UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

PLAINTIFF'S OPPOSITION TO THE MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT FILED BY DEFENDANTS DOW CHEMICAL COMPANY, KETCHUM, TIMOTHY WARD, JAY ARTHUR BLY, MICHAEL MIKA AND GEORGE FERRIS

Victoria S. Nugent (D.C. Bar No. 470800)
Kit A. Pierson (D.C. Bar No. 398123)
Emmy L. Levens (D.C. Bar No. 997826)
Robert Cacace (D.C. Bar No. 999006)
COHEN, MILSTEIN, SELLERS & TOLL, PLLC
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005-3934
T: (202) 408-4600
F: (202) 408-4699

John P. Relman (D.C. Bar No. 405500)
Reed N. Colfax (D.C. Bar No. 471430)
RELMAN, DANE & COLFAX PLLC
1225 19th Street, N.W.
Washington, DC 20036
T: (202) 728-1888
F: (202) 728-0848

Attorneys for Plaintiff Greenpeace, Inc.

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INTRODUCTION

Greenpeace is among the country's most prominent and influential environmental organizations. Greenpeace has pushed to the fore environmental issues with profound effects on human health and welfare and its foresight has been vindicated repeatedly as citizens, corporations and governments have come to realize the dangers of global warming, environmental degradation and exposure to persistent toxic pollutants. With modest resources, Greenpeace has repeatedly triumphed over better-funded industrial giants in shaping public opinion.

This case is about how two of those corporations – Dow Chemical and CONDEA Vista – responded to Greenpeace's public criticism of their assaults on human health and the environment.

Dow Chemical and CONDEA Vista, aided by their respective public relations companies, Ketchum and Nichols-Dezenhall, hired private investigators – all former intelligence or law enforcement officers – to spy on Greenpeace and its employees and allies. The Defendants conspired to undertake clandestine and unlawful activities that included misappropriation and theft of confidential information and trade secrets, unlawful surveillance, misuse of law enforcement personnel, and, in all likelihood, unlawful breaking and entering into Greenpeace offices and other locations. The purpose of this unlawful scheme was to secure confidential information that would enable Dow Chemical and CONDEA Vista to predict, neutralize, or carry on, untroubled by, Greenpeace's activities and ultimately to enhance their own economic gains.

Defendants Dow, Ketchum, and their private investigators have asked the Court to dismiss Greenpeace's claims against them on numerous grounds. The bases for their motions, however, can be distilled to three central arguments:

First, Defendants argue that Greenpeace has not alleged that facts that establish unlawful activities. However, the facts alleged in the Complaint do not describe normal and legitimate business activities, nor do they reflect community standards governing privacy, property rights, and straightforward dealings. To the contrary, the Complaint describes moles and plants, trespasses, code-breaking, hacking software, and late-night trips between Severna Park, Maryland and Washington, D.C. to transport stolen documents for sorting, review, analysis, and sale. These illegal activities were not mistakes or isolated events; they occurred on hundreds of occasions over a two-year period. This deliberate and persistent scheme fits the definition of racketeering and runs afoul of the standards embodied in the torts of trespass, invasion of privacy, conversion, and trespass to chattel.

Second, Defendants Dow and Ketchum argue that Greenpeace cannot establish knowledge and involvement sufficient to prove a conspiracy that would render them liable for the misconduct of their private investigators. But the facts alleged in the Complaint describe a vertically integrated operation, in which money was passed down (from Dow to the private investigators) and information was passed up (from the investigators to Dow) at frequent intervals, in a continuous cycle, over a period of approximately two years. The types of information passed to Dow, through Ketchum, included Greenpeace's prospective budgets, prospective plans, and Greenpeace's internal debates and dynamics. There are no legitimate means by which Defendants could have obtained this type of inside information, regularly, over such an extended period of time. Nor is there a plausible and legitimate explanation for Dow's decision to hire private investigators based in Annapolis, Maryland, and to pass all payments, and certain communications, to those investigators through a public relations company based in Washington, D.C. Even if Defendants proffered a credible explanation, the resulting factual

disputes could not be resolved on a motion to dismiss without the benefit of discovery.

Third, Defendants argue that even if everything alleged in the Complaint is true, Greenpeace's claims should nonetheless be dismissed because Greenpeace has no damages. Here, too, Defendants are wrong. Greenpeace has alleged, and can recover, several types of damages: compensation for the diminished value of its confidential business information; compensation for the interference with its operations, campaigns, and organizational mission; and, compensation for costs incurred in investigating the nature and scope of Defendants' intrusions and misappropriations. Greenpeace is entitled, further, to disgorgement of the income Defendants derived from their unlawful activities. Given that hundreds of thousands of dollars were exchanged between the Defendants in payments for Greenpeace intelligence, Defendants cannot credibly argue that nothing of value was taken from Greenpeace.

Dow, Ketchum, and their private investigators (as well as Defendants Sasol North America and Dezenhall Resources) ask the Court to look at each fact alleged in the Complaint and to decide whether that fact proves each Defendant's culpability. That approach is inconsistent with the procedural rules and substantive law governing this case. Plaintiff's Complaint provides a detailed and compelling account of Defendants' activities, pieced together with the fragmentary, but incriminating, evidence Plaintiff has been able to collect without the benefit of discovery. Plaintiff is entitled to the support of the reasonable inferences that can be drawn from the facts alleged. Viewed as a whole, the facts alleged create a mosaic that reveals the *modus operandi* of this conspiracy: a multi-faceted effort to steal confidential business information from a non-profit organization whose protest activity Dow Chemical regarded as a threat to its profits.

FACTS

Greenpeace Challenges Dow's Environmental Destruction; Dow, Ketchum, and the Individual Defendants Agree to Target Greenpeace

The Dow Chemical Company ("Dow") is one of the world's largest producers of chlorine and a significant producer of genetically modified organisms ("GMOs"). Compl. ¶¶ 8, 80. Chlorine production creates dioxin, a carcinogen, and between 1995 and 1999 Greenpeace published numerous reports identifying the dangers of dioxin and criticizing Dow for using chlorine in its manufacturing process. *Id.* ¶ 81. During that same period, Greenpeace also aggressively campaigned against the spread of GMOs in the United States, seeking federal regulation of the GMO industry that would require labeling of food products that contained GMOs. *Id.*

Amidst a firestorm of negative publicity, Dow turned to public-relations giant Ketchum, Inc. ("Ketchum") which recommended hiring the now defunct Beckett Brown International, Inc. ("BBI"). Compl. ¶ 20. BBI, an investigative firm run by former Secret Service officers and members of the Central Intelligence Agency, identified Greenpeace as a "target" and, according to an internal BBI memorandum, would provide "insight into the scheduling of environmental protests and actions of the group, corporate targets, the tracking of maritime cargo by the group, and internal political issues of the group." *Id.* ¶ 22.

Dow and Ketchum hired BBI to procure confidential information from Greenpeace. Compl. ¶ 81. Dow, Ketchum, and BBI agreed to target Greenpeace and obtain confidential information via the employment of illegal means. *Id.* ¶ 79. Indeed, Dow was quite explicit in its wish to obtain highly confidential information unlikely available via legal means; Dennis Heydanek of Dow's Public Policy Systems indicated that "OPPO research" involved getting the

"rest of the story" on a group – which was the reason companies like Dow were willing to spend hundreds of thousands of dollars for it. *Id.* ¶ 92.

In Furtherance of that Agreement, the Individual Defendants Commit Numerous Illegal Acts

In September 1998, BBI began surveiling its "target" on behalf of Dow and Ketchum. Compl. ¶ 82. Individual Defendants Timothy Ward, Jay Arthur Bly, Michael Mika, and George Ferris (collectively the "Individual Defendants") personally directed and performed many of the surveillance activities, including "D-Lines." *Id.* ¶ 25, 26. "D-Lines" referred to the theft of confidential documents and internal records from dumpsters, recycling bins, or via moles sent to Greenpeace's offices under false pretenses. *Id.* ¶ 25.

Evidence exists that during the first two years of BBI's surveillance, BBI and the Individual Defendants conducted over *100* D-Lines at Greenpeace's U Street offices. Compl. ¶¶ 26, 28, 85. During that time, Greenpeace's trash dumpster and recycling bins were located on a loading dock, sheltered inside the back façade of the building, on private property. *Id.* ¶¶ 27, 28. In order to steal documents placed in Greenpeace's trash and recycling, the Individual Defendants and their employees donned black clothing and, under the cover of darkness, trespassed onto Greenpeace's private property. *Id.* ¶ 27. In the event their illegal activities were detected, the Individual Defendants employed a D.C. police officer, James Daron, to project authority and avoid any suspicion. *Id*. ¶¶ 26, 86. Records from BBI show that Daron participated in at least 55 D-Lines. *Id*. ¶ 26.

In May 2000, Greenpeace moved to 702 H Street, NW, Washington DC. Compl. ¶ 29. After the move, Greenpeace's trash and recycling bins were located on private property, *inside* the building, in a *locked* ground-floor room. *Id.* That room was secured by a locked, exterior, roll-down door and could only be accessed via an alley, which, itself, was secured by a locked

gate. *Id.* Individual Defendants Ward, Bly, Mika, and their agents conducted more than 15 documented D-Lines at Greenpeace's H-street location. *Id.* ¶¶ 29, 85.

In addition to conducting D-Lines, evidence exists that BBI employees or contractors broke into Greenpeace's office. Recovered from BBI's files were lists of three- and four-digit security codes used to unlock Greenpeace's U Street office. Compl. ¶ 35. Greenpeace alleges that BBI employees or contractors tested these codes and confirmed which codes granted access to Greenpeace's office. *Id.* Greenpeace alleges that BBI obtained the layout of its offices in 1998, when Ward hired Mary Lou Sapone to masquerade as a prospective campaign volunteer and gather information on Greenpeace. *Id.* ¶ 33. On November 18, 1998, Ms. Sapone visited Greenpeace, toured the office, and later reported back to Defendants regarding the layout and personnel. *Id.*

Through these means, Defendants obtained a variety of confidential, internal, Greenpeace documents, including: campaign planning documents; confidential donor letters and records of contributions; internal communications; confidential legal memoranda; privileged attorney-client communications; financial reports, balance sheets and budgets; passwords for private electronic mailing lists; Greenpeace credit card account numbers; and highly-sensitive personal information about Greenpeace employees such as Social Security Numbers, personal bank account statements, and employment agreements. Compl. ¶ 46. Many of these documents were tightly guarded within Greenpeace and would only have been accessible to a limited number of employees; such documents would not have been discarded as garbage or recycling in the ordinary course of business and could not have been obtained merely by rummaging through bins. *Id.* The vast majority of the Greenpeace documents that were ultimately recovered from BBI were in pristine condition, giving rise to the inference that these documents were not taken

from trash dumpsters, but rather from recycling receptacles or, as alleged below, from inside Greenpeace's office. *Id.* ¶ 31.

BBI employed several different techniques to procure information on Greenpeace. Greenpeace alleges that BBI planned to use staff and contractors to pose as job applicants and interns to get inside targets' offices. Compl. ¶¶ 98, 103, 106. Evidence also exists that BBI employees tailed various Greenpeace allies as well as Greenpeace's then-Executive Director. *Id.* ¶ 34.

Finally, Greenpeace alleges that the Individual Defendants went further – into electronic surveillance of Greenpeace. Greenpeace recovered from BBI's files a folder labeled "Wire Tap Info." Compl. ¶ 37. A former BBI employee testified under oath that in the course of his employment at BBI he would record telephone conversations. *Id.* ¶¶ 38. Ward and Mary Lou Sapone considered acquiring, and may have acquired, a computer program called Data Interception by Remote Transmission ("DIRT"), which allows the user to "monitor and intercept data from any PC in the world anytime you want." *Id.* ¶ 41. A proposal to acquire this type of hacking software was presented to BBI's directors. *Id.* BBI purchased the services of NetSafe, Inc., a company that specialized in computer intrusion and electronic surveillance, to assist with the Greenpeace project. *Id.* ¶ 42. BBI referred to its electronic surveillance efforts as Technical Surveillance Counter-Measures or "TSCM." *Id.* ¶ 43. Usually, this term refers to methods of *detecting* electronic surveillance such as sweeping for bugs. *Id.* However, BBI created an account under the label TSCM to refer to its offensive electronic surveillance activities. *Id.* Defendant Mika began charging his work to the TSCM in January 1999, concurrent with the period of time he worked on the Greenpeace surveillance project. *Id.* ¶ 44. BBI employees met

with Ketchum to discuss TSCM and wrote a proposal for "intrusion and survey" for Ketchum and its client as well. *Id.*¶ 45.

Dow and Ketchum Receive Inside Information Obviously Obtained through Theft, Subterfuge, and Improper Surveillance and Pay Generously for It

Information gleaned from stolen documents and other inside information was shared with Ketchum and Dow, and Defendant Ward personally briefed Dow and Ketchum regarding the surveillance of Greenpeace. Compl. ¶¶ 53, 82, 84. Indeed, throughout 1998 and 1999, Ward had more than 20 in-person meetings with representatives from Ketchum. *Id.* ¶ 84. In addition to these in-person briefings, BBI sent Ketchum documents relating to the "Dow Project" on at least six occasions. *Id.* ¶ 88. 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. *Id.* ¶ 94. Donnelly specified one Hotmail address with his name on it for regular communications and another, anonymous, Hotmail address for the "really sensitive information." *Id.*

Executives from Dow were also briefed directly regarding the ongoing efforts of the conspiracy. On July 28, 1999, at Loew's Hotel in Annapolis, Maryland, BBI briefed representatives from Ketchum and Dow directly to discuss the ongoing surveillance of Greenpeace and other environmental organizations. Compl. ¶ 89. Meeting attendees included Dow's then-Global Vice President for Public Affairs, Elin Miller, as well as Defendants Ward and Bly. *Id.* After this meeting, Ketchum created the "Dow Global Tracking System," in order "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." *Id.* ¶¶ 90-91.

