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DISTRICT COURT, COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: ERIC COOMER Defendants: DONALD J. TRUMP FOR PRESIDENT, INC., Et al.	▲COURT USE ONLY▲ Case # 20-CV-34319 Div. 409
Attorney for Defendants Joseph Oltmann, FEC United, and Shuffling Madness Media, Inc. d/b/a Conservative Daily Andrea M. Hall THE HALL LAW OFFICE, LLC P.O. Box 2251 Loveland, CO 80539 (970) 419-8234 andrea@thehalllawoffice.com Atty. Reg. #: 036410	

DEFENDANTS JOSEPH OLTMANN/FEC UNITED, INC./SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY'S SPECIAL MOTION TO DISMISS PURSUANT TO § 13-20-1101, C.R.S. (2021)

Defendants, Joseph Oltmann, FEC United, Inc., and Shuffling Madness Media, Inc., by and through their attorney, The Hall Law Office, LLC, and, bring their Special Motion to Dismiss pursuant to § 13-20-1101, C.R.S. (2021). As grounds therefor, Defendants state as follows:

INTRODUCTION

In 2019, the Colorado General Assembly enacted Colorado's first Anti-SLAPP[1] statute, with

[1] SLAPP is an acronym for "strategic lawsuits against public participation", a term introduced

the expressed legislative intention to, "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law…"subsection (1)(b). The statute provides protection against lawsuits designed to stifle free expression and criticism, and is modeled closely after California' statute, enacted in 1992[2].

The statute provides, at subsection (3):

> (a) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue is subject to a special motion to dismiss unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim.
>
> (b) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Subsection 3 establishes the procedural mechanism for consideration of the special motion to dismiss, and provides the rule of decision; subsection 4 provides for attorneys' fees and costs, and subsection 7 vests the Court of Appeals with jurisdiction to hear interlocutory appeals.

Under subsection 3, a defendant must make a prima facie showing that the acts upon which the plaintiff relies for his or her claims are ones "in furtherance of the [defendant's]right of petition or free speech, in connection with a public issue. If a defendant is able to make that showing, the burden shifts to the plaintiff to demonstrate that s/he is reasonably likely to prevail on the claim or claims subject to the special motion.

While no Colorado appellate court has yet provided an analysis of the statute, the California courts have done so for decades, and, because much of Colorado's statute is word-for-word the same,[3]

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by two DU law professors, George W. Pring and Penelope Canan in the 1980s.

[2] Codified at the California Code of Civil Procedure § 425.16, a copy of which is attached as *Exhibit A*. Washington State enacted the first such law, in 1989. The District of Columbia and twenty-eight other states have done so as of January 1, 2021.

California Courts' decisions have significant persuasive value.[4] California has determined that the identical language contained in subsection (b)(1) means a plaintiff's pleadings, even when verified, are not sufficient to overcome a special motion to dismiss, and that the trial court may consider only admissible evidence in making its determination, as it would in ruling on a motion for summary judgment. *See, e.g., Finton Constr., Inc. v. Bidna & Keys APLC*, 190 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2015).

It should be noted that Texas's anti-SLAPP statute also contains identical language, but Texas courts have taken an opposite view[5], holding that the court may consider the pleadings. *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App. 2015). However, Texas's approach suffers from a fundamental difficulty with the canons of statutory construction: a construction which renders words surplusage is to be avoided. *Montclair v. Ramsdell,* 107 U.S. 147, 152 (1883)(court should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); *Hibbs v. Winn,* 542 U.S. 88, 101 (2004)("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant..."); *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."); *Rose v. Allstate Ins. Co.*, 782 P.2d 19, 23 (Colo. 1989). Texas's approach renders the phrase, "and supporting and opposing affidavits" mere surplusage.

If the claims are not actions brought by governmental agencies to enforce the law or protect

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[3] Attached as *Exhibit A*

[4] Oregon and Washington generally follow California's approach, while Louisiana and Maine generally follow Texas.

[5] The Texas Supreme Court has not addressed the issue beyond noting that pleadings "may not" satisfy the evidentiary standard, "clear and specific", which Colorado's statute does not contain. *In re Lipsky,* 460 S.W. 574, (Tex. 2015). Texas's statute is attached as *Exhibit B.*

against a public threat, or brought solely in the public interest, neither of which is at issue here, the analysis moves to the first prong, which focuses on whether the defendant can establish that the claim arose from a protected activity. If the defendant establishes that the conduct alleged to give rise to liability was protected activity under the statute (right of petition or free speech in connection with a public issue), the analysis moves to the second prong, and the burden shifts to the plaintiff.

