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 SASOL NORTH AMERICA, DEZENHALL RESOURCES, TIMOTHY WARD, JAY ARTHUR BLY, MICHAEL MIKA AND GEORGE FERRIS

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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 Sasol North America (formerly CONDEA Vista), Dezenhall Resources (formerly Nichols-Dezenhall), 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 Sasol and Dezenhall 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 CONDEA Vista to the private investigators) and information was passed up (from the investigators to CONDEA Vista) at frequent intervals, in a continuous cycle, over a period of approximately two years. The types of information passed to CONDEA Vista, sometimes through Dezenhall, 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 CONDEA Vista's decision to hire private investigators based in Annapolis, Maryland, and to pass some 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.

Sasol, Dezenhall, and their private investigators (as well as Defendants Dow Chemical and Ketchum) 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 CONDEA Vista regarded as a threat to its profits.

FACTS

Greenpeace Challenges CONDEA Vista's Devastation of Lake Charles, Louisiana; CONDEA Vista, Dezenhall and the Individual Defendants Agree to Target Greenpeace

Between 1984 and 2001 CONDEA Vista (now Sasol North America or "Sasol") operated a vinyl chloride manufacturing facility in Lake Charles, Louisiana. Compl. ¶ 56. Its manufacture of vinyl chloride released dioxins and other toxic chemicals into the environment, causing environmental damage and raising health concerns in the region. *Id.* Greenpeace campaigned to expose the hazards of vinyl chloride production and the environmental damages caused by CONDEA Vista in the Lake Charles region. *Id.* ¶ 57. As part of its campaign, Greenpeace: conducted an investigation into toxic chemical contamination in the Lake Charles environment; provided outside observers, medical experts, documentarians, and grassroots organizers to publicize the contamination of the Lake Charles region; and urged the EPA to focus on CONDEA Vista's facilities and vinyl chloride production in its Dioxin Reassessment report. *Id.*

Keen to minimize the impact of Greenpeace's campaign in Lake Charles, CONDEA Vista sought the advice of Nichols-Dezenhall (now Dezenhall Resources or "Dezenhall"), which recommended hiring Beckett Brown International ("BBI"), a now-defunct private security firm based in Annapolis, Maryland. Compl. ¶ 58. Most of the key executives and employees at BBI were former officers of the Secret Service and the Central Intelligence Agency. *Id.* ¶ 20. In addition to its staff, BBI used a network of subcontractors, including off-duty police officers in Washington D.C. and Baltimore, to carry out its investigative work. *Id.* ¶ 26. Among BBI's employees were Timothy Ward, Jay Arthur Bly, Michael Mika, and George Ferris (collectively, the "Individual Defendants"). *Id.* ¶¶ 12-15.

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

On May 26, 1998, working at the behest of both CONDEA Vista and Dezenhall, BBI initiated the "Lake Charles Project" to secure confidential information about environmental organizations and campaigners, including Greenpeace and its employees, for CONDEA Vista. Compl. ¶ 59. CONDEA Vista was well aware that BBI was a surveillance operation. *Id.* ¶ 60. CONDEA Vista gave BBI a broad mandate: "find out what you can find out." *Id.* Dezenhall, too, was well aware of what it was buying for its client, CONDEA Vista, in engaging BBI. BBI'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. *Id.* ¶ 61. Key players at these companies met and talked on a regular basis. *Id.* BBI and Dezenhall had extensive and repeated discussions about BBI's activities including discussions of joint marketing plans. *Id.*

BBI's accounting records show that BBI spent hundreds of hours collecting and analyzing information from Greenpeace. Compl. ¶ 22. Records and correspondence reveal the use of surreptitious and deceitful methods of data collection, including but not limited to: pilfering documents awaiting private trash and recycling collection; placing undercover operatives within groups; using false pretenses to case offices; procuring phone records; and infiltrating meetings and electronic mail networks. *Id.*

The Individual Defendants acquired internal documents from their targets through actions they referred to as "D-lines." Defendants obtained a steady stream of inside information from Greenpeace by stealing confidential documents and internal records from dumpsters and recycling bins located at Greenpeace's offices. Compl. ¶ 25. Defendants Ward, Bly, Mika, and Ferris personally directed or conducted D-Lines at Greenpeace's offices in Washington, D.C. *Id.*

¶ 26. Their subcontractors for this work included a police officer for the District of Columbia, James Daron. *Id.* Between 1998 and 2000, the Individual Defendants conducted or directed more than 100 D-Lines at Greenpeace's U Street office, collaborating on document collection and review as well as client briefings. *Id.* ¶ 28. Between July 13, 1998 and November 12, 1998 alone, at least 35 D-Lines at Greenpeace's offices were billed to the Lake Charles Project specifically. *Id.* ¶ 65.

Entrances to the U Street building where Greenpeace was located in 1998 and 1999 were locked at all times. Compl. ¶ 28. Greenpeace's recycling bins and trash dumpster were located on private property. *Id.* The recycling bins, which were covered, were located on an elevated loading dock sheltered inside the back façade of the building; the trash dumpster, which was covered, abutted the building at ground level. *Id.* In May 2000, Greenpeace moved to 702 H Street, NW, Washington, D.C. This building's entrances were also locked at all times. *Id.* ¶ 29. The recycling and trash bins at this office were also located on private property, inside the building in a locked ground-floor room. *Id.* This room was secured by a locked, exterior, roll-down door that was accessible from an alley; the alley itself was also secured by a locked gate. *Id.* In 2000, Ward, Bly, and Mika, or their agents, conducted more than 15 documented D-Lines at Greenpeace's H Street office. *Id.*

Greenpeace has also alleged that BBI employees or contractors broke into Greenpeace's U Street offices using the three- and four-digit security codes that unlocked the office suite doors. *Id.* ¶ 35. BBI employees or contractors tested multiple three- and four-digit codes and documented whether each code was successful in granting access to the offices. *Id.* Additionally, BBI sent one of its subcontractors, Mary Lou Sapone, to Greenpeace's office in November 1998 posing as a potential volunteer. *Id.* ¶ 33. Ms. Sapone asked for, and received, a

tour of the office and subsequently submitted a report to Defendant Ward noting the layout of the office and location of various divisions and employees. *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 and/or, as alleged below, from inside Greenpeace's office. *Id.* ¶ 31.