Tom Donnelly of Ketchum, Joy Hutchinson and Michael Webber of Dow, and employees of BBI comprised the "Dow Chemical Trends Tracking Team." *Id.* ¶ 90. The Team held regular meetings, including a meeting at Dow's headquarters in Midland, Michigan on October 6, 1999, to discuss their ongoing "tracking" efforts. *Id.* ¶¶ 90, 93. Additionally, throughout the period in which BBI committed various unlawful acts to procure confidential information from Greenpeace, BBI-employee Sarah Slenker produced weekly or bi-weekly reports for the Dow Trends Tracking Team. *Id.* ¶ 93.

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.

In addition to the allegations that specifically relate to the Dow-Ketchum account, Greenpeace's Complaint includes other facts that demonstrate a general *modus operandi*.

First, BBI records reflect plans to use staff and subcontractors posing as job applicants and interns to infiltrate target organizations for sustained periods of time. Compl. ¶¶ 98, 106. BBI records also reflect plans to obtain generic work uniforms, fake IDs, and equipment that could be used to generate work order forms and photo credentials – all of which would be used to enter target offices under false pretenses. *Id.* ¶ 103.

Second, correspondence between Ward and Bly indicates BBI was quite willing to work around locked gates and use moles to obtain information from targets as soon as Ketchum provided a budget – *i.e.*, financial authorization – for its clandestine activities. *Id.* ¶¶ 98-99.

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 to secure new clients for their surveillance and "public relations" work. Compl. ¶ 54. BBI documents record Ward's "marketing GP [Greenpeace] network" including an August 1998 marketing meeting with Ketchum. *Id.* 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. *Id.*

Fourth, during roughly the same period that BBI, Dow, and Ketchum were spying on Greenpeace, BBI was working with Defendants Dezenhall and CONDEA Vista to do the very same thing. Compl. ¶¶ 56-78.

ARGUMENT

In considering a Rule 12(b)(6) motion, the Court "must accept as true all of the factual allegations contained in the complaint," *Atherton v. District of Columbia*, 567 F.3d 672, 681 (D.C. Cir. 2009), and grant the plaintiff, "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *see also Utterback v. Geithner*, No. 09-2236, 2010 WL 4985894, at *2 (D.D.C. Dec. 9, 2010). Defendants' Motions must be denied if Greenpeace has pled factual allegations that are "enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Allen v. U.S. Dept. of Educ.*, No. 10-1101, 2010 WL 5080019, at *2 (D.D.C. Dec. 14, 2010).

I. PLAINTIFF'S CLAIMS ARE TIMELY FILED

Defendants and Plaintiff agree that the limitations period for Greenpeace's state law claims is three years and the limitations period for the claims stated under RICO is four years.[1] Defendants have argued that Plaintiff's claims were not filed within the limitations period and thus should be dismissed. As alleged in the Complaint, Greenpeace filed suit within three years of learning that it had been the target of Defendants' corporate espionage; thus, Greenpeace's claims were timely filed under applicable state and federal law.

A. Plaintiff's Claims Did Not Accrue Until April 2008 Under The Discovery Rule.

The discovery rule applies to claims based upon D.C. law where, as here, "the relationship between the fact of injury and the alleged tortious conduct is obscure when the injury occurs."[2] A similar injury discovery rule applies to Greenpeace's federal RICO claim.[3] Under the discovery rule, Greenpeace's claims did not accrue until April 2008, when Greenpeace was contacted by a *Mother Jones* reporter investigating a story about corporate espionage. This case was filed in November 2010, less than three years later. Because the shortest limitations period applicable here is three years, Defendants' limitations defense must be rejected.

Under the District's discovery rule, a cause of action does not accrue until the plaintiff has knowledge of "(1) an injury; (2) its cause in fact; and (3) some evidence of wrongdoing [by

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[1] One exception to this general agreement exists. Dow argues that the limitations period for Greenpeace's invasion of privacy claim is one year. Dow Mem. at 5 n.5. For the reasons set forth at Part II.C below, Dow is not correct.

[2] *See, e.g.*, *Diamond v. Davis*, 680 A.2d 364, 379 (D.C. 1996) (citation omitted). There is no basis for Ketchum's statement that the discovery rule only applies to cases involving latent injuries, and the cases it cites do not support that proposition. *See* Ketchum Mem. at 8 n.5, 9.

[3] *See Rotella v. Wood*, 528 U.S. 549, 553 (2000) (holding that federal discovery rule applies to RICO claims); *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) (federal discovery rule applies to federal claims absent contrary instruction from Congress regarding accrual of claims).

defendants]."[4] Because a plaintiff must exercise "reasonable diligence under all of the circumstances" to "investigate matters affecting her," the date of accrual is the date when Greenpeace in the exercise of such diligence "would have known" of each of the three elements.[5] Similarly, under the federal discovery rule, a claim does not accrue "until the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action."[6]

Determining the accrual date (also termed the date of "inquiry notice") requires a "highly factual analysis" and "the relevant facts may be such that it may be reasonable to conduct no investigation at all."[7] The date of accrual is a question of fact for a jury to decide and a complaint may only be dismissed based on the statute of limitations if it "is barred on its face."[8] Even where the "basic facts" are undisputed, whether a plaintiff exercised reasonable diligence to discover its claim in light of those facts is "for the jury to resolve" if it is not beyond dispute.[9] Moreover, it is a defendant's burden, as the proponent of an affirmative defense, to prove that a plaintiff did not exercise reasonable diligence and would have discovered its claim earlier had it done so.[10]

The Complaint demonstrates with a wealth of detailed allegations why it was reasonable for Greenpeace not to commence its investigation until April 2008. The guiding principle of Defendants' unlawful scheme was to act covertly so that Greenpeace would not detect the theft

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[4] *Diamond*, 680 A.2d at 379; *Smith v. Brown & Williamson Tobacco Corp.*, 108 F. Supp. 2d 12, 15 (D.D.C. 2000).
[5] *Diamond*, 680 A.2d at 381.
[6] *Connors*, 935 F.2d at 341 (internal quotation marks and citation omitted).
[7] *See, e.g.*, *Diamond*, 680 A.2d at 370, 372; *see McQueen v. Woodstream Corp.*, 244 F.R.D. 26, 33 (D.D.C. 2007) (denying motion to dismiss where defendant did not explain why an earlier investigation, or any investigation at all, was warranted).
[8] *Brin v. S.E.W. Investors*, 902 A.2d 784, 800 (D.C. 2006); *see Firestone v. Firestone*, 76 F.3d 1205, 1208-09 (D.C. Cir. 1996) ("As we have repeatedly held, courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint.").
[9] *Brin*, 902 A.2d at 800.
[10] *See id.*; *McQueen*, 244 F.R.D. at 33; *Diamond*, 680 A.2d at 374 n.10.

of its confidential information or any other wrongdoing by Defendants, or even any exceptional improvement in Defendants' abilities to predict and defuse Greenpeace's campaigns.[11] For example, Defendants stole documents (from secure locations) that were scheduled to be removed in any event (but by private trash and recycling vendors). Compl. ¶¶ 27-29. They did so in the dark of night, using off-duty police officers to help gain access to Greenpeace property and deflect any suspicions an accidental observer might have about theft. *Id.* ¶¶ 26-27. They did not break down doors to gain access to Greenpeace's offices, but instead tested security code combinations to find the right ones. *Id.* ¶ 35. They did not announce that they were sending people to observe Greenpeace by obtaining positions with the organization, but instead had their agents lie about what they were doing and why. *Id.* ¶ 33. Nor was there any reason for Greenpeace to suspect that the success of its campaigns had been affected by the systematic theft of its confidential information instead of by the ordinary and lawful factors that regularly affect the success of political activities. Indeed, the very *modus operendi* of all of Defendants' actions was to avoid suspicion of injury, wrongdoing, and the identity of the wrongdoers. Greenpeace knew nothing of Defendants' activities until an investigative reporter told the organization that it had been one of BBI's targets. *Id.* ¶ 108.[12]

In the face of Greenpeace's detailed allegations, Defendants offer conclusory assertions that given the scale of their unlawful acts, Greenpeace should have been suspicious and investigated years earlier as a matter of law. *See* Ketchum Mem. at 9-10. To agree, at a minimum the Court would have to usurp the jury's prerogative and reject both the allegations of the Complaint and the reasonable inferences that can be drawn from them. Moreover, even if

[11] *See Diamond*, 680 A.2d at 376 (evaluation of plaintiff's diligence should "take[] into account deceptive actions on the part of the defendant").

[12] The reporter only learned of BBI's activities when a BBI insider revealed this information. Compl. ¶ 24.

traces of Defendants' activities had been detected, neither the allegations of the Complaint nor Defendants' motions suggest how a reasonable investigation would have led Greenpeace to suspect – of all the corporations and private investigators in the country – the corporations and individuals who are the defendants here, an essential component of the discovery rule criteria.[13]

The Complaint shows that Greenpeace exercised reasonable diligence under all of the circumstances in commencing its investigation upon learning of BBI's activities. Therefore, its prior lack of knowledge about the three elements that constitute notice under the discovery rule may not be second-guessed on a motion to dismiss. Under the discovery rule, its claims did not accrue until April 2008 and are therefore timely presented to the court.

B. Defendants' Affirmative Acts of Concealment Tolled The Limitations Period.

Even if the discovery rule did not apply, the statute of limitations was tolled until April 2008 because of Defendants' concerted efforts to conceal their wrongdoing.[14] The D.C. Court of Appeals has explained that "[i]n cases involving alleged misrepresentation or concealment, there is an obvious overlap between the discovery rule and the tolling doctrine."[15]

The tolling doctrine applies where "the defendant [has] done something of an affirmative nature designed to prevent discovery of the cause of action," and "any statement, word or act which tends to suppress the truth raises the suppression to that level."[16] Phrased differently, the requirement is for "some trick or contrivance intended to exclude suspicion and prevent

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[13] *See Reeves v. Eli Lilly and Co.*, 368 F. Supp. 2d 11, 22-24, 27 (D.D.C. 2005) (defendant's summary judgment motion denied under discovery rule where plaintiff knew of her infertility but reasonably did not link it to the drug DES until much later).

[14] *See, e.g., William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191 (D.C. 1980).

[15] *Ray v. Queen*, 747 A.2d 1137, 1141 n.6 (D.C. 2000). Defendants obscure the distinction between the discovery rule and tolling based on concealment, but they are separate doctrines and either one supports Plaintiff's timeliness argument here. *See, e.g., Connors*, 935 F.2d at 340-41 (explicitly not reaching tolling based on concealment because claims were timely under discovery rule).

[16] *William J. Davis, Inc.*, 412 A.2d at 1191, 1192.

inquiry."[17] Defendants' assertions that the Complaint contains no such allegations are meritless. For example, instead of diving into Greenpeace's dumpsters in plain daylight in front of Greenpeace employees, Defendants hired an off-duty police officer to do so in the dead of night. Compl. ¶¶ 26-27. The Complaint is replete with many more examples of how Defendants went out of their way to hide their unlawful acts, taking affirmative steps to prevent any suspicion. These detailed allegations of active concealment are more than enough to satisfy the requirement of particularized pleading under Fed. R. Civ. P. 9(b).[18]

II. PLAINTIFF'S CLAIMS ARE WELL-PLED AND SUPPORTED BY THE DETAILED ALLEGATIONS OF THE COMPLAINT

A. Greenpeace Has Met All of the Requirements for Bringing a Claim under RICO.

1. Greenpeace Has Standing to Bring RICO Claims.

Under the Act, "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue." 18 U.S.C. § 1964(c). Therefore, standing exists where there is an injury, and where that was caused by a RICO violation. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006).

a. Greenpeace Suffered an Injury to Its Business and Property Interests.

To establish standing, a plaintiff must have "been injured in [its] business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). The injury requirement is not to be interpreted narrowly to limit private claims under the statute. *See id.* at 498. Courts considering whether an injury establishes RICO standing may

[17] *Larson v. Northop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994) (citations and quotation marks omitted).
[18] Plaintiff does not concede that Rule 9(b) applies here. The D.C. Circuit has explained that a plaintiff does not have to plead fraudulent concealment in its complaint because limitations is an affirmative defense. *See Connors,* 935 F.2d at 343 n.12.

look to state law to determine whether a particular interest amounts to property.[19] Greenpeace asserts that its intellectual property was stolen by Defendants and that Defendants' misconduct interfered with its campaigns, compromised the security of its facilities, and undermined its organizational mission. Compl. ¶¶ 157, 127.

The Supreme Court has held in no uncertain terms that "confidential business information" qualifies as property. *Carpenter v. United States*, 484 U.S. 19, 25-26 (1987) (noting that "intangible nature" of newspaper's confidential business information "does not make it any less 'property' protected by the mail and wire fraud statutes"). Indeed, the Court concluded that "an important aspect" of such information is its exclusivity; a business has the right to decide how and when to disclose such information. *See id.* at 26-27. Greenpeace's confidential documents – including work-product related to its advocacy, legal memoranda, financial records and reports, and personal employee information – were stolen.[20] Compl. ¶ 123, 154. The information was transported interstate and then shared with multiple parties – either digested in reports or in its original form. *Id.* ¶ 154. Greenpeace's ability to control the timing and release of its announcements, reports, and actions is a form of currency; the loss of its ability to control the release of its own intellectual property diminishes its value. *Carpenter*, 484 U.S. at 26-27. As a result, Greenpeace suffered an actual financial loss in the value of its property. That this loss must be quantified by a fact-finder does not make it any less concrete or

[19] *See Diaz v. Gates*, 420 F.3d 897, 899 (9th Cir. 2005) (relying on *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992)). In *Diaz*, for example, the Ninth Circuit sitting *en banc* found that the purported RICO injury – a wrongly incarcerated plaintiff's loss of employment opportunities and wages – "amount[ed] to intentional interference with contract and interference with prospective business relations, both of which are established torts under California law." *Id.* at 900.

[20] As discussed in detail below, these materials were Greenpeace's property at the time they were stolen. Therefore, any argument that Greenpeace suffered no injury to property because its confidential business information was abandoned must be rejected.

actual for standing purposes;[21] Greenpeace was injured and actually suffered financial loss, and therefore its claims do not rely on speculative or hypothetical losses.

