IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Greenpeace, Inc.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:10-cv-02037-RMC
The Dow Chemical Company, et al.,	)	
Defendants.	)	

DEFENDANT DEZENHALL RESOURCES LTD.'S MOTION TO DISMISS AND STATEMENT OF POINTS AND AUTHORITIES

February 18, 2011

Thomas A. Clare, P.C. (D.C. Bar No. 461964)
Dana E. Hill (D.C. Bar No. 974232)
KIRKLAND & ELLIS, LLP
655 15th St. N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200
thomas.clare@kirkland.com
dana.hill@kirkland.com

Attorneys For Defendant Dezenhall Resources, Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Page(s)

Cases

[1] Pursuant to Local Rule 7(a), the cases and authorities on which Dezenhall Resources chiefly relies have been marked with asterisks.

Statutes

Other Authorities

Rules

INTRODUCTION

In its Complaint, Greenpeace, Inc. ("Greenpeace") accuses Dezenhall Resources Ltd. ("Dezenhall Resources") of retaining private investigators to obtain information regarding Greenpeace, paying for that service, and receiving information as a result. The Complaint adorns these allegations with adjectives like "unlawful," "misappropriated," and "illegal" and it surrounds them with a narrative of unlawful investigative tactics allegedly conducted by the private investigators that were retained. But putting to one side conclusory adjectives and allegations about other defendants, the ***facts*** Greenpeace alleges about Dezenhall Resources do nothing more than depict a lawful retention of a licensed investigative firm. Greenpeace devotes the bulk of its factual allegations to establishing the existence of this engagement. But such allegations do not suggest an unlawful conspiracy, or even unlawful conduct. At one point, even Greenpeace acknowledges that "legal methods of surveillance of Greenpeace activists" were part of this retention. (Nov. 29, 2010 Complaint ¶ 168 [Dkt. 1].)

Greenpeace's ability to state a legal claim for which relief can be granted against Dezenhall Resources, therefore, depends on the existence of the factual allegations that Dezenhall Resources was complicit in *unlawful* investigative tactics. It depends on Greenpeace's ability to allege facts plausibly suggesting Dezenhall Resources's involvement in, or agreement to be complicit in, something other than "legal methods of surveillance."

Greenpeace's Complaint fails to do this. It sets forth factual allegations devoted to supporting claims that individual investigators committed various District-law torts in conducting surveillance of the environmental group. Greenpeace then takes these facts and attempts to make, quite literally, a federal case of it against defendants who did not commit the torts alleged. As a result, at least with regard to Dezenhall Resources, the legal causes of action that Greenpeace asserts — violations of the Racketeering and Corrupt Influenced Organizations

Act ("RICO"), conspiracy to violate RICO, conspiracy to commit trespass, conversion and other torts — do not fit the facts that Greenpeace alleges. At each turn, the facts Greenpeace alleges about Dezenhall Resources do not connect to the legal claims it asserts, and critical factual allegations, required to support those claims, are omitted. These fatal pleading errors requires dismissal of the claims against Dezenhall Resources.

Greenpeace's RICO Claims are deficient as a matter of law because neither of the two predicate criminal acts identified by Greenpeace are adequately pled. Greenpeace claims that Dezenhall Resources violated the federal statute against interstate transportation of stolen goods. But this statute applies by its terms to stolen "goods" — items worth more than $5,000 that are ordinarily the subject of commerce. Courts have declined to expand this statute to reach transportation of items that are not ordinarily bought and sold in a market like, for example, documents containing confidential information. *See In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971). Yet this is precisely what Greenpeace seeks to accomplish by predicating its claims for civil liability on the alleged transportation of stolen environmental strategy documents.

The second claimed federal criminal violation falls even further from the mark. Greenpeace claims Dezenhall Resources committed wire fraud but it fails to plead, with particularity, the "who, what, when, where, and how" of the alleged fraud as required by federal pleading rules. Moreover, the one fact that Greenpeace does specify about this alleged fraud is that it was perpetrated on CLEAN, a "Greenpeace ally." Thus Greenpeace does not even allege that Dezenhall Resources defrauded Greenpeace; it alleges a wire fraud that injured a ***different*** environmentalist group. To state a claim for civil RICO, Greenpeace must plead facts plausibly suggesting that two predicate federal statutes had been violated. Greenpeace does not do so with regard to either, and its civil RICO claims must be dismissed as a result.

Greenpeace also fails to state any claim for relief under District tort law against Dezenhall Resources for the alleged unlawful activities of the Individual Defendants. Greenpeace attempts to hold Dezenhall Resources liable for torts allegedly committed by others based on allegations that Dezenhall Resources engaged in a conspiracy with those individuals. This unlawful conspiracy, however, is little more than a conclusory assertion. Greenpeace's factual allegations evince a lawful retention of a licensed private investigative firm. Conspiracy claims that are founded on allegations that are "not only compatible with, but indeed [] more likely explained by, lawful … behavior," fail to "plausibly suggest an illicit accord" and must be dismissed. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (explaining *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Greenpeace alleges no facts to plausibly suggest that Dezenhall Resources was complicit in unlawful investigative tactics allegedly employed by the investigators. Indeed, not only do the facts in its Complaint fail to support claims of a conspiracy to commit torts under District law, they do not even state claims for most of the underlying torts themselves. All of these failings are exacerbated by the fact that Greenpeace brings these decade-old claims without properly pleading that they are not time-barred.

Greenpeace's Complaint poses a straight-forward question of law for this Court: Does a plaintiff state a claim for civil RICO and conspiracy to commit torts with a complaint that alleges that the defendant lawfully retained private investigators, but does not allege any facts plausibly suggesting that defendant's complicity in the unlawful investigative tactics allegedly used? The answer is "no," and it is apparent from the allegations that are made and the allegations that are missing in the Complaint. All of the claims against Dezenhall Resources must be dismissed as a result.

FACTS

Dezenhall Resources, Ltd. is a nationally-recognized communications firm that assists clients with crisis management, public affairs, and training services. Dezenhall Resources provides communications support to clients, many of whom are involved in high-stakes litigation, and has provided these services to a diverse array of corporate, non-profit, and individual clients. Dezenhall Resources was formed in 2003 as the successor to the public relations firm Nichols-Dezenhall Communications that was founded in 1987 by Eric Dezenhall and David Nichols. (Compl. ¶ 11.)[2] Mr. Dezenhall, who remains at Dezenhall Resources, Ltd. today as Chief Executive Officer, has authored and co-authored two non-fiction books related to crisis management; provided dozens of articles, commentary, and op-eds in publications such as the Financial Times, the New York Times, the Wall Street Journal, BusinessWeek, Forbes, Fortune, and Ethical Corporation; produces regular blogs on The Daily Beast and The Huffington Post; and has made regular appearances in such media outlets as CNBC, ABC News, NPR, NBC's Today Show, and ABC's Nightline to discuss public relations strategies and related issues.

On November 29, 2010, Greenpeace filed this lawsuit accusing Dezenhall Resources of "a pattern and practice of clandestine and unlawful activities" with "the intention of preempting, blunting, thwarting its [Greenpeace's] environmental campaigns." (Compl. at 2, ¶ 3.) This allegation derives from the claim that four private investigators, Timothy Ward, Jay Arthur Bly, Michael Mika, and George Ferris ("Individual Defendants"), while employed at a private security firm, Brown Beckett International ("BBI"), undertook unlawful activities in 1998, 1999,

[2] Because the Complaint focuses on activities in 1998, 1999 and 2000, the allegations in the Complaint relate to the activities of Nichols-Dezenhall, not Dezenhall Resources. For purposes of this Motion, the two entities are referred to collectively as "Dezenhall Resources" throughout.

2000 to obtain confidential information about Greenpeace. (*Id.* at ¶ 2.) According to Greenpeace, the alleged conduct by private investigators reflected not only unlawful trespass by those individuals, but also two separate broader conspiracies by corporations and their public relations firms to thwart Greenpeace's environmental campaigns. In the first, Greenpeace accuses Dow Chemical Company and Ketchum, Inc. of conspiring with these private investigators to unlawfully derail environmental campaigns against manufacturing activities involving dioxin and products containing genetically modified organisms. (*Id.* at ¶ 18.) In the second, Greenpeace accuses Sasol North America, Inc. and Dezenhall Resources of conspiring with these private investigators to break the law to combat a campaign against chlorine production in the Lake Charles region of Louisiana. (*Id.* at ¶¶ 18-19.)

