IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. CONCORD MANAGEMENT AND CONSULTING LLC Defendant.	CRIMINAL NUMBER: 1:18-cr-00032-2-DLF

DEFENDANT CONCORD MANAGEMENT AND CONSULTING LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SHOW CAUSE ORDER

Defendant Concord Management and Consulting LLC ("Defendant" or "Concord"), by and through undersigned counsel, respectfully submits this reply brief in support of its motion seeking an order to show cause why Attorney General William Barr ("AG Barr") and Special Counsel Robert S. Mueller III ("SC Mueller") should not be held in contempt for violating United States District Court for the District of Columbia Local Criminal Rule 57.7 (the "Motion").

Introduction

The question for the Court is a simple one. Can a federal prosecutor publicly describe the evidence and state orally and in a written report that a defendant is guilty while a criminal case is pending trial? The answer, which is no, is found in the law and regulations ignored by the government. Instead, the government conflates the violation of a local rule and federal regulations with whether or not a remedy is appropriate, arguing that: 1) the statements in the Mueller Report track the Indictment, and 2) no trial date has been set, and as such there has been no harm to Concord. *See* Gov't Opp'n To Def's Mot. Show Cause 3-4 ("Opp'n"). The government compounds its violation by failing to cite to a single authority supporting its

incorrect interpretation of law as required by LCrR 47(b), and as such has arguably conceded contempt.[1] As the government would have it, this Court would be the first Court in any reported decision to find no fault with such prosecutorial misconduct.

According to the government, there is no harm in the Attorney General and Special Counsel publicly stating, in a manner designed to achieve maximum media coverage, that the Defendants are both guilty and were acting on behalf of the Russian government in an overarching two-pronged scheme involving Russian military intelligence because the jury pool will forget about these statements by the time of trial. *See* Opp'n 4. Putting aside that there is no case authority for this novel and incorrect interpretation of LCrR 57.7 and related prohibitions regarding extra-judicial statements, any such interpretation would apply a no harm-no foul exception, making the rule meaningless. Moreover, the government does not challenge, and thus has conceded, that the Attorney General and the Special Counsel acted willfully. *See Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) ("[I]f a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded.").[2]

The Redactions to the Mueller Report Were for the Purpose of Hiding Evidence From Concord, Not for Ensuring a Fair Trial

While the government hypes the fact that the portions of the Mueller Report relating to the Indictment in this case were redacted in part, it is now absolutely clear that not a single

[1] LCrR 47(b) states that, "Within 14 days of the date of service . . . an opposing party shall serve and file a memorandum of points ***and authorities*** in opposition to the motion. If such memorandum is not filed within the prescribed time, the Court may treat the motion as conceded." (Emphasis added).

[2] AG Barr also conceded willfulness by stating in testimony on May 1, 2019, "I was making a decision as to whether or not to make [the Mueller Report] public and I effectively overrode the regulations, used discretion to lean as far forward as I could to make that public . . ." Ex. A, *Hr'g on Justice Dep't Investigation of Russian Interference in 2016 Presidential Election Before the Senate Judiciary Comm.*, 116th Cong. (May 1, 2019).

redaction was for the purpose of protecting the rights of Concord, but instead were for the purpose of continuing to hide evidence from Concord. This is apparent from civil litigation in this Court related to the Mueller Report.

Pursuant to a court order in a civil lawsuit filed under the Freedom of Information Act ("FOIA"), on Monday, May 6, 2019, the Department of Justice ("DOJ") released a new version of the Mueller Report. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, No. 19-810 (D.D.C. May 3, 2019), ECF No. 43; FOIA-Processed Report on the Investigation into Russian Interference in the 2016 Presidential Election (March 2019), *available at* https://www.justice.gov/oip/available-documents-oip (the "FOIA Report"). The redactions in the new version of the Report are identical, but as ordered by Judge Walton, each redaction now refers to the appropriate FOIA exemption allegedly justifying the redaction. *See* FOIA Report. The DOJ also sent a letter to the plaintiff in the FOIA litigation explaining that redactions were made pursuant to seven different FOIA exemptions. Ex. B, Letter from DOJ Office of Information Policy to Jason Leopold, Senior Investigative Report, BuzzFeed News (May 6, 2019), *available at* https://twitter.com/JasonLeopold/status/1125548527080239104/photo/1. ("the Letter"). The FOIA exemptions related to the allegations in the Indictment were as follows:

- (b)(7)(A), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings.

