an ongoing proceeding. *E.g., In re Interest of B.B.M.*, 514 N.W.2d 524, 426 (Iowa 1994); *U.S. Bank Nat. Ass'n v. Vahle*, Case No. 12-0439, 2012 WL 5539865, at *2 and *6 (Iowa Ct. App. Nov. 15, 2012) (district court has discretion on intervention motions and affirming denial of intervention); *In re M.O.*, Case No. 05-1706, 2005 WL 3478170, at *1 (Iowa Ct. App. Dec. 2005) ("The trial court is accorded a certain amount of discretion to deny intervention in proper cases."). Denying Sierra's eleventh-hour Motion to Intervene in this case is the proper use of the Court's discretion. *See In re Interest of B.B.M.*, 514 N.W.2d at 426; *In re M.O.*, 2005 WL 3478170, at *1. *See also Adam Joseph Resources v. CNA Metals Ltd.*, 919 F.3d 856, 865 (5th Cir. 2019) (stating that a court determination to permit intervention should consider the "length of time during which the intervenor actually knew or reasonably should have known of his interest in the case" and "the extent of prejudice to the existing parties to the litigation," among other factors.); *MasterCard Intern. Inc. v. Visa Intern.*

Serv. Ass'n, Inc., 471 F.3d 377, 390-91 (2d Cir. 2006) (finding no abuse of discretion where district court denied motion to intervene because motion was not filed until the eve of the preliminary injunction hearing).[1]

Second, Sierra has no statutory or unconditional right to claim intervention status as of right. *See* IOWA R. CIV. P. 1.407(1). Sierra doesn't even claim to have one by pointing to any law or regulation that would say so. As a result, this sub-element of the intervention as of right test cannot be fulfilled.[2]

Third, because Sierra has no "right" to anything related to this litigation, it cannot obtain intervention by baldly asserting that its "interests" will not be adequately protected by IUB in these proceedings. *See* IOWA R. CIV. P. 1.407(1). *See also* Sierra's Motion, at ¶ 5. In order for this sub-element to apply in Sierra's favor, the baseline predicate is that Sierra actually have an interest that is legally recognizable. *See* IOWA R. CIV. P. 1.407(1). Although the Court has the ability to exercise discretion with respect to granting intervention as of right, *see, e.g., In re Interest of A.G.*, 558 N.W.2d 400, 408 (Iowa 1997), "[t]his discretion is not the ability to deny intervention where

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[1] In the alternative, the doctrine of laches dictates that Sierra's Motion should be denied. *See, e.g., Collins v. Western Digital Tech., Inc.*, Case No. 2:09-cv-219-TJW, 2011 WL 3849310, at *5 (E.D. Tex. Aug. 29, 2011) (denying a motion to intervene on the basis of laches).

[2] It cannot go unnoticed that in its Petition to Intervene, Sierra only asserts counter arguments against the original claims already presented by WCS. Nowhere in the Petition to Intervene does Sierra assert what its concrete and particularized interests are in the matter under current review other than to say it is an organization that opposes the WCS pipeline project. *See* Petition, at ¶¶ 1-6(A)-(G). Instead of following the intervention rules and articulating a cognizable interest other than "we just don't like you," Sierra penned what is essentially an anti-WCS *amicus* brief under the guise of intervention. Unfortunately for Sierra, petitions to intervene are not supposed to be used for such purposes, and doing so was improper and did nothing to make its case for intervention. *See* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 403 (2015) (stating intervenors and *amici* are "at the opposite ends of a spectrum of direct involvement in a case…*amicus curiae* should be disinterested friends of the court, while intervenors must have sufficient interest in the dispute to be a party.").

the prerequisites of [IOWA R. CIV. P. 1.407(1)] have been met, [r]ather this discretion is to be exercised on the question of whether an intervenor is 'interested' in the litigation." *Id*. (citing *In re Estate of Devoss*, 474 N.W.2d 539, 541 (Iowa 1991)). *See also In re Interest of G.E.*, Case No. 21-1121, 2021 WL 5106407, at *1 (Iowa Ct. App. Nov. 3, 2021) (May, J., controlling opinion).

"One is 'interested' under [IOWA R. CIV. P. 1.407(1)] if one has a ***legal right*** that the proceeding will ***directly affect***." *In re Estate of A.G.*, 558 N.W.2d at 408 (citing *In re B.B.M.*, 514 N.W.2d 425, 426 (Iowa 1994)) (emphasis in original). If no legal right will be directly affected, invention as of right should be denied. *See, e.g., State ex rel. Miles v. Minar*, 540 N.W.2d 462, 465 (Iowa Ct. App. 1995) (holding asserted interest not sufficient where there was no risk "from a practical standpoint" that it would be affected by a pending action, a speculative or contingent interest is not enough); *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122 (Mo. 2000) (*en banc*) ("An interest necessary for intervention as a matter of right does not include a mere, consequential, remote, or conjectural possibility of being affected as a result of the action, but must be a direct claim upon the subject matter that the intervenor will either gain or lose by direct operation of judgment.").