Although this conduct occurred over a decade ago, Greenpeace claims to have learned about these conspiracies recently as a result of an April 2008 Mother Jones article about BBI's surveillance of Greenpeace based on internal BBI documents. (*Id.* at ¶ 108.) According to the article, BBI's documents were being made available to Greenpeace when the former BBI investor storing these internal records "began contacting some of BBI's targets and shared its records with them" after he lost a 2005 lawsuit. James Ridgeway, *Black Ops, Green Groups*¸ MotherJones (April 10 2008), http://motherjones.com/environment/2008/04/exclusive-cops-and-former-secret-service-agents-ran-black-ops-green-groups. Thus, Greenpeace has had years to review "more than 100 boxes of records from" BBI stored in a warehouse in Maryland. Jenna Johnson, *Corporate Espionage Detailed in Documents; Defunct Md. Agency Targeted*, Washington Post (June 22, 2008), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/06/21/AR2008062101572.html. Greenpeace acknowledges that its

lawsuit is based in large part on the "voluminous ... records" and "extensive documentation" reflected in these news reports. (Compl. ¶ 24.)

Despite this wealth of available documentary evidence, the actual factual allegations Greenpeace makes about Dezenhall Resources are notably sparse. Greenpeace's Complaint essentially alleges that Dezenhall Resources hired, paid, met with, and received information from BBI for its clients. Greenpeace alleges that Dezenhall Resources met with the Individual Defendants on various occasions, (*id.* at ¶¶ 44, 45), that Dezenhall Resources received information and briefings from BBI that involved its clients' interests, *(id.* at ¶¶ 47, 51, 53), and that Dezenhall Resources relayed this information to its clients (*id.* at ¶ 71). Greenpeace alleges that BBI billed Dezenhall Resources for its work "with account-specific, monthly invoices," (*id.* at ¶ 50), like surveillance of Greenpeace headquarters billed under the title the "U Street Project," (*id.* at ¶ 52), and that Dezenhall Resources paid BBI for its work, (*id.* at ¶¶ 64, 72). Greenpeace alleges that BBI was retained to conduct surveillance of Greenpeace and that BBI did so. (*Id.* at ¶ 60.)[3] Greenpeace further alleges that Dezenhall Resources was involved with BBI in marketing services to potential clients, (*id.* at ¶ 54), and proposed a joint marketing venture (never actually consummated) where both firms would offer public relations and investigative services, within their separate competencies, in a package deal, (*id.* at ¶ 102). As for surveillance activities, Greenpeace candidly acknowledges that Dezenhall Resources and BBI "engaged in some legal methods of surveillance of Greenpeace activists" as part of their business relationship. (*Id.* at ¶ 168.)

[3] The Complaint does not clearly specify whether Dezenhall Resources retained BBI or whether it merely referred BBI to its client who then retained this firm. In the latter circumstance, stating a claim for liability against Dezenhall Resources would be unfathomable. But for the purposes of this Motion, Dezenhall Resources accepts that Greenpeace's allegations allow at least for a reasonable inference that it had a relationship with BBI or was somehow involved in that relationship. Of course, nothing herein should be construed as an admission of the truth of any such allegations.

Greenpeace makes two attempts to allege facts to suggest that Dezenhall Resources participated in something other than "legal ... surveillance of Greenpeace activists." ***First***, Greenpeace's alleges that Dezenhall Resources was on notice as to the unlawful activities of BBI because of the inclusion of a boilerplate confidentiality disclaimer that appeared on BBI reports. Greenpeace alleges:

> From 1998 through 2000, Ward regularly briefed Andy Shea of Dezenhall, Tom Donnelly of Ketchum and Peter Markey of CONDEA Vista about the information unlawfully obtained from Greenpeace.... In addition to in-person briefings, BBI produced written reports which began with the advisory, "The following information was supplied by confidential sources and should be used with great discretion." From this advisory and the content of these reports, which included prospective plans and budgets and reflected internal debates and dynamics, Dezenhall and Ketchum knew of the unlawful means employed to procure the information presented to them and/or consciously avoided asking about details of how the information was procured so that they could maintain plausible deniability.

(*Id.* at ¶ 51.) ***Second***, Greenpeace alleges that Dezenhall Resources wanted "vague" descriptions in its billing:

> During that period, Dezenhall paid approximately $150,700 to BBI for the Lake Charles Project on behalf of client CONDEA Vista. These payments were authorized by Maya Shackley, a Senior Vice President at Nichols-Dezenhall. Ms. Shackley has admitted under oath that BBI's invoices were "intentionally vague" because Nichols-Dezenhall did not want "specific information" appearing in the invoices. Ms. Shackley has also testified that this lack of specificity was requested by Nichols-Dezenhall's clients, who wanted "vague" invoices. Ms. Shackley admitted under oath that Dezenhall's practice was to "immediately turn around payment to [BBI] as soon as [Dezenhall's] clients paid [Dezenhall]," giving rise to the reasonable inference that Dezenhall billed, and was paid by, CONDEA Vista for work on the Lake Charles Project before paying BBI.

(*Id.* at ¶ 72.) From this allegation of vague billing — combined with CONDEA Vista's alleged direction to BBI to '"find out what you can find out'" and general allegations regarding the retention of BBI — Greenpeace infers that Dezenhall Resources "knew that BBI would engage in the unlawful activities described above and/or were willfully blind to the illegality of those actions." (*Id.* at ¶ 77.)

Based on these facts, Greenpeace contends that Dezenhall Resources's conduct constitutes "numerous indictable predicate acts" that violate federal criminal statutes prohibiting transportation of stolen goods, 18 U.S.C. § 2314, and wire fraud, 18 U.S.C. § 1843, and that this "pattern of racketeering activity" violates RICO, 18 U.S.C. § 1962. (Compl. ¶¶ 172, 178, 181.) Greenpeace seeks to hold Dezenhall Resources liable for violating RICO and conspiracy to violate RICO. (*Id.* at ¶¶ 164-181 (Count 8 and Count 9).) In addition, Greenpeace claims that Dezenhall Resources may be held liable for conspiracy to commit trespass, (*id.* at ¶¶ 110-115 (Count 1)), invasion of privacy, (*id.* at ¶¶ 116-121 (Count 2)), conversion, (*id.* at ¶¶ 122-130 (Count 3)), trespass to chattel, (*id.* at ¶¶ 131-137 (Count 4)), and misappropriation of trade secrets, (*id.* at ¶¶ 138-145 (Count 5)).

STANDARD OF REVIEW

To state a claim for which relief can be granted, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While it "does not need detailed factual allegations," it must "provide the 'grounds' of [the] 'entitlement to relief'" with factual allegations that are sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted). This means that "[t]he pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action." *Id.* (internal quotations, citation & alterations omitted). Instead, it must plead facts that, when accepted as true, state a claim for relief that is "plausible on its face." *Id.* at 570.

In making that determination, a court need not accept the truth of conclusory statements and legal conclusions set forth in a complaint because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" under Rule 8. *Ashcroft,* 129 S. Ct. at 1949. "While legal conclusions can provide the framework of a

complaint, they must be supported by factual allegations." *Id.* at 1950. This support must be pled at the outset of litigation, as "notice" pleading "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* Similarly, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

Claims of fraud must satisfy a more exacting standard. To state such a clam, a complaint "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). As discussed below in more detail, "[t]he particularity requirement of Rule 9(b) demands that the pleader specify what [fraudulent] statements were made and in what context, when they were made, who made them, and the manner in which the statements were misleading." *Intex Recreation Corp. v. Team Worldwide Corp.*, 390 F. Supp. 2d 21, 24 (D.D.C. 2005).

ARGUMENT

I. GREENPEACE FAILS TO STATE A CLAIM IN COUNTS 8 AND 9 THAT DEZENHALL RESOURCES ENGAGED IN A PATTERN OF CRIMINAL CONDUCT CONSTITUTING A RICO VIOLATION.

