ERIC COOMER, Ph.D., Plaintiff vs. DONALD J. TRUMP FOR PRESIDENT, INC., et al., Defendants	DATE FILED: April 30, 2021 6:54 PM FILING ID: A7DA5EF84102C CASE NUMBER: 2020CV34319
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DEFENDANTS HERRING NETWORKS, INC.'S DBA ONE AMERICA NEWS NETWORK AND CHANEL RION'S MOTION TO DISMISS PURSUANT TO COLORADO'S ANTI-SLAPP STATUTE, COLO. REV. STAT. § 13-20-1101	

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Pursuant to Colorado's anti-SLAPP statute, Colo. Rev. Stat. § 13-20-1101 ("Anti-SLAPP Statute"), Defendants Herring Networks, Inc. d/b/a/ One America News Network ("OAN") and Chanel Rion ("Rion") (collectively "Defendants") submit this Special Motion to Dismiss, which seeks a dismissal of all claims against Defendants in the First Amended Complaint ("FAC"), a stay of discovery, and an award in favor of Defendants and against Plaintiff Eric Coomer ("Plaintiff" or "Coomer") of Defendants' fees as permitted by the statute.[1] As grounds for this Motion, Defendants state the following:

CERTIFICATE OF CONFERRAL

The undersigned certifies that he has conferred with counsel for Coomer regarding this Motion. Coomer opposes this Motion.

I. INTRODUCTION

On July 1, 2019, Colorado became the thirtieth state (including the District of Columbia) to enact an anti-SLAPP statute. On June 3, 2019, House Bill 19-1324 was signed into law by Colorado's Governor Jared Polis. The bill is modeled after (copied almost verbatim from) California's anti-SLAPP statute.[2] The instant case exemplifies why the anti-SLAPP statute was enacted.

A. Background.

OAN is a prominent 24-hour national news network which reports on national and international news daily around America. It is headquartered in San Diego, California and

[1] Pursuant to the Order dated March 23, 2021, the Court granted Defendants' Motion for an Enlargement of Deadline to File Special Motion to Dismiss Under Anti-SLAPP law, providing a deadline of April 30, 2021. Thus, this Motion is timely.

[2] https://www.rcfp.org/colorado-anti-slapp-protections.

operates news bureaus in Washington, D.C. and New York City. Defendant Chanel Rion is the Chief White House Correspondent for OAN.[3]

During the time period spanning the allegations in the FAC, the subject of the November 3, 2020 Presidential Election was the most important and most dominant news story in America, covered widely and around-the-clock on television and radio, in newspapers, and on social media.

After the mainstream media called the 2020 election for Joseph Biden, President Donald Trump and others generated the biggest news story in decades, asserting he had won the election and that victory had been stolen from him. Tens of millions of Americans have reached similar conclusions. Tens of millions of other Americans disagree with those conclusions. Over the ensuing months, countless stories were published by the entire media spectrum portraying myriad examples of improprieties and alleged malfeasance involving the vote and vote counts. The story was also driven in one way, shape or form by elected officials of all political parties who had the ability to get in front of a microphone, as well as by the President himself, his lawyers, his family and other surrogates and their political opponents. At least sixty lawsuits were filed regarding the election in courts throughout the land. One lawsuit was joined by more than one-hundred members of Congress.

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[3] On February 24, 2021, Rion served and filed a Motion to Dismiss for Lack of Personal Jurisdiction. Thus, Rion brings this Motion subject to her Motion to Dismiss and expressly reserving her rights in this regard. The jurisdictional challenge is currently before the Court and Rion believes that the Court's ruling on that Motion to Dismiss will moot this Motion as to Rion because, by dismissing for lack of personal jurisdiction, the Court will not be able to rule on the merits of Coomer's claims against Rion. However, due to the Court's Order requiring all defendants to file any special motions to dismiss by April 30, 2021, Rion brings this Motion to preserve her rights under COLO. REV. STAT. § 13-20-1101 should the Court find that it has personal jurisdiction over Rion. *Wakefield v. Brit. Med. J. Publ'g Grp., Ltd.*, 449 S.W.3d 172, 183 (Tex. App.—Austin 2014) (holding that defendant does not waive personal jurisdiction by filing Anti-SLAPP motion subject to personal jurisdiction challenge in light of strict timing requirements of Anti-SLAPP statute).

