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 DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S OCTOBER 28 MEMORANDUM OPINION**

[¶1] Greenpeace, Inc., Greenpeace International ("International"), and Greenpeace Fund, Inc. ("Fund"; collectively, the "Greenpeace Defendants") respectfully move for narrow reconsideration of the Court's Memorandum Opinion dated October 28, 2025 (Dkt. No. 5321) (the "Memorandum Opinion") on certain post-trial motions filed by the parties. The Greenpeace Defendants do not ask the Court to revisit any issue the Court actually decided. Rather, reconsideration is warranted because the Memorandum Opinion did not address three of the Greenpeace Defendants' key arguments: (1) International is not subject to personal jurisdiction; (2) the record contains no evidence that the allegedly defamatory statements were made with actual malice; and (3) the damages imposed against International and Fund vastly exceeded any harm they could have possibly caused.

[¶2] These omissions are particularly significant because the Court itself recognized that the sole possible basis for imposing any liability on International and Fund was their co-signing one BankTrack letter that contained two of the nine defamatory statements. *E.g.*, Mem.

Op. 10.[1] As a result, International is not subject to personal jurisdiction in North Dakota, and no evidence could support any finding that either Fund or International published with actual malice, an element necessary for them to be liable for defamation. International and Fund also cannot have caused the $86,714,200 in compensatory damages that the Court's order would impose upon them simply by being two of 500 signatories on one letter containing two defamatory statements. Accordingly, the Greenpeace Defendants respectfully request that the Court resolve these outstanding issues now and issue an amended opinion.[2]

I. BACKGROUND

[¶3] A jury trial began in this case on February 27, 2025. After Plaintiffs rested, the Greenpeace Defendants filed initial motions for judgment as a matter of law ("JMOL") on March 10, 2025, which the Court denied from the bench. Dkt. No. 5193, at 30. The jury returned a verdict on March 19, 2025, awarding Plaintiffs compensatory and exemplary damages against each defendant. Dkt. No. 5035. The Greenpeace Defendants each filed a motion to reduce damages on March 29, 2025, and a renewed JMOL on April 16, 2025.

[¶4] The Court's Memorandum Opinion granted in part and denied in part the renewed JMOLs (and ruled on other post-trial motions). As relevant here:

- The Court denied Greenpeace International's JMOL on all claims for which the jury issued a verdict against it (other than defamation *per se*, which the Court found to be duplicative of the defamation claim).[3] Dkt. 5321, at 7-15. With respect to the conspiracy verdict, the Court concluded that the "jury found [International] did conspire based on its signature on the [November 30, 2016,] BankTrack letter, and

[1] Fund maintains that, consistent with undisputed record evidence, Annie Leonard acted only for Greenpeace, Inc. when she signed the BankTrack Letter.

[2] While this Motion only addresses these three issues, the Greenpeace Defendants reserve all rights to make any other arguments challenging the Court's Memorandum Opinion and/or the jury's verdict.

[3] One of the claims on which the Court denied judgment is the civil conspiracy claim. A motion for clarification of the Court's analysis of the conspiracy claim and assessment of conspiracy damages is currently pending.

little more." *Id.* at 10. The Court did not address International's arguments on personal jurisdiction.

- As to Fund, the Court determined that sufficient evidence only existed to hold Fund liable for statements signed by Annie Leonard on behalf of Greenpeace USA. *Id.* As with International, this only extends to the two statements in the November 30, 2016, BankTrack letter—the only statements that Ms. Leonard signed.

- The Court denied JMOL on the defamation claim and preserved the jury's award of compensatory damages for defamation against all defendants. Dkt. No. 5321, at 8-10, 15-16. The Court did not analyze the required element of actual malice as to any of the Greenpeace Defendants.

- The Court also did not address the arguments that neither International nor Fund could have been responsible for all the compensatory damages imposed against them.

The Greenpeace Defendants now ask the Court to reconsider these conclusions.

