

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF MORTON

SOUTH CENTRAL JUDICIAL DISTRICT

ENERGY TRANSFER LP, <i>et al.</i> ,)	Case No.: 30-2019-CV-00180
)	
Plaintiffs,)	
)	
v.)	GREENPEACE DEFENDANTS'
)	BRIEF IN SUPPORT OF MOTION
GREENPEACE INTERNATIONAL, <i>et al.</i> ,)	FOR A NEW TRIAL, OR TO ALTER
)	OR AMEND THE JUDGMENT
Defendants.)	
)	
)	

TABLE OF CONTENTS

	Page
I. LEGAL STANDARD.....	17
A. Rule 59(b) Motion for a New Trial.....	17
B. Rule 59(j) Motion to Alter or Amend the Judgment.....	19
II. ARGUMENT.....	19
A. The Defendants Could Not Receive a Fair and Impartial Trial in Morton County.....	19
1. Relevant Procedural Background	19
2. Greenpeace Defendants Are Entitled to a New Trial in a Fair Venue.....	22
a. Community Bias and Prejudice	23
b. Paid Local Pretrial Publicity	25
B. The Court Erred in Refusing to Strike Potential Jurors for Cause.....	28
C. The Verdict Does Not Reflect Comparative Fault.....	36
D. The Jury’s Verdict Is Manifestly Against the Weight of the Evidence	42
1. Defamation.....	43
a. Energy Transfer’s Lack of Standing.....	44
b. Publication	44
c. Falsity.....	45
d. Actual Malice.....	48
e. Proximate Cause	50
f. Damages.....	52
g. Fund Specific Issues	53
h. International Specific Issues	54
2. Tortious Interference.....	55
a. Energy Transfer’s Lack of Standing.....	55
b. Energy Transfer’s Lack of a Business Relationship.....	56
c. Petition Clause Immunity	56
d. Causation.....	57
e. Damages.....	59
3. Property Damage Claims Against Greenpeace Inc.....	60
a. Both Plaintiffs’ Lack of Standing	61
b. Aiding and Abetting.....	62

c.	Causation and Damages	63
4.	Conspiracy Claim.....	68
5.	Exemplary Damages	68
6.	Greenpeace Defendants Are Entitled to A New Trial on All Claims	72
E.	Numerous Other Issues Independently Warrant a New Trial	73
1.	The Verdict Erroneously Awarded Additional Compensatory Damages as Conspiracy Damages	73
2.	The Court Erred in Denying Bifurcation	74
3.	Law Enforcement Presence at Trial Prejudiced Greenpeace Defendants	76
4.	The Court Erred by Admitting Inadmissible Evidence Offered by Plaintiffs That Substantially Prejudiced Greenpeace Defendants	78
a.	Admission of Plaintiffs’ Expert Testimony	78
b.	Evidence Related to Non-Defamatory Statements	80
c.	Evidence of Greenpeace Defendants’ protected activity	82
d.	Evidence of Greenpeace Defendants’ campaigns relating to pipelines other than DAPL or after the filing of this lawsuit.....	83
e.	Nonviolent Direct Action Trainings	84
f.	Lockboxes	86
g.	Admission of Exhibit 1243	87
h.	Testimony From Witnesses Without Personal Knowledge	88
i.	Inflammatory Evidence Related to Violence That Occurred During the Standing Rock Protests And Ms. Liakos’s Arrest	91
j.	Inadmissible Hearsay Statements Related to Refinancing.....	94
5.	The Court Erred by Excluding Greenpeace Defendants’ Admissible and Relevant Evidence.....	95
l.	Evidence Related to Reputational Harm.....	95
m.	Expert Testimony	96
n.	Foley Hoag Report.....	97
6.	The Court Erred in Providing Erroneous or Incomplete Jury Instructions.....	98
a.	Defamation.....	98
b.	Direct Property Torts	99
c.	Other Instructions.....	100
7.	The Court Erred in Using Plaintiffs’ Verdict Form	101

a.	Defamation.....	102
b.	Exemplary Damages	102
c.	Other Verdict-Form Questions	102
8.	The Court Erred in Allowing Amendment During Trial	103
9.	The Court Never Ruled on Plaintiffs’ Motion to Strike the Greenpeace Defendants’ Answer to the Second Amended Complaint; the Greenpeace Defendants’ Motion for Leave to Amend to Add Defenses to the Answer; or the Greenpeace Defendants’ Motion to Compel Completion of Kelcy Warren’s Deposition.....	105
10.	Most of Dakota Access’s Defamation Claims Were Untimely	107
11.	Plaintiffs Never Should Have Been Able to Bring Claims Against International Given Their Failure to Establish Personal Jurisdiction	111
III.	CONCLUSION.....	112

TABLE OF AUTHORITIES

Page(s)

Cases

Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.,
155 F.4th 795 (6th Cir. 20025), *reh’g en banc denied*, 164 F.4th 529 (6th Cir. 2026)73

Alexander WF, LLC v. Hanlon,
No. 4:14-cv-068, 2015 WL 12803715 (D.N.D. Feb. 19, 2015)111

Am. Aerial Servs., Inc. v. Terex USA, LLC,
No. 2:12-CV-00361-JDL, 2015 WL 1947265 (D. Me. Apr. 29, 2015).....80

Anderson v. Meyer Broad. Co.,
2001 ND 125, 630 N.W.2d 46101

Arnold v. Ingersoll-Rand Co.,
908 S.W.2d 757 (Mo. Ct. App. 1995).....91

Arthaud v. Fuglie,
No. 08-2021-CV-01885, 2022 WL 19920083 (D.N.D. June 30, 2022), *aff’d*, 2023 ND 36,
987 N.W.2d 379108

Atkinson v. McLaughlin,
462 F. Supp. 2d 1038 (D.N.D. 2006).....108

Basin Elec. Power Coop. v. Boschker,
289 N.W.2d 553 (N.D. 1980)25

Beck v. Prupis,
529 U.S. 494 (2000).....73

Brandenburg v. Ohio,
395 U.S. 444 (1969).....63, 84

Brengettcy v. Horton,
No. 01 C 197, 2006 WL 1793570 (N.D. Ill. May 5, 2006)109

Brummett v. Taylor,
569 F.3d 890 (8th Cir. 2009)81

Campbell v. Citizens for an Honest Gov’t, Inc.,
255 F.3d 560 (8th Cir. 2001)75

<i>Carlson v. Roetzel & Andress</i> , Civ. No. 3:07-CV-33, 2008 WL 873647 (D.N.D. Mar. 27, 2008), <i>aff'd</i> , 552 F.3d 648 (8th Cir. 2008)	80
<i>Catalyst Campus for Tech. & Innovation, Inc. v. Brown</i> , No. 1:24-cv-00059, 2025 WL 2781561 (D. Utah Sept. 30, 2025)	74
<i>Cenveo Corp. v. S. Graphic Sys., Inc.</i> , 784 F. Supp. 2d 1130 (D. Minn. 2011).....	73
<i>Ceynar v. Barth</i> , 2017 ND 286, 904 N.W.2d 469	107
<i>Champagne v. United States</i> , 513 N.W.2d 75 (N.D. 1994)	39
<i>City of Grand Forks v. Henderson</i> , 297 N.W.2d 450 (N.D. 1980)	19
<i>Comcast Corp. v. Behrend</i> , 569 U.S. 27 (2013).....	78
<i>Cont'l Res., Inc. v. P&P Indus., LLC I</i> , 2018 ND 11, 906 N.W.2d 105 (N.D. 2011).....	73
<i>Cook v. Stenslie</i> , 251 N.W.2d 393 (N.D. 1977)	18
<i>Coppage v. State</i> , 2013 ND 10, 826 N.W.2d 320	96
<i>Corsini v. Dentons US LLP</i> , No. 1:24-CV-03196, 2025 WL 2781345 (S.D.N.Y. Sept. 30, 2025), <i>appeal filed</i> , No. 25-2710 (2d Cir. Oct. 28, 2025).....	74
<i>Counterman v. Colorado</i> , 600 U.S. 66 (2023).....	63
<i>Crain v. Lightner</i> , 364 S.E.2d 778 (W. Va. 1987).....	54
<i>Creative Calling Sols., Inc. v. LF Beauty Ltd.</i> , 799 F.3d 975 (8th Cir. 2015)	111
<i>CSMN Invs., LLC v. Cordillera Metro. Dist.</i> , 956 F.3d 1276 (10th Cir. 2020)	56

<i>Curtis Publ'g Co. v. Butts</i> , 388 U.S. 130 (1967).....	45
<i>Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.</i> , 783 F.3d 976 (4th Cir. 2015)	104
<i>Delzer v. United Bank of Bismarck</i> , 527 N.W.2d 650 (N.D. 1995)	73
<i>Doe #6 v. Miami-Dade Cnty.</i> , 974 F.3d 1333 (11th Cir. 2020)	103
<i>Doe v. Baxter Healthcare Corp.</i> , 380 F.3d 399 (8th Cir. 2004)	67
<i>Dongguk Univ. v. Yale Univ.</i> , 734 F.3d 113 (2nd Cir. 2013).....	48, 69
<i>Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961).....	56
<i>Ekstam v. Wells</i> , No. 12-25-00071-CV, 2025 WL 3170992 (Tex. App. Nov. 12, 2025)	73
<i>Endresen v. Scheels Hardware & Sports Shop, Inc.</i> , 560 N.W.2d 225 (N.D. 1997)	36
<i>Energy Transfer Equity, L.P. v. Greenpeace Int'l</i> , No. 17-CV-173-BRW, 2019 U.S. Dist. LEXIS 32264 (D.N.D. Feb. 14, 2019).....	47
<i>Energy Transfer Equity, LP v. Greenpeace Int'l</i> , No. 1:17-Cv-00173-BRW, 2018 WL 4677787 (D.N.D. July 24, 2018).....	111
<i>Ensign v. Bank of Baker</i> , 2004 ND 56, 676 N.W.2d 786	111
<i>Everett J. Prescott, Inc. v. Beall</i> , No. 1:25-cv-00071, 2025 WL 2855399 (D. Me. Oct. 8, 2025)	74
<i>Ex parte Profit Boost Mktg., Inc.</i> , 254 So. 3d 862 (Ala. 2017).....	109
<i>Fleck v. Jacques Seed Co.</i> , 445 N.W.2d 649 (N.D. 1989)	105
<i>Fontes v. Dixon</i> , 544 N.W.2d 869 (N.D. 1996)	40

<i>Frazier v. Eagler Air Med Corp.</i> , No. 3:21-cv-136, 2022 WL 1303070 (D.N.D. May 2, 2022)	111
<i>Freeman v. Bechtel Constr. Co.</i> , 87 F.3d 1029 (8th Cir. 1996)	80
<i>Fritz v. Cnty. of Marin</i> , No. A114549, 2007 WL 1874369 (Cal. Ct. App. June 29, 2007) (unpublished)	47
<i>Geomatrix, LLC v. NSF Int’l</i> , 82 F.4th 466 (6th Cir. 2023)	57
<i>Gisvold v. Windbreak, Inc.</i> , 2007 ND 54, 730 N.W.2d 597	18, 42
<i>Goodleft v. Gullickson</i> , 556 N.W.2d 303 (N.D. 1996)	110
<i>Groppi v. Wisconsin</i> , 400 U.S. 505 (1971).....	22
<i>Hadley v. Perez</i> , No. 25-cv-22162, 2025 WL 2851643 (S.D. Fla. Oct. 8, 2025), <i>amended in part on reconsideration</i> , No. 25-cv-22162, 2025 WL 3534104 (S.D. Fla. Dec. 10, 2025)	74
<i>Hagen v. N.D. Ins. Rsrv. Fund</i> , 2022 ND 53, 971 N.W.2d 833	109
<i>Hale v. Ward Cnty.</i> , 2012 ND 144, 818 N.W.2d 697	107
<i>Holbrook v. Flynn</i> , 475 U.S. 560 (1986).....	77
<i>Hollins v. Powell</i> , 773 F.2d 191 (8th Cir. 1985)	72
<i>Hoovestol v. Sec. State Bank of New Salem</i> , 479 N.W.2d 854 (N.D. 1992)	18
<i>Horstmeyer v. Golden Eagle Fireworks</i> , 534 N.W.2d 835 (N.D. 1995)	41, 42
<i>Hurt v. Freeland</i> , 1999 ND 12, 589 N.W.2d 551	73

<i>In re Mullins</i> , No. 16-13773, 2025 WL 3177060 (D. Colo. Nov. 13, 2025)	73
<i>In re N.C.C.</i> , 2000 ND 129, 612 N.W.2d 561	19
<i>Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of Black Hills</i> , 141 F.3d 1284 (8th Cir. 1998)	19
<i>Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass’n</i> , 337 N.W.2d 427 (1983)	107
<i>Jim’s Hot Shot Serv., Inc. v. Cont’l W. Ins. Co.</i> , 353 N.W.2d 279 (N.D. 1984)	61
<i>Johnson v. Buskohl Constr. Inc.</i> , 2015 ND 268, 871 N.W.2d 459	18, 87
<i>Johnson v. Monsanto Co.</i> , 303 N.W.2d 86 (N.D. 1981)	50
<i>Kaiser v. Kaiser</i> , 474 N.W.2d 63 (N.D. 1991)	19
<i>Kiemele v. Soo Line R.R. Co.</i> , 93 F.3d 472 (8th Cir. 1996)	39
<i>Kluver v. SGJ Holdings</i> , LLC, 2023 ND 65, 988 N.W.2d 569.....	74
<i>La Liberte v. Reid</i> , Case No. 1:18-cv-05398 (E.D.N.Y Sept. 24, 2024), ECF No. 181-45	49
<i>Lipp v. Ginger C, L.L.C.</i> , 229 F. Supp. 3d 1018 (W.D. Mo. 2017)	92
<i>Little v. Spaeth</i> , 394 N.W.2d 700 (N.D. 1986)	45
<i>Littleton v. McNeely</i> , 562 F.3d 880 (8th Cir. 2009)	94
<i>Lochthowe v. C.F. Peterson Est.</i> , 2005 ND 40, 692 N.W.2d 120	104
<i>Lovin v. Lovin</i> , 1997 ND 55, 561 N.W.2d 612	19

<i>Lucchesi v. Experian Info. Sols., Inc.</i> , 226 F.R.D. 172 (S.D.N.Y. 2005)	109
<i>Macquarie Bank Ltd. v. Knickel</i> , No. 4:08-CV-48, 2009 WL 10665539 (D.N.D. Mar. 26, 2009)	44
<i>Massachusetts School of Law at Andover, Inc. v. American Bar Association</i> , 107 F.3d 1026 (3d Cir. 1997).....	57
<i>Masson v. New Yorker Mag., Inc.</i> , 501 U.S. 496 (1991).....	46
<i>McFarlane v. Sheridan Square Press, Inc.</i> , 91 F.3d 1501 (D.C. Cir. 1996).....	49
<i>Mitchell v. Kirchmeier</i> , 28 F.4th 888 (8th Cir. 2022)	73
<i>Mitchell v. Morton Cnty. Sheriff Kyle Kirchmeier</i> , Civil No. 1:19-cv-149, 2020 WL 8073625 (D.N.D. Dec. 10, 2020)	73, 74
<i>Mr. G's Turtle Mountain Lodge, Inc. v. Roland Township</i> , 2002 ND 140, 651 N.W.2d 625	59
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	45, 48
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982).....	<i>passim</i>
<i>Neb. Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976).....	28
<i>Neibauer v. Well</i> , 319 N.W.2d 143 (N.D. 1982)	19
<i>Nitschke v. Barnick</i> , 226 N.W.2d 785 (N.D. 1975)	18
<i>Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau</i> , 2004 ND 60, 676 N.W.2d 752	44
<i>Norman v. Ark. Dep't of Educ.</i> , 79 F.3d 748 (8th Cir. 1996)	19
<i>North Dakota v. United States</i> , 785 F. Supp. 3d 473 (D.N.D. 2025) <i>appeal filed</i> , No. 25-2276 (8th Cir. June 26, 2025)	67

<i>O’Rear v. Fruehauf Corp.</i> , 554 F.2d 1304 (5th Cir. 1977)	83
<i>Okken v. Okken</i> , 325 N.W.2d 264 (N.D. 1982)	42, 43
<i>Olson v. N.D. Dist. Ct.</i> , 271 N.W.2d 574 (N.D. 1978)	25, 27, 28
<i>Ouachita Nat’l Bank v. Tosco Corp.</i> , 686 F.2d 1291 (8th Cir. 1982)	18
<i>Palatkevich v. Choupak</i> , 152 F. Supp. 3d 201 (S.D.N.Y. 2016).....	109
<i>Raridon & Assocs. Orthopedics, Inc. v. Schmidt</i> , No. 2:23-CV-2373, 2025 WL 2480614 (D. Kan. Aug. 28, 2025).....	74
<i>Rayo v. New York</i> , 882 F. Supp. 37 (N.D.N.Y. 1995).....	110
<i>Reader’s Dig. Ass’n v. Superior Ct.</i> , 37 Cal. 3d 244 (1984)	49
<i>Resolute Forest Prods., Inc. v. Greenpeace Int’l</i> , 302 F. Supp. 3d 1005 (N.D. Cal. 2017).....	47
<i>Riemers v. Mahar</i> , 2008 ND 95, 748 N.W.2d 714	45, 48, 98
<i>Sadler v. Basin Elec. Power Coop.</i> , 409 N.W.2d 87 (N.D. 1987)	98
<i>Schindler v. Wageman</i> , 2019 ND 41, 923 N.W.2d 507	104
<i>Schultze v. Continental Ins. Co.</i> , 619 N.W.2d 510 (N.D. 2000)	108
<i>Scroggins v. McGee</i> , No. 4:10CV01121, 2011 WL 4018049 (E.D. Ark. Sept. 12, 2011)	109
<i>Sears v. Rivero</i> , No. 8:12-CV-288-T-33TGW, 2019 WL 4600407 (M.D. Fla. Sept. 23, 2019), <i>aff’d</i> , No. 19-13668, 2022 WL 2291220 (11th Cir. June 24, 2022)	77

<i>Sessions Tank Liners, Inc. v. Joor Mfg, Inc.</i> , 17 F.3d 295 (9th Cir. 1994)	57
<i>Slatton v. Martin K. Eby Constr. Co.</i> , 506 F.2d 505 (8th Cir. 1974)	18
<i>Slaubaugh v. Slaubaugh</i> , 499 N.W.2d 99 (N.D. 1993)	23, 34
<i>South Dakota v. Kansas City S. Indus., Inc.</i> , 880 F.2d 40 (8th Cir. 1989)	56
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs</i> , 255 F. Supp. 3d 101 (D.D.C. 2017)	58
<i>Standing Rock Tribe v. U.S. Army Corp. of Eng'rs</i> , 471 F. Supp. 3d 71 (D.D.C. 2020), <i>aff'd in part, rev'd in part</i> , 985 F.3d 1032 (D.C. Cir. 2021)	51
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003).....	71, 72
<i>State v. Jaster</i> , 2004 ND 223, 690 N.W.2d 213	32
<i>State v. Linne</i> , 501 P.2d 1186 (Ariz. Ct. App. 1972).....	93
<i>State v. McLain</i> , 301 N.W.2d 616 (N.D. 1981)	33
<i>State v. Ritter</i> , 2024 ND 142, 10 N.W.3d 119	97
<i>State v. Saulter</i> , 2009 ND 78, 764 N.W.2d 430	88
<i>State v. Wickham</i> , 2020 ND 25, 938 N.W.2d 141, <i>grant of post-conviction relief rev'd</i> , 974 N.W.2d 646 (N.D. 2022)	90
<i>Stein v. Ohlhauser</i> , 211 N.W.2d 737 (N.D. 1973)	78
<i>Thompson v. Altheimer & Gray</i> , 248 F.3d 621 (7th Cir. 2001)	30, 33

<i>Thorson v. Latendresse</i> , 307 N.W.2d 586 (N.D. 1981)	108
<i>Tice v. Mandel</i> , 76 N.W.2d 124 (N.D. 1956)	71
<i>United Mine Workers v. Pennington</i> , 381 U.S. 657 (1965).....	56
<i>United States v. BestFoods</i> , 524 U.S. 51 (1998).....	53, 54
<i>United States v. Brumfield</i> , 686 F.3d 960 (8th Cir. 2012)	97
<i>Usayan v. Republic of Turkey</i> , No. 18-cv-1141, 2025 WL 2642134 (D.D.C. Sept. 15, 2025).....	74
<i>Vicnire v. Ford Motor Credit Co.</i> , 401 A.2d 148 (Me. 1979).....	69
<i>Victory Park Apartments, Inc. v. Axelson</i> , 367 N.W.2d 155 (N.D. 1985)	67
<i>Victory Recs., Inc. v. Virgin Recs. Am., Inc.</i> , No. 08 C 3977, 2011 WL 382743 (N.D. Ill. Feb. 3, 2011).....	80
<i>Walden v. Fiore</i> , 571 U.S. 277 (2014).....	111
<i>Warger v. Shauers</i> , 574 U.S. 40 (2014).....	22
<i>White v. Ford Motor Co.</i> , 312 F.3d 998 (9th Cir. 2002)	72
<i>Williams v. ConAgra Poultry Co.</i> , 378 F.3d 790 (8th Cir. 2004)	69
<i>Williams v. Flagler Humane Soc’y, Inc.</i> , Case No. 3:12-cv-767-J-34MCR, 2013 WL 12358254 (M.D. Fla. Dec. 11, 2013)	68
<i>Woods v. Dugger</i> , 923 F.2d 1454 (11th Cir. 1991)	77
<i>Zander v. Morsette</i> , 2021 ND 84, 959 N.W.2d 838	68, 69

<i>Zander v. Morsette</i> , 2024 ND 80, 6 N.W.3d 623	42, 67
---	--------

Statutes

28 U.S.C. § 1367(d).....	109
-----------------------------	-----

Rules

Fed. R. Civ. P. 59(e)	19
-----------------------------	----

Fed. R. Evid. 701	88
-------------------------	----

N.D.R. Civ. P.

15.....	103, 104, 109, 110
17.....	110
37(a)(1)	107
39.1(b)(1)(B).....	22
49(a)	40, 41, 42
51(a)	40
59.....	<i>passim</i>

N.D.R. Ev.

103(d).....	78
602.....	88
701.....	88
702.....	80
801(c)	94
803(6).....	87, 98

Regulations

N.D. Cent. Code

§ 10-06.1-02 (2021)	61
§ 28-01-18.....	107
§ 28-14-06.....	28, 29, 34
§ 31-11-03(20)	53
§ 32-03.2-02.....	<i>passim</i>
§ 32-03.2-11	<i>passim</i>
§ 32-43-03(1), (3)(b).....	81
§ 32-43-03(2)	99
§ 34-03.2-02.....	42

Constitutional Provisions

U.S. Const. amend. I *passim*

U.S. Const. amend. XIV 22

[¶1] This case, “one of the most complex . . . in North Dakota's history,” Dkt. 1139, at 5, now threatens to result in one of the largest miscarriages of justice in North Dakota’s history. This Court already slashed over \$300 million of improper damages awarded by a biased jury, yet the Judgment remains deeply flawed. There is still no adjustment for fault, as required by North Dakota law. The Judgment imposes damages that cannot even be attributed to Greenpeace Defendants,¹ such as costs that pre-date the alleged defamatory statements and alleged property damage that pre-date Greenpeace Inc.’s presence at Standing Rock. The jury’s remaining liability determinations are also contrary to established legal principles and the First Amendment.

[¶2] Unlike earlier post-trial motions, where the Court evaluated the evidence in the light most favorable to the nonmoving party, here the Court may weigh the evidence, disbelieve witnesses, and grant a new trial even assuming substantial evidence sustains the verdict. Pursuant to N.D.R.Civ.P. 59(b) & (j) (“Rule 59”), Greenpeace Defendants respectfully move for a new trial or other relief as appropriate. Greenpeace Defendants focus here on four core issues that this Court has not yet resolved in addressing the parties’ post-trial motions.

[¶3] **First**, given the extent to which residents of Morton County were personally affected by the Dakota Access Pipeline (“DAPL”) protests and the prejudicial pretrial publicity targeted at them, Greenpeace Defendants could never have a fair trial in Morton County. The fact that this Court has already been compelled to reduce the jury’s extreme verdict by over \$300 million confirms that Greenpeace Defendants should have been accorded a trial in a different venue where the venire was not tainted by such exposure.

[¶4] **Second**, even if a fair trial could *ever* be held in Morton County, the jurors selected were not capable of providing one. To the contrary, twelve of the final twenty jurors—

¹ Defendants Greenpeace, Inc., Greenpeace Fund, Inc. and Greenpeace International (“International”) (together, the “Greenpeace Defendants”).

Energy Transfer LP, et al., vs. Greenpeace International, et al.

Greenpeace Defendants’ Brief in Support of Motion for New Trial

Page 16 of 113

4921-4707-7003v.4 0107455-000006

including seven of nine empaneled jurors—expressed bias and should have been struck for cause.

[¶5] **Third**, even if these jurors had been impartial, they were not permitted to render a verdict that complies with North Dakota law. Specifically, the verdict form’s failure to provide the jury with a mechanism to allocate comparative fault renders it impossible to determine how much of the excessive damages the jury imposed can legally be imposed on each defendant.

[¶6] **Fourth**, Greenpeace Defendants are also entitled to a new trial on each of the claims that this Court has not already set aside given the weakness of Plaintiffs’ evidence. Although this Court may have determined that Plaintiffs’ factual showing for these claims met the bare minimum standard of legal sufficiency, the jury’s verdict on these counts was at the very least against the weight of the evidence presented at trial and the heavy burden imposed on Plaintiffs by the First Amendment.

[¶7] For each of these reasons—along with numerous others discussed below—Greenpeace Defendants are entitled to a new trial.

I. LEGAL STANDARD

A. Rule 59(b) Motion for a New Trial

[¶8] Rule 59(b) provides that a court may vacate a verdict and grant a new trial “on any of the following grounds materially affecting the substantial rights of the party”:

- (1) irregularity in the proceedings of the court, jury, or adverse party, or any court order or abuse of discretion that prevented a party from having a fair trial;. . . .
- (5) excessive damages appearing to have been awarded under the influence of passion or prejudice . . . ;
- (6) insufficient evidence to justify the verdict or other decision, or that the verdict is against the law;
- (7) errors in law occurring at trial and, when required, objected to by the moving party

N.D.R.Civ.P. 59(b).

[¶9] Greenpeace Defendants seek relief under each of these subsections, as follows:

[¶10] **Irregularity in Proceedings.** Under Rule 59(b)(1), an “irregularity” in the proceeding is “non-conformance to a rule or a law, or failure to follow the requirement of the law.” *Johnson v. Buskohl Constr. Inc.*, 2015 ND 268, ¶ 12, 871 N.W.2d 459 (quotation omitted). This broad standard encompasses a wide range of errors, including admitting inadmissible hearsay evidence and giving erroneous jury instructions. *See, e.g., id.* ¶ 27 (ordering new trial due to irregularity in admitting inadmissible hearsay evidence); *Hoovestol v. Sec. State Bank of New Salem*, 479 N.W.2d 854, 859 (N.D. 1992) (ordering new trial due to irregularity in jury instruction containing incorrect legal standard).