In addition to the theft of documents, the Individual Defendants, Dezenhall and CONDEA Vista conspired to infiltrate Greenpeace by fraud. BBI's subcontractor, Mary Lou Sapone, in turn hired Dick Rogers, another subcontractor, with orders to infiltrate Greenpeace ally CLEAN. Compl. ¶ 66. Rogers was trained by Sapone "to be inquiring, but not participatory . . . to seek documents, ID friends and foe legislators and regulators, follow money trails, ID informants, discover future targets and campaign design, ID activists' chain of command, discover plans for illegal activity and civil disobedience, discover support from national groups,

and generally discover 'what they know'." *Id.* ¶ 66. Posing as a concerned citizen, Rogers managed to get elected to CLEAN's board. *Id.* ¶ 67. From that position, he monitored the activities of Greenpeace, including communications between CLEAN and Greenpeace, and attended a confidential meeting sponsored by Greenpeace in Washington, D.C. *Id.* Rogers sent more than 65 narrative reports and forwarded at least 150 confidential emails to Sapone; Sapone, in turn, forwarded the confidential emails and reports, almost daily, to Ward between August 1998 and November 1999. *Id.*

To these tactics, the Defendants added intrusive surveillance. In 1998, Jay Bly traveled to Louisiana to surveil the offices and homes of activists working in Lake Charles. Compl. ¶ 68. He submitted numerous reports detailing his activities, which involved trailing the activists and recording their activities and collecting and sorting trash from various locations. *Id.* BBI also hired Russ Andrews of TriWest Investigations to obtain the call records from Mercury Cell Phones for telephones leased by Greenpeace for environmental activists in Louisiana campaigning for the remediation of CONDEA Vista's chemical spill, as well as for other Greenpeace cell phones serviced by Bell South and MCI. *Id.* ¶ 69. Andrews provided handwritten and typed logs of the calls made from these phones. *Id.*

Greenpeace has alleged that BBI went further – into electronic surveillance. Among the Greenpeace internal documents and research files maintained in BBI's offices was a file labeled "Wire Tap Info." Compl. ¶ 37. A former BBI employee, Eric Pikus, has testified that during the course of his work at BBI, he would tape-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 spent $4,000 (in cash) to purchase the services of NetSafe, Inc., a company that specializes in computer intrusion and electronic surveillance, for work on its Greenpeace projects. *Id.* ¶ 42. Most tellingly, perhaps, BBI created an internal billing/account code for Technical Surveillance Counter-Measures or "TSCM" – a term of art in the security industry that encompasses methods of detecting electronic surveillance (*e.g.*, sweeping for bugs, radio signals, and other evidence of wiretaps). *Id.* ¶ 43. Greenpeace alleges that BBI used the term TSCM to cover its offensive electronic surveillance activities. During 1999, BBI employees met with Dezenhall to discuss TSCM. *Id.* ¶ 45.

CONDEA Vista and Dezenhall Receive Inside Information Obviously Obtained Through Theft, Subterfuge and Improper Surveillance and Pay Generously for It

All of the information that was obtained by BBI related to Lake Charles, Louisiana – by Ward, Bly, or any other employee or agent – was obtained with the approval of CONDEA Vista or at CONDEA Vista's express direction. Compl. ¶ 76. The president and general counsel of CONDEA Vista were among the tight circle of officials at CONDEA Vista knowledgeable about the company's relationship with BBI. *Id.* ¶ 62. Timothy Ward repeatedly met with and briefed Peter Markey, a CONDEA Vista executive, about the status of and information obtained from the Lake Charles Project. *Id.* Confidential information obtained through BBI's activities was provided, in written reports sent in interstate mails and telephone reports made in interstate calls, to CONDEA Vista officials, including Markey. *Id.* ¶¶ 62, 63, 70. The reports included prospective plans and financial information and reflected internal debates and dynamics. *Id.* ¶51. Markey also reviewed documents that BBI had stolen from Greenpeace. *Id.* ¶ 62.

CONDEA Vista paid BBI directly for its services between September 1998 and November 1999. At least ten invoices from BBI were issued on a periodic basis, for amounts

ranging from $5,000 to $10,000. Compl. ¶ 64. CONDEA Vista paid approximately $85,000 directly to BBI for the Lake Charles Project. *Id*.

Dezenhall also received regular and extensive briefings of the work being done on behalf of CONDEA Vista and Dezenhall. During the period July 1998 through April 1999, BBI's internal records show charges for "client briefing[s]" or "UC briefing" (*i.e.*, undercover briefing) with Dezenhall on more than 35 occasions. Compl. ¶ 71. Dezenhall received, and regularly paid, invoices for work on the Lake Charles and U Street projects. BBI's invoices were intentionally vague because neither Nichols-Dezenhall nor its clients wanted specific information appearing in the invoices. *Id.* ¶ 72. In 1998 and 1999, Dezenhall made numerous payments totalling approximately $150,700 to BBI for the Lake Charles Project on behalf of client CONDEA Vista. *Id.*

In addition to the allegations that specifically relate to the Dezenhall-CONDEA Vista 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, during the period it was engaged in this "information gathering" on behalf of Dezenhall and CONDEA Vista, the Louisiana law offices of Cox, Cox & Filo were broken into and records, including client files and other sensitive materials relating to pending litigation, were stolen. Compl. ¶ 75. Cox, Cox & Filo represented workers exposed to ethylene dichloride

after a massive spill from a CONDEA Vista/CONOCO pipeline. *Id.* ¶ 74. Confidential records from the law firm were subsequently found in BBI's files. *Id.* ¶ 75. BBI records also confirmed that the "information gathering" work done by BBI was done on behalf of Dezenhall – almost certainly acting for CONDEA Vista. *Id.*

Third, the information about Greenpeace gathered by BBI was not only used by BBI and Dezenhall in connection with CONDEA Vista, it was also used by BBI and Dezenhall to try to secure new clients for their surveillance and "public relations" work. Compl. ¶ 54. For example, BBI documents indicate that on August 24, 1998, Ward spent five hours "marketing w/ND [Nichols Dezenhall] – GP [Greenpeace] intelligence." Another document records Ward's "marketing GP [Greenpeace] network." *Id.* In August 1998, BBI held a marketing meeting at Dezenhall's offices to offer its intelligence to Aristech, a major acrylics manufacturer. *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, Dezenhall, and CONDEA Vista were spying on Greenpeace, BBI was working with Defendants Ketchum and Dow Chemical to do the very same thing. Compl. ¶¶ 79-101.

ARGUMENT

In considering a Fed. R. Civ. P. 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. 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."[1] A similar injury discovery rule applies to Greenpeace's federal RICO claim.[2] 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

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[1] *See, e.g.*, *Diamond v. Davis*, 680 A.2d 364, 379 (D.C. 1996) (citation omitted).

