No. 13-CV-685

DISTRICT OF COLUMBIA COURT OF APPEALS

GREENPEACE INC.,
Appellant,

v.,

DOW CHEMICAL COMPANY, et al.,
Appellees.

On Appeal from the
Superior Court of the District of Columbia –
Civil Division

BRIEF OF APPELLANT GREENPEACE, INC.

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THE DISTRICT OF COLUMBIA COURT OF APPEALS

GREENPEACE, INC.,

Plaintiff,

v.

DOW CHEMICAL COMPANY; SASOL NORTH AMERICA, INC.; DEZENHALL RESOURCES, LTD.; KETCHUM, INC.; TIMOTHY WARD; JAY ARTHUR BLY; MICHAEL MIKA; GEORGE FERRIS,

Defendants.

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CORPORATE STATEMENT

Greenpeace, Inc. has no parent companies, subsidiaries, or affiliates. Likewise, Greenpeace, Inc. has no outstanding securities or stock held in the hands of the public.

STATEMENT OF ISSUES

The issues presented for review by this Court include:

1. Whether a tenant may maintain a claim of trespass for entry into common areas against a party that is neither the landlord, another tenant, or an invitee.
2. Whether a claim of invasion of privacy via intrusion may be maintained:
    a. by a non-profit corporation where its office and staff have been subjected to repeated trespass, intrusive surveillance, and theft of confidential materials,
    b. where interference with its intellectual property (*i.e.*, the confidentiality of its prospective plans, internal deliberations, fundraising prospects, and personnel information) is alleged as the actual damage supporting the claim; and
    c. the claim for invasion of privacy is brought within three years of discovery.
3. Whether conversion of intangible property is actionable in the District of Columbia.

STATEMENT OF THE CASE

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 industrial giants – Dow Chemical and CONDEA Vista[1] – 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 and then neutralize or undermine Greenpeace's activities and ultimately to enhance their own economic gains.

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[1] In 2001, Sasol Ltd. Purchased CONDEA Vista and changed its name to Sasol North America, Inc., a defendant in this action. *See* App. Tab 1, AP04 (Complaint). Because Sasol North America Inc. operated as CONDEA Vista during the time period relevant to the allegations in Greenpeace's complaint, this appeal will refer to the defendant as Sasol North America Inc. as CONDEA Vista.

The question presented here is whether this shady scheme was legal. Greenpeace contends that Defendants' activities – late night trips to the District of Columbia to root through trash and recycling maintained on private property, intrusive surveillance, and the use of moles to gain information that Defendants then bought and sold – were not legitimate business activities and do not reflect community standards governing privacy, property rights, and straightforward dealings. These activities were not mistakes or isolated events; they occurred on hundreds of occasions over a two-year period. This deliberate and persistent scheme runs afoul of the standards embodied in the torts of trespass, invasion of privacy, and conversion.

On these allegations, Greenpeace brought claims for trespass, trespass to chattel, invasion of privacy, conversion, and misappropriation of trade secrets. On February 5, 2013, the Superior Court granted Defendants' motions to dismiss the Complaint in large part. Greenpeace appeals the dismissal of its claims for trespass to common areas, invasion of privacy, and conversion. Each of the legal issues in this appeal presents an open question of law in the District of Columbia, necessitating reference to legal authority from other jurisdictions and consideration of relevant policy rationales.

The law of torts is an expression of community standards and collective values. Because community standards and values shift over time, tort law is necessarily flexible, but its purpose remains constant: to correct and deter unacceptable behavior. This case presents an opportunity for the Court to decide whether – in the Nation's capital, a city where non-governmental organizations, trade associations, lobbying firms, campaign offices, embassies, and diplomatic residences co-exist shoulder-to-shoulder – the law of tort and the values of this community will tolerate corporations deploying former national

security and Secret Service personnel to trail activists, sneak onto the property of non-profit organizations to repeatedly steal their trash and recycling in an effort to obtain confidential information, and pose as volunteers to infiltrate the ranks of activist organizations. Greenpeace urges this Court to find Defendants' conduct incompatible with the values and laws of the District of Columbia and reinstate its claims.

STATEMENT OF FACTS

Greenpeace, a non-profit corporation, counts itself one of the largest and most influential environmental organizations in the world. In the late 1990s, Greenpeace worked diligently to bring to light the dangers inherent in manufacturing vinyl chloride; vinyl chloride releases dioxins and other toxic chemicals which cause environmental damage and serious health concerns. Compl. ¶ 54 (*see* Appendix at AP20). One of the targets of that campaign included defendant CONDEA Vista which operated a vinyl chloride plant in Louisiana. During that same time, Greenpeace also campaigned aggressively against the spread of Genetically Modified Organisms ("GMOs"), of which defendant Dow Chemical Company ("Dow") was a significant producer, and published reports identifying environmental dangers and health hazards caused by the manufacture of chlorine, of which Dow is one of the world's largest producers. *Id.* ¶ 79 (AP28).

