**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **GREENPEACE, INC.,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**THE DOW CHEMICAL COMPANY, et al.,**<br><br>**Defendants.** | **Civil Action No. 1:10-cv-02037-RMC** |

**DEFENDANT SASOL NORTH AMERICA INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND IN RESPONSE TO PLAINTIFF'S OPPOSITION**

The Opposition filed by Plaintiff Greenpeace, Inc. ("Greenpeace") to Defendant Sasol North America, Inc.'s ("Sasol") motion to dismiss attempts to salvage Greenpeace's deficient claims by urging the Court to look at the "mosaic" of the Complaint rather than "each fact alleged" therein. Opp'n at 3, Docket No. 56. Yet, Greenpeace does not dispute that its Complaint has jumbled together a myriad of allegations, half of which have nothing whatsoever to do with Sasol. In such circumstances, the Court must examine only the allegations of the Complaint that pertain to Sasol when ruling on the present motion. Those allegations make it apparent, for the reasons set forth below and in Sasol's motion, that Greenpeace has failed to properly state a claim against Sasol and therefore that the Complaint should be dismissed in its entirety.[1]

[1] In the alternative, as set forth in Sasol's motion, any claims against Sasol that survive this motion to dismiss should be severed from any surviving claims against defendants The Dow Chemical Company ("Dow") and Ketchum, Inc. ("Ketchum"). Given that Greenpeace did not oppose the motion to sever, the Court may treat it as conceded. *See, e.g.*, *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294-95 (D.C. Cir. 2004); *Buggs v. Powell*, 293 F. Supp. 2d 135, 141 (D.D.C. 2003).

## ARGUMENT

### I. GREENPEACE'S D.C. LAW CLAIMS SHOULD BE DISMISSED

As set forth in Sasol's motion to dismiss, Greenpeace's D.C. law claims are defective because they are based on the alleged removal of materials from abandoned trash. In an attempt to prop up these claims, Greenpeace now argues that they are not based entirely on trash but rather also are supported by the alleged taking of materials from within its offices as a result of illegal physical intrusions and/or electronic surveillance. A close examination of these allegations reveal that this is not the case.

#### A. Greenpeace's Alleged Removal of Trash Does Not Support Its Claims

Greenpeace does not dispute that its D.C. law claims – trespass (Count I), invasion of privacy (Count II), conversion (Count III), trespass to chattels (Count IV) and misappropriation of trade secrets (Count V) – are based on the allegation that individual defendants Ward, Bly, Mika, and Ferris searched and recovered documents from trash/recycling containers kept in the common areas of the office buildings in which Greenpeace leased space. To this extent, as set forth in Sasol's motion, these claims fail because, under District of Columbia law, Greenpeace did not have any property or privacy interest in these trash/recycling materials or in the locations where such trash was kept. *See* Sasol Mem. at 10-16. (citing *inter alia Danai v. Canal Square Assocs.*, 862 A.2d 395, 402-03 (D.C. 2004) (holding that plaintiff "abandoned and relinquished control" and could have no "reasonable expectation of privacy in the discarded [trash]").

In response, Greenpeace argues that this case is distinguishable from *Danai*, because: (1) the plaintiff in *Danai* did not maintain a key to the trash room; and (2) the defendant was the building manager who controlled the trash room. Opp'n at 45. The *Danai* court, however, considered many factors when determining that the plaintiff abandoned her trash and could have

no reasonable expectation of privacy therein, including that the plaintiff deposited her trash into a community trash room, that plaintiff made no effort to keep her trash secure, that plaintiff did not request segregation of her trash, and that plaintiff did not make any "special arrangement" for the disposal of her trash. *Danai*, 862 A.2d, at 401-03. Here, as in *Danai*, Greenpeace does not allege that it took any special measures to secure its trash and recyclables, segregate it from the trash of other building tenants, or instruct anyone to keep those items "intact and under seal." *Id.* at 401. Nowhere does Greenpeace allege that it had exclusive control or ownership over the areas that housed its trash. There was no lock or chain that Greenpeace put on the bins, as was the case in *United States v. Varjabedian*, No. 05-10103, 2006 U.S. Dist. LEXIS 19227 (D. Mass. Apr. 14, 2006). Nor does Greenpeace argue it had any continuing duty with regard to its trash and recyclables until they were deposited at a landfill, as was essential to the Texas state court ruling in *Sharpe v. Turley*, 191 S.W.3d 362, 367-68 (Tex. App. 2006). Furthermore, Greenpeace's allegation that it "entrusted the collection of its trash and recycling to private contractors," (Opp'n at 46), does not support an inference that Greenpeace took any affirmative measures to protect the privacy of its trash given that District law requires commercial properties to employ private waste collectors and Greenpeace does not allege that it, as opposed to its property managers, selected the private contractor for waste removal services. *See* D.C. Mun. Regs. tit. 21, § 700.9.