II. ARGUMENT

[¶5] Prior to final judgment, "interim or interlocutory orders are subject to revision or reconsideration at any time." *Hoffman v. Hoffman*, 2023 ND 18, ¶ 11, 985 N.W.2d 683. The restrictions that apply to reconsideration of final judgments under Rule 60 do "not apply to interlocutory judgments and orders." *Ceynar v. Barth*, 2017 ND 286, ¶ 7, 904 N.W.2d 469 (citing *Cumber v. Cumber*, 326 N.W.2d 194, 195 (N.D. 1982)). Instead, "the district court may correct" itself whenever it "is convinced that it incorrectly decided a legal question in an interlocutory ruling." *Id.* at ¶ 7 (quoting *Strom-Sell v. Council for Concerned Citizens, Inc.*, 1999 ND 132, ¶ 12, 597 N.W.2d 414).

[¶6] The district court abuses its discretion "when it fails to address nonfrivolous issues presented to the court." *Hilgers v. Hilgers*, 2004 ND 95, ¶ 25, 679 N.W.2d 447 (concluding that "district court abused its discretion in failing to reconsider and address" issues raised by defendant, which he had raised in numerous motions before the court). Courts across the country have thus recognized that a motion for reconsideration must be granted when the

court failed to address a previously raised issue. *See, e.g.*, *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 751 (7th Cir. 1995) (vacating decision of district court because court refused to reexamine its previous ruling that failed to address party's argument); *Collison v. Int'l Chem. Workers Union, Loc. 217*, 34 F.3d 233, 236-37 (4th Cir. 1994) (reversing district court's denial of motion for reconsideration of the court's order granting summary judgment without addressing some of the party's claims, noting that "[w] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821))); *Garziano v. La. Log Home Co.*, 569 F. App'x 292, 300 (5th Cir. 2014) (reversing denial of motion for reconsideration because district court committed legal error by "fail[ing] to address a key legal argument"); *Pellegrino v. United Parcel Serv., Inc.*, No. 7:08-CV-00180-RBH, 2010 WL 11531442, at *2 (D.S.C. May 19, 2010) (granting motion for reconsideration for failure to address defendant's argument on dispositive element, and then addressing that argument and granting summary judgment for defendant); *Bryant v. Nicholson*, 20 Vet. App. 144, at *2 (2005) (granting motion for reconsider based on court's failure to address party's argument).

[¶7] Greenpeace Defendants ask the Court to reconsider its Memorandum Opinion because it failed to address three nonfrivolous—indeed, meritorious—arguments the Greenpeace Defendants raised.

A. The Court Should Grant Dismissal to International on All Claims Because It Is Not Subject to Personal Jurisdiction

[¶8] As International has consistently explained, the Court's exercise of personal jurisdiction over International does not comport with basic requirements of due process. While this Court has not yet addressed this question, personal jurisdiction is an issue for the court, not

the jury, to decide. *Creative Calling Sols., Inc. v. LF Beauty Ltd*., 799 F.3d 975, 979 (8th Cir. 2015). And even where a plaintiff has survived dismissal of its complaint by alleging facts that might establish personal jurisdiction, the plaintiff still "bears the burden of proof on the issue of personal jurisdiction, and must establish jurisdiction by a preponderance of the evidence at trial or when the court holds an evidentiary hearing." *Id.* (citing *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th Cir. 1991)).

[¶9] It is therefore up this Court to resolve whether Plaintiffs met their burden of proof. It should find Plaintiffs did not come close to meeting that burden. As this Court's order reflects, International's sole relevant act was co-signing BankTrack's open letter calling on certain banks, none of which were based in North Dakota, to address the concerns of the Standing Rock Sioux Tribe. And as the federal district court previously determined, that is not enough to subject BankTrack, the actual author of this letter, to suit in North Dakota. *See Energy Transfer Equity, LP v. Greenpeace Int'l*, No. 1:17-Cv-00173-BRW, 2018 WL 4677787, at *5 (D.N.D. July 24, 2018). The same conclusion necessarily follows for International, a mere co-signer of that same letter. While Plaintiffs have attempted to assert that Greenpeace International created minimum contacts through its purported participation in a conspiracy with Greenpeace, Inc., this Court's order recognizing the limited scope of any such conspiracy—namely, as being "based on [International's] signature on the BankTrack letter, and little more" (Mem. Op. 10, 10)—forecloses that contention.

