IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREENPEACE, INC., Plaintiff, v. THE DOW CHEMICAL COMPANY; SASOL NORTH AMERICA, INC.; DEZENHALL RESOURCES, INC.; KETCHUM, INC.; TIMOTHY WARD; JAY ARTHUR BLY; MICHAEL MIKA; GEORGE FERRIS; and DOES 1-20; Defendants.	Case No. 1:10-cv-02037-RMC

KETCHUM'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Roger S. Goldman (D.C. Bar No. 333294)
Abid R. Qureshi (D.C. Bar No. 459227)
Gabriel K. Bell (D.C. Bar No. 987112)
John S. Cooper (D.C. Bar No. 991575)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200 (Telephone)
(202) 637-2201 (Facsimile)
Email: abid.qureshi@lw.com

Attorneys for Defendant Ketchum, Inc.

April 8, 2011

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

Page(s)

Page(s)

STATUTES AND RULES

OTHER AUTHORITY

* Pursuant to L. Civ. R. 7, authorities on which we chiefly rely are marked with asterisks.

Greenpeace's *Consolidated Opposition* to the *Motions to Dismiss* filed by Ketchum, Dow and the individual defendants fails to salvage the deficiencies in the *Complaint*. Greenpeace's decade-old claims are barred by the applicable statutes of limitation, its RICO claims are inadequate as a matter of law, and its state law tort claims fail on the merits. Accordingly, the Court should dismiss the *Complaint* in its entirety.

THE COMPLAINT CONTAINS CONCLUSORY ASSERTIONS, NOT FACTS

In the "Statement of Facts" section of its *Consolidated Opposition*—and throughout its brief—Greenpeace attempts to remedy the deficiencies in its *Complaint* by exaggerating the facts actually pled. These embellishments are a feeble and transparent attempt to supply the critical inferences that are absent from Greenpeace's *Complaint*. *See* **Appendix A** (chart comparing the exaggerations in the brief with the paragraphs of the *Complaint* purportedly cited in support)

Stripped of the unsubstantiated "factual" glosses present in the *Opposition*, the *Complaint* contains only descriptions of particular activities allegedly undertaken by BBI and implausible inferences—unsupported by any factual basis—that Ketchum knew of or participated in those acts. *See* Plaintiff's Opposition to the Motions to Dismiss ("Opp.") at 5-7 (Doc. No. 66). But without facts sufficient to support a reasonable inference, the conclusory assertions in the *Complaint* fail to state a claim against Ketchum. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice."). For example:

- Greenpeace alleges that BBI employees provided briefings to Ketchum, and argues, without any factual basis, that these briefings ***must have*** included discussions regarding the means through which BBI was gathering information. Opp. at 8-9 (citing Compl. ¶¶ 53, 82, 84, 89, 90, 93);

- Likewise, Greenpeace claims Ketchum's involvement in the "Dow Trends Tracking Team" reveals knowing participation in an illegal enterprise but supplies no facts to suggest that this Team was formed to do anything other than monitor trends. Opp. at 8-9;

- Greenpeace infers that Ketchum ***must have known*** of illegal activity simply because it received BBI reports that included the boilerplate disclaimer "[t]he following information was supplied by confidential sources and should be used with great discretion." *See* Compl. ¶ 51;

- Greenpeace further speculates that Ketchum knew of illegal activity by BBI because a Ketchum employee (Tom Donnelly) allegedly requested that BBI use personal email addresses when sending him information. *See* Compl. ¶ 94. But the *Complaint* itself acknowledges that this request was made in the context of a Federal Trade Commission review of a proposed Dow merger—and provides no facts suggesting knowledge of or participation in any illegal activities targeting Greenpeace. *See id.*; *see also* Opp. at 6-8.

- Greenpeace asks the Court to infer that certain unspecified documents Greenpeace itself threw away were worth $5,000 or more simply because BBI was paid "more than $125,000" for services it provided over a two year period. *See* Opp. at 9. But the *Complaint* itself pleads no facts regarding the actual value of the items allegedly stolen, *see* Compl. ¶ 95, and it acknowledges that BBI was paid for a variety of work during these two years, including "dozens" of reports and briefings, Compl. ¶ 84, and "hundreds of hours collecting and analyzing information." Compl. ¶ 22. Greenpeace also acknowledges in its *Complaint* that only some of BBI's information gathering efforts were unlawful, Compl. ¶ 153, but yet the pleading makes no attempt to quantify the dollar value of the allegedly illegal services.

At root, all of the claims against Ketchum require this Court to assume that "[t]here are no legitimate means by which Defendants could have obtained … inside information." Opp. at 2; *see also id.* at 8 ("inside information" was "[o]bviously [o]btained through" improper means). But plaintiff's own lawsuit, as alleged, undercuts this inference because it is premised *entirely* on purportedly confidential information obtained from "a BBI insider." Opp. at 13 n.12. Without that crucial inference, plaintiffs' attempt to link Ketchum (and Dow) to the alleged actions of BBI cannot meet the *Twombly*/*Iqbal* standard. Likewise, unrelenting appeals to innuendo and hindsight cannot paper over the glaring factual holes in plaintiff's theory—that because *BBI* did X, Y, and Z, Ketchum must not only have known but directed it and planned it from the start. Absent a factual basis from which to conclude that Ketchum not only knew of BBI's activities but directed them, Greenpeace has failed to meet its burden to plead "factual content that allows

the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged," *Iqbal*, 129 S. Ct. at 1949 (emphasis added).

ARGUMENT

I. GREENPEACE'S CLAIMS ARE TIME-BARRED AND THIS IS CLEAR FROM THE FACE OF THE COMPLAINT

Greenpeace does not dispute that the alleged acts underlying its *Complaint* occurred over a decade ago, and it concedes that none of the applicable statutes of limitations are longer than four years. Opp. at 11. Because Greenpeace's claims accrued when the alleged injuries occurred, they are all time-barred—regardless of whether Greenpeace actually knew of its injuries because courts "'presume[] that property owners know what and where their assets are.'" *Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 890 F.2d 456, 461-62 (D.C. Cir. 1989) (citation omitted). But, even if the "discovery rule" applies—delaying accrual—the claims are still untimely because, in light of the scope and nature of the injuries alleged, Greenpeace knew or should have known of its injuries long ago. Indeed, by alleging that its environmental campaigns were disrupted and that its documents were stolen from its premises, Greenpeace effectively *concedes* constructive awareness of the alleged injuries. Moreover, Greenpeace fails to plead particular facts showing that the Defendants lulled Greenpeace into an untimely filing with additional acts on top of the alleged tortious conduct.