The voting machines used in the Presidential Election and their manufacturers were the subject of thousands of media reports published throughout the entire media spectrum. Coomer was and is employed as Director of Product Strategy and Security by Dominion Voting System's Inc. ("Dominion"), which manufactured and supported the voting machines used in several swing states, including Michigan and Georgia.

On about November 9, 2020, a private citizen named Joseph Oltmann came forward and claimed to have overheard a conversation in which Coomer told others, "Don't worry about the election, Trump is not gonna win. I made f-ing sure of that. Hahahaha." Oltmann reported that he had identified Coomer as the speaker and that he was an executive at Dominion. Oltmann further reported that he had accessed and retrieved a number of vitriolic and depraved Facebook posts published before the election by Dominion's Strategy and Security Chief Coomer that were frighteningly critical of President Trump.

Oltmann first reported these matters on his Podcast, and later in interviews with Gateway Pundit, Newsmax, Michele Malkin. More significantly, Oltmann's claims were set forth in a sworn Affidavit for use by President Trump's legal team in their election challenges. President Trump's lawyers addressed Oltmann's claims about Coomer in the media and in a press conference where they directly tied Coomer's alleged statement to the President's election legal challenges. Coomer first came to OAN's/Rion's attention ***after*** these others had reported and publicly discussed the statements attributed to Coomer by Oltmann. FAC ¶¶ 52 -64.

B. Colorado's Anti-SLAPP Law.

The Colorado Anti-SLAPP Statute allows a defendant to file a "special motion to dismiss" claims arising from the "act in furtherance of a person's right of petition or free

speech," including "any written or oral statement or writing made in a public forum in connection with an issue of public interest." Colo. Rev. Stat. § 13-20-1101(1), (3)(a)-(c). If the Court finds, upon the filing of such a motion, the defendant has satisfied the first prong of the statute, then the claims must be dismissed "unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." *Id*.

In the instant case, both elements of the Anti-SLAPP Statute test have been met. First, Coomer's claims undeniably arise from OAN's and Rion's furtherance of their right of free speech in connection with a public issue. Their reporting about the 2020 Presidential Election and the massive and widespread concerns regarding voting integrity, which included coverage of the statements attributed to Coomer, is an issue of significant public concern and interest. Every news organization in America, big and small, and including Defendants, covered the story that the election had been stolen.

Second, because OAN and Rion have satisfied the first prong of the Anti-SLAPP Statute – namely that Coomer's claims undeniably arise from the furtherance of their right of free speech in connection with an issue of public interest – such claims must be dismissed "unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." For the reasons demonstrated in detail below in Section IV, ***all*** of the claims alleged against OAN and Rion fail. There is ***no likelihood*** (much less a reasonable likelihood) that Coomer will prevail on any of his claims.

Coomer's claim for Defamation fails because OAN's and Rion's reporting is protected by the First Amendment which provides an absolute defense against Coomer's state law claims. OAN and Rion did not defame Coomer. And even assuming *arguendo* that they defamed

Coomer (and they manifestly did not), there is no showing whatsoever that OAN's and Rion's statements were made with "actual malice" as required by Colorado law to maintain this claim. The evidence submitted herewith shows that, other than Coomer's own self-serving denials, OAN and Rion did not have any indication that their reporting with respect to Coomer is untrue and, indeed, they believed it to be true and accurate when reported. (Declaration of Charles Herring ("Herring Decl.); Declaration of Chanel Rion ("Rion Decl.").)

Coomer's claim for Intentional Infliction of Emotional Distress fails because OAN and Rion did not engage in any "outrageous" conduct whatsoever, much less the requisite conduct required to prevail on this claim. To the contrary, OAN and Rion are merely alleged to have *reported* what Oltmann was claiming, just as virtually all other news outlets did. This is the opposite of outrageous conduct. News reporting and the First Amendment are one of the dearest liberties in this country.