1. International Has No Minimum Contacts With North Dakota

[¶10] "To satisfy due process concerns, the nonresident defendant must have sufficient minimum contacts with North Dakota so the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice." *Ensign v. Bank of Baker*, 2004 ND 56,

¶ 9, 676 N.W.2d 786 (citation omitted). Where, as here, a plaintiff attempts to establish personal jurisdiction over a foreign defendant based on its purportedly tortious actions outside the forum state, the U.S. Supreme Court has established a three-part test (the "*Calder* effects test") asking whether the "defendant's acts (1) were intentional, (2) were uniquely or expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered—and which the defendant knew was likely to be suffered—[in the forum state]." *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010) (alteration in original) (citation omitted); *accord Northstar Founders, LLC v. Hayden Cap. USA, LLC*, 2014 ND 200, ¶¶ 36-37, 855 N.W.2d 614 (assessing whether "intentional actions" were "purposely directed" at North Dakota resident that was "the focal point of the challenged conduct and the harm allegedly suffered").

[¶11] Plaintiffs presented no evidence that could satisfy these standards. Instead, the evidence at trial made clear that International's sole relevant act was co-signing the BankTrack letter. That open letter, again, was drafted by BankTrack, an organization based in the Netherlands, and it called on certain banks—none of which were based in North Dakota—to address the concerns of the SRST. Dkt. No. 3809. The federal district court previously held that BankTrack itself could not be subjected to the jurisdiction of a court in North Dakota based on its publication of this letter. *Energy Transfer*, 2018 WL 4677787 at *5. BankTrack posted the letter, not International.[4] International's actions in simply being one of more than 500 other signatories to this letter cannot possibly have created the requisite minimum contacts with North Dakota.

[4] *See* https://www.banktrack.org/news/global_call_on_banks_to_halt_loan_to_dakota_access_pipeline.

[¶12] To the contrary, the federal court's straightforward conclusion is fully applicable here for at least two independent reasons. *First*, in signing this letter, International did nothing to "expressly aim" its conduct at North Dakota. *Arden*, 614 F.3d at 796. Instead, International (an NGO in the Netherlands) simply joined another entity in the Netherlands (and hundreds of other signees) in one letter communicating with banks outside North Dakota about their relationship with entities based and incorporated outside North Dakota. Dkt. No. 3809. Even assuming this letter could have later had downstream effects ultimately felt in North Dakota, "mere effects in the forum state are insufficient to confer personal jurisdiction." *Arden*, 614 F.3d at 797. Rather, as the U.S. Supreme Court has held, the focus must be on the defendant's contacts with the forum state itself. *Walden v. Fiore*, 571 U.S. 277, 290 (2014) (holding defendant who knew plaintiff resided in Nevada and signed an affidavit resulting in seizure of plaintiff's property was insufficient to establish personal jurisdiction in Nevada). International's actions in signing a letter to banks in New York, California, and abroad may have been expressly aimed at those fora, but it was not aimed at North Dakota.

[¶13] *Second*, Plaintiffs also cannot show that the "brunt" of any "harm" resulting from this letter was "suffered" in North Dakota, let alone that International knew the harm was likely to be suffered in this state. *Arden*, 614 F.3d at 796. Even assuming Plaintiffs presented evidence that the BankTrack letter caused them harm (and they did not), that harm would have been damage to their reputation and increased costs in refinancing a construction loan. These were not harms suffered in North Dakota because no Plaintiff is located in North Dakota. *Frazier v. Eagle Air Med Corp.*, No. 3:21-CV-136, 2022 WL 1303070, at *7 (D.N.D. May 2, 2022) (no personal jurisdiction where "the brunt of the injury—damage to [corporate plaintiff's] reputation—would logically be felt where [plaintiffs] are domiciled, Wyoming and Montana")

(citations omitted). Instead, Plaintiffs are located in Delaware and Texas. 2d Am. Compl. ¶¶ 11, 12, 14, Dkt. No. 2836. For that reason as well, International could not have established the sort of contacts with North Dakota that justify personal jurisdiction. *Arden*, 614 F.3d at 796.

