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

REPLY IN SUPPORT OF DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S SPECIAL MOTION UNDER THE D.C. ANTI-SLAPP ACT TO DISMISS THE FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

In their opposition to the Campaign's special motion to dismiss under the District of Columbia's Anti-SLAAP Act, Plaintiffs assert that the Act does not apply in federal court (and in any event does not cover this case). As we noted in our opening brief, we recognize that this Court did not apply the Act in *Deripaska v. Associated Press*, No. 17-913 (Oct. 17, 2017); we have presented the anti-SLAPP motion primarily to preserve the defense. We briefly address Plaintiffs' arguments below.

A. The District of Columbia Anti-SLAPP Act applies in federal court

Plaintiffs invoke the D.C. Circuit's decision in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015), refusing to apply the D.C. Anti-SLAPP Act in federal court. Plaintiffs never deny, however, that the D.C. Circuit addressed a particular interpretation of the Act that the D.C. Court of Appeals later rejected in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1238 n.32 (D.C. 2016). Plaintiffs instead assert that "the applicability of the Anti-SLAPP statute in federal court" is for federal courts, not D.C. courts, to determine. (Opp. 5.) That is true, but beside the point. The D.C. Court of Appeals may not be final authority on whether the Anti-SLAPP Act applies in federal court, but it *is* the final authority on what the Act means in the first place. And that court has now held that the Anti-SLAPP Act does not mean what the D.C. Circuit thought it meant in *Abbas*. As a result, no binding precedent addresses whether the D.C. Anti-SLAPP Act, *as currently interpreted*, applies in federal court. For the reasons explained in our opening brief, the Act does apply.

B. The Anti-SLAPP Act applies to this case

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." D.C. Code § 16-5502(b). The publication of the DNC emails was an act in furtherance of the right of advocacy on issues of public interest. Therefore, the D.C. Anti-SLAPP Act covers this case.

Plaintiffs' assertions to the contrary are unpersuasive. Plaintiffs implicitly concede that the disclosure, taken as a whole, addresses "issues of public interest": The emails discuss "public figures" (such as Secretary Clinton and Senator Sanders), in addition to numerous issues of "economic" and "community" well-being. D.C. Code § 16-5501(3). Plaintiffs can claim only that snippets of information in particular emails "about individuals' sexuality, health, personal information, and social security numbers" do not fit the Act's definition of "public interest." (Opp. 8.) In other words, Plaintiffs want courts to sift through defendants' speech line by line, sorting each statement in each email into buckets for "public interest" (Act applies) and "private interest" (Act does not apply). That is simply wrong; as we showed in our opening brief, the Anti-SLAPP Act requires the court to assess the speech in the aggregate. (Mem. 14.)

For example, the statute applies if the defendant's "act" furthers the right of advocacy on public issues. § 16-5502(b). Accordingly, the court must evaluate the entire "act" of publication, rather than separately parsing each line that the defendant has published. Similarly, the statute directs courts to consider whether the defendant's "statements" are "directed primarily" toward public rather than private issues. D.C.

Code § 16-5501(3). That, again, shows that the court should concentrate on the primary purpose of the defendant's "statements" taken as a whole. (And Plaintiffs do not deny that the WikiLeaks disclosure, taken as a whole, is "directed primarily" toward public rather than private affairs.) Plaintiffs never engage with these arguments and do not explain why they believe the statute calls for line-by-line review rather than holistic analysis.

Plaintiffs next argue that "no case from a D.C. Court" has ever applied the Anti-SLAPP Act to a case like this one. (Opp. 7.) Even if that were true, that would be no reason not to apply the statute here. At best, Plaintiffs' argument establishes only that the issues presented here have not come up in the D.C. courts since the District enacted its Anti-SLAPP Act just seven years ago. But the fact that the issue has not come up in that short time in no way suggests that Plaintiffs' view is right.

Plaintiffs also claim that applying the Anti-SLAPP Act here would mean that a political operative's emails "can be hacked." (Opp. 9.) That is incorrect. The Anti-SLAPP Act protects "written or oral statement[s]" (§ 16-5501); it does not protect conduct. The Act applies here because this case is only about the *publication* of the DNC emails, and there can be no dispute that disclosing emails is speech. If a plaintiff had sued instead for the *illegal acquisition* of the emails, the Act would not apply because hacking into someone else's email account is conduct, not speech. Applying the statute here would not protect "hack[ing]."

C. The Anti-SLAPP Act does not entitle Plaintiffs to take discovery

Plaintiffs, last of all, ask the Court to allow discovery before ruling on the anti-SLAPP motion. The very purpose of the Anti-SLAPP Act, however, is to "protec[t]" speakers from "expensive and time consuming discovery." *Mann*, 150 A.3d at 1230. As a result, the Act allows a court to order discovery only "when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome." D.C. Code § 16-5502(c)(2).

Plaintiffs insist that this heightened standard does not even apply in federal court, on the theory that it conflicts with Rule 26. That is incorrect. Rule 26 does not grant litigants an unconditional right to take discovery. Quite the contrary, the rule allows courts to impose "limitations on discovery." Fed. R. Civ. P. 26(f)(3)(E); *see Viles v. Ball*, 872 F.2d 491, 494 (D.C. Cir. 1989) ("The district court has broad discretion … to allow or deny discovery"). Nothing in the rule requires a district court to disregard the D.C. Anti-SLAPP Act when deciding whether to grant discovery on D.C.-law claims. The anti-SLAPP standard is thus compatible with Rule 26, and the Court should apply that standard in this case.

Plaintiffs cannot satisfy the Anti-SLAPP Act's standard for targeted discovery. First, Plaintiffs' request for discovery has no "target." They identify no discrete categories of documents they believe will help them prove their case. They candidly admit their desire to launch a fishing expedition into all the documents that the Campaign has collected "in responding to inquiries from Congress and the Department of Justice." (Opp. 10.) Plaintiffs may be curious about what the Campaign has produced,

but they do not explain why the Campaign's productions to others will shed light on the specific issue here: the publication of the DNC emails.

Second, Plaintiffs have not shown that it is "likely" that targeted discovery would enable them to defeat the anti-SLAPP motion. Even with targeted discovery, Plaintiffs' claims would still fail for a variety of reasons: Plaintiffs have failed to establish diversity jurisdiction, failed to establish personal jurisdiction, failed to establish venue, failed to show that D.C. substantive law governs their claims, failed to fulfill the elements of the public-disclosure and intentional-infliction torts, and failed to overcome the First Amendment. Plaintiffs have not explained how targeted discovery would help them overcome any of those problems.

Third, discovery would be "unduly burdensome." Plaintiffs claim that the Campaign need only turn over the documents that it has "already collected" in response to inquiries from Congress and the Special Counsel. (Opp. 10.) But Plaintiffs are not entitled to receive every single document that Congress and the Special Counsel have sought—particularly since the production is confidential. Conversely, Plaintiffs might ask for some documents that Congress and the Special Counsel have *not* sought. Thus, the Campaign cannot simply turn over the same documents it has already produced to Congress and the Special Counsel; it would have to review thousands of documents all over, to determine whether they fit within Plaintiffs' (as yet unspecified) discovery requests. That is unduly burdensome. The Court should therefore deny Plaintiffs' request for discovery.

CONCLUSION

The Court should dismiss Plaintiffs' claims for public disclosure of private facts and intentional infliction of emotional distress in accordance with the D.C. Anti-SLAPP Act.

Dated: December 29, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 29, 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: December 29, 2017

/s/ Michael A. Carvin
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