

DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

ENERGY TRANSFER LP, *et al.*,

Plaintiffs,

V.

GREENPEACE INTERNATIONAL, *et al.*,

Defendants.

Case No.: 30-2019-CV-00180

**GREENPEACE DEFENDANTS' BRIEF IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
PLAINTIFFS' DEFAMATION CLAIM
REGARDING "USE OF FORCE"
(STATEMENTS 3, 39, 46)**

[DEFAMATION MOTION 1 OF 3]

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[¶1] Greenpeace, Inc., Greenpeace International and Greenpeace Fund, Inc. (“Greenpeace Defendants”) seek dismissal of Plaintiffs’ defamation claim to the extent it is based on three statements by Greenpeace, Inc. (“Statements”) that address law enforcement and security contractors’ use of force against protesters at Standing Rock. This is the first of three motions, filed concurrently, seeking partial summary judgment on Plaintiffs’ defamation claim. Here, none of the Statements about use of force is actionable, for multiple independent reasons.

[¶2] Plaintiffs cannot meet their burden of proving material falsity, on two distinct grounds. First, the allegedly defamatory portions of the Statements—their alleged “sting”—is true: the Statements accurately assert that law enforcement and Plaintiffs’ private security used pepper spray, dogs, sound cannons and other methods of force (much of it supplied by Plaintiffs) at Standing Rock, including against demonstrators who were peaceful. *See* Section II.B.1, *infra*.

[¶3] Second, Plaintiffs’ argument that the Statements are defamatory because the demonstrations were not “peaceful” or the use of force was not “violent” fails, because such characterizations are non-actionable opinions. The issue here is not whether there were violent incidents at the Standing Rock protests; there were, and the Statements do not contend otherwise. Instead, the Statements accurately note that force was used indiscriminately, including against protesters who were peaceful. Moreover, characterizations that demonstrators were “peaceful” or that use of force was “violent” are matters of opinion that cannot be proven false. The First Amendment protection for opinion applies with particular force where, as here, it concerns matters of intense public interest and debate. *See* Section II.B.2, *infra*.

[¶4] Third, even if the accused Statements were in some respects provably false (and they are not), Plaintiffs’ claim would fail because the Statements were not published with constitutional “actual malice.” As public figures, Plaintiffs cannot recover for defamation unless

they establish this heightened fault standard, which on summary judgment requires “clear and convincing” proof a defendant subjectively knew the statement was false or had serious doubts as to its truth. Plaintiffs have no evidence that Greenpeace, Inc. (the only Defendant that published the Statements) acted with actual malice. To the contrary, its publications mirrored (and relied on) numerous credible and contemporaneous reports from news publishers, independent eyewitnesses and others regarding the protests. *See* Section II.C, *infra*.

[¶5] Finally, summary judgment should be granted as to Greenpeace International and Greenpeace Fund, Inc. (“Greenpeace Fund”) for all of the reasons set out above, and also because those entities did not publish the Statements. “Publication” is an element of defamation, and there is no evidence Greenpeace International or Greenpeace Fund communicated the three Statements, or had any participation or involvement in communicating them. The Statements were published only on Greenpeace USA’s website, the content of which is controlled solely by Greenpeace, Inc. *See* Section II.D, *infra*.

I. FACTUAL BACKGROUND

A. Greenpeace

[¶6] Greenpeace, Inc. is the U.S.-based entity that is a part of a global network of 26 independent national and regional non-profit entities.¹ Greenpeace International, based in the Netherlands, is the network’s worldwide coordinating organization.² Greenpeace Fund is a non-profit that acts “to protect and preserve the environment through the funding of grants to other organizations,” primarily to the other Greenpeace Defendants.³

¹ Ex. 1, Greenpeace Fund 30(b)(6) (Emerson) Dep. 21:3-22:2; Ex. 2, Greenpeace International 30(b)(6) (Christensen) Dep. 18:1-20. Unless otherwise stated, all exhibits cited within this Motion are attached to the Declaration of Eric M. Stahl (“Stahl Decl.”) in support of this Motion.

² Ex. 2, Greenpeace International 30(b)(6) (Christensen) Dep. 18:8.

³ Ex. 3, Dep. Ex. 1578 (Greenpeace Fund tax form 990); *see* Ex. 1, Greenpeace Fund 30(b)(6) (Emerson) Dep. 22:7-10, 42:5-9, 83:6-20, 87:20-88:1.

[¶7] Greenpeace, which was founded within the Quaker tradition of bearing witness⁴ and which remains dedicated to principles of non-violence,⁵ campaigns internationally through peaceful “creative confrontation” to publicize and address climate change and other environmental issues.⁶

[¶8] Greenpeace Defendants support reducing fossil fuel infrastructure, including oil and gas pipelines, because they believe it perpetuates reliance on fossil fuels that pose environmental and climate risks.⁷ In connection with the Dakota Access Pipeline (“DAPL”), Greenpeace, Inc. published information about the pipeline and the protests at Standing Rock in blogs, news releases, and on social media. Plaintiffs have not challenged the vast majority of these publications.⁸ Nor have Plaintiffs claimed they were defamed by any of the massive body of news coverage and other publications reporting on the use of force against peaceful demonstrators at Standing Rock.⁹

B. Greenpeace, Inc.’s Three Statements Mentioning Use of Force

[¶9] Plaintiffs’ Second Amended Complaint alleges defamation based on nine statements about DAPL, all arising in the context of Greenpeace’s environmental advocacy

⁴ Ex. 4, Spencer Dep. 82:4-24.

⁵ Ex. 2, Greenpeace International 30(b)(6) (Christensen) Dep. 32:14-33:18; 103:12-17 (“Nonviolence is embedded in our mission, ... it’s the first core value we have.”); Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 138:14-24 (noting Greenpeace’s 50-year commitment to nonviolence); Ex. 6, Leonard Dep. at 193:3-9 (“I have been involved with the organization off and on since 1988, and I am unaware of any incident where the principles of nonviolence were not followed.”); *id.* 200:2-12, 201:8-17.

⁶ *See* Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 272:3-24 (activism on climate change is core Greenpeace principle); Ex. 7, Dorozenski Dep. 24:21-25:9 (“[C]reative confrontation” includes displaying banners and demonstrating in ways that highlight global warming).

⁷ Ex. 6, Leonard Dep. 71:8-72:9, 76:15-78:2.

⁸ Indeed, the defamation claim in Plaintiffs’ First Amended Complaint challenged 85 statements in 40 different publications. *See* First Amended Complaint App’x A (Doc. 103). Plaintiffs withdrew most of their defamation claim, which now challenges only nine statements in eight publications. *See* Second Amended Complaint Appendix A (Doc. 2837) (“SAC Am. App’x A”).

⁹ *See, infra* § I.E.

described above. *See* SAC Am. App’x A (Doc. 2837). This Motion concerns the three statements identified as Statements 3, 39 and 46. They refer to incidents in which “law enforcement” and “private security” used “aggression and violence” against “peaceful” DAPL protesters.¹⁰ As detailed below, each Statement mentions use of force against protesters only in passing, in publications largely about other subjects.

[¶10] All three Statements were published at www.greenpeace.org/usa, a website managed by Greenpeace, Inc. and over which the other Greenpeace Defendants have no editorial control.¹¹ None of the publications containing the Statements was published by Greenpeace Fund or Greenpeace International. *See* § II.D.

[¶11] The three Statements are set out below, in order of their publication date, along with the authors and further context.

1. Statement 46 (November 6, 2016)

[¶12] Statement 46 is a blog item published on Greenpeace, Inc.’s website on November 16, 2016.¹² The post is titled “#NoDAPL Day of Action Draws Tens of Thousands, Lights Up Social Media.” The post reports on 300 “solidarity events in all 50 states” nationwide the previous day, which were intended to “put the pressure squarely on President Obama to stop the Dakota Access Pipeline.” The post includes reports from six U.S. cities.

[¶13] Statement 46 (underlined below) appears in an embedded post from Greenpeace USA’s Instagram account, as the caption to a photograph of an event in San Francisco. It reads:

Today, thousands of people across the country took to the streets in solidarity with the Water Protectors fighting construction of the Dakota Access Pipeline.

¹⁰ *See* SAC Am. App’x A (Doc. 2837); Exs. 8, 9, and 10 (Dep. Exs. 1055, 1063, 1602).

¹¹ *See* § II.D, *infra*; Declaration of Mike Townsley (“Townsley Decl.”), ¶ 4.

¹² *See* Ex. 9, Dep. Ex. 1063; SAC Am. App’x A Statement 46. The original post is available online at <https://www.greenpeace.org/usa/nodapl-day-action-draws-tens-thousands-lights-social-media/>.

For months, the Standing Rock Sioux and allies have been peacefully protesting the crude oil pipeline, but have been met with aggression and violence from Dakota Access private security and construction crews.

These events were a powerful reminder to President Obama and Dakota Access that the world is watching.

Did you attend a #nodapl event in your city? Tell us how it went (and don't forget to take action in our bio!) #waterislife #dakotaaccesspipeline #respectourwater #activism #greenpeace.¹³

[¶14] The post was compiled by Ryan Schleeter, an Online Editor for Greenpeace, Inc.¹⁴ Schleeter wrote parts of the blog, but did not write the embedded social media items, including the Instagram caption containing Statement 46.¹⁵

[¶15] Schleeter believed Statement 46 was true because Greenpeace, Inc.'s practice was to have subject-matter experts fact-check its statements,¹⁶ and he "trusted that the content coming from my colleagues who were being held to the same standard in executing their work had gone through the process of fact-checking and verifying what was in the post already."¹⁷

[¶16] Schleeter also believed that peaceful protesters at Standing Rock were met with aggression and violence based on a first-hand account and video that he had reviewed, two weeks earlier, of a DAPL protester who had been "shot by militarized police with a rubber bullet" while recording protests at Standing Rock.¹⁸

[¶17] Schleeter did not believe Statement 46 was false.¹⁹ He was aware of no information demonstrating its falsity, and had no serious doubts as to its truth.²⁰ He also was not aware of anyone at Greenpeace who believed the statement was false, entertained serious doubts

¹³ *Id.*

¹⁴ Ex. 11, Schleeter Dep.19:3-8.

