IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ROY COCKRUM; SCOTT COMER; and ERIC SCHOENBERG, Plaintiffs, v. DONALD J. TRUMP FOR PRESIDENT, INC., Defendant.	Civil Action No. 3:18-cv-484-HEH

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR STAY OF DISCOVERY

Plaintiffs recognize that this case is extraordinary in some respects—after all, it involves a conspiracy between a U.S. political campaign and a hostile foreign power that injured the three individual Plaintiffs who were caught in the crosshairs. But Defendant's motion to stay discovery is based almost entirely on hypothetical issues that are not actually before this Court and, for the most part, may well never be. The Court need not resolve any discovery issues now, let alone the types of issues raised by Defendant. And the Campaign's hyperbolic idea that this Court's current case management "transgress[es] the separation of powers, violate[s] the . . . First Amendment, and interfere[s] with an ongoing criminal investigation," Def.'s Br. in Supp. Mot. Stay Disc. ("Def.'s Mot.") at 6, ECF No. 75, has no basis in law or common sense. This Court should deny the motion to stay and allow this case to proceed.

Most of the Campaign's protestations center on the false assertion that Plaintiffs have already sought discovery directly from the President and other high-ranking officials, and

"documents relating to the President's official acts." *Id.* That is a straw man based on a misreading of the first set of requests for production ("RFPs") that Plaintiffs served on the Campaign on January 8, 2019, pursuant to this Court's Scheduling Order and Schedule A (ECF Nos. 68, 68-1); *see* Def's Mot., Ex. 1 ("Pls.' RFPs"), ECF No. 75-1. Plaintiffs served party discovery and seek documents *from the Campaign*—that is, documents that are within the Campaign's "possession, custody, or control." Fed. R. Civ. P. 34(a)(1); Pls.' RFPs (ECF No. 75-1). The Campaign is a private corporation, not a governmental entity. Plaintiffs have not asked for documents from the President or any other high ranking official. Nor is the Court currently faced with any issue of discovery into "the President's official acts." Acts taken during the campaign were not official acts, and the vast majority of the allegations in the complaint focus on events that occurred before the November 2016 election.[1]

Defendant's concern seems to stem from the definitions in the RFPs. *See* Def.'s Mot. at 4. Had the Campaign conferred with Plaintiffs' counsel about their specific concerns (as required by Local Civil Rule 37(E)), Plaintiffs' counsel would have immediately responded that the RFPs do not seek discovery from the President and do not seek presidential documents. The broad definition of the "Campaign" in the RFPs is necessitated by the ambiguous contours of the Campaign and certain staffers' roles. For example, George Papadopoulos is alternately described in Defendant's Answer as an "external unpaid volunteer[]," Def.'s Answer to Pls.' Am. Compl. ¶

[1] In this respect—and others—this case differs substantially from *In re Donald J. Trump*, No. 18-2486, Dkt. 9 (4th Cir. Dec. 20, 2018), the Emoluments Clause case cited by Defendant as an example of a stay of discovery pending the resolution of a motion to dismiss. *See* Def.'s Mot. at 2. In that case, the President is the Defendant, and discovery focuses squarely on him. Here, the document requests served on the Campaign focus on: the scope of the Campaign as an entity; documents pertaining to the Plaintiffs; the Campaign's documents pertaining to very specific subjects at the heart of the claims here, including the hack into the DNC computers and the publication of stolen e-mails on WikiLeaks; and communications with alleged co-conspirators about those subjects. *See* Pls.' RFPs (ECF No. 75-1).

42, ECF No. 71, and an "internal" part of the Campaign, *id.* at ¶¶ 94-95 (invoking First Amendment privilege). Plaintiffs' definition therefore seeks to describe those acting on behalf of the Campaign in a manner designed to ensure that relevant documents are produced. That does not change the fact that the Campaign itself is a private corporation, not a governmental entity, and that the requests seek documents within the possession and control of the Campaign.