The plaintiff's claims must be based on competent evidence and legal sufficiency. It must make out a prima facie case, based on elements of each claim supported by competent evidence, sufficient to defeat the defendant's burden, under Colorado law, of clear and convincing evidence.

FACTUAL BACKGROUND

Dominion voting systems, the Plaintiff's employer, is a privately-held corporation chartered in Delaware, with U.S. operations based in Colorado, which contracts with state and local governments in more than half the United States to administer elections. Dominion sells its machines, systems, hardware, and software, and enters into contracts with some 1,300 U.S. jurisdictions to manage their elections. For more than a decade, Dominion has faced scrutiny for insecurity and vulnerability to hackers.[6] Under intense scrutiny after the 2020 election, Dominion set about a campaign of terrorizing detractors with threats of lawsuits and financial ruin and mighty moves to silence the voices raised against wholesale adoption of its machines and technology, at the expense of the American voter and taxpayer. Those on the receiving end of Dominion's campaign included more than 150 individuals, news networks, and companies, according to Dominion's own website. https://www.dominionvoting.com/legal-updates-learn-how-we-are-defending-dominion/ John Poulos, Dominion CEO has publicly announced, "Our legal team is looking at frankly

[6] A partial list of these inquiries is attached as *Exhibit C*.

everyone, and we're not ruling anybody out." https://neonnettle.com/news/14337-dominion-ceo-warns-of-more-lawsuits-we-re-not-ruling-anyone-out-

"Silence or ruin; your Hobson's choice"… Coomer and Dominion's strategy is "lawfare", "Popularized by General Charles Dunlap, 'lawfare' usually describes the use of law as a weapon of war." https://www.lawfareblog.com/topic/meaning-lawfare In the colloquial parlance, it is defined by Wikipedia as, "[t]he misuse of legal systems and principles against an enemy, such as by damaging or delegitimizing them, wasting their time and money (e.g. SLAPP suits), or winning a public relations victory." https://en.wikipedia.org/wiki/Lawfare Lawfare gave rise to anti-SLAPP statutes; Colorado recognized the need to combat lawfare with speedy resolution and pushback against threats to free expression in the political sphere. This lawsuit was a SLAPP, and the Defendants are entitled to dismissal.

BASIS FOR DISMISSAL

The Defendants' Special Motion to Dismiss rest upon four grounds: the Plaintiff cannot show falsity; the Plaintiff cannot defeat the Defendants' First Amendment Privileges; and the Plaintiff cannot make a *prima facie* showing of actual malice or conspiracy. The Plaintiff's claim for outrageous conduct is barred by Colorado law, and is addressed in Defendants' Rule 12(b) Motion to Dismiss.

I. THE PLAINTIFF CANNOT SHOW BY ANY COMPETENT EVIDENCE THAT JOSEPH OLTMANN'S STATEMENTS WERE FALSE.

The Plaintiff accuses Joseph. Oltmann of creating a false narrative and buttressing it with a report of the telephone conversation during which he heard, "Eric", "the guy from Dominion" state that he had a scheme to interfere with the 2020 election. Mr. Coomer now swears he was not present on that phone call, but has not adduced any competent evidence to make even a threshold showing that Joseph Oltmann fabricated the conversation, or did not hear what he reported. Apparently hoping to distract from the complete lack of competent evidence, the Plaintiff offers loaded language,

heated rhetoric, creative theories, and verbal histrionics in place of factual allegations, but cannot meet his burden by means of those. In the complete absence of any competent evidence, the Plaintiff cannot demonstrate that he is "reasonably likely to prevail on the merits" of his claims, which is the burden of proof he must meet to avoid dismissal.

Mr. Coomer cannot seem to decide what he believes the history is, here. Contrary to his Complaint, his self-funding website recounts a different chronology: https://fundly.com/eric-coomer-fight-against-election-disinformation states:

> Just days after the election, Eric Coomer, an employee of Dominion Voting Systems, was baselessly accused of committing treason against the United States and manipulating the November 3rd election. While these accusations started with fringe alt-right personalities on YouTube on November 9th, they were quickly amplified by right-wing television media and the Trump Presidential campaign. These lies have become the basis of their claims to "Stop the Steal" leading to the January 6 insurrection. They are still promoting The Big Lie today.