Likewise, although Greenpeace correctly notes that abandonment depends, at least in part, on intent (Opp'n at 46), the law in this jurisdiction, as in many others, is that the act of discarding an item into the trash constitutes an intent to abandon. *See Danai*, 862 A.2d at 402; *see also Borgen v. State*, 468 A.2d 390, 393 (1983) ("A thing is abandoned when the owner throws it away . . . .") (internal citation omitted); *Long v. Dilling Mech. Contractors Inc.*, 705

N.E.2d 1022, 1025 (Ind. Ct. App. 1999) (citing numerous authorities for the proposition that "there is a widely-held and long-standing doctrine that personalty discarded as waste is considered abandoned"). Greenpeace's reliance upon *Sharpe*, 191 S.W.3d 362, is equally misplaced. There, a Texas intermediate appellate court held that a church did not abandon documents when it discarded them in a dumpster located on the church's private property and contracted with a private service for waste collection. 191 S.W.3d at 367-68. Here, Greenpeace's trash is alleged to have been kept in common areas of the office building in which it leased space, not on Greenpeace's private property, and Greenpeace does not allege that it contracted for private waste collection. *See* Compl. ¶ 28 (discarded trash located in alleyway adjacent to building in which Greenpeace leased office space); ¶ 29 (trash kept in communal trash room).

Separately, Greenpeace's bald assertion that discarding documents into the trash constitutes a reasonable effort to maintain their secrecy (*see* Opp'n at 52) cannot be accepted. As set forth in Sasol's motion, one cannot misappropriate from the trash a "trade secret," which the D.C. Code defines as "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) derives actual or potential independent economic value from not generally being known to [others]; and (b) is the subject of reasonable efforts to maintain its secrecy." D.C. Code § 36-401(4) (emphasis added). Greenpeace cites no case to support its nonsensical assertion to the contrary. *See also World Health Prods., LLC v. Chelation Specialists, LLC*, No. 2:06 CV 633, 2006 U.S. Dist. LEXIS 61444, *13-14 (D. Utah Aug. 28, 2006) (holding that plaintiff was unlikely to succeed on a trade secret misappropriation claim because the plaintiff threw documents in the garbage without first shredding them and failed to mark the documents confidential, both in electronic and tangible form).

**B. Greenpeace's Alleged Physical Intrusions Do Not Support Its Claims**

The Opposition relies on two allegations concerning physical intrusion in an attempt to support Greenpeace's D.C. law claims: (1) Mary Lou Sapone's alleged tour of Greenpeace's offices; and (2) Greenpeace's suspicion that certain individual defendants broke into its office space and stole certain unidentified documents. Opp'n at 37-38. Neither allegation, even if accepted as true, is a proper basis for any of Greenpeace's D.C. law claims.

First, Ms. Sapone allegedly taking a tour of the Greenpeace facility while claiming to be a prospective volunteer does not give rise to any claim under D.C. law. *See Desnick v. Am. Broad. Co., Inc.*, 44 F.3d 1345, 1351-52 (7th Cir. 1995) (consent to an entry is not void on the basis of a misrepresentation if that entry does not interfere with the owner's possessory interest). Greenpeace attempts to distinguish its allegations from *Desnick* and the other cases cited by Sasol by arguing that Ms. Sapone intended to interfere with Greenpeace's possession. Opp'n at 38. No such allegation is made in the Complaint. Even if it was, it would be irrelevant. Trespass, invasion of privacy, conversion, trespass to chattels, and misappropriation of trade secrets are not inchoate torts; D.C. law does not recognize a claim for intended interference with another's property. Instead, a plaintiff must allege an actual interference in order to properly state such claims. Because no such allegation is made regarding Ms. Sapone, her alleged tour cannot support any of Greenpeace's D.C. law claims.[2]

Nor does Ms. Sapone's alleged tour support a reasonable inference that illegal intrusions occurred in the future. It does not follow that breaking and entering occurred simply because Ms. Sapone took an open and obvious tour of the office. Greenpeace must affirmatively allege

[2] Even were "intended" trespass a valid claim under D.C. law (which it is not), the Complaint would be insufficient because there is no allegation that Ms. Sapone's actions interfered with Greenpeace's "secure use and enjoyment" of its offices. Opp'n at 38. Thus, Ms. Sapone's entry was precisely like the entry in *Keyzer v. Amerlink, Ltd.*, 618 S.E.2d 768, 772 (N.C. Ct. App. 2005), where the court found no trespass because the investigator posing as a potential client of a law firm did not interfere with possession or ownership of the land. *Id.* at 73.

an actual intrusion in order to pursue such claims; speculation and surmise are insufficient. Moreover, the Complaint merely alleges that Ms. Sapone, during her tour, "didn't observe any high school or college aged interns," and observed an "in/out board [which] indicated that Dave DeRosa (Chicago) was in and Damu Smith was out from 13-23 November." Compl. ¶ 33. This hardly supports an inference that, as Greenpeace now would have it, the tour was used as an opportunity to note the likely location of "sensitive program documents" and locations where "information would be exchanged orally and audibly" (Opp'n at 37) – allegations that are markedly absent from the Complaint.

Second, Greenpeace does not argue in its Opposition or allege in its Complaint that any specific document was ever removed from its offices as a result of these purported intrusions. Instead, Greenpeace attempts to rely upon suspicion and innuendo by inferring that certain unidentified documents *must* have been taken from its offices given the nature of the documents it claims to have found amongst BBI's files. This inference, however, is not supported by any actual allegation of fact in the Complaint. For example, the allegation that documents allegedly in BBI's possession were in "pristine condition" does not support a reasonable inference that documents were stolen from Greenpeace's offices rather than recovered from the trash given that Greenpeace admits that documents retrieved from recycling bins would also be pristine (Compl. ¶ 31) and that some of these documents were sent from CLEAN. *Id.* at 33. Indeed, though Greenpeace claims it has had access to "voluminous records" (*id.* at ¶ 24), and even appears to be quoting language from those records in paragraph 41 of the Complaint, there is no allegation that any one of these documents was actually removed from inside Greenpeace's offices.

