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 TRIBAL LANDS (STATEMENTS 19, 30, 39, 44)** **[DEFAMATION MOTION 3 OF 3]**

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[¶1] Defendants seek dismissal of Plaintiffs' defamation claim to the extent it is based on four statements ("Statements") describing the Dakota Access Pipeline ("DAPL") as passing through "tribal land" of the Standing Rock Sioux Tribe ("SRST") or impacting "Native land titles." These characterizations are not defamatory, but simply reflect well established and widely held views that the area through which DAPL passes can be regarded—historically, traditionally, and as a matter of treaty rights—as Sioux land. This is the third of three motions, filed concurrently, each seeking partial summary judgment on Plaintiffs' defamation claim.

[¶2] Plaintiffs claim the Statements are actionable because DAPL does not traverse the current boundaries of the SRST reservation. This argument fails, first, because none of the Statements contends DAPL encroaches the SRST reservation. Instead, the Statements assert the pipeline crosses "tribal land," which accurately reflects the SRST's view that the broader area around Standing Rock is land the Tribe traditionally occupied and to which it has historic rights. That position is not provably false. Indeed, it is undisputed DAPL passes through land in which SRST retains treaty rights and other Native title, as the U.S. Supreme Court recognized in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). *See* § II.B.1, *infra*.

[¶3] Second, characterizing the territory at issue—which indisputably includes unceded treaty land and the land historically occupied by the Lakota Sioux—as "tribal land" is a matter of longstanding historic and cultural debate. The First Amendment fully protects speech on such matters. *See* § II.B.2, *infra*.

[¶4] Third, 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

the Greenpeace Defendants subjectively knew the "tribal land" statements were false or had serious doubts about them. There is no evidence showing actual malice here. *See* § II.C, *infra*.

[¶5] Finally, summary judgment should be granted as to Greenpeace Fund, Inc. ("Greenpeace Fund"), and to Greenpeace International with respect to three of the four Statements, for all the reasons above, and also because these entities did not publish those Statements. *See* § II.D, *infra*.

I. UNDISPUTED MATERIAL FACTS

[¶6] 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 Claims Regarding 'Use of Force' (Statements 3, 39 and 46)" ("MSJ No. 1").

[¶7] 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 incorporated by reference here.

A. Statements Mentioning SRST Tribal Lands

[¶8] Plaintiffs' Second Amended Complaint ("SAC") alleges defamation based on nine statements about DAPL, all arising in the context of Greenpeace's environmental advocacy described above. *See* SAC Am. App'x. A, Doc. 2837. This Motion concerns four statements, identified as Statements 19, 30, 39 and 44, appearing in four separate publications.[1] The Statements mention (in most cases only in passing) that DAPL crosses SRST tribal lands.[2]

[1] Statements 30 and 39 are discussed here only to the extent they refer to DAPL's path across tribal land. Other portions of the statements are discussed in Defendants' separate motions regarding statements about use of force (MSJ No. 1) and DAPL's desecration of cultural property (MSJ No. 2).

[2] *See* Second Amended Complaint Appendix A (Doc. 2837) ("SAC Am. App'x A"); Exs. 1-4, Dep Exs 1128, 1055, 1068, 1692. 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.

[¶9] The SAC alleges that the Statements are false because DAPL does not cross "the legal boundary of the SRST reservation," but instead a half-mile north of it. SAC ¶ 38. But as detailed below, none of the Statements claims DAPL encroaches on the SRST reservation. The Statements, in order of publication date, are set out below, along with their context.

1. Statement 44 (November 18, 2016).

[¶10] Statement 44 is blog item published on Greenpeace, Inc.'s website on November 18, 2016.[3] The post is titled "Exxon Just Reminded Us Why Fossil Fuels Are on the Way Out." The post reports on Exxon's decision to "likely 'de-book' nearly one-fifth of its oil and gas reserves by the end of this year," and explains that "Shell and BP are also facing problems with their investments in oil sands."

[¶11] The accused Statement 44 (underlined below) appears near the end of the post, under a subheading urging readers to "join the fight against another pipeline," DAPL.[4] The section begins, "First and foremost, the Dakota Access Pipeline fight is about Indigenous rights and sovereignty." It then says:

> For months, the Standing Rock Sioux have been resisting the construction of a pipeline through their tribal land and waters that would carry oil from North Dakota's fracking fields to Illinois. They've since been joined by thousands of allies in what's become a defining movement against colonial violence. And as with Keystone XL, stopping the Dakota Access Pipeline would not only be a big win for Indigenous leaders and climate activists like you, it would be a major blow to the future prospects of companies like Exxon.[5]

[¶12] Brian Johnson, a campaigner for Greenpeace Inc., is identified as the author of the blog and wrote part of it, but not the portion that discusses DAPL and contains Statement 44.[6] That portion was added by Ryan Schleeter, an Online Editor for Greenpeace, Inc. in the editing

[3] *See* Ex. 1, Dep. Ex. 1128; SAC Am. App'x A (Doc. 2837), Statement 44. The original post is available online at https://www.greenpeace.org/usa/exxon-just-reminded-us-fossil-fuels-way/.

[4] *Id*.

[5] *Id*. at 2.

[6] *See* Ex. 5, Johnson Dep. 9:16-23, 62:8-63:10.

process.[7] Schleeter testified the statement that DAPL was constructed through SRST "tribal land" was based on claims made by SRST and reported in contemporaneous media sources.[8] He did not believe Statement 44 was false; did not know of anyone affiliated with Greenpeace, Inc. who thought the statement was false or had any information suggesting it was false; and did not understand it to be a statement that DAPL went through the SRST reservation.[9]

2. Statement 39 (November 21, 2016)

[¶13] Statements 39 is an online news article published on Greenpeace, Inc.'s website on November 21, 2016.[10] The article is titled "Young Women Shut Down TD Bank, Call for Divestment of the Dakota Access Pipeline." As the title suggests, the article focuses on a protest outside a bank in Philadelphia, urging companies financing DAPL to divest from the project.

