IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROY COCKRUM, ET AL., *Plaintiffs,* v. DONALD J. TRUMP FOR PRESIDENT, INC., ET AL., *Defendants.*	Case No. 1:17-cv-1370-ESH

DEFENDANT ROGER STONE'S SPECIAL MOTION TO DISMISS AMENDED COMPLAINT UNDER THE D.C. ANTI-SLAPP ACT

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Defendant Roger Stone (Stone) respectfully moves that the Court dismiss Plaintiffs' claims in ECF No. 17 for public disclosure of private facts and intentional infliction of emotional distress in accordance with the District of Columbia Anti-SLAPP Act (D.C. Code § 16-5502(a)). In accordance with the Anti-SLAPP Act (D.C. Code § 16-5504(a)) and Federal Rule of Civil Procedure 54(d)(2), Stone reserves the right to seek the costs of litigation, including a reasonable attorney's fee, if the Court grants the motion.

Dated: October 25, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ROGER STONE'S SPECIAL MOTION TO DISMISS AMENDED COMPLAINT UNDER THE D.C. ANTI-SLAPP ACT

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INTRODUCTION

Plaintiffs claim that Roger Stone committed a tort by allegedly conspiring with others to communicate about them. They allege that Russian hackers stole emails from the Democratic National Committee, and that Stone later conspired with others to strategically publish those emails on WikiLeaks. Plaintiffs do not claim that Stone himself participated in the hack; rather, they claim that the mere dissemination of the information and commentary on the substance of the publications is tortious. Plaintiffs seek, in other words, to hold Stone liable for speech. Not for false speech, defamatory speech, or threatening speech, but for truthful speech, of matters already in the public domain, uttered in the course of a presidential campaign.

The District of Columbia has enacted a statute—the Anti-SLAPP Act (D.C. Code § 16-5502)—to protect defendants from just such lawsuits. Under that statute, a court must dismiss any claim arising out of speech related to issues of public interest, unless the plaintiff, at the outset of the case, produces the same evidence that he would need to survive summary judgment.

This case is nothing more than a group formed by attorneys after the 2016 election still smarting that their preferred candidate for president lost the election.[1] They went in search of plaintiffs in order use the judicial system as a means to launch their own private investigation. The group purporting to represent these hand-picked plaintiffs is a group with a political agenda. What the Plaintiffs have pled is exactly what the anti-SLAPP statute is designed to protect against -- a created narrative out of thin air and seek, by nothing more than unsubstantiated regurgitation of speculative news reports, to manufacture a conspiracy where there is none. While groups of like-minded individuals have every right to espouse their views under the protection of the law, they do not have the right to use the court system to accomplish their goals

[1] https://unitedtoprotectdemocracy.org/about/

in a way that is retaliatory. SLAPP suits masquerade as ordinary lawsuits, the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights; or to punish them for doing so.

The Act was enacted to mitigate the chilling effect of such lawsuits directed against free-speech and petitioning activities. It establishes a procedure, followed by federal courts as well as D.C. courts, for prompt review and disposal of state law claims against a person arising from an act, in furtherance of the person's right of petition or free speech under United States or District of Columbia law in connection with issues of serious public concern. Under the statute, a court must dismiss any claim arising out of speech related to issues of public interest, unless the plaintiff, at the outset of the case, produces the same evidence that he would need to survive summary judgment. Under the law, in order to survive the Defendant's special motion to dismiss, Plaintiffs have the burden of establishing a probability of success on their claims as explained below, plaintiffs cannot possibly do so.

The Plaintiffs have no independent knowledge about any allegation they put on paper and yet, they expect the Defendants to prove that they did not conspire. This is not the way our system of justice is designed to work. A Plaintiff must allege or show they suffered harm at the hands of a Defendant. The Plaintiffs in the instant case do not allege even once, that the Defendant had anything to do with acquiring the information they allege is now in the public domain. In fact, they do not even allege that the Defendants disseminated the information.

On all of the matters contained in this lawsuit Stone has been an open book. He has published each communication he had with a persona using the screen name, "Guccifer 2.0" and

he openly shared that he had a friend who talked to Julian Assange and that his friend subsequently related to Stone the subject matter of the discussion they had -- nothing more.