Coomer's claim for Civil Conspiracy fails because it does not provide an independent basis for relief. And even assuming *arguendo* an independent claim for Civil Conspiracy existed under Colorado law, this claim also fails because Coomer cannot show that there has been a "meeting of the minds" among OAN and Rion on the one hand, and their competitors in the media and anyone else, on the other hand, to do anything whatsoever, much less some agreement to defame or inflict distress upon Coomer. Again, and at best, all Plaintiff's FAC does as to these Defendants is attack a news service for reporting a newsworthy story

Coomer's claim for Preliminary and Permanent Injunctive relief fails because it does not constitute an independent claim for relief.

In sum, Coomer has no reasonable likelihood of prevailing on any of his claims.[4] For these reasons and those demonstrated below, OAN's and Rion's Motion pursuant to the Anti-SLAPP Statute should respectfully be granted, discovery should be stayed, and they should be awarded their fees as permitted by the statute.

II. THE FAC'S ALLEGATIONS

A. Nationwide Claims of Election Fraud Dominated the News Cycle.

The FAC admits that that there was no bigger news story during the time period in issue than the alleged theft of the 2020 election. Coomer alleges that following the November 3, 2020 presidential election, "the former President, his campaign, his agents and many of his supporters began alleging widespread voter fraud . . .." FAC at ¶ 4. At least 60 separate lawsuits were filed challenging the election, many brought by the President and/or his campaign. *Id*. at ¶ 50. The FAC alleges that the story of election fraud dates back to 2016 when the Trump Campaign allegedly "fomented" election fraud conspiracies. *Id*. at ¶ 63. The FAC does not, because it cannot, allege that these claims were not newsworthy. *Id*. at ¶¶ 46-50. They obviously were.

A central figure in the nationwide allegations of fraud was Dominion. FAC at ¶ 1. At the time of the election, Coomer worked (and still works) as Dominion's Director of Product Strategy and Security. *Id*. at ¶¶ 1 & 43. Dominion provides a wide array of election support services including "election set-up, ballot layout . . . machine set-up and systems testing. *Id*. at ¶

[4] This Motion is submitted while OAN's 12(b)(5) Motion to Dismiss (in which Rion joined) is pending before the Court. Defendants note that the standards of review on the 12(b)(5) Motion to Dismiss are different from those on this Anti-SLAPP Motion. Consequently, assuming *arguendo* that the Court denies the 12(b)(5) Motion before the instant Motion is heard, Defendants note that the present Motion is not decided on whether Coomer has properly pled his claims (and OAN and Rion submit that Coomer has not done so). Rather, for the instant Motion, Coomer cannot show—as he must—that he has a likelihood of prevailing on his claims.

44. Dominion provided these services in at least thirty different states during the 2020 election. *Id*. at ¶ 45.

Every news organization in America, big and small, and including defendant OAN, covered the story that the election had been stolen. Coomer allegedly became newsworthy after multiple of OAN's competitors, and the President's lawyers, reported the statements attributed to Coomer by Joseph Oltmann. *Id*. at ¶¶ 52 -64.

B. Oltmann's Reports About Coomer And Subsequent Reporting.

The FAC alleges that on November 9, 2020, defendant Oltmann reported on his podcast that he overheard Coomer speak at a meeting of people that he understood to be affiliated with Antifa. *Id*. at ¶ 52. According to Oltmann, Coomer (who was identified as being affiliated with Dominion) said, "Don't worry about the election, Trump is not gonna win. I made f-ing sure of that. Hahahaha." *Id*. Oltmann also reported that he had accessed Coomer's Facebook page which included posts highly critical of President Trump. *Id*. at ¶ 53. Coomer admits that he made these posts criticizing President Trump. *Id*. at ¶ 54.

Four days later, on November 13, 2020, Gateway Pundit published a story reporting the substance of Oltmann's podcast and adding additional content. *Id*. at ¶ 57. That same day, television personality (and another defendant in this case) Michelle Malkin hosted an interview with Oltmann on her personal YouTube channel. *Id*. at ¶ 58. Oltmann repeated his claims in this interview. *Id*. Malkin followed this interview with related Tweets. *Id*. The next day, November 14, 2020, Gateway Pundit published additional articles on the topic of Coomer. *Id*. at ¶ 60.