Nor does it violate the separation of powers to subject the Campaign to civil discovery. In *Clinton v. Jones*, the Supreme Court held that separation of powers was not violated even where a sitting president was directly sued and subjected to discovery and trial. 520 U.S. 681, 703-707, 710 & n.40 (1997). If a trial against the president did not implicate the separation-of-powers, then it is surely true that *requests for production* propounded on *a private corporate entity* do not either, even if that entity supported the candidacy of President Trump.

Defendant's other arguments fare no better. This Court's case management does not violate the First Amendment by permitting discovery prior to a ruling on the motion to dismiss. Even if the Campaign has a colorable claim that some of its internal documents that may be responsive to Plaintiffs' document requests are privileged under the First Amendment—which is doubtful, *see* Joint Statement re Disc ("Joint Statement") at 11-12, ECF No. 72—it can, like any other litigant, assert that privilege at the appropriate time. It is unreasonable—and not supported by any precedent—to suggest that political campaigns are entirely immune from civil discovery, or that *all* documents within the Campaign's control, or *all* documents responsive to the RFPs, are somehow privileged under the First Amendment. Indeed, the majority of documents that Plaintiffs seek—such as communications between Campaign national-security advisor George Papadopoulos and Maltese academic Joseph Mifsud (an alleged Russian intermediary), communications between Campaign political advisor Donald Trump Jr. and Russian lawyer

Natalia Veselnitskaya, and communications between the Campaign's chairman Paul Manafort and Konstantin Kilimnik, another alleged Russian intermediary—are not privileged under any theory of privilege. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1164-65 (9th Cir. 2010) (noting that party claiming First Amendment privilege had already agreed to disclose external communications).

That leaves only the Campaign's concerns that this Court's case management threatens to interfere with the Special Counsel's investigation. This is not the first civil case involving a parallel criminal investigation, and the standard for justifying a stay in such circumstances is high and requires specific prejudice. *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 379 (4th Cir. 2013). Yet the Campaign's motion neither points to a particular indictment or circumstance that justifies a stay. And, as for the Campaign's concern about interfering with "a critically important investigation," Def.'s Mot. at 18, the Special Counsel is more than capable of representing his own interests, just as Independent Counsel Starr did during his investigation of President Clinton. *See* Motion of the United States for Limited Intervention and a Stay of Discovery, *Clinton v. Jones*, No. LR-C-94-290, ECF No. 261 (E.D. Ark. Jan. 29, 1998).

Finally, Defendant's reliance on Judge Huvelle's order dismissing a prior version of this case for lack of personal jurisdiction in D.C. is off point. Judge Huvelle's concern was that plaintiffs were "seeking merits discovery" and not discovery "tailor[ed] . . .to jurisdictional matters" relating to the Campaign's activities in the District of Columbia. *Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158, 188 (D.D.C. 2018). But this Court's order opened merits discovery, and this Court's Local Civil Rules make clear that Plaintiffs dally with discovery at their own risk in this District. *See* Local Civil Rule 16(B) ("The parties and their counsel are bound by the dates specified in any such orders and no extensions . . . shall be granted in the

absence of a showing of good cause. Mere failure on the part of counsel to proceed promptly with the normal processes of discovery shall not constitute good cause . . . .").

Plaintiffs recognize that the Court has broad discretion on matters of case management, including whether to stay discovery. Defendant has not established any real prejudice in complying with the requirements of the Federal and Local Rules and Scheduling Order regarding its pending discovery obligations, which are to (1) meet and confer with Plaintiffs to develop appropriate discovery agreements; (2) provide initial disclosures; and (3) respond to basic document discovery. All of the concerns Defendant raises regarding the complexity of this case, while overstated, provide good reason to grant a reasonable case schedule, as requested by Plaintiffs in the parties' Joint Statement, but are not grounds for delaying the case at the outset. If the Court disagrees and decides to stay discovery pending the resolution of the motion to dismiss, Plaintiffs respectfully request that the Court provide a corresponding extension of discovery and other case management deadlines by an equal amount of time when the stay is lifted.