[¶11] **Excessive Damages.** Under Rule 59(b)(5), a court may grant a new trial if the jury awarded excessive damages “under the influence of passion or prejudice.” N.D.R.Civ.P. 59(b)(5). “The jury’s award must remain within reasonable limits in that it must be fair and reasonable, free from sentimental and fanciful standards and based upon the facts disclosed.” *Cook v. Stenslie*, 251 N.W.2d 393, 397 (N.D. 1977) (citing *Nitschke v. Barnick*, 226 N.W.2d 785 (N.D. 1975)).

[¶12] **Against the Weight of the Evidence.** Under Rule 59(b)(6), a court may set aside a jury verdict “when, in considering and weighing all the evidence, the court’s judgment tells it the verdict is wrong because it is manifestly against the weight of the evidence.” *Gisvold v. Windbreak, Inc.*, 2007 ND 54, ¶ 11, 730 N.W.2d 597 (collecting cases). Rather than viewing the evidence in the light most favorable to the nonmoving party, the Court may “weigh the evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict.” *Ouachita Nat’l Bank v. Tosco Corp.*, 686 F.2d 1291, 1295 (8th Cir. 1982) (quoting *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505, 508 n.4 (8th Cir. 1974)), *on reh’g*, 716 F.2d 485 (8th Cir. 1983).

[¶13] **Errors in Law.** Finally, Rule 59(b)(7) permits a new trial when an error in law prejudiced the defendant. *See Neibauer v. Well*, 319 N.W.2d 143, 146 (N.D. 1982) (granting a new trial on the ground that plaintiff’s reference during trial to liability insurance constituted prejudicial error); *Kaiser v. Kaiser*, 474 N.W.2d 63, 70 (N.D. 1991).

[¶14] The purpose of a motion for new trial is “to give the trial court an opportunity to correct errors without subjecting the parties and appellate courts to the time and expense involved in an appeal.” *Lovin v. Lovin*, 1997 ND 55, ¶ 14, 561 N.W.2d 612. That remedy is warranted here.

B. Rule 59(j) Motion to Alter or Amend the Judgment

[¶15] In the alternative, where appropriate, Greenpeace Defendants also seek alteration or amendment of the Court’s judgment under Rule 59(j). A “motion to alter or amend ‘may be used to ask the court to reconsider its judgment and correct errors of law.’” *In re N.C.C.*, 2000 ND 129, ¶ 12, 612 N.W.2d 561 (quoting 47 Am. Jur. 2d *Judgments* § 743 (1995 & Supp. 1999)). In interpreting the nearly identical federal rule,² the Eighth Circuit has noted that it “was adopted to clarify a district court’s power to correct its own mistakes,” *Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (citing *Norman v. Ark. Dep’t of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996)), which may include dismissal of claims on which judgment has been granted, *id.* at 1287-88.

II. ARGUMENT

A. The Defendants Could Not Receive a Fair and Impartial Trial in Morton County

1. Relevant Procedural Background

[¶16] The Greenpeace Defendants have consistently maintained that Morton County could not provide them a fair trial. When Plaintiffs Energy Transfer LP and Dakota Access LLC

² *See City of Grand Forks v. Henderson*, 297 N.W.2d 450, 452 & n.4 (N.D. 1980) (looking to the federal court’s interpretation of Federal Rule 59(e) to help interpret N.D. Rule 59(j)).

(“Plaintiffs”) first filed suit in 2019, every judge in the South Central Judicial District (which includes Morton County) recused themselves from the case. Dkt. 10. In 2022, the four new judges seated in the South Central Judicial District since 2019 likewise recused themselves, explaining that they “are acquainted with the plaintiff/defendant, and feel that in the best interest of justice should disqualify themselves.” Dkt. 635.

[¶17] This concern was not limited to the bench. There is no reason to believe the jury pool in Morton County is any less acquainted with, or biased about, the parties or the underlying events than its judges. For that reason, the Greenpeace Defendants first moved to change the venue of this lawsuit from Morton County to Cass County in August 2022. Dkts. 826, 827. On January 25, 2023, the Court denied the motion to change venue, but only “at this time.” Dkt. 1131, ¶ 12; Dkt. 1137.

[¶18] Compounding the problem, immediately before trial, actions were undertaken to exploit and exacerbate local bias. In October 2024, four months before trial, Morton County residents received a direct mailer, stylized as a local newspaper called “Central ND News,” that casts the protests that took place eight years ago in a negative light and touted the benefits that Plaintiff Energy Transfer conferred on the community. Dkt. 4293, ¶ 5. On November 22, 2024, the Greenpeace Defendants filed an emergency motion seeking limited discovery, based on evidence including ties to Plaintiffs, to investigate the source of the fake mailers being sent to Morton County residents. *See generally id.* Although the Court noted its “extremely dim view” of “attempts to influence a jury panel before the trial,” it denied the Greenpeace Defendants’ emergency discovery motion. Dkt. 4322, ¶ 4.

[¶19] The drumbeat of targeted prejudicial publicity continued as trial approached. On February 19, 2025, less than a week before trial, the Greenpeace Defendants discovered additional pretrial publicity targeted at potential jurors. Central ND News continued to appear in residents’ mailboxes during trial. Dkt. 4812; Dkt. 5029; Dkt. 5030. The January 2025 issue contained an article with the headline, “Former Dakota Access Pipeline protester: ‘We ended up

creating a local ecological disaster.” *Id.* ¶ 3. Another article discusses the arrest and imprisonment of Ruby Montoya (who has no links to Greenpeace Defendants) for her criminal acts of damage to DAPL in Iowa and South Dakota (*id.*) that at trial Plaintiffs falsely attributed to the Greenpeace Defendants and that are included in the jury’s damage award. Declaration of Steven Caplow (“Caplow Decl.”) Ex. D (“Feb. 27, 2025 Tr.”) 91:12-92:3; Caplow Decl. Ex. G (“Mar. 4, 2025 Tr.”) 206:10-20. The February 2025 issue featured a pull quote from a local businessperson describing the impacts of the protests “50 miles from the protest site.” Dkt. 4812, ¶ 5. As trial began, residents received yet another issue of Central ND News headlined: “Eight years ago: President Trump signs order to expedite Dakota Access Pipeline.” Caplow Decl. Ex. V. The notion that a community “newspaper” with ties to Plaintiffs would treat an eight-year-old presidential directive as front-page news—at the onset of a jury trial focused on this issue—underscores its true function: to inflame rather than inform.

[¶20] In late 2024, Morton County residents also received unsolicited text messages linking to Central ND News and other articles. Dkt. 4812, ¶¶ 4, 6. One text links to an article headlined, “North Dakota says shutdown of Dakota Access Pipeline would cause ‘immediate’ fiscal harm.” *Id.* ¶ 6. These messages were crafted to play on the jury’s anxieties—repeatedly expressed in the jury questionnaires—that the outcome of the trial could negatively impact their job and the economy.³ At the same time, both prior to and during trial Plaintiffs ran commercials on local television promoting their work in North Dakota. Dkt. 4819, ¶ 3. The same or substantially similar 30-second video was posted on YouTube with the title, “Energy Transfer Proudly Operates in North Dakota with the Dakota Access Pipeline.” Dkt. 4819, ¶ 3.

³*See, e.g.*, Declaration of Laurie Kuslansky, Ex. A at 9 (“My life, my family, and my employer depend on pipelines daily”); *Id.* at 44 (“I as well as family work in these industry and support them for livelihood”); *Id.* at 64 (“Could affect my spouse’s job and our income”); *Id.* at 114 (“The entire state would be effected [*sic*]”); *Id.* at 179 (“Banning of pipelines could result in rising cost to consumers”); *Id.* at 229 (“The community has a higher cost of gas/fuel, no direct pipelines in the area”); *Id.* at 264 (“I have concerns that [it] could indirectly effect [*sic*] my [redacted] job, my own personal fuel costs, etc.”); *Id.* at 269 (“Work at refinery”); *Id.* at 340 (“Loss of income”); *Id.* at 449 (“I feel it would be negative on our state as a whole”); *Id.* at 479 (“If we don’t have access to oil & gas, the prices will go up and that will definitely [*sic*] affect me negatively!”).

[¶21] The Greenpeace Defendants informed the Court of this new paid local media targeting potential jurors and for a second time moved to change venue. On February 19, 2025, the Court denied the motion. Caplow Decl. Ex. S (“Feb. 19, 2025 Tr.”) 19:7-20:1, 23:8-31:12; 65:20-23.

[¶22] After the completion of jury selection—in which many prospective jurors confirmed their inability to be impartial—the Greenpeace Defendants made a third request for a change of venue, again to no avail. Caplow Decl. Ex. B (“Feb. 25, 2025 Tr.”) 129:20-131:10.

2. Greenpeace Defendants Are Entitled to a New Trial in a Fair Venue

[¶23] The trial results confirmed that Greenpeace Defendants could not and did not obtain a fair trial in Morton County. Residents of Morton County are not just familiar with the protests surrounding DAPL—they lived through them. Regardless of the merits of the Indigenous-led opposition to DAPL, there is no doubt that for nearly a year, the protests disrupted everyday life in Morton County, instilling a deep sense of fear and anger among its residents that has hardly dissipated with time. In these circumstances, there is plenty of “reason to believe an impartial trial cannot be obtained in the county of venue.” N.D.R.Civ.P. 39.1(b)(1)(B). Indeed, given the degree to which exposure to the protests and outside publicity permeated the jury pool, holding the trial in Morton County violated the Greenpeace Defendants’ constitutional right to due process. *Groppi v. Wisconsin*, 400 U.S. 505, 509-11 (1971) (holding that because “[a] fair trial in a fair tribunal is a basic requirement of due process” (citation omitted), in some circumstances “only a change of venue [i]s constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment”); *see Warger v. Shauers*, 574 U.S. 40, 50 (2014) (“The Constitution guarantees both criminal and civil litigants a right to an impartial jury.”). The Court erred in denying the Greenpeace Defendants’ motions to change venue.

a. Community Bias and Prejudice

[¶24] “[D]etermining whether a fair and impartial trial can be had in a particular location requires an analysis of the jury as a whole and of the community where the trial is to be held.” *Slaubaugh v. Slaubaugh*, 499 N.W.2d 99, 106 (N.D. 1993) (upholding the district court’s change of venue based on the “cumulative effect” of personal relationships “among the prospective jurors, litigants, and witnesses”). The record confirms that a jury drawn from residents of Morton County could not be, and was not, impartial.

[¶25] A survey prior to trial of eligible Morton County jurors found that **100%** of the 150 people surveyed were aware of the Standing Rock protests, and the majority of them had either been personally affected or knew someone who had been affected by the protests. Declaration of Diane Wiley (“Wiley Decl.”), Dkt. 829, ¶¶ 37-39; 44-46; 73; 76; 156. A staggering **97%** of those surveyed—virtually the entire community—indicated they could not be a fair and impartial juror in this lawsuit. *Id.* ¶ 64.

[¶26] Before trial, prospective jurors completed questionnaires asking for their general views relating to the parties, events, and issues underlying this case. The juror questionnaires aligned with the prior survey results: Many Morton County residents would not be able to set aside their personal experiences to decide the case fairly and impartially.⁴ Of the 86 prospective jurors who completed questionnaires, 65 of them (74%) indicated they have personal knowledge or opinion of the protests. Declaration of Laurie R. Kuslansky (“Kuslansky Decl.”) ¶ 7. The majority of the prospective jurors had negative opinions of Greenpeace Defendants, organizations that oppose the use of fossil fuels, and/or protests in general. *Id.* ¶ 6.

⁴ Consistent with the later jury questionnaires, survey respondents similarly stated their understanding that protesters “interfered with our farming and ranching operations”; “blocked roads”; “burnt out the bridge [which affected] people getting to work”; caused “[p]ersonal property [to be] damaged and animals poached”; damaged vehicles with rocks and bottles, forced family and friends to move out of their homes, and more. *Id.* ¶ 44. Others expressed that “everyone was scared to stick their heads outside, until things were clear”; protesters “scared children on school buses”; “[f]amily and friends [were] getting called at their workplaces or being threatened”; and even that “young men [] slept with knives under their pillows just in case.” *Id.* ¶¶ 44, 73, 76, 156.

[¶27] Unsurprisingly, during voir dire, nearly a dozen prospective jurors indicated they could not be fair based *solely* on the fact that some Greenpeace, Inc. employees were at the protests for a period of time. Caplow Decl. Ex. A (“Feb. 24, 2025 Tr.”) 244:23-245:12. Many prospective jurors were either personally affected by the protests or knew someone who had been affected by the protests. *See, e.g., id.* 55:1-8. Others spoke of their disapproval of people from outside their community disrupting their life and damaging property. *See, e.g., id.* 41:4-10 (Juror 6 stating, “I don’t think that there’s anyone that was a resident at that time that couldn’t tell you that there wasn’t complete disruption in our community because of the protests. I think you’ll find a tough time finding people that are completely unbiased on that, because it affected everyone.”); *see also id.* 41:11-14 (“every juror” except a handful indicated he or she felt “the same way”). As an example, Juror 6 (whom the Court refused to strike for cause) testified about a terrifying incident in which she and her younger brother got lost and were surrounded by protesters who she claimed were pounding on her car. *See id.* 112:1-8. Prospective jurors were also overwhelmingly opposed to organizations—like the Greenpeace Defendants—that oppose the use of fossil fuels, and/or protests in general. One prospective juror arrived wearing an Energy Transfer hat. *Id.* 75:18-22.

[¶28] Plaintiffs’ theory of the case explicitly linked their damages claims to the personal experiences of Morton County residents. Seizing upon the community’s general frustration and negative local media coverage of the protests, Plaintiffs claimed that the Greenpeace Defendants were 100% responsible for any alleged loss or damage, no matter whether it was caused by the federal government, financial institutions, or tens of thousands of unidentified, unknown, and unaffiliated individual protesters who descended on the area. This meant that residents of Morton County were not only participants and witnesses to events and actions which the Plaintiffs attributed to the Greenpeace Defendants, but were also asked to adjudicate these events and actions. As counsel noted, “[i]t would be like having a traffic accident at an intersection and

having people sit on the jury who were sitting on the corner and watched the accident.” Feb. 25, 2025 Tr. 63:24-64:2.

[¶29] Given how Morton County residents recalled their experiences of the protests—recollections characterized by fear and disruption—and the negative feelings and opinions of the protests and protesters the residents expressed, the Greenpeace Defendants could not, and did not, receive a fair trial in the same county where the protests occurred.

b. Paid Local Pretrial Publicity

[¶30] The bias stemming from jurors’ personal experiences was compounded by an apparent campaign to exert influence over potential jurors. The paid local publicity was specifically directed to and reached its intended audience—potential jurors in Morton County. One juror even brought a copy of Central ND News to the courtroom because he thought it was “weird” to get a newspaper about the protests at this time and “it brought back memories.” Feb. 24, 2025 Tr. 242:7-16. During voir dire, *seven* prospective jurors indicated that they had seen Energy Transfer television commercials in recent months. *See id.* 242:15-23.

[¶31] To determine whether the prejudice from pretrial publicity requires a change of venue, this Court considers the following factors:

- (1) whether the publicity was recent, widespread, and highly damaging to the defendant;
- (2) whether the [plaintiff] was responsible for the objectionable material, or if it emanated from independent sources;
- (3) whether inconvenience to the prosecution and administration of justice will result from a change of venue or continuance; and
- (4) whether a substantially better panel can be sworn at another time and place.

Olson v. N.D. Dist. Ct., 271 N.W.2d 574, 580 (N.D. 1978); *Basin Elec. Power Coop. v. Boschker*, 289 N.W.2d 553, 558 (N.D. 1980) (applying these factors to civil cases). Here, the factors weighed strongly in favor of a transfer of venue.

[¶32] **First**, the publicity was “recent, widespread, and highly damaging to the defendant.” In denying the Greenpeace Defendants’ initial motion to change venue, the Court

acknowledged that “[d]uring the actual protests and the aftermath, the publicity was widespread, but nothing was provided to the Court to show the publicity was highly damaging to Greenpeace.” Dkt. 1131, ¶ 8. Even if that were correct at the time, the Greenpeace Defendants subsequently presented evidence of recent publicity that was highly damaging. For example, the January 2025 issue of Central ND News, circulated just before jury selection, contained an article with the headline, “Former Dakota Access Pipeline protester: ‘We ended up creating a local ecological disaster,’” Dkt. 4812, ¶ 3, while the February 2025 issue features a pull quote from a local businessperson describing the impacts of the protests “50 miles from the protest site,” *id.* ¶ 5. The apparent purpose of these *ex parte* communications was to taint the jury pool. And it worked. This publicity actually reached prospective jurors—including the person who brought his copy to the courthouse during jury selection. And it was damaging to the Greenpeace Defendants in a trial in which Plaintiffs sought to hold them responsible for all of the damage allegedly stemming from the protests.

[¶33] **Second**, the timing and nature of much of this recent publicity suggest it emanated from Plaintiffs or someone closely connected to them. On or about September 5, 2024, Energy Transfer’s founder and Board Chair Kelcy Warren donated \$5M to a Super PAC named Turnout for America. Dkt. 4293, ¶ 9. Two weeks later, Turnout for America paid \$250,000 to Northern CB Corp. (an Illinois corporation providing printing and publishing services that was dissolved in 2022, whose president, Brian Timpone, is also the operator of Central ND News’s publisher Metric Media) for “media services.” *Id.* Less than a month later, the direct mailer was sent primarily—and perhaps exclusively—to Morton County, North Dakota, via FMC Printing in Dallas, Texas, where Energy Transfer is based. *Id.* The direct mailer identified a Central ND News website, which featured articles about North Dakota residents’ negative experiences with 2016 protests and stories lauding Energy Transfer’s donations in North Dakota. Dkts. 4293, 4298, 4303. The same day the Central ND News website posted one such negative article about the protests, the group Grow America’s Infrastructure Now (GAIN) re-posted the article. Dkt.

4301; Dkt. 4293, ¶ 9. GAIN is an advocacy coalition funded by Energy Transfer and set up by DCI, Energy Transfer’s longtime public relations firm. Dkt. 4314, ¶ 3.

[¶34] The Court recognized that if the publicity were *not* independent or unbiased, this factor would weigh in favor of a change of venue. Dkt. 1131. To the extent this Court believed the available evidence was insufficient on this factor, the Court should have granted the Greenpeace Defendants’ request to conduct limited discovery to more definitely determine if Plaintiffs were involved in the objectionable material. Dkt. 4929.

[¶35] **Third**, as the Court has acknowledged, inconvenience to Plaintiffs or the administration of justice “does not impact a change of venue either way.” *Id.* ¶ 9. That is because Plaintiffs have no connection to Morton County, and the additional costs of holding a trial in Cass County, if any, would have been minimal.

[¶36] **Finally**, the Greenpeace Defendants’ evidence shows that a better panel could be sworn in Cass County. “[I]t is generally true that in counties geographically removed from the locale of the [events], lack of a sense of community involvement will permit jurors a degree of objectivity unobtainable in that locale” *Olson*, 271 N.W.2d at 582. Cass County is approximately 200 miles from where the protests occurred. Although nearly all of the Cass County residents surveyed were also familiar with the protests, fewer of the Cass County respondents demonstrated strong feelings of hostility towards the protest and protesters than the respondents in Morton County. Wiley Decl. ¶¶ 50-53. And, compared to Cass County residents, more than twice as many Morton County residents have a personal connection to the Dakota Access Pipeline, other pipelines or an oil or gas company, or the protests. *Id.* ¶ 39. Notably, only 12% of Cass County residents surveyed were either personally affected or knew someone who was affected by the protest—compared to 55% of Morton County respondents. *Id.* ¶ 40.

[¶37] The Court deemed this factor “inconclusive” at the time of the Greenpeace Defendants’ initial motion, declaring that “a panel of 50 potential jurors could provide the necessary jury.” Dkt. 1131, ¶ 10. But the results of the voir dire and trial confirmed the Court

was mistaken. Because the jury empaneled in Morton County was, in fact, biased, the advantages of Cass County are all the more compelling.

[¶38] As the U.S. Supreme Court states, “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should . . . transfer it to another county not so permeated with publicity.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 553 (1976). To vindicate the fundamental guarantee of due process, this Court should now do what it declined to do previously: grant the Greenpeace Defendants a new trial in a fair venue.

B. The Court Erred in Refusing to Strike Potential Jurors for Cause

[¶39] Even assuming, for the sake of argument, that the Greenpeace Defendants could ever have a fair trial in Morton County, they were deprived of that right by the Court’s failure to strike biased jurors. Under North Dakota law, parties may challenge and courts may strike for cause jurors who have an interest “in the event of the action, or in the main question involved in the action”; have “an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them”; or have “a state of mind . . . evincing enmity against or bias for or against either party.” N.D.C.C. § 28-14-06(5)-(7). Fundamentally, “[a] jury verdict must be based upon evidence received in open court, not from outside sources.” *Olson*, 271 N.W.2d at 582 (citation omitted).

[¶40] Of the final twenty prospective jurors, the Greenpeace Defendants moved to strike *twelve* for cause. *See* Feb. 24, 2025 Tr. 87:2-11, 100:14-107:25 (challenging Juror 5); *id.* 87:12-19, 115:7-17 (challenging Juror 6); *id.* 88:15-25, 134:23-141:16 (challenging Juror 14); *id.* 89:12-19, 146:5-11 (challenging Juror 17); *id.* 91:25-92:10, 167:23-168:7 (challenging Juror 25); *id.* 92:11-93:2, 172:25-173:8 (challenging Juror 26); *id.* 93:3-15, 192:11-23 (challenging Juror 29); *id.* 93:16-94:1, 199:25-200:8 (challenging Juror 30); *id.* 205:12-16 (challenging Juror 31); Feb. 25, 2025 Tr. 49:6-14 (challenging Juror 41); *id.* 62:11-66:3 (challenging Juror 44); *id.* 114:14-23 (challenging Juror 59). The Court denied all of those challenges. As a result, *seven* of the nine empaneled jurors, and one alternate, were among those the Greenpeace Defendants

had moved to strike for cause (Jurors 5, 14, 17, 26, 30, 31, 41, and 59). *See* Kuslansky Decl. ¶ 9. That is after the Greenpeace Defendants used their peremptory challenges on four jurors who should have been excused for cause (Jurors 6, 25, 29, and 44). *Id.*

[¶41] The sources of these final 20 prospective jurors' impermissible biases stemmed from a variety of interrelated sources. **First**, at least *eight* had a direct personal experience with the protests or protesters, or knew a friend or family member who had a direct personal experience with the protesters. *See* Kuslansky Decl. ¶ 8; *id.* Ex. A. Since Plaintiffs' theory of the case was that everything that happened at Standing Rock was Greenpeace Defendants' fault, this meant that nearly half of the prospective jurors selected to the final pool had "an unqualified opinion or belief as to the merits of the action" based on their personal negative experiences with the protests. *See* N.D.C.C. § 28-14-06(6). Just as an individual who had *participated* in the protests could not have fairly decided this case, surely those individuals who *experienced* their effects could not either. **Second**, many of the jurors selected to the final pool were personally, financially, and ideologically tied to the fossil fuel industry. *See, e.g.*, Feb. 24, 2025 Tr. 135:18-22; Kuslansky Decl. ¶ 8; *id.* Ex. A. These jurors were thus biased in favor of Plaintiffs and "interested" in the outcome of the action to the extent it could negatively impact their livelihoods. *See* N.D.C.C. § 28-14-06(5), (7). **Third**, and relatedly, many jurors were biased against the Greenpeace Defendants themselves, expressing negative opinions about the defendants. *See, e.g.*, Feb. 24, 2025 Tr. 102:6-103:12, 185:12-186:17. **Fourth**, some jurors selected to the final pool expressed serious concerns about their ability to perform their duties in accordance with North Dakota law. *See* Kuslansky Decl. ¶ 8; *see generally id.* Ex. A. Despite these jurors' personal experiences, financial interest, bias, and stated inability to be impartial, the Court declined to excuse any of them for cause.

[¶42] Critically, because the Court should have struck seven of the jurors who ultimately decided this case, the jury as ultimately empaneled was biased. The presence of even

one of these improper jurors is sufficient to warrant a new trial. *See, e.g., Thompson v. Altheimer & Gray*, 248 F.3d 621, 627 (7th Cir. 2001).

[¶43] There can be no doubt that at least *one* of these challenged seated jurors should have been excluded for cause—if not all. Juror 5 and her father both worked at power plants; she inherited oil wells and mineral rights, Kuslansky Decl. Ex. AR at 111-12; and she recognized her family “has benefited . . . from fossil fuel” and had only had “positive” experiences with the industry, Feb. 24, 2025 Tr. 104:1-5. She had a negative opinion of Greenpeace based on her perceptions of protests in Seattle, which she associates with Greenpeace. *See* Feb. 24, 2025 Tr. 100:24-107:25; Kuslansky Decl. Ex. AR at 111 (stating she was “[a]gainst” Greenpeace). She also believed that even if “the law doesn’t require the defense to prove anything, . . . the defense [still] has to prove their innocence.” Feb. 24, 2025 Tr. 61:21-25.

[¶44] Juror 14 relayed his father’s personal experience with protesters at a local business and how this interaction left a lasting, negative impression of the protests generally. *Id.* 137:10-139:14. He was also employed by a petroleum company that owns a stake in DAPL and admitted that, given his existing biases, the Greenpeace Defendants would “start at a disadvantage” compared to Plaintiffs. *Id.* 135:23-136:3; *see also* Kuslansky Decl. Ex. AR at 157 (acknowledging that a negative outcome for Plaintiffs “[c]ould put the oil & gas industry in a negative light in the eyes of the public & since I work for a refinery they could look at me negatively”). During trial, he recognized one of Plaintiffs’ exhibits because he had performed contract work for Plaintiffs’ subcontractor. *See* Kuslansky Decl. Ex. AS; *see also* Caplow Decl. Ex. J (“Mar. 7, 2025 Tr.”) 16:22-26:25. And like Juror 5, he affirmed that a defendant would have to prove its innocence even if that was not what the law required. Feb. 24, 2025 Tr. 61:21-25.

[¶45] Juror 17 was personally affected by the protests when traffic was detoured because some protesters had attached themselves to machinery along Highway 6. Feb. 24, 2025 Tr. 142:14-143:6, 146:5-9.

[¶46] Juror 26 candidly stated that “my job depends on fossil fuels” and that he supports the industry because “otherwise I’m out on the street.” Feb. 25, 2025 Tr. 169:17-170:5.

[¶47] Juror 30’s spouse worked for one of Plaintiffs’ subcontractors, whose work at the protests is the subject of damages claims. *Id.* 194:2-199:6. Her father also worked in the oil industry, and she had a negative opinion of Greenpeace because she “wouldn’t want something risking” her family members’ jobs. *Id.*; Kuslansky Decl. Ex. AR at 332 (stating a “negative” opinion of Greenpeace). She expressly admitted she would be uncomfortable finding against the pipeline industry and could not be fair. *See* Feb. 24, 2025 Tr. 194:2-199:6.

[¶48] Juror 31 has a negative opinion of organizations that oppose the use of fossil fuels. Kuslansky Decl. Ex. AR at 353. She agreed that given her bias, the Greenpeace Defendants “would be starting at a disadvantage in this case.” *See* Feb. 24, 2025 Tr. 201:6-202:21.

