

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

<b>GREENPEACE, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 2011 CA 0008036 B</b>
	)	<b>Judge Michael L. Rankin</b>
	)	<b>Calendar 7</b>
<b>THE DOW CHEMICAL COMPANY, et</b>	)	
<b>al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**ORDER**

On October 7, 2011, plaintiff Greenpeace, Inc. (“Greenpeace”) filed a complaint<sup>1</sup> in the Superior Court of the District of Columbia against The Dow Chemical Company (“Dow”), Sasol North America, Inc. (“Sasol”),<sup>2</sup> Ketchum, Inc. (“Ketchum”), Dezenhall Resources, Ltd. (“Dezenhall”), Timothy Ward, Jay Arthur Bly, Michael Mika, and George Ferris. In its complaint, plaintiff alleges two separate but substantively similar conspiracy schemes in which Dow and Sasol hired public relations firms Ketchum and Dezenhall, respectively, who in turn hired private security firm Beckett Brown International<sup>3</sup> to “surveil, infiltrate, and steal confidential information from Greenpeace with the intention of preempting, blunting or thwarting [Greenpeace’s] environmental campaigns.” *Compl. at 2.*

This matter is now before the court on motions by all defendants to dismiss plaintiff’s

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<sup>1</sup> A related complaint was previously brought in the United States District Court for the District of Columbia, where the Honorable Rosemary Collyer dismissed the racketeering counts (not included in the instant complaint) for failure to state a claim, and declined to exercise supplemental jurisdiction over the remaining state law claims.

<sup>2</sup> While the complaint alleges actions taken by the CONDEA Vista Company, the named defendant is Sasol North America, Inc. because The CONDEA Vista Company changed its name to Sasol North American, Inc. after it became a subsidiary of Sasol, Ltd. We will refer to this defendant as Sasol throughout this order.

<sup>3</sup> Notably, Beckett Brown International, Inc. is not a named defendant in this case.

complaint, which plaintiff has opposed.<sup>4</sup> Defendants challenge each of plaintiff's five counts as failing to state a claim upon which relief can be granted, and further raise global challenges of statute of limitations and challenges to vicarious liability and evidence of a conspiracy. The court held a hearing on the motions to dismiss on May 10, 2012 and heard argument from all parties. After careful consideration, the court has concluded that these motions to dismiss must be granted in part and denied in part.

### Injury

In order to have standing to sue in the District of Columbia, a plaintiff "must allege facts showing the following: (1) the plaintiff['s] . . . injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of — the injury must be fairly traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court; [and] (3) a likelihood, as opposed to mere speculation, that an injury will be redressed by a favorable decision." *Grayson v. AT&T Corp.*, 15 A.3d 219, 246 (D.C. 2011) (internal quotations omitted), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The claims for trespass and conversion are exempt from the injury-in-fact requirement, as evidence of actual damages is not necessary to proceed on these claims. *Decker v. Dreisen-Freedman, Inc.*, 144 A.2d 108, 110 (D.C. 1958) (Even without proof of the extent of damages,

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<sup>4</sup> Defendants Dezenhall, Ketchum, and Dow filed motions to dismiss on November 16, 2011; defendant Sasol filed its motion to dismiss or sever on the same day; and individual defendants Ward, Bly, Mika and Ferris filed their joint motion to dismiss the following day, November 17, 2011. Pursuant to a consented-to briefing schedule, plaintiff filed two oppositions on December 14, 2011: the first, in response to the motions to dismiss filed by Dow, Ketchum, Ward, Bly, Mika and Ferris; and the second, in response to the motions to dismiss filed by Sasol, Dezenhall, Ward, Bly, Mika and Ferris. Sasol and Dezenhall filed replies to plaintiff's opposition.

“proof of trespass ... warrant[s] recovery of nominal damages”); *Pearson v. Dodd*, 410 F.2d 701, 707 (D.C. Cir. 1969) (“a judgment for conversion can be obtained with only nominal damages.”) Further, “provided the damages are of the kind that would typically be expected to flow from a trespass, Plaintiffs are not required to plead their damages with particularity.” *Council on American-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 344 (D.D.C. 2011), *citing* Fed. R. Civ. P. 8(a)(3), 9(g); *Pearson v. Dodd*, 410 F.2d 701, 707 (D.C. Cir. 1969).

Similarly, the claim for misappropriation of trade secrets does not depend on an injury-in-fact alleged to survive the motion to dismiss. Misappropriation of trade secrets is a statutory claim, and the statute does not require a pleading of damages to succeed on the claim. D.C. Code § 36-401.

Greenpeace’s claims for invasion of privacy and trespass to chattel, however, are not sustainable without a pleading of injury in fact. Greenpeace submits that it has suffered the following damages as a result of defendants’ alleged clandestine activities: (1) interference with its campaigns and organizational mission; (2) interference with its intellectual property; and (3) costs of investigating the alleged actions. As to these claims, Greenpeace has not alleged that it has suffered even one dollar of actual, compensable damages. Regarding the first allegation of harm, interference with Greenpeace’s campaigns and organizational mission, Greenpeace pleads this injury only in general terms. Even when asked to name specific, concrete damages during the motions hearing, counsel for Greenpeace was only able to cite generally the undermining and subverting of campaigns and projects. Greenpeace has failed to cite a single campaign or effort that was undermined or a single donor whose financial support was lost as a result of defendants’ alleged acts. Greenpeace pleads its injury to intellectual property similarly, submitting that because its confidential documents, such as donor lists or event plans, might be valuable to

defendants, it therefore had ownership over that information and was damaged by its theft. This argument, without more, does not convince the court that injury has been sufficiently pleaded. Again, Greenpeace failed to allege that it suffered any concrete loss. Finally, the costs incurred in investigating the alleged wrongdoing and bringing suit cannot provide a basis for a finding of injury sufficient to create standing. As the Supreme Court stated, “a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (U.S. 1998). The costs of investigation, which were incurred years after the alleged injury, are a “byproduct of the litigation itself” and do not provide a sufficient basis to create standing.