Sierra is not an "interested" participant in this case because it has no "legal liability which will be directly enlarged by the judgment or decree in the pending action." *In re Estate of A.G.*, 588 N.W.2d. at 408 n.1 (marks omitted). *See also State ex rel. Ball v. Cummings*, 540 N.E.2d 917, 924 (W. Va. 1999) ("the interest claimed by the proposed intervenor must be direct and substantial."). Mere curiosity in the subject matter of an action or its potential future consequences is not enough for granting intervention as a matter of right. *See In re Interest of B.B.M.*, 514 N.W.2d at 427. *See also New Hampshire Ins. Co. v. Greaves*, 110 F.R.D. 549, 551 (D. R.I. 1986) ("The would-be intervenor must have a concern which is more than mere curiosity, or academic

or sentimental desire" to participate in the action); *Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d 225, 241-42 (Mo. Ct. App. 2019) (same). If mere public policy interests in a case — such as the ones claimed by Sierra — "were sufficient, there would be no limit to the number of people who could intervene." *In re B.B.M.*, 514 N.W.2d at 427. Consequently, a putative intervenor needs "some basis other than their desire to" participate in the litigation. *Id.* at 417.

Sierra may be a policy-oriented organization, but it does not provide evidence it legally represents any potential landowner on the proposed WCS pipeline route. Sierra does not claim to be a landowner itself along the proposed WCS pipeline route. Instead, Sierra simply asserts that it wants to communicate with persons who may or may not be within the WCS pipeline route corridor — a corridor that has not yet been approved for a project that itself is still under regulatory review. Sierra says openly (and brazenly) that it wants to intervene in an explicit effort to literally and figuratively hurt WCS' commercial efforts and legal rights. *See* Petition, at ¶ 1; Sierra's Motion, at ¶ 2. This is not a sufficient basis for intervention as of right, and that is not what intervention is for. *See, e.g., Goldberg v. Johnson*, 485 So.2d 1386, 1388 (Fla. Dist. Ct. App. 1986) (noting "the trial court held [a proposed intervenor was] not motivated by a serious and legitimate interest…but only out of mere curiosity or a private interest relating to pending litigation…all of which interests the movant attempts to cloak in a shroud of the public's right to know.").

Accordingly, Sierra's request to intervene as a matter of right should be denied. *See* IOWA R. CIV. P. 1.407(1). *See Terrill v. Killion*, 70 N.W.2d 835, 838 (Iowa 1955) ("One who attempts to intervene in an action pending between other parties, without bringing himself within the provisions of the statute, is a mere interloper, who acquires no rights by his unauthorized interference…").

II. SIERRA CANNOT PERMISSIVELY INTERVENE.

In order to permissively intervene under IOWA R. CIV. P. 1.407(2), a movant must: (a) Make a timely application; ***and*** (b) Show a statute contains a conditional right to intervene; ***or*** (c) Show the putative intervenor has a claim or defense with common questions of law or fact being litigated in the action; ***or*** (d) The party to the action relies on a claim for relief upon a law or government order. Sierra, on its pleadings, relies only upon the "common questions of law or fact" rationale. *See* Sierra's Motion, at ¶ 6. Sierra cannot obtain permissive intervention on these grounds.[3]

First, just as Sierra's request for intervention as of right was not timely, the same applies with respect to permissive intervention. *See, e.g.*, *Primerica Life Ins. Co. v. Pawlik*, Case No. MO:20-CV-63-DC, 2022 WL 1111019, at *2 (W.D. Tex. Apr. 4, 2022) ("Both permissive interventions and interventions of right may be permitted ***only upon timely application***.") (citing authorities) (emphasis added). As a result, this mandatory threshold criterion cannot be met. *See* IOWA R. CIV. P. 1.407(2). *See also In re Interest of T.F.-M*, Case No. 19-0153, 2019 WL 2524102, at *2 (Iowa Ct. App. Jun. 19, 2019) (affirming a lower court determination a motion to intervene was untimely); *U.S. Bank Nat. Ass'n v. Vahle*, Case No. 12-0439, 2012 WL 5539865, at *6 (Iowa Ct. App. Nov. 15, 2012) (denying a motion to intervene as untimely).

Second, even if Sierra's Motion was timely filed — and it was not — Sierra's sole second pleaded criterion for permissive intervention also fails. Sierra states it has a "claim with respect to the

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[3] As stated above, Sierra does not, and cannot, point to any statute granting any right (conditional or unconditional) to justify intervention. Further, Sierra did not plead in its Motion for Intervention that it relies on a claim for relief upon a law or government order. As such, those grounds are deemed waived and will not be discussed herein. *See, e.g.*, *Lincoln v. State*, Case No. 18-0285, 2019 WL 6358303, at *2 (Iowa Ct. App. Nov. 27, 1999) (grounds for arguments are deemed waived if not initially raised); *In re Interest of D.M.*, Case No. 08-0219, 2008 WL 18857327, at *1 (Iowa Ct. App. Apr. 30, 2008) (same).

landowner list" involving "questions of law and fact in common with [WCS'] claims in this action." Sierra's Motion, at ¶ 6. Curiously, Sierra never articulates what that "claim" may be, or why it may be "common" on issues of law or fact ***with WCS***. To the contrary, Sierra seems to be confused about the nature of its intervention attempt. In Paragraph 5 of Sierra's Motion, it is asserted that IUB cannot adequately protect Sierra's interests, thus justifying intervention. *See* Sierra's Motion, at ¶ 5. This implies that Sierra and IUB have similar, but not identical interests. Then, in the next paragraph, Sierra asserts that it has "claims" "in common" with WCS' claims, not IUB's. *See id*. at ¶ 6. So which is it? Is Sierra adverse or in unison with WCS? Sierra does not explain, but the practicalities of this case indicate that Sierra cannot conceivably be on the side of WCS because Sierra admits it is actively working against WCS' commercial and legal interests. *See id*. at ¶ 5; *see also* Sierra Petition, at ¶ 1.

