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GREENPEACE INTERNATIONAL (aka "GREENPEACE STICHTING COUNCIL"), GREENPEACE, INC., DANIEL BRINDIS, AMY MOAS, MATTHEW DAGGETT and ROLF SKAR

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

RESOLUTE FOREST PRODUCTS, INC., RESOLUTE FP US, INC., RESOLUTE FP AUGUSTA, LLC, FIBREK GENERAL PARTNERSHIP, FIBREK U.S., INC., FIBREK INTERNATIONAL INC., and RESOLUTE FP CANADA, INC.,

Plaintiffs,

v.

GREENPEACE INTERNATIONAL (aka "GREENPEACE STICHTING COUNCIL"). GREENPEACE, INC., GREENPEACE FUND, INC., FORESTETHICS, DANIEL BRINDIS, AMY MOAS, MATTHEW DAGGETT, ROLF SKAR, TODD PAGLIA, and JOHN AND JANE DOES 1 through 20, inclusive,

Defendant.

Case No. 17-cv-02824-JST

GREENPEACE DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6) AND MOTION TO STRIKE AMENDED COMPLAINT PURSUANT TO CAL. CIV. PROC. CODE § 425.16

Date: May 31, 2018
Time: 2:00 p.m.
Judge: The Honorable Jon S. Tigar
Location: Courtroom 9 19th Floor

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT ON May 31, 2018 at 2:00 p.m. in Courtroom 9 of the U.S. District Court for the Northern District of California located at 450 Golden Gate Avenue, San Francisco, California, Greenpeace International ("GPI"), Greenpeace, Inc. ("GP Inc."), Daniel Brindis, Amy Moas, Matthew Daggett, and Rolf Skar (collectively, the "Greenpeace Defendants") will and do hereby bring this motion under Rule 12(b)(6) to dismiss in its entirety and with prejudice the Amended Complaint of Resolute Forest Products, Inc. ("Resolute FP"), Resolute FP US, Inc., Resolute FP Augusta, LLC ("Resolute Augusta"), Fibrek General Partnership, Fibrek U.S., Inc., Fibrek International Inc., and Resolute FP Canada, Inc. (collectively, "Resolute," "RFP"), and to strike the Amended Complaint pursuant to the California anti-SLAPP statute.

This motion will be based on this Notice of Motion and Motion, the following Memorandum of Point and Authorities, the Declaration of Lacy H. Koonce, III, and all exhibits thereto, the Supplemental Appendix, the Request for Judicial Notice, all pleadings and papers on file herein, the Reply the Greenpeace Defendants anticipate filing, and any oral and/or documentary evidence as may be presented at the hearing in this matter.

This 29th day of January, 2018.

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP

By: /s/ *Lacy H. Koonce, III*
Lacy H. Koonce, III

Attorneys for Defendants
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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Greenpeace International ("GPI"), Greenpeace, Inc. ("GP Inc."), Daniel Brindis, Amy Moas, Matthew Daggett, and Rolf Skar (collectively, the "Greenpeace Defendants") bring this motion under Rule 12(b)(6) to dismiss in its entirety and with prejudice the Amended Complaint of Resolute Forest Products, Inc. ("Resolute FP"), Resolute FP US, Inc., Resolute FP Augusta, LLC ("Resolute Augusta"), Fibrek General Partnership, Fibrek U.S., Inc., Fibrek International Inc., and Resolute FP Canada, Inc. (collectively, "Resolute," "RFP"), and to strike the Amended Complaint pursuant to the California anti-SLAPP statute.[1]

INTRODUCTION

On October 16, 2017, this Court properly terminated a creative but ill-conceived attempt by Plaintiff Resolute to have the Court apply the federal RICO statute to environmental advocacy by Greenpeace and others, and to find their public statements defamatory because those non-profit advocates take positions critical of Resolute's environmental practices. ECF No. 173 ("MTD Order"). As the Court held, "[t]he academy, and not the courthouse, is the appropriate place to resolve scientific disagreements of this kind." Notwithstanding this clear directive, Resolute has chosen to file an Amended Complaint that again tries to impose legal liability on Greenpeace and others for their public advocacy in excess of $300 Million.[2]

The impact on the Greenpeace Defendants resulting from this litigation is enormous, but the potential chilling effect on speech by all advocacy groups is even greater, especially now that other multinational companies, represented by Resolute's counsel, have brought[3] or are considering[4] copycat lawsuits seeking to intertwine RICO remedies with defamation claims.

---

[1] The Greenpeace Defendants also join in the arguments of Greenpeace Fund, Inc., and ForestEthics and Todd Paglia, in support of their separate motions, as appropriate.

[2] Resolute seeks damages "far in excess" of $100 million in Canadian dollars, and is seeking treble damages under RICO. Am. Compl. ¶¶ 17, 436, 444, 453.

[3] *See* Declaration of Lacy H. Koonce, III ("Koonce Decl."), Ex. 1 (*Energy Transfer Partners v. Greenpeace Int'l*, No. 17-cv-00173 (D.N.D. Aug. 22, 2017)).

[4] *See* Koonce Decl., Ex. 2 (Paul Barrett, *How a Corporate Assault on Greenpeace Is Spreading*, Bloomberg, Aug. 28, 2017 ("Michael Bowe, the Kasowitz partner handling the RICO cases, says he's in touch with other companies thinking of filing their own racketeering suits. . . . 'I know others who are considering having to do so, and would be shocked if there are not many more.'")); *see also* Koonce

These chilling effects are the very point of SLAPP lawsuits, and the mere possibility of an award of treble damages under the RICO statute would only heighten the potential chilling effect.

Here, Resolute has attempted to amend its complaint by making mostly cosmetic changes, despite the Court's admonition that the appropriate means of addressing any issues Resolute may have with Defendants' speech activities is more speech. Resolute has added speech that post-dates the lawsuit, revealing its true purpose: to censor future speech.

Doubling down on its initial approach, in its Amended Complaint, Resolute essentially thumbs its nose at this Court's earlier findings in several ways. First, and most notably, Resolute does not substantively address the deficiencies the Court identifies in its RICO claims at all, yet reasserts all of these claims in the Amended Complaint:

- Resolute makes no further effort to plausibly allege proximate cause given that, as the Court held, any alleged fraud was against donors, not Resolute. ***This failure alone mandates dismissal, again, of all of Resolute's RICO claims***.
- Resolute does not identify the "misconduct" or "specific content" that constitutes alleged fraud in the publications which it claims defrauded donors and others.
- Resolute does not otherwise remedy the lack of specificity around its RICO claims, including the allegation – expressly noted by the Court – that Greenpeace processed millions of dollars in fraudulently induced donations, as it fails yet again to describe "a single donor, donation date or amount, nor how the donation was fraudulently induced."
- Resolute makes no further effort to address the Court's holding that there was no Hobbs Act extortion claim because the Defendants did not obtain property from Resolute itself, or Resolute's customers.

Resolute's inability to address the flaws in its RICO claims is fatal, and further demonstrates that those claims are merely disguised defamation claims. In light of Resolute's wholesale failure to remedy these flaws, the Court should dismiss the RICO claims again, this time with prejudice.

Decl., Ex. 3 (Rebecca Leber, *'Corporate Bullies' Are Using RICO Laws to Go After Greenpeace*, Mother Jones, Oct. 18, 2017).

The intellectual bankruptcy of Resolute's RICO claims is perhaps best illustrated by its remarkable assertion that Defendants used "extortive threats" on major book publishers to compel them to criticize Resolute. As an example, Resolute points to a public letter from Hachette Livre's CEO to his counterpart at Resolute in August 2017 that Resolute says Greenpeace "extorted" from Hachette. In that letter, after noting that Hachette has "stringent ecological requirements" and has been working with ecological NGOs for years, Hachette's CEO addresses the legal dispute between Resolute and Greenpeace:

> *I do not have any intention of interfering in this dispute, because, as publishers, we are neither knowledgeable nor resourceful to take an enlightened stand on which party is right or wrong, in what seems to be a complex and very technical debate.*
>
> *I just wish, with all due respect, to draw your attention on two points which we consider fundamental:*
>
> *The first is that our commitment towards FSC is the cornerstone of our social responsibility and environmental policy. As such, there can't be any exceptions or we can't adapt to any specific situation from any supplier.*
>
> *I am calling on you therefore to do all that is in your power to maintain FSC Certificates that you have in Canada, and specifically, those through which we comply with our ecological requirements.*
>
> *The second point which I would like to raise here, and which does not come from the client, but from the publisher and the citizen that I am, is your virulent reaction towards Greenpeace. Relying on the RICO provisions seems excessive to me. There is reason enough to alarm publishers, who by the very nature of their activity, respect and animate public debates and count – as it is the case with us - many ecologists among their authors. Thus, if this dispute were to escalate legally, we will not rule out the fact that some authors will refuse to have their books printed on Résolu paper, which would only further complicate the situation.*

> *It goes without saying that we respect both the law and the right of every individual to turn towards the courts if they feel wronged. However, I am wondering if there wouldn't be other ways to respond to the criticisms of Greenpeace.*

Koonce Decl., Ex. 4 (certified translation from French). This hardly constitutes capitulation on the threat of extortion, but rather an impassioned plea from one corporate executive to another, ***begging*** the forest products company to do the right thing – to work to keep its FSC certifications, stop pursuing "excessive" RICO claims, and let environmental groups do their work. That Resolute attempts to spin a letter which, on its face, recognizes the parameters of scientific debate over environmental issues as well as the need for both free speech and access to justice, into the fruits of a criminal conspiracy, eloquently demonstrates why this case does not belong in the courts.

In its renewed effort to plead actual malice in support of its defamation claim, Resolute wholly ignores two fundamental restrictions on its defamation claims: (1) the one-year statute of limitations under California law; and (2) the principle that only one who takes a responsible part in publication of defamatory material may be held liable for it. As the Greenpeace Defendants' made clear in their prior motion, of the 267 allegedly defamatory statements in the Complaint, only 26 were made by named defendants during the year prior to the time the Action was filed. In Resolute's new pleading, fully 112 of the 135 alleged defamatory statements made by Defendants are outside the statute of limitations and thus cannot form the basis of a libel claim.