In his Amended Complaint, Coomer claims that Oltmann "used Dr. Coomer's position and employment with Dominion to allege Dr. Coomer was a key figure in a high-level conspiracy to rig the election against President Trump." He claims that "[t]hese statements are baseless and unequivocally false" *Amended Complaint* ¶ *59*. The Complaint alleges that this occurred on a Conservative Daily Podcast, *Id.* ¶ *52*, rather than "on YouTube", as Coomer contends elsewhere.

II. THE PLAINTIFF CANNOT SURMOUNT THE FIRST AMENDMENT BARRIERS TO HIS CLAIMS

The First Amendment protects a great deal of opinion and public speech against legal action by those who dislike, and would seek to retaliate for, the opinions and speech. Absent deliberate falsity or the speaker's "serious doubt as to the truth", *St. Amant v. Thompson*, 390 U.S. 727, 731(1968), statements of fact, even when wrong, or motivated by "spite, hostility or deliberate intention to harm", *Greenbelt Co-op, Pub. Ass'n v. Bresler,* 398 U.S. 6, 14 (1970) statements on matters of public concern are not actionable. Where the statement at issue is not "factual", that is, not "provably true or false", the

statement is absolutely protected. *Milkovich v. Lorain J. Co.,* 497 U.S. 1 (1990).

THE ACTUAL MALICE STANDARD

Eric Coomer is, at the very least, a limited purpose public figure. Since at least mid-2017, he has made and given continual public appearances, presentations, product announcements, sales pitches, testimony in government and election board hearings and court proceedings, as Director of product strategy and security for Dominion Voting Systems.[7] While the Plaintiff is very careful not to include his history and responsibilities with Dominion in his complaint, he concedes it in attempting to establish harm to his reputation. *See, e.g.,* fn 137, *Amended Complaint*, in which he admits that harm to his "working relationship with state and county officials (public officials)…compromised his continued involvement and employment in relation to and support of elections" Indeed, with his photo front and center on Dominion's home page, Coomer has made himself the company's public face. Contrary to the Plaintiff's allegations, in ¶ 62 that "[i]n reality, Dr. Coomer had not been on Dominion's website for years" he is most certainly "there". https://www.dominionvoting.com/about/

It is beyond debate that the 2020 presidential election and issues surrounding the security of US elections and of voting machines and technology is a matter of "significant" public concern. This has been the case since at least February, 2018, when the Director of National Intelligence warned Congress, in a public hearing, that United States' elections were "under attack" by Russian hackers. By February 13, six US intelligence agencies concurred that Russian hackers were actively interfering in American elections. Congress has held numerous hearings on election security; states across the country have done so as well; the media has reported unceasingly on a whole raft of issues involving US election security, from Chinese, Korean, and Russian hackers, to voting machine vulnerabilities,

[7] A partial list of the Plaintiff's public presentations on behalf of Dominion is attached as *Exhibit D*

ballot harvesting and abandonment, improper election-day disenfranchisement, and postal service concerns over ballot timeliness. Thus, even if the Plaintiff were not a limited-purpose public figure, and the evidence establishes that he is, Joseph Oltmann's statements were irrefutably made "in connection with a public issue", and clearly meet the first prong of the special motion analysis.

Further, under well-settled Colorado law, it is irrelevant whether Coomer is a private individual or a limited-purpose public figure, because when the publication involves a matter of public concern, or even "general interest", Colorado requires "actual malice". *Diversified Management, Inc. v. Denver Post, Inc.* 653 P.2d 1103, 1106 (Colo.1982)(quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971)). Actual malice requires, at least, "reckless disregard" for the truth or falsity of the statement, and proof by "clear and convincing evidence". *New York Times v. Sullivan,* 376 U.S. 254, 279-80 (1964); *Barnett v. Denver Publ'g, Inc.*, 36 P.3d 145, 147 (Colo.App. 2001). Failure to investigate, and negligence, are "constitutionally insufficient to show the recklessness that is required". *Sullivan, supra; Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967). Like actual falsity, the Plaintiff has brought forth **no** evidence of reckless disregard on Mr. Oltmann's part, let alone evidence of sufficient weight to meet the "clear and convincing" standard of proof.