Sierra, in seeking intervention — whether as of right or permissively — "*sub judice* cannot speak out of both sides of [its] mouth with equal vigor and credibility before this court." *Reigel v. Kaiser Found. Health Plan of N.C.*, 859 F. Supp. 963, 970 (E.D.N.C. 1994). *See also In re Interest of A.R.*, Case No. 18-2089, 2019 WL 1300487, at *3 (Iowa Ct. App. Mar. 20, 2019) (criticizing the filing of "Janus-like arguments — looking opposite directions…").[4] In other words, Sierra has not provided enough information for WCS nor the Court to determine what its concrete and particularized interests are, and with whom or against whom those interests are aligned. *See generally Hawkeye Food Distribution, Inc. v. IA Educators Corp.*, 812 N.W.2d 600, 609 (Iowa 2012) (quoting *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353-54 (Iowa 2009)) (while a "'petition need not allege ultimate facts that support each element of the cause of action,'" "a petition must contain factual allegations that give

[4] *See In re Matter of Reynolds*, 8 B.R. 619, 620 (S.D. Ohio 1981) ("The god Janus of the ancient Romans is depicted as having two faces, each looking in opposite directions.").

the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition.'").

Accordingly, Sierra's request to intervene permissively should be denied. *See* IOWA R. CIV. P. 1.407(2). *See also North Dakota v. Heydinger*, 288 F.R.D. 423, 432 (D. Minn. 2012) (denying Sierra Club's motion for permissive intervention in a carbon dioxide emissions case).

III. ALLOWING SIERRA TO INTERVENE WOULD UNDULY DELAY AND COMPLICATE ONGOING PROCEEDINGS.

"In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." IOWA R. CIV. P. 1.407(2). "It is the well-settled rule of law in this state that" a party seeking to intervene has "no right to delay the trial of the case." *Flood v. City Nat'l Bank of Clinton*, 263 N.W. 321, 327 (Iowa 1935). *See also Teachout v. Des Moines Broad Gauge St. Ry. Co.*, 38 N.W. 145, 147-48 (Iowa 1888) ("The Court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay."); *Van Gorden v. Ormsby Bros & Co.*, 8 N.W. 625, 628 (Iowa 1881) (intervenors may not delay or cause a continuance).

The trial scheduling conference between the original and primary parties to this action — WCS and IUB — is scheduled for November 16, 2022. *See* Order, at p. 1 (Filed Oct. 7, 2022). This trial scheduling conference is mere days away, and it would be inequitable, unreasonable, and unfair for the Court or any counterparties to expect WCS to agree to any discovery or trial deadlines while not knowing exactly who is in this litigation, and who in this litigation is or is not adverse to WCS. Allowing intervention of Sierra in this case would necessarily cause a delay in the conduct of these proceedings because the specter of nailing down parameters in a scheduling order against "mystery" parties is enough to potentially compel WCS to move for a continuance until such matters are sorted out. *See* IOWA R. CIV. P. 1.407(2). *See also Cooper v. Erickson*, 239

N.W. 87, 89 (Iowa 1931) ("An intervenor, by instituting an independent action through his petition for intervention, cannot insist upon a change in the form of the original proceedings between the plaintiff and defendant."). After all, how can WCS expect to agree to a discovery and trial schedule when WCS does not yet know who exactly is going to be involved in this case? Conducting discovery with two adverse parties is totally different than conducting discovery with only one, and briefing one's case-in-chief against two sets of arguments is totally different than briefing against only one, even if zero discovery were to be involved.[5]

The Court should not permit a litigant — and especially a putative intevernor who is not yet even a deemed party — to disrupt the cadence of established proceedings. *See State v. Lopez*, 633 N.W.2d 774, 778-79 (Iowa 2001). Accordingly, Sierra's request to intervene permissively should be denied. *See* IOWA R. CIV. P. 1.407(2). *See also Nucor Steel-Arkansas v. E.P.A.*, Case No. 3:15CV00333 JLH, 2016 WL 4045425, at *1 (E.D. Ark. Apr. 13, 2016) (holding "Sierra Club's motion to intervene is denied" on both as-of-right and permissive intervention grounds because "allow[ing] Sierra Club to intervene at this point would be pointless and potentially time consuming."). *Accord Athens Lumber Co., Inc. v. F.E.C.*, 690 F.2d 1364, 1367 (11th Cir. 1982) (upholding district court's decision to deny permissive intervention in expedited proceedings due to 'the introduction of additional parties [causing] inevitable delays" and "the remoteness and the