CONDEA Vista and Dow sought shelter from Greenpeace's campaigns with their respective public relations firms: Nichols-Dezenhall (now Dezenhall Resources or "Dezenhall"), and Ketchum, Inc. ("Ketchum"). In turn, Dezenhall and Ketchum each recommended hiring Beckett Brown International ("BBI"), a now-defunct private security firm comprised predominantly of former officers of the Secret Service and the Central Intelligence Agency and a network of subcontractors including off-duty police

officers. Compl. ¶¶ 18, 24, 57 (AP07, AP09, AP21). According to an internal BBI memorandum, BBI believed it could provide "insight into the scheduling of environmental protests and actions of the group, corporate targets, the tracking of maritime cargo by the group, and internal political issues of the group." *Id.* ¶ 20 (AP07-AP08). The primary BBI employees who worked on the CONDEA Vista and Dow accounts were Timothy Ward, Jay Arthur Bly, Michael Mika, and George Ferris (collectively, the "Individual Defendants"). *Id.* ¶¶ 10-13 (AP05 - AP06).

Thus, two intersecting conspiracies were hatched: one between CONDEA Vista, Dezenhall, and the BBI Individual Defendants and another among Dow, Ketchum, and the BBI Individual Defendants.[2] At the heart of each conspiracy was the same goal: to circumvent – using any means necessary – Greenpeace's environmental campaigns against CONDEA Vista and Dow. Compl. ¶¶ 6, 54, 78 (AP04, AP20, AP28). These facts did not become known to Greenpeace until BBI went bankrupt and an investigative reporter uncovered this information in 2008.

Any Means Necessary: BBI Crosses Many Legal Lines To Get Information on Greenpeace

The participants to the CONDEA Vista-conspiracy and the Dow-conspiracy employed similar illegal means to appropriate Greenpeace's confidential plans and information. A primary method employed to obtain Greenpeace's confidential

[2] For the purposes of discovery and trial, the Superior Court severed the case against CONDEA Vista, Dezenhall, and the former employees of BBI, from that against Dow, Ketchum, and the former employees of BBI. Only the individual defendants would serve as defendants in both cases. However, the legal issues relevant to this appeal are identical for both cases, and the Superior Court Order denying in part and granting in part Defendants' motions to dismiss applied to all the Defendants. Accordingly, the issues relevant to this appeal can be briefed and decided in one case.

information involved the use of "D-Lines." "D-Lines" referred to the theft of confidential documents and internal records from dumpsters, recycling bins, or via moles sent to Greenpeace's offices under false pretenses. *Id.* ¶ 23 (AP09). The Individual Defendants Timothy Ward, Jay Arthur Bly, and Michael Mika personally executed many "D-Lines" and other surveillance activities in furtherance of the CONDEA Vista and Dow conspiracies. *Id.* ¶¶ 23, 24 (AP09). Evidence exists that during the first two years of BBI's surveillance, BBI and the Individual Defendants conducted over *100* D-Lines at Greenpeace's U Street offices. Compl. ¶¶ 24, 26, 83 (AP09 – AP11, AP29).

Each and every D-Line required a trespass. Entrances to the U Street building where Greenpeace was located in 1998 and 1999 were located on private property and were locked at all times. Compl. ¶ 26 (AP10 – AP11). Additionally, 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.* ¶ 27 (AP11). 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.*

BBI's illicit activities extended beyond pilfering Greenpeace's recycling.

Greenpeace alleges BBI broke into its U Street offices using the three- and four-digit security codes that it had obtained by testing a larger list of potential codes to identify which worked. *Id.* ¶ 33 (AP13 – AP14).

BBI employed subterfuge as readily as force. In November 1998 BBI sent one of its subcontractors, Mary Lou Sapone, to Greenpeace's office posing as a potential volunteer, where she asked for, and received, a tour of the office. *Id.* ¶ 31 (AP12 – AP13). Sapone relayed this information to BBI in a report detailing the office layout and the location of various divisions and employees. *Id.* In furtherance of the CONDEA Vista conspiracy, Sapone hired Dick Rogers, another subcontractor, with orders to infiltrate Greenpeace's ally in Louisiana, the Calcasieu League for Environmental Action Now ("CLEAN"). Compl. ¶ 64 (AP23). 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.* Posing as a concerned citizen, Rogers managed to get elected to CLEAN's board of directors, a position that provided him access to monitor Greenpeace's activities, overhear communications between Greenpeace and CLEAN, and attend a confidential meeting held by Greenpeace. *Id.* ¶ 65 (AP23). Rogers sent more than 65 narrative reports and forwarded at least 150 confidential emails to Sapone; Sapone, in turn, forwarded the materials to her BBI contact, Ward. *Id.*

To these tactics, the Defendants added intrusive surveillance. In 1998, Jay Bly traveled to Louisiana to surveil the offices and homes of environmental activists working

near CONDEA Vista's manufacturing facility in Louisiana. Compl. ¶ 66 (AP23 – AP24). BBI also surveilled the Washington, D.C. home of David Fenton, the president of a non-profit public relations firm, as well as known supporters of Greenpeace and the then-Executive Director of Greenpeace. *Id*. at ¶ 32 (AP13). According to Bly's numerous reports, his activities in Louisiana included trailing the activists, recording their activities, and collecting and sorting trash from various locations. *Id.*

BBI also hired Russ Andrews of TriWest Investigations to obtain Greenpeace's call records from Bell South, MCI, and Mercury Cell Phones (which Greenpeace had used to acquire phones for activists in Louisiana campaigning for the remediation of CONDEA Vista's chemical spill). *Id.* ¶ 67 (AP24). Andrews's handwritten and typed notes and logs demonstrate that he successfully completed his assignment. *Id.*
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. ¶¶ 96, 104 (AP33 – AP34, AP38). 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.* ¶ 101 (AP37).

