STATE OF NORTH DAKOTA	**DISTRICT COURT**
COUNTY OF MORTON	**SOUTH CENTRAL JUDICIAL DISTRICT**

ENERGY TRANSFER LP, *et al.*, Plaintiffs, v. GREENPEACE INTERNATIONAL, *et al.*, Defendants.	Case No.: 30-2019-CV-00180 **BRIEF IN SUPPORT OF GREENPEACE INTERNATIONAL'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS**

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[¶1] Despite the passage of almost seven years since the events alleged, and more than three years of litigation discovery, Plaintiffs have uncovered no evidence to substantiate their claims against Greenpeace International ("International"). Plaintiffs' vague assertions regarding International's involvement in the Standing Rock protests are inadequate. In fact, International is located outside the United States, and its employees never set foot in North Dakota in connection with the Standing Rock protests, did not provide financial or in-kind support, or otherwise have any meaningful involvement in the Standing Rock protests. For these reasons, summary judgment is proper as to Counts I through VI and IX (Trespass to Land and Chattels, Conversion, Nuisance, Aiding and Abetting, and Conspiracy) of Plaintiffs' Second Amended Complaint ("SAC").

[¶2] With regard to Count VIII (Tortious Interference) and Count VII (Defamation), the sum total of evidence with regard to International is that it joined, along with more than 500 other organizations, in signing ***one letter*** sent by a third party to a number of financial institutions, including those providing construction loan financing for the Dakota Access Pipeline ("DAPL"). Furthermore, there is no indication that any DAPL lender or potential investor (1) saw this one letter, (2) read this one letter, or (3) made any decision based on this one letter that caused harm to Plaintiffs. International also re-posted a DAPL-related statement originally published by Greenpeace, Inc.—but this statement cannot have caused any of Plaintiffs' claimed interference damages, because it was made months after the time when Plaintiffs apparently intended to refinance their loan.

[¶3] Finally, there is no evidence supporting any award of exemplary or punitive damages against International.

[¶4] Because Plaintiffs cannot carry their burden to establish facts supporting essential elements of their claims, International is entitled to summary judgment on all claims alleged, including Plaintiffs' request for exemplary damages.

I. UNDISPUTED MATERIAL FACTS

A. The Greenpeace Defendants Are Separate Entities

[¶5] International is a Netherlands-formed non-profit foundation. It is distinct from the other Greenpeace entity defendants, Greenpeace, Inc. and Greenpeace Fund, Inc., which are both located in the United States. *See* Ex. 1, Deposition of Mads Christensen ("Christensen Dep.") 18:6-8 (explaining that International is the "coordinating body" of "25 independent Greenpeace organizations across the world"); Ex. 2, Deposition of Njambi Good 38:12-19 (stating that Greenpeace, Inc. and International are "different organizations").[1] Indeed, this Court has recognized that the Greenpeace entity defendants are distinct entities and not the "alter ego" of one another. *See* Dkt. 2821, Mem. Opinion on Mot. Am. Compl., ¶¶ 10-14.

[¶6] A few particular differences are worth noting. International has a different executive director than Greenpeace, Inc. and Greenpeace Fund, Inc., and has no say as to the appointment or removal of those entities' executive director. *See* Ex. 1, Christensen Dep. 20:25-22:1. International, Greenpeace, Inc., and Greenpeace Fund, Inc. each has a different board. *See id.* 23:11-14; Ex. 3, Deposition of Annie Leonard 18:10-14. As "coordinating body," International develops top-line strategy for the Greenpeace entities but has no power to enforce implementation of that strategy, including individual protest activities, by the regional organizations. Ex. 1,

[1] All exhibits are to the Declaration of Everett Jack submitted with this motion.

Christensen Dep. 35:10-36:16.

B. International Had No Involvement in the On-the-Ground Activities in North Dakota

[¶7] Plaintiffs accuse all "Greenpeace Defendants," including International, of committing a host of allegedly tortious actions in connection with protests against DAPL. *See generally* Second Am. Compl. ("SAC). But "Greenpeace International was not involved in [the anti-DAPL] work that Greenpeace Inc was conducting at the time." Ex. 1, Christensen Dep. 55:16-18. For example, International did not send anyone to Standing Rock, did not know what activities Greenpeace, Inc. had authorized at Standing Rock, and did not itself conduct any fundraising or supply drives focused on supporting the protests. *Id*. 120:21-121:4.