¹⁵ *Id.* at 113:15-116:16; 124:2-126:23.

¹⁶ *Id.* at 25:22-28:5.

¹⁷ *Id.* at 127:24-128:10.

¹⁸ Declaration of Ryan Schleeter ("Schleeter Decl."), Ex. 1.

¹⁹ Ex. 11, Schleeter Dep. 153:12-154:11.

²⁰ *Id.* at 154:12-22.

about its truth, or disregarded information in their possession about the truth of the statement.²¹

2. Statement 39 (November 21, 2016)

[¶18] Statement 39 is contained in a news release published on the Greenpeace USA website, titled “Young Women Shut Down TD Bank, Call for Divestment on the Dakota Access Pipeline.” As the title suggests, the article is about a protest outside a bank in Philadelphia, urging companies financing DAPL to divest from the project.²²

[¶19] The accused Statement 39 (underlined below) appears as a background statement, in the sixth paragraph of the eight-paragraph release. It says:

Since April, there has been a peaceful, nonviolent encampment on Standing Rock Sioux Tribal land in the path of the pipeline. In recent months, Water Protectors — the Sioux, Indigenous allies, and non-Native allies — have been met with extreme violence, such as the use of water cannons, pepper spray, concussion grenades, tasers, LRADs (Long Range Acoustic Devices), and dogs, from local and national law enforcement, and Energy Transfer Partners and their private security.²³

[¶20] Statement 39 is attributed to Perry Wheeler, a communications specialist for Greenpeace, Inc.²⁴ Wheeler followed local and national news coverage of the DAPL protests closely.²⁵ He believed statements that protesters were met with violence to be true, based on media reports, video live streams of events at Standing Rock, and social media posts.²⁶ In Wheeler’s opinion, based on what he had seen, the violence that occurred at Standing Rock “was

²¹ *Id.* at 154:23-155:12.

²² *See* Ex. 8, Dep. Ex. 1055; SAC Am. App’x A, Statement 39. The original post is available online at <https://www.greenpeace.org/usa/news/young-women-shut-down-td-bank-call-for-divestment-of-the-dakota-access-pipeline/>.

²³ Ex. 8, Dep. Ex. 1055. Only the portion of Statement 39 referring to the violence used on peaceful Water Protectors is addressed in this Motion. The portion of Statement 39 referring to “Standing Rock Sioux Tribe land in the path of the pipeline” is addressed in a separate summary judgment motion (“MSJ No. 3”).

²⁴ Ex. 12, Wheeler Dep. 23:9-16.

²⁵ *Id.* at 42:8-44:5.

²⁶ *Id.* at 79:14-80:2; 164:8-165:6 (Wheeler aware of and viewed footage of security dogs attacking protesters); *id.* at 184:11-21 (Wheeler relied on media sources, “live streams that were happening on the ground where I could see firsthand where folks were peaceful,” social media, and conversations with knowledgeable friends and colleagues).

at the hands of law enforcement” but the protesters he observed “were peaceful.”²⁷

3. Statement 3 (March 2, 2018)

[¶21] Statement 3 is contained in a Greenpeace, Inc. blog post published on March 2, 2018, more than a year after the protests at Standing Rock and seven months after Plaintiffs’ predecessors had filed a lawsuit (later dismissed) against the Greenpeace Defendants and others. The post is titled, “The Truth About Energy Transfer Partners,” and focuses on Plaintiffs’ strategic litigation aimed at silencing critics, and their “cozy business and political relationships and intimidation tactics.”²⁸

[¶22] Statement 3 appears ten paragraphs into the blog. The Statement reads, “As the protests at Standing Rock grew, ETP sent in private security contractors who [used] pepper spray and attack dogs on peaceful Water Protectors and pipeline opponents.”²⁹

[¶23] Plaintiffs claim only the underlined text above is defamatory. They do not challenge the remainder of the blog. In particular, Plaintiffs do not assert the following statements about their security practices are false:

ETP hired TigerSwan, a private security firm, to oversee protection of the pipeline project.... TigerSwan ... originated as a US military contractor charged with executing the war on terror, and after being contracted by ETP turned its military-style counterterrorism tactics against the movement opposing DAPL. ETP later paid TigerSwan for information that was used to manufacture a meritless conspiracy lawsuit against environmental groups. TigerSwan did this by infiltrating the protest camps and activist circles and gathering information via fake social media pages.... Documents have also revealed that TigerSwan collaborated closely with police in North Dakota and other states. TigerSwan shared information with law enforcement, met with them to discuss evidence “collected for prosecution,” and built “person of interest” files as part of their ongoing efforts to attempt to stop the Water Protectors.³⁰

²⁷ *Id.* at 217:15-218:14.

²⁸ Ex. 10, Dep. Ex. 1602, available at <https://www.greenpeace.org/usa/the-truth-about-energy-transfer-partners/>.

²⁹ *Id.*

³⁰ *Id.*

[¶24] The portion of Statement 3 referring to “pepper spray and attack dogs” contains a link to a September 4, 2016, NPR news story reporting that private security contractors had used pepper spray and security dogs on protesters.³¹ The next sentence of the blog contains an embedded video recorded by the independent news program *Democracy Now!* showing security officers leading dogs into the protests; individuals who claimed they were bitten by the dogs; and individuals who had been pepper sprayed.³²

[¶25] Molly Dorozenski, Greenpeace, Inc.’s Communications Director, was responsible for the blog post containing Statement 3.³³ She believes the statement is accurate based on news coverage, videos and photos she reviewed at the time, and firsthand accounts.³⁴ In Dorozenski’s view, the embedded *Democracy Now!* video showed protesters she would describe as peaceful.³⁵ Further, in her role as Communications Director, she was “reading media every single day,” and did not “encounter anything that made me not believe that [the protesters] were peaceful.”³⁶

C. Police and Plaintiffs’ Private Security Contractors Used Force on Anti-DAPL Demonstrators, Including Those Demonstrating Peacefully

[¶26] Statements 3, 39 and 46 refer to incidents at Standing Rock between September and November 2016. Anti-DAPL protests grew at this time and, according to the North Dakota State Highway Patrol (“NDSHP”) Commander responsible for the day-to-day law enforcement

³¹ *Id.*; Declaration of Christopher Weil (“Weil Decl.”) ¶ 7; Eyder Peralta, *Dakota Access Pipeline Protests in North Dakota Turn Violent*, NPR (Sept. 4, 2016), <https://www.npr.org/sections/thetwo-ay/2016/09/04/492625850/dakota-access-pipeline-protests-in-north-dakota-turn-violent>. Defendants request judicial notice of the fact and content of this and other news articles cited in this Motion. *See infra* n.68.

³² Ex. 51; VIDEO: *Dakota Access Pipeline Company Attacks Native American Protesters with Dogs and Pepper Spray*, Democracy Now! (Sept. 4, 2016), [³³ Ex. 7, Dorozenski Dep. 30:24-31:4, 183:17-184:15.](https://www.democracynow.org/2016/9/4/dakota_access_pipeline_company_attacks_native#:~:text=On%20September%203%2C%20the%20Dakota%20Access%20pipelin,e%20company.day%20from%20North%20Dakota%E2%80%99s%20Bakken%20oilfield%20to%20Illinois; See infra n.68 (request for judicial notice).</p></div><div data-bbox=)

³⁴ *Id.* at 185:24-186:17.

³⁵ *Id.* at 190:18-191:11.

³⁶ *Id.* at 187:5-15.

response, some (though by no means all) demonstrators became “more confrontational.”³⁷

[¶27] As detailed below, it is undisputed that demonstrators were subjected to the use of force by law enforcement and Plaintiffs’ security contractors at Standing Rock, including the specific measures identified in Statements 3 and 39 (security dogs, pepper spray, LRADs, etc.).

[¶28] Plaintiff Dakota Access LLC (“DAL”) hired seven companies to provide private security and “intelligence” services for DAPL.³⁸ This private force included armed security and monitoring, recording and infiltrating demonstrators.³⁹ [REDACTED]

[REDACTED]⁴⁰

[¶29] Joey Mahmoud, Plaintiffs’ Executive Vice President responsible for DAPL’s routing, oversaw the security contractors, and [REDACTED].⁴¹

[¶30] On September 3, 2016, thousands of demonstrators arrived at a construction site near the Cannonball Ranch to protest the active bulldozing of a location that had been identified (including in a declaration filed in court the previous day by the Standing Rock Sioux Tribe’s Historic Preservation Officer) as a tribal burial and historic site.⁴²

[¶31] In the ensuing demonstration, according to Morton County officials, security dogs

³⁷ Ex. 13, Pederson Dep. 126:7-15 (“[T]here was groups of protesters that didn’t break any laws. There was groups of protesters that did. You know, there were some groups that were more confrontational than others. It’s—it’s such a varied group you can’t just paint it with a broad brush.”); *id.* at 28:5-31:3.

³⁸ Ex. 14, Plaintiffs’ Response to Interrogatory No. 19.

³⁹ *See* Ex. 15, 10-Code Dep. 75:4-76:8; 94:14-23 (contractor initially hired to monitor protester activity for Plaintiffs before contract expanded to include armed security); *id.* at 148:23-151:14 (describing Plaintiffs’ monitoring of protesters, including providing “thousands” of photographs to Plaintiffs, surveillance of social media, and “intelligence”); Ex. 16, Janisch Dep. 127:9-130:10 (security contractors collected intelligence on pipeline opponents and infiltrated camps).