Finally, there is reason to believe BBI's illegal activities also extended into electronic surveillance. Among the internal documents and research files maintained in BBI's offices was a file labeled "Wire Tap Info" and Eric Picus, a former BBI employee, testified in another matter that he would tape-record telephone conversations in the course of his work at BBI. Compl. ¶¶ 35, 36 (AP14). 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.* ¶ 40 (AP15). Additionally, Ward and Sapone at least 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.* ¶ 39 (AP15). A proposal to acquire this type of hacking software was presented to BBI's directors. *Id.* 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.* ¶ 41 (AP15 – AP16). 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.* ¶ 43 (AP16).

Defendants Successfully Abscond with Confidential Campaign, Donor, and Employee Information

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. ¶ 44 (AP16 – AP17).

Many of these documents were tightly guarded within Greenpeace and would only have been accessible to a limited number of employees; such documents would not

have been discarded as garbage or recycling in the ordinary course of business and could not have been obtained merely by rummaging through bins. *Id.* The vast majority of the Greenpeace documents that were ultimately recovered from BBI were in pristine condition, giving rise to the inference that these documents were not taken from trash dumpsters, but rather from recycling receptacles or, as alleged below, from inside Greenpeace's office. *Id.* ¶ 29 (AP11).

Moreover the value of these materials to Defendants was clear – in exchange for confidential information on Greenpeace, Dezenhall (acting for CONDEA Vista) paid approximately $150,700 to BBI. *Id*. ¶ 70 (AP 25). Likewise between October 30, 1998 and January 31, 2001, Ketchum (acting on behalf of Dow) paid BBI 22 separate payments totaling more than $125,000. *Id*. ¶ 93 (AP32 – AP33).

Defendants' Schemes Stay Hidden For More Than a Decade

Many of Defendants' activities were, by their very nature, secretive and clandestine, and Defendants went to great lengths to ensure their actions remained concealed. *Id*. ¶ 108 (AP38 – AP39). Given the covert nature of Defendants' activities, Greenpeace remained in the dark as to the crimes Defendants had perpetrated until April 2008, when an investigative reporter for Mother Jones magazine discovered Defendants' espionage. *Id*. ¶ 109 (AP39). Upon learning of this conduct, Greenpeace immediately initiated an investigation which ultimately prompted Greenpeace to file this law suit.

The District Court Grants in Part and Denies in Part Defendants' Motion to Dismiss.

Greenpeace filed its complaint in the D.C. Superior Court on October 7, 2011, and the Defendants moved to dismiss. A hearing was held before Judge Rankin on May 10, 2012, and on February 5, 2013, Judge Rankin issued an order granting in part and

denying in part Defendants' motions to dismiss. *See* App. Tab 7, AP064 – AP122 (Hearing Transcript); App. Tab 8, AP123 – AP148 (Order).

Importantly, the Superior Court held Greenpeace had alleged facts sufficient to maintain a claim that Dow, Ketchum, CONDEA Vista, and Dezenhall could be held vicariously liable for the acts of BBI and the Individual Defendants. Order at 8-11 (AP130 – AP133). However, the Superior Court granted Defendants' motions to dismiss three of Greenpeace's central causes of action.

The Court dismissed Greenpeace's trespass claim as it pertained to trespass to the trash room and loading docks where Greenpeace's recycling bins and trash receptacles were located. Order at 12-15 (AP134 – AP137). The Court reasoned that because Greenpeace's landlord, as well as other tenants in the building, all had access to the trash room and loading docks were properly considered "common areas," and, as such, Greenpeace was not in "exclusive possession" of these areas and thus could not maintain a claim of trespass to these common areas. *Id*. at 13 (AP135).

The Court granted Defendants' motion to dismiss Greenpeace's claim for invasion of privacy for three separate reasons. First, the Court held that, as a corporation, Greenpeace could not maintain a claim of invasion of privacy. *Id*. at 17-18 (AP139 – AP140). Second, the Court held that Greenpeace lacked standing to assert a claim for invasion of privacy because it had not sufficiently pleaded an injury in fact.[3] *Id*. at 3-4 (AP125 – AP126). Third, although the Court held Greenpeace had sufficiently alleged

[3] The Court also dismissed Greenpeace's claim of trespass to chattel for failure to plead injury in fact. Greenpeace has chosen not to pursue its trespass to chattel claim further, accordingly Greenpeace's arguments with regard to the Court's injury analysis focus exclusively on its invasion of privacy claim.

Defendants concealed their conduct and therefore the statute of limitations did not begin to run until Greenpeace learned of the conduct from an investigative reporter, the Court applied a one-year statute of limitations to invasion of privacy by intrusion. *Id*. at 5-8 (AP127 – AP130). Because the original complaint was not filed within one year of Greenpeace having learned of the alleged conduct, the Court dismissed as untimely Greenpeace's invasion of privacy by intrusion claim as untimely. *Id*. at 8 (AP130).

Finally, the Court dismissed Greenpeace's claim of conversion, holding that Greenpeace could not maintain a claim of conversion based on the theft of intangible property. *Id*. at 19-22 (AP141 – AP144). The Court denied Defendants' motions to dismiss Greenpeace's claim for Misappropriation of Trade Secrets and Trespass as it pertained to Greenpeace's offices.