[¶8] Plaintiffs have never identified any evidence that International played any role in the conduct alleged in the property tort claims (Counts I-VI and IX), either in its own capacity, as an aider and abettor, or as a co-conspirator. Plaintiffs' evidence merely seeks to lump International in with the activities of the other defendants, *see, e.g.*, Ex. 4, Deposition of Michael Futch (Oct. 25, 2023), 180:7-15, 189:19-190:21, 238:17-239:7, but Plaintiffs cannot describe any actions ***by International*** related in any way to the allegations made in each of these Counts. Further, Plaintiffs have not identified any agreement between International and the other Greenpeace entity defendants regarding any actions taken by the other defendants in connection with their anti-DAPL activities.

C. International's Only "Anti-DAPL" Activity Was Signing an Open Letter Along with Over 500 Other Organizations and Re-Posting a Statement by Greenpeace, Inc.

[¶9] International's only involvement with any "anti-DAPL" activity was its endorsement of three of the challenged statements regarding DAPL: Statements 1, 30, and 31. SAC, Second Am. App'x A.

[¶10] First, International co-signed, along with more than 500 other organizations, an open letter drafted and sent by BankTrack on November 30, 2016 calling on banks to halt the financing of DAPL (the "BankTrack Letter"). Ex. 5. BankTrack is an international organization that urges commercial banks not to finance projects that have adverse climate impacts, including fossil fuel projects. *See* BankTrack, 2022 Annual Report at 4, *available at* https://www.banktrack.org/download/banktrack_annual_report_2022/banktrack_annual_report_2022_1.pdf. The BankTrack Letter contains two allegedly defamatory statements:

- "Given that Indigenous rights are presumed to be respected by the [Equator Principles Financial Institutions], . . . it is for us inexplicable that . . . gross violations of Native land titles . . . and the desecration of burial grounds have not been identified early on as reasons for [BBVA] to not provide funding for this project." SAC, Second Am. App'x A, Statement 30.

- "DAPL personnel deliberately desecrated documented burial grounds and other culturally important sites." *Id.*, Statement 31.

[¶11] Second, on June 18, 2018, International published a version of a news release originally posted by Greenpeace, Inc. that contains an allegedly defamatory statement (the "News Release"). Ex. 6, Deposition of Trillia Fidei-Bagwell ("Fidei-Bagwell Dep.") Ex. 1474. The challenged statement in the News Release is that Energy Transfer "damag[ed] at least 380 sacred and cultural

sites along the DAPL pipeline route."[2] SAC, Second Am. App'x A, Statement 1.

D. Plaintiffs Have Provided No Evidence Linking Any of the Statements International Endorsed to Any Claimed Interference Damage

[¶12] Plaintiffs vaguely assert that International's endorsement of these three statements interfered in two ways. Plaintiffs claim that statements in the BankTrack Letter and the News Release: (1) caused some of the banks that participated in the loan for the construction of the DAPL project (the "Construction Loan") to assign their interest to other banks, and (2) caused investors to lose interest and/or refuse participation in the issuance of bonds to refinance the Construction Loan ("Bond Refinancing") on terms acceptable to the Plaintiffs. *See* SAC ¶¶ 79-87 (discussing loan divestment theory); Ex. 10, Supplemental Expert Report of David M. Leathers ("Leathers Suppl. Rep.") ¶¶ 54-55 (discussing bond refinancing theory). However, as discussed below, Plaintiffs can provide no evidence whatsoever that any one of the banks involved with either the Construction Loan or the Bond Refinancing even saw, read, or took any action based on the BankTrack Letter or the News Release.

1. Plaintiffs Base Their Claim on Two Transactions

[¶13] ***The Construction Loan.*** To finance the construction of the DAPL project, Plaintiff Dakota Access, LLC and its affiliate Energy Transfer Crude Oil Company, LLC ("ETCOC") entered the [redacted]. Ex. 11 (ISB_0000203). Under the terms of the Construction Loan, each of the lenders had the right to

[2] International also participated in the anti-DAPL movement in at least two other ways, neither of which is at issue in this case. In December 2016, International [redacted]. Ex. 7, Christensen Dep. Ex. 1729. International also [redacted]. Ex. 8, Fidei-Bagwell Dep. 98:2-14, 133:9-17; Ex. 9, Fidei-Bagwell Dep. Ex. 1463.

assign their interest in the Construction Loan at any time with the consent of Dakota Access and ETCOC, unless the assignee was another lender, in which case consent was not required. *Id.* at ISB_0000306, § 12.15(b)(i). Plaintiffs contend that unspecified statements by unspecified defendants somehow caused four creditors—[redacted]—to exercise this right and sell their shares of the Construction Loan to new creditors.[3] Ex. 10, Leathers Suppl. Rep. ¶ 43. Missing, however, is any evidence from the four creditors themselves supporting this purely speculative assertion.