Greenpeace asserts two Counts of civil RICO against Dezenhall Resources. Greenpeace claims that Dezenhall Resources violated RICO's prohibition against use of an enterprise to engage in a "pattern of racketeering activity," 18 U.S.C. § 1962(c), (Compl. ¶ 176 (Count 8 of the Complaint)), and claims that Dezenhall Resources "conspired to violate" RICO under 18 U.S.C. 1962(d), (*id*. at ¶ 181 (Count 9 of the Complaint)). These claims are based on allegations that the Individual Defendants conducted "D-Lines and electronic and physical surveillance" of Greenpeace's headquarters and the "infiltration of a Greenpeace ally, CLEAN." (*Id.* at ¶¶ 170(a), 172(b), 179(a), 179(b).) On both Counts, Greenpeace contends that it may hold Dezenhall Resources liable for violating RICO because the conduct alleged violates the federal

criminal statute prohibiting interstate transportation of stolen goods, and the federal wire fraud statute. (*Id.* at ¶¶ 162, 178.)

To state a RICO claim, a claimant "must allege facts showing '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering.'" *Prunté v. Universal Music Group*, 484 F. Supp. 2d 32, 42 (D.D.C. 2007) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). The requisite showing of "racketeering activity" is not satisfied merely by describing a panoply of tortious acts. Rather, Greenpeace must premise its claim for relief on the violation of a limited class of statutorily-delineated "predicate acts." 18 U.S.C. § 1961(1); *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 987 (2010). And "[a] 'pattern of racketeering activity' requires commission of at least two predicate offenses on a specified list." *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1264 (D.C. Cir. 1995).

As an initial matter, Dezenhall Resources vigorously denies the allegations in the Complaint that it has been involved in a pattern of criminal or tortious conduct or, for that matter, any wrongful conduct at all. For the purposes of this motion to dismiss, however, Dezenhall Resources will assume, as it must at this stage, the truth of the factual allegations contained in Greenpeace's Complaint. It does not concede, and this Court must not accept, the truth of any of the various conclusory statements of illegality and unlawful conduct by Dezenhall Resources that are interspersed throughout the Complaint.

But even accepting every fact Greenpeace alleges as true, Greenpeace has failed to state a claim for which relief can be granted under the RICO statute. Greenpeace identified the transportation of stolen goods in violation of 18 U.S.C. § 2314, and wire fraud in violation of 18 U.S.C. § 1343, as the predicate acts to support its RICO counts. To state a claim for RICO

violations, Greenpeace must plead two predicate criminal offenses and must do so in compliance with federal pleading rules. Greenpeace has failed to state a claim with respect to either.

A. Greenpeace's Factual Allegations Do Not Support A Claim That Dezenhall Resources Transported Stolen Goods.

Greenpeace fails to state a claim for interstate transportation of stolen goods in violation of 18 U.S.C. § 2314 for two reasons. ***First***, Greenpeace fails to allege — let alone plead any facts to demonstrate — that the stolen items have a "value of $5,000 or more." 18 U.S.C. § 2314. ***Second***, the items in question, as described by Greenpeace, are not the type of "goods, wares, [or] merchandise" contemplated by the statute. *Id.* Greenpeace simply failed to plead the essential elements set forth in the text of this criminal statute.

The statute Greenpeace claims was violated states:

> Whoever 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 … Shall be fined under this title or imprisoned not more than ten years, or both.

Id.[4] Greenpeace suggests that this statute was violated by so-called "D-Lines," in which the Individual Defendants removed internal Greenpeace documents from Greenpeace's recycling bins and/or dumpsters and then carried these documents to BBI's Maryland office. (*See* Compl. ¶¶ 25-31, 46-55, 174.) Greenpeace claims that the items allegedly stolen and transported were documents from Greenpeace's trash dumpsters and recycling bins. (*See id*. at ¶ 22.)

The first and most obvious failing with this claim is that Greenpeace does not allege or plead facts to show that these documents were worth more than $5,000. It is well-settled that "[i]t is an essential element of [§ 2314] that the value of the transported goods be $5,000 or more," *United States v. Hassel*, 341 F.2d 427, 430 (4th Cir. 1965), and that pleading and proving

[4] Emphasis added unless otherwise specified.

"value in excess of $5,000.00" is an "indispensable ingredient" of the crime of interstate transportation of stolen property. *Abbott v. United States*, 239 F.2d 310, 312 (5th Cir. 1956).

Greenpeace does not allege facts to support this element of the offense. Greenpeace alleges that the documents consisted of "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 statements and employment agreements." (Compl. ¶ 46.) The only allegation that even refers to value is the vague allegation that "Plaintiff's intellectual property was diminished in value" as a result of Defendants actions generally. (*Id*. at ¶ 175.) Nothing in this statement can be interpreted as an allegation that the documents at issue had a value of $5,000 or more.[5] Greenpeace's failure to ascribe any value to the "goods" it claims were stolen leaves its Complaint missing one of the essential elements of its claim.

Greenpeace's claim that Dezenhall Resources violated the federal statute against interstate transportation of stolen goods also fails because the documents Greenpeace claims Defendants transported are not "goods, wares, [or] merchandise" within meaning of this statute. 18 U.S.C. § 2314.[6] Five decades of judicial decisions have made clear that this statute encompasses only items that are bought and sold in commerce. *See American Cynamid Co. v. Sharff*, 309 F.2d 790, 796 (3d Cir. 1962) ("[T]he terms 'goods, wares, and merchandise' is a general and

[5] *See also* 18 U.S.C. § 2311 (defining "value" for purpose of Section 2314 as the "market value" of the stolen goods).

[6] As noted, the statute applies to "goods, wares, merchandise, securities or money," 18 U.S.C. § 2314. In its Complaint, Plaintiff specifically claims that the items taken were "goods." (*See* Compl. ¶ 172.)

comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce.") (internal quotations & citation omitted); *United States v. Smith*, 686 F.2d 234, 241 (5th Cir. 1982) (finding that copyrights, while "arguably" the "subjects of commerce," are not considered "goods, wares, or merchandise"); *United States v. Kwan*, No. 02CR241 (DAB), 2003 WL 22973515, at *4 (S.D.N.Y. Dec. 17, 2003) (finding that, although the statute can apply to documents in some instances, "the intrinsic commercial aspect of an object or thing is key to determining whether it is an article 'ordinarily a subject of commerce' and hence constitutes 'goods, wares, [or] merchandise' under § 2314"). To demonstrate that an item is ordinarily bought and sold in commerce, the party claiming the crime must plead and prove the existence of a market for that item because "[i]n the absence of a readily obvious market, for an article to be ordinarily a subject of commerce sufficient to constitute 'goods, wares, [or] merchandise, under § 2314, a market for the article must be established." *Id.* at *6.

The allegation that Greenpeace's confidential documents are ordinarily bought and sold in commerce is missing from the Complaint. Greenpeace does not allege that a market exists for the campaign strategies of an environmentalist organization. Nor could it plausibly do so. In *In re Vericker*, the Second Circuit considered and rejected that argument when it held that 18 U.S.C. § 2314 would not reach the transportation of internal FBI documents containing confidential Government information. *In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971) . The mere fact that some individuals might want such documents for their own purposes did not convince the Court to expand the meaning of "goods, wares, [or] merchandise":

> It is quite true that under some circumstances mere papers may constitute 'goods,' 'wares,' or 'merchandise.' The Third Circuit has so held with respect to geophysical maps, and we have done so with respect to documents describing procedures for manufacturing certain antibiotic drugs and a steroid from microorganisms. But such papers were well within the normal meaning of goods, wares, or merchandise, 'a general and comprehensive designation of such

> personal property or chattels as are ordinarily a subject of commerce.' Geophysical maps are an ordinary object of sale by geologists or oil companies and secret manufacturing procedures are an ordinary subject of sale or, more frequently, of license. We are not aware that papers showing that individuals are or may have been engaging in criminal activity or what procedures are used by the FBI in tracking them down are ordinarily bought and sold in commerce, and the Government has not come forward or proffered any evidence to that effect.

Id. (opinion of Friendly, C.J.) The Court rejected the argument that the legislative history of the statute reflected Congress's "intention to cover 'all property'" because the same legislative history was cited "to show that Congress was aiming at the kind of property normally the subject of theft by gangsters and racketeers." *Id.*

Like the FBI's confidential strategic documents in *In re Vericker*, documents showing Greenpeace's "confidential strategy information," (Compl. ¶ 47), are not "ordinarily bought and sold in commerce," *In re Vericker,* 446 F.2d at 248. Greenpeace's failure to allege otherwise renders the claim that Dezenhall Resources committed interstate transportation of stolen property deficient as a mater of law. This, alone, justifies dismissing all RICO Claims against Dezenhall Resources.