Notwithstanding these clear limitations, Resolute continues to claim that statements made by other parties, such as Greenpeace Canada, from 2012 through early 2015 – most of which are the subject of another defamation suit against Greenpeace Canada in Ontario – are relevant to its defamation claims here. No matter how hard Resolute tries to blur the lines between RICO and defamation claims, though, it simply cannot hold GP Inc., GPI, or the individual defendants liable for out-of-time statements made by others, most notably the statements based on mistaken maps which are the focus of the Amended Complaint, but which were made by Greenpeace Canada in 2012 (and retracted). Further, to the extent Resolute claims that its allegations about

purported intent are relevant to actual malice, it is clear that documents allegedly related to a party's state of mind in 2012 or 2013 can have little bearing on that party's state of mind after May 30, 2015 about subsequent statements, much less the state of mind of another party entirely.

Regardless, on their face the new factual allegations do not demonstrate actual malice. For instance, Resolute's claims that Greenpeace "should have known" about statements based on erroneous maps that were later retracted, or that Greenpeace should have included more positive information about Resolute in its statements, simply do not demonstrate actual malice under any standard. Mistakes do not equal actual malice, retractions evidence no actual malice and courts refrain from exercising 20/20 hindsight over such matters of editorial judgment. Resolute also makes no attempt to explain why its new allegations do not suffer from the other deficiencies previously identified by the Court – that the underlying statements were not provably false opinions based on disclosed facts.

Finally, Resolute also makes the extraordinary argument that because it filed a (legally deficient) complaint and submitted expert opinions in connection therewith that challenge statements made by the Greenpeace Defendants, Greenpeace's continuing public advocacy about Resolute's poor environmental record suffices to show actual malice. This Court has already indicated that such scientific disagreements do not reflect malice and should be resolved in the "academy," not in the courtroom. Yet Resolute continues to argue that its science is "better," and that because it has laid out those positions, anything that the Greenpeace Defendants say contrary to those positions must be made with actual malice. Not so. Even more remarkably, Resolute argues that by asserting an opinion defense (which notably this Court held appeared to be valid with respect to many of the alleged statements), the Greenpeace Defendants somehow have conceded that all of their statements were false. This too is a gross misstatement of the law and of the Greenpeace Defendants' position.

Resolute's "shuffling of the deck chairs" of its pleading – notwithstanding the number of new paragraphs it inserts to do so – cannot save the Amended Complaint from the same result as its original Complaint. This Court should dismiss Resolute's claims again, with prejudice. The Court has already awarded Defendants their attorney's fees and costs on their initial SLAPP

motion. Even more so on Defendants' renewed motions, an award of fees and costs is necessary in order to prevent Plaintiff's baseless claims from furthering the deleterious impact on Greenpeace and the *in terrorem* effect on other advocacy groups, and to discourage new plaintiffs from pursuing these chilling lawsuits.

ARGUMENT

A. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER RULE 12(B)(6)

As Resolute has elected to include many of the same allegations from its original Complaint without amendment, and as its new allegations are subject to the same defenses raised on the previous motions granted by the Court, the Greenpeace Defendants hereby adopt and incorporate, as relevant, their prior substantive submissions. *See* ECF Nos. 60, 61, 98, 127, 162.

1. Resolute Again Fails to Plead a Plausible Claim for Defamation

In dismissing the original Complaint and striking Resolute's state law claims under the Anti-SLAPP statute, this Court held that Resolute failed to plausibly plead ***any*** of its claims. As to the defamation claims, the Court held that Resolute did not plead actual malice because Resolute's conclusory allegations did not "provide any specific allegations that would support a finding that [the Defendants] harbored serious subjective doubts as to the validity of [their] assertions." MTD Order 14. Additionally, the Court held that many of defendants' statements (i) were not provably false; (2) constituted opinion based on disclosed facts; and/or (3) consisted of "obviously overemphatic" language. *Id*. 14-18. As set forth below, Resolute has failed to remedy any of these fatal flaws in its new pleading.

a. The Amended Complaint Does Not Plausibly Plead Statements Made With Actual Malice

The Amended Complaint fails to state a claim as a matter of law because it does not allege the requisite high degree of fault on the part of Greenpeace. The First Amendment makes clear that a public figure like Resolute may recover for injury to reputation only on clear and convincing proof of "actual malice," a state of mind defined as a subjective awareness of the truth through "a showing that a false publication was made with a high degree of awareness of

probable falsity," and that defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (internal quotation marks omitted). As this Court held, the alleged defamatory speech here clearly addresses matters with which the public has legitimate concern. MTD Order 24. The public is legitimately interested in all manner of environmental harm, risks to animal habitat, and treatment of Indigenous peoples.

i. Resolute Cannot Plead Malice Generally

At paragraphs 319-378 of the Amended Complaint, Resolute purports to provide a "summary" of its allegations that the Greenpeace Defendants published the challenged statements with actual malice. Notably, this section begins with an argument that "[e]ach defendant's and Enterprise' [*sic*] member's actual and constructive knowledge summarized below is imputed to all other members of the Enterprise …." Am. Compl. ¶ 320. Yet as Greenpeace argued in its supplemental briefing, and as this Court held, MTD Order 13-14, a libel plaintiff must prove actual malice as to ***each*** defendant; the knowledge or subjective doubt of one defendant – even the author of an article published by another defendant – cannot be imputed. *See* ECF No. 127-1 at 12 n.10 (citing ECF No. 62 at 18-19 & n.18), 16 (citing *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974) (a plaintiff must prove actual malice with respect to each defendant, including the publisher); *Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal. 1985) ("[p]laintiff cannot recover … without proving each defendant acted with actual malice as to each purported defamation")). This is especially relevant here, where many of the alleged statements, in particular those from 2012 and 2013, were made by non-party Greenpeace Canada. *See* ECF No. 62, Mot. Dismiss 18-20 (citing *Karaduman v. Newsday*, 51 N.Y.2d 531, 540-42 (1980); *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 852 (1984)). As in their responsive supplemental pleading, *see* ECF No. 148, Resolute fails to address this central flaw in its reasoning, and again fails to offer any plausible facts suggesting that the Greenpeace Defendants in this suit published the challenged statements with actual malice, which precludes recovery absent clear and convincing evidence that the challenged statements were made with knowledge of their falsity or serious doubts as to their truth, and that the statements were materially false. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1954).

ii. Resolute Cannot Plead Actual Malice Based on Statements Made in 2012-2014

Of the 135 alleged defamatory statements made by Defendants, *see* Am. Compl. Apps. A-D, 112 are outside the applicable statute of limitations and thus cannot form the basis of any libel claim; only statements that were made after May 31, 2015 can be the basis for Resolute's defamation claims under California law. Cal. Civ. P. Code § 340(c); Cal. Civ. Code § 3425.1-3425.5 (single publication rule). *See also Resolute Forest Prods. v. Greenpeace Int'l*, 2017 WL 4618676, at *5 n.8 (N.D. Cal. Oct. 16, 2017). Most of the allegations regarding purported actual malice also relate to events long before May 31, 2015,[5] and Resolute cannot demonstrate that any supposed malice based on events in 2012 and 2013, upon which the Amended Complaint places so much focus, have any bearing on Greenpeace's purported state of mind in 2015 or afterwards (especially as these statements are by Greenpeace Canada, not a named Defendant). The existence of malice must be determined as of the date of publication. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964); *see also Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) (defendant's state of mind one year after alleged libel "sheds little light on the extent of his knowledge or disregard for the truth" at time of statement); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (evidence must show defendant "realized the inaccuracy at the time of publication").

One of Plaintiffs' "new" allegations regarding actual malice is a purported "operational" or "planning" memorandum that Resolute says was authored by Defendant Stand. Am. Compl. ¶¶ 76-88. Based on its alleged content, this document was created before Greenpeace withdrew from the CBFA in December 2012. *See id.* Thus this document, upon which Resolute now puts much emphasis, not only cannot demonstrate malice on the part of the Greenpeace Defendants as

[5] *See, e.g.*, Am. Compl. ¶¶ 89-118 (incorrect and retracted 2012 and 2013 statements Resolute harvesting in Boreal forest regions in violation of the CBFA), 119-130 (2013 "Resolute: Forest Destroyer" campaign statements), 197-218 (2013 and 2014 statements Resolute harvested in protected areas of Broadback Valley, Trout Lake, and Montagne Blanches), 223-227 (2012 and 2013 statements Resolute failed to comply with CBFA), 228-245 (2012-2014 "private" statements to Resolute's customers); 246-273 (2012-2014 "public" statements addressed to Resolute's customers).

it is not alleged to have been authored by them, but also can have little bearing on actual malice with respect to ***anyone's*** statements made years later.

iii. Resolute Has Failed to Plead Actual Malice Again

Resolute's arguments as to actual malice rely not upon any plausible allegations of intent or subjective doubt, but upon Resolute's "spin" of the underlying facts and mere speculation that Defendants intended to use false information to harm Resolute. For example, the so-called "planning" document does not even suggest that the information to be disseminated was known to be false – quite the contrary. According to Resolute, the document states that environmental groups planned to "announce that Resolute has failed to live up to its commitment under the CBFA, that they will no longer negotiate with Resolute or attend any meetings attended by Resolute," and that this would likely be "contrasted by an announced intention to carry on work implementing the CBFA with the remaining FPAC members, referencing the positive work taking place there." Am. Compl. ¶ 77. The document then allegedly said that environmental groups intended to begin a "very targeted market campaign directed at Resolute [because] Resolute [is] threatening the most significant global conservation agreement (i.e., the CBFA)." *Id.* ¶ 78. None of these statements suggest that the groups believed that the bases for leaving the CBFA or targeting Resolute were untrue. *See also id.* ¶¶ 79, 82-85, 323.

Indeed, Resolute ***itself*** inserts language in its allegations to try to manufacture an impression that the memorandum concerned falsities – but any text quoted from the alleged memorandum states nothing of the sort. For example, when citing a purported quote from the memorandum about environmental groups announcing that Resolute had not lived up to its commitment under the CBFA, Resolute states that "the Enterprise would ***aggressively disseminate the intentional misrepresentations*** that Resolute violated the CBFA," but this is Resolute' interpretation of the circumstances. Am. Compl. ¶ 77 (emphasis added); *see also* ¶ 323 ("As the Enterprise's operational memo explicitly detailed, the 'objective' of the Enterprise's campaign was to ***falsely*** 'position[ ] Resolute as the most regressive forest products company.'") (emphasis added). This fits a clear pattern of obfuscation: Resolute uses the words

"false" or "falsely" nearly 450 times in its Amended Complaint in a transparent attempt to create an impression of falsity not present in the actual statements.