Plaintiffs have been affected by a storyline perpetuated by a constant barrage of media and politicians that do not want the truth to be known, they want their narrative to be true. This is a conclusion searching for evidence, not evidence leading to a conclusion. Each public pronouncement by Stone was preceded by the actual party in control of the allegedly hacked information announcing that they had the information, and they were going to release that information to the public. Stone participated in the after-the-fact public discourse on matters that were of great national importance. Stone did not at any time comment in any way on any matter released by third parties that was potentially private or personal to any of the Plaintiffs.

The institution of a suit against the Trump Campaign and Roger Stone is designated to do nothing more than make them think twice about their public participation in the future. Plaintiffs cannot sue anyone they want just because they do not like their expressed political views. As is apparent in this case, Plaintiffs are suing these Defendants because they have no way to possibly sue or hold accountable the actual people or entities that may have caused them harm. Our justice system demands more before someone is subjected to the highly intrusive and very expensive process that is litigation. Plaintiffs cannot posit a theory with no independent facts or knowledge and then try to prove it by obtaining the records of a defendant. The Plaintiffs must make a *prima facie* showing that Roger Stone had something to do with the harm they are alleging. They have not met this standard.

The Anti-SLAPP Act governs the resolution of D.C. law claims in federal court. Protect Democracy, the organization of networked lawyers, has stated their purpose is to conduct a private investigation and cannot wait for U.S. law enforcement and intelligence services to do

their job methodically and appropriately.[2] As Plaintiffs' claims for public disclosure of private facts and intentional infliction of emotional distress trigger the statute's protections, Plaintiffs have not even *attempted* to introduce affidavits or other evidence to satisfy the Act's evidentiary requirements. The Court should therefore dismiss these claims.[3]

FACTS

On July 22, 2016, days before the Democratic Convention met to nominate Hillary Clinton for President of the United States, WikiLeaks published a collection of thousands of work emails sent and received by officials at the Democratic National Committee ("DNC"). (Am. Compl. ¶¶ 16, 42.) As a result, the public learned important information about the presidential campaign and about the Democratic Party.

WikiLeaks, however, did not redact the emails, so the publication also included details that Plaintiffs describe as private. (Am. Compl. ¶¶ 43–50.) Plaintiffs Roy Cockrum and Eric Schoenberg, both Democratic Party donors, allege that the emails revealed their social security numbers, dates of birth, addresses, and other identifying information, which they say they sent to the DNC in order to get clearances to attend an event with then President Barack Obama. (Am. Compl. ¶¶ 45–50.) Plaintiff Scott Comer, formerly the DNC's Finance Chief of Staff and LGBT

[2] ". . . plaintiffs cannot wait for other law enforcement and intelligence investigations into coordination between Russia and Trump associates to run their course. . ." https://unitedtoprotectdemocracy.org/privacylawsuit/

[3] The issues presented in this Special Motion to Dismiss overlap with the issues in No. 1:17-cv-913-ESH, *Deripaska v. Associated Press*, in which this Court recently issued its opinion. (*Deripaska*, Memorandum Op. ECF No. 16). In that case, a Russian billionaire sued the Associated Press for allegedly defaming him in an article about Paul Manafort's alleged links with Russia. The Associated Press sought dismissal of the lawsuit under the D.C. Anti-SLAPP Act. The Court granted its Rule 12(b) motion but denied its Anti-SLAPP motion.

Finance Director, alleges that the emails included information "suggesting" (and allowing his grandparents to "deduce") that "he is gay." (Am. Compl. ¶¶ 5, 34, 51.)

Plaintiffs sued Donald J. Trump for President, Inc. ("the Campaign") and Roger Stone ("Stone") over the publication of the emails. They allege that "elements of Russian intelligence" (on their own, without involvement of Stone) hacked into the DNC's email systems "in July 2015" and "maintained that access" over the course of the next year. (Am. Compl. ¶ 86.) They say that, in "a series of secret meetings in the spring and summer of 2016," the Campaign and Stone conspired with "Russian actors" to publish those emails on WikiLeaks in order to harm Hillary Clinton's chances of winning the Presidency. (Am. Compl. C., ¶ 88.) They say that this conspiracy covered only the "release" of the emails, not their initial acquisition or transfer to WikiLeaks. (Am. Compl. ¶ 167.)