The Court's Order dismissed the three claims upon which the bulk of the objectionable conduct alleged in the Complaint was actionable: the repeated theft of its confidential campaign information, donor lists, and confidential employee information. Because the Court's Order relied on novel questions of law in the District of Columbia, and because Greenpeace considered these questions central to its case, Greenpeace asked the Superior Court to stay the surviving claims and certify the issues identified in this brief for interlocutory appeal. The Superior Court declined this request. App. Tab 9, AP149 – 151 (March 27, 2013 Order Denying Interlocutory Appeal). Following the Court's denial of its request for interlocutory appeal, Greenpeace voluntarily dismissed its Misappropriation of Trade Secrets and Trespass (as it related to its office) claims to pursue this appeal. *See* App. Tab 10, AP152 – AP158 (Stipulation of Dismissal). The Court entered final judgment on May 29, 2013. *See* App. Tab 11, AP159 – AP160

(Order and Final Judgment).

ARGUMENT

This Court reviews de novo an order to dismiss pursuant to D.C. Superior Ct. R. 12(b)(6). *See Chamberlain v. American Honda Finance Corp.*, 931 A.2d 1018, 1022 (D.C. 2007); *In re Estate of Curseen*, 890 A.2d 191 (D.C. 2006). Accordingly, this Court applies the same level of scrutiny to the complaint as would the trial court: In reviewing the complaint, the Court must accept as true the factual allegations and construe them in a light most favorable to the non-moving party, *see Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005), however, "[f]actual allegations must be enough to raise a right to relief above the speculative level...." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN HOLDING THAT GREENPEACE COULD NOT MAINTAIN A CLAIM OF TRESPASS TO COMMON AREAS.

The general rule of trespass in the District of Columbia requires only "an unauthorized entry onto property that results in interference with the property owner's possessory interest therein." *Sarete, Inc. v. 1344 U Street Ltd. P'ship*, 871 A.2d 480, 490 (D.C. 2005) (citation and quotation omitted). Accordingly, under the plain language of the rule, any individual with a possessory property interest may maintain a claim of trespass. Courts within and outside the District of Columbia have recognized that tenants may maintain trespass claims based on infringements of their possessory rights. *See Gaetan v. Weber*, 729 A.2d 895, 898 (D.C. 1999) ("Tenants have standing to sue third parties for damages arising for negligence, nuisance and trespass.") (citing 8 Thompson on Real Property, Thomas Edition § 68.06(a)(1) at 199 (David A. Thomas ed., 1994));

see also Weinman v. De Palma, 232 U.S. 571, 575 (1914) (holding that tenant could sue third party for damages resulting from trespass).

Both landlords and tenants have a possessory interest in common spaces. *See* 6 A.L.R. 465 ("each tenant has the right to make reasonable use of that portion of the premises retained for the use of the different tenants in common". As the Supreme Court of Washington has explained:

> [L]andlords do not have exclusive authority over the common areas. In order to admit visitors to an apartment, the tenant must necessarily possess the authority to permit guests to pass through the common areas leading to that apartment. The tenant must therefore possess the authority to consent to the visitor's entry into the building itself. For that reason, the authority over common areas is more properly characterized as common to both tenant and landlord, rather than exclusive to the landlord alone.

City of Seattle v. McCready, 877 P.2d 686, 690 (Wash. 1994). Accordingly, both landlords and tenants have standing to pursue an action against a third party for trespass. *See id*.

Rather than applying the plain language of trespass in the District of Columbia, the Superior Court instead turned to Black's Law Dictionary and the law of Maryland and New York for guidance. Order at 14 (AP136). Black's Law Dictionary defines "possession" as "one's right to 'exercise control over something to the exclusion of all others.'" *Id*. As the Superior Court concluded, "consistent with that dictionary definition," courts in Maryland and New York presume that landlords retain possession of common areas and, accordingly, tenants may not maintain a claim of trespass to common areas. Order at 14 (AP136) citing *Shields v. Wagman*, 350 Md. 666, 674 (Md. Ct. App. 1998); *Catherman v. United States*, 1992 U.S. Dist. LEXIS 11120, at *32-33

(N.D.N.Y. July 16, 1992).

But this approach is flawed. If "possession" requires the right to "exercise control over something to the exclusion of all others" as the Superior Court held, no one would have a possessory interest in common spaces because *neither* landlords nor tenants have rights to common areas to the exclusion of each other.

Notwithstanding this error in logic, the Superior Court indicated that it did not intend for *no one* to be held accountable for the transgressions alleged in the Complaint. The Superior Court explained that its ruling would not leave Greenpeace "entirely without remedy for this alleged wrong" because Greenpeace "could more properly bring a suit against its landlord regarding these events." Order at 15 (AP137). Setting aside the undesirability of the Superior Court's proposed rule – under which a tenant is required to sue a satisfactory or even exemplary landlord to vindicate rights that have been violated by unknown third-party trespassors (and thus burdening the landlord with the dual role of defendant (vis-à-vis the tenant) and plaintiff (vis-à-vis the trespassor)) – the Superior Court's model breaks down quickly as a matter of law. While the District of Columbia has held that a tenant may sue her landlord for a third-party trespass to common areas in certain circumstances, there are important limitations. A landlord's liability for such a trespass extends only to the extent the trespass was "forseeable" or "probable and predictable." *See Graham v. M & J Corp.*, 424 A.2d 103, 105 (D.C. 1980).

A clear rationale exists for those cases holding landlords liable for harms occurring in common areas – as the Maryland Court explained: "where a landlord leases separate portions of his property to different tenants and reserves under his control the

passageways and stairways, and other parts of the property for the common use of all the tenants[,] he must then exercise ordinary care and diligence to maintain the retained portions in a reasonably safe condition." *Shields v. Wagman*, 714 A.2d 881, 884 (Md. Ct. App. 1998) (cited by Superior Court at 14, AP136). The reasoning behind this rule is sound – where multiple tenants occupy the same common space, landlords are better positioned to evaluate and implement measures to ensure the safety of common spaces while considering the rights and needs of all tenants.