Accordingly, the court finds that Greenpeace’s claims for invasion of privacy and trespass to chattel must be dismissed for failure to plead an injury-in-fact sufficient to create standing as to these counts.

#### Statute of Limitations

In addition to the defects discussed above, the defendants raise the defense of statute of limitations (“SOL”) as to all of Greenpeace’s claims. Greenpeace argues that due to defendants’ alleged affirmative acts of concealment, the discovery rule tolled the SOL as to all counts until April 2008, when plaintiff became aware of defendants’ alleged acts.

### **Appropriate Limitations Period**

Parties agree that the claims of trespass, conversion, trespass to chattel, and misappropriation of trade secrets are all governed by a three year statute of limitations in the District of Columbia. In dispute is the proper SOL to apply to the invasion of privacy claim.

Defendant Sasol argues that the correct statute of limitations for an invasion of privacy claim is one year, citing a case in which the United States District Court for the District of Columbia applied a one year SOL to plaintiff's claims that she was surveilled by the defendants, who allegedly then used the information gathered to humiliate her. *Richards v. Duke University*, 480 F. Supp. 2d 222, 241 (D.D.C. 2007). In support of its decision, the District Court cited *Grunseth v. Marriott Corp.*, 872 F. Supp. 1069, 1074 (D.D.C. 1995) and *Doe v. Southeastern University*, 732 F. Supp. 7, 9 (D.D.C. 1990), where the court had previously interpreted District of Columbia law to the same result.

Plaintiff urges the court to apply a three year SOL because the D.C. Code does not expressly provide a limitations period for invasion of privacy. Plaintiff argues that the type of invasion of privacy of which it complains, intrusion, is "fundamentally distinct" from the types of privacy claims to which the one-year statute is applied, because intrusion does not require publication. While the D.C. Court of Appeals case plaintiff cites does distinguish intrusion from the other three privacy torts, it does not discuss any potential impact on the statute of limitations, and thus does not reach plaintiff's conclusion that publication is the key element to applying a one-year SOL. *Wolf v. Regardie*, 553 A.2d 1213, 1217 (D.C. 1989). Plaintiff's only support for the proposition that intrusion should not have the same one-year SOL as other incarnations of invasion of privacy is a 1999 case from the Illinois Court of Appeals, applying Illinois law.

The court will rely on the District Court opinions that interpret and apply District of Columbia law. This line of decisions—*Richards*, *Grunseth*, and *Doe*—has been indicating since 1990 that the statute of limitations for all invasion of privacy claims is one year in the District of Columbia, and the D.C. Court of Appeals has not contradicted that interpretation. On this basis, the court finds that regardless of whether this claim is for intrusion or a different incarnation of invasion of privacy,<sup>5</sup> a one-year statute of limitations is appropriate.

Because the court applies a one year statute of limitations to plaintiff's invasion of privacy claim, even assuming *arguendo* that the discovery rule does toll the statutes of limitations until April 2008, plaintiff failed to file its complaint within one year of that time, and therefore this count is dismissed as time-barred.

#### **Discovery Rule**

Also at issue is whether plaintiffs have pleaded facts sufficient, if proven, to support application of the discovery rule to toll the relevant SOLs. In the District of Columbia, the discovery rule applies “where the relationship between the fact of injury and the alleged tortious conduct is obscure when the injury occurs.” *Diamond v. Davis*, 680 A.2d 364, 379 (D.C. 1996) (internal citations omitted). Generally, the statute of limitations begins to run when the plaintiff “has either actual notice of her cause of action or is deemed to be on inquiry notice.” *Id.* at 372.

To be on notice of a cause of action, a plaintiff must be aware of “(1) an injury; (2) its cause in

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<sup>5</sup> It is not clear that plaintiff's claims are properly categorized as claims for intrusion rather than a different type of invasion of privacy. In spite of its insistence otherwise, plaintiff has alleged that publication occurred. *Armenian Assembly of Am., Inc. v. Cafesjian*, 597 F. Supp. 2d 128 (D.D.C. 2009) (finding that for publication to occur, “it is sufficient that the communication be made to just a single individual and need not have been made to a large or even a substantial group of persons”). At the heart of plaintiff's allegations is the claim that BBI shared the information gathered with clients Ketchum, Dezenhall, Sasol and Dow. The information-sharing is essential to plaintiff's claims that defendants Sasol and Dow somehow used this information to “thwart” its efforts. These allegations squarely make this claim the type of invasion of privacy claim to which the *Doe* court referred as a “defamation type action,” therefore applying the one year SOL. The set of facts alleged by Greenpeace are furthermore substantially similar to the facts in *Richards*, where plaintiff alleged that defendants gathered information and shared it to plaintiff's detriment, and where a one-year statute of limitations was applied. Plaintiff does not suggest that non-intrusion-based invasion of privacy claims have a statute of limitations longer than one year, so whether the claim is categorized as intrusion or otherwise does not affect the court's result.

fact; and (3) some evidence of wrongdoing.” *Id.* at 379. For this reason, the court is not convinced by defendant Ketchum’s argument that Greenpeace was on notice of the injury because it must have been aware of any alleged injury. Without delving into a discussion of the sufficiency of Greenpeace’s injuries, it suffices to say that Greenpeace could have been aware of the failure of a particular campaign without, at the time, knowing that some wrongdoing had caused that failure.