[¶49] Finally, Juror 41 has an uncle who worked DAPL security during the protests and a husband who is “tied to the oil and gas industry.” Kuslansky Decl. Ex. AR at 61-62; Feb 25, 2025 Tr. 42:22-23. She had been affected personally by the protests, believed that Greenpeace was involved with the protests, and had a negative opinion of Greenpeace and organizations that oppose the use of fossil fuels. Kuslansky Decl. Ex. AR at 61. When asked if she could nevertheless be fair responded, “I don’t know,” then added: “I mean, if no one was there, we wouldn’t be here, right?” Feb 25, 2025 Tr. 42:22-23, 43:5-12, 44:12-19, 45:7-15, 46:24-25.

[¶50] None of these seven jurors should have ever been permitted to resolve this case.

[¶51] Moreover, that these jurors ultimately sat on the jury was in part a result of this Court’s failure to strike the five other biased jurors on whom the Greenpeace Defendants moved for cause. Greenpeace Defendants were forced to use their peremptory challenges on four of these prospective jurors when those for-cause challenges were denied, and the final biased juror sat as an alternate. This deprived the Greenpeace Defendants of challenges that otherwise could have been used on the jurors ultimately seated. *See* Kuslansky Decl. ¶ 9. Given the sheer

number of biased jurors in the final group of twenty, the Court’s refusal to decline to strike these prospective jurors for cause was prejudicial. *See State v. Jaster*, 2004 ND 223, ¶¶ 9-10, 690 N.W.2d 213 (reversible error where deprivation of peremptory challenges leads biased juror to sit on the jury).

[¶52] Each of these five biased prospective jurors should have been struck for cause. Juror 6 stated that the “[p]rotestors were out of hand,” had “disrupted our community,” were “[d]irty [and] disruptive,” and that she had “[s]een it with [her] own eyes.” Kuslansky Decl. Ex. AR at 251. In particular, she described a personally traumatic experience with protesters when she was driving her little brother near the protests, and the car was stopped and surrounded by protesters who physically attacked her car. Feb. 24, 2025 Tr. 111:16-112:8. She also recounted that she had a positive view of Energy Transfer, that she “[s]trongly disagree[d]” with organizations that oppose the use of fossil fuels, Kuslansky Decl. Ex. AR at 251, and that she believed that “if a case gets to trial, it must have merit,” indicating her inability to follow the law, Feb. 24, 2025 Tr. 60:16-20.

[¶53] Juror 25 relayed the story of how protesters had stolen liquor from her close friend’s business and then harassed this friend by posting false and negative reviews of the business online. Feb. 24, 2025 Tr. 59:9-16; *see also* Kuslansky Decl. Ex. AR at 191. She also stated that the protests made her feel unsafe and admitted that she would be uncomfortable finding against the pipeline industry. Feb. 24, 2025 Tr. 56:7-14. She further stated that she had a positive opinion of Energy Transfer because it had donated millions of dollars to the community, and a negative opinion of Greenpeace because they had supported the protesters—sentiments that directly track the messages of the paid direct mailers and advertisements targeted at prospective jurors before trial. *See* Feb. 24, 2025 Tr. 48:23-49:3, 163:6-164:20; Kuslansky Decl. Ex. AR at 191.

[¶54] Juror 29, in turn, had direct interactions with protesters who purportedly claimed to have been paid \$250 per day in addition to receiving free marijuana. Feb. 24, 2025 Tr.

188:21-189:16. He was also friends with a National Guard member who provided law enforcement to the State of North Dakota during the DAPL protests and with whom he had discussed the conduct of protesters. *Id.* 190:1-6. He stated that it would be nearly impossible for him to ignore that information in the jury room. *Id.* 190:7-191:18. He also expressed many negative opinions about the Greenpeace Defendants, stating he believed that they are extreme and that he disapproves of their tactics. Kuslansky Decl. Ex. AR at 211.

[¶55] Similarly, Juror 44 saw the car of one of the security workers that protesters had purportedly smashed. Feb. 25, 2025 Tr. 57:2-24. She also believed that a negative outcome for Plaintiffs could mean a “[l]oss of income” for her because she owns mineral rights, Kuslansky Decl. Ex. AR at 342-43, and she self-identified as a bad juror for this case, Feb. 24, 2025 Tr. 239:17-24.

[¶56] Finally, Juror 59 acknowledged his disagreement with organizations that oppose fossil fuel use because “my livel[i]hood depends on fossil fuels.” Kuslansky Decl. Ex. AR at 281.

[¶57] Plaintiffs may insist that every one of these jurors was rehabilitated and agreed to wipe their memory of their personal experiences. But while perfunctory assertions that a juror could be fair may raise a presumption of impartiality (*e.g.*, *State v. McLain*, 301 N.W.2d 616, 622-23 (N.D. 1981)), that presumption is rebutted here by the ample indications that these jurors could not in fact give the Greenpeace Defendants a fair trial through the bias they consistently exhibited in explicit comments—from questionnaire responses through voir dire—against Greenpeace and the protesters and in favor of the oil and gas industry. The Judgment must be vacated, and a new trial granted, due to demonstrated bias among multiple seated jurors—where, again, the presence of even a single biased juror is enough to warrant a new trial. *Thompson*, 248 F.3d at 627.

[¶58] Regardless, even assuming that each of these individual jurors was not so biased as to taint the jury’s verdict, the “cumulative effect” of all these jurors being in the juror pool

confirms that the Greenpeace Defendants’ motion for a change of venue should have been granted. *Slaubaugh*, 499 N.W.2d at 106. *Slaubaugh* holds that a motion to change venue requires a “broader analysis” than a challenge to an individual juror for cause, expressly advising the district court to look beyond the criteria set forth in N.D.C.C. § 28-14-06. 499 N.W.2d at 105-06. Even if each individual juror purported to be able to set aside his or her personal beliefs, the Court should have considered that the “cumulative effect” of these jurors’ beliefs was more than sufficient to justify a change of venue. *Id*

[¶59] This table summarizes the prospective jurors challenged for cause:

Juror	Key evidence of bias	Challenged for cause?	Outcome
5	She and her father worked at power plants; inherited oil wells and mineral rights; she recognized her family “has benefited . . . from fossil fuel” and had only had “positive” experiences with the industry; negative view of Greenpeace based on Seattle protests; believed defense must prove innocence.	Yes	Seated — on jury
6	Stated “[p]rotestors were out of hand,” had “disrupted our community,” were “[d]irty [and] disruptive,” and that she had “[s]een it with [her] own eyes.” Witnessed protests firsthand; described a personally traumatic experience with protesters surrounding and physically attacking her car. Had a positive view of Energy Transfer; “[s]trongly disagree[d]” with organizations that oppose the use of fossil fuels; believed a case reaching trial must have merit.	Yes	Struck via peremptory
14	Father had negative personal experience with protesters at a local business, leaving him with a negative impression of the protests generally; employed by petroleum company that owns a stake in DAPL; acknowledged Greenpeace Defendants would “start at a disadvantage” with him; had performed	Yes	Seated — on jury

contract work for one of Plaintiffs' subcontractors; believed defendants must prove innocence.

17	Personally affected when traffic was detoured because protesters attached themselves to machinery along Highway 6.	Yes	Seated — on jury
25	Close friend's liquor business was stolen from and harassed with negative reviews by protesters; felt unsafe due to protests; uncomfortable finding against the pipeline industry; positive opinion of Energy Transfer because it had donated millions of dollars to the community, and a negative opinion of Greenpeace because they had supported the protesters.	Yes	Struck via peremptory
26	Stated “my job depends on fossil fuels” and that he supports the industry "otherwise I'm out on the street."	Yes	Seated — on jury
29	Direct interactions with protesters (who allegedly claimed to have been paid \$250/day plus free marijuana); friends with a National Guard member who policed the protests, with whom he had discussed protester conduct; stated he could not ignore that information; expressed many negative opinions about the Greenpeace Defendants, including that they are extreme and he disapproves of their tactics.	Yes	Struck via peremptory
30	Spouse worked for one of Plaintiffs' subcontractors whose DAPL work is subject of damages claims; father worked in oil industry; negative view of Greenpeace because she “wouldn’t want something risking” her family members’ jobs; expressly admitted she would be uncomfortable finding against the pipeline industry and could not be fair.	Yes	Seated — on jury
31	Negative view of organizations opposing fossil fuels ("seen MANY benefit of oil & gas (good & bad) I am a supporter"); agreed that given her bias, the	Yes	Seated — on jury

Greenpeace Defendants would be "starting at a disadvantage in this case."

41	Uncle worked DAPL security during protests; husband tied to oil and gas industry; was affected personally by the protests, believed Greenpeace was involved in protests; personally affected by protests, and had a negative opinion of Greenpeace and organizations that oppose the use of fossil fuels.; when asked if she could be fair said "I don't know" and "I mean, if no one was there, we wouldn't be here, right?"	Yes	Seated — alternate
44	Saw a security worker's car allegedly smashed by protesters; owns mineral rights and believed a negative outcome for Plaintiffs could mean a "[l]oss of income" for her; self-identified as a bad juror for this case.	Yes	Struck via peremptory
59	Generally against organizations opposing fossil fuels because "my livelihood depends on fossil fuels."	Yes	Seated — on jury

C. The Verdict Does Not Reflect Comparative Fault

[¶60] Even if these jurors had not been biased, the contradiction between the instructions given to the jury and the verdict form would have prevented them from rendering a proper damages award. The result of this contradiction was that the verdict does not reflect actual *fault* attributable to each of the Greenpeace Defendants—as opposed to the many other individuals who would have contributed to the alleged damages Plaintiffs sought and recovered. “Under N.D.C.C. § 32-03.2-02, a person who contributes to an injury is only responsible for the percentage of damages equal to that person’s percentage of fault.” *Endresen v. Scheels Hardware & Sports Shop, Inc.*, 560 N.W.2d 225, 235 (N.D. 1997). Here, the jury did not find—and it could not have possibly found—that the Greenpeace Defendants were the sole parties at fault for *all* the damages it awarded. That is because the jury was never given the opportunity to determine the amount of fault of each Greenpeace Defendant. The Court instructed the jury that

it should award the *total* amount of damages suffered by Plaintiffs, and that the Court would then reduce that total by the percentage of fault attributed to each of the Greenpeace Defendants. But the verdict form failed to provide the jury with any mechanism to determine those respective percentages of fault, and so it did not make that determination. The Greenpeace Defendants are entitled to a new trial in which the jury is given the opportunity to make those critical findings, as is required under North Dakota law.

[¶61] North Dakota’s comparative fault statute provides that a court “may, and when requested by any party, **shall** direct the jury to find separate special verdicts determining the amount of damages **and** the percentage of fault attributable to each person, **whether or not a party**, who contributed to the injury.” N.D.C.C. § 32-03.2-02 (emphasis added). When it has done so, “each party is liable only for the amount of damages attributable to the percentage of fault of that party.” *Id.*

[¶62] Here, consistent with this statute, the Court instructed the jury to determine the *total* damages purportedly incurred by the Plaintiffs, whether caused by each of the Greenpeace Defendants or by anyone else at fault. Using pattern instruction C - 2.82, the Court instructed the jury to make special findings of fact determining who was at fault, if anyone; whether such fault was a proximate cause of damages; the respective percentages of fault allocated to each of the Defendants, each of the Plaintiffs, and anyone else who contributed to proximately cause damages; and the amount of each Plaintiff’s proven damages *without reduction for fault*. See Final Jury Instructions, Dkt. 5036, at 9 (Comparative Fault). The jury was further instructed that the *Court* would reduce damages for the fault caused by Plaintiffs or anyone else and that the jury was not permitted to reduce any damage amounts. *Id.*

[¶63] But Plaintiffs then proposed—and the Court ultimately adopted without entertaining argument from the parties on the Sunday evening before closing arguments—a verdict form that provided the jury no opportunity to apportion or allocate fault between the Greenpeace Defendants, the Plaintiffs, and third parties. See Ex. H to Greenpeace Defs.’ Mot. to

Reduce Damages Award, Dkt. 5048 (email from the Court on the evening of Sunday, March 16, 2025, stating “WE WILL NOT RE-ADDRESS” these issues); Special Verdict Form, Dkt. 5035. At the Monday, March 17, 2025, morning hearing session, the Court allowed the parties to make their objections, but did not entertain argument on the verdict form. Caplow Decl. Ex. P (“Mar. 17, 2025 Tr.”) 11:13-15.

[¶64] At that March 17, 2025 hearing, the Greenpeace Defendants expressly took exception to the verdict form, arguing “that [the verdict form] provides no ability to actually do any comparative fault by the jurors in any place. So we have an instruction that provides for comparative fault, an allocation of fault. But they have no place on the verdict form to actually engage in that activity.” Mar. 17, 2025 Tr. 10:7-15.

[¶65] Consistent with the jury instruction given by the Court, the jury then purported to award 100% of Plaintiffs’ requested damages. Ex. L to Greenpeace, Inc.’s Renewed Mot. for JMOL, Dkt. 5098; Special Verdict Form, Dkt. 5035. Critically, the jury’s verdict did not specify the amount of damages that were proximately caused by the Greenpeace Defendants or make findings of fact that would allow the Court to calculate the percentage of damages to impose against the Greenpeace Defendants based on the percentage of fault they bore. This failure, in and of itself, warrants a new trial. N.D.C.C. § 32-03.2-02; N.D.R.Civ.P. 59(b)(7).

[¶66] This failure is particularly significant here, given that all three of Plaintiffs’ damages experts assumed that *any loss* incurred by the Plaintiffs over the course of the pipeline project was 100% attributable to the Greenpeace Defendants. *See infra* ¶¶ 164–167. As a result, the jury was simply presented with Plaintiffs’ alleged total losses—including amounts Plaintiffs themselves and Plaintiffs’ experts conceded were not attributable to the Greenpeace Defendants. *See supra* ¶ 60; *infra* ¶¶ 164–167. And because the jury was expressly instructed that it should not reduce the total amount of damages, and was also given no means to specify the portion of those damages that should be allocated to the Greenpeace Defendants, those *total* losses are what the jury’s verdict ultimately reflects.

[¶67] As an illustration of how prejudicial this error was, take the jury’s award to Dakota Access of \$5,851,034 million in compensatory damages against Greenpeace Inc. for its purported trespass to land. This Court concluded that Dakota Access presented sufficient evidence to support the conclusion that Greenpeace Inc.’s “agents and employees were involved in the trespass to property” Dkt. 5321 (“Dkt. 5321 Order”) ¶ 7—presumably a reference to the testimony that Harmony Lambert ran down the pipeline easement carrying a windsock at some unspecified time. Caplow Decl. Ex. W (“Lambert Trial Dep.”) 202:15–204:02; Trial Ex. 1171. Assuming, for present purposes, that Greenpeace Inc. could have been liable on this count at all, this brief trespass could not possibly have caused nearly \$6 million in damages. But that is because the jury’s award does not reflect harm caused by Ms. Lambert. Rather, Ms. Lambert was just one of tens of thousands of protestors, some portion of whom may have trespassed on Dakota Access’s purported property and caused it damage. The actual amount that could, under North Dakota law, be imposed against Greenpeace Inc. is instead 5,851,034 * X, where X is the percentage of fault that Greenpeace Inc.—of all the thousands of participants at the Standing Rock protest—bore for the harm Dakota Access purportedly experienced from trespass on Dakota Access’s purported property. But because the jury never found what X was, there is no basis on which this Court can determine the damages to impose against Greenpeace Inc. for this trespass claim. This illustration using Plaintiffs’ trespass to land claim applies across all claims and all damages for which the Greenpeace Defendants were found liable.

[¶68] Thus, the Greenpeace Defendants cannot be liable for the total losses the jury found. Rather, as a matter of law, they are liable only for those damages that they proximately caused, allocated by the percentage of fault that they bore. N.D.C.C. § 32-03.2-02. The jury’s verdict provides no basis for making these critical determinations. But the Greenpeace Defendants are entitled to the *jury’s* determination of the “percentage of fault” attributable to each Defendant and to myriad non-parties. N.D.C.C. § 32-03.2-02; *see Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 476 (8th Cir. 1996) (citing *Champagne v. United States*, 513 N.W.2d 75, 79

(N.D. 1994)). Where, as here, a jury’s verdict fails to make a critical finding and thus cannot support a judgment, a new trial is warranted. *Fontes v. Dixon*, 544 N.W.2d 869, 871-72 (N.D. 1996).

[¶69] Plaintiffs cannot escape this straightforward reasoning by arguing—as they did in response to the Greenpeace Defendants’ statutory motion to reduce damages—that the Greenpeace Defendants somehow waived their right to have the jury determine this critical factual issue. Dkt. 5057 (Plaintiffs’ Opp. to Defendants’ Mot. to Reduce Damages Award) ¶¶ 26-35. Plaintiffs have relied on North Dakota Rule of Civil Procedure 51(a), which provides that parties must make “requests for jury instructions” “[a]t the close of the evidence or at any earlier reasonable time that the court orders.” N.D.R.Civ.P. 51(a)(1) (emphasis added). Yet Rule 51(a) is not the relevant Rule, as the Greenpeace Defendants did not propose a jury instruction that this Court rejected as untimely. Just the opposite. Greenpeace Defendants consistently requested that the jury be instructed on the governing principles of contributory fault, and this Court (correctly) granted that request. The problem here is that notwithstanding this instruction, the verdict *form* did not enable the jury to “find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party”—the critical determination the jury was required to make. N.D.C.C. § 32-03.2-02.

[¶70] Rule 49(a), not Rule 51(a), governs a party’s purported waiver of its right to have an issue submitted to the jury on a verdict form, and the Greenpeace Defendants readily satisfied the applicable preservation requirement. Rule 49(a)(3) provides: “A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury.” N.D.R.Civ.P. 49(a)(3). As Plaintiffs cannot dispute, Greenpeace Defendants objected immediately prior to closing argument that the verdict form was faulty because it “provide[d] no ability to actually do any comparative fault.” Mar. 17, 2025 Tr. at 10:7-15. Thus, Greenpeace Defendants made

precisely the sort of “demand[]” “before the jury retires” that Rule 49(a)(3) contemplates. N.D.R.Civ.P. 49(a)(3).

[¶71] Plaintiffs have suggested that the Greenpeace Defendants nevertheless waived this objection because they did not *also* submit a proposed verdict form that would have corrected this error. *See* Dkt. 5057 (Plaintiffs’ Opp. to Defendants’ Mot. to Reduce Damages Award) ¶ 31 . But while proposing a proper verdict form is one way in which a party could satisfy Rule 49(a)(3), it is not a requirement. *See* 9B *Wright & Miller’s Federal Practice & Procedure* § 2510 (3d ed. Sept. 2025 update) (“[A] party is not required to submit other forms to preserve an objection to the forms submitted.”). Instead, as the North Dakota Supreme Court has made clear, a party must either “object to the special verdict form *or* request his own form.” *Horstmeyer v. Golden Eagle Fireworks*, 534 N.W.2d 835, 840 (N.D. 1995) (emphasis added) (holding defendant waived submission of apportionment of fault issue to jury where it did not “specifically object[] to the special verdict form” *and* “the record [did not] contain any special verdict form requested by” it). Here, the Greenpeace Defendants satisfied Rule 49(a)(3) by expressly objecting to the omission from the verdict form of a method for the jury to assign comparative fault. *See id.*⁵

[¶72] Finally, even if the Greenpeace Defendants waived their right to have the jury decide this issue—and they did not—that would simply mean that it is up to this *Court* to

⁵ Indeed, even if a party could waive submission of an issue to the jury simply by failing to also propose a verdict form addressing the issue, a finding of waiver would be inappropriate here. While the Greenpeace Defendants consistently requested the comparative fault jury instruction, this Court did not definitively rule on that request until Sunday, March 16—the day before it delivered those instructions. *See* Dkt. 5048 (Caplow Decl. ISO Defendants’ Motion to Reduce Damages Award Ex. H). Less than two hours after this Court’s decision, Greenpeace Defendants responded with a proposed verdict form that, as counsel’s cover email expressly highlighted, “in the interest of time, [did] not address some of your instructions sent earlier this morning resolving disputed issues such as . . . comparative fault.” *See id.* at 5. Accordingly, Greenpeace Defendants highlighted the need for the verdict form to account for the comparative fault issue as soon as this Court determined it would be submitted to the jury, and their proposed form omitted the comparative fault issue only because it was submitted as soon as possible even though it was expressly *not* complete. And if that were not enough, the Greenpeace Defendants then expressly put their objection to the lack of a comparative fault mechanism on the record the very next morning. Especially in these circumstances, the Greenpeace Defendants could not have waived this issue even if Plaintiffs were correct regarding the governing legal standard (which they are not).

determine the share of fault each of the Greenpeace Defendants bears for the total amount of damages the jury awarded. Rule 49(a)(3) provides that when a party has waived submitting an issue to the jury, “the court may make a finding on the issue.” N.D.R.Civ.P. 49(a)(3); *see Horstmeyer*, 534 N.W.2d at 840 (affirming trial court’s finding of fault following defendant’s Rule 49(a)(3) waiver). In other words, this Court would then need to make factual findings on the X described in the example above (*supra* ¶ 67), which North Dakota law *requires* to be made in awarding damages. N.D.C.C. § 34-03.2-02. If this Court does find waiver and make that finding, it should determine that the Greenpeace Defendants bear only a small percentage of the fault—if any—for any damages caused, as they were at most only a few of the thousands of contributing actors. *See infra* Section II.C.3.c, II.C.5 . Thus, even assuming Plaintiffs’ waiver argument were correct, this Court should still reduce the damages award substantially. But because Plaintiffs’ waiver argument is not correct, and the Greenpeace Defendants are entitled to the jury’s determination of this issue, a new trial is required.

D. The Jury’s Verdict Is Manifestly Against the Weight of the Evidence

[¶73] A court may grant a new trial when the verdict is manifestly against the weight of the evidence. *Gisvold*, 2007 ND 54, ¶ 11, 730 N.W.2d 597. In assessing this issue, “the trial court may, within limits, weigh the evidence and judge the credibility of witnesses.” *Okken v. Okken*, 325 N.W.2d 264, 269 (N.D. 1982) (citation omitted). Similarly, in determining whether the damages awarded are excessive, the North Dakota Supreme Court has identified three considerations that individually or together render a verdict excessive and require a new trial:

[1] the amount is so unreasonable and extreme as to indicate passion or prejudice on the part of the jury, . . . [2] the award is so excessive as to be without support in the evidence, . . . [3] the jury verdict is so excessive as to appear clearly arbitrary, unjust, or such as to shock the judicial conscience.

Zander v. Morsette, 2024 ND 80, ¶ 25, 6 N.W.3d 623 (alterations in original) (citation omitted).

[¶74] Here, accepting arguendo the Court’s conclusion that Plaintiffs presented sufficient evidence to sustain the jury’s verdict on liability, this evidence was extremely weak—especially when balanced against the Greenpeace Defendants’ contrary evidence. In making its prior ruling on Defendants’ Motion for Judgment as a Matter of Law, the Court was required to “admit the truth of all evidence in favor of the verdict and the truth of all reasonable inferences from that evidence,” on a motion for a new trial, “[t]he trial judge must weigh the evidence; . . . he must consider that evidence which supports the verdict equally with the evidence which challenges the verdict.” *Okken*, 325 N.W.2d at 269 (citations omitted). “In short, when ruling on a motion for a new trial, the trial judge may consider *all* the evidence.” *Id.*

[¶75] The verdict is manifestly against the evidence and requires a new trial as to each of the claims. These are addressed below as follows: (1) defamation; (2) tortious interference; (3) the property torts; (4) conspiracy; and (5) exemplary damages.

1. Defamation

[¶76] Under various defamation theories, Plaintiffs sought additional interest costs and fees incurred because of an alleged delay in the refinance of the Construction Loan, plus public relations costs. Dkt. 3716 (Supplemental Expert Report of David Leathers) at 25-27, Table 8 and Table 10 (summarizing costs associated with refinance of Construction Loan attributable to Plaintiffs’ interests); Dkt. 3676 (Expert Report of Robert Trout) at 52, Table 5 (summarizing campaign management costs). The Court’s October 28, 2025 Order, granted judgment as a matter of law in favor of Greenpeace Defendants as to Plaintiffs’ claims for defamation per se, and all defamation-related exemplary damages. Dkt. 5321 Order ¶¶ 25; 29-31. This motion addresses the remaining defamation claims and damages, which following the Court’s recalculation are as follows:

Energy Transfer	Dakota Access
\$24,979,275	\$24,979,275

As between the Greenpeace Defendants, defamation damages are allocated:

	Energy Transfer	Dakota Access
Inc.	\$8,326,425	\$8,326,425
Fund	\$8,326,425	\$8,326,425
International	\$8,326,425	\$8,326,425

a. Energy Transfer’s Lack of Standing

[¶77] Energy Transfer has no standing to assert a claim arising from the refinancing of the Construction Loan. Energy Transfer is an indirect holding company. Through a series of intermediate entities, ET has an *indirect* and *partial* ownership interest in *non-party* Energy Transfer Crude Oil Company (ETCOC), the owner and operator of the ETCOC pipeline segment that runs from Illinois to Texas). In this lawsuit, Plaintiff Energy Transfer asserted its defamation claim as one of the indirect holding companies of non-party ETCOC. As a matter of law, however, parent corporations are not permitted to sue for injuries suffered by their subsidiaries. *Macquarie Bank Ltd. v. Knickel*, No. 4:08-CV-48, 2009 WL 10665539, at *8 (D.N.D. Mar. 26, 2009); *see also Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 15, 676 N.W.2d 752 (to assert claim as a shareholder, Energy Transfer would have needed to plead and prove “an injury separate and distinct from other shareholders” (citation omitted)). Energy Transfer cannot recover for ETCOC’s share of refinancing costs and related PR costs, Rule 59(b)(7), nor can the jury award damages for such a claim, Rule 59(b)(6).

b. Publication

[¶78] Under North Dakota law, “[p]ublication means that the defamatory matter has been [i] communicated by the Defendant to a third person who [ii] believes it to be defamatory.” C - 9.40 Publication 2014, North Dakota Jury Instructions - Civil (2025 Edition). Plaintiffs were unable to proffer evidence to establish this basic element of their claim.

[¶79] The refinance of the \$2.5 billion loan required an army of people, mountains of documentation and multiple levels of approval. Plaintiffs had four years to conduct discovery, and issued a blizzard of subpoenas. Yet at trial Plaintiffs did not put forward any evidence or testimony by any of these “third-parties” that a statement by a Greenpeace Defendant delayed the refinance of the Construction Loan. Nor did Plaintiffs put forward any evidence that a third party “believe[d]” a statement by a Greenpeace Defendant was defamatory.

[¶80] Critically, no third-party evidence was provided to the jury as to either element of publication: Plaintiffs did not present the testimony of its investment bankers who structured the refinance transaction, or any of the financial institutions that were given the right to participate in the purchase of these over-subscribed bonds. Plaintiffs failed to establish the publication element of their defamation claim. *See Little v. Spaeth*, 394 N.W.2d 700, 706 (N.D. 1986) (affirming summary judgment on defamation claim where third parties who heard allegedly defamatory statement did not assert that they understood the statement to be defamatory).

c. Falsity

[¶81] Public figures like Plaintiffs are subject to stricter constitutional requirements for proving defamation than private individuals. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Curtis Publ’g 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.

[¶82] By the time of trial, Plaintiffs alleged defamation based on nine statements over the period November 7, 2016, to June 18, 2018, which fell into three categories: (i) the routing of the pipeline through tribal or Native land (Statements 3, 4 & 7); (ii) damage and desecration of cultural sites (Statements 1, 4, 5 & 9); and (iii) use of force on non-violent protestors (Statements 2, 6 & 8). *See* Dkt. 5035; *see also* Dkt. 2837, Second Amended Appendix A (identifying statements in same order, but by different numbers, as Special Verdict Form, Dkt. 5035).