[¶14] ***The Bond Refinancing.*** After completing DAPL, Plaintiffs refinanced the Construction Loan in 2019. Lenders underwrote the bonds and marketed them to institutional investors like pension funds. *See* Ex. 12, Rule 30(b)(6) Deposition of Ashton Hayse ("Hayse Dep.") 177:11-178:11. Plaintiffs assert they would have ***preferred*** to conduct the Bond Refinancing earlier than 2019. *See* Ex. 10, Leathers Suppl. Rep. ¶¶ 54-55. Plaintiffs contend that certain unspecified statements caused lenders and institutional investors to lose interest and/or refuse participation in the Bond Refinancing in August 2017 or February 2018, causing Plaintiffs to incur additional financing charges and less favorable terms when they completed the Bond Refinancing in 2019. *Id*. ¶¶ 45-55. Again, there is no evidence to support Plaintiffs' speculative contention.

2. There Is No Evidence That the Three Statements International Endorsed Affected Either the Construction Loan or the Bond Refinancing

[¶15] Despite these bald assertions, Plaintiffs admit they cannot identify even one lender or institutional investor that was aware of the BankTrack Letter or of the News Release, let alone that

[3] Plaintiffs' discovery responses also list [redacted], but neither bank exited the Construction Loan.

read them or relied on any statement in them to make any decisions regarding their participation in either the Construction Loan or the Bond Refinancing.

[¶16] ***Written Discovery Answers.*** In Plaintiffs' discovery responses, they provide no facts or documents reflecting that any of the Construction Loan lenders took any actions based upon any statement by International. *E.g.*, Ex. 13, Pl. Dakota Access LLC's Am. Resps. First Set of Interrogs. (Feb. 15, 2022), Resp. No. 8.

[¶17] ***Plaintiffs' Rule 30(b)(6) Designees.*** Plaintiffs' corporate designees likewise could not identify any fact or document supporting the claim that the banks or investors involved in either the Construction Loan or the Bond Refinancing actually saw, read, or made any decision based upon any statement by International, let alone the contents of the BankTrack Letter or the News Release. For example, Plaintiffs' designee on their tortious interference claim acknowledged that he "can't get into the head of the person" who made investing decisions at the banks. *See* Ex. 12, Hayse Dep. 167:10-11; *see also id.* 169:2-7 ("Q. Would you agree that we can't get in the head of [redacted] about how they made a decision whether or not to assign their interest in the construction loan? . . . A. Yeah.").

[¶18] This witness also could not provide any facts suggesting that any statement by International affected any lender's or investor's decision-making. *See id.* 113:5-7, 114:6 ("Q. So in the course of the conversations you had with these potential investors, do you recall any specific mention of Greenpeace? . . . A. I don't remember."). Plaintiffs' other corporate designee similarly testified that he did not know of any individuals who worked at any of the banks ever reviewed any Greenpeace statement about Energy Transfer or DAPL. *See* Ex. 14, Deposition of Michael Futch (Feb. 15, 2024) ("Feb. 15 Futch Dep.") 103:1-15.

[¶19] ***Plaintiffs' Expert Reports.*** Plaintiffs' expert reports likewise fail to identify any evidence that any of the lenders or financial institutions involved with the Construction Loan or the Bond Refinancing ever saw, read, or took any action adverse to Plaintiffs based on the contents of BankTrack Letter or the News Release. The Expert Report of Marc. J. Brown ("Brown Report") does not identify ***any*** damages associated with the Construction Loan, and on the Bond Refinancing, the Brown Report specifically states that he offers no opinion "[redacted]." Ex. 15, Brown Rep. ¶ 6. The Leathers Supplemental Report and the Rebuttal Report of Vince Cubbage ("Cubbage Rebuttal Report") likewise fail to identify any lender or financial institution that actually took any action adverse to Plaintiffs based on any allegedly defamatory statements, whether in the BankTrack Letter, the News Release, or elsewhere. *See* Ex. 10, Leathers Suppl. Rep. ¶¶ 43, 53; Ex. 16, Cubbage Rebuttal Rep. ¶ 26.

II. LEGAL STANDARD

[¶20] The Court must grant summary judgment if "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. P. 56(c)(3). Rule 56 "allows the defendant to put the plaintiff to its proof," and requires judgment against the plaintiff unless the plaintiff presents "competent admissible evidence which raises an issue of material fact." *Black v. Abex Corp.*, 1999 ND 236, ¶ 23, 603 N.W.2d 182, 188-89. When a defendant moves for summary judgment "with respect to an issue on which the nonmoving [plaintiff] bears the burden of proof," the defendant meets its burden simply by "pointing out . . . an absence of evidence to support the nonmoving party's case." *Id.* at 188 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986)). "Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case

and on which that party will bear the burden of proof at trial." *State v. $3260.00 United States Currency*, 2018 ND 112, ¶ 5, 910 N.W.2d 839, 841 (quoting *Dahlberg v. Lutheran Soc. Servs.*, 2001 ND 73, ¶ 11, 625 N.W.2d 241).