But importantly, this rationale does not preclude the possibility that some trespasses to common areas may fall outside the scope of "foreseeability" to common areas and still result in real, cognizable harms to tenants. That is exactly what occurred here. It is difficult to imagine a court charging Greenpeace's landlord with the duty to "foresee" former CIA and Secret Service operatives dressed in black trespassing onto its property under cover of the night to misappropriate its tenant's recycling. And indeed, Greenpeace's landlord suffered no harm from these activities – only the tenant, Greenpeace, was injured when documents it designated for destruction instead ended up in the hands of its political adversaries. Accordingly, only Greenpeace would have the requisite injury, and incentive, to sue and Greenpeace's landlord cannot be held accountable. Critically, the cases cited by both Defendants and the Court do not preclude the possibility of tenants maintaining suits for trespass to common areas; rather they simply permit tenants to maintain claims against their landlords in the event of a foreseeable third-party trespass to common areas.

As explained in the beginning of this section, however, District of Columbia law of trespass contemplates that, in certain circumstances, more than one entity may have

property interests worthy protection in a trespass suit. The Superior Court incorrectly interpreted the District of Columbia trespass standard. The holding that only one property interest – ownership of real property – was sufficient to give rise to a claim for trespass is not the law in this jurisdiction. Therefore Greenpeace asks this Court to reverse the Superior Court's opinion and hold that Greenpeace can maintain a trespass claim premised on the entry onto loading docks or into trash rooms containing recycling and trash bins.

II. GREENPEACE'S CLAIM FOR INVASION OF PRIVACY VIA INTRUSION IS LEGALLY COGNIZABLE.

The Court of Appeals for the District of Columbia has explained, "[i]nvasion of privacy is not one tort, but a complex of four" – (1) public disclosure of private facts, (2) false light publicity, (3) appropriation of name or likeness, and (4) intrusion. *Wolf v. Regardie*, 553 A.2d 1213, 1216-17 (D.C. 1989). Greenpeace alleges that Defendants' actions – trailing activists, infiltrating offices with fake volunteers and workmen, and the theft of confidential information by intrusion – render Defendants liable under a theory of invasion of privacy by intrusion.

Importantly, this is the only strain of invasion of property where the alleged injury does not stem directly from publication. The first three forms of invasion of privacy are *defined*, ultimately, by publication; accordingly those torts seek to remedy the plaintiff's damages (sometimes stemming from emotional distress) caused from having their private information made public, their character publicly maligned, or their name or likeness stolen. In contrast invasion of privacy by intrusion is unrelated to publication. Rather, this strain of invasion of privacy is found where a defendant has intruded the victim's

private space.

The United States Court of Appeals for the District of Columbia explained this difference as follows:

> [I]n analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference. On the other hand, where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained.

Pearson v. Dodd, 410 F.2d 701, 705-06 (D.C. Cir. 1969).

Indeed, invasion of privacy by intrusion is not about protecting private *information*, rather it is about protecting the sanctity of certain private *spaces*. Defendants routinely intruded into the private spaces of Greenpeace by riffling through its recycling, following its employees, and infiltrating its offices *via* deceit. Accordingly, Greenpeace asks that its claim for invasion of privacy by intrusion be reinstated.

A. Non-Profit Advocacy Organizations Have a Cognizable Privacy Interest.

The D.C. Circuit has expressly rejected the application of bright-line rules to the "rights" of non-profit corporations such as Greenpeace. Greenpeace alleges that through surveillance and infiltration of its offices, its right to privacy was intruded upon. The Superior Court rejected this argument out of hand, holding that, "[m]ore recent decisions from the District of Columbia Court of Appeals indicate a different result." Order at 18 (AP140).

Yet the authority cited for this proposition – *Bean v. Guiterrez*, 980 A.2d 1090,

1095 n.6 (D.C. 2009) – stands only for the very general principle that, "[t]he District of Columbia has long recognized the common law tort of invasion of privacy. In so doing, the courts have adopted the RESTATEMENT formulation of the 'right of privacy.'" *Id*. citing *Vassiliades v. Garfinckel's Brooks Bros*., 492 A.2d 580, 587 (D.C. 1985). Nothing in *Bean* or *Vassiliades* addresses the critical issue in this case: whether a non-profit corporation has a protectable right of privacy.

Vassiliades instructs that, "the concept of a cause of action for invasion of privacy is generally considered as having originated with the law review article written in 1890 by Samuel D. Warren and Louis Brandeis." 492 A.2d at 587; citing Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Importantly, nothing in that article precludes a corporate entity from possessing the right to privacy. Indeed, in *The Right to Privacy*, Warren & Brandeis explain that the right to privacy stems from the right to be "let alone." *Id*. Neither corporate entities nor individuals have an unfettered of privacy right. Moreover, the law will most certainly afford individuals more "privacy" than corporate entities, many of which are subject to affirmative reporting requirements. But simply because the scope of the right to be "let alone" may differ as between a corporate entity and an individual, there is no reason to reject the idea that a corporate entity, just like an individual, should be "entitled to decide whether that which is his shall be given to the public." *Id*. at 199.