- (b)(7)(E), which pertains to records or information compiled for law enforcement purposes, the release of which would disclose techniques or procedures for law enforcement investigations or prosecutions.

- (b)(3), which pertains to information "specifically exempted from release by statute other than the FOIA (in this instance, the National Security Act of 1947, 50 U.S.C. § 3024(i)(1), which pertains to intelligence sources and methods, and Rule 6(e) of the Federal Rules of Criminal Procedure, which pertains to the secrecy of grand jury proceedings)."

- (b)(7)(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

- (b)(6), which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy.

FOIA Report Vol I. 14-35.

The Letter also refers to a FOIA exemption (b)(7)(B), which pertains to "records or information compiled for law enforcement purposes, the release of which would deprive a person of a right to a fair trial or an impartial adjudication." *See* Ex. B. But exemption (b)(7)(B) is not referenced *a single time* in pages 14 through 35 of the Mueller Report, the pages that deal exclusively with the allegations at issue in this criminal proceeding. On the other hand, exemption (b)(7)(B) is referenced throughout other sections of the Report. *See* FOIA Report Vol. I 5, 9, 36, 44, 51-59, 65, 174, 176-80, 184, 189-91, 196-97; FOIA Report Vol. II 3, 6, 15, 17-18, 52, 77, 120, 128-30, 132-33, 147, 151, App. B, App. D. The government is clearly aware of its obligation not to deprive a person of the right to a fair trial or impartial adjudication and made documented efforts to uphold that obligation for others, but not for Concord.

Moreover, the farcical notion proffered by the government that there is no harm because Concord's name was redacted in all but three instances, *see* Opp'n 3, ignores the fact that the Indictment alleges—and the Mueller Report states—that Concord was responsible for all of the activities of the Internet Research Agency, a co-defendant whose names appears over *a hundred times* in the Mueller Report. *See, e.g.,* Report 14-35.

Disparate Treatment of Foreign National Concord

With respect to the Special Counsel initiated case *United States v. Stone*, the government redacted virtually all of the evidence against Stone, a U.S. national, from the public version of the Mueller Report, the Attorney General made no statements about Stone, and the government

provided both the Court and Stone with advance notice of its efforts to protect Stone's right to a fair trial. *See* No. 19-0018 (D.D.C. Apr. 17, 2019), ECF No. 85 (Government's Notice Regarding Report of the Special Counsel) (the "*Stone* Notice").

While undersigned counsel has no way of knowing which of the redactions that reference FOIA exemption (b)(7)(B) relate specifically to Stone, it is clear that at least some of them directly relate to Mr. Stone, *see* FOIA Report App. B-10, and more than likely that others do as well. *See* FOIA Report Vol. I 51-59 (invoking exemption (b)(7)(B) over a hundred times in the section titled "Trump Campaign and the Dissemination of Hacked Materials," which is the subject matter of the Introduction and Background sections of the *Stone* Indictment).[3] In *Stone*, Judge Jackson entered a gag order pursuant to LCrR. 57.7(c), which prohibits counsel for the parties and witnesses "making statements to the media or in public settings that pose a substantial likelihood of material prejudice to this case." No. 19-0018, ECF No. 36. In so doing, Judge Jackson noted that LCrR. 57.7(b)(1) applies to "any case in this district" and also that "[b]ecause lawyers have special access to information through discovery and client communications, their external statements pose a threat to the fairness of a pending proceeding." *Id*. (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991)).[4] In the *Stone* Notice, the government referred specifically to both LCrR 57.7(b)(1) and the duty it imposes on a lawyer not to release or authorize information or opinion if there is a reasonable likelihood that dissemination will interfere with a fair trial or prejudice the due administration of justice, and to

[3] Should the Court deem this issue to be significant, it could issue an order similar to Judge Jackson's in the *Stone* case for an *in camera* review of the redactions that reference exemption (b)(7)(B). *See United States v. Stone*, No. 19-0018 (May 9, 2019) (minute order) (ordering the government to submit for *in camera* review unredacted versions of the Report that relate to Stone and/or the dissemination of hacked materials, specifically including pages 41-65 of Volume I).

[4] The gag order in Stone does not distinguish the two cases because LCrR. 57.7(b) alone prohibits AG Barr's and SC Mueller's statements in both cases.

Judge Jackson's gag order pursuant to Rule 57.7(c). *See Stone* Notice 1-2. Despite this, the government decided not to issue a similar notice in this case.

