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 PLAINTIFFS' DEFAMATION CLAIM REGARDING DAMAGE TO CULTURAL SITES (STATEMENTS 1, 30, 31, 54)** **[DEFAMATION MOTION 2 OF 3]**

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Statutes

Rules

[¶1] Greenpeace, Inc., Greenpeace International, and Greenpeace Fund, Inc. (collectively, "Greenpeace Defendants") seek dismissal of Plaintiffs' defamation claim to the extent it is based on four statements asserting that Plaintiffs, in the course of constructing the Dakota Access Pipeline ("DAPL"), deliberately desecrated culturally important sites and burial grounds ("Statements"). This is the second of three motions, filed concurrently, seeking partial summary judgment on Plaintiffs' defamation claim. The Statements at issue here, which reflect the views of the Standing Rock Sioux Tribe ("SRST") and other Indigenous leaders that DAPL's construction damaged sites significant to them, are not actionable.

[¶2] First, Plaintiffs cannot meet their burden of proving the Statements' falsity. State officials, experts and even Plaintiffs' own cultural surveyors all recognize that a site's cultural significance, and what constitutes desecration, are matters of cultural and archaeologic debate, not factual questions capable of being proven false. And it is undisputed that SRST views sites along DAPL's route as sacred, regardless of whether they met the legal criteria for historic protection. It also is undisputed that Plaintiffs bulldozed a site the day after SRST's Historic Officer filed a sworn declaration in federal court identifying it as culturally significant. Plaintiffs admit they knew of the declaration before they bulldozed the site, and chose to do so because they disputed its accuracy (on grounds that, discovery has shown, were false). Opining that these actions were "deliberate" is protected speech. Moreover, the "gist" of the Statements—that the SRST believe it was not accidental that Plaintiffs and DAPL damaged culturally significant sites—is also substantially true. *See* Section II.B, *infra*.

[¶3] Second, even if the Statements were in some respect factually false (and they are not), Plaintiffs' claim would fail because they have no evidence the Statements were published with constitutional "actual malice." As public figures, Plaintiffs cannot recover for defamation

unless they establish this heightened fault standard, which requires clear and convincing proof defendants subjectively knew a statement was false or had serious doubts as to its truth. There is no evidence of actual malice here. The Statements rely on SRST and public sources that Greenpeace Defendants believed to be true. *See* Section II.C, *infra*.

[¶4] Third, summary judgment should be granted as to Greenpeace Fund, Inc. ("Greenpeace Fund") entirely, and to Greenpeace International with respect to one Statement, for the additional reason that they did not publish these Statements. "Publication" is an element of defamation, and these defendants did not publish, and had no participation or involvement in communicating, Statements appearing only on Greenpeace USA's website, the content of which is solely controlled by Greenpeace, Inc. *See* Section II.D, *infra*.

I. UNDISPUTED MATERIAL FACTS

[¶5] To avoid unnecessary repetition, this Motion will incorporate by reference undisputed facts and legal analysis set out more fully in Greenpeace Defendants' concurrently filed "Motion for Partial Summary Judgement on Plaintiffs' Defamation Claim Regarding 'Use of Force' (Statements 3, 39 and 46)" ("MSJ No. 1").

[¶6] The Greenpeace Defendants' background, their views on reducing reliance on fossil fuels, and Greenpeace, Inc.'s publication of DAPL-related information, are set out in MSJ No. 1, Section I.A., and are incorporated by reference here.

A. Statements Mentioning Desecration of Cultural Sites

[¶7] This Motion concerns four of the nine statements on which Plaintiffs base their defamation claim. *See* Second Amended Complaint, Amended App'x A (Doc. 2837). The Statements, identified as Statements 1, 30, 31 and 54, appear in three publications, all related to Greenpeace's environmental advocacy.

1. Statement 54 (November 7, 2016)

[¶8] Statement 54 is from a November 7, 2016, "open letter to the Equator Principles Association," circulated and signed by Johan Frijns of non-party BankTrack.[1] BankTrack is an international organization that urges commercial banks to consider the climate impacts of projects they are asked to finance.[2]

[¶9] The BankTrack letter is co-signed by 28 environmental organizations.[3] Diana Best signed it on behalf of "Greenpeace USA" (Greenpeace, Inc.), her employer.[4]

[¶10] Neither Greenpeace International, Greenpeace Fund, nor any other Greenpeace entity, signed the letter.[5]

[¶11] The BankTrack letter was sent to the Equator Principles Association and is directed to the 85 financial institutions that had signed the Equator Principles ("EP").[6] The EP, founded in 2003, is a sustainability initiative committing member banks to consider environment and social risks in financing decisions for infrastructure projects like pipelines.[7]

[¶12] The letter urges EP signatories that given "the magnitude of the current climate,"

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[1] Ex. 1, Dep. Ex. 1067; Ex. 2, Dep. Ex. 1114; Ex. 3, Best Dep. 38:8-24, 71:20-72:6 (authenticating same). The letter is available online at https://www.banktrack.org/news/an_open_letter_to_the_equator_principles_association. 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] *See* Ex. 41, BankTrack, 2022 Annual Report at 4, available at https://www.banktrack.org/download/banktrack_annual_report_2022/banktrack_annual_report_2022_1.pdf.

[3] Ex. 1, Dep. Ex. 1067.

[4] *Id*.; Ex. 3, Best Dep. 38:8-24, 71:20-72:6.

[5] Ex. 1, Dep. Ex. 1067; Ex. 3, Best Dep. 129:11-130:4 (Best did not sign on behalf of Greenpeace International or Greenpeace Fund).

[6] Ex. 1, Dep. Ex. 1067; *see id*. at BNPP-00000063 ("85 of the world's leading banks" were EP signatories). According to the organization, there are currently 127 signatories. *See* Ex. 42, https://equator-principles.com/signatories-epfis-reporting.

[7] Ex. 1, Dep. Ex. 1067; Ex. 4, Lummus 30(b)(6) (Darby) Dep. 94:11-96:25 (engineering consultant who reviewed DAPL under Equator Principles, describing same).

they should "start strengthening [their] collective climate commitments, by including stringent and binding climate criteria for all projects to be considered under the EP framework[.]"[8]

[¶13] The letter notes DAPL "is the subject of huge international outcry, led by the Standing Rock Sioux tribe," and "has escalated into a national crisis and an international scandal." It also notes that a "member of the UN's Permanent Forum on Indigenous Issues has been deployed to North Dakota to monitor the situation[.]"[9]

[¶14] Statement 54 is contained in the paragraph of the letter describing the SRST objections to DAPL. The paragraph (with the allegedly defamatory portion underlined) states:

> As you are aware, the proposed 1,172 mile-long DAPL is the subject of huge international outcry, led by the Standing Rock Sioux tribe, but supported by the tribal governments of over 280 other tribes and allies from all over the world. This growing global resistance opposes DAPL because it threatens air and water resources in the region and further downstream, and because the pipeline trajectory is cutting through Native American sacred territories and unceded Treaty lands. Harm to Native areas has already occurred when <u>DAPL personnel deliberately desecrated documented burial grounds and other culturally important sites</u>. Native American opponents to the project emphasize that the DAPL struggle is about larger Native liberation, self-determination and survival at the hands of colonial corporations and compliant government actors.[10]

[¶15] Greenpeace, Inc. believed Statement 54 was true.[11] First, before signing the BankTrack letter, Best reviewed it, did not see anything in it that struck her as inaccurate, and noted that BankTrack was continuing to fact-check it.[12]

[¶16] Best also believed the content of the letter was accurate because BankTrack was a trusted organization that she and other Greenpeace, Inc. employees had worked with before,

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[8] Ex. 1, Dep. Ex. 1067 at BNPP-00000063, 64.