The *Diamond* court described inquiry notice as occurring when, “if [the plaintiff] had met her duty to act reasonably under the [c]ircumstances ... such an investigation, if conducted, would have led to actual notice. What is reasonable under the circumstances is a highly factual analysis.” *Id.* at 372 (internal citation omitted). The court in *Diamond* went on to hold that “the discovery rule in cases involving fraud and fraudulent concealment is the same as in other cases to which a discovery rule applies...In every case, the plaintiff has a duty to investigate matters affecting her affairs with reasonable diligence under all of the circumstances” *Id.* at 381–2. Because whether plaintiff fulfilled its duty to investigate is a “highly factual” inquiry, that is a determination more appropriate for the jury. For now, the court finds that plaintiff has sufficiently pleaded its unawareness of the alleged wrongs to raise facts that, if proven, would support application of the discovery rule. For that reason, counts two, three, and five are not time-barred. Count four bears additional discussion, however, as courts have treated conversion differently.

Typically, “a cause of action in conversion accrues at the time the defendant wrongly exercises dominion, regardless of the plaintiff’s ignorance.” *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 462 (D.C. Cir. 1989). However, this rule may not apply when the defendant has fraudulently concealed the conversion. *Fox v. Commissioner*, 75 A.F.T.R.2d

(RIA) 642 (D.D.C. 1994). As defendant Sasol correctly points out, fraudulent concealment must be pleaded with particularity. See Super. Ct. Civ. R. 9(b) and *Woodruff v. McConkey*, 524 A.2d 722. (D.C. 1987). The D.C. Circuit has explained that the “particularity” standard requires that the complaint “state the time, place and content of the false misrepresentations, the fact misrepresented and what was [ob]tained or given up as a consequence of the fraud.” *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 20, 25 (D.D.C. 2010) (internal citations and quotations omitted). In *Folliard*, the court went on to explain that the purposes of the particularity requirement are, *inter alia*, to ensure that defendant can sufficiently prepare its defense and to prevent fraud claims from being used as a gateway to discovery of “unknown wrongs.” Here, since the fraudulent concealment allegation is only pertinent to determining application of the discovery rule, the primary purpose of Rule 9 (b) is to ensure that the claim is pleaded sufficiently to permit defendants to oppose it if they so desire.

On this issue, the court finds that plaintiff has sufficiently pleaded fraudulent concealment. Greenpeace has alleged, *inter alia*, that defendants shredded company records in January 2001, and that defendants Ward and Bly communicated about “sterilizing the office.” *Compl.* at 28. These allegations are sufficiently pleaded to constitute the factual basis for a fraudulent concealment claim. Accordingly, the conversion claim is not dismissed as time-barred at this time.<sup>6</sup>

### Vicarious Liability

Greenpeace’s complaint centers on acts allegedly committed by BBI and the individual defendants. Against the additional defendants, Dow, Sasol, Ketchum, and Dezenhall,

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<sup>6</sup> The issue of whether the claim for conversion is time-barred will be determined by the finder of fact, who will determine whether fraudulent concealment actually occurred, thereby deciding whether the discovery rule extends the statute of limitations as to this count.



Greenpeace asserts vicarious liability on the theories of conspiracy and aiding and abetting.

### **Conspiracy**

The elements of civil conspiracy in the District of Columbia are: “(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.” *Weishapl v. Sowers*, 771 A.2d 1014, 1023 (D.C. 2001) (internal citations omitted).

Defendants Dow, Sasol, Ketchum, and Dezenhall urge the court to dismiss them from the case, arguing that Greenpeace has failed to state a claim for civil conspiracy. Defendants Dow, Sasol, Ketchum and Dezenhall do not dispute that they hired BBI to provide surveillance services. Rather, they argue that Greenpeace has pleaded that they (lawfully) hired BBI to provide surveillance and investigation services, but has failed to plead that they either agreed that BBI would use unlawful (here, tortious) means to carry out the services, or that they were aware that BBI was using tortious means to carry out the services and continued to order and pay for those services. Greenpeace contends in opposition that it has pleaded sufficient factual material to state a claim for civil conspiracy as to these defendants. Because the complaint alleges one conspiratorial agreement involving Sasol, Dezenhall, and BBI, and another between Dow, Ketchum, and BBI, the court will address, in turn, the sufficiency of pleading as to those defendants.

#### *Sasol & Dezenhall*

The court finds that conspiracy has been adequately pleaded as to defendants Sasol and Dezenhall. While those defendants argue that Greenpeace has not pleaded facts sufficient to “plausibly suggest an unlawful agreement,” *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2008), the

court disagrees. Greenpeace has alleged that Dezenhall and Sasol were party to meetings with BBI, during which they were briefed on the status of the investigations. Taken together with the other facts pleaded in this matter, the court finds that plaintiff has pushed its allegations that Sasol and Dezenhall were privy to and/or supportive of the alleged acts “across the line from conceivable to plausible.” *Id.* (internal quotations omitted). This count survives the motions to dismiss.