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

> The action was called for by Pennsylvanian Native women and women of color, in response to the national call to action from the Water Protectors at Standing Rock. The pipeline violates the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to which the United States is a signatory, in addition to violating the Treaty of Fort Laramie of 1851.
>
> Since April, there has been a peaceful, nonviolent encampment on Standing Rock Sioux Tribal land in the path of the pipeline. In recent months, Water Protectors — the Sioux, Indigenous allies, and non-Native allies — have been met with extreme violence, such as the use of water cannons, pepper spray, concussion grenades, tasers, LRADs (Long Range Acoustic Devices), and dogs, from local and national law enforcement, and Energy Transfer Partners and their private security.

Only the portion of the Statement referring to "Standing Rock Sioux Tribe land in the path of the pipeline" is addressed in this Motion.[11]

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[7] Ex. 6, Schleeter Dep. 19:3-17, 132:9-134:19.

[8] *Id*. at 139:16-25.

[9] *Id*. at 150:8-152:5

[10] *See* Ex. 2, Dep. Ex. 1055; SAC Am. App'x A (Doc. 2837), Statement 39; Ex. 7, Wheeler Dep. 223:4-19. The original news article is available online at https://www.greenpeace.org/usa/news/young-women-shut-down-td-bank-call-for-divestment-of-the-dakota-access-pipeline/.

[11] Ex. 2, Dep. Ex 1055 (Statement 39) at ET-00146253.

[¶15] Statement 39 is attributed to Perry Wheler, a communications specialist for Greenpeace, Inc.[12] Wheeler understood there is a "difference between tribal land and what the government defines as a reservation," and that in his view SRST "land" is "where their resources [are], what their water supply is, where their ancestors are buried."[13] He believes it is appropriate to defer to SRST regarding whether or not DAPL crosses "tribe land," as tribes have a "pretty good grasp of what land is sacred to them [and] what land is home to their ancestors."[14]

3. Statement 30 (November 30, 2016 BankTrack letter)

[¶16] The portion of Statement 30 at issue in this Motion turns on three words—"Native land titles." That language appears within a longer sentence in an open letter from Johan Frijns of BankTrack, dated November 30, 2016, [15] which reads as follows (with the allegedly defamatory portions underlined):

> Given that Indigenous rights commitments are presumed to be respected by the [Equator] Principles, 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 Standing Rock Sioux Tribe, 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.

The rest of Statement 30 is addressed in Defendants' separate summary judgment motion on Statements that DAPL damaged cultural sites (MSJ No. 2). Defendants respectfully refer the Court to ¶¶ 21-28 of that Motion for a more complete discussion of the context of the BankTrack letter, which it incorporates here by reference.

[¶17] In brief, the BankTrack letter is co-signed by more than 500 organizations from around the world. Greenpeace, Inc.'s Executive Director Annie Leonard signed on behalf of

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[12] Ex. 7, Wheeler Dep. 23:9-16.

[13] *Id*. at 257:3-13.

[14] *Id*. at Wheeler 255:1-256:1.

[15] Ex. 8, Leonard Dep. 242:25-243:23; Ex. 3, 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.

Greenpeace USA.[16] Greenpeace International also signed the letter.[17] Defendant Greenpeace Fund is not a signatory. The letter is addressed to 17 banks involved in financing DAPL, including four signatories to the Equator Principles ("EP").[18] The letter recounts the "huge international outcry, led by the Standing Rock Sioux tribe," arising from DAPL's proposed construction, and urges the recipient banks to honor 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 Standing Rock Sioux Tribe."[19]

[¶18] Greenpeace, Inc. believed Statement 30 was true because it regarded BankTrack as a reliable source and because it had no reason to doubt its claims, which aligned with Greenpeace, Inc.'s understanding of the SRST concerns about "outstanding claims that were not being recognized to unceded lands."[20]

[¶19] Greenpeace, Inc. also believed the BankTrack letter was accurate because the letter relied in part on a report about DAPL published earlier that month on November 1, 2016 from the United Nations' Permanent Forum on Indigenous Issues by Chief Edward John, a member of the UN Forum. Chief John's report, in turn, detailed "evidence that demonstrates harm to unceded lands of the Standing Rock Sioux Tribe."[21] It states:

> The Chairman of Standing Rock Sioux, the Chairman of the Cheyenne River Sioux and Sioux Elders and spiritual Leaders explained that the rights of the Sioux are recognized and affirmed in their treaties, agreements and other constructive arrangements with the United States, in various court decisions, in the US Constitution and in international human rights instruments. Despite such recognition, their rights are being violated by decisions made with respect to the pipeline project traversing un-ceded Sioux territory.

[16] Ex. 3, Dep. Ex. 1068 (Statement 30) at 9; Ex. 8, Leonard Dep. 242:25-243:23.

[17] Ex. 3, Dep. Ex. 1068 (Statement 30) at 9.

[18] *Id*. at 2.

[19] *Id*.

[20] Ex. 10, Greenpeace, Inc. 30(b)(6) (Skar) Dep. 315:21-316:16 ("BankTrack was a, is a trusted source for us. We had no reason to doubt these claims, and they aligned with our understanding of the situation."); *id*. at 344:13-345:7.

[21] *Id*. at 316:20-317:24.

