

ROGER STONE DOES THE RICO DEFENSE

Most of the Russian investigation beat journalists are analyzing Amy Berman Jackson's latest smackdown of Roger Stone, in which she requires him to comply with her gag order even though (he claims) the book forward that conflicts with it was planned in advance of her gag. I'll leave that to other journalists for now (though I will note that in the order, she relies on all the traps she set in the hearing on the gag, including Stone's admission he doesn't need the book for his livelihood and Stone's lawyer's concession that Stone shouldn't speak about his case). Effectively, she's still letting their stunt in that hearing make her ruling for her.

I've been engaged in the far more mundane analysis of how Stone's defense against the DNC lawsuit has evolved, possibly in conjunction with his indictment and the prospect of further information coming out.

Yesterday, all the defendants who have accepted service in the DNC lawsuit against Trump's campaign, WikiLeaks, the Agalarovs, and GRU submitted their motions to dismiss a second amended complaint (SAC). Because of the timing of all this, I wanted to compare Roger Stone's last response (Second Motion) with the one submitted yesterday (Third Motion).

The last motions to dismiss were submitted December 7. The SAC, filed January 18, added allegations tied to Jerome Corsi's draft plea agreement and related revelations, but not Stone's indictment (which was filed a week after the SAC). But Stone's response, submitted March 4, reflects the indictment, and presumably may reflect what his lawyers are seeing in discovery.

So comparing the two motions provides a sense of what Stone's lawyers are seeing and how they

imagine they'll defend him against his indictment.

The SAC mentions Stone around 112 times; his actions (described starting at ¶161) form a key part of the Democratic narrative, and is key to tying the Trump associates named in the suit to the Russian and WikiLeaks efforts to exploit the stolen documents.

There are three key differences in Stone's Third Motion and the Second.

Stone stops quoting the accusations against him

The Second Motion takes on the specific accusations against him, quoting some of the key paragraphs.

The specific facts alleged as to Roger Stone make him a unique defendant. While analyzing these allegations, it is critical for the Court to note when Stone is alleged, by Plaintiff to have joined the conspiracy (post-July 22, 2016, first DNC dissemination), what acts he allegedly committed to in fact join the conspiracy, and do those acts allege a conspiracy to which the DNC can seek a remedy in this Court. As to Roger Stone, the amended complaint alleges:

19. Throughout the summer and fall of 2016, during the height of the Presidential campaign, Trump's associates continued to communicate secretly with Russian agents and WikiLeaks, who strategically disseminated information stolen from Democratic targets. For example, in August 2016, Stone began communicating secretly with GRU operatives and bragged about his contacts with Assange. Similarly, Gates, who served as the Trump Campaign's deputy chairman

and then liaison to the Republican National Committee, maintained secret communications with an individual he knew to be connected to the GRU. (emphasis added).

Other than the private messages (communication on the social network platform, twitter), between Guccifer 2.0 and Stone there are no additional allegations about what they communicated about. The communications are attached as exhibits to this motion.

20. In the summer and fall of 2016, Stone revealed information that he could not have had unless he were communicating with WikiLeaks, Russian operatives, or both about their hacking operations in the United States. For instance, in August of 2016, nobody in the public sphere knew that Russia had stolen emails from John Podesta, the chairman of Secretary Hillary Clinton's presidential campaign. Nevertheless, on August 21, 2016, Stone predicted that damaging information about Podesta would be released, tweeting "it will soon [be] the Podesta's time in the barrel." Weeks later, WikiLeaks began releasing batches of Podesta's emails on a near-daily basis until Election Day—as Stone had predicted. Similarly, in mid-September 2016, Stone said that he expected "Julian Assange and the WikiLeaks people to drop a payload of new documents on Hillary [Clinton] on a weekly basis fairly soon." And, beginning on October 7, 2016, WikiLeaks began releasing stolen emails at least once a week—as Stone had predicted. (emphasis added).

WikiLeaks merely telling Stone that it has specific information is not a tort. Additionally, since the DNC alleged that Stone's prediction about "the Podesta's" proves Stone joined the relevant conspiracy is belied by the fact John Podesta's emails were not on the DNC server. The DNC cannot properly allege Stone joined the conspiracy and committed torts based upon this allegation in which the DNC cannot claim a concrete injury fairly traceable to Stone. An analysis of the DNC's standing and misuse of inferences to attempt to sufficiently plead this conspiracy will be discussed below.