III. ARGUMENT

[¶21] All of Plaintiffs' claims against International, including Plaintiffs' request for punitive or exemplary damages, must fail because Plaintiffs have provided no evidence regarding International that supports these claims.

[¶22] ***First***, there is no evidence International engaged in any trespass to land or chattels, conversion, or nuisance, nor that it conspired or aided and abetted any others to engage in the alleged tortious actions in North Dakota. As a result, International is entitled to summary judgment on Counts I-VI and IX of the SAC.

[¶23] ***Second***, as to International's endorsement of three challenged statements, there is no evidence of any damages related to tortious interference (Count VIII) or defamation (Count VII) based on these statements, because there is no evidence that any of Plaintiffs' lenders or potential investors ever (1) saw the BankTrack Letter or the News Release, (2) read the BankTrack Letter or the News Release, or (3) took any action based on the BankTrack Letter or the News Release—let alone any of the three challenged statements therein.

[¶24] ***Finally***, there is no evidence that International acted with oppression, fraud, or actual malice warranting an award of exemplary or punitive damages. Plaintiffs' request for such damages should be denied.

A. Count I (Trespass to Land and Chattels) Fails for Lack of Evidence

1. Trespass to Land

[¶25] "For trespass, the plaintiff must establish the defendant intentionally entered the land of another, or caused a thing or third person to do so, without the consent of the landowner." *Knutson v. City of Fargo*, 2006 ND 97, ¶ 16, 714 N.W.2d 44, 50. "The essence of a trespass to real property is interference with possession of land . . . ." *Sagebrush Res., LLC v. Peterson*, 2014 ND 3, ¶ 20, 841 N.W.2d 705, 713.

[¶26] Because no International employee went to Standing Rock, no International employee could have "intentionally entered" Plaintiffs' property. *See Knutson*, 714 N.W.2d at 50. International is entitled to summary judgment on Plaintiffs' claim for trespass to land.

2. Trespass to Chattels

[¶27] "[T]respass to chattels or personal property generally requires dispossession of the property, impairment of the condition, quality, or value of the property, loss of use of the property, or other harm." *Sagebrush Res.*, 2014 N.D. 3, ¶ 19.

[¶28] Because no International employee went to Standing Rock, no International employee could have interfered with Plaintiffs' property in any way, whether via dispossession or otherwise. International is entitled to summary judgment on Plaintiffs' claim for trespass to chattels.

B. Count III (Conversion) Fails for Lack of Evidence

[¶29] Similar to trespass to chattels, a conversion claim "consists of a tortious detention or destruction of personal property, or a wrongful exercise of dominion or control over the property inconsistent with or in defiance of the rights of the owner." *Ritter, Laber & Assocs. v. Koch Oil, Inc.*, 2004 ND 117, ¶ 11, 680 N.W.2d 634, 638.

[¶30] Because no International employee went to Standing Rock, no International employee could have interfered with Plaintiffs' property in any way, whether via detention, destruction, or otherwise. International is entitled to summary judgment on Plaintiffs' conversion claim.

C. Count V (Nuisance) Fails for Lack of Evidence

[¶31] "A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission: 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others; 2. Offends decency; 3. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or 4. In any way renders other persons insecure in life or in the use of property." N.D.C.C. § 42-01-01. The North Dakota Supreme Court "has explained that '[t]he duty which gives rise to a nuisance claim is the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property.'" *G&D Enterprises v. Liebelt*, 2020 ND 213, ¶ 8, 949 N.W.2d 853, 856 (quoting *Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992)).

[¶32] Because no International employee went to Standing Rock, no International employee could have interfered with Plaintiffs' use and enjoyment of their property, whether "unreasonably" or not. *G&D Enterprises*, 949 N.W.2d at 856 (quoting *Rassier*, 488 N.W.2d at 637). International is entitled to summary judgment on Plaintiffs' nuisance claim.

D. Counts II, IV, and VI (Aiding and Abetting) Fail for Lack of Evidence

[¶33] North Dakota courts have not expressly recognized aiding and abetting as an independent tort claim, and for that reason alone summary judgment should be granted on these Counts. The closest authority supporting such a claim is dicta in which the North Dakota Supreme Court, referencing the Restatement (Second) of Torts, indicated that it ***could be possible*** for a defendant

to be liable "for harm resulting to a third person from the tortious conduct of another if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Hurt v. Freeland*, 1999 ND 12, ¶ 26, 589 N.W.2d 551, 558 (quoting Restatement (Second) of Torts § 876 (1979)).