It also is worth noting that on this point the Opposition improperly relies upon a number of allegations that have no connection to Sasol. Citing paragraphs 98, 103, and 106 of its

Complaint, Greenpeace argues it alleged that "BBI sent its agents into target offices posing as repairmen, deliverymen, and interns as a matter of course." Opp'n at 37. These paragraphs reference alleged actions that BBI took on behalf of Dow and Ketchum. Compl. ¶¶ 88, 103, 106. No such allegation is made with respect to Sasol.

This all is insufficient to state a claim. Trespass, invasion of privacy, conversion, trespass to chattels, and misappropriation of trade secrets based upon an alleged physical intrusion all require a specific allegation that such an intrusion actually took place, that some specific document actually was removed during the alleged intrusion (not merely that Greenpeace suspects this), and identification of the document(s) that were allegedly removed. Because the Complaint does not contain such allegations, Greenpeace's D.C. law claims, to the extent they are based on any alleged physical intrusion, should be dismissed.

**C. Greenpeace's Alleged Electronic Surveillance Does Not Support Its Claims**

Greenpeace first argues that BBI employees "took steps to acquire" a computer data interception program. Opp'n at 39. This is an inartful restatement of the allegations in the Complaint that BBI employees "considered acquiring" the data interception program. Compl. ¶ 41. Greenpeace does not allege that BBI (1) did acquire such a program, or (2) acquired such a program on behalf of Sasol to illegally surveil Greenpeace. Next, Greenpeace argues that BBI paid $4,000 in cash to NetSafe, an alleged specialist in electronic surveillance. Opp'n at 39. The Complaint, however, alleges only that Richard Beckett of BBI was issued a check for $4,000 with the noted purpose of "Patanella – GP." Compl. ¶ 42. Although Greenpeace alleges a person named "Joe Patanella" was an employee of NetSafe, it does not allege that this check was ever given to him. *See id.* Last, Greenpeace argues that BBI "created an internal billing/account code for Technical Surveillance Counter-Measures (TSCM)" – a term of art Greenpeace

acknowledges describes methods of detecting electronic surveillance. *Id.* ¶ 43; Opp'n at 39. Greenpeace's present argument that TSCM was really a deliberate mislabeling of a project to cover the fact that BBI conducted illegal electronic surveillance of Greenpeace's office is pure speculation. Opp'n at 39. The only plausible interpretation of this allegation – one supported by the accepted definition of TSCM recited in Greenpeace's Complaint (Compl. ¶ 43) – is that BBI used TSCM to prevent, not conduct, intrusive electronic surveillance. Arguing that TSCM stood for the exact opposite of its accepted meaning is implausible, particularly without an allegation (absent in the Complaint) that the term was deliberately misused.

**D. Greenpeace's Trespass Claim Fails for Independent Reasons**

Greenpeace's trespass claim also fails because it is based on an alleged intrusion into property that was not owned by Greenpeace. *See* Sasol Mem. at 7 (quoting *Sarete Inc. v. 1344 U St. Ltd. P'ship.*, 871 A.2d 480, 490 (D.C. 2005) (trespass is "an unauthorized entry onto property that results in interference with the property owner's possessory interest therein")). The Opposition does not dispute Sasol's definition of trespass or that Greenpeace was not the "property owner" of any of the premises on which its trespass claim is based. Instead, it incorrectly argues that a tenant such as itself has standing to sue for trespass anywhere in the building in which it leases office space. *See* Opp'n at 35. In fact, a tenant such as Greenpeace may bring a claim for trespass only on the basis of an alleged intrusion into those areas of the premises leased and possessed by the tenant, not common areas of a property. *See, e.g.*, *Aberdeen Apts. v. Cary Campbell Realty Alliance, Inc.*, 820 N.E.2d 158, 165 (Ind. Ct. App. 2005) (finding the landlord of an apartment complex to be the only individual with sufficient interest in common areas to maintain an action for trespass); *Motchan v. STL Cablevision, Inc.*, 796 S.W.2d 896, 900 (Mo. Ct. App. 1990) ("[A] tenant does not have control of the common

areas and thus does not possess them . . . . [A] landlord, who retains control of common areas in a multi-tenant building, also retains possession of those areas so as to support an action for trespass to the common areas."). Accordingly, only the landlord of the buildings in which Greenpeace leased office space can bring a claim for an alleged trespass in the common areas of those buildings. Opp'n at 35. To the extent Greenpeace's trespass claim is based on alleged unauthorized entries into such common areas housing trash and recyclables, it thus fails.