The FAC also alleges, ***significantly***, that on or about November 14, 2020, Oltmann prepared a sworn "***affidavit for the Trump campaign***" for use in its lawsuits challenging the election and which included his description of what he heard Coomer say at the Antifa meeting. *Id*. at ¶ 63 n.100 (emphasis added).

On November 17, 2020 Newsmax began covering Coomer and his alleged role in President Trump's claims of voter fraud. *Id*. at ¶ 62.

Also, on November 17, 2020 Eric Trump, the son of the President of the United States, tweeted out a link to the Gateway Pundit story about the statement attributed to Coomer. *Id*. at ¶ 63.

On November 19, 2020, President Trump's lawyers – Sidney Powell, Rudolph Giuliani and Jenna Ellis – conducted a press conference about their various election legal challenges. *Id*. at ¶ 64. The FAC alleges that this press conference was carried live by C-SPAN and "substantially reported" on at least CNN, Fox and the New York Times. *Id*. Both Ms. Powell and Mr. Giuliani repeated Oltmann's claims about Coomer and tied Coomer directly to the President's election legal challenges. *Id*.

C. The Paltry, and Unsustainable, Claims Against OAN and Rion.

Nether OAN, nor Rion, reported on the Coomer allegations until November 17, 2020. *Id*. at ¶ 61. According to the FAC, on that date, Rion simply tweeted out a link to a Gateway Pundit story about Coomer and highlighting the statement attributed to Coomer by Oltmann ("Trump won't win. I made F***ing sure of that.") *Id*. at ¶ 61. OAN/Rion did not broadcast its report about Coomer until November 21, 2021. *Id*.

Coomer reveals the weakness of his claims against OAN and Rion by burying them in two footnotes in the apparent hope that these defendants will be swept along with the others. FAC at ¶ 61 n. 83 & 84. Footnote 83 itemizes three purportedly defamatory statements which were made about Coomer by either Rion or Oltmann in programs broadcast by OAN:

Rion: "In Coomer's case, he was in a position of power to actually act on his rage against Trump and Trump voters." This statement is a true (or substantially true) comment about Coomer's position and role at Dominion and his rage and therefore not defamatory.

Rion: "What does he mean when he says 'Trump won't win. I made f-ing sure of that.' Nothing?" This comment by Rion, raising a question about the statement reported by Oltmann is precisely the type of debate protected from civil actions by the First Amendment.

Oltmann: "Eric Coomer was this, you know, he's not just Antifa, he was responsible for putting his finger on the scales of our election . . . ***If Coomer is investigated and found to have indeed*** tampered with a presidential election, such an action could be tried for treason. Unfortunately, the question is, will the FBI step up to investigate." (Emphasis added). This statement makes plain that the ultimate question of whether Coomer acted inappropriately remains open, and thus, this statement lacks the requisite definitiveness to sustain a defamation claim. More importantly, this "statement" ***was not*** made by OAN or Rion, but rather consists of OAN/Rion quoting someone else (Oltmann) – regarding a national news event of tremendous importance.

Then, in footnote 85, Coomer purports to allege that OAN's reporting about his employer ***Dominion***, somehow gives rise to a claim by Coomer that ***he*** was defamed. *Id*. at ¶ 61 n. 85. Footnote 85 does nothing more than list several links to OAN news stories about Dominion, not

about Coomer, including references to statements made by President Trump's lawyers. *Id*. Tellingly, however, the FAC does not even attempt to allege how these stories defamed Dominion, much less Coomer individually. Put simply, footnote 85 fails to identify a single specific statement attributable to OAN and Rion, when it was made, who made it, and how it amounts to defamation of ***Coomer***. *Id*. Colorado law does not permit a party to dump a bunch of links to news stories in a footnote and then claim – *voila* – defamation.