Resolute also asserts that each Greenpeace Defendant (whether individual or entity) must be deemed to have been aware of all of the facts that Resolute says support its positions and would thus undermine statements made by Greenpeace. Yet Plaintiff alleges this "knowledge" generally and collectively and provides no support for the notion that the Greenpeace Defendants actually held such knowledge. For example, Resolute alleged that Defendants' "scienter and malice is most plainly exhibited in the campaign's intentional misrepresentation of Resolute as a bad actor while endorsing and promoting other companies holding the identical positions." Am. Compl. ¶ 324. However, it fails to identify by name a single other company that engaged in the same acts as Resolute, or any factual basis for concluding that other forestry companies were "identically situated, or in most cases, less favorably situated" than Resolute. *Id.* It simply asks the Court to assume that because the Defendants advocated against Resolute, Defendants were doing so maliciously. But for all of the reasons set forth in the very publications Resolute points to, the Greenpeace Defendants had every reason to single out Resolute for its bad acts – indeed, Resolute's loss of FSC certificates alone sets the company apart from other timber companies. *See* ECF No. 60, Mot. Strike 14-17. The choice of Resolute, one of Canada's largest timber companies, as the subject of criticism is exactly the type of editorial judgment and ranking that is protected as opinion and cannot establish actual malice. *Montgomery v. Risen*, 875 F.3d 709, 715 (D.C. Cir. 2017) (the statement "one of the most elaborate and dangerous hoaxes in American history" is protected opinion); *Seaton v. Trip Advisor*, 728 F.3d 592 (6th Cir. 2013) (ranking as the "Dirtiest Hotel" is protected opinion).

Much of what Resolute adds to its Amended Complaint are further allegations about Greenpeace Canada's withdrawal from the CBFA in 2012 and its public criticism of Resolute for failing to uphold that agreement, which are the subject of Resolute's claims against Greenpeace Canada in a separate action pending before the Ontario Superior Court of Justice.[6] Although

[6] *See* Koonce Decl., Ex. 5; *see also id.* Ex. 6, Decision in *Resolute Forest Products Inc., et al. v. 2471256, dba Greenpeace Canada, et al.*, 2016 ONSC 5398 (Aug. 26, 2016).

Resolute concedes that Greenpeace Canada retracted its statements regarding maps later discovered to be erroneous,[7] Am. Compl. ¶¶ 114, 197, 226, 236, 331, 401, it argues now that the maps and accompanying photos were deliberately manipulated and/or that the Greenpeace Defendants should have known they were incorrect. First, all of these alleged statements were made outside the applicable statute of limitations for libel. *See supra* at 8. Second, Resolute's allegations that Greenpeace Canada had to be "aware" that its messaging relied on photos and video depicting forest degradation for which Resolute was not responsible are premised only on suppositions about Greenpeace Canada's general knowledge about the region and Resolute's logging activities; that is, it is based on what Resolute says Greenpeace Canada ***should*** have known, not what it allegedly ***did*** know. Am. Compl. ¶¶ 328-329. Third, a simple misreading does not constitute actual malice. *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 116-17 (D.C. Cir. 2017) (Kavanaugh, J.), *cert. denied*, 138 S. Ct. 366 (Oct. 16, 2017). And fourth, the retraction itself is evidence that Greenpeace lacked actual malice when it initially published the challenged materials. MTD Order 14; *see also Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 823 n.6 (N.D. Cal. 1977); *Hoffman v. Wash. Post Co.*, 433 F. Supp. 600, 605 (D.D.C. 1977) ("[I]t is significant and tends to negate any inference of actual malice on the part of the [publisher] that it published a retraction"), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978).

A significant portion of Plaintiff's allegations regarding actual malice involve positive information about Resolute that it says was omitted from Defendants' publications criticizing its forestry practices, such as Resolute's claim that it is "only responsible for a fraction of logging in Quebec and Ontario," it is supposed record on sustainability, whether it "remains one of the largest holders of FSC certificates in North America," and its contention that Resolute has "successful partnerships with various First Nations." *See* Am. Compl. ¶¶ 333-339. Yet the Greenpeace Defendants have no legal obligation to include information that Resolute would

[7] Indeed, Resolute waived its right to sue Greenpeace Canada based on that retraction. *See* Koonce Decl., Ex. 6 at 6. In the Canadian Action, Resolute has tried to avoid the effect of its release by arguing that Greenpeace Canada repeated its mistake. In its Defence, Greenpeace Canada has responded that subsequent publications did not repeat the earlier mistakes but instead made clear it was referencing a broader description for the Montagne Blanches area where Resolute was operating. *See id.* Ex. 9.

prefer they include, so long as the statements made are not false. It is the function of advocacy groups to hold the powerful to account, not to disseminate their marketing materials. Choice of what to include in the Greenpeace Defendants' advocacy is an editorial judgment which a defamation plaintiff cannot dictate and with which courts do not interfere. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 825 (9th Cir. 2002). Omissions are only actionable if they render a statement false. *Janklow v. Newsweek, Inc.* 759 F.2d 644, 647-48 (8th Cir. 1985). If the gist or the sting is the same, the omission is not actionable, as is the case here. *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 465-66 (9th Cir. 1977).

Resolute also attempts to shore up its arguments that Greenpeace's statements are not supported by the scientific evidence cited in its publications, arguing that this provides an "inference" of malice, Am. Compl. ¶ 340, but as the Court previously found, the appropriate place for a debate over science is in "[t]he academy, and not the courthouse." MTD Order 18. Indeed, Resolute appears once again to be setting up a "battle of the experts" by arguing, for example, that the Greenpeace Defendants relied on scientific studies showing that natural forests store more carbon than forests managed for timber production due to their older average age, Am. Compl. ¶¶ 341-344, and instead should have relied on studies cited by Plaintiff. Yet Resolute does not dispute that the Greenpeace Defendants relied on legitimate published articles and scientific reports for their conclusions, it just argues that the studies it relies on are better. Similarly, Resolute disagrees with the Greenpeace Defendants' focus on conclusions in scientific reports that caribou herds in regions where Plaintiff operates were not self-sustaining and faced decline, because the same reports also pointed to diminishing caribou herds in Alberta and British Columbia (where Resolute says it does not operate), Am. Compl. ¶¶ 345-348, but this is a disagreement over emphasis, not grounds for actual malice. *See also* ECF No. 60, Mot. Strike 20-22. The same can be said for Resolute's claim that Greenpeace relied on a report detailing global forest degradation to conclude that "Canada leads the world in loss of intact forests," claiming the designation was unfair if the study also found greater losses in other regions, yet without once disputing that the referenced study addressed significant intact forest losses in the

Canadian Boreal. *See* Am. Compl. ¶¶ 349-350. As explained in the prior motion papers, this does not establish malice. *See, e.g.*, ECF No. 98, Reply 20-22; ECF No. 162, Suppl. Reply 11**.** Rather, differing views on environmental science illustrated by Resolute's pleading only underscores that the subject matter, and sources on which they are based, are open to differing interpretations and opinions based on fact, thus precluding an inference that Greenpeace made their statements with knowledge of falsity or serious doubts as to the truth.

Insofar as Resolute ardently disagrees with Greenpeace's sources, that does not even raise an issue of falsity, much less actual malice. At best, Resolute's disagreements reflect a different interpretation of multiple objective data points leading to a different conclusion. *See ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 798 (N.D. Cal. 2010), *aff'd sub nom., ZL Tech., Inc. v. Gartner Grp., Inc.*, 433 F. App'x 547 (9th Cir. 2011). *See also Francis v. Dun & Bradstreet, Inc.*, 3 Cal. App. 4th 535, 540 (1992) (true statement never actionable). Thus, to the extent Greenpeace concluded Resolute's logging practices were destructive, based on disclosed scientific governmental studies and reports, they were well within their First Amendment rights in expressing that opinion. *See* ECF No. 60, Mot. Strike 14-23.

Resolute's argument that the Greenpeace Defendants' statements were made with actual malice because they occurred after Greenpeace was put on notice of their alleged falsity is also unavailing. *See* Am. Compl. ¶¶ 351-378. The Greenpeace Defendants are not required to withdraw statements or cease their advocacy just because Resolute provided notice it disagreed with Greenpeace's conclusions – Plaintiff's denials do not establish actual malice. *Worrell-Payne v. Gannett Co.*, 49 F. App'x 105, 108 (9th Cir. 2002) (Defendants' knowledge that plaintiff "made [statements] in her own defense at a press conference" and distributed packet of "'corrective' information" did not support finding of actual malice).[8] And a "failure to investigate" Resolute's grounds for disagreement is not evidence of actual malice either since "a

[8] *See also Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977) (actual malice "cannot be predicated on mere denials, however vehement, such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error"); *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 260 (1984) (a demand for a retraction or a threat of libel action does not establish that defendant doubted "the truthfulness of its article or its sources").

plaintiff will always be able to point to ways in which the defendant could have pursued another lead, or sought another piece of corroborating evidence." *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 53 (D.D.C. 2005). *See also St. Amant*, 390 U.S. at 731; *Tavoulareas v. Piro*, 817 F.2d 762, 798 (D.C. Cir. 1987); *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1169 (2004) ("[M]ere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient" to establish actual malice). As the Supreme Court highlighted in *Harte-Hanks Communications v. Connaughton*, actual malice turns not on whether a publisher "could have" investigated further, but whether the publisher had a subjective awareness of a statement's probable falsity at the time of publication. 491 U.S. 657, 667 (1989). Even where a failure to investigate would constitute "'an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers,'" such failure does not establish actual malice, unless the publisher had "'obvious reason to doubt'" the truth of the information, at the time of publication. *Id*. at 666, 668 (citations omitted).[9]

In each instance noted by Resolute here (other than the one that led to a retraction), the parties have a disagreement over the ***conclusions*** to be drawn from the relevant facts, and this is reflected in the opinions Greenpeace expressed. Also, no inference of actual malice may be drawn from the Greenpeace Defendants' choice to rely on their own interpretation of scientific and governmental reports on Resolute's timber operations and its effects on the Canadian Boreal forest. *See Reader's Digest*, 37 Cal. 3d at 259 ("Neither is there a duty to write an objective account. … So long as [a publisher] has no serious doubts concerning its truth, he can present but one side of the story.") (citation omitted).[10] This is hardly the circumstances presented in

[9] *See St. Amant*, 390 U.S. at 732-33; *Lohrenz v. Donnelly*, 350 F.3d 1272, 1285 (D.C. Cir. 2003); *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1508 (D.C. Cir. 1996) (actual malice must "necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication"); *Herbert v. Lando*, 781 F.2d 298, 305 (2d Cir. 1986) ("It is self-evident that information acquired after the publication of defamatory material cannot be relevant to the publisher's state of mind or his alleged malice at the time of publication.").