[9] *Id.* at BNPP-00000065.

[10] *Id*.

[11] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 298:12-299:4, 306:11-307:10.

[12] Ex. 3, Best Dep. 45:15-46:2; Ex. 2, Dep. Ex. 1114 at GP-INC0173759.

and knew to have a good reputation.[13] She did not believe anything in the letter was false.[14]

[¶17] Greenpeace, Inc. also believed the BankTrack letter was accurate because of its reference to the U.N. Permanent Forum on Indigenous Issues, which had published a report on DAPL on November 1, 2016, six days before BankTrack issued its letter. In that report, Chief Edward John (the member of the UN Forum who had "been deployed to North Dakota to monitor the situation"), states he was invited by SRST to visit the area and spoke to multiple sources, including DAPL opponents, law enforcement, and members of SRST. He states:

> I am advised by a Sioux elder and cultural leader that so far some 380 cultural and sacred sites along the pipeline route have been destroyed by work associated with the right of way clearing for the pipeline. She confirmed that on October 31 an ancient village site near the "north camp" will be destroyed." … She advises that the Sioux have done extensive research and have documentation of these sites.[15]

[¶18] Greenpeace, Inc. also believed Statement 54 was true based on statements by SRST, including in court filings and in the press describing the cultural importance of sites.[16]

[¶19] Greenpeace, Inc. believed the statement that DAPL personnel acted "deliberately" was true because Plaintiffs persisted in pursuing DAPL's construction through sites SRST had identified, in court filings and public statements, as culturally important to them.[17] It is undisputed that Plaintiffs elected to actively bulldoze a location near Cannonball Ranch over Labor Day weekend, the very day after the site had been identified as a tribal burial and historic site in a declaration filed in court the previous day by SRST's Historic Preservation

[13] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 306:11-307:10; Ex. 3, Best Dep. 43:1-9; Ex. 6, Sweeters Dep. 231:21-232:12.

[14] Ex. 3, Best Dep. 79:18-80:1.

[15] Ex. 7, Dep. Ex. 1117, at 3; Ex. 1, Dep. Ex. 1067 at BNPP-00000065.

[16] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 306:11-307:10, 307:11-25; Ex. 8, Dep. Ex. 939 (Mentz Decl.); Ex. 9, Plaintiffs' 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 197:17-198:7; *see infra* §§ I.B.

[17] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 308:3-21; *see infra* § I.B.

Officer.[18] Greenpeace, Inc. agreed with BankTrack's view that the Plaintiffs' decision to persist in constructing through this area constituted a "deliberate" act, given the Tribe's status as an authority on its own history and culture: "Our point of view is that the bulldozing, the construction, this desecration was not accidental, the bulldozers didn't drive themselves.[19]

[¶20] Greenpeace, Inc. also believes Plaintiffs acted deliberately because Plaintiffs were aware of and understood SRST's objections, and elected to proceed anyway.[20]

2. Statement 30 and 31 (November 30, 2016 BankTrack letter)

[¶21] Statements 30 and 31 are both contained in a second open letter from Johan Frijns of BankTrack, dated November 30, 2016.[21] The letter is addressed to the CEOs of 17 banks involved in a credit agreement financing DAPL, including four signatories to the EP.[22]

[¶22] The letter is co-signed by more than 500 organizations from around the world. Greenpeace, Inc.'s Executive Director Annie Leonard signed on behalf of Greenpeace USA.[23] Greenpeace International also signed the letter, as did two other Greenpeace entities (non-parties Greenpeace France and Greenpeace Netherlands) through their respective representatives.[24] Defendant Greenpeace Fund is not a signatory.

[¶23] This BankTrack letter again recounts the "huge international outcry, led by the [SRST]," arising from DAPL's proposed construction. The letter urges recipient banks to honor

[18] *See infra* § I.B.1; Ex. 8, Dep. Ex. 939 (Mentz Decl.); Ex. 9, Plaintiffs' 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 197:17-198:22; Ex. 10, Pederson Dep. 67:24-68:3 (noting Labor Day weekend bulldozing).

[19] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 309:2-310:20; *id*. at 311:6-18.

[20] *Id*. at 311:20-312:8; *see infra* § I.B.1.

[21] Ex. 11, Leonard Dep. 242:25-243:23; Ex. 39, Dep. Ex. 1068. The letter is available online at https://www.banktrack.org/news/global_call_on_banks_to_halt_loan_to_dakota_access_pipeline.

[22] Ex. 39, Dep. Ex. 1068 at BNPP-00000049.

[23] *Id*. at BNPP-00000056; Ex. 11, Leonard Dep. 242:25-243:23.

[24] Ex. 39, Dep. Ex. 1068 at BNPP-00000056.

their "stated commitment to respect indigenous rights" by putting DAPL's financing "on hold until all outstanding issues are resolved to the full satisfaction of the [SRST]."[25]

[¶24] Statements 30 and 31 appear in the same paragraph of the November 30 BankTrack letter, which reads as follows (with the allegedly defamatory portions underlined):

> As the loan syndicate is led by four banks that are signatory to the [EP], this project loan is subject to these Principles. Given that Indigenous rights commitments are presumed to be respected by the [EP], specifically the right of indigenous communities to withhold consent to projects affecting their ancestral lands (FPIC), it is for us inexplicable that the clear and long standing opposition to the project by the [SRST], as well as widely documented gross violations of Native land titles, threats to water sources and the desecration of burial grounds have not been identified early on as reasons for participating banks to not provide funding for this project. Harm to Native areas has now already occurred when DAPL personnel deliberately desecrated documented burial grounds and other culturally important sites.[26]

[¶25] Greenpeace, Inc. believed the Statements were true. First, as when it signed the first BankTrack letter three weeks earlier, with its nearly identical statements, Greenpeace, Inc. regarded BankTrack as reliable, and had no reason to doubt its claims, which aligned with Greenpeace, Inc.'s understanding of the SRST concerns about deliberate cultural desecration.[27]

[¶26] Ms. Leonard, who signed the second BankTrack letter on behalf of Greenpeace, Inc., also believed DAPL had desecrated burial grounds and other cultural sites based on her discussions with a trusted Indigenous activist she had known for 25 years and considered "very reliable and credible."[28] She also was aware of Chief Edward John's U.N. report finding 380

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[25] *Id*. at BNPP-00000049.

