IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROY COCKRUM, SCOTT COMER, and ERIC SCHOENBERG, Plaintiffs, v. DONALD J. TRUMP FOR PRESIDENT, INC., and ROGER STONE, Defendants.	Civil Action No. 1:17-cv-1370-ESH

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' SEPCIAL MOTIONS TO DISMISS UNDER THE D.C. ANTI-SLAPP ACT

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INTRODUCTION

As the Complaint sets forth, Plaintiffs come before this Court seeking redress for injuries sustained when Defendants conspired with a foreign adversary and an entity described by the CIA Director as a non-state hostile intelligence service to expose the private information of Plaintiffs and others to all the world based on Plaintiffs' participation in the 2016 election. Seeking to escape liability, Defendants recast the attack on Mr. Cockrum, Mr. Comer, and Mr. Schoenberg—and on the democratic process—as the Trump Campaign "conspiring with others to speak about" Plaintiffs. Def. Donald J. Trump for President, Inc.'s Spec. Mot. to Dismiss Am. Compl. ("Campaign Br.") at 1, ECF No. 21; *see* Def. Roger Stone's Spec. Mot. to Dismiss Am. Compl. ("Stone Br.") at 1, ECF No. 23. The factual gymnastics required to configure Plaintiffs' lawsuit as an attack on the Trump Campaign and Roger Stone's rights to "speak about them" would doom the Special Motions, if the Court could reach their merits. But the Court cannot reach the merits because the Special Motions are precluded by binding D.C. Circuit precedent, as this Court recently held.

Just over a month ago, this Court decided *Deripaska v. Associated Press*, No. 17-cv-913, Mem. Op., ECF No. 16 (Oct. 17, 2017) (hereinafter "*Deripaska* Mem. Op."). That holding forecloses Defendants' Special Motions, as Defendants themselves rightly concede. *See* Campaign Br. 1 ("We acknowledge that this Court recently ruled in another case that the District's Anti-SLAPP Act does not apply in federal court. . . . We nevertheless present this motion in order to preserve the anti-SLAPP defense, for appeal or in case of other intervening developments."); Stone Br. 6. In *Deripaska*, this Court correctly ruled that the D.C. Circuit's opinion in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015), forecloses consideration of a Special Motion to Dismiss brought pursuant to the D.C. Anti-

SLAPP Act. *Deripaska* Mem. Op. at 1. There, the D.C. Circuit held that, because the Anti-SLAPP Act conflicts with Rules 12 and 56 of the Federal Rules of Civil Procedure, a federal court sitting in diversity must apply the Federal Rules rather than the procedural rules outlined in the Act. Neither the *en banc* D.C. Circuit nor the U.S. Supreme Court has overruled *Abbas*, so it remains controlling precedent in this Court. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997).

While Defendants ask this Court to read *Abbas* as overruled by a footnote in a recent D.C. Court of Appeals decision, *see* Campaign Br. 11; Stone Br. 12 (citing *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1238 n.32 (D.C. 2016)), this Court rightly rejected an invitation to do just that in *Deripaska*. Mem. Op. at 5. Defendants also misinterpret the scope of the conflict with the Federal Rules that the D.C. Circuit identified in *Abbas*, as well as the degree to which *Mann* may limit that conflict. Therefore, this Court, as it did in *Deripaska*, should reject Defendants' Special Motions to Dismiss.

Even if the Anti-SLAPP Act did apply in this Court, however, Defendants' motions would fail. This case is about the Defendants' conspiracy with state and non-state adversaries of the United States to expose to the public a trough of stolen private correspondence, including private information about the Plaintiffs. The D.C. Anti-SLAPP Act is designed to protect speakers in political or policy debates against defamation or similar suits filed in order to stifle the speech of those who may present an opposing point of view. *Abbas*, 783 F.3d at 1332 (citing Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, at 1 (Nov. 18, 2010)). D.C. courts have never applied the Anti-SLAPP Act to a claim of public disclosure of private facts, nor to any case presenting allegations remotely akin to

those presented here. This Court should reject Defendants' invitation to extend D.C. Anti-SLAPP law to cover these claims.

Furthermore, the private information about the Plaintiffs contained in the tens of thousands of emails that WikiLeaks posted online is not addressed to any matter of public concern, as required for protection under the Act. Plaintiffs' claims are unrelated to the Defendants'—or anyone else's—point of view on the Plaintiffs' sexuality, health information, social security numbers, or other personal identifying information. Plaintiffs' suit does not seek to suppress anybody's speech. Rather, Plaintiffs want to obtain redress for the suffering they have endured and to ensure that future Americans who wish to participate in the political process will not see their private information stolen and weaponized.