The Plaintiff argues that Oltmann must have been reckless, because he failed to contact Coomer for confirmation or denial, and failed to ask Coomer if he was, in fact, on the call. However, he misstates the test for recklessness: grave doubt as to the truth of the statement, not negligence. In a remarkable example of *reductio ad absurdum,* he appears to argue that Coomer (despite his position with Dominion, his self-admitted "relationships" with election officials throughout the nation, the apparent Antifa auspices and circumstances of the call) would have simply given a truthful answer on which Mr. Oltmann could, and should have, relied. Plainly, the argument cannot substitute for competent evidence, and Mr. Coomer's "theories" that Oltmann "fabricated a conspiracy" because he is allegedly a "right-wing activist" don't get him even close to plausibility, let alone clear and

convincing evidence. Neither does it recognize that there were no obvious available sources of corroboration or refutation whom Mr. Oltmann could have contacted. He simply had to do the best he could to identify the speaker. He did so, and, once convinced by voice comparison and an investigation into the Plaintiff, whose identity Oltmann had not even known prior to the September call, he went public.

If Mr. Oltmann was wrong about who was posing as Coomer on the call, that has yet to be shown by any evidence. However, being wrong is not actionable, if the speaker had a reasonable and informed belief that the statement he made was accurate and correct. Erroneous statements are "inevitable" in public discourse. *Sullivan,* 376 U.S. at 270.

HYPERBOLE, RHETORIC, AND OPINION

The First Amendment protects statements of opinion, "rhetorical hyperbole", and assertions that are not readily demonstrable as, "true" or "false". *Old Dominion Branch No. 496*, 418 U.S. 264, 284-86 (1974); *Hustler Mag. v. Falwell,* 485 U.S. 46 (1988)(Vigorous exercise of the right to persuade others must not be stifled by the "threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact". A statement of opinion is actionable only when it implies facts known to the speaker, but undisclosed. *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351 (Colo. 1983). A statement must be examined "in terms of apparency", in context of the entire publication, and after consideration of all the circumstances surrounding the statement, including the medium and audience. *Id.*; *see also, Keohane v. Stewart,* 882 P.2d 1293 (Colo. 1994).

Joseph Oltmann's statement to other media that he was present on a call in September, 2020, with "Eric", whom another speaker stated, without correction, was, "the guy from Dominion" was a statement of fact, concerning which the Plaintiff has not brought forth any evidence of falsity. As the Plaintiff admits, at paragraph 52 of his Amended Complaint, Mr. Oltmann disclosed the facts surrounding that call and what he witnessed. There were no insinuations that Oltmann knew more

than he was telling.

Oltmann's alleged "media platform" posts, whatever that refers to, opining that the Plaintiff is "mentally ill, an unhinged sociopath, a creep, a fraud, a cheat, a scumbag, a lynchman, a terrorist, a traitor, evil" *Amended Complaint, fn 131,* are clearly statements of opinion, and rhetorical hyperbole. Many of these words have multiple meanings, depending on the audience, and each is highly-loaded – the stuff of which heated rhetoric is made. The United States Supreme Court holds that rhetorical hyperbole has, "traditionally added much to the discourse of our Nation." *Milkovich,* 497 U.S. at 20. Hence, a reference to a university official as the "Director of Butt Licking", however offensive, is not actionable. *Yeagle v. Collegiate Times,* 255 Va. 293, 297 (1998)(following *Milkovich*); an accusation of blackmail, while an accusation of criminal conduct, is not actionable when "no reasonable reader could have thought that either the speakers…or the newspapers…were charging Bresler with the commission of a criminal offense." *Greenbelt Co-op, supra,* 398 U.S. at 14 ("even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet"); *see also, Letter Carriers v. Austin,* 418 U.S. 264, 284-86 (1974)(use of "scab" in a union dispute was 'figurate language', a "lusty and imaginative expression of contempt"). Statements on an internet forum that a woman is, "the dumbest person, possibly ever," "really fucking stupid," a "moron," a "slut whore," that she writes like she uses "crayola magic marker," and she has "ha[d] like a dozen husbands by age 30.", insulting and offensive as they are, are not "actionable as defamation". *Melinda Scott v. Joshua Moon,* Case No. 2:19CV5 (W.D. Va. Jan. 24, 2019). "[U]se of words like "traitor" cannot be construed as representations of fact", *Old Dominion, supra,* at 284.