Dow's reliance on *Lopez v. Council on American-Islamic Relations Action Network, Inc.*, 657 F. Supp. 2d 104 (D.D.C. 2009), does not dictate a different outcome. In that case, the injury was characterized as "speculative at best," where it was founded upon the theory that an attorney's potential failure to file certain cases harmed his clients in some concrete way. *Id.* at 114. Such an injury failed to allege that plaintiffs sustained damage "in some quantifiable way." *Id.* In contrast, Greenpeace alleges quantifiable damage in a diminishment of the value of its property and interference with its business, and submits that the appropriate time to prove the exact amount of such damages is at trial.

Additionally (and in the alternative), Defendants' schemes injured Greenpeace by interfering with its business. In *National Organization For Women v. Scheidler*, 510 U.S. 249 (1994) ("*NOW*"), the Supreme Court concluded that a complaint survived a motion to dismiss where it alleged that RICO violations "induce[d] clinic staff and patients to stop working and obtain medical services elsewhere." *Id.* at 256.[22] The *NOW* complaint alleged that such conduct "has injured the business and/or property interests" of the plaintiffs. *Id.* (quoting complaint). Here, Greenpeace maintains that the regular and repeated infiltration of its premises and theft of its property represents an injury to its business interests. Compl., ¶ 157. This injury exists even if Defendants did not foil a specific Greenpeace project related to Dow. Greenpeace has alleged,

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[21] *See, e.g., New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 248 F.R.D. 363, 371 (D. Mass. 2008) ("For RICO claims, 'Where injury is established, damages need not be demonstrated with precision.'"); *Reuther v. Smith*, No. 01-3625, 2002 WL 1303119, at *6 (E.D. La. June 12, 2002) ("[T]he remainder of the damages alleged, although their quantification may be difficult, are not so intangible as to be insufficient to confer standing.").

[22] *See also Farmers & Merchants Nat'l Bank v. San Clemente Fin. Group Sec., Inc.*, 174 F.R.D. 572, 582 (D.N.J. 1997) ("[B]usiness property is injured, within the meaning of § 1964(c), if the § 1962 misconduct of defendant causes delay, added expenses and inconvenience to the business's functions.").

and will prove through evidence developed during discovery, that a part of its influence over corporations stems from its role as a watchdog. But if a company like Dow were to learn through inside information, for instance, that Greenpeace intended to focus more resources on ancient forest conservation than dioxin in the coming year, that deterrent effect would be lifted.[23]

Defendant Ketchum argues that Greenpeace's injuries are not sufficiently tangible or concrete to satisfy RICO's standing requirement. Ketchum Mem. at 15-16; *see also* Dow Mem. at 14. This argument is flatly contradicted by numerous RICO cases including, but not limited to, *NOW* and *Diaz*.[24] Ketchum's reliance on case law from a New York district court for the contrary conclusion reflects only a confusion between standing's injury and causation requirements. Relying on *Buyers and Renters United to Save Harlem v. Pinnacle Group NY LLC*, 575 F. Supp. 2d 499 (S.D.N.Y. 2008), Ketchum argues that interference with a plaintiff's business mission and campaigns cannot provide the basis for RICO standing. *See* Ketchum Mem. at 16. However, in that case a tenants' advocacy group was not permitted to bring a RICO

[23] Ketchum explained the value to Dow of systematically collecting intelligence like this: "[it] provide[s] senior managers with a tool that assesses the current issues that Dow has on their 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.

[24] *See also, e.g., Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 648 (2008) (Supreme Court sustained injury of loss of "opportunity to acquire valuable liens"); *Elemary v. Philipp Holzmann A.G.*, 533 F. Supp. 2d 116, 142 (D.D.C. 2008) ("the destruction of [plaintiff's] professional reputation and hence, her source of income" established an injury that supported standing); *Formax, Inc. v. Hostert*, 841 F.2d 388, 390 (Fed. Cir. 1988) (theft of trade secrets can support RICO claim). Defendant Ketchum cites cases from the Seventh Circuit and Federal Circuit to support the proposition that an injury to a "valuable intangible property interest" cannot provide the basis for RICO standing. *See* Ketchum Mem. at 15 (citing *Evans v. City of Chicago*, 434 F.3d 916, 932 (7th Cir. 2006) and *Litton Sys., Inc. v. Ssangyong Cement Indus. Co.*, 107 F.3d 30 (Fed. Cir. 1997)). Properly understood, these cases rely on *dicta* from the Ninth Circuit that stands for the unremarkable proposition that alleging an injury to a valuable intangible property interest is not sufficient without an allegation of damages. *See Evans*, 434 F.3d at 932 (relying on *dicta* traceable to Ninth Circuit case, *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990)); *Litton*, 107 F.3 at 10 (relying on *Berg*). Further, in *Diaz* an *en banc* Ninth Circuit panel held that an intangible property interest could support RICO standing, and in doing so indicated that *Berg* and its progeny cannot be invoked for the proposition that the property in question must be tangible. *See Diaz*, 420 F.3d at 900 (upholding property interest of "a wrongly incarcerated plaintiff's loss of employment opportunities and wages").

claim against a property developer for injuries suffered by tenants. *Id.* at 507. Even though the association could establish Constitutional standing *via* its members' injuries, it could not use RICO to seek redress for conduct that was antithetical to its mission but had no actual impact on the association. *Id.* Greenpeace's claims are plainly different. The frustration of their business operations, as in *NOW*, was directly caused by misconduct aimed at them. This difference distinguishes the case from *Buyers and Renters*. Additionally, the First Circuit case relied on by *Buyers and Renters* illustrates that misconduct aimed at a corporation will make interference with business operations actionable for that corporation (*e.g.*, Greenpeace), but not necessarily for its patrons. *See Libertad v. Welch*, 53 F.3d 428, 437-38 (1st Cir. 1995) (holding that targeted clinics had RICO standing because they suffered injury to property, but individuals and associations affiliated with clinic do not have standing).

b. Defendants' Conduct Caused Injuries To Greenpeace's Business and Property Interests.

The second inquiry for standing purposes is whether the RICO violation caused the injury. Courts must determine whether the violation "proximately caused" the injury. *Hemi Group, LLC v. City of New York, N.Y.*, 130 S. Ct. 983, 989 (2010). "[S]ome direct relation between the injury asserted and the injurious conduct alleged" must exist. *Id.* (quoting *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (internal citation omitted)). Proximate cause necessarily requires case-by-case examination, as it is a "flexible concept" that does not lend itself to a rule structure. *See Bridge*, 553 U.S. at 654. In this case, the RICO violation – theft and interstate transportation of property – caused the injuries described above. The diminished value of Plaintiff's property was a direct result of its theft and dissemination to a wide audience.

One way that courts assess proximate cause is by determining whether the plaintiff is the

direct victim of the violation, or whether the plaintiff's injury is derivative of misconduct directed at a third party.[25] Here, there can be no dispute that Defendants' theft and interstate transportation of property (a violation of 18 U.S.C. § 2314) directly targeted Greenpeace. *See, e.g.*, Compl. ¶¶ 30, 85 (alleging that more than 100 D-Lines took place at Greenpeace's offices). As discussed below, and in contravention to Dow's challenge that it was not involved in the multiple predicate acts alleged (*see* Dow Mem. at 16), Dow and Ketchum are liable for the acts carried out by Individual Defendants.[26]

Additionally, courts will determine proximate cause by examining whether an independent cause (rather than the RICO violation) accounts for the plaintiff's injuries.[27] Unlike *Hemi* and other cases relied on by Defendants (*see* Dow Mem. at 15-16, Ketchum Mem. at 18), there are no intervening steps between Defendants' misconduct and the injuries alleged. The theft of Greenpeace's property, and attendant reduction in its value, was a direct result of the D-Lines, infiltration, and surveillance perpetrated against it. No third-party conduct severed the connection between Defendants' violation and the illegal acquisition of Plaintiff's property.

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[25] *See, e.g.*, *Holmes.*, 503 U.S. at 268-69 ("[A] plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover."); *Anza*, 547 U.S. at 458 (determining that defendant was not direct victim); *Bridge*, 553 U.S. at 650 (noting that it would be a "counterintuitive" for "primary and intended victims of the scheme to defraud" to have no RICO cause of action).

[26] Dow insists that Greenpeace plead "what, how, when, and where" the stolen information was used. There is no requirement that transportation of stolen property be pled with particularity. Rather, it is sufficient that, as Greenpeace alleges, there was theft of Plaintiff's property and that theft resulted in the diminishment of the value of that property.

[27] *Hemi*, 130 S. Ct. at 993; *Bridge*, 553 U.S. at 644. For instance, in *Anza*, one steel company (Ideal) sued another (National) under RICO for defrauding the government by misrepresenting its taxable sales. Ideal's theory was that the fraud allowed National to pay fewer taxes which in turn allowed it to lower its prices which in turn made it more competitive, and therefore National injured Ideal by harming Ideal's bottom line. *Anza*, 547 U.S. at 454; 458-59. The Court found this connection to be too attenuated. *Id.* at 459. Supporting its conclusion, the Court observed that the "lowering of [National's] prices in no sense required it to defraud the state tax authority." *Id.* at 458-59. A number of other factors could have prompted National to lower its prices. The same cannot be said in this case.

Ketchum's alternative view of proximate causation must also be rejected. It argues that the transportation itself must be the cause of the injury, and that the underlying theft cannot be the source of the harm. In doing so, Ketchum relies on *Guerrero v. Katzen*, 571 F. Supp. 714, 722 (D.D.C. 1983). That case has been superseded by Supreme Court case law. *Guerrero*'s peculiar interpretation of what conduct must cause the injury relied on the premise that the sustained injuries must be "caused by the distinctive RICO violation, and not simply by the commission of the predicate offenses." *Id.* at 718. Based on this interpretation, plaintiffs in *Guerrero* were made to show "'racketeering injuries' essential to a private RICO claim." *Id.* at 722. In *Sedima*, the Supreme Court held that "[t]here is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement;" rather, "the compensable injury necessarily is the harm caused by predicate acts." 473 U.S. at 480.

2. Greenpeace Has Alleged Facts That Establish The Elements of a RICO Claim.

Plaintiff has adequately pled the elements of RICO. A violation of § 1962(c) requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[28] *See Sedima*, 473 U.S. at 496. Defendants' challenges consistently conflate the need to *plead* certain elements with the later requirement to *prove* aspects of those elements. At the pleadings stage, it is inappropriate to insist that Plaintiff allege and establish the facts that are required to persuade the jury of its case.[29]

a. Each of the Defendants Was a Knowing and Active Participant in the Conduct of the Alleged Enterprise.

Section 1962(c) makes it unlawful "for any person employed by or associated with any

[28] Defendants do not challenge the existence of a RICO enterprise.

[29] *See In re Sealed Case*, 494 F.3d 139, 147-48 (D.C. Cir. 2007) ("[T]o avoid dismissal of his complaint under Fed. R. Civ. P. 12(b)(6), [a plaintiff] need not plead the facts sufficient to prove his allegations and evidence that will ultimately be used at trial.").

enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c). According to the Supreme Court, this "conduct" requirement means that "one is not liable under that provision unless one has participated in the operation or management of the enterprise itself."[30] In rounding out this definition, the Court instructs: "An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management. An enterprise also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery." *Reves*, 507 U.S. at 184. Adopting language from *Reves*, the Court of Appeals stated "a covered party 'must have some part in directing [the enterprise's] affairs.'" *Grant Thornton, LLP v. Office of Comptroller of the Currency*, 514 F.3d 1328, 1333 (D.C. Cir. 2008) (quoting *Reves*, 507 U.S. at 179). "A directing role can, of course, be a minor one." *Grant Thornton*, 514 F.3d at 1333. Indeed, *Reves* does not require that the defendant had "primary responsibility for the enterprise's affairs," nor "*significant control* over or within an enterprise." 507 U.S. at 179 n.4 (quotation marks omitted) (emphasis added by Supreme Court).

Greenpeace alleges that the Individual Defendants participated in the operation or management of the enterprise. As alleged, the Individual Defendants "personally directed and/or conducted D-Lines at Greenpeace's offices." Compl. ¶¶ 26, 85. Plaintiff submits that this fact alone meets the standard set forth in *Reves*. The D-Lines were central to the affairs of the enterprise and in directing and/or conducting them, Individual Defendants participated in the operation of the enterprise. Greenpeace additionally alleges that Individual Defendants and/or

[30] *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993); *see also Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (1990) (*en banc*), *cert. denied*, 501 U.S. 1222 (1991).

their agents engaged in various surveillance, infiltration, and intrusion activities that were designed to acquire Greenpeace information on behalf of its clients. *Id.* ¶¶ 32, 36. Defendant Ward held a leadership role on the operations side of the enterprise. *See id.* ¶ 84. Consistent with this role, he "conducted regular client briefings" with Dow and Ketchum about the stolen information. *Id.* ¶ 51 (briefing Tom Donnelly of Ketchum), 84, 88 (sending UPS packages to Kathy Jeavons, a Ketchum account manager), 90. Defendants Bly and Mika assisted with these briefings, *id.* ¶¶ 51, 84, 90, and thereby participated in the affairs of the enterprise by communicating the activities of the "lower rung" members to the members that controlled the enterprise's affairs.

Each of these tactics – stealing property as participants in D-Lines, surveiling Greenpeace and its affiliates, and maintaining communication between different members of the enterprise's hierarchy – were executed at the direction of Dow and Ketchum. Compl. ¶¶ 100-01, 113, 152(b)-(e). Thus, the Individual Defendants' acts amount to participation in the operation and/or management of the enterprise.[31]

Greenpeace contends that Dow directed the affairs of the enterprise by setting objectives, reviewing the fruits of BBI's sleuthing, and then paying Ketchum, who in turn regularly paid BBI. Dow personally attended planning meetings and briefings with BBI and Ketchum. Compl. ¶¶ 89-91, 93. Dow encouraged Ketchum to be aggressive in conducting "opposition research" and "getting the rest of the story." Compl. ¶ 92. Dow was a participant in the Trends Tracking

[31] *See Reves*, 507 U.S. at 184 (finding that liability for "lower rung" of enterprise will lie where its participation is directed by upper management); *see also MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 979 (7th Cir. 1995) (finding that defendants who were "vital to the achievement of the enterprise's primary goal" participated in RICO enterprise where they "knowingly implemented management's decisions"); *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994) (holding that even where Government failed to establish that collectors for loansharking enterprise participated in decisionmaking, they could be liable for their conduct under RICO in part because they were integral in carrying out the operation).

