STATE OF NORTH DAKOTA **DISTRICT COURT**

COUNTY OF MORTON **SOUTH CENTRAL JUDICIAL DISTRICT**

ENERGY TRANSFER LP, *et al.*, Plaintiffs, v. GREENPEACE INTERNATIONAL, *et al.*, Defendants.	Case No.: 30-2019-CV-00180 **BRIEF IN SUPPORT OF GREENPEACE, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW**

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[¶1] For six years Plaintiffs promised that if allowed to proceed to trial, actual evidence would establish the elements of each tort claim and that Greenpeace, Inc. proximately caused specified damages. Instead, Plaintiffs offered the jury mere argument, not evidence. Accordingly, pursuant to N.D.R.Civ.P. 50(b), Greenpeace, Inc. renews its motion for judgment a matter of law.

[¶2] Plaintiffs' failures of proof are glaring. The defamation verdict suffers from multiple legal errors—an obvious example of which is that Plaintiffs failed to establish, by clear and convincing evidence, that Greenpeace, Inc. acted with constitutional "actual malice" with regard to the alleged defamatory statements, that is, that Greenpeace, Inc. made the statements having serious doubts as to their truth or with knowledge that the statements were false. To the contrary, the undisputed evidence was that Greenpeace, Inc. relied on reputable sources, as it was entitled to do as a matter of well-established law. Nor did Plaintiffs offer clear and convincing evidence that the statements were anything other than constitutionally protected opinion, which cannot sustain a defamation claim as a matter of law.

[¶3] Plaintiffs' tortious interference claim also fails as a matter of law. The claim required proof that an independent tort proximately caused the delay in pipeline service, but Plaintiffs failed to prove defamation by Greenpeace, Inc., or present evidence establishing that Greenpeace, Inc. engaged in any other alleged tort that caused interference. Plaintiffs offered no evidence that Greenpeace, Inc. was the proximate cause of a five-month delay in the completion and operation of DAPL. To the contrary, the undisputed evidence of the United States Government, the Plaintiffs' employees, and the Greenpeace Defendants' expert was that delay in issuance of the easement for Lake Oahe was not caused by any supposedly tortious act committed by Greenpeace, Inc.

[¶4] With regard to Plaintiffs' property tort claims, a necessary element of each is possession of the relevant land or personal property. It is undisputed, however, that Plaintiff Energy Transfer presented no evidence it had any relevant property interest at all—which is why Energy Transfer was never included as a plaintiff as to the property tort claims. Yet the jury awarded Energy Transfer over $125 million in damages for the property-based claims (Counts I through VI) against Greenpeace, Inc. As to Plaintiff Dakota Access, there was no evidence any Greenpeace, Inc. employee trespassed on any land or interfered with any personal property that Dakota Access possessed. Plaintiffs' evidence on these claims required the jury to engage in rank speculation—which the jury was prepared to do given the clear bias against the Defendants. Greenpeace, Inc. is entitled to judgment as a matter of law on these claims.

[¶5] Above all, Plaintiffs failed to prove that Greenpeace, Inc. proximately caused any of their claimed damages. Not a single one of Plaintiffs' fact witnesses offered such testimony. None of Plaintiffs' damage experts offered such testimony either—and instead were told to merely assume that the defendants were the cause of all damages. Nor did any law enforcement, government official or banking witness offer such testimony; and, significantly, not one of the tens of thousands of pages of records from the minute-by-minute surveillance of the protests, police records, and banking records reference Greenpeace, Inc. In short, Plaintiffs never fulfilled their promise or met their obligation to prove their claims and establish that any loss was proximately caused by Greenpeace, Inc.

[¶6] Greenpeace, Inc.'s renewed motion for judgment as a matter of law should be granted.

I. PROCEDURAL BACKGROUND

[¶7] During trial, Greenpeace, Inc. submitted and presented oral argument on its motion for judgment as a matter of law under N.D.R.Civ.P. 50(a). The Court denied the motion from the bench, stating that based on North Dakota authority, "a mid-term grant of this is probably frowned on." Ex. A, Mar. 10, 2025 Tr. ("Mar. 10 Tr.") 77:1-4. On March 19, 2025, the jury returned a verdict awarding Plaintiffs a total of $666,890,020, including $143,990,330 in compensatory damages and $260,000,000 in exemplary damages against Greenpeace, Inc. on all nine causes of action.

II. LEGAL STANDARD

[¶8] N.D.R.Civ.P. 50(b) provides that a "moving party may renew its request for judgment as a matter of law by serving and filing a motion no later than 28 days after notice of entry of judgment." *See Perry v. Reinke*, 1997 ND 213, ¶ 12 n.1, 570 N.W.2d 224, 228 n.1. While similar to a Rule 50(a) motion, the differing timing of a Rule 50(b) motion is significant. With respect to Rule 50(a) motions, courts have recognized that "it may be desirable to refrain from granting motion for judgment as a matter of law, despite the fact that it would be possible for the [court] to do so." 9B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civ. § 2533 (3d ed. Apr. 2025). "Appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion." *Id.* (collecting cases).

[¶9] For the court to deny judgment as a matter of law, "[t]he evidence must be sufficient to create a factual issue with regard to each essential element of a claim." *Meyer v. Maus*, 2001 ND 87, ¶ 12, 626 N.W.2d 281, 285 (affirming grant of motion for judgment as a matter of law because plaintiffs did not prove that defendants' conduct proximately caused

damages to plaintiffs). Judgment as a matter of law as to a claim is proper when the evidence "leads to but one conclusion as to the verdict about which there can be no reasonable difference of opinion." *Amyotte ex rel. Amyotte v. Rolette Cnty. Hous. Auth.*, 2003 ND 48, ¶ 15, 658 N.W.2d 324, 329 (citation omitted).

III. ARGUMENT

A. Defamation (Count VII)

[¶10] Plaintiffs claimed that Greenpeace, Inc. published or endorsed nine allegedly defamatory statements (the "Statements"). Dkt. 5036, at 20-21. The jury found in favor of Plaintiffs, awarding $16,652,850 in compensatory damages, $16,652,850 in presumed damages under a defamation per se theory, and $50,000,000 in exemplary damages against each of the three Greenpeace Defendants.[1] Dkt. 5035, at 11-13, 28-29, 32.

[¶11] A public figure plaintiff like Plaintiffs is subject to stricter constitutional requirements for proving a defamation claim than a private individual. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967). Under the First Amendment, public figures are "required to present *clear and convincing evidence* [the defendant's] statements were false and were made with actual malice." *Riemers v. Mahar*, 2008 ND 95, ¶ 19, 748 N.W.2d 714, 722 (emphasis added).

[¶12] Greenpeace, Inc. is entitled to judgment as a matter of law on these claims for at least four independent reasons.

[1] Specifically, as to each Greenpeace Defendant, the jury awarded $8,326,425 to Energy Transfer and $8,326,425 to Dakota Access in compensatory damages; $8,326,425 to Energy Transfer and $8,326,425 to Dakota Access in presumed damages; $12,500,000 to Energy Transfer and $12,500,000 to Dakota Access in exemplary damages on the defamation claim; and $12,500,000 to Energy Transfer and $12,500,000 to Dakota Access in exemplary damages on the defamation per se claim.

1. The Statements were not actionably false as they expressed public views on matters subject to significant public debate.

[¶13] Where, as here, the plaintiff is a "public figure," it is "required to present *clear and convincing evidence* [the defendant's] statements were false." *Riemers*, 2008 ND 95, ¶ 19, 748 N.W.2d at 722 (emphasis added). An opinion is not capable of being proven true or false and is protected by the Constitution. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). Here, the evidence established that each of the Statements was either protected opinion or factually true. *See Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 394 (8th Cir. 1996) ("[F]or a statement to be actionable, the inquiry is whether the statement is factual and provable.").