[5] At this time, WCS is not asking for a continuance of the trial scheduling conference on November 16, 2022, but it reserves the right to do so if intervention is granted in favor of Sierra. WCS also reserves the right to move for an alteration of the trial scheduling conference if the issue of intervention is not resolved until after a preliminary/tentative scheduling order is entered at the November 16, 2022 trial scheduling conference.

general nature of the [proposed intervenor's] claims."); *Ringen Stove Co. v. Bowers*, 80 N.W. 318, 319 (Iowa 1899) ("the intervenor has no right to delay…").[6]

IV. SIERRA'S INTERVENTION FILINGS PROVE WCS' CLAIMS WERE RIGHT IN THE FIRST INSTANCE REGARDING THE LEGAL AND PRACTICAL RISKS OF RELEASING THE LIST. EVEN IF SIERRA WAS ALLOWED TO INTERVENE, ANY ARGUMENTS THEY WOULD BRING WOULD FAIL.

WCS' Petition for Temporary and Injective Relief laid out eight distinct legal claims for why the List should not be released by IUB to outside actors such as Sierra:

- Count I: Violation of IOWA CODE § 22.7(18), a confidentiality provision of the Iowa Open Records Act that prohibits disclosure of information not required by law, rule, or procedure made by persons outside government that, if released, may cause harm to those whose information is released. This statutory provision is directly on point. Sierra wants IUB to disclose voluntarily provided sensitive information that was not required to be filed with IUB by law, rule, or procedure to be open to third parties — in this case, Sierra — so that Sierra may browbeat members of the List into not signing otherwise voluntary easements. *See* Sierra Motion, at ¶ 2; *see also* Aff. of Jessica Mazour, at ¶¶ 2. This is clearly prohibited by law and is currently being litigated in the *Summit Carbon Solutions* case now on appeal. *See* Iowa App. Ct. Case No. 22-1444 (Filed for appeal on Sept. 2, 2022).

- Count II: Violation of IOWA CODE § 22.7(3), a confidentiality provision of the Iowa Open Records Act that prohibits the release of "trade secrets" provided by outside entities to the government from being released to the general public if such disclosure could potentially allow

[6] Allowing permissive intervention on the eve of WCS' need to make consequential and strategic litigation considerations regarding discovery and trial scheduling matters with imperfect information about participants in this litigation also raises serious Due Process issues that should be avoided. *See* U.S. CONST. art. XIV, § 1; IOWA CONST. art. I, § 9. *Cf. In re C.A.*, 603 N.E.2d 1171, 1193 (Ill. App. Ct. 1991) (McMorrow, J., dissenting) ("judicial proceedings are not well suited or equipped for such short notice….intervention would violate the procedural due process of C.A.").

commercial competitors to gain a competitive advantage. The List is a trade secret under Iowa law. *See* IOWA CODE § 550.2(4)(*a*)-(*b*). It was compiled in furtherance of a multi-million dollar carbon sequestration pipeline project with the help of outside consultants. *See* Aff. of Nick Noppinger, at ¶ 7. For Sierra to claim the List has no "independent economic value," *see* Sierra Petition, at ¶ 6(B), is either laughably absurd or a blatant misrepresentation of reality. While Sierra may not be a direct economic competitor of WCS, the information contained in the List, if provided to Sierra — an opponent of the WCS pipeline project — would almost certainly be circulated publicly such that it could come into the hands of those who are direct or potential economic competitors. Furthermore, Sierra openly admits it will use the contents of the List to organize third parties against the economic interests of WCS. *See* Sierra's Motion, at ¶¶ 2-3. This is exactly the type of harm IOWA CODE § 22.7(3) was meant to prevent.

- Count III: Violation of Iowa Code Chapter 550, Iowa's Trade Secrets Act, a law that allows the holder of a trade secret to petition for court intervention to enjoin actual or threatened misappropriation of trade secrets. *See* IOWA CODE §§ 55.3(1) and (3). As stated above, the List is a trade secret under Iowa law. *See* IOWA CODE § 550.2(4)(*a*)-(*b*). The release of the List to Sierra would be an ***actual*** misappropriation of protected trade secret information provided by WCS to IUB under the auspices of confidentiality. Even the ***threat*** of Sierra obtaining the List would violate this statute and the protections it vests in WCS as a trade secret holder. *See* IOWA CODE §§ 55.3(1) and (3). Balancing the statutory legal rights of WCS against Sierra's mere generalized desire to obtain the List, it is clear WCS' interests are superior to those of Sierra's or anyone else who may want to obtain the List. *See, e.g., Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405, 1436-38 (N.D. Iowa 1996) (holding the balance of the harms and interests between

release of trade secrets and those wishing to see them, and the irreparable harm that could result from such release, warranted injunctive relief in favor of the trade secret holder.).

