UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Greenpeace, Inc. Plaintiff, v. The Dow Chemical Company, *et al.*, Defendants.	Case No. 1:10-CV-02037-RMC The Hon. Rosemary M. Collyer

PLAINTIFF'S OPPOSITION TO DEFENDANT GEORGE FERRIS'S
MOTION FOR SUMMARY JUDGMENT

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TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

STATE AND LOCAL STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

INTRODUCTION

Plaintiff Greenpeace, Inc. ("Greenpeace") brought suit against two major chemical companies, their public relations companies and various individuals who engaged in a pattern and practice of unlawful activities in efforts to secure confidential information about and potentially disrupt the efforts of Greenpeace and other non-profit organizations to expose and inform the public about the chemical companies' environmentally hazardous activities. The unlawful activities associated with this scheme include, but are not limited to: misappropriation and theft of confidential information and trade secrets, unlawful surveillance, misuse of law enforcement personnel and, in all likelihood, unlawful breaking and entering into Greenpeace's offices and other locations.

Because of the clandestine nature of Defendants' scheme and efforts that were taken to shred or "sterilize" records maintained by conspirators, Greenpeace has no way to ascertain the full scope and duration of these activities. These unlawful activities demonstrate a pattern and practice by Defendants to intrude upon and invade the privacy and lawful interests of Greenpeace and misappropriate confidential information for economic gain.

Defendant George Ferris ("Ferris") filed a motion for summary judgment, claiming that the facts alleged in Plaintiff's Complaint are false, that he had no involvement in the above-referenced unlawful scheme, and that he has no personal knowledge of the allegations. Defendant's motion should be denied for several reasons. First, Defendant's motion does not comply with the requirements of Local Rule 7(h); Defendant failed to provide a separate statement of material facts as to which there is no genuine issue. Second, to contradict Ferris's denial of the factual allegations, Plaintiff submits documentary evidence of Ferris's employment with Defendant BBI during the alleged time period, as well as evidence of his involvement with

BBI's Greenpeace project. Third, as the parties have not yet conducted discovery, Ferris's motion for summary judgment is premature and should be denied. For each of these reasons, Defendant's motion for summary judgment should be denied.

FACTS

Parties

Plaintiff Greenpeace is a nonprofit California corporation headquartered in Washington, D.C. Founded in 1971, Greenpeace is one of the oldest and largest environmental organizations in the world, and it campaigns to protect the oceans and ancient forests and to end toxic pollution, global warming, nuclear hazards and genetic engineering. Complaint, ¶ 7.

Defendant Dow Chemical Company ("Dow") is a publicly-traded, for-profit Delaware corporation with its principal place of business in Midland, Michigan. *Id*., ¶ 8. Dow sells chemical, plastic and agricultural products and services. *Id*.

Defendant Sasol North America, Inc. ("Sasol") is a for-profit producer of commodity and specialty chemicals incorporated in Delaware and headquartered in Houston, Texas. *Id*., ¶ 9. The company was founded in 1984 under the name CONDEA Vista Company. *Id*. In 1991, it became a wholly-owned subsidiary of RWE-DEA AG, a German oil and gas producer. *Id*. On March 1, 2001, Sasol Ltd. concluded an agreement with RWE-DEA AG to purchase the CONDEA Vista Company, and CONDEA Vista Company changed its name to Sasol North America, Inc. *Id*. Sasol North America, Inc. is a subsidiary of Sasol, Ltd. During the relevant time period, Sasol North America, Inc. (then, CONDEA Vista) made ethylene dichloride and vinyl chloride at a manufacturing facility in Lake Charles, Louisiana. *Id*.

Defendant Ketchum Inc. ("Ketchum") is a for-profit public relations firm incorporated in Delaware and headquartered in New York with offices in Washington, D.C. *Id*., ¶ 10. Ketchum

is one of the oldest and largest public relations firms in the United States and operates in more than 50 countries. *Id*. Since 1996, Ketchum has been a subsidiary of Omnicom Group Inc., a publicly traded advertising and marketing firm. *Id*.