2. Plaintiffs' Theory of Jurisdiction-By-Conspiracy Fails

[¶14] Plaintiffs have all but conceded that International's own conduct cannot support a North Dakota court's exercise of personal jurisdiction over International. In particular, in opposing International's JOML motion, Plaintiffs do not argue that the federal district court's determination that the BankTrack letter did not create minimum contacts with North Dakota was mistaken—likely because they would be collaterally estopped from doing so. Pls. Opp'n to Defs.' Renewed JMOLs, Dkt. No. 5184, ¶¶ 142-150; *see Blonder-Tongue Labys., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333-34 (1971). Instead, Plaintiffs' primary contention was that because International was purportedly in a conspiracy with Greenpeace, Inc., International has constitutionally sufficient minimum contacts with North Dakota through the actions of the handful of Greenpeace, Inc. employees who were on the ground in North Dakota during the Standing Rock protests. Dkt. No. 5184, ¶ 147. This contention fails both factually and legally.

[¶15] *First*, as a factual matter, Plaintiffs presented no evidence International was involved in any conspiracy that could establish the requisite minimum contacts. Plaintiffs presume that once some "conspiracy" is established, a defendant becomes responsible for each and every action their purported co-conspirator takes. *See id.* ¶ 146 ("[T]he acts of all Greenpeace co-conspirators are attributable to Greenpeace International . . . ."). But while a conspirator may become liable for the "unlawful act[s]" its co-conspirators commit in pursuing their common illegal plan, it is not liable for other tortious acts outside the scope of that

agreement. *Hurt v. Freeland*, 1999 ND 12, ¶¶ 22, 37, 589 N.W.2d 551; *see Freeman v. HSBC Holdings PLC*, 57 F.4th 66, 81-82 (2nd Cir. 2023).

[¶16] Plaintiffs presented no evidence of a conspiracy that could extend to any Greenpeace, Inc. actions on the ground in North Dakota. That is presumably why the jury rejected all Plaintiffs' property tort claims against International, including the claims that International aided and abetted property torts committed by others in North Dakota.

[¶17] If Plaintiffs presented any evidence of a conspiracy at all (and International maintains they did not), it would instead pertain only to International's advocacy reminding banks of their climate commitments. *See* Dkt. No. 5184, ¶¶ 148-49. This Court's order confirms that limited scope, citing the "BankTrack letter and communications between" International and Greenpeace, Inc. as the evidence that could have supported the conspiracy. Mem. Op. 7. The sum total of the evidence Plaintiffs have cited as establishing this purported conspiracy consists of the BankTrack letter, a subsequent email describing the BankTrack letter, an email chain in which a Greenpeace, Inc. employee asked for support from International and others in petitioning banks, and an email International sent to Citigroup that echoes the message of the BankTrack letter but contains no statements Plaintiffs allege to be defamatory. *See* Dkt. No. 5184, ¶¶ 148-49 (citing Trial Exs. 2837, 1368, 1446, 1162, and 1449).

[¶18] Such a "conspiracy" would do Plaintiffs little good in establishing personal jurisdiction, as these advocacy efforts cannot create the requisite minimum contacts with North Dakota. To the contrary, this "conspiracy" adds nothing to the basic, undisputed facts: Plaintiffs' evidence confirms that International, along with many other entities, participated in asking banks located outside of North Dakota to ensure that their loans to entities located outside of North Dakota were consistent with their stated commitments. Because, as this Court put it, the

"conspiracy" is "the BankTrack letter, and little more" (Mem. Op. 10), that cannot possibly suffice to establish personal jurisdiction unless the BankTrack letter itself created minimum contacts with North Dakota—which it did not. *Supra* section II.A.1.