Plaintiffs raise claims under D.C.-law for public disclosure of private facts and intentional infliction of emotional distress. Defendant Roger Stone filed a motion to dismiss under Rule 12(b) contemporaneously with this special motion to dismiss the amended complaint.

LEGAL BACKGROUND

A strategic lawsuit against public participation (or "SLAPP") is a lawsuit "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Competitive Enterprises Institute v. Mann*, 150 A.3d 1213, 1231 (D.C. 2016); *Forras v. Rauf*, 39 F. Supp. 3d 45, 52 (D.D.C. 2014). SLAPP suits deter speech even if they are dismissed, because they punish individuals through onerous discovery and perhaps, trial.

The District of Columbia, like many States, has responded to this threat to public debate by enacting a statute under which the defendant may secure dismissal of a speech-related lawsuit before discovery. To claim the protection of the act, the defendant must first make a "prima facie

showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." § 16-5502(b). If the defendant does so, the court must dismiss the case with prejudice unless the plaintiff "demonstrates that the claim is likely to succeed on the merits. . . ." *Id.*

This District Court has ruled in *Deripaska v. Associated Press,*[4] that the D.C. Anti-SLAPP statute does not apply in diversity cases. Naturally, Mr. Stone understands the Court will likely rule consistently with *Deripaska,* yet makes the arguments below to preserve the issue in the event of appellate review.

Other District Court opinions have waivered on the applicability of the Anti-SLAPP statute since this Circuit's opinion in *Abbas v. Foreign Policy Group, LLC,* 783 F.3d 1328 (D.C. 2015).[5] The D.C. Court of Appeals has held that this likely-to-succeed standard "is substantively the same" as Federal Rule 56's standard for summary judgment. *Mann*, 150 A.3d at 1238 n.32. The plaintiff must come forward with "evidence" that "suffices to permit a jury" to find for him on each element of his claim. *Id.* The main difference between an anti-SLAPP motion and a summary judgment motion is that the former requires the plaintiff to produce the requisite evidence *before* discovery. *Id.*; *see* § 16-5502(c). Based upon Plaintiffs' far-out claims, with no nexus to Roger Stone but mere correlations to selected events, Plaintiffs will not likely meet their

[4] No. 1:17-cv-913-ESH

[5] *See, e.g., Forras v. Rauf*, 39 F. Supp. 3d 45, 51-52 (D.D.C. 2014) (applying statute); *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 9-11 (D.D.C. 2013) (same), *aff'd in part on other grounds*, 783 F.3d 1328 (D.C. Cir. 2015); *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 254 (D.D.C. 2013) (same); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 n.10 (D.D.C. 2012) (same); *Diwan v. EMP Glob. LLC*, 841 F. Supp. 2d 246, 247 n.1 (D.D.C. 2012) (same); *see also Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012) (finding statute to be substantive but not retroactive), *aff'd*, 720 F.3d 932 (D.C. Cir 2013); *but see 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 96 (D.D.C. 2012) (declining to apply statute in diversity).

evidentiary burden at the pleadings stage or at summary judgment. Indeed, Stone presented an expert's declaration to show at the outset that Plaintiffs' account of Russian hacking of DNC computer is too nondescript and thus proof of their allegations is an obstacle too high to clear. (Decl. Griffith, ECF No. 15-1). In addition, a defendant who prevails on the anti-SLAPP motion may recover "the costs of litigation, including reasonable attorney fees." § 16-5504(a).

ARGUMENT

The D.C. Anti-SLAPP Act applies in federal court. The Act requires dismissal of Plaintiffs' D.C.-law claims.