A. Greenpeace's Claims Accrued When The Alleged Injury Occurred And Are Barred By the Statutes of Limitations

In D.C., the default rule is that "'[w]here the fact of an injury can be readily determined, a claim accrues *at the time that the plaintiff suffers the alleged injury*.'" *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 321 (D.C. 2008) (citation omitted) (emphasis added). Thus, for example, the D.C. Circuit has held that a claim for conversion accrues under D.C. law at the time of the conversion "'***regardless of the plaintiff's ignorance***'" because "'the law of conversion

presumes that property owners know what and where their assets are'" even if "'the property owner … fails to discover his or her ownership rights until after the period has run.'" *Kuwait Airways*, 890 F.2d at 461-62 (emphasis added) (citation omitted); *see also Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 335 (D.D.C. 2007) (conversion claim "accrues immediately" under D.C. law). Under D.C.'s default accrual rule, Greenpeace's state law claims are untimely.[1]

This court should likewise apply the injury accrual rule to Greenpeace's RICO claims. Contrary to Greenpeace's assertion, Opp. at 11 n.3, the Supreme Court has *never* held that the discovery rule applies to RICO claims and has *explicitly reserved* the possibility that it does not. *See Rotella v. Wood*, 528 U.S. 549, 554 n.2 (2000) (noting that "a straight injury occurrence rule" may apply). Indeed, as Ketchum explained it its *Motion to Dismiss*, the Supreme Court has imported the Clayton Act's four-year statute of limitations to RICO claims, and its rationale in doing so supports adopting the Clayton Act's accrual rule as well. *See* Mot. at 9; *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152 (1987).

Thus, because the injury accrual rule applies and Greenpeace's alleged injuries occurred a decade ago, all of its claims are untimely.[2]

B. Even If The Discovery Rule Applies, Greenpeace Knew or Should Have Known of the Alleged Injuries Years Ago

---

[1] Although the D.C. Court of Appeals applies the discovery rule in a narrow class of cases involving latent harms such as "medical, legal and architectural malpractice actions and products liability actions where the injury is a latent disease," the court has expressly "declined to declare the [discovery] rule applicable in all cases." *Diamond v. Davis*, 680 A.2d 364, 380 n.15 (D.C. 1996); *see also Kuwait Airways*, 890 F.2d at 460-61; *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1202 (D.C. 1984). Tellingly, Greenpeace does not cite a single D.C. case where the discovery rule was extended beyond these discrete factual scenarios—none of which involve intentional torts—and the factors D.C. courts have taken into account in extending the discovery rule by analogy do not justify doing so here. Contrast *Burns v. Bell*, 409 A.2d 614, 616-17 (D.C. 1979), with *Woodruff v. McConkey*, 524 A.2d 722, 727-28 (D.C. 1987).

[2] Indeed, if this Court finds that any one of Greenpeace's intertwined claims accrues, then all of the others likewise accrue. *See Tolbert v. Nat'l Harmony Mem'l Park*, 520 F. Supp. 2d 209, 212 (D.D.C. 2007); *Morton v. Nat'l Med. Enters., Inc.*, 725 A.2d 462, 471 (D.C. 1999).

Even if this Court decides to extend the discovery rule to this case, Greenpeace's claims should still all be dismissed because, on the facts alleged, Greenpeace knew or with reasonable diligence should have known of the injuries it alleges. *See* Mot. to Dismiss at 9-11. As discussed, Greenpeace must at least be on inquiry notice given the nature of the injuries alleged and the scope of the alleged conspiracy. *Id*. Greenpeace cannot plausibly contend otherwise. In *Diamond*, for example, the court explained that a plaintiff alleging he had been defrauded in a land transaction was, "as matter of law, on notice of the fraud because the information showing the fraud was available in the public land records at the time of the purchase." 680 A.2d at 376 (discussing *Dist.-Fla. Corp. v. Penny*, 66 F.2d 794, 795 (D.C. Cir. 1933)); *see also*, *e.g.*, *Retz v. Siebrandt*, 181 P.3d 84, 89-90 (Wyo. 2008) ("An account holder is charged with knowledge of the state of her account."). Similarly, here, Greenpeace was "on notice" as a matter of law, because the evidence of the alleged injuries (e.g., missing documents and physical intrusions) was readily available to it—by, for example, examining whether its property was missing. *See Hobson v. Wilson*, 737 F.2d 1, 33 & n.102 (D.C. Cir. 1984). Indeed, documents allegedly taken from the "trash" were, according to Greenpeace itself, still within Greenpeace's premises and control at the time—in "secluded" and "protected" storage areas. Opp. at 42 (citing Compl. ¶¶ 27-29). Having asserted a privacy interest in those documents, *id.*, Greenpeace cannot plausibly claim it had no way to determine if the documents remained in its possession. Despite Greenpeace's repeated suggestions, the "clandestine" nature of the alleged acts (e.g., under "dark of night" and without "break[ing] down doors," Opp. at 13) does not make the injuries self-concealing (like fraud) because Greenpeace is still fully capable of discovering the theft and physical intrusions.

Furthermore, one of Greenpeace's primary claims is that its environmental campaigns

were "undermined" and "interfered with." *See, e.g.*, Compl. ¶¶ 143, 157. This amounts to an admission that Greenpeace had reason to know that it had suffered an injury even if it did not yet have "easy access to all the information necessary to support a viable claim." *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1229-30 (D.C. Cir. 1996). Because Greenpeace alleges no actions (interference or otherwise) after January 2001, its claims are barred. Conversely, if there was no interference to begin with, then Greenpeace's injury is illusory and its claims fail for that reason. Greenpeace cannot have it both ways—either it adequately pled injury and was on inquiry notice of its claims or it failed to plead an injury at all.

C. Greenpeace Has Not Adequately Pled Fraudulent Concealment

Finally, there is no reason to toll the statute of limitations because Greenpeace has not met its burden to plead fraudulent concealment with the particularity required under Federal Rule of Civil Procedure 9(b). *See Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994); *see also Guerrero v. Gates*, 442 F.3d 697, 706-07 (9th Cir. 2006). The doctrine of fraudulent concealment presupposes that Greenpeace has (or should have) discovered the alleged injuries but was lulled into an untimely filing by additional affirmative acts of the Defendants. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (Posner, J.). Greenpeace's attempt to invoke fraudulent concealment fails for two fundamental reasons.

First, Greenpeace pled no affirmative acts by the Defendants "'above and beyond the wrongdoing upon which [Greenpeace's] claim is filed.'" *Guerrero*, 442 F.3d at 706 (citation omitted); *see also Sprint Commc'ns*, 76 F.3d at 1226; *Drake v. McNair*, 993 A.2d 607, 619 (D.C. 2010); *accord Pena v. A. Anderson Scott Mortg. Grp., Inc*. 692 F. Supp. 2d 102, 108 (D.D.C. 2010). It is not enough for Greenpeace to allege that Defendants did not "break down doors to gain access to Greenpeace's offices" or "announce that they were sending people to observe Greenpeace." Opp. at 13. Greenpeace would have the court "merge[] the [alleged] substantive

wrong" with the fraudulent concealment doctrine, "effectively eliminating the statute of limitations." *In re Park West Galleries, Inc., Mktg. & Sales Practices Litig.*, No. 09-2076RSL, 2010 WL 2640250, at *3 (W.D. Wash. June 25, 2010).