[¶19] Indeed, even assuming this "conspiracy" could have extended to encompass an agreement to make the seven additional defamatory statements Plaintiffs alleged that were not contained in the BankTrack letter itself—and the limited evidence Plaintiffs proffered cannot support such a finding—those statements would do nothing to change the jurisdictional calculus. That is because these statements likewise were not directed to, and did not cause the brunt of any harm in, this State. For all the reasons set forth above, these sorts of communications are not enough to subject International to personal jurisdiction in North Dakota. *Supra* section II.A.1; *Energy Transfer*, 2018 WL 4677787 at *5. Simply put, this conduct was not "expressly aimed" at North Dakota, and the "brunt" of any "harm" that resulted was not suffered in North Dakota. *Arden*, 614 F.3d at 796.

[¶20] *Second*, and in any event, Plaintiffs are also legally wrong: personal jurisdiction over a defendant cannot be based on the actions of that defendant's co-conspirator. In *Walden v. Fiore*, the Supreme Court made clear that personal jurisdiction must be based on "contacts that the 'defendant himself' creates with the forum State," and not "contacts between the plaintiff (or third parties) and the forum State." 571 U.S. at 284. Adhering to this principle, "[m]any courts that have considered the viability of vicarious conspiracy jurisdiction post-*Walden* have rejected it, holding that participation in a conspiracy cannot 'provide a standalone basis for jurisdiction.'" *Martin v. Eide Bailly LLP*, No. 1:15-cv-1202, 2016 WL 4496570, at *3 (S.D. Ind. Aug. 26, 2016) (citing cases); *see id.* at *4 (holding "Plaintiffs' reliance on the conspiracy theory of personal jurisdiction is misplaced, as courts are moving away from the theory as a basis for

establishing personal jurisdiction"); *see also*, *e.g.*, *Alexander WF, LLC v. Hanlon*, No. 4:14–cv–068, 2015 WL 12803715, at *6 & n.3 (D.N.D. Feb. 19, 2015) (holding "a mere claim of civil conspiracy against individuals with otherwise insufficient minimum contacts will not support a finding of personal jurisdiction"). Like these courts, this Court should follow *Walden* and hold that personal jurisdiction must be based on contacts that International itself "create[d] with the Forum State," not those of another party like Greenpeace, Inc. *Walden*, 571 U.S. at 284. That independently defeats Plaintiffs' arguments for personal jurisdiction over International.

B. The Court Should Grant Judgment as a Matter of Law on the Defamation Claim Because There Was Insufficient Evidence of Actual Malice

[¶21] All the Greenpeace Defendants raised the lack of evidence of actual malice in their renewed JMOLs. Greenpeace, Inc. Br. ISO Renewed JMOL, Dkt. No. 5085, ¶¶ 17-22; Greenpeace Fund Br. ISO Renewed JMOL, Dkt. No. 5129, ¶¶ 24-27; International Br. ISO Renewed JMOL, Dkt. No. 5110, ¶¶ 16-18. Although the Court acknowledged these arguments, it did not address the standard for proving actual malice or identify any evidence that could satisfy it. Dkt. No. 5321, at 9-10. The Court should reconsider its ruling and find that there was insufficient evidence of actual malice. *See Reid v. Viacom Int'l Inc.*, No. 1:14-CV-1252-MHC, 2017 WL 11634619, at *7 (N.D. Ga. Sept. 22, 2017) (granting in part motion for reconsideration to the extent court's actual malice inquiry did not include a scene-by-scene analysis of allegedly defamatory scenes in the movie at issue); *Dongguk Univ. v. Yale Univ.*, 873 F. Supp. 2d 460, 466 (D. Conn. 2012) (similar), *affirming judgment*, 734 F.3d 113 (2d Cir. 2013).

[¶22] Public figures like Plaintiffs are "required to present *clear and convincing* evidence [the defendant's] statements . . . were made with actual malice." *Riemers v. Mahar*, 2008 ND 95, ¶ 19, 748 N.W.2d 714 (emphasis added). Actual malice means that the defendant

had "serious doubts about the truth of his publication or had 'a high degree of awareness of [the] probable falsity.'" *Id.* (quoting *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991)). This "is a *subjective* inquiry; it is not based on whether a 'reasonably prudent' person would have conducted further investigation prior to publishing." *Revell v. Hoffman*, 309 F.3d 1228, 1233 (10th Cir. 2002) (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)); *see also Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016) ("Actual malice requires more than a departure from reasonable journalistic standards." (citing *Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999))).