[¶14] To start, the Statements were nonactionable opinions on matters that were subject to significant debate. The evidence was undisputed that the Standing Rock Sioux Tribe ("SRST"), the United Nations, and hundreds of other publications expressed their opinion on each of the three categories of Statements based on observations of events on the ground, and Greenpeace, Inc did nothing more than express these same opinions. *See* Trial Ex. 326; Trial Ex. 5981; Trial Ex. 6274; Trial Ex. 1117; Ex. H, Mar. 13, 2025 Tr. ("Mar. 13 Tr.") 67:3-68:22; *see also* Ex. B, Mar. 12, 2025 Tr. ("Mar. 12 Tr.") 143:6-168:3. "[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 J. Co.*, 497 U.S. 1, 20 (1990). Indeed, in dismissing Plaintiffs' claim under the Racketeer Influenced and Corrupt Organizations Act, the federal district court noted that "most (if not all) of the alleged 'false and sensational claims' are either subject to debate, matters of opinion, or inconsequential. Ex. R, at 11.

[¶15] Plaintiffs' own witnesses admitted that Statements about what constitutes the desecration of cultural resources are opinions—what the SRST considers cultural resources may not be the same as what are legally protected cultural artifacts under the law. *See, e.g.*, Feb. 27, 2025 Tr. ("Feb. 27 Tr.") 120:20-121:11. So too are the Statements about use of force and tribal lands—statements characterizing force as extreme or excessive have been found to be matters of opinion protected by the First Amendment, *see, e.g.*, *Fritz v. Cnty. of Marin*, 2007 WL 1874369 (Cal. Ct. App. June 29, 2007) (unpublished), and statements that DAPL crosses tribal lands conveys the Tribe's subjective view on a matter of public concern, namely that they never relinquished claims to unceded Treaty land and land they historically occupied. Greenpeace, Inc. never published a statement that DAPL crossed the SRST reservation—despite Plaintiffs effort to create this distortion.

[¶16] Even if the Statements were factual assertions, there was no clear and convincing evidence presented at trial that the Statements were materially false. *See Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991) (statement is not false for purposes of defamation claim "so long as the substance, the gist, the sting, of the libelous charge be justified" (internal quotation marks and citation omitted)). None of the Statements about DAPL crossing tribal lands say that DAPL passes through the SRST reservation. Indeed, there was no dispute that DAPL crosses unceded Treaty land belonging to the Tribe. *See* Ex. D, Feb. 28, 2025 Tr. ("Feb. 28 Tr.") 154:6-24; Mar. 12 Tr. 143:6-13. As to the Statements that Plaintiffs deliberately desecrated culturally important SRST sites and burial grounds, Plaintiffs admitted to changing their construction schedule to grade the area containing sites identified by SRST member Tim Mentz on the Saturday of Labor Day weekend, the day after those sites were publicly disclosed by Mr. Mentz in his sworn declaration filed in federal court. And as to the Statements regarding use of force

against peaceful protestors, it is undisputed that Plaintiffs' security contractors as well as the law enforcement officers used dogs, pepper spray, and other munitions against protestors. Indeed, law enforcement witnesses testified that many of the protestors were peaceful. Feb. 27 Tr. 77:21-78:2; Feb. 28 Tr. 112:2-6, 119:1-19, 139:13-21, 146:12-147:11, 150:21-151:8; Ex. E, Mar. 3, 2025 Tr. ("Mar. 3 Tr.") 85:9-14, 97:20-98:3. Plaintiffs and their witnesses failed to explain why the force used was proportionate, and whether or how law enforcement even distinguished between peaceful and non-peaceful protestors.

2. Plaintiffs presented no evidence the Statements were made with "actual malice" as required for defamation under the First Amendment.

[¶17] Where, as here, the plaintiff is a "public figure," the plaintiff is "required to present *clear and convincing evidence* [the defendant's] statements . . . were made with actual malice." *Riemers*, 2008 ND 95, ¶ 19, 748 N.W.2d at 722 (emphasis added). "The plaintiff must demonstrate the author had serious doubts about the truth of his publication or had 'a high degree of awareness of [the] probable falsity.'" *Id.* (alteration in original) (quoting *Masson*, 501 U.S. at 510). However, Plaintiffs did not present any evidence that came close to meeting that requirement: there was no evidence any Greenpeace, Inc. employee responsible for publishing or endorsing the Statements had "serious doubts" about the truth of the Statements.

[¶18] Instead, in trying to prove actual malice, Plaintiffs relied on evidence that, even if credited, is insufficient as a matter of law.

[¶19] First, Greenpeace, Inc.'s purported failure to conduct an investigation into the Statements cannot constitute actual malice. *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, or would have investigated before publishing."). To the contrary, Greenpeace, Inc.

was entitled, as a matter of law, to rely on statements by the UN, along with the SRST, others in the indigenous community, and many other credible sources, without conducting a further investigation. *See id.*; *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987).

[¶20] Second, Greenpeace, Inc.'s failure to present Plaintiffs' viewpoint on the substance of the Statements cannot support any claim of actual malice. *See Speer*, 828 F.2d at 478 (affirming judgment notwithstanding the verdict based on insufficiency of evidence to establish newspaper's actual malice, where newspaper relied on trusted source and eyewitness accounts but did not do an investigation into conflicting accounts).

[¶21] Third, the handful of Greenpeace, Inc. employee emails that Plaintiffs argued reflect personal animus are also insufficient to support a finding of actual malice. As the North Dakota Supreme Court has made clear, "[t]he standard for actual malice 'should not be confused with the concept of malice as an evil intent or a motive arising from . . . ill will.'" *Riemers*, 2008 ND 95, ¶ 19, 748 N.W.2d at 722 (quoting *Masson*, 501 U.S. at 510)); *accord Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). Even assuming these emails showed particular employees might have ill will toward Plaintiffs, they do not demonstrate that any employee responsible for the publication of the supposedly defamatory Statements had serious doubts about the truth of any of the Statements.

[¶22] In fact, the evidence showed that the employee authors of, or signatories to, the Statements had a legitimate basis to believe the Statements were true, relying on sources like BankTrack, court filings, the special report from the UN expert who went to North Dakota, and many, many credible news sources. Ex. F, Dorozenski Dep. 227:20-25, 228:14-230:07; Ex. G, Sweeters Dep. 231:21-232:12, 232:25-234:07; Ex. Q, Wheeler Dep. 270:2-10. *see McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510 (D.C. Cir. 1996) ("[A] publisher's good faith

reliance on previously published reports in reputable sources … precludes a finding of actual malice as a matter of law." (internal quotation marks and citation omitted)). Plaintiffs have failed to establish that Greenpeace, Inc. acted with actual malice in publishing or endorsing the Statements.

3. Plaintiffs presented no evidence that a third party believed any of the Statements were defamatory.

[¶23] Under North Dakota law, "[p]ublication means that the defamatory matter has been communicated by the Defendant to a third person who believes it to be defamatory." C - 9.40 Publication 2014, North Dakota Jury Instructions - Civil (2025 Edition); *see Little v. Spaeth*, 394 N.W.2d 700, 706 (N.D. 1986) (affirming summary judgment on defamation claim where people who heard allegedly defamatory statement did not assert that they understood the statement in a defamatory sense).

[¶24] Plaintiffs presented no evidence of a third party who believed the Statements to be defamatory. The closest that Plaintiffs came to meeting this element was the testimony of law enforcement officers who, when read statements about use of force on peaceful protestors by law enforcement and private security, testified that they were false. Feb. 28 Tr. 119:1-19; Mar. 3 Tr. 81:22-25, 88:18-89:11. But that testimony did not establish that the officers believed the statements to be defamatory as to Plaintiffs (as opposed to, for example, the law enforcement officers themselves). *See Little*, 394 N.W.2d at 706. Nor can any expert witness for Plaintiffs satisfy this element as part of their expert testimony on damages. All other testimony was from Plaintiffs themselves—not a third party. That testimony cannot satisfy this necessary element. Accordingly, under North Dakota law, Plaintiffs' claim fails.