[2] *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).

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 defendants]."[3] 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.[4] 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."[5]

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."[6] 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."[7] 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.[8] 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

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[3] *Diamond*, 680 A.2d at 379; *Smith v. Brown & Williamson Tobacco Corp.*, 108 F. Supp. 2d 12, 15 (D.D.C. 2000).

[4] *Diamond*, 680 A.2d at 381.

[5] *Connors*, 935 F.2d at 341 (internal quotation marks and citation omitted).

[6] *Diamond*, 680 A.2d at 370, 372; *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).

[7] *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.").

[8] *Brin*, 902 A.2d at 800.

done so.[9]

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 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.[10] 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. Compl. ¶¶ 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. Compl. ¶ 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. Compl. ¶ 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 operandi* 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. Compl. ¶ 108.[11]

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[9] *Id.*; *McQueen*, 244 F.R.D. at 33; *Diamond*, 680 A.2d at 374 n.10.

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

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

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. Dezenhall Mem. at 33. 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 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.[12]

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.[13] 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

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[12] *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).

[13] Although not obligated to do so on the present motion, Greenpeace points out that Defendant Dezenhall's reading of the April 2008 *Mother Jones* article is objectively wrong. *See* Dezenhall Mem. at 5, 32 (stating that according to *Mother Jones*, documents revealing Defendants' unlawful acts were offered to Greenpeace in 2005). The article says only that some victims of BBI were offered a chance to review unspecified BBI records at some unspecified point in 2005 or later. *Id.* Nor does the *Washington Post* article cited by Dezenhall indicate that Greenpeace had the chance to review any BBI documents before April 2008. *See id*. Plaintiff has explained that it was offered access to BBI's records in 2008. Compl. ¶ 24.

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

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 inquiry."[17] 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 injury was caused by a RICO violation. *Anza v. Ideal Steel*

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[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 1191-92.

[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.

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. *Id.* at 498. Courts considering whether an injury establishes RICO standing may 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. ¶¶ 127, 175.

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. *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 and intercepted

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[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.

by fraud.[20] Compl. ¶¶ 33, 46-48, 67, 123, 172. The information was transported interstate and then shared with multiple parties – either digested in reports or in its original form. *Id.* ¶¶ 33, 172(a)-(b). 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 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.

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. 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. ¶ 175. This injury exists even if Defendants did not foil a specific Greenpeace project related to CONDEA Vista. Greenpeace has alleged, and will prove through evidence developed during discovery, that a part of its

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[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.

[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.").

influence over corporations stems from its role as a watchdog. But if a company like CONDEA Vista 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.[22]

Defendant Sasol argues that Greenpeace's injuries are not sufficiently tangible to satisfy RICO's standing requirement. Sasol Mem. at 19-23. This argument is flatly contradicted by numerous RICO cases including, but not limited to, *NOW* and *Diaz*.[23]

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, (1992) (internal citation omitted)). Proximate cause necessarily requires case-by-case examination, as it is a "flexible concept" that does not

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[22] Defendant Ketchum explained the value to its client, Defendant 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.

[23] *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 Sasol cites Ninth Circuit cases to support its interpretation of the injury requirement. Sasol Mem. at 18, 20-21. One of those cases, *Oscar v. University Students Cooperative Ass'n*, 965 F.2d 783 (9th Cir. 1992), was abrogated by *Diaz*. *See Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1055 (9th Cir. 2008) ("Since the district court issued its order, we have overturned the rules on which the court relied."). The other case relied upon by Sasol is *Ove v. Gwinn*, 264 F.3d 817 (9th Cir. 2001); that case and its progeny depend on *Oscar*'s faulty reasoning, and otherwise stand for the unremarkable proposition that alleging an injury to a valuable intangible property interest is not sufficient without an allegation of damages. *See id.* at 825 (relying on *Oscar*).

lend itself to a rule structure. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 648 (2008).

In this case, the RICO violations – theft and interstate transportation of property and engaging in a scheme to commit wire fraud – both 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. Similarly, the scheme to defraud targeted Greenpeace and its ally CLEAN. With the intention and design of intercepting Greenpeace's information, Defendants made or caused to be made fraudulent representations to deceive CLEAN and Greenpeace, and prompted both organizations to trust Rogers as a recipient of their confidential information.

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.[24] 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. ¶¶ 25-26, 65 (alleging that dozens of D-Lines took place at Greenpeace's offices). Similarly, the wire fraud activities (a violation of 18 U.S.C. § 1343) targeted Plaintiff. Greenpeace alleges that Defendants aimed to "gather information on the inner workings and planned activities of the *two groups* [Greenpeace and CLEAN]." Compl. ¶ 33(b) (emphasis added). The scheme was "designed to provide more information to BBI and its paying clients, Dezenhall and Sasol, about Greenpeace's activities." *Id.* ¶ 172(b). Greenpeace alleges that its confidential business information was intercepted by Rogers, who defrauded CLEAN and Greenpeace by posing as an individual worthy of their trust. *Id.* ¶ 67. As such, Plaintiff's claim

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[24] *See*, *e.g., Holmes v. Sec. Investor Protection Corp.,* 503 U.S. 258, 268-69 (1992) ("[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).

can be distinguished from *Bivens Gardens Office Building, Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898 (11th Cir. 1998), where the court found a creditor's RICO claim derivative because the defendant's misconduct was "aimed primarily at the corporation, not at its creditors." *Id.* at 908.

Additionally, courts will determine proximate cause by examining whether an independent cause (rather than the RICO violation) accounts for the plaintiff's injuries.[25] Unlike *Anza* and other cases relied on by Defendants (*see* Sasol Mem. at 22, Dezenhall Mem. at 16-18), 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. The fraudulent scheme to plant a mole (masquerading as a volunteer) inside CLEAN was designed with the purpose of acquiring Greenpeace's confidential business information. Compl. ¶¶ 66, 67, 172(b). Rogers was trained by his BBI contact (Mary Lou Sapone) about what information to intercept. *Id.* ¶ 66. Rogers intercepted Greenpeace's business information and forwarded it to his BBI contact. *Id.* ¶ 67. Greenpeace was directly deceived; it was led to believe that Rogers was who he said he was – a legitimate volunteer working for a trusted ally. Greenpeace sent him confidential information in reliance on such representations and even invited him to a confidential meeting that it sponsored in Washington, D.C. Compl. ¶ 67. No third-party conduct severed the connection between

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[25] *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.