[¶34] Here, even if aiding and abetting could be an affirmative claim, Plaintiffs' evidence falls short. There is no evidence International engaged in any actions in North Dakota or coordinated any actions in North Dakota, nor did it provide financial support or supplies for Standing Rock protestors. Plaintiffs' only basis to hold International liable for aiding and abetting trespass, conversion, and nuisance is its endorsement of the statements in the BankTrack Letter and the News Release, which are utterly inadequate to serve as the basis for aiding and abetting liability.

[¶35] ***First***, neither the BankTrack Letter nor the News Release could have caused anyone to commit any of the torts alleged in Counts I, III, or V because they were published well after the events in question—in the case of the News Release, almost two years later. The last alleged incident of property interference occurred on November 20, 2016, *see* SAC ¶ 77, while the BankTrack letter was sent on November 30, 2016 and the News Release was posted in June 2018. Moreover, Plaintiffs cannot identify a single person who engaged in any of the torts alleged in Counts I, III, or V who either saw, read, or engaged in the alleged wrongful conduct based on the contents of the BankTrack Letter or the News Release.

[¶36] ***Second***, no statements in either the BankTrack Letter nor the News Release directed or solicited anyone to commit any of the torts alleged in Counts I, III, or V—they did not assist or encourage anyone to trespass on Plaintiffs' land or interfere with their personal property. *See Hinton v. Bryant*, 236 Ark. 577, 581, 367 S.W.2d 442, 444 (1963) (defendant liable "where a

trespass is committed ***by defendant's advice or direction***" (emphasis in original)).

[¶37] ***Third***, it is plainly legally insufficient for one website post or a mere signature on an open letter that 500 other organizations also signed to constitute the "substantial assistance" necessary under *Hurt.* For example, in *Hurt*, the North Dakota Supreme Court acknowledged that a passenger could be held liable for injuries caused in a car accident by actively furnishing alcohol to the driver (though ultimately finding there was no evidence that the passenger gave the driver alcohol or encouraged him to drink). 589 N.W.2d at 558. The BankTrack Letter and the News Release lack a sufficient connection to any of the alleged torts.

[¶38] Accordingly, Plaintiffs have not provided competent evidence supporting their aiding and abetting claims against International, and International is entitled to summary judgment on Counts II, IV, and VI.

E. Count IX (Conspiracy) Fails for Lack of Evidence

[¶39] "Civil conspiracy is: a combination of two or more persons acting in concert to commit an unlawful act or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another and an overt act that results in damages." *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 42, 785 N.W.2d 164, 179 (quoting *Peterson v. North Dakota Univ. Sys.*, 2004 ND 82, ¶ 27, 678 N.W.2d 163). Civil conspiracy differs from aiding and abetting in that it "allows an agreement between the parties to serve as a substitute for the substantial assistance required to support a claim of aiding and abetting." Restatement (Third) of Torts: Liab. For Econ. Harm § 27 cmt. A (2020). In other words, proof of agreement is required to prevail on a civil conspiracy claim. *See Peterson v. North Dakota Univ. Sys.*, 2004 ND 82, ¶ 27, 678 N.W.2d 163, 174 (affirming summary judgment on civil

conspiracy claim where faculty member failed to show any agreement by university officials to act unlawfully).

[¶40] Here, Plaintiffs must prove there was an "agreement" among the defendants to "inflict a wrong against" Plaintiffs in the form of trespass, conversion, nuisance, or providing substantial assistance for any of those torts. *See Burris*, 785 N.W.2d at 179. The BankTrack Letter and the News Release—the only relevant evidence of International's involvement in activities opposing DAPL—do not constitute such an agreement, as they only express opinions on the events at Standing Rock without evincing any agreement to participate in or contribute to those events. Ex. 5. And Plaintiffs have provided no other evidence establishing that International entered into such an agreement. Because Plaintiffs cannot prove this essential element of their civil conspiracy claim, International is entitled to summary judgment on Count IX.

F. Count VIII (Tortious Interference) and Count VII (Defamation) Fail for Lack of Evidence

1. Tortious Interference (Count VIII)

[¶41] In Count VIII of the SAC, Plaintiffs allege that International "intentionally interfered" with both "existing and prospective business relationships." SAC ¶ 131. Specifically, Plaintiffs claim that International (1) interfered with existing business relationships by causing lenders to divest from the Construction Loan, and (2) interfered with prospective business relationships concerning the Bond Refinancing. However, after years of discovery, Plaintiffs have no evidence that any contract was breached, nor that a single Construction Loan lender or potential Bond Refinancing investor saw, read, or took any adverse action against Plaintiffs based upon any statement by International, including the BankTrack Letter or the News Release. Absent such evidence,