Defendant Dezenhall Resources, Ltd. ("Dezenhall") is a for-profit public relations firm incorporated in Delaware and headquartered in Washington, D.C. *Id*., ¶ 11. Formerly known as Nichols-Dezenhall, the firm was founded in 1987 by David Nichols and Eric Dezenhall and changed its name to Dezenhall Resources, Ltd. when Nichols left the firm in 2004. *Id*.

Defendants Timothy Ward, Jay Arthur Bly, Michael Mika and George Ferris were employees of Beckett Brown International, Inc. ("BBI"), a private investigation firm located in Maryland. Compl., ¶¶ 12-15. George Ferris was a manager of Investigative Support. *Id*., ¶ 14.

Greenpeace's Environmental Campaigns

During the period 1998 through 2000, Greenpeace was involved in campaigns across the United States to expose environmental hazards and improve environmental conditions. Compl., ¶ 18; Ps Stmt. Disp. Facts, ¶ 6. Some of those campaigns targeted the practices or products of Defendants Sasol and Dow Chemical. Compl., ¶ 18; Ps Stmt. Disp. Facts, ¶ 7. Because of both financial and public relations concerns about the actions of Greenpeace and other environmental non-profit organizations, Defendants Sasol North America, Inc. ("Sasol," formerly CONDEA Vista Company), Dow Chemical Company ("Dow"), Dezenhall Resources Ltd. ("Dezenhall") and Ketchum Inc. ("Ketchum") – assisted by BBI, the individual Defendants and other participants in this conspiracy – engaged in an unlawful scheme to obtain confidential information and thus track and potentially disrupt or preempt Greenpeace's campaigns and activities. Compl., ¶ 19; Ps Stmt. Disp. Facts, ¶ 8.

Beckett Brown International's Activities

Much of the unlawful surveillance activity described herein was conducted for the Corporate and Public Relations Defendants' benefit by BBI. Compl., ¶ 20; Ps Stmt. Disp. Facts, ¶ 9. BBI was formed in August 1995. Compl., ¶ 20. Most of the key executives and employees at BBI were former officers of the Secret Service and the Central Intelligence Agency. *Id*. In or around April 2000, BBI changed its name to S2I Corporation (referred to herein as BBI). *Id*.

Beginning in or about 1998, CONDEA Vista and Dow paid BBI – either directly or by paying Defendants Dezenhall and Ketchum, which then paid BBI – hundreds of thousands of dollars for engaging in the conduct described herein. *Id*., ¶ 21; Ps Stmt. Disp. Facts, ¶ 10. In return for these payments, CONDEA Vista and Dow received confidential information that had been misappropriated from Greenpeace through a variety of unlawful means and received numerous reports on Greenpeace's financial support, internal operations, plans and activities. Compl., ¶ 21; Ps Stmt. Disp. Facts, ¶ 11.

BBI's accounting records show that BBI spent hundreds of hours collecting and analyzing information from Greenpeace. Compl., ¶ 22; Ps Stmt. Disp. Facts, ¶ 12. Records and correspondence reveal the use of surreptitious and deceitful methods of data collection, including but not limited to: pilfering documents awaiting private trash and recycling collection, placing undercover operatives within groups, using false pretenses to case offices, procuring phone records, and infiltrating meetings and electronic mail networks. Compl., ¶ 22; Ps Stmt. Disp. Facts, ¶ 13. These records also reveal that BBI relied upon a network of subcontractors, including off-duty police officers in Washington, D.C. and Baltimore, to carry out this work. Compl., ¶ 22; Ps Stmt. Disp. Facts, ¶ 14.

Although it is now evident that these unlawful activities continued for years, because of their clandestine nature and actions by BBI to "sterilize" its records and destroy documents, the full scope and duration of these activities is not known. Compl., ¶ 23. Ps Stmt. Disp. Facts, ¶ 15.

D-Lines

Defendants acquired internal documents from their targets through actions they referred to as "D-Lines." Compl., ¶ 25; Ps Stmt. Disp. Facts, ¶ 16. For example, Defendants obtained a steady stream of inside information from Greenpeace as a result of BBI stealing confidential documents and internal records from dumpsters and recycling bins located at Greenpeace's offices. Compl., ¶ 25; Ps Stmt. Disp. Facts, ¶ 17. Upon information and belief, D-lines also included the acquisition of documents stolen from Greenpeace's offices or obtained by BBI's employees and/or subcontractors who obtained access to Greenpeace's documents through false pretenses. Compl., ¶ 25; Ps Stmt. Disp. Facts, ¶ 18.