Defendants' violation and the illegal acquisition of Plaintiff's property.[26]

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."[27] *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 pleading stage, it is inappropriate to insist that Plaintiff allege and establish the facts that are required to persuade the jury of its case.[28]

a. Each of the Defendants Was a Knowing and Active Participant and Thus Conducted the Alleged Enterprise.

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

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[26] The causation in this case is even more direct than that upheld in *Bridge*. In *Bridge*, the Court held that a party claiming injury for a mail fraud violation under RICO need not have relied on the fraudulent representations. 553 U.S. at 661. The misrepresentations polluted a county-administered auction process that plaintiffs were involved in, which deprived them of an opportunity to acquire valuable property liens. *Id.* at 643-44. The court held that "[RICO] provides a right of action to '[a]ny person' *injured* by the violation, suggesting a breadth of coverage not easily reconciled with an implicit requirement that the plaintiff show reliance *in addition to* injury in his business or property." *Id.* at 649 (emphasis added). Thus, the *Bridge* Court reasoned, a business's scheme to injure a rival could provide the basis for a RICO claim where the business defrauded the rival's customers – but not the rival – and thereby hurt the rival's profits. *Id.* at 649-50. Accordingly, even if Defendants were correct in arguing that only CLEAN was deceived by the fraud, Greenpeace would still have a cognizable RICO injury under *Bridge*.

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

[28] *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.").

unless one has participated in the operation or management of the enterprise itself." [29] 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 D.C. Circuit has 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, 65. 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 their agents engaged in various surveillance, infiltration, and intrusion activities that were designed to acquire Greenpeace information on behalf of their clients. *Id.* ¶¶ 32, 36, 68. Defendant Ward held a leadership role on the operations side of the enterprise. *Id.* ¶ 62.

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[29] *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).

Consistent with this role, he "regularly briefed" Andy Shea of Dezenhall and Peter Markey of CONDEA Vista about "the information unlawfully obtained from Greenpeace." *Id.* ¶¶ 51, 62. Defendant Mika assisted with these briefings (*id.* ¶ 51), 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 Dezenhall and CONDEA Vista. Compl. ¶¶ 76, 113, 170(b)-(c). Thus, the Individual Defendants' acts amount to participation in the operation and/or management of the enterprise.[30]

Greenpeace contends that Sasol directed the affairs of the enterprise by setting objectives, reviewing the fruits of BBI's sleuthing and then paying the bills. Compl. ¶¶ 113, 170(b)-(c), 171. CONDEA Vista granted its "consent, permission, and expressed authority" to obtain all of the information that BBI did in Louisiana; indeed, CONDEA Vista provided "direction" for everything that BBI did in Lake Charles. *Id.* ¶ 76. CONDEA Vista executive Peter Markey testified under oath that he hired BBI to "infiltrate activist groups" and that he personally reviewed stolen documents and confidential Greenpeace emails. *Id.* ¶¶ 60, 62, 70. Markey was kept abreast of BBI's activities via regular meetings with BBI and Dezenhall. *Id.* ¶¶ 51, 62. The president and general counsel of CONDEA Vista knew of the corporation's relationship with

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[30] *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).

BBI, too. *Id.* ¶ 62. And, CONDEA Vista paid BBI directly for the Individual Defendant's services, periodically sending checks in amounts ranging from $5,000 to $10,000 over a period of many months. *Id.* ¶¶ 50, 64, 73. Each of these alleged facts supports the inference that CONDEA Vista participated in the conduct of the enterprise.[31]

Similarly, Greenpeace adequately alleges that Dezenhall participated in the conduct of the enterprise, providing facts that show its key role in financing, designing, and implementing the enterprise's schemes. Compl. ¶¶ 170(b)-(c), 171. Dezenhall "ma[de] clear the nature of the information that they wanted to secure" and insisted on "intentionally vague" invoices. *Id.* ¶¶ 72, 78. On its own, this conduct may not be sufficient to show liability, but it does provide inferential support for the allegation that Dezenhall provided direction to BBI employees on carrying out their illegal activities. Dezenhall paid significant sums of money to BBI (*id.* ¶¶ 52, 64, 72), for unlawful conduct, and received regular briefings on that conduct. *Id.* ¶ 71 (listing many meetings with BBI). As with Sasol, the alleged facts support the contention that Dezenhall 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 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. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989) (emphasis in original).

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[31] *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).

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 and scheme to defraud was to secure confidential records from Greenpeace. Compl. ¶¶ 77, 171-72. This goal was achieved through an integrated, multi-faceted approach: D-lines, surveillance and unlawful infiltration. The transportation of stolen goods and wire fraud were two of the methods used to carry out these activities.

Greenpeace was a common victim throughout – although in order to gather information about Greenpeace, Defendants targeted Plaintiff's employees and affiliates. Compl. ¶¶ 33-34, 49. The Individual Defendants planned and carried out at least 35 D-lines at Greenpeace's offices alone to illegally gather information for the Lake Charles Project. *Id.* ¶ 65. The wire fraud was carried out by Defendants' agent, Dick Rogers, through numerous transmissions of narrative reports and confidential business information. Compl. ¶ 67. CONDEA Vista and Dezenhall directed the Individual Defendants at regular intervals (*id.* ¶¶ 60, 76, 78, 77, 119, 128, 135, 143, 179(c)-(d)), and, in turn, the Individual Defendants routinely briefed CONDEA Vista and Dezenhall regarding the misconduct. *Id.* ¶¶ 51, 62, 77, 128, 135, 143. The conspiracy reflects a carefully coordinated, completely related, and highly secretive campaign to steal from and defraud Greenpeace. The Court should reject Defendant Sasol's unsupported characterization of the allegations as "[i]solated" and "sporadic." *See* Sasol Mem. at 32.

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 17 months – "spanned a substantial period of time." *United States v. Wilson*, 605 F.3d 985, 1021 (D.C. Cir. 2010). In this case, the transportation of stolen goods predicate act continued for a period of "at least 16 months." Compl. ¶ 171. A reasonable inference based on facts in the Complaint demonstrates that the wire fraud lasted for at least 15 months. *Id.* ¶ 67. These time periods resemble that found sufficient in *Wilson*, and exceed other periods of time that have sustained a RICO pattern.[32]

Defendants cite cases where a longer period of time has been found insufficient to establish closed-ended continuity. *See* Sasol Mem. at 32-33. 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

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[32] *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).

the acts were committed, 3) the similarity of the acts, 4) the number of 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. Compl. ¶¶ 65, 67. 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 – CLEAN, Lake Charles activists, Greenpeace employees, Fenton Communications, and a Louisiana law firm, as well as a number of other prominent environmental groups. Compl. ¶¶ 23, 34, 49, 66-68, 74-75; *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 Dezenhall and CONDEA Vista provided direction and funding. Compl. ¶¶ 62, 68, 76-77. 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.[33]

c. Defendants Engaged in Racketeering Activity.