[10] The Greenpeace Defendants' motive to further their environmental mission, even by specifically pressuring Resolute to reform its practices, "cannot provide a sufficient basis for finding actual malice." *Harte-Hanks*, 491 U.S. at 665-66 ("[T]he is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term."); *DARE Am. v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1285-

cases like *Harte-Hanks*, where a newspaper relied on a single source that was "consistently and categorically" contradicted by six other witnesses interviewed by its journalists. There, the Supreme Court concluded evidence of obvious reason to doubt the veracity of a story and the newspaper's failure to listen to contrary sources suggested a "deliberate effort to avoid the truth" sufficient to support a jury's finding of actual malice. *Id*. at 683-85, 692. Contrast that with the context here: A mosaic of government reports, comprehensive audits of Resolute's logging practices by a third party (Rainforest Alliance), termination/suspension of Resolute's certificates of compliance by the FSC, critiques by First Nation Communities, and scientific analyses published by reputable sources upon which the Greenpeace Defendants relied for their challenged statements – and all of which contain the facts Resolute challenges. And, as discussed further *infra*, Greenpeace's statements remain protected opinion based on these disclosed facts.

Resolute's notice argument also fails on the topic of Greenpeace Canada's retraction. The fact that Greenpeace Canada first hired an independent consultant to help determine whether its maps were in error before issuing a retraction does not indicate actual malice. *See Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 131 (2d Cir. 2013) (lower negligence standard not even met where libel defendant delayed in correcting earlier misstatement because delay did not cause further reputational harm); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996) (publisher's failure to update readers on state of the controversy not evidence that published book in suit with actual malice). And, of course, the statements at issue here were made by a non-party outside the statute of limitations and cannot form the basis of Resolute's defamation claims against the Greenpeace Defendants in this action.

Resolute takes its knowledge of falsity argument to extraordinary – and unconvincing – lengths, by claiming that the statements of its experts in this litigation, which were rebutted by experts for the Greenpeace Defendants, render Greenpeace's further advocacy defamatory. Am. Compl. ¶¶ 304, 363-365, 367-368, 370-372, 376. Indeed, this Court found that these differences

86 (C.D. Cal. 2000) ("[E]ven if [defendants] were biased against [plaintiff], this would not show 'actual malice'"; "*Rolling Stone's* editorial slant is not at issue here"), *aff'd*, 270 F.3d 793 (9th Cir. 2001); *Fletcher v. San Jose Mercury News*, 216 Cal. App. 3d 172, 187 (1989).

only ***underscored*** why the Greenpeace Defendants' statements at issue were protected opinion, dismissing Resolute's claims notwithstanding those expert reports. MTD Order 17 ("The submission by Resolute of two expert declarations makes more manifest, not less, the degree to which the challenged statements are protected by the First Amendment.").

Finally, Greenpeace's advocacy after the filing of the original Complaint, including a letter to publishers, is of a piece with its prior advocacy and Resolute has not demonstrated malice in connection with those statements.[11] The letter, which relies on extensive footnotes to scientific and government reports, asserts that publishers sourcing paper from Resolute should take a skeptical eye to the company's "claims that its operations and products are sustainable," because "these are very difficult to reconcile with the findings of independent auditors, including those of the Forest Stewardship Council, and the growing body of scientific evidence that underscores the adverse impacts that Resolute operations are having on critical endangered species habitat, old growth forests, and endangered forests." *Id.* Resolute takes issue with the Greenpeace Defendants' statements in the same letter that Canada's Department of the Environment found risks to caribou herds "[i]n the forests in which Resolute sources fiber," and that the FSC has found Resolute to have "Indigenous rights nonconformances" in violation the FSC's certificate criteria, but these statements – as with the others in suit – rely on credible government and scientific sources and public audits and thus Plaintiff cannot plausibly allege they were made with actual malice. Rather, Resolute's attempt to chill these communications further supports the conclusion that Resolute's goal here is, in fact, censorship. *See, e.g.*, Koonce Decl., Ex. 7. The response by Resolute's customer, Hachette (*supra* at 3-4), only emphasizes the consequences that Resolute has brought upon itself by this effort to destroy its critic.

b. Greenpeace's Statements Remain Protected Opinion

That a statement may be held to be opinion based on disclosed facts on a motion to dismiss does not mean that it is false, as Resolute claims. Under the First Amendment, to succeed, a defamation claim requires a false statement of fact. *See* ECF No. 62 at 20-24; see also

[11] The same letter was sent to multiple publishing companies. A copy of the letter is included at Tab 7 of the Supplemental Appendix filed herewith.

Rodriguez v. Panayiotou, 314 F.3d 979, 985 (9th Cir. 2002); *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995). The law affords protection for opinions that, like the Greenpeace Defendants' here, are based on disclosed facts, because the disclosure of the factual basis for the opinion enables the public to decide whether they agree or disagree with the opinion. *See, e.g.*, *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995); *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1233-34 (N.D. Cal. 2014). Such advocacy, consisting of judgments supported by facts disclosed in the publications, is classic protected opinion, and cannot serve as the basis for defamation liability. Accordingly, the remaining 17 challenged statements within the applicable statute of limitations arising from 10 Greenpeace publications aimed at swaying corporations to press Resolute to change it logging practices are quintessential statements of opinion. *See* Suppl. App.

As the Greenpeace Defendants set forth in full in their initial anti-SLAPP motion, they had ample basis to draw critical conclusions regarding Resolute's practices, and their challenged publications disclosed, in extensive footnotes and hyperlinks to key sources, the scientific bases for their conclusions. *See* ECF No. 60, Mot. Strike 13-24. Indeed, six of the Greenpeace Defendants' publication in suit were already challenged as allegedly defamatory – and found by this Court to be protected opinion – in Resolute's original Complaint. *See* Suppl. App. Tabs 1, 3, 4, 5, 6, 10. The four additional publications challenged in Resolute's Amended Complaint are likewise protected opinion. *See id.* Tabs 2, 7, 8, 9. For example, the Greenpeace Defendants' letter to book publishers, *see id.* Tab 7, like the letters to McGraw Hill and Midland Paper challenged in the original Complaint, *see id.* Tabs 5 and 6, is heavily footnoted to government and scientific reports, and include hyperlinks to key sources, so the recipients could review the bases for Greenpeace's advocacy positions. The publication "Clearcutting Free Speech: How Resolute Forest Products is going to extremes to silence critics of its controversial logging practices," *see id.* Tab 8, is also annotated with hyperlinks, footnotes, and a long compendium of "references," which include scientific and government reports, among other published sources.

Advocacy pieces like Greenpeace's here are quintessential opinion publications by a well-known organization identified with environmental advocacy. For example, Resolute

challenges the Greenpeace's Defendants' publication "US Pharmacy Giant Rite Aid Is Destroying Canada's Boreal Forest," addressing Rite Aid's use of paper sourced from Resolute, and arguing that Rite Aid should join "a growing number of large companies like Kimberly-Clark, Procter & Gamble, Mattel and others," which have "adopted policies that reduce their impact on endangered forests." Suppl. App. Tab 2. Campaign publications like this, by a well-known environmental activism group, using memorable phrases to amplify a forceful message seeking a policy change, signal to any reader that the statements contained therein are expressions of opinion. *See also* Suppl. App. Tab 1 ("Rite Aid Wrong Choice, Destroying forests, one flyer at a time."). The statements directly challenged by Resolute include various obvious statements of opinion and emphatic speech, such as "[T]he health of forests around the world – and with them the health of billions of people – is in jeopardy," Suppl. App. Tab 3, and are thus understood in the context of the Greenpeace Defendants publications to be consistent with Greenpeace's commitment to environmental advocacy. In this vein, the publications in suit are similar to a newspaper's op-ed page, understood by reasonable readers to be inherently opinion-based. *Ollman v. Evans*, 750 F.2d 970, 985 (D.C. Cir. 1984) (*en banc*); *Cochran v. NYP Holdings*, 58 F. Supp. 2d 1113, 1117, 1123-27 (C.D. Cal. 1998); *Immuno A.G. v. Moor-Jankowski*, 145 A.D.2d 114, 123, 537 N.Y.S2d 129, 134-35, *aff'd sub nom. Immuno A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.E.2d 129 (1989), *cert. granted, judgment vacated sub nom. Immuno A.G. v. Moor-Jankowski*, 497 U.S. 1021 (1990) (letter to editor from animal rights activist arguing pharmaceutical company's tests on chimpanzees could spread hepatitis to humans protected opinion).

It is beyond cavil that "debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times*, 376 U.S. at 270, and courts go so far as to say that "the language of the political arena" can even be "vituperative" or "inexact," *Watts v. United States*, 394 U.S. 705, 708 (1969). Thus, accusations made "in the contest of political, social or philosophical debate" are understood to be opinion. *Ollman*, 750 F.2d at 987 (citation omitted); *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987); *Campanelli v. Regents of Univ. of Cal.*, 44 Cal. App. 4th 572, 578 (1996). Here, Greenpeace's political advocacy is understood, in context, to be statements of

opinion from the general context and tenor of the publications, aimed at convincing Resolute's customers to reconsider using its paper products, which are readily understood to be expression of Greenpeace's environmental points of view. All of these publications, and the challenged statements, are quintessential advocacy and opinion based on disclosed facts to persuade paper-sourcing companies and Resolute's investors to change practices and/or demand that Resolute take a more sustainable approach to logging in the Canadian Boreal forest.

As noted *supra*, the challenged statements touch on matters of scientific controversy on which many reasonable minds disagree. Indeed, this is why numerous courts – including this one – have concluded that debates on matters of scientific opinion are ill-suited to defamation litigation. Because environmental science, like so many scientific pursuits, can engender "much debate and disagreement," *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1202-03 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985), speech on matters of environmental science is protected "[r]egardless of the merit of [those] opinion[s]."

