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 **GREENPEACE DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFAMATION AND TORTIOUS INTERFERENCE CLAIMS (COUNTS VII AND VIII)**

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[¶1] Greenpeace International, Greenpeace, Inc., and Greenpeace Fund, Inc. (together, "Greenpeace Defendants") respectfully move for partial summary judgment limiting Plaintiffs' damages on their defamation claim (Count VII) and their tortious interference claim (Count VIII) to the extent it is based on allegedly false statements. *See* Second Am. Compl. ("SAC"), Dkt. 2836. For these publication-related claims, Plaintiffs can recover no more than their "provable economic loss," because they failed to seek a timely correction of the allegedly false statements as required by the North Dakota Uniform Correction or Clarification of Defamation Act ("UCCDA"), N.D.C.C. § 32-43-03. This statutory bar precludes Plaintiffs, as a matter of law, from recovering damages for alleged reputational harm or any other non-pecuniary relief (including, without limitation, any presumed or punitive damages) on any claim, "however characterized … caused by the false content of a publication[.]" N.D.C.C. § 32-43-02.

I. UNDISPUTED MATERIAL FACTS

[¶2] Plaintiffs' defamation claim is based on nine allegedly defamatory statements (the "Statements"). SAC App'x A, Dkt. 2837. Seven of the Statements were published in late 2016 (Statements 19, 30, 31, 39, 44, 46, and 54). *Id.* The two remaining Statements (Statements 1 and 3) were published in March and June 2018, in two different Greenpeace, Inc. posts. *Id.*[1] Plaintiffs' tortious interference claim is derived in part from this defamation claim, in that it alleges interference consisting of "disseminating false, misleading, and defamatory statements concerning Energy Transfer and Dakota Access's business and DAPL[.]" SAC ¶ 131.

[¶3] Plaintiffs knew about the DAPL-related-publications at issue at the time those

[1] Greenpeace Fund did not publish any of the Statements. Neither did Greenpeace International; it merely co-signed a November 30, 2016, open letter (along with hundreds of other organizations) written by an organization known as BankTrack, which contains Statements 30 and 31.

statements were made. Plaintiffs and their public relations team regularly monitored public statements, and "[redacted]." Ex. 1,[2] Deposition of Vicki Granado 101:1-10.[3] *See also id.* 57:24-59:22, 113:4-7 (Plaintiffs' public relations firm prepared "[redacted]"); Ex. 2, Deposition of Lisa Coleman 64:20-25 ("[redacted]").

[¶4] Records produced by Plaintiffs and their public relations firm show Plaintiffs knew about eight of the nine Statements contemporaneous to their publication, and knew about them all for far more than 90 days before first asserting a claim that they were false or defamatory. This timing is significant because, as detailed below (*see infra* [¶10]-[¶14]), N.D.C.C. § 32-43-03(2) requires a plaintiff to notify a publisher of the alleged falsity of a statement within 90 days in order to preserve a claim for non-pecuniary defamation damages.

- Statement 1, contained in a June 18, 2018 post published by Greenpeace, Inc., was discussed and linked in a media clips email circulated to a large group of Energy Transfer employees the next day, on June 19, 2018. Ex. 3 (ET-00443690 at ET-00443694).
- Statement 3, contained in a March 2, 2018 Greenpeace, Inc. post, was quoted and cited in a daily news roundup sent to Energy Transfer's public relations head on March 6, 2018. Ex. 4 (ET-01222667 at ET-01222702).

[2] All exhibits are to the Declaration of Eric M. Stahl submitted with this motion.

[3] This deposition was a Rule 30(b)(6) deposition of Vicki Granado, Energy Transfer's Vice President of Public Relations, who was designated by Plaintiffs to testify on Plaintiffs' public relations and media strategy.