Second, Greenpeace has pled no facts showing the Greenpeace somehow "relied on the [Defendants'] misconduct in failing to file in a timely manner," which is an essential element of a fraudulent concealment claim. *Guerrero*, 442 F.3d at 706-07; *see also* 51 Am. Jur. 2d *Limitation of Actions* § 185 (2010) ("The statute of limitations cannot be tolled under the doctrine of fraudulent concealment unless the wrongdoer has conveyed to the plaintiff a knowing or intentional, material misrepresentation upon which the plaintiff reasonably, and without knowledge, acted or relied."). Absent well-pled facts that it has been *affirmatively misled*—not simply that it failed to discover its injury—Greenpeace cannot claim the statute of limitations was equitably tolled. *See Cada*, 920 F.2d at 451. Greenpeace cannot now invoke fraudulent concealment to resurrect its long-barred state and federal claims. All of its claims are untimely and should be dismissed.

II. GREENPEACE'S RICO CLAIMS MUST BE DISMISSED

The arguments in the *Consolidated Opposition* only highlight the deficiencies in Greenpeace's RICO claims—its only basis for federal jurisdiction. These claims fail because Greenpeace lacks statutory standing to sue under 18 U.S.C. § 1964(c), and it has not adequately plead that Ketchum violated 18 U.S.C. § 1962(c) or § 1962(d). *See* Mot. to Dismiss at 13-27.

A. Greenpeace Has Not Pled Statutory Standing

1. Greenpeace Has Not Alleged a Concrete Financial Harm

The "injuries" Greenpeace alleges in its *Complaint* and recounts in its *Consolidated Opposition* do not constitute the kind of "concrete financial harm" RICO requires. *See* Mot. to Dismiss at 14-16. Greenpeace first claims that it suffered actual financial harm because its

"ability to control the timing and release of its announcements, reports, and actions is a form of currency" and "the loss of its ability to control the release of its own intellectual property diminishes its value." Opp. at 16. Second, Greenpeace contends that Dow and Ketchum were able to anticipate its advocacy efforts using information acquired by BBI, and that their ability to anticipate Greenpeace's strategy injured Greenpeace's business by making its advocacy more difficult or less effective. Opp. at 17-18.[3]

These alleged harms are not sufficient to support standing under RICO because they are not concrete financial injuries sustained by Greenpeace's business or property. Indeed, Greenpeace does not even allege such an injury: Greenpeace does not say it received less income or other revenue, or that its out of pocket costs were increased, nor does it allege that it lost *the opportunity to obtain income* because of the alleged unlawful acts. Instead, it asserts that the value of its internal information was reduced,[4] and that its advocacy efforts were thwarted. Opp. at 16-19. Neither theory is sufficient. *See, e.g.*, *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992) (en banc) ("The only injury [plaintiff] has alleged is a 'decrease in the value of her property' due to the racketeering activity next door. We do not believe that such a decrease entails financial loss to [plaintiff]."); *Buyers & Renters United to Save Harlem v. Pinnacle Grp. NY LLC*, 575 F. Supp. 2d 499, 507 (S.D.N.Y. 2008) ("RICO injury requires injury to 'business or property,' and does not encompass activity that merely 'conflicts with the group's

---

[3] In its *Complaint*, Greenpeace also argues that investigation costs provide a basis for standing, but it does not appear to pursue this point in its *Opposition*. Nor should it. *See* Mot. to Dismiss at 17, 18-19.

[4] *Carpenter v. United States*, 484 U.S. 19 (1987), a criminal insider trading and wire fraud case, is not relevant to Greenpeace's standing to bring a civil RICO claim. Greenpeace's conclusory assertion that its "ability to control the timing and release of its announcements, reports, and actions is a form of currency," and thus somehow has value, Opp. at 16, is wholly unsupported and undeserving of the assumption of truth. The information in *Carpenter* was valuable to the Wall Street Journal because the WSJ uses it to sell newspapers. In contrast, here, Greenpeace does *not* allege it uses its information for its

mission and renders their objectives more difficult to achieve.'" (citation omitted)).[5]

The cases Greenpeace cites in its *Consolidated Opposition* do not support its argument that an amorphous harm to organizational objectives is sufficient to confer RICO standing. In *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994), *NOW's* standing under RICO was not before the Court. *Id.* at 255 ("Respondents are correct that only DWHO and SWHO, and not NOW, have sued under RICO."). And the plaintiff abortion clinics plainly alleged a concrete financial harm—that is, lost revenue from patients and staff being driven away by the defendants' racketeering activity. *Id.* at 256. Likewise, the plaintiff in *Diaz v. Gates* alleged lost wages—again, a concrete financial harm. 420 F.3d 897, 898 (9th Cir. 2005); *see id.* at 900 ("Diaz … has alleged both the property interest and the financial loss. … And his claimed financial loss? He could not fulfill his employment contract or pursue valuable employment opportunities because he was in jail."). Greenpeace's focus on "tangible" vs. "intangible" rights, *see* Opp. at 18 n.24, is a red herring. Because Greenpeace has not alleged any financial harm or lost financial opportunity here, it lacks standing under RICO.

2. Greenpeace Has Not Pled Proximate Cause

Not only does Greenpeace fail to allege a concrete financial harm, but it also fails to identify a legally sufficient causal link between the nebulous injuries it claims and the alleged RICO violation. While Greenpeace claims to have alleged that it was the "direct[] target[]" of Defendants' actions, Opp. at 20, its theory of causation is still too attenuated to establish

---

own financial gain; its theory is that *Dow saves* money by being able to anticipate Greenpeace's public relation campaigns.

[5] *Buyers & Renters* is directly on point, *see* 575 F. Supp. 2d at 507, and Greenpeace's strained attempt to distinguish it, *see* Opp. at 18-19, is unavailing. Whether Greenpeace was the direct object of the alleged racketeering activity is irrelevant to whether it has alleged a *concrete financial loss* and thus has standing under RICO. Absent more, allegations that racketeering activities frustrated an organization's advocacy efforts or campaigns, or made its goals more difficult to achieve do not meet this standard, as *Buyers & Renters* correctly holds.

proximate cause. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 271-74 (1992) (explaining that a link that is "too remote," "purely contingent," or "indirect[]" is insufficient).

Here, Greenpeace fails to plead *any* details about which environmental campaigns were disrupted, when, how, or by whom, so its theory of proximate cause is wholly speculative. Likewise, its nebulous claim that its ability to control the release of its information is "currency" is too speculative to support standing absent a plausible explanation of *why* this "currency" has value to begin with and *why* that value was reduced the moment it was allegedly acquired by Ketchum or Dow. *See supra* n.4.

Similarly, Greenpeace's attempt to distinguish relevant case law falls flat. *See* Opp. at 21. As detailed in Ketchum's *Motion to Dismiss*, RICO requires a causal connection between the violation of the statute and the plaintiff's injury:

> [T]he remedy Plaintiffs seek—which appears to be the value of the materials that [defendant] allegedly purloined from the construction site—flows from the underlying thefts (which violate state, not federal, law) and not from the predicate RICO offense of *transporting* the goods in interstate commerce. Without a causal connection between the RICO violation and Plaintiffs' injury, Plaintiffs are without redress under § 1964.