The standard articulated by the D.C. Circuit Court allows for such growth while still adhering to the principles underlying the Restatement's articulation of invasion of privacy. The D.C. Circuit rejected a rigid rule denying corporate entities the ability to bring invasion of privacy claims, holding instead that:

> 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).

Consideration of the circumstances of this particular case – which *Hubbard* requires – demonstrates that Greenpeace had a strong and reasonable interest in the privacy of work that goes on inside the organization – *i.e.*, within its office, its computer networks, and between its personnel. The "nature and purpose" of Greenpeace is to wage environmental campaigns in the public's interest. Compl. ¶¶ 15-16 (AP06 – AP07). 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 trailed individuals and stole documents that shared internal deliberations, detailed personal information about employees, listed information about donors, and described fundraising efforts. Compl. ¶¶ 28-29, 32 (AP11, AP13). Defendants' excessive, repeated, and 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 valid and it is appropriate for Greenpeace to vindicate those expectations through an invasion of privacy tort claim.

It bears mention that the balancing test embraced by *Hubbard* appropriately recognizes that not all privacy interests are equal, nor should all privacy interests be

protected. Indeed, the scope of a corporation's privacy interest differs as compared to an individual's as well as compared to other corporations. For example, a corporation that puts a product into the public sphere may have a lesser claim to privacy than an issue-advocacy organization for the obvious reason that the public has a legitimate interest in knowing whether a product in the stream of commerce is safe or was made using child labor. Corporations that hold themselves out to the public, integrate themselves into public markets, use public resources, and ask for public trust, would likely be found to have a very narrow right to privacy under *Hubbard*. Indeed, many corporations have an affirmative duty to *share* certain information with shareholders or government bodies rather than a right to keep its information private.

The test adopted by the D.C. Circuit allows courts to balance the public's need for certain corporate information against a corporation's interest in a limited right to privacy. In the context of non-profit advocacy organizations such as Greenpeace, the recognition of some right to privacy serves only to *facilitate* the exercise of that corporation's first amendment right to speech and association without undermining any public interests such as safety or security. As such, Greenpeace asks that the Court adopt the *Hubbard* standard and reinstate its invasion of privacy by intrusion claim.

B. Interference with Intellectual Property Establishes Actual Damages.

The Superior Court also dismissed Greenpeace's invasion of privacy claim, holding that Greenpeace failed to plead an injury sufficient to establish standing. Order at 2-4 (AP124 – AP126). The Superior Court acknowledged that Greenpeace identified at least three categories of damages – "(1) interference with its campaigns and organizational mission; (2) interference with its intellectual property; and (3) the costs of

investigating the alleged actions" – but found none of these categories sufficient. Order at 3 (AP125).

The Court summarily rejected Greenpeace's first two damages theories. Order at 3-4 (AP125 – AP126). With regard to campaign interference, the Court chastened Greenpeace for failing "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." Order at 3 (AP125). Likewise, with regard to the value of Greenpeace's intellectual property, the Court stated only that those allegations "without more, does not convince the court that injury has been sufficiently pleaded." Order at 4 (AP126). In so doing, the Court exceeded its authority at the motion to dismiss stage.

At the motion to dismiss stage, the trial court must accept as true the factual allegations and construe them in a light most favorable to the non-moving party. *See Jordan Keys & Jessamy, LLP*, 870 A.2d at 62. Indeed, the Court must accept the allegations as true, "even if doubtful in fact." *Bell Atl. Corp.*, 550 U.S. at 555. Moreover, the Court must 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 Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 730 (D.C. 2011).

Not only did the trial court fail to grant Greenpeace all reasonable inferences in evaluating its claims of injury, the court dismissed these allegations out of hand deeming them insufficient to "convince the court." Order at 4 (AP126). The Superior Court cited no case law for the proposition that Greenpeace's allegations of injury were *legally* insufficient and Greenpeace need not "convince" the Court of the veracity of its factual

allegations in opposing a motion to dismiss. Accordingly, the Superior Court's holding on this issue should be reversed as a matter of law.

Moreover, Greenpeace need not identify a specific campaign that was harmed to establish its standing to sue. As Ketchum itself explained in 1999, knowing what Greenpeace *was not* planning was as useful to Dow as knowing what Greenpeace *was* planning because the knowledge would "[en]able [Dow] to divert resources to more pressing matters" if it knew Greenpeace's plans were not aimed at Dow. Compl. ¶¶ 88-89 (AP31). Thus, the loss of control over its confidential business information lifts the deterrent effect that the possibility of Greenpeace's scrutiny holds, and thereby creates a substantial interference with Greenpeace's business; this injury is compensable. Similarly, 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. *See Carpenter v. United States*, 484 U.S. 19, 26-27 (1987). In these ways Greenpeace has pleaded a cognizable injury.

Turning to Greenpeace's third theory of damages, the Court held that: "the costs incurred in investigating the alleged wrongdoing and bringing suit cannot provide a basis for a finding of injury sufficient to create standing." Order at 4 (AP126). The Court cited *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107-08 (1998) for this proposition. Critically, Greenpeace did not assert that its costs in preparing this lawsuit establish the injury element of its tort claims. Greenpeace asserted the costs of investigating the scope of Defendants' intrusions were compensable and *Steel Company* does recognize that such investigation costs incurred by a plaintiff for its own purposes (i.e., independent of a lawsuit) constitute an injury that confers standing. Accordingly,

Steel Company does not preclude a plaintiff seeking damages for costs incurred outside of preparation for the lawsuit. For this reason alone, the Superior Court's dismissal of Greenpeace's invasion of privacy for failure to plead injury should be reversed.