- Statement 19, contained in a blog post published by Greenpeace, Inc. on December 13, 2016, was circulated to Plaintiffs' PR agency—which was responsible for reviewing news media daily for Energy Transfer—just two days later on December 15, 2016. Ex. 5 (DCI-00038620).
- Statements 30 and 31 were contained in the November 30, 2016 BankTrack letter that Greenpeace, Inc. and Greenpeace International joined in signing along with over 500 other organizations. According to the document's metadata, Plaintiffs were aware of this letter by no later than December 1, 2016. Ex. 6 (ET-00145904).
- Statement 39 was contained in a Greenpeace, Inc. blog published on November 21, 2016. Plaintiffs produced a copy of this publication in a document dated March 22, 2017, indicating they were aware of Statement 39 no later than that date, five months before they first accused Greenpeace Defendants of defamation. Ex. 7 (ET-00146253).
- Statements 44 and 46 were published on Greenpeace, Inc. blogs and social media on November 16 and November 18, 2016. Plaintiffs' daily online media monitoring identified Greenpeace as a "top author" of DAPL-related content on the day or day after Greenpeace, Inc. published each of these statements. *See* Ex. 8 (DCI-00031903 at DCI-00031908); Ex. 9 (ET-00154208 at ET-00154213).
- Statement 54, contained in an open letter that Greenpeace, Inc. joined in signing along with 25 other organizations on November 7, 2016, was circulated internally among Energy Transfer employees that same day. Ex. 10 (ET-01759193, ET-01759196).

[¶5] There is no evidence Plaintiffs made *any* "attempt to request a correction or clarification" of any Greenpeace publication within 90 days, as required by N.D.C.C. § 32-43-

03(2). Instead, the first time Plaintiffs asserted that the seven 2016 Statements were false was on August 22, 2017, when the federal complaint alleging those Statements (all of which Plaintiffs had knowledge of between five months and a year earlier) were defamatory. Ex. 11, Case No. 1:17-cv-173, App'x A (Statements re: Tribal Treaty Lands) at 1-2; Ex. 12, Case No. 1:17-cv-173, App'x D (Statements re: Excessive Force) at 4-5; Ex. 13, Case No. 1:17-cv-173, App'x F (Statements re: Cultural Resources) at 1-2. The first time Plaintiffs asserted the two 2018 Statements were defamatory was in the First Amended Complaint filed in this action in August 2019, over a year after Plaintiffs knew those Statements had been published. App'x A, Dkt. 103, at 1. Rather than making a timely request for a statutory correction or clarification after learning of the Statements, Plaintiffs sat on their hands—for up to 18 months in some cases—before alleging defamation.

II. LEGAL STANDARD

[¶6] 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). A party opposing summary judgment may not rely "upon unsupported conclusory allegations, but 'must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.'" *Perius v. Nodak Mut. Ins. Co.*, 2010 N.D. 80, ¶ 9, 782 N.W.2d 355 (2010) (quoting *Beckler v. Bismarck Pub. Sch. Dist.,* 2006 N.D. 58, ¶ 7, 711 N.W.2d 172 (2006)).

III. ARGUMENT

[¶7] The Court should hold that Plaintiffs are not entitled to recover for reputational harm, exemplary or punitive damages, or any other non-pecuniary damages stemming from any

allegedly false Greenpeace statement, because Plaintiffs failed to provide timely notice as unequivocally required by the UCCDA.

[¶8] The UCCDA applies to "any claim for relief, however characterized, for damages arising out of defamation caused by the false content of a publication that is published on or after August 1, 1995." N.D.C.C. § 32-43-02. Here, the statute applies not only to Plaintiffs' defamation claim, but also to their tortious interference claim to the extent it seeks "damages arising out of harm to personal (including corporate) reputation caused by publication of a false statement – i.e., by the consequences of the statement's falsity[.]" Uniform Law Commission, Uniform Correction or Clarification of Defamation Act § 2, Comment.[4] Plaintiffs' tortious interference claim meets this criterion because the alleged interference consists in part of the Greenpeace Defendants supposedly "disseminating false, misleading, and defamatory statements concerning Energy Transfer and Dakota Access's business and DAPL[.]" SAC ¶ 131.

[¶9] The UCCDA contains two distinct notification requirements. First, a plaintiff can maintain a defamation-based claim only if it "has made a *timely* and *adequate* request for correction or clarification from the defendant." N.D.C.C. § 32-43-03(1) (emphasis added). This requirement is satisfied if the plaintiff serves "a summons and complaint stating a claim for relief for defamation." *Id.* § 32-43-03(4). The Greenpeace Defendants do not contest that Plaintiffs have satisfied this element, because they served a summons and complaint asserting defamation claims in their previous federal action and in this case.