Plaintiff has alleged that Defendants committed many wrongs in furtherance of their

[33] Sasol argues that no RICO "pattern" exists because Plaintiff complains of a single scheme that took place against a single victim in one location. Sasol Mem. at 34 (relying on *Western Associates Ltd. Partnership v. Market Square Associates*, 235 F.3d 629, 634 (D.C. Cir. 2001)). In *Western Associates*, however, 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 involving a single project" could not elevate a dispute about "cost and income projections" to a RICO claim. *Id.* at 635-36. The scope of Defendants' schemes – in every dimension – distinguishes this case from *Western Associates*.

scheme. Two of these – the interstate transportation of stolen property and wire fraud – are considered racketeering activities under RICO.

i. The Transfer of Stolen Greenpeace Documents and Intellectual Property from D.C. to Maryland and Beyond Is Interstate Transportation of Stolen Property.

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." Compl. ¶ 172(a). The theft of the goods took place in the District of Columbia, and they were then transferred to Maryland. *Id.* Defendants paid hundreds of thousands of dollars for this and related information. *Id.* ¶ 126. Therefore, Plaintiff has adequately pled a predicate act for interstate transportation of stolen property.

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 $5,000. Second, they insist that the stolen documents do not qualify as "goods, wares, or merchandise" under the statute. Sasol Mem. at 27-31; Dezenhall Mem. at 11-14.[34]

The Complaint does not explicitly state that Greenpeace's stolen documents and business information were worth $5,000. But the Complaint contains an allegation that Defendants paid *hundreds of thousands* of dollars for the stolen goods. Compl., ¶ 126. This fact supports the inference that the goods were valued at over $5,000. *See United States v. Bottone*, 365 F.2d 389,

[34] Defendant Sasol also contends that the documents were thrown away, and therefore cannot be stolen. Plaintiff addresses this argument at Part II.D.1 below. Each Defendant is liable for the theft of Greenpeace's property.

393 (2d Cir. 1966) (ruling that property can be valued by reference to price paid in thieves' market).[35]

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. 414, 420 (N.D. Ill. 1990) (summarizing federal authority).[36]

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

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[35] "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 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.").

[36] 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. 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).

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 – was found to fall 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, Individual Defendants carried out the theft and transport of the property at the direction of Dezenhall and CONDEA Vista, who then paid for the work product and proprietary business information. Greenpeace has also alleged that the Individual Defendants and Dezenhall (as well as Defendant Ketchum) 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.[37]

Defendant Dezenhall insists 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. Dezenhall Mem. at 13. 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

[37] *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).

market.[38]

ii. Using Electronic Mail to Elicit Confidential Business Information Under False Pretenses Is Wire Fraud.

Defendants also violated 18 U.S.C. § 1343, which criminalizes "devis[ing] or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means" of false representations and using the wires "for the purpose of executing such scheme or artifice." "It is the scheme to defraud and not actual fraud that is required. Fraudulent intent may be inferred from the *modus operandi* of the scheme." *United States v. Reid*, 533 F.2d 1255, 1264 (D.C. Cir. 1976). Plaintiff alleges that Rogers was recruited by Sapone with Ward's knowledge and directed to adopt a false persona to infiltrate CLEAN; the design of the scheme was to ferret out information related to Greenpeace, and to that end he was trained on what to look for. Compl. ¶¶ 66-67. Rogers was a retired teacher who posed as a concerned citizen. *Id.* ¶¶ 33(b), 67. He began working with CLEAN as a volunteer, and then eventually became a member of its board. *Id.* From that position he monitored Greenpeace's confidential information and provided dozens of reports and over 100 emails to Defendants between August 1998 and November 1999. *Id.* ¶¶ 66-67.

These allegations meet the heightened pleading standard required for fraud claims. Courts acknowledge that the particularity requirement of Rule 9(b) must be harmonized with the notice pleading standard in Rule 8, and therefore the rules are read "in conjunction." *HTC Corp. v. IPCom GmbH & Co., KG*, 671 F. Supp. 2d 146, 149 (D.D.C. 2009) (Collyer, J.). Additionally, courts are mindful of the policy considerations animating 9(b): the particularity requirement "ensures that the opponent has notice of the claim, prevents attacks on his reputation

[38] *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. . . .").

where the claim for fraud is unsubstantiated, and protects against a strike suit brought solely for its settlement value." *S.E.C. v. Boling*, No. 06-1329, 2007 WL 2059744, at *2 (D.D.C. July 13, 2007) (citation omitted).

As noted, Plaintiff has provided more than enough information to put Defendants on notice of the nature of the claim. Greenpeace describes a circumscribed time period in which much of the fraud took place, and describes the misrepresentations made by Rogers to CLEAN and others who took him to be a like-minded concerned citizen. Defendants are on notice that Rogers misrepresented the nature of his allegiances.[39] The Complaint spells out that Rogers intercepted confidential information and emails and sent the information to Sapone and others in the form of narrative reports and email forwards. The Complaint states that CLEAN is based in Louisiana (Compl. ¶ 34(a)); it is a reasonable inference that this was the site of Rogers's initial misrepresentation. If these facts are insufficiently detailed to provide notice of Plaintiff's claims, Plaintiff can provide more detail and requests the opportunity to re-plead these allegations.[40]

Defendants ask the Court to apply the holding of *Bates v. Northwestern Human Services, Inc.*, 466 F. Supp. 2d 69 (D.D.C. 2006), here. The facts in that case differ sharply from those presented here.[41] The court criticized the *Bates* complaint as betraying "unmitigated vagueness." 466 F. Supp. 2d at 90. Indeed, the fraud allegations in *Bates* were unadorned recitations of the elements of the charge and descriptions of routine banking activities. *Id.* Here, the charges in

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[39] Defendant Sasol suggests that allegations of nondisclosures somehow do not satisfy 9(b)'s requirements in the absence of a legal or fiduciary duty to make such disclosures. *See* Sasol Mem. at 31. The case Sasol relies on, *Sanchez v. Triple-S Management, Corp.*, 492 F.3d 1 (1st Cir. 2007), acknowledges that where nondisclosure would be misleading or the information is withheld with an intent to deceive, fraud likely exists. *See id.* at 10.