Team. Compl. ¶ 91. Dow was billed by Ketchum for the work done by BBI. Compl. ¶ 95. Each of these alleged facts support the inference that Dow participated in the conduct of the enterprise.[32]

Similarly, 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. Ketchum was aware that Dow wanted aggressive opposition research and made clear to BBI that Dow expected more than a clipping service. *Id.* ¶¶ 91-92. On its own, this conduct may not be sufficient to show liability, but it does provide inferential support for the allegation that Ketchum provided direction to BBI employees on carrying out their illegal activities, particularly because Ketchum was receiving reports and materials from BBI that were obviously obtained through clandestine and illegal means. *Id.* ¶¶ 51, 89, 94. At one point, Tom Donnelly of Ketchum advised BBI to send "really sensitive information" to an anonymous Hotmail account to avoid inadvertent detection by the FTC (which was reviewing a proposed Dow merger). *Id.* ¶ 94. Ketchum was also regularly briefed by BBI, sometimes on the same days that Ward scheduled "UC briefings" – *i.e.*, undercover briefings – billed to the Dow/Ketchum account. *Id.* ¶ 84 (listing many meetings with BBI). Ketchum paid significant sums of money to BBI. *Id.* ¶ 95. As with Dow, the alleged facts support the contention that Ketchum participated in the conduct of the RICO enterprise.

b. Defendants' Activities Reveal a Pattern of Racketeering Activities.

In defining a "pattern of racketeering activity," RICO requires that two predicate acts

[32] *See United States v. Philip Morris*, 449 F. Supp. 2d 1, 876-77 (D.D.C. 2006) (finding liability for conduct of "high-level employees" and corporate defendants where they participated in meetings that "made key decisions regarding the enterprise's activities"), *clarified by United States v. Philip Morris*, 477 F. Supp. 2d 191 (D.D.C. 2007).

have taken place within ten years of each other. *See* 18 U.S.C. § 1961(5). Courts have further held that "a plaintiff or prosecutor must show that the[se] racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989) (emphasis in original).

i. Defendants' Repeated and Complementary Activities Were Part of a Larger Scheme to Steal Information from Greenpeace.

The relatedness prong is satisfied where the "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240.

As alleged, the predicate acts are related. Greenpeace alleges that the purpose of the theft was to secure confidential records from Greenpeace. Compl. ¶¶ 153-54. This goal was achieved through an integrated, multi-faceted approach: D-Lines, surveillance, and unlawful infiltration. The theft and transportation of stolen goods was the culmination of these activities.

Greenpeace was a common victim throughout – although in order to gather information about Greenpeace, Defendants targeted Plaintiff's employees and affiliates. Compl. ¶¶ 23, 34, 49. The Individual Defendants planned and carried out at least 100 D-Lines at Greenpeace's offices alone to gather information illegally for the Dow and Ketchum. *Id.* ¶ 85. The Individual Defendants were directed at regular intervals by Ketchum, *id.* ¶¶ 91, whom they in turn briefed about the misconduct and sent information to, *id.* ¶¶ 84, 88-90, 93-94; *cf. id.* ¶¶ 97-98 (showing same dynamic in Ketchum-BBI relationship where ultimate client was Kraft Foods Company). Ketchum was directed by Dow. *Id.* ¶¶ 90-92. BBI billed Ketchum; Ketchum paid BBI and billed Dow. *Id.* ¶¶ 95-96. The conspiracy reflects a carefully coordinated, completely related, and highly secretive campaign to steal from Greenpeace.

ii. The Duration and Repetition of Defendants' Activities Establish the Continuity of Their Scheme.

The pattern must also demonstrate continuity. "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J., Inc.*, 492 U.S. at 241. The Supreme Court understands continuity mainly as a temporal concept, and has found that closed-ended continuity can be shown "by proving a series of related predicates extending over a substantial period of time." *Id.* at 242.

According to *H.J. Inc.*, a substantial period of time extends more than "a few weeks or months." *Id.* at 242. The Court of Appeals recently held that a drug scheme lasting from November 21, 2002 to March 16, 2004 – a period of time just shy of 16 months – "spanned a substantial period of time." *United States v. Wilson*, 605 F.3d 985, 1021 (D.C. Cir. 2010). In this case, Plaintiff alleges that the conduct constituting the predicate acts – the D-Lines – continued for a period of at least two years. Compl. ¶ 85, 156. This time period exceeds that found sufficient in *Wilson*, as well as other periods of time that have sustained a RICO pattern.[33]

Defendants cite cases where a longer period of time has been found insufficient to establish closed-ended continuity. *See* Dow Mem. at 19; Ketchum Mem. at 24. As the divergence in case law suggests, the time period is not the dispositive factor. According to the D.C. Circuit, a variety of factors should be considered: 1) the number of unlawful acts, 2) the length of time over which the acts were committed, 3) the similarity of the acts, 4) the number of

[33] *See, e.g., United States v. Cooper*, 91 F. Supp. 2d 60, 75 (D.D.C. 2000) ("The federal courts have found close-ended continuity to exist where predicate offenses occurred over a period of time ranging from fourteen months to more than three years."); *see also Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (concluding that 13 months would represent substantial period of time); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543 (10th Cir. 1993) (seven to 18 months could support jury finding of continuity); *A.I. Credit Corp. v. Hartford Computer Group, Inc.*, 847 F. Supp. 588, 604 (N.D. Ill. 1994) (13 months); *Farberware, Inc. v. Groben*, 764 F. Supp. 296, 306 (S.D.N.Y. 1991) (ten months).

victims, 5) the number of perpetrators, and 6) the character of the unlawful activity. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995). Under this balancing test, "some factors will weigh so strongly in one direction as to be dispositive." *Id.*

In this case, dozens of unlawful acts (enumerated above) took place over a substantial period of time. *See, e.g.*, Compl. ¶ 85. The acts all served a common purpose and bore the hallmark of tight coordination, and therefore were similar. While Greenpeace was the main target of Defendants' activities, Defendants targeted other individuals and entities – Greenpeace allies, Greenpeace employees, and Fenton Communications, as well as a number of other prominent environmental groups. Compl. ¶¶ 23, 34, 40, 49; *cf. Edmondson*, 48 F.3d at 1265 ("we see no basis for defendants' suggestion that a non-plaintiff cannot be a victim").

While the exact number of perpetrators is unknown, it is clear that Defendant Ward managed the operation and other Individual Defendants helped execute it, and Defendants Dow and Ketchum provided direction and funding. Compl. ¶¶ 95-96, 153. These key participants remained constant. Considered together, the conduct was wide-ranging, sustained, and flagrantly violative of the privacy and property rights of Greenpeace and others.[34]

[34] Defendants argue that no RICO "pattern" exists because Plaintiff complains of a single scheme that took place against a single victim in one location. Dow Mem. at 19 (relying in part on *Western Associates Ltd. Partnership v. Market Square Associates*, 235 F.3d 629, 634 (D.C. Cir. 2001)); Ketchum Mem. at 24 (relying on *Edmondson*). The particular holdings of those cases, tailored as they were to the unique facts presented, are not dispositive of Greenpeace's claims. For instance, in *Western Associates*, the court found that the alleged criminal activity had the character of an "ordinary business deal gone sour" and thus that the "closely related accounting misrepresentations involv[ing] a single project" could not elevate a dispute about "cost and income projections" to a RICO claim. *Id.* at 635-36. Similarly, in *Edmondson*, the misconduct was "designed to frustrate one transaction and inflict[ed] a single, discrete injury." *Edmondson*, 48 F.3d at 1263. Like the narrow focus of the scheme in *Western Associates*, the goal of the misconduct in *Edmondson* was to disrupt a lone business deal (the sale of real estate). *Id.* at 1265. The scope of Defendants' schemes – in every dimension – distinguishes this case from those relied upon by Defendants.

c. Defendants' Transfer of Stolen Greenpeace Documents and Intellectual Property from D.C. to Maryland and Beyond Is Interstate Transportation of Stolen Property and Thus Qualifies as Racketeering Activity.

Plaintiff has alleged that Defendants committed many wrongs in furtherance of their scheme. One of these wrongs – the interstate transportation of stolen property and wire fraud – is considered a racketeering activity under RICO.

Criminal liability attaches to "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U.S.C. § 2314. Greenpeace alleges that Defendants knowingly and willingly violated this section by "transporting, transmitting and/or transferring documents in interstate commerce after stealing them from Plaintiff."[35] Compl.¶ 154. The theft of the goods took place in the District of Columbia, and they were then transferred to Maryland. *Id.* Greenpeace alleges that Defendants engaged in these predicate acts more than 100 times, thereby satisfying the requirement to plead more than two acts. *Id.* ¶ 85. Defendants paid hundreds of thousands of dollars for this and related information. *Id.* ¶ 95-96, 100. Therefore, Plaintiff has adequately pled a predicate act for interstate transportation of stolen property.[36]

Defendants challenge this position on two main grounds, neither of which is persuasive. First, they argue that Greenpeace failed to plead that the stolen property was worth more than

[35] Dow objects that Plaintiff has failed to plead the requisite *mens rea* regarding the predicate acts. *See* Dow Mem. at 18 n.15. First, Greenpeace alleges that Defendants "knowingly and willfully committed multiple predicate acts" in violation of 18 U.S.C. § 2314. Compl. ¶ 154. Additionally, this argument again imposes a heightened requirement on Greenpeace at the pleading stage. The case cited by Dow does not make a *mens rea* allegation – which Greenpeace has made, in any event – an irreducible pleading requirement; instead, it concerns what the appropriate jury instruction is for establishing *proof* of knowledge. *See United States v. Alston-Graves*, 435 F.3d 331, 339 (D.C. Cir. 2006).

[36] As discussed, below at Part II.D, Greenpeace's property was stolen, and each Defendant is liable for the theft of that property.

$5,000. Second, they insist that the stolen documents do not qualify as "goods, wares, or merchandise" under the statute. Dow Mem. at 16-18; Ketchum Mem. at 19-22.

The Complaint does not explicitly state that Greenpeace's stolen documents and business information were worth $5,000.[37] But the Complaint contains an allegation that Defendants paid *hundreds of thousands* of dollars for the stolen goods. Compl.¶¶ 95-96, 126. This fact supports the inference that the goods were valued at over $5,000. *See United States v. Bottone*, 365 F.2d 389, 393 (2d Cir. 1966) (ruling that property can be valued by reference to price paid in thieves' market); *cf. Schaffer v. United States*, 362 U.S. 511 (1960) (holding that value of goods may be aggregated when they are related yet transported in separate shipments).

Further, the stolen property qualifies as "goods" under 18 U.S.C. § 2314. Courts agree that for a stolen item to fall within the scope of the statute, it must ordinarily be the subject of commerce. *In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971); *see also United States v. Seagraves*, 265 F.2d 876, 880 (3d Cir. 1959). "It is well-settled that when proprietary business information is affixed to some tangible medium, such as a piece of paper, it constitutes 'goods, wares, or merchandise' within the meaning of § 2314." *United States v. Riggs*, 739 F. Supp. 420 (N.D. Ill. 1990) (summarizing federal authority).[38]

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[37] "In order to state a claim, and thereby survive a Rule 12(b)(6) motion to dismiss, a complaint must contain either direct or inferential allegations sufficient to state all elements of a cause of action." *M.K. v. Tenet*, 99 F. Supp. 2d 12, 23 (D.D.C. 2000); *Johns v. Rozet*, 141 F.R.D. 211, 219 (D.D.C. 1992) ("A claim will not be dismissed under Rule 12(b)(6) merely because it does not allege with specificity every element of a cause of action, if it contains allegations from which an inference may be drawn that evidence on the essential elements will be produced.").

[38] Courts have gone one step further, routinely holding that intangible property can be goods, wares, or merchandise under 18 U.S.C. § 2314. *See, e.g., United States v. Aleynikov*, 737 F. Supp. 2d 173, 187 (S.D.N.Y. 2010) (concluding that Goldman Sachs's trade secrets were stolen under statute, and "anyone who 'transmits' or 'transfers' stolen property, even if the mode of such transmission or transfer is not physical, violates § 2314"); *United States v. Farraj*, 142 F. Supp. 2d 484, 488 (S.D.N.Y. 2001) (noting that Congress amended § 2314 to include the word "transmits," which applied to intangible property); *Riggs*, 739 F. Supp. at 421 ("Reading a tangibility requirement into the definition of 'goods, wares, or merchandise' might unduly restrict the scope of § 2314, especially in this modern technological age."); *cf.*

Many types of intellectual property – work product, confidential business information, and trade secrets – have been held to be "the subject of commerce" because there is a market for such valuable information among industry participants and competitors. For instance, in *United States v. Farraj*, 142 F. Supp. 2d 484 (S.D.N.Y. 2001), a paralegal attempted to sell a legal team's trial plan to a competitor. The court ruled that the plan was "the work product of a business relationship between client and attorney, and may thus be viewed as an ordinary subject of commerce, created for a commercial purpose and carrying inherent commercial value at least as to the persons directly interested in the matter." *Id.* at 487-88. As such, the trial plan – which was transmitted in electronic form – fell within the purview of the statute. Similarly, the Second Circuit in *Bottone* ruled that documents containing a business's confidential information about its manufacturing processes were the subject of commerce by virtue of the fact there was a thieves' market for the goods. 365 F.2d at 393.

In this case, the Individual Defendants carried out the theft and transport of the property at the direction of Dow and Ketchum, who then paid for the work product and proprietary business information. 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. As in *Bottone*, the creation of a thieves' market, which could "readily be proven at trial," demonstrates that the goods are the subject of commerce.[39]

Defendants argue that the Complaint should be dismissed for failure to plead that the goods are ordinarily bought and sold in a market, or that a market exists. *See* Dow Mem. at 17;

Bottone, 365 F.2d at 393-94 (reasoning that where physical form of information is of secondary importance, whether that information is stolen in a tangible form is immaterial).