⁴⁰ Ex. 17, Dep. Ex. 72; Ex. 18, Dep. Ex. 73 at ET-00410258, 259; Ex. 13, Pederson Dep. 72:10-73:9.

⁴¹ Ex. 19, Mahmoud Dep. 27:1-7, 184:1-5; Ex. 20, Futch Dep. (Feb. 16, 2024) 92:9-94:23; Ex. 21, Dep. Ex. 950.

⁴² Ex. 22, Dep. Ex. 939 (Mentz Decl.); Ex. 23, Plaintiffs’ 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 197:17-198:1; Ex. 13, Pederson 67:12-68:3 (noting camps “really swelled” after the Labor Day weekend bulldozing).

brought to the scene by Plaintiffs' contractor bit at least one protester.⁴³ Morton County later determined the dog handlers were not properly licensed to do security work in North Dakota.⁴⁴

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

45

[¶32] Plaintiffs' security force also used pepper spray on protesters at the same September 3, 2016 demonstration.⁴⁶

[¶33] The day after the September 3 demonstration, Mahmoud (the DAPL executive responsible for approving security contractors) contacted and later hired a new contractor known as TigerSwan to coordinate Plaintiffs' security efforts.⁴⁷ Mahmoud acknowledged that he also later approved TigerSwan employees embedding themselves within the protest camps.⁴⁸

[¶34] TigerSwan was later investigated for not being licensed to provide security work in North Dakota.⁴⁹ *See N. Dakota Priv. Investigative & Sec. Bd. v. TigerSwan, LLC*, 2019 ND

⁴³ Ex. 24, Dep. Ex. 70 ([REDACTED]); Ex. 13, Pederson Dep. 108:10-110:13; Ex. 25, Woodall Dep. 141:3-22; Ex. 26, Borrer Dep. 56:21-57:24. The dogs also "nipped" "a couple of" individuals working for another security contractor that was not responsible for the dogs. Ex. 15, 10-Code Dep. 104:5-13. *See also* Ex. 23, Plaintiffs' 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 119:18-120:5 (admitting to security contractor "dogs being present"); Ex. 13, Pederson Dep. 99:7-15; 100:14-17; Ex. 15, 10-Code Dep. 100:22-101:24, 102:24-103:2 (confirming security contractors had dogs at Sept. 3, 2016 protests); Ex. 28, Double M Dep. 176:21-177:21; 246:9-247:2; Ex. 29, Herman Dep. 69:21-23, 71:15-72:4 (confirming use of security dogs on protesters).

⁴⁴ Ex. 52, Morton County Completes Investigation of Dog Handlers, ND Response (Oct. 26, 2016), <https://ndresponse.gov/archive/2016/dakota-access-pipeline/press-releases/october-2016/morton-county-completes>.

⁴⁵ Ex. 48, Defoe Dep. 237:22-238:11, 240:11-241:9, 243:16-244:18 (rough transcript).

⁴⁶ Ex. 24, Dep. Ex. 70 ([REDACTED]); Ex. 30, Dep. Ex. 71 (timeline prepared by state authorities) at T MOR 0206 (timeline prepared by state authorities, with 9/3/2016 entry noting "Pepper mace was used against the protestors"); Ex. 13, Pederson Dep. 108:10-109:8, 110:11-13; 143:17-145:9 (authenticating same).

⁴⁷ Ex. 19, Mahmoud Dep. 97:5-12; Ex. 31, Dep. Ex. 223 ([REDACTED]); Ex. 26, Borrer Dep. 32:2-11, 33:12-15.

⁴⁸ Ex. 19, Mahmoud Dep. 100:5-25; Ex. 16, Janisch Dep. 47:2-49:6.

⁴⁹ Ex. 29, Herman Dep. 85:22-86:6.

¶¶35] Plaintiffs’ security contractors worked closely with public law enforcement. TigerSwan “intermixed” with police at Standing Rock, including by coordinating intelligence efforts.⁵⁰ Another contractor shared a surveillance helicopter with law enforcement.⁵¹

[¶37] Plaintiffs also purchased and made available to law enforcement pepper spray, rubber bullets, flameless grenades and other ammunition.⁵⁶

[¶38] Pepper spray, tear gas and other chemical agents were used on demonstrators in October and November 2016, including on peaceful protesters.⁵⁷

⁵¹ Ex. 16, Janisch Dep. 73:13-75:3; Ex. 13, Pederson Dep. 218:16-219:15; Ex. 32, Dep. Ex. 78 at ET-00261451 (_____)).

⁵³ Ex. 13, Pederson Dep. 219:16-220:4.

⁵⁵ Ex. 33, Aranaydo Dep. 241:24-244:5; Ex. 37, Milton Dep. 213:11-215:19.

⁵⁶ Ex. 20, Futch Dep. 56:1-57:5, 111:9-114:4, Exs. 38 & 39 (Dep. Exs. 955, 956).

⁵⁷ Ex. 33, Aramaydo Dep. 244:19-245:6 ([REDACTED]); Ex. 40, Hirsty Dep. 101:1-7, 113:4-15 (same); Ex. 15, 10-Code Dep. 97:19-98:1; *id.* at 118:9-12 (confirming employees of DAL contractor “utilized pepper spray to try to gain compliance from the protesters.”); Ex. 41, Keller Dep. 10:1-15, 165:22-166:3 (public information officer for North Dakota Department of Emergency Services DAPL incident management assistance team, confirming pepper spray used on protesters); Ex. 35, Kaiser Dep. 115:3-11; Ex. 36, Edinger Dep. 48:8-49:22; Ex. 32, Dep. Ex. 78 at ET-00261457; Ex. 30, Dep. Ex. 71 at T MOR0217-18, 221; Ex. 37, Milton Dep. 181:6-182:9, 216:18-217:9.

[¶39] Plaintiffs' security contractor admits to [REDACTED]

[REDACTED] and

concussion grenades against demonstrators.⁵⁸

[¶40] Peaceful protesters also were physically roughed up by law enforcement, hog-tied and [REDACTED].⁵⁹

[¶41] On November 20, 2016, law enforcement sprayed "water from a fire truck ... on protestors to disperse them."⁶⁰ Law enforcement also used "less lethal munitions," including rubber bullets.⁶¹ One Standing Rock protester has alleged in a federal civil rights lawsuit that he was shot with "lead-filled bean bags" and injured while peacefully demonstrating that day. *See Mitchell v. Kirchmeier*, 28 F.4th 888, 893 (8th Cir. 2022).⁶²

D. The Statements Accurately State that Pipeline Opponents Protested Peacefully

[¶42] The accused Greenpeace, Inc. Statements do not assert the protests at Standing Rock in late 2016 were entirely peaceful; violent acts unfortunately did occur. As U.S. District Judge Hovland found shortly after the September 3, 2016 demonstration noted above, "To suggest that all of the protest activities to date have been 'peaceful' and law-abiding defies

⁵⁸ Ex. 32, Dep. Ex. 78 at ET-00261451, 00261455, 00261459; Ex. 13, Pederson Dep. 214:8-216:1; Ex. 15, 10-Code Dep. 217:5-22.

⁵⁹ Ex. 33, Aranaydo Dep. 201:7-15; 237:19-239:6; Ex. 42, Liakos Dep. 160:5-12.

⁶⁰ Ex. 30, Dep. Ex. 71 at 18; Ex. 13, Pederson Dep. 249:24-250:9; Ex. 15, 10-Code Dep. 96:10-97:12; 231:16-232:19. Stutzman County Sheriff Chad Kaiser, who was at the November 20, 2016, incident, confirmed water was sprayed on protesters to disperse them. Ex. 35, Kaiser Dep. 105:11-106:18. 111:1-13, 120:5-121:18. Scott Edinger, the police chief for the City of Jamestown, also witnessed protesters being sprayed by fire hoses. Ex. 36, Edinger Dep. 7:10-12, 60:10-17.

⁶¹ Ex. 30, Dep. Ex. 71 at T MOR0217 ("less lethal munitions"); Ex. 42, Liakos Dep. 202:13-203:5, 203:21-204:22, 256:3-6.

⁶² *Mitchell* is a civil rights suit against Morton County and state officials. Plaintiff alleges law enforcement was "aggressive," and used "violent tactics," including "rubber bullets, tear gas, pepper spray, and firehoses to spray freezing water" on the crowd. *Id.* at 893. The Eighth Circuit partially reversed the district court's dismissal of the complaint, finding plaintiff stated a plausible claim that officers and Morton County used excessive use of force in violation of his Fourth Amendment rights. *Id.* at 898-901.

common sense and reality.” *Dakota Access, LLC v. Archambault*, No. 1:16-CV-296, 2016 WL 5107005, at *2 (D.N.D. Sept. 16, 2016) (ruling on Plaintiffs’ action against seven individuals seeking to enjoin protest). At the same time, as Judge Hovland also recognized, “violent protestors” constituted “a very small percentage of the entire entourage.” *Id.*

[¶43] The Statements do not assert that the protests were free of violence. Rather, they state that DAPL opponents “have been peacefully protesting” (Statement 46), and that “peaceful Water Protectors and pipeline opponents” were present when force was used by law enforcement and Plaintiffs’ security contractors (Statement 3).