[40] *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) ("[L]eave to amend is almost always allowed to cure deficiencies in pleading fraud.") (quotation marks omitted).

[41] *Cf. United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp. 2d 258, 269-70 (D.D.C. 2002) (observing that Rule 9(b) is "analyzed case by case").

the Complaint are specific, contain details about the scope and nature of the fraud, and make clear to Defendants what conduct they are being asked to defend.

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. ¶ 179. 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.* ¶ 180.

Defendants only response to this charge is 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. Sasol Mem. at 35; Dezenhall Mem. at 18 n.9. Defendants have not raised objections to the merits of the RICO conspiracy claim, and should not be permitted to in their Reply.

For the reasons discussed above, Plaintiff's substantive RICO claim should not be dismissed. If, however, the Court were to conclude that Defendants Sasol and Dezenhall did not manage or operate the enterprise alleged here, they should still be held liable for conspiracy. A 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 claims are dismissed. Sasol Mem. at 35; Dezenhall Mem. at 18 n.9. As argued above, the Court should not dismiss Greenpeace's § 1962(c) claims; however, dismissal of those claims does not require that the § 1962(d) claims be dismissed as well.[42] 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. 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.[43]

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

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[42] *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).

[43] *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). Defendant Sasol argues that the Court should dismiss all RICO claims and decline to exercise supplemental jurisdiction over the state law claims. Sasol Mem. at 37 n.8. As argued, and as illustrated by *Meridian Towers*, at the very least Plaintiff has adequately alleged a valid RICO conspiracy claim and therefore the state law claims should be addressed by this Court.

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. Partnership*, 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.

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 further alleges that Defendants sent at least one agent, Mary Lou Sapone, into Greenpeace's office in November 1998 posing as a prospective volunteer. Compl. ¶ 33.[44] Ms. Sapone asked for, and was given, a tour of the office. Her purpose, reported to Timothy Ward, was to "to assess which divisions were largest, and observe all employees in their workspace." *Id.* Defendant Sasol has argued that there is no trespass when consent to enter the property has been given – even if that consent was elicited by fraud. Sasol Mem. at 8-9. No such blanket rule exists. Rather, courts consider the purposes behind the fraud and the protectable interests of the person deceived.[45]

Here, Plaintiff has alleged a malevolent purpose behind Ms. Sapone's visit to Greenpeace: (1) she was working as a contractor for BBI, who in turn was working for Dezenhall and CONDEA Vista (Compl. ¶ 33); (2) she used the tour as an opportunity to note locations in the office where the most sensitive program documents were likely to be located and where information would be exchanged orally and audibly (*id.*); (3) she observed that there weren't any college-aged interns around; (*id.*); (4) she noted the information posted on the organization's "In/Out" board, including the fact that Damu Smith, who was very active in Greenpeace's Lake Charles campaign, would be out of the office from November 13-23 (*id.*).

Greenpeace has further alleged that BBI sent its agents into target offices posing as repairmen, deliverymen, and interns as a matter of course. Compl. ¶¶ 98, 103, 106. BBI recorded time billed to the CONDEA Vista/Dezenhall account as "UC briefing" – *i.e.*,

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[44] Undoubtedly, Ms. Sapone was convincing as a prospective volunteer. She worked her way up to the highest levels of the gun control movement – all the while working for the National Rifle Association. Compl. ¶ 33.

[45] *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1352 (7th Cir. 1995).

undercover briefings. *Id.* ¶ 71. Finally, Greenpeace alleges that: BBI obtained and tested codes that controlled the locks on Greenpeace office doors (*id.* ¶ 35); documents that would never have been discarded (as trash or recycling) were subsequently found in BBI's possession (*id.* ¶ 31); and BBI file notes and client reports to Dezenhall and CONDEA Vista reflected first-hand knowledge of insider meetings and discussions (*id.* ¶ 44).

From these facts, it is reasonable to infer that Ms. Sapone was casing Greenpeace's offices, looking for the best places to collect information from inside the 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. As such, Plaintiff asserts that the conduct described here does not fit the mold of permissible fraud (*e.g.*, the restaurant critic who wants to eat undetected before writing a review).[46] Here, the fraud was impermissible because it was intended to interfere with Greenpeace's possession (*i.e.*, the secure use and enjoyment) of its offices. The fraud was undertaken to observe Greenpeace's internal workings and to map the interior of the office to facilitate theft of documents and electronic surveillance in the future.[47]

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[46] *Desnick*, 44 F.3d at 1351-52.

[47] The facts here are readily distinguished from those presented in *Keyzer v. Amerlink Ltd.*, 173 N.C. App. 284 (N.C. Ct. App. 2005), relied upon by Sasol. In *Keyzer*, the Court held that no trespass had occurred where an investigator misrepresented his occupation and purpose in seeking legal advice. There, a lawyer reached a settlement with the manufacturer of a log cabin kit on behalf of a client; the settlement included a non-disclosure agreement. The lawyer was subsequently visited by an investigator pretending to be another aggrieved consumer seeking to sue the log cabin kit manufacturer. In fact, the investigator had been hired by the log cabin kit manufacturer to test the lawyer's compliance with the non-disclosure agreement. The court held that the investigator's fraudulent statements did not matter because "the entry complained of was not of the kind that interfered with plaintiff's ownership and possession of the land." *Id.* at 291. Equally unavailing is Sasol's reliance on *Lewis v. United States*, 385 U.S. 206, 207 (1966), where the Court was unwilling to suppress evidence of narcotics possession and sales that was obtained by an undercover officer; the officer was invited to the defendant's home after identifying himself as a potential customer and found the evidence in the home. *Id.* at 207, 210-11.

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 Dezenhall about Greenpeace. *Id.* ¶ 44. 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., by a client located in Lake Charles, Louisiana, 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 CONDEA Vista's Louisiana plant 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.

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

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

entitled to at least nominal damages.[48] 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.[49] 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.

As explained above at Part II.A.1, the loss of control over its confidential business information creates a substantial interference with Greenpeace's business and thus is compensable.

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.[50] 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

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[48] *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).

[49] *Gaetan*, 729 A.2d at 898. 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, any "actual harm" requirement 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. *Acosta Orellana*, 711 F. Supp. 2d 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").