I. The District of Columbia Anti-SLAPP Act Applies in Federal Court.

From the 2011 enactment of the D.C. Anti-SLAPP Act through 2015, courts in this Circuit found the Anti-SLAPP Act to be generally applicable at least a half-dozen times in cases where jurisdiction arose out of diversity among the parties. *See Forras*, 39 F. Supp. 3d at 51-52; *Abbas*, 975 F. Supp. 2d at 9-11; *Boley*, 950 F. Supp. 2d at 254; *Farah*, 863 F. Supp. 2d at 36 n.10; *Sherrod*, 843 F. Supp. 2d at 84-86 & n.4; and *Diwan*, 841 F. Supp. 2d at 247 n.1. But the D.C. Circuit issued its opinion in *Abbas*, affirming the district court's dismissal of plaintiff's claim under Rule 12(b)(6), but reversing on the question of the application of Anti-SLAPP protections for defendants in federal courts. 783 F.3d at 1333-39.

Ever since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts hearing state-law claims have applied state substantive law and federal procedural law. The District of Columbia is not a state, but the same framework governs federal courts hearing claims under D.C. local law. *Burke v. Air Serv International, Inc.*, 685 F.3d 1102, 1107 n.4 (D.C. Cir. 2012). Federal courts apply a two-step test to determine whether a state or federal provision governs a given issue. *Shady Grove Orthopedic Associates v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010);

see Burke, 685 F.3d at 1107. First, regardless of whether the statute is substantive or procedural, it is preempted if it comes into "direct collision" with a valid Federal Rule. *Hanna v. Plumer*, 380 U.S. 460, 465 (2012). If there is no direct collision, the court proceeds to the second step to determine whether the state law is substantive or procedural. This issue turns on whether application of the state provision would advance the "twin aims" of *Erie*—namely, avoiding unfair discrimination in the administration of state law and discouraging forum-shopping. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996). If it would, the federal court must apply the state provision. *Id.* at 428.

A. **The Anti-SLAPP Act is consistent with the Federal Rules.**

A Federal Rule blocks application of a state law only if the two come into "direct collision." *Hanna*, 380 U.S. at 472. The Anti-SLAPP Act, as interpreted by the D.C. Court of Appeals, does not come into direct collision with any Federal Rule. A state provision and Federal Rule "directly collide" only where they "unavoidabl[y]" "clash" (*Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980)), "unmistakably conflic[t]" (*Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987)), or "flatly contradict each other" (*Shady Grove*, 559 U.S. at 405). Far from "flatly contradicting" the Federal Rules, the Anti-SLAPP Act replicates the standard for summary judgment established by Federal Rule of Civil Procedure 56. As the D.C. Court of Appeals put it, the anti-SLAPP and summary-judgment standards are "substantively the same." *Mann*, 150 A.3d at 1238 n.32. Two provisions cannot "unmistakably conflict" if they require application of the *same* substantive standard.

The Anti-SLAPP Act protects defendants more than Rule 56 does. The Act requires courts to decide motions before discovery; the Rule does not. The Act allows courts to award attorney fees; the Rule does not. But the *substantive standard* under the Act and the Rule are the

same, and the Act's different means of enforcing that standard do not conflict with any Federal Rule. *Burke*, 685 F.3d at 1108 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)). Nothing in the Rules *prohibits* disposing of a case before discovery; to the contrary, courts may grant dismissal, judgment on the pleadings, and (in some cases) even summary judgment before discovery. *See Dunning v. Quander*, 508 F.3d 8, 10 (D.C. Cir. 2007)). And nothing in the Rules *prohibits* courts from awarding fees; to the contrary, Rule 54(d)(2) states that entitlement to fees depends on "substantive law" rather than on the Rules of Procedure. The Act complements the Rules; it does not contradict them.

The Supreme Court's decision in *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541 (1949), reinforces this analysis, because it confirms that the Federal Rules usually do not preempt state provisions that grant defendants extra protection against meritless litigation. The Federal Rule in *Cohen* (then Rule 23, now Rule 23.1) established prerequisites for bringing shareholder derivative lawsuits; for example, the shareholder had to verify the complaint and identify previous attempts to use internal corporate procedures to resolve the problem. The state law in *Cohen* imposed an *additional* requirement intended to deter frivolous derivative lawsuits: Shareholders also had to post bond covering the corporation's costs and attorney fees. In an opinion by Justice Jackson, the Supreme Court held that the state law applied in federal court, because there was "n[o] conflict" between federal law and the supplemental safeguards provided by state law. *Id.* at 556.