That same passage in yesterday's motion to dismiss is far more abbreviated and – in the passage that most directly addresses the charges against him – doesn't cite the DNC's full accusations against him directly.

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Next, the DNC alleges Roger Stone was prophetic because he “revealed information he could not have had unless he were communicating with WikiLeaks, Russian operatives or both. (SAC ¶ 22). An example cited is: In August of 2016, nobody in the public sphere knew that Russia had stolen emails from John Podesta, Stone predicted that damaging information about Podesta would be released, tweeting: “it will soon [be] the Podesta’s time in the barrel.” Weeks later, WikiLeaks began releasing batches of Podesta’s emails on a near-daily basis until Election Day—as Stone had predicted. (SAC ¶91).

WikiLeaks merely telling Stone that it has non-specific information is not a tort. But the DNC emphasizes that “Stone discussed highly confidential and strategic information stolen from another Democratic party institution and disseminated to the public.” (SAC ¶ 23). This admission in and of itself proves that the Podesta emails were not part of the DNC records. Since the DNC alleged that Stone’s prediction about “the Podesta’s” proves Stone joined the relevant conspiracy and enterprise it is absolutely defeated by the fact John Podesta’s emails were not on the DNC server or that of the other “Democratic party institution.” Similarly, in midSeptember 2016, Stone said that he expected “Julian Assange and the WikiLeaks people to drop a payload of new documents on Hillary [Clinton] on a weekly basis fairly soon.” Id. And, beginning on October 7, 2016, WikiLeaks began releasing stolen emails at least once a week—as Stone had predicted. Id.

Then the DNC alleges Stone and other defendants misled various government agencies. Stone did not lie to the Special Counsel or the FBI; he only appeared or testified to one congressional committee. ³ He is alleged to have intimidated a witness who “threatened to contradict his narrative about his communications with WikiLeaks.” (SAC ¶ 30). But neither the testimony to Congress, nor the “intimidation” occurred prior to the 2016 presidential election.

³ Roger Stone has been indicted in the District of the District of Columbia. (Case No. 1:19-cr-18-ABJ). The indictment charges Stone with lying to Congress and intimidating a witness, Randy Credico in relation to Credico asserting his Fifth Amendment right to a House Committee. The indictment is not for conspiracy, RICO, theft, or trespass. The DNC alleges an open-ended RICO, something the Special Counsel has not been willing to allege against any American.

By telling this instead as a narrative rather than quoting the actual paragraphs, Stone minimizes the accusations against him, which the DNC could now fill out with more from his indictment.

Ultimately, Stone’s defense remains, as it has been from the start, that any foreknowledge of the John Podesta emails is useless to the Democrats’ lawsuit because Podesta’s emails were not stolen from a DNC server, and that he had no foreknowledge of the DNC release to WikiLeaks (he also leans heavily on WikiLeaks not having engaged in a tort, which may get him in trouble if WikiLeaks does get charged with something).

The possibility that Stone saw the Podesta emails in advance may explain this strategy. After all, if it comes out that he did receive

the Podesta emails in advance, then his defense here (that the emails don't amount to economic espionage) still might fly given that Podesta was not part of the DNC.

But now that Cohen has described Stone warning Trump of the July 22 release, that strategy may begin to crumble.

Stone drops his claim not to be part of the campaign

In the Second Motion, in an effort to distance himself from the network of conspirators, Stone denied that he was part of the campaign.

Conspiracy between Stone and the Campaign.

Plaintiffs do not state a proper theory of conspiracy to support any claim. An agent of a corporation cannot conspire with the corporation itself. *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 739 (D.C. 2000) (referred to as the "intracorporate conspiracy doctrine"); *Little Professor Book Co. v. Reston N. Pt. Vill.*, 41 Va. Cir. 73 (1996) (circuit court opinion); *Reich v. Lopez*, 38 F. Supp. 3d 436, 464 (S.D.N.Y. 2014), *aff'd*, 858 F.3d 55 (2d Cir. 2017); *Tabb v. D.C.*, 477 F. Supp. 2d 185, 190 (D.D.C. 2007) (citing *Dickerson v. Alachua County Comm.*, 200 F.3d 761, 767 (11th Cir. 2000)). Stone worked as an independent contractor for the Campaign for a few months in 2015. In short, the amended complaint alleges Stone was always acting as an agent of the Trump Campaign for President. In the only footnote in the amended complaint, the term "Trump Associate" is defined as an agent of the Campaign. (Am. Compl. at 16 *). The D.C.-law and Virginia law, therefore, does not support a claim of

conspiracy between Stone and the Campaign.