Defendants Ward, Bly, Mika and Ferris personally directed and/or conducted D-Lines at Greenpeace's offices in Washington, D.C. Compl., ¶ 26; Ps Stmt. Disp. Facts, ¶ 19. They hired subcontractors, including a police officer for the District of Columbia, James Daron, to assist with the collection of the materials at Greenpeace's offices in the District of Columbia. Compl., ¶ 26; Ps Stmt. Disp. Facts, ¶ 20. Daron was expected to use his official police badge to gain access to dumpsters that were enclosed by a locked fence. Compl., ¶ 26; Ps Stmt. Disp. Facts, ¶ 21. Between July 13, 1998 and July 18, 2000, Defendants Ward, Bly, Mika and Ferris, or their agents, conducted more than 120 documented D-Lines at Greenpeace's offices. Compl., ¶ 26; Ps Stmt. Disp. Facts, ¶ 22. They used Daron in connection with at least 55 of those D-Lines. Compl., ¶ 26; Ps Stmt. Disp. Facts, ¶ 23.

Each D-Line conducted at Greenpeace involved trespassing on private property and stealing documents where Greenpeace had a reasonable expectation of privacy. Compl. ¶ 27; Ps Stmt. Disp. Facts, ¶ 24. Indeed, the scope and nature of these activities, which occurred well over a hundred times over at least a two year period, involved systematic and clandestine efforts to steal records, often with the help of "off-duty" law enforcement officials, without regard to whether they were on private property, behind locked fences, in locked or closed containers or otherwise guarded from public exposure. The activities show utter disregard for Greenpeace's privacy and property interests. Compl., ¶ 27; Ps Stmt. Disp. Facts, ¶ 25. The Defendants' conduct reflected their understanding that these documents would never have been shared with them, and could only be obtained by clandestine means executed under the cover of darkness. Compl., ¶ 27; Ps Stmt. Disp. Facts, ¶ 26.

Between 1998 and May 2000, Greenpeace was located at 1436 U Street, NW, Washington, D.C. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 27. The building's entrances were locked at all times. Greenpeace's recycling bins and trash dumpsters were located on private property. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 28. The recycling bins, which were covered, were located on an elevated loading dock sheltered inside the back façade of the building. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 29. The trash dumpster, which was covered, abutted the building at ground level. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 30. Greenpeace had access to these materials at any time. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 31. Greenpeace did not use municipal garbage collection services. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 32. Instead, Greenpeace's recycling and trash were handled by private contractors licensed by the District. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 33. Between 1998 and 2000, Ward, Bly, Mika and Ferris, or their agents, conducted more than 100 D-Lines at this office, and police officer Daron participated in at least

55 of them. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 34. The overwhelming majority of these intrusions were conducted on behalf of Defendants Dow, Sasol (i.e., its predecessor CONDEA Vista), Ketchum and/or Dezenhall. Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 35. The "U Street Project Objectives" explicitly included obtaining financial information about Greenpeace: "funding"; "[d]onors: corporate political, private"; and "money trails." Compl., ¶ 28; Ps Stmt. Disp. Facts, ¶ 36.

Greenpeace has recovered more than one thousand pages of its own internal documents from BBI's files. Compl., ¶ 30; Ps Stmt. Disp. Facts, ¶ 37. On information and belief, this represents only a fraction of what was taken. Compl., ¶ 30; Ps Stmt. Disp. Facts, ¶ 38. The vast majority of Greenpeace's internal documents that were ultimately recovered from BBI were in pristine condition, giving rise to the inference that these documents were not taken from trash dumpsters, but rather from recycling receptacles and/or from inside Greenpeace's office. Compl., ¶ 31; Ps Stmt. Disp. Facts, ¶ 39.