The same reasoning applies here. As in *Cohen*, the Federal Rules establish certain minimum requirements for bringing lawsuits. As in *Cohen*, the state law creates a further safeguard in order to deter a category of abusive lawsuits (there abusive lawsuits against corporations, here abusive lawsuits against speakers). As in *Cohen*, federal courts may apply the

state law, since the state safeguard *reinforces* the federal provisions and does not *contradict* them. The Court should therefore hold that the D.C. Anti-SLAPP Act once against applies in diversity cases.

B. **Applying the Anti-SLAPP Act in federal court advances the twin aims of *Erie.***

The second step of the inquiry asks whether applying state law would advance the "twin aims of the *Erie* rule"—avoiding inequitable administration of state law and discouraging forum-shopping. *Gasperini*, 518 U.S. at 428. Applying the Anti-SLAPP Act in federal court would promote both of these objectives. *Erie*'s first aim is avoiding "discrimination" between litigants in state court and litigants in federal court. *Erie*, 304 U.S. at 74. Any such discrimination contradicts elementary principles of "equal protection," which call for "uniformity in the administration" of state law regardless of "whether enforcement [is] sought in the state or in the federal court." *Id.* at 74–75.

Applying the Anti-SLAPP Act in the District's local courts but not in its federal courts would produce precisely the kind of discrimination, incongruence, and disuniformity that *Erie* aims to avoid. If a speaker gets sued in the District's local courts, he could move to dismiss his case at once. But if a speaker gets sued in the District's federal courts—say, because he happens to be from a different State than the plaintiff, triggering diversity jurisdiction—he would have to endure months of pleading, discovery, and trial; a discrimination which citizens from other states were meant to be protected. *See Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010). The result is a two-tier marketplace of ideas, in which speakers receive more or less protection depending on whether they end up in federal or local court (which, in light of the requirements for federal diversity jurisdiction, may depend on the States in which they and their adversaries happen to

live or their adversaries' resources or ambitions). *Erie* directs courts to avoid this kind of disparity.

Erie's second aim is to prevent forum-shopping. *Hanna*, 380 U.S. at 467. To promote this aim, courts must avoid any divergence between federal and state practice that makes an "important … difference to the character or result of the litigation," or has an "important … effect upon the fortunes of one or both of the litigants." *Id.* at 468 n.9. Courts may, however, tolerate "trivial" discrepancies between federal and state practice such as variations in time limits for filing pleadings—because they are unlikely to prompt forum-shopping. *Id.* at 468.

Applying the Anti-SLAPP Act in local but not federal court would generate the very forum-shopping that *Erie* seeks to avoid. Far from having merely "trivial" consequences, the Anti-SLAPP Act makes an "important … difference" to the "character" of the litigation and the "fortunes" of the litigants—to the character of the litigation because it allows the court to cut it off sooner, and to the fortunes of the litigants because it spares defendants from the necessity of squandering their resources on pleading, discovery, and trial. Indeed, the Anti-SLAPP Act's fee-shifting provision will often deter the plaintiff from filing a fishing-expedition lawsuit in the first place. There is no doubt, therefore, that if the Anti-SLAPP Act were enforced in state court but not federal court, a "litigant interested in bringing meritless SLAP claims would have a significant incentive to shop for a federal forum." *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999). *Erie* instructs federal courts to avoid such an outcome.

This Court in *Deripaska*, recognized that the result of denying the application of the Anti-SLAPP Act to cases such as this "will likely promote the type of forum-shopping that *Erie* intended to avoid. . . ." (*Deripaska*, Memo. Op., ECF. No. 16 at 5). The harm, in this case,will

be inflicted on an individual, not the Associated Press or the Donald J. Trump for President, Inc., two large well-funded entities.

In sum, applying the Anti-SLAPP Act in federal court would advance *Erie*'s twin aims of *Erie*. This Court must therefore apply the Act to Plaintiffs' D.C.-law claims.