[26] Ex. 39, Dep. Ex. 1068 at BNPP-00000049; Second Amended Complaint App'x A. Statement 30 is the portion of the paragraph above beginning "Given that Indigenous rights are presumed to be respected by the Principles," and ending "… have not been identified early on as reasons for participating banks to not provide funding for this project." (The portion of Statement 30 referring to "Native land titles" is addressed in Greenpeace's separate summary judgment motion regarding statements that DAPL crossed SRST land (Motion 3 of 3).) Statement 31 is the portion of the paragraph above reading, "DAPL personnel deliberately desecrated documented burial grounds and other culturally important sites."

[27] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 315:21-316:16; *see supra* ¶¶ [¶15]-[¶20].

[28] Ex. 11, Leonard Dep. 106:19-107:15, 233:10-17, 234:25-235:11; 238:6-21; 253:11-254:1.

sites along the pipeline route had been destroyed,[29] and of research by Greenpeace, Inc. staff.[30]

[¶27] Greenpeace International's purpose in signing the November 30 BankTrack letter was to remind banks of their own commitment, as expressed in the EP, to consider the climate impacts of projects they finance.[31] Greenpeace International was not involved in any activities at Standing Rock,[32] but has a broad strategic goal of preventing climate change, including through resisting new fossil fuel infrastructure.[33]

[¶28] Greenpeace International spent four or five days discussing the letter with at least five subject matter experts and confirming that the SRST agreed with its content; it signed the letter in part because it learned Indigenous groups had no concerns with its content.[34]

3. Statement 1 (June 18, 2018)

[¶29] Statement 1 is contained in a news release by Greenpeace, Inc., announcing and linking to a "[n]ewly released Greenpeace USA report, 'Too Far, Too Often: Energy Transfer Partners' Corporate Behavior On Human Rights, Free Speech, and the Environment'" ("TFTO").[35] The release is dated June 18, 2018, more than a year after DAPL's completion.

[29] *Id*. at 265:14-266:6; Dep. Ex. 1117, at 3.

[30] *Id*. at 264:10-23, 266:11-18.

[31] Ex. 12, Greenpeace International 30(b)(6) (Christensen) Dep. 80:3-10, 143:14-17; Ex. 39, Dep. Ex. 1068.

[32] *Id*. at 55:10-18; 114:20-23; 120:21-121:4.

[33] *Id*. at 35:11-24, 54:18-25.

[34] *Id*. at Greenpeace International 30(b)(6) (Christensen) Dep. 131:18-133:19.

[35] SAC Appendix A, Statement 1; Ex. 13, Dep. Ex. 1066; Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 335:3-20; Ex. 14, Dep. Ex. 1612 ("Too Far, Too Often" report); Ex. 15, Dorozenski Dep. 225:16-226:6. The full "Too Far, Too Often" report is available at https://www.greenpeace.org/usa/wp-content/uploads/2018/06/9122696a-toofar-toooften-web-mech-6.18.pdf.

[¶30] The news release announcing TFTO was published by Greenpeace, Inc. on its website, https://www.greenpeace.org/usa.[36] Greenpeace International also published a version on its separate website.

[¶31] The news release summarizes TFTO (in statements Plaintiffs do not contend are defamatory) as "detail[ing] how [Plaintiffs] uses bullying SLAPPs (Strategic Lawsuits Against Public Participation) and aggressive private security firms to intimidate opponents of its project," a reference to the federal RICO lawsuit (later dismissed) that Plaintiffs' predecessors filed against Greenpeace entities and others, seeking $900 million in damages.[37]

[¶32] The release then describes Plaintiffs' "bad corporate behavior" including (again, in statements Plaintiffs do not challenge) its use of "private security firms," its "[a]ggressive use of eminent domain proceedings to seize private property," and its "egregious spill record that includes 527 incidents from 2002-2017 … 67 of which contaminated water resources, fines of more than USD $355 million since 2000, and 146 enforcement actions."[38]

[¶33] Statement 1 appears in this list, stating that Plaintiffs "Damag[ed] at least 380 sacred and cultural sites along the DAPL pipeline route, as reported by the [SRST]."[39]

[¶34] The online version of the news release contains two links inviting readers, in all-capital letters, to click to "READ FULL REPORT."[40] That report (TFTO), in turn, states in its executive summary that "Dakota Access bulldozed an area of the pipeline corridor filled with

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[36] The full news release is available at https://www.greenpeace.org/usa/news/greenpeace-usa-report-urges-banks-end-relationship-energy-transfer-partners/#:~:text=Washington%2C%20DC%2C%2018%20June%202018,the%20controversial%20Dakota%20Access%20Pipeline.

[37] Ex. 13, Dep. Ex. 1066.

[38] *Id*.

[39] *Id*.

[40] *See* https://www.greenpeace.org/usa/news/greenpeace-usa-report-urges-banks-end-relationship-energy-transfer-partners/#:~:text=Washington%2C%20DC%2C%2018%20June%202018,the%20controversial%20Dakota%20Access%20Pipeline.

Tribal sacred sites and burials. Documented in a UN report, a Sioux elder and cultural leader reported damage to at least 380 cultural and sacred sites along the pipeline route."[41] This sentence has a footnote (with a link in the online version) to Chief John's November 1, 2016, UN report.[42] As described above, Chief John's report describes meeting a Sioux elder who reported damage to "some 380 cultural and sacred sites along the pipeline route."[43]

[¶35] Molly Dorozenski, then Greenpeace, Inc.'s Communications Director, drafted and reviewed the TFTO executive summary from which Statement 1 is derived.[44] She confirms the statement is based on Chief John's U.N. report.[45] She and Greenpeace, Inc. believed the U.N. report to be a reputable source.[46]

[¶36] Dorozenski did not view statements about the "damage" to "380 sacred and cultural sites" along DAPL's entire route to be inconsistent with a statement by the State Historical Society of North Dakota ("SHSND") that no law regarding disturbance of significant sites or human remains had been violated on a 1.36-mile stretch inspected by the State on September 22, 2016. Although Dorozenski was not aware of the SHSND conclusion when she wrote the TFTO summary, she understood Statement 1 to reflect "a different definition for important sites," likely accounting for the broader "context that the Sioux elder was speaking in," as cited in the U.N. report.[47] (Notably, as further explained below, the state Chief Archaeologist who wrote the September 22, 2016 SHSND statement agrees with this

[41] Ex. 14, Dep. Ex. 1612.