Finally, Greenpeace sought two additional forms of recovery – disgorgement and injunctive relief – that the Superior Court entirely ignores in its opinion. According to the new Restatement of Restitution and Unjust Enrichment, disgorgement may be the most appropriate remedy in a trespass and conversion actions 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. *See* Restatement (3d) of Restitution and Unjust Enrichment § 40 (Tentative Draft No. 4, 2005) (recognizing disgorgement as a remedy for conversion and trespass). 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." *Id*. Disgorgement is rational, even where the disgorgement of the value acquired by the defendant exceeds any quantifiable injury to the property owner (or occupant). *Id*. Here, Plaintiffs allege that hundreds of thousands of dollars changed hands between Defendants as payment for the information obtained through their illegal scheme, Compl, ¶¶ 93-94 (AP32 – AP33), and this money may be disgourged as damages.

Even if the Court were to conclude that Greenpeace is not entitled to damages, Plaintiff has requested injunctive relief that would ensure that Defendants' conduct has ceased and will not resume. Injunctive relief is available, for example, 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. The Superior Court Incorrectly Applied the False-Light Limitations Period to Greenpeace's Invasion of Privacy via Intrusion Claim.

Finally, Greenpeace argues that the Superior Court erred in holding that a one-year limitations period applies to its invasion of privacy via intrusion claim. Courts have applied a one-year period to three types of invasion of privacy claims but the fourth, which is at issue here, is distinct and properly subject to a three year limitations period.

Because the D.C. Code contains no express limitations period for invasion of privacy, courts have sought to apply the limitations periods of analogous torts. In *Mittleman v. United States*, the D.C. Circuit concluded that because false light required publication it was "intertwined" with torts like libel, slander, and defamation, and, therefore, the one-year limitations period applicable to those torts should be applied it to false light invasion of privacy. 104 F.3d 410, 415 (D.C. Cir. 1997). Subsequently, courts extended this reasoning – and the one-year statute of limitations – to the two other invasion of privacy strains which requiring publication: public disclosure of private facts and the appropriation of name or likeness.

But intrusion is fundamentally distinct from false light (and the other varieties of privacy claims) because it does not require publication. *Wolf*, 553 A.2d. at 1217; *see also Benitez v. KFC Nat'l Mgmt. Co.*, 714 N.E.2d 1002, 1007 (Ill. Ct. App. 1999) (rejecting one year limitations period for intrusion because it differs in not requiring publication). In other words intrusion does not require the critical element *Mittleman* relied upon in holding false light analogous to libel, slander, and defamation (and thus subject to the

same limitations period.

Intrusion more closely resembles trespass than those torts requiring publication such as libel or slander because the act triggering liability involves the intrusion into a protected (either due to property or privacy interests) space. For this reason, the Court should properly rely on the District of Columbia's 3-year residual limitations period for "torts involving injury to property" set forth in D.C. Code § 12-301(2)-(3). In the alternative, the Court may properly rely on the District of Columbia's three-year residual limitations period set forth in D.C. Code § 12-301(8) for claims for which "a limitation is not otherwise specially prescribed[.]"

In holding that the one-year limitations period should apply, the court stated its intention to rely on D.C. cases applying D.C. law. Order at 6 (AP128). But the cases the Superior Court cites are not premised on invasion of privacy *by intrusion* and therefore do not undermine Greenpeace's argument that because invasion of privacy by intrusion requires no publication it should not be held to a one-year limitations period. *See Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 944 (D.C. 2003) (invasion of privacy claim premised on disclosure of confidential information); *Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1, 10 (D.D.C. 2008) (expressly noting that one-year limitations period applied to torts similar to defamation); *Richards v. Duke Univ.*, 480 F. Supp. 2d 222 (D.D.C. 2007) (case involving public disclosure); *Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 174 n.10 (D.D.C. 2006) (invasion of privacy claim premised on public disclosure of private facts).

Because the rationale behind a one-year limitations period for other forms of invasion of privacy does not apply to Greenpeace's intrusion claim, Greenpeace asks that

the Court apply the three-year limitations period identified by D.C. statute.

III. BOTH D.C. LAW AND PUBLIC POLICY WEIGH IN FAVOR OF RECOGNIZING A CLAIM OF CONVERSION OF INTANGIBLE PROPERTY.

Greenpeace seeks damages stemming from the conversion of its documents including financial reports, campaign strategy documents, and other confidential materials taken from Greenpeace's private trash and recycling containers. Compl. ¶ 125 (AP42). The Superior Court dismissed this claim, holding that Greenpeace could not pursue a claim of conversion of intangible property. This is an open issue of law in the District of Columbia. Greenpeace respectfully argues that both persuasive legal authority and public policy support recognizing a claim for the conversion of intangible property and asks that the Court so hold.

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." 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). The Superior Court correctly identified the two "most instructive" authorities on the issue of whether a claim of conversion may be premised on the left of intangible information: *Pearson*, 410 F.2d at 707 and *Kaempe v. Myers*, 367 F.3d 958 (D.C. Cir. 2004). Order at 20 (AP142).