Finally, Resolute's continued attempt to define "destroy" in a manner contrary to logic and context is unavailing, and contrary to this Court's prior holding. *See, e.g.*, Am. Compl. ¶¶ 369, 401. Such complained-of statements constitute the type of "colorful" language given wide latitude under the First Amendment. *Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995).[12] This Court previously criticized Resolute's "overly literal approach to obviously overemphatic speech," affirming that rhetorical flourishes are "protected speech." MTD Order 16-17. Because environmental issues generally, and climate change debate in particular, are notoriously contentious topics, recipients of these publications would expect strong language from Greenpeace. Resolute complains that Greenpeace's statement that "each time Resolute logs in intact forests and woodland caribou habitat, it is further jeopardizing the species' chances of survival," *see* Suppl. App. Tab 8, is defamatory (even criminally fraudulent), but such statements indisputably signal nonactionable, protected opinion.

[12] *See also Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980); *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005); *Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union, Local 996*, 302 F.3d 998, 1006 (9th Cir. 2002); *Liedholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988).

The Amended Complaint has failed to cure the fatal flaws of the original Complaint and the defamation claims should be dismissed with prejudice.

2. Resolute Again Fails to Plead a Plausible Claim Under RICO

Almost a decade ago, this Court rejected a RICO plaintiff seeking to hold the Council on American-Islamic Relations liable under RICO for their advocacy work, stating:

> As an initial matter, plaintiff's RICO claim raises serious First Amendment concerns. Nearly all – and quite possibly all – of defendants' activities that trouble plaintiff and serve as the basis for defendants' alleged involvement in a RICO conspiracy are related to speech and thus may have First Amendment protection. Plaintiff alleges that defendants have engaged in the filing of lawsuits, the writing of letters, the organizing of boycotts, and the criticism of plaintiff himself on their website. . . . [T]he gravamen of plaintiff's dispute is with the ideas that defendants may or may not espouse. As plaintiff should no doubt be aware, this is fertile First Amendment territory . . . .

Savage v. Council on American-Islamic Relations, Inc., 2008 WL 2951281, at *10 (N.D. Cal. July 25, 2008).[13] As the Greenpeace Defendants have demonstrated at length in the previous section and in prior briefing, the Court's warning is just as appropriate here, where Resolute is attempting yet again to convert purported defamatory statements into a racketeering claim, on the basis of vague factual allegations that fail even to meet the heightened pleading standard under Rule 9(b). *See* MTD Order 18-19.

Similarly, the First Amendment right of association limits expansive claims like these. As the Supreme Court has stated, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley*, 454 U.S. 290 (1981); *see also*

[13] Judge Illston further noted, *id.* at *12, that Supreme Court precedent "demonstrates that defendants may use the First Amendment as a shield to defend against claims alleging antitrust and civil RICO violations, in addition to the usual cases involving state law claims for libel, defamation, false light, invasion of privacy, and the like," citing the concurrence in *National Organization for Women, Inc. v. Scheidler* which warned of "the danger presented by 'harassing RICO suits' and the importance of the First Amendment in preventing such harassment." 510 U.S. 249, 264 (1994) (Souter, J., concurring).

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-08 (1982). While this does not mean that collective behavior will never lead to civil liability, where parties have associated to advance a social or political agenda, courts must carefully review any attempt to impose liability. *Claiborne Hardware*, 458 U.S. at 920 "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").[14]

In this connection, it is important to recall that "RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff." *Oscar v. Univ. Students Co-operative Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992). The types of predicate acts that Resolute identifies – extortion, mail and wire fraud, money laundering – should be grounded in serious crimes, not the open publication of articles or letters advocating against a company's environmental practices, which anyone can read and make their own decisions about, and which Resolute is free to rejoin in like manner (as it frequently does, having written extensively about this lawsuit on its website and elsewhere). Again, a cause of action that nominally fits the alleged facts Resolute proffers is available here: Defamation. But defamation is not a predicate criminal act for RICO. Given the First Amendment concerns surrounding speech, courts have developed significant protections around defamation claims, and so Resolute attempts to evade those protections by casting its claims under RICO. By seeking to expand that statute to cover well-established environmental groups like Greenpeace that have pursued – for many years – the very same type of advocacy against companies they believe are poor stewards of the environment, Resolute attempts to expand the reach of RICO in order to make it easier for large companies to stop such advocacy in its tracks by the threat of devastating lawsuits. Indeed, if Resolute's view here were to prevail, any "cause" that rallied people and advocacy groups together, including political issues, civil rights or immigration, could result in a RICO claim. But RICO was never intended to squelch this type of speech, or this kind of association, in the name of big business.

[14] *See also Citizens Against Rent Control*, 454 U.S. at 296 ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them.").

a. The Court's Prior Dismissal of the RICO Claims

On Defendants' prior motions, this Court held that Resolute's RICO claims fell "far short" of the applicable pleading requirements under Rule 9(b), which required pleading with specificity because all of Resolute's RICO claims sounded in fraud. MTD Order 18-19. The Court noted that the Complaint never identified the "misconduct" or "specific content" constituting alleged fraud, including the claim that Greenpeace processed millions of dollars in fraudulently induced donations, which was made "without describing a single donor, donation date or amount, nor how the donation was fraudulently induced." *Id.* at 19. The Court also found that Resolute did not demonstrate proximate cause on its RICO claims because it did not explain how it was the victim of the alleged fundraising scheme, where the only persons who could have been defrauded were the donors. *Id.* at 20. Finally, the Court held that Greenpeace's communications to Resolute's customers did not amount to extortion under the Hobbs Act, because the Defendants did not obtain property from Resolute itself, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. *Id.* at 21.

b. The Alleged Predicate Acts

As in its original complaint, in its new pleading Resolute again identifies mail and wire fraud, and Hobbs Act extortion, as the chief alleged predicate acts. The difference between mail/wire fraud, on the one hand, and extortion, on the other, is that the former is based on deception and trickery while the latter requires threats; however, both crimes typically require targeting of property of the victim[15] – an element missing here. In this case, Resolute identifies a multitude of types of "property" allegedly targeted by Defendants: Donations from contributors, endorsements from Resolute customers, the customers themselves, confidential information and trade secrets, and even tree harvesting rights. Yet for the most part the victims it identifies are not itself, and rather than identifying a cognizable harm that it suffered flowing directly from a

[15] While extortion ***always*** requires the acquisition of property, mail and wire fraud in may include, for instance, schemes that deprive another party of the "honest services" of a public official. *See Skilling v. United States*, 561 U.S. 358, 400-01 (2010) (describing development of "intangible rights" doctrine). Mail and wire fraud can also involve fraud intended to deprive another of property, whether or not it is obtainable by the party committing the fraud. *United States v. Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), *abrogated on other grounds by Skilling*, 561 U.S. 358 (2010).

criminal act targeting ones of these categories of property, at its core what Resolute continues to plead here is reputational damage from negative statements about it. This harm is redressable, if at all, under its defamation claim (which cannot be the requisite predicate act for RICO). See ECF No. 62, Mot. Dismiss 30-31.

In addition to mail/wire fraud and extortion, discussed below, Plaintiff identifies the following alleged predicate acts in the Amended Complaint: Computer fraud in violation of 18 U.S.C. § 1030(a)(5); money laundering in violation of 18 U.S.C. § 1957; and theft of trade secrets in violation of 18 U.S.C. § 1832. Am. Compl. ¶¶ 400, 440, 447. As to computer fraud, every one of these factual allegations is based on rank speculation as to what parties participated in the supposed attacks on Resolute's computers or those of its customers. Am. Compl. ¶¶ 424-428. Resolute simply attributes those actions to the alleged "Enterprise" and makes no further effort to provide a factual basis for including these spurious allegations in the Amended Complaint. Plaintiff's allegations regarding alleged theft of "proprietary information" also are primarily based on actions of conveniently unidentified perpetrators. Am. Compl. ¶¶ 128, 228-230. The one allegation about purported trade secret theft actually said to involve Greenpeace relates to a letter allegedly sent to Resolute customers, which Resolute says, in conclusory fashion, was an attempt to "gain access to customers' proprietary supply-chain data." Am. Compl. ¶ 128. But Resolute does not allege that (a) the type of information Greenpeace offered to help customers examine actually was proprietary; (b) the proprietary information belonged to Resolute; or (c) Greenpeace actually obtained any proprietary information at all, from anyone, much less unlawfully. Regardless, Resolute has no standing to pursue a claim for information belonging to its customers, nor could it have suffered any injury from the alleged theft.[16]

[16] Resolute's allegations regarding purported money laundering fair no better than in the original complaint, as they consist of a single paragraph that says, without any factual support, "the Enterprise knowingly engaged in monetary transactions involving illicit proceeds derived from the illegal campaign against Resolute." Am. Compl. ¶ 429. That is, Resolute asks the Court to ***assume*** the following causal chain: (1) Defendants made false statements to donors; (2) those statements constituted fraud; (3) the fraud caused donors to donate money (even though as noted Resolute has not pled any specifics around that allegation); (4) all money collected by Defendants while they were advocating against Resolute was thus illicit; and (5) as a result, any transactions involving those funds constituted money laundering even while also pursuing other campaigns. Notably, Plaintiff ***fails*** to plead that the alleged predicate act of money laundering proximately caused Resolute itself any injury, which is fatal to this claim. *See Oki*

i. Resolute Again Fails to Plausibly Allege Mail and Wire Fraud

To state a claim under the mail and wire fraud statutes, a plaintiff must plead and show that a defendant used the mails or interstate wires to further a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. The Supreme Court has held that "the words 'to defraud' commonly refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally v. United States*, 483 U.S. 350, 358 (1987), *superseded by statute on other grounds* by *Skilling*, 561 U.S. 358 (2010) (citation and internal quotation marks omitted); *see also United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989). As the Greenpeace Defendants have explained, mere (alleged) false statements, alone, cannot constitute fraud – the further element of attempting to deprive one of property by trick must be pled. ECF No. 62, Mot. Dismiss 31-32. Specific intent to deceive also is a required element.[17] *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F. 2d 397, 404 (9th Cir. 1991).

In its Amended Complaint, Resolute identifies the following predicate acts under 18 U.S.C. §§ 1341 and 1343: the "use of mails and wires in a scheme to defraud Resolute of its confidential business information and business" and the "use of mails and wires in a scheme to defraud donors by targeting and harming Resolute . . . ." Am. Compl. ¶ 400. With respect to the first alleged category, the only factual allegations Resolute makes regarding any alleged fraudulent procurement of "confidential business information" are, as noted earlier, wholly bare

Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 774 (9th Cir. 2002); *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 167 (D.D.C. 2013), *aff'd*, 796 F.3d 1 (D.C. Cir. 2015). Also, as the Greenpeace Defendants have explained previously, statements made for the purpose of soliciting donations are protected by the First Amendment. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.").

