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Via Email Only

Michael A. Carvin, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington D.C. 20001-2113

Re: *Democratic National Committee v. The Russian Federation*, *et al.*, No. 1:18-cv-3501 (S.D.N.Y.)

Dear Mr. Carvin:

Contrary to your May 13, 2019 letter, the Special Counsel's Report does not "refute" the DNC's claim that the Trump Campaign conspired with Russia. Rather, the Report methodically compiles evidence that the Trump Campaign participated in Russia's plan to interfere in the 2016 election. Over the course of more than 100 pages, the Report details the Campaign's repeated suspicious interactions with Russian agents, confirming and bolstering the central allegations of the DNC's Second Amended Complaint ("Complaint").

The Special Counsel specifically warned that his "statement that the investigation did not establish particular facts does not mean there was no evidence of those facts." Report at 2. Indeed, he reiterated in a televised press conference last week that a decision not to prosecute should not be confused with an exoneration. And yet, this is exactly what the Trump Campaign does in its letter: It wrongly equates the Special Counsel's finding that the evidence did not "establish" beyond a reasonable doubt that the Trump Campaign was involved in a conspiracy with the farfetched conclusion that the Campaign must be innocent of all charges. The Campaign's letter also ignores the different burdens of proof in civil and criminal actions and the fact-gathering tools that are available to civil plaintiffs like the DNC, but not to prosecutors like the Special Counsel.

In light of these obvious deficiencies, the Campaign's letter is wholly groundless. We urge the Campaign to refrain from proceeding with this ill-advised action, as the pursuit of a Rule 11

motion on the grounds set forth in the Campaign's letter would itself violate Rule 11 and could be sanctionable.

1. *The Special Counsel's Report Provides Ample Evidence of Defendants' Liability*

Contrary to the Trump Campaign's insistence that the Special Counsel's Report "definitively refuted" the DNC's Complaint, Letter at 1, the Report confirms and reinforces the central allegations in the Complaint and presents additional evidence that the Trump Campaign agreed to a plan in which Russia would steal documents from Democratic targets—including the DNC—and use them to aid Trump. Among other findings, the Report stated that:

- In the run up to the 2016 Presidential election, there were "multiple links between Trump Campaign officials and individuals tied to the Russian government. Those links included Russian offers of assistance to the Campaign. In some instances, the Campaign was receptive [to] the offer[.]" Report at 173;[1] *cf.* Compl. ¶¶ 2, 10.

- In April 2016, Mifsud (a London-based academic with ties to the Russian government) told Papadopoulos (a foreign policy advisor to and agent of the Trump Campaign) that the Russian government "had obtained 'dirt' on candidate Hillary Clinton," in the form of "thousands of emails." Report at 86-89; *cf.* Compl. ¶¶ 13, 94. Ten days later, "Papadopoulos suggested to a representative of a foreign government that the Trump Campaign had received indications from the Russian government that it could assist the Campaign through the anonymous release of information damaging to Hillary Clinton." Report at 89; *cf.* Compl. ¶ 99.

- In April 2016, Manafort and Gates began sharing internal Campaign polling data and information on battleground states including "Michigan, Wisconsin, Pennsylvania, and Minnesota" with Konstantin Kilimnik, a man with known connections to Russian intelligence. Report at 140. This data sharing continued for several months. "Gates stated that, in accordance with Manafort's instruction[s], he periodically sent Kilimnik polling data via WhatsApp; Gates then deleted the communications on a daily basis." In addition to secretly sharing this data, Manafort and Kilimnik "discussed the status of the Trump Campaign and Manafort's strategy for winning Democratic votes in Midwestern states." *Id.* at 6, 136-37. *Compare generally* Report at 129-143 *with* Compl. ¶¶ 67, 91, 152, 231. Manafort later "lied to the [Special Counsel's] Office and the grand jury about . . . his meetings with Kilimnik[.]" Report at 130; *cf.* Compl. ¶ 231.

- In early June 2016, Rob Goldstone "passed along an offer purportedly from a Russian government official to provide 'official documents and information' to the Trump

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[1] Citations to pages of the Report refer to Volume I of the Report.