III. COLORADO'S ANTI-SLAPP STATUTE BARS COOMER'S CLAIMS AGAINST OAN AND RION

Colorado enacted a strong anti-SLAPP law in 2019. Colo. Rev. Stat. § 13-20-1101. The statute allows a defendant to file a "special motion to dismiss" claims arising from the "act in furtherance of a person's right of petition or free speech," including "any written or oral statement or writing made in a public forum in connection with an issue of public interest." Colo. Rev. Stat. § 13-20-1101(1), (3)(a)-(c). Upon the filing of such a motion, if the Court finds that the defendant has satisfied the first prong of the statute, then the claims must be dismissed "unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." *Id*.

At the second stage of the analysis, a plaintiff has the burden of establishing—not merely alleging—facts. For this reason, a plaintiff may not rest on his pleadings. "An anti-SLAPP motion is an evidentiary motion. Once the court reaches the second prong of the analysis, it must rely on admissible evidence, not merely allegations in the complaint or conclusory

statements by counsel." *Finton Constr., Inc. v. Bidna & Keys APLC*, 190 Cal. Rptr. 3d 1, 11 (Cal. App. 2015).[5]

IV. ARGUMENT

A. Coomer's Claims Seek To Punish Protected Statements Made in a Public Forum in Connection With An Issue of Public Interest.

The first prong of the Anti-SLAPP Statute test is satisfied here. Coomer's claims clearly arise from OAN's and Rion's furtherance of their right of free speech in connection with a public issue. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1109 (10th Cir. 2017) (recognizing that under Colorado law, a matter is of public concern whenever it embraces an issue about which information is needed or is appropriate, "or when the public may reasonably be expected to have a legitimate interest in what is being published") (citing *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1035 (10th Cir. 2013) (quoting *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 17 (Colo. App. 1996)).

For example and without limitation, the FAC alleges that "this case is based on Defendants' false and baseless assertions that ***Dr. Coomer, an employee of Dominion Voting Systems, Inc. (Dominion) sits at the center of a national conspiracy to fraudulently elect the President of the United State***s." FAC ¶ 1 (emphasis added). Coomer further admits that "Defendants, by their actions, have elevated Dr. Coomer ***into the national spotlight***, invaded his privacy, threatened his security, and fundamentally defamed his reputation across this country,"

[5] Colorado's Anti-SLAPP statute is modeled after California's Anti-SLAPP statute. Thus, California's statute is persuasive authority for interpreting the Colorado statute. Calif. Code of Civ. Proc. § 425.16.

among other things. *Id*. (emphasis added).) In line with these allegations and various others,[6] it is difficult to conceive of a matter of greater public concern and interest than an alleged conspiracy to fraudulently elect the President of the United States involving a widespread scheme of voter fraud through the illicit use of voting machines. FAC ¶ 63.

The FAC admits that there was no bigger news story during the relevant time period than the alleged theft of the 2020 election and was widely reported on by the press. FAC ¶¶ 49, 50, 57-71. Coomer alleges that following the November 3, 2020 presidential election, "the former President, his campaign, his agents and many of his supporters began alleging widespread voter fraud . . .." FAC ¶ 4. At least 60 separate lawsuits were filed challenging the election, many brought by the President and/or his campaign. *Id*. ¶ 50. These issues were obviously newsworthy and of public interest. *Id*. ¶¶ 46-50.[7]

Under the "free speech clause" of the First Amendment, when publishing on matters of significant public interest, the press is afforded the leeway to report statements which are inherently newsworthy, even when they turn out to be false. *Edwards v. National Audubon Society, Inc*. 556 F.2d 113, 120 (2nd Cir. 1977); *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection."). Where the fact of an allegation is newsworthy, the press is entitled to report on it without fear of a defamation suit. *Edwards*, 556 F.2d at 120.

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6 *See also* FAC ¶¶ 2-4, 49, 50, 57-71 (alleging "widespread voter fraud" and admitting that such allegations were widely reported on by the press).

7 Coomer has admitted in various filings in this matter, including by way of example his own declaration, that allegations of voter fraud by Dominion were the subject of "numerous national broadcasts." Declaration of Eric Coomer filed in support of Response to Defendant Rudolph Guiliani's Motion to Dismiss, dated April 13, 2021, ¶ 9.