Plaintiffs cannot prove that International "instigated" any breach of an existing contract. *Hilton v. North Dakota Educ. Ass'n,* 2002 ND 2099, ¶ 24, 655 N.W.2d 60, 68. Nor can Plaintiffs show that "but for" these statements, a single additional creditor would have underwritten Plaintiffs' bond issuance in 2017 or 2018, or a single additional investor would have purchased those bonds. *Smith Enterprises, Inc. v. In-Touch Phone Cards, Inc.*, 2004 ND 169, ¶ 20, 685 N.W.2d 741, 747. Under either theory, Plaintiffs' claim therefore fails.

a. Plaintiffs Cannot Establish Tortious Interference with the Construction Loan

[¶42] To establish a prima facie case of intentional interference with a contract, in this instance the alleged Construction Loan, Plaintiffs must prove:

(1) a contract existed,

(2) the contract was breached,

(3) the defendant instigated the breach, and

(4) the defendant instigated the breach without justification.

Hilton, 655 N.W.2d at 68. "Generally, an interference with contract claim contemplates a tortfeasor who either prevented a third party from entering into a contract or induced the third party to breach the contract with the plaintiff." *Thimjon Farms P'ship v. First Int'l Bank & Tr.*, 2013 ND 160, ¶ 12, 837 N.W.2d 327, 333–34. "[T]he person whose wrongful conduct is responsible for these results [will be] liable in damages to the party injured." *Van Sickle v. Hallmark & Assocs., Inc.*, 2008 ND 12, ¶ 24, 744 N.W.2d 532, 540 (quoting *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 2001 ND 116, ¶ 33, 628 N.W.2d 707, 716). Here, Plaintiffs can present no evidence that any one of the Construction Loan lenders breached any contract they had with Plaintiffs, let

alone because of any statement contained within the BankTrack Letter or the News Release.

[¶43] ***First***, under the "Credit and Guaranty Agreement" between Plaintiffs and lenders for the Construction Loan, lenders were permitted to assign their interests in DAPL to third parties with Plaintiffs' consent, unless the assignee was another lender. Ex. 11 (ISB_0000203) at ISB_0000306, § 12.15(b) ("Any Lender may assign to one or more Persons . . . all or a portion of its rights and obligations under this Agreement . . . . "). Here, while there were assignments by certain lenders, Plaintiffs ***consented*** to every one of these assignments, or were not required to because the assignment was to another lender. *See, e.g.*, Ex. 17 (ET-01072306); Ex. 18 (ET-01057795); Ex. 19 (ET-01061744); Ex. 20 (ET-01202319). In other words, Plaintiffs cannot show that any of the lenders breached the Agreement.

[¶44] In *Berger v. Sellers*, the North Dakota Supreme Court affirmed the dismissal of two intentional interference claims regarding a construction contract and a construction loan agreement because "no evidence was presented showing either of these contracts was breached." 2023 ND 171, ¶ 48, 996 N.W.2d 329, 349. The Court should find the same here: there is no evidence that any of Plaintiffs' contracts with lenders were breached. International is entitled to summary judgment on this basis alone.

[¶45] ***Second***, Plaintiffs can present no evidence that any of these alleged Construction Loan lenders ever saw, read, or took any action based on the contents of the BankTrack Letter or the News Release, let alone International's endorsement of these writings. *See* Ex. 12, Hayse Dep. 113:5-7, 114:6, 167:10-11, 169:2-7; Ex. 14, Feb. 15 Futch Dep. (Feb. 15, 2024) 103:1-15. For that reason, Plaintiffs lack any evidence that International "instigated" any claimed breach or did so "without justification." *Hilton*, 655 N.W.2d at 68. In short, Plaintiffs lack evidence of causation,

which is fatal to their claim. *See Mr. G's Turtle Mountain Lodge, Inc. v. Roland Twp.*, 2002 ND 140, ¶ 26, 651 N.W.2d 625, 633 (affirming summary judgment on tortious interference claim due to lack of evidence that defendant's letters caused the interference alleged).

[¶46] Because Plaintiffs cannot prove essential elements of their claim for intentional interference with contract, the Court should grant summary judgment for International on Count VIII.

b. Plaintiffs Cannot Establish Tortious Interference with the Bond Refinancing

[¶47] To prevail on a claim for unlawful interference with prospective business, in this instance the subsequent Bond Refinancing damage claim, Plaintiffs must prove five essential elements:

(1) the existence of a valid business relationship or expectancy;

(2) knowledge by the interferer of the relationship or expectancy;

(3) an independently tortious or otherwise unlawful act of interference by the interferer;

(4) proof that the interference caused the harm sustained; and

(5) actual damages to the party whose relationship or expectancy was disrupted.