[¶44] The evidence cited above confirms that force in fact was used at Standing Rock, in the manner asserted in Statements 3, 39 and 46, on protesters who were “peaceful.”⁶³

[¶45] More generally, statements that peaceful protesters opposing DAPL were present at Standing Rock are accurate, and consistent with the view of law enforcement at the scene. For example, the spokesman for the Morton County Sheriff’s Department characterized “most” of the protesters as “peaceful and prayerful.”⁶⁴ NDSHP Commander Pederson, who was responsible for much of the law enforcement response at Standing Rock, witnessed assemblies that he characterized as peaceful and as an exercise of First Amendment rights.⁶⁵

[¶46] Plaintiffs’ own employees and security contractors likewise recognized the protesters were not a homogenous group, and that that many demonstrators acted peacefully.⁶⁶

⁶³ See Ex. 33, Aranaydo Dep. 201:7-15; 237:19-239:6; 243:25-244:5; 244:19-245:6; Ex. 40, Hirsty Dep. 101:1-8; Ex. 42, Liakos Dep. 160:5-25.

⁶⁴ See Ex. 41, Keller Dep. 73:18-75:5 (testimony of public information officer for the Morton County Sheriff).

⁶⁵ Ex. 13, Pederson Dep. 79:10-80:8, 185:23-186:7.

⁶⁶ Ex. 45, Plaintiffs’ 30(b)(6) (Granado) Dep. 155:7-11 (“It’s my contention that it was not a peaceful protest. I didn’t say anything about all the individuals there.”); Ex. 28, Double M Helicopters 30(b)(6) Dep. 250:1-23 (some protesters were peaceful, some were not); Ex. 16, Janisch Dep. 165:18-166:16 (TigerSwan intelligence analyst: “very small” number of protesters advocated violent means).

E. Greenpeace, Inc.’s Statements Relied on, and Mirrored, Widely Circulated News Media Reports About the Use of Force on Peaceful Protesters

[¶47] Statements 3, 39 and 46 do not purport to be first-hand accounts of the Standing Rock demonstrations. In addition to the material cited in § B, *supra*, Greenpeace, Inc.’s Statements about violence used on peaceful demonstrators rested on, and reflected, widespread news media reporting from multiple sources that its staff believed to be accurate, as well as statement by the Standing Rock Sioux Tribe and Indigenous leaders who opposed DAPL.⁶⁷

[¶48] Numerous news outlets and media sources published widely circulated contemporaneous statements that ETP security and law enforcement used violence, including against peaceful protesters.⁶⁸ These include at least 59 articles published in local, state and national media between September 3 and November 15, 2016, i.e., before the first Greenpeace, Inc. publication (Statement 46, published November 16, 2016).⁶⁹

⁶⁷ See Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 338:23-339:7 (Statement 3 based on “reporting from ... national or international media”); *id.* at 340:8-342:1 (statements relied in part on “claims made by the Standing Rock Sioux”); *id.* at 347:12-349:1 (Statement 39 based on “international and national reporting,” “reports on social media,” livestreams and “statements from the Sioux ... about the treatment of peaceful water protectors”); *id.* at 353:6-355:9 (Statement 46 based on same sources, as well as staff on the ground); Ex. 6, Leonard Dep. 233:10-17, 239:1-17, 263:5-23 (Greenpeace, Inc. executive director relied on media reports and eyewitness accounts of Indigenous activist for her understanding of violence directed at demonstrators).

⁶⁸ Pursuant to N.D. R. Ev. 201, Defendants respectfully request judicial notice of (1) the fact of publication and contents of all news articles identified in this Motion and (2) the existence of court records filed in other proceedings cited in this Motion. On summary judgment, a court must take judicial notice of facts not subject to reasonable dispute, when requested by a movant who provides the necessary supporting information. N.D. R. Ev. 201(b)-(d); *Ochana v. Flores*, 199 F. Supp.2d 817 (N.D. Ill. 2002), *aff’d*, 347 F.3d 266 (7th Cir. 2003). Courts routinely take judicial notice of news articles and media reports to establish that particular information was publicly available. See *Wishah v. City of Country Club Hills*, 2021 WL 3860328, at *3 (E.D. Mo. Aug. 30, 2021); *White Hall Pharmacy LLC v. Doctor’s Orders RX Inc.*, 2019 WL 7838299, at *1 (E.D. Ark. June 10, 2019); see *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 307 F. Supp. 3d 952, 967 (D. Minn. 2018), *aff’d*, 971 F.3d 747 (8th Cir. 2020) (taking judicial notice, on summary judgment, website’s publication in analysis of alleged defamatory statement). Media coverage also is judicially noticeable to show a defendant’s speech involved a matter of public interest. *Cross v. Cooper*, 197 Cal. App. 4th 357, 378 n.13 (2011). Courts also regularly take judicial notice of the fact of court material “already in the public record and filed in other courts” (*Duke v. City Coll. of S.F.*, 445 F. Supp. 3d 216, 224 (N.D. Cal. 2020)), and of filings in judicial proceedings that “have a direct relation to matters at issue.” *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979). In libel cases, judicial notice of the existence and contents of documents that defendants relied upon in publishing challenged statements is appropriate, at minimum, “for the fact that they were filed and provided certain information to the public.” *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1235, 1239-40 (N.D. Cal. 2014).

⁶⁹ Declaration of Chris Weil, ¶ 6 & Weil Ex. 2 at 1-3.

[¶49] For example, the NPR article referenced above and embedded in Statement 3,⁷⁰ was published on September 4, 2016. It reports that the September 3, 2016, confrontation between Plaintiffs’ private security and demonstrators “turned violent” when the “security officers threaten[ed] protesters with dogs,” and that “[p]rotesters said that security guards used pepper spray and that they were bitten by their guard dogs. The images show dogs with bloodied muzzles and a private security guard holding what looks like a pepper spray canister.”⁷¹

[¶50] A September 5, 2016, CBS News article about the same protest reported that “Tribe spokesman Steve Sitting Bear said protesters reported that six people had been bitten by security dogs, including a young child. At least 30 people were pepper-sprayed, he said.”⁷² KFYR-TV in Bismarck likewise reported contemporaneously on the use of dogs and pepper spray on September 3, along with characterizations of it as “peaceful”; and *Indian Country Today* reported the next day that “DAPL’s private security guards initiated force against a crowd of mostly tribal members who were protesting in a non-confrontational manner”).⁷³

[¶51] On September 20, 2016, a newspaper in Ohio, where the Plaintiffs’ private K9-security contractor was based, reported that the company’s proprietor acknowledged “some protesters” were bitten by its dogs on September 3.⁷⁴ The following month, a Fargo news source

⁷⁰ See *supra* n.31.

⁷¹ Weil Decl. ¶ 7; Ex. 50; Eyder Peralta, *Dakota Access Pipeline Protests in North Dakota Turn Violent*, NPR (Sept. 4, 2016), <https://www.npr.org/sections/thetwo-way/2016/09/04/492625850/dakota-access-pipeline-protests-in-north-dakota-turn-violent>).

⁷² Weil Decl. ¶ 8; Ex. 53; *Guards accused of unleashing dogs, pepper-spraying oil pipeline protesters*, CBS News (Sept. 5, 2016), <https://www.cbsnews.com/news/dakota-access-pipeline-protest-turns-violent-in-north-dakota/>.

⁷³ Weil Decl. ¶ 8; Ex. 54; *Demonstrators say Dakota Access Pipeline security used pepper spray, dogs*, KFYR-TV (Sept. 3, 2016), <https://www.kfyrtv.com/content/news/Demonstrators-say-Dakota-Access-Pipeline-security-used-pepper-spray-dogs-392267651.html>; Ex. 55; Harold Frazier, *Cheyenne River Sioux Tribe Demands Answers From North Dakota State Leadership After Attack on Peaceful Protesters*, Indian Country Today Media Network (Sept. 4, 2016), <https://indiancountrytodaymedianetwork.com/2016/09/04/cheyenne-river-sioux-tribe-demands-answers-north-dakota-state-leadership-after-attack> .

⁷⁴ Weil Decl. Ex. 2 at 11; Ex. 56; Sam Allard, *How Did an Ohio Kennel Get Involved in Dakota Access Pipeline Security?*, Cleveland Scene (Sept. 20, 2016), <https://www.clevelandscene.com/news/how-did-an-ohio-kennel-get-involved-in-dakota-access-pipeline-security-4958339>.

reported that the investigation by the Morton County Sheriff's Department concluded the contractor was not properly licensed to perform security work in North Dakota.⁷⁵

[¶52] Later news publications reported on violent tactics used against protesters in October and early November 2016, all preceding the earliest accused Statement. CBS News reported police used pepper spray, “bean bag guns” and “a long-range acoustic device blasting high-pitched tones used to disperse crowds in riots” at the anti-DAPL demonstrations.⁷⁶ Mother Jones magazine reported law enforcement also “us[ed] tear gas, rubber pellets, sound cannons, and other controversial methods to clear activists from a road and a nearby encampment,” including tasers and LRADs.⁷⁷ NPR published a photograph of a local law enforcement officer “stand[ing] guard by an armored personnel carrier equipped with an LRAD ... while deployed to watch protesters demonstrating against the Dakota Access Pipeline.”⁷⁸

II. ARGUMENT

A. Summary Judgment Is Favored In Defamation Cases, and Must Be Granted Where There Is No Genuinely Disputed Material Fact.

[¶53] The Court must grant summary judgment “if the pleadings, the discovery and disclosure materials on file, and any declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” N.D. R. Civ.

⁷⁵ Ex. 57; C.S. Hagen, *Attack Dog Handlers in the Wrong, No Charges Pending, Lawyers Threatened by FBI*, High Plains Reader (Oct. 26, 2016), <https://hpr1.com/index.php/feature/news/attack-dog-handlers-in-the-wrong-no-charges-pending-lawyers-threatened-by-f/>.

⁷⁶ Ex. 58; *Violence erupts during protests over controversial Dakota Access Pipeline*, CBS News (Oct. 28, 2016), <https://www.cbsnews.com/news/violent-protests-over-dakota-access-pipeline-end-with-over-140-arrests/>.