B. Greenpeace's Factual Allegations Do Not Support A Claim That Dezenhall Resources Committed Wire Fraud

Greenpeace's claim that Dezenhall Resources committed wire fraud must meet a more demanding standard because a complaint "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Johnson v. Computer Tech. Servs., Inc*., 670 F. Supp. 1036, 1039-40 (D.D.C. 1987). This heightened standard is fully applicable to complaints that rely on wire fraud as one of the predicate acts supporting a claim a pattern of racketeering activity. *Bates v. Northwestern Human Servs., Inc.*, 466 F. Supp. 2d 69, 88 (D.D.C. 2006) ("It is well-settled in this and other Circuits that '[w]here acts of mail and wire fraud constitute the alleged predicate racketeering [activity], these acts are subject to the heightened

pleading requirement of [Federal Rule of Civil Procedure] 9(b).'") (quoting *Warden v. McLelland*, 288 F.3d 105, 114 (3d Cir. 2002)). Thus, at a minimum, Greenpeace must "state the time, place and content" of the fraud alleged and "what was retained or given up as a consequence of the fraud." *Bates*, 466 F. Supp. at 89 (quoting *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004)). Moreover, courts are "particularly sensitive" to attempts to bootstrap a RICO claim from vague allegations of mail or wire fraud, and have required "specific allegations as to which defendant caused what to be mailed … and when and how each mailing … furthered the fraudulent scheme." *Id.* at 89-90 (quoting *Gotham Print, Inc. v. American Speedy Printing Ctrs.*, 863 F. Supp. 447, 458 (E.D. Mich. 1994)).

The facts pled to support the wire fraud claim fall far short of this standard. Greenpeace's claim of wire fraud is grounded in allegations that BBI investigators infiltrated a different environmental group named CLEAN:

> BBI coordinated the infiltration of a Greenpeace ally, CLEAN, by Dick Rogers. Rogers used false pretenses to gain a seat on CLEAN's board. From that position, he monitored information related to Greenpeace. The fraudulent scheme was designed to provide more information to BBI and its paying clients, Dezenhall and Sasol, about Greenpeace's activities. Rogers forwarded confidential emails related to Greenpeace to BBI's agent, and submitted reports about Greenpeace's activity. The interstate use of email and/or telephone was a part of the essential scheme to defraud CLEAN and Greenpeace of proprietary information. These regular and repeated acts in violation of 18 U.S.C. § 1343 constitute "racketeering activity" as defined in 18 U.S.C. § 1961(1).

(Compl. ¶ 172(b); *see id*. at ¶¶ 33(b), 67.) Greenpeace does not identify when Rogers was hired, when he made any particular misrepresentation, when he joined CLEAN's board, or where the scheme took place.[7] Greenpeace also fails to identify with any particularity what information

[7] In a separate paragraph, Greenpeace notes only that CLEAN is "based in Louisiana," but it is not at all clear from the Complaint where Rogers is supposed to have perpetrated his fraud on CLEAN. (*See id.* at ¶¶ 33-34.)

Rogers supposedly obtained, other than to claim he received emails containing "copies of correspondence, memoranda, and reports." (*Id.* at ¶ 33(b).) The Complaint does not answer any of the questions as to "***which*** defendant caused ***what*** to be [e]mailed … and ***when*** and ***how*** each [e]mailing … furthered the fraudulent scheme." *Bates*, 466 F. Supp. 2d at 89-90 (internal quotations & citation omitted). The Complaint also "utterly fails to provide a date on which the fraudulent scheme alleged by [Greenpeace] commenced." *Id.* at 92. Greenpeace claims these emails were forwarded to BBI (apparently the basis of the wire fraud claim), but Greenpeace fails to specifically identify the time, place, or content of any of these alleged transmissions. This does not satisfy the pleading standard of Rule 9(b), and thus the wire fraud claim — along with the civil RICO claim that relies on this predicate act — must also be dismissed.

But the particulars of the alleged fraud are not the only missing piece of this wire fraud claim; facts demonstrating any proximate causation between Rogers's actions and a judicially-cognizable injury to Greenpeace are also wholly absent from Greenpeace's pleading. A complaint cannot stop at alleging fraud; it must allege facts suggesting '"some direct relation between the injury asserted and the injurious conduct alleged.'" *Browning v. Clinton*, 292 F.3d 235, 249 (D.C. Cir. 2002) (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). Put simply, Greenpeace must plead facts ***connecting*** the fraud it alleges to the injury it alleges.

No such casual connection can be pled in this case because Greenpeace's claim of wire fraud is grounded in allegations that defendants ***committed fraud on somebody else***. The only injury Greenpeace claims is that its "intellectual property was diminished in value, and Plaintiff's business — environmental campaigns — was interfered with." (Compl. ¶ 175.) Although the circumstances of the alleged fraud are not at all clear from the pleading, Greenpeace's

allegations of wire fraud do make one thing crystal clear: the party injured by the alleged fraud was not Greenpeace, but "a Greenpeace ally, CLEAN." (*See id.* at ¶ 172(b).) Greenpeace claims that as a result of his allegedly ill-gotten position on CLEAN's board, Rogers obtained and forwarded "internal, confidential information (copies of correspondence, memoranda, and reports)." (*Id.* at ¶ 33(b).) But Greenpeace does not state that Rogers obtained ***Greenpeace's*** "internal, confidential information" as opposed to ***CLEAN's***. (*Id.*) The most Greenpeace can muster in this regard is the vague claim that Rogers forwarded emails "related to Greenpeace." (*Id.* at ¶ 172(b).) Without more, Greenpeace appears to be claiming that wire fraud was perpetrated on a third party, and that the fraud may or may not have harmed the broader mission of environmentalism to which both Greenpeace and the third party subscribe.

A RICO plaintiff, like all other claimants, '"only has standing if … he had been injured … by the conduct constituting the violation,' an unexceptional requirement which buttresses the need for plaintiffs to plead not only actual fraud, but ***actual fraud directed at the plaintiffs***." *Bates*, 466 F. Supp. 2d at 91 (internal quotations & citation omitted, emphasis in original); *see Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 459 (2006) (rejecting RICO claim where the "direct victim" of the alleged wire and mail fraud was a third party and there was a "discontinuity between the RICO violation and the asserted injury"); *Firestone v. Galbreth*, 976 F.2d 279, 285 (6th Cir. 1992) (dismissing RICO action for lack of standing where plaintiff claimed "an indirect injury because any harm to [plaintiff] flows merely from the misfortunes allegedly visited upon [a third party] by the defendants"). While Greenpeace may take offense to a fraud allegedly perpetrated on CLEAN because Greenpeace believes that it and CLEAN have a similar environmentalist mission, it is axiomatic that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the

problem, is not sufficient by itself" to create a "judicially remediable injury." *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 434 (D.C. Cir. 2002) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).[8]

Because Greenpeace fails to identify the particular circumstances of the fraud it alleges, and because the fraud Greenpeace does attempt to identify was directed at — and caused injury to — a different organization, Greenpeace's wire fraud claims must be dismissed. As a result, Greenpeace has failed to state claim for the commission of any predicate act and its RICO claim must be dismissed. *Ficken v. AMR Corp.*, 578 F. Supp. 2d 134, 140-41 (D.D.C. 2008).[9]

II. GREENPEACE FAILS TO STATE A CLAIM IN COUNTS 1 THROUGH 5 THAT DEZENHALL RESOURCES CONSPIRED TO COMMIT COMMON LAW TORTS.

In addition to an alleged pattern of federal criminal violations, Greenpeace also seeks to hold Dezenhall Resources liable for five different common law torts. (Compl. ¶¶ 110-145.) It is plain from the allegations that Dezenhall Resources is not accused of committing trespass or conversion itself. Rather, Greenpeace appears to allege that the individual investigator defendants "committed unlawful acts" while the corporate and public relations defendants "provided financial support and direction and received the fruits of those unlawful acts." (*Id.*

[8] Nor is Greenpeace aided by the Supreme Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 641-42 (2008), which held that first-party reliance on a misrepresentation is not a required element of a RICO claim predicated on mail fraud. The Court also strongly affirmed a plaintiff's duty to show a real injury and proximate causation between the harm alleged and the fraudulent conduct, *id*. at 653, and distinguished the plaintiff in *Bridge* from cases where "there are [] independent factors that account for [a plaintiff's] injury, there is [] risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and [a] more immediate victim is better situated to sue," *id*. at 658. All of these factors are present here.