- Count IV: A violation of IOWA CODE § 22.7(6), a confidentiality provision of Iowa's Open Records Act that prohibits release of commercial information provided to the government by outside entities that, if released, would give advantage to competitors and serve no public purpose. Again, the List is a trade secret that contains proprietary information that WCS has been diligent in keeping confidential to the extent it can. As the Court is aware, there are other carbon sequestration pipelines currently in the works in Iowa in addition to WCS. *See Summit Carbon Solutions v. IA Utils. Bd.*, Iowa App. Ct. Case No. 22-1444 (Filed for appeal on Sept. 2, 2022). While the business models and current operational territories might be different now, there is no guarantee that the other pipeline companies may not eventually come into direct competition with WCS. If that occurs, access to the List would certainly provide a commercial advantage to those other pipeline companies which they would not otherwise have absent the List's disclosure. Further, to some extent, Sierra itself is a "competitor" of WCS in that it is trying to interrupt or completely halt WCS' lawful business operations. Moreover, there is little public purpose in facilitating the potential intimidation and harassment of landowners along the WCS pipeline route by Sierra while opposing the WCS project. Such coercion is not in the public interest. *See generally Ameristar Casino East Chicago, LLC v. Unite Here Local 1*, Case No. 16 CV 5379, 2018 WL 4052150, at *5 (N.D. Ill. Aug. 24, 2018) ("Various forms of harassment are banned under state and federal law…Such laws unquestionably serve important state and public interests.").

- Count V: A violation of the *Clymer/DeLaMater* common law public records confidentiality balancing test standard, which provides that when disclosure is contested, the party

contesting its disclosure may require the court to engage in a balancing test. This balancing test involves weighing: (a) The public purpose of the requesting party; (b) Whether the purpose can be served without releasing personal information; (c) The scope of the request; and (d) Possible alternatives other than disclosure; and (e) The gravity of any potential invasion of privacy. *See Clymer v. City of Cedar Rapids*, 601 N.W.2d. 42, 45-47 (Iowa 1999); *DeLaMater v. Marion Civ. Servs. Comm'n*, 554 N.W.2d 875, 879 (Iowa 1996). Although specific Open Records Act exemptions apply as noted above, to the extent there may be ambiguity, the *Clymer/DeLaMater* standard applies. *See, e.g.*, *Ripperger v. IA Public Information Bd.*, 967 N.W.2d 540 (Iowa 2021) (applying a similar balancing test to the *Clymer/DeLaMater* standard, but using different terminology, to resolve an Open Records Act ambiguity dispute). Sierra's assertion to the contrary is belied by both well-established and recent case law.

Here, little public purpose is served by facilitating Sierra's attempts to thwart an energy infrastructure project on idiosyncratic ideological grounds, particularly where it is Sierra, not WCS, that is apparently putting pressure on landowners. *See* Aff. of Jessica Mazour, at ¶¶ 1-5. The disclosure of the List literally cannot be done without the release of personal information, this has been held to be a significant factor under this balancing framework. *See Clymer*, 601 N.W.2d at 47-48 (holding the scales tip in favor of confidentiality of personal information, such as names and addresses). The scope of the request here is broad — Sierra is seeking everything on the List, with no exception or tailoring. Due to the nature of the request, there are no alternatives between full disclosure and full confidentiality. And given Sierra's ongoing, and already broadcasted intent to continue, physically contacting the persons named in the List, the risk of privacy invasion is high. As a result, Sierra has once again shown that their operations and intentions justify an

injunction in WCS' favor under at least one of WCS' stated claims, the *Clymer/DeLaMater* standard.

- Count VI: This claim, in relation to Sierra, speaks for itself. WCS has pled that release of the List would result in a heightened risk of interference with prospective contractual relations. Sierra admits that, if the List were to be disclosed to them, they would actively and more efficiently seek to disrupt, interfere, and impede WCS' ability to obtain voluntary landowner easements along the proposed pipeline route. *See* Petition, at ¶ 1. *See also* Sierra's Motion, at ¶¶ 1-3; Aff. of Jessica Mazour, at ¶¶ 1-5. This is the very definition of the tort of interference with prospective contractual relations. *See, e.g., Dillon v. Ruperto*, Case No. 09-0600, 2010 WL 2383517, at *4 (Iowa Ct. App. Jun. 16, 2010) (citing *IA Coal Mining Co., Inc. v. Monroe Cnty.*, 555 N.W.2d 418, 438 (Iowa 1996) (reciting elements of tortious interference with prospective contractual relations as knowledge of the prospective relationship, intentional attempts to interfere, risk of relations not materializing, and damages). This Court should not allow Sierra's intervention in this action to facilitate such tortious conduct.

- Count VII: Just as intervention of Sierra and disclosure of the List would cause tortious interference with prospective contractual relations, it would also facilitate the tort of interference with prospective business advantage.[7] *See, e.g., Nesler v. Fisher and Co. Inc.*, 452 N.W.2d 191, 199 (Iowa 1990). Interference with prospective business advantage occurs when a wrongdoer knew of a prospective business relationship, intentionally interfered with that relationship, caused a third party not to enter into or continue that relationship or tended to reach

[7] Interference with prospective contractual relations and prospective business advantage are separate and distinct tort actions under Iowa law. *See Farmers Co-op Elevator, Inc., Duncombe v. The State Bank*, 236 N.W.2d 674, 674 (Iowa 1974) (stating the two claims are "considerably different" in nature).

that result, and damages. *See id*. With the List being shielded from release, its trade secret information provides WCS a prospective business advantage in completing its project and securing profitable voluntary easements along the route. If Sierra were to be allowed to intervene and secure the List, after which it most assuredly would circulate, it would substantially dilute the current prospective business advantage held by WCS. This Court should not allow Sierra's intervention in this action to facilitate such tortious conduct. *See, e.g*., *Burke v. Hawkeye Nat. Life Ins. Co*., 474 N.W.2d 110, 115 (Iowa 1991) (release of a potential customer list may establish a claim for interference of prospective business advantage).