⁷⁷ Ex. 59; Wes Enzinna, *I Witnessed Cops Using Tear Gas, Rubber Bullets, and Sound Cannons Against Anti-Pipeline Protesters*, Mother Jones (Oct. 31, 2016), <https://www.motherjones.com/politics/2016/10/standing-rock-protests-pipeline-police-tasers-teargas/>.

⁷⁸ Ex. 60; Rebecca Hersher, *Obama: Army Corps Examining Possible Rerouting Of Dakota Access Pipeline*, NPR (Nov. 2, 2016), <https://www.npr.org/sections/thetwo-way/2016/11/02/500363689/obama-army-corps-examining-possible-rerouting-of-dakota-access-pipeline>.

P. 56(c)(3). Summary judgment provides for “prompt and expeditious disposition of a controversy without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result.” *Grinnell Mut. Reinsurance Co. v. Lynne*, 686 N.W.2d 118, 122 (N.D. 2004) (citation omitted).

[¶54] Defamation cases are “particularly susceptible to summary judgment,” because unmeritorious defamation actions “threaten the free exercise of rights of speech and press.” *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 686 (La. 2006). As now-Justice Brett Kavanaugh recognized, “To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits.” *Kahl v. Bureau of Nat’l Affs., Inc.*, 856 F.3d 106, 109-10 (D.C. Cir. 2017) (Kavanaugh, J.), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). “[S]ummary judgment is the ‘rule’ and not the exception, in defamation cases.” *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 896 (W.D. Mich. 1980), *aff’d*, 665 F.2d 110 (6th Cir. 1981).

[¶55] The heightened burdens the First Amendment imposes on defamation claims apply on summary judgment. In particular, the Supreme Court has held that public-figure defamation plaintiffs cannot overcome summary judgment absent “clear and convincing” evidence that the defendants acted with actual malice. *Anderson*, 477 U.S. at 252-56. This means a defamation plaintiff cannot defeat a defendant’s properly supported summary judgment motion “by merely asserting that the jury *might*, and legally *could*, disbelieve the defendant’s denial of ... legal malice.” *Id.* at 256 (emphasis added). Instead, summary judgment must be granted unless plaintiff affirmatively presents “concrete” evidence of a “caliber or quantity to

allow a rational finder of fact to find actual malice by clear and convincing evidence.” *Id.* at 254.

B. Plaintiffs Cannot Meet Their Burden of Establishing That the Statements Were Materially False.

[¶56] “A publication must be false to be defamatory.” *Schmitt v. MeritCare Health Sys.*, 2013 ND 136, ¶ 11, 834 N.W.2d 627, 632. Both the First Amendment and the common law place the burden of proving falsity squarely on the shoulders of Plaintiffs. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 648 (8th Cir. 1986); *Schmitt*, 834 N.W.2d at 632.

[¶57] Here, the Statements are entirely protected against defamation liability both because they are substantially true (§ 1, *infra*) and because they are expressions of opinion that cannot be proven factually false (§ 2, *infra*).

1. The Statements Are Substantially True

[¶58] On summary judgment, a defamation plaintiff’s burden to show material falsity cannot be met arguing the accused statement was not precisely or literally true. Rather, it has long been understood that “[m]inor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’” *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991); *accord, Bustos v. A & E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011) (“Unless a statement contains a *material* falsehood it simply is not actionable.”) (emphasis in original). This concept of substantial truth reflects “the idea that publication as it stood must make the plaintiff significantly worse off than a completely or literally truthful publication would have.” *Pope v. Chron. Pub. Co.*, 95 F.3d 607, 613 (7th Cir. 1996).

[¶59] Courts therefore regularly grant summary judgment to defendants on the falsity element of a defamation claim so long as the gist of the allegedly defamatory statements was

substantially true, even with respect to statements that (unlike here) did contain factual inaccuracies. *See, e.g., Stepanes v. Ritschel*, 663 F.3d 952, 964-65 (8th Cir. 2011) (“minor inaccuracies” did not show falsity “because even had they been completely accurate they would have produced the same ‘gist or sting’ in the mind of the viewer”); *Nichols v. Moore*, 477 F.3d 396, 401 (6th Cir. 2007) (statements that individual was arrested “in connection with” the Oklahoma City bombing substantially true even though plaintiff was “never arrested or charged” for crimes “directly related” to the bombing, but for an unrelated incident resulting from the investigation); *Bustos*, 646 F.3d at 762 (statement that inmate was a “member” of the Aryan Brotherhood prison gang not materially false when in actuality he “conspired” with the gang); *Riley v. Harr*, 292 F.3d 282, 296 (1st Cir. 2002) (statement that judge found plaintiff had “committed perjury,” when in fact judge found he had engaged in “deliberate concealment,” was substantially accurate).

[¶60] Here, the “gist” or “sting” of the three Statements is that law enforcement and Plaintiffs’ private security used pepper spray, attack dogs, and other methods of force at demonstrations, including on peaceful protesters. The truth of this is undisputed. As detailed above, people protesting DAPL at Standing Rock from September through November 2016 indisputably were subjected to force, including the specific measures (pepper spray, attack dogs, water cannons, concussion grenades, and LRADs) identified in the Statements. *See supra* ¶¶ 27-32, 36, 38-41. It is not disputed that these uses of force were inflicted by both public law enforcement and Plaintiffs’ private security contractors. *See supra* ¶¶ 27-29, 31-32, 35-41. Plaintiffs and their contractors also supplied law enforcement with intelligence, weaponry and equipment. *See supra* ¶¶ 35-37, 39. Finally, there is no genuine dispute that the protesters at Standing Rock included individuals who were largely “peaceful and prayerful,” and that “violent

protestors” constituted “a very small percentage” of those present. *See supra* ¶¶ 42-46.

[¶61] In sum, the gist and sting of the Statements is accurate: force was used at Standing Rock in the manner described, including on individuals who were peacefully exercising their right to demonstrate. Plaintiffs cannot carry their burden of establishing the material falsity of the Statements, and summary judgment should be granted on this basis alone. *Jose v. Norwest Bank N. Dakota, N.A.*, 1999 ND 175, ¶ 7, 599 N.W.2d 293, 296 (“Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial.”).

2. The Statements Are Protected Opinions

[¶62] Plaintiffs cannot salvage their defamation claim by asserting that the Statements inaccurately described the force used at Standing Rock as “violent,” or the protests as “peaceful.” These terms are inherently matters of opinion. Summary judgment must be granted because such expressions of opinion are core protected speech.

[¶63] A “statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). “[F]or a statement to be actionable, the inquiry is whether the statement is factual and provable.” *Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 394 (8th Cir. 1996). Where, as here, “it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” *McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 359 (3d Cir. 2020) (citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

[¶64] Whether speech is opinion, rather than fact, is an issue of law appropriate for this Court to decide on summary judgment. *Secrist v. Harkin*, 874 F.2d 1244, 1248 (8th Cir. 1989).

a. The Statements Are Subjective Expression

[¶65] The Statements’ characterizations of protesters as “peaceful” and subject to “violence” are not provably false. Instead, they reflect Greenpeace, Inc.’s subjective view of what occurred at Standing Rock.

[¶66] The view that the protests at Standing Rock were mostly peaceful, and that the force used against protesters was aggressive and violent, is consistent with and supported by the Eighth Circuit’s holding in *Mitchell*. That decision holds that a protester present at Standing Rock in November 2016, who was shot by officers with “lead-filled bean bags capable of shattering his eye socket” while he was “neither committing a serious crime nor threatening anyone’s safety nor fleeing or resisting arrest,” stated a plausible civil right claim based on use of excessive force against a “peaceful” protestor. *Mitchell*, 28 F.4th at 899. The court held the severity of the plaintiff’s injuries confirms that “to fire a shotgun loaded with a lead-filled bean bag at a person, regardless of whether one is aiming at the person’s face, is to use more than *de minimis* force against the person.” *Id.* at 898-99.

[¶67] Statements characterizing force as “extreme” (Statement 39) or excessive have been found to be matters of opinion protected by the First Amendment, and not provably false facts. In *Fritz v. Cnty. of Marin*, 2007 WL 1874369 (Cal. Ct. App. June 29, 2007) (unpublished), a California Court of Appeal, considering an appeal of a grant of summary judgment, found that a sheriff’s statements to a reporter that a deputy’s actions against an inmate constituted “excessive force” was “simply a reflection of his opinion that the Personnel Commission had reached an incorrect conclusion” in exonerating the deputy of an excessive force charge. *Id.* at *4. The court held that the statement did not reflect a provably false fact, and “reject[ed] the contention that the sheriff’s statement is actionable because his assessment of the facts was erroneous.” *Id.* at *5. Instead, “[t]he matter of whether [the deputy sheriff] used excessive force

was a close issue on which reasonable minds could differ.” *Id.* See also *Frascatore v. Blake*, 344 F. Supp. 3d 481, 497-98 (S.D.N.Y. 2018) (defendant’s statement discussing three reported complaints of “excessive force” by plaintiff police officer, and wondering whether there might be more, was “plainly” a non-actionable statement of opinion).

[¶68] As in *Fritz*, the Statements about whether a demonstration was “peaceful” or whether the force used against protesters at Standing Rock was violent or aggressive—and whether or not that violence was “extreme”—are subjective matters on which opinions may differ, not “unqualified assertion[s] of fact.” *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 (8th Cir. 1989).

b. The Statements’ Context Makes It Clear They Are Opinions

[¶69] The context of the Statements also indicates that Greenpeace, Inc. was stating its opinion. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986). “In determining whether words are libelous and actionable, the relevant words must be construed in the context of the entire document, and the sense or meaning of the document must be determined by construing the words according to the natural and ordinary meaning a reasonable person of ordinary intelligence would give them.” *Schmitt*, 2013 ND 136, ¶ 13, 834 N.W.2d at 633. “Ultimately, we must decide—not whether a statement in isolation is by virtue of its phrasing factual—but rather whether, when taken in context, the statement functions and would be understood as an unqualified assertion of fact rather than as an element of an opinion.” *Viking Penguin, Inc.*, 881 F.2d at 1432; *Secrist*, 874 F.2d at 1248-49 (context “can turn what, out of context, appears to be a statement of fact into ‘rhetorical hyperbole,’ which is not actionable.”) (citing *Ollman v. Evans*, 750 F.2d 970, 1000 (D.C. Cir. 1984)).