Throughout, Plaintiffs were permitted to misrepresent what was actually stated, and then argue their purported falsity. For example, Plaintiffs repeatedly sought to prove that the pipeline did not travel through the SRST *reservation*, that bodies had not been unearthed and that not all of the protests were free of violence. They attacked strawman statements, conducting weeks of trial on statements no Greenpeace Defendant had actually made.

[¶83] Plaintiffs failed to present clear and convincing evidence that any of the nine allegedly defamatory Statements were materially false. *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991). For example, Plaintiffs rely on witness testimony that responds to Plaintiffs' questions asking whether the pipeline route passes through the Standing Rock Tribe's *reservation*, *see, e.g.*, Dkt. 5204, Cox Decl. Ex. S (Diana Best); Caplow Decl. Ex. AB ("Best Trial Dep.") 37:10-37:14, when the actual statements correctly state the pipeline passes through "the Standing Rock Sioux Tribe's land," "Native land," or "tribal land and waters." *See* Dkt. 2837, Second Amended Appendix A, Statements 19, 30. Plaintiffs also characterized the statements about cultural sites as accusing them of "digging up dead bodies," *see, e.g.*, Mar. 17, 2025 Tr. 48:7-12, 65:16-25, which plainly contradicted evidence that confirmed that Sioux burial sites may not have human remains and that no one associated with the Greenpeace Defendants or the SRST understood burial sites to mean sites with dead bodies. Caplow Decl. Ex. M ("Mar. 12, 2025 Tr.") 160:7-14; Caplow Decl. Ex. AC ("Tilsen Trial Dep.") 92:05-09; Trial Ex. 627; Trial Ex. 698; Trial Ex. 6274; Mar. 12, 2025 Tr. 158:11-160:14 (expert Braun explaining burial customs of Standing Rock Sioux Tribe). The statements relevant to this issue all referred to "cultural sites," "culturally important sites," and/or "burial grounds"; none mentioned "bodies" or human remains. Dkt. 2387.

[¶84] The events at Standing Rock were the subject of intense public debate as detailed in Foley Hoag's report, United Nations expert reports, statements by the Tribes⁶ and thousands if

⁶ Even an archaeologist employed by Plaintiffs' contractor Gray & Pape deferred to the opinion of the tribes as to what constitutes a cultural property and agreed that DAPL was technically crossing the Standing Rock Sioux's tribal lands. *See* Caplow Decl. Ex. AI ("Kovacs Trial Dep.") 77:01-04 (Q: "What makes something a tribal cultural

not millions of web postings. Unrefuted evidence established that more than 140 organizations published reports on just the topics addressed in the Statements. Caplow Decl. Ex. N (“Mar. 13, 2025 Tr.”) 67:23-68:2 (expert Weil explaining volume of published reports). For example, on September 16, 2016, Fox News reported “The encampment is on U.S. Army Corp of Engineers land, but most believe rightful ownership belongs to the Standing Rock Sioux, who had made their home there for centuries.” Trial Ex. 6099.

[¶85] 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.” *Energy Transfer Equity, L.P. v. Greenpeace Int’l*, No. 17-CV-173-BRW, at *8, 2019 U.S. Dist. LEXIS 32264, *13-14 (D.N.D. Feb. 14, 2019). Plaintiffs’ own witnesses admitted that Statements about what constitutes the desecration of cultural resources are at the very least matters of debate. *See, e.g.*, Feb. 27, 2025 Tr. 120:20-121:11. As such, it is non-actionable option, a matter best left to “the academy, and not the courthouse.” *Resolute Forest Prods., Inc. v. Greenpeace Int’l*, 302 F. Supp. 3d 1005, 1021 (N.D. Cal. 2017).

[¶86] Plaintiffs had the burden of proving that it was false to say that force was ever used *against* peaceful protesters. Unable to make this showing, Plaintiffs simply reframed their challenge as to whether the protestors were *always peaceful*, confusing the jury as to what the actual statement at issue was. And statements characterizing force as extreme or excessive have been found to be nonactionable statements of opinion protected by the First Amendment, *see, e.g., Fritz v. Cnty. of Marin*, No. A114549, 2007 WL 1874369 (Cal. Ct. App. June 29, 2007) (unpublished).

property?” A: “You’d actually have to ask the tribes that.”); 96:18-21, 96:24-25 (“I’m not qualified to assess what is tribal cultural property or not.”); 169:11-24 (“None of us are qualified to speak toward cultural property because we’re not members of the tribe.”); 196:21-197:05 (Q: “You wrote that technically it was true that the pipeline was crossing the Sioux—the Sioux’s tribal lands?” A: “I did.” Q: “And why did you write that?” A: “I—in my opinion, it seems as if they never fully relinquished control of that land, although it had been sold into private property.”).

[¶87] Finally, statements that DAPL crosses tribal lands conveys the Tribe’s well-established position on a historic and legal matter, namely, that it never relinquished claims to unceded Treaty land and land they historically occupied. Mar. 12, 2025 Tr. 150:4-151:13 (expert Braun explaining history of unceded treaty land and positions of Standing Rock Sioux Tribe); Caplow Decl. Ex. E (“Feb. 28, 2025 Tr.”) 154:2-24 (Sheriff Kirchmeier identifying the pipeline’s location on unceded treaty lands as a reason people came to protests).

d. Actual Malice

[¶88] As a “public figure,” Plaintiffs were “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 714. “The plaintiff must demonstrate the Statement’s *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) (emphasis added) (quoting *Masson*, 501 U.S. at 510).

[¶89] “[T]he plaintiff must identify the *individual responsible for publication of the statement*, and it is *that individual the plaintiff must prove acted with actual malice.*” *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2nd Cir. 2013) (emphasis added). Organizational defendants, like those here, are *not* charged with collective knowledge of their agents and employees for purpose of the actual malice inquiry. *Sullivan*, 276 U.S. at 287. Yet, Plaintiffs offered no evidence that any Greenpeace Defendants’ employee responsible for publishing or endorsing the Statements had “serious doubts” about the truth of the Statements (which were, in fact, true, or at the very least not provably false), let alone awareness of probable falsity “at the time of publication.” *Id.* at 286. Indeed, even if actual malice could be satisfied through collective knowledge—which it cannot—Plaintiffs would not have met that standard, either.

[¶90] Plaintiffs tried to circumvent the actual malice requirement with Greenpeace Inc. employee emails that used the work “fuck” or expressed dislike for Kelcy Warren *See, e.g.*, Trial Exs. 1177, 1558, 1617, 1618. But it is elemental that the constitutional “actual malice” necessary to establish defamation turns on the defendant’s attitude toward the truth or falsity of

the *material published*, not the defendant’s attitude toward the plaintiff. As Plaintiffs’ counsel Gibson Dunn explained in another case:

But, even if true, such **“hostility” is irrelevant: “actual malice” “has nothing to do with bad motive or ill will” and “may not be inferred alone from evidence of personal spite [or] ill will.”** *Harte-Hanks*, 491 U.S. at 666 n.7. A case *La Liberte* cites (Opp. 23) makes clear: **“actual malice” turns on the “defendant’s attitude toward the truth or falsity of the material published . . . [not] the defendant’s attitude toward the plaintiff.”** *Reader’s Dig. Ass’n v. Superior Ct.*, 37 Cal. 3d 244, 257 (1984) (emphasis added).

Dkt. ___ Ex. 1 (Gibson Dunn Reply ISO Def. J. Reid’s Mot. Summ. J., *La Liberte v. Reid*, Case No. 1:18-cv-05398 (E.D.N.Y Sept. 24, 2024) (alterations in original) (emphasis added), ECF No. 181-45.

[¶91] Regardless, “a publisher’s⁷ good faith reliance on ***previously published reports*** in reputable sources . . . ***precludes a finding of actual malice*** as a ***matter of law.***” *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510 (D.C. Cir. 1996) (internal quotation marks and citation omitted) (emphasis added). Here, the evidence showed that the employee authors of, or signatories to, the Statements consistently relied on previously published reports from reputable sources, court filings, the special report from the United Nations expert who went to North Dakota, Trial Ex. 1117, BankTrack, statements made by the Standing Rock Sioux Tribe (including sworn declarations), and many, many credible news sources. *See, e.g.*, Caplow Decl. Ex. AD (“Schleeter Trial Dep.”) 139:16-25 (“It was also reported by various media, ***credible media sources*** on the ground); Caplow Decl. Ex. AE (“Wheeler Trial Dep.”) 184 11-21 (“referred to media sources”); *id.* 270:2-10 (relied on “articles” and “statements by tribal member about where cultural resources” we located and impacted); Caplow Decl. Ex. Z (“Dorozenski Trial Dep.”) 186:9-17 (“reading news coverage at the time”; discussed in “wide range of media”); *id.* 227:20-25 & 228:14-230:07 (basis of statement was a “UN report”); Trial Ex. 1617 (“Strong supportive UN statements”); Caplow Decl. Ex. AG (“Sweeters Trial Dep.”) 231:21-

⁷ In this context, “publisher” refers to the person who disseminated an allegedly defamatory statement.

232:12 (BankTrack “issue expert” and “reliable source”), 232:25-234:07 (relied on court filings); Mar. 13, 2025 Tr. 67:3-68:22 (expert Weil describing volume and nature of media reports); Caplow Decl. Ex. K (“Mar. 10, 2025 Tr.”) 168:15-169:18. Given this reliance, the jury’s finding of actual malice was contrary to the overwhelming weight of the evidence presented at trial.

[¶92] Like falsity, Plaintiffs consistently sought to establish actual malice based on mischaracterized versions of the Statements. *E.g.* Best Trial Dep. 30:23-31:12 (challenging statement that the “pipeline trajectory is cutting through Native American *sacred territories* and *unceded Treaty lands*,” based on cross-examination that the pipeline was over a half mile from the Tribe’s “Reservation lands”); Trial Ex. 1241 (same); Dorozenski Trial Dep. 195:20-25 (examination that not all protestors were “completely peaceful”).

e. Proximate Cause

[¶93] Plaintiffs failed to establish that any Statement caused damages. *Johnson v. Monsanto Co.*, 303 N.W.2d 86, 95 (N.D. 1981). Incredibly, when asked to explain the purpose of the public relations campaign that is the basis of Plaintiffs’ damage claim in this case, Vicky Granado, who led this effort, testified that these costs were incurred responding to statements by **Jan Hasselman**, an attorney for **Earthjustice** (an organization not in any way affiliated with the Greenpeace Defendants) who was at the time representing the Standing Rock Sioux Tribe in its successful lawsuit against USACE, and public statements by the **USACE** when it was refusing to issue the necessary easement for DAPL to cross at Lake Oahe. Caplow Decl. Ex. X (“Granado Trial Dep.”) 82:03-85:15; Ex. J to Greenpeace, Inc.’s Renewed Mot. for JMOL, Dkt. 5906; Caplow Decl. Ex. Y (“L. Coleman Trial Dep.”) 34:25-35:13, Ex. K to Greenpeace, Inc.’s Renewed Mot. for JMOL, Dkt. 5907. Ms. Granado’s admission that the public relations expenses were unrelated to the Statements by Greenpeace was corroborated by Plaintiffs’ damage experts who likewise calculated Plaintiffs damages based on statements and costs that *pre-date* Greenpeace Defendants’ Statements. Caplow Decl. Ex. H (“Mar. 5, 2025 Tr”) 111:24-

112:19; 125:23-126:6. If damages pre-date the Statements, then definitionally there is no connection between those Statements and the damages.

[¶94] As discussed above with reference to publication, despite the issuance of extensive subpoenas, neither Plaintiffs offered any evidence that its investment bankers or the bond purchasers read, considered or acted upon any Statement. Plaintiffs' belief that some unidentified person delayed completion of the bond issuance because of a Statement by a Greenpeace defendant is 100% speculation.

[¶95] The only non-speculative information available is from Plaintiffs' own contemporaneous Board Minutes (which have never been revised). As with Ms. Granado's admission regarding the PR campaign, Plaintiffs' official corporate records show that the delay in refinancing was attributable to uncertainty of repayment caused by the potential consequences of the *Standing Rock Sioux Tribe's lawsuit* challenge to the USACE's issuance of the easement for the pipeline to travel under federal land; by Plaintiffs own admission, the delay in refinancing was an intentional decision that had nothing whatsoever do with a Statement by Greenpeace. *See* Trial Ex. 973; Trial Ex. 975; Trial Ex. 976; Trial Ex. 978.

[¶96] Even in the absence of these admissions, Plaintiffs' theory would be contrary to the weight of the evidence. Common sense holds that a lawsuit challenging the legal basis for the operation of the pipeline—a lawsuit that resulted in the invalidation of the easement, and briefly resulted in a court order requiring Dakota Access to shut down the pipeline and empty it of oil, *Standing Rock Tribe v. U.S. Army Corp. of Eng'rs*, 471 F. Supp. 3d 71, 88 (D.D.C. 2020), *aff'd in part, rev'd in part*, 985 F.3d 1032 (D.C. Cir. 2021)—was more threatening to Dakota Access' efforts to refinance its Construction Loan than a handful of comments that repeated widespread criticisms. A new trial is warranted.

f. Damages

[¶97] Plaintiff Dakota Access (and non-party ETCOC) financed construction of the respective pipeline section through a Construction Loan. Purportedly, the Statements delayed the refinance of the Construction Loan resulting in higher interest and fees.

[¶98] However, as shown on the face of the Construction Loan, the only party to this case that was a borrower on the Construction Loan was Dakota Access, not Energy Transfer. Trial Ex. 919. Similarly, the corporate bonds used to repay and thereby refinance the Construction Loan were issued by non-party Midwest Connector Capital Company LLC on behalf of Dakota Access, not Energy Transfer. Trial Ex. 245 (“We will use the net proceeds of this offering to extend intercompany loans to Dakota Access, LLC”). The jury awarded Energy Transfer tens of millions of dollars for claims it cannot bring.

[¶99] Further, Plaintiffs’ damage expert calculated that ETCO’s share of the refinancing costs were between \$1.82 million and \$2.57 million. Dkt. 3716 (Supplemental Expert Report of David Leathers) at 25-26, Table 10 and Table 8. Even with the Court’s large reduction, Energy Transfer’s defamation damages vastly exceed its own calculation. The jury awarded more damages than Energy Transfer itself said it had incurred.

[¶100] Dakota Access acknowledges that its defamation damages reflect 100% of its alleged loss without any reduction for the fault of other parties or the more than 221 similar statements by reputable news organizations that pre-date any Statement by a Greenpeace Defendant. Mar. 13, 2025 Tr. 67:3-68:22. And even if Plaintiffs’ costs could somehow be attributed to the Greenpeace Defendants, Plaintiffs still could not recover these costs without segregating which were specifically caused by *wrongful*, as opposed to protected, statements and other activity. *E.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982). Greenpeace Defendants are subject to tens of millions of dollars in damages without factual or legal basis

[¶101] A further example is the two Statements contained in the November 30, 2016 letter prepared by BankTrack and co-signed by over 500 other parties. The letter was of so little

significance that Plaintiffs did not even invoke their statutory right of retraction (Dkt. 5321 at 13). Clearly, adding a signature to 500 others cannot be the source of \$33 million of damages. Thus, the Judgment against Fund and International must be vacated and a new trial ordered.

g. Fund Specific Issues

[¶102] The jury’s verdict against Fund for defamation is manifestly against the weight of the evidence and cannot stand. As a threshold matter, Plaintiffs failed to prove that Fund published any of the Statements—a necessary element of defamation. The jury nonetheless found Fund liable for defamation for all nine Statements, including seven Statements that even Plaintiffs did not contend were made by Fund. While this Court has held that the jury could have found that Fund was liable for the November 30, 2016 letter based on Annie Leonard’s signature on behalf of “Greenpeace, USA,” that implicit jury finding is manifestly against the weight of the evidence.

[¶103] The evidence at trial was uniform and unrebutted: Fund is only a fundraising and grantmaking entity with no programmatic activities, or advocacy function, and any external-facing work on behalf of “Greenpeace USA” is only on behalf of Greenpeace, Inc. Caplow Decl. Ex. AF (“Passacantando Trial Dep. 215:11-216:02”); Caplow Decl. Ex. AJ (“Emerson Trial Dep.”) 272:02-273:18; Mar. 12, 2025 Tr. 60:3-61:16 (Annie Leonard explaining that Greenpeace Fund is “only a regrating organization” that does not do advocacy work, that “Greenpeace USA” is “another name for Greenpeace Inc.,” and that her signature as “Greenpeace USA” is signing for Greenpeace Inc.). No evidence contradicted this. Plaintiffs did nothing to rebut the North Dakota presumption that the ordinary course of business was followed. *See* N.D.C.C. § 31-11-03(20).

[¶104] Nor does Leonard’s dual role as an officer of both Fund and Greenpeace Inc. permit imputing liability to Fund. The Supreme Court has long recognized the common-law “principle that officers who hold positions in affiliated corporations “can and do ‘change hats’ to represent the two corporations separately.” *United States v. BestFoods*, 524 U.S. 51, 69 (1998).

Indeed, the “time-honored” principle presumes that an officer acts on behalf of the entity for whom she purports to act. *Id.* at 70 & n.13. Here, Leonard testified—without contradiction—that she signed advocacy letters solely on behalf of Greenpeace Inc., which is entirely consistent with the distinct functions and norms of organizational behavior of the two entities. *See id.* (“[T]he presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior . . .”).

[¶105] Nor can Fund be liable based on its relationship with Greenpeace, Inc. A defendant is not responsible for a third party’s defamatory publication absent proof that the third party acted as its agent or that the defendant “direct[ed] or procure[d]” the publication. Restatement (Second) of Torts § 577 cmt. f (1997); *see also Crain v. Lightner*, 364 S.E.2d 778, 786 (W. Va. 1987). Plaintiffs introduced no evidence that Fund participated in, directed, or had any involvement in the publication of any Statement. To the contrary, the Court instructed the jury that Greenpeace, Inc. and Fund are distinct entities, Dkt. 5036, Jury Inst. 60, and the jury found no conspiracy between them. Without agency, participation, or conspiracy, the verdict against Fund rests on nothing more than impermissible guilt by association.

[¶106] Nor is there any suggestion that Ms. Leonard’s statement that “projects affect[ed] their ancestral lands”; “Native land titles” and “Native areas” was even incorrect, no less that she acted with knowledge of falsity or reckless disregard for the truth needed to show constitutional actual malice. In sum, *none* of the evidence on which Plaintiffs relied to prove actual malice relates to Fund.

h. International Specific Issues

[¶107] The same defects independently require the verdict against International to be set aside. The jury found International liable for defamation for all nine Statements, including seven Statements not made by International. And *none* of the evidence on which Plaintiffs relied to prove actual malice relates to International, as the statements and actions relied upon were by Greenpeace, Inc. employees. Dkt. 2837.

2. Tortious Interference

[¶108] Plaintiffs’ tortious interference claim was based on lost profits allegedly arising from a delay in the US Army Corp of Engineers issuance of a permit needed to build the Dakota Access Pipeline under Lake Oahe. The jury awarded 100% of the alleged damages. The Court’s October 28, 2025 Order made no reductions to compensatory or exemplary damages. Dkt. 5321 Order ¶¶ 26-28.

	Energy Transfer	Dakota Access
Compensatory	\$40,056,375	\$40,056,375
Exemplary	\$31,500,000	\$31,500,000

As between the Greenpeace Defendants, these combined compensatory and exemplary damages are allocated:

	Energy Transfer	Dakota Access
Inc	\$23,852,125	\$23,852,125
Fund	\$23,852,125	\$23,852,125
International	\$23,852,125	\$23,852,125

As to Fund and International, the tortious interference claims, which require an underlying tort, can only be predicated on the defamation claims. E.g. Dkt. 5036, Jury Inst. 28.

a. Energy Transfer’s Lack of Standing

[¶109] Plaintiff Energy Transfer asserted its tortious interference claim as non-party ETCOC’s indirect holding company. Energy Transfer cannot state a tortious interference claim for ETCOC’s share of lost profits. As discussed above, Energy Transfer cannot sue for the alleged lost profits of a subsidiary. *Supra* ¶ 77.

b. Energy Transfer’s Lack of a Business Relationship

[¶110] A threshold requirement of a tortious interference claim is interference with a valid business relationship. Dkt. 5036, Jury Inst. 28, Element No. 1 (“Plaintiff must establish...[t]he existence of a valid business relationship”). Here, the alleged tortious interference involved the Transportation Service Agreements (TSAs), i.e. the tariffs between the shippers and Dakota Access. It is undisputed that Energy Transfer was not a party to the TSAs that are the subject of this claim. *See, e.g.*, Trial Ex. 219 (agreement on behalf of Dakota Access and non-party Energy Transfer Crude Oil Company, LLC). ET was awarded over \$70 million of damages for alleged interference with a business relationship to which it was not a party.

c. Petition Clause Immunity

[¶111] As a matter of law, Defendants cannot be held liable for losses arising from decision of the USACE to delay issuance of the easement to Dakota Access. Not only is there no evidence that any Statement caused the alleged delay (*see infra* ¶¶ 116–118), but advocacy with the U.S. Government resulting in harm to Plaintiffs is protected by the First Amendment as established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and their progeny.

[¶112] Although initially developed in the context of antitrust claims, the *Noerr-Pennington* doctrine has been widely applied to immunize petitioning activity. *See, e.g.*, *CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1283 (10th Cir. 2020) (noting such immunity is broader than antitrust); *South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40, 50 (8th Cir. 1989) (petitioning among “privileged activities which may result in interference of contract but which shall not incur liability”). Indeed, the Court’s jury instructions correctly recognized that the Greenpeace Defendants could not be held liable for their petitioning activity. Dkt. 5036, Jury Inst. 30.

[¶113] The Court failed to recognize, however, that this same principle entails that Plaintiffs cannot claim damaging flowing from the decisions of the USACE. For example, in

Massachusetts School of Law at Andover, Inc. v. American Bar Association, 107 F.3d 1026, 1036 (3d Cir. 1997), a law school claimed it was injured because the ABA and other organizations had improperly influenced state authorities' bar exam decisions. The Third Circuit held that when the injury flows from governmental decision-making, private parties cannot be held liable. *Id.*; see also *Sessions Tank Liners, Inc. v. Joor Mfg, Inc.*, 17 F.3d 295, 299 (9th Cir. 1994) (where injuries "are the result of governmental action, [defendant] is shielded by petitioning immunity for liability")

[¶114] Nor does it matter that the Statements were public rather than directed to a USACE proceeding. *Geomatrix, LLC v. NSF Int'l*, 82 F.4th 466, 480 (6th Cir. 2023) ("[I]mmunity is not limited to 'direct' petitioning of the government; indirect petitioning of the government though the media or other avenues is still protected." (citation omitted)) What matters here is that Plaintiffs claim damages flow from a **governmental decision** to delay the easement that they contend resulted from Greenpeace Defendants' tortious defamatory conduct. And that is immunized under the First Amendment. "To impose tort liability for damages resulting from valid governmental decisions by public officials requires an examination of the motives of those officials that judges, federal or state, are reluctant to undertake." *Sessions Tank Liners*, 17 F.3d at 302.

d. Causation

[¶115] Under blackletter law, to satisfy the third element of tortious interference, the plaintiff must show that the defendant's conduct would be actionable under a separate recognized tort. E.g. Dkt. 5036, Jury Inst. 28. Second Amended Complaint Paragraph 133 alleged the separate tort was defamation or trespass. Dkt. 2386. Here, Dakota Access' purported injury arose from the United States government, *i.e.*, the USACE, delaying issuance of an easement for Dakota Access to drill under the navigable waters of Lake Oahe. It is undisputed that Greenpeace Defendants have no authority to issue (or withhold issuance of) a federal easement for Dakota Access to construct the pipeline under Lake Oahe. Accordingly, Plaintiffs'

contention (unsupported by **any** evidence from USACE’s files and records and contradicted by all of its public statements) was that alleged defamation by Greenpeace Defendants or perhaps trespass by Greenpeace Inc. was the reason for the USACE’s delay in issuance of the federal easement to drill under Lake Oahe.

[¶116] Plaintiffs did not depose anyone from USACE or issue a FOIA request. There is **no evidence in the record** of USACE’s internal process or deliberations. The only information in this regard is pure **speculation**. What we do have is USACE’s official public statements and records, which irrefutably establish that the USACE’s delay in issuance of the easement was unrelated to the Greenpeace Defendants:

- On July 27, 2016, SRST sued USACE in federal district court in Washington, DC. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’g.*, 1:16-cv-01534-JEB seeking an order vacating all authorizations pending compliance with various federal statutes. (Trial Ex. 969).
- On September 9, 2016, the US Army, along with Department of Interior (DoI) and Department of Justice (DOJ), issued a statement that because of the issues raised by SRST and other tribes, USACE would not authorize construction until it could reconsider its previous decisions regarding construction under Lake Oahe. (Trial Ex. 208).
- On November 14, 2016, USACE Assistant Secretary of the Army Jo-Ellen Darcy wrote to Kelcy Warren and Joey Mahmoud, informing that construction on or under Corps land bordering or under Lake Oahe could not occur because USACE had not made a final decision on whether to grant an easement, and that additional discussion with the Standing Rock Sioux Tribe was warranted. (Trial Ex. 210).
- On December 2, 2016, the USACE, SRST and DAL met to discuss “over 30 additional terms and conditions that could further reduce the risk of a spill or pipeline rupture.” (Trial Ex. 211).
- On December 4, 2016, the US Army released a memo advising that “the Army will not grant an easement to cross Lake Oahe as the proposed location based on the current record.” (Trial Ex. 211).

Plaintiffs did not call any witness or provide any internal documents to establish that the delay in the issuance of the easement was for any reason other than the official government records.⁸

⁸ Indeed, Plaintiffs’ own press releases assign blame for the delay in the issuance of the easement to these USACE statements and the reasons set forth therein—without mentioning the protests, let alone the Greenpeace Defendants. Trial Ex. 942 (November 15, 2016, press release following USACE’s November 14, 2016, determination that

Plaintiffs did not identify a shred of evidence linking Greenpeace Defendants to the delay, and instead claimed that by virtue of visiting Standing Rock in rural North Dakota,⁹ Greenpeace Inc employees would have personal knowledge of the confidential deliberations among USACE senior officials held at a government office in Washington, DC or some other place.

[¶117] But there was no evidence Greenpeace Defendants even talked to USACE about a delay to the easement. The documents relied upon by Plaintiffs to claim over \$80 million of tortious interference damages do not refer to communications with *anyone* at the USACE, or otherwise show that the Greenpeace Inc employees would have any way of knowing what motivated the agency’s internal, non-public decision-making.

[¶118] What’s more, even if someone at USACE saw one of the Statements—and there is not a scrap of evidence they did—it would not be sufficient to prove that the Statement had affected USACE’s decision on when to issue the easement. In *Mr. G’s Turtle Mountain Lodge, Inc. v. Roland Township*, 2002 ND 140, ¶ 28, 651 N.W.2d 625, letters to the editor could not form the basis for plaintiff’s interference claim, because there was no evidence “that a causal connection existed between the publication of the letters” and the alleged interference damages. The same is true here.

e. Damages

[¶119] It is undisputed that Energy Transfer was not a party to the Transportation Service Agreements (TSAs) that are the subject of this claim. *See, e.g.*, Trial Ex. 219 (agreement on behalf of Dakota Access and non-party Energy Transfer Crude Oil Company, LLC). Energy Transfer therefore stumbles on the first element of a tortious interference claim. Dkt. 5036, Jury

additional discussions with the Standing Rock Sioux were warranted and, as such, construction could not continue); Trial Ex. 618 (December 4, 2016, press release following USACE’s decision not to issue easement); *see also* Trial Ex. 821.