[9] As noted above, Greenpeace claims that Dezenhall Resources not only violated RICO under 18 U.S.C. § 1962(c), but that it engaged in a conspiracy to violate RICO that itself was in violation of 18 U.S.C. § 1962(d). (Compl. ¶¶ 177-181.) It is well settled that where a claim under Section 1962(c) "do[es] not set forth violations, the [RICO conspiracy count] does not set forth a conspiracy to commit violations; therefore, it must fail as well." *See Danielsen v. Burnside-Ott Aviation Training Ctr. Inc.*, 941 F.2d 1220, 1232 (D.C. Cir. 1991). A pleading that fails to allege injury resulting from ***a valid predicate act*** fails to state a claim for conspiracy to violate RICO. *See e.g., id.; Beck v. Prupis*, 529 U.S. 494, 506 (2000). And, so, Count 9 of Greenpeace's Complaint should be dismissed for the same reasons that Count 8 should be dismissed.

at ¶¶ 113, 119, 128, 135, 143.) Greenpeace attempts to hold Dezenhall Resources liable for the torts of others by claiming that it conspired with the individual investigator defendants to commit the alleged torts. (*See, e.g.*, *id*. at ¶¶ 112-114 (alleging that Dezenhall Resources engaged in a "conspiracy" and "aided and abetted" unlawful investigative tactics).)[10]

Here too, however, Greenpeace fails to allege facts to support a claim for vicarious liability against Dezenhall Resources based on the alleged actions of private investigators. Nowhere does Greenpeace set forth the facts to support the "unlawful agreement" that is at the heart of such a conspiracy claim. Separately, Greenpeace also fails to state legally viable claims with respect to several of the underlying torts that Dezenhall Resources allegedly conspired to commit.

A. Greenpeace Fails To Plead Any Factual Support For The "Agreement" That Must Be Plead And Proved To Hold Dezenhall Resources Liable For Conspiring To Commit Torts.

The *sina qua non* of a conspiracy claim is an unlawful agreement. "A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, ***the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another***, and an overt act that results in that

[10] Plaintiff does not appear to assert that Dezenhall Resources should be held vicariously liable for the torts of BBI's employees on a *respondeat superior* theory. Nor could they plausibly do so. Clients are not generally liable for the acts of independent contractors they hire. *See, e.g., Liablity of One Hiring Private Investigator Or Detective For Tortuous Acts Committed in The Course of Investigation*, 73 A.L.R.3d 1175 § 2 (1976) (observing that "determining the liability of the hirer of a private investigator" turns in part on "whether the investigator is the servant or agent of the hirer or merely an independent contractor" because generally "the hirer of an independent contractor is ordinarily not liable for the torts of the contractor"); *Judah v. Reiner*, 744 A.2d 1037, 1040-42 (D.C. 2000) (rejecting *respondeat superior* liability for independent contractors). Greenpeace's own allegations about BBI depict the firm as an independent contractor. (*See, e.g.*, Compl. ¶ 26 ("[Individual Defendants] personally directed and/or conducted D-Lines at Greenpeace's offices in Washington, D.C." and "hired subcontractors" to do so).) Plaintiff nowhere alleges facts to plausibly support the inference that the Individual Defendants and/or BBI were agents of Dezenhall Resources or that Dezenhall Resources controlled or directed individual BBI employees in the performance of their work. To the extent that Plaintiff's bald statement that "Defendants and/or their agents" committed torts can be interpreted as an attempt to do so, (*see, e.g., id.* at ¶ 111), it does no more than assert the agency relationship as a conclusion that cannot be accepted as true without more. And the remainder of the Complaint makes plain that Greenpeace has resorted to claims that Dezenhall Resources conspired with the individual tortfeasors rather than attempting to demonstrate some sort of agency relationship.

damage." *Brady v. Livingood*, 360 F. Supp. 2d 94, 104 (D.D.C. 2004) (internal quotations & citation omitted). "The question of whether a conspiracy has been adequately pled often turns upon the existence of an agreement, which is the 'essential element of a conspiracy claim.'" *Acosta Orellena v. Croplife Int'l*, 711 F. Supp. 2d 81, 113 (D.D.C. 2010) (quoting *Graves v. United States*, 961 F. Supp. 314, 320 (D.D.C. 1997)).

To plead such a claim, the plaintiff must do more than simply state that an unlawful agreement existed or allege conduct that is lawful and assert that it was not. Any question on this point was resolved when the Supreme Court decided in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) that allegations of "parallel" conduct by two business was insufficient to state a claim for antitrust conspiracy. The Court made clear that conspiracy claims must be dismissed if the pleading fails to state facts that are "suggestive enough" of an unlawful agreement that there is "a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. The Court clearly held that a litigant cannot merely set forth allegations of conduct that is lawful along with a statement that it was not, because "lawful parallel conduct fails to bespeak unlawful agreement." *Id.* at 557. As the Court later explained, allegations that are "not only compatible with, but indeed … more likely explained by, lawful … behavior" do not "plausibly suggest an illicit accord" that must be pled to state a conspiracy claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (explaining the Court's *Twombly* decision).

Such reasoning explains why courts routinely dismiss conspiracy claims that fail to plead the time, place, and persons involved in reaching an unlawful agreement. *Acosta Orellena*, 711 F. Supp. 2d at 113 (dismissing complaint "devoid of any factual support" showing "any indication of when or how [the conspiratorial] agreement was brokered, or how the [moving] Defendants specifically, as opposed to all the named defendants generally, were parties to an

agreement"); *Bush v. Butler*, 521 F. Supp. 2d 63, 68-69 (D.D.C. 2007) (dismissing complaint where "plaintiff provide[d] no description of the persons involved in the agreement, the nature of the agreement, what particular acts were taken to form the conspiracy"); *McCreary v. Heath*, No. 04-0623 PLF, 2005 WL 3276257, at *5 (D.D.C. Sept. 26, 2005) (dismissing complaint that "fail[ed] to allege the existence of any events, conversations, or documents indicating that there was ever a 'meeting of the minds' between any of the defendants to [commit an unlawful act]"). Alleging that a conspiracy existed, without facts plausibly suggesting an unlawful agreement was reached, is espousing a conspiracy theory not a conspiracy claim.

Greenpeace fails to plead any facts to plausibly suggest that Dezenhall Resources entered into an agreement with the Individual Defendants (or any other party) to commit unlawful investigative acts. The vast majority of its allegations against Dezenhall Resources (putting aside conclusory "unlawful" and "illegal" descriptions) make the uncontroversial point that Dezenhall Resources was involved in retaining BBI as private investigators, paying them, and receiving information from them. Retaining private investigators to gather information or conduct surveillance is an entirely lawful activity. The investigators themselves are licensed and regulated by the states in which they operate. *See, e.g.*, Md. Code Ann., Bus. Occ. & Prof. § 13-301; D.C. Code § 47-2839. And Greenpeace readily acknowledges that BBI "engaged in some legal methods of surveillance of Greenpeace activists" as part of their association. (Compl. ¶ 168.) It is undisputed, therefore, that mere allegations of retaining an investigative firm to conduct surveillance do not state a claim for, or plausibly support the inference that, Dezenhall Resources participated in an unlawful conspiracy.

Greenpeace claims that this inference is warranted as it "is reflected in, and evidenced by, the following facts:" (1) Dezenhall Resources knew that BBI was engaged in "surveillance

operations," and somebody (unspecified) instructed BBI to '"find out what you can find out;'" (2) Dezenhall Resources received briefings on the information BBI was learning about Greenpeace; (3) Dezenhall Resources paid BBI for their work; (4) Dezenhall Resources retained BBI for up to two years; and (5) BBI used "veiled terminology" to describe its work to Dezenhall Resources. (*Id.* at ¶ 77 (summarizing the evidence of a conspiracy).) Stripped of Greenpeace's conclusory statements about these facts, the Complaint does no more than state facts sufficient to show that Dezenhall Resources engaged in the ***lawful*** activity of hiring a licensed investigative firm — BBI — on behalf of a client — CONDEA Vista — to obtain information about Greenpeace. Glaringly absent are any facts that show "the existence of any events, conversations, or documents indicating that there was ever a 'meeting of the minds'" between Dezenhall Resources and BBI to obtain such information through *illegal* means. *McCreary*, 2005 WL 3276257, at *5.