To the extent that Greenpeace's trespass claim is based on an alleged intrusion into the office space actually leased by Greenpeace, it would still fail because Greenpeace has not alleged any recoverable damages based on such alleged physical intrusion. Greenpeace claims that it has suffered the following intangible damages as a result of the defendants' alleged trespass: (1) an unspecified interference with its campaigns and organizational mission; (2) diminished value of intellectual property; and (3) out of pocket costs to determine the scope of the alleged trespass. Opp'n at 40; Compl. ¶ 113. Yet, Greenpeace cites no authority supporting recovery of these types of damages in trespass. The two cases cited by Greenpeace are inapposite. In *John McShain, Inc. v. L'Enfant Plaza Props., Inc.*, 402 A.2d 1222, 1224-31 (D.C. 1979), the plaintiff was compensated for concrete and itemized expenses incurred as a result of delays to a construction project caused by the defendant's continuing trespass. No such costs or delay in any of Greenpeace's campaigns are alleged in the Complaint. Indeed, Greenpeace has not identified a single campaign that was delayed or otherwise affected. Likewise, in *Gaetan v. Weber*, 729 A.2d 895, 898 (D.C. 1999), the damages recovered by the tenant plaintiff for trespass, including personal injuries, "out of pocket expenses for repairs," and nuisance resulting from "loss of use and enjoyment" of the property, all were concrete and quantifiable. Greenpeace's argument that it suffered an interference with the "secure use of its office" (Opp'n

at 40), is not only not a concrete injury – no such allegation is made in the Complaint. *See* Compl. ¶¶ 110-15. Greenpeace's remaining alleged injuries – diminished value of intellectual property and interference with campaigns – are, at best, speculative and the Complaint contains no explanation of how Greenpeace's: (1) intellectual property could have diminished in value after it had already been discarded to the trash; or (2) campaigns could have been negatively impacted when Greenpeace did not discover the alleged trespass supposedly until more than a decade later.

Greenpeace, in the alternative, asks the Court to remedy any trespass through the equitable remedy of disgorgement. Opp'n at 41. Although, as Greenpeace notes, the Tentative Draft of the new Restatement of Restitution and Unjust Enrichment[3] suggests that disgorgement may be an appropriate remedy for trespass, Greenpeace cites no case in which this theory was accepted and it has ignored the cases decided after publication of the Tentative Draft that have declined to do so. *See Young v. Appalachian Power Co.*, 2008 U.S. Dist. LEXIS 80496 at *22-27, 37 (S.D. W. Va. Oct. 10, 2008) (denying request for equitable relief from trespass through disgorgement); *McLaughlin v. Miss. Power Co.*, 2010 U.S. Dist. LEXIS 105837, at *14 (S.D. Miss. Oct. 4, 2010) ("disgorgement of revenues or gross profits are not and cannot be remedies for an alleged trespass to real property"). Given this, that Greenpeace cites no D.C. authority in support of its argument, and that the Court is presiding over the state law claims pursuant to supplemental jurisdiction, D.C. law cannot be expanded merely at Greenpeace's behest.

Furthermore, even if the Court were inclined to interpret D.C. law as allowing disgorgement as a remedy for trespass, Greenpeace has not alleged facts to support such a remedy being available in this case. In non-trespass cases, the D.C. Circuit has ruled that an

[3] Restatement (3d) of Restitution and Unjust Enrichment § 40 (Tentative Draft No. 4, 2005).

appropriate calculation of disgorgement must be "a reasonable approximation of profits causally connected to the violation." *See S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). Here, Greenpeace does not allege the existence of any profits connected with the alleged trespass. In an attempt to overcome this deficiency, Greenpeace suggests in its Opposition that its remedy could be the "hundreds of thousands of dollars" that the "Defendants" allegedly paid BBI. Opp'n at 21. Such alleged amounts, however, do not represent profit to Sasol under any set of facts and therefore cannot be the basis for an order of disgorgement.

Greenpeace's suggestion that it is entitled to injunctive relief to ensure that further trespasses do not occur also is a non-starter. In order to obtain such relief, Greenpeace must have alleged a threat of continuing trespass. *See Lucy Webb Hayes Nat'l Training Sch. for Deaconesses and Missionaries v. Geoghegan*, 281 F. Supp. 116, 118 (D.D.C. 1967). Here, Greenpeace does not, and could not plausibly, make such an allegation given the Complaint's averment that the alleged conduct ceased over a decade ago. *See, e.g.*, Compl. ¶¶ 51, 52, 71 ,77.

**E. Conspiracy – Greenpeace's Failure to Allege Facts Sufficient to Hold Sasol Liable for Any Allegedly Tortious Acts of Dezenhall or Any Individual Defendant**

It is undisputed that Greenpeace must, to properly allege a conspiracy, plead facts showing that there was: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or in a lawful act in an unlawful manner; and (3) an injury caused by an unlawful overt act . . . ; (4) pursuant to, and in furtherance of, the common scheme." *Weishapl v. Sowers*, 771 A.2d 1014, 1023 (D.C. 2001). Notably, Greenpeace does not dispute Sasol's argument that neither BBI nor Dezenhall were agents of Sasol. Sasol Mem. at 15-16. Nor does Greenpeace dispute Sasol's argument that conspiracy is an inappropriate means under District of Columbia law for applying vicarious liability to underlying statutory offenses, such as misappropriation of