C. *Abbas* permits application of the Anti-SLAPP Act, as now authoritatively interpreted by the D.C. Court of Appeals, in federal court.

Plaintiffs perhaps will argue that the D.C. Circuit's decision in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015), forecloses application of the Anti-SLAPP Act in federal court. It does not, because it rests on an interpretation of the Anti-SLAPP Act that the D.C. Court of Appeals has since repudiated. In *Abbas*, a party invoked the D.C. Anti-SLAPP Act in federal court. In the absence of authoritative guidance from the D.C. Court of Appeals, the D.C. Circuit interpreted the Act's "likelihood of success standard" to be "different from and more difficult for plaintiffs to meet" than the dismissal and summary-judgment standards established by Rules 12 and 56. *Id.* at 1335. The D.C. Circuit stressed, in reaching this conclusion, that the "D.C. Court of Appeals" had "never interpreted the … likelihood of success standard to simply mirror" the summary-judgment standard. *Id.*

As interpreted in *Abbas*, the Act conflicted with the Federal Rules, since it imposed a more stringent substantive standard than Rules 12 and 56 for reviewing the sufficiency of a claim. Because the Rules "establish the exclusive criteria for testing the … sufficiency of a claim in federal court," a state provision could not replace those criteria with a "different … and more difficult" standard. *Id.* at 1334–35.

The D.C. Circuit continued, however, that "an interesting issue could arise if a State anti-SLAPP act did in fact exactly mirror" Rule 56. *Id.* at 1335 n.3. Would the Act still be preempted?

The court said that it "need not address" that "hypothetical" question, because, as it had explained, "the D.C. Anti-SLAPP Act's dismissal standard [did] not exactly mirror" Rule 56. *Id.*

Indeed, *Abbas* has nothing at all to say about the present case. The D.C. Circuit expressly stated that it "need not address" the "interesting" but "hypothetical" question of how *Erie* applies to a state law that "in fact exactly mirror[s]" Rule 56. 783 F.3d at 1335 n.3. This Court must therefore decide afresh—under *Erie*, not *Abbas*—whether the Anti-SLAPP Act, as the D.C. Court of Appeals has now interpreted it, applies in federal court. For the reasons discussed earlier, it does.

II. **The Anti-SLAPP Act Requires Dismissal of Plaintiffs' D.C.-Law Claims.**

To invoke the protections of the Anti-SLAPP Act, a defendant must make, in the special motion to dismiss, "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." § 16-5502(b). Once the defendant makes this showing, the court must dismiss the case unless the plaintiff comes forward with evidence that would suffice to survive summary-judgment. *Id.* This special motion to dismiss clearly makes the necessary prima facie showing. Plaintiffs, however, have yet to come forward with any evidence at all, let alone evidence that would suffice to survive summary judgment.

A. **Plaintiffs' claims arise from an act in furtherance of the right of advocacy on issues of public interest.**

The D.C. Anti-SLAPP Act applies to any claim that "arises from an act in furtherance of the right of advocacy on issues of public interest." § 16-6502(b). As relevant here, "act in furtherance …" includes (1) "any written or oral statement made … in a place open to the public or a public forum in connection with an issue of public interest" as well as (2) "any other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." § 16-5501(1).

Plaintiffs' D.C.-law tort claims arise from the publication of DNC emails on WikiLeaks "right before the Democratic National Convention." (Am. Compl. ¶ 165.) Defendants must therefore show that the publication satisfies one of the two parts of the definition set out above. It satisfies both.

To begin, the publication both (1) occurred "in a place open to the public or a public forum" and (2) involved "communicating views to members of the public." It occurred in a place open to the public or a public forum, because "websites" qualify as "places open to the public" and as "public forums." *Mann*, 150 A.3d at 1227. And it involved "communicating views to members of the public," since (in Plaintiffs' own words) the emails were "published to the entire world." (Am. Compl. ¶ 1.)

In addition to the dissemination of Plaintiffs' emails as part of the WikiLeaks tranche, Plaintiffs cite Roger Stone's public social media postings on Twitter in their complaint. All of these postings are political speech, commentary, or punditry.