[17] Since Plaintiff has not plausibly pled actual malice for all of the reasons set forth in Section A *supra*, neither can it show a specific intent to defraud based on those same statements.

ones that do not identify individuals or organizations involved, and ***none*** of these allegations describe any attempt to obtain such information from Resolute itself.[18]

With respect to the second category of alleged mail and wire fraud – the alleged "scheme to defraud donors by targeting and harming Resolute" – despite the Court's prior admonition that Resolute failed to describe "a single donor, donation date or amount, nor how the donation was fraudulently induced," MTD Order 19, the Amended Complaint again just alleges generally that the Greenpeace Defendants fraudulently induced "millions of dollars" from "regular working class people" (¶ 18), "individual donors and foundations" (¶ 43), and "the public at-large" (¶ 439), and that public requests for donations were made in some of Defendants' publications that Resolute says contained false statements. Even assuming any false statements by the Greenpeace Defendants, those statements would only be ***fraudulent*** if Plaintiff could show they were used to deprive someone of property through trickery, but instead Plaintiff reverts to vague pronouncements or conclusory statements rather than identifying with specificity any "misconduct" or "specific content" in those statements constituting actionable fraud.[19] To the contrary, even assuming any tangential harm to Resolute, it would flow from the statements themselves, and would thus constitute at most reputational damage; in other words, if any such harm is remediable at all, it would fall under Resolute's defamation claim. Resolute also has not plausibly pled specific intent to harm donors. *See United States v. Takhalov*, 827 F.3d 1307,

[18] Even if the Amended Complaint did plead any attempt to obtain information about Resolute's customers from Resolute, the fact that Resolute was one of the largest manufacturers of newsprint and thus had major newspapers and book publishers as its clients hardly constitutes "confidential business information" or require an elaborate scheme such as Resolute imagines.

[19] *See, e.g.*, Am. Compl. ¶ 18 (alleging that campaign "fraudulently induced many millions of dollars in donations from regular working class people, who have been duped about Greenpeace and Resolute, and, most important, duped into believing their donations were preventing forest loss, mitigating climate change, saving caribou, and helping indigenous peoples," but providing no details of how specific statements were used to generate specific donations); ¶ 54 (alleging that "at the heart of this fraudulent scheme are fundamental lies as to what Greenpeace is and does" and "the manner in which donation dollars are used," again without providing any specifics). Just as importantly, despite Resolute's efforts to blur the issue, any alleged fraud associated with fundraising would have been committed on donors, not Resolute, and no harm to Resolute would flow from the donors' purported loss of property (*see also infra* at 27-29). This wholly distinguishes the instant case from cases that Resolute has cited previously, including *Feld Entm't Inc. v. ASPCA*, 873 F. Supp. 2d 288, 318 (D.D.C. 2012) and *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008). In those cases, the fraud was perpetuated on the plaintiff, the direct victim of the fraud.

1313 (11th Cir. 2016) ("[A] schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick.")

Finally, Resolute continues to allege that statements to Resolute's customers were violations of the mail and wire fraud acts. Am. Compl. ¶¶ 228-273, 401-411. However, Resolute again fails to allege how such statements either (a) constituted a scheme by Greenpeace to defraud customers in order to obtain money or property from them; or (b) constituted a scheme by Greenpeace to defraud Resolute itself in order to obtain its customers (or anything else). *See* ECF No. 62, Mot. Dismiss 33. Resolute cannot make this showing because none of those things occurred; rather, Greenpeace advocated to Resolute's customers in order to convince those customers to make changes in their own policies (some did, some did not). And there are simply no plausible fact allegations that Greenpeace even ***attempted*** to defraud Resolute. Given these flaws in its arguments, Resolute now appears to claim that Defendants made misrepresentations to Resolute's customers (not attempt to obtain property from them), in order to harm Resolute (not to obtain property from it), in order for Greenpeace to then obtain property from donors in the form of increased donations. *See* Am. Compl. ¶¶ 412-419. As discussed *infra* at 29-32, this remote, multi-pronged chain does not plausibly state proximate cause, but moreover it still does not set forth a claim that the Greenpeace Defendants defrauded ***anyone*** to obtain property ***from that party***, the very problem this Court identified in the original pleading.[20]

The contortions required for Resolute to even present an argument here demonstrate that at their base all of these alleged activities all boil down to the creation or dissemination of advocacy, and thus again at best state a claim for defamation, not fraud (a defamation claim that fails for the reasons stated *supra*).

[20] Previously, Resolute has argued that so long as it shows an alleged misrepresentation directed towards a party, it need not show that the purpose was to obtain that party's property, but rather it can instead show an intent to harm that party. ECF No. 75, Resolute Opp. Mem. 58-59. Yet even assuming fraud directed towards Resolute's customers, there was no alleged attempt to harm those customers; Plaintiff claims only that Greenpeace intended to harm Resolute itself. Am. Compl. ¶¶ 412-419. This confuses proximate cause with the elements of mail and wire fraud as predicate acts.

ii. **Resolute Again Fails to Plausibly Allege Extortion**

In its Amended Complaint, Resolute makes little effort to bolster its claim of extortion under the Hobbs Act, which it summarizes as follows:

> Beginning in April 2013, the Enterprise, through defendant Paglia of ForestEthics used fear and threats of a "coordinated" "brand damaging campaign" and "lawsuits directed at all of Resolute tenures based on endangered species legislation" to attempt to coerce Resolute to forego harvesting rights in large tracts of land and endorse the Enterprise's position and efforts, which provided a substantial benefit to the Enterprise in the form of enhanced fundraising potential.
>
> As alleged herein, the Enterprise also took direct action against Resolute's customers whereby the Enterprise issued extortive threats demanding that such customers terminate their relationships with Resolute and endorse the Enterprise's position and efforts, which provided a substantial benefit to the Enterprise in the form of enhanced fundraising potential.

Am. Compl. ¶¶ 421-22; *see also* ¶¶ 131-34.

Hobbs Act extortion requires a demand for property that is transferrable from the party being extorted to the party doing the extorting, under the threat of force, violence or fear. ECF No. 62, Mot. Dismiss 33-34; *Sekhar v. United States*, 133 S. Ct. 2720, 2725 (2013) (coercion or interference not sufficient to state a claim); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404 (2003) (obtaining property means "not only the deprivation but also the acquisition of property."). Extortion is "a 'larceny-type offense,' which 'does not occur when a victim is merely forced to part with property.'" *United States v. McFall*, 558 F.3d 951, 956 (9th Cir. 2009) (citing *United States v. Panaro*, 266 F.3d 939, 943 (9th Cir. 2001)). While the Hobbs Act may be violated by acquisition of property by the use of economic fear, "[c]ourts must . . . differentiate between legitimate use of economic fear—hard bargaining—and wrongful use of such fear—extortion." *United Bhd. of Carpenters & Joiners v. Bldg. & Constr. Trades Dep't*, 770 F.3d 834, 838 (9th Cir. 2014). Speech that merely coerces or embarrasses others into

boycotting a business not only does not constitute extortion, it is protected by the First Amendment. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Claiborne Hardware*, 458 U.S. at 910; *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

On their face, the above allegations do not plausibly plead that Defendants – and especially not the Greenpeace Defendants – obtained property from Resolute itself by the wrongful use of actual or threatened force, violence, or fear, or under color of official right. Even if the Greenpeace Defendants could be held liable for the alleged statements made by another party, which they cannot, Defendants could not have "obtained" any alleged harvesting rights that Resolute was purportedly asked to forego. Nor can "enhanced fundraising potential" on the part of environmental groups constitute property – much less property obtained from Resolute, which does not engage in charitable fundraising.

Further, the purported "extortion" of Resolute's customers did not constitute a demand for the transfer of anything of value to the Greenpeace Defendants, as this Court already held:

> [E]ven if Greenpeace sought to harm Resolute through Resolute's customers, it did not seek to obtain the business assets it sought to deprive Resolute of. Any alleged property transfer induced by fraud, coercion, or threats, moved between Greenpeace and its donors, or between Resolute and its customers. There was no alleged property transfer between Greenpeace and Resolute.

MTD Order 21. Just as in the original Complaint, the only "threats" identified here were statements to Resolute customers that they would be publicly exposed as . . . Resolute customers. This would constitute nothing more than reputational damage (although this reputational damage would result from an association with Resolute), and thus at most would be a claim for defamation, not extortion, and would be subject to First Amendment protection. As the Supreme Court has said, "[c]onduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis." *Scheidler*, 510 U.S. at 264 (Souter, J., concurring). That is precisely how it should and will "turn out" in this case.

Finally, Resolute suggests – but only in the vaguest terms – that Greenpeace obtained "endorsements" of its position from Resolute customers through extortion. *See* Am. Compl. ¶¶ 4, 15, 41, 55, 235, 253. Nowhere in the case law addressing the Hobbs Act is there even a suggestion that securing a testimonial of this type might be sufficient to show extortion. Indeed, the only remotely specific allegation in this regard concerns the open letter sent in August 2017 by the CEO of French book publisher Hachette to Resolute's CEO, which plainly does not suggest an endorsement obtained by force or fear – rather it is an endorsement of free speech.

c. Proximate Cause

Perhaps most revealingly, Resolute is unable to present any new facts, or elaboration of facts as previously pled, that in any way alter the Court's finding that Resolute has not plausibly pled proximate cause, which alone is fatal to Plaintiff's RICO claims. As the Court noted, for the purposes of standing "a plaintiff must allege that the RICO violation proximately caused injury to its business or property," and courts must examine several factors to determine whether such as showing has been made. ***Resolute falls short on each factor***.

The first factor is whether there are more direct victims, and as the Court noted "Resolute does not explain how it is the victim of [the] fundraising scheme, given that the only persons who could have been defrauded were the donors who gave the money." MTD Order 20. Nowhere in the Amended Complaint does Resolute provide any further or different explanation how it was the victim of Defendants' alleged scheme to defraud donors; the only new paragraph addressing proximate cause in the context of fundraising says:

> Defendant's scheme to defraud donors was the but-for, direct, and proximate cause of injury to Resolute's business, property, and reputation. These predicate acts were intended to and did mislead donors about the Plaintiffs and the putative impact of their harvesting on the environment in order to fraudulently induce donors to donate to Greenpeace's campaign against Resolute.

Am. Compl. ¶ 418. This simply restates the same proximate cause argument that the Court already expressly rejected, and should be rejected again for the same reasons.