Finally, if this Court finds it has the authority to apply the D.C. Anti-SLAPP Act, and that the Act in fact encompasses claims like Plaintiffs', it should defer ruling on the Special Motions until Plaintiffs have conducted adequate discovery as permitted by the Act.

BACKGROUND

Plaintiffs provide the relevant factual and procedural history of this matter in their Memorandum in Opposition to the Defendants' Motions to Dismiss, also filed today, and incorporate those points herein by reference.

ARGUMENT

I. The D.C. Circuit's Opinion in *Abbas* Bars Application of the D.C. Anti-SLAPP Act in this Court, and *Abbas* Remains Good Law and Binding on this Court.

A. The D.C. Circuit's opinion in *Abbas* properly holds that the D.C. Anti-SLAPP Act is inapplicable in federal court.

Abbas, like this case, dealt with whether a special motion to dismiss available under the D.C. Anti-SLAPP Act could be entertained in federal court. To answer this question, the court of

appeals in *Abbas* turned to the familiar *Erie* doctrine, which requires federal courts sitting in diversity to apply the substantive law of the state in which they sit and the Federal Rules of Civil Procedure where there is any conflict between those Rules and state procedural rules. Looking to *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 559 U.S. 393, 399 (2010), the D.C. Circuit explained that a federal court applying *Erie* must determine whether the state procedure in question "attempts to answer the same question" as a federal procedural rule; if it does, and there is a conflict, the Federal Rules govern. *Abbas*, 783 F.3d at 1333. With that lens, the D.C. Circuit identified several components of the Anti-SLAPP Act that "answer the same question" as Federal Rules 12 and 56. *Id.* The D.C. Anti-SLAPP Act, like those Rules, "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial." *Id.* But where the Anti-SLAPP Act allows dismissal if the plaintiff cannot show a "likelihood of success on the merits," the Federal Rules place a much lower burden on a plaintiff opposing pre-trial dismissal. *Id.* at 1334.

The defendant in *Abbas* argued to the court that the Anti-SLAPP Act imposes the same standard for deciding whether a case may proceed to trial as does the federal summary judgment standard. *Abbas*, 783 F.3d at 1334. The Anti-SLAPP Act, according to the defendant, was "just another way of describing the federal test for summary judgment," and the only effect of the Act was to "layer[] a right to attorney's fees in this category of cases on top of the existing federal procedural scheme." *Id.* But the D.C. Circuit rejected this reading of the Act, noting that "the D.C. Court of Appeals has never interpreted the D.C. Anti-SLAPP Act's likelihood of success standard to simply mirror the standards imposed by Federal Rules 12 and 56." *Id*. at 1335. Because of this conflict, the court could not apply the Act to dismiss the claim. *Id. Abbas* "forecloses application of D.C.'s Anti-SLAPP Act in federal court." *Deripaska* Mem. Op. at 1.

B. Footnote asides in *Abbas* and *Mann* do not undermine *Abbas* as controlling precedent.

The D.C. Circuit's holding in *Abbas* remains good law and has not been overruled or superseded. In a footnote following its discussion of the Anti-SLAPP Act's conflict with Rules 12 and 56, the D.C. Circuit in *Abbas* left open the possibility that if "a State anti-SLAPP act did in fact exactly mirror Federal Rules 12 and 56," an "interesting issue could arise" that "could matter for attorney's fees and the like." *Id.* at 1335 n.3. But the court concluded that it need not "address that hypothetical here because, as we have explained, the D.C. Anti–SLAPP Act's dismissal standard does not exactly mirror Federal Rules 12 and 56." *Id.* Defendants argue that this footnote, plus another footnote in the D.C. Court of Appeals' decision in *Competitive Enterprise Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), add up to *Abbas*'s reversal. But, as this Court already decided in *Deripaska*, they are wrong. *Deripaska*, Mem. Op. at 1.

By selectively quoting from a footnote in *Mann*, Defendants claim to have found the "hypothetical" *Abbas* declined to answer in the D.C. Courts of Appeals' statement that the Anti-SLAPP Act's "likelihood of success" standard is akin to the federal summary judgment standard. But the most important part of that footnote—and a part omitted by Defendants—is the D.C. Court of Appeals' recognition that "[t]he applicability of the Anti-SLAPP statute in federal court is not for this court to determine." *Mann*, 150 A.3d at 1238 n.32. In other words, the court in *Mann* expressly did not—and could not—take a position on whether a federal court could apply the D.C. Anti-SLAPP Act. Any argument that this footnote in *Mann* renders *Abbas* bad law is misleading.