[¶70] Here, the Statements’ context makes plain they are not unqualified assertions of fact, but rather subjective commentary about events on which perceptions may differ.

[¶71] First the Statements all appear on Greenpeace Inc.’s website—a signal to readers that they are statements of an advocate, and in this case, one widely known for its efforts to confront climate and environmental threats.⁷⁹ Greenpeace, Inc. is outspoken about its opposition to the expansion of new fossil fuel infrastructure, a point that is clear in the Statements themselves.⁸⁰ For example, Statement 46 reported on hundreds of nationwide events intended to put “pressure squarely on President Obama” to act on DAPL.⁸¹ Such advocacy pieces are quintessential opinion, similar to a newspaper’s op-ed page, understood by reasonable readers to be inherently subjective. *Ollman*, 750 F.2d at 986-87; *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 17 (D.D.C. 2013), *aff’d*, 783 F.3d 1328 (D.C. Cir. 2015).

[¶72] Second, read in context, the Statements reflect Greenpeace, Inc.’s sincere view that the Standing Rock Sioux and their allies were peacefully protesting DAPL. *See supra* ¶¶ 15-17, 20, 25. This view is consistent with widely-circulated news reports, which also characterized the protest as peaceful. *See supra* ¶¶ 16, 20, 25, 47-52.

[¶73] Finally, individuals attending a demonstration may be “peaceful” even if they are present when private security or law enforcement uses force—again, a point the Eight Circuit recognized as a matter of law in *Mitchell* when it held that a plaintiff who alleged he was “neither committing a serious crime nor threatening anyone’s safety nor fleeing or resisting arrest” was “peacefully protesting” for purposes of stating a civil-rights claim based on use of excessive force. *Mitchell*, 28 F.4th at 899.

⁷⁹ Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 35:13-17 (describing Greenpeace, Inc. as “the organization that does programmatic work and advocacy”); *id.* at 272:3-24; Ex. 6, Leonard Dep. 71:8-72:9, 76:15-78:2; Ex. 7, Dorozenski Dep. 24:21-25:9.

⁸⁰ Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 47:2-13 (explaining that a priority of Greenpeace, Inc.’s broader climate campaign was to “avoid new investments in fossil fuel, so fossil fuel expansion, which lock us into potentially, decades of future emissions”).

⁸¹ *See* Ex. 9, Dep. Ex. 1063; SAC Am. App’x A (Doc. 2837), Statement 46.

**c. The First Amendment Is Especially Protective of Opinions
Involving Matters of Public Concern**

[¶74] The First Amendment requires courts to be especially protective of speech expressing opinions about matters of public concern, like the Statements here. “[W]hen determining initially whether a statement is fact or opinion, it does a disservice to the First Amendment not to consider the public or political arena in which the statement is made and whether the statement implicates core values of the First Amendment.” *Janklow*, 788 F.2d at 1303. “To qualify as a matter of public concern, the speech ... must touch on issues in which the public (even a small slice of the public) might be interested, as distinct, say, from purely personal squabbles.” *Pan Am Sys., Inc. v. Atl. Ne. Rails & Ports, Inc.*, 804 F.3d 59, 66 (1st Cir. 2015); *Snyder v. Phelps*, 562 U.S. 443, 451–53 (2011) (“Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ ... or when it ‘is a subject of legitimate news interest’”).

[¶75] Here, the Statements clearly address matters with which the public is legitimately concerned, including DAPL’s potential to harm the environment and exacerbate climate change; treatment of Indigenous communities; and the public’s right to free speech and protest. *See supra* § I.E. *See, e.g., Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 874 (N.D.N.Y. 1995) (“admitted violations of environmental regulations implicate issues of environmental safety and public health,” and are issues of public concern), *aff’d*, 112 F.3d 504 (2d Cir. 1996); *Container Mfg. Inc. v. CIBA-GEIGY Corp.*, 870 F. Supp. 1225, 1234-35 (D.N.J. 1994) (storage of chemicals “pose potentially sever[e] health and environmental risks to society” and is an issue of public concern); *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 999 F. Supp. 137, 140 (D. Me. 1998) (“[A] matter worthy of or the subject of public debate and a part of the nation’s free exchange of ideas is a matter of public concern.”). Greenpeace, Inc.’s commentary on the protests and the

response by Plaintiffs and law enforcement, certainly qualifies as “speech on public issues occup[ying] the highest rung of the hierarchy of First Amendment values.” *Snyder*, 562 U.S. at 452, 454 (holding funeral protest by church members touching on issues such as “the political and moral conduct of the United States and its citizens” was matter of public concern). Debate over such issues must remain “uninhibited, robust, and wide-open,” *Boos v. Barry*, 485 U.S. 312, 318 (1988), and “in order to provide adequate breathing space to the freedoms protected by the First Amendment.” *Id.* at 322 (internal quotations omitted).

d. Statement 3 Is Supported By Disclosed Facts

[¶76] Finally, interpretations of fact are fully protected, in the same manner as entirely subjective opinion, where the factual bases for the statement are disclosed, either directly or linked to in the publication. “The First Amendment generally protects statements of opinion where the speaker outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the [listener] free to draw his own conclusions.” *Piccone v. Bartels*, 785 F.3d 766, 774 (1st Cir. 2015) (internal quotations omitted). *See also Partington v. Bugliosi*, 56 F.3d 1147, 1154, 1156 (9th Cir. 1995); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir. 1998).

[¶77] This is true even where the statements could be interpreted as a factual assertion. In *Lewis v. Abramson*, 673 F. Supp. 3d 72 (D.N.H. 2023), for example, the court recognized that statements challenged by plaintiffs went “beyond opining on the plaintiffs’ viewpoints and could be read to either imply or directly allege that the plaintiffs played a role in the January 6 attack on the Capitol.” *Id.* at 92. Even so, the court found “many of these allegations are not actionable because they are opinions based on fully disclosed facts that were either directly discussed or linked to in the relevant publication, and are therefore protected by the First Amendment.” *Id.*

[¶78] This is precisely the case with Statement 3, which mentions “pepper spray and attack dogs,” and provides readers links to both a news story from NPR reporting that private security contractors had used pepper spray and security dogs on protesters, and an embedded video recorded by the independent news program *Democracy Now!* showing the events in question.⁸² The inclusion of this information leaves the reader free to click on the links and draw their own conclusions about the events in question. See *Adelson v. Harris*, 973 F. Supp. 2d 467, 485 (S.D.N.Y. 2013) (“[P]rotecting defendants who hyperlink to their sources is good public policy, as it fosters the facile dissemination of knowledge. ... It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits.”), *aff’d*, 876 F.3d 413 (2d Cir. 2017); 973 F. Supp. 2d at 491 n.19 (“the underlying facts were fully disclosed both in the Petition itself and via hyperlink”).

C. Plaintiffs Have No Evidence, Much Less “Clear and Convincing” Evidence, That Defendants Acted with Actual Malice

[¶79] Independently, Plaintiffs’ defamation claim fails because there is no evidence, much less the required “clear and convincing” evidence, that Greenpeace, Inc. published the Statements with constitutional actual malice. This heightened evidentiary standard applies on summary judgment. *Anderson*, 477 U.S. at 254. “Given the importance of the free and open exchange of ideas, a public figure is prohibited from recovering damages for defamatory criticism unless there is clear and convincing evidence the defamatory statement was made with actual malice.” *Riemers v. Mahar*, 2008 ND 95, ¶ 15, 748 N.W.2d 714, 720-21 (citing *Gertz v.*

⁸² Weil Decl. ¶ 7; Ex. 50; Eyder Peralta, *Dakota Access Pipeline Protests in North Dakota Turn Violent*, NPR (Sept. 4, 2016), <https://www.npr.org/sections/thetwo-way/2016/09/04/492625850/dakota-access-pipeline-protests-in-north-dakota-turn-violent>; Ex. 51; VIDEO: *Dakota Access Pipeline Company Attacks Native American Protesters with Dogs and Pepper Spray*, Democracy Now! (Sept. 4, 2016), https://www.democracynow.org/2016/9/4/dakota_access_pipeline_company_attacks_native#:~:text=On%20September%203%2C%20the%20Dakota%20Access%20pipeline%20company,day%20from%20North%20Dakota%E2%80%99s%20Bakken%20oilfield%20to%20Illinois.

Robert Welch, Inc., 418 U.S. 323, 342 (1974)). Under the actual malice standard, Greenpeace, Inc.’s “intent” in publishing the Statements is irrelevant. For example, it is of no consequence whether it harbored animosity toward Plaintiffs. *Riemers*, 748 N.W.2d at 722 (standard for actual malice “should not be confused with the concept of malice as an evil intent or a motive arising from ... ill will.”) (citing *Masson*, 501 U.S. at 510).

[¶80] Whether a plaintiff is a private or public figure, and whether the record evidence is sufficient to show actual malice, are questions of law. *Id.* at 721-22; *Lundell Mfg. Co. v. American Broadcasting Cos., Inc.*, 98 F.3d 351, 362 (8th Cir. 1996) (“determination of plaintiff’s status is a question of law governed by federal constitutional law”).

1. Plaintiffs Are Public Figures

[¶81] North Dakota law thoroughly embraces the essentiality of demanding the highest standard of fault for public figures, actual malice. *Riemers*, 748 N.W.2d at 720-22. Federal constitutional law limits defamation actions for statements made about public figures, “because of concerns for free speech.” *Id.* at 720.