In an effort to avoid the same result as before, Resolute now additionally alleges:

> As a direct result of the misinformation campaign, Resolute was injured in its business, property, and reputation including in the form of lost business and other interference with its contractual and prospective business relationships, including accommodations from Resolute such as alternative sourcing from Resolute's other non-Canadian mills, FSC certifications, or exit clauses. Moreover, countless other customers demanded information from Resolute in direct response to the Defendant's false allegations, referencing specific false statements by Defendants. As a result, Resolute was forced to divert enormous time, effort, resources, and funds to rebutting these false allegations.

Am. Compl. ¶ 419; *see also* ¶¶ 409, 423. Once again there is a disconnect between the alleged predicate acts by the Greenpeace Defendants and any supposed direct harm to Resolute. Resolute's muddled assertion that "[t]he Enterprise's scheme to defraud Resolute of its customers" caused its injury is particularly revealing, because it is the very fact that Resolute does ***not*** plausibly allege that the Greenpeace Defendants defrauded Resolute, as discussed above, that defeats its claim.[21] What is clear is that any alleged acts – and thus any alleged injury – would have been directed towards third parties, not Resolute.

The second factor in the proximate cause analysis is whether determination of the amount of damages will be difficult. Just as before, the damage theories advanced by Resolute are convoluted and untenable. For instance, it would be not just difficult but impossible for the Court to determine the quantum of damages to Resolute caused by the defrauding of Greenpeace donors, since there is literally no causal link between the two. With respect to lost customers, it is notable that of all of the customers mentioned in the Amended Complaint, Resolute can only point to four that it says terminated their relationships with it. Am. Compl. ¶ 409. The majority of its customers instead asked for "accommodations from Resolute such as alternative sourcing from Resolute's other non-Canadian mills" or "demanded information from Resolute in direct

[21] The suggestion that Resolute was injured "in its business, property and reputation" by the "misinformation campaign" is yet another concession that the harm claimed here is reputational injury.

response to the Defendant's false allegations,"[22] which Resolute also now tries to characterize as harm to its business. Am. Compl. ¶¶ 410-11. These sorts of tangential, ill-defined, non-actionable injuries clearly would be difficult to quantify.

With respect to the four purported lost customers, the Amended Complaint provides no answer to the Court's prior holding that there are "numerous reasons why a customer might cease or interrupt its relationship with Resolute," making calculation of damages difficult. MTD Order 20. For instance, as described above, one of the reasons Hachette gave for writing a critical letter to Resolute's CEO was that it disagreed with Resolute's choice to pursue RICO and defamation claims against Greenpeace, and there can be no allegation that Greenpeace misled or defrauded Resolute's customers about the existence of this very lawsuit. Hachette also cited Resolute's loss of certification from the FSC, a readily ascertainable public fact. *See* Koonce Decl., Ex. 4. Similarly, the fact that Kimberly-Clark terminated its relationship "[d]ue to Resolute's continued dispute with Greenpeace" is not an indication that the termination was the direct result of any fraudulent act. Indeed, if a few customers left Resolute because it was engaged in a public clash with Defendants over its environmental practices – even if that customer was concerned about public backlash from being associated with the company – that was likely an indication of a general concern over how the market would perceive the merits of that dispute, not the result of fraud. Moreover, as previously discussed, the First Amendment protects "hard bargaining" and the application of commercial pressure, and here Resolute had every opportunity to – and did – try to rebut any public statements made about it to customers or consumers.

The final factor is whether "complicated rules apportioning damages" must be adopted "to obviate the risk of multiple recoveries." MTD Order 20 (citing *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168-69 (9th Cir. 2002)). The Court held that "because of the indirect and convoluted path that might connect Greenpeace's actions to Resolute's harm, if any, the Court would be required adopt "complicated rules apportioning damages." *Mendoza*, 301 F.3d at

[22] Of course, if customers sought further information as a result of Greenpeace's advocacy, this is the type of activity fostered by First Amendment protections that ensures a vital open marketplace of ideas in which the differing positions of Resolute and the environmental groups can (and should) be debated.

1168-69. The path from those actions to Resolute's purported harm remains precisely the same in the Amended Complaint. Indeed, the risk of double recovery given Resolute's ongoing suit against Greenpeace Canada arising out of the same statements, is all too real.

d. Additional Reasons for Dismissing Resolute's RICO Claims

A RICO plaintiff must plead: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity ("predicate acts") (5) causing injury to the plaintiff's "business or property." 18 U.S.C. §§ 1964(c), 1962(c); *see Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996). Absent in Resolute's Amended Complaint are factual allegations regarding criminal intent, ongoing connections between parties, or any organization or framework that would tie the alleged "Enterprise members" together in the commission of criminal acts. At most, Resolute simply identifies the longstanding connections between Greenpeace's different national and international entities, and parallel conduct that occurs when like-minded advocacy groups rally around the same issue or cause – a classic right of association protected by the First Amendment. *See supra* at 20-21; ECF No. 62, Mot. Dismiss 14.

The original goal of RICO was "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce," S. Rep. No. 91-617, at 76 (1969), but it has been held to protect against not just the corruption of legitimate entities, but also the operation of illegitimate ones. *United States v. Turkette*, 452 U.S. 576 (1981). Here, although sometimes suggesting without support that the various Greenpeace entities have been "infiltrated" by bad actors, *see* Am. Compl. ¶ 193, Plaintiff's chief argument is that the different Greenpeace entities, numerous employees, and several other environmental groups formed an illegitimate enterprise, *see id.* ¶¶ 41-49. As such, Resolute appears to be claiming the existence of an "association-in-fact" enterprise, which requires a plaintiff to plausibly plead "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Boyle v. United States*, 556 U.S. 938, 944-45 (2009) (citation omitted). Thus an association-in-fact must have the following attributes: (1) a common purpose of engaging in a course of conduct, (2) relationships among those associated with the enterprise, and (3) sufficient longevity to permit the associates to pursue the purpose. *Id.* at 946.

Plaintiff has failed to plausibly allege any of these elements, and in particular fails to plausibly identify a common racketeering purpose. In the Amended Complaint, Resolute says that "[t]he common purpose of the Enterprise was to target Resolute with a disinformation campaign that could be used to fraudulently induce millions of dollars in donations from individual donors and foundations." Am. Compl. ¶ 41. This is pure speculation. Resolute provides no factual basis for the existence of any common purpose other than the one apparent on the face of the advocacy: protecting the Boreal forest. Nowhere in the Amended Complaint does it allege that the "Enterprise members" communicated about, or agreed upon, any supposed illicit purpose, or organized themselves with such a purpose in mind. Even where advocates organize themselves around a cause, and coordinate some of their activities, such behavior cannot be the subject of RICO claims without a criminal purpose, otherwise the right of association would be meaningless.

Resolute also fails to plausibly plead the necessary "relationships" between the various "Enterprise members" to carry a claim of an association-in-fact. For the most part, it relies on the pre-existing organizational relationships between the independent Greenpeace entities and their employees, and the fact that Stand and Canopy also published articles and other public statements about Resolute. None of these alleged facts suggest an "ongoing organization" with members functioning as a "continuing unit," as opposed to independent activities or the activities of paid employees, much less one functioning for an illicit purpose.

The only new factual allegations that Resolute presents for its RICO claims in the Amended Complaint are those about the purported "operational memorandum" which Resolute claims shows that the "enterprise members" conspired to commit criminal acts against Resolute. Am. Compl. ¶¶ 76-88. However, Resolute has not attached this document to its pleading, or identified it with any specificity, including by date or author.[23] There are no plausible factual allegations that it was shared among the Defendants or served to memorialize any agreement between them. In any event, nowhere in the purported quotes does it describe an alleged

[23] It is hardly an "operational memorandum," as Resolute argues – for instance, it states that the ENGOs would continue to work to implement the CBFA but in fact Greenpeace withdrew from the CBFA.

"common purpose" of defrauding donors – it simply describes an effort to advocate aggressively against Resolute's environmental practices. While Resolute says that the "Enterprise collectively agreed no later than the second half of 2012 to specifically target Resolute with a campaign, the explicitly stated objective of which was to ruin Resolute's brand and business and that of any customer who did business with it," Am. Compl. ¶ 67, in fact even the quotes purportedly from the memorandum say nothing of the sort. The quotes instead appear to describe a belief that Resolute had failed to live up to the commitments in the CBFA – a view supported by the termination of Resolute's certificates – and possible advocacy that ENGOs could take to address this failure.

Resolute cannot rely on a single document, especially one not plausibly alleged to have been shared among the Defendants, as the entire basis for an alleged RICO enterprise. There is, furthermore, no description of any illegal activity to be undertaken by the alleged enterprise – for that matter, there is not even a suggestion that the ENGOs should publish ***knowing falsities*** about Resolute (even assuming such falsities could constitute mail or wire fraud, which they cannot, *see supra* at 24-26). Further, the memo does not set forth any organizational structure or indicate that the Defendants will engage in any ongoing coordinated activities. In short, for all of the attention Resolute gives this alleged memorandum, it simply does not provide a plausible basis for a RICO enterprise.

The Court should dismiss the RICO claims with prejudice.

3. RFP's State Law Claims Should Be Dismissed

Resolute includes several state law claims in addition to defamation in its Amended Complaint, including trade libel, tortious interference with prospective business relations and with contract, civil conspiracy and unfair business practices. All of these claims, at their base, rest on the same alleged false statements by Defendants, and thus are subject to the same First Amendment scrutiny and defenses – including the requirement of actual malice – as set forth above in connection with Plaintiffs' defamation claim, and fail for the same reasons. *See* MTD Order 10 (citing *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1081 (C.D. Cal. 1998) (First Amendment limitations applicable to trade libel); *Gardner v.*

Martino, 563 F.3d 981, 992 (9th Cir. 2009) (same, tortious interference); *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033 (1986) (same, unfair business practices). "The fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not solely to those labeled 'defamation' is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values. *Blatty*, 42 Cal. 3d at 1043 (citing *Reader's Digest*, 37 Cal. 3d at 265).

i. Tortious Interference

To plead interference, a plaintiff must plausibly assert "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's acts." *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152 n.6 (2004). A plaintiff also must allege that the defendant "engaged in an independently wrongful act in disrupting the relationship," in addition to the interference itself. *Id.* at 1152 (act is "independently wrongful" if "'unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard'" (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003) (citation omitted)).