⁹ *See* Trial Ex. 1777 (March 16, 2021 blog post claiming “peaceful and prayerful direct actions ... were crucial for pressuring the Army Corp of Engineers to deny the permit” four years earlier); Caplow Decl. Ex. W (“Lambert Trial Dep.”) at 220:16-18 (“What happened at Standing Rock was well known around the nation and the world at the time, and created pressure on the Army Corp of Engineers.”); Trial Ex. 1355 (December 2, 2016 email describing “three-week stint” at Standing Rock, without any mention of the US Army Corp. of Engineers).

Inst. 28, Element No. 1 (“Plaintiff must establish . . . [t]he existence of a valid business relationship”).

[¶120] The claim for non-party ETCOC also underscores the wild inaccuracy of the jury’s award, which was *six times* even the amount that Energy Transfer claimed as an indirect holding company. Dkt. 3716 (Supplemental Expert Report of David Leathers) at 25-26, Table 10 and Table 8. Energy Transfer’s own calculation demonstrates the tortious interference award is unreasonable and unsupportable.

3. Property Damage Claims Against Greenpeace Inc.

[¶121] Under various tort theories, the Judgment awards damages against Greenpeace Inc. for property damage; neither Fund nor International is liable for any of these claims. The Court’s October 28, 2025 Order, granted judgment as a matter of law in favor of Greenpeace, Inc. as to Energy Transfer’s claims for trespass to land and aiding and abetting trespass to land, and on both Plaintiffs’ claims for conversion and aiding and abetting conversion; it also granted judgment removing exemplary damages for these claims. Dkt. 5321 Order ¶¶ 6, 8, 12, 28. The Judgment thus awards property damages claims to both Plaintiffs for: (i) Trespass- Chattels; (ii) Aiding & Abetting Trespass – Chattels; (iii) Nuisance; and (iv) Aiding & Abetting Nuisance. Dakota Access was also awarded damages for (v) Trespass – Land; and (vi) Aiding and Abetting Trespass – Land. Following the Court’s recalculation, the damages for these remaining property claims are as follows:

	Energy Transfer	Dakota Access
Compensatory	\$15,044,136	40,635,568
Exemplary	\$30,088,272	63,000,000
Total	\$45,132,408	\$103,635,568

All of these damages are awarded solely against Greenpeace, Inc.

a. Both Plaintiffs' Lack of Standing

[¶122] Energy Transfer is a holding company. At the time the lawsuit was filed, it was not registered to do business in North Dakota and did not own any land, property or equipment. Dkt. 5321 Order ¶ 6 (concluding ET failed to provide evidence of any ownership or possessory interest in real estate). It has no lawful basis to assert a property claim or recover over \$45 million related to property damages.

[¶123] Dakota Access is an operating company. However, it contracted with non-parties for the construction of the DAL pipeline. *E.g.* Trial Exs. PC07-0373; PC07-2506 Dakota Access's only physical assets located in the State of North Dakota were steel pipe segments, none of which were damaged. (If and to the extent Dakota Access claims "property damage" for delay in the pipeline's operation, this would duplicate its tortious interference claim.)

[¶124] In addition to awarding Dakota Access almost \$100 million for non-cognizable property claims, the jury awarded Dakota Access \$8,360,000 related to the purchase of the Cannonball Ranch. *Ex. L to Greenpeace, Inc.'s Renewed Mot. for JMOL, Dkt. 5098; Special Verdict Form, Dkt. 5035.* Yet, Dakota Access presented no evidence 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, 2025 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. *See Jim's Hot Shot Serv., Inc. v. Cont'l W. Ins. Co.*, 353 N.W.2d 279, 282 (N.D. 1984) ("[A]n owner's opinion of value is insufficient to support a value determination by the factfinder if it is given without a valid basis or is based upon improper facts or analysis." (collecting cases)). As it did throughout, the jury purported to provide damage calculations down to the dollar (\$8,360,000) without competent evidence.

b. Aiding and Abetting

[¶125] Aside from these defects—which defeat all of Plaintiffs’ remaining property claims—Plaintiffs also failed to present any meaningful evidence that Greenpeace, Inc. knew any third party was planning to commit, and then actually did commit, any specific tortious act. 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. Restatement (Third) of Torts: Liability for Economic Harm § 28 (2020). Likewise, none of Plaintiffs’ evidence demonstrated that Greenpeace Inc. knowingly aided or encouraged a third party to commit any particular *tortious* act. *See id.*

[¶126] In many respects, the circumstances parallel those in *NAACP v. Claiborne Hardware*, 458 U.S. 886. There, a state court had held that 92 different individuals and organizations who had participated in a boycott of white merchants designed to protest racial discrimination were all liable in damages for *all* of the economic consequences of that boycott. *Id.* at 888. In reversing, the Supreme Court acknowledged that some individuals had engaged in violent conduct unprotected by the First Amendment. *Id.* at 916. But, the Court emphasized, “[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advanced doctrine that itself is not protected.” *Id.* at 908. To the contrary, the “presence of activity protected by the First Amendment imposes restraints on groups that may give rise to damages liability and on the persons who may be held accountable for those damages.” *Id.* at 916-17.

[¶127] Even assuming Greenpeace Inc. could be held liable for the IP3 trainings (see below), these trainings were not unlawful—in fact, they were protected by the First Amendment. While non-violent direct action may include some form of civil disobedience, and therefore conduct that may be illegal on its face, advocacy for illegal conduct—even *violent* conduct

(which this was not)—is protected by the First Amendment unless it is “directed to inciting or producing imminent lawless action and likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). In *Claiborne Hardware*, even though a boycott leader told people that if they broke the boycott, they would “break your damn neck,” there was no evidence that he “authorized, ratified, or directly threatened acts of violence,” and thus could not be held liable. *Counterman v. Colorado*, 600 U.S. 66, 98-99 (2023) (Sotomayor, J., concurring in part) (cleaned up). Nor was the provision of supplies unlawful, because there were lawful, non-tortious uses for those supplies. In the absence of evidence that Greenpeace Inc. *intended* any of its supplies to be used to damage property, it cannot be held liable on the basis of this conduct either.

[¶128] The jury’s verdict on Plaintiffs’ aiding and abetting claims is thus against the weight of the evidence.

c. Causation and Damages

[¶129] *Losses Impossible to Attribute to Greenpeace Inc.* The jury charged Greenpeace, Inc. with 100% of every property-related loss that Plaintiffs claimed to have incurred, even when it was impossible for Greenpeace, Inc. to have caused that loss. Plaintiffs’ damage experts simply added up unbudgeted costs for the almost three-year period from July 2016 to May 2019. Mar. 5, 2025 Tr. 94:18-22. The jury awarded that full amount, including alleged property damage that *pre-dated* Greenpeace, Inc.’s arrival at Standing Rock and continued for years *after* the last person left. *E.g.*, Feb. 27, 2025 Tr. 89:21-90:2; Trial Ex. PC26; Trial Ex. PC27. The jury included costs that Plaintiffs themselves blamed on the Standing Rock Sioux Tribe (the “SRST” or the “Tribe”) for protest events that pre-date Greenpeace, Inc.’s arrival. *See, e.g.*, Trial Ex. 1026B (Plaintiff Dakota Access LLC also sued former Standing Rock Sioux Chairman Dave Archambault for similar alleged harms). The jury also included costs that Plaintiffs attribute to criminal acts by parties unrelated to the Greenpeace Defendants. *See, e.g.*, Feb. 27, 2025 Tr. 91:12-92:3 (Energy Transfer official Joey Mahmoud testifying that two women

affiliated with Catholic Charities were responsible for trying to cut a hole in the pipeline in Iowa); Caplow Decl. Ex. G (“Mar. 4, 2025 Tr.”) 257:6-7 (Plaintiffs’ expert Sullivan offering no opinion on causation with respect to Greenpeace Defendants). Even when Plaintiffs said that someone else caused the loss, the verdict included these amounts in the award against the Greenpeace Defendants.

[¶130] ***Non-Standing Rock Losses.*** Plaintiffs and their experts also failed to make any distinction between costs incurred at Standing Rock and elsewhere. Plaintiffs implied that Greenpeace Inc. should be held liable for these out-of-state losses, insisting during closing that jurors had a “responsibility” to protect residents of “Louisiana or Texas or Oklahoma or Ohio.” Mar. 17, 2025 Tr. 72:23-24. Based on unspecified property damage claims in North Dakota, the jury also awarded all of the costs Plaintiffs purportedly incurred throughout the United States, including in South Dakota, Iowa, Illinois, North Carolina, and Texas. *See, e.g.*, Trial Ex. PC-21 (security services in Iowa and South Dakota); Trial Ex. PC29-0102-103 (dry cleaning in Texas); Trial Ex. 94 (Precision Pipeline work change order for work Illinois, including \$98,192 for security and \$545,112 for fencing in Illinois); Trial Exs. PC29-0048, PC29-0053-61 (gaming laptops and other computer accessories shipped to and used in North Carolina).

[¶131] ***No Causation Linking Losses to Greenpeace Inc.*** Nor did Plaintiffs establish any link between any action undertaken by Greenpeace, Inc. and any resulting property damage. 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. *See, e.g.*, Feb. 27, 2025 Tr. 91:12-92:1, 106:12-17, 110:4-8 (Michael Futch); *id.* 230:4-14 (Joey Mahmoud); Feb. 28, 2025 Tr. 80:13-19, 82:2-5, 153:2-8, 157:4-158:6 (Sheriff Kirchmeier). Plaintiffs instead inflamed the jury with pictures of burned and damaged equipment but never provided a scrap of evidence linking the Greenpeace Defendants with destruction of the pictured property. *See, e.g.*, Trial Exs. PC2-0001; PC2-0007; PC2-0009; PC2-0019; PC5-0036; PC5-0114-116; PC16-0006; PC16-0007; PC33-1607; PC33-1751; PC33-2366-2371; PC33-2372-2400.

[¶132] The verdict awards Plaintiffs over \$60 million in security costs, including tracking the details of the protest on a minute-by-minute basis and preparing daily reports. *See, e.g.*, Trial Ex. 622 (identifying organizations as threats and tracking movements of protesters). Yet, there is no evidence that any of the security reports mention Greenpeace Inc. Similarly, plaintiffs obtained thousands of pages of police reports. *See, e.g.*, Trial Ex. 44. These too are devoid of even a mention of Greenpeace Inc.

[¶133] Plaintiffs, their \$60 million private security force, and the police all failed to identify any wrongful conduct involving Greenpeace Inc. Plaintiffs contend that they proved that 100% of the protest-related costs were incurred because of Greenpeace Inc. and no other source. Plaintiffs' primary argument is that Greenpeace Inc. assisted IP3 with training in accordance with Direct Action Principles. But on examination, these principles oppose violence consistent with Greenpeace's Quaker origins, *see* Trial Ex. 467:



[¶134] Plaintiffs never explain how teaching people to be “peaceful and prayerful,” to be “non-violent” and not to engage in “property damage” is unlawful or could support the damage verdict. Indeed, Plaintiffs consistently implied, without evidence, that Greenpeace Defendants trained protesters in destructive behavior, encouraging the jury to disregard the only evidence in the record—that IP3’s trainings were not run by Greenpeace, Inc., taught nonviolent principles, and expressly discouraged property destruction. *See* Mar. 17, 2025 Tr. 26:16-20; 54:8-10 (referring to law enforcement having “human feces and bottles or urine” thrown at them); *id.* at 54:16-18 (graffiti containing inflammatory phrases such as “killers” and “rape machine”); *id.* at 54:18-22 (cut equipment wires and saw). Finally, Plaintiffs rely on David Khoury’s email regarding “awesome spy shit” in which standing outside the right-of-way he monitored work on the pipeline. But here again, Plaintiffs failed to identify a single incident that took place at the location Mr. Khoury identified or any associated cost.

[¶135] ***Failure to Exclude Losses Arising from Lawful Acts or Other Parties.*** Nor did the sums calculated by Plaintiffs’ experts distinguish between costs incurred to address lawful acts—such as legitimate advocacy—and unlawful acts (even assuming any of Greenpeace Inc.’s acts led to these costs or were unlawful). *See infra* ¶¶ 164–167. Nevertheless, the verdict held Greenpeace Inc. 100% responsible for every protester, every piece of damaged equipment, and every cost associated or claimed to be associated with the protests throughout the U.S.

[¶136] In *Clairborne Hardware*, the Supreme Court held, “[o]nly those losses proximately caused by unlawful conduct may be recovered.” 458 U.S. at 918. The same reasoning applies fully here. Some individuals at the Standing Rock protests may have engaged in violent or destructive conduct unprotected by the First Amendment. But Plaintiffs made no effort to show that *all* their claimed losses were proximately caused by this unlawful conduct—as opposed to the fully protected First Amendment conduct that Greenpeace Inc. and many others engaged in. Still less did Plaintiffs demonstrate that Greenpeace Inc. itself either committed such unlawful acts or specifically intended to further their commission.

[¶137] 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. v. Axelson*, 367 N.W.2d 155, 164 (N.D. 1985). The costs Plaintiffs complained of could have been caused by the thousands of other protesters at Standing Rock who arrived even before Greenpeace, Inc. did, or even the U.S. government. *See, e.g., North Dakota v. United States*, 785 F. Supp. 3d 473, 561 (D.N.D. 2025) (ordering U.S. Army Corps of Engineers to pay the State of North Dakota \$27.8 million in damages for failing to take actions to control the protesters), *appeal filed*, No. 25-2276 (8th Cir. June 26, 2025). But Plaintiffs presented no evidence disproving this alternative cause. *See Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 406 (8th Cir. 2004).

[¶138] ***Damages Unreasonable, Extreme and Excessive***. Even assuming that there is some competent evidence that could support any of these damages, the jury’s award is unreasonable, extreme and excessive. Perhaps the clearest illustration is that the *only* evidence of any purported trespass by Greenpeace, Inc.—indeed, the only evidence of anyone from Greenpeace, Inc. being on any asset owned or possessed by any Plaintiff—was the testimony of Harmony Lambert (one of the estimated 100,000 people that attended the protests) that on an unspecified date and location, she ran down the pipeline easement carrying a windsock. Lambert Trial Dep. 202:15–204:02; Trial Ex. 1171. Putting aside for the moment that crossing an easement cannot give rise to a trespass claim, the jury awarded Plaintiffs a total of over \$11.7 million of compensatory damages for that alleged trespass, plus an additional \$21 million of exemplary damages against Greenpeace, Inc. Dkt. 5035, Special Verdict Form. Even if any damages could be sustained for this claim, a judgment of \$32.7 million for running with a windsock is excessive, and it exceeds each of the three standards set forth in *Zander*, 2024 ND 80, ¶ 25, 6 N.W.3d 623.

4. Conspiracy Claim

[¶139] As this Court recognized in its order on the Greenpeace Defendants' motion for judgment as a matter of law, the jury's conspiracy verdict was based on International and Inc.'s signatures "on the BankTrack letter, and little more." Dkt. 5321 Order ¶ 25; *see id.* ¶ 15. Even assuming, for the sake of argument, that this limited evidence provided any support for the jury's verdict, the finding that International and Greenpeace Inc. were engaged in a civil conspiracy is contrary to the weight of the evidence. Most significantly, this evidence does not show that these defendants entered into an agreement to commit any actual *torts*. Rather, to the extent these exhibits show an agreement to do anything, it is to engage in constitutionally protected advocacy and petitioning activities, which cannot be a basis for a civil conspiracy claim. *See e.g.*, Trial Ex. 1308 (corresponding with Krystal Two Bulls about promoting blog post); Trial Ex. 1309 (sharing blog post with Greenpeace, Inc. staff); *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).

5. Exemplary Damages

[¶140] Although this Court substantially reduced the exemplary damages awards the jury had entered in its prior order, it did not take into consideration that as a matter of law, *no* exemplary damages award could be imposed given the Plaintiffs' failure to present evidence of the Greenpeace Defendants' actual malice. Assuming there was any such evidence to support the jury's finding, the Judgment reflects a verdict that was at the very least contrary to the clear weight of the evidence presented at trial.

[¶141] To recover exemplary damages, Plaintiffs were required to produce "clear and convincing evidence" that the Greenpeace Defendants' actions were undertaken 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 (citation omitted). Actual malice is determined by “the actual state or condition of the mind of *the person who did the act.*” *Id.* (emphasis added).¹⁰

[¶142] In attempting to meet that heavy burden, Plaintiffs relied on a handful of off-hand comments made by lower-level Greenpeace, Inc. employees about Energy Transfer and its CEO. *See e.g.*, Trial Ex. 1177; Trial Ex. 3806; Trial Ex. 1558. But none of these comments could meaningfully demonstrate the actual malice necessary for exemplary damages because none of them are related to Plaintiffs’ claims in this case. *See 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.”). And to the extent that Plaintiffs have attempted to identify any evidence that does actually bear on the state of mind of any Greenpeace Inc. employees involved in the alleged torts at issue in this case, they strain to find ill will in the most innocuous of documents. *E.g.*, Trial Ex. 1151 (email about “engag[ing] the local bank[s]” funding DAPL, and mentioning “the reputational risk to *the financial institutions involved*” (emphasis added)). Even if Plaintiffs produced any evidence of actual malice at all, any finding that they met their clear-and-convincing burden of proof is contrary to the plain weight of the evidence presented at trial.

[¶143] That is still more obviously true for International and Fund. *None* of the statements on which Plaintiffs relied to prove animus were from International or Fund employees. While Plaintiffs have continuously attempted to lump the Defendants together under one Greenpeace umbrella, an award of exemplary damages requires evidence of the “actual state or condition of the mind” of the defendant who has done the act for which such an additional penalty is imposed. *Zander*, 2021 ND 84, ¶ 31, 959 N.W.2d 838 (citation omitted); *see Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979) (“Punitive damages must be based on underlying tortious conduct by the defendant.” (citation omitted)). Nothing Plaintiffs have cited

¹⁰ Although in this respect, exemplary damages “actual malice” is similar to constitutional “actual malice, *Dongguk*, 734 F.3d at 123 (plaintiff must prove individual who published the statement acted with constitutional actual malice), the standards are otherwise different. *See supra* [¶¶ 88–92]

as evidence of purported ill will, oppression, or fraud bears on that question with respect to Fund or International at al. *See* Dkt. 5184, ¶ 139. Any finding that International and Fund acted with the requisite “ill will or wrongful motive” is thus necessarily contrary to the clear weight of the evidence. N.D.C.C. § 32-03.2-11.

[¶144] Even if the exemplary damages awards are not set aside entirely, they should be reduced because they are excessive as a matter of both North Dakota and federal law. To start, consistent with this Court’s prior order, if it reduces any of the remaining compensatory damages awards (as it should), it should correspondingly reduce the exemplary damages for that count, consistent with N.D.C.C. § 32-03.2-11. *See* Order ¶ 32 [Dkt. 5321].

[¶145] The statutory factors set forth in N.D.C.C. § 32-03.2-11(5) independently confirm the jury’s exemplary damages awards were motivated by passion or prejudice. **First**, there is no “reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant’s conduct.” N.D.C.C. § 32-03.2-11(5)(a). For all the reasons explained *supra* in Section II.C.1-3, the exemplary damages awards far outstrip any actual harm that Greenpeace Inc., which had just six attendees half way through, could have proximately caused Plaintiffs in a yearlong protest event with 100,000 different attendees.

[¶146] **Second**, although the verdict reflected the anger and frustration of the Morton County community, *see supra* § II.A, the actual evidence of the Greenpeace Defendants’ conduct upon which exemplary damages could be based reflected an absence or extremely low “degree of reprehensibility” and occurred over a relatively short “duration.” N.D.C.C. § 32-03.2-11(5)(b). Indeed, even accepting Plaintiffs’ characterizations of the Greenpeace Defendants’ purportedly tortious conduct at face value, Plaintiffs provided no evidence suggesting the Greenpeace Defendants engaged in or endorsed any physical harm to any person or property, and any supposedly tortious conduct was intended to protect the environment and tribal sovereignty. Plaintiffs’ own witnesses admitted that no such evidence existed. *See, e.g.*, Feb. 27, 2025 Tr. 91:12-92:1, 106:12-17, 110:4-8 (Michael Futch); *id.* 230:4-14 (Joey Mahmoud); Feb. 28, 2025

Tr. 80:13-19, 82:2-5, 153:2-8, 157:4-158:6 (Sheriff Kirchmeier). Yet International, for example, is currently subject to \$21 million in exemplary damages for being one of more than 500 co-signatories to the November 30, 2016, BankTrack letter that echoed statements in a United Nations report and other media sources—a letter that at most led the banks to ask questions about the projects. Trial Ex. 1068; Trial Ex. 1117. As another example, Greenpeace Fund is subject to \$21 million in exemplary damages for defamation-based claims even though it did not publish or republish *any* of the allegedly defamatory Statements.

[¶147] **Third**, Greenpeace Defendants did not meaningfully “conceal[]” their purported misconduct (N.D.C.C. § 32-03.2-11(5)(a)): The relevant letters, blog posts and social media were all signed or acknowledged. *E.g.*, Trial Ex. 1367; Trial Ex. 1777.

[¶148] **Fourth**, the exemplary damages are all the more excessive given that the Greenpeace Defendants are not-for-profit entities with relatively limited resources. *See Tice v. Mandel*, 76 N.W.2d 124, 137 (N.D. 1956) (upholding reduction in exemplary damage award and holding “the defendant may show that he is poor, or a man of little wealth, so that an excessive amount may not be awarded” (citation omitted)). Exemplary damages are supposed to punish a defendant, not financially destroy or bankrupt it.

[¶149] The same conclusion follows as a matter of constitutional due process. The U.S. Supreme Court has held that “courts reviewing punitive damages” must assess three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citation omitted). Given Plaintiffs’ counsel’s argument imploring the jurors to punish Greenpeace Defendants to prevent it from taking actions “in Louisiana or Texas or Oklahoma or Ohio,” Caplow Decl. Ex. R (“Mar. 17, 2025 Tr.”) 72:23-24, the verdict reflects an impermissible attempt to reach conduct outside North Dakota. *See State Farm*, 538 U.S. at 421. That alone is

reason enough to set it aside. *White v. Ford Motor Co.*, 312 F.3d 998, 1019-20 (9th Cir. 2002) (setting aside punitive damages verdict where jury impermissibly considered out-of-state conduct).

[¶150] But the award would also be excessive regardless. On the first factor, even if the Greenpeace Defendants' conduct was reprehensible at all, it was in the exercise of First Amendment protected activities opposing DAPL, and the record reflects no evidence of the Greenpeace Defendants engaging in, directing, or supporting violence or threats to person or property, which is contrary to their foundational Quaker values. As for the third factor, no civil penalty in North Dakota or elsewhere could even remotely approach the more than \$150 million in exemplary damages the Judgment imposed here. And as for the second factor, the Supreme Court has made clear that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *State Farm*, 538 U.S. at 425. The compensatory damages imposed here are “substantial” by any measure, rendering the more than \$150 million in exemplary damages imposed in the Judgment unconstitutionally excessive. That is all the more true given the Greenpeace Defendants' limited resources: An exemplary damages award that would threaten to force a non-profit entity to cease operations entirely is necessarily excessive. *Cf. Hollins v. Powell*, 773 F.2d 191, 198 (8th Cir. 1985) (“We can see neither the justice nor sense in affirming a verdict which cannot possibly be satisfied. The purpose of punitive damages is to punish [the defendant] for outrageous conduct, not to drain him of his life’s blood.”).

6. Greenpeace Defendants Are Entitled to A New Trial on All Claims

[¶151] If even a subset of Plaintiffs' claims are against the weight of the evidence (as all of them in fact are), Greenpeace Defendants should be granted a new trial as to *all* claims. The jury's willingness to find for Plaintiffs as to even one of these claims notwithstanding the manifest weakness of the evidence illustrates the degree to which its deliberations were tainted by passion and prejudice. Especially given the degree to which the factual issues overlapped

between each of Plaintiffs' claims and the various individual Greenpeace Defendants, no part of the jury's verdict can be salvaged. *Delzer v. United Bank of Bismarck*, 527 N.W.2d 650, 656 (N.D. 1995) (where verdict was against the weight of the evidence on one count, courts should grant a new trial on all "intertwined" counts); *see also Cont'l Res., Inc. v. P&P Indus., LLC I*, 2018 ND 11, ¶ 28, 906 N.W.2d 105 (N.D. 2011) (trial court abused its discretion in denying new trial motion "[b]ecause the breach of contract, fraud, and deceit claims are largely based on the same allegations, we conclude a new trial is required"). A retrial on all claims is necessary.

E. Numerous Other Issues Independently Warrant a New Trial

1. The Verdict Erroneously Awarded Additional Compensatory Damages as Conspiracy Damages

[¶152] The judgment against Greenpeace, Inc. and International awards Dakota Access and Energy Transfer \$439,895 per entity/per defendant in *compensatory damages for conspiracy*, plus exemplary double damages against Greenpeace, Inc. Judgment, Dkt. 4507; Order Granting Plaintiffs' Motion for Judgment, Dkt. 5398. Correctly applied, however, the conspiracy-specific damages instead identify the amount of compensatory damages subject to joint and several liability.

[¶153] A "civil conspiracy claim is merely a vehicle for asserting vicarious or joint and several liability." *Mitchell v. Morton Cnty. Sheriff Kyle Kirchmeier*, Civil No. 1:19-cv-149, 2020 WL 8073625, at *20 (D.N.D. Dec. 10, 2020) (quoting *Cenveo Corp. v. S. Graphic Sys., Inc.*, 784 F. Supp. 2d 1130, 1136 (D. Minn. 2011)), *aff'd in part & rev'd in part on other grounds sub nom. Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022); *see* 15A C.J.S. *Conspiracy* § 3 (Dec. 2024) (conspiracy is not a "separate theory of recovery"); *see also Hurt v. Freeland*, 1999 ND 12, ¶ 37, 589 N.W.2d 551 (citing 15A C.J.S. *Conspiracy* § 1(1)).¹¹ Amounts listed in the verdict

¹¹ As explained by Justice Thomas, under the common law, conspiracy is a means for establishing vicarious liability for the underlying tort. *Beck v. Prupis*, 529 U.S. 494, 504 (2000); *see also, e.g., In re Mullins*, No. 16-13773, 2025 WL 3177060, at *1 (D. Colo. Nov. 13, 2025) (civil conspiracy extends joint and several liability); *Ekstam v. Wells*, No. 12-25-00071-CV, 2025 WL 3170992, at *8 (Tex. App. Nov. 12, 2025) (civil conspiracy is a theory of vicarious liability); *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 155 F.4th 795, 828 (6th Cir. 20025) (conspiracy is a method to hold one conspirator liable for the actions of others on vicarious-liability

form for conspiracy are not additive to Plaintiffs' other damages. Instead, the conspiracy-specific damage amounts are *the only* damages that may be imposed jointly and severally. *Mitchell*, 2020 WL 8073625, at *20.