Greenpeace's attempt to hold Dezenhall Resources (and CONDEA Vista/Sasol) liable for conspiracy based on the blanket instruction to private investigators to '"find out what you can,'" is little different than other litigants' failed attempts to state claims against those who retain private investigators for alleged misconduct of the private investigators they hire. In *Steel v. City of San Diego*, 726 F. Supp. 2d 1172 (S.D. Cal. 2010), for example, a divorce attorney was accused of conspiring with the private investigators he hired to obtain information about an opponent in litigation and instructing those investigators to "ascertain incriminating evidence" about his client's husband. *Id.* at 1177. The court found that the husband stated an actionable civil conspiracy claim against the private investigators that were hired, along with several police officers, for a scheme to engage in alleged unlawful investigative tactics. *Id.* at 1179. But the

court refused to allow plaintiff to include the attorney who retained the private investigators in that conspiracy:

> Plaintiff alleges that the conspiracy was formed when Wood [the attorney] contacted Sisson-Brown [private investigator] and retained the services of her and CRC [private investigative firm] to "perform private investigative surveillance on Plaintiff in order to ascertain incriminating evidence that could be used to ignite a custody battle between his client and Plaintiff." Plaintiff then asserts that Wood and Sisson-Brown entered into a contract for services. ***Retaining a private investigator to gather "incriminating evidence" is not, in and of itself, an unlawful objective that can serve as the basis of a conspiracy claim***. ***Indeed, private investigators are retained by attorneys every day to gather incriminating evidence.*** Accordingly, the Court finds that Plaintiff's argument that Wood's retention of Sisson-Brown and CRC's services compels the inference that the retention had an unlawful objective is unreasonable and grounded on nothing other than Plaintiff's speculation.

Id. at 1183 (citing references omitted) . The *Steel* case demonstrates that the instruction of a private investigator to '"find out what you can find out,'" (Compl. ¶ 77), is assumed in the retention of such services. It is commonplace, not unlawful or actionable. Alleging such conduct does not give rise to conspiracy claims against Dezenhall Resources any more than it gives rise to conspiracy claims against the countless other clients of private investigators who retain such services, with the same purpose and same instruction, every day.

Greenpeace also mistakes the mundane for the nefarious by arguing that the allegation that BBI used, and that the instruction that Dezenhall Resources's clients wanted '"vague'" invoices for their work, (Compl. ¶ 72), and that the standard form disclaimer on BBI reports ('"The following information was supplied by confidential sources and should be used with great discretion'") somehow indicates that Dezenhall Resources "knew of the unlawful means employed to procure the information presented to them and/or consciously avoided asking about details of how the information was procured so that they could maintain plausible deniability," (*id.* at ¶ 51). As a firm specializing in crisis management, Dezenhall Resources's clients (and BBI's clients in all likelihood) are invariably involved in litigation that requires their services.

Descriptions in discoverable billing that do not convey every detail of the work performed are commonplace in this context, and "vague" descriptions hardly indicate an agreement to conduct unlawful activities. Moreover, if it were an indicia of criminal activity to receive information labeled "confidential" and calling for discretion in its use or distribution, every law firm involved in this case would be suspected of illegal or conspiratorial conduct. *See, e.g.*, Law Firm Email Confidentiality Advisories (Ex. 1). Greenpeace's conspiracy claim "must contain something more … than … a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (internal quotations & citation omitted). But, absent the conspiratorial suspicions that Greenpeace infuses into the Complaint, the conduct Greenpeace alleges is routine in the litigation context in which BBI and Dezenhall Resources operate.

In essence, Greenpeace asks the Court to accept a deceptive syllogism: Dezenhall Resources lawfully engaged BBI; BBI conducted its business unlawfully; therefore, Dezenhall Resources knew about and engaged in unlawful activity. For example, Greenpeace states:

> Dezenhall was well aware of what it was buying for its client, CONDEA Vista, in engaging BBl. Not only did BBI and Dezenhall have joint marketing plans and meetings, they had extensive and repeated discussions about BBI's activities. In fact, BBl's internal records make clear its status as a go-to company for Dezenhall. BBI records include at least 35 Dezenhall accounts - many cryptically named - during the relevant time period. Key players at these companies met and talked on a regular basis. Dezenhall knew exactly what it was getting when it engaged BBI and successfully recommended that its client, CONDEA Vista, do so as well.

(Compl. ¶ 61.)

To state this logic is to refute it. Nowhere does Greenpeace's Complaint fill in the missing step in that logic by alleging how Dezenhall Resources's retention of BBI — or even its repeated retention of BBI in 1998, 1999, and 2000 — plausibly supports any inference that Dezenhall Resources was aware of, or complicit in, unlawful investigative tactics. Alleging

actions that are "merely consistent" with an unlawful agreement is not enough if those actions are also consistent with lawful behavior. *See Aschcroft*, 129 S. Ct. at 1949. Without any facts suggesting that Dezenhall Resources agreed to be part of a conspiracy or was aware of the Individual Defendants' tortious acts, there is no "allowable inference that [Dezenhall Resources] assented to the alleged conspiracy or was aware of its role in the [] scheme and knowingly and substantially assisted the perpetrators." *Dooley v. United Techs. Corp.*, No. 91-2499, 1992 WL 167053, at *3 (D.D.C. June 17, 1992).

Greenpeace's attempt to hold Dezenhall Resources vicariously liable for the Individual Defendants' torts on an "aiding and abetting" theory fares no better. First, the District of Columbia has never recognized aiding and abetting as a theory of vicarious liability — a point of law discussed by this Court just last year:

> Both parties rely on the District of Columbia Circuit's decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), for their conflicting positions as to whether aiding and abetting is an actionable theory of vicarious liability in the District of Columbia. This reliance may be misplaced. While the *Halberstam* Court reasoned that the "existence of the civil conspiracy action [in the District] suggests a high probability that the legal rationale underlying aiding-abetting would also be accepted," it was also careful to note that … "[t]he separate tort of aiding-abetting has not yet, to our knowledge, been recognized in the District." *See* 705 F.2d at 479. Since the decision in *Halbertstam* was rendered, it remains unclear whether the District of Columbia Court of Appeals will recognize a claim of aiding and abetting. … There does not appear to be any case law in the District of Columbia that explicitly recognizes aiding and abetting as an actionable theory of liability.

Acosta Orellena, 711 F. Supp. 2d at 107 (internal citations partially omitted); *see Central Bank of Denver, N.A. v. First Interstate Bank of Denver N.A.*, 511 U.S. 164, 181 (1994) (observing the lack of uniform recognition of aiding and abetting as a theory of civil liability along with the *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) "comprehensive opinion" and conclusion that "the common-law precedents" supporting the theory are "largely confined to isolated acts of adolescents in rural society") (internal quotations & citation omitted).

But even if aiding and abetting were a valid legal theory of vicarious liability, it is still deficient under Rule 8(a) because Greenpeace fails to state any facts plausibly suggesting that Dezenhall Resources "knowing[ly] and substantially assist[ed] in the [Individual Defendants'] principal violation," and that Dezenhall Resources had "knowledge of [its] role as part of an overall illegal or tortious activity at the time that [it] provided assistance." *Acosta Orellana*, 711 F. Supp. 2d at 108 (describing the elements assuming, *arguendo*, that the theory was actionable). With respect to both the conspiracy and aiding and abetting claims, the factual allegations in the Complaint suggest only that Dezenhall Resources hired an investigative firm to obtain information for a client, and that this investigative firm committed torts against Greenpeace. Greenpeace fails to "plausibly suggest an illicit accord," because all of its factual allegations directed at Dezenhall Resources are "not only compatible with, but indeed [] more likely explained by, lawful … behavior." *Ashcroft*, 129 S. Ct. at 1950 (explaining the Court's *Twombly* decision). All of the tort claims against Dezenhall Resources must be dismissed as a result.

B. Greenpeace Fails To State A Claim For Relief With Respect To Several Of Its Common-Law Tort Claims.

Greenpeace also fails to state claims for relief with respect to three out of five of the underlying District-law torts identified in the Complaint for more basic reasons involving the causes of action it asserts. Greenpeace alleges five common-law causes of action based on the activities of the Individual Defendants, for which it attempts to hold Dezenhall Resources vicariously liable: (1) trespass; (2) invasion of privacy by intrusion; (3) conversion; (4) trespass to chattel; and (5) misappropriation of trade secrets. (*See generally* Compl. ¶¶ 110-145.) Greenpeace fails to plead facts sufficient to support its claims for invasion of privacy by intrusion, conversion, and misappropriation of trade secrets. Thus, the conspiracy claim — assuming, *arguendo*, that it were properly pled — cannot be maintained with respect to these

three tort claims. *See Acosta Orellena*, 711 F. Supp. 2d at 106 (noting that a conspiracy claim cannot be maintained where plaintiff does not state a claim for the underlying tort).