Respectfully submitted,

Dated: January 16, 2019

By: __*/s/ Elizabeth C. Burneson*__

Counsel for Plaintiffs

KELLY J. BUNDY (VA Bar No. 86327)
ELIZABETH C. BURNESON (VA Bar No. 93413)
Hirschler Fleischer, a Professional Corporation
2100 E. Cary Street (23223)
Post Office Box 500
Richmond, VA 23218-0500
Telephone: (804) 771-9505
(804) 771-9528
Facsimile: (804) 644-0957
E-mail: kbundy@hirschlerlaw.com
lburneson@hirschlerlaw.com

BENJAMIN L. BERWICK (MA Bar No. 679207)
(*pro hac vice*)
United to Protect Democracy
10 Ware St.
Cambridge, MA 02138
202-579-4582
Ben.Berwick@protectdemocracy.org

IAN BASSIN (NY Attorney Registration No. 4683439) (*pro hac vice*)
United to Protect Democracy
222 Broadway, 19th Floor
New York, NY 10038
202-579-4582
Ian.Bassin@protectdemocracy.org

JUSTIN FLORENCE (D.C. Bar No. 988953)
(*pro hac vice*)
ANNE TINDALL (D.C. Bar No. 494607)
(*pro hac vice*)
CAMERON KISTLER (D.C. Bar No. 1008922)
(*pro hac vice*)
United to Protect Democracy
2020 Pennsylvania Ave. NW, #163
Washington, DC 20006
202-579-4582
Justin.Florence@protectdemocracy.org
Anne.Tindall@protectdemocracy.org
Cameron.Kistler@protectdemocracy.org

JESSICA MARSDEN (N.C. Bar No. 50855)
(*pro hac vice*)
United to Protect Democracy
510 Meadowmont Village Circle, No. 328
Chapel Hill, NC 27517
202-579-4582
jess.marsden@protectdemocracy.org

STEPHEN P. BERZON (CA State Bar No. 46540)
(*pro hac vice*)
BARBARA J. CHISHOLM (CA State Bar No. 224656) (*pro hac vice*)
DANIELLE LEONARD (CA State Bar No. 218201)
(*pro hac vice*)
Altshuler Berzon LLP
177 Post Street, Suite 300

San Francisco, CA 94108
(415) 421-7151
sberzon@altber.com
bchisholm@altber.com
dleonard@altber.com

NANCY GERTNER (MA Bar No. 190140)
pro hac vice)
Fick & Marx
100 Franklin Street, 7th floor
Boston, MA 02110
(857) 321-8360
ngertner@fickmarx.com

RICHARD PRIMUS (MI Bar No. P70419)
(*pro hac vice*)
The University of Michigan Law School*
625 S. State Street
Ann Arbor, MI 48109
(734) 647-5543
PrimusLaw1859@gmail.com
* For identification purposes.

STEVEN A. HIRSCH (CA State Bar No. 171825)
(*pro hac vice*)
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111-1809
(415) 391-5400
shirsch@keker.com

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2019, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of Court for the Eastern District of Virginia, Richmond Division, using the Court's CM/ECF system, which thereby caused the above to be served electronically on all registered users of the Court's CM/ECF system who have filed notices of appearance in this matter of such filing (NEF) to all registered parties.

Dated: January 16, 2019

By: */s/ Elizabeth C. Burneson*

Counsel for Plaintiffs

KELLY J. BUNDY (VA Bar No. 86327)
ELIZABETH C. BURNESON (VA Bar No. 93413)
Hirschler Fleischer, a Professional Corporation
2100 E. Cary Street (23223)
Post Office Box 500
Richmond, VA 23218-0500
Telephone: (804) 771-9505
(804) 771-9528
Facsimile: (804) 644-0957
E-mail: kbundy@hirschlerlaw.com
lburneson@hirschlerlaw.com