4. Plaintiffs presented no evidence that the Statements were the proximate cause of any damages.

[¶25] The lack of evidence establishing that the Statements were individually or collectively the proximate cause of any harm is fatal to Plaintiffs' claims. *Waite v. Stockgrowers' Credit Corp.*, 249 N.W. 910, 912 (1933) (defamation plaintiff must prove damage was "the direct, immediate and proximate effect of the publication"). There was no evidence presented at trial that any one of the Greenpeace Defendants' Statements was the proximate cause of any specific damage.

[¶26] *i. Refinancing damages.* Neither Plaintiff proved that the Statements were the proximate cause of the delayed refinancing and claimed damages from that delay. Indeed, Energy Transfer could not have suffered such harm, as it was not a party to the construction loan for DAPL (the "Construction Loan"), Trial Ex. 919, nor was it the responsible party for payments to be made on any bonds sold to refinance the Construction Loan, Trial Ex. 245. And even with respect to Dakota Access, there was no evidence of harm at all because the bonds were fully oversubscribed. Mar. 13 Tr. 116:6-12, 128:6-24. The evidence is that Dakota Access chose to delay the refinancing—not that any investor or lender refused to participate based on any one of the Statements. While Plaintiffs argued that banks complained of "headline risk," there is no evidence that headline risk was based upon the alleged Statements by Greenpeace, Inc. Indeed, there was unrefuted testimony of numerous prior publications that independently made substantially the same statements—publications made many months before the first Greenpeace, Inc. Statement. Mar. 13 Tr. 67:3-68:22

[¶27] Regardless, there was no evidence presented at trial that any one of the Greenpeace Defendants was the proximate cause of any claimed damages. Plaintiffs offered no

evidence that any potential refinancing participant abandoned or delayed their participation in the refinancing because of any one of the Statements.

[¶28] In fact, the evidence conclusively established that Plaintiffs chose to delay the refinancing due to concerns with the SRST's litigation against the U.S. Army Corps of Engineers ("USACE")—not something Greenpeace, Inc. said or did. Trial Ex. 973; Trial Ex. 975; Trial Ex. 976; Trial Ex. 978. Where, as here, a plaintiff tries to prove proximate cause of a harm through circumstantial evidence, it must also offer "evidence which excludes other possible causes." *Victory Park Apartments, Inc. v. Axelson*, 367 N.W.2d 155, 164 (N.D. 1985). Here, Plaintiffs failed to present any evidence disproving that concerns over the SRST litigation was the reason for delays in refinancing. That failure means that their efforts to establish proximate cause through circumstantial evidence fails. *Id.*

[¶29] *ii. PR damages.* Plaintiffs also offered no evidence that Greenpeace, Inc. was a proximate cause of the public relations costs that were incurred. The evidence presented at trial established that public relations professionals were hired for reasons unrelated to Greenpeace Inc., and months before the first Statement by Greenpeace, Inc. was published. Ex. I, Mar. 5, 2025 Tr. ("Mar. 5 Tr.") 120:4-22. Plaintiffs never identified a single expense incurred to respond to any specific statement of Greenpeace, Inc. Instead, the only public statements Plaintiffs offered evidence of responding to were those statements by third parties Earthjustice and its attorney, Jan Hasselman, and public statements by the USACE when it was refusing to issue the necessary easement for DAPL to cross at Lake Oahe (which, like the Statements, were perfectly legitimate statements protected by the First Amendment). Ex. J, Granado Dep. 82:03-85:15; Ex. K, L. Coleman Dep. 34:25-35:13.

[¶30] *iii. Non-economic damages.* As a matter of law, the North Dakota Uniform Correction or Clarification of Defamation Act ("UCCDA") precludes Plaintiffs from recovering damages other than provable economic loss because they failed to timely demand a retraction of the allegedly defamatory statements. N.D.C.C. § 32-43-03. Because Plaintiffs are limited to provable economic loss, the award for reputational damages and presumed damages totaling $33,305,700, as well as exemplary damages of $50,000,000, must fail.

[¶31] Even if Plaintiffs' failure to demand retraction under the UCCDA did not bar recovery for these damages, judgment as a matter of law would still be warranted. Under North Dakota law, an award of defamation damages is *never* presumed. Even general damages for reputational harm for libel per se are available *only* to the extent plaintiff proves they are "the direct, immediate and proximate effect of the publication." *Waite*, 249 N.W. at 912. Here, Plaintiffs failed to provide any such evidence. Indeed, Plaintiffs never pled defamation per se, they did not offer an expert on reputation, and when the Defendants sought to introduce evidence of damage to the Plaintiffs' reputation based on other aspects of the permitting, siting, construction and operation of pipelines (including Energy Transfer's prosecution in Pennsylvania), the Court excluded that evidence.

B. Tortious Interference with Business Relations (Count VIII)

[¶32] Plaintiffs' tortious interference claim was based upon alleged damages from (i) interference with Transportation Service Agreements ("TSAs") with customers who were shipping oil through DAPL, and (ii) interference with the Construction Loan and/or the refinancing of the Construction Loan. Ex. L. The jury found in favor of Plaintiffs, apparently adopting Plaintiffs' theory that Greenpeace, Inc. somehow interfered with their relationships with oil shippers, and awarding Plaintiffs Energy Transfer and Dakota Access a combined total

of $80,112,750—which was the amount Plaintiffs claimed in lost profits from the delay in pipeline service—along with another $21,000,000 million in exemplary damages against Greenpeace, Inc. Dkt. 5035, at 14, 30; Ex. L. But to prove a claim for tortious interference with business relations, a plaintiff must demonstrate:

> (1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an independently tortious or otherwise unlawful act of interference by the interferer; (4) proof that the interference caused the harm sustained; and (5) actual damages to the party whose relationship or expectancy was disrupted.

Trade 'N Post L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 36, 628 N.W.2d 707, 717. Plaintiffs failed to satisfy these requirements.[2]

[¶33] *First*, Plaintiff Energy Transfer's tortious interference claim fails from the get-go because it failed to present any evidence of the first essential element—that it had a valid business relationship or expectancy under the TSAs. *See id*. That is because Energy Transfer was not a party to the TSAs for which damages were awarded—the shipping contracts were with Plaintiff Dakota Access. *E.g.*, Trial Ex. PC03-0915; Trial Ex. PC03-1008; Trial Ex. PC03-1055. Accordingly, Energy Transfer had no contract, relationship, or expectancy that could have been interfered with. For that reason alone, the Court should enter judgment in favor of Greenpeace, Inc. on Energy Transfer's tortious interference claim.

[¶34] *Second*, Plaintiffs did not present evidence that Greenpeace, Inc. committed an independently tortious act of interference. Plaintiffs failed to prove their property tort claims.

[2] There are two types of tortious interference claims: intentional interference with contract and tortious interference with prospective business. Because there was no evidence presented at trial that any contract, including the TSAs, was breached, Plaintiffs could not have proved a claim for intentional interference with contract (and they do not appear to contend otherwise). *See Ebel v. Engelhart*, 2024 ND 168, ¶ 26, 11 N.W.3d 10, 20 (intentional interference with contract claim requires proof of breach of contract).

See infra Part III.C. And while the Plaintiffs did not even argue that defamation was an independent tortious act by which the Greenpeace Defendants should be liable for interference with the TSAs, Ex. L, Plaintiffs also failed to prove their defamation claim against Greenpeace, Inc., as explained above. Nor could Plaintiffs rely on a generalized "misinformation campaign" for their tortious interference claim without having proved the elements of defamation.[3] Greenpeace, Inc.'s advocacy campaigns constitute "perfectly acceptable constitutional conduct, things that advocacy organizations like Greenpeace do all the time every day on lots of different issues," and "cannot form the basis of [Dakota Access's] claim." Mar. 10 Tr. 24:16-20.