Campaign for the purposes of influencing the presidential election. Trump Jr. appears to have accepted that offer and to have arranged a meeting to receive those materials." Report at 185; *cf.* Compl. ¶¶ 133-36. That meeting took place on June 9, 2016, when "senior representatives of the Trump Campaign met in Trump Tower with a Russian attorney expecting to receive derogatory information about Hillary Clinton from the Russian government. . . . Members of the Campaign discussed the meeting before it occurred, and Michael Cohen recalled that Trump Jr. may have told candidate Trump about an upcoming meeting to receive adverse information about Clinton, without linking the meeting to Russia." Report at 110; *cf.* Compl. ¶¶ 137. *Compare generally* Report at 110-20 *with* Compl. ¶¶ 132-138.

- At a press conference on July 27, 2016, Trump discussed the release of stolen DNC documents and data, and claimed that it was "ridiculous" that Russia was involved. Nevertheless, he "stated that it would give him 'no pause' if Russia had Clinton's emails. Trump added, 'Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing.'" Report at 18, 49; *cf.* Compl. ¶ 158. Within "approximately five hours" of Trump's request for assistance, Russian intelligence officers launched a cyberattack against Secretary Clinton's personal office "for the first time," targeting the office's email accounts. Report at 49. While Russia was engaged in this hacking effort, Trump asked "individuals affiliated with his Campaign," including Michael Flynn, to find the emails. Flynn, in turn contacted Peter Smith, "an investment advisor who was active in Republican politics," to enlist him in the effort to find the emails. Report at 62. Within weeks of Trump's July 27 press conference, Smith "created a company, raised tens of thousands of dollars, and recruited security experts and business associates. Smith made claims to others involved in the effort (and those from whom he sought funding) that he was in contact with hackers with 'ties and affiliations to Russia' who had access to the emails, and that his efforts were coordinated with the Trump Campaign." Report at 63.

- On August 23, 2016, Sergei Millian, who told Papadopoulos that he had "insider knowledge and direct access to the top hierarchy in Russian politics," sent "a Facebook message to Papadopoulos promising that he would 'share with you a disruptive technology that might be instrumental in your political work for the campaign.'" Report at 94-95.

Given this extensive evidence that the Trump Campaign conspired with Russia to influence the results of the 2016 election, the Trump Campaign cannot in good faith claim that the Special Counsel's Report "definitively" proves its innocence.

2. *The Campaign's Letter Rests on a Logical Error*

In arguing to the contrary, the Trump Campaign commits a logical error that the Report warned readers not to make. Specifically, the Campaign assumes that there were only two possible outcomes from the Special Counsel's investigation: (1) it would conclusively establish the Trump Campaign's guilt; or (2) it would conclusively establish the Trump Campaign's innocence. And because the investigation did not conclusively prove that the Trump Campaign conspired with Russia, the Campaign insists that investigation proved their innocence. By creating a false choice between these two extremes, the Trump Campaign leaves no room for the Report's actual findings: there was evidence of the Trump Campaign's guilt, but not enough to establish that guilt beyond a reasonable doubt. On page 2 of the Report, the Special Counsel warned readers not to make that mistake, explaining: "A statement that the investigation did not establish particular facts does *not* mean there was no evidence of those facts." Report at 2 (emphasis added). Nevertheless, the Trump Campaign's letter repeatedly and falsely suggests that, if the Special Counsel's investigation "did not establish" a particular fact, then the investigation refuted that fact.

3. *The Campaign's Letter Overlooks the Differences Between Civil and Criminal Actions*

The Campaign's May 13 letter also overlooks the crucial differences between civil and criminal cases. It is axiomatic that an "acquittal in [a] criminal action does not bar civil suit based on the same facts." 2A Charles Wright et al, *Federal Practice & Procedure* § 468 (4th ed. 2013); *see also Purdy v. Zeldes*, 337 F.3d 253, 259 (2d Cir. 2003). Similarly, the government's decision not to press criminal charges against a defendant has no effect on civil proceedings. Indeed, civil plaintiffs routinely prevail in cases where the government has declined to prosecute the defendants. *See, e.g.*, *In re: Urethanes Antitrust Litigation*, No. 04-1616 (D. Kan.) (after the government determined there was not enough evidence to prosecute the defendants, civil plaintiffs took the case to trial and secured a judgment of approximately $1.06 billion). This is not surprising in light of the different standards of proof in civil and criminal cases and the additional sources of evidence available to civil plaintiffs.

First, a civil plaintiff's burden of proof is much lighter than the government's burden of proof in a criminal case. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (noting that a civil plaintiff only needs to show that it is more likely than not that the defendants violated the law, while criminal prosecutors must prove their case "beyond a reasonable doubt"). Thus, while the information available in the Special Counsel's Report may be insufficient to sustain a criminal conviction, a civil jury could find the same information more than sufficient to hold Defendants civilly liable.