[42] *Id*.; *see also* https://www.greenpeace.org/usa/wp-content/uploads/2018/06/9122696a-toofar-toooften-web-mech-6.18.pdf

[43] Ex. 7, Ex. 1117, at 3.

[44] Ex. 15, Dorozenski Dep. 226:4-227:19.

[45] *Id*. at 227:20-229:19; Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 335:3-336:7; Ex. 7, Dep. Ex. 1117.

[46] Ex. 15, Dorozenski Dep. 230:2-7; Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 336:8-337:7.

[47] Ex. 15, Dorozenski Dep. 231:9-234:9; 259:5-260:9.

understanding of his report.[48]) Greenpeace, Inc. understood SRST elders to be "in a unique position to document sacred and cultural sites that are important to them."[49]

B. DAPLs' Construction Desecrated Sites SRST Had Identified as Significant

1. Plaintiffs Bulldozed An Area Containing Sites SRST Identified as Culturally and Historically Important, Including Burial Grounds

[¶37] Statements 1, 30, 31 and 54 reflect actions Plaintiffs took after SRST raised concerns about the potential for DAPL to disturb culturally significant sites.

[¶38] SRST had "extensive concerns about the potential impact of [DAPL] on cultural, historic and archaeological sites," which it raised repeatedly, including at a 2014 meeting attended by Plaintiffs' representatives and in correspondence with the U.S. Army Corps of Engineers ("ACOE") in January 2016.[50]

[¶39] On July 27, 2016, SRST filed suit in the U.S. District Court for the District of Columbia ("ACOE Litigation"), seeking to enjoin ACOE from issuing permits for a portion of DAPL running through ACOE land. SRST alleged construction and operation of DAPL would "damage and destroy sites of historic, religious, and cultural significance" to the tribe.[51]

[¶40] On September 2, 2016, SRST filed a declaration in the ACOE Litigation from its Historical Officer Timothy Mentz, an enrolled SRST member with 31 years' experience in cultural resources management. He identified at least 82 sites of "very great cultural and historic significance," including burial grounds, in a corridor slated to be cleared for DAPL.[52]

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[48] *See* [¶49]-[¶51], *infra*.

[49] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 337:2-7.

[50] *See* Ex. 16, Dep. Ex. 326 at ET-00055234-35 (1/8/2016 SRST letter to ACOE); Ex. 17, Minter Dep. 162:20-163:5 (authenticating same).

[51] Ex. 43, Complaint, *Standing Rock Sioux Tribe v. US Army Corps of Engineers*, No. 1:16-cv-01534-JEB (D.D.C. July 27, 2016). Defendants request judicial notice of the fact and content of this and other court records cited in this Motion. *See infra* n.83.

[52] Ex. 8, Dep. Ex. 939 (Mentz Decl.) ¶¶ 6, 7; Ex. 9, Plaintiffs' 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 197:17-198:7.

[¶41] On September 3, 2016, the Saturday of Labor Day weekend, Plaintiffs [redacted].[53]

[¶42] Joey Mahmoud, Plaintiffs' executive vice president responsible for routing and permitting DAPL, admits that this type of pipeline grading removes cultural resources because "you destroy and you segregate the soil on top of the ground to a certain depth where anything that's on that surface is removed."[54]

[¶43] Mahmoud and Plaintiffs stated publicly that they believed the Mentz sites were "fabricated" because a preexisting pipeline built in the 1980s, the Northern Border Pipeline ("NBPL"), ran through the locations identified by Mentz, and there was no way prehistoric sites could have remained intact on top of that existing utility corridor.[55] In response to the Mentz declaration, Plaintiffs (who had intervened in the ACOE Litigation) filed a map with the Court depicting the NBPL intersecting with the Mentz sites.[56]

[¶44] In fact, the NBPL is *not* in the location Plaintiffs represented it to be in its court filing. Monica Howard, Plaintiffs' Environmental Director, admitted that Plaintiffs' contractor surveyed the specific location of the NBPL later in September 2016 and confirmed NBPL was actually located *north* of the Mentz sites and DAPL's construction workspace, not *over* them:

> Q: [W]hen someone actually went out and staked the Northern pipeline, they found that it – what I'm seeing here is that once the Northern Border centerline was definitively located, it turned out that it

[53] Ex. 18, Mahmoud Dep. 19:2-5; 27:1-7; 174:19-175:3; 178:4-21; 181:5-23; 202:19-203:7; Ex. 19, Dep. Ex. 165; Ex. 20, Dep. Ex. 167 at ET-00416854-56.

[54] Ex. 18, Mahmoud Dep. 169:5-11.

[55] *Id*. at 167:25-170:8; Ex. 21, Dep. Ex. 160 ("[redacted]").

[56] Ex. 22, Dep. Ex. 846 at 6-8, 20 (purportedly showing the NBPL centerline in purple, intersecting with both DAPL and the Mentz sites); Ex. 23, Peyton Dep. 68:12-73:8.

> actually did not pass through any of the Mentz sites. Is that what we're seeing on this map? [Counsel objects]
>
> A: It appears so.[57]

In other words, the DAPL work area and sites identified by Mentz were not in the same corridor as NBPL; they are further south, such that grading the route for DAPL was plowing new ground.

[¶45] Plaintiffs *knew* the maps they filed in the SRST action were wrong. [redacted].[58] Yet the maps Plaintiffs filed in court showed the NBPL in the incorrect location, closer to the Mentz sites,[59] and [redacted].[60]

[¶46] [redacted].[61] In other words, [redacted].[62] As a result, at least one Mentz site was covered by backfill dirt from the bulldozing.[63]

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[57] Ex. 24, Howard Dep. 141:5-13; *see also id*. at 137:4-140:1 & Ex. 25, Dep. Ex. 669 (Howard confirming map that shows Mentz cites in circles and NBPL in pink and *not* intersecting with the Mentz sites); *see also* Ex. 24, Howard Dep. 158:1-162:8 & Ex. 26, Dep. Ex. 675 (depicting the accurate path of the NBPL in pink, north of the DAPL workspace (in green) and north of Mentz sites (in yellow)).

[58] Ex. 24, Howard Dep. 125:7-13 & Ex. 27, Dep. Ex. 662; *see also* Ex. 24, Howard Dep. 122:23-124:13; Ex. 23, Peyton Dep. 64:3-65:4 & Ex. 28, Dep. Ex. 844 .

[59] Ex. 22, Dep. Ex. 846 at 20.

[60] Ex. 18, Mahmoud Dep. 174:191-175:3; 202:19-203:20.

[61] *Id*. at 202:11-203:21.

[62] *Id*. at 202:1-202:10; Ex. 29, Dep. Ex. 176 at ET-00433157, ET-00433167.

[63] Ex. 30, Dep. Ex. 587 at G&P-00002700; Ex. 31, Kovacs Dep. 86:16-88:6; 99:20-101:9 (Plaintiffs' cultural resource contactor Grey & Pape confirming feature identified by Mentz was covered by a construction "spoil pile").