1. As A Corporation, Greenpeace Cannot Claim An Invasion Of Privacy

Greenpeace's cause of action for invasion of privacy by intrusion fails to state a claim for the simple reason that corporations do not have a cause of action for invasion of privacy. This is a universally-acknowledged rule. *CNA Fin. Corp. v. Local 743 of the Int'l Bhd. of Teamsters Chauffeurs, Warehouseman & Helpers of Am.*, 515 F. Supp. 942, 946 (N.D. Ill. 1981) ("The right of privacy is a personal right designed to protect persons from unwanted disclosure of personal information. It does not extend to protect corporations from disclosure of information."); *Clinton Cmty. Hosp. Corp. v. Southern Md. Med. Ctr.*, 374 F. Supp. 450, 456 (D. Md. 1974) ("It is clear that corporations do not enjoy a right of privacy."), *aff'd*, 510 F.2d 1037 (4th Cir. 1975); *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1429 (D. Conn. 1986) ("[T]he plaintiff has offered the court no persuasive reason to reject the considerable uncontroverted authority that 'corporations do not enjoy a right to privacy.'") (quoting *Clinton Cmty. Hospt. Corp.*, 371 F. Supp. at 456); *Warner-Lambert Co. v. Execuquest Corp.*, 691 N.E.2d 545, 548 (Mass. 1998) ("Cases from other jurisdictions unanimously deny a right of privacy to corporations."); Restatement (Second) of Torts § 652I ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."); *id*. at cmt. c. ("A corporation, partnership, or unincorporated association has no personal right of privacy.").

Greenpeace acknowledges that it is a corporation in its Complaint, (*see* Compl. ¶ 7), and therefore Greenpeace has no judicially-cognizable claim for invasion of privacy by intrusion. As a result, Greenpeace's attempt to hold Dezenhall Resources vicariously liable for invasion of privacy fails.

2. Greenpeace Fails To State A Claim For Conversion Of Intellectual Property

Greenpeace also fails to state a claim for conversion because, in this context, there is no such legally valid cause of action. The District of Columbia does not recognize a cause of action for conversion of the type of "intellectual property" identified by Greenpeace. (*See* Compl. ¶¶ 122-130.) In *3D Global Solutions, Inc. v. MVM, Inc.*, 552 F. Supp. 2d 1, 4 (D.D.C. 2008), the district court considered a claim that the defendant had converted the plaintiff's "confidential and proprietary" information, which was contained in "administrative packages" provided by the plaintiff to the defendant. The Court held that such "property" was not the proper subject of a conversion claim under District law:

> In Count VIII, 3D alleges that MVM converted the proprietary and confidential data within the administrative packages. Neither District of Columbia nor Virginia law recognizes a cause of action for conversion of intangible property. ***It is apparent from the Complaint that the administrative packages had value only because they contained this proprietary data***. Because such data constitutes intangible property, 3D fails to state a claim for conversion under either District of Columbia or Virginia law.

Id. at 10 (citing references omitted).

In this case, Greenpeace attempts to state the same legally invalid claim for conversion of allegedly proprietary information. The documents it claims were taken had value only because they contained Greenpeace's "intellectual property." (*See* Compl. ¶ 127.) Greenpeace does not appear to complain that it was deprived of the nominal value of the paper on which its confidential information was printed, nor could it credibly do so, since by its own admission the documents were taken from recycling bins and dumpsters after having been discarded by Greenpeace. (*See id*. at ¶ 22.)

Moreover, conversion requires a more substantial deprivation of the value of the property at issue than Greenpeace alleges here. The tort of conversion requires a "complete or very

substantial deprivation of [Plaintiff's] possessory rights in the property," whereas trespass to chattel is a lesser intermeddling with property rights that diminishes the value of the property. *Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir. 1969). Greenpeace was not deprived of the full value of this property merely because Defendants allegedly obtained discarded copies of the same documents that Greenpeace retained in its possession. Greenpeace does not claim that its "intellectual property" lost all value as a result of the Defendants allegedly obtaining discarded copies of the documents; rather, it claims that Defendants' actions "diminish[ed] the value of Plaintiff's intellectual property and [] undermin[ed] Plaintiff's organizational mission." (Compl. ¶ 127.) This may support a claim for trespass to chattel, but it ***negates*** a claim for conversion. *Pearson*, 410 F.2d at 707 ("Insofar as the documents' value to [plaintiff] resided in their usefulness as records of the business of his office, [plaintiff] was clearly not substantially deprived of his use of them."). Because Greenpeace fails to state a claim for conversion, its attempt to hold Greenpeace vicariously liable for conversion also fails.

3. Greenpeace Fails To Adequately Plead Misappropriation Of Trade Secrets

Finally, Greenpeace fails to properly plead a claim for misappropriation of trade secrets because it fails to actually identify any of the supposed trade secrets that were allegedly misappropriated. "It is generally accepted that a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether a misappropriation has or is threatening to occur." *Analog Devices, Inc. v. Michalski*, 579 S.E.2d 449, 453 (N.C. Ct. App. 2003).

Greenpeace provided no such thing in its Complaint. Instead, it provides a generalized laundry list of the types of documents taken, and asks the Court and Defendants to infer that

these items constitute or contain trade secrets, without pleading any facts that would plausibly allow for such an inference:

> Many of the documents improperly obtained by Defendants and/or their agents from the offices of Greenpeace constitute trade secrets. The documents 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 related to fundraising.

(Compl. ¶ 139.) This description is so vague as to make it impossible to even begin to analyze whether the claimed trade secrets are protectable as such. Surely Greenpeace would not contend that all "internal operating information" of a company, or that any "legal memoranda" in a company's possession, constitutes a trade secret, without regard to their nature or contents. Greenpeace offers no facts to show that any or all of these generic types of information "[d]erive[] actual or potential independent ***economic value***, from not being generally known to, and not being readily ascertainable by, proper means by another who can obtain ***economic value*** from [their] disclosure or use." D.C. Code § 36-401(4)(A).

Greenpeace's failure to sufficiently identify any supposed trade secret is all the more inexcusable considering the "voluminous" records and "extensive documentation" of the Individual Defendants' actions that Greenpeace admits to having access to. (*See* Compl. ¶ 24.) It should not be a tall order for Greenpeace to identify trade secrets contained in those documents — if any such secrets do in fact exist. Greenpeace's claim for misappropriation of trade secrets should therefore be dismissed due to Greenpeace's total failure to identify the trade secrets it claims were misappropriated. *See, e.g., Analog Devices*, 579 S.E.2d at 453-54 (denying an injunction were plaintiff "failed to show what, if anything, in those schematics is specifically deserving of [trade secret] protection"); *Medafor, Inc. v. Starch Med., Inc.*, No. 09-CV-0441, 2009 WL 2163580, at *1 (D. Minn. July 16, 2009) (granting motion to dismiss because the

description of the trade secrets at issue as "business methodologies, formulas, devices, and compilations of information, including suppliers and customers" was found to be "so broad as to be meaningless"); *Mai Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 522 (9th Cir. 1993) (rejecting claim where plaintiff "asserts that it has trade secrets in its diagnostic software and operating system" but "does not specifically identify these trade secrets"). Because Greenpeace fails to state a claim for misappropriation of trade secrets, its effort to hold Dezenhall Resources vicariously liable for misappropriation of trade secrets also fails.

III. GREENPEACE'S CLAIMS ARE TIME-BARRED BY THE RESPECTIVE STATUES OF LIMITATIONS

Greenpeace's claims also fail for the independent reason that each is barred by a statute of limitations. All of the allegedly unlawful activity on which Greenpeace bases its causes of action occurred more than a decade ago, from 1998-2000. (Compl. ¶ 2.) Greenpeace's District-law claims are subject to a three-year statute of limitations, *see* D.C. Code §§ 12-301, 36-406, and its civil RICO claims are subject to a four-year limitations period, *Agency Holding Corp. v Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987). Both the District-law claims and RICO claims accrue, for statute of limitations purposes, when Greenpeace either knew or should have known of the existence and source of its injury. *Drake v. McNair*, 993 A.2d 607, 617 (D.C. 2010); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 185-86 (1997).