In short, Coomer's claims arise from OAN's and Rion's acts in furtherance of their right of free speech in connection with a public issue, as the subject statements were made in a public forum in connection with an issue of public interest. *See* Colo. Rev. Stat. § 13-20-1101(1), (3)(a)-(c). Thus, OAN and Rion have satisfied the first prong of the statute, and Coomer's claims must be dismissed "unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." *Id*.

B. Coomer Cannot Establish That There Is A Reasonable Likelihood That He Will Prevail On His Claims.

A reasonable likelihood on the merits means a plaintiff must show that he/she has a reasonable probability of prevailing. *Stevens v. Mulay*, 2021 WL 1153059, at *3 (D. Colo. Mar. 26, 2021) (citing *Lefebvre v. Lefebvre*, 199 Cal. App. 4th 696, 702 (2011)).

1. Coomer Has No Reasonable Likelihood of Prevailing On His Defamation Claim.

"In Colorado, the elements of a cause of action for defamation are: (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." *McIntyre v. Jones*, 194 P. 3d 519, 523-24 (Colo. App. 2008).[8]

Moreover, where, as here, the statements involve "a matter of public concern," the plaintiff cannot prevail absent proof, by clear and convincing evidence, "that the defendant

[8] When evaluating a defamation claim, the interest in protecting an individual's reputation can be outweighed by the interest in fostering vigorous public debate protected by the First Amendment and Article II, section 10 of the Colorado Constitution (providing that "No law shall be passed impairing the freedom of speech…"). *Id*. at 524.

published the defamatory statement with actual malice" *i.e*., knowledge of falsity or in reckless disregard of the truth. *Lewis v. McGraw-Hill Broad. Co*., 832 P. 2d 1118, 1122-23 (Colo. App. 1992). "Actual malice" is also required if the plaintiff is a public figure.

a) The Statements Are Protected By The First Amendment And Therefore They Are Not Defamatory (Element One) And Were Not Uttered With Any Fault (Element Three).

The "free speech clause" of the First Amendment which states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press", can serve as a defense in state tort suits. *See*, *e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988) (emphasis added). The First Amendment implements a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The protection offered by the First Amendment is at its strongest for speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Snyder*, 562 U.S. at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted) (emphasis added)). The First Amendment's specific use of the word "press" is "intended to give to liberty of the press" the "broadest scope that could be countenanced in an orderly society." *Bridges v. California*, 314 U.S. 252, 265 (1941).

When publishing on matters of significant public interest, the press is afforded the leeway to report statements which are inherently newsworthy, even when they turn out to be false. *Edwards*, 556 F.2d at 120. Where the fact of an allegation is newsworthy, the press is entitled to

report on it without fear of a defamation suit. *Id*. This remains true even where the press has "serious doubts" about the veracity of the allegation. *Id*.

Moreover, under the "fair report" privilege, the right to publish without fear of liability is even stronger where the allegations are included in legal proceedings. *Tonnessen v. Denver Publishing Co*., 5 P. 3d 959, 964-65 (2000) (citing *Rosenberg v. Helinski*, 616 A.2d 866 (1992); *Cianci v. New Times Publishing Co*., 639 F.2d 54 (2nd Cir. 1980)). The press possesses a privilege to report defamatory statements made in legal proceedings, even where the statements are believed or known to be false. *Id*. Indeed, the privilege is not limited to the media but extends to all other persons as well. *Id*.

In *Tonnessen*, a wife's testimony at trial portrayed her ex-husband as a rapist. *Id*. The wife's sister, who was not present in the courtroom made a similar statement. *Id*. The defendant newspaper published both statements and was sued for defamation. *Id*. The *Tonnessen* court held that the newspaper could not be held liable for either statement under the "fair report" privilege, even though the sister was not present in court but was merely repeating what she had heard. *Id*.