- Count VIII: Violations of U.S. Constitutional right to protected commercial associations under the First and Fourteenth Amendments are also at stake should Sierra be allowed to intervene and ultimately obtain the List. *See* U.S. CONST. amend. I and XIV. *See also Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (in a case holding that the disclosure of personal information contained in a commercial document was not proper, the High Court said "it is immaterial" whether the right of association in question is "political, ***economic***, religious, or cultural….") (emphasis added). Just as Sierra has the right to advocate for its beliefs regarding the WCS pipeline, WCS has a concomitant right to constitutionally associate on economic terms with those along the proposed route without risk of interference by Sierra. However, that is exactly what Sierra has self-professed it intends to do. *See* Petition, at ¶ 1. *See also* Sierra's Motion, at ¶¶ 1-3; Aff. of Jessica Mazour, at ¶¶ 1-5. Allowing intervention would essentially put the thumb on the scale in favor of Sierra as opposed to WCS, and require WCS to unwillingly and involuntarily subsidize the right of association of Sierra at the expense of WCS' own constitutional rights. This Court should not allow Sierra's intervention in this action to facilitate such a situation. The Court may not prize one party's "constitutional rights over another."

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976) (declining to declare the constitutional rights of one party superior to that of another, stating "The authors of the Bill of Rights did not undertake to assign priorities…[but] were fully aware of the potential conflicts between them…it is not for us to rewrite the Constitution by undertaking what [the Framers] declined to do."). Sierra is free to interact with landowners, but not at the infringement of WCS' own constitutional rights.

CORRECTING THE RECORD

V. THE AFFIDAVIT SUBMITTED BY SIERRA IN SUPPORT OF INTERVENTION CONTAINS FACTUAL ERRORS AND RED HERRRINGS THAT CALL INTO QUESTION THE CREDIBILITY OF THE AFFIANT AND SIERRA MORE GENERALLY. THESE CREDIBILITY ISSUES FURTHER SUPPORT DENYING INTERVENTION.

When an individual signs an affidavit in a court proceeding, they certify, under penalty of perjury, pursuant to the laws of the State of Iowa, that the content of that affidavit is true and correct to the best of their knowledge. *See* IOWA CODE § 622.1. This attestation requirement "is an important requirement because the 'under penalty of perjury' language…acts to bind the conscience of the person and emphasizes the obligation to be truthful." *State v. Carter*, 618 N.W.2d 374, 378 (Iowa 2000). A person who makes statements under oath that are false as to material facts can face serious consequences. *See* IOWA CODE § 720.2 (criminal violations for perjury). In addition, those who provide legal representation to those who make such false representations, or suspect falsity and do nothing, also face serious consequences. *See, e.g.*, *Comm. on Prof'l Ethics & Conduct v. Wenger*, 469 N.W.2d 678, 679 (Iowa 1991) ("a reprimand or suspension may be the appropriate sanction for false testimony or providing false instruments or affidavits."); *Comm. on Prof'l Ethics & Conduct v. O'Donohoe*, 426 N.W.2d 166, 169 (Iowa 1988) (deliberate misstatement of facts resulted in an attorney reprimand); *Comm. on Prof'l Ethics*

& Conduct v. Wilson, 270 N.W.2d 613, 616 (Iowa 1978) (false and misleading statements of fact to a panel of judges resulted in a six month suspension).

Whether through being misinformed or through intention, many of the allegations in Affiant Jessica Mazour's Affidavit filed on behalf of Sierra are outright false or materially misleading. Those allegations cannot be allowed to rest idle in the record without being addressed head-on.

A. False Statements Regarding WCS And Its Land Agents Pressuring Landowners.

In her Affidavit in support of Sierra, Jessica Mazour asserts that WCS' land agents are engaging in ongoing "harassment, threats, and intimidation" against persons along the proposed pipeline route. *See* Aff. of Jessica Mazour, at ¶ 3. This is factually wrong, misleading, and incorrect.

Iowa law prohibits pipeline project operators from directly contacting landowners along a proposed route until certain public informational meetings are held and IUB grants the pipeline company permission to negotiate. *See* IOWA CODE § 479.5(5). WCS has carefully and prudently adhered to this law and procedure. *See* Aff. of Nick Noppinger, at ¶¶ 9-10. The only times WCS or its land agents have had any direct contact with landowners individually regarding specific easement matters was during in-person, voluntary conversations initiated by landowners (not WCS), in public spaces, in the presence of IUB officials and others, after previously held public informational meetings in conformance with Iowa law and without any objection from IUB. *See* Aff. of Nick Noppinger, at ¶¶ 9-10; and 12. During those conversations, there was never any effort, attempt, or intention of exerting pressure on landowners to sign easements, to harass them, to threaten them, or to intimidate them. WCS' intent and objectives during those interactions were to educate potential easement partners and members of the public, not to strong-arm anyone for

any reason. *See* Aff. of Nick Noppinger, at ¶ 13.[8] Indeed, unlike other pipeline operators, WCS has never exercised eminent domain in any of its previous pipeline projects. This evidences WCS' proclivity to take cooperative approaches to pipeline matters, not aggressive stances. *See* Aff. of Nick Noppinger, at ¶ 8.