In contrast to the government's actions toward Concord here, more than a century of Supreme Court case law recognizes "that foreign citizens in the United States enjoy many of the same constitutional rights that U.S. Citizens do . . . [including] in the criminal process . . . ." *Bluman v. FEC*, 800 F. Supp. 2d 281, 286 (D.D.C. 2011) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). Among these protections are those afforded by the Equal Protection Clause. *See id.* (citing cases). "[E]qual protection is denied when there is unlawful discrimination in the administration of an otherwise neutral law." *Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1319 (D.D.C. 1985) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). Fundamental to the Equal Protection analysis is whether similarly situated individuals of a different national origin were treated differently. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Here, there can be no doubt that Stone was treated differently than Concord in an effort to preserve the former's right to a fair trial while denying it to the latter.

The Government's Misleading Characterizations of the Mueller Report

Rather than focusing on the details provided in the Mueller Report that are not contained in the Indictment, the government broadly claims that the twenty-two single spaced pages of the Report merely repeat the allegations in the Indictment. This is not true.

For example, the Report asserts that the Defendants' activities "constituted 'active measures,'" and defines that term as "operations conducted by Russian security services." Report 14. No such allegation appears in the Indictment. The Report states that numerous media sources have reported on Defendant Prigozhin's ties to Russian President Putin. Report 17. No

such allegation appears in the Indictment.[5] The Report states that the Defendants recruited U.S. persons to hold signs in front of the White House. Report 19. The Indictment alleges only one single person held any such sign. Indictment ¶ 12(b). The Report states that the Defendants used a social media platform named Tumblr. Report 22. The Indictment contains no such allegation. The Report states that the Defendants purchased certain anti-Clinton ads on March 18, 2016 and April 6, 2016, acts that are not alleged in the Indictment. Report 25. The Report states the Defendants purchased certain pro-Trump ads that are not alleged in the Indictment. Report 25. The Report states the number of Facebook followers of certain social media accounts which are not alleged in the Indictment. Report 27. The Report states that U.S. media outlets and "high profile" U.S. persons quoted and re-tweeted Defendants' content. Report 27-28. No such allegations are contained in the Indictment. The Report states numbers on Twitter accounts and tweets by Defendants. Report 28-29. No such allegations are contained in the Indictment. The Report states that some rallies organized by Defendants drew hundreds of attendees. Report 29. No such allegation appears in the Indictment. The Report states that Defendants used the persona "Black Fist." Report 32. No such allegation appears in the Indictment. The Report states that the Trump Campaign promoted Defendants' political materials, including retweeting Defendants' political content. Report 33-34. No such allegations appear in the Indictment.

Furthermore, the government's argument that there is no harm because the Report repeats allegations in the Indictment equates the Indictment—which contains only allegations that must be proven in court through admissible evidence—with the statements in the Mueller Report, which are set forth as having been "established," where "substantial, credible evidence enabled the Office to reach a conclusion with confidence." Report 2. Nowhere in the Report, or in AG

[5] Moreover, the sole source for this assertion is a single newspaper article from 2018. *See* Report 17 n. 22.

Barr's statements announcing its release, does the government explain to the public and the jury pool that the statements relating to Concord or its alleged co-conspirators are unproven allegations or that Concord is entitled to a presumption of innocence, as required by the DOJ Manual. *See* Motion 9 (noting that the Justice Manual makes clear that a news release issued before the finding of guilt should state that the charge is merely an accusation and the defendant is innocent until proven guilty).

The Government's Conduct and Resulting Trial Publicity Undermine Concord's Right to Fair Trial

The Government ignores the jurisprudence that the court has the inherent power to fashion appropriate relief in cases of prejudicial pre-trial publicity. "It is fundamental that 'the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.'" *United States v. Haldeman*, 559 F.2d 31, 60 (D.C. Cir. 1976) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). Although "[i]t is not required . . . that the jurors be totally ignorant of the facts and issues involved," *Irvin*, 366 U.S. at 722, the United States Supreme Court has recognized that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton v. Yount*, 467 U.S. 1025, 1031 (1984). "Wholesale public access even of materials apparently relevant to criminal activity does not allow for the safe guards of the criminal process as to what is admissible evidence and what is not." *United States v. Hubbard*, 650 F.2d 293, 323 (D.C. Cir. 1980).