Nevertheless, Defendants endeavor to make that very argument. In so doing, the Campaign leans on a recent D.C. District Court decision in *Easaw v. Newport*, No. 17-cv-28-BAH, 2017 WL 2062851, at *10 (D.D.C. May 12, 2017), where the Court noted that "when a

decision by the D.C. [Court of Appeals] clearly and unmistakably renders inaccurate a prior decision by the D.C. Circuit interpreting D.C. law, this Court should apply the D.C. [Court of Appeals]'s more recent expression of the law." Campaign Br. 11. The Campaign says that *Mann* "clearly and unmistakably" renders *Abbas* "inaccurate." *Id.* [1]

But this argument falls short. While the footnote in *Mann* does state that the Anti-SLAPP Act's "likelihood of success" standard "mirror[s] the standards imposed by Federal Rule 56," the D.C. Court of Appeals called attention to different burden-shifting requirements in the D.C. and federal procedural regimes. *See id.* at 1237 ("[W]e agree with *Abbas* that the special motion to dismiss is different from summary judgment in that it imposes the burden on plaintiffs."). The *Mann* court also expressly identified differences between the standard for dismissal in the Anti-SLAPP Act and the one applicable under Federal Rule 12(b)(6): the Anti-SLAPP Act's standard is "more demanding." *See Mann*, 150 A.3d at 1221 n.2. A far cry from overruling *Abbas*, then, the reasoning in *Mann* actually supports *Abbas*'s holding regarding the procedural irreconcilability of the Anti-SLAPP Act and the Federal Rules.

* * *

In short, the D.C. Circuit properly held in *Abbas* that the D.C. Anti-SLAPP Act does not apply in this Court. That decision remains good law. Because the Anti-SLAPP Act does not apply in this Court, Defendants' Special Motions should be denied. *See Deripaska,* Mem. Op. at 5.

II. Even if the D.C. Anti-SLAPP Act Applied in Federal Court, It Does Not Apply to this Case.

Defendants' motions fail for an additional reason. This suit is about the Trump Campaign and Roger Stone's participation in a conspiracy to publicize private information about private

[1] Mr. Stone makes a similar argument. Stone Br. 8-9.

individuals in the course of interfering in the 2016 presidential election. The Trump Campaign and Roger Stone are free to speak in political and policy debates however they would like; but the Anti-SLAPP law provides no protection to those who conspire to make public stolen private information.

The District of Columbia enacted its Anti-SLAPP Act in 2010 to discourage "lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Abbas*, 783 F.3d at 1332. To weed out early in litigation claims brought as speech suppression, the Anti-SLAPP Act instituted certain procedural hurdles to trial on the merits in speech-related suits, such as those alleging defamation or libel. One such restriction is that defendants "may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a).

The Act defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" to mean "[a]ny written or oral statement made . . . [i]n a place open to the public or a public forum in connection with an issue of public interest," or an "expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1). Under the Act, an "issue of public interest" is one "related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Code § 16-5501(3). Defendants seek to shoehorn their conspiracy into the definition of "an act in furtherance of the right of advocacy on issues of public interest," but this effort fails on multiple grounds.

To begin, no case from a D.C. Court applying the Anti-SLAPP bears any resemblance to the circumstances of this case. This suit concerns Defendants' participation in a conspiracy to

post *stolen private* information to the Internet for the world to see. D.C. courts have applied the Anti-SLAPP Act just a handful of times and in narrow circumstances—each of which fall squarely within the Act's targeted protection of speech in "furtherance of the right of advocacy on issues of public interest," D.C. Code§ 16-5502(a). *See Mann*, 150 A.3d at 1221 (claims against writers who criticized the work of a well-known climate scientist in articles published on the Competitive Enterprise Institute's and *National Review*'s websites); *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016); and *Doe No. 1 v. Burke*, 91 A.3d 1031, 1034 (D.C. 2014) (claims against Wikipedia contributor who added publicly available information about litigation arising from a mass shooting in Baghdad to a Wikipedia page about a lawyer involved in such litigation). Applying D.C.'s Anti-SLAPP law here, where Defendants conspired with foreign adversaries to disclose—globally and permanently—private facts about Plaintiffs would stretch the Act to cover activity well outside existing interpretations of D.C.'s Anti-SLAPP law.

What is more, even if the Anti-SLAPP law could be extended to reach defendants who conspire to disclose stolen information, by the Act's very terms, it does not protect disclosure of stolen private information about individuals' sexuality, health, personal information, and social security numbers. That information is not an "issue of public interest," which it must be for the Act to apply. D.C. Code § 16-5502. Distorting the text of the Anti-SLAPP Act, Defendants claim that speech need only be "directed primarily toward" such an issue in order to receive protection under the Act. *See* Campaign Br. 14; Stone Br. 16. But that is not what the Act says. The Act defines an "issue of public interest" very clearly—and without qualification—as one "related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Code § 16-5501(3). The private information released about Plaintiffs does not fall within this definition. Defendants also

read the Act's requirement that speech be "in connection" with an "issue of public interest" to sweep in *any* publicized stolen email sitting in the same inbox as an email addressed to an "issue of public interest." *See* Campaign Br. 15; Stone Br. 17. But the relevant "connection" under the Act is to the topic of "public interest," not to the speaker's email platform.