> The pipeline right of way is now on lands, described by local enforcement officials as "private lands', adjacent to the Standing Rock Sioux reservation but which the Sioux leaders describe as un-ceded Sioux lands.[22]

[¶20] Greenpeace International's purpose in signing the November 30 BankTrack letter was to remind banks of their own commitment, as expressed in the EPs, to consider the climate impacts of projects they finance.[23] Greenpeace International was not involved in any activities at Standing Rock,[24] but has a broad strategic goal of preventing climate change, including through resisting new fossil fuel infrastructure.[25]

[¶21] Greenpeace International spent four of five days discussing the letter with a group of subject matter experts and confirming the SRST agreed with its content; it signed the letter in part because it learned Indigenous groups had no concerns with its content.[26]

4. Statement 19 (December 13, 2016)

[¶22] Statement 19 is in an online news article published on Greenpeace, Inc.'s website on November 13, 2016.[27] The article is titled "After Visiting Standing Rock, Swedish Bank Nordea Puts Companies Behind DAPL on Watch." The article reports that Nordea "met with tribal representatives on the ground, including Standing Rock Sioux Tribe Chairman David Archambault II." The article states that after the SRST "urged Nordea to divest and respect the rights of Indigenous communities," the bank "announced that it will not back the Dakota Access Pipeline if it violates the demands of the Standing Rock Sioux Tribe."

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[22] Ex. 11, Dep. Ex. 1117 (Diana Best) at 2.

[23] Ex. 12, Greenpeace International 30(b)(6) (Christensen) Dep. 80:3-10; Ex. 3, Dep. Ex. 1068.

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

[25] *Id*. at 35:10-24, 54:18-25.

[26] *Id*. at 131:18-133:19, 143:14-17.

[27] *See* Ex. 4, Dep. Ex. 1692; SAC Am. App'x A (Doc. 2837), Statement 19. The original news article is available online at https://www.greenpeace.org/usa/news/after-visiting-standing-rock-swedish-bank-nordea-puts-companies-behind-dapl-on-watch/#:~:text=to%20News%20%26%20Media-,After%20Visiting%20Standing%20Rock%2C%20Swedish%20Bank%20Nordea,Companies%20Behind%20DAPL%20on%20Watch&text=Washington%2C%20DC%20%2D%20After%20a%20visit,the%20Standing%20Rock%20Sioux%20Tribe.

[¶23] Statement 19 (underlined below) appears as part of a quote from Greenpeace Nordic Climate and Energy Campaigner Rolf Lindahl in response to the news. Lindahl said:

> "It's an important step that Nordea put its foot down and now has specific requirements that the oil pipeline not go through the Standing Rock Sioux Tribe's land. It sends a clear signal to the world that the rights of indigenous peoples must be respected. We encourage others to set the same demands for the companies that are building the oil pipeline."[28]

[¶24] Lindahl's quote follows a list of six announcements from Nordea, none of which Plaintiffs challenge. These include Nordea's demand that Plaintiffs "respect the Standing Rock Sioux Tribe's demands not to route the Dakota Access Pipeline in the vicinity of their land."[29]

[¶25] Statement 19 is attributed to Perry Wheler, a communications specialist for Greenpeace, Inc.[30] Wheeler followed local and national news coverage of the DAPL protests closely.[31] As stated above, Wheeler understood there to be a difference between "tribal" and "reservation" land, and believed that SRST "land" is "where their resources [are], what their water supply is, where their ancestors are buried."[32] He believed the SRST themselves were the best authority on their ancestral land, and believed it was appropriate to defer to them as to whether or not DAPL crosses "tribe land."[33]

[¶26] Greenpeace, Inc. believed it was true that DAPL passed through SRST land "based on the repeated statements from the Standing Rock Sioux Tribe, and our understanding of their traditional land rights from the treaties of Fort Laramie, 1851 and 1868, and the way that was adjudicated by the U.S. Supreme Court in 1980, that they had outstanding and valid land right claims, and, the these unceded lands, including the section of the Dakota Access Pipeline."

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[28] *Id.*

[29] *Id.*

[30] Ex. 7, Wheeler Dep. 23:9-16.

[31] *Id*. at 42:8-44:5.

[32] *Id*. at 257:3-13.

[33] *Id*. at 257:3-13; 255:1-256:1.

It believed, based on U.S. Supreme Court precedent (*see* ¶ 38, *infra*) that the territory in question is "unceded lands that … had been wrongfully taken from the SRST[.]"[34]

B. SRST's Traditional and Ancestral Territory Extends Beyond the Boundaries of the Current SRST Reservation

[¶27] The two subsections that follow, regarding SRST's traditional, historic and treaty rights in the lands at issue lands, cite the opinion of Dr. Sebastian Braun, Director of American Indian Studies at Iowa State University and Defendants' retained expert on Lakota Sioux culture and history. Dr. Braun's opinion is unrefuted; Plaintiffs have not disclosed any rebuttal expert.[35]

1. SRST's Traditional Territory and Native Title Are Established By Their Historic Presence on the Lands North of the Cannonball River

[¶28] The SRST's traditional and ancestral territory is distinct from SRST's reservation land, and the Statements reflect Greenpeace Defendants view that SRST's claims to land extending beyond the boundaries of the current reservation are valid.[36]

[¶29] DAPL crosses lands that are historically and culturally Indian lands and that are considered by the SRST to be tribal lands.[37]

[¶30] The SRST is today mostly a community of Hankpapa and Yanktonai Lakota, related peoples whose ancestors had an early, documented, presence in the lands north of the Cannonball River.[38] The consensus of both tribal history and the academic fields of history, anthropology, and related fields, is that the area around Standing Rock, including where DAPLE

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[34] Ex. 10, Greenpeace, Inc. 30(b)(6) (Skar) Dep. 343:2-344:2.

[35] *See* Declaration of Sebastian Braun ("Braun Decl."), ¶¶ 2-4. The Braun Decl. has been filed concurrently in connection with Defendants' separate Motion for Partial Summary Judgement on Plaintiffs' Defamation Claims Re. Damage to Cultural Sites (Defamation Motion 2 of 3).

[36] Ex. 10, Greenpeace, Inc. 30(b)(6) (Skar) Dep. 342:2-344:2 ("[T]he foundation for our understanding is both what we viewed as valid claims that the Standing Rock Sioux Tribe had to the lands in question" and that "there's a distinction made between the Standing Rock Sioux Tribe's reservation land and other land.")