[¶23] "When there are multiple actors involved in an organizational defendant's publication of a defamatory statement, the plaintiff must identify the individual responsible for publication of a statement, and it is that individual the plaintiff must prove acted with actual malice." *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013); *accord King v. S. Poverty L. Ctr., Inc.*, No. 2:22-CV-207-WKW, 2023 WL 3061825, at *19 n.6 (M.D. Ala. Apr. 24, 2023) ("When actual malice in making a defamatory statement is at issue, the critical question is the state of mind of those responsible for the publication." (quoting *Palin v. N.Y. Times Co.*, 940 F.3d 804, 810 (2d Cir. 2019)). The Court must analyze each statement one by one, considering only the state-of-mind evidence that is relevant to the individual responsible for a particular statement. *See Reid*, 2017 WL 11634619, at *7-9.

1. Plaintiffs failed to prove actual malice on the part of Greenpeace, Inc.

[¶24] Plaintiffs presented no evidence that could establish that anyone at Greenpeace, Inc. made the supposedly defamatory statements "serious doubts about the[ir] truth" or "'a high degree of awareness of [their] probable falsity.'" *Riemers*, 2008 ND 95, ¶ 19, 748 N.W.2d 714

(citing *Masson*, 501 U.S. at 510). Instead, Plaintiffs relied on a handful of emails from lower-level Greenpeace, Inc. employees that indicated their dislike of Plaintiffs. None of these emails suggested these employees' awareness that the purportedly defamatory statements were *false*. And even more importantly, these employees were not actually responsible for the publication of these statements. Instead, to the extent Plaintiffs presented any evidence regarding the statements' actual authors, it demonstrated only their First Amendment-protected advocacy against a pipeline that they sincerely believed posed risks to the rights of Indigenous peoples and climate protection. Such evidence does not even demonstrate ill-will toward Plaintiffs, let alone that these individuals had subjective doubts about the truth of the challenged statements. *See Keenan v. Int'l Ass'n of Machinists & Aerospace Workers*, 632 F. Supp. 2d 63, 73 (D. Me. 2009) ("[T]he actual malice standard is wholly subjective, and is thus properly assessed with respect to particular statements and individual speakers." (citation modified)).

[¶25] Once this evidence is cast aside, Plaintiffs are left with the argument that Greenpeace, Inc. was required to do further investigation into the truth of these statements. But as a matter of well-established law, "[a] publisher's failure to make an independent investigation of a story, even when the publisher is aware of the possible bias of its source, does not amount to reckless disregard in the absence of serious doubts about the story's truthfulness." *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1508 (D.S.C. 1989) (citing *St. Amant v. Thompson*, 390 U.S. 727 (1968)). Here, the sources relied upon—the UN report, numerous reputable publications, and the sworn declaration of a tribal expert filed in federal court—do not permit a finding of actual malice as a matter of law. Plaintiffs thus made no showing that Greenpeace, Inc. published these statements with *actual malice*.

2. Plaintiffs failed to prove actual malice on the part of Fund or International

[¶26] Plaintiffs' showing of actual malice was even more obviously deficient with respect to International and Fund. Significantly, even assuming personal animus is a relevant factor in the actual malice inquiry, *none* of the emails on which Plaintiffs relied to purportedly show personal animus against Plaintiffs were from International or Fund employees. *E.g.*, Trial Exs. 1617, 1618, 3086.

[¶27] Thus, with respect to Fund, this Court recognized that the only thing tying it to any of the defamatory statements is the signature of Annie Leonard on the BankTrack letter. Mem. Op. 10. And even assuming Ms. Leonard was acting for Fund when she signed it,[5] there is no evidence whatsoever—*none*—that she subjectively believed any of the statements in the BankTrack letter (let alone the other defamatory statements) were false—and indeed, she affirmatively believed the statements were true. Plaintiffs thus cannot possibly have demonstrated that Fund acted with actual malice.