[¶35] *Third*, no evidence at trial supported the finding that any act by Greenpeace, Inc. was a proximate cause in the delay in completion of the pipeline, either by delaying construction or by causing the USACE to delay in approving construction under Lake Oahe. *See Mr. G's Turtle Mountain Lodge, Inc. v. Roland Twp.*, 2002 ND 140, ¶¶ 26-27, 651 N.W.2d 625, 633 (2002) (affirming summary judgment on tortious interference claim because plaintiff "failed to present any evidence that [the defendant's] letters caused prospective bidders to refrain from bidding"). Indeed, while the jury awarded damages for lost profits purportedly arising from interference with the TSAs (i.e., Dakota Access's contracts with oil shippers), Plaintiffs failed to establish that any customer was unwilling to perform under the TSAs because of any act by

[3] Plaintiffs cannot rely on evidence of entirely lawful, constitutionally protected activity to prove an allegedly unlawful act or scheme. *See Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (First Amendment bars holding defendants liable for constitutionally protected picketing); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-15 (1982) (First Amendment precludes holding defendants liable for constitutionally protected boycott activity). Liability for speech may be imposed for defamatory statements, if the plaintiff proves all of the elements of defamation. But a plaintiff cannot recover damages based on a defendant's non-defamatory speech. *See Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (liability for speech is limited "to certain categories or modes of expression, such as obscenity, defamation, and fighting words." (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992))). It follows that evidence pertaining solely to protected First Amendment activity, other than the alleged defamatory statements, cannot be used to prove Plaintiffs' tortious interference claim.

Greenpeace, Inc. No action by the customers with respect to the TSAs caused the lost profits that Plaintiffs recovered at trial.

[¶36] Instead, the undisputed evidence was that delay in completion of DAPL, and the corresponding delay in shipments of oil under the TSAs, was solely as a result of the USACE's delay in issuing an easement to allow construction to proceed under Lake Oahe. Critically, Plaintiffs did not present evidence of any supposed tortious activity by Greenpeace, Inc. that proximately caused the delay by the USACE in issuing the easement necessary for Dakota Access to complete construction under Lake Oahe. Not only did Plaintiffs fail to present any affirmative evidence of causation, they also did not present "evidence which excludes other possible causes" for the delay—such as the concerns raised by the SRST that led the USACE to decline to issue the easement, as reflected in the USACE's own statements, Trial Ex. 208; Trial Ex. 210; Trial Ex. 211, or actions by one of the thousands of other protestors that could have interfered with the construction schedule. *Victory Park Apartments, Inc.*, 367 N.W.2d at 164. This lack of evidence is fatal to the claim for damages arising from a delay of DAPL's in-service date.

[¶37] The sum total of Plaintiffs' evidence of proximate cause was a self-congratulatory email of a single Greenpeace, Inc. employee suggesting that the protests successfully convinced USACE not to issue the easement without an Environmental Impact Statement ("EIS"). Trial Ex. 1775. Yet this email does nothing more than reflect that one employee *believed* the Standing Rock protests caused USACE not to issue the easement. It is not evidence of the reason the USACE did not issue the easement, because USACE's actual decision-making process is something that Greenpeace, Inc. would have no way of knowing. A Greenpeace, Inc. employee is not an agent of USACE and cannot speak or "admit" a fact on behalf of USACE. *Cf. Gomez*

v. Rivera Rodriguez, 344 F.3d 103, 117-18 (1st Cir. 2003) (municipal employee's hearsay testimony as to the substance of alleged discussions with mayor's wife lacked adequate foundation to be admission of party opponent because wife was not an agent of the mayor).

[¶38] Regardless, holding Greenpeace, Inc. liable under any theory of liability for lobbying the federal government would be unconstitutional because such lobbying is constitutionally protected petitioning activity. *See Hinshaw v. Smith*, 436 F.3d 997, 1003 (8th Cir. 2006) ("[T]he *Noerr-Pennington* doctrine . . . is a defense to liability premised on the defendant's actions of exercising his own private rights to free speech and to petition the government."). Even Plaintiffs' witnesses agreed that communication with the government lobbying for positions is not improper and not a basis for liability—considering that Plaintiffs did their own lobbying of the administration. Ex. M, Mar. 4, 2025 Tr. ("Mar. 4 Tr.") 109:1-13, 111:17-21.

[¶39] If all that were not enough, Plaintiffs also cannot prevail on this theory because a federal statute required the result about which Plaintiffs complain—that the USACE conduct an EIS before issuing the easement Plaintiffs needed to complete DAPL. In *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021), the United States Court of Appeals, while allowing the pipeline to operate, upheld a lower court's decision vacating the easement to drill under Lake Oahe and requiring the USACE to complete an EIS before determining the ultimate placement of DAPL. The EIS process is still ongoing as of this filing.

C. Property-Based Claims (Counts I – VI)

1. Plaintiff Energy Transfer

[¶40] Greenpeace, Inc. is entitled to judgment as a matter of law on Energy Transfer's property-based claims (trespass to land and chattel, conversion, nuisance, and aiding and abetting those torts) for a straightforward reason: Energy Transfer neither pleaded those claims nor presented any evidence that it had any relevant property interest. As explained previously (Br. ISO Greenpeace, Inc.'s Mot. for JMOL, Dkt. 5010, at ¶¶ 6, 12, 17; Mar. 10 Tr. 9:20-10:15, 10:22-11:2), all of the property tort claims in this case require evidence of possession of the land or personal property at issue.[4]

[¶41] Plaintiff Energy Transfer never even attempted to plead that it had property-based claims because it could not satisfy this fundamental requirement. *See* Second Am. Compl. ("SAC"), Dkt. 2836, at 38-42 (asserting Counts I through VI only on behalf of Plaintiff Dakota Access). As a result, Energy Transfer never presented any evidence at trial that it possessed the land allegedly trespassed upon (i.e., by ownership or lease), possessed any construction equipment that was converted or subject to a trespass to chattel, or even held any easements in North Dakota which could support the claims.

[¶42] Nevertheless, the jury somehow found in favor of Energy Transfer on these unpleaded claims and awarded $30,088,272 in compensatory damages and $84,000,000 in

[4] *See G&D Enters. v. Liebelt*, 2020 ND 213, ¶ 17, 949 N.W.2d 853, 858 (civil trespass claim requires that land be "in possession of another"); C - 7.30 Alternative Findings (Conversion) (Illustration) 1986, North Dakota Jury Instructions - Civil (2025 Edition) (for conversion and trespass to chattel, plaintiff must be "the owner [or] the person entitled to possession of the property"); Restatement (Second) of Torts § 821E (1979) ("For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected . . . .").

exemplary damages.[5] Because these claims fail as a matter of law, the Court must set aside the verdict and enter judgment in favor of Greenpeace, Inc. Indeed, even if Energy Transfer had some relevant property interest, this result would be required, as these claims would still fail for the same reasons that Plaintiff Dakota Access's claims in on Counts I through VI fail, as discussed below.

2. Plaintiff Dakota Access

[¶43] Greenpeace, Inc. is entitled to judgment as matter of law on Dakota Access's property-based claims because there was no evidence presented that Greenpeace, Inc. actually engaged in, caused, or aided and abetted any of the alleged property torts, or that any of Dakota Access's damages were caused by Greenpeace, Inc.

a. Trespass to Land (Count I)

[¶44] "A civil trespass occurs where a person intentionally and without a consensual or other privilege . . . enters land in possession of another or any part thereof or causes a thing or third person so to do." *G&D Enters.*, 2020 ND 213, ¶ 17, 949 N.W.2d at 858 (internal quotation marks and citation omitted). The jury found in favor of Dakota Access on the trespass to land claim and awarded $5,851,034 in compensatory damages as well as $10,500,000 in exemplary damages. Dkt. 5035 at 18, 31. But Greenpeace, Inc. is entitled to judgment as a matter of law because Plaintiffs presented no evidence that (1) Dakota Access possessed land that was (2) entered onto by Greenpeace, Inc.