If any harassing, threatening, or intimidating tactics ever happened — and they never did — it would have occurred in full view of IUB officials and other members of the public. The lack of any evidence of such behavior occurring speaks volumes. If Sierra had real evidence of anything different, it would not have been Jessica Mazour submitting an affidavit based on hearsay for Sierra, but from a landowner who could personally and verily swear under oath that it happened to them directly. *Cf. In re Nathaniel L.*, Case No. C043787, 2003 WL 22391148, at *5 (Cal. Ct. App. Oct. 21, 2003) ("if they had evidence…they should have tendered that information to the court."). False statements like the one in question risks serious harm to WCS' public and private sector reputation. *See* Aff. of Nick Noppinger, at ¶ 19.

Another damning fact against the credibility of Jessica Mazour's Affidavit is that ***WCS has not even created any easement documents for anyone to sign yet***. *See* Aff. of Nick Noppinger, at ¶ 15. WCS has not conducted market studies to produce any land value estimates, so there is no feasible manner in which WCS could harass, intimidate, or threaten a landowner into an easement agreement that has not been drawn up nor specified for compensation purposes. *See* Aff.

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[8] Only one "cold call" was made by a representative of WCS, and that was to the Clinton County Conservation Board, not to a particular landowner about a specific easement. *See* Aff. of Nick Noppinger, at ¶ 14. All other landowner interactions have been based off of inquiries from landowners to WCS, not the other way around. *See* Aff. of Nick Noppinger, at ¶ 13. Furthermore, the Executive Director of the Clinton County Conservation Board subject to the singular "cold call" invited the land agent who called to the Board's fall fundraising banquet. *See* Aff. of Nick Noppinger, at ¶ 14. That would not indicate a reasonable inference of any type of "harassment, intimidation, or threatening" interaction to the objective observer. *See* Aff. of Nick Noppinger, at ¶ 14.

of Nick Noppinger, at ¶¶ 15-16. In other words, the accusations in Paragraph 3 of the Jessica Mazour Affidavit are literally "make believe." *See Budget Premium Co. v. Motor Ways, Inc.*, 400 N.W.2d 60, 64 (Iowa Ct. App. 1986) ("The court will not permit itself to be deceived….[nor] affected by such jugglery of words or make-believe, but will ascertain the facts as they actually are, and on such facts determine the truth and the true relationship as it is in reality.").

Moreover, it appears it is Sierra — not WCS — that has been independently and directly contacting landowners to unduly influence their private decisions about their land and business relations with WCS. *See* Aff. of Jessica Mazour, at ¶¶ 1-5. In other words, the one making false accusations against WCS appears to be the actual perpetrator of the wrongdoing alleged. Were these statements not made in a court filing, they would otherwise constitute actionable defamation. *See, e.g, Kennedy v. Zimmerman*, 601 N.W.2d 61, 64-65 (Iowa 1999) (statements made in judicial proceedings, if otherwise defamatory, are not actionable, but statements made outside of judicial proceedings are). Should WCS become aware of similar false and defamatory statements in the future ***not*** made in a court filing, WCS, along with its land agents and land agent vendors, reserve any and all legal and equitable rights to move against those who make them or intentionally repeat them. *See, e.g., Solers, Inc. v. Doe*, 977 A.2d 941, 948-49 (D.C. Ct. App. Aug. 13, 2009) (allowing a case for defamation to proceed where the statement was untrue and caused harm to a business' commercial reputation and future business advantages); *Bertrand v. Mullin*, 846 N.W.2d 884, 901 (Iowa 2014) ("It goes without saying that a speaker who repeats a defamatory statement after being informed of the statements unambiguous falsity does so at the peril of generating an inference of actual malice.").

WCS respectfully urges the Court to carefully scrutinize the statements and evidence provided hereafter by Sierra and its supporters. They have already suggested that close adherence

to facts is not their strong suit. *See generally U.S. v. Knox*, Case No. 1:20-CR-48-HAB, 2022 WL 1183881, at *6 (N.D. Ind. Apr. 21, 2022) ("Truthfulness is not Knox's strong suit…[a]nd he did himself no favors, but managed to lend even more substance to the Government's evidence in the process.").[9]

B. OTHER STATEMENTS IN SIERRA'S SUBMITTED AFFIDAVIT ARE EQUALLY MISLEADING.

Sierra's supporting Affidavit asserts that "[w]ithout access to the full list of landowners [named in the List] it is extremely difficult for the landowners to communicate with each other and support each other." Aff. of Jessica Mazour, at ¶ 2. This is simply not accurate. In fact, Affiant Jessica Mazour's own public statements admit to the opposite. In a news article published on November 3, 2022, Affiant Jessica Mazour was reported as saying: "Even without Summit's [another pending pipeline project] landowner list, Mazour said the group [Sierra] has been assembling a strong coalition to oppose the [Summit] pipeline." Jeffrey Tomich, *CO2 Pipeline Developers, Foes Clash Over Landowner Lists*, E&E NEWS.COM (Nov. 3, 2022), *available at* https://www.eenews.net/articles/co2-pipeline-developers-foes-clash-over-landowner-lists/ (Last visited Nov. 8, 2022). In other words, Affiant Jessica Mazour apparently does not believe the words that are coming out of her own mouth.