#### *Dow & Ketchum*

Similarly, the court finds that Greenpeace has stated a claim for civil conspiracy against defendants Dow and Ketchum. Greenpeace alleges that Dow and Ketchum participated in meetings regarding BBI’s investigations and received information about the surveillance and investigation activities. At this stage, under the standard stated above, Greenpeace has alleged a civil conspiracy that meets the plausibility standard enunciated in *Iqbal*.

#### *Statutory Offenses as Predicates for Civil Conspiracy*

In the District of Columbia, civil conspiracy is not actionable as an independent tort, but rather, functions as a “means for establishing vicarious liability for [an] underlying tort.” *Exec. Sandwich Shoppe v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000). The conspiracy claim can therefore proceed only as a basis for vicarious liability for the limited claims that survive the motions to dismiss. Defendant Sasol argues that there can be no conspiracy liability for the misappropriation of trade secrets count, a statutory offense. Sasol cites *Executive Sandwich Shoppe v. Carr Realty Corp.* for the proposition that in the District of Columbia, “civil conspiracy has never supported an underlying statutory offense.” *Sasol. Mot. to Dismiss at 18*. Plaintiff responds that Sasol is misinterpreting the caselaw, and cites a District of Columbia District Court case suggesting that statutory claims codifying claims that existed at common law

can form the basis of a civil conspiracy claim. *Findlay v. CitiMortgage, Inc.*, 813 F. Supp. 2d 108, 122 (D.D.C. 2011).

Having read *Executive Sandwich Shoppe*, the court believes that Sasol mischaracterizes the Court of Appeals' opinion. It is an oversimplification to interpret *Executive Sandwich Shoppe* as barring conspiracy liability based on a statutory offense. Rather, the court agrees with the *Findlay* court's interpretation of that case:

the District of Columbia Court of Appeals has expressed skepticism about statutory violations serving as "underlying torts" for civil conspiracy claims *where the statutory right at issue has no common law tort analogue*.

*Id.* (emphasis added). The court finds here that the D.C. Uniform Trade Secrets Act (DCUTSA) codifies causes of action that existed at common law, as evidenced by experts' attempt to define the common law on trade secrets in Section 757 of the Restatement (First) of Torts, published in 1939. *See also* *Sikes v. McGraw-Edison Co.*, 671 F.2d 150, 151 (5th Cir. 1982) (“[A]ll trade secret actions ... derive[e] from the common law of some state.”) Because the causes of action articulated in the DCUTSA do have common law analogues sounding in tort, a violation of this statute can serve as the predicate for a civil conspiracy claim. Whether the plaintiff may proceed on the misappropriation claim will be discussed below.

### **Aiding and Abetting**

Greenpeace submits that defendants Dow, Sasol, Ketchum and Dezenhall may alternatively be liable on a theory of aiding and abetting. Defendants argue that no civil cause of action for aiding and abetting the commission of a tort exists in the District of Columbia. Having reviewed the case law cited by both parties, the court agrees with defendants' position.

In 1983, the United States Court of Appeals for the District of Columbia Circuit wrote in *Halberstam* that “[t]he separate tort of aiding-abetting has not yet, to our knowledge, been

recognized explicitly in the District, but the existence of the civil conspiracy action suggests a high probability that the legal rationale underlying aiding-abetting would also be accepted.” *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983). While plaintiff asserts that the court should allow this cause of action based on the District of Columbia Circuit Court’s estimation that, if the issue came before the District of Columbia Court of Appeals, the cause of action *would* be accepted, the court finds that District of Columbia case law suggests a different outcome. In 2007, the District of Columbia Court of Appeals addressed this issue, albeit indirectly, in *Flax v. Schertler*, 935 A.2d 1091. In *Flax*, the court cited the *Halberstam* court’s above-quoted passage, and went on to say, “[a]lthough the Halberstam court predicted that this court would recognize a tort of aiding and abetting tortious conduct, we have not done so to date, and we are not bound by that court’s ruling.” *Id.* at 1108 n.15.

Furthermore, plaintiff has failed to cite any precedent indicating that this court should recognize aiding and abetting as a viable theory of vicarious liability separate from civil conspiracy. This court will not create a cause of action or a theory of vicarious liability that has never been recognized by the District of Columbia Court of Appeals.

#### Count 1: Trespass

Greenpeace alleges that defendants committed trespass in three primary and distinct ways: first, by acquiring documents from dumpsters and recycling bins; second, by sending employees or subcontractors to enter Greenpeace’s office under false pretenses or without consent; and third, through electronic surveillance. Defendants argue that Greenpeace has not pleaded sufficient facts to sustain a claim for trespass regarding any of these alleged events.

## Trespass to Common Areas

Greenpeace alleges that defendants Ward, Bly, Mika and Ferris, and their subcontractors, collected documents from dumpsters and recycling bins, thus committing trespass. *Compl.* at 23. The receptacles were located on private property, at the office buildings where Greenpeace leased office space.<sup>7</sup> *Compl.* at 26. However, as defendants point out, these areas were not leased by Greenpeace, but rather, were common space for the use of all of the building's tenants.