Resolute claims that Defendants interfered with a laundry list of third parties, including potential customers, investors, distributors, and employees, as well as community leaders and government regulators. Am. Compl. ¶ 471. However, it makes no effort to identify which Defendant allegedly interfered with which prospective relationship, what that particular Defendant knew about the particular relationship, or how that Defendant actually disrupted the relationship. Instead, it alleges generally – and insufficiently – that "[e]ach of the Defendants knew of Plaintiffs' potential business relationships with these third parties." *Id.* ¶ 472. Finally, the "independently wrongful act" that Resolute identifies in support of its claim is none other than "the dissemination of false, misleading and defamatory statements concerning Plaintiffs'

business," *id.* ¶ 473, confirming that the interference claim merely restates Plaintiff's defamation claim and should be dismissed for the same reasons.

ii. Trade Libel

Resolute also brings a claim for trade libel under California law. Trade libel, which is more akin to unfair competition than defamation, involves "an intentional disparagement of the quality of property, which results in pecuniary damage...." *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346 (9th Cir. 1988) (citing *Erlich v. Etner*, 224 Cal. App. 2d 69, 73 (1964)). The elements of trade libel are: (1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages. *Id.* While defamation actions are "designed to protect the reputation of the plaintiff," a disparagement claim "is based on pecuniary damages and lies only where such damage has been suffered." *Films of Distinction*. 12 F. Supp. 2d at 1081 (citations and internal quotation marks omitted). All of these elements must be pled with specificity. *First Advantage Background Servs. v. Private Eyes*, 569 F. Supp. 2d 929, 937 (N.D. Cal. 2008).

Resolute generally identifies several categories of statements it says constitute trade libel, including that Resolute engaged in destructive and unsustainable logging activities; harvested in First Nations territories without consent; was responsible for destruction of vast areas of the Boreal forest as well as woodland caribou habitat; violated Canadian forestry regulations and FSC standards; and has had FSC certificates suspended because of serious deficiencies in its logging operations. Am. Compl. ¶ 464. None state a claim. First, even if Plaintiff had particularized which statements it intended to reference, which it does not, these types of statements concern Resolute's own reputation, and are not disparaging of any specific good or service offered by Resolute – which is hardly surprising, as these categories of statements are precisely the same as the statements that Resolute claims defamed it, under its defamation cause of action. Second, Resolute has not adequately pled special damages. In *Background Services*, this Court held that the plaintiff failed to plead the requisite special damages because of the lack of specificity in its claims regarding loss of business from customers:

> Private Eyes merely alleges that the libelous statements "harmed PEI's business relationship with CCE." It does not allege the amount of business it

> had from CCE prior to First Advantage allegedly making these statements, how much it had after, or the value of the business. Private Eyes alleges a total loss of "$4-5 million" on the intentional interference claim as a whole, including the two preempted acts, but never provides specific damages for the claim based on trade libel. This is the same figure that Private Eyes alleges as total damages for all of its claims. As such, it is impossible to determine what, if any, damage to its relationship with CCE Private Eyes claims to have suffered just as a result of the libelous statements.

569 F. Supp. 2d at 938 (internal citations omitted). Here, Resolute only alleges that ***Greenpeace*** estimated in a press release that "reductions and cancellations" by three different customers might total a combined C$100 million, but of course in addition to not being particularized as to customer, this alleged "loss" is the same loss alleged under Resolute's RICO claims, its interference claims, its defamation claims, and its conspiracy claims, and thus cannot constitute special damages.

iii. Unfair Practices Act and Civil Conspiracy

To state a claim under the Unfair Practices Act, Resolute must plausibly plead that the Greenpeace Defendants "engaged in a business practice that was unlawful or unfair," and to state a claim for civil conspiracy, Resolute "similarly" must plead that the Greenpeace Defendants "have committed an underlying tort." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 992 (9th Cir. 2001) (citing Cal. Bus. & Prof. Code §§ 17200 *et seq.* (West 2000), and *Klein v. Earth Elements, Inc.*, 59 Cal. App. 4th 965, 69 Cal. Rptr. 2d 623, 626 (1997) (unfair practices); *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 869 P.2d 454, 457 (1994) (conspiracy)). In support of both causes of action, Resolute alleges that the underlying unfair practice or tort was the dissemination of false and misleading statements. Am. Compl. ¶¶ 488, 493. For all of the reasons set forth previously with respect to Plaintiff's defamation, RICO, interference and trade libel claims, Resolute has failed to plausibly plead the underlying unlawful acts or torts – whether framed as defamation, fraud, extortion or otherwise – necessary to sustain these additional causes of action. Also, just as Resolute cannot show a common racketeering purpose

uniting the alleged "Enterprise members" in a common design, it cannot show the necessary "unlawful objective" or "unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement," to demonstrate a civil conspiracy. At bottom, Greenpeace is an environmental advocacy non-profit, not a competing timber company engaging in unfair business practices to steal away Resolute's customers. *See Sub Corp. v. Best Buy Co.*, 365 F. App'x 767, 768 (9th Cir. 2010) ("The UPA does not define 'injurious effect,' but courts have interpreted it to mean 'injury to a competitor or destruction of competition.'") (quoting *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1049 n.61 (9th Cir. 1981).

B. RFP'S STATE LAW CLAIMS SHOULD BE STRICKEN PURSUANT TO THE ANTI-SLAPP STATUTE

As this Court noted, the Ninth Circuit evaluates anti-SLAPP motions in two steps: "First, the defendant 'must make a prima facie showing that the plaintiff's suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States or California Constitution.'" MTD Order 23-24 (citing *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1272-73 (9th Cir. 2013)). The Court has already held that Defendants' environmental advocacy meets the first prong.

Second, a plaintiff must establish a reasonable probability that it will prevail on its claims, meaning here that Resolute "must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited." MTD Order 24 (citing *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001)). This Court noted that the "no plausibility" showing required for a motion to dismiss is more demanding than the "no probability" showing required for a motion to strike. *Id.* Therefore, this Court held that Resolute did not meet its burden of showing a probability of success on its state claims as a matter of law because it had not met its burden under Rule 12(b)(6), including failing to allege facts which could show actual malice by Defendants. *Id.*

For all of the reasons set forth *supra*, Resolute still cannot show actual malice or otherwise meet its burden under Rule 12(b)(6) on its state claims, and this Court should again award attorney's fees and costs to the Greenpeace Defendants.

C. GPI SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

Defendant GPI is organized and located in the Netherlands. (Am. Compl. ¶ 31.) The Amended Complaint does not allege that GPI transacts business in California, or any other act by GPI in California. (Compl. ¶ 208.) As a foreign party, this Court's jurisdiction over GPI under RICO depends on application of the California long-arm statute, and Resolute has not come close to showing minimum contacts between GPI and California. *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1181-84 (C.D. Cal. 1998) (rejecting "national contacts" test), *aff'd*, 248 F.3d 915 (9th Cir. 2001). GPI must be dismissed. Since Resolute's reputation is centered in Canada, GPI's conduct was not aimed at California. *Compare with Electronic Frontier Found. v. Global Equity Mgm't (SA) Pty. Ltd.*, 2017 WL 5525835, at *8 (N.D. Cal. Nov. 17, 2017) (Tigar, J.).

CONCLUSION

In sum, Greenpeace requests that this Court grant its motions to dismiss and strike the complaint, dismiss Resolute's amended complaint with prejudice, and award Greenpeace its attorney's fees pursuant to Cal. Civ. Proc. Code § 415.16(c)(1).

This 29th day of January, 2018.

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP

By: /s/ *Lacy H. Koonce, III*
Lacy H. Koonce, III

Attorneys for Defendants
GREENPEACE INTERNATIONAL (aka "GREENPEACE STICHTING COUNCIL"), GREENPEACE, INC., DANIEL BRINDIS, AMY MOAS, MATTHEW DAGGETT and ROLF SKAR

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of January, 2018, I have served all parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

DAVIS WRIGHT TREMAINE LLP

By: /s/ *Lacy H. Koonce, III*
Lacy H. Koonce, III

Attorneys for Greenpeace Defendants GREENPEACE INTERNATIONAL (aka "GREENPEACE STICHTING COUNCIL"), GREENPEACE, INC., DANIEL BRINDIS, AMY MOAS, MATTHEW DAGGETT and ROLF SKAR

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

RESOLUTE FOREST PRODUCTS, INC., RESOLUTE FP US, INC., RESOLUTE FP AUGUSTA, LLC, FIBREK GENERAL PARTNERSHIP, FIBREK U.S., INC., FIBREK INTERNATIONAL INC., and RESOLUTE FP CANADA, INC.,

Plaintiffs,

v.

GREENPEACE INTERNATIONAL (aka "GREENPEACE STICHTING COUNCIL"). GREENPEACE, INC., GREENPEACE FUND, INC., FORESTETHICS, DANIEL BRINDIS, AMY MOAS, MATTHEW DAGGETT, ROLF SKAR, TODD PAGLIA, and JOHN AND JANE DOES 1 through 20, inclusive,

Defendant.

Case No. 17-cv-02824-JST

[PROPOSED] ORDER

Date: May 31, 2018
Time: 2:00 p.m.
Location: Courtroom 9, 19th Floor

The Court has considered the Motion to Dismiss Amended Complaint Pursuant to Rule 12(b)(6) and Motion to Strike Amended Complaint Pursuant to Cal. Civ. Proc. Code § 425.16 filed by Defendants Greenpeace International, Greenpeace, Inc., Daniel Brindis, Amy Moas, Matthew Daggett, and Rolf Skar (collectively, the "Greenpeace Defendants"). Upon consideration of the motion, any opposition thereto, and all pleadings on file, it is hereby

ORDERED that the Greenpeace Defendants' motion to dismiss each and every cause of action asserted against them is hereby GRANTED, without leave to amend, and it is

FURTHER ORDERED that the Greenpeace Defendants' motion to strike pursuant to California Code of Civil Procedure § 425.16 is GREANTED, without leave to amend, and it is

FURTHER ORDERED that the Amended Complaint hereby is DISMISSED WITH PREJUDICE, and it is

FURTHER ORDERED that the Greenpeace Defendants are entitled to recover from Plaintiffs their attorney's fees and costs associated with their motion to strike and the motion to strike previously brought and granted as to Plaintiff's original complaint.

IT IS SO ORDERED.

Dated: _____, 2018

By: _____

THE HONORABLE JON S. TIGAR
UNITED STATES DISTRICT JUDGE