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

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.[51]

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.[52] 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."[53] Thus, disgorgement is rational, even where the disgorgement of the value acquired by the trespasser exceeds any quantifiable injury to the property owner (or occupant).[54] Here, Plaintiff alleges that hundreds of thousands of dollars changed hands between Defendants as payment for the information obtained through the Individual Defendants' trespassing. Compl. ¶¶ 72, 73, 100.

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

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[51] *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107-08 (1998). Plaintiff has not asserted that its costs in preparing this lawsuit establish the injury element of its tort claims. Rather, Greenpeace asserts, as *Steel Company* recognizes, 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.
[52] 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).
[53] *Id.*
[54] *Id.*

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, 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. Defendant Dezenhall goes so far as to contend that "[t]his is a universally-acknowledged rule." Dezenhall Mem. at 27. 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).[55]

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

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[55] 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 indeed 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.

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.

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

Defendant Sasol alone makes a second argument in support of its Motion to Dismiss Plaintiff's invasion of privacy of claim. Sasol argues that Greenpeace's recycling and trash were not maintained in seclusion or solitude, and that Greenpeace therefore cannot satisfy the second element of its privacy claim. Sasol Mem. at 11-12.[56]

This argument only applies to a subset of the allegations that make up Greenpeace's invasion of privacy claim. Greenpeace's 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.

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[56] 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 v. Regardie*, 553 A.2d 1213, 1217 (D.C. 1989).

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 plaintiff's subjective expectation of privacy was objectively reasonable – have frequently borrowed from Fourth Amendment jurisprudence.[57] 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

[57] *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 Sasol, Dezenhall or the Individual Defendants – cannot offer an interest that serves the public good as the basis for its intrusion.

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.

Defendant Sasol, on the other hand, relies heavily on *Danai v. Canal Square Associates*, 862 A.2d 395 (D.C. 2004). *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 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.

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."[58] 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.[59] Defendants have asserted challenges to the sufficiency of Greenpeace's allegations as to both theories.

Greenpeace has alleged that Defendants stole documents including financial reports, campaign strategy documents, and other confidential materials from Greenpeace's offices, and private trash and recycling containers. Compl. ¶¶ 28-29, 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.

1. Greenpeace Did Not Abandon Its Property.

Sasol argues that Greenpeace cannot maintain a cause of action for either conversion or trespass to chattel because Greenpeace "abandoned" the relevant property. Sasol Mem. at 12-13. While few courts have had the opportunity to address the issue, the relevant case law rejects

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[58] 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).

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

Sasol's argument. In *Sharpe v. Turley*, the Texas Court of Appeals held that the 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). This conclusion squares with case law recognizing that whether property is abandoned turns on whether the owner had the intent to abandon the property. *See Borgen v. Maryland*, 468 A.2d 390, 393 (Md. Ct. Spec. App. 1983).

In any event, courts have held that whether an item is abandoned for purposes of depriving the owner of a property interest[60] is a factual question.[61] Given the safeguards that it

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[60] 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.").

[61] *See*, *e.g., American 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

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.

2. 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:

> [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 v. Dodd, 410 F.2d 701, 707-08 (D.C. Cir. 1969), *cert. den.*, 395 U.S. 947 (1969). In accordance with this view, several courts across the country have permitted plaintiffs to pursue conversion claims based on intangible property interests.[62]

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effectuates the intention. Determining the intent to abandon is a fact-intensive inquiry."); *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).

[62] *See U.S. Gypsum Co. v. LaFarge North America 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);

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).[63] In fact, the Court of 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.

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

Greenpeace alleges that BBI – at the behest of Dezenhall and CONDEA Vista – 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

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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).

[63] 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* that 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 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.

establish a claim 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, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 77 (D.D.C. 2007). Information is covered under the Act if it is secret, derives its value from its 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

[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.").

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] Greenpeace has pleaded sufficient detail to apprise Defendants of the nature of the suit and that is all that is required at this time.[66] 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.

Next, Defendants argue that the information at issue did not have independent economic value that derived from its secrecy. But Greenpeace clearly 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

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[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"); *American Bldg. Maint. Co. of N.Y. v. Acme Prop. Servs., Inc.*, 515 F. Supp. 2d 298, 309 (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] *See BlueEarth BioFuels LLC v. Hawaiian Elec. Co.*, No. 09-00181, 2011 WL 563766, at *14 (D. Haw. Feb. 8, 2011) (rejecting claim that plaintiff failed to sufficiently identify trade secret and explaining that "Courts generally require sufficient pleading such that the other party is on notice of what it is alleged to have misappropriated."). Defendants' authority supports Greenpeace's position. In *Analog Devices, Inc. v. Michalski*, cited by both Sasol and Dezenhall, the plaintiffs sought a temporary restraining order to prevent former employees from disclosing confidential information and trade secrets to a competitor. 579 S.E. 2d 449, 453 (N.C. Ct. App. 2003). Because plaintiffs requested a preliminary injunction, requiring them to demonstrate a likelihood of prevailing on the merits, plaintiffs were required to describe the trade secrets at issue with sufficient particularity. *Id.* at 452-53. The other two cases cited by Dezenhall have conclusory allegations of trade secrets and are therefore not analogous to this case. *See Medafor, Inc. v. Starch Med., Inc.,* No. 09-CV-0441, 2009 WL 2163580, at *1 (D. Minn. July 16, 2009); *MAI Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511, 522 (9th Cir. 1993). In both cases, the plaintiffs merely alluded to "business methodologies" or "diagnostic software" without identifying the secret information that was taken. *Id*. Greenpeace has clearly alleged the categories of secret information stolen by Defendants and has even identified precise campaign information taken. These allegations more than satisfy Greenpeace's burden.

"has significant economic value because it allows a company or business that would otherwise not have this information gain a distinct advantage," *BlueEarth BioFuels 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. ¶¶ 72-73) supports a finding that the stolen documents conferred a business advantage upon Defendants and thus had economic value to them.[67]

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

Finally, Sasol argues, without citing a single case or referencing any part of the Complaint, that Greenpeace failed to take reasonable efforts to maintain the secrecy of its information. Sasol ignores Greenpeace's substantial efforts, described throughout the Complaint, to protect its secret information. 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. These efforts were more than reasonable, and the relevant case law is in accordance.[68] Additionally, Sasol's argument ignores Greenpeace's allegation that some of the misappropriated secrets were taken from *inside* Greenpeace's office which Greenpeace kept locked. *Id.* ¶¶ 31, 35. Sasol's implication that Greenpeace – or any

[67] 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. *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).