At issue is whether a tenant has standing to bring suit against one who trespasses in a common area. Neither party cited controlling authority on this topic. Defendants argue that as a tenant and not an owner, Greenpeace lacks the "possessory interest" necessary to bring a suit in trespass regarding a common area. Plaintiff contends that its right to use the common spaces and amenities at each of its office locations grants it a sufficient possessory interest to bring suit in trespass. Neither party was able to locate any binding case law, or even case law representing the position of a majority of jurisdictions. Having considered the existing case law in this jurisdiction and others, the court finds defendants' stance persuasive.

The District of Columbia 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 v. 1344 U Street Ltd. P'ship.*, 871 A.2d 480, 490 (D.C. 2005) (citations omitted). While plaintiff correctly points out that this rule cannot be interpreted to mean that only an *owner* may sue in trespass, as that would lead to the absurd result that a lessee could not maintain an action for trespass on its exclusive leased property, plaintiff's argument goes astray when it argues that Greenpeace had a possessory interest in the common areas of the office building sufficient to sustain a suit in trespass.

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<sup>7</sup> The complaint alleges that this type of trespass occurred between 1998 and May 2000 at 1436 U Street, N.W., and also after May 2000 at 702 H Street, N.W., Greenpeace's new office location.

Black's Law Dictionary defines a common area in the landlord-tenant context as "[t]he realty that all tenants may use though the landlord retains control and responsibility over it." *Black's Law Dict.* 291(8<sup>th</sup> ed. 2004). While courts infrequently address common areas with respect to civil trespass, many courts have discussed possession of common areas in the context of tort actions for wrongs occurring in common areas. Generally, possession is based on one's right to "exercise control over something to the exclusion of all others." *Id.* at 1201. Consistent with that dictionary definition, courts often presume that common areas remain in the possession of the landlord. *See Shields v. Wagman*, 350 Md. 666, 674 (Md. 1998) ("Our recognition of landlord liability in common areas is generally premised on the control a landlord maintains over the common areas"); *see also Catherman v. United States*, 1992 U.S. Dist. LEXIS 11120 at \*32-33 (N.D.N.Y. July 16, 1992) (stating that under New York law, when a landlord retains parts of the premises as common areas, there is an implied presumption that he has possession and control of the area, which can be superseded if the tenant exhibits *actual* possession and control, and further noting that the landlord's contracting for maintenance of the area indicated that he had both possession and control); *see also Motchan v. STL Cablevision, Inc.*, 796 S.W. 2d 896, 900 (Ct. App. Mo. 1990) ("[A] tenant does not have control of the common areas and thus does not possess them. We conclude that a landlord, who retains control of common areas in a multi-tenant building, also retains possession of those areas so as to support an action for trespass to the common areas.") Like in other jurisdictions, in the District of Columbia, a landlord can be held liable for injury occurring in common areas. *See e.g. Spar v. Obwoya et al.*, 369 A.2d 173 (1977). It is reasonable, therefore, to apply the same presumption that the New York and Maryland courts explicated in *Catherman* and *Shields*: that unless the tenant exhibits actual possession and control, the landlord is presumed to retain control and responsibility, and

therefore possession, of the common areas of a multi-tenant building. No extenuating circumstances were pleaded that would divest the landlord of its possession of the common spaces; rather, plaintiff admits that the areas were shared with other tenants and that they had no exclusive right to possession. Nor has plaintiff pleaded that it maintained or controlled the common areas. On that basis, the court finds it improper to allow a tenant to proceed on a claim for trespass of a common area.

It is worth noting that plaintiff is not entirely without remedy for this alleged action. Plaintiff could more properly bring a suit against its landlord regarding these events. *See Spar v. Obwoya*, 369 A.2d 173 (D.C. 1977) (upholding a jury verdict in favor of plaintiff who alleged that he was injured during a robbery as a proximate cause of defendant landlords' failures to properly secure the common hallway); *see also Nottingham Assocs. v. Christian*, 29 Va. Cir. 175 (Va. Cir. Ct. 1992) (holding landlord liable for injury caused to plaintiff when defendant landlord failed to remedy dangerous conditions of which it had notice); *but see De Foe v. W. & J. Sloane*, 99 A.2d 639 (Mun. Ct. App. D.C. 1953) (holding that to find a landlord liable to a tenant for injuries incurred by a trespasser to a common area, tenant must show that landlord's negligence was the proximate cause of its injury).

Because the court finds that the tenant cannot properly maintain a suit in trespass regarding a common area, this component of count one is dismissed.

### **Trespass to Greenpeace's Offices**

While a tenant may not be able to sue in trespass regarding a common area, it certainly can complain of trespass regarding its exclusive leased space. *See, e.g., Gaetan v. Weber*, 729 A.2d 895, 898 (D.C. 1999) ("Tenants have standing to sue third parties for damages arising from negligence, nuisance and trespass"). Greenpeace alleges that BBI used covertly acquired security codes to enter the Greenpeace offices without consent, thereby acquiring documents and information.

Greenpeace further alleges that Mary Lou Sapone, an agent of BBI, posed as a prospective volunteer to gain access to the Greenpeace office for an interview, where she asked for and was given a tour.

Defendants respond by raising the affirmative defense of consent. Plaintiff contends that the alleged fraud should negate consent when the purpose behind the fraud is malevolent.