[39] *Aleynikov*, 737 F. Supp. 2d at 187. *See also United States v. Weinstein*, 834 F.2d 1454, 1463 (9th Cir. 1987) (finding that if property can be sold, even on thieves' market, then it falls within terms of statute); *United States v. Stegora*, 849 F.2d 291, 292 (8th Cir. 1988) (noting Eighth Circuit's approval of thieves' market as means of valuing stolen goods).

Ketchum Mem. at 21. There is, however, no requirement under RICO to plead a market or the method for valuing the stolen property. Instead, absent a readily obvious market, the existence of a market and the valuation of the goods are factual issues that can be established later in the litigation with evidence. *United States v. Kwan*, No. 02-241, 2003 WL 22973515, at *5-6 (S.D.N.Y. Dec. 17, 2003); *cf. In re Vericker*, 446 F.2d at 248. The pleadings stage is not the time to establish such a market.[40]

3. Plaintiff Adequately States a RICO Conspiracy Claim.

Under 18 U.S.C. § 1962(d), "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Greenpeace alleges that Defendants participated in or facilitated a scheme to steal, trespass, and distribute Plaintiff's property. Compl. ¶ 161. It continues by detailing how each member of the conspiracy contributed to the operation. The charge concludes by alleging that the enterprise created by the conspiracy injured Plaintiff by engaging in racketeering activity. *Id.* ¶ 162.

Defendants respond to this charge by arguing that it cannot be sustained if the underlying § 1962(c) charges cannot be sustained; because, in their view, the underlying claim should be dismissed, the conspiracy claim must be dismissed as well. *See* Dow Mem. at 20-21; Ketchum Mem. at 26-27 (arguing lack of standing and insufficient § 1962(c) allegations). Defendant Dow has not raised objections to the merits of the RICO conspiracy claim, and should not be permitted to in its Reply.

For the reasons discussed above, Plaintiff's substantive RICO claim should not be dismissed. If, however, the Court were to conclude that Defendants Dow and Ketchum did not manage or operate the enterprise alleged here, they should still be held liable for conspiracy. A

[40] *See Atchinson v. District of Columbia*, 73 F.3d 418, 421-22 (D.C. Cir.1996) ("A complaint . . . need not allege all that a plaintiff must eventually prove. . . .").

defendant is liable under § 1962(d), even if he did not participate in the operation or management of an enterprise. *See Wilson*, 605 F.3d at 1019. Instead, liability attaches where the conspirator "adopt[ed] the goal of furthering or facilitating the criminal endeavor" (as long as the endeavor, "if completed, would satisfy all of the elements of a substantive criminal offense"). *Salinas v. United States*, 522 U.S. 52, 65 (1997). For liability to attach, there is no requirement that Defendants participate in any overt act. *Id.* at 63.

Defendants oversimplify the case law pertaining to § 1962(d) in arguing that the conspiracy claims cannot survive where the substantive RICO are dismissed. *See* Dow Mem. at 20-21; Ketchum Mem. at 26-27. As argued above, the Court should not dismiss Greenpeace's § 1962(c) claims; however, should the Court decide otherwise, dismissal of those claims does not require that the § 1962(d) claims be dismissed as well.[41] Greenpeace has adequately alleged that each Defendant knowingly facilitated the aims of the enterprise; members of the enterprise participated directly in the theft and interstate transportation of Greenpeace's property. *See* above at Part II.A.2.a. Therefore, Ketchum's reliance on *Doe v. State of Israel*, 400 F. Supp. 2d 86, 120 (D.D.C. 2005), is unavailing. In that case, plaintiffs failed to plead "specific facts to suggest that the . . . defendants knew that [the] predicate acts were occurring." *Id.* As pled, and discussed above, Greenpeace maintains that Defendants Dow and Ketchum were aware of the predicate acts (and, indeed, contributed directly to their commission). Even if the Court decides that the corporate Defendants are not liable for the theft, their alleged conduct supports liability as members of a RICO conspiracy.[42]

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[41] *See, e.g.*, *Salinas*, 522 U.S. at 66 (holding that defendant's conspiracy conviction should be upheld even where jury acquitted defendant on substantive RICO charge).

[42] *See Jones v. Meridian Towers Apartments, Inc.*, 816 F. Supp. 762, 772-73 (D.D.C. 1993) (holding defendants liable for conspiracy to violate RICO after dismissing substantive RICO counts against those defendants, and retaining jurisdiction over pendant state law claims).

B. Greenpeace Has Alleged All of the Elements Needed to Support a Claim for Trespass.

1. As a Tenant, Greenpeace Has Standing to Sue for Trespass.

It is well-established in the District of Columbia that tenants have standing to sue third parties for damages arising from trespass. *Gaetan v. Weber*, 729 A.2d 895, 898 (D.C. 1999). This right flows from the tenant's right of possession, granted by lease. *Id.* (citing 8 Thompson on Real Property, Thomas Edition § 68.06(a)(1), at 199 (David A. Thomas ed. 1994)). Here, Greenpeace leased office space at 1436 U Street NW and 702 H Street NW and had the right to use the office space leased as well as the common spaces and amenities (including, but not limited to entrances, walkways, curtilage, and trash and recycling receptacles) provided by its landlords. Compl. ¶¶ 28-29. Greenpeace had the right to determine who could enter its offices and use the amenities provided for Greenpeace's use, comfort, and safety. Thus, Greenpeace has the right to sue trespassers who enter its offices (and grounds) and interfere with Greenpeace's right to possess – *i.e.*, use and enjoy – its offices and the amenities located therein without Greenpeace's permission.

2. Defendants' Conduct Encompasses a Variety of Physical Invasions, Each of Which Is a Form of Trespass.

The D.C. Court of Appeals has defined trespass as "an unauthorized entry onto property that results in interference with the property owner's possessory interest therein." *Sarete, Inc. v. 1344 U Street Ltd. P'ship*, 871 A.2d 480, 490 (D.C. 2005) (citation and quotation omitted). Greenpeace alleges that three types of the Defendants' activities constitute trespass: entry onto Greenpeace property to conduct D-Lines; physical surveillance performed by entering Greenpeace's offices under false pretenses; and electronic surveillance. Compl. ¶¶ 111, 113.

a. Unauthorized Entry Into a Private Building or Its Grounds Is a Trespass.

Plaintiffs have alleged that the Individual Defendants, who were neither owners nor tenants of either of the buildings where Greenpeace has maintained its offices, entered onto Greenpeace property and meddled with the trash and recycling receptacles. The Individual Defendants had no right to enter these properties and no right to access the trash and recycling facilities. Specifically, Greenpeace alleges that at its U Street office, the Individual Defendants (or agents acting on their instructions), pilfered a covered trash dumpster that abutted the building and covered recycling bins that were located inside a sheltered loading dock up a flight of stairs on the back side of the building. Compl. ¶ 28. Greenpeace alleges that at its H Street office, the Individual Defendants pilfered trash and recycling containers located in a locked room, inside the building, which was accessible only by coming through the building's front entrance (which was locked) or through the back alley (which was gated and locked). *Id.* ¶ 29.

Greenpeace further alleges that BBI obtained and tested codes that controlled the locks on Greenpeace office doors (Compl. ¶ 35) and that documents that would never have been discarded (as trash or recycling) were subsequently found in BBI's possession. *Id.* ¶ 31.

b. Entry onto Private Property with Permission Obtained through Fraud Is a Trespass Where It Interferes with an Occupant's Use and Enjoyment of the Property.

Greenpeace has also alleged that BBI sent its agents into target offices posing as repairmen, deliverymen, and interns as a matter of course. Compl. ¶¶ 98, 103, 106. For example, BBI sent one of its subcontractors, Mary Lou Sapone, to case Greenpeace's offices in November 1998. *Id.* ¶ 33. Ms. Sapone asked for, and received, a tour of the entire office because she presented herself as a prospective volunteer; afterwards, she sent Ward a report describing the layout and personnel of the office. *Id.* Ward recorded time billed to the

Dow/Ketchum matter as "UC briefing/client meeting" – *i.e.*, undercover briefing. *Id.* ¶ 84. From these facts, it is reasonable to infer that Ms. Sapone was looking for the best places to collect information from inside Greenpeace's offices and that at some point, the Individual Defendants (or their agents) did enter and remove information from inside. It is also reasonable to infer that Ms. Sapone was not the only agent of Defendants to enter Greenpeace's offices under false pretenses. Where fraud is intended to interfere with Greenpeace's possession (*i.e.*, the secure use and enjoyment) of its offices, it is impermissible and constitutes a trespass.[43]

c. Electronic Surveillance Is a Trespass.

The third form of trespass suffered by Greenpeace is electronic surveillance. Greenpeace has reason to believe that BBI changed its information-gathering tactics beginning in 1999, when the number of D-Lines dropped and the number of hours billed to research and technical surveillance counter measures (TSCM) rose. Greenpeace has several reasons for believing that electronic surveillance was employed: BBI employees and contractors discussed and took steps to acquire hacking software (Compl. ¶ 41); in August 1999, BBI paid $4,000 in cash, designated for its Greenpeace work, to NetSafe, a firm specializing in computer intrusion and electronic surveillance (*Id.* ¶ 42); the descriptions on Michael Mika's time records changed from "D-Lines" to "research" and "TSCM" at the same time Mika was working on the U Street Project and briefing clients about Greenpeace (*Id.* ¶ 44.); and BBI employees wrote a proposal for "intrusion and survey" for Ketchum (*Id.* ¶ 45).

It is quite reasonable to infer that if Michael Mika, as an employee of a private investigation firm based in Maryland, were hired to investigate Greenpeace in Washington, D.C.,

[43] *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1352 (7th Cir. 1995) (conclusion that trespass occurred where false pretenses are used to secure permission to enter depends upon the purposes behind the fraud and the protectable interests of the person deceived).

by a client located in Midland, Michigan, and began billing his time to "technical surveillance counter-measures" while working in Maryland and Washington, D.C., that he was not, in fact, sweeping Dow Chemical's Michigan headquarters for bugs. It is also quite reasonable to infer that if a person were engaged in illegal electronic surveillance on a billable hour basis, that he would not record his time as "illegal electronic surveillance." Greenpeace submits that here, the allegations, taken as a whole, show a picture of sophisticated electronic technologies, increasing amounts of money changing hands for BBI's surveillance of Greenpeace, and steady intelligence reports about Greenpeace. Electronic intrusions can and should be inferred by the facts alleged.

Defendant Dow argues that it cannot be sued for trespass because it took no action that directly caused the physical invasion of Greenpeace's offices. Dow mistakenly relies upon *Dine v. Western Exterminating Co.*, No. 86-1857, 1988 U.S. Dist. LEXIS 4745 (D.C.C. Mar. 9, 1988), in asserting that it cannot be held liable without a demonstration of conduct that "directly caused" the trespass. In *Dine*, no allegations of a conspiracy, or even a business relationship between the defendants, were presented; there, the court ruled that a chemical manufacturer could not be held liable for trespass caused by a pest-control company's allegedly negligent application of a pesticide.[44] Here, by contrast, Greenpeace has alleged that Dow asked Ketchum to act as go-between with private investigators, sought internal information that could only be obtained through illicit methods, and paid for such information on a regular basis over a period of, at a minimum, 25 months. Compl. ¶¶ 82, 85.

3. Greenpeace Has Suffered Actual Harm and Incurred Compensable Damages.

District of Columbia courts have repeatedly recognized that the victim of trespass is

[44] *Dine*, 1988 U.S. Dist. LEXIS 4745, at *27-28.

entitled to at least nominal damages.[45] The District's high court has held, moreover, that tenants can recover damages associated with loss of use and enjoyment and for out-of-pocket expenses for repairs necessitated by trespass.[46] In addition to nominal damages, Greenpeace asserts actual damages. Greenpeace is entitled to nominal damages and asserts actual damages as well. These damages take three forms:

1) an interference with Greenpeace's possession of its offices – *i.e.*, the secure use of its offices – that interfered with Greenpeace's campaigns and organizational mission;

2) an interference with Greenpeace's secure use of its offices that diminished the value of Greenpeace's intellectual property, and;

3) out-of-pocket costs incurred in trying to determine the scope and nature of Defendants' trespass.

Defendant Dow argues that Greenpeace must show the failure of a particular campaign or project to prove an interference with Greenpeace's mission, but this is not correct. But as Ketchum itself explained, knowing what Greenpeace was not planning was as useful to Dow as knowing what Greenpeace was planning because the knowledge would "[en]able [Dow] to divert resources to more pressing matters." Compl. ¶¶ 90-91. Thus, the loss of control over its confidential business information lifts the deterrent effect that the possibility of Greenpeace's scrutiny holds, and thereby creates a substantial interference with Greenpeace's business; this injury is compensable.

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[45] *See, e.g.*, *Morgan v. Barry*, 12 Fed. App'x. 1, 4-5 (D.C. Cir. 2000) (citing *Cahill v. Harris*, 6 D.C. 214, 215 (D.C. 1867)).

[46] *Gaetan*, 729 A.2d at 898. Contrary to Defendant Dow's assertions, Greenpeace does not have to show damage to the land for two reasons. First, in holding that tenants have standing to sue for trespass, D.C. courts have recognized that tenants cannot recover damages to real property. *Id.* Second, the "actual harm" requirement asserted by Dow is limited to trespass claims predicated on "invisible, microscopic invasions of toxins or contaminants." *Acosta Orellana v. Croplife Int'l*, 711 F. Supp. 2d 81, 93 (D.D.C. 2010). Recognizing that, historically, any invasion – "regardless of how insignificant" – could constitute trespass, courts now require a showing of some "actual harm to the property" to support allegations of diminished [real] property value where a trespass claim is based on particle deposits. *Id.* at 93. *See also Nat'l Tel. Coop. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 15 (D.D.C. 1998) (discussing limitation on requirement of actual harm to trespass "based on invisible particulate deposits").