Application of the above-cited principles to Coomer's allegations against OAN and Rion requires the dismissal of the defamation claim. *Sullivan* at 270; *Falwell* at 50-51; *Snyder at 452;* and *Bridges* at 265. It is difficult to conceive of a matter of greater public concern and interest than the serious and pervasive claims made during the time period encompassing Coomer's allegations of a stolen presidential election. Millions of people to this day believe the claims. Millions of people to this day doubt the claims. Coomer alleges and admits that the statements attributed to him by Oltmann concerned the very heart of the election fraud claims being made

by many people nationwide, and Oltmann set forth these claims in a sworn affidavit for use by the President and his lawyers in challenging the election results. *See Tonnessen*, 5 P. 3d at 964-65 (upholding and applying the "fair report" privilege even for attenuated uses of judicial statements).

The First Amendment protects Defendants' right to report on Oltmann's accusations which were sworn under oath, widely reported, and repeated by many including the President's attorneys. By law and undisputed fact, Coomer cannot show that there is a likelihood of prevailing on this claim.

b) The Statements Themselves Are Not Defamatory (Element One).

It is a fundamental precept of any claim for defamation that the statement at issue must be false, *i.e*., truth is an absolute defense. *Gordon v. Boyles*, 99 P.3d 75, 81 (Colo. App. 2004) ("Truth is a complete defense to defamation. However, absolute truth is not required; instead, a defendant need only show substantial truth…"). Moreover, courts must analyze statements in the full context in which they are made. *McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008) (court must analyze "the content, form, and context of statements, in conjunction with the motivation or 'point' of the statements as revealed by the whole record."). Applying these basic rules to the statements alleged to be defamatory reveals that Coomer cannot prevail on his defamation claim.

First, Rion is alleged to have said that, "[i]n Coomer's case, he was in a position of power to actually act on his rage against Trump and Trump voters." This statement is plainly true which is an absolute defense to defamation. *Gordon*, 99 P.3d at 81. ("Truth is a complete defense to defamation."). Coomer alleges that during the 2020 election, he was the Director of Product

Strategy and Security for the voting machine company, Dominion. Dominion's machines were used in key swing states such as Michigan and Georgia. Accordingly, it is simply a fact that Coomer was "in a position" to "act" whether or not he in fact did. As for Coomer's "rage against Trump and Trump voters," look no further than Exhibit A to the accompanying Rion Decl.

Second, Rion is alleged to have asked: "What does he mean when he says 'Trump won't win. I made f-ing sure of that.' Nothing?" Rion does nothing more than take the statement attributed to Coomer by Oltmann and ask an obvious question about it. When this question is considered in the context of the right of the press to engage in robust debate and discussion, this statement is simply not defamatory. *McIntyre,* 194 P.3d at 525. Indeed, Rion's question is at the very heart of OAN's First Amendment right to engage in a robust discussion about matters of public concern. *Sullivan* at 270. The question attributed to Rion is far milder than the robust invective inherent in modern political dialogue which courts find non-defamatory. *See*, *e.g.*, *McDougal v. Fox News Network, LLC*, 2020 WL 5731954 (S.D.N.Y. Sept. 24, 2020); *Pullum v. Johnson*, 647 So. 2d 254, 257-58 (Fla. 1st DCA 1994) (calling plaintiff a "drug pusher" in a political broadcast was rhetorical hyperbole); *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (charge of "accomplice to homicide" during heated television interview on abortion was hyperbole). In *McDougal*, the Court found that Tucker Carlson's use of the word "extortion" to describe the conduct by a former paramour of President Trump was not defamatory and granted the network's motion to dismiss. *McDougal*, 2020 WL 5731954, at *6. The Court recognized that such "hyperbolic" language is inherent in modern political commentary and that, when read in context (as the law requires) did not rise to the level of defamation. *Id*. Rion's purported

question is far milder than the use of the inflammatory word "extortion," and, accordingly is insufficient to sustain a claim for defamation.

Third, Oltmann is alleged to have said: "Eric Coomer was this, you know, he's not just Antifa, he was responsible for putting his finger on the scales of our election . . . such an action could be tried for treason. Unfortunately, the question is, will the FBI step up to investigate." Here again, Rion was simply reporting on what someone else said – a statement by Oltmann which he qualifies by saying "***If*** Coomer is investigated ***and found*** to have indeed tampered with a presidential election . . ." When Oltmann's statement is read in context – as is required in ascertaining whether a statement is defamatory – it is clear that Oltmann is saying that Coomer's participation in election fraud remains in question. *McIntyre* at 525 (statements must be read in their entire context and for their point). Like the statements at issue in *McDougal*, the context and qualifying language in which the subject statement was made make it clear that Coomer was not actually being accused of a committing a crime. *McDougal*, 2020 WL 5731954, at *6.