trade secrets. Sasol Mem. at 18, n.4. Instead, Greenpeace argues that it has alleged facts that are "suggestive enough" to render its claim of an agreement to participate in an unlawful act plausible. Opp'n at 54. While Greenpeace alleges that BBI briefed the defendants on the status of its investigation, that defendant Bly provided reports of his alleged surveillance activities and trash collections, and that Peter Markey (a former Sasol employee) reviewed documents BBI had obtained, such allegations are conclusory to the extent that they assume an illegal purpose or illegal activity. Opp'n at 54-55. Greenpeace bases its assumption that Sasol agreed to any unlawful acts committed by BBI on a much less suggestive set of allegations, including that: (1) Sasol gave BBI an instruction to "find out what you can find out" about Greenpeace; (2) during 1998 and 1999, Sasol participated in meetings and calls in which BBI briefed Sasol and Dezenhall on the progress of its investigation; (3) Sasol and Dezenhall paid BBI for its services; and (4) Sasol and Dezenhall used "veiled terminology" to describe BBI's activities. Compl. ¶ 77. Greenpeace attempts to distinguish the allegations in this case from those in *R.C.M. Exec. Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 643 (S.D.N.Y. 1995), by noting that the *R.C.M.* plaintiffs only alleged knowledge of monthly loan payments. In *R.C.M.*, however, the plaintiffs' underlying claim was that defendants charged usurious interest rates on a loan. *Id.* at 633-34. Knowledge of the monthly loan payments incorporating the alleged usurious rate is no different than the alleged briefings in which the defendants participated. Moreover, Greenpeace wholly fails to address Sasol's argument that Greenpeace has made no allegation of injury resulting from the conspiracy, as required by *Weishapl*. 771 A.2d at 1023.

## II. RICO STANDING – GREENPEACE'S FAILURE TO ALLEGE A COGNIZABLE INJURY (COUNT VIII AND COUNT IX)

### A. Greenpeace Has Not Alleged a Concrete Financial Loss To Its Business Or Property

Greenpeace does not dispute that the injury to a plaintiff's or property required for RICO standing must be a concrete financial loss. *See, e.g.*, Sasol Mem. at 18, 20 (citing *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998) (no standing when plaintiffs claimed "no tangible financial loss")); *Strates Shows, Inc. v. Amusements of Am., Inc.*, 379 F. Supp. 2d 817. 825 (E.D.N.C. 2005) ("Injury to mere expectancy interests or an 'intangible property interest' is not sufficient to confer RICO standing.") (quoting *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 730 (8th Cir. 2004)); *In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995) (lost opportunity to obtain loan insufficient "because the alleged injury is speculative and does not show a conclusive financial loss")).[4] The question before the Court, accordingly, is whether the alleged injuries cited in Greenpeace's Opposition, i.e., its protest campaigns being "interfered with," its organizational mission being "undermined," the security of its facilities being "compromised," and its intellectual property being "stolen" (*see* Opp'n at 17), constitute the requisite "concrete financial loss." For the reasons set forth in Sasol's motion, this cannot be the case. *See* Sasol Mem. at 19-26. Greenpeace's counterarguments are not convincing.

The cases cited by Greenpeace – *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994) and *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 648 (2008) – do not support its argument. In *Scheidler*, the injury alleged was not a general right to engage in protest

[4] Greenpeace does take issue with Sasol's assertion that the Ninth Circuit has held that hypothetical or speculative injury to an intangible property interest cannot confer RICO standing. Opp'n at 19. However, this is a distinction without difference given that such injuries cannot cause a concrete financial loss. *See, e.g.*, *Thomas v. Baca*, 308 Fed. App'x 87, 88 (9th Cir. 2009) ("*Newcal Indus., Inc. v. Ikon Office Solutions*, 513 F.3d 1038 (9th Cir. 2008), suggests that we overruled *Oscar* in *Diaz*. . . . However, our more recent holding in *Canyon County* explicitly states that a "'concrete financial loss'" is a necessary element of a RICO claim, 519 F.3d at 975[.]").

activities or pursue an organizational mission absent interference. *See* 510 U.S. at 256. Rather, the plaintiff clinics alleged that anti-abortion protestors "conspired to use force to induce clinic staff" to stop working and caused patients "to obtain medical services" elsewhere. *Id.*[5] Likewise, in *Bridge*, the plaintiff bidders alleged a concrete injury to a commercial product – liens that they would have obtained but for defendants' conduct. 553 U.S. at 643-44. Unlike Greenpeace, the *Bridge* plaintiffs did not allege that they could have hypothetically obtained such liens,[6] that their organizational missions were somehow frustrated, undermined, or interfered with by the defendants, or that their intellectual property was diminished.

In an attempt to import some concreteness into its alleged injuries, Greenpeace references its allegations that its "confidential business information" was "stolen and intercepted by fraud." Opp'n at 17-18. Noting that the Supreme Court has previously determined that confidential business information was property under the mail and wire fraud statutes in *Carpenter v. United States*, 484 U.S. 19 (1987), Greenpeace asserts it has "actually suffered financial loss" and therefore alleged RICO injury. Opp'n at 18. This argument, however, ignores that Greenpeace does not allege that this purported theft of information had any impact on Greenpeace other than the same non-concrete, hypothetical, and speculative injuries discussed above, all of which are insufficient to confer RICO standing.

[5] Greenpeace also has ignored that, no matter how frustrated or undermined the organizational mission of the National Organization for Women may have been, it did not sue the anti-abortion protestors under RICO. *Id.* at 255 ("Respondents are correct that only DWHO [a clinic] and SWHO [a clinic], and not NOW, have sued under RICO."). NOW's standing to bring such a claim was therefore not at issue.