2. "Culturally Significant" Sites Include Those That Are Not Necessarily Legally Protected, and Such Sites Can Be "Desecrated" Regardless of Whether Doing So Is Illegal

[¶47] Plaintiffs have argued that statements regarding their destruction of tribal cultural resources are false because government authorities issued findings that DAPL affected no legally qualified "historic properties."[64]

[¶48] Plaintiffs rely in particular on two records from the SHSND certifying that DAPL affected no historic or protected "sites" as defined by relevant state or federal laws. The first, dated April 26, 2016 (before the Mentz sites had been discovered) concurs in the ACOE's "No Historic Properties Affected" determination, a legal conclusion that the site is "[redacted]."[65]

[¶49] The second SHSND record is a September 22, 2016, memo by its Chief Archaeologist Paul Picha, describing a survey the previous day of the DAPL construction corridor that was the subject of the September 3 Mentz Declaration. The memo, which Picha characterizes as a "draft," found "no evidence of infractions or violations of North Dakota Century Code § 23-06-27 with respect to disturbance of human remains or significant sites."[66]

[¶50] None of the accused Statements asserts that DAPL damaged cultural sites in violation of any law, or sites that were subject to legal protection or preservation. Rather, as discussed above, they refer to "sacred and cultural sites … as reported by the Standing Rock Sioux Tribe" (Statement 1) and by the UN's Permanent Forum on Indigenous Issues (the BankTrack letters containing Statements 30, 31 and 54). *See* § I.B, *supra.*

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[64] Second Amended Complaint ¶¶ 39, 40.

[65] *Id.*; Ex. 32, Dep. Ex. 1124 (4/26/16 SHSND letter); Ex. 3, Best Dep. 143:23-144:9.

[66] Ex. 33, Picha Dep. 78:3-11; Ex. 34, Dep. Ex. 697.

[¶51] Picha, the SHSND Chief Archaeologist who wrote the September 22, 2016, memo, testified that the State and the SRST can have different definitions of what constitutes a cultural site, and that Native Americans can identify features as relevant "sites" in a way that an archaeologist might not:[67]

> Q. And so if [SHSND's] Historic Preservation Office says something isn't a cultural site, that doesn't mean it's not a cultural site to the Standing Rock Sioux tribe, correct?
>
> A. Yes.[68]

[¶52] The fields of archaeology and cultural resources management ("CRM") recognize there can be differing definitions of "sacred" sites.[69] Practitioners in those fields—including Plaintiffs' own CRM contractors—recognize the concept of "traditional cultural property" ("TCP"), which includes sites that may not meet any statutory definition for legal protection, but are still recognized as culturally important by tribes.[70] In contrast to Plaintiffs' current position, the CRM contractors who worked on DAPL confirm that the SHSND statement (that no evidence of criminal disturbance of "human remains or significant sites" was identified by the Mentz survey) was *not* a finding that the sites lacked cultural or historic value; the SHSND findings were "not speaking to what could be a heritage property or TCP."[71]

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[67] *Id.*, Picha Dep.112:19-118:2.

[68] *Id.*, Picha Dep. 118:10-14.

[69] *Id.*, Picha Dep. 125:14-16.

[70] Ex. 23, Peyton Dep. 16:21-17:5, 31:25-33:18 (DAPL CRM contractor Perennial: "An archaeological site has the physical remains of a historic or prehistoric activity or occupation. … [TCP] can be a vista, it can be a landscape, it can be something that doesn't have tangible remains. It can be a location that is important to the tribe, a certain type of plant, a vista, a mountain, a ceremonial center."); Ex. 35, Picka Dep. 14:15-15:15, 32:23-34:22 (DAPL CRM investigator Merjent: sites identified by Mentz were TCPs – "not … something archaeological, but someone that is trained with traditional cultural properties, typically people associated with the tribes … they have a better expertise on what's … important for them"); Ex. 31, Kovacs Dep. 13:22-14:1, 95:23-96:11 (DAPL CRM Contractor Gray & Pape: "[Y]ou could have tribal cultural property that has significance to the tribe but still not be an archaeological site.")

[71] Ex. 23, Peyton Dep. 99:16-100:10.

[¶53] In other words, a site can be "sacred" and "culturally important"—a TCP—to the SRST regardless of whether it qualifies for legal protection, or meets specific criteria for identification in an archaeological survey. The accused Statements in this case incorporate exactly this broader understanding of cultural importance to the SRST.[72]

[¶54] Similarly, the term "burial grounds" (*see* Statements 30, 31, 54) lacks a precise archaeological definition, and different cultures define this term differently.[73] The SRST identifies burial grounds based on the presence of grave cairns, markers, and other stone features with cultural significance to the SRST.[74] Further, the SRST may consider a place a "burial grounds " even if no buried body currently exists there. According to the unrefuted testimony of Dr. Sebastian Braun, Director of American Indian Studies at Iowa State University and Greenpeace Defendants' retained expert on Lakota Sioux culture, sites can be identified as graves by SRST even in the absence of a historically proven burial ground, including in places where the dead are placed temporarily before being relocated or buried elsewhere.[75] Plaintiffs failed to disclose any expert rebuttal to Dr. Bruan's opinion in this case.

[¶55] Finally, it also is undisputed that from the SRST's perspective, DAPL's construction desecrated something of cultural value. First, Plaintiffs have admitted to physical destruction, including bulldozing the corridor site Mentz surveyed,[76] and it is undisputed at least one of the sites Mentz identified was buried in backfill.[77] Plaintiffs' corporate representative

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[72] *See, e.g.*, Ex. 15, Dorozenski Dep. 231:9-234:9; 259:5-260:9.

[73] Ex. 33, Picha Dep. 126:10-21.

[74] Ex. 8, Dep. Ex. 939 (Mentz Decl.) at 3, 6-8 ("I am very confident that this site, located within the center of the corridor, includes burials because the site contained rock cairns which are commonly used to mark burials."); Ex. 35, Picka Dep. 53:16-54:7.

[75] Declaration of Dr. Sebastian Braun ("Braun Decl.") ¶¶ 3-8.

[76] *See supra* [¶40], [¶42].