[37] Braun Decl. ¶ 9.

[38] *Id*. at ¶ 10.

passes, is historically Lakota tribal land.[39]

[¶31] There are many different kinds of Indian land "titles." "Original" title, or the fact that Native nations owned, controlled, lived on, and used the lands before the arrival of any Europeans, is the "title" as recognized from the Native perspective.[40]

2. DAPL Crosses Land That Was Specifically Retained By the SRST in the 1851 and 1868 Treaties of Fort Laramie

[¶32] The Statements also reflect the SRST's longstanding position that the Sioux people were specifically granted various rights to large swaths of land under both the 1851 and 1868 Treaties of Fort Laramie.[41]

[¶33] The basis for this position is that the United States acquired title from Native nations through treaties; lands not sold or "ceded" to the U.S. remained under Native title.[42] In other words, by acquiring title to some lands from Native nations, but not to other lands, the United States acknowledged or created title for Native nations in those unceded lands.[43]

[¶34] The 1851 Fort Laramie Treaty was negotiated between the U.S. and several Sioux nation tribes in the region of the northern Plains. That treaty delineated the territories of the nations involved.[44] The region through which DAPL approaches and where DAPL crosses the Missouri River was included in Lakota territory as agreed in the 1851 Fort Laramie Treaty.[45]

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[39] *Id.*

[40] *Id*. at ¶ 11.

[41] Ex. 10, Greenpeace, Inc. 30(b)(6) (Skar) Dep. 342:2-344:2 (stating Greenpeace Inc. "understood, based on the repeated statements from the Standing Rock Sioux Tribe, and our understanding of their traditional land rights from the treaties of Fort Laramie, 1851 and 1868, and the way that was adjudicated by the U.S. Supreme Court in 1980, that they had outstanding and valid land right claims, and, the these unceded lands, including the section of the Dakota Access Pipeline."). *See also* Ex. 13, Dep. Ex. 153 (Mahmoud) (Dec. 4, 2016 U.S. DOI Memo); Braun Decl. ¶¶ 12, 13.

[42] Braun Decl. ¶ 12; *see also* An Act to Regulate Trade and Intercourse with the Indian Tribes. June 23, 1790. Section 5.; Indian Claims Commission, Final Report. U.S. Government Printing Office. 1979. p.129.

[43] Braun Decl. ¶¶ 12-13.

[44] *Id*. at ¶ 14; *see* Treaty of Fort Laramie with Sioux, Etc., 1851, Articles 1-5.

[45] *Id*. at ¶ 14.

[¶35] The U.S. and Sioux nation tribes entered a later treaty the ("1868 Fort Laramie Treaty") that again delineated the territories of the nations involved, including as follows: "The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory."[46] This unceded Indian territory is understood to include lands between the North Dakota/South Dakota state line and the Heart and Missouri rivers.[47]

[¶36] The Native nations also retained hunting and fishing rights under both Treaties of Laramie.[48]

[¶37] In 1877, Congress passed an act (the "Act of 1877") purporting to abrogate the 1868 Fort Laramie Treaty and the "unceded Indian territory" status of the land over which DAPL approaches and crosses the Missouri. The Sioux Nation disputed the legality of the Act of 1877 and never relinquished its claims to the territories it retained under the 1851 and 1868 Treaties of Fort Laramie.[49] In 1980, the U.S. Supreme Court determined that the 1851 and 1868 Fort Laramie Treaties were unlawfully abrogated by the Act of 1877, which constituted a "taking" of Sioux land, and awarded the Sioux a monetary award of approximately $100 million as "just compensation" for the taking of its lands and natural resources. *See Sioux Nation of Indians*, 448 U.S. at 410-12, 423-24. The Sioux have never accepted this monetary award and continue to demand the relinquishment of their territory.[50]

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[46] *Id*. at ¶ 15, *see* Treaty with the Sioux – Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee – and Arapaho, 1868, Article 16.

[47] *Id.*

[48] Braun Decl. ¶¶ 14, 15.

[49] *Id*. at ¶ 17.

[50] *Id*. at ¶ 17; *see, e.g., Hearing Before the Select Committee on Indian Affairs, United States Senate*, 99TH Cong., 2d Sess., S. 1453 (Sioux Nation Black Hills Act) http://www.gpo.gov/fdsys/pkg/CHRG-99shrg63488/pdf/CHRG-99shrg63488.pdf; *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. U.S. Army Corps. of Eng'rs*, 570 F.3d 327 (D.C. Cir. 2009).

3. Plaintiffs Knew DAPL Crossed Lands to Which the SRST Has a Historic and Ancestral Claim

[¶38] In the course of planning DAPL, Plaintiffs were aware of the SRST's historic and legal claims to land along the pipeline route. Joey Mahmoud, Plaintiffs' Executive Vice President responsible for DAPL's routing,[51] understood DAPL crossed land over which the SRST has a historic and ancestral claim. On July 27, 2016, the SRST sued in the U.S. District Court for the District of Columbia to enjoin the Army Corp of Engineers ("ACOE") from issuing permits for a portion of the pipeline running through ACOE land.[52] In the suit, the SRST alleged "[t]he pipeline's route passes through the Tribe's ancestral lands[.]"[53] Mahmoud submitted a declaration in that suit on August 18, 2016, acknowledging the SRST considered the "entire western Great Plains Region" to be "the 'Greater Sioux Nation's 'historical range'."[54]

[¶39] Soon after, [redacted]

[51] Ex. 14, Mahmoud Dep. 27:2-11.