[6] This was the case in *In re Taxable Mun. Bond Secs. Litig.*, where the Fifth Circuit determined that an alleged intangible right to participate in a non-fraudulent loan process, *i.e.*, a lost opportunity to obtain a loan, was insufficient to confer standing on a RICO plaintiff. 51 F. 3d at 521. Essential to this decision was the hypothetical and speculative nature of the plaintiff's claimed injury, which the court described as an intangible right to a fair loan process – because the plaintiff had not established that he actually qualified for the loan. *Id.* at 521-23.

Furthermore, in *Carpenter*, the defendants were convicted of mail and wire fraud for using advance information about the timing and content of a newspaper column to buy or sell stocks. 484 U.S. at 23. The column was found to have had an impact on the stock market, due to the column's "perceived quality and integrity," and the newspaper victim specifically prohibited pre-publication release of the column. *Id.* at 22-23. Though the defendants, one of whom was the author of the column, contended the newspaper's interest in pre-publication confidentiality of the column was not a property right, the Supreme Court disagreed. *Id.* at 26. In concluding that there was a property right, and thus "property" for the purposes of the mail and wire fraud statutes, the Court observed, "'[N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those will pay money for it.'" *Id.* (quoting *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 236 (1918)). As such, the business information at issue in *Carpenter* implicated concrete financial loss.

Here, in contrast, the only purported "confidential business information" alleged to have been taken as part of conduct implicating the wire fraud statute[7] was "information related to Greenpeace" that was in the possession of CLEAN. Compl. ¶ 172. There is no allegation how this information could implicate any financial loss, concrete or otherwise. Moreover, this allegation is certainly not equivalent to Greenpeace's "confidential business information," i.e., its property, being taken. At most, it is an allegation that CLEAN's information was taken.[8] Even

[7] The allegations regarding the CLEAN information cannot support a RICO claim based on wire fraud, as they are not pleaded with the particularity required by Fed. R. Civ. 9(b). *See infra* Section III.A

[8] Further, even if the Complaint establishes that CLEAN's information was taken, Greenpeace still lacks standing because it fails to properly plead how it was concretely or directly harmed by that taking. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) ("[M]isfortunes visited upon a third person by the defendant's acts" do not suffice to establish RICO standing.); *Bivens Gardens Office Bldg., Inc. v Barnett Banks, Inc.*, 140 F.3d 898, 906 (11th Cir. 1998) (same).

when challenged on a motion to dismiss, Greenpeace fails to point to any allegation supporting its assertion that it had any cognizable property right to information "related to" Greenpeace that was in the possession of CLEAN, whether by contract or other agreement.[9] For similar reasons, and as set forth above, Greenpeace's claim that any "confidential business information" was stolen from its premises is insufficient to demonstrate any "concrete financial loss" to Greenpeace. *See supra* Sections I.A & I.B.

In sum, allegations of interference with Greenpeace's protest activities, diminishment of its intellectual property, undermining of its organizational mission, and physical intrusions into its office space (all of which apparently went undetected by Greenpeace for nearly a decade) do not constitute allegations of the concrete financial loss necessary to confer RICO standing.

**B. Greenpeace Alleges No Injury Proximately Caused By A RICO Violation**

Even if Greenpeace had alleged a cognizable RICO injury, it would still have to show that there was a direct relationship between the injury and the RICO violation. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010). Greenpeace has not made any allegations to satisfy this proximate-cause requirement. Nor can Greenpeace, as it attempts to do now, circumvent this requirement simply by claiming it was the target of an alleged scheme. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006) ("A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense . . . the central question . . . is whether the alleged violation led directly to the plaintiff's injuries."). Such an attempt, in any event, is contradicted by Greenpeace's admission in its Opposition that the "success of its campaigns" was just as likely affected by "ordinary and lawful factors that regularly affect the success of political activities" as

[9] The fact that discovery has not occurred in this case does not excuse Greenpeace's failure. Surely Greenpeace would be the one best able to produce evidence regarding its relationship with its alleged "ally" CLEAN.

that success might have been affected by any alleged conduct attributable to Sasol. Opp'n at 14. That such an alternative explanation exists is why the Supreme Court concluded there was no proximate cause in *Anza*. 547 U.S. at 458-59 (noting that the plaintiff's injury, lost sales, "could have resulted from factors other than [plaintiff's] alleged acts of fraud"). Because, as in *Anza*, Greenpeace's campaigns could have failed for many "reasons, and it would require a complex assessment to establish" whether such alleged failure was the product of any defendant's conduct, the proximate cause requirement has not been met. *Id.* at 459.

## III. GREENPEACE'S FAILURE TO PROPERLY ALLEGE A RICO CLAIM

### A. Greenpeace Has Not Properly Alleged A Predicate Act (Count VIII)

#### 1. 18 U.S.C. § 1343 – Greenpeace's Failure to Satisfy Rule 9(b)

Greenpeace's Opposition pays lip service to the particularity requirements of Rule 9(b), but then erroneously contends that its Complaint need only "put Defendants on notice of the nature of the claim." Opp'n 32-33. Notice pleading is insufficient. *See, e.g., Ponder v. Chase Home Fin. LLC*, 666 F. Supp. 2d 45, 49 (D.D.C. 2009). Because Greenpeace has based its RICO claim on the predicate act of wire fraud, it must identify in the Complaint, at minimum, "the time, place, and contents of the false misrepresentations, the fact misrepresented, and what was retained or given up as a consequence of the fraud." *See, e.g., United States ex. rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (internal quotation omitted).[10] Greenpeace has done none of this.