2. The Court Erred in Denying Bifurcation

[¶154] Greenpeace Defendants timely elected to bifurcate the trial to determine issues of compensatory damages and exemplary damages in separate proceedings. Dkt. 4501. Despite this exercise of their statutory right of election, the Court denied the Greenpeace Defendants' request. Mar. 4, 2025 Tr. 28:10-29:18. That decision necessarily constituted legal error, as such bifurcation is mandatory upon election. N.D.C.C. § 32-03.2-11(2) ("If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages.").

[¶155] The denial of bifurcation particularly prejudiced the Greenpeace Defendants here because it encouraged the jury to conflate the two distinct "malice" requirements for defamation compensatory damages and exemplary damages. The "actual malice" (i.e., animosity) required to find that Plaintiffs were entitled to exemplary damages differs from the "actual malice" required to find defamation of public figures and matters of public concern. *Kluver v. SGJ Holdings, LLC*, 2023 ND 65, ¶ 18, 988 N.W.2d 569 ("[T]he constitutional standard of actual malice that a plaintiff must prove when the person is a public figure bringing a defamation claim'

grounds), *reh'g en banc denied*, 164 F.4th 529 (6th Cir. 2026); *Hadley v. Perez*, No. 25-cv-22162, 2025 WL 2851643, at *12 (S.D. Fla. Oct. 8, 2025) (conspiracy is a vehicle for imputing the tortious acts of one coconspirator to another to establish joint and several liability), *amended in part on reconsideration*, No. 25-cv-22162, 2025 WL 3534104 (S.D. Fla. Dec. 10, 2025); *Everett J. Prescott, Inc. v. Beall*, No. 1:25-cv-00071, 2025 WL 2855399, at *6 (D. Me. Oct. 8, 2025) (conspiracy is a rule of vicarious liability); *Catalyst Campus for Tech. & Innovation, Inc. v. Brown*, No. 1:24-cv-00059, 2025 WL 2781561, at *12 (D. Utah Sept. 30, 2025) (conspiracy more accurately described as a method of imposing vicarious liability); *Corsini v. Dentons US LLP*, No. 1:24-CV-03196, 2025 WL 2781345, at *9 (S.D.N.Y. Sept. 30, 2025) (conspiracy is a theory under which a party can establish vicarious liability), *appeal filed*, No. 25-2710 (2d Cir. Oct. 28, 2025); *Usayan v. Republic of Turkey*, No. 18-cv-1141, 2025 WL 2642134, at *13 (D.D.C. Sept. 15, 2025) (civil conspiracy is a means for establishing vicarious liability for an underlying tort), *adopting report & recommendation*, No. 18-1141, 2025 WL 3282436 (D.D.C. Oct. 2, 2025); *Raridon & Assocs. Orthopedics, Inc. v. Schmidt*, No. 2:23-CV-2373, 2025 WL 2480614, at *10-11 (D. Kan. Aug. 28, 2025) (civil conspiracy merely an avenue for imposing vicarious liability).

. . . requires ‘knowledge that the statements are false or that the statements were made with reckless disregard for whether they were false.’” (citation omitted); *Campbell v. Citizens for an Honest Gov’t, Inc.*, 255 F.3d 560, 569 (8th Cir. 2001) (“[e]vidence of a defendant’s ill will, desire to injure, or political or profit motive does not suffice” to establish constitutional actual malice).

[¶156] But as the Court acknowledged, Plaintiffs used the same or similar evidence for both “malice” requirements. Mar. 4, 2025 Tr. 29:6–11. Thus, when determining the Greenpeace Defendants’ liability for the nine challenged Statements, the jury improperly considered non-challenged statements offered as proof of animosity or ill-will that either were not made by authors of any defamatory statement or not otherwise related to defamation, did not constitute constitutional actual malice, or both.

[¶157] For example, Plaintiffs presented a statement, and related deposition testimony, by Molly Dorozenski, the author of Statement 2,¹² that suggested nominating Energy Transfer Partners for a “Motherfucker Award” due to its poor human rights record. Dorozenski Trial Dep. 251:18–252:04, 252:11–252:19, 255:07–255:10; 256:10–257:09; Trial Ex. 1617. Far from evincing doubts about the accuracy of the allegedly defamatory Statement 2, Dorozenski’s comment instead demonstrates her sincere belief that Energy Transfer Partners engaged in “hiring firms like TigerSwan to use violent paramilitary tactics on activists, violating indigenous rights, various attacks on free speech including promoting really shitty laws that primarily criminalize peaceful activism for indigenous people/people of color.” Dorozenski Trial Dep. 256:14–20.

[¶158] Plaintiffs also repeatedly presented to the jury a statement—“fuck ‘em”—by Greenpeace, Inc. employee Brent Maness. Trial Ex. 1177; Caplow Decl. Ex. AA (“Maness Trial Dep.”) 23:18–23:21; Caplow Decl. Ex. L (“Mar. 11, 2025 Tr.”) 213:7–16; Mar. 12, 2025 Tr.

¹² “Dakota Access “us[ed] pepper spray and attack dogs on peaceful Water Protectors and pipeline opponents.”

21:25–22:10. Mr. Maness, however, did not author any challenged statements nor did his role at Greenpeace, Inc. involve preparing or vetting public communications. *See* Mar. 12, 2025 Tr. 6:6-7:6. Similarly, Plaintiffs presented an email containing a statement—“Fuck DAPL”—by a Greenpeace, Inc. employee Benjamin Smith. Trial Ex. 3086. Mr. Smith is not the author of any challenged Statement, nor did any content in the email relate to any defamatory statement. Yet Plaintiffs specifically argued that Mr. Smith’s comment was relevant to its defamation claims and “shows the general attitude towards Dakota Access Pipeline by the rank and file employees at Greenpeace.” Mar. 12, 2025 Tr. 117:12-16. Because the failure to bifurcate the proceedings allowed the jury to be led astray by such confusing arguments, a new trial is warranted.

[¶159] Furthermore, as explained more thoroughly in Section II.E.4 *infra*, Plaintiffs were permitted to introduce evidence related to non-defamatory statements to support their defamation claims. The Court erred in allowing Plaintiffs to introduce this irrelevant and inflammatory evidence that would not have been allowed to be introduced in the first stage of a bifurcated trial. As a result, the jury heard distracting evidence about statements that were not even part of Plaintiffs’ defamation claims, including statements made by Greenpeace entities in different countries that are not even defendants in this lawsuit. This led to juror confusion as to which statements were allegedly defamatory, and allowed consideration of statements and emails by entities that were not defendants. And more generally, such inflammatory evidence was also likely to lead the jury to award a larger compensatory damages award—precisely the harm that bifurcation under N.D.C.C. § 32-03.2-11(2) is intended to prevent.

3. Law Enforcement Presence at Trial Prejudiced Greenpeace Defendants

[¶160] The Greenpeace Defendants are also entitled to a new trial because they were substantially prejudiced by the actions of law enforcement at trial, particularly in light of the community bias and pretrial publicity *supra* § II.A.2. “Civil litigants, like criminal defendants, have a right to a fair trial,” including ensuring that any security measures are not prejudicial. *See*

Sears v. Rivero, No. 8:12-CV-288-T-33TGW, 2019 WL 4600407, at *6 (M.D. Fla. Sept. 23, 2019), *aff'd*, No. 19-13668, 2022 WL 2291220 (11th Cir. June 24, 2022). “[I]t is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.” *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (internal quotation omitted); *see, e.g., Woods v. Dugger*, 923 F.2d 1454, 1456 (11th Cir. 1991) (finding that presence of uniformed law enforcement spectators during trial deprived defendant of a fair trial where trial took place in small rural county and voir dire showed juror bias in favor of law enforcement).

[¶161] Here, the security measures imposed only increased the jury’s inability to grant the Greenpeace Defendants a fair trial. The prejudicial actions included instructing jurors to enter and exit the courthouse through a separate entrance, giving security briefings to jurors, having a sheriff deputy present at all times in the courtroom, having Sheriff Kyle Kirchmeier—who was also an Energy Transfer witness—intermittently attend the proceedings, and instructing jurors on the process for their immediate escort out of the courthouse following the verdict. Kuslansky Decl. ¶ 10. At the same time, Plaintiffs explicitly invoked the jury’s bias in favor of local law enforcement,¹³ telling the jury (in contrast to the evidence) that “shaming the police” is “what they teach in nonviolent direct action.” Mar. 17, 2025 Tr. 24:9-11; *contra* Mar. 12, 2025 Tr. 41:7-9 (“unequivocally, Greenpeace never teaches people how to shame police; it’s not something we do”); *id.* at 41:15-17 (“I can tell you for sure in my 15 years experience, we never taught someone to shame a police officer.”). All of these actions created two related—and prejudicial—impressions: that law enforcement supported Plaintiffs, and that the Greenpeace

¹³ Eight of the final 20 prospective jurors, including four members of the jury and one alternate juror, indicated they would give more weight to the testimony of law enforcement witnesses over other witnesses merely because they were in law enforcement. *See* Kuslansky Decl. Ex. AR at 157 (Juror 14, seated on jury); 192 (Juror 25, GP Strike); 378 (Juror 26, seated on jury); 333 (Juror 30, seated on jury); 353 (31, seated on jury); 277 (Juror 55, ET strike) (voluntarily adding “in this case possibly” to response); 318 (Juror 62, ET Strike); and 328 (Juror 64, alternate, voluntarily adding “probably” to response).

Defendants, both during the DAPL protests and at trial, presented a threat of violence from which the jurors needed to be protected.

4. The Court Erred by Admitting Inadmissible Evidence Offered by Plaintiffs That Substantially Prejudiced Greenpeace Defendants

[¶162] The Court must, to the extent practicable, “conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.” N.D.R.Ev. 103(d). As further detailed below, in allowing Plaintiffs to admit irrelevant, incompetent, and prejudicial evidence, this Court erred. These errors prejudiced the Greenpeace Defendants, resulting in an excessive verdict that was the product of inflamed passion and prejudice. In addition, concurrent errors were made by the exclusion of the Greenpeace Defendants’ relevant, probative evidence, which hindered their ability to present a defense, rebut assertions set forth by Plaintiffs, and temper the predictably inflamed reactions from the jury resulting from Plaintiffs’ improper evidence and argument. The Greenpeace Defendants should be granted a new trial in which Plaintiffs’ inflammatory and irrelevant evidence is excluded and the Greenpeace Defendants are properly permitted to put on their defense.

a. Admission of Plaintiffs’ Expert Testimony

[¶163] The Court erred in admitting the testimony of Plaintiffs’ experts Leathers, Sullivan, and Trout. The North Dakota Supreme Court has affirmed the granting of a new trial where expert testimony “lacked sufficient foundation, both as to a scientific basis for the testimony and the qualifications of the witness to testify on the subject.” *Stein v. Ohlhauser*, 211 N.W.2d 737, 742 (N.D. 1973). That is the case here.

[¶164] Specifically, while all three of these experts were offered to prove Plaintiffs’ damages, all three of them impermissibly *assumed* causation. “The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact of that event.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 38 (2013) (citation omitted). In other words, while a damages expert may assume liability, i.e., that the defendant caused the “harmful

event,” the expert must then calculate the damages attributable to “that event.” What the expert may not do is calculate the total loss plaintiff suffered and simply assume this amount is attributable to the defendant’s alleged wrongful acts.

[¶165] But that is exactly what Plaintiffs’ experts did. For every category of damages, Plaintiffs’ experts were instructed by counsel to add together *any* cost or loss associated with DAPL and issue a report designating this sum total as a calculation of Plaintiffs’ damages allegedly caused by the Greenpeace Defendants, with only a handful of de minimis subtractions. *See* Trout Mot., Dkt. 3672, ¶¶ 6-8, 17–24; Leathers and Sullivan Mot., Dkt. 3712, ¶¶ 8–19. Thus, for example, Leathers failed to validate Plaintiffs’ assumption that their debt refinancing damages were caused by the Greenpeace Defendants, ignoring evidence showing that this assumption is untrue (*i.e.*, that the refinancing was actually delayed because of the uncertainty caused by the Standing Rock Sioux Tribe’s litigation against the USACE). Dkt. 3712 Leathers and Sullivan Mot. ¶¶ 14-15; *but see, e.g.*, Trial Exs. 208, 211. He also simply assumed that the nine Statements caused or could have caused the U.S. Army Corps of Engineers to delay issuance of an easement needed for construction under Lake Oahe, even though there was no evidence that the government ever saw these statements. Leathers and Sullivan Mot. ¶ 13.

[¶166] Similarly, Sullivan did nothing more than add up the costs Plaintiffs incurred in contractor standby time, security, fencing, etc. (including costs incurred in Illinois, Iowa, and South Dakota) *See* Mar. 4, 2025 Tr. 241:15–25. He did not analyze whether these costs could have been caused by other parties. Dkt. 3712, Leathers and Sullivan Mot. ¶¶ 17–18.

[¶167] Like Sullivan, Trout merely used “third grade” arithmetic to conclude that the total cost for security and public relations amounted to more than \$75 million. Dkt. 3672 Trout Mot. ¶ 4. Trout included costs that logically could not be attributed to the Greenpeace Defendants because they were incurred before any Greenpeace, Inc. employee went to Standing Rock and before the first allegedly defamatory Statement was even published. *Id.* ¶¶ 18–20.

Trout also failed to consider alternative causes for these costs, such as “any of the thousands of other similar statements about DAPL” or “the tens of thousands of other protesters.” *Id.* ¶ 24.

[¶168] This evidence’s admission violates Rule 702’s requirement that expert testimony be reliable. “[W]hen an expert premises his opinions on an assumption, the assumption must be reliable. . . . [but] an assumption based on the internal projections of the expert’s sponsor lacks the reliability demanded by Rule 702.” *Victory Recs., Inc. v. Virgin Recs. Am., Inc.*, No. 08 C 3977, 2011 WL 382743, at *2 (N.D. Ill. Feb. 3, 2011) (citation omitted). A damages expert cannot, as these experts did, simply speculate as to the underlying foundation for their conclusions: “[O]pinion testimony based on information that does no more than equip a jury to make a damages determination based on ‘pure speculation’ fails under Rule 702.” *Am. Aerial Servs., Inc. v. Terex USA, LLC*, No. 2:12-CV-00361-JDL, 2015 WL 1947265, at *4 (D. Me. Apr. 29, 2015) (citation omitted).

[¶169] The Court’s error in law had the consequence of presenting to the jury a damages calculation that far exceeded the losses conceivably attributable to the Greenpeace Defendants. The effect is evident in the jury’s damages verdict. As described above (*see supra* ¶¶ 164-167), the jury simply took the experts’ damages calculations at face value, awarding them in its verdict. Because this testimony allowed Plaintiffs to cloak their failure to prove causation in a veneer of “expert” analysis, it was highly prejudicial, effectively encouraging the jury to rely on speculation and conjecture in awarding damages. This error requires a new trial.

b. Evidence Related to Non-Defamatory Statements

[¶170] The Court erred by admitting evidence referencing statements not alleged to be defamatory. A defamation claim must be based on specific statements, not a general claim of falsehood. *Freeman v. Bechtel Constr. Co.*, 87 F.3d 1029, 1031 (8th Cir. 1996); *Carlson v. Roetzel & Andress*, Civ. No. 3:07-CV-33, 2008 WL 873647, at *14 (D.N.D. Mar. 27, 2008), *aff’d*, 552 F.3d 648 (8th Cir. 2008).

[¶171] Here, Plaintiffs could only recover damages arising out of the nine challenged Statements. *See* N.D.C.C. § 32-43-03(1), (3)(b) (defamation action requires that plaintiff “[s]pecifies with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of the publication.”). Plaintiffs “irrevocably abandon[ed]” all other previously identified statements as a basis for their defamation claim more than a year prior to trial. Notice of Withdrawal of Certain Allegations, Dkt. 2233. On June 11, 2024, Plaintiffs affirmed that the actionable statements are “limited” to accusations that Plaintiffs “deliberately desecrated, . . . violated tribal property rights, and . . . initiated the violence.” Greenpeace Defs.’ Br. on Categories of Objs. to Trial Exs. and Dep. Designations (“Greenpeace Defs.’ Objs. Br.”), Ex. 6 (“June 11, 2024 Tr.”) 22:25–23:4, Dkt. 4379.

[¶172] Accordingly, the Greenpeace Defendants objected to evidence related to alleged falsity of or sourcing for statements that were not the defamatory statements at issue (identified as objections category 1.6). *See* Greenpeace Defs.’ Br. on Categories of Objs. to Trial Exs. and Dep. Designations ¶¶ 31-33; Caplow Decl. Ex. Q (“Jan. 15, 2025 Tr.”) 102:8. But this Court allowed much of this inadmissible evidence to be presented to the jury. The Court overruled without explanation the Greenpeace Defendants’ objection to designated testimony from the deposition of Diana Best in which Ms. Best was asked about her fact checking process of a statement about arrestees at Standing Rock being locked up and held in dog kennels. *See* Mar. 5, 2025 Tr. 20:7–8; Best Trial Dep. 63:19–21, 63:22–64:01, 64:04–14, 64:15–25, 65:15–20, 65:22–23, 68:04–07, 69:03–10, 69:12, 70:14–17, 70:19. The testimony includes extensive questioning about arrestees being held in dog kennels, locked up naked, deprived of food or warmth, and comments from Plaintiffs’ counsel that the statement is “an outrageous accusation.” Best Trial Dep. 63:22-64:01. Not only was the statement that protesters were locked up naked in dog kennels not one of the challenged statements, it could not have been: it did not accuse *Plaintiffs* of anything. *See Brummett v. Taylor*, 569 F.3d 890, 893 (8th Cir. 2009) (affirming

judgment as a matter of law because allegedly defamatory statements were not “of and concerning” plaintiffs).

[¶173] Similarly, the Court also overruled without explanation the Greenpeace Defendants’ objection to designated testimony from the deposition of Daniel Mittler in which Mr. Mittler was questioned about this same statement. Mar. 5, 2025 Tr. 42:25; Caplow Decl. Ex. AN (“Mittler Trial Dep.”) 115:07–117:03; *see also id.* 108:19–108:25, 113:21–144:05 (questioning about other statements not alleged to be defamatory). The Court erred in allowing this inflammatory evidence to go before the jury.

c. Evidence of Greenpeace Defendants’ protected activity

[¶174] The Court erred in admitting evidence of protected speech activity—including, in particular, Greenpeace, Inc.’s, International’s and non-party Greenpeace Nordic’s advocacy directed at financial institutions, or, in the case of Greenpeace, Inc., the government. *See, e.g.*, Mar. 5, 2025 Tr. 25:3–29:20 (overruling Greenpeace Defendants’ objections to admissions of Exhibits 1308, 1309, and 1310—communications with Krystal Two Bulls); Mar. 4, 2025 Tr. 56:2–58:25 (overruling Greenpeace Defendants’ objections to admission of Exhibit 1729—letter to Citigroup which did not contain any allegedly defamatory statements). This speech could not serve as a basis for either Plaintiffs’ defamation claims or their tortious interference claims. The Court, recognizing as much, referenced imposing limits on the use of such evidence, but nevertheless admitted it throughout trial. The Court ultimately instructed the jury that evidence related to bank advocacy “may be considered to the limited purpose of determining whether International and Greenpeace, Inc. knew of Plaintiffs’ existing relationships with the banks and/or financial institutions” and that evidence of parties engaged in lobbying, advocacy, or petitioning directed at government agencies “cannot be the basis of awarding, or declining to award, damages in this case.” Final Jury Instructions, Dkt. 5036, at 29, 30.

[¶175] One need only consider how Plaintiffs used and argued about this evidence at trial to know that the Court’s limiting instructions on bank advocacy and petitioning the government

could not eliminate the prejudice to the Greenpeace Defendants. *See, e.g.*, Mar. 17, 2025 Tr. 46:8-19, 47:1-25, 59:15-60:8. As the Fifth Circuit has noted, “cautionary instructions are effective only up to a certain point. . . . [A]fter repeated exposure of a jury to prejudicial information, . . . cautionary instructions will have little, if any, effect in eliminating the prejudicial harm.” *O’Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977); *see also id.* (“[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn’t do any good.”). That is the case here, as evidenced by the fact that the jury awarded hundreds of millions of dollars in damages based on nothing but speculation.

d. Evidence of Greenpeace Defendants’ campaigns relating to pipelines other than DAPL or after the filing of this lawsuit

[¶176] Substantial evidence was admitted at trial relating to pipelines other than DAPL. Some of this evidence was *specifically identified* by the Greenpeace Defendants in their briefing on objections which preceded the Court’s January 15, 2025, ruling *sustaining* that objection. *See* Greenpeace Defs.’ Objs. Br. ¶ 20. Notwithstanding that ruling, the Court allowed Trial Exhibit 1009 and related testimony from the deposition of John Passacantando. *See* Passacantando Trial Dep. 149:12–149:23, 150:01–150:12. Trial Exhibit 1009 is a document from 2018, two years after the events related to DAPL, that discusses strategies “to stop the construction of the new pipelines.” Likewise, the Court sustained the Greenpeace Defendants’ objections to the similar Trial Exhibit 1123 and related deposition testimony of Diana Best. *See* Greenpeace Defs.’ Objs. Br. ¶ 20; Jan. 15, 2025 Tr. 65:11; Best Trial Dep. 116:01–08. Nonetheless, when Plaintiffs sought to introduce Trial Exhibit 1123 and designated such testimony at trial, the Court contradicted its prior ruling and admitted the exhibit and designated testimony. It provided no basis for overruling the objection or overturning itself. *See* Mar. 5, 2025 Tr. 17:1.

[¶177] The admission of this evidence was an error as a matter of law. This inadmissible evidence was prejudicial and misled the jury, as it could have no bearing on the Greenpeace Defendants’ liability for any of the alleged torts in this case. *See* Mar. 5, 2025 Tr. 15:6-19.

[¶178] Similarly, the Court erred by admitting evidence related to actions taken by the Greenpeace Defendants in response to Plaintiffs’ decision to file suit, which Plaintiffs then used as the keystone of their argument that a conspiracy existed in 2016 to stop construction of DAPL. The Court had granted Defendants’ limine motion to exclude evidence related to the Standing Truth campaign—a project initiated by the Greenpeace Defendants for responding to this lawsuit—and initially sustained the Greenpeace Defendants’ objections to the admission of testimony related to that campaign. *See* Nov. 21, 2024 Order, Dkt. 4224, at 12-13; *see* Jan. 15, 2025 Tr. 41:8-51:7. Plaintiffs nonetheless sought to introduce, and the Court received, exhibits and trial testimony regarding the Standing Truth project. The evidence discussed the Greenpeace Defendants’ reaction to being sued and planned opposition to *other* pipelines in 2018. The Court overruled without explanation the Greenpeace Defendants’ objection to Exhibit 1121 and corresponding testimony from the deposition of Diana Best. Mar. 5, 2025 Tr. 10:18-19.

[¶179] All of this evidence should have been excluded, consistent with the Court’s prior rulings. Its erroneous admission again prejudiced the Greenpeace Defendants by allowing Plaintiffs to confuse the jury as to the nature and scope of their claims.

e. Nonviolent Direct Action Trainings

[¶180] The Court also should have excluded evidence related to a 2016 draft non-violent direct action (“NVDA”) manual created by International. The Court granted the Greenpeace Defendants’ motion in limine No. 12 to exclude evidence or argument related to any such non-violent direct action manual, handbook, or document to train protesters. *See* Nov. 21, 2024, Order, Dkt. 4224, at 12-13; *see also Brandenburg*, 395 U.S. at 447. But the Court then overruled the Greenpeace Defendants’ objection to the admission of Exhibit 1319 during pretrial hearings. It did not state a basis for overturning its prior ruling. *See* Caplow Decl. Ex. T (“Feb. 20, 2025 Tr.”) 161:15-170:4.

[¶181] As a result, Plaintiffs used Exhibit 1319 throughout the trial. Indeed, in his opening statement, Plaintiffs’ counsel showed Exhibit 1319 and told the jury that “when they

come out here and tell you, we weren't there, you can't point to anybody with a Greenpeace jersey on, it wasn't me. I want you to keep this document in mind, Exhibit 1319. This is what they call their mass NVDA, is that training mobilization guidebook." Caplow Decl. Ex. C ("Feb. 26, 2025 Tr.") 70:7-71:12.

[¶182] Plaintiffs never should have been permitted to use this draft NVDA manual in this manner. It was a draft manual and not being used by International, let alone by anyone at Greenpeace, Inc. And no testimony was ever presented that connected the NVDA manual to the events at Standing Rock. On the contrary, testimony established that the NVDA trainings were created by the Indigenous Peoples Power Project ("IP3")¹⁴ after meeting with members of the Standing Rock Sioux Tribe and conducted in accordance with the IP3 principles—all independent of and prior to any involvement from Greenpeace, Inc. at Standing Rock. *See* Tilsen Trial Dep. 27:10-27:19, 30:20-31:09, 31:18-32:03, 39:10-41:22. *See also* Lambert Trial Dep. 225:05-225:18, 225:21-225:23; Trial Ex. 1269 (text from Harmony Lambert to Brent Maness and Cy Wagoner, dated Nov. 21, 2018).

[¶183] Thus, the NVDA manual was not used at Standing Rock, and it was not probative of anything that occurred at Standing Rock. The Court erred in allowing its admission.

[¶184] For the same reasons, the Court erred in admitting two duplicate exhibits related to internal Greenpeace training agendas, Exhibits 1146 and 1174. Exhibit 1146 is a Greenpeace Inc. email providing an agenda for training *Greenpeace Inc. trainers* to provide *Greenpeace nonviolent direct action trainings*, dated February 2, 2017. Exhibit 1174 is a duplicate of Exhibit 1146, about which Plaintiffs sought to question Brent Maness. This evidence should not have been admitted because it had nothing to do with Standing Rock. The evidence was uncontested that no Greenpeace Inc. training materials (or those of any other Greenpeace entity) were used at Standing Rock; Plaintiffs offered nothing but argument to refute those facts.

¹⁴ As has been discussed extensively in this case, IP3 is not a Greenpeace organization, and no Greenpeace Defendant was involved in the creation of IP3's training at Standing Rock (or IP3's NVDA principles). *See* Tilsen Trial Dep. 27:10-27:19, 30:20-31:09, 31:18-32:03, 39:10-41:22.