[52] Ex. 15, Complaint, *Standing Rock Sioux Tribe v. US Army Corps of Engineers*, No. 1:16-cv-01534-JEB (D.D.C. July 27, 2016). Pursuant to N.D. R. Ev. 201, Defendants respectfully request judicial notice of (1) the fact of publication and contents of all news articles identified in this Motion and (2) the existence of court records filed in other proceedings cited in this Motion. On summary judgment, a court must take judicial notice of facts not subject to reasonable dispute, when requested by a movant who provides the necessary supporting information. N.D. R. Ev. 201(b)-(d); *Ochana v. Flores*, 199 F. Supp.2d 817 (N.D. Ill. 2002), *aff'd* 347 F.3d 266 (7th Cir. 2003). Courts routinely take judicial notice of news articles and media reports to establish that particular information was publicly available. *See Wishah v. City of Country Club Hills*, 2021 WL 3860328, at *3 (E.D. Mo. Aug. 30, 2021); *White Hall Pharmacy LLC v. Doctor's Orders RX Inc.*, 2019 WL 7838299, at *1 (E.D. Ark. June 10, 2019); *see East Coast Test Prep LLC v. Allnurses.com, Inc.*, 307 F. Supp. 3d 952, 967 (D. Minn. 2018), *aff'd* 971 F.3d 747 (8th Cir. 2020) (taking judicial notice, on summary judgment, website's publication in analysis of alleged defamatory statement). Media coverage also is judicially noticeable to show a defendant's speech involved a matter of public interest. *Cross v. Cooper*, 197 Cal. App. 4th 357, 378 n.13 (2011). Courts also regularly take judicial notice of the fact of court material "already in the public record and filed in other courts" (*Duke v. City Coll. of S.F.*, 445 F. Supp. 3d 216, 224 (N.D. Cal. 2020)), and of filings in judicial proceedings that "have a direct relation to matters at issue." *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979). In libel cases, judicial notice of the existence and contents of documents that defendants relied upon in publishing challenged statements is appropriate, at minimum, "for the fact that they were filed and provided certain information to the public." *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1235, 1239-40 (N.D. Cal. 2014).

[53] Ex. 15 at ¶ 51.

[54] Ex. 16, August 18, 2016, Declaration of Joey Mahmoud in support of Dakota Access, LLP's Opposition to Plaintiffs' Motion for a Preliminary Injunction in *Standing Rock Sioux Tribe v. US Army Corps of Engineers*, No. 1:16-cv-01534-JEB.

[redacted]."[55]

[¶40] Plaintiffs also knew the ACOE solicited the U.S. Department of the Interior's opinion on Tribal treaty rights as they related to DAPL.[56] The resultant Memorandum, dated December 4, 2016, concluded "[b]oth the Standing Rock and Cheyenne River Sioux Tribes have treaty hunting and fishing rights in Lake Oahe," under which DAPL was set to cross, and that the tribes "retain some proportion of water rights in Lake Oahe. And both Tribes maintain a meaningful historic and cultural connection to the land[.]"[57] Plaintiffs obtained this memo and [redacted]."[58]

C. Statements 19, 30, 39 and 44 Relied on, and Mirrored, Earlier Published Statements About DAPL Crossing Over Tribal Lands.

[¶41] Greenpeace Defendants did not originate the statements about DAPL crossing over their tribal lands. At least 88 articles appeared in local, state, national, and international media between April 1, 2016 and November 18, 2016 (the day the earliest accused Statement, Statement 44, was published) discussing claims that DAPL was routed through tribal land.[59]

[¶42] For example, on April 1, 2016, *The Guardian* quoted a member of the Standing Rock nation as saying "Although we do live on a reservation, the land that [the Dakota Access pipeline is] going to be crossing is on original land that was given us by treaty."[60]

[¶43] On August 24, 2016, SRST Chairman David Archambault contributed an Op-Ed

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[55] Ex. 17, Dep. Ex. 289.

[56] Ex. 13, Dep. Ex. 153 at 1.

[57] Ex. 13, Dep. Ex. 153 at 34.

[58] Ex. 14, Mahmoud Dep. 127:24-129:18, 140:2-142:23; *see also* Ex. 18, Plaintiffs' 30(b)(6) (Futch) Dep. (Feb. 15, 2024) 139:16-23 (acknowledging "the Tribe claims some privilege over where the buffalo roamed").

[59] Declaration of Chris Weil ("Weil Decl."), ¶ 12 and Weil Ex. 2 at 9-12. The Weil Decl. has been filed concurrently in connection with Defendants' separate Motion for Partial Summary Judgement on Plaintiffs' Defamation Claims Re. "Use of Force" (Statements 3, 39, 46) (Defamation Motion 1 of 3).

[60] Weil Decl. ¶ 13; Nicky Woolf, *Native American tribes mobilize against proposed North Dakota oil pipeline*, THE GUARDIAN (Apr. 1, 2016), https://www.theguardian.com/us-news/2016/apr/01/native-american-north-dakota-oil-pipeline-protest.

for *The New York Times* in which he wrote "The nearly 1,200-mile pipeline … would snake across our treaty lands … Just a half-mile from our reservation boundary …." He also stated that "[t]he first draft of [Energy Transfer Partners'] assessment of the planned route through our treaty and ancestral lands did not even mention our tribe."[61]

[¶44] Numerous other publications also discussed the pathway of DAPL as crossing through the SRST's tribal and ancestral native lands.[62]

II. ARGUMENT

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

[¶45] 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 incorporated by reference here.

[¶46] Significantly, the heightened burdens the First Amendment imposes on defamation claims apply on summary judgment. 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

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[61] Weil Decl. ¶ 14; David Archambault II, *Taking a Stand at Standing Rock*, THE NEW YORK TIMES (Aug. 24, 2016), https://www.nytimes.com/2016/08/25/opinion/taking-a-stand-at-standing-rock.html.