In *Pearson*, Senator Thomas Dodd alleged two former employees entered his staff offices at night and, without his authority or knowledge, copied documents from the office file. *Pearson*, 410 F.2d at 703. The copies were handed over to the defendants,

two newspaper columnists, who were aware of the manner in which the copies were obtained. *Id*. Applying D.C. law, the Court 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, 410 F.2d at 707-08. There, the Court held Plaintiff had not established that the stolen information had either been arranged at such cost or had independent commercial value. *Id*. The information was stolen for the purpose exposing Senator Dodd's relationship with certain lobbyists for foreign interests in a series of six newspaper articles, *id*. at 703, and there were no allegations suggesting the defendant-reporters had purchased the copied documents or otherwise traded a thing of value for the information contained in the documents.

Although the facts in *Pearson* were deemed insufficient to permit recovery based on a theory of conversion of information, numerous courts across the country have applied the reasoning in *Pearson* to allow plaintiffs to pursue conversion claims based on intangible property interests.[4] In doing so, courts have recognized that many types of

[4] *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,*

intellectual property are not protected by copyright or patent law.

In *Kaempe*, plaintiff sued his former law firm for conversion, alleging the firm had converted his patent rights by assigning them to a third party without his permission. 367 F.3d at 960. Finding that the plaintiff's patent rights had not been infringed, the Court held that it need not decide the legal question regarding whether the patent rights at issue were capable of being converted. *Id*. The Court did note, however, that the law was unclear as to whether the District of Columbia would recognize a conversion claim for the theft of intangible property. *Id.* at 963-64. 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.

The Superior Court provided little reasoning in support of its holding that conversion of intangible property was not a cognizable claim. First, the Court noted that Defendants had cited federal cases from the District of Columbia federal court in support of the proposition that intangible property cannot be converted. Order at 22 (AP144).

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. Ct. App. 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. Ct. App. 1987) (recognizing conversion claim where Defendant stole bid information); *Annis v. Tomberlin & Shelnutt Assocs., Inc.*, 392 S.E.2d 717, 723 (Ga. Ct. App. 1990) (upholding a jury verdict of $7500 for conversion of a marketing strategy manual by a former employee); *Charter Hosp. of Mobile, Inc. v. Weinberg*, 558 So. 2d 909, 910 (Ala. 1990) (affirming an award of compensatory damages for "conversion of a treatment program for people suffering from drug abuse or alcoholism"); *Benaquista v. Hardesty & Assocs.*, 20 Pa.D. & C.2d 227 (1959) (recognizing possibility of conversion of an idea for a house design); *Tennant Co. v. Advance Mach. Co.*, 355 N.W.2d 720, 725 (Minn. Ct. App. 1984) (recognizing conversion of confidential marketing information including customer lists retrieved from the defendant company's garbage); *Nat'l Sur. Corp. v. Applied Sys., Inc.*, 418 So. 2d 847, 850 (Ala. 1982) (recognizing claim of conversion of a computer program).

First, the mere fact that federal courts applying D.C. law have rejected certain claims is not, in and of itself, a reason for interpreting the law of the District of Columbia a certain way. Indeed, if the weight of authority were measured by counting cases cited, Greenpeace would refer the Court to the numerous state court opinions where common law conversion claims have been interpreted to permit claims premised on intangible property. *See infra*. note 4. Additionally, the federal authority upon which the Superior Court (and Defendants) relied recognizes that conversion may be premised on "intangible rights identified by a tangible document" which is exactly what Greenpeace alleges. *See Flicken v. AMR Corp.*, 578 F. Supp. 2d 134, 143 (D.D.C. 2008) and *Primedical, Inc. v. Allied Inv. Corp.*, No. 90-1802 (NHJ), 1994 U.S. Dist. Lexis 4517, at *21 (D.D.C. Mar. 30, 1994), and *Equity Group, Ltd. v. Painewebber, Inc.*, 839 F. Supp. 930, 933 (D.D.C. 1993).

The Superior Court also found persuasive the Maryland Court of Appeals's decision, *Allied Investment Corp. v. Jasen*, 731 A.2d 957, 965 (Md. Ct. App. 1999), where an action for conversion of intangible information was not permitted. *Allied Investment* dismissed the conversion claims on other grounds, but first "agree[d] that the tort of conversion generally may extend to the type of intangible property rights that are merged or incorporated into a transferable document." *Id*. Merger has traditionally been applied in the context of intangible property that takes the form of negotiable financial instruments. *See id*. But the policy concerns underlying the merger requirement – ensuring that the property can be possessed and determining who possesses it – are met in this case. See Courtney W. Franks, *Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of Kremen v. Cohen*, 42 Hous.

L. Rev. 489, 506-07 (Summer 2005) (relying *Pearson* to establish a test for the right to possession).

Greenpeace maintains that the reasoning in Pearson is persuasive, and not restricted by *Kaempe*. Permitting a claim for conversion premised upon intellectual property and work product that has been reduced to writing properly balances the policy interests involved. Such a rule ensures that the doctrine of conversion is not extended to inchoate intangible property that has not been merged into a written document. At the same time, the rule serves the important role of protecting intangible property that does not fall within the ambit of intellectual property laws. By providing some protection to such information, the common law encourages corporations and individuals to invest their energy in creative and productive efforts rather than on security and protection. *See* Franks, at 515-16. For these reasons, Greenpeace asks that the Court reverse the holding of the Superior Court on this issue.

CONCLUSION

For the foregoing reasons, Greenpeace respectfully requests that the Court reverse the Superior Court's dismissal of its trespass to common areas, invasion of privacy, and conversion claims and remand.

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I, Emmy L. Levens, do hereby certify that on October 1, 2013, a copy of the foregoing Brief of Appellant Greenpeace, Inc. and its accompanying Appendix were served United States mail and electronic mail to the counsel of record listed below.

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