[5] Specifically, the jury awarded $3,761,034 in compensatory damages and $10,500,000 in exemplary damages on Energy Transfer's claims for (1) trespass to land, (2) aiding and abetting trespass to land, (3) trespass to chattel, (4) aiding and abetting trespass to chattel, (5) conversion, (6) aiding and abetting conversion, (7) nuisance, and (8) aiding and abetting nuisance.

[¶45] *First*, the only evidence presented of land any Plaintiff possessed in North Dakota was Dakota Access's lease and subsequent purchase of the Cannonball Ranch. Feb. 27 Tr. 240:3-20. Right of way easements held by Dakota Access cannot support a claim of trespass because an easement is not an exclusive possessory interest in land, and the Court properly instructed the jury in this regard. *Sagebrush Res., LLC v. Peterson*, 2014 ND 3, ¶ 20, 841 N.W.2d 705, 713; Final Jury Instructions, Dkt. 5036, at 12 (Civil Trespass to Land). Therefore, to prevail, Dakota Access was required to establish that Greenpeace, Inc. employees were on the Cannonball Ranch and/or caused others to enter the Cannonball Ranch. But Plaintiffs presented no evidence that any of the six Greenpeace, Inc. employees who went to North Dakota during the Standing Rock protests ever entered Cannonball Ranch, or caused any third party to enter the Cannonball Ranch.

[¶46] *Second*, and in any event, Plaintiffs also presented no evidence of any harm from any alleged trespass by a Greenpeace, Inc. employee. *See Peterson v. Conlan*, 119 N.W. 367, 370 (N.D. 1909) (plaintiff in trespass action can only recover damages "proximately caused by such trespass").

[¶47] To the extent Plaintiffs argue that Greenpeace, Inc. employee Harmony Lambert admitted to running on Dakota Access's easement, Trial Ex. 1171, the trespass claim still fails. First, to repeat, unauthorized presence on an easement cannot be a trespass to land. Second, Plaintiffs presented no evidence that Lambert was ever on the only land Dakota Access leased or owned—the Cannonball Ranch. Third, Plaintiffs presented no evidence of harm beyond pure speculation from Lambert's supposed trespass on an easement—neither actual harm nor consequential harm. *See Anderson v. Meyer Broad. Co.*, 2001 ND 125, ¶ 35, 630 N.W.2d 46, 55

("While, in an appropriate situation, circumstantial evidence may provide an inference of causation, there must be something more than pure speculation or conjecture.")

[¶48] Accordingly, judgment as a matter of law in favor of Greenpeace, Inc. must be entered on this Count.

b. Trespass to Chattel (Count I) and Conversion (Count III)

[¶49] Trespass to chattel is the intentional "dispossession of the property, impairment of the condition, quality or value of the property, loss of use of the property, or other harm." *Sagebrush Res., LLC*, 2014 ND 3, ¶ 19, 841 N.W.2d at 712. Conversion differs from trespass to chattel "only in degree," and constitutes a "complete or very substantial deprivation of possessory rights in the property." *Wilkinson v. United States*, 564 F.3d 927, 932 (8th Cir. 2009) (citation omitted); *see Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 2004 ND 117, ¶ 11, 680 N.W.2d 634, 638 ("Conversion consists of a tortious detention or destruction of personal property, or a wrongful exercise of dominion or control over the property inconsistent with or in defiance of the rights of the owner." (collecting cases)). The jury found in favor of Dakota Access on its trespass to chattel and conversion claims, awarding for each $6,188,375 in compensatory damages plus $10,500,000 in exemplary damages. Dkt. 5035 at 20, 22, 31. But Greenpeace, Inc. is again entitled to judgment as a matter of law because Plaintiffs did not present evidence (1) that Dakota Access possessed any construction equipment, (2) that Greenpeace, Inc. dispossessed Dakota Access of its property or destroyed Dakota Access's property, or caused any third party to do so, or (3) that actual or consequential damages were caused by Greenpeace, Inc.

[¶50] *First*, Plaintiffs presented no evidence that Dakota Access owned or leased any of the construction equipment—and in fact, Plaintiffs' expert witness testified to the fact that the

construction equipment was *not* owned by Dakota Access, but rather by Dakota Access's contractors. *See* Mar. 4 Tr. 206:10-209:6. And if the plaintiff is "neither the owner nor the person entitled to possession of the property alleged to have been converted" or subject to trespass to chattel, the plaintiff cannot prevail. *See* C - 7.30 Alternative Findings (Conversion) (Illustration) 1986, North Dakota Jury Instructions - Civil (2025 Edition). Although Plaintiffs' witness testified that Dakota Access could be entitled to possess the equipment in the event of certain defaults by the construction contractors, there was no evidence such a right to possession ever matured. Feb. 27 Tr. 216:8-217:19; Ex. N, Siguaw Dep. 77:7-81:2.

[¶51] *Second*, Plaintiffs presented no evidence that any Greenpeace, Inc. employee touched or was near any construction equipment—let alone that it dispossessed Dakota Access of any construction equipment, destroyed any equipment, exercised control over any equipment, or otherwise interfered with Dakota Access's use of any equipment (e.g., by vandalizing or locking onto equipment).

[¶52] *Third*, Plaintiffs did not present evidence of the damages caused by any alleged trespass to chattel or conversion by Greenpeace, Inc. Even when a plaintiff has established liability and fault, the plaintiff must "satisf[y] the burden of proof with respect to the damages." C - 70.06 Burden of Proving Damages 2004, North Dakota Jury Instructions - Civil (2025 Edition). Dakota Access did not meet that burden here.

[¶53] For all these reasons, Greenpeace, Inc. is entitled to judgment as a matter of law on Dakota Access's claims of trespass to chattel and conversion.

c. Nuisance (Count V)

[¶54] Nuisance requires proof that the defendant committed an unlawful act which unreasonably interfered with the plaintiff's use and enjoyment of its property. *See* N.D.C.C.

§ 42-01-01 (defining nuisance in part as an act that "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of others," or "[i]n any way renders other persons insecure in life or in the use of property"); *Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992) ("The duty which gives rise to a nuisance claim is the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property."). The jury found in favor of Dakota Access on the nuisance claim, awarding $8,278,375 in compensatory damages plus $10,500,000 in exemplary damages. Dkt. 5035, at 24, 32. Judgment is proper as to Greenpeace, Inc. notwithstanding the verdict because Plaintiffs did not present evidence that (1) Greenpeace, Inc. unreasonably interfered with Dakota Access's property or that (2) any of Plaintiffs' damages were caused by Greenpeace, Inc.

[¶55] *First*, Plaintiffs presented no evidence that Greenpeace, Inc. unreasonably interfered with Dakota Access's use and enjoyment of its land, namely by interfering with Dakota Access's construction activities on Cannonball Ranch and its easements. There is no evidence that any Greenpeace, Inc. employee engaged in any action that caused any unreasonable interference.

[¶56] *Second*, Plaintiffs presented no evidence of claimed damages, nor that any damages were caused by Greenpeace, Inc. To the extent Plaintiffs presented any evidence of a Greenpeace employee on or near an easement, it was of Harmony Lambert running on the easement with a windsock in tow. Trial Ex. 1171. But Plaintiffs presented no evidence of damage from this "interference." To the extent Plaintiffs argue that there is evidence that Greenpeace, Inc. employee Christina Alexa Liakos was arrested for blocking a public roadway, no claim can stand based on that action because there is no evidence that Liakos's presence on the road—along with approximately 30 other people—blocked Dakota Access from accessing

construction equipment or stopped its construction activities. There was no evidence presented of construction being delayed, and Deputy Chief Stugelmeyer testified that there were multiple other roads that accessed the location of the construction equipment. Mar. 3 Tr. 142:20-25.