[62] *See, e.g.*, Ex. 21, *Dakota Access Approved: Resistance Unfolds*, LAKOTA PEOPLE'S LAW PROJECT (Aug. 2, 2016), https://lakotalaw.org/news/2016-08-02/dakota-access-approved-resistance-unfolds; Ex. 22, Jimmy Hoover, *Sioux Tribe Says 'Cultural Survival' at Stake in Pipeline Row*, LAW360 (Aug. 24, 2016), https://www.law360.com/articles/832438/sioux-tribe-says-cultural-survival-at-stake-in-pipeline-row; Ex. 23, *Nebraskans protest against Dakota Access Pipeline*, KOLN-TV (Aug. 24, 2016), https://www.1011now.com/content/news/Nebraskans-protest-against-Dakota-Access-Pipeline-391227672.html; Ex. 24, *Yakama Nation leaders join others in denouncing pipeline project*, YAKIMA HERALD-REPUBLIC (Aug. 30, 2016), https://www.yakimaherald.com/news/local/yakama-nation-leaders-join-others-in-denouncing-pipeline-project/article_04283532-6f10-11e6-abcc-ff62a124c6af.html; Ex. 25, Lex Talamo, *SBC protests Dakota pipeline at Shreveport's federal court house*, SHREVEPORT TIMES (Nov. 15, 2016), https://www.shreveporttimes.com/story/news/2016/11/15/pipeline-protest-federal-court-house-today/93803136/; Weil Decl. ¶ 15.

could, disbelieve the defendant's denial of … legal malice." *Id*. at 256 (emphasis added). Instead, summary judgment must be granted unless plaintiff affirmatively presents "concrete" evidence of a "caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Id*. at 254.

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

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

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

1. The Statements Are Substantially True

[¶49] On summary judgment, a defamation plaintiff's burden to show material falsity cannot be met by arguing the accused statement was not precisely or literally true. Rather, it has long been understood that "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991). *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."). 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).

[¶50] Likewise, "defamation will not lie where only a forced construction will place a defamatory connotation on the communication." *Mr. G's Turtle Mountain Lodge, Inc. v. Roland Twp.*, 2002 ND 140 ¶ 38, 651 N.W.2d 625, 634. In *Mr. G's*, for example, a landowner alleged that letters to the editor advising the public about possible problems with the zoning and building permits for lots he was selling were libelous, because they implied wrongful conduct and damaged his business reputation. *Id*. at 628-29, 633. The Supreme Court of North Dakota affirmed summary judgment dismissing this claim, holding that as a matter of law, "the truthful and innocuous language of the letters is not fairly susceptible of a defamatory meaning" and "'[i]magination and suspicion are not determinative—the meaning of the words is what counts.'" *Id*. at 635 (citing *Moritz v. Med. Arts Clinic, P. C.*, 315 N.W.2d 458, 462 (N.D. 1982).

[¶51] Here, statements that DAPL crosses the SRST's "tribal land" or violates "Native land titles" are true. They are consistent with the view—recognized by the U.S. Supreme Court—that the SRST has a valid historic claim to lands they traditionally occupied, and it is undisputed that DAPL passes through that land. *See supra* ¶¶ 28-37. There is no dispute that this territory, in which SRST retains treaty rights and other forms of Native title, extends well beyond the boundaries of the current SRST reservation, *id.*, and none of the Statements say, imply, or insinuate that DAPL encroaches on the legal boundaries of the SRST reservation. *See supra* ¶¶ 10-11, 13-14, 16-17, 22-24; SAC ¶ 38. *See Moritz*, 315 N.W.2d at 461 ("The fact that plaintiff places a defamatory connotation on the statement does not make it actionable.").

[¶52] Because Plaintiffs cannot carry their burden of establishing the material falsity of the Statements, summary judgment should be granted on this basis. *Jose v. Norwest Bank N. Dakota, N.A.*, 1999 ND 175, ¶ 7, 599 N.W.2d 293, 296 ("Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to

the party's case and on which that party will bear the burden of proof at trial.").

2. The Statements Are Protected Opinions

[¶53] The Statements' characterizations of the land at issue also is not provably false, because the scope of "tribal land" and "Native title" is indisputably a matter of longstanding historic and cultural controversy that cannot be resolved on a defamation claim. *See supra* ¶¶ 28-37. The First Amendment fully protects speech on such matters; as a matter of law, views on whether territory at Standing Rock is or is not "Native" or "tribal" are not actionable.

[¶54] 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)).

[¶55] Whether the challenged speech is opinion, rather than fact, is an issue of law appropriate for this Court to decide on summary judgment. *Secrist v. Harkin*, 874 F.2d 1244, 1248 (8th Cir. 1989). The Statements here are protected opinion, for the following reasons.

a. The Statements Reflect the Greenpeace Defendants' Subjective View, and the Subjective View of the SRST

[¶56] The Statements reflect the SRST's view, accepted by Defendants, that DAPL crosses land the Sioux consider Indigenous, and that they never relinquished claims to unceded treaty land and land they historically occupied. There is no dispute that SRST's unceded land

claims extend beyond the boundaries of their current-day reservation; that the Tribe has never abandoned its claims to those territories to which it was awarded rights in the 1851 and 1968 Treaties of Fort Laramie; or that it continues to dispute the illegal taking on its lands and natural resources by the Act of 1877. *See supra* ¶¶ 31-38. Nor is there any dispute that DAPL passes through those lands. *See supra* ¶¶ 39-44.

[¶57] Following the U.S. Supreme Court's decision in *Sioux Nation*, and the Tribes' continued refusal to accept the "just compensation" awarded by the Court for the "taking" of Sioux land, the status of these lands remains unsettled. *See supra* ¶ 38. Plaintiffs' defamation claim challenging the characterization of disputed lands "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) (internal quotation marks omitted). That is why in "cases involving 'matters of argument' appearing in print, [courts are] reluctant to 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). The Statements here cannot be proven false and must be protected.

b. The Context of the Statements Makes It Clear They Are Opinions on Matters of Public Concern

[¶58] The context of the Statements also indicates that the Greenpeace Defendants were stating their opinion on matters of public concern. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986). "In determining whether words are libelous and actionable, the relevant words must be construed in the context of the entire document, and the sense or meaning of the document must be determined by construing the words according to the natural and ordinary meaning a reasonable person of ordinary intelligence would give them." *Schmitt*,

2013 ND 136, ¶ 13, 834 N.W.2d at 633. "Ultimately, we must decide—not whether a statement in isolation is by virtue of its phrasing factual—but rather whether, when taken in context, the statement functions and would be understood as an unqualified assertion of fact rather than as an element of an opinion." *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 (8th Cir. 1989).