Greenpeace has failed to plead any facts to plausibly suggest that these claims are not time-barred, and the facts they do allege indicate that they are. If the harm that Greenpeace claims to have suffered actually occurred, Greenpeace was presumably aware that its "intellectual property was diminished in value, and Plaintiff's business — environmental campaigns — was interfered with," a decade ago, when this "interference" took place. (Compl. ¶ 175.) Its campaigns targeted specific companies, so the sources of "interference" with

these campaigns would have been readily apparent. (*Id.* at ¶ 18.) If Greenpeace did, in fact, sustain the harm it now claims in this lawsuit, it is untenable to suggest that it would not have noticed for a decade.

Greenpeace attempt to revive such claims is to assert, in conclusory fashion, that it is protected by the discovery rule because "[o]nly when an investigative reporter for *Mother Jones* magazine discovered Defendants' espionage and informed Plaintiff in April 2008 could Plaintiff have learned of Defendants' misconduct." (*Id.* at ¶ 108.) The article they cite contradicts this assertion, stating that in 2005, a former BBI agent began contacting former targets of BBI and offering to share records with them. James Ridgeway, *Black Ops, Green Groups*¸ MotherJones (April 10 2008), http://motherjones.com/environment/2008/04/exclusive-cops-and-former-secret-service-agents-ran-black-ops-green-groups. And Greenpeace acknowledge that these "voluminous ... records" and "extensive documentation" that were being shown to BBI targets were the primary source for both the Complaint and the newspaper articles that the Complaint incorporates by reference. (Compl. ¶ 24.)[11] But even accepting Greenpeace's claim that it lacked actual knowledge of its causes of action prior to April 2008, the discovery rule will not shield a plaintiff's lack of actual knowledge if the wrongdoing could have been discovered had the plaintiff '"exercised reasonable diligence under the circumstances in acting or failing to act on whatever information was available to him.'" *Drake*, 993 A.2d at 617 (quoting *Ray v. Queen*, 747 A.2d 1137, 1141-42 (D.C. 2000)). Nor can a plaintiff who fails to exercise reasonable diligence assert fraudulent concealment as a basis for failing to bring an action within the

[11] The Court is free to consider evidence contained in the Mother Jones article in considering this motion, as Greenpeace incorporated the article into its Complaint by relying on it as the basis for avoiding the limitations period. *See Phillips v. Fulwood*, 616 F.3d 577, 582 n.3 (D.C. Cir. 2010).

limitations period. *Klehr*, 521 U.S. at 194-96.[12] That Greenpeace chose to wait more than a decade after allegedly suffering "interference" with its environmental campaigns for a reporter to perform the reasonable diligence that Greenpeace should have performed itself does not excuse its failure to file a timely suit. Dismissal of the Complaint is required at this time as well.

CONCLUSION

Once stripped of adjectives like "unlawful," "misappropriated," and "illegal," Greenpeace's Complaint essentially accuses Dezenhall Resources of the entirely lawful act of retaining a private investigation firm. Greenpeace's attempt to morph its common-law claims against the Individual Defendants into a sweeping civil RICO and conspiracy claim against Dezenhall Resources is fatally flawed. And the fact that Greenpeace waited a decade after its supposed injury until bringing this claim is not plead with any specificity in the Complaint. Despite years of access to volumes of record evidence, Greenpeace identifies no BBI document and makes no factual allegation to support the complicity of Dezenhall Resources in authorizing, directing, approving, knowing about, or condoning any unlawful investigative tactics. The facts Greenpeace alleges do not support Counts 8 and 9 against Dezenhall Resources for RICO violations. Nor do the facts recited in the Complaint support a plausible inference that Dezenhall Resources conspired with the Individual Defendants, BBI, or anyone else to commit the tortious acts against Greenpeace asserted in Counts 1 through 5. Indeed, Greenpeace fails to state a claim with respect to most of its underlying torts. And, finally, the obvious time bar for these

[12] In any event, Greenpeace fails to properly plead fraudulent concealment. Allegations of fraudulent concealment, in order to toll the statute of limitations, must meet the requirements of Rule 9(b). *Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994). Greenpeace alleges generally that Defendants concealed their ***conduct*** from Greenpeace, but fails to allege that Defendants in any way attempted to conceal the ***injury*** Greenpeace complains of. (*See* Compl. ¶¶ 107-109.) Greenpeace claims to have been the victim of dual conspiracies operating simultaneously, yet at the same time asserts it had no idea it was injured, and would not have known if not for the Mother Jones article. Greenpeace's claims are insufficient to allege fraudulent concealment, but they do call into question whether Greenpeace has suffered any compensable injury at all.

complaints is not evaded by Greenpeace's conclusory assertion that it only recently learned about its claims. As a result, Dezenhall Resources respectfully requests that the Court dismiss the Complaint as to all causes of action asserted against it.

REQUEST FOR HEARING

Pursuant to Local Rule 7(f), Dezenhall Resources requests that the Court allow for the parties to be heard on this Motion. Dezenhall Resources stands read to clarify and amplify the arguments presented here to assist the Court should it determine, in its discretion, that such a hearing would be helpful.

February 18, 2011 Respectfully submitted,

/s/ Thomas A. Clare, P.C.
Thomas A. Clare, P.C. (D.C. Bar No. 461964)
Dana E. Hill (D.C. Bar No. 974232)
KIRKLAND & ELLIS, LLP
655 15th St. N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200
thomas.clare@kirkland.com
dana.hill@kirkland.com

Attorneys For Defendant Dezenhall Resources, Ltd.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Defendant Dezenhall Resources, Ltd.'s Motion to Dismiss and Statement of Points and Authorities was served on counsel of record that have appeared in this action through the electronic filing system for the U.S. District Court for District of Columbia on February 18, 2011:

/s/ Thomas A. Clare, P.C.
Thomas A. Clare, P.C. (D.C. Bar No. 461964)
Dana E. Hill (D.C. Bar No. 974232)
KIRKLAND & ELLIS, LLP
655 15th St. N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200
thomas.clare@kirkland.com
dana.hill@kirkland.com

Attorneys For Defendant Dezenhall Resources, Ltd.

Law Firm Email Confidentiality Advisories

Cohen Milstein Sellers & Toll PLLC

This transmission is intended for the exclusive use of the individual or entity that is the named addressee and may contain information that is privileged or confidential or otherwise legally exempt from disclosure. If you are not the named addressee or an employee or agent responsible for delivering this message to the named addressee, you are not authorized to read, print, retain, copy or disseminate this transmission or any part of it. If you have received this message in error, please notify me immediately, discard all paper copies and delete any electronic files of this message. Thank you.

Cowdrey Thompson, PC

Attention:
This e-mail, including any attachments, is intended for the receipt and use by the intended addressee(s), and may contain confidential and privileged information. If you are not an intended recipient of this e-mail, you are hereby notified that any unauthorized use or distribution of this e-mail is strictly prohibited.

Fulbright & Jaworski, L.L.P.

This email message and any attachments are for the sole use of the intended recipient(s). Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message and any attachments.

To reply to our email administrator directly, send an email to postmaster@fulbright.com.

Latham & Watkins LLP

This email may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

Latham & Watkins LLP

Kirkland & Ellis LLP

****
The information contained in this communication is
confidential, may be attorney-client privileged, may
constitute inside information, and is intended only for
the use of the addressee. It is the property of
Kirkland & Ellis LLP or Kirkland & Ellis International LLP.
Unauthorized use, disclosure or copying of this
communication or any part thereof is strictly prohibited
and may be unlawful. If you have received this
communication in error, please notify us immediately by
return e-mail or by e-mail to postmaster@kirkland.com, and
destroy this communication and all copies thereof,
including all attachments.
****

Weil, Gotshal & Manges LLP

The information contained in this email message is intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by email (postmaster@weil.com), and destroy the original message. Thank you.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Greenpeace, Inc.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:10-cv-02037-RMC
The Dow Chemical Company, et al.,	)	
Defendants.	)	

[PROPOSED] ORDER

Upon consideration of Defendant Dezenhall Resources, Ltd.'s Motion to Dismiss and Statement of Points and Authorities in support of same, and for good cause shown, the Court finds that Dezenhall Resources, Ltd.'s Motion to Dismiss should be granted.

WHEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

Defendant's Motion to Dismiss is GRANTED. All claims against Dezenhall Resources, Ltd. are hereby DISMISSED.

Entered this _____ day of _____, 2011.

Rosemary M. Collyer
U.S. District Court Judge