[¶82] In *Gertz*, the U.S. Supreme Court noted two fundamental characteristics of public figures. First, public figures usually have greater access to the media, which gives them “a more realistic opportunity to counteract false statements than private individuals normally enjoy.” 418 U.S. at 344; *see also Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979) (“[R]egular and continuing access to the media ... is one of the accouterments of having become a public figure.”). Second, “public figures ... voluntarily expose[] themselves to increased risk of injury from defamatory falsehoods concerning them.” *Gertz*, 418 U.S. at 345. In short, public figures “invite attention and comment.” *Hutchinson*, 443 U.S. at 134. *See also Riemers*, 748 N.W.2d at 721 (“To determine an individual’s public figure status we look at the nature and extent of the individual’s participation in the controversy giving rise to the alleged defamation.”).

[¶83] Plaintiffs’ predecessor entities did not dispute their public-figure status in their opposition to the Greenpeace Defendants’ motion to dismiss their prior federal action.⁸³ Nor could they reasonably dispute their public-figure status here, given the “clear evidence of [their] general fame or notoriety in the community and pervasive involvement in society’s affairs.” *Riemers*, 748 N.W.2d at 721 (citing *Gertz*, 418 U.S. at 352).

[¶84] First, corporations like Plaintiffs that are subject to regulation by state or federal authorities invite public scrutiny by virtue of voluntarily entering such businesses. *See* *Nw. Airlines, Inc. v. Astraeva Aviation Servs., Inc.*, 111 F.3d 1386, 1393-94 (8th Cir. 1997) (highly regulated corporations are public figures); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983) (dictum) (“there seems no reason to classify a large corporation as a private person.”). As discussed above, *supra* § II.B.2.c, the business Plaintiffs voluntarily chose to enter is one that by its very nature implicates matters over which the public has legitimate concern.

[¶85] In addition, Plaintiffs voluntarily exposed themselves to increased scrutiny through their outreach to communities along the pipeline route and engagement with stakeholders and government authorities.⁸⁴

[¶86] Plaintiffs also enjoyed and repeatedly took advantage of access to the media to assert their own narrative concerning DAPL and their business record. For instance, Plaintiffs

⁸³ *See Energy Transfer Equity, L.P., et al. v. Greenpeace International, et al.*, No. 17-cv-00173 (D.N.D. Sept. 18, 2018), ECF 111, at 33-34.

⁸⁴ Ex. 43, Bloomgren Dep. 202:24-203:19 (discussing Plaintiffs’ public affairs consultants’ support for “landowners and agricultural groups and labor unions that wanted the project built” and “work with people on the ground to engage with the community”); Ex. 44, McCown Dep. 95:2-98:25 (member of Department of Transportation presidential transition team asked to attend meeting in North Dakota “with the Army Corps of Engineers and experts, I think, retained by Energy Transfer, stakeholders, technical experts not in favor of the project ...[and] the head of Standing Rock ...”); Ex. 19, Mahmoud Dep. 86:15-87:3 (describing meeting with the Department of Interior and U.S. Army Corps of Engineers).

engaged in robust public relations and media campaign to elevate support for the pipeline,⁸⁵ “boost” Plaintiffs reputation, “educate people” about DAPL, and respond to “critical or negative media coverage.”⁸⁶ Plaintiffs have also been the subject of significant new reporting regarding DAPL, the protests at Standing Rock, and their pipeline operations, generally—including intense journalistic scrutiny about criminal and civil charges involving their Mariner East pipeline in Pennsylvania.⁸⁷ There is no question Plaintiffs are highly visible “public figure” corporations.

[¶87] At a minimum, Plaintiffs qualify as a limited purpose public figure on the public controversy related to DAPL, and statements germane to their participation in the controversy. *See Stepnes*, 663 F.3d at 964; *Resolute Forest Prods., Inc. v. Greenpeace Int’l*, 302 F. Supp. 3d 1005, 1017 (N.D. Cal. 2017) (Canadian forestry company was a limited purpose public figure where the alleged defamation concerned “a public controversy generating large scale demonstrations and signed petitions” concerning company’s “record, or lack thereof, of sustainable forestry practices in general, and specifically in the Boreal forest”). In *Riemers*, for example, the plaintiff—a proponent of two ballot initiatives—was at least a limited purpose

⁸⁵ Ex. 45, Plaintiffs’ 30(b)(6) (Granado) Dep. 36:3-13 (Plaintiffs worked with at least four different “public relations or media relations firms ... in connection with DAPL”); Ex. 43, Bloomgren Dep. 141:4-24; Ex. 46, Dep. Ex. 866 (Plaintiffs’ public relations consultant [REDACTED] and stating [REDACTED]).

⁸⁶ Ex. 47, Coleman Dep. 28:3-19 (job was to “boost” Plaintiffs’ reputation by “[p]roviding positive company information via ... social media” and through “factual information I provide in media statements” and “on websites”); *id.* at 33:8-16 (stated she might “[p]rovide information on social media,” “write a blog post,” and “update a website” in response to “critical or negative media coverage” of Plaintiffs); *id.* at 38:7-25 (Plaintiffs responded to news reports and publications during the period of the DAPL protests); *id.* at 111:22-113:2 (discussing quote given for article in OK Energy Today in response to Revolution Pipeline explosion in Pennsylvania); Ex. 45, Plaintiffs’ 30(b)(6) (Granado) Dep. 43:24-44:21 (stating [REDACTED]); *id.* at 60:1-10 (Plaintiffs’ communications consultant engaged in “public advocacy” to “support the education campaign to put accurate information out about the project” “to media” and “through advertising”).

⁸⁷ *See supra* § I.E; *see also*, e.g., State Impact Pennsylvania, <https://stateimpact.npr.org/pennsylvania/tag/mariner-east-2/> (NPR project reporting over 300 new stories on environmental damage, criminal charges, civil lawsuits, and regulatory fines involving Plaintiffs’ Mariner East pipeline in Pennsylvania).

public figure where he “voluntarily assumed a role of special prominence in the controversy and sought to influence its outcome”; “had access to channels of effective communication”; and wrote articles and gave interviews about the initiatives, and to rebut criticism. 748 N.W.2d at 721. *See also Tavoulareas v. Piro*, 817 F.2d 762, 774 (D.C. Cir. 1987) (*en banc*) (oil company president a limited purpose public figure on public policy toward oil industry due to his “widely-reported, influential public role in the debate as president of Mobil”). Likewise, Plaintiffs voluntarily injected themselves into the public debate concerning DAPL and sought to influence its outcome, including through a “philanthropic strategy,” consultations with communities, appearances at a congressional hearing, and voluntary engagement in the public pipeline-approval process, and through use of media to rebut criticism and generate support for DAPL.⁸⁸

2. Greenpeace, Inc. Did Not Publish the Statements With Actual Malice, and Subjectively Believed Them To Be True

[¶88] As public figures, Plaintiffs thus bear the burden to present clear and convincing evidence that the Statements were published with actual malice; i.e., knowledge of falsity or reckless disregard of the truth. *Riemers*, 2008 ND 95, ¶ 19, 748 N.W.2d 714, 722 (citing *Gertz*, 418 U.S. at 334). To do so, Plaintiffs must demonstrate that Greenpeace, Inc. “had serious doubts about the truth” of the Statements, or had “a high degree of awareness of [the] probable falsity.” *Id.* (citing *Masson*, 501 U.S. at 510).

⁸⁸ *See supra*, n.84-86; Ex. 47, Coleman Dep. 26:13-27:6 (Plaintiffs “donate[d] funds along the pipeline route” “as a way of being a good neighbor and establishing ongoing relationships in the communities” as part of Plaintiffs’ “philanthropic strategy”); Ex. 19, Mahmoud Dep. 33:9-15 (talked to SRST during Plaintiffs’ “first public meeting”); *id.* at 43:22-44:22 (Plaintiffs had their “environmental person” reach out to the SRST “to establish communication” and discussing coordination with SRST); *id.* at 86:15-87:3 (describing meeting with the Department of Interior and U.S. Army Corps of Engineers “after the protest had a negative turn”); *id.* at 205:21-206:23 ([REDACTED]); Plaintiffs’ Motion for De Novo Review of Discovery Ruling on Plaintiffs’ Motion for a Protective Order, Dkt. 2345, at 4 (stating Plaintiffs’ CEO Kelcy Warren “attended the congressional hearing on DAPL” along with “a dozen other Energy Transfer employees”).

[¶89] Under this bedrock constitutional principle, a public figure can support a libel claim only with evidence that the defendant was subjectively aware the story was “(1) fabricated; (2) so inherently improbable that only a reckless person would have put [it] in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that [plaintiff] ha[s] obvious reasons to doubt.” *Lohrenz v. Donnelly*, 350 F.3d 1272, 1283 (D.C. Cir. 2003). “For [the actual malice] standard to be met, the publisher must come close to willfully blinding itself to the falsity of its utterance.” *Tavoulareas*, 817 F.2d at 776 (citation omitted).

[¶90] The evidence in the record does not come close to allowing Plaintiffs to clear this “daunting[ly]” high hurdle. *Kahl*, 856 F.3d at 116 (reversing denial of summary judgment on actual malice grounds).

[¶91] Each Greenpeace, Inc. employee responsible for the Statements believed them to be true when they were published. *See supra* ¶¶ 15-17, 20, 25. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964)(actual malice measured “at the time of publication”). Far from being “willfully blind[],” *Tavoulareas*, 817 F.2d at 776, their beliefs were based on Greenpeace, Inc.’s practice of having subject-matter experts fact-check its statements (*see supra* ¶ 15) and on first-hand accounts, video, and photos they reviewed. *See supra* ¶¶ 16, 20, 25. None of these Greenpeace, Inc. employees believed them to be false, and none was aware of any information demonstrating the falsity of the Statements. *See supra* ¶¶ 17, 20, 25.