Greenpeace's remaining damages are easily quantified. In the District, damages for trespass have included "extra labor and material costs incurred as a result of the delay" caused by defendant's trespass.[47] Here, upon learning of Defendants' activities, Greenpeace took immediate steps to determine the scope and nature of Defendants' trespass and intrusion; Greenpeace did so in an attempt to determine whether these activities were on-going and to prevent them from recurring. Compl. ¶¶ 108, 113. Greenpeace's costs, both out-of-pocket expenses and diversion of staff time and organizational resources, are compensable damages.[48]

It defies common sense to accept Defendants' "no harm-no foul" assessment of liability here, when Defendants paid and earned substantial sums for the information gathered through these clandestine, illegal activities. Therefore, Plaintiff asserts a second theory of recovery: disgorgement. In summarizing prevailing legal principles, the new Restatement of Restitution and Unjust Enrichment explains that disgorgement may be the most appropriate remedy in a trespass action where the wrongdoers have acted consciously or with disregard of a known risk that their conduct violates the rights of the claimant and profited from doing so.[49] Disgorgement "grounds the defendant's liability in the circumstances of the wrong, affording both protection of the claimant's interest and an appropriate deterrent to the defendant's conduct without resort to an arbitrary penalty."[50] Disgorgement is rational, even where the disgorgement of the value

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[47] *John McShain, Inc. v. L'Enfant Plaza Props., Inc.*, 402 A.2d 1222, 1228 (D.C. 1979).

[48] *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107-08 (1998). Dow cites *Steel Company* as support for its contention that Plaintiff cannot claim litigation costs as damages. Dow Mem. at 21-22. But Plaintiff has not asserted that its costs in preparing this lawsuit establish the injury element of its tort claims. *Steel Company* does recognize, however, that investigation costs incurred by a plaintiff for its own purposes (*i.e.*, independent of a lawsuit) constitute an injury that confers standing. *Steel Co.*, 523 U.S. at 107-08.

[49] In general "[a] conscious wrongdoer . . . will be required to *disgorge all gains* (including consequential gains) derived from the wrongful transaction." Restatement (3d) of Restitution and Unjust Enrichment § 40 (Tentative Draft No. 4, 2005) (emphasis added).

[50] *Id.*

acquired by the trespasser exceeds any quantifiable injury to the property owner (or occupant).[51] 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.

Finally, even if the Court were to conclude that Greenpeace is not entitled to damages for trespass, Plaintiff has requested injunctive relief that would ensure that Defendants' conduct has ceased and will not resume. Injunctive relief is available in trespass cases where "there is a threat of continuance and the remedy at law is inadequate or a multiplicity of suits would be avoided by the equitable remedy." *Lucy Webb Hayes Nat'l Training Sch. for Deaconesses and Missionaries v. Geoghegan*, 281 F. Supp. 116, 118 (D.D.C. 1967).

C. Because Plaintiff's Interest in Privacy is Protected and Reasonable, Plaintiff Has Properly Asserted a Claim for Invasion of Privacy.

1. Greenpeace's Privacy Claim Is Grounded in Intrusion, Not Exposure, and Therefore Is Bound by a Limitations Period of Three Years.

Dow is the only Defendant to suggest that the limitations period for bringing an invasion of privacy claim is less than three years. Dow Mem. at 5 n.5. The D.C. Code contains no express limitations period for invasion of privacy; courts have therefore limited privacy claims by applying the limitations periods for related torts. *Mittleman v. United States*, 104 F.3d 410, 415 (D.C. Cir. 1997).

The Court of Appeals for the District of Columbia has explained "[i]nvasion of privacy is not one tort, but a complex of four" – (1) public disclosure of private facts, (2) false light publicity, (3) appropriation of name or likeness, and (4) intrusion. *Wolf v. Regardie*, 553 A.2d 1213, 1216-17 (D.C. 1989). Concluding that false light publicity depends upon publication and

[51] *Id. Cmt b.*

thus is "intertwined" with torts like libel, slander and defamation, the D.C. Circuit has borrowed the one-year limitations period from those torts and applied it to invasion of privacy. *Mittleman*, 104 F.3d at 415. But intrusion is fundamentally distinct from false light (and the other varieties of privacy claims) because it does not require publication. *Wolf*, 553 A.2d. at 1217; *see also Benitez v. KFC Nat'l Mgmt. Co.*, 714 N.E.2d 1002, 1007 (Ill. Ct. App. 1999) (rejecting one year limitations period for intrusion because it differs in not requiring publication). For this reason, the Court should apply, as Ketchum suggests, the three-year limitations period for "torts involving an injury to property" set forth in D.C. Code § 12-301(2)-(3). Ketchum Mem. at 8. In the alternative, the Court may properly rely on the District of Columbia's three-year residual limitations period set forth in D.C. Code § 12-301(8) for claims for which "a limitation is not otherwise specially prescribed." In either case, Dow's reliance on *Richards v. Duke University*, 480 F. Supp. 2d 222 (D.D.C. 2007), is misplaced. *Richards* does not identify the privacy tort at issue as intrusion or consider the difference between intrusion and the other privacy torts, and it relies exclusively on a case involving public disclosure of private facts in identifying a one-year period. *See id.* at 241 (citing *Grunseth v. Marriott Corp.*, 872 F. Supp. 1069, 1074 (D.D.C. 1995)). Moreover, the distinction was irrelevant in *Richards*, and therefore did not have to be scrutinized, because the case was filed more than four years after the limitations period began to run. *See id.*

2. Greenpeace, as a Corporation, Can Assert an Invasion of Privacy Claim.

Defendants assert that corporations may not bring invasion of privacy tort claims because they are not living individuals. This is simply wrong. The D.C. Circuit has explicitly rejected this position:

> Whether and to what extent the privacy interests protected by state law may be asserted by corporate bodies is still unsettled. However, we think

> one cannot draw a bright line at the corporate structure. The public attributes of corporations may indeed reduce pro tanto the reasonability of their expectation of privacy, but the nature and purposes of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation per se has a protectible privacy interest.

United States v. Hubbard, 650 F.2d 293, 306 (D.C. Cir. 1980) (footnotes omitted).[52]

Consideration of the circumstances of this particular case – which *Hubbard* requires – demonstrates that Greenpeace had an exceedingly strong and reasonable interest in the privacy of the information at issue. The "nature and purpose" of Greenpeace is to wage environmental campaigns in the public's interest. Compl. ¶¶ 17-18. Greenpeace's "interest sought to be protected" is two-fold: an interest in protecting the confidentiality of its plans for those campaigns and an interest in maintaining a secure workplace in which the organization (*i.e.*, its staff) can plan and implement its campaigns. Defendants' illicit efforts to obtain access to Plaintiff's plans thus strikes at the very core of the organization's nature and purpose. On these facts, Greenpeace's privacy expectations were indisputably valid and it is appropriate for Greenpeace to vindicate those expectations through an invasion of privacy tort claim.

3. Defendants Intruded Upon Greenpeace's Seclusion and Solitude by Stealing Documents from Greenpeace's Recycling and Garbage Bins.

Defendants cannot argue that Greenpeace's recycling and trash were not maintained in seclusion or solitude, and that Greenpeace therefore cannot satisfy maintain its privacy claim for

[52] Plaintiff respectfully suggests that the sole case from the District of Columbia that Defendants rely on, *Southern Air Transport, Inc. v. American Broadcasting Cos.*, 670 F. Supp. 38 (D.D.C. 1987), should not be followed. *Southern Air Transport* makes no reference to and, in fact, contradicts the D.C. Circuit's *Hubbard* decision. The case involved a different type of privacy tort – false light – which requires a plaintiff to show that the false light in which he has been portrayed would be offensive to an ordinary person. 670 F. Supp. at 42. The court held that a corporation, lacking the emotional sensitivity of a natural person, could not be offended and thus could not claim a protectable interest. *Id.* False light ties "offense" to the portrayal of the plaintiff, not the conduct of the defendant in publishing the portrayal.

two reasons.[53]

First, Greenpeace's invasion of privacy claim does not rest solely on Defendants' stealing confidential documents and internal records from Greenpeace's dumpsters and recycling bins. The invasion of privacy claim is also based on allegations that Defendants intentionally entered the private property of Greenpeace without permission, conducted overzealous physical and electronic surveillance of Greenpeace's private offices and employees, examined Greenpeace's confidential financial records and internal memoranda and communications obtained from within Greenpeace's offices, and eavesdropped on Greenpeace's private conversations. Compl. ¶ 117. Accordingly, even if the Court were to conclude that Greenpeace did not have a privacy interest in the confidential documents and internal records that Defendants stole from Greenpeace's dumpsters and recycling bins, Greenpeace's invasion of privacy claim would remain amply supported by other allegations.

Furthermore, Greenpeace has adequately pleaded that it had a reasonable expectation of privacy over trash deposited in its recycling bins and garbage dumpster. Compl. ¶ 27. The Complaint explains, in detail, that the garbage and recycling bins were secluded from public access and protected from third-party intrusion. *Id.* ¶¶ 28-29. Greenpeace relied upon private contractors, authorized to enter its private property, to collect its trash and recycling, and not municipal services. *Id.* These allegations are sufficient to support a finding that Greenpeace had a reasonable expectation of privacy over materials it deposited in the garbage and recycling bins.

Courts considering the second element of an invasion of privacy claim – whether the

[53] The elements of invasion of privacy by intrusion are: "(1) an invasion or interference by physical intrusion, by use of a defendant's sense of sight or hearing, or by use of some other form of investigation or examination . . .; (2) into a place where the plaintiff has secluded himself, or into his private or secret concerns . . .; (3) that would be highly offensive to an ordinary, reasonable person . . . ."). *Wolf*, 553 A.2d at 1217.

plaintiff's subjective expectation of privacy was objectively reasonable – have frequently borrowed from Fourth Amendment jurisprudence.[54] Two Fourth Amendment cases with facts analogous to Greenpeace's allegations demonstrate that Greenpeace has adequately pleaded a privacy interest in the confidential documents and internal records Defendants stole from Greenpeace's dumpsters and recycling bins. In *United States v. Varjabedian*, No. 05-10103, 2006 WL 1004847 (D. Mass. Apr. 14, 2006), the Court found a reasonable expectation of privacy where a proprietor of a gas station placed bags of trash in a dumpster that had lids secured with a lock and chain, but that were loose enough for trash bags to be removed without unlocking the lids. The court found that "[defendant] had a subjective expectation that bags placed in the dumpster were not abandoned to public accessibility but remained securely private and that, in the circumstances, his expectation in this respect is one that society would accept as reasonable." *Id.* at *3. Similarly, *Ohio v. American Legion*, No. 1818, 1990 WL 40199 (Ohio Ct. App. Apr. 4, 1990), turned on the expectation of privacy over trash placed in a dumpster pushed to the back of the defendant's building and attached to the building with a chain and lock. The Ohio Court of Appeals agreed with the trial court finding that the defendant maintained a reasonable expectation of privacy because the dumpster was chained to the building, enclosed on three sides, and had a roof overhead. *Id.* at *2. Because the facts presented here closely resemble those of *Varjabedian* and *American Legion*, the reasoning supporting those holdings is persuasive here.[55]

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[54] *See Danai v. Canal Square Assocs.*, 862 A.2d 395 (D.C. 2004). In cases involving invasion of privacy, however, the state's interest in public safety and order is not present; therefore, a private defendant – like Dow, Ketchum, or the Individual Defendants – cannot offer an interest that serves the public good as the basis for its intrusion.

[55] Plaintiff submits that the holding of *Danai v. Canal Square Associates*, 862 A.2d 395 (D.C. 2004), is inapplicable because *Danai* involved considerably different facts than those presented here. The *Danai* plaintiff's invasion of privacy claim involved a draft letter she had torn up and deposited in her

D. The Theft of Greenpeace's Confidential Documents and Intellectual Property Establishes the Basis for Plaintiff's Well-Pled Conversion and Trespass To Chattel Claims.

Conversion is defined as: "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."[56] Similarly, a defendant commits trespass to chattel by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.[57] Defendants have asserted challenges to the sufficiency of Greenpeace's allegations as to both theories.

Greenpeace has alleged that Defendants stole from its property documents including financial reports, campaign strategy documents, and other confidential materials from Greenpeace's offices and private trash and recycling containers. Compl. ¶ 123. Additionally, Greenpeace alleges that the Defendants exercised dominion and control over its intellectual property, such as the campaign strategies memorialized in the aforementioned documents. *Id.* ¶ 124. Defendants' actions constitute an interference with Greenpeace's property rights and are actionable under these related torts.

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wastepaper basket. The contents of the wastepaper basket were collected and deposited in a common trash room where trash from various suites in the plaintiff's building was accumulated. *Id.* at 400. The building manager retrieved the letter from the trash room – an act plaintiff asserted violated her privacy. *Id*. The court disagreed, finding plaintiff had abandoned and relinquished her trash. *Id.* at 401-03. Two facts critical to the *Danai* court's finding are not present here. First, in *Danai*, the plaintiff expressly and permanently abandoned the trash to a third party. Once she surrendered the trash and her wastepaper basket was taken from her office, plaintiff could not retrieve it because she had no key to the trash room. *Id.* at 401 Second, the plaintiff relinquished control of the trash to the very entity she accused of violating her privacy by retrieving the letter. *Id.* at 398. Greenpeace always had access to its trash and recycling. Greenpeace did not hand its trash to the very people it accuses of violating its privacy; Greenpeace entrusted the collection of its trash and recycling to private contractors.

[56] Restatement (Second) of Torts § 222A (1965); *see also Gov't of Rwanda v. Rwanda Working Grp.*, 227 F. Supp. 2d 45, 62 (D.D.C. 2002); *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 158 (D.C. 2000).

[57] *Pearson v. Dodd*, 410 F.2d 701, 707 (D.C. Cir. 1969) (quoting Restatement (Second) of Torts § 217).