[¶28] The same goes for International. There is no evidence at all of International's state of mind with respect to seven of the nine defamatory statements for which it was found liable (which makes sense, because there is no evidence that International had anything to do with these statements). And as for the two statements in the November 30, 2016, BankTrack letter—which International did sign—the only evidence at trial confirmed that International did *not* sign on to that letter with any subjective awareness of the falsity of the two challenged statements. Mads Christensen testified that in deciding to sign the letter, International relied on multiple trusted sources, including the report from an Expert Member of the United Nations

[5] *See* note 1, *supra*.

Permanent Forum on Indigenous Issues, Rainforest Action Network, "credible news sources," and BankTrack itself. Dkt. No. 5112, 133:6-22; Dkt. No. 5233, 159:9-160:9; *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." (citation modified)). And Daniel Mittler testified his 2024 deposition only that he did not recall the source for certain information in the BankTrack letter he had signed eight years earlier. Dkt. No. 5184, ¶ 33. That does not shed any light on his subjective state of mind, and is not evidence—let alone clear and convincing evidence—of actual malice. *See Brueggemeyer v. Am. Broad. Cos.*, 684 F. Supp. 452, 461 (N.D. Tex. 1988) (defendant's inability to recall specifics of investigation that took place three years earlier "[could not] satisfy the onerous actual malice standard").

3. Because The Defamation Claims Against Fund And International Fail, The Tortious Interference and Conspiracy Claims Fail as Well

[¶29] If judgment on the defamation claims is granted to International and Fund, they are also entitled to judgment as a matter of law on the tortious interference claims. "[I]n order to recover for wrongful interference with business, the plaintiff must prove the defendant's conduct was independently tortious or otherwise unlawful." *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 2001 ND 116, ¶ 42, 628 N.W.2d 707 (collecting cases). This means that "the plaintiff must prove that the defendant's conduct would be actionable under a recognized tort." *Id.* Here, the jury did not find Fund or International liable for any "independently tortious" conduct other than defamation. If they are not liable for defamation as a matter of law—and they are not—then they likewise cannot be liable for tortious interference. And because the conspiracy count is

likewise predicated on International's defamation, judgment as a matter of law should be granted on it as well.

C. The Court Should Reduce the Damages Assessed Against International And Fund on Defamation and Tortious Interference

[¶30] Even if the Court does not set aside the defamation claims in their entirely, it should at least reconsider and reduce the damages assessed against both International and Fund to reflect that these defendants' sole relevant conduct was to sign the November 30, 2016, BankTrack letter. From signing that one letter containing only two of the allegedly defamatory statements, Fund and International each remain liable for $43,357,100 in compensatory damages for defamation and tortious interference. That far exceeds any possible damages that either Fund or International could have caused simply by being two of the 506 signatories on a letter neither of them even *wrote*.

[¶31] The Court has the authority to reduce a damages award in a situation, such as this, where the damages exceed reasonable limits based on the evidence. *See Johnson v. Monsanto Co.*, 303 N.W.2d 86, 92 (1981) ("The determination of the amount of damages is in the province of the jury and rests largely in the discretion of the jury. . . . Nevertheless, the jury must determine the compensation to which a party is entitled within reasonable limits, based upon the evidence. If those limits have been exceeded, it is the duty of the court to make a proper reduction or grant a new trial." (citations omitted)); *Vallejo v. Jamestown College*, 244 N.W.2d 753, 755 (N.D. 1976) (court empowered to reduce damages when damages are "so excessive or so inadequate as to be without support in the evidence").