That footnote in the SAC has been rewritten to define Trump associate this way:

“Trump Associates” refers to the Trump advisors and confidants named as Defendants herein: Trump, Jr., Manafort, Kushner, Stone, and Papadopoulos.

In the section disclaiming a role in managing the RICO enterprise, Stone also drops an argument that the complaint doesn’t allege “that he was even communicating with the other ‘Trump associates’,” leaving this argument denying that he played a key role in the conspiracy.

The lawsuit does not allege Roger Stone had a management or operational position in the Campaign at all. He was merely an informal adviser. In short, Stone did not have any part in directing the enterprise’s affairs as required by the law in this Circuit. See *id.* At best, Stone is talking to an alleged Russian hacker on twitter about a hack and theft after the DNC’s data was stolen.

In the wake of his indictment – which gets closer to suggesting Stone got the October release timed to drown out the Access Hollywood release (a claim Jerome Corsi has sometimes backed), not to mention Michael Cohen’s claim that Stone told the President about the initial July 22 email dump several days in advance – this claim may get harder to sustain.

Indeed, as it is, if Stone goes to trial multiple communications with the campaign about WikiLeaks’ releases will become public. But Cohen’s allusion to corroboration about the July 18 or 19 Stone call to Trump suggests that information could become public even sooner.

Stone continues to ignore potential CFAA exposure

As in the Second Motion, there's a key part of the Democratic narrative that Stone ignores in the Third Motion: the hack of the Dem's analytics on AWS, which post-dates Guccifer 2.0's offer to help Stone and offer of the DCCC analytics in early September, which starts this way (I discuss and quote this in more depth in this post).

N. The GRU Reaches Out To Stone About Democratic Party Turnout Models

177. On August 22, 2016, GRU operatives transmitted several gigabytes of data stolen from another Democratic party target to a Republican party strategist in Florida. The data included voter turnout analyses for Florida and other states.¹⁶⁰

178. Between September 7 and September 8, 2016, the GOP strategist exchanged private messages with GRU operatives posing as Guccifer 2.0 in which he explained the substantial value of the stolen data he had received from them.¹⁶¹

179. On September 9, 2016, GRU operatives posing as Guccifer 2.0 contacted Stone, writing him "please tell me if I can help u anyhow[,] " and adding "it would be a great pleasure to me." The operatives then asked Stone for his reaction to the "turnout model for the Democrats' entire presidential campaign." Stone replied, "[p]retty standard." ¹⁶²

O. Russia Launches Another Attack On DNC Servers Housing Sensitive And Valuable Trade Secrets

180. On September 20, 2016, CrowdStrike's monitoring service discovered that unauthorized users—later discovered to be GRU officers—had accessed the DNC's cloud-computing service. The cloud-computing service housed test applications related to the DNC's analytics. The DNC's analytics are its most important, valuable, and highly confidential tools. While the DNC did not detect unauthorized access to its voter file, access to these test applications could have provided the GRU with the ability to see how the DNC was evaluating and processing data critical to its principal goal of winning elections. Forensic analysis showed that the unauthorized users had stolen the contents of these virtual servers by making exact duplicates ("snapshots") of them and moving those snapshots to other accounts they owned on the same service. The GRU stole multiple snapshots of these virtual servers between September 5, 2016 and September 22, 2016. The U.S. government later concluded that this cyberattack had been executed by the GRU as part of its broader campaign to damage to the Democratic party.

DNC's allegation that Stone informed Guccifer 2.0 he was unimpressed with the DCCC oppo research released in early September, followed shortly by GRU's hack of the crown jewels, would seem to undermine Stone's entire defense, given that his claims that his conversations with Guccifer 2.0 preceded all hacks (it doesn't — indeed, it happens as the hacks are occurring) and his claims that the Podesta release is unrelated because is not DNC does not apply to the analytics.

But thus far, he's just ignoring those allegations.

None of the new details about Stone's conduct will really get the DNC to The RICO. But it may

put Stone at more risk of other exposure.

As I disclosed last July, I provided information to the FBI on issues related to the Mueller investigation, so I'm going to include disclosure statements on Mueller investigation posts from here on out. I will include the disclosure whether or not the stuff I shared with the FBI pertains to the subject of the post.