1. Greenpeace's Claims for Conversion and Trespass to Chattel Are Not Preempted.

Ketchum and Dow argue that Greenpeace's conversion claims are preempted by the D.C. Uniform Trade Secrets Act. ("DCTSA"). The DCTSA states that the Act "supersedes *conflicting* tort, restitution and other law of the District of Columbia." D.C. Code § 36-407(a) (emphasis added). The majority of courts to address the issue have held that a statutory claim for misappropriation of trade secrets does not preempt common law torts such as conversion and trespass to chattel where the confidential business information is not a trade secret within the meaning of the Act.[58]

Defendants cite *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 83-84 (D.D.C. 2007), for the proposition that Greenpeace's conversion and trespass to chattel claims are preempted. However, in *DSMC*, the court held only that the plaintiffs' conspiracy claim was preempted because it was "clearly predicated on misappropriation of trade secrets." *Id*. at 84. Here, Greenpeace alleges that Defendants stole hundreds of documents including campaign planning documents, internal correspondence, financial reports and balance sheets, budgets, personnel files, internal communications, and corporate credit card numbers. Compl. ¶ 46; *cf. Carpenter*, 484 U.S. at 26 ("Confidential business information has long been recognized as property."). Plaintiff has only alleged that a portion of these documents contain information that qualifies as trade secrets. *Compare* Compl. ¶ 46 and ¶ 48. Thus, to the extent Greenpeace alleges Defendants stole confidential business documents and information that are not trade secrets,

[58] *See Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, No. 08-0840-CV-W-ODS, 2010 WL 4980235, at *8 (W.D. Mo. Dec. 2, 2010) (holding conversion claim not preempted "if the information does not qualify as a trade secret"); *FBK Partners, Inc. v. Thomas*, No. 09-292-GFVT, 2010 WL 4940056, at *3 (E.D. Ky. Nov. 30, 2010); *TMX Funding, Inc. v. Impero Techs., Inc.*, No. 10-00202, 2010 WL 2509979, at *4-5 (N.D. Cal. June 17, 2010); *Micro Display Sys., Inc. v. Axtel, Inc.* 699 F. Supp. 202, 204-05 (D. Minn. 1988); *Tronitec, Inc. v. Shealy*, 547 S.E.2d 749, 755 (Ga. Ct. App. 2001).

Greenpeace's claims are not preempted.

But importantly, the Court should not dismiss any portion of Greenpeace's conversion and trespass to chattel claims on preemption grounds at this stage in the litigation. In analyzing a similar situation involving the identical Connecticut Uniform Trade Secrets Act ("CUTSA"), the District of Connecticut reasoned:

> The question of whether information sought to be protected by [the CUTSA] rises to the level of a trade secret is one of fact . . . [t]he Court does not need to decide the preemption issue because there are genuine issues of material fact regarding [plaintiff's] assertion that it possessed trade secrets and that defendants misappropriated them. If [plaintiff] fails to prove its assertion, thereby failing to prove a violation of CUTSA, [plaintiff] may then seek relief pursuant to its common law causes of action.

Panterra Engineered Plastics, Inc. v. Transp. Sys. Solutions, LLC, 539 F. Supp. 2d 600, 603-04 (D. Conn. 2008) (internal quotation marks and citations omitted). In that case, the Court refused to preempt the plaintiff's common law claims *at the summary judgment stage*. Here, Greenpeace pleads claims for conversion and trespass to chattel that Greenpeace should be permitted to pursue if the Court or jury later finds that the purloined information does not qualify as a trade secret.

2. Greenpeace Did Not Abandon Its Property.

Defendants cannot argue that Greenpeace "abandoned" its property. While few courts have had the opportunity to address the issue, the relevant case law rejects Defendants' argument. In *Sharpe v. Turley*, the Texas Court of Appeals held that a church had not abandoned its property interest in various documents where those documents were (1) deposited in a dumpster on the Church's private property, and (2) the Church contracted with a private waste disposal company who emptied the dumpster into a truck and hauled it to a private landfill. 191 S.W.3d 362, 367 (Tex. Ct. App. 2006). The Court found persuasive the fact that the trash never left defendants' control or the control of its private agents. *Id.* at 368.

Like the church in *Sharpe*, Greenpeace alleges that the items taken from its trash and recycling were stored on *private property* and awaiting retrieval by a private contractor specifically hired to dispose of its trash and recycling. Compl. ¶¶ 28-29. Indeed, Greenpeace went to even greater lengths than the church in *Sharpe*, by placing its trash and recycling receptacles behind locked gates and on loading docks. Accordingly, like in *Sharpe*, Greenpeace has not abandoned its property. *Id*.; *see also Ingram v. Texas*, 261 S.W.3d 749, 753-54 (Tex. Ct. App. 2008) (recognizing chattel not abandoned when stored on private property).

In any event, courts have held that whether an item is abandoned for purposes of depriving the owner of a property interest[59] is a factual question.[60] Given the safeguards that it took to protect this property before it was ultimately disposed of, Plaintiff submits that it has alleged facts that indicate its intent not to abandon the property; therefore, resolution of the intent question is not appropriate at this stage.

3. Conversion May Be Premised on Intangible Property Interests.

Finally, Defendants argue that Greenpeace cannot maintain a claim for conversion based on an intangible property interest. In raising this argument, Defendants fail to acknowledge that this question is unsettled in the District of Columbia and across the country. The D.C. Circuit court has opined that:

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[59] It is well-established that it is more difficult to abandon an item as property than it is to abandon a privacy interest in the object. *See United States v. Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989) ("The test for abandonment in the search and seizure context is distinct from the property law notion of abandonment: it is possible for a person to retain a property interest in an item, but nonetheless to relinquish his or her reasonable expectation of privacy in the object.").

[60] *See, e.g., Am. Petroleum Inst. v. U.S. E.P.A.*, 216 F.3d 50, 57 (D.C. Cir. 2000) ("Legal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances."); *Hunt v. DePuy Orthopaedics, Inc.*, 729 F. Supp. 2d 231, 233 (D.D.C. 2010) ("To prove abandonment, a party must demonstrate both an intent to abandon and an act or omission that effectuates the intention. Determining the intent to abandon is a fact-intensive inquiry.") (citation omitted); *see also Katsaris v. United States*, 684 F.2d 758, 762 (11th Cir. 1982) (reasoning that abandonment is centrally a question of intent, and occurs only when "there is total desertion by the owner . . . because he no longer desires to possess the thing and willingly *abandons it to whoever wishes to possess it*") (emphasis added).

> [D]ocuments often have value above and beyond that springing from their physical possession. They may embody information or ideas whose economic value depends in part or in whole upon being kept secret. The question then arises whether the information taken by means of copying . . . files is of the type which the law of conversion protects. The general rule has been that ideas or information are not subject to legal protection, but the law has developed exceptions to this rule. Where information is gathered and arranged at some cost and sold as a commodity on the market, it is properly protected as property. Where ideas are . . . instruments of fair and effective commercial competition, those who develop them may gather their fruits under protection of the law.

Pearson, 410 F.2d at 707-08. In accordance with this view, several courts across the country have permitted plaintiffs to pursue conversion claims based on intangible property interests.[61]

Defendants cite three cases from this Circuit that discuss the issue, but only one of those cases, *Kaempe*, is binding on this Court. There, the court held that the law was unclear as to whether the District of Columbia would recognize a conversion claim for the theft of intangible property. *Kaempe v. Myers*, 367 F.3d 958, 963-64 (D.C. Cir. 2004).[62] In fact, the Court of

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[61] *See U.S. Gypsum Co. v. LaFarge N. Am. Inc.*, No. 03-6027, 2009 WL 3871824, at *3 (N.D. Ill. Nov. 16, 2009) (permitting plaintiff to proceed on conversion theory premised on theft of proprietary information); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003) ("[T]he 'goods' converted may include intellectual property. Although an idea alone cannot be converted, the 'tangible expression or implementation of that idea' can be.") (citation omitted); *Bilut v. Northwestern Univ.*, 296 Ill. App. 3d 42, 52 (Ill. App. Ct. 1998) (holding plaintiff could maintain conversion claim against professor accused of stealing student's ideas from research); *Conant v. Karris*, 165 Ill. App. 3d 783, 792 (Ill. App. Ct. 1987) (recognizing conversion claim where Defendant stole bid information); *Annis v. Tomberlin & Shelnutt Assocs., Inc.*, 392 S.E.2d 717, 723 (Ga. Ct. App. 1990) (upholding a jury verdict of $7500 for conversion of a marketing strategy manual by a former employee); *Charter Hosp. of Mobile, Inc. v. Weinberg*, 558 So. 2d 909, 910 (Ala. 1990) (affirming an award of compensatory damages for "conversion of a treatment program for people suffering from drug abuse or alcoholism"); *Benaquista v. Hardesty & Assocs.*, 20 Pa.D. & C.2d 227 (1959) (recognizing possibility of conversion of an idea for a house design); *Tennant Co. v. Advance Mach. Co.*, 355 N.W.2d 720, 725 (Minn. Ct. App. 1984) (recognizing conversion of confidential marketing information including customer lists retrieved from the defendant company's garbage); *Nat'l Sur. Corp. v. Applied Sys., Inc.*, 418 So. 2d 847, 850 (Ala. 1982) (recognizing claim of conversion of a computer program).

[62] Defendants cite two other cases for the proposition that D.C. refuses to recognize a cause of action for conversion of intangible property. Neither case is binding on this court, and neither case distinguishes the language in *Pearson* which strongly suggests that a conversion claim may be based on the theft of intangible property. *See 3D Global Solutions v. MVM, Inc.*, 552 F. Supp. 2d 1, 10-11 (D.D.C. 2008) (citing *Equity Group, Ltd*. as authority for proposition that conversion cannot be based on intangible

Appeals cited with favor the proposition that "an action for conversion will lie only where such property is merged in a transferrable document and the document itself is converted." *Id.* at 964. Greenpeace maintains that the reasoning in *Pearson* is persuasive and permitting a claim for conversion premised upon intangible property is the better rule.

4. Disgorgement Is An Appropriate Remedy, in Lieu of Damages, for Plaintiff's Conversion and Trespass to Chattel Claims.

Dow argues that Greenpeace has failed to allege a compensable injury stemming from trespass to chattel. Plaintiff has alleged a diminution in the value of its intellectual property. In addition, Greenpeace asserts that disgorgement is an appropriate remedy where a defendant has profited from the use of a plaintiff's property.[63]

E. Greenpeace States A Claim For Misappropriation Of Trade Secrets.

Greenpeace alleges that BBI – at the behest of Ketchum and Dow – stole confidential information related to Greenpeace's campaigns, fundraising efforts, and legal strategies and that this theft substantially interfered with its organizational mission and environmental campaigns, rendering Defendants liable for misappropriation of trade secrets. To establish a claim of trade secret misappropriation under the D.C. Uniform Trade Secrets Act ("DCUTSA"), a plaintiff must "demonstrate (1) the existence of a trade secret; and (2) acquisition of the trade secret by improper means, or improper use or disclosure by one under a duty not to disclose." *DSMC*, 479 F. Supp. 2d at 77. Information is covered under the Act if it is secret, derives its value from its

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property); *Equity Group, Ltd. v. Painewebber, Inc.*, 839 F. Supp. 930, 933 (D.D.C. 1993). Importantly, however, *Equity Group Ltd.* did recognize that "courts have . . . allowed actions for conversion in cases involving intangibles, '[t]he process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with some document.'" 839 F. Supp. at 933, quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 15, at 91 (5th ed. 1983). Thus, even that case left open the possibility that conversion *could* be based on intangible property.

[63] According to the Restatement of Restitution and Unjust Enrichment, disgorgement is a remedy for conversion as well as trespass, for the reasons explained at Part II.B.3 above. Restatement (3d) of Restitution and Unjust Enrichment § 40 (Tentative Draft No. 4, 2005).

secrecy, and its owner uses reasonable efforts to safeguard its secrecy. *Id.* at 77-78; D.C. Code § 36-401(4). Defendants raise three arguments that Greenpeace should not be permitted to maintain its claim for misappropriation, each of which fails.

1. The Existence and Nature of Greenpeace's Trade Secrets Are Adequately Pled.

First, Defendants argue that Greenpeace has failed to describe its trade secrets with sufficient detail. Greenpeace alleges that Defendants conspired to steal documents that "contain unique, internal operating information, including confidential campaign strategy, internal legal memoranda, privileged attorney-client communications, financial reports and balance sheets, passwords for private electronic mailing lists and original records relating to fundraising." Compl. ¶¶ 30, 46, 49. Greenpeace further specifies that many of these secrets related to campaigns against toxic chemicals, global warning nuclear energy, genetic engineering, and the pollution of fisheries and oceans. *Id.* ¶ 47. Greenpeace even identifies some of the specific campaign strategy documents that Defendants unlawfully obtained. *Id.* ¶ 48. These allegations satisfy the pleading standard.[64]

To the extent that Defendants seek even greater specificity, Plaintiff is not required to provide such detail at the pleading stage. *See IDX Sys. Corp. v. Epic Sys. Corp.*, 165 F. Supp. 2d 812, 815 (W.D. Wis. 2001), *aff'd in part & rev'd in part*, 285 F.3d 581 (7th Cir. 2002) ("[a]t the complaint stage . . . plaintiff is not and cannot be expected to plead its trade secrets in detail.").[65]

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[64] *Compare Penrose Computer MarketGroup, Inc. v. Camin*, 682 F. Supp. 2d 202, 213 (N.D.N.Y. 2010) (denying motion to dismiss misappropriation of trade secrets for misappropriation of "customized and confidential computer services, solutions or designs for its clients, as well as its cost structure, supply vendors, customer relationships, sales strategies, customer files, customer lists and identifies, and other confidential and proprietary information not known to the general public.").

[65] *See also Medtech Prods. Inc., v. Ranir, LLC*, 596 F. Supp. 2d 778, 789 (S.D.N.Y. 2008) ("specificity as to the precise trade secrets misappropriated is not required in order for [plaintiff] to defeat the present Motions to Dismiss"); *Am. Bldg. Maint. Co. of N.Y. v. Acme Prop. Servs., Inc.*, 515 F. Supp. 2d 298, 309

Greenpeace has pleaded sufficient detail to apprise Defendants of the nature of the suit and that is all that is required at this time. Plaintiff is not required to prove that these documents are trade secrets at this time.