Trade 'N Post, L.L.C., 2001 ND 116, ¶ 36, 628 N.W.2d at 717. Plaintiffs asserting a claim for tortious interference with a prospective business relationship "are held to a stringent standard, and they must show they would have obtained the economic benefit in the absence of the interference." *Bertsch v. Duemeland*, 2002 ND 32, ¶ 24, 639 N.W.2d 455, 462; *accord Smith Enterprises, Inc. v. In-Touch Phone Cards, Inc.*, 2004 ND 169, ¶ 20, 685 N.W.2d 741, 747 (plaintiff must prove that "***but for*** the actions of [the defendant], [the plaintiff] ***would have*** obtained the actual economic

benefit").

[¶48] Plaintiffs claim that the allegedly defamatory statements in the BankTrack Letter and the News Release interfered with their prospective business opportunity with lenders and financial institutions, causing a delay in the Bond Refinancing. *See* Ex. 10, Leathers Suppl. Rep. ¶¶ 54-55. But Plaintiffs fail to present evidence necessary for the claim to survive.

[¶49] ***First***, there is no evidence that "the [alleged] interference caused the harm sustained." *Trade 'N Post, L.L.C.*, 2001 ND 116, ¶ 36, 628 N.W.2d 707, 717. There is no evidence that any lender or potential investor saw, read, or took any action in connection with the Bond Refinancing as a result of the BankTrack Letter or the News Release. Indeed, the News Release was published in June 2018—several months to a year after Plaintiffs apparently intended to refinance the Construction Loan, in August 2017 or February 2018—so the News Release could not have been the basis of any decision by any potential investor. And although expert Leathers states that Plaintiffs expected the Construction Loan lenders to participate in the Bond Refinancing, Ex. 10, Leathers Suppl. Rep. ¶ 77, there is no actual evidence from a single one of the lenders to that effect. Plaintiffs therefore cannot satisfy the "stringent standard" to "show they would have obtained the economic benefit in the absence of the interference." *Bertsch*, 639 N.W.2d at 462.

[¶50] *Mr. G's Turtle Mountain Lodge, Inc. v. Roland Twp.* controls this case. In *Mr. G's*, the court affirmed summary judgment for the defendant because the plaintiff "failed to present any evidence that [the defendant's] letters caused prospective bidders to refrain from bidding" at the plaintiff's public auction, and "could not identify anyone whose decision whether to bid or attend the auction was influenced by the letters." 2002 ND 140, ¶¶ 26-27, 651 N.W.2d 625, 633. The court found that the plaintiff's argument was "mere conjecture that a causal connection existed

between the publication of the letters and the decision of individual purchasers to bid on the lots," and that "[t]here may have been numerous other factors which caused the failure of the sale." *Id.* ¶ 28. In short, the plaintiff could not defeat a summary judgment motion because there was no evidence of causation. The same result should follow here; Plaintiffs have provided nothing more than speculation that the BankTrack Letter caused their Bond Refinancing damages.

[¶51] In fact, the undisputed evidence is that Plaintiffs decided to delay the Bond Refinancing for reasons entirely unrelated to any Greenpeace entity, or even the Standing Rock protests at all. Plaintiffs' corporate representative and treasurer Ashton Hayse advised at two separate board meetings that management decided to "[redacted]." Ex. 21, ET-01603527 – ET-01603556, at ET-01603532 (Sept. 26, 2018 Bakken Pipeline Investments LLC Board Meeting Minutes); *accord* Ex. 22, ET-01655731 – ET-01655760, at ET-01655736 (June 27, 2018 Bakken Pipeline Investments LLC Board Meeting Minutes). Other banks that divested from Energy Transfer expressly stated that they "did not divest . . . as the result of pressure from Greenpeace," and "[t]here is no way that any NGO in the world could make us to 'cave in' as alleged by the plaintiff." Ex. 23, Deposition of Lisa Coleman Ex. 193.

[¶52] ***Second,*** Plaintiffs have presented no evidence that "a valid business relationship or expectancy" with any particular potential creditor or investor existed. *Trade 'N Post, L.L.C.*, 2001 ND 116, ¶ 36, 628 N.W.2d at 717. Plaintiffs list several institutions that declined to participate in the Bond Refinancing, but Plaintiffs have presented no evidence that those institutions had previously committed to participating in these specific financings, and Plaintiffs admit that the institutions had no obligation to do so. *See* Ex. 12, Hayse Dep. 49:19-50:4, 245:4-9.

[¶53] ***Third***, Plaintiffs have presented no evidence that International had "knowledge by the interferer of the relationship or expectancy." *Trade 'N Post, L.L.C.*, 2001 ND 116, ¶ 36, 628 N.W.2d 707, 717. There is no evidence that International (1) knew that Plaintiffs tentatively planned the Bond Refinancing in 2017 or 2018, (2) knew the identity of any one of the potential investors in the Bond Refinancing, or (3) directed the BankTrack Letter to those institutions.