Guerrero v. Katzen, 571 F. Supp. 714, 722 (D.D.C. 1983) (emphasis in original), *aff'd*, 774 F.2d 506 (D.C. Cir. 1985). *Katzen* stands for the proposition that if an alleged injury is caused by an underlying state law tort (e.g. conversion) rather than the statutory predicate offense (interstate transportation of stolen goods valued in excess of $5000), RICO's proximate cause requirement is not satisfied.

The Supreme Court did not—as Greenpeace claims—"supersede" this principle in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). *See* Opp. at 21. Instead, *Sedima* directly and unambiguously establishes the rule that civil RICO requires a plaintiff to plead that he was injured by the *predicate offense* underlying the statute (not an underlying state tort):

> Where the plaintiff alleges each element of the violation, the compensable injury *necessarily is the harm caused by predicate acts* sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

473 U.S. at 497 (emphasis added).[6]

Because Greenpeace has failed to allege a "concrete financial loss" proximately caused by Ketchum, it lacks standing under 18 U.S.C. § 1964(c), and the Court should dismiss its RICO claims.

B. Greenpeace Has Not Pled a Pattern of Racketeering Activity

While Greenpeace claims it alleged a pattern of "closed-ended" continuity, *see* Opp. at 27, its *Complaint* contains no allegations sufficient to plead the pattern required by RICO. *See* Mot. to Dismiss at 22-24. In evaluating closed-ended continuity, the key (often dispositive) factor is the length of the alleged pattern of predicate acts because the Supreme Court has emphasized that a closed-ended pattern can only occur over a "substantial" period of time. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989). Accordingly, this Court and others have used one and a half to two years as a baseline. *See* Mot. to Dismiss at 23-24; *see also* Dow Mot. to Dismiss at 18-20.

Here, the alleged predicate acts are "multiple occasions" of transporting stolen documents from D.C. to Maryland in violation of 18 U.S.C. § 2314.[7] Compl. ¶ 154. Greenpeace does not

---

[6] To the extent Greenpeace claims it has standing based solely on the alleged entry into its facilities and misappropriation of its documents (those thrown away or otherwise), it has likewise failed to plead a concrete financial harm. In neither case does it allege any damage, loss of revenue, increase in expenses, replacement costs, or other concrete financial loss. *See Oscar*, 965 F.2d at 787 (explaining that because plaintiff failed to plead a basis for claiming a concrete financial loss from the reduction in value she alleged, her claimed loss was "purely speculative").

[7] As explained in Ketchum's *Motion to Dismiss* (at 20-21), Greenpeace fails to plead that the documents allegedly transported across state lines are goods or that they are ordinarily sold in commerce,

allege when these "multiple occasions" occurred or over what period of time. Instead it argues that the Court should infer a pattern from the number and timing of the "D-lines" it alleges, which span roughly two years. *See* Opp. at 26. However, because Greenpeace has not alleged that the "D-lines" involved interstate transportation of documents, *see* Compl. ¶¶ 25-31,[8] a "D-line" is not a predicate act, and the timing of D-lines alleged is not relevant to the pattern analysis. Rather, to sustain Greenpeace's RICO claims, the Court must *assume* that the "multiple occasions" on which documents were allegedly transported to Maryland, Compl. ¶ 154, occurred at the far ends of the period of allegedly unlawful conduct.[9]

This problem is compounded by the fact that Greenpeace fails to allege that $5,000 worth of documents was transported on ***any*** of these "multiple occasions," which 18 U.S.C. § 2314 requires. *United States v. Whetzel*, 589 F.2d 707, 710 (D.C. Cir. 1978) ("[T]he tapes Whetzel transported into Maryland [must] *in each instance* [be] worth at least $ 5,000" because the statutory value threshold is "*an essential element* of the crime charged." (emphasis added)).[10] Indeed, the *Consolidated Opposition* brazenly acknowledges that "[t]he Complaint does not explicitly state that Greenpeace's stolen documents and business information were worth

---

and has likewise failed to plead facts that support such a claim. To the extent nonbinding decisions fail to apply this requirement, they should not be followed. *See* Mot. to Dismiss at 19-21.

[8] Greenpeace merely alleges that it recovered documents from BBI's former investor sometime after April 2008, Compl. ¶¶ 24, 108, but offers no further factual basis for its claim that these documents were taken to Maryland, *see* Compl. ¶ 154.

[9] Post-*Twombly* decisions correctly reject Greenpeace's claim that it need only plead interstate transportation generally, without factual support. *See, e.g., Robinson v. Fountainhead Title Grp. Corp.*, 252 F.R.D. 275, 279 n.4 (D. Md. 2008) ("Robinson also alleges, in a conclusory fashion, that Defendants engaged in '[m]ultiple instances of interstate transport of money converted or fraudulently obtained in violation of 18 U.S.C. § 2314.' The Court will not consider this predicate act based merely on this bare assertion given that Robinson does not explain how or when these interstate transports occurred." (citation omitted)).

$5,000." Opp. at 29. In asking this Court to infer the $5,000 threshold is met, Greenpeace asks this Court to do indirectly what it would not do directly. *See id.* (requesting factual inference based on the amount of money Ketchum paid BBI). So to sustain Greenpeace's claims, the Court must not only assume that documents were transported to Maryland in a pattern spanning the entire two year period, it must also infer that documents worth $5,000 were transported each time. As already noted, Greenpeace has pled no factual basis for such a claim, and its unsupported, conclusory assertion that BBI transported stolen documents (worth $5,000 or more) on "multiple occasions," Compl. ¶ 154, is inadequate to establish a closed-ended pattern.

C. Greenpeace Has Failed to Allege That Ketchum Conducted the Affairs of the Alleged Enterprise Through a Pattern of Racketeering Activity

As Ketchum explained previously, Mot. to Dismiss at 24-26, Greenpeace has not adequately alleged that Ketchum (as distinct from the other Defendants) committed a substantive violation of RICO. For Ketchum to be liable, Greenpeace must show that Ketchum directed or otherwise "willfully caused" the predicate acts alleged. Yet Greenpeace fails to plead facts showing that Ketchum willfully caused BBI to violate 18 U.S.C. § 2314, let alone showing Ketchum willfully caused *multiple* violations sufficient to form a pattern of racketeering activity. *See Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice."); *see also* **Appendix A**. Accordingly Greenpeace's RICO claims should be dismissed.