As to the alleged entrance of BBI employees using improperly obtained security codes, Greenpeace has sufficiently stated a claim to survive the motion to dismiss. Greenpeace alleges that BBI maintained documentation of which codes worked and which did not, and that it used these codes to gather documents. These allegations are sufficient to meet the pleading requirement adopted by the D.C. Court of Appeals in *Mazza v. Housecraft LLC*, 18 A.3d 786, which adopted the *Iqbal* and *Twombly* standards in the District of Columbia.

Regarding Mary Lou Sapone's alleged entrance under false pretenses, a different analysis applies. Trespass, like other intentional torts, is subject to an affirmative defense of consent; however, consent "may be ineffective if induced . . . by a substantial mistake concerning the nature of the invasion of [the owner's] interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation." *Council on American-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 345 (D.D.C. 2011), citing Restatement (Second) of Torts §§ 173, 892B(2) (1965); *see also Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995) (internal quotations omitted). Plaintiff has pleaded that such a misrepresentation occurred, inducing the consent. Determination of the effectiveness of consent would require a fact-intensive inquiry inappropriate at this stage. At this juncture, it suffices to say that plaintiff has sufficiently pleaded trespass as to the factual scenario regarding Mary Lou Sapone to survive defendants' motions to dismiss.



### **Trespass by Electronic Surveillance**

Plaintiff states that it has “reason to believe” that BBI conducted illegal surveillance of it; however, support for this belief is spurious at best. Plaintiff bases its belief on a decrease in the use of “D-lines” (collection of discarded documents) and the increase in hours billed as “technical surveillance counter-measures.” Plaintiff further alleges that BBI “took steps to acquire hacking software.” *Opp. to Sasol’s Mot. to Dism. at 30*. While plaintiff submits that “it is reasonable to infer” from these facts that illegal electronic surveillance occurred, the court disagrees. These are not the “well-pleaded factual allegations” necessary to survive a motion to dismiss. *See Mazza v. House Craft LLC*, 18 A.3d 786, 790-91 (D.C. 2011) (adopting *Ashcroft v. Iqbal*’s heightened pleading standard). While it is true that illegal activities would likely not be listed as such on a billing statement, the court cannot agree that the use of a different, non-illicit billing code implicitly indicates a cover up of illicit activities. The facts here do no more than raise “a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009). The facts alleged “are merely consistent with a defendant’s liability ... [and] sto[p] short of the line between possibility and plausibility of entitlement to relief.” *Id.* (internal quotations omitted). Because the facts alleged do not “allo[w] the court to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged,” *Id.*, this component of the trespass claim is dismissed.

### **Count 2: Invasion of Privacy by Intrusion**

Plaintiff submits that by committing the alleged surveillance and infiltration activities, defendants have violated its right to privacy. Defendants contend that as a corporation, plaintiff has no right to privacy that can be violated. This determination turns on whether a 1980 federal

case, applying District of Columbia law, which speaks directly to the issue of corporations' privacy rights, is more controlling than more recent District of Columbia Court of Appeals cases which do not specifically address the issue of corporate privacy rights, but which do indicate that the District of Columbia follows the Restatement on invasion of privacy claims.

In *United States v. Hubbard*, the United States Court of Appeals for the District of Columbia Circuit analyzed the privacy rights under District law of a corporation—in that case, a church—concluding that it was inappropriate to draw a “bright line” prohibition on corporate privacy rights. *United States v. Hubbard*, 650 F.2d 293, 306 (D.C. Cir. 1980). More recent decisions from the District of Columbia Court of Appeals indicate a different result. In 2009, the Court of Appeals repeated in *Bean v. Gutierrez* that this jurisdiction has “adopted the Restatement formulation of the ‘right of privacy.’” *Bean v. Gutierrez*, 980 A.2d 1090, 1095 no. 6 (D.C. 2009) (citing *Vassiliades v. Garfinckel’s, Brooks Bros.*, 492 A.2d 580, 587 (D.C. 1985)). The Restatement formulation provides, *inter alia*, that “[a] corporation . . . has no personal right of privacy [and] therefore no cause of action for any of the four forms of invasion of privacy.” Rest. 2d (Torts) § 652I, Comment (c).

The court sees no reason to now stray from the path begun by the District of Columbia Court of Appeals. Accordingly, the court holds that Greenpeace, as a corporation, cannot state a claim for invasion of privacy in the District of Columbia. Additionally, as discussed above, the invasion of privacy claim is governed by a one-year statute of limitations. Plaintiff knew or had reason to know of the events not later than April of 2008, yet did not file a complaint until November 2010. This count is therefore dismissed as failing to state a claim under Super. Ct. Civ. R. 12 (b)(6) and as time-barred.

### Counts 3 and 4: Trespass to Chattel and Conversion

The court finds it appropriate to discuss trespass to chattels and conversion in the same section, as they both address interference with rights in personal property. While conversion requires “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,” *Pearson v. Dodd*, 410 F.2d 701, 706-707 (D.C. Cir. 1969), quoting Restatement (Second) of Torts § 222A(1) (1965), the lesser tort of trespass to chattels occurs “[w]here the intermeddling falls short of the complete or very substantial deprivation of possessory rights in the property” *Id.* at 707.