The culture of internet communications is distinct from that of print media, and has been characterized as encouraging a "freewheeling, anything goes writing style." See Eirik Cheverud, COMMENT, COHEN V. GOOGLE, INC., 55 N.Y. L. Sch. L. Rev. 333, 335 (2010/11) "Reasonable readers of most Facebook pages do not understand [posts] to be conveying factual information," and this

must be taken into consideration by a court when analyzing the "context" of the statement. See Ellyn M. Angelotti, TWIBEL LAW: WHAT DEFAMATION AND ITS REMEDIES LOOK LIKE IN THE AGE OF TWITTER, 13 J. High Tech L. 433, 472-73 (2013). A case in point: President Trump called Stephanie Clifford a "total con job" in a tweet; she sued; the court dismissed her claim as non-actionable "hyperbole". *Clifford v. Trump,* 339 F. Supp. 3d 915, 919 (C.D. Cal. 2018). *See also, Jacobus v. Trump,* 156 A.D.3d 452 (N.Y. App. Div. 2017)(The alleged defamatory statements are too vague, subjective, and lacking in precise meaning (i.e., unable to be proven true or false) to be actionable. The immediate context in which the statements were made would signal to the reasonable reader or listener that they were opinion and not fact). Even tweets "rife with vague and simplistic insults such as 'loser' or 'total loser' or 'totally biased loser,' 'dummy' or 'dope' or 'dumb,' 'zero/no credibility,' 'crazy' or 'wacko,' and 'disaster'" are not actionable. *Trump v. Chicago Tribune,* 616 F. Supp. 1434 (S.D. N.Y.1985).

When an audience should "anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole....", the plaintiff bears the burden to establish that the audience would understand the words as defamatory, an expression of truth. *Info. Control Corp. v. Genesis One Comput. Corp.,* 611 F.2d 781, 781 (9th Cir. 1980)(quoting *Gregory v. McDonnell Douglas Corp.,* 17 Cal. 3d 596, 601 (1976)). The Plaintiff's contention that Oltmann's December 14, 2020 statement on Parler[8] was defamatory fails as a matter of law: it was textbook rhetorical hyperbole, uttered to a self-selected audience:

> . . Eric Coomer, you are a traitor. We are coming for you and your shitbag company. We are coming for Antifa and we are coming for your politician friends. Share this . . . share Eric's name . . . If they certify the electors today after this audit, we have an obligation to forcibly remove them all. This is not a drill, our country is not their evil playground. God is at the wheel, but we are the warriors that must do the work of men to repel evil. These people are evil, and they are liars, cheats and thieves out to take what they did not earn or deserve. Where will you stand?

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[8] Amended Complaint ¶ 78 and fn 134

Altar calls are not actionable; fevered, offensive, rhetoric is not actionable; political exhortation, however immoderate, is not actionable, unless it incites immediate violence. *Snyder v. Phelps,* 562 U.S. 443 (2011)("God hates fags" signs displayed at gay persons' funerals"; *Cohen v. California,* 403 U.S. 15, 22 (1971)("fuck the draft" jacket); *Texas v. Johnson,* 491 U.S. 397, 414 (1989)(public flag burning).

II. THE CLAIM FOR CIVIL CONSPIRACY DOES NOT MEET THE STATUTORY *PRIMA FACIE* SHOWING A PLAINTIFF MUST MAKE

Like the claim for defamation, the Plaintiff's claim for civil conspiracy is predicated upon his unsupported theory that all the defendants agreed together to attack the Plaintiff, and by extension, Dominion, and falsely accuse Plaintiff of being present on a September, 2020 conference call where he stated that he intended to interfere with the November, 2020 election. The claim is subject to § 13-20-1101, C.R.S. (2021) because the alleged conspiracy involved matters of significant public importance, discussed in the public sphere, meeting the first prong of the test.

The Plaintiff's civil conspiracy claim suffers from the same fatal lack of any supporting evidence or factual allegations as his defamation claim against these Defendants. He invented a motive for Defendants to act, supported only by conjecture, aspersions, and dramaturgy. Absent evidence, the Plaintiff cannot establish the *prima facie* showing required under the statute's second prong. "Prima facie evidence is evidence that, unless rebutted, is sufficient to establish a fact." Stamp v. Vail Corp., 172 P.3d 437, 449 (Colo. 2007)

Nowhere in the Amended Complaint is there a factual allegation of an agreement between the Defendants; there is no who, when, how, where, or under what circumstances or conditions. There are merely multiple conclusory allegations, but those will not even establish plausibility, let alone the *prima facie* showing required to defeat a special motion to dismiss.