Finally, in this case the policy of the Act would protect Plaintiffs, not Defendants. Recognizing that the language of the statute is not on their side, Defendants make a vague policy argument that declining to apply the Anti-SLAPP Act in this case will stand in the way of journalism that relies on large volumes of government documents, such as that at issue in the *Pentagon Papers* case. *See* Campaign Br. 15; Stone Br. 17. (This is an odd choice, since neither New York nor D.C. had an anti-SLAPP statute in place in the early 1970s when the *New York Times* and *Washington Post* published their landmark reporting on the war in Vietnam). But the real policy interests at stake in this litigation rest firmly on the side of Plaintiffs. If a person's decision to contribute labor or money to an electoral campaign means sacrificing the right to privacy—that anything said by or about the person in electronically stored communications can be hacked and posted online for the world to see—those willing to participate in advocacy for political candidates will quickly shrink. And that, it seems, would be the very opposite of the result intended by the D.C. Anti-SLAPP Act. For these reasons, even if the Act could ever apply in this Court, it would not apply to this suit.

III. If the Court Applies the Anti-SLAPP Act's Procedure in this Case, It Should Allow for Discovery Before Requiring Plaintiffs to Respond.

If the Court finds that the Anti-SLAPP Act applies in this Court and should apply to this case, it should also permit discovery, which is allowed under the Act, prior to ruling on the Special Motions. The Anti-SLAPP Act provides that "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly

burdensome, the court may order that specified discovery be conducted." D.C. Code § 16-5502(c)(2). The *Mann* court admitted that this provision, which requires a plaintiff to demonstrate that discovery would *likely defeat* a motion to dismiss before being permitted to engage in such discovery, is inconsistent with the Federal Rules. *Mann*, 150 A.3d at 1237. And the Defendants themselves stress the difference between the Act and the Rules with regards to discovery, claiming that "the Anti-SLAPP Act protects defendants more than Rule 56 does. The Act requires courts to decide motions before discovery; the Rule does not." Campaign Br. at 6. The Defendants have not explained, or even tried to explain, how this Court could apply the Anti-SLAPP Act's discovery standard at the motion-to-dismiss stage in a way that does not radically upend the procedural posture in which federal litigation ordinarily proceeds. Thus, if this Court applies the Anti-SLAPP Act, in order to minimize conflict with the Federal Rules, it should defer any ruling on Defendants' Special Motions until Plaintiffs have had the opportunity to conduct sufficient discovery, to the extent permitted by the Act.

Under the Federal Rules, Rule "56(f) facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition," but "the Supreme Court has restated the rule as *requiring*, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)) (emphasis added)). Here, the Defendants have already collected, reviewed, and produced documents related to the very conspiracy at issue in Plaintiffs' Complaint in responding to inquiries from Congress and the Department of Justice. Very little burden would be involved in providing relevant material from these production sets to Plaintiffs. While under 56(f), Plaintiffs need not show that this material

would likely defeat Defendants' Special Motions to Dismiss, it would in fact meet the heightened burden in D.C. Code § 16-5502(c)(2), and thus Plaintiffs should be permitted to obtain this information and argue to the Court why it shows Plaintiffs are likely to succeed on the merits of their claims.

IV. In All Events, Defendants' Motions Should Be Denied.

As set forth above, the Anti-SLAPP Act does not apply in this Court and does not apply to this suit. But even if the Act applies here, Defendants' motions should be denied. When the Act is triggered, and a defendant "makes 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," then the burden shifts to plaintiffs to show they are "likely succeed on the merits." D.C. Code § 16-5502(b). Here, Plaintiffs are likely to succeed on the merits, for the reasons set forth in their Memorandum in Opposition to the Motions to Dismiss, which they hereby incorporate by reference.[2]

CONCLUSION

This Court should follow its recent decision in *Deripaska*, decline to apply the D.C. Anti-SLAPP Act, and deny Defendant's Special Motion to Dismiss. Even if this Court holds that the D.C. Anti-SLAPP Act applies in federal court, Defendant's Special Motions should be rejected because they fail to show they are entitled to its protections. Finally, should the Court determine that Defendants did make the necessary *prima facie* showing, their Special Motions nevertheless should be deferred pending Plaintiffs' request for discovery under the Act or denied.

[2] In the event that this Court finds that the Anti-SLAPP Act does apply in this Court and to this case, Plaintiffs respectfully request that this Court provide an additional opportunity to respond to the Special Motions to Dismiss, following discovery.

Date: December 1, 2017

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