> 171. In August and September 2016, Defendant Stone and Guccifer 2.0 engaged in an exchange of direct messages over Twitter.
>
> 172. On August 12, 2016, Guccifer 2.0 released documents obtained from the DCCC and tweeted: "@RogerJStoneJr thanks that u believe in the real #Guccifer2." Guccifer 2.0 subsequently tweeted "paying u back," in reply to a tweet from Defendant Stone.[6]
>
> 173. On August 18, 2016, Defendant Stone stated in a C-SPAN interview that he was in touch with Assange "through an intermediary."

[6] Roger Stone's posting to "Guccifer 2.0" would be contextually relevant, but Plaintiffs do not share Stone's comments or reasoning.

> 174. On August 21, 2016, Defendant Stone tweeted: "Trust me, it will soon the [sic] Podesta's time in the barrel. #CrookedHillary."
>
> 175. In mid-September, Stone said on a radio interview that he expected "Julian Assange and the Wikileaks people to drop a payload of new documents on a weekly basis fairly soon."
>
> 176. On October 1, 2016, Defendant Stone tweeted: "Wednesday @HillaryClinton is done."
>
> 177. Two days later, on October 3, 2016, Defendant Stone tweeted: "I have total confidence that @wikileaks and my hero Julian Assange will educate the American people soon # LockHerUp."
>
> 178. Then, on October 4, 2016, Defendant Stone tweeted: "Payload coming. #Lockthemup."

These are all remarks about the Presidential Election 2016. It is political speech in a public forum communicating views on those public issues. *See Mann*, 150 A.3d at 1227. This lawsuit is a SLAPP suit meant to deter that political speech. The Trump campaign in its special motion to dismiss refers to emails discussing political matters within the DNC. Reference to that political controversy demonstrates the applicability of the Anti-SLAPP statute as well for Roger Stone. In fact, the controversy within the Democratic National Committee was the subject of a lawsuit recently dismissed in the Southern District of Florida involving allegations the DNC was in cahoots with the Clinton campaign and sought to tip the scales in her favor in the Democratic primaries. *See Wilding v. DNC Services Corp.*, Case No. 16-61511-CIV-Zloch (ECF No. 62, S.D. FL Aug. 25, 2017) (filed with court at ECF No. 15-2). The publication of Stone's "tweets" and the DNC's emails has an obvious "connection" with issues "of public interest." The emails also revealed the nature of the Democratic Party's interactions with wealthy donors, information that should interest any citizen who wants to find out "whether elected officials are in the pocket of … moneyed interests." *Citizens United v. FEC*, 558 U.S. 310, 370 (2010). The emails likewise

showed the closeness of the party's ties to the media, "the great interpreters between the government and the people." (*Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

The amended complaint confirms all of these points. It states that the emails received coverage in papers ranging from "*The New York Times*" to "Comer's hometown newspaper." (Am. Compl. ¶¶ 51, 70.) The emails would not have received such widespread coverage if they had no connection with public affairs.

The Act turns on the character of the defendants' speech as a whole, not on the character of each individual statement that the defendant utters. It applies if the "act" from which the claim arises furthers the right of public advocacy. § 16-5502(a). In this case, the "act" from which Plaintiffs' claims arise is the publication of a large collection of emails. The critical question, then, is whether that single act of publication has the requisite connection with an issue of public interest (not whether each individual email does). It does, and the Act thus applies to Plaintiffs' claims.

The Act also turns on the primary purpose of the defendant's speech, not on its ancillary effects. To distinguish "issues of public interest" from issues of private interest, courts must consider whether the defendant's statements are "*directed primarily toward*" "commenting on or sharing information about a matter of public significance," or instead toward "protecting the speaker's commercial interests." § 16-5501(3) (emphasis added). WikiLeaks' publication of the DNC emails was plainly directed primarily toward sharing information about a matter of public significance—namely, information about the misdeeds of officials at the Democratic National Committee. (*See* Am. Compl. ¶ 165.) No allegation is made that the dissemination of Plaintiff Comer's emails were "directed primarily toward" exposing his sexual preference or Plaintiffs

Cockrum and Schoenberg's emails were to expose their financial information of Plaintiffs Cockrum and Schoenberg. Again, the Act applies to Plaintiffs' claims.