[77] *See supra* [¶45], [¶46].

also admits that on September 2, 2016 (the day Plaintiffs received the Mentz Declaration), with no archaeologists present, a construction manager moved a feature identified by Mentz in an attempt to see what was underneath; another employee described the same scene as construction workers "picking stuff up, throwing stuff down" in the area.[78]

[¶56] Second, as Dr. Braun confirms, DAPL's presence at the confluence of the Missouri and Cannonball rivers, in a landscape SRST has identified as having religious and cultural significance, is itself fairly characterized as a cultural "desecration."[79]

[¶57] Third, from SRST's perspective, the archaeological surveying techniques used to prepare for DAPL's construction also desecrated sites significant to the tribe. This surveying used "shovel probes" to dig up test pits of up to a meter deep, from which soil was removed and screened.[80] To the SRST, this excavation and removal of objects, in an ancestral burial area of historic significance, severs spiritual ties to the land and is regarded as a desecration.[81]

C. Statements 1, 30, 31 and 54 Relied on, and Mirrored, Earlier Published Statements About Plaintiffs' Desecration of Native Sites

[¶58] The accused Statements were far from the first to discuss DAPL's desecration of important cultural sites at Standing Rock. At least 79 articles appeared in local, state and national media between August 20 and November 7, 2016 (i.e., before the earliest Statement was published),[82] including multiple publications labeling Plaintiffs' desecration "deliberate."[83]

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[78] Ex. 9, Plaintiffs' 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 278:10-280:18; Ex. 36, Love Dep. 75:12-76:7; 91:17-92:12.

[79] Braun Decl. ¶¶ 6-7.

[80] Ex. 30, Kovacs Dep. 24:7-23; Ex. 23, Peyton Dep. 23:5-24:2.

[81] Braun Decl. ¶ 7.

[82] Declaration of Chris Weil ("Weil Decl."), ¶ 9 and Weil Ex. 2 at 4-8. The Weil Decl. has been filed concurrently in connection with Defendants' separate Motion for Partial Summary Judgement on Plaintiffs' Defamation Claim Re. "Use of Force" (Statements 3, 39, 46) (Defamation Motion 1 of 3).

[83] 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

[¶59] For example, on September 20, 2016 (seven weeks before the first Statement was published), SRST Chairman David Archambault testified before the United Nations Human Rights Council, stating, "I am here because oil companies are causing the deliberate destruction of our sacred places and burials…. This company has knowingly destroyed sacred sites and our ancestral graves with bulldozers." The comments were broadcast the same day on MSNBC.[84] Archambault's testimony—including his statement about "deliberate destruction of our sacred places and burials," was also reported in *The Washington Post*, *NBC* and *Lakota Times*.[85]

[¶60] On September 21, 2016, the Natural History Museum initiated an open letter to President Obama and federal agencies "concerning the destruction of Native American burial grounds and sacred sites by the Dakota Access Pipeline company." The letter relied on Mentz's assessment of the sites as "one of the most significant archeological finds in North Dakota in many years." It also quoted SRST Chairman Archambault as saying "[t]his demolition is

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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).

[84] Weil Decl. ¶ 10.

[85] Weil Decl. ¶ 10; Ex. 44; Rosalyn R. LaPier, *Here's what no one understands about the Dakota Access Pipeline crisis*, The Washington Post (Nov. 4, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/04/heres-what-no-one-understands-about-the-dakota-access-pipeline-crisis/; Ex. 45; Daniel A. Medina, *Standing Rock Sioux Takes Pipeline Fight to UN Human Rights Council in Geneva*, NBC News (Sept. 20, 2016), https://www.nbcnews.com/storyline/dakota-pipeline-protests/standing-rock-sioux-takes-pipeline-fight-un-human-rights-council-n651381; Ex. 46, Brandon Ecoffey, *Pres. Archambault Jr. Takes Fight to UN*, Lakota Times (Sept. 22, 2016), https://www.lakotatimes.com/articles/pres-archambault-jr-takes-fight-to-un/.

devastating … These grounds are the resting places of our ancestors."[86]

[¶61] On September 7, 2016, the Lakota People's Law Project recorded and posted on its website and social media, a video interview of Mark Tilsen, an organizer who was active in the non-violent Indigenous-led opposition to DAPL at Standing Rock. In this published interview, Mr. Tilsen states, "Tim Mentz from the Standing Rock Sioux Tribe identified sacred sites and burial sites. And instead of respecting these, they use it as actionable intel to intentionally destroy these sites knowing it would incite us."[87]

II. ARGUMENT

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

[¶62] The standard for granting summary judgment, and the reasons summary judgment is favored in defamation claims, are set out in MSJ No. 1, Section II.A, and are incorporated by reference here.

[¶63] Significantly, the heightened burdens the First Amendment imposes on defamation claims apply on summary judgment. In particular, the U.S. Supreme Court has held that public figure defamation plaintiffs (like Plaintiffs here) cannot overcome summary judgment absent "clear and convincing" evidence that the defendants acted with actual malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). This means that 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

[86] Weil Decl. ¶ 11; Ex. 47; Archaeologists & Museums Denounce Desecration of Standing Rock Sacred Sites, Natural History Museum (Sept. 21, 2016), https://thenaturalhistorymuseum.org/archaeologists-and-museums-respond-to-destruction-of-standing-rock-sioux-burial-grounds/.

[87] Ex. 40, Mark Tilsen Dep. at 10:5-24, 11:25-12:6, 22:17-24:15, 197:6-199:5, 201:1-25.

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.

[¶64] "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 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.

[¶65] 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)).

[¶66] Likewise, a defamation plaintiff's burden to show material falsity on summary judgment cannot be met by arguing the accused statement was not precisely or literally true. Rather, "[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). *See also 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). 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 actual, factual inaccuracies.[88]

[¶67] Here, the Statements are entirely protected against defamation liability because they are subjective expressions of opinion that cannot be proven factually false, and because, to extent they contain factual assertions, those assertions are substantially true.

1. Whether a Site Is "Sacred" or "Culturally Significant" Are Matters of Significant Debate And Not Provably False

[¶68] First, the Statements reflect Greenpeace, Inc. and Greenpeace International's subjective view that DAPL's construction and Plaintiffs' actions impacted culturally significant SRST sites. Whether a site is culturally significant or a burial ground is a matter of significant cultural and archaeological debate. As such, Plaintiffs' "claim ... threatens to ensnare the Court in [a] thorny and extremely contentious debate over ... which side of this debate has 'truth' on their side. That is hardly the sort of issue that would be subject to verification based upon a core of objective evidence." *Arthur v. Offit,* 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010). That is why, in cases such as this "involving 'matters of argument'," courts are "reluctant to

[88] *See, e.g., Stepnes v. Ritschel*, 663 F.3d 952, 964-65 (8th Cir. 2011) ("minor inaccuracies in [] broadcast" 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 criminal acts "directly related" to the bombing, but rather charged in connection with 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) (author's statement that judge found plaintiff had "committed perjury," when in fact judge found he had engaged in "deliberate concealment," held to be a substantially accurate report).

recognize causes of action grounded on statements of fact that are best evaluated by an informed reader." *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013) ("as a matter of law, statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation"). Such questions are best left to "[t]he academy, and not the courthouse[.]" *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1021 (N.D. Cal. 2017) (opining that "'methods of litigation'" are not the way to settle scientific controversies, "'especially in the defamation context'").