[¶59] In this case, the context of the Statements makes it clear that they were published by advocates of a particular viewpoint. Specifically, they are all couched within a larger discussion of "Indigenous rights and sovereignty" (Statement 44) explicitly (*see id.*; Statement 19 ("the rights of indigenous peoples must be respected")) and implicitly, through references to colonialism (Statement 44); "the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)" and the "Treaty of Fort Laramie of 1851" (Statement 39); and the Equator Principles and the concepts of Free Prior Informed Consent (Statement 30).

[¶60] The standard for determining whether the Statements address issues that qualify as a matter of public concern meriting heightened First Amendment protection is set out in MSJ No. 1, Section II.B.2.c, and incorporated by reference here. In short, the Statements clearly address matters with which the public has legitimate concern. Greenpeace, Inc. and Greenpeace International's commentary concerning Indigenous rights and sovereignty certainly qualifies as "speech on public issues occup[ying] the highest rung of the hierarchy of First Amendment values," *see Snyder v. Phelps*, 562 U.S. 443, 452, 454, and debate over such issues must remain "'uninhibited, robust, and wide-open,'" *Boos v. Barry*, 485 U.S. 312, 318 (1988).

[¶61] Additionally, Statement 30 appears in a letter that was circulated and signed by an international organization known for urging commercial banks to consider the climate impacts of projects they are asked to finance.[63] The letter was co-signed by more than 500

[63] *See* Ex. 20, BankTrack, 2022 Annual Report at 4, *available at* https://www.banktrack.org/download/banktrack_annual_report_2022/banktrack_annual_report_2022_1.pdf.

organizations from around the world, including well-known environmental organizations in addition to Greenpeace, Inc. and Greenpeace International. Such advocacy pieces are quintessential opinion publications, similar to a newspaper's op-ed page, understood by reasonable readers to be inherently subjective. *Ollman v. Evans*, 750 F.2d 970, 986-87 (D.C. Cir. 1984); *Abbas v. Foreign Pol'y Grp., LLC*, 975 F. Supp. 2d 1, 17 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015).

c. Statement 39 Is Supported By Disclosed Facts

[¶62] Additionally, interpretations are protected by the First Amendment in the same manner as entirely subjective opinion where the factual bases for the statement are disclosed. *Lewis v. Abramson*, 673 F. Supp. 3d 72, 89 (D.N.H. 2023) ("First Amendment protections for a speaker's interpretation of disclosed facts play an essential role in fostering the sort of 'free expression and interchange of ideas that the First Amendment is designed to promote.'") (citing *Geary v. Renne*, 880 F.2d 1062, 1081 (9th Cir. 1989)). "The First Amendment generally protects statements of opinion where the speaker outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the [listener] free to draw his own conclusions." *Piccone v. Bartels*, 785 F.3d 766, 774 n.12 (1st Cir. 2015) (internal quotations omitted). *See also Partington v. Bugliosi*, 56 F.3d 1147, 1154, 1156 (9th Cir. 1995); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir. 1998).

[¶63] This is so even where the statements could be interpreted as a factual assertion. In *Lewis*, for instance, the court recognized that statements challenged by plaintiffs went "beyond opining on the plaintiffs' viewpoints and could be read to either imply or directly allege that the plaintiffs played a role in the January 6 attack on the Capitol." 673 F. Supp. 3d at 92. Even so, the court found "many of these allegations are not actionable because they are opinions based on fully disclosed facts that were either directly discussed or linked to in the relevant publication,

and are therefore protected by the First Amendment." *Id*.

[¶64] This is precisely the case with Statement 39. The challenged language in Statement 39 (referring to "[SRST] land in the path of the pipeline") follows a paragraph explaining that DAPL "violates the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)" and the "Treaty of Fort Laramie of 1851." As explained above, *supra* ¶¶ 32-34, the 1851 Fort Laramie Treaty delineated the territories of several Sioux nations, and retained their hunting and fishing rights on those lands. The Supreme Court held the 1851 Fort Laramie Treaty was unlawfully abrogated by the Act of 1877. *See supra*. ¶ 37. Additionally, the UN Declaration expresses that "indigenous peoples have suffered from historic injustices as a result of … colonization and dispossession of their lands, territories, and resources."[64] Disclosure of this underlying support for statements that DAPL passes through SRST "Tribal land" leaves the reader free to read the source documents and decide for themselves.

C. Plaintiffs Have No "Clear and Convincing," or Any, Evidence, of Actual Malice

[¶65] Independently, Plaintiffs' defamation claim fails because there is no evidence, much less the required "clear and convincing" evidence, that the Greenpeace Defendants 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).

[¶66] 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 incorporated by reference here.

[64] Ex. 19, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on September 13, 2007.

[¶67] As public figures, 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 v. Mahar*, 2008 ND 95, ¶ 19, 748 N.W.2d 714, 722 (citing *Gertz v. Welch*, 418 U.S. 323, 334 (1974)). 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).

[¶68] Under this bedrock constitutional principle, a public figure can support a libel claim only with evidence that the defendant was subjectively aware the publication 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 willfully blinding itself to the falsity of its utterance." *Tavoulareas v. Piro*, 817 F.2d 762, 776 (D.C. Cir. 1987) (*en banc*) (citation omitted). Here, the evidence does not come close to allowing Plaintiffs to clear this "daunting" hurdle. *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017) (reversing denial of summary judgment on actual malice grounds).