D. Greenpeace Has Not Pled a RICO Conspiracy

Greenpeace cites several *criminal* cases in support of its RICO conspiracy claim. However, as the Supreme Court explained in *Beck v. Prupis*, those cases are not on point in a

---

[10] Case law allowing prosecutors to aggregate the value of goods stolen in a *single scheme* to support a *single* 18 U.S.C. § 2314 charge does not help Greenpeace, as RICO not only requires two

civil RICO conspiracy case, which requires the plaintiff to establish standing (including a concrete financial injury) and relies on *civil* conspiracy principles. 529 U.S. 494, 500-01 & 501 n.6 (2000); *see also Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) ("Because a conspiracy—an agreement to commit predicate acts—cannot by itself cause any injury, we think that Congress presupposed injury-causing overt acts as the basis of civil standing to recover for RICO conspiracy violations."). As the Court explained in *Beck*, civil conspiracy is not a separate substantive tort but a means of holding co-conspirators liable for an otherwise unlawful act. 529 U.S. at 503 ("'Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort.'" (quoting *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983))). Thus, courts—including the D.C. Circuit—consistently dismiss conspiracy claims in civil RICO cases when the plaintiff has failed to plead injury from a substantive violation of RICO. *See* Mot. to Dismiss at 26-27; Dow Mot. to Dismiss at 18-20; *see also Beck*, 529 U.S. at 505-06 (requiring injury from "an act that is independently wrongful under RICO"). The Court should do the same here—both because the underlying substantive claim fails and because Greenpeace's RICO conspiracy claim fails on its own terms. *See* Mot. to Dismiss at 26-27; *see also Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989) (civil RICO conspiracy claim must plead agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity).

III. GREENPEACE'S D.C. TORT CLAIMS MUST BE DISMISSED

A. Greenpeace Has Not Pled Vicarious Liability

Greenpeace does not claim Ketchum is directly liable for committing state law torts, but

---

predicate acts, but two over a two-year period. Greenpeace has not pled the statutory value element *at all*, let alone as to several specific acts of transportation over the course of two years.

instead purports to rely on vicarious liability. But Greenpeace has not pled facts plausibly showing Ketchum's liability for conspiracy or aiding and abetting under the *Twombly*/*Iqbal* standard. Greenpeace's conspiracy claims fall short because its factual allegations do not show that Ketchum agreed to commit the torts alleged and Greenpeace's aiding and abetting claim fails because it has not shown Ketchum willfully caused the torts alleged. *See* Mot. to Dismiss at 28-29. Greenpeace attempts to manufacture the necessary inference of Ketchum's knowledge and participation with rhetoric and innuendo. But an "assertion of an unlawful agreement [is] a legal conclusion" that is "not entitled to the assumption of truth" and, to survive a motion to dismiss on a conspiracy or aiding and abetting claim, a plaintiff's allegations must not merely be "consistent with an unlawful agreement." *Iqbal*, 129 S. Ct. at 1950 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Here, because Greenpeace's allegations are "more likely explained by[] lawful … behavior," the *Complaint* fails to "plausibly suggest an illicit accord" under the governing Rule 8 standard. *Iqbal*, 129 S. Ct. at 1950. *All* of Greenpeace's allegations as to Ketchum—the regular briefings, the receipt of confidential information, the payment for services, and so—are fully consistent with (and best explained by) a routine business relationship between a public relations firm and a private security firm. For example, even as alleged in Greenpeace's *Complaint*, BBI nowhere informed Ketchum—in the briefings or otherwise—that it was operating illegally. Although Greenpeace ominously suggests that conducting "opposition research" necessarily involves illicit methods, it is a thoroughly unremarkable practice used alike by politicians, corporations, and non-profit organizations as a means of pursuing their respective interests.

At root, for Greenpeace's vicarious liability allegations to pass muster, this Court must make the untenable inference that, simply because BBI obtained *confidential* information,

Ketchum must have intended and understood that BBI used *illegal* means to do so. According to Greenpeace, there is no other way that that BBI could obtain confidential information about Greenpeace's activities so Ketchum knew or should have known BBI's methods. Opp. at 2; *see also, e.g.*, *id.* at 8 ("inside information" was "[o]bviously [o]btained [t]hrough" improper means). However, Greenpeace fails to explain why this is obvious and its claim belies common sense. Indeed, Greenpeace *itself* premises this entire suit on information gleaned from "a BBI insider." Opp. at 13 n.12. Without this false premise, Greenpeace's claims of vicarious liability collapse under the *Twombly*/*Iqbal* standard.

Because Greenpeace has failed to plead that Ketchum is vicariously liable and did not plead that Greenpeace is directly liable, all of its state law tort claims must be dismissed.

B. Greenpeace Has Not Pled Claims For Invasion of Privacy, Conversion, Trespass To Chattels, or Misappropriation of Trade Secrets

Even if Greenpeace had pled vicarious liability, its *Complaint* is still deficient.

1. Invasion of Privacy

Greenpeace cannot sue for invasion of privacy, and its strained attempts to argue otherwise are unavailing. Greenpeace does not cite a single case recognizing the cause of action it asserts. *See* Opp. at 41-43. Accordingly, the court should follow precedent and authoritative treatises, which explicitly recognize that corporations cannot sue for invasion of privacy because the common law right to privacy is a personal right. *See S. Air Transp., Inc. v. Am. Broad. Cos.*, 670 F. Supp. 38, 42 (D.D.C. 1987) (corporations "ha[ve] no right of privacy"); Restatement (Second) of Torts § 652I cmt. c (1977) ("A corporation, partnership or unincorporated association *has no personal right of privacy*. It has therefore no cause of action for [invasion of privacy]." (emphasis added)); William L. Prosser, *Handbook of the Law of Torts* § 117 at 815 (4th ed. 1971) (same); *cf. FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1183-85 (2011) (holding

corporations do not have personal privacy rights under FOIA, citing Restatement (Second) of Torts § 652I); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 814 (9th Cir. 2002) ("Privacy is personal to individuals and does not encompass any corporate interest.") (citing Restatement (Second) of Torts § 652I).[11]

Even accepting Greenpeace's premise for the sake of argument, Greenpeace has offered no grounds to justify departing from long-settled precedent: it cannot distinguish the privacy interests it asserts from those possessed by any other incorporated entity, and the primary privacy interest it asserts is in documents it threw away. *Cf. Danai v. Canal Square Assocs.*, 862 A.2d 395, 402-03 (D.C. 2004) (no expectation of privacy in trash made accessible to third parties).[12]

2. Conversion and Trespass to Chattel

Greenpeace's claims for conversion and trespass to chattel are preempted by the D.C. Uniform Trade Secrets Act ("UTSA"). Mot. to Dismiss at 31-32. The UTSA "broadly" displaces any tort actions that provide "'civil remedies for misappropriation of a trade secret.'" *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1363 (Fed. Cir. 2005) (addressing identical Virginia law). Here, Greenpeace's conversion and trespass to chattel claims are "clearly predicated on misappropriation of trade secrets," *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 84 (D.D.C. 2007), because Greenpeace alleges that the Defendants, in stealing confidential information, "diminish[ed] the value of [Greenpeace's] intellectual property." Compl. ¶ 127 (conversion), ¶ 134 (trespass to chattel). Indeed, Greenpeace, in arguing that its

---

[11] *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), is not on point, as it addresses when a third party corporation may intervene to oppose the disclosure of documents seized from it in a criminal investigation and filed under seal in district court, *not* whether a corporation can bring an independent tort suit for invasion of privacy. *See id.* at 295-96. Consistent with this principle, the third party in *Hubbard* intervened "to 'protect [its] constitutional rights,'" *id.* at 301 (citation omitted), not any alleged common law rights. *Id.* at 305.