Physical Surveillance and Intrusion

Upon information and belief, under the direction of Defendant Ward, BBI employees or contractors acted in furtherance of conspiracies described herein by breaking into Greenpeace's U Street offices using the three- and four-digit security codes that unlock office doors. Compl., ¶ 35; Ps Stmt. Disp. Facts, ¶ 40. BBI employees or contractors tested multiple three- and four-digit codes and documented whether each code was successful in granting access to the offices. Compl., ¶ 35; Ps Stmt. Disp. Facts, ¶ 41. The following facts all support the conclusion that BBI unlawfully entered Greenpeace's offices: (a) BBI sent an operative into Greenpeace's offices under false pretenses to case the offices; (b) BBI obtained and maintained information about the confidential security codes for Greenpeace's internal U Street office; (c) BBI maintained

information showing that it had determined and/or confirmed which of these confidential security codes worked for internal offices at this location and which were no longer operative; and (d) BBI procured and held highly confidential Greenpeace records – including, for example, confidential personnel, financial and employment records – which could only have been secured from Greenpeace's offices. Compl., ¶ 35.

Electronic Surveillance

Upon information and belief, Defendants Bly, Mika and Ferris, or their agents, engaged in electronic surveillance of Greenpeace, including the wiretapping of phones and hacking into computers. Compl., ¶ 36; Ps Stmt. Disp. Facts, ¶ 42. Among the Greenpeace internal documents and research files maintained at BBI's offices was a file labeled "Wire Tap Info." Compl., ¶ 37; Ps Stmt. Disp. Facts, ¶ 43. A former BBI employee, Eric Pikus, has testified that during the course of his work at BBI, he would tape-record telephone conversations. Compl., ¶ 38; Ps Stmt. Disp. Facts, ¶ 44. BBI hired TriWest Investigations to procure the phone call records of Greenpeace employees or contractors. Compl., ¶ 39; Ps Stmt. Disp. Facts, ¶ 45. BBI obtained the records of cellular phone calls placed and received by Greenpeace employees or contractors from Greenpeace's cellular phone provider. Compl., ¶ 40; Ps Stmt. Disp. Facts, ¶ 46.

Stolen Confidential Information

As a result of Defendants Ward, Bly, Mika and Ferris, or their agents, ordering and conducting unlawful D-Lines, physical intrusions and electronic surveillance, Defendants obtained a variety of confidential, internal Greenpeace documents, including: campaign planning documents; confidential donor letters and records of contributions; internal communications; confidential legal memoranda; privileged attorney-client communications; financial reports, balance sheets and budgets; passwords for private electronic mailing lists; Greenpeace credit

card account numbers; and highly-sensitive personal information about Greenpeace employees such as Social Security Numbers, personal bank account statements and employment agreements. Compl., ¶ 46; Ps Stmt. Disp. Facts, ¶ 47. Many of these documents were tightly guarded within Greenpeace and would only have been accessible to a limited number of employees; such documents would not have been discarded as garbage or recycling in the ordinary course of business and could not have been obtained merely by rummaging through bins. Compl., ¶ 46; Ps Stmt. Disp. Facts, ¶ 48.

Sharing the Confidential Information

Dow, CONDEA Vista, Ketchum and/or Dezenhall paid for the vast majority of D-Lines and physical and electronic surveillance and intrusions of Greenpeace that BBI conducted. Compl., ¶ 50; Ps Stmt. Disp. Facts, ¶ 50. From 1998 through 2000, Defendant Ward regularly briefed Andy Shea of Dezenhall, Tom Donnelly of Ketchum and Peter Markey of CONDEA Vista about the information unlawfully obtained from Greenpeace. Compl., ¶ 51; Ps Stmt. Disp. Facts, ¶ 51. On occasion, Defendants Mika, Bly, Ferris and another employee, Sarah Slenker, assisted Ward with the briefings. Compl., ¶51; Ps Stmt. Disp. Facts, ¶ 52. In addition to in-person briefings, BBI produced written reports, which began with the advisory, "The following information was supplied by confidential sources and should be used with great discretion." Compl., ¶ 51; Ps Stmt. Disp. Facts, ¶ 53.