In view of the lower standard of proof in civil cases, a civil plaintiff can readily rely on evidence that a defendant obstructed justice. *See* 2 Kenneth S. Broun et al, *McCormick on Evidence* § 265 (7th ed. 2016) ("[W]rongdoing by [a] party in connection with its case amounting to an obstruction of justice is . . . commonly regarded as an admission by conduct."); *see also Great Am.*

Ins. Co. v. Horab, 309 F.2d 262, 264 (8th Cir. 1962) (Blackmun, J.) ("It is generally held that, in a civil case, evidence that a litigant, or his agent, has attempted to influence or suppress a witness is receivable as an admission or as an indication of the litigant's consciousness that his case is weak or unfounded or that his claim is false or fraudulent. Specifically, an attempt to persuade a witness not to testify is admissible against the party responsible for that attempt." (citations omitted)). Here, Defendants' extensive obstructive conduct, detailed in the Complaint, *see* Compl. ¶¶ 206-231, will strongly support the DNC's claims.

Moreover, a civil plaintiff can pursue evidentiary avenues unavailable to prosecutors. For example, unlike in a criminal proceeding, where a defendant has no obligation to speak to government investigators regarding her own illegal conduct, a civil plaintiff can compel a defendant to attend a deposition, and if the defendant refuses, she can be held in contempt of court or otherwise sanctioned. *See* Fed. R. Civ. P. 37(b). Similarly, if a defendant invokes her Fifth Amendment right not to answer specific questions during a deposition or at trial, a civil jury—unlike a criminal jury—can infer that the defendant invoked her rights because she violated the law. *See, e.g.*, *See Mitchell v. United States*, 526 U.S. 314, 328 (1999); *Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 170 (2d Cir. 2017). Thus, in this case, Trump, Jr., Assange, and the Agalarovs—whom the Special Counsel did not interview—can be compelled to attend depositions, where they will have an incentive to answer the DNC's questions truthfully (rather than invoking their Fifth Amendment rights).

4. *Additional Information Pertinent to This Case Continues to Come to Light*

The Trump Campaign's letter also overlooks the fact that the public portions of the Special Counsel's Report are not the only source of evidence of Defendants' wrongdoing. Many passages in the Report have been redacted, in part to protect ongoing investigations into misconduct surrounding the 2016 elections.

Additionally, the House Permanent Select Committee on Intelligence ("HPSCI") and the Senate Intelligence Committee continue to investigate Russian election interference. Indeed, on May 8, 2019 the HPSCI issued a subpoena for the unredacted Special Counsel's Report and the evidence underlying it.[2] Likewise, the Senate Intelligence Committee recently secured an agreement for Trump, Jr. to testify before that Committee regarding his participation in the Trump

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[2] *House Intelligence Committee Issues Subpoena for Counterintelligence and Foreign Intelligence Materials in Mueller Investigation, Including Report and Underlying Evidence*, U.S. House of Representatives Permanent Select Committee on Intelligence (May 8, 2019), https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=638.

Tower meeting, among other topics.[3] Not only are these ongoing investigations likely to reveal additional evidence pertinent to this action, but the very fact that these congressional bodies—led by both Republicans and Democrats—continue their investigations is a forceful rejection of the Campaign's false claim that the Special Counsel's Report "definitively refuted" the DNC's "theory of liability[.]" Letter at 1.

5. *The Campaign's Letter Misconstrues Specific Events Discussed in the Report*

In addition to these overarching problems with the Trump Campaign's arguments, the May 13 letter presents a deeply misleading picture of specific events discussed in the Report. For example, the letter falsely claims that "[t]here is no . . . evidence that Papadopoulos told the Campaign about any 'stolen materials.'" Letter at 2. But Papadopoulos told investigators that he recalled an incident where he told Sam Clovis, the Trump Campaign's National Co-Chair, that he thought the Russian government had Secretary Clinton's emails, though he "wavered" about the accuracy of this recollection. Report at 93.