[12] In any event, as explained in Ketchum and Dow's *Motions to Dismiss*, a one-year statute of

"[t]rade [s]ecrets are [a]dequately [p]led," implicitly acknowledges that it believes the allegedly stolen "confidential information" qualifies as "trade secrets." *See* Opp. at 50 (citing Compl. ¶¶ 46-49). Thus, Greenpeace's conversion and trespass to chattel claims are preempted because they are "based on the same facts that comprise the trade secret misappropriation claim." *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284, 1297 n.13 (11th Cir. 2003) (conversion claims preempted); *see also Digital Envoy, Inc. v. Google, Inc*., 370 F. Supp. 2d 1025, 1033-34 (N.D. Cal. 2005) (claims preempted because they are "*based on the identical nucleus of facts* as those alleged in [its] misappropriation claim") (emphasis added); *Hutchison v. KFC Corp*., 809 F. Supp. 68, 71 (D. Nev. 1992) (claims preempted because they involve information that the plaintiff believes is a trade secret).

Contrary to Greenpeace's assertion, Opp. at 46, courts readily dismiss claims in these circumstances without further factual development because the UTSA "preempts claims that are based upon the unauthorized use of information, regardless of whether that information meets the statutory definition of a trade secret." *Mortg. Specialists, Inc. v. Davey*, 904 A.2d 652, 664 (N.H. 2006). Indeed, *Convera*, the leading case in this district applied this very rule. *Convera*, 479 F. Supp. 2d at 84 ("Because the Court reads the conspiracy claims in the Third Amended Complaint to *allege* conspiracy to misappropriate trade secrets, both the common law and statutory conspiracy claims are preempted." (emphasis added)); *see also, e.g*., *Chatterbox, LLC v. Pulsar Ecoproducts, LLC*, No. CV 06-512-S-LMB, 2007 U.S. Dist. LEXIS 34022, at *12 (D. Idaho May 9, 2007) (dismissing claims based on "same nucleus of facts" as trade secrets claim).

In addition, Greenpeace's conversion claim fails because the intangible property rights at issue here cannot support claims for conversion or trespass to chattel. *See* Mot. to Dismiss at 32-33; *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 511-12 (D.C. Cir. 2009)

---

limitations bars Greenpeace's invasion of privacy claim. Mot. to Dismiss at 31 n.15.

(rejecting trespass to chattel claim for harm to an intangible right). Greenpeace does not dispute that the gravamen of its claim is that BBI stole intangible property interests. *See* Mot. to Dismiss at 32; Opp. at 44-49. Instead, Greenpeace merely argues that it is an "unsettled" question whether intangible property interests can be converted. But the case upon which Greenpeace relies, *Pearson v. Dodd*, acknowledges that "[t]he general rule has been that ideas or information are *not* subject to legal protection [under the law of conversion]." 410 F.2d 701, 707 (D.C. Cir. 1969) (emphasis added). And none of the exceptions that case identifies applies here because the information Greenpeace seeks to protect is not the type used in commercial competition or "sold as a commodity on the market." *Id.* at 707-08.

Thus, Greenpeace's trespass to chattel and conversion claims should be dismissed.

3. Misappropriation of Trade Secrets

Greenpeace's misappropriation of trade secrets claims fails because it has not alleged that its confidential information has "independent economic value" resulting from being kept secret from business competitors, as required under the D.C. UTSA. D.C. Code § 36-401(4)(A); *see* Mot. to Dismiss at 33-35. Greenpeace argues, Opp. at 51, that the confidential information here is a trade secret because it is akin to a confidential customer list, as in *BlueEarth BioFuels LLC v. Hawaiian Elec. Co.*, No. 09-00181, 2011 WL 563766, at *14 (D. Haw. Feb. 8, 2011). But it is not enough, as Greenpeace asserts, that the Defendants were allegedly willing to spend thousands of dollars on the information and derived a benefit from it. A company's confidential customer list can be a trade secret only because there is value in keeping it secret *from a commercial competitor who could use it in competition with the company itself. See* Mot. to Dismiss at 32-35. For example, in *BlueEarth BioFuels*, the company had "developed valuable contact lists, know-how, and information for conducting its business" and this information gave the company "'a distinct advantage *over its competitors who do not know or use them.*'" 2011

WL 563766, at *14 (emphasis added) (citation omitted). Here, Ketchum is not a "competitor" of Greenpeace in any way relevant to trade secret protection—e.g., competition for market share and income—and Greenpeace does not allege that the confidential information gives it any sort of commercial advantage. Therefore, Greenpeace has not stated a claim for misappropriation of trade secrets. *See* Mot. to Dismiss at 32-35.

C. Greenpeace Has No Claim for Disgorgement or Other Equitable Remedies

In its *Consolidated Opposition*, Greenpeace attempts to amend its *Complaint* to add claims for equitable relief, including disgorgement and injunctive relief. *See* Compl. ¶¶ 115, 121, 130, 137. That tactic is not appropriate. *Arbitraje Casa de Cambio, S.A. de C.V. v. United States Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) ("'It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.'" (citation omitted)). Moreover, the *remedy* requested is not relevant to whether Greenpeace has adequately pled its claims and does not cure its failure to do so. *See, e.g.*, Restatement (Third) Restitution and Unjust Enrichment 39 (Tentative Draft No. 4, Apr. 8, 2005) ("The law of restitution …. does not answer the question whether the defendant's question is wrongful in a particular case.").

In any case, equitable relief is not appropriate here. An injunction is not appropriate because Greenpeace has not alleged any facts that support a claim of continuing or future harm. *Nat'l Conference on Ministry to the Armed Forces v. James*, 278 F. Supp. 2d 37, 42 (D.D.C. 2003) (injunctive relief requires a showing of irreparable harm). Likewise, Greenpeace has failed to allege facts that justify disgorgement.[13] *Avianca, Inc. v. Corriea*, No. 85-3277 (RCL), 1992 WL 93128, at *12 (D.D.C. Apr. 13, 1992) ("[D]isgorgement is an extraordinary remedy,

[13] Greenpeace does not claim disgorgement is an appropriate remedy under RICO, *see* Compl. ¶¶ 158, 163, and the D.C. Circuit has squarely held it is not. *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1197-202 (D.C. Cir. 2005); *see also United States v. Philip Morris USA Inc.*, 566 F.3d 1095,

and if it is ever appropriate, it should be used only in situations where the deterrence rationale is so important that only disgorgement will serve a socially useful purpose."). This is true not least of all because Greenpeace's claims rest primarily on information obtained from documents it threw away. *Cf. Danai*, 862 A.2d at 402-03.