The Dezenhall-CONDEA Vista (Sasol) Accounts

Between 1984 and 2001, CONDEA Vista (now Sasol) operated a vinyl chloride manufacturing facility in Lake Charles, Louisiana. Compl., ¶ 56; Ps Stmt. Disp. Facts, ¶ 54. The manufacture of vinyl chloride released dioxins and other toxic chemicals directly into the

environment or indirectly through incinerator emissions, causing environmental damage and raising health concerns in the region. Compl., ¶ 56; Ps Stmt. Disp. Facts, ¶ 55.

During the period that CONDEA Vista hired BBI to monitor Greenpeace's activities, Greenpeace was campaigning to expose the hazards of vinyl chloride production and the environmental damages caused by CONDEA Vista in the Lake Charles region of Louisiana. Compl., ¶ 57; Ps Stmt. Disp. Facts, ¶ 56. CONDEA Vista engaged Dezenhall for help in securing confidential information about environmental campaigns affecting its plant in Louisiana. Compl., ¶ 58; Ps Stmt. Disp. Facts, ¶ 57. On May 26, 1998, working at the behest of both CONDEA Vista and Dezenhall, BBI initiated the "Lake Charles Project" to secure confidential information about environmental organizations and campaigners, including Greenpeace and its employees for CONDEA Vista. Compl., ¶ 59; Ps Stmt. Disp. Facts, ¶ 58.

Peter Markey, an executive who reported directly to the president of CONDEA Vista during the relevant time period, has testified under oath that he hired BBI to "infiltrate activist groups" that were drawing attention to the environmental hazards created by CONDEA Vista's manufacturing activities in Louisiana and that he instructed BBI to "find out what you can find out." Compl., ¶ 60; Ps Stmt. Disp. Facts, ¶ 59. In selecting BBI, he was aware of its "surveillance experience" and that it was a "surveillance operation." Compl., ¶ 60; Ps Stmt. Disp. Facts, ¶ 60.

Between July 13, 1998 and November 12, 1998, Defendants Ward, Mika and Ferris and/or their agents conducted at least 35 D-lines at Greenpeace's offices for the Lake Charles Project, collaborating on the pick-up, review and client briefings. Compl., ¶ 65; Ps Stmt. Disp. Facts, ¶ 61.

A Pattern of Covert Surveillance, Infiltration, Deceit and Misappropriation of Business Information

Nichols-Dezenhall approached BBI as early as 1996 proposing a "joint venture" in which Nichols-Dezenhall and BBI would gather and "exploit" intelligence for corporate clients. Compl., ¶ 102; Ps Stmt. Disp. Facts, ¶ 62. The proposed target (i.e., buyer) for these services was "risk-oriented, top-level managers who either view decisive action as a necessary last resort or, preferably, as a prophylactic course of action." Compl., ¶ 102; Ps Stmt. Disp. Facts, ¶ 63.

Shortly after beginning surveillance work for BBI, Defendant Ferris advised BBI investigators to obtain false IDs from a source recommended by him to purchase equipment that could generate photo credentials and work order forms, and to procure "generic work uniforms" to assist in visits to the offices of targets. Compl., ¶ 103; Ps Stmt. Disp. Facts, ¶ 64.

Greenpeace filed its Complaint on November 29, 2010. Defendant Ferris filed his Answer on December 20, 2010, a motion for summary judgment on February 18, 2011 and a motion to dismiss on February 22, 2011.

ARGUMENT

I. Summary Judgment Must Be Denied Because Defendant Ferris Failed to Comply with Local Rule 7(h)

A. Local Rule 7(h) Requires That The Moving Party Submit a Separate Statement of Facts Not In Dispute

Local Rule 7(h) states that "[e]ach motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement." LCvR 7(h). This local rule "requires *separate* statements of material facts from each party which shall *include references* to the parts of the record relied on to support each and every factual assertion." *Fudali v. Pivotal Corp*., No. Civ A. 03-1460 (CGS), 2005 WL 607880, at *1 (D.D.C.

Mar. 16, 2005). "The burden is on the parties 'to crystallize for the district court the material facts and relevant portions of the record.'" *Id*. (citation omitted). The purpose of the Local Rule is to "[isolate] the facts that the parties assert are material, [distinguish] disputed from undisputed facts, and [identify] the pertinent parts of the record." *Burke v. Gould*, 286 F.3d 513, 517 (D.C. Cir. 2002). "This circuit has long upheld strict compliance with the district court's local rules on summary judgment when invoked by the district court." *Id*.