[¶69] Each of the Greenpeace employees responsible for the Statements testified that they believed them to be true when they were published. *See supra* ¶¶ 14, 17, 21-23, 25, 29-30. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (actual malice measured "at the time of publication"). Far from being "willfully blind[]," *Tavoulareas*, 817 F.2d at 776, their beliefs were based on claims made by the SRST and reported in contemporaneous media sources.[65] Reliance on previously published material from reputable publications, in itself,

[65] Ex. 6, Schleeter Dep.139:16-25; Ex. 7, Wheeler Dep. 42:8-44:5; *See supra* n.59-62.

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.")

[¶70] For Statements 30, the Greenpeace Defendants reasonably relied on BankTrack, a trusted organization they had worked with before, and believed the letter to be accurate because it relied in part on a report about DAPL published earlier that month on November 1, 2016 from the United Nations' Permanent Forum on Indigenous Issues.[66] The UN report explained that DAPL violated the SRST's rights "with respect to the pipeline project traversing un-ceded Sioux territory," and distinguished between "un-ceded Sioux lands" and "the Standing Rock Sioux reservation."[67] *See CACI Premier Tech. v. Rhodes*, 536 F.3d 280, 297-98 (4th Cir. 2008) (no actual malice where relied on official reports) Schleeter, who had responsibility for Statements 44, also testified that he also did not understand the reference to SRST "tribal land" to be a statement DAPL went through the SRST reservation.[68]

[¶71] 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* ¶¶ 12, 15, 18-21. The Greenpeace, Inc. employees responsible for the Statements testified that they understood there to be a difference between "tribal land" and reservation land.[69] They also believed it was appropriate to defer to the SRST

[66] Ex. 10, Greenpeace, Inc. 30(b)(6) (Skar) Dep. 315:21-316:16 ("BankTrack was a, is a trusted source for us. We had no reason to doubt these claims, and they aligned with our understanding of the situation."); *id.* at 316:20-317:24; *id*. at 344:13-345:7.

[67] Ex. 11, Dep. Ex. 1117; Ex. 10, Greenpeace, Inc. 30(b)(6) (Skar) Dep. 316:20-317:24.

[68] Ex. 6, Schleeter Dep. 139:16-25, 141:1-12.

[69] Ex. 7, Wheeler Dep. 257:3-13; Ex. 6, Schleeter Dep. 150:11-25.

themselves on the question of their own ancestral lands.[70]

[¶72] Because there is absolutely no evidence that Defendants entertained "serious doubts" about the truth of the Statements or acted recklessly with respect to their publication, summary judgment must be granted. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published"; 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.").

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

[¶73] Summary judgment should be granted as to Greenpeace Fund as to all Statements, and to Greenpeace International with respect to Statements 19, 39, and 44, for all of the reasons above, and also because they did not publish those Statements.

[¶74] To be liable for defamation, a defendant must be a "publisher" of the allegedly defamatory matter—meaning, the party responsible for the act of its communication. *See* N.D.C.C. § 14–02–03 ("Libel is a false and unprivileged *publication* ") (emphasis added); Restatement (Second) of Torts § 577 ("publication" in this context requires communication to a third party). A defendant is not liable for third party's defamatory "publication" unless the other 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.").

[¶75] For example, in *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531 (1980), the court granted summary judgment for defendant newspaper reporters who, though the original authors

[70] Ex. 7, Wheeler 255:1-256:1; *see* Ex. 6, Schleeter Dep. 119:4-21, 139:16-25, 141:1-12.

of a work, were not involved in the allegedly defamatory book republication: "Inasmuch as the record is barren of any concrete evidence of the reporters' involvement in the republication of the newspaper series, we conclude that the causes of action against them must be dismissed." *Id*. at 540-41.

[¶76] 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. It was not involved at all in opposing construction of DAPL,[71] or in amplifying the message of pipeline opponents.[72] It is not listed as an author or co-signer of any of the statements Plaintiffs claim are defamatory.[73] There is no evidence it played any role at all in the publication of any DAPL-related statement, including Statements 19, 30, 39, and 44. It cannot be held liable for the Statements, with which it had nothing to do with publishing.

[¶77] Nor is there any evidence that Greenpeace International published, participated in, or was involved in communicating Statements 19, 39, and 44. Plaintiffs' Second Amended Appendix A to their Second Amended Complaint lists "Greenpeace USA" as the author of each of those Statements, and as detailed above, the individuals responsible for the publications were Greenpeace, Inc. employee at the time the Statements were published.[74] Statements 19, 39, and 44 were each published at https://www.greenpeace.org/usa, which is the website of Greenpeace, Inc., the U.S.-based entity that is a part of the Greenpeace network. Although Greenpeace International owns the domain "greenpeace.org,"[75] it does not operate or manage the content of any portions of the website dedicated to other national or regional Greenpeace organizations,

[71] Ex. 9, Greenpeace Fund 30(b)(6) (Emerson) Dep. at 120:11-121:3.

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

[73] *Id*. at 271:8-273:18; Ex. 9, Dep. Ex. 1068 (Statement 30).

[74] SAC Am. App'x A (Doc. 2837), Statements 19, 39, 44; *See supra* ¶¶ 12, 15, 25.

[75] Declaration of Mike Townsley ("Townsley Decl."), ¶ 3

including the U.S.-based Greenpeace, Inc.[76] Greenpeace, Inc. controls and is solely responsible for the content on https://www.greenpeace.org/usa, without editorial oversight or management from Greenpeace International or Greenpeace Fund.[77]

[¶78] Summary judgment should be granted as to Greenpeace Fund for all the challenged Statements, and as to Greenpeace International for Statements 19, 39, and 44.

III. CONCLUSION

[¶79] For all these reasons, Greenpeace respectfully requests that this Court grant its Motion for partial summary judgment and dismiss Plaintiffs' defamation claims based on the Statements about tribal lands.

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[76] Ex. 12, Greenpeace International 30(b)(6) (Christensen) Dep. 124:4-10; Townsley Decl. ¶ 4.

[77] *Id.*