The List's contents were gathered from publicly available data curated into a particular form customized for the use of WCS through private commercial contractors. *See* Aff. of Nick

[9] It should also be noted that WCS held meetings across all of the potentially impacted counties in early 2022. Meetings were held with key stakeholders, such as mayors, city council members, businessmen, and the like. The point of these meetings were to simply introduce WCS to the population in the geographical area, and it was not prohibited by IUB rules. *See* Aff. of Nick Noppinger, at ¶ 12. WCS also conducted an "Informational Day" in May of 2022, again, to educate, not intimidate, harass, or threaten any landowners. *See* Aff. of Nick Noppinger, at ¶ 12-13 . These were public forums where no allegations of coercion were expressed by any voluntary participants.

Noppinger, at ¶ 7. It is the curation, sorting, and formatting (plus additional content) that makes the List a protected trade secret possessing independent economic value. *See* IOWA CODE § 550.2(4)(*a*)-(*b*). If Sierra (or anyone) wants to go out on the open market and purchase its own data, hire a geographical information system ("GIS") technician, and generate its own projected list of landowners within a pipeline route as-yet-to-be-determined, it certainly can do so. But Sierra should do so at its own expense, not as a costless piggyback off of WCS' commercial and financial investments and interests through this litigation. *See generally Klein v. IA Public Information Bd.*, 968 N.W.2d 220, 234, 238, and n.9 (Iowa 2021) (a petitioner lacks standing to seek public record information that can already be obtained through public means).

Furthermore, it is not WCS' duty to make it easier for its adversaries to sabotage its commercial efforts, nor should it be. *See* IOWA CODE §§ 22.7(3); 22.7(6); and 550.3(1)-(3). *See also Washington Post v. McManus*, 355 F.Supp.3d 272, 304 (D. Md. 2019) ("The compelled disclosure of this information could expose their proprietary data…"). However, that is apparently how Sierra views the situation. *See* Aff. of Jessica Mazour, at ¶ 5 ("I currently do not have the ability to check [WCS'] list for accuracy and proper notification.") As the famous Miles Davis jazz tune once indicated: "***So What***?" *Hall v. Inner City Records*, Case No. 79 Civ. 1854, 1980 WL 1163, at *1 (S.D.N.Y. Jun. 19, 1980). The underlying information, as previously stated, was derived from public database sources. Sierra can access and obtain that same information and undertake cross-checking efforts of its own. That is none of WCS' concern, and it certainly does not support a basis of intervention in ongoing litigation where Sierra's interest are remote, at best.

See generally Chicago Lawyers' Comm. for Civil Rights v. Craigslist, Inc., 461 F.Supp.2d 681, 695 n.13 (N.D. Ill. 2006) ("that is a problem for [Sierra]…and not [WCS], to address.").[10]

Lastly, Jessica Mazour's Affidavit asserts that because she has not heard any landowner express a desire to have their names contained on the List remain confidential, the List should be released. *See* Aff. of Jessica Mazour, at ¶ 4. Setting already articulated credibility issues aside as to whether this is true, this portion of the Affidavit is a red herring. ***First***, how would Affiant Jessica Mazour know if any individual who made that representation to her is actually on the List when Sierra doesn't have it? ***Second***, the desires of individuals whose names are on the List is immaterial as to the legal questions of whether or not the List writ large can be released wholesale to third parties. Either legal protections apply to the List, or they don't. *See Ditech Financial, LLC, Hollywood Highlands East Landscape Maintenance Ass'n, Inc.*, Case No. 2:16-cv-00298-JAD-NJK, 2016 WL 3751944, at *1 n.9 (D. Nev. Jul. 13, 2016) ("This is not Schrödinger's cat. Either the statute applies or it does not…"). Individual opinions of unnamed people are irrelevant for the purposes of intervention as well as to the disclosure of the List. The law here protects the List from disclosure and Jessica Mazour's Affidavit on behalf of Sierra can do nothing to change that.

CONCLUSION

For the reasons stated above, and in the other documents filed in conjunction herewith, Sierra's Motion to Intervene should be denied on all grounds.

[10] Furthermore, WCS, like any business entity, has a legal and fiduciary duty to maximize return on investments for the benefit of its members/shareholders. *See, e.g., Urbandale Best, LLC v. R&R Realty Group, LLC*, Case No. 15-2015, 2017 WL 363239, at *7 (Iowa Ct. App. Jan., 25, 2017). Releasing proprietary information such as the List to opponents who wish to harm the financial and commercial stature of WCS would place WCS in an unenviable position of hurting its own members/shareholders while placating and assisting the opposition that wishes to harm WCS' operations writ large. This reason alone is enough to warrant nondisclosure of the List.

Respectfully submitted,

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