B. Defendant Ferris Failed to Submit a Separate Statement of Facts Not In Dispute

Defendant Ferris failed to comply with Local Rule 7(h) because he did not submit a separate Statement of Facts To Which There Is No Genuine Issue. Defendant's deviation from the intent of Local Rule 7(h) undermines the purpose of the rule, "which is to assist the Court in quickly determining if any facts are actually in dispute." *Holt v. American City Diner, Inc*., No. 05-1745 (CKK), 2007 WL 1438489, at *1 (D.D.C. May 15, 2007). In the text of his memorandum of points and authorities in support of his motion for summary judgment, Ferris merely submits a "statement of material facts." This "statement of material facts" does not comply with the requirements of Local Rule 7(h); "repeatedly blending factual assertions with legal argument, the 'relevant facts' section does not satisfy the purposes of a [Rule 7(h)] statement." *Id*. (citation omitted). Because Ferris failed to comply with Local Rule 7(h) by omitting a separate Statement of Material Facts to Which There Is No Genuine Issue, Ferris's motion for summary judgment should be denied in its entirety. *See Lewis v. Schafer*, 571 F. Supp. 2d 54, 56 n.2, 58 (D.D.C. 2008); *see also Baptiste v. Bureau of Prisons*, 554 F. Supp. 2d 1, 2 n.1, (D.D.C. 2008).

II. Summary Judgment Should Be Denied, As Plaintiff Presents Sufficient Evidence To Establish That Genuine Issues of Material Fact Exist Regarding Defendant Ferris's Employment at BBI and Participation in the Unlawful Schemes

A. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden of establishing the non-existence of a "genuine issue" is on the party moving for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (citation omitted). A dispute over a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). With respect to materiality, "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* The non-moving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by producing additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e). *Celotex*, 477 U.S. 317, 333 n.3.

The court may "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 150 (2000). When adjudicating a summary judgment motion, the court must draw "all justifiable inferences" in the non-moving party's favor, *Anderson*, 477 U.S. at 255, and the "factual allegations of the complaint must be taken as true." *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985).

B. Defendant Ferris Fails to Show that No Genuine Issue of Material Fact Exists

In his motion for summary judgment and supporting affidavit, Defendant Ferris claims and declares under penalty of perjury that he was not employed by BBI during the time period

covered by the Complaint and had no involvement nor any personal knowledge of the allegations therein. Def. George Ferris's Mot. for Summ. J. ("Ferris Mot.") at 5-6, 8-9. Ferris Aff. ¶¶ 2, 3, 10. Ferris's assertions, submitted in a declaration, have been untested and are contradicted by evidence in Plaintiff's possession. Ferris's work logs, and those of his colleague, Michael Mika, as well a memorandum and letter written by Ferris while employed by BBI demonstrate that Ferris was personally involved in the matters set forth in the Complaint.

1. Daily Work Logs

As evidenced by a sampling of Ferris's Daily Work Logs from BBI (attached as Exhibits A through E), Ferris not only had knowledge of the allegations set forth in the Complaint, but he was also involved in the alleged unlawful scheme. Upon information and belief, BBI's internal project number for the Dezenhall/CONDEA Vista/Greenpeace project is 125-006-98. On Ferris's July 13, 1998 work log, attached as Exhibit A, it states that Ferris performed three hours of "Intel analysis" for project number 125-006-98. According to his July 14, 1998 work log, Ferris performed two hours of "Intel sort" under the Greenpeace project number. Exhibit B. On July 23, 1998, Ferris conducted one and a half hours of "Intel collection/sort/analysis" under the Greenpeace number. Exhibit C. A handwritten note on Exhibit C states that the "Intel collection" took place in DC from 10:30 pm-2:00am. An August 4, 1998 work log states that Ferris performed "Intel collection/sort/analysis" under the Greenpeace project number for one and a half hours. Exhibit D. Additionally, Exhibit E, a July 22, 1998 work log for Defendant Mika, states that Mika performed a "D-Line with George – Gpe WDC" for an hour and a half under the Greenpeace project number. Exhibit E also lists an additional "D-Line with George" under the same project number for an additional hour and a half.