[¶57] For all these reasons, Greenpeace, Inc. is entitled to judgment as a matter of law on this Count.

d. Aiding and Abetting Property Torts (Count II – Aiding and Abetting Trespass to Land and Chattel; Count IV – Aiding and Abetting Conversion; Count VI – Aiding and Abetting Nuisance)

[¶58] Aiding and abetting is not "a separate theory of recovery," but rather a "way[] in which a person may become jointly liable for another's unlawful conduct." 15A Thomas Muskus & Karl Oakes, *Corpus Juris Secundum Conspiracy* § 3. A defendant is liable for aiding and abetting an unlawful act if:

> (a) [an unlawful act] was committed against the plaintiff by another party;
>
> (b) the defendant knew that the other party's conduct was wrongful;
>
> (c) the defendant knowingly and substantially assisted in the commission or concealment of the [unlawful act]; and
>
> (d) the plaintiff suffered economic loss as a result.

Restatement (Third) of Torts: Liab. for Econ. Harm § 28 (2020); *see also* Final Jury Instructions, Dkt. 5036, at 13 (Aiding and Abetting Trespass to Land); 15 (Aiding and Abetting Trespass to Chattel); 17 (Aiding and Abetting Conversion); 19 (Aiding and Abetting Nuisance). The jury found in favor of Dakota Access on all claims of aiding and abetting, awarding a combined total of $26,506,159 in compensatory damages and $42,000,000 in exemplary damages.[6] Dkt. 5035,

[6] The jury awarded $5,851,034 plus $10,500,000 in exemplary damages for aiding and abetting trespass to land; $6,188,375 plus $10,500,000 in exemplary damages for aiding and abetting trespass to chattel; $6,188,375 plus

at 19, 21, 23, 25, 31-32. Greenpeace, Inc. is entitled to judgment on these claims because Plaintiffs did not present evidence that: (1) Greenpeace, Inc. knew a third party was committing or intended to commit a tortious act; (2) Greenpeace, Inc. knowingly aided or encouraged the tortious act; or (3) Dakota Access suffered harm from a known tortious act that Greenpeace, Inc. knowingly aided or encouraged.

[¶59] *First*, Plaintiffs did not present evidence that Greenpeace, Inc. knew that any third party was planning to commit, and then actually did commit, any specific tortious act against Dakota Access. Instead, Plaintiffs put on evidence of Greenpeace, Inc. providing supplies and assisting in non-violent direct action trainings led by IP3. But Plaintiffs' evidence left a crucial gap: there was no evidence that Greenpeace, Inc. knew that any particular third party it supported planned to commit or did commit any specific tortious action.

[¶60] *Second*, Plaintiffs presented no evidence that Greenpeace, Inc. knowingly aided or encouraged a third party to commit a tortious act against Dakota Access. With respect to the trespass claim, for example, there was no evidence that Greenpeace, Inc. controlled, encouraged, or solicited anyone else to enter the Cannonball Ranch. Mere statements encouraging people to support the SRST, provide no basis to infer knowledge or direction of anyone's commission of trespass. Greenpeace, Inc.'s support for lawful protest cannot give rise to liability.

[¶61] The same is true with regard to Plaintiffs' arguments of aiding and abetting based on Greenpeace, Inc. providing camping supplies, loaning a truck that supplied solar power, and supporting non-violent direct action trainings—Plaintiffs presented no evidence Greenpeace, Inc. knew that anyone who received this support intended to commit, and did commit, any alleged

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$10,500,000 in exemplary damages for aiding and abetting conversion; and $8,278,375 plus $10,500,000 in exemplary damages for aiding and abetting nuisance.

tortious act against Dakota Access. Instead, Plaintiffs merely argued that support was provided and that certain protestors engaged in tortious conduct, without any evidence connecting those protestors to any action of Greenpeace, Inc. Indeed, witnesses testified that there were other peaceful individuals who provided such materials to protestors, like yurts and stoves. Mar. 13 Tr. 172:23-174:2.

[¶62] The argument that scouting activities of Greenpeace, Inc. employee David Khoury constituted support for subsequent tortious acts fails as a matter of law. Plaintiffs failed to establish a single instance of property interference or destruction from any scouting by Mr. Khoury. Although Plaintiffs argued that two emails supported a claim of aiding and abetting, one was an email internal to Greenpeace, Inc. of an event which did not happen (Trial Ex. 1172), and the second discussed the status of the horizontal directional drilling on the Cannonball Ranch to determine whether Plaintiffs were in compliance with a court order precluding drilling under USACE land—not any action or tortious conduct (Trial Ex. 1173; *see also* Ex. O, Tilsen Dep. 97:24-98:15). Once again, lacking crucial evidence of any actual event taking place, or that Greenpeace, Inc. knew that any third party intended to and did commit any tortious act based on Mr. Khoury's scouting, Plaintiffs resorted to arguments of activities by unknown third parties, speculating that their actions were supported by Greenpeace, Inc. This kind of speculation and conjecture is insufficient as a matter of law. *See Anderson,* 2001 ND 125, ¶ 35, 630 N.W.2d at 55.

[¶63] Plaintiffs also presented no evidence, actual or implied, that Greenpeace, Inc. knew that Daniel T'seleie, Nick Tilsen, or Wanikiya Loud Hawk intended to use lockboxes to attach to equipment. Trial Ex. PC33-4440; Trial Ex. PC33-4442; Trial Ex. PC33-4419; Trial Ex. 1014. Tilsen and Loud Hawk were not part of the IP3 delegation Greenpeace, Inc. financially

supported, and in any event, Greenpeace, Inc. supported IP3 for the purpose of providing nonviolent direct action training—not to engage in use of lockboxes. Nor did Plaintiffs present evidence that Greenpeace, Inc. provided the lockboxes or otherwise directed, controlled, or solicited those individuals to engage in the conduct. Indeed, the lockboxes Greenpeace, Inc. supplied were designed to lock people together, not lock people to equipment, and there is no evidence those were used on any construction equipment. Without such evidence, the claims of aiding and abetting fail.

[¶64] *Third*, Plaintiffs failed to prove that Greenpeace, Inc. proximately caused Dakota Access's damages. Plaintiffs argued that every protest activity at Standing Rock that involved trespass, nuisance, violence, or property damage was at the insistence of Greenpeace, Inc. But Plaintiffs failed to present any evidence establishing that the action of *any* third party was caused by an act of assistance by Greenpeace, Inc.—let alone every third party that participated at Standing Rock. Moreover, Plaintiffs failed to present any evidence that Greenpeace, Inc. knew that any particular third party intended to commit tortious acts against Plaintiffs.

[¶65] Plaintiffs also failed to tie any of Dakota Access's costs to any specific protest action, and still less to any tortious action of a third party that Greenpeace, Inc. knowingly controlled, directed, or supported. To the contrary, every one of the Plaintiffs' witnesses testified that they had no evidence of Greenpeace, Inc.'s involvement in events on the ground. While Plaintiffs presented evidence of property destruction and interference with their construction efforts, no foundation was ever laid establishing a connection to Greenpeace, Inc.'s knowing support of these actions.

[¶66] Finally, to the extent Plaintiffs tried to prove proximate cause for its aiding and abetting torts by circumstantial evidence, Plaintiffs were required to present "evidence which

excludes other possible causes." *Victory Park Apartments, Inc.*, 367 N.W.2d at 164. The property damage Dakota Access complained of could have been caused by any number of the 100,000 individuals at Standing Rock who had no relationship with Greenpeace, Inc.—including those who brought their own supplies, conducted their own scouting and ran their own trainings. Yet Plaintiffs presented no evidence disproving those alternative causes or tortfeasors. That left the jury only to speculate impermissibly on whether the damages were attributable to Greenpeace, Inc. *See Anderson*, 2001 ND 125, ¶ 35, 630 N.W.2d at 55.

[¶67] Because there was no evidence to support Dakota Access's aiding and abetting claims, Greenpeace, Inc. is entitled to judgment as a matter of law.