[¶92] The authors’ beliefs were also informed by credible news coverage of the protests at Standing Rock that they followed at the time. *See supra* ¶¶ 20, 24, 25; § I.E.

[¶93] Reliance on previously published material from reputable publications, in itself, defeats actual malice as a matter of law. *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002) (“One who repeats what he hears from a reputable news source, with no individualized

reason external to the news report to doubt its accuracy, has not acted recklessly.”); *Watkins v. Washington Post*, Case No. PWG-17-818, 2018 WL 805394, at *7 (D. Md. Feb. 9, 2018) (“courts have found that reporters are not negligent, let alone acting with malice, when relying on other reputable sources”) (collecting cases); *Klayman v. City Pages*, No. 5:13-cv-143-Oc-22PRL, 2015 WL 1546173, at *16-17 (M.D. Fla. Apr. 3, 2015) (not actual malice to rely on judicial opinions and public filings), *aff’d*, 2016 WL 3033141, at *5 (11th Cir. May 27, 2016); *CACI Premier Tech. v. Rhodes*, 536 F.3d 280, 292 (4th Cir. 2008) (no actual malice where defendant relied on official reports); *Montgomery v. Risen*, 197 F. Supp. 3d 219, 260 (D.D.C. 2016) (not actual malice to rely on prior publications), *aff’d on other grounds*, 875 F.3d 709 (D.C. Cir. 2017).

[¶94] Reliance on previously published material defeats actual malice even in the face of conflicting information. *See, e.g., Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987) (“A newspaper may not constitutionally be required to determine truth by counting the number of witnesses on each side.”).

[¶95] Actual malice is not based on a failure to investigate. “[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (state court misapplied actual malice standard; political candidate’s failure to investigate veracity of union official’s allegation of elected official’s corruption was not enough to establish “reckless disregard”). Instead, the evidence must demonstrate “defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* This standard requires a showing of “subjective doubts by the defendant.” *Tavoulareas*, 817 F.2d at 789.

[¶96] Here, there is absolutely no evidence that Greenpeace, Inc. entertained “serious

doubts” about the truth of the Statements, let alone “fabricated” them. Rather than doubting the Statements, the record is clear that they reflected the Greenpeace Defendants’ subjective belief that the protests at Standing Rock were mostly peaceful, and that the force used against protesters was aggressive and violent, sometimes excessively so. *See supra* ¶¶ 15-17, 20, 24, 25.

D. Greenpeace Fund and Greenpeace International Did Not Publish the Statements at Issue

[¶97] All of the arguments above apply with equal force to Defendants Greenpeace Fund and Greenpeace International. Additionally, there is no evidence that Greenpeace Fund or Greenpeace International published the Statements at all, which is an independent ground for granting summary judgment as to these Defendants.

[¶98] To be liable for defamation, a defendant must be a “publisher” of the allegedly defamatory matter—meaning, the party responsible for the act of its communication. *See* N.D.C.C. § 14-02-03 (“Libel is a false and unprivileged *publication* ”) (emphasis added); Restatement (Second) of Torts § 577 (“publication” in this context requires communication to a third person). A defendant is not liable for third party’s defamatory “publication” unless the third party acted as the defendant’s servant or agent, or the defendant “directs or procures” the third party to publish the defamatory matter. *Id.*, § 577 cmt. f; *see, e.g., f* (“alleged procurers or assistants are not responsible as publishers of libel absent a showing of their participation or involvement in the publication.”).

[¶99] For example, in *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531 (1980), the court granted summary judgment for defendant newspaper reporters who, though the original authors of a work, were not involved in the allegedly defamatory book republication: “Inasmuch as the record is barren of any concrete evidence of the reporters’ involvement in the republication of

the newspaper series, we conclude that the causes of action against them must be dismissed.” *Id.* at 540-41.

[¶100] Applied here, neither Greenpeace Fund nor Greenpeace International can be subject to defamation liability based on the Statements because, as in *Karaduman*, “the record is barren” of any evidence of their involvement in the Statements’ publication.

[¶101] Plaintiffs’ Second Amended Appendix A identifies “Greenpeace USA” as the author of each of the Statements, and as detailed above, the individuals responsible for the publications in which Statements 3, 39 and 46 appeared (Molly Dorozenki, Perry Wheeler and Ryan Schleeter, respectively), were Greenpeace, Inc. employees at the time the Statements were published.⁸⁹

[¶102] All the Statements were published at <https://www.greenpeace.org/usa>, which is the website of Greenpeace, Inc., the U.S.-based entity that is a part of the Greenpeace network. Although Greenpeace International owns the domain “greenpeace.org,”⁹⁰ it does not operate or manage the content of any portions of the website dedicated to other national or regional Greenpeace organizations, including the U.S.-based Greenpeace, Inc.⁹¹ Greenpeace, Inc. controls and is solely responsible for the content on <https://www.greenpeace.org/usa>, without editorial oversight or management from Greenpeace International or Greenpeace Fund.⁹² Greenpeace International did not participate in the publication of any of the posts on <https://www.greenpeace.org/usa> that contained these Statements.⁹³

⁸⁹SAC Am. App’x A (Doc. 2837), Statements 3, 39, 46; Ex. 7, Dorozenki Dep. 30:24-31:4, 183:17-184:15; Ex. 12, Wheeler Dep. 23:9-16; Ex. 11, Schleeter Dep. 19:13-17.

⁹⁰ Townsley Decl. ¶ 3.

⁹¹ *Id.* ¶ 4; Ex. 2, Greenpeace International 30(b)(6) (Christensen) Dep. 124:4-10.

⁹² *Id.*

⁹³ Townsley Decl. ¶ 5.

[¶103] More generally, Greenpeace International was not involved with Greenpeace, Inc.’s advocacy against DAPL’s construction.⁹⁴ Greenpeace International sets the Greenpeace network’s broad strategic goals (such as the goal of preventing climate change), but leaves it to regional entities like Greenpeace, Inc. to decide independently the campaigns and activities they pursue in implementing that goals.⁹⁵ Greenpeace International did not fund training activities at Standing Rock.⁹⁶ It did not send any staff or supplies to Standing Rock.⁹⁷

[¶104] Based on these undisputed facts, Greenpeace International cannot be held vicariously liable for defamation based on any of the Statements. It had no “participation or involvement” in communicating the Statements. *Crain*, 364 S.E.2d at 786. Nor can they be held vicariously liable as a “publisher” of statements by Greenpeace, Inc. Numerous courts have found, in the defamation context, that “a parent corporation cannot be held liable for a subsidiary’s torts, unless it is proven that the subsidiary is wholly dominated and controlled by the parent corporation such that piercing the corporate veil is justified.” *Stern v. News Corp.*, 2010 WL 5158635, at *4 (S.D.N.Y. Oct. 14, 2010), *report and recommendation adopted*, 2010 WL 5158637 (S.D.N.Y. Dec. 16, 2010).⁹⁸ And this Court has recognized that the Greenpeace Defendants are not the “alter ego” of one another. Dkt. 2821, Mem. Opinion on Mot. Am. Compl., ¶¶ 10-14.

⁹⁴ Ex. 2, Greenpeace International 30(b)(6) (Christensen) Dep. 55:10-18.

⁹⁵ *Id.* at 35:11-24, 38:20-39:2.

⁹⁶ *Id.* at 114:20-23.

⁹⁷ *Id.* at 120:21-121:4.

⁹⁸ *Accord, Williby v. Hearst Corp.*, 2017 WL 1210036, at *4 (N.D. Cal. Mar. 31, 2017) (dismissing Hearst Corporation as a defendant in defamation action based on statements by an employee of Hearst’s indirect subsidiary); *Rodriguez v. Nishiki*, 653 P.2d 1145 (1982) (dismissing from defamation action shareholder directors of a newspaper who did not participate, either actively or passively, in publication of alleged defamatory statement).

[¶105] Indeed, Greenpeace International’s relationship as the “coordinating body” of all Greenpeace organizations is even more distant than that of a parent and subsidiary.⁹⁹ In particular, Greenpeace International had no editorial control over the content posted on Greenpeace, Inc.’s section of the website. *See Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 472 & n.1 (Minn. Ct. App. 2005) (university not liable for defamation based on statements in student newspaper because of policy prohibiting university from exercising editorial control over the newspaper, despite “plethora of connections” between newspaper and university, including the university’s provision of equipment, services, facilities and trademarks to the newspaper).

[¶106] Greenpeace Fund was not involved at all in opposing DAPL’s construction DAPL,¹⁰⁰ or in amplifying the message of pipeline opponent.¹⁰¹ It is not listed as an author or co-signer of any statements Plaintiffs claim are defamatory.¹⁰² There is no evidence it played any role at all in the publication of any DAPL-related statement, including Statements 3, 39 and 46. It cannot be held liable for the Statements, with which it had nothing to do with publishing.

[¶107] In sum, this Motion should be granted and the defamation claim dismissed as to Greenpeace International and Greenpeace Fund, because neither published the Statements.

III. CONCLUSION

[¶108] For all these reasons, Greenpeace Defendants respectfully request that the Court grant this Motion for partial summary judgment and dismiss Plaintiffs’ defamation claim based on the Statements about force used against anti-DAPL protesters.

⁹⁹ Ex. 2, Greenpeace International 30(b)(6) (Christensen) Dep. 18:5-8.

¹⁰⁰ Ex. 1, Greenpeace Fund 30(b)(6) (Emerson) Dep. at 120:11-121:3.

¹⁰¹ *Id.* at 220:18-221:16.

¹⁰² *Id.* at 271:8-273:18 & Ex. 49, Dep. Ex. 1068 (11/30/16 BankTrack letter).

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