As set forth in the motion, Greenpeace's wire fraud allegation is based entirely on a few paragraphs of the Complaint – which together assert that a person named Dick Rogers "use[d]

[10] *Am. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010); *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009); *Potts v. Howard Univ. Hosp.*, 258 Fed. Appx. 346, 346-47 (D.C. Cir. 2007); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003); *Poblete v. Rittenhouse Mortgage Brokers*, 675 F. Supp. 2d 130, 135 (D.D.C. 2009).

false pretenses . . . to infiltrate" CLEAN, and that this same person forwarded emails and information "related to Greenpeace." Compl. ¶¶ 33, 67, 172. In its Opposition, Greenpeace does not point to any allegation in the Complaint setting forth any of the particularity required by Rule 9(b). *See* Opp'n at 32-33.[11] Nor does any such allegation exist. Nowhere in the Complaint is the time, date, or place of any purported communication by Mr. Rogers, fraudulent or otherwise, alleged much less the content of any such communication. This lack of specificity is made even more egregious because Greenpeace alleges that Mr. Rogers was at CLEAN for "more than a year." Compl. ¶ 174. With such a broad span of time, Sasol should not have to guess at which alleged communications of Mr. Rogers are relied upon by Greenpeace. For this reason and Greenpeace's other failures to satisfy Rule 9(b), its RICO claim should be dismissed. *See, e.g.*, *Prunte v. Universal Music Group*, 484 F. Supp. 2d 32, 42 (D.D.C. 2007); *Anderson v. USAA Cas. Ins. Co.*, 221 F.R.D. 250, 254-55 (D.D.C. 2004).

### 2. 18 U.S.C. § 2314 – Greenpeace's Failure to Allege That "Goods" Worth More Than $5,000 Were Stolen

Greenpeace's arguments regarding the other predicate act upon which its RICO claims are based – interstate transportation of stolen goods (18 U.S.C. § 2314) – are equally deficient. Conceding that the Complaint fails to allege an essential element of the offense, i.e., that the alleged stolen "goods" in question are worth $5,000 or more, Greenpeace pivots and asserts that the value of the goods in question can be inferred to be worth more than $5,000 because a stray

[11] The Opposition also does not respond to the point that complaints with far more specificity than Greenpeace's have been dismissed for failure to satisfy Rule 9(b). *See* Sasol Mem. at 29-31; *see also Poblete*, 675 F. Supp. 2d at 135 (dismissing when plaintiff alleged the date and the location of the alleged fraudulent loan closing but did not allege "the *content* of the false misrepresentations [and] *the fact misrepresented*") (quoting *Kowal v. MCI Comm'cns Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994) (emphasis in original)); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 301 (S.D.N.Y. 2000) (dismissing RICO claims based on wire fraud when plaintiff's description of three allegedly fraudulent faxes contained the sender, recipient, date, and three-word summary, but not their purpose within the allegedly fraudulent scheme); *Walther v. Patel*, 2011 U.S. Dist. LEXIS 12048, *26 (E.D. Pa. Feb. 4, 2011) (dismissing even though the complaint alleged the "time, date, and place of the alleged conduct").

paragraph of the Complaint (¶ 126) contains an allegation that "Defendants paid *hundreds of thousands* of dollars for the stolen goods" and *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir. 1966), permits valuation based on a black market value. Opp'n 29-30 (emphasis in original). Such an inference cannot be reasonably or plausibly drawn for two reasons. First, Greenpeace admits that the relationship between Sasol, Dezenhall, and BBI involved "lawful activity." Compl. ¶ 168. Second, the Complaint makes clear that most, if not all, of the documents acquired had been thrown away, and thus could not have been "stolen" for the purposes of 18 U.S.C. § 2314. Compl. ¶ 26; *Morrissette v. United States*, 342 U.S. 246, 247 (1952). This case is therefore distinguishable from *Bottone*, where the $5,000 element of the § 2314 offense rested on the entire value paid to disloyal employees who sold their employer's property (not discarded trash) on the international black market. 365 F.2d at 391.

Furthermore, Greenpeace has not responded to Sasol's argument that the Complaint lacks any allegation sufficient to show that any of the alleged documents or information at issue would qualify as "goods" for the purposes of § 2314. *See* Sasol Mem. at 28. Greenpeace's argument based on a conclusory allegation that the documents in question are "goods" is insufficient. To qualify as "goods," the documents or information must ordinarily be the subject of commerce. *In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971); *see also United States v. Weinstein*, 834 F.2d 1454, 1463 (9th Cir. 1987) (finding airline tickets, including blank tickets, are "goods or merchandise" within the meaning of the statute); *United States v. Greenwald*, 479 F.2d 320, 321 (6th Cir. 1973) (documents containing chemical formulae and formulations, "treated as assets, in the same manner as machinery," are a "good"). Here, Greenpeace does not, and cannot, point to any allegation in the Complaint that any document in question was the subject of commerce or treated as an asset.