[¶32] These excessive damage awards reflect three fundamental problems. *First*, the jury found both Fund and International liable for all *nine* of the alleged defamatory statements,

even though they participated in the publication of only the two statements in the November 30, 2016 BankTrack letter.[6] A defendant must have participated in the publication of the statement at issue. *See* N.D.C.C. § 14–02–03 ("Libel is a false and unprivileged *publication* . . . ." (emphasis added)); *see, e.g.*, *Catalfo v. Jensen*, 628 F. Supp. 1453, 1456 (D.N.H. 1986) (granting summary judgment where plaintiffs failed to carry their burden of "produc[ing] some evidence of [moving defendant's] responsible participation in the publication"). As the Court recognized, Mem. Op. 10, there is no evidence that Fund had anything to do with any of the alleged statements not contained in the BankTrack letter, and the jury rejected the conspiracy claim against Fund. And while Plaintiffs may attempt to contend that because the jury found International conspired with Greenpeace, Inc. there is a basis for imposing vicarious liability on it, this Court has recognized that the evidence of that purported conspiracy amounted to "the BankTrack letter, and little more." Mem. Op. 10. There is no evidence that International was involved in any conspiracy that could connect it to blog posts or other statements made by Greenpeace, Inc. *See, e.g.*, *Gauvin v. Conn., Dep't of Special Revenue*, Civ. No. H–88–45, 1991 WL 441897, at *3 (holding a supposed "conspiracy to 'cause false investigative reports to be published and spread false rumors . . . about the abilities of the plaintiff'" did not suffice where there was no evidence of the defendants' direct participation in publishing the specific supposedly defamatory report). For these reasons, the damages against International and Fund should be reduced by 77.77%, to reflect that they each made only two of the nine statements for which the jury found them liable.[7]

[6] Fund maintains its position that it participated in none of the statements.

[7] A proportional reduction in the damages is warranted here when there was no statement-by-statement damages analysis presented by Plaintiffs.

[¶33] *Second*, to the extent that International and Fund were only responsible for two of these statements, they were "responsible" only in the sense that they were two of 506 cosigners of a letter containing them. Even assuming the letter itself caused Plaintiffs any harm at all, Fund and International's mere signing of that letter could not have produced the full amount of those purported damages. Rather, International and Fund should at most each be held responsible for their marginal contributions to any purported harm as one of 506 signatories to the BankTrack letter: the compensatory damages award against each of them should be divided by 506.

[¶34] *Third*, on Plaintiffs' tortious interference claim, the jury awarded Plaintiffs the lost profits allegedly due to the interference with Plaintiffs' shipping contracts caused by the DAPL construction delay, $80,112,750, and divided that amount among the Greenpeace Defendants. Dkt. No. 5035, at 14, 30. At trial Plaintiffs specifically attributed those damages only to the alleged property torts. *See* Ex. L to Greenpeace, Inc.'s Renewed JMOL, Dkt. No. 5098. But the jury found that both International and Fund did not commit, nor conspire in, any of the property torts. Dkt. No. 5035, at 2-9, 18-25. Because International and Fund did not commit the torts underlying the tortious interference claim, as a matter of law the damages awarded against them for tortious interference must be set aside. *See Trade N' Post*, 2001 ND 116, ¶ 42, 628 N.W.2d 707 ("[I]n order to recover for wrongful interference with business, the plaintiff must prove the defendant's conduct was independently tortious or otherwise unlawful.").

[¶35] In sum, the damages against International and Fund should be reduced to reflect that they each made only two of the nine defamatory statements for which the jury found them liable, that for those statements they were each merely one of 506 signatories, and that those

statements also were not the basis for any of the tortious interference damages. Therefore, the total compensatory damages should be, at most, $7,313.50 against each of International and Fund.[8] The exemplary damages awards should then be reduced in accordance with North Dakota law. Mem. Op. 14.

III. CONCLUSION

[¶36] For the foregoing reasons, the Greenpeace Defendants respectfully request that the Court reconsider the conclusions in its October 28 Memorandum Opinion as to (1) JMOL on all claims against International, (2) JMOL on the defamation claim against all defendants (and, as a result, the tortious interference claim against International and Fund and the conspiracy claim), and (3) the assessment of damages against International and Fund.

[8] Because the damages for civil conspiracy are duplicative, as discussed in the pending motion for clarification, they are not included in this amount. To the extent that the conspiracy damages are additional, they should be reduced in the same proportion as the defamation damages (i.e., two-ninths and divided by 506), because they are again premised on the two statements in the November 30, 2016, BankTrack letter.

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