Ferris claims that he has no personal knowledge of the allegations set forth therein and he never worked with Defendant Mika on any matter relating to Greenpeace. Ferris Mot. 5-6, 8-9. Ferris Aff. ¶¶ 3, 10, 11, 12, 13, 14, 17. Contrary to paragraphs 8, 10, 11 and 12 of his affidavit, Plaintiff's evidence shows that not only did Ferris have knowledge that BBI was performing work related to Greenpeace, but Ferris was also directly involved in collecting and sorting through the gathered intelligence and worked with Defendant Mika on at least one occasion on a matter relating to Greenpeace. These conflicting pieces of evidence establish the existence of a genuine of issue material fact that cannot be resolved on a motion for summary judgment.

2. After Action Report

In an "After Action Report" for Project Number 97-0007, submitted by Defendant Ferris while employed at BBI (Exhibit F), Defendant outlines lessons learned after his first introduction to surveillance work and suggests equipment for use in further surveillance work. Ferris lists the following among the lessons learned: "Have each investigator obtain a false ID from David Lee. This can be used in any number of situations requiring non-law enforcement requested ID." Among the suggested equipment are: (1) a credential card machine – a machine that generates professional quality photo credentials with software to generate personal data and unlimited logos; (2) form generating software - professional quality computer generated work order/contractual forms to assist in "office visits"; and (3) uniforms – maintenance coveralls or generic work uniforms to assist in "office visits."

Defendant Ferris claims that he never advised BBI employees or agents to obtain false IDs, purchase equipment that could generate photo credentials and work order forms, or procure generic work uniforms, nor does he have knowledge of BBI or its agents ever using such tactics. Ferris Aff. ¶ 20. As evidenced by Defendant Ferris's memo, a question of material fact exists as

to whether he advised BBI to procure work equipment, forms and uniforms that would enable him and others to enter "target" offices under false pretenses and whether he had knowledge of BBI or its agents ever using such tactics. These questions of material fact preclude the summary judgment requested by Defendant Ferris.

3. Resignation Letter

Ferris claims that he left BBI on August 21, 1998 – one month after any specific facts in the Complaint allegedly commenced. Ferris Mot. 5-6, 8-9. Ferris Aff. ¶¶ 2, 3. In direct contradiction to his claim, Ferris's Resignation Notice, dated September 14, 1998 (attached as Exhibit G), states that "[his] current active duty recall will terminate on September 25th … [he] will be afforded three working days to complete a turnover of responsibilities and duties...[and] as of close of business on September 30, 1998, [he] will turn in all required items issued to include but not limited to: pager, ATT cell phone, and Nextel cell phone." The letter states that as of October 1, 1998 Ferris would return to active military duty assigned to the Defense Intelligence Agency. As evidenced by his signed resignation letter, Ferris did not leave BBI on August 21, 1998 and in fact was still actively employed with BBI through September 25, 1998, the time period covered by the Complaint.

III. Summary Judgment Must Be Denied Because Plaintiff is Entitled to Discovery According to Fed. R. Civ. P. 56

A. Rule 56 Permits a Court to Deny a Motion for Summary Judgment if the Parties Have Not Had the Opportunity to Make Full Discovery

Summary judgment "ordinarily 'is proper only after the plaintiff has been given adequate time for discovery.'" *Americable Int'l, Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274 (D.C. Cir. 1997). Under Federal Rule of Civil Procedure 56(d), a court may deny or defer considering a motion for summary judgment or order a continuance to permit discovery if the party opposing the motion adequately explains why, at that time, it cannot present by affidavit facts needed to

defeat the motion. "The purpose of Rule 56(f)[1] is to prevent 'railroading' the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *Dickens v. Whole Foods Mkt. Grp., Inc*., No. Civ. A. 01-1054 (RMC), 2003 WL 21486821, at *2 n.5 (D.D.C. Mar. 18, 2003) (citation omitted).