[¶69] Here, Plaintiffs argue that statements regarding their destruction of tribal cultural resources are necessarily false because government authorities issued findings that DAPL affected no legally qualified "historic properties."[89] But sites can be considered "sacred" or culturally important—including, especially, to Native American people—even if they do not qualify for legal protection under specific criteria governing historic preservation or criminal desecration, and even if they are not recognized in archaeological surveys applying those criteria. *See supra* ¶¶ 50-56. Indeed, Plaintiffs' own CRM contractors recognize that TCP can be "sacred" and "culturally important" regardless of legal status. This is consistent with the plain language of the Statements, which do not accuse Plaintiffs of violating any laws or damaging any legally-protected sites or properties. *See supra* ¶¶ 14, 24, 33, 50. Even SHSND Chief Archaeologist Picha—whose draft report Plaintiffs purport to rely on for the alleged falsity of the Statements—confirms the SRST and the State can have different definitions of what constitutes a cultural site or burial ground. *See supra* ¶¶ 51-54.

[¶70] Finally, Statement 1, which specifically attributes the damage to sites along the DAPL route to the SRST, is protected for the additional reason that it is an interpretations based

[89] Second Amended Complaint ¶¶ 39, 40.

on disclosed facts. Such statements are fully protected by the First Amendment, in the same manner as opinion, when the underlying factual bases for the statement are disclosed, either directly or linked to in the publication, the statements. *Lewis v. Abramson*, 673 F. Supp. 3d 72, 89 (D.N.H. 2023); *Piccone v. Bartels*, 785 F.3d 766, 774 (1st Cir. 2015). This is true even where the statements could be interpreted as a factual assertion. *See Lewis*, 673 F. Supp. 3d at 92. Here, Statement 1 is from a news release that hyperlinks to the TFTO report, which itself identifies the UN report and a "Sioux elder and cultural leader" as the basis for the claim that at least 380 cultural and sacred sites along the pipeline route" were damaged when Dakota Access bulldozed the area.[90] That particular claim in the online version of the TFTO report also directly hyperlinks to the UN report.[91] The inclusion of these links supports Greenpeace, Inc.'s interpretation and leaves the reader free to click on the links to read the source documents and decide for themselves. *See Adelson v. Harris*, 973 F. Supp. 2d 467, 485, 491 n.19 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413 (2d Cir. 2017).

[¶71] Even if the claim that a site is culturally important were a factual assertion, the assertion in this case is accurate: there is no dispute that Native American groups in fact regarded sites along DAPL's route and the surrounding landscape as sacred, significant, and containing traditional cultural property. The SRST repeatedly raised concerns about DAPL's potential to damage culturally significant sites by 2014, and repeated those concerns numerous times before Plaintiffs' September 3, 2016 bulldozing of the Mentz sites. *See supra* ¶¶ 38-42. Plaintiffs cannot meet their burden of establishing the material falsity of Statements recognizing the cultural significance of SRST sites impacted by DAPL.

[90] Ex. 14, Dep. Ex. 1612.

[91] *Id.*; *see also* https://www.greenpeace.org/usa/wp-content/uploads/2018/06/9122696a-toofar-toooften-web-mech-6.18.pdf

2. Whether Plaintiffs' Conduct Constituted a Desecration Is Not Provably False

[¶72] Similarly, statements characterizing Plaintiffs' actions with respect to the siting and construction of DAPL as a "desecration" reflect a subjective opinion about the impact of Plaintiffs' actions that cannot be proven false and that, to the extent they state any factual assertion, are substantially true. There is no genuine dispute that the SRST consider DAPL's construction and placement, and the location of DAPL itself, to have desecrated sacred sites. *See supra* ¶¶ 38-42, 54-57, 59-61. Whether an action qualifies as a "desecration" can, broadly speaking, encompass "acts more or less offensive," and is not necessarily limited by any particular legal definitions. *Crosson v. Silver*, 319 F. Supp. 1084, 1087 n.3 (D. Ariz. 1970) (even in case challenging constitutionality of flag desecration statute, the court explicitly "use[d] the term 'desecration' in this opinion in its broadest sense; i.e., encompassing acts touching and not touching the flag, and acts more or less offensive."). Even if Plaintiffs consider descriptions of their actions as "desecration" to be embellished, they still cannot prove the falsity of the Statements.

[¶73] Nor is there a genuine dispute that the construction of DAPL in fact damaged sacred and culturally important sites of the SRST. Plaintiffs admit to grading the stretch of land containing sites identified in the Mentz declaration as having "very great cultural and historic significance," and to covering with a "spoil pile" at least one of the specific sites he identified. *See supra* ¶¶ 41-42, 45-46. They also admit to physically disturbing areas of the sites identified by Mr. Mentz, and to moving and removing objects during their archaeological "mitigation" efforts, which was itself regarded as a desecration by the SRST. *See supra* ¶¶ 41-42, 45-46, 55, 57. Plaintiffs cannot prove these statements false, because undisputed evidence shows sites significant to the SRST were physically damaged and bulldozed. *See supra* ¶ 55.

3. Statements Characterizing Plaintiffs Actions As Deliberate Are Not Provably False

[¶74] Characterizing Plaintiffs' actions as "deliberate[]" in Statements 54 and 31 reflects the view that Plaintiffs' decision to persist in constructing through an area the SRST had identified as culturally significant, even in the face of the SRST's objections, constituted an intentional, non-accidental act. Greenpeace, Inc.'s opinion—shared by the hundreds of other organizations that signed the November 30 BankTrack letter, as well as the SRST, the United Nations, and the Natural History Museum, among others—was that "the bulldozing, the construction, this desecration was not accidental, the bulldozers didn't drive themselves.[92]

[¶75] The assertion that Plaintiffs proceeded "deliberately" is also substantially true. The "gist" or "sting" of the Statements is that Plaintiffs' siting and construction of DAPL damaged areas of cultural importance to the SRST, in a manner that was not accidental. The undisputed facts bear this out: Plaintiffs were aware of the Mentz Declaration, [redacted]. *See supra* ¶¶ 40-45. Their justification for doing so—that the Mentz sites were "fabricated" because of their alleged location relative to the NBPL—was based on an inaccurate map (filed in court and never corrected), and on Plaintiffs' disregard of information in their possession showing NBPL was in fact well away from the Mentz sites. *See supra* ¶¶ 42-45. These actions qualify as "deliberate" when "construed in the context of the entire document … according to the natural and ordinary meaning a reasonable person of ordinary intelligence would give [it]." *Schmitt*, 2013 ND 136, ¶ 13, 834 N.W.2d at 633.

[92] Ex. 5, Greenpeace, Inc. (Skar) 30(b)(6) Dep. 309:2-310:20; *id*. at 311:6-18.