CONCLUSION

For the foregoing reasons, and those stated in Ketchum's and the other moving Defendants' memoranda in support of their *Motions to Dismiss*, Ketchum respectfully requests that the Court grant Ketchum's *Motion to Dismiss*.

Dated: April 8, 2011

Respectfully submitted,

/s/ Abid R. Qureshi

Roger S. Goldman (D.C. Bar No. 333294)
Abid R. Qureshi (D.C. Bar No. 459227)
Gabriel K. Bell (D.C. Bar No. 987112)
John S. Cooper (D.C. Bar No. 991575)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200 (Telephone)
(202) 637-2201 (Facsimile)
Email: abid.qureshi@lw.com

Attorneys for Ketchum, Inc.

1147 (D.C. Cir. 2009) (affirming disgorgement opinion), *cert. denied*, 130 S. Ct. 3501 (2010).

APPENDIX A

EMBELLISHED CLAIMS IN THE OPPOSITION BRIEF	FACTUAL "SUPPORT" ACTUALLY PLED IN THE COMPLAINT
"*Amidst a firestorm of negative publicity, Dow turned to public-relations giant Ketchum, Inc. ('Ketchum') which recommended the hiring the now defunct Beckett Brown International, Inc. ('BBI'). Compl. ¶ 20.*" Opp. at 4.	"Much of the unlawful surveillance activity described herein was conducted for the Corporate and Public Relations Defendants' benefit by a private security firm called Beckett Brown International ('BBI'). BBI was formed in August 1995. Most of the key executives and employees at BBI were former officers of the Secret Service and the Central Intelligence Agency. By 1998, BBI had 22 employees working in five different divisions." Compl. ¶ 20.
"*Dow, Ketchum, and BBI agreed to target Greenpeace and obtain confidential information via the employment of illegal means. [Compl.] ¶ 79.*" Opp. at 4.	"During the same period, BBI and the individual defendants were engaged in many of the same (and other very similar) activities targeting Greenpeace on behalf of defendants Dow Chemical and Ketchum. Each of these Defendants participated and acted in furtherance of a conspiracy to obtain confidential information from Greenpeace by unlawful means." Compl. ¶ 79.
"*Ketchum knew that these regular briefings included information related to illegal events; in December 1999, Ketchum-employee Tom Donnelly warned BBI to forward its updates to two Hotmail addresses because his Ketchum email was subject to review by the Federal Trade Commission. [Compl.] ¶ 94.*" Opp. at 8.	In December 1999, Tom Donnelly of Ketchum warned BBI that it should not send email to his normal business address at Ketchum, but should instead use one of two Hotmail addresses. Donnelly was aware that Ketchum's records might be reviewed by the Federal Trade Commission in the course of investigating a proposed Dow merger and wanted to be sure that information coming from BBI would not be seen. Donnelly provided two email addresses: one based on his name and a second, anonymous address for 'really sensitive information.'" Compl. ¶ 94.
"*Third, the information about Greenpeace gathered by BBI was not only used by BBI and Ketchum in connection with Dow, it was also used by BBI and Ketchum to try and secure new clients for their surveillance and 'public relations' work. Compl. ¶ 54.*" Opp. at 10.	"This information was not only used by BBI, Dezenhall and Ketchum in connection with CONDEA Vista and Dow, it was also used by at least BBI and Dezenhall to try to secure new clients for their surveillance and 'public relations' work. … In August 1998, Ward and Richard Beckett of BBI had a 'marketing meeting' with Ketchum Public Relations in Ketchum's Washington, D.C. offices. … During this same period, BBI's records reflect marketing efforts and plans directed at other major manufacturers that had been the subject of Greenpeace environmental campaigns, including Boise Cascade, PPG, Monsanto and General Electric." Compl. ¶ 54.

EMBELLISHED CLAIMS IN THE OPPOSITION BRIEF	FACTUAL "SUPPORT" ACTUALLY PLED IN THE COMPLAINT
"BBI and the Individual Defendants were handsomely rewarded for their illegal efforts to obtain information on Greenpeace. Between October 30, 1998 and January 31, 2001, Ketchum paid BBI 22 separate payments totaling more than $125,000. Id. ¶ 95. The evidence indicates that these charges were ultimately paid by Dow. Id. ¶ 96." Opp. at 9.	"Between October 30, 1998 and January 31, 2001, Ketchum paid BBI more than $125,000 to obtain confidential information from Greenpeace for its client Dow Chemical. Ketchum's payments to BBI include payments on the following dates: January 11, 1999 - $5,000; January 15,1999 - $7,000; May 17, 1999 - $4,030; May 18,1999 - $4,030; June 22, 1999 - $10,000; July 20, 1999 - $5,000; August 9, 1999 - $5,000; September 20, 1999- $17,000; November 15,1999 - $10,000; January 7, 2000 - $10,000; January 14, 2000 - $5,000; February 9, 2000 - $5,000; April 27, 2000 - $5,000; May 1,2000 - $5,000; May 8, 2000- $4,000; July 10, 2000 - $4,000; July 14,2000 - $4,000; August 15,2000 - $4,000; October 10, 2000 - $8,000; January 10, 2001- $4,000; January 22, 2001 - $4,000; January 30, 2001 - $4,000." Compl. ¶ 95.
"The Complaint does not explicitly state that Greenpeace's stolen documents and business information were worth $5,000. But the Complaint contains an allegation that Defendants paid hundreds of thousands *of dollars for the stolen goods. Compl.¶¶ 95-96, 126."* Opp. at 29.	"Correspondence between Ketchum and BBI indicates that these charges were ultimately paid by Dow Chemical. For example, in November 2000, Ketchum advised BBI that Dow 'closes its books early' and asked BBI for all Global Trends Tracking Project invoices so that Ketchum '[c]ould ... bill Dow for all services rendered in 2000 by the end of the year.'" Compl. ¶ 96.
"Here, Plaintiffs allege that hundreds of thousands of dollars changed hands between Defendants as payment for the information obtained through the Individual Defendants' trespassing. Compl. ¶¶ 95-96." Opp. at 39.	"Defendants used the internal and confidential documents taken from Plaintiff, as well as the intellectual property contained therein, to anticipate and weaken Plaintiff's environmental campaigns and otherwise frustrate Plaintiff's organizational purpose. Knowledge of what Greenpeace intended to do, and how Greenpeace planned to allocate resources, was valuable information even when it did not relate directly to Defendants' activities, because it removed the uncertainty about whether Defendants' activities would be scrutinized, challenged or brought into the public spotlight by Greenpeace. Indeed, because this information had economic value to Defendants, Defendants funded these illegal activities, paying hundreds of thousands of dollars for hundreds of intrusions and briefings over an extended period of time." Compl. ¶ 126.