A party seeking the protection of Rule 56(d) "must state by affidavit the reasons why he is unable to present the necessary opposing material." *Klayman v. Judicial Watch, Inc.*, Civ. A. No. 06-670 (CKK), 2007 WL 1034937, at *6 (D.D.C. Apr. 3, 2007) (citation omitted). "The party seeking additional discovery bears the burden of identifying the facts to be discovered that would create a triable issue and the reasons why the party cannot produce those facts in opposition to the motion." *Id*. (citation omitted). The non-moving party "must also show a reasonable basis to suggest that discovery might reveal triable issues of fact." *Id*. (citation omitted). Plaintiff submits such an affidavit herewith. See Affidavit of Victoria S. Nugent In Support of Plaintiff's Application for Stay of Its Opposition To Defendant George Ferris's Motion for Summary Judgment.

B. The Court Should Deny Defendant's Motion for Summary Judgment Because the Parties Have Not Conducted Discovery In This Case

In the event that the Court holds that Exhibits A through G do not raise a genuine issue of material fact and defeat Defendant's motion for summary judgment, Plaintiff requests that the Court deny the motion because discovery has not yet been conducted. Defendant's motion for summary judgment was filed on February 18, 2011 – less than two months after Defendant filed his Answer and four days before Defendant filed his Motion to Dismiss. No parties in this

[1] In the 2011 edition of the Federal Rules of Civil Procedure, Rule 56(f) was re-designated as 56(d). The amendments to the Federal Rules of Civil Procedure note that "[s]ubdivision (d) carries forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56(d) cmt. Subdivision (d) (2010 Amendments).

litigation have taken discovery. In fact, on February 23, 2011, Defendant Ferris made a motion to stay discovery (opposed by Plaintiff) while his motion to dismiss is pending. Plaintiff filed opposition to Defendant's motion to stay on March 9, 2011.

Plaintiff's Exhibits A through G were obtained when, in 2008, one of BBI's former principals revealed BBI's unlawful activities and made voluminous – albeit incomplete – records of these activities available to BBI's targets and the press. Compl. ¶ 24. While these records do not reveal the full scope of Defendants' unlawful activities, the record that does exist provides documentation of Defendants' scheme and conspiracy to invade Greenpeace's lawful interests and misappropriate, use and sell confidential information. *Id*.

Plaintiff requests the opportunity to conduct full discovery relating to: Defendant Ferris's duties as an employee of BBI; Ferris's work logs; Ferris's work experiences with the other individual defendants in this matter; any memoranda, letters, reports, and/or notes Ferris wrote in his capacity as an employee of BBI in relation to Greenpeace; any memoranda, letters, reports, and/or notes Ferris wrote in his capacity as an employee of BBI in relation to suggestions and/or guidelines for conducting physical and electronic surveillance and/or D-Lines; any physical surveillance efforts Ferris conducted regarding Greenpeace; any electronic surveillance efforts Ferris conducted regarding Greenpeace. Plaintiff also requests the opportunity to depose Mr. Ferris.

Because the parties have not yet had the opportunity to conduct full discovery, Plaintiff requests that this Court deny Defendant Ferris's motion for summary judgment.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that Defendant Ferris's motion for summary judgment be denied.

Dated: March 25, 2011

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Greenpeace, Inc. Plaintiff, v. The Dow Chemical Company, *et al.*, Defendants.	Case No. 1:10-CV-02037-RMC The Hon. Rosemary M. Collyer

ORDER

Upon consideration of Defendant Ferris's Motion for Summary Judgment and supporting affidavit, Plaintiff's Opposition thereto, and the entire record herein,

This Court finds that Plaintiff has put forth genuine issues of material fact, such that Defendant Ferris is not entitled to summary judgment as a matter of law. *See* Fed. R. Civ. P. 56.

And it is hereby ORDERED that Defendant George Ferris's Motion for Summary Judgment is DENIED.

Dated: _____ _____

The Hon Rosemary M. Collyer
United States District Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Plaintiff's Opposition to Defendant George Ferris's Motion for Summary Judgment and Proposed Order were served on counsel of record who have appeared in this action through the electronic filing system for the U.S. District Court for District of Columbia on March 25, 2011.

/s/ Victoria S. Nugent