[4] The uniform law on which UCCDA is based can be accessed online at https://www.uniformlaws.org/viewdocument/final-act-44?CommunityKey=6ba5d1ed-8924-48aa-81e9-1ed0f7a9f47d&tab=librarydocuments. For the Court's convenience, it is attached to this motion as Exhibit 14.

[¶10] Second, even as to a plaintiff who makes a "timely" request, the UCCDA limits damages to "provable economic loss" if the plaintiff, "within ninety days after knowledge of the publication, fails to make a good-faith attempt to request a correction or clarification." *Id.* § 32-43-03(2). The UCCDA defines "[e]conomic loss" as "special, pecuniary loss caused by a false and defamatory publication." *Id.* § 32-43-01(2). The statute's plain language thus bars recovery of non-pecuniary damages—including reputational damages and punitive damages. This Uniform Law "is intended to embrace those forms of provable loss described, variously, as pecuniary, special, or out-of-pocket, and to *exclude all other forms of damage*, including presumed, general, reputational, and punitive damages." Uniform Law Commission, Uniform Correction or Clarification of Defamation Act § 1, Comment (emphasis added). This requirement "provides a strong incentive for an early request and a significant penalty for failure to make one." *Id.* § 3. It advances the statutory goal of prompt identification and mitigation of any perceived reputational harm "by providing sticks and carrots to induce plaintiffs and defendants to take prompt action to rectify defamatory publications so any ensuing damages are ameliorated." *Warner Bros. Ent. v. Jones*, 611 S.W.3d 1, 10 (Tex. 2020) (discussing Texas's version of UCCDA).

[¶11] Plaintiffs ignored the UCCDA's 90-day early-notice requirement. They never requested a timely correction or clarification of any of the accused Statements. As to the seven Statements published in 2016, Plaintiffs first informed the Greenpeace Defendants of the Statements' alleged falsity by filing their federal complaint on August 22, 2017—which was more than 90 days (indeed, at least six months and up to a year) after Plaintiffs knew of each Statement. *See supra* [¶4].

[¶12] As to the two Statements published in 2018, Plaintiffs first informed the Greenpeace Defendants that they believed the statements were defamatory when they filed the

First Amended Complaint in this action over a year after publication, in August 2019. Again, Plaintiffs had knowledge of these statements within days of their publication in 2018, over a year earlier. *See supra* [¶4].

[¶13] Even without this clear evidence of Plaintiffs' contemporaneous knowledge of the Statements, they are presumed as a matter of law to have known about the Statements as of the date on which each one was published. The timeliness of a UCCDA correction request is measured in the same way as the timeliness of a defamation action, *see* N.D.C.C. § 32-43-03(2), and under North Dakota law a defamation claim based on a statement "published through a public format, such as the internet" accrues "when the publication of the false statement is made to a third party." *Arthaud v. Fuglie*, 2023 ND 36, ¶¶ 7-8, 987 N.W.2d 379, 382 (discovery rule, under which statute of limitations for certain torts is triggered when plaintiff discovers the harm, does not apply to defamation claims based on publicly available statements). Here, because all of the accused Statements were published openly, Plaintiffs' clock for a UCCDA correction request started running at the time each was published.

[¶14] Both the fact of publication, and Plaintiffs' contemporaneous knowledge of the Statements, triggered Plaintiffs' obligation under N.D.C.C. § 32-43-03(2) "to make a good-faith attempt," within 90 days, "to request a correction or clarification" of any statement they believed was defamatory. Because Plaintiffs failed to contact any of the Greenpeace Defendants within this statutory timeframe, their damages for any claim based on the alleged falsity of those statements is limited to "provable economic loss." *Id.* The Court must dismiss any other prayer for damages, including damages for alleged reputational harm and any presumed or punitive damages, on Plaintiffs' defamation claim and on their tortious interference claim to the extent it is based on allegedly false statements.

IV. CONCLUSION

[¶15] For the above reasons, the Greenpeace Defendants respectfully request that the Court grant partial summary judgment on Count VII and (to the extent it is based on any allegedly false or defamatory statement) Count VIII, and issue an order limiting Plaintiffs' recoverable damages to provable economic loss in accordance with N.D.C.C. § 32-43-03(2).

Dated: April 8, 2024

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