[68] *See AlphaMed Pharm. Corp. v. Arriva Pharm. Inc.,* No. 03-20078, 2005 U.S. Dist. LEXIS 45923 (S.D. Fla. 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 U.S. Dist. LEXIS 11183 (E.D. Pa. 1991) (recognizing plaintiffs could maintain misappropriation action where plaintiffs stored trash bins in area not accessible to others).

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 CONDEA Vista, Greenpeace alleges that BBI, Dezenhall, and CONDEA Vista jointly agreed to commit various legal infractions to mitigate the effects of that environmental advocacy. Dezenhall and Sasol may be held liable for these acts alongside the Individual Defendants who actually committed the torts.

1. Allegations that CONDEA Vista, Dezenhall, 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." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000). Greenpeace alleges that CONDEA Vista, Dezenhall, and BBI's employees conspired to procure confidential information from Greenpeace

via illegal means and, accordingly, Sasol and Dezenhall may be held liable for the acts of BBI and its employees. Compl. ¶¶ 70-71, 76-77, 113, 128, 135, 143. Sasol and Dezenhall challenge only whether Greenpeace has satisfactorily pleaded that all Defendants "agreed" to commit an unlawful act.[69]

Greenpeace need only show facts "suggestive enough" to render its claim of an unlawful agreement plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Greenpeace easily satisfies this standard. Greenpeace alleges that CONDEA Vista and Dezenhall were regularly briefed on the Individual Defendants' illegal activities. Between 1998 and 2000 Defendant Timothy Ward regularly briefed CONDEA Vista Executive Peter Markey "about the information unlawfully obtained from Greenpeace." Compl. ¶ 51. During that same period, Dezenhall and the Individual Defendants conducted regular strategy meetings. *Id.* ¶¶ 61-63. Additionally, Defendant Jay Arthur Bly provided detailed reports of his efforts trailing activists and collecting trash. *Id.* ¶ 68. Furthermore, BBI briefed Dezenhall on its "undercover" activities on several dates throughout 1998 and 1999. *Id.* ¶ 71.

Greenpeace also alleges that CONDEA Vista and Dezenhall reviewed stolen documents. At these briefings and meetings, CONDEA Vista and Dezenhall reviewed the Individual Defendants' illicit activities, including the items stolen from Greenpeace. Mr. Markey personally "reviewed documents and information that BBI had stolen from Greenpeace." Compl. ¶ 62

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[69] As Defendant Sasol acknowledges, 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.").

Greenpeace alleges that CONDEA Vista and Dezenhall intended for BBI and the Individual Defendants to commit illegal acts. According to Greenpeace's complaint, Mr. Markey admitted, *under oath* that CONDEA Vista hired BBI expressly to "infiltrate activist groups" that opposed CONDEA Vista's manufacturing activities, knowing full well that BBI intended to execute a "surveillance campaign." Compl. ¶ 60. And, despite knowledge of illegality, CONDEA Vista and Dezenhall continued to pay BBI thousands of dollars. In the face of regular briefings related to the Individual Defendants' unlawful activities and illicitly obtained information, CONDEA Vista and Dezenhall continued to pay BBI's periodic bills: Dezenhall paid BBI well over $100,000 and CONDEA Vista made more than 10 periodic payments directly to BBI totaling more than $65,000. *Id.* ¶¶ 64, 73.

Finally, CONDEA Vista and Dezenhall tried to mask their involvement in the conspiracy. Greenpeace alleges that CONDEA Vista and Dezenhall deliberately used veiled terminology to describe the Individual Defendants' activities – an act entirely incongruous with lawful activities. Compl. ¶¶ 71, 72.

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 committed the overt act that violates the law – an inference of conspiracy is appropriate.[70] *See Halberstam v. Welch,* 705 F.2d 472, 487 (D.C. Cir. 1983). Indeed, it is incredibly *unlikely* that BBI would risk arrest or a

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[70] Defendants' own case law supports this conclusion. In *Steel v. City of San Diego*, cited by Dezenhall, the court held that evidence of regular communications among the co-conspirators during the time-period of the illegal activity supported an inference of an agreement and conspiracy. 726 F. Supp. 2d 1172 (S.D. Cal. 2010). Greenpeace alleges that CONDEA Vista, Dezenhall, and BBI 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.

Dezenhall cites *Steel* for the proposition that simply instructing a private investigator to "find out what you can" is not sufficient to support an inference of a conspiracy. (Dezenhall Mem. at 23.) However, as detailed above, Sasol's and Dezenhall's knowledge of and involvement in BBI's illegal activities went far beyond this simple instruction.

civil suit in order to perform services for which Sasol and Dezenhall had not authorized payment.[71]

Sasol and Dezenhall 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.[72]

Sasol and Dezenhall argue that there are many lawful means of obtaining confidential information and thus Greenpeace's conspiracy theory is implausible. Setting aside the absurdity of the suggestion that CONDEA Vista and Dezenhall possessed a legitimate reason for hiring a

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[71] *See Mendocino Envtl. Ctr. v. Mendocino County*, 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).

[72] *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. Health*, 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. The two cases cited by Sasol are similarly unpersuasive. In *R.C.M. Executive Gallery Corp. v. Rols Capital Corp.*, 901 F. Supp. 630, 643 (S.D.N.Y. 1995) the allegations of conspiracy contained *no* details other than a bare assertion of knowledge of monthly loan payments. In stark contrast, Greenpeace alleges *multiple* meetings spanning *multiple* years in which Defendants actually had access to stolen information. Sasol also cites *Flynn v. Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP*, No. 3:09-cv-00422-PMP-RAM, 2010 U.S. Dist. LEXIS 110458 (D. Nev. Oct. 15, 2010). But *Flynn* is entirely distinguishable because *Flynn* held that the applicable relationship between the defendants was that of principal-agent. Accordingly, Defendants' case law fails to undermine Greenpeace's allegations of a conspiracy.

private investigator to "infiltrate an activist group," Sasol and Dezenhall 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."[73] 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.

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

Greenpeace also alleges that Sasol and Dezenhall 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 held 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, Sasol and Dezenhall 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

[73] *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).

extensive detail above, Greenpeace alleges substantial facts that support the inference that CONDEA Vista and Dezenhall 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.[74]

CONCLUSION

For the foregoing reasons, the motions to dismiss of Sasol North America, Dezenhall Resources, Timothy Ward, Jay Arthur Bly, Michael Mika, and George Ferris should be denied.

Dated: March 25, 2011

By: /s/ Victoria S. Nugent

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[74] *See*, *e.g.*, *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).

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 Sasol North America, Dezenhall Resources, 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