**B. Greenpeace's Failure to Plead a Pattern**

Greenpeace contends that it has sufficiently alleged a pattern, rather than isolated or sporadic conduct, because there were allegations of a "multi-faceted approach: D-lines, surveillance and unlawful infiltration." Opp'n at 26. Greenpeace further contends that it has met the continuity requirement because the Complaint alleges a closed-ended period of repeated conduct that lasted 15 or 16 months and that multiple entities and individuals were targeted. *Id.* at 27-28.

Greenpeace's first contention fails because the alleged D-lines (aka "dumpster diving"), surveillance, and unlawful infiltration are not predicate acts. While wire fraud or interstate transportation of stolen goods are predicate acts (Compl. ¶ 172), they have not been properly alleged. Hence, such allegations cannot be used to establish a RICO pattern. *See United States v. Burden*, 600 F.3d 204, 216 (2d Cir. 2010) (a RICO pattern is "a series of criminal acts as defined by the statute") (internal quotation omitted).

Greenpeace's second contention, based upon *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010), is equally flawed. In *Wilson*, the D.C. Circuit concluded that the evidence supported a finding of both closed-ended and open-ended continuity. *Id.* at 1021. The D.C. Circuit also observed that, had the defendants not been arrested, the criminal conduct would have persisted. *Id.* Here, in contrast, the alleged conduct supposedly occurred over, at most, a 16-month period, and ceased over 11 years ago. Compl. ¶¶ 59, 171. Unlike *Wilson*, where the defendants were convicted of multiple criminal acts, Greenpeace has not properly alleged even two predicate acts with respect to Sasol. Additionally, given Greenpeace's allegation that Sasol's supposed actions were directed at a single objective, the Lake Charles project, the analysis in *Western Assocs. Ltd. P'ship v. Market Square Assocs.*, 235 F.3d 629 (D.C. Cir. 2001) is particularly instructive.

Allegations of narrowly focused activity over a brief period of time that are directed against a single victim generally fail to establish a RICO pattern. *Id.* at 634.

### C. Conspiracy – Greenpeace Does Not Dispute It Failed to Plead An Agreement to Commit Any RICO Predicate Acts

Greenpeace wrongly contends that the merits of its conspiracy claim allegations were unchallenged. Opp'n at 34. In fact, Sasol expressly noted that dismissal of the RICO claim was warranted in the absence of an alleged agreement to commit "'an act of racketeering or otherwise wrongful [act] under RICO,'" *see* Sasol Mem. at 35. (quoting *Beck v. Prupis*, 529 U.S. 994, 504 (2000)), a proposition with which Greenpeace does not disagree.

The case cited by Greenpeace – *Jones v. Meridian Towers Apartments, Inc.*, 816 F. Supp. 762 (D.D.C. 1993) – does not alter this conclusion. In *Jones*, the issue was whether dismissal of substantive RICO claims against two defendants on the ground the allegations did not demonstrate the defendants operated or managed the alleged RICO enterprise required dismissal of the RICO conspiracy claim. 816 F. Supp. at 772-73. Observing that a defendant could be held liable for conspiracy to commit an offense even if he did not commit the offense or was not capable of committing the offense, the court declined to dismiss the RICO conspiracy claims. *Id.* at 772. The defendants in *Jones*, however, did not challenge the conspiracy allegations on the basis of a failure to allege an agreement to commit the RICO offense. Here, in contrast, Sasol has challenged the allegations of an illegal agreement and, because RICO conspiracy law requires the same scienter as civil conspiracy law, Greenpeace must allege more than Sasol's knowledge or mere presence in an alleged conspiracy. *Salinas v. United States*, 522 U.S. 52, 65 (1997). It must allege facts showing that Sasol "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Id.* at 65. This includes facts demonstrating the "assent of each defendant to the conspiracy." *Barlow v.*

*McLeod*, 666 F. Supp. 222, 225 (D.D.C. 1986). In short, Greenpeace must allege facts showing that Sasol knew about, and agreed to the overall objective of committing RICO predicate offenses or agreed to the commission of those predicate offenses. *Salinas*, 522 U.S. at 65; *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993).

The Opposition does not argue that the Complaint contains any such allegations, nor do any exist. At most, the Complaint contains conclusory assertions that the information acquired by BBI and Dezenhall was obtained with Sasol's "consent, permission and express authority." Compl. ¶ 77. This is not sufficient to show agreement by Sasol that information related to Greenpeace would be obtained by unlawful means. *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 120 (D.D.C. 2005) (RICO conspiracy claimant must plead specific facts supporting the alleged agreement). Furthermore, that the Complaint attempts to allege multiple schemes involving multiple parties, none of which are alleged to be known to or involve Sasol, does not state a conspiracy claim against Sasol. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."). More must be alleged, and, as it is not, Greenpeace's RICO conspiracy claim should be dismissed.

## CONCLUSION

WHEREFORE, Sasol respectfully requests that its motion be granted and the Complaint be dismissed in its entirety with prejudice. In the alternative, if any claims survive Sasol's motion, Greenpeace should be ordered to re-plead such claims in a new action severed from any claims that survive against Ketchum and Dow.

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Respectfully submitted,

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