Trespass to chattels may “be committed by intentionally (a) dispossessing another of [a] chattel, or (b) using or intermeddling with a chattel in the possession of another.” *Pearson*, 410 F.2d at 707 & no. 30, quoting Restatement (Second) of Torts § 217 (1965). “Trespass to chattels exists only on a showing of actual damage to the property interfered with.” *Id.* In other words, to prevail on a claim for trespass to chattels, a plaintiff must show that damage to personal property resulted from the defendants’ non-permissive use. *See id.* Because no actual damage to personal property has been alleged, as discussed *supra*, the trespass to chattels claim must be dismissed.

The claim for conversion presents a different issue. The tort of conversion is defined as “the (i) “unlawful exercise” (ii) “of ownership, dominion or control” (iii) “over the personal property of another” (iv) “in denial or repudiation” of that person’s rights.” *Council on American-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 338 (D.D.C. 2011) (citing *Shea v. Fridley*, 123 A.2d 358, 361 (D.C. 1956)); *see also Dennis v. Edwards*, 831 A.2d 1006, 1013 (D.C. 2003) (citing *Blanken v. Harris, Upham & Co.*, 359 A.2d 281, 283 (D.C. 1976)). A

claim for conversion may be sustained in the District of Columbia with only nominal damages. *Pearson*, 410 F.2d at 707 (“a judgment for conversion can be obtained with only nominal damages”); *see also Morrisette v. Boiseau*, 91 A.2d 130, 131 (D.C. 1952) (finding that an award of nominal damages was inappropriate in an action for conversion when the trial court had also awarded actual damages). However, for other reasons, the claim for conversion must be dismissed.

Defendants argue that a conversion claim cannot be grounded in control over the intellectual property of another. It is clear that under D.C. law, no action in conversion can lie for the physical property, i.e., the papers, since plaintiff has not alleged that it was denied its rights in the physical aspects of these documents. *See Pearson*, 410 F.2d at 707–08. The question of whether the information contained in these documents is “subject to protection by suit for conversion” is more complex. *Id.*

*Pearson v. DC* and *Kaempe v. Myers* are the most instructive cases on the issue of conversion of intangible property in the District of Columbia. While both cases came out of the United States Court of Appeals for the D.C. Circuit, both apply D.C. law in their analyses.

In the *Pearson* case, plaintiff alleged that defendant took documents from plaintiff’s office one night, photocopied them, and returned them undamaged before the next morning. The D.C. Circuit Court of Appeals in *Pearson* wrote that “[i]nsofar as the documents’ value to [plaintiff] resided in their usefulness as records of the business ... [plaintiff] was clearly not substantially deprived of his use of them.” *Id.* at 707. The court went on to distinguish the information contained in the documents from the documents themselves. Regarding whether intangible property may be converted, the court stated,

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 formulated with labor and inventive genius, as in the case of literary works or scientific researches, they are protected. Where they constitute instruments of fair and effective commercial competition, those who develop them may gather their fruits under the protection of the law.

*Id.* at 708. Because the court found that under the facts alleged, the information in plaintiff's documents was not "an instrument of fair and effective commercial competition" or any of the other categories listed as deserving of protection, the court dismissed the claim for conversion. Here, the circumstances are somewhat different. Plaintiff suggests that its documents contained precisely the type of commercially valuable information for which the *Pearson* court sought to maintain protection. Defendants contend that *Kaempe*, along with several cases out of the local United States District Court, leads to a different result.

In *Kaempe v. Myers*, 367 F.3d 958 (D.C. Cir. 2004), the United States Court of Appeals for the District of Columbia Circuit addressed whether patent rights may be the subject of a suit for conversion. In its discussion of conversion, the court begins by acknowledging that "[t]he D.C. courts have never ruled on whether, or under what circumstances, intangible property ... can be the subject of a suit for conversion." *Kaempe*, 367 F.3d at 963. It reviews the law in various other jurisdictions, noting that Maryland state courts have allowed actions for conversion of intangible property "only where such property is merged in a transferrable document and the document itself is converted," *Id.* at 964, citing *Allied Inv. Corp. v. Jasen*, 354 Md. 547 (Md. 1999). While the District of Columbia Court of Appeals has not expressly defined the outer boundaries of conversion of intangible property, it has, like Maryland, recognized the potential for conversion of intangible property that is merged in a transferrable document such as a bond. *See Duggan v. Keto*, 554 A.2d 1126, 1137-1138 (D.C. 1989).

Defendants cite several Federal cases from D.C. in further support of the proposition that intangible property cannot be converted. *See, e.g., 3D Global Solutions, Inc. v. MVM, Inc.*, 552 F. Supp. 2d 1, 10 (D.D.C. 2008); *Equity Group v. Painewebber Inc.*, 839 F. Supp. 930, 933 (D.D.C. 1993) (“Although courts have relaxed this limitation and allowed actions for conversion in cases involving intangibles, “the process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with some document.”) Plaintiff’s primary argument in opposition is that there is no *binding* authority that would prohibit the court from extending protection from conversion to the intangible property at issue here. The court does not find this argument persuasive, first because federal courts applying D.C. law consistently reject that application of conversion, and second, because Maryland’s Court of Appeals has rejected it. *See Allied Inv. Corp. v. Jasen*, 354 Md. 547 (1999).

Because the court finds that a cause of action for conversion cannot be brought as to intangible property that is not merged in a transferrable document, the court does not find it necessary to discuss defendants’ other arguments regarding the conversion count.<sup>8</sup> This count is dismissed.