[¶185] These errors created significant prejudice, as the admission of this evidence impermissibly suggested that the Greenpeace Defendants were running the trainings. Plaintiffs’ counsel took full advantage of that confusion, using the NVDA manual in his closing arguments to depict the Greenpeace Defendants as deceptive. He claimed that Greenpeace witnesses were “trying to hide from you what the truth is” (including with “code words, anonymity, amnesia”), even going so far as to tell the jury that “[y]ou saw this, they didn’t want—they fought so hard, they did not want this document coming in, but it’s their own document, they wrote it.” Mar. 17, 2025 Tr. 23:18-24:15. He told the jury that the NVDA manual illustrates how the Greenpeace Defendants teach people the “active refusal to obey certain laws” and “be lawless.” See Mar. 17, 2025 Tr. 24:16-24. Had this evidence been properly excluded, Plaintiffs could not have made such inflammatory and misleading arguments.

f. Lockboxes

[¶186] Plaintiffs repeatedly offered, and the Court admitted over Greenpeace Defendants’ repeated objections,¹⁵ testimony, photographs and videos that showed the attachment and removal of v-shaped lockboxes that a protestor could use to briefly connect themselves to construction equipment. See, e.g., Trial Ex. PC33-4437-4443; PC2-0007 This was pure misdirection. The only evidence presented of lockboxes used at Standing Rock was of lockboxes that were v-shaped, made of steel or PVC pipe, or used by an individual to lock themselves onto equipment. But the undisputed evidence is that, if Greenpeace Inc. made lockboxes in 2016, those lockboxes would have been straight lockboxes, made of ABS pipe (an alternative to PVC), and only for use in connecting two people together—not for individual use, or for locking onto equipment. Mar. 11, 2025 Tr. 18:10-21:4 (Brent Maness). There is no evidence of a straight lockbox provided by Greenpeace Inc. being used at Standing Rock, and no

¹⁵ See, e.g., Feb. 28, 2025 Tr. 104:2-20; 107:14-20 (the Court recognizing Greenpeace Defendants’ repeated objections to law enforcement evidence such as lockboxes with no foundational basis relevant to Greenpeace Defendants and admitting exhibits from PC33 over such objection); Mar. 3, 2025 Tr. 61:6-63:15; Mar. 3, 2025 Tr. 86:20-25; Mar. 4, 2025 Tr. 136:5-10 (objecting to admission of PC44-4437-4443).

law enforcement witness testified that they encountered a straight lockbox made of ABS pipe. Nor did Greenpeace Inc. employees train people to use the v-shaped lockboxes. Mar. 11, 2025 Tr. 189:4-14. Yet, the supply and use of lockboxes was a central tenet of Plaintiffs’ case. *See, e.g.*, Mar. 17, 2025 Tr. 24:8-15 (“This is what they teach in nonviolent direct action. Lock boxes. . . . You saw examples of that stuff through out this process.”); *id.* 26:26:13-27:11; 39:3-10; 42:25-43:3; 45:7-12

g. Admission of Exhibit 1243

[¶187] The Court stated multiple times in its order on the parties’ motions in limine that “[n]o evidence or argument will be admissible without a valid foundational basis.” *See* Nov. 21, 2024 Order, Dkt. 4224, at 11, 12. Nevertheless, at trial, Plaintiffs offered Exhibit 1243—a letter from the North Dakota State Historic Preservation Office (the “ND SHPO”) dated April 26, 2016—during Plaintiffs’ direct examination of Mike Futch for the letter’s “No Historic Properties Affected” determination. *See* Feb. 26, 2025 Tr. 209:7-212:17.

[¶188] That was error. “[E]ven if [a document] is a record regularly kept by [the original custodian], the rule requires testimony of the custodian or another qualified witness or by certification for the [record] to be admitted.” *Johnson v. Buskohl Const. Inc.*, 2015 ND 268, ¶ 20, 871 N.W.2d 459. Here, no such testimony was provided. “Without a qualified witness from [the custodian] to lay foundation, the [record] was not admissible under N.D.R.Evid. 803(6)(D).” *Id.*

[¶189] This prejudicial evidence should have never been admitted. Plaintiffs used Exhibit 1243 to cast doubt on the identification of cultural properties at Cannonball Ranch made by Tim Mentz, the Tribe’s expert on cultural and sacred sites. *See* Mar. 17, 2025 Tr. 50:17-23. The Court refused to admit Mentz’s declaration filed in the USACE litigation for the truth of the matter asserted. But because it admitted Exhibit 1243 while limiting the use of the Greenpeace Defendants’ contrary evidence, that suggested to the jury that Exhibit 1243’s findings should be considered credible while Mentz’s were unreliable. That prejudiced the Greenpeace Defendants’ ability to present a meaningful defense to Plaintiffs’ defamation and tortious interference claims

by hamstringing their ability to prove that cultural properties were indeed affected by pipeline construction.

h. Testimony From Witnesses Without Personal Knowledge

[¶190] The Court erred by allowing witnesses to testify about events and evidence for which they had no personal knowledge. Lay opinion testimony is limited to testimony that is “rationally based on the witness’s perception.” N.D.R.Ev. 701. The witness must have observed the incident or have first-hand knowledge of the facts that form the basis for their opinion. Fed. R. Evid. 701 advisory committee’s note to 1972 proposed rules.¹⁶ N.D.R.Ev. 602 provides that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” *See State v. Saulter*, 2009 ND 78, ¶ 14, 764 N.W.2d 430 (much of lay witness’s testimony “exceeded that of a lay witness and was based on specialized knowledge or responses to hypothetical questions.”)

[¶191] ***Plaintiffs’ witnesses.*** Over the Greenpeace Defendants’ objections, Plaintiffs’ witnesses were permitted to testify about protest events that that they did not personally witness. *See, e.g.*, Feb. 26, 2025 Tr. 216:24. For example, the Court allowed Mike Futch to testify about the September 3, 2016 clash between security and protesters based merely on his general awareness of the company’s response to the protest. *See* Feb. 27, 2025 Tr. 21:19-22:9, 23:10-15. Based on that insufficient foundation, the Court then admitted a number of photographs of the protest camps and security measures. Feb. 26, 2025 Tr. 248:15-250:6 (admitting Trial Ex. PC5-87, a photograph of the protest camp on USACE property, even though Futch was not able to identify when the photo was taken beyond that it was taken “in the fourth quarter of 2016”); Feb. 26, 2025 Tr. 251:9-254:16 (admitting PC5-36 even while initially sustaining Greenpeace Defendants’ objection to the lack of a proper foundation, where Futch could not identify when it was taken); Feb. 26, 2026 Tr. 268:6-270:25 (admitting PC5-114, PC5-115, and PC5-116

¹⁶ N.D.R.Evid. 701 is based on Fed.R.Ev. 701. *See* N.D.R.Evid. 701 Explanatory Note.

showing Dakota Access’s security measures even though the “best [Futch] can do” was say the photos were taken “during construction”). Notably, Mr. Futch erroneously identified the area in PC5-36 as Backwater Bridge and testified about the significance of Backwater Bridge to the protests as a whole. Feb. 26, 2025 Tr. 253:19-254:16. Captain Steele later confirmed that any testimony identifying the area as Backwater Bridge was wrong. Caplow Decl. Ex. F (“Mar. 3, 2025 Tr.”) 96:1-17.

[¶192] The fact that a witness may have learned of events in their employment capacity does not make such facts substantively admissible, and Plaintiffs did not argue (nor did the Court rule) that the facts were being admitted for a limited purpose. The erroneous admission of this evidence was highly prejudicial: This inflammatory evidence suggested to the jury that the Greenpeace Defendants were involved in destructive protest events when there was no witness with personal knowledge.

[¶193] ***Law enforcement witnesses.*** The Court also permitted testimony of law enforcement witnesses that exceeded the scope of their personal knowledge and relied on specialized knowledge or responses to hypothetical questions. Sheriff Kirchmeier was permitted to testify about his opinion that the allegedly defamatory statements about private security’s use of force were false—specifically, that pepper spray and other devices were used “as a result of what’s occurring, not in an offensive manner”—based on his “experience as the chief law enforcement officer in this county,” not his personal knowledge of what private security had actually done. Feb. 28, 2025 Tr. 119:1-120:1. Indeed, even if Sheriff Kirchmeier had been properly introduced as an expert, this opinion testimony would have been inadmissible, as it reflected pure speculation.

[¶194] Likewise, Deputy Chief Stugelmeyer testified that, in his opinion, the multiple protest actions which occurred on November 11, 2016, were coordinated. Mar. 3, 2025 Tr. 132:13-23. When questioned about his basis for that opinion, Stugelmeyer relied on his

purported expertise, testifying: “I’ve been in law enforcement 25 years, I have instincts that happen in one situation that can be applied to another.” Mar. 3, 2025 Tr. 146:24-147:7.

[¶195] Similarly, Officer Bryan Steele testified that it appeared to him that “[s]omebody was training” protesters. Mar. 3, 2025 Tr. 70:7-10. While Officer Steele’s testimony was based in part on his personal observations, his ultimate conclusions were informed by his specific training. As he testified, his testimony was based on the fact that “through the binoculars it looked like the training we had went through—because we had never had nothing like this happen before. So forming lines and stuff, it looked like the training that they at the time us as far as, you know, if you want to move forward against another force.” Mar. 3, 2025 Tr. 102:3-13.

[¶196] These law enforcement witnesses “crossed the line into expert opinion testimony” when they relied on specialized knowledge and training to form their opinions. *See State v. Wickham*, 2020 ND 25, ¶ 35, 938 N.W.2d 141 (police officer “crossed the line into expert opinion testimony when, for example, he relied on specialized knowledge and training to form an opinion that [defendant’s] nonverbal communication and one-word answers were indicia of untruthfulness”), *grant of post-conviction relief rev’d*, 974 N.W.2d 646 (N.D. 2022). These witnesses were also allowed to testify about details of events which they did not witness. This prejudicial testimony—which went to the central issue of whether the Greenpeace Defendants could be held liable for the actions of the protesters—should have been excluded.

[¶197] ***Greenpeace Defendant witnesses.*** Plaintiffs were also permitted to question the Greenpeace Defendants’ witnesses about matters of which they had no personal knowledge. In particular, many of the employees were subjected to hypothetical lines of questioning about the events at Standing Rock even though they ***were never at Standing Rock***. *See, e.g.*, Best Trial Dep. 64:05-10 (conditions of protesters in detention); Caplow Decl. Ex. AH (“Prokop Trial Dep.”) 72:14-73:14 (trainings on the ground), 85:05-15 (supplies at camp); Caplow Decl. Ex. AK (“Molina Trial Dep.”) 115:14-18 (scouting), 196:21-25, 197:04-06 (whether it would be trespass for a tribe member to be present on unceded treaty land); Mar. 12, 2025 Tr. 100:24-

101:18, 106:17-21, 109:14-19, 126:19-127:5, 127:11-17 (Annie Leonard). Such “[t]estimony about what a [party] might have done under a hypothetical state of facts is speculative and immaterial.” *Arnold v. Ingersoll-Rand Co.*, 908 S.W.2d 757, 763 (Mo. Ct. App. 1995) (citations omitted).

[¶198] The Court’s allowance of the improper hypothetical questioning misled the jury into believing that Greenpeace Defendants’ employees being asked to opine on hypothetical facts or the actions of unidentified individuals were doing so because they were somehow involved in the events—which was not the case. In other words, the jury was permitted to infer that there was a reason Plaintiffs’ counsel were asking these witnesses about their opinions, even though nothing any Greenpeace Defendant’s employee *actually* said or did served as such a basis.

i. Inflammatory Evidence Related to Violence That Occurred During the Standing Rock Protests And Ms. Liakos’s Arrest

[¶199] The Court erred by allowing the admission of inflammatory evidence for which there was never any evidence establishing a connection to the Greenpeace Defendants. The inflammatory evidence included hundreds of photographs and videos from the conflict between law enforcement and protesters, damaged equipment, and implements used by unknown protesters in conflicts with law enforcement. *See, e.g.*, Trial Exs. PC2-0001, PC2-0007, PC2-0009, PC2-0019; PC5-0036, PC5-0114–116 (depicting drill box, Hesco barriers, and concertina wire); Mar. 3, 2025 Tr. 74:3–75:8. Plaintiffs’ counsel made clear during opening statements what Plaintiffs believed the jury should do with this evidence: “Pictures. You going to believe the words they say or pictures that are in front of you of what happened?” Feb. 26, 2025 Tr. 91:3-4.

[¶200] An example is the Court’s admission over objection of Trial Exhibit PC33-1607, a photograph of the confrontation between protesters and law enforcement on October 27, 2016, commonly referred to as the “Big Push,” and lengthy testimony about events that day including protesters’ use of fire, whether the protest was peaceful, and whether the Sheriff was “worried

for about [his] responders” in that instance—even though, at that time no Greenpeace, Inc. employees were present at Standing Rock or were involved in any trainings. *See, e.g.*, Trial Exs. PC33-1607, PC33-1751, PC33-2366–2371; Feb. 28, 2025 Tr. 95:24-98:22 (Kirchmeier). Similarly, the Court admitted photographs from the November 20, 2016, confrontation at Backwater Bridge and related testimony over objection. *See id.* at 105:14-106:20. The Court also allowed, over objection, Plaintiffs’ counsel to question Sheriff Kirchmeier as to whether it cost money to clean up the area where the protesters had camped out. *Id.* at 115:16-23.

[¶201] This evidence should have been excluded, as it had no probative value as to the claims against the Greenpeace Defendants, and was used by Plaintiffs to argue that the Greenpeace Defendants were somehow responsible for what the photos depicted—even though no testimony or document supported that conclusion. *See Lipp v. Ginger C, L.L.C.*, 229 F. Supp. 3d 1018, 1026 (W.D. Mo. 2017) (excluding photographs taken by police department of property after party where photographs had a high likelihood of diverting the jury’s attention from the material issues at trial such that prejudicial effect outweighed the minimal probative value). Despite Plaintiffs’ promises to connect the evidence in question or insistence that they could prove it was part of a common scheme by Greenpeace Defendants, they never did. At no point could Plaintiffs identify any person in the photographs they contended was a Greenpeace, Inc. employee or had been trained by a Greenpeace, Inc. employee, nor could they identify a single item belonging to or coming from the Greenpeace Defendants. *See, e.g.*, Feb. 27, 2025 Tr. 91:12-92:1, 106:12-17, 110:4-8 (Michael Futch); *id.* 230:4-14 (Joey Mahmoud). Nothing in the record establishes that the Greenpeace Defendants took part in any property damage. On the contrary, Greenpeace Defendants’ witnesses consistently testified that property damage is against the values of the Greenpeace network, and no evidence contradicted this testimony. Caplow Decl. Ex. AL (“Khoury Trial Dep.”) 174:25:175:02 (testifying that he would have been bothered if any information he provided was used for vandalism); Caplow Decl. Ex. AM (“Liakos Trial Dep.”) 312:05-312:10 (Greenpeace does not approve of arson), 313:24-315:09 (not doing property

damage is a core principle of Greenpeace); Caplow Decl. Ex L (“Mar. 11, 2025 Tr.”) 233:5-18 (Cy Wagoner) (“I am a nonviolent person. We believe that property damage does not get us closer to the goal.”); Mar. 12, 2025 Tr. 12:5-12 (Brent Maness) (Greenpeace, Inc.’s code of conduct includes not destroying property); *id.* 21:5-16 (in fifteen years working at Greenpeace, Inc., never saw Greenpeace, Inc. promote violence, arson, or property destruction); *id.* 63:21-23 (Annie Leonard) (“Greenpeace’s definition of nonviolence includes not destroying property.”), 127:11-17 (if a Greenpeace, Inc. employee did any vandalism or property destruction, they would have been fired immediately); Passacantando Trial Dep. 168:05-168:10 (Greenpeace, Inc.’s mission statement committing to nonviolence “absolutely means no harm to others, and it also means no harm to property.”). Law enforcement testimony likewise did not establish any connection between the Greenpeace Defendants and the inflammatory photos. *See, e.g.*, Feb. 28, 2025 Tr. 80:13-19, 82:2-5, 153:2-8, 157:4-158:6 (Sheriff Kirchmeier).

[¶202] Because this evidence had no connection to the Greenpeace Defendants, the Court should not have admitted it in the first place. *See State v. Linne*, 501 P.2d 1186, 1189 (Ariz. Ct. App. 1972) (reversible error in not declaring a mistrial “when it became clear that the evidence presented could not be connected to the defendant by counsel for the State”). At the very least, the Court should have stricken the evidence and instructed the jury to disregard it when it became clear that the Plaintiffs could not connect it to the Greenpeace Defendants.

[¶203] To the extent that Plaintiffs contend the photos were relevant to the allegedly defamatory Statement regarding use of force on peaceful protesters, any such minimal relevance was substantially outweighed by their prejudicial impact. Not a single allegedly defamatory statement asserts that *all* of the tens of thousands of protesters were peaceful, rendering these incendiary photographs irrelevant. It is also not even clear from many of the photographs whether protesters are acting peacefully or violently or whether force was used against them. Considering the likelihood that the photos would—and did—evoke emotional, disapproving responses from the jury, while having no connection to any Greenpeace Defendant, they should

have been excluded. *See Littleton v. McNeely*, 562 F.3d 880, 889 (8th Cir. 2009) (upholding exclusion of photos of minimal relevance that jurors could have found depicted “lewd, offensive, or immoral” conduct).

[¶204] In addition, the Court also erred in admitting the police report purportedly related to Ms. Liakos’s arrest. As the Greenpeace Defendants argued in objecting to the admission of the police report, Trial Ex. 1135, Ms. Liakos’s arrest did not involve any trespass, violence, or vandalism, and her testimony about the underlying conduct—what she actually did—was sufficient relevant evidence. Mar. 3, 2025 Tr. 4:23-10:13. The fact of Ms. Liakos’s arrest, as the Court recognized in its ruling on the Greenpeace Defendants’ Motion in Limine No. 20, Dkt. 4224, was prejudicial and not independently relevant to issues in the case. *Id.*

j. Inadmissible Hearsay Statements Related to Refinancing

[¶205] The linchpin of Plaintiffs’ theory of interference damages—that financial institutions decided to end their relationships with Plaintiffs because of Greenpeace, Inc. or International Statements—was based entirely on inadmissible hearsay. Specifically, the Court erred by allowing Ashton Hayse to testify regarding his purported conversations with investors or banking institutions over the Greenpeace Defendants’ objections. *See* Mar. 5, 2025 Tr. 213:9-21; Mar. 5, 2025 Tr. 214:17-25; Caplow Decl. Ex. I (“Mar. 6, 2025 Tr.”) 49:23-50:5; Mar. 6, 2025 Tr. 65:22-66:9.

[¶206] This testimony was plainly inadmissible hearsay. Hayse testified as to what these third parties said regarding their institutions’ reluctance to refinance, statements that were presented for the truth of the matter asserted—i.e., why these institutions were reluctant to refinance. *See* N.D.R.Ev. 801(c). Greenpeace Defendants never had the opportunity to cross-examine these third parties, and no possible hearsay exception applies. And the improper admission of this evidence was highly prejudicial, as this hearsay was the sole evidence supporting Plaintiffs’ theory of damages for their defamation and tortious interference claims—for which the jury nevertheless awarded more than \$180 million in compensatory damages. No

witnesses from the financial institutions provided testimony at trial. This legal error allowed the jury to rely only on Mr. Hayse’s inadmissible testimony for these critical propositions.

5. The Court Erred by Excluding Greenpeace Defendants’ Admissible and Relevant Evidence

[¶207] The Court erred as a matter of law in excluding the Greenpeace Defendants’ admissible and relevant evidence. These rulings substantially prejudiced the Greenpeace Defendants’ defense.

I. Evidence Related to Reputational Harm

[¶208] The Court erred by excluding evidence related to Plaintiffs’ reputation, including of leaks in other Energy Transfer pipelines—such as Mariner East 2, Rover, and Revolution pipelines—and criminal prosecution. *See* Nov. 21, 2024 Order, Dkt. 4224, at 6-7; *see* Mar. 13, 2025 Tr. 21:21-22 (Weil’s proposed testimony as to information in the public domain bearing on Plaintiffs’ reputation). As the Court acknowledged, Plaintiffs’ reputation was obviously relevant to their defamation claims. Thus, in denying the Greenpeace Defendants’ motion in limine to exclude evidence or argument regarding alleged benefit(s) Plaintiffs purport to have conferred on the State of North Dakota, the Court stated that, because “Greenpeace argues that ET’s negative reputation is relevant,” “[c]onversely, ET must be allowed to address that argument, and part of the argument may well be the benefits ET provided.” *Id.* at 10. Similarly, in denying the Greenpeace Defendants’ motion to exclude evidence, argument, or testimony relating to, referring to, or concerning the safety of Plaintiffs’ pipelines or comparing relative safety to methods of transportation, the Court stated that it “believes the defamation claims deal with reputation, and if Greenpeace can challenge the reputation of ET concerning the safety of pipeline operation and construction, ET can rebut those claims about the danger of pipeline operation and construction by comparing the pipeline to other modes of transportation.” *Id.* at 16 (emphasis added). For those very same reasons, the Greenpeace Defendants’ evidence of Plaintiffs’ safety record was plainly relevant.

[¶209] This evidence was also relevant to the issue of proximate causation. As noted, Plaintiffs attempted to attribute to Greenpeace Defendant all alleged higher costs they incurred for Dakota Access refinancing the pipeline. *See supra* ¶¶ 100–101. But this excluded evidence would have shown that there were many other legitimate concerns about refinancing the pipeline, independent of anything to do with Greenpeace Defendants.

[¶210] The Court thus erred in excluding this evidence. And the resulting prejudice was particularly great given the inconsistency of the Court’s rulings. The Court permitted Plaintiffs to present evidence buttressing their supposedly positive reputation (*supra* ¶ 208) while precluding the Greenpeace Defendants from presenting their contrary evidence. That prejudicial impact was then compounded by the positions expressed by jurors in their questionnaires and on voir dire—which included the opinion that pipelines are a safer mechanism to transport oil than by rail or truck.¹⁷ Plaintiffs were thus permitted to appeal to the jurors’ pre-existing opinions without being challenged on their own safety record.

m. Expert Testimony

[¶211] The Court erred by excluding the testimony of the Greenpeace Defendants’ expert, Brun Hilbert, that would have rebutted the testimony of Plaintiffs’ witnesses Futch and Mahmoud that Plaintiffs’ contractors were the best in class and there were no inadvertent returns (the accidental release of drilling fluid to the surface, triggering reporting duties and potential penalties) during the drilling under Lake Oahe. The Court excluded Mr. Hilbert’s testimony based on the supposed risk that the jury would “start[] looking for” a claim of defamation related to the pipeline’s safety. *See* Mar. 13, 2025 Tr. 28:8-9 (overruling objection); 32:5-34:1. But “[e]vidence that is otherwise inadmissible, may be admitted if the opposing party opens the door through his testimony and invites any error. . . . The evidence may be used to ‘rebut the impression left by the opposing party’s own testimony.’” *Coppage v. State*, 2013 ND 10, ¶ 18,

¹⁷ *See, e.g.*, Kuslansky Decl. Ex. AR at 156-157 (Juror 14 expressing positive opinion of Dakota Access Pipeline with explanation “pipelines are the safest way to transport oil & gas”; indicating discomfort finding against pipeline industry with explanation “safest way to transport oil & gas”).

826 N.W.2d 320) (citations omitted) (quoting *United States v. Brumfield*, 686 F.3d 960, 964 (8th Cir. 2012)); *see also State v. Ritter*, 2024 ND 142, ¶ 27, 10 N.W.3d 119. That rule should have been applied here: Plaintiffs opened the door to such issues, and the Greenpeace Defendants were entitled to respond. That is particularly true because these issues regarding pipeline safety also bear on Plaintiffs' claims of reputational harm. By preventing the Greenpeace Defendants from introducing evidence that the pipeline was not safe because such evidence did not pertain to a specific defamatory statement, while nevertheless permitting Plaintiffs to introduce ample evidence related to statements that were not alleged to be defamatory, the Court allowed Plaintiffs to present a skewed picture to the jury.

n. Foley Hoag Report

[¶212] The Court erred by excluding the Foley Hoag report (Trial Exhibit 151), an independent report commissioned by investors that assessed Plaintiffs' compliance with established principles of investment. Plaintiffs opened the door to this evidence by presenting (over the Defendants' objections) hearsay testimony from witness Ashton Hayse as to what the banks told him, and what he told the banks, concerning issues involving opposition to DAPL, the SRST's objections to DAPL, and the banks' investment decisions. The report is highly relevant to the financial institutions' motivations for divesting or abstaining from participation in the refinancing efforts—a fact consequential to the tortious interference claim, the claim of defamation damages allegedly arising from banks' reliance on the Greenpeace Defendants' statements, and Plaintiffs' theory of damages more generally.

[¶213] Plaintiffs' argument was that the Foley Hoag report should be excluded as inadmissible hearsay. But the report was not offered for the truth of the matter asserted. Rather, it was relevant to banks' reasons for deciding not to participate in the refinancing, regardless of the truth of the contents of the report. As the Greenpeace Defendants explained, it showed that the banks "made their decision based on the independent assessment of the information," whether or not that information was true. Mar. 13, 2025 Tr. 38:14-22. And even if the report

was hearsay, the business-records exception applies. The Greenpeace Defendants obtained a certificate pursuant to N.D.R.Ev. 803(6) from Amy Lehr, the author of the report, that establishes the work she did in preparing the report was in the ordinary course of business. *Id.* 31:11–13. The certification spells out all of the elements sufficient to satisfy Rule 803(6). *Id.* 32:1–3. The Court erred in nevertheless sustaining Plaintiffs’ objection to the report’s admission. *Id.* 40:17.

6. The Court Erred in Providing Erroneous or Incomplete Jury Instructions

[¶214] The Court made several errors of law in the jury instructions, any one of which warrants a new trial. N.D.R.Civ.P. 59(b)(7). *See generally* Final Jury Instructions, Dkt. 5036.

a. Defamation

[¶215] The Court made at least three errors in the jury instructions for the defamation claim. First, the Court rejected the Greenpeace Defendants’ request to specify in the falsity instruction that Plaintiffs bear the burden to prove this element by clear and convincing evidence, and that a Defendant has no burden to prove the truth of a statement as set forth in Defendants’ Special Instruction No. 10 (*see* Dkt. 4488). *See Riemers v. Mahar*, 2008 ND 95, ¶ 19, 748 N.W.2d 714 (public figures must “present clear and convincing evidence [defendant’s] statements were false”); *Sadler v. Basin Elec. Power Coop.*, 409 N.W.2d 87, 89 (N.D. 1987) (affirming the burden is on the plaintiff to prove defendant published a false statement). The Court also rejected the Greenpeace Defendants’ request to include Special Instruction No. 11 (*see* Dkt. 4488), which accurately sets out the scope of constitutional protection for opinions.

[¶216] Second, the Court erred in declining to give Defendants’ Special Instructions No. 12.1 through 12.4 regarding actual malice (*see* Dkt. 4488). Although the Court adopted one sentence from each of Defendants’ Special Instruction No. 12.2 (No Duty to Investigate) and 12.3 (No Obligation to Present Both Sides), *see* Dkt. 5036, at 26, the Court otherwise rejected these special instructions. As a result, the Court’s “Actual Malice” instruction is incomplete. The Court’s instruction as given is also prejudicial and inconsistent with case law in that it provides

two separate iterations of the “reckless disregard” standard (describing the standard as involving either “reckless disregard” or “serious doubts”), essentially turning a two-part test into a three-part test. *See id.*

[¶217] Third, the Court erroneously rejected Defendants’ Special Instruction No. 18 (*see* Dkt. 4488), which set forth a clear and accurate statement of North Dakota law on the damages available for defamation. The Court should have instructed the jury that Plaintiffs’ defamation damages are limited, as a matter of law, to provable economic loss under N.D.C.C. § 32-43-03(2), as described in the Greenpeace Defendants’ motion for summary judgment on the issue and motions for judgment as a matter of law. *See* Dkts. 2904, 5011, 5085. And regardless of whether Plaintiffs are permitted to recover non-economic damages on their defamation claim, the Court should have instructed the jury that Plaintiffs are required to show that any damages were proximately caused by an alleged defamatory publication.