The District of Columbia Circuit has recognized that egregious prosecutorial misconduct "may so pollute a criminal prosecution as to require dismissal of the indictment [. . .] without regard to prejudice to the accused." *United States v. McCord*, 509 F.2d 334, 349 (D.C. Cir. 1974). As stated by Justice Brandeis, and noted by the Court in *McCord*, "[i]f the government

becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." *McCord*, 509 F.2d at 349 (citing *Olmstead v. United States*, 277 U.S. 438, 468 (1928), Brandeis, J., (dissenting)).

Attempting to influence public opinion by publishing materials related to a criminal prosecution may warrant dismissal of an indictment. *In re Anderson*, 306 F. Supp. 712, 714 (D.D.C. 1969). In *Anderson*, the court dismissed a criminal prosecution against certain Howard University students charged with criminal contempt related to student unrest when it became apparent that the university had purchased full-page advertisements that were "likely to interfere with a fair trial or otherwise prejudice the due administration of justice." *Id.* (internal quotation marks omitted). Even though the court ultimately concluded that the "University administration proceeded unconscious of its responsibility to this Court and insensitive to the implications of its actions," the Court still concluded that dismissal was appropriate. *Id.* at 714-15; *see also United States v. Slough*, 679 F. Supp. 2d 55, 60-61 (D.D.C. 2010) (noting that under its supervisory powers a court may dismiss an indictment as a sanction for prosecutorial misconduct).

The U.S. Supreme Court has also recognized that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). To that end, courts addressing claims of pretrial publicity also consider reporting of statements made by prosecutors as part of that analysis. *See Spivey v. Head*, 207 F.3d 1263, 1270 n.5 (11th Cir. 2000); *United States v. Pratt*, 807 F.3d 641, 649 (5th Cir. 2015) ("Finally, we note that while prosecutorial misconduct is one route to a presumption

of prejudice, it is not the only one. In certain 'extreme' cases, pretrial publicity of any kind—not just pretrial publicity stoked by prosecutors—can 'manifestly taint[] a criminal prosecution…'" (citations omitted)). Courts are, moreover, quick to condemn improper government conduct which creates undue pretrial publicity. *See United States v. Abbott Labs.*, 505 F.2d 565, 570-71 (4th Cir. 1974). In *Abbott Labs*, individuals from the DOJ and the FDA made statements to reporters that led to pervasive reporting about deaths related to an allegedly misbranded and adulterated drug sold by the defendant. *Id.* The court refused to dismiss the indictment but, "accept[ed], without question, that the pretrial publicity in [that] case was prejudicial and highly inflammatory" and that the underlying news reports were the results of "a conscious, deliberate statement" made by DOJ and FDA officials. *Id.*

As noted in Concord's Motion (and ignored by the government in its Opposition), prosecutors have a "responsibility of a minister of justice and not simply that of an advocate." Comments to D.C. Rule of Prof'l Conduct 3.8. As such, "[p]rosecutors maintain the integrity, fairness and objectivity of the criminal justice system in part by refraining from speaking in public about pending and impending cases except in very limited circumstances. The government's own list of applicable regulations and ethical rules demonstrates that the prosecutors' obligation of silence extends beyond 'confidential and grand jury matters' and beyond the 'prosecution team' narrowly defined to include only those who participate in a particular case." *United States v. Bowen,* 799 F.3d 366, 353-54 (5th Cir. 2015). While "statements to the press may be an integral part of a prosecutor's job, and may serve a vital public function, that function is strictly limited to the prosecutor's overarching duty to do justice." *Aversa v. United States*, 99 F.3d 1200, 1215 (1st Cir. 1996) (quoting *Souza v. Pina*, 53 F.3d 423, 425 (1st Cir. 1995)). "Those who wield the power to make public statements about

criminal cases must 'be guided solely by their sense of public responsibility for the attainment of justice.'" *Id*. (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987)). "Equally important, the prosecutor must respect the presumption of innocence even as he seeks to bring a defendant to justice." *Bowen*, 799 F.3d at 354.

Conclusion

Both AG Barr and SC Mueller violated LCrR. 57.7 by willfully releasing information and opinions not alleged in the Indictment knowing that the information and opinions would be widely disseminated in the press. If they can evade sanctions for this conduct simply by arguing *ipse dixit* that there cannot be prejudice when a trial date has yet to be set, then LCrR 57.7 is meaningless. AG Barr and SC Mueller have not rebutted the prima facie case made by Concord, and as such, Concord respectfully urges the Court to schedule a contempt hearing.

Dated: May 15, 2019

Respectfully submitted,

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