2. The Economic Value of Greenpeace's Trade Secrets Has Been Alleged.

Greenpeace alleges that the stolen information had value *as a result of* its secrecy because it gave Defendants the opportunity to circumvent or mitigate Greenpeace's activities (or imbued Defendants with the certainty that Greenpeace's campaigns would not affect them). Compl. ¶ 139. Just as the theft of a confidential contact list "has significant economic value because it allows a company or business that would otherwise not have this information gain a distinct advantage," *see BlueEarth BioFuels LLC v. Hawaiian Elec. Co.*, No. 09-00181, 2011 WL 563766, at *14 (D. Haw. Feb. 8, 2011), so too did the theft of Greenpeace's information permit Defendants to gain an advantage in their business efforts. The fact that Defendants were willing to pay hundreds of thousands of dollars for Greenpeace information (Compl. ¶¶ 95-96) supports a finding that the stolen documents conferred a business advantage upon Defendants and thus had economic value to them.[66]

3. Greenpeace's Interest in Its Trade Secrets Deserves Protection because Greenpeace Took Reasonable Steps to Protect Its Secret Information.

Greenpeace took reasonable efforts to maintain the secrecy of its information.

(N.D.N.Y. 2007) (denying motion to dismiss misappropriation of trade secrets claim where pleadings "suggest that [plaintiff] could prevail on this cause of action and entitle it to gather and present related evidence").

[66] Although most of the documents stolen from Greenpeace derive their value from the timing of their release and have no open public market value, documents related to fundraising from large donors and foundations have objective market value, and thus are similar to press contact or client lists, which are routinely held to be trade secrets. *See BlueEarth BioFuels*, 2011 WL 563766, at *14 (client lists qualify as trade secrets); *Saturn Sys., Inc. v. Militare*, No. 07-CA-2453, 2011 WL 543759, at *3-4 (Colo. App. 2011) (holding client and debtor lists qualified as trade secrets).

Greenpeace stored its recycling and trash on private property, in covered bins, behind a locked entrance, and contracted with licensed private business for retrieval. Compl. ¶¶ 28, 29, 140. These efforts were more than reasonable, and the relevant case law is in accordance.[67] Moreover, Greenpeace alleges that some of the misappropriated secrets were taken from *inside* Greenpeace's office which Greenpeace kept locked. *Id.* ¶¶ 31, 35. Any argument that Greenpeace – or any entity – must do more to protect its secrets than keeping them locked up on private property is neither supported in the case law, nor sound public policy.

Where, as here, a plaintiff both identifies information it believes qualifies as a trade secret and specifies the steps it has taken to protect that information, plaintiff has pleaded a claim for misappropriation of trade secrets. *See Mediostream, Inc. v. Microsoft Corp.*, No. 2:08-CV-369-CE, 2010 WL 4274578 (E.D. Tex. Oct. 29, 2010).

F. The Liability of the Corporate Defendants for The Acts of the Conspiracy Alleged Is Well-Established.

In an effort to derail environmental campaigns that posed public-relations challenges to chemical-giant Dow, Greenpeace alleges that Dow, Ketchum, and the Individual Defendants jointly agreed to commit various legal infractions to mitigate the effects of that environmental advocacy. Dow and Ketchum may be held liable for these acts alongside the Individual Defendants who actually committed the torts.

[67] *See AlphaMed Pharm. Corp. v. Arriva Pharm., Inc.*, No. 03-20078, 2005 WL 5960935 (S.D. Fla. Aug. 24, 2005) (denying summary judgment where plaintiffs alleged that some documents were stolen from trash bins on private property); *Frank W. Winne & Son, Inc. v. Palmer*, No. 91-2239, 1991 WL 155819 (E.D. Pa. Aug. 7, 1991) (recognizing plaintiffs could maintain misappropriation action where plaintiffs stored trash bins in area not accessible to others).

1. Allegations that Dow, Ketchum, and the Individual Defendants Conspired to Commit Illegal Acts Satisfy *Twombly*'s Plausibility Standard.

It is a "well-settled principle of conspiracy law that someone who jointly undertakes a criminal activity with others is accountable for their reasonably foreseeable conduct in furtherance of the joint undertaking." *United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994). A civil conspiracy exists where plaintiff can demonstrate: "(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 performed by one of the parties to the agreement (4) pursuant to, and in furtherance of, the common scheme." *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000). Greenpeace alleges that Dow, Ketchum, and the Individual Defendants conspired to procure confidential information from Greenpeace via illegal means and, accordingly, Dow and Ketchum, may be held liable for the acts of BBI and its employees. Compl. ¶¶ 79, 89-93, 100, 113, 119, 128, 135, 143. Dow and Ketchum challenge only whether Greenpeace has satisfactorily pleaded that all Defendants "agreed" to commit an unlawful act.[68]

Greenpeace need only show facts "suggestive enough" to render its claim of an unlawful agreement plausible. *Twombly*, 550 U.S. at 556. Greenpeace easily satisfies this standard. Specifically, Greenpeace alleges that Dow and Ketchum were regularly briefed on the Individual Defendants' illegal activities. Between 1998 and 2000 Timothy Ward and Jay Bly regularly briefed Ketchum and Dow. Compl. ¶ 84. In July 1999, executives from Ketchum and Dow

[68] An agreement can be inferred from circumstantial evidence. *See Weishapl v. Sowers*, 771 A.2d 1014, 1024 (D.C. 2001) ("Where there is no direct evidence of an agreement between the alleged co-conspirators, there must be circumstantial evidence from which a common intent can be inferred."); *United States v. Gatling*, 96 F.3d 1511, 1518 (D.C. Cir. 1996) ("It is well established that an agreement sufficient to support a conspiracy conviction can be inferred from circumstantial evidence.").

traveled to Annapolis, Maryland for an in-person briefing on Greenpeace. *Id.* ¶ 89. BBI, Dow, and Ketchum shortly thereafter formalized their intelligence gathering activities and created the Dow Trends Tracking Team, which included employees from each of the three companies. *Id.* ¶¶ 90, 93. The Team communicated regularly and convened in Midland, Michigan in October 1999. *Id.* ¶ 93.

Greenpeace further alleges that Dow and Ketchum reviewed confidential information. BBI delivered documents to Ketchum via UPS for the "Dow Project." Compl. ¶ 88. Because Defendants were clearly corresponding by email and telephone, it is reasonable to infer that packages sent by special delivery were Greenpeace's documents (obtained from D-Lines or other means) that BBI was sharing with its clients. In December 1999, Tom Donnelly of Ketchum advised BBI employees that sensitive information should be sent to his Hotmail, rather than Ketchum, email accounts while the Federal Trade Commission was investigating a proposed Dow merger. *Id.* ¶ 94. BBI sent bi-weekly reports to the Trends Tracking Team beginning with this advisory: "The following information was supplied by confidential sources and should be used with great discretion." *Id.* ¶ 51.

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. And, despite knowledge of illegality, Dow paid Ketchum, knowing that Ketchum was paying BBI tens of thousands of dollars. In the face of regular briefings related to the Individual Defendants' unlawful activities and illicitly obtained information, Ketchum continued to pay BBI's periodic

bills and Dow paid Ketchum: Ketchum paid BBI well over $125,000 and passed this cost along to Dow. *Id.* ¶¶ 95-96.

Finally, Greenpeace alleges that Dow and Ketchum tried to mask their involvement in the conspiracy. Ketchum's point-man on the Dow account, Donnelly, directed email to a private account to avoid accidental detection by federal investigators who were evaluating a merger that had nothing to do with Greenpeace. Compl. ¶ 94. Dow, though it was in direct contact with BBI employees on a regular basis, funneled payments to BBI through Ketchum. *Id.* ¶¶ 95-96.

Where, as here, alleged co-conspirators work symbiotically, over the course of several years, in pursuit of a common goal – even if only one conspirator commits the overt act that violates the law – an inference of conspiracy is appropriate.[69] *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983). As a practical matter, it is incredibly *unlikely* that BBI would risk arrest or a civil suit in order to perform services for which Dow and Ketchum had not authorized payment.[70] Indeed, the correspondence between Ward and Bly shows that they would not conduct D-Lines at properties with tight security without having authorization from Ketchum and Ketchum's ultimate client. Compl. ¶¶ 97-98 (discussing work for Ketchum and Kraft Foods Company).

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[69] *See, e.g., Steel v. City of San Diego*, 726 F. Supp. 2d 1172 (S.D. Cal. 2010) (holding that evidence of regular communications among co-conspirators during time-period of illegal activity supported an inference of an agreement and conspiracy). Greenpeace alleges that Dow, Ketchum, and the Individual Defendants remained in regular contact during the period in which BBI improperly obtained confidential information about Greenpeace. This type of regular communication supports an inference that the parties conspired.

[70] *See Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999); *see also Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal. App. 4th 736 (Cal. Ct. App. 2007) (rejecting company's denial of knowledge regarding private investigators' acts of trespass to steal confidential documents where nature of the information taken should have put company on notice that the investigator was engaged in questionable conduct).

Dow and Ketchum criticize the sufficiency of Greenpeace's allegations, but in making those criticisms they misleadingly reference only a handful of Greenpeace's allegations. Examining Greenpeace's allegations *in toto* reveals substantial detail concerning the conspiracy's participants, the timeframe for the conspiracy, exact dates of meetings among the conspirators, and the purpose of the overarching conspiracy. Detailed allegations of this nature are sufficient to support an inference of a conspiracy.[71]

Dow and Ketchum argue that there are many lawful means of obtaining confidential information and thus Greenpeace's conspiracy theory is implausible. But Defendants fail to identify any lawful means BBI could have used to gather the stolen documents and information at issue. Regardless, at the pleading stage, "[i]t is not necessary that the factual allegations tend to exclude the alternative explanation offered by defendants. That is the standard appropriate for a summary judgment motion. Here, the plaintiffs need only allege a conspiracy which is plausible in light of the competing explanations."[72] And, because Greenpeace has pleaded sufficient facts that support its allegations that the parties conspired, Greenpeace need not disprove Defendants' alternate theories of the case.

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[71] *Cf. In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1362 (N.D. Ga. 2010) (holding plaintiffs stated plausible conspiracy claim where plaintiffs' "conspiracy allegations detail how and when the alleged conspiracy was reached, who was involved in the alleged collusive communications, the content of the communications, the changed business practices following the collusive communications, and the pretextual reasons for the changed business practices."). Plaintiffs also note that Defendants' case law supports the same conclusion; Defendants cite several cases for the premise that allegations of a conspiracy absent facts describing the persons, places, and time period of the conspiracy fail the plausibility test. *See Acosta Orellana*, 711 F. Supp. 2d at 113; *Bush v. Butler*, 521 F. Supp. 2d 63, 68-69 (D.D.C. 2007); *McCreary v. Heath*, No. 04-0623 PLF, 2005 WL 3276257, at *5 (D.D.C. Sept. 26, 2005). But these are exactly the type of detailed allegations that Greenpeace alleges. Accordingly, even under the standard that Defendants embrace, Greenpeace has sufficiently pleaded a conspiracy.

[72] *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09-C-7666, 2011 WL 462648, at *9 (N.D. Ill. Feb. 9, 2011) (rejecting defendants' argument that allegations supporting an inference of an illegal agreement could be explained by independent, legal behavior).

2. Aiding and Abetting Liability Exists in the District of Columbia.

Greenpeace also alleges that Dow and Ketchum may be held liable for the acts of the Individual Defendants under an aiding and abetting theory. Defendants first argue that this Court should not recognize an aiding and abetting theory because one court has questioned whether the theory is viable. Critically, however, that case recognized that courts in the District have upheld the proposition that aiding and abetting is a colorable cause of action. *Acosta Orellana*, 711 F. Supp. 2d at 107-08 (citing several cases that had recognized cause of action). One district court opinion questioning, *in dicta*, whether aiding and abetting liability is a legitimate theory of liability is an insufficient basis upon which to argue that this Court should ignore circuit court precedent that endorses the use of aiding and abetting liability. *See Halberstam*, 705 F.2d at 487-88.

Next, Dow and Ketchum argue that Greenpeace has failed to satisfy the standard for pleading aiding and abetting liability, which requires that Greenpeace plead their "knowing and substantial assistance" with the commission of the underlying torts. As demonstrated in extensive detail above, Greenpeace alleges substantial facts that support the inference that Dow and Ketchum had knowledge of the illegal acts and provided substantial assistance in the commission of those acts. These allegations are more than sufficient to plead aiding and abetting liability.[73]

[73] *See Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86, 96 (D.D.C. 2009) (holding plaintiff adequately plead vicarious liability under an aiding and abetting liability where complaint alleged a "general awareness of wrongdoing on the part of the one being aided or abetted" and substantial assistance consisted of providing tortfeasor with job opportunities).

CONCLUSION

For the foregoing reasons, the motions to dismiss of the Dow Chemical Company, Ketchum, Timothy Ward, Jay Arthur Bly, Michael Mika and George Ferris should be denied.

Dated: March 25, 2011

By: /s/ Victoria S. Nugent

Victoria S. Nugent (D.C. Bar No. 470800)
Kit A. Pierson (D.C. Bar No. 398123)
George F. Farah (D.C. Bar No. 992638)
Emmy L. Levens (D.C. Bar No. 997826)
Robert Cacace (D.C. Bar No. 999006)
COHEN, MILSTEIN, SELLERS & TOLL P.L.L.C.
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699

John P. Relman (D.C. Bar No. 471430)
Reed N. Colfax (D.C. Bar No. 405500)
RELMAN, DANE & COLFAX PLLC
1225 19th Street, N.W.
Washington, DC 20036

Telephone: (202) 728-1888
Facsimile: (202) 728-0848

Attorneys for Plaintiff Greenpeace, Inc.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Plaintiff's Opposition to the Motions to Dismiss Plaintiff's Complaint Filed By Defendants Dow Chemical Company, Ketchum, Timothy Ward, Jay Arthur Bly, Michael Mika and George Ferris was served on counsel of record who have appeared in this action through the electronic filing system for the U.S. District Court for District of Columbia on March 25, 2011.

/s/ Victoria S. Nugent