Both individually and collectively, these errors prejudiced Greenpeace Defendants by substantially lowering the standard Plaintiffs were required to meet to prove their defamation claims.

b. Direct Property Torts

[¶218] The Court made at least four errors in the jury instructions for the direct property torts. First, the instructions included language about causing third parties to act, conflating these direct claims with aiding and abetting claims and likely leading to juror confusion. Thus, for example, the instruction on civil trespass to land provided that one of the elements is “Defendants intentionally entered the land or any part thereof *or caused a thing or third person to do so.*” Dkt. 5036, at 12. That was error, as the Greenpeace Defendants could not be liable for third parties’ actions on the facts here unless the requirements of aiding and abetting were satisfied. *E.g., Claiborne Hardware Co.*, 458 U.S. at 919. The jury should have been separately instructed for the direct-liability and aiding and abetting claims, so that the elements of each type

of claim were clear to jurors. This was prejudicial because it allowed the jury to impose liability for aiding and abetting without meeting the requirements of North Dakota law.

[¶219] Second, the Court erroneously rejected Defendants’ Special Instruction No. 4, which sets forth the degree of impairment of property required for a conversion claim under North Dakota law (*see* Dkt. 4488). The Court’s given instruction lacks this required element of a conversion claim. *See* Dkt. 5036, at 18. Here again, the jury was invited to impose liability without satisfying the elements of the tort.

[¶220] Third, for the nuisance claim, the Court included language applicable only to a claim of public nuisance. Plaintiffs asserted only a private nuisance, so the inclusion of references to a “street, or highway” in the language describing what is included in “interference with the use and enjoyment of land” likely led to juror confusion and may have led jurors to award *private* nuisance damages for Christina Liakos’ arrest on a *public* highway.

[¶221] Fourth, also as to the nuisance instruction, the Court erroneously declined to give Defendants’ Special Instruction No. 6 - Coming to the Nuisance (*see* Dkt. 4488). That instruction sets forth an accurate statement of the law in North Dakota, and it is directly applicable here given the evidence presented at trial that Plaintiffs sought to acquire the land known as Cannonball Ranch with advance knowledge that the purported nuisance of which they complained already existed on that property. Had the jury been properly instructed on this defense, it thus could well have reached a different verdict.

c. Other Instructions

[¶222] The Court made at least three other errors that infected the jury’s deliberation. First, the Court gave an instruction on direct and circumstantial evidence over the Greenpeace Defendants’ objection to its language indicating that the law makes no distinction between direct and circumstantial evidence. *See* Dkt. 5036, at 56. This is an incorrect statement of law. The Court should have adopted Defendants’ Special Instruction No. 19 distinguishing between circumstantial evidence and speculation (*see* Dkt. 4488). This instruction made clear that as to

elements of proof, circumstantial evidence is not adequate if it rests on an inference that requires speculation or guesswork. *See, e.g., Anderson v. Meyer Broad. Co.*, 2001 ND 125, ¶ 35, 630 N.W.2d 46 (“While, in an appropriate situation, circumstantial evidence may provide an inference of causation, there must be something more than pure speculation or conjecture.”). The omission of this essential instruction likely led jurors to resort to improper speculation and guesswork, particularly when determining whether the Greenpeace Defendants caused all of the damages alleged.

[¶223] Second, the Court rejected Defendants’ Special Instruction No. 15 (*see* Dkt. 4488). Plaintiffs allege that Defendants conspired with and aided and abetted the Red Warrior Society, which is an unincorporated association. *See generally* Dkt. 1840. The Court should have given Special Instruction No. 15, which correctly explained that an unincorporated association that does not hold itself out as a legal entity cannot be a party to a conspiracy (as detailed in the Greenpeace Defendants’ summary judgment motion on the issue).

[¶224] Third, the Court did not include Defendants’ Special Instruction No. 24, which sets forth an accurate statement of law that no damages may be awarded to non-parties (*see* Dkt. 4488). The jury heard evidence regarding damages allegedly sustained by Energy Transfer Crude Oil Company (“ETCOC”). *See, e.g.,* Trial Ex. 967, Table 1. ETCOC is not a party to this action. The omission of this instruction was prejudicial because it likely caused juror confusion, resulting in an erroneous award to Plaintiffs of damages that were actually incurred by a non-party to the case.

7. The Court Erred in Using Plaintiffs’ Verdict Form

[¶225] In addition to the Court’s error in omitting any mechanism for the jury to allocate fault between the Greenpeace Defendants and others (*see supra* Section II.C), the Court’s special verdict form contained other errors. *See generally* Special Verdict Form, Dkt. 5035.

a. Defamation

[¶226] The verdict form did not require the jury to analyze the elements with respect to each allegedly defamatory statement, attribute damages to each individual statement, or determine which Defendant made which statement. Dkt. 5035, at 11-12, 27-28. This led the jury to attribute to International and Greenpeace Fund statements they did not make and also to perversely return the exact same damages award against each of the three Defendants.

b. Exemplary Damages

[¶227] The verdict form included multiple exemplary damages questions after each claim, which was highly prejudicial to the Greenpeace Defendants and led the jury to return an excessive punitive damages award. Dkt. 5035, at 15-16, 31-32.

c. Other Verdict-Form Questions

[¶228] The Court erred by including on the verdict form questions as to liability and damages for Plaintiff Energy Transfer on claims which were not pled and for which there was no evidence in support. Dkt. 5035, at 2-9. Energy Transfer did not plead Counts I through IV (direct property torts and aiding and abetting)—including, for example, the trespass to chattels and nuisance claims that survived this Court’s order resolving Greenpeace Defendants’ motion for judgment as a matter of law—nor did it prove standing to do so because it did not own the property at issue.

[¶229] The Court also erred by asking the jury if Defendants “did” commit the various torts in the verdict form, instead of using “did Plaintiffs prove” language for each claim. *See generally* Dkt. 5035. That had the effect of lowering the burden of proof to jurors’ sentiments rather than the appropriate legal standard, which is especially prejudicial in a case where multiple empaneled jurors expressed that they believed that the Defendants needed to prove their innocence. *See supra* ¶¶ 43-44.

8. The Court Erred in Allowing Amendment During Trial

[¶230] Plaintiffs never filed, and the Court never granted, a motion to amend the complaint during trial. Rather, the Court implicitly allowed amendment by adopting Plaintiffs' proposed jury instructions and verdict form questions that reflected an expansion of their claims from the Second Amended Complaint. Because the jury relied on these impermissible theories and claims in reaching its verdict, this error in law warrants a new trial. N.D.R.Civ.P. 59(b)(7).

[¶231] Specifically, the Court gave jury instructions on tortious interference that include Plaintiffs' property tort and aiding and abetting claims among the possible underlying torts that could satisfy the third element of the claim, contrary to the complaint. Dkt. 5036, at 28. It also delivered jury instructions on civil conspiracy that included Plaintiffs' defamation claims as within the scope of the alleged wrongful acts, when the complaint had originally limited the conspiracy claim to Counts I through VI (Plaintiffs' property tort and aiding and abetting claims). Dkt. 5036, at 31. And the Court adopted Plaintiffs' verdict form that included Energy Transfer as a Plaintiff asserting the property tort and aiding and abetting claims, when the Complaint only pled these claims on behalf of Dakota Access. Dkt. 5036, at 2-9.

[¶232] Such implicit amendments were improper because the Greenpeace Defendants did not receive notice of the expanded scope of Plaintiffs' claims until the parties were presenting their proposed jury instructions and verdict forms. Nor did they consent to such expansions of Plaintiffs' claims. *See* Caplow Decl. Ex. O ("Mar. 14, 2025 Tr.") 14:1-26:18. "[T]rial of unpled issues by implied consent is not lightly to be inferred' and must comply with 'the notice demands of procedural due process.'" *Doe #6 v. Miami-Dade Cnty.*, 974 F.3d 1333, 1339 (11th Cir. 2020) (alteration in original) (citation omitted) (ruling the district court did not abuse its discretion in holding that Rule 15(b) did not permit adding an as-applied challenge). The Greenpeace Defendants did not, as Plaintiffs have suggested, somehow consent to these amendments by failing to object to evidence Plaintiffs presented at trial. "[F]ailure to object to evidence raising issues outside of the pleadings constitutes implied consent *as long as the*

evidence is not relevant to issues already within the pleadings.” *Id.* (emphasis added) (citation omitted); *see also Schindler v. Wageman*, 2019 ND 41, ¶ 14, 923 N.W.2d 507 (“Consent to try an issue outside the pleadings cannot be implied from evidence which is relevant to the pleadings but which also bears on an unpled issue.”); *Lochthowe v. C.F. Peterson Est.*, 2005 ND 40, ¶ 8, 692 N.W.2d 120 (“Amendment of pleadings by implication may only arise when the evidence introduced is not relevant to any issue pleaded in this case.” (citation omitted)).

[¶233] Here, the Greenpeace Defendants could not have objected to any evidence on the basis that it fell outside the scope of the Second Amended Complaint, because Plaintiffs’ evidence (to the extent it was relevant at all) was relevant to existing issues set forth in the Complaint. That is, evidence as to Plaintiffs’ property tort and aiding and abetting claims was relevant to those claims themselves, so the Greenpeace Defendants could not have objected on the ground that those claims were not a valid premise for Plaintiffs’ tortious interference claim. Similarly, evidence as to Plaintiffs’ defamation claim was relevant to that claim itself, so the Greenpeace Defendants could not have objected on the ground that the defamation claim was not a valid premise for their civil conspiracy claim. And Plaintiffs never submitted evidence regarding Energy Transfer also being able to recover on the torts it did not plead, so the Greenpeace Defendants had no opportunity to object to such evidence. *See* Caplow Decl. Ex. AQ (email from Trey Cox, counsel for Plaintiffs, noting on the eve of closing arguments that “the jury has not heard evidence regarding separate plaintiffs”). Thus, there is no basis to infer implied consent to amend Plaintiffs’ complaint. *See Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 984 (4th Cir. 2015) (since evidence submitted was “germane” to the asserted negligence claim, it could not “establish trial by consent of a phantom contract claim”). Plaintiffs should not have been able to recover based on these unpled theories.

[¶234] Allowing Plaintiffs to amend their claims at trial, circumventing proper pleading requirements, infringed upon the Greenpeace Defendants’ right to defend themselves and deprived them of a fair trial. This was highly prejudicial because, among other things, it

deprived Greenpeace Defendants of the ability to present evidence specific to defending against those unpled claims. For example, if the Greenpeace Defendants had known that Plaintiff Energy Transfer was pleading property torts like nuisance and trespass to chattels, they could have more effectively demonstrated that Energy Transfer did not, in fact, possess or own any relevant property. Courts consistently find that a verdict rendered after such an improper trial-by-surprise should be set aside. *See, e.g., Fleck v. Jacques Seed Co.*, 445 N.W.2d 649, 653 (N.D. 1989) (rejecting argument that defendant impliedly consented to new claims, recognizing “[i]f the [defendant] had been aware of a claim of fraud, it may have sought more testimony from its witnesses and might have called additional witnesses” (citation omitted)).

9. The Court Never Ruled on Plaintiffs’ Motion to Strike the Greenpeace Defendants’ Answer to the Second Amended Complaint; the Greenpeace Defendants’ Motion for Leave to Amend to Add Defenses to the Answer; or the Greenpeace Defendants’ Motion to Compel Completion of Kelcy Warren’s Deposition

[¶235] On April 9, 2024, Energy Transfer filed a motion to strike Greenpeace Defendants’ Second Amended Answers, alleging that the Greenpeace Defendants’ amended answers far exceeded the scope of the Second Amended Complaint. Dkts. 2942, 2943. The Greenpeace Defendants filed a cross-motion for leave to file an amended answer. Dkts. 3214, 3215. The Court never ruled on either motion. Conducting a trial without ruling on the operative pleadings and allowed defenses was prejudicial error, and a new trial should be granted. N.D.R.Civ.P. 59(b)(7).

[¶236] **First**, three of the Greenpeace Defendants’ defenses were critical for determining the scope of the trial. The Greenpeace Defendants’ Answers raised whether and what claims could be asserted by and whether any remedies are available to Plaintiff Energy Transfer Operating, L.P, which has no legal existence. Dkt. 2843, at 24 & ¶ 12; Dkt. 2844, at 24 & ¶ 12. **Second**, the Greenpeace Defendants raised a defense based on Plaintiffs’ lack of legal capacity to sue in the courts of North Dakota when they filed suit, because they had failed to obtain certifications of authority to transact business in the State of North Dakota. Dkt. 2843, at 23;

Dkt. 2844, at 23. **Third**, the Greenpeace Defendants raised a defense that Plaintiffs' property-based claims are barred, in whole or in part, because the land and property at issue was not possessed by Plaintiffs. *Id.* Had a ruling been issued on any of these questions, the issues presented at trial would have been significantly narrowed and simplified, and the Greenpeace Defendants would have had clarity on which claims were asserted by which plaintiffs and which defenses could be argued for each plaintiff and asserted claim.

[¶237] **Fourth**, the Greenpeace Defendants asserted a defense based on comparative fault—namely, that any injuries or damages suffered by Plaintiffs were caused in whole or in part by the actions of third parties. Dkt. 2843, at 22; Dkt. 2844, at 22. Yet prior to trial, the Court never issued a ruling on comparative fault. This left an open question throughout trial as to the relevance of actions taken by and harm caused by third parties. Had this Court ruled on this defense, the Greenpeace Defendants would have had the opportunity to raise this key issue at the outset. Moreover, in part because the Court only allowed the Greenpeace Defendants to press this defense just before closing arguments, the verdict form improperly failed to provide questions that would allow the jury to make an allocation of fault for Plaintiffs' claimed damages. *See supra* § II.C. A direct ruling on a comparative fault defense would have resulted in a different verdict form, giving the jury the opportunity to allocate fault—likely reducing the damages allocated to the Greenpeace Defendants by hundreds of millions of dollars.

[¶238] **Fifth**, the Greenpeace Defendants asserted a defense to Counts II, IV, VI, and IX, to the extent they were based on alleged conspiracy with or aiding and abetting Red Warrior Society, that Red Warrior Society was a non-juridical entity. Dkt. 2843, at 24; Dkt. 2844, at 24; *see also* Dkt. 1840. A ruling on this defense would have clarified which parties were alleged by Plaintiffs to be involved in the conspiracy, enabling the Greenpeace Defendants to rebut Plaintiffs' ever-shifting theories.

[¶239] **Sixth**, Plaintiff Dakota Access purchased the property known as Cannonball Ranch with knowledge that DAPL protests were occurring on or near the property, then asserted

the protests constituted a nuisance to their newly acquired property. Under North Dakota law, coming to the nuisance is an element of the balancing test used to determine whether there is in fact a cognizable nuisance. *Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n*, 337 N.W.2d 427, 431-32 (1983); *Ceynar v. Barth*, 2017 ND 286, ¶ 23, 904 N.W.2d 469 (“The coming-to-the-nuisance doctrine is one of the factors considered in determining whether the nuisance exists.” (citation omitted)); *Hale v. Ward Cnty.*, 2012 ND 144, ¶ 17, 818 N.W.2d 697 (“[A]nyone who comes to a nuisance ‘has a heavy burden to establish liability.’” (citation omitted)). But while the Greenpeace Defendants raised this defense, the Court did not address it.

[¶240] **Finally**, the Court also failed to rule on the Greenpeace Defendants’ renewed motion¹⁸ to compel completion of the deposition of Energy Transfer CEO Kelcy Warren, filed on November 1, 2024, effectively denying it. *See* Dkts. 4184, 4185. During Mr. Warren’s deposition, Plaintiffs’ counsel repeatedly impeded the Greenpeace Defendants’ examination of Mr. Warren with improper instructions—obstructing the Greenpeace Defendants’ ability to obtain evidence necessary and relevant to their defenses. And because Mr. Warren did not take the stand at trial, the Court’s failure to rule on the Greenpeace Defendants’ renewed motion and compel completion of Mr. Warren’s deposition left the Greenpeace Defendants with only the incomplete, obstructed testimony as evidence in this case.

10. Most of Dakota Access’s Defamation Claims Were Untimely

[¶241] Under North Dakota law, actions for libel and slander “must be commenced within two years after the claim for relief has accrued.” *See* N.D.C.C. § 28-01-18. “[A] cause of action accrues on a defamation claim upon the publication of the false statement to a third party,”

¹⁸ The Greenpeace Defendants first filed a motion to compel completion of Mr. Warren’s deposition on July 2, 2024. Dkts. 3914, 3915. The parties met and conferred several times in July 2024 on the issues raised in the motion to compel but were unable to resolve the dispute. On September 30, 2024, the Court denied the motion solely on the basis that Rule 37(a)(1) required filing a “meet and confer” certification with the motion, and the submission of the certification with the reply brief and prior to hearing did not suffice. Dkt. 4104. Subsequently, the Greenpeace Defendants’ counsel sought in good faith to resolve the dispute with Plaintiffs’ counsel, but Plaintiffs’ counsel stood by their instructions not to answer. The Court never ruled on the renewed motion filed after the failure of the parties’ conferral.

regardless of when the plaintiff discovers the publication. *Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1055 (D.N.D. 2006) (citing *Schultze v. Continental Ins. Co.*, 619 N.W.2d 510, 513 (N.D. 2000)); *Thorson v. Latendresse*, 307 N.W.2d 586, 588 (N.D. 1981); accord *Arthaud v. Fuglie*, No. 08-2021-CV-01885, 2022 WL 19920083, at *4 (D.N.D. June 30, 2022) (defamation claim based on blog post that “was open to the public for viewing” accrues from date of publication, and was untimely because complaint was filed two years after statements were published), *aff’d*, 2023 ND 36, 987 N.W.2d 379.

[¶242] At least seven of the allegedly defamatory Statements were published before August 23, 2017, more than two years before Plaintiff Dakota Access first asserted its defamation claim.. Dkt. 100. In February 2023, the Greenpeace Defendants moved for partial summary judgment on Dakota Access’s untimely defamation claims. Dkts. 1291, 1292. On June 29, 2023, the Court denied the motion on the ground that Dakota Access’s appearance in the First Amended Complaint relates back to the “original Complaint.” Dkt. 1173, ¶ 16; *see id.* ¶ 9. This order (and the Court’s subsequent denial of Greenpeace Defendants’ motion to reconsider) was in error, and it denied Greenpeace Defendants a fair trial.

[¶243] The Court’s Order did not specify whether the “original Complaint” means the [i] the August 22, 2017, complaint filed by Energy Transfer’s predecessor entities in federal court, District of North Dakota (the “2017 Federal Action”) that was ultimately dismissed,¹⁹ or [ii] the February 21, 2019, complaint Plaintiff Energy Transfer filed in *this* proceeding. Either way, the Court’s order is erroneous and the bulk of Dakota Access’s defamation claims would still be untimely.

¹⁹ In the 2017 Federal Action, Energy Transfer asserted RICO claims and several state law claims, including defamation. *See* Trial Ex. 6349. Dakota Access was not a party to the Federal Action. On February 14, 2019, U.S. District Court Judge Wilson dismissed the RICO claims with prejudice, and declined to exercise supplemental jurisdiction over the state law claims. One week later, on February 21, 2019, Energy Transfer filed this state court action, generally asserting the same state law claims as in the dismissed Federal Action (including the defamation claim). Dakota Access was not a party to this action at the time it was filed.

[¶244] If this Court meant the federal complaint, it misapplied the federal tolling statute relevant here. *See* 28 U.S.C. § 1367(d) (filing of federal action tolls statute of limitations for supplemental state law claims “while the claim [was] pending and for a period of 30 days after it [was] dismissed.”). That statute could only toll the statute of limitations for *Energy Transfer’s* defamation claims, not the claims of non-party Dakota Access. *See Ex parte Profit Boost Mktg., Inc.*, 254 So. 3d 862, 871-72 (Ala. 2017) (tolling pursuant to 28 U.S.C. 1367(d) did not apply to action against party not named in federal complaint); *Brengettcy v. Horton*, No. 01 C 197, 2006 WL 1793570, at *10 (N.D. Ill. May 5, 2006) (“Section 1367(d), by its plain terms, tolls only ‘claims asserted,’” and claims not asserted in federal action “fall outside of Section 1367’s tolling provision”). Section 1367 cannot toll claims that were never “asserted” by an entity that was not even a party in the Federal Action.

[¶245] Nor can Dakota Access’s claims relate back to the 2017 Federal Action because relation back is permitted only within the context of a single action. By its plain language, Rule 15 addresses when “[a]n amendment to a pleading relates back to the date of *the original pleading.*” N.D.R.Civ.P. 15(c) (emphasis added).²⁰ The dismissed complaint in the Federal Action is not the “original pleading” in this case; the Federal Action and this case are not the same matter. *See* Mar. 12, 2025 Tr. 81:15-18 (Plaintiffs’ counsel stating that federal complaint is “not the live complaint in this case”); Pls.’ Opp’n to Defs’ MILs, Dkt. 4013, at 33 (distinguishing “this lawsuit” from federal lawsuit). No authority allows relating an amended pleading back to a complaint originally filed in a separate, dismissed proceeding in a different court.²¹

²⁰ North Dakota courts look to federal law in interpreting materially identical relation-back rules. *See* N.D.R.Civ.P. 15 Explanatory Note (“Rule 15 is based on Fed. R. Civ. P. 15”); *Hagen v. N.D. Ins. Rsrv. Fund*, 2022 ND 53, ¶ 9, 971 N.W.2d 833 (citing federal authority to interpret Rule 15).

²¹ *Lucchesi v. Experian Info. Sols., Inc.*, 226 F.R.D. 172, 174-75 (S.D.N.Y. 2005) (Rule 15 applies “only in the context of a *single* proceeding”; rejecting argument that amended complaint in a federal action related back to a prior complaint in state action (emphasis added)); *Scroggins v. McGee*, No. 4:10CV01121, 2011 WL 4018049, at *6 (E.D. Ark. Sept. 12, 2011) (Rule 15 does not permit claim asserted for the first time in federal action to relate back to previously filed state complaint); *Palatkevich v. Choupak*, 152 F. Supp. 3d 201, 225-26 (S.D.N.Y. 2016) (untimely slander claim asserted in federal action does not relate back to timely slander claim in state court action that plaintiff voluntarily dismissed; “relation back permits parties to modify claims already filed, not to file entirely

[¶246] To the extent the Court’s order relied on Rule 17 instead of Rule 15, that was also incorrect. Rule 17(a)(3) cannot save Dakota Access’s untimely defamation claim because Dakota Access was not added as a “real party in interest” on Energy Transfer’s defamation claim; Dakota Access was joined under Rule 15 to assert its own defamation claim. *See* Dkt. 86, ¶¶ 2-6. Adding Dakota Access as a plaintiff under Rule 17 would have required Energy Transfer to show that it originally brought the action in the name of the wrong party due to an “understandable mistake” or an inability to identify the correct plaintiff. *Goodleft v. Gullickson*, 556 N.W.2d 303, 309 (N.D. 1996). Plaintiffs offer no plausible explanation why Dakota Access chose not to plead a defamation claim prior to the FAC. Nor could they. As a multi-billion-dollar entity that spent years litigating in federal court, Energy Transfer could not have mistakenly failed to identify Dakota Access—its own subsidiary—as the “real party in interest” on its defamation claim. It is clear that each Plaintiff asserted a defamation claim *in its own right*. Rule 17 does not apply in these circumstances.

[¶247] If this Court instead intended to hold that Dakota Access’s claims relate back to Energy Transfer’s original complaint in this proceeding, that would be more consistent with Rule 15—but most of Dakota Access’s claims would *still* be barred. The original complaint was filed on February 21, 2019. Thus, seven of the nine Statements were published more than two years before Energy Transfer filed the “original Complaint.” Dkt. 1173, ¶ 16. Accordingly, even if Dakota Access’s claims relate back to Energy Transfer’s complaint in this action, most of Dakota Access’s defamation claim would still be untimely. N.D.R.Civ P. 15(c)(1); Dkt. 547. Dakota Access’ untimely defamation claims should have been dismissed, and the Court’s failure to do so tainted both the trial and the jury’s ultimate verdict.

new lawsuits”); *Rayo v. New York*, 882 F. Supp. 37, 40 (N.D.N.Y. 1995) (an amended complaint “does not relate . . . back to any prior proceedings which is not part of the action in question”); 6A Wright & Miller’s *Federal Practice & Procedure* § 1496 n. 2 (3d ed. 2022) (relation back applies “only in instances in which the original pleading is amended”).

11. Plaintiffs Never Should Have Been Able to Bring Claims Against International Given Their Failure to Establish Personal Jurisdiction

[¶248] As International has consistently explained, the Court’s exercise of personal jurisdiction over International does not comport with fundamental requirements of due process. “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). “The plaintiff 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.” *Creative Calling Sols., Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 979 (8th Cir. 2015) (citation omitted). Here, Plaintiffs did not come close to meeting that burden: International’s sole relevant act was co-signing an open letter authored by another non-profit from the Netherlands, BankTrack, calling on certain banks, none of which were based in North Dakota, to adhere to international banking standards. As the federal court previously determined, that is not enough to subject BankTrack to suit in North Dakota, and that holding applies to International and has collateral estoppel effect against Plaintiffs. *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). And as International has already explained at length, Plaintiffs’ claims that International was engaged in a conspiracy with Greenpeace, Inc. does nothing to change this analysis, both because this purported conspiracy did not encompass either the alleged property torts in North Dakota or any actions directed at North Dakota that caused Plaintiffs to suffer the brunt of their injuries there, and because North Dakota law does not recognize Plaintiffs’ conspiracy theory of jurisdiction. *E.g., Frazier v. Eagler Air Med Corp.*, No. 3:21-cv-136, 2022 WL 1303070, at *8 (D.N.D. May 2, 2022); *Alexander WF, LLC v. Hanlon*, No. 4:14-cv-068, 2015 WL 12803715, at *6 & n.3 (D.N.D. Feb. 19, 2015). As the Supreme Court has made clear, personal jurisdiction depends on the forum contacts of the defendant, not those of plaintiffs or third parties. *Walden v. Fiore*, 571 U.S. 277, 285 (2014).

III. CONCLUSION

[¶249] For the foregoing reasons, the Greenpeace Defendants' motion for new trial should be granted.

Dated: March 27, 2026

s/ Derrick Braaten

Derrick Braaten, ND Bar # 06394
BRAATEN LAW FIRM
109 North 4th Street, Suite 100
Bismarck, ND 58501
(701) 221-2911
derrick@braatenlawfirm.com
*Attorneys for Defendants Greenpeace
International and Greenpeace, Inc.*

s/ Matt J. Kelly

Matt J. Kelly, ND Bar #08000
Amy C. McNulty, ND Bar #08134
TARLOW STONECIPHER WEAMER
& KELLY, PLLC
1705 West College St.
Bozeman, MT 59714
(406) 586-9714
mkelly@lawmt.com
amcnulty@lawmt.com
Attorneys for Defendant Greenpeace Fund, Inc.

s/ Everett W. Jack, Jr.

Everett W. Jack, Jr. (*pro hac vice*)
DAVIS WRIGHT TREMAINE LLP
560 SW 10th Ave, Suite 700
Portland, OR 97205
(503) 241-2300
everettjack@dwt.com

Laura Handman (*pro hac vice*)
Adam Caldwell (*pro hac vice*)
DAVIS WRIGHT TREMAINE LLP
1301 K Street, NW, Suite 500
Washington, DC 20005
(202) 973-4200
laurahandman@dwt.com
adamcaldwell@dwt.com

*Attorneys for Defendants Greenpeace
International and Greenpeace, Inc.*

Elizabeth Elsberry, ND Bar # 06286
Christopher Rausch, ND Bar # 06277
ELSBERRY & SHIVELY, P.C.
2800 N Washington St.
Bismarck, ND 58503
(701) 557-3384
betsy@nodaklaw.com
chris@nodaklaw.com

*Attorneys for Defendant Greenpeace
International*