[¶54] Because Plaintiffs cannot prove essential elements of their claim for unlawful interference with prospective business, the Court should grant summary judgment for International on Count VIII.[4]

2. Defamation (Count VII)

[¶55] Plaintiffs also seek damages against International for the alleged defamatory statements in the BankTrack Letter and the News Release. But again, Plaintiffs have presented no evidence that any of their lenders or potential investors ever (1) saw the BankTrack Letter or News Release, (2) read the BankTrack Letter or News Release, or (3) made any decision or took any action that caused damage to Plaintiffs based on the BankTrack Letter or News Release.[5]

G. Plaintiffs' Claim for Exemplary or Punitive Damages Against International Fails for Lack of Evidence

[4] Additionally, the "independently tortious . . . act of interference" that Plaintiffs allege is defamation based on the statements in the BankTrack Letter and the News Release. *Trade 'N Post, L.L.C.*, 2001 ND 116, ¶ 36, 628 N.W.2d at 717. If the Court finds that Plaintiffs cannot prove their defamation claim (Count VII), it must necessarily grant summary judgment on Plaintiffs' tortious interference claim (Count VIII).

[5] As Defendants explain in a separate motion, Plaintiffs are precluded from any recovery for defamation ***other than*** provable economic loss, because they failed to serve a timely demand for the correction or retraction of any allegedly defamatory statement as required by North Dakota law. N.D.C.C. § 32-43-03. Accordingly, because Plaintiffs cannot show International caused Plaintiffs any economic loss, the Court should hold that Plaintiffs are not entitled to ***any*** recovery from International on the defamation claim. Separately, Defendants intend to move for summary judgement on the defamation claim because Plaintiffs cannot meet their burden of establishing the elements of that claim as to any of the allegedly defamatory statements, including falsity of the statements and actual malice.

[¶56] North Dakota law allows for recovery of exemplary damages only where there is "clear and convincing evidence of oppression, fraud, or actual malice." N.D.C.C. § 32-03.2-11. "'Oppression,' as used in the statute, means 'subjecting a person to cruel and unjust hardship in conscious disregard of his rights.'" *Harwood State Bank v. Charon*, 466 N.W.2d 601, 604 (N.D. 1991) (quoting *Napoleon Livestock Auction, Inc. v. Rohrich*, 406 N.W.2d 346 (N.D. 1987)). "'[F]raud' is (1) the suggestion as fact of that which is not true by one who does not believe it to be true; (2) the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact by one who is bound to disclose it, or who gives information that is likely to mislead because that fact was not communicated; or (4) a promise made without any intention of performing." *McHugh v. Jacobs*, 450 F. Supp. 2d 1019, 1022–23 (D.N.D. 2006) (citing North Dakota pattern jury instructions and North Dakota case law). And actual malice, for purposes of the exemplary damages statute, "is defined as 'an intent with ill will or wrongful motive to harass, annoy, or injure another person.'" *Zander v. Morsette*, 2021 ND 84, ¶ 31, 959 N.W.2d 838, 846 (quoting *McHugh v. Jacobs*, 450 F. Supp. 2d 1019, 1022 (D.N.D. 2006)).

[¶57] Because Plaintiffs' substantive claims fail, as described above, Plaintiffs' request for exemplary damages must also be denied. *See Rodenburg Law Firm v. Sira*, 2019 ND 205, ¶ 18, 931 N.W.2d 687, 691 ("A claim for exemplary damages is derivative of another cause of action, is not an independent claim, and 'no award of exemplary damages may be made if the claimant is not entitled to compensatory damages.'" (quoting N.D.C.C. § 32-03.2-11(4))).

[¶58] In any event, there is no evidence that International acted with oppression, fraud, or actual malice warranting exemplary damages. Although the Court found Plaintiffs had made a sufficient

showing to ***plead*** exemplary damages as to the Defendants generally, there was no evidence presented as to International that could support an award of exemplary damages. Accordingly, the Court should bar Plaintiffs from recovering exemplary damages against International.

IV. CONCLUSION

[¶59] International has "point[ed] out . . . an absence of evidence to support the nonmoving party's case," and is therefore entitled to summary judgment. *Black*, 603 N.W.2d at 188 (quoting *Celotex Corp*, 477 U.S. at 325). For all the above reasons, International respectfully requests that this Court grant summary judgment in its favor on all claims (Counts I, II, III, IV, V, VI, VII, VII, VIII, and IX), and on Plaintiffs' request for exemplary or punitive damages.

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Respectfully submitted,

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