D. Civil Conspiracy (Count IX)

[¶68] Civil conspiracy is not an "independent tort," but is instead a "theory of vicarious liability" by which one party may be liable for the actions of another. *Shopoff Advisors, LP v. Atrium Circle, GP*, 596 S.W.3d 894, 908 (Tex. App. 2019). To maintain a claim for civil conspiracy the plaintiff must prove the following elements:

(a) the defendant made an agreement with another to commit a wrong;

(b) a tortious or unlawful act was committed against the plaintiff in furtherance of the agreement; and

(c) the plaintiff suffered economic loss as a result.

Restatement (Third) of Torts: Liab. For Econ. Harm § 27.

[¶69] At trial, Plaintiffs relied only on the property torts (Counts I through VI) to support a conspiracy, and alleged only that the Defendants conspired with each other—not with a third party. SAC ¶ 135; Ex. L. The jury found in favor of Plaintiffs on the civil conspiracy claim, awarding $439,895 in compensatory damages and $10,500,000 in exemplary damages to

each Plaintiff against each of Greenpeace, Inc. and Greenpeace International. Dkt. 5035, at 10, 16, 26, 32. But Greenpeace, Inc. is entitled to judgment as a matter of law on these claims for at least four reasons.

[¶70] *First*, the civil conspiracy claim fails as to both Plaintiffs because they did not prove any underlying property tort, or any other tort including defamation, connected to any Greenpeace Defendant. *See S&T Bank, Inc. v. Advance Merch. Servs., LLC*, 2024-Ohio-4757, at ¶ 62 ("The element of 'resulting in damages' means that, if a plaintiff suffers no actual damages from the underlying unlawful act, there can be no successful civil conspiracy action." (citation omitted)).

[¶71] *Second*, Plaintiffs did not present any evidence that could support a finding the Defendants entered into an agreement to commit the alleged property torts (or any other alleged tort, including any agreement to defame Plaintiffs). Instead, Plaintiffs relied exclusively on two emails Greenpeace, Inc. sent to Greenpeace International and other groups inside the Greenpeace network in late October and early November 2016. But these emails asked for nothing more than a show of support. Trial Ex. 1721; Trial Ex. 1456. These exhibits do not reflect a meeting of the minds to undertake any action to "commit a wrong"—let alone the activities alleged in Counts I through VI. Even if arguendo these emails entered any sort of agreement (they do not), at most it was to engage in constitutionally protected advocacy by simply sharing information about what was happening at Standing Rock. *See Williams v. Flagler Humane Soc'y, Inc.*, Case No. 3:12-cv-767-J-34MCR, 2013 WL 12358254, at *10 (M.D. Fla. Dec. 11, 2013) (evidence of a lawful agreement insufficient to establish existence of conspiracy). On this basis alone, the conspiracy claims must fail.

[¶72] *Third*, the civil conspiracy claim also fails to the extent the damages are duplicative. Civil conspiracy is not "a separate theory of recovery," but rather a way in which a person may become jointly liable for another's unlawful conduct. Muskus & Oakes, *supra*, § 3. Thus, "[b]ecause civil conspiracy cannot support an independent cause of action, it cannot have its own measure of damages. Instead, damages are assessed based on the harm caused by the underlying tortious activity." *Anderson v. Anderson Tooling, Inc.*, 928 N.W.2d 821, 826 (Iowa 2019). The jury awarded the Plaintiffs 100% of their claimed damages for the property torts—$83,100,590 for security costs, contractor costs, and the purchase of the Cannonball Ranch. Ex. L; Dkt. 5035 at 2-9, 18-25. Plaintiffs cannot, as a matter of law, recover damages for civil conspiracy when they already have been awarded damages for the underlying torts. *See Chandless v. Borg*, 93 A.2d 651, 660 (N.J. Super. Ct. Law Div. 1952) (barring recovery of damages for conspiracy to defame when party was awarded damages for the defamation itself).

[¶73] *Fourth*, and similarly, the damages are also duplicative of the aiding and abetting claims because both civil conspiracy and aiding and abetting are premised on the property torts. Plaintiffs may not recover for both the civil conspiracy and aiding and abetting claims. *See In re Platinum-Beechwood Litig.*, 426 F. Supp. 3d 14, 21 (S.D.N.Y. 2019) (dismissing civil conspiracy claim as duplicative of aiding and abetting claim because both sought to hold defendant secondarily liable for underlying tort).

E. Plaintiffs Did Not Prove Any of Their Damages Claims

[¶74] Plaintiffs claimed they suffered six categories of compensatory damages: (1) security costs; (2) property acquisition costs; (3) contractor costs; (4) lost profits from the service delay of the pipeline; (5) public relations costs; and (6) refinancing costs. In total, Plaintiffs claimed $266,649,578 in compensatory damages. Ex. L. Plaintiffs also sought exemplary

damages. The jury awarded compensatory damages across all six categories, totaling $264,890,020, as well as $402,000,000 in exemplary damages.

[¶75] Plaintiffs and their experts conceded that in a case involving hundreds of millions of dollars, they were unable to identify any evidence establishing that even one dollar of these claims was attributable to any Greenpeace Defendant. The total failure to prove their case is all the more striking given the fact that Plaintiff Dakota Access paid its security contractors tens of millions of dollars to monitor the protests on a minute-by-minute basis, and Plaintiffs put into evidence tens of thousands of pages of security reports, police records, and internal corporate records. The jury was therefore asked to do what Plaintiffs and their experts could not—which was to prove the Greenpeace Defendants caused the claimed damages. This further explains Plaintiffs' strenuous objection to Defendants' proposed verdict form that required the jury to award damages "proximately caused" by a Greenpeace Defendant. Instead, without any findings of proximate cause, and no evidence or expert testimony, the jury was left to speculate.

[¶76] It is axiomatic that this violates North Dakota law. "The trier of fact must be furnished data sufficient to determine damages without resort to mere speculation or conjecture." *Johnson v. Monsanto Co.*, 303 N.W.2d 86, 95 (N.D. 1981); *see also Swain v. Harvest States Coops.*, 469 N.W.2d 571, 575 (N.D. 1991) ("An award of damages for tort or breach of contract must not be based on conjecture or speculation and must be proximately caused by either the tort or the breach of contract."). Nor does so-called circumstantial evidence cure this failure of proof. "While, in an appropriate situation, circumstantial evidence may provide an inference of causation, there must be something more than pure speculation or conjecture." *Anderson*, 2001 ND 125, ¶ 35, 630 N.W.2d at 55. Proving proximate cause by circumstantial evidence "requires that some affirmative evidence be presented from which the jury may infer that the injury

resulted from a cause for which the defendant was responsible, in addition to evidence which excludes other possible causes." *Victory Park Apartments, Inc.*, 367 N.W.2d at 164.

[¶77] Plaintiffs' evidence did not demonstrate a causal link between any specific action of Greenpeace, Inc. and any specific damage Plaintiffs supposedly suffered. To award any damages to either Plaintiff for any specific action of Greenpeace, Inc. thus required the jury to resort to speculation and conjecture. Because that is impermissible, the verdict must be set aside and judgment as a matter of law should be entered in favor of Greenpeace, Inc.

1. Plaintiffs Failed to Prove Any Damages by Each Plaintiff as to Each Defendant

[¶78] As an initial matter, the entire damages award must be set aside because Plaintiffs failed to distinguish between the two Plaintiffs and the three Defendants. Plaintiffs were required to prove which damages were suffered by which Plaintiff, and which damages as to each Plaintiff were proximately caused by which Defendant. *See* Final Jury Instructions, Dkt. 5036, at 7 (Proximate Cause) ("You cannot find for *a* Plaintiff unless it proves that *a* Defendant was a proximate cause of *that Plaintiff's* injury." (emphasis added)); *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 406-07 (8th Cir. 2004) (holding that plaintiffs' negligence claim failed because the evidence did not provide a means of distinguishing between two defendants, either of whom could have been the but-for cause of plaintiffs' harm). Without such proof, the jury was impermissibly left to speculate on the amount of damages awarded to each Plaintiff and caused by each Defendant. *See Anderson*, 2001 ND 125, ¶ 35, 630 N.W.2d at 55. Accordingly, judgment as a matter of law must be entered in favor of Greenpeace, Inc.