Similarly, the Campaign's letter misconstrues the Report's discussion of the Trump Tower meeting on June 9, 2016. Contrary to the Trump Campaign's suggestion, the Special Counsel's Report did not provide a complete record of the discussions at the Trump Tower meeting. Rather, it recounted the meeting participants' self-serving explanations of what happened, noted that the Special Counsel was not able to interview two of the attendees (Trump Jr. and Natalia Veselnitskaya), highlighted some meeting attendees' conflicting accounts of what transpired, and observed that the notes Manafort took during the meeting "reflect the general flow of the conversation, although not all of its details." Report at 118. Moreover, the Report notes that, even according to the meeting participants' self-serving statements, Russia gave the Trump Campaign some information about the Clinton Campaign, and Kushner expressed disappointment that the information was not more incriminating. *Id.* These findings are completely consistent with a situation where the participants in the Trump Tower meeting discussed stolen Democratic documents, but failed to record that discussion or confess to government investigators. That situation is plausible given that: (1) there is documentary evidence showing that the purpose of the meeting was for Russia to offer documents to the Trump Campaign, Report at 110; (2) the day after the meeting, Russia attempted to hack into a DNC backup server, Compl. ¶ 143; (3) less than a week after the Trump Tower meeting, Russia started disseminating stolen Democratic materials,

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[3] Karoun Demirjian et al., *Donald Trump Jr. agrees to testify before the Senate Intelligence Committee again*, Wash. Post (May 14, 2019), https://www.washingtonpost.com/world/national-security/donald-trump-jr-agrees-to-testify-before-the-senate-intelligence-committee-again/2019/05/14/2efd4574-7686-11e9-bd25-c989555e7766_story.html?utm_term=.eef8d1b7e644.

Report at 42; Compl. ¶ 148; and (4) members of the Trump Campaign lied about the existence and substance of the meeting, *see, e.g.*, Compl. ¶¶ 29, 141-42, 213, 217-19, 222.

Moreover, the Campaign misleadingly describes an event where J.D. Gordon, a Senior Campaign advisor on policy and national security, diluted proposed language in the Republican Party Platform that called on the United States to support Ukraine in a dispute with Russia. Letter at 3. The Report expressly notes that Gordon "felt obliged to object to the proposed platform [language] and seek its dilution" in light of "Trump's statements on the campaign trail." Report at 125.

Finally, while the Special Counsel's Report could not affirmatively prove why Manafort and Gates spent months sending internal Campaign polling data and strategies to Kilimnik—in part because Gates deleted his messages to Kilimnik on a daily basis and in part because Manafort lied to the Special Counsel about the data—nothing in the report would prevent a civil jury from adopting the most natural explanation for that data sharing (and the efforts to conceal it): The Campaign wanted to help Russia gauge the effectiveness of its election interference efforts. *See supra* at Section 3 (discussing adverse inference from destruction of evidence).

6. *The Trump Campaign's Motion is a Transparent and Improper Effort to Litigate the Merits of this Action*

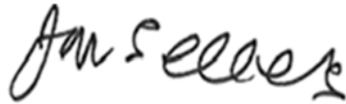
As the foregoing demonstrates, the Campaign's position that the DNC has violated Rule 11 by failing to "withdraw or even amend its claims" is untenable. Letter at 5. "Rule 11 sanctions are judged under an objective reasonableness standard and are appropriate only when it is patently clear that a pleading has no chance of success." *In re Bridge Constr. Servs. of Fla., Inc.*, 140 F. Supp. 3d 324, 332 (S.D.N.Y. 2015) (Koeltl, J.) (quoting *Shuster v. Oppleman*, No. 96cv1689 (JGK), 1999 WL 9845, at *6 (S.D.N.Y. Jan. 11, 1999)). "The imposition of Rule 11 sanctions is discretionary, and should be reserved for extreme cases." *Cooksey v. Digital*, 14cv7146 (JGK), 2016 WL 5108199, at *8 (S.D.N.Y. Sept. 20, 2016) (citation omitted). Given this exacting standard and the facts at hand, the Campaign's motion is baseless.

Notably, the Advisory Committee notes on Rule 11 expressly warn that Rule 11 "should not be employed as a discovery device or to test the legal sufficiency of allegations in the pleadings . . . . Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, . . . to intimidate an adversary into withdrawing contentions that are fairly debatable, [or] to increase the costs of litigation . . . ." Fed. R. Civ. P. 11, advisory committee's notes to 1993 amendment. That is precisely the sort of inappropriate conduct in which the Trump Campaign has engaged here.

7. *Conclusion*

Given the manifest deficiencies in the Campaign's letter, we remind the Campaign that "the filing of a [Rule 11] motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions." *Id*. Rather than engage in this needless and wholly unfounded litigation over sanctions, the parties should proceed with the adjudication of the pending motions to dismiss and, should those motions be denied, embark on discovery and the ultimate trial of this action.

Sincerely,



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