III. THE PLAINTIFF CANNOT MAKE THE NECESSARY SHOWING TO RECEIVE THE INJUNCTIVE RELIEF HE REQUESTS

At paragraphs 95-98 of the Amended Complaint, Mr. Coomer seeks injunctive relief against what he claims are "escalating violent threats", including a court order to "Oltmann, FEC United, Conservative Daily, and their officers, agents, servants, employees and **attorneys**" enjoining them from "threatening or encouraging acts of violence, intimidation or coercion against Dr. Coomer" and further ordering "these Defendants to remove any publication of threats, intimidation, personal information or coercion made against Dr. Coomer", and further relief after all claims are adjudicated.

"Preliminary injunctive relief is an extraordinary remedy designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982). In exercising its discretion, the trial court must find that the moving party has demonstrated: (1)A reasonable probability of success on the merits; (2)a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3)that there is no plain, speedy, and adequate remedy at law; (4)that the granting of a preliminary injunction will not disserve the public interest; (5)that the balance of equities favors the injunction; and (6)that the injunction will preserve the status quo pending a trial on the merits. *Id.; Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007).

Generally, injunctive relief will not issue if there is an adequate remedy at law. *Beacon Theatres, Inc. v. Westover***,** 359 U.S. 500 506-07 (1959). In defamation actions monetary damages are considered to be an adequate and appropriate remedy. *In re Providence Journal Co.***,** 820 F.2d 1342, 1345 (1st Cir. 1986). More troubling is that fact that what the Plaintiff seeks is, effectively, a vague "prior restraint" injunction, against media defendants, circumscribing and limiting the Defendants' speech to that which the Plaintiff deems acceptable. The First Amendment accords the media protection against prior restraint. An attempted prior restraint is "the most serious and the least tolerable

infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Although not unconstitutional per se, prior restraints on the press, in order to be lawful, "must fit within one the narrowly defined exceptions to the prohibition against prior restraints . . ." *Southeastern Promotions, Ltd. v. Conrad***,** 420 U.S. 546, 558 (1975). No such exception has been shown herein." The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). Further, this Court cannot enter such an order as a preliminary injunction.

> Under modern case law, an injunction of defamation is permissible only if it is (1) 'narrowly tailored,' (2) 'based upon a continuing course of repetitive speech,' and (3) 'granted only after a final adjudication on the merits that the speech is unprotected.' *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993); *see also Pittsburgh Press*, 413 U.S. at 390 (upholding prior restraint injunction where "no interim relief was granted," meaning the court's order "will not have gone into effect before our final determination that the actions of [the defendant] were unprotected.").

Banks v. Jackson, 2020 U.S. Dist. LEXIS 222010 (D. Colo. 2020). The Plaintiff does not seek a narrowly-tailored order, but rather seeks to enjoin anything he deems "threatening or encouraging acts of violence, intimidation or coercion", which is undefinably vague, and impossible to ban without running afoul of the First Amendment. There is no "continuing course of repetitive speech" alleged here; indeed, there are no threats identified in the complaint. There are statements of frustration, disgust, and anger attributed to Mr. Oltmann, none of which constitutes a "true threat", which the Supreme Court characterizes very narrowly, finding that, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." is not. *Watts v. United States,* 394 U.S. 705 (1969). Neither is the following:

> "You know your s***'s ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent lady stood so close
> Took all the strength I had not to turn the b**** ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner

[laughter]
So the next time you knock, you best be serving a warrant
And bring yo' SWAT and an explosives expert while you're at it
Cause little did y'all know, I was strapped wit' a bomb
Why do you think it took me so long to get dressed with no shoes on?
I was jus' waitin' for y'all to handcuff me and pat me down
Touch the detonator in my pocket and we're all goin'
[BOOM!]…

Elonis v. United States, 575 U.S. 723 (2015). Finally, the Defendants' First Amendment defenses have not been adjudicated, precluding the requested injunctive relief.

CONCLUSION

Wherefore, Defendants Joseph Oltmann, FEC United, and Shuffling Madness Media respectfully request that the Court grant their Special Motion to Dismiss, and dismiss this case with prejudice.

Respectfully submitted this 30th day of April, 2021

By: Andrea M. Hall
Attorney for Defendants Oltmann/FEC United/Shuffling Madness Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2021, I electronically filed **DEFENDANTS JOE OLTMANN/FEC UNITED/SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY'S SPECIAL MOTION TO DISMISS PURSUANT TO § 13-20-1101, C.R.S. (2021)** with the Clerk of the Court using the ICCES electronic filing system, which will send an electronic copy of this filing to all counsel of record.

Andrea M. Hall