2. Security Costs

[¶79] Plaintiffs claimed they incurred unforeseen security costs due to the protests. In calculating this number, Plaintiffs' experts simply assumed Greenpeace, Inc. caused all of the

damages. Mar. 4 Tr. 255:1-11. Plaintiffs did not tie any of these security costs to any specific protest action, let alone to any unlawful action by Greenpeace, Inc. or that Greenpeace, Inc. knowingly supported, or any agreement to commit property torts entered into by any Greenpeace Defendant. *See Johnson*, 303 N.W.2d at 95. Plaintiffs' claim even included costs incurred before and after the Standing Rock protests and costs incurred in other states. *E.g.*, Feb. 27 Tr. 89:21-90:2; Trial Ex. PC26; Trial Ex. PC27.

[¶80] And even if Plaintiffs had provided some affirmative evidence of causation, they were then also required to present "evidence which excludes other possible causes." *Victory Park Apartments, Inc.*, 367 N.W.2d at 164. The security costs Plaintiffs complained of could have been caused by the thousands of other protestors at Standing Rock who arrived even before Greenpeace, Inc. did, but Plaintiffs presented no evidence disproving this alternative cause. Plaintiffs also failed to distinguish among any of the Greenpeace Defendants or any other actors. *See Baxter Healthcare Corp.*, 380 F.3d at 406.

3. Property Costs

[¶81] Plaintiffs claimed they incurred costs for the purchase of Cannonball Ranch due to the protests so that they would be able to pursue legal action against trespassers on the land. In calculating these costs, Plaintiffs' experts again simply assumed Greenpeace, Inc. caused all of the damages. Mar. 5 Tr. 111:24-112:19, 125:23-126:6. Plaintiffs failed to prove that any Greenpeace, Inc. employee ever set foot on Cannonball Ranch or caused or encouraged others to do so, thereby making it necessary for Dakota Access to purchase Cannonball Ranch. Plaintiffs also failed to present evidence disproving any alternative causes of their property costs, such as the thousands of independent Standing Rock protestors. *See Victory Park Apartments, Inc.*, 367 N.W.2d at 164. Nor have Plaintiffs distinguished among any of the Greenpeace Defendants or

any other actors with respect to causation of damages. *See Baxter Healthcare Corp.*, 380 F.3d at 406.

[¶82] The jury awarded $8,360,000 for the purchase of the Cannonball Ranch. Yet, Dakota Access did not enter into evidence a deed or other legal record that it even owned the property. Nor could it. Ownership of ranchland by a corporation or LLC is prohibited by North Dakota law. *See* N.D.C.C. § 10-06.1-02. Even if Dakota Access had demonstrated its (illegal) ownership of Cannonball Ranch (it did not), Dakota Access never established damages. The Court excluded expert testimony regarding the valuation of the property at the time of purchase. Mar. 5 Tr. 102:12-104:10. Nor did Dakota Access put evidence in the record to establish the current value of the property making it impossible to establish what if any loss was incurred. As it did throughout, the jury purported to provide damage calculations down to the dollar ($8,360,000) without competent evidence.

4. Contractor Costs

[¶83] Plaintiffs claimed they incurred contractor costs due to construction delays caused by the protests, blaming the Defendants for 100% of these costs. But Plaintiffs did not tie any delay or any specific contractor cost to any specific protest action, let alone to any tortious action by Greenpeace, Inc. or a tortious action that Greenpeace, Inc. knowingly supported, or any agreement to commit property torts entered into by any Greenpeace Defendant. No fact witness attributed causation of any specific damage to Greenpeace, Inc. Plaintiffs also again failed to present "evidence which excludes other possible causes." *Victory Park Apartments, Inc.*, 367 N.W.2d at 164. And Plaintiffs again failed to distinguish among Greenpeace, Inc. or any other actors. *See Baxter Healthcare Corp.*, 380 F.3d at 406.

5. Lost Profits from Service Delay

[¶84] Plaintiffs claim they suffered lost profits due to the five-month delay in the operation of DAPL from January 1, 2017, to June 1, 2017. As explained above, however, Plaintiffs presented no evidence establishing that any act by Greenpeace, Inc. was a substantial factor in any construction delays or in the USACE's decision-making. *See supra* ¶¶ 34-38.

6. Public Relations Costs

[¶85] Plaintiffs claim they incurred public relations or campaign management costs due to bad publicity surrounding the construction of DAPL. In calculating this number, Plaintiffs' experts again assumed Greenpeace, Inc. caused the damages. Mar. 5 Tr. 111:24-112:19; 125:23-126:6. Plaintiffs did not call any witness who tied these costs to any statement published or endorsed by Greenpeace, Inc. (much less to the nine Statements attributed to Greenpeace, Inc.). *See Johnson*, 303 N.W.2d at 95. Indeed, the only statements specifically identified as those that Plaintiffs had to respond to were those by Earthjustice and its attorney, Jan Hasselman, and public statements by the USACE when it was refusing to issue the necessary easement for DAPL to cross at Lake Oahe. *See supra* ¶ 28.

7. Refinancing Costs

[¶86] Plaintiffs claim they suffered damages from the delayed refinancing of the Construction Loan. In calculating this number, Plaintiffs' experts again assumed Greenpeace, Inc. caused the damages. Ex. P, Mar. 7, 2025 Tr. 99:23-100:8; 103:16-104:15. Plaintiffs presented no evidence from any bank or financial institution that it took any action because of the Statements attributed to Greenpeace, Inc., much less the Statements in the BankTrack letters directed toward banks. Neither Hayse nor Leathers was able to establish any link whatsoever between any statement by a Greenpeace Defendant and the delay in the refinance. Indeed, as

Hayse testified, the evidence showed that Plaintiffs delayed the refinancing due to the concerns over the unrelated litigation between the SRST and the USACE—not anything Greenpeace, Inc. said or did. *See supra* ¶ 27. Plaintiffs certainly did not, as they were required to do, disprove all other causes of the lost financing, including the SRST litigation—which was the only basis ever stated in Plaintiffs' documents. *See Victory Park Apartments, Inc.*, 367 N.W.2d at 164.

8. Exemplary Damages

[¶87] Because there is no evidence to support any of Plaintiffs' claims against the Greenpeace Defendants, exemplary damages are also improper. *See Rodenburg L. Firm v. Sira*, 2019 ND 205, ¶ 18, 931 N.W.2d 687, 691 ("A claim for exemplary damages is derivative of another cause of action, is not an independent claim, and 'no award of exemplary damages may be made if the claimant is not entitled to compensatory damages.'" (quoting N.D.C.C. § 32-03.2-11(4))).

[¶88] But even assuming that Plaintiffs had presented evidence that could support any of their claims, the jury's exemplary damages awards cannot stand. Most significantly, *none of the evidence was related to the alleged conduct underlying Energy Transfer's claims*. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) ("[I]t is crucial that a court focus on the conduct related to the plaintiff's claim rather than the conduct of the defendant in general."). The exemplary damages award fails on this basis alone. In any event, Plaintiffs' evidence did not rise to the level of "clear and convincing evidence" that Greenpeace, Inc. acted with "actual malice," defined as "an intent with ill will or wrongful motive to harass, annoy, or injure another person," with respect to any of the claimed torts. N.D.C.C. § 32-03.2-11; *Zander v. Morsette*, 2021 ND 84, ¶ 31, 959 N.W.2d 838, 846 (citation omitted). The handful of off-hand comments made by lower-level Greenpeace, Inc. employees about Energy Transfer and its CEO cannot

constitute actual malice under the statute. Accordingly, exemplary damages were impermissible as a matter of law.

IV. CONCLUSION

[¶89] For the foregoing reasons, Greenpeace, Inc. respectfully requests that the Court grant its Renewed Motion for Judgment as a Matter of Law and enter Judgment against Plaintiffs on Counts I through IX and all of their damages claims.

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