#### Count 5: Misappropriation of Trade Secrets

Under the District of Columbia Uniform Trade Secrets Act, D.C. Code. Ann. § 36-401 et seq., there are two elements of a trade secret misappropriation claim: “(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 (D.D.C. 2007) (citing D.C. Code § 36-401, further internal citations omitted).

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<sup>8</sup> Defendants additionally argue that a conversion claim is preempted in this case by the District of Columbia Uniform Trade Secrets Act, D.C. Code. Ann. § 36-401 et seq., and that as a matter of law, documents that were allegedly recovered from Greenpeace’s garbage cannot be the subject of an action for conversion.

As to the first element, the *DSMC* opinion contains an in-depth review of the (persuasive) law defining trade secrets in this jurisdiction:

For information to constitute a trade secret under the DCUTSA, (1) the "information must be secret"; (2) "its value must derive from its secrecy"; and (3) its owner must use reasonable efforts to safeguard its secrecy. Whether a particular piece of information is a trade secret is generally a question of fact. Even if individual elements are known to the public, a trade secret can exist in a unique combination of those otherwise publicly available elements.

*DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d at 77-79 (internal citations omitted).

Here, the plaintiff has pleaded that the information at issue was secret. Plaintiff has also alleged that the information's value "derive[d] from its secrecy," writing, "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.)" *Pl. Opp. Dow M. to Dismiss at 43*. The court agrees that internal operating documents could be proven to have this type of value. As to reasonable efforts to safeguard the secrecy of documents, plaintiff has alleged that some documents at issue were taken from inside its offices or by electronic interception. While defendant Dow cites *World Health Prods., LLC v. Chelation Specialists, LLC*, 2006 U.S. Dist. LEXIS 61444, 11-14 (D. Utah Aug. 28, 2006) in support of its argument that plaintiff has not proven sufficient efforts to safeguard its information, the court disagrees, finding that plaintiff has alleged that it took more precautions to safeguard its information than had been done in *World Health*. The court reminds parties that at the current stage of the litigation, the *Iqbal* test for sufficiency of pleading applies; plaintiff needs not prove its efforts at this point. Furthermore, "[t]he question of whether certain information constitutes a trade secret ordinarily is best resolved by a fact finder after full presentation of evidence from each side." *DSMC, Inc.*,

479 F. Supp. 2d at 79. The court therefore finds that plaintiff has pleaded the existence of a trade secret sufficiently to survive the motions to dismiss.

The court in *DSMC* explains the second element, “improper means,” as follows:

The DCUTSA defines "improper means" as "theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means." D.C. Code § 36-401(1). Courts have held, however, that the statute does not provide an exhaustive list of what constitutes improper means. *See, e.g., Reingold v. Swiftships, Inc.*, 126 F.3d 645, 648 (5th Cir. 1997) ("A complete catalogue of the means which are 'improper' for a person to acquire knowledge of the trade secret is not possible, but [the UTSA] includes a partial listing."); *Systems 4, Inc. v. Landis & Gyr, Inc.*, 8 Fed. Appx. 196, 200 (4th Cir. 2001) (finding that list of improper means in the UTSA is "not exhaustive" but that all of the examples listed "constitute intentional conduct involving some sort of stealth, deception, or trickery"). More generally, "improper means" has been defined as those means that "fall below the generally accepted standards of commercial morality and reasonable conduct." *E.I. DuPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (citation omitted).

*Id.* Here, the plaintiff has alleged that defendant BBI obtained its documents through tortious acts of trespass and conversion. Plaintiff charges that defendants obtained documents that it closely guarded, *Complaint* at 44-47, and actually identifies, *inter alia*, several specific campaign documents that it has reason to believe defendants obtained. The court finds, again, that the level of detail given is sufficient to propel the claim across the line of plausibility. The court has determined that plaintiff may proceed on a theory of trespass by physical intrusion into Greenpeace’s offices. Insofar as plaintiff’s theory of improper acquisition rests on documents acquired through that alleged wrongful entry, this claim survives the motion to dismiss. Furthermore, because “unlawful means” is such a vague term, and because the courts have explained that no exhaustive list exists, a determination of whether the actions plaintiff alleges constitute unlawful means is a question more appropriate for the finder of fact. This count survives the motions to dismiss.



**CONCLUSION**

In light of the foregoing discussion, it is hereby:

**ORDERED**, that defendants' motions to dismiss are **GRANTED IN PART AND DENIED IN PART**; and it is further

**ORDERED**, that count one (trespass) is **DISMISSED IN PART**; the claims of trespass to common areas and trespass by electronic surveillance are **DISMISSED**; and it is further

**ORDERED**, that count two (invasion of privacy) is **DISMISSED** as failing to state a claim upon which relief can be granted, for lack of standing, and as time-barred; and it is further

**ORDERED**, that count three (trespass to chattel) is **DISMISSED** for failing to state a claim upon which relief can be granted and for lack of standing; and it is further

**ORDERED**, that count four (conversion) is **DISMISSED** as failing to state a claim upon which relief can be granted; and it is further

**ORDERED**, that plaintiff may proceed only on (1) its claim of trespass as discussed *supra*, and (2) on count five for misappropriation of trade secrets; and it is further

**ORDERED**, that a scheduling conference is set for March 29, 2013 at 9:45 a.m.

**SO ORDERED.**

Dated: February 5, 2013



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Michael L. Rankin, Associate Judge  
Superior Court of the District of Columbia

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