[¶76] Finally, the content and context of the Statements also indicates that the Greenpeace Defendants were stating opinions. The Statements were plainly advocacy, appearing in forums where readers would understand they were encountering the statements of an advocate.[93] *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986). They reflect the views of the SRST and other Native Americans, who the Greenpeace Defendants considered to be the best authority on their own history and culture. *See supra* ¶¶ 20, 27, 36-37, 39-41, 60-61. The Statements also clearly address matters with which the public has legitimate concern—namely, Indigenous rights, sovereignty, and self-determination. The rule that opinions addressing matters of public concern merit heightened First Amendment protection is set out in MSJ No. 1, Section II.B.2.c, and incorporated by reference here.

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

[¶77] Independently, Plaintiffs' defamation claim fails because there is no evidence, much less the required "clear and convincing" evidence, that any Defendant published the Statements with constitutional actual malice. This heightened evidentiary standard applies even at the summary judgment stage. *Anderson*, 477 U.S. at 254 ("in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden" requiring "convincing clarity" of actual malice). "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. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974)).

[93] *Id*. at 35:13-17; 47:2-13; 272:3-24; Ex. 11, Leonard Dep. 71:8-72:9, 76:15-78:2; *see supra* ¶¶ 9-10.

[¶78] The legal standards for determining whether a plaintiff is a public figure, and the reasons why Plaintiffs here qualify as public figures, are set out in MSJ No. 1, Section II.C.1, and are incorporated by reference here.

[¶79] As a public figure, Plaintiffs 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 the Greenpeace Defendants "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).

[¶80] 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] has 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 wilfully blinding itself to the falsity of its utterance.'" *Tavoulareas v. Piro*, 817 F.2d 762, 776 (D.C. Cir. 1987) (*en banc*) (citation omitted). The evidence in the record does not come close to allowing Plaintiffs to clear this "'daunting[ly]'" high hurdle. *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 116 (D.D.C. 2017) (reversing denial of summary judgment on actual malice grounds).

[¶81] Each of the Greenpeace employees responsible for the Statements testified that they believed them to be true when they were published. *See supra* ¶¶ 15-19, 25-28, 35-36. *See Sullivan*, 376 U.S. at 286 (actual malice measured "at the time of publication"). Far from being "wilfully blind[]," *Tavoulareas*, 817 F.2d at 776, their beliefs were based on those the

Greenpeace Defendants' considered to be highly reputable and credible sources: SRST members, elders and leaders; trusted Indigenous activists; a contemporaneous report put out by the UN's Permanent Forum on Indigenous Issues; court filings; and press coverage. *Id*. Reliance on previously published material from reputable publications, in itself, defeats actual malice as a matter of law. *See, e.g., 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."); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 297-98 (4th Cir. 2008) (no actual malice where relied on official reports).

[¶82] For the BankTrack letters (Statements 30, 31, and 54), Greenpeace, Inc. and Greenpeace International also reasonably relied on BankTrack—a trusted organization they had worked with before. They consulted subject matter experts and Indigenous groups prior to publishing, and the content aligned with the Greenpeace Defendant's own understanding of the SRST concerns about deliberate cultural desecration. *See supra* ¶¶ 15-20, 25-28.

[¶83] None of the Greenpeace employees responsible for the Statements believed them to be false, had any reason to doubt their claims, or was aware of any information demonstrating the falsity of the Statements. *See supra* ¶¶ 15-20, 25-28, 35-36.

[¶84] As discussed above, *supra* § II.B.3, Statements that characterized Plaintiffs actions as "deliberate[]" were well-founded. Plaintiffs persisted in pursuing DAPL's construction through sites SRST had identified, in court filings and public statements, as culturally important to them. *See supra* ¶¶ 19, 37-40, 58-61. Plaintiffs' actions on September 3, 2016 are a prime example: less than 24 hours after receiving a sworn declaration from SRST member Mentz identifying sites of "very great cultural and historic significance," including

burial grounds, within the corridor of land slated to be cleared for DAPL construction, Plaintiffs proceeded to bulldoze the land containing those sites.[94]

[¶85] 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) (reversing state court due to misapplication of actual malice standard because political candidate's failure to investigate veracity of union official's allegation of elected official's corruption was not enough to establish that the statement was published with "reckless disregard"). Instead, "[t]here must be sufficient evidence to permit the conclusion that the 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.

[¶86] There is absolutely no evidence that the Greenpeace Defendants entertained "serious doubts" about the truth of the Statements, let alone believed they were "fabricated." Rather than doubting the Statements, the record is clear that they reflected the Greenpeace Defendants' subjective belief that in the course of constructing DAPL, Plaintiffs deliberately desecrated culturally important sites and burial grounds.

D. Summary Judgment Is Required As To Statements Greenpeace Fund and Greenpeace International Did Not Publish

[¶87] Summary judgment should be granted as to Greenpeace Fund as to all Statements, and to Greenpeace International with respect to Statement 54, for all of the reasons above, and also because they did not publish those Statements.

[94] Dep. Ex. 939 (Mentz Decl.) ¶¶ 6, 7; Ex. 9, Plaintiffs' 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 197:17-198:7.

[¶88] To be liable for defamation, a defendant must be a "publisher" of the allegedly defamatory matter—meaning, 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 party). 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 Crain v. Lightner*, 364 S.E.2d 778, 786 (W. Va. 1987) ("alleged procurers or assistants are not responsible as publishers of libel absent a showing of their participation or involvement in the publication.").

[¶89] For example, in *Karaduman v. Newsday, Inc*., 51 N.Y.2d 531, 435 N.Y.S.2d 556, 416 N.E.2d 557, 560-61 (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." 416 N.E.2d at 560-61.

[¶90] As in *Karaduman*, "the record is barren" of any evidence that Greenpeace Fund published, or had any involvement in the publication of any of the Statements. Greenpeace Fund was not involved at all in opposing construction of DAPL,[95] or in amplifying the message of pipeline opponents.[96] It is not listed as an author or co-signer of any of the statements Plaintiffs claim are defamatory.[97] There is no evidence it played any role at all in the publication of any

[95] Ex. 38, Greenpeace Fund 30(b)(6) (Emerson) Dep. at 120:11-121:3.

[96] *Id.* at 220:18-221:16.

[97] *Id.* at 271:8-273:18 & Ex. 39, Dep. Ex. 1068.

DAPL-related statement, including Statements 1, 30, 31, and 54. It cannot be held liable for the Statements, with which it had nothing to do with publishing.

[¶91] Greenpeace International did not publish, participate in, or have any involvement in communicating Statements 54. It did not co-sign the November 7, 2016 BankTrack letter containing the Statement, and there is no evidence that Greenpeace International directed BankTrack, or played any role at all in the publication of that letter or in Greenpeace, Inc.'s independent decision to sign it.

[¶92] Summary judgment should be granted as to Greenpeace Fund for all the challenged Statements, and as to Greenpeace International for Statement 54.

III. CONCLUSION

[¶93] For all these reasons, Greenpeace Defendants respectfully request that this Court grant its Motion for partial summary judgment and dismiss Plaintiffs' defamation claim based on the Statements about damage to cultural sites.

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