The Act's language is in all events so sweeping that it encompasses all of the emails published by WikiLeaks. The Act applies where the defendant engages in speech "*in connection with*" an issue of public interest. § 16-5501(1) (emphasis added). "Issue of public interest," in turn, includes any issue "*related to*" public affairs. § 16-5501(3). In connection with" and "related to" are broad phrases. Work emails sent by officials of a political party necessarily have a "connection" with issues that are "related to" public affairs, even if not every single email specifically discusses public affairs. That, once more, means that the Act applies to Plaintiffs' claims.

Any other interpretation would make a parody of the Act's protections. Many notable exercises of the right of free speech have involved the publication of massive collections of leaked documents—the New York Times' publication of the Pentagon Papers in 1971, WikiLeaks' publication of United States diplomatic cables in 2010, the International Committee of Investigative Journalists' publication of the Panama Papers in 2015, and so on. In each such case, the collections as a whole plainly concerned issues of profound public importance, even though some individual documents within the collection may well have discussed only private matters. Yet the publishers of these documents would lose the Anti-SLAPP Act's protection if courts were to scrutinize the document line by line to separate out the parts that relate to public affairs from the parts that do not. The D.C. Council could not have intended such a result when it enacted the Anti-SLAPP Act "to protect a particular value of a high order—the right to free speech guaranteed by the First Amendment." *Mann*, 150 A.3d at 1231. The Anti-SLAPP Act applies to Plaintiffs' claims.

B. **Plaintiffs have yet to produce any evidence at all, let alone enough evidence to allow a jury to rule for them.**

To overcome Stone's anti-SLAPP motion, Plaintiffs must produce evidence that would suffice to survive summary judgment. *Mann*, 150 A.3d at 1238 n.32. In other words, they must "present evidence—not simply allegations—and that evidence must be legally sufficient to permit a jury … to reasonably find in the plaintiff's favor." *Id.* at 1221. Compare Federal Rule of Civil Procedure 56(c)(1), which requires a party to rely on "affidavits" and other evidence—not just on allegations in the complaint—to survive summary judgment.

So far, Plaintiffs have produced no evidence at all—no affidavits, no incriminating documents, nothing. Even though it is not his burden, Roger Stone has provided sworn evidence that demonstrates that Plaintiffs will not be able to produce the evidence sufficient to overcome a special motion to dismiss.

Plaintiffs would have to prove by sworn evidence that Russian hackers broke into the DNC computers that necessarily had to store the data in question in Washington, D.C. The two questions expert Virgil Griffith was asked was: 1) Are the allegations of the complaint clear enough to determine if it is possible to identify the hackers of a databased described as belonging to the Democratic National Committee; and, 2) even if adequately described can a hack be traced back to a particular individual or individuals? As to the first question, the Plaintiffs did not make allegations clear enough to determine if the Plaintiffs are even on the right track. Meaning, are they even describing a computer hacking of a computer database server? The answer is, no. (Decl. Griffith, ECF No. 15-1, ¶ 9). As to the second question, it would be near impossible for private plaintiffs to sufficiently prove that a hack occurred by certain individual Russians or tied to Russian intelligence. (Decl. Griffith ¶¶ 9-11). If the hack of the DNC's database cannot be

linked to Russian hackers and consequently Russian intelligence, then every other conclusion in the complaint falls to the side. This would mean some other individual or group gave the DNC's data to WikiLeaks. This fact would exonerate Roger Stone. It also emphasizes the nature of Stone's public social media posting – political speech.

CONCLUSION

In accordance with the District of Columbia Anti-SLAPP Act, the Court should dismiss Plaintiffs' claims for public disclosure of private facts and intentional infliction of emotional distress.

Dated: October 25, 2017

Respectfully submitted,

/s/ Robert Buschel
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CERTIFICATE OF SERVICE

I certify that on October 25, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: October 25, 2017

/s/ Robert C. Buschel
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