EMBELLISHED CLAIMS IN THE OPPOSITION BRIEF	FACTUAL "SUPPORT" ACTUALLY PLED IN THE COMPLAINT
"Greenpeace adequately alleges that Ketchum participated in the conduct of the enterprise, providing facts that show its key role in financing, designing, and implementing the enterprise's schemes. Compl. ¶¶ 90, 93, 95." Opp. at 24.	"Following the meeting in Annapolis, Ketchum established the 'Dow Global Tracking System' and created a 'Dow Chemical Trends Tracking Team' comprised of employees of BBI, Dow Chemical, Ketchum and the research firm Allis Information Management. The team - including Tom Donnelly of Ketchum and Joy Hutchinson and Michael Webster of Dow Chemical - held meetings and tracked the activities of Greenpeace, particularly regarding genetic engineering issues." Compl. ¶ 90. "On October 6, 1999, the Dow Trends Tracking Team held a strategy meeting at Dow Chemical's headquarters in Midland, Michigan. At the meeting, the Team decided that BBI would prepare weekly reports for Ketchum, which would incorporate the information into reports produced for the Team. These reports were being prepared for Ketchum and Dow at the same time that BBI was unlawfully securing confidential information on their behalf from Greenpeace's offices. During the last three months of 1999 and throughout 2000, Slenker produced weekly or bi-weekly reports for Ketchum for the Dow Trends Tracking Team." Compl. ¶ 93. "Between October 30, 1998 and January 31, 2001, Ketchum paid BBI more than $125,000 to obtain confidential information from Greenpeace for its client Dow Chemical. Ketchum's payments to BBI include payments on the following dates: January 11, 1999 - $5,000; January 15, 1999 - $7,000; May 17, 1999 - $4,030; May 18, 1999 - $4,030; June 22, 1999 - $10,000; July 20, 1999 - $5,000; August 9, 1999 - $5,000; September 20, 1999 - $17,000; November 15, 1999 - $10,000; January 7, 2000 - $10,000; January 14, 2000 - $5,000; February 9, 2000 - $5,000; April 27, 2000 - $5,000; May 1, 2000 - $5,000; May 8, 2000- $4,000; July 10, 2000 - $4,000; July 14, 2000 - $4,000; August 15, 2000 - $4,000; October 10, 2000 - $8,000; January 10, 2001- $4,000; January 22, 2001 - $4,000; January 30, 2001 - $4,000." Compl. ¶ 95.

EMBELLISHED CLAIMS IN THE OPPOSITION BRIEF	FACTUAL "SUPPORT" ACTUALLY PLED IN THE COMPLAINT
"The Individual Defendants were directed at regular intervals by Ketchum, [Compl. ¶] 91" Opp. at 25. *"Dow and Ketchum intended for BBI and the Individual Defendants to commit illegal acts. According to Greenpeace's complaint, Dow made clear that it wanted far more than a 'clipping service' that would keep it apprised of Greenpeace's activities by consulting publicly available resources. Compl. ¶ 91. Dow viewed this endeavor as 'opposition research' and was willing to pay considerable sums for what it called 'the rest of the story.' Id. ¶ 92."* Opp. at 54.	"In a memo circulated to 'Dow Global Trends Tracking Team Members,' BBI's responsibility on the team was summarized as 'primarily discussions among activist groups on the issues being tracked.' Donnelly also advised BBI that the Dow Trends Tracking project was 'not a clipping service.' Rather, the purpose of the Trends Tracking reports was 'to provide senior [Dow] managers with a tool that assesses the current issues that Dow has on their [sic] radar screen and provides an analysis of where the issue is likely to go ... If an issue is dormant, the system will show it and Dow will be able to divert resources to more pressing matters.'" Compl. ¶ 91. "Dow encouraged Ketchum to be aggressive in gathering information about its targets. In September 1999 after reviewing a Ketchum report on INFACT (a public interest group currently known as Corporate Accountability International), Dow conveyed disappointment. Dennis Heydanek of Dow's Public Policy Systems communicated to Michael Webster and Joy Hutchinson of Dow: 'This is a start. OPPO research is one of Elin [Miller]'s pet areas of interest … I've always had Mongoven a notch above Ketchum when it comes to getting the 'rest of the story' on a person or an opposition group. If this is what we get for $480,000/yr....' This communication was forwarded by Hutchinson to Tom Donnelly." Compl. ¶ 92.
"Greenpeace has also alleged that the Individual Defendants and Ketchum (as well as Defendant Dezenhall) were trying to market Greenpeace's 'business intelligence.' Compl. ¶ 104" Opp. at 30.	"In March 1999, BBI was working on pitches for a project called 'Active Intelligence Collection' which was described as follows: 'BBI proposes to initiate a discrete [sic], long-term program of active intelligence collection that will provide client with information on the plans and intentions of the international environmentalist movement. This sensitive all-source intelligence collection effort, mounted from outside the US, will be focused on specific foreign-based organizations. Our objective will be to colect [sic] reliable warning and indication information on the specific issues of interest to client. BBI will design all aspects of this program and provide client with regular updates based on the relevant intelligence obtained. Safeguards will be designed into the program to ensure that the client's interest in the environmentalist movement will not be revealed.'" Compl. ¶ 104

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April 2011, a copy of Ketchum's Reply Brief in Support of Its Motion to Dismiss was served electronically by the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF) upon the following persons of record that have appeared in this action:

Victoria S. Nugent
Emmy L. Levens
Kit A. Pierson
Robert Cacace, Jr.
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, NW
Suite 500
Washington, DC 20005-3934

Attorneys for Greenpeace, Inc.

Michael J. Lyle
Steven A. Tyrrell
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, NW - Suite 900
Washington, D.C. 20005

Attorneys for Dow Chemical Company

David J. Lender
James W. Quinn
Jennifer M. Oliver
WEIL, GOTSHAL & MANGES, LLP
767 Fifth Avenue
New York, NY 10153

Attorneys for Dow Chemical Company

Matthew H. Kirtland
Richard C. Smith
Kimberly S. Walker
FULBRIGHT & JAWORSKI, LLP
801 Pennsylvania Avenue, NW
Washington, DC 20004-2623

Attorneys for Sasol North America, Inc.

Dana E. Hill
Thomas A. Clare
KIRKLAND & ELLIS, LLP
655 15th Street, NW
Washington, DC 20005

Attorneys for Dezenhall Resources, LTD.

W. Scott Sonntag
LAW OFFICES OF W. SCOTT SONNTAG, P.A.
7841 Belle Point Drive
Belle Point Office Park
Greenbelt, MD 20770

Attorney for George Ferris

Brinja M. Booth
Roy B. Cowdrey, Jr.
David R. Thompson
COWDREY THOMPSON, P.C.
130 North Washington Street
P.O. Box 1747
Easton, MD 21601

Attorneys for Timothy Ward, Jay Arthur Bly, Michael Mika, and George Ferris

Dated: April 8, 2011

/s/ Abid R. Qureshi

Abid R. Qureshi (D.C. Bar No. 459227)
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200 (Telephone)
(202) 637-2201 (Facsimile)
Email: abid.qureshi@lw.com

Attorney for Defendant Ketchum, Inc.