Regardless, Rion reported the statement of another which she believed to be true. (Rion Decl. ¶ 10.)

c) The Statements Were Not Made With "Actual Malice".

Coomer's Defamation claim also fails for the separate and independent reason that he has no likelihood of prevailing on his claim because he cannot prove "actual malice" against OAN and Rion. "Actual malice" must be shown: (a) if the statement in question was of a matter of public concern; or (2) if the plaintiff is a public figure. Both of these exist here. *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1122–23 (Colo. App. 1992); *New York Times Co. v.*

Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Coomer has not and cannot come close to satisfying this daunting standard.

To prove "actual malice", the plaintiff must demonstrate that the defendant in fact entertained serious doubts as to the truth of the statement, *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); *Seible v. Denver Post, Corp.,* 782 P.2d 805 (Colo.App.1985), or acted with a high degree of awareness of its probable falsity. *Kuhn v. Tribune–Republican Publishing Co.,* 637 P.2d 315 (Colo.1981). Predictably, Coomer's FAC never plausibly suggests he can satisfy this prerequisite. Nor could it. Coomer has no clue at all what OAN and Rion subjectively think about Coomer and about the statements Rion made regarding Coomer.[9]

OAN/Rion reported on the statements of various sources, conducted independent research to corroborate the reporting and indeed, to this day, OAN/Rion have no proof that any of the statements about Coomer were not true. (Rion Decl. ¶¶ 5-10.) The FAC does not, and cannot, allege that OAN has ever expressed or demonstrated any doubt of the truth of its reporting. "A plaintiff must prove by 'clear and convincing evidence' that the speaker made the statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Id*. at 240. A defamation suit by one who must prove actual malice must plead "that the

[9] Taking Coomer's often times manically deranged and extreme hate-filled statements that he directed to former President Trump and his supporters on his Facebook account (which he deleted before filing this lawsuit) (the Facebook posts we were able to find accompany this Motion as Exhibit "A" to the Rion Decl.), together with Coomer's incredibly prominent role in, and involvement with Dominion and the very machines used to collect and tabulate votes in the Presidential Election, and it was and remains entirely understandable why the defendants believed Coomer capable of severe and pervasive election misconduct. Coomer was not simply a random nut spouting anti-Trump hate on social media. Rather, he was and is ***Dominion's Director of Strategy and Security*** with highly advanced degrees and an intimate knowledge of how to program and manipulate the very software and hardware at the center of the alleged voter fraud, and with direct access thereto, that undeniably had a massive impact on the Presidential Election.

defendant must have made the false publication with a high degree of awareness of probable falsity, or 'must have entertained serious doubts as to the truth of his publication.'" *Id*. (citation omitted).

Coomer's status as a "public figure" provides a separate and independent reason for the requirement that he must prove "actual malice" in order to prevail on his Defamation claim. The concept of a limited purpose public figure has been explicated in several Colorado cases. *See Diversified Management, Inc. v. Denver Post, Inc.,* 653 P.2d 1103 (Colo.1982); *DiLeo v. Koltnow,* 200 Colo. 119, 613 P.2d 318 (1980); *Walker v. Colorado Springs Sun, Inc.* These cases apply the United States Supreme Court's definition of limited purpose public figure set out in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

The court in *Gertz* identified a limited purpose public figure as one who "voluntarily injects [herself] or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues" such that the person has achieved "special prominence in the resolution of public questions." Limited purpose public figure status focuses on two questions: the threshold question of whether the defamatory statement involves a matter of public concern and, more importantly, whether the level of plaintiff's participation in the controversy invites scrutiny. *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Gertz v. Robert Welch, Inc., supra.*

Applying these criteria to instant case, Coomer is clearly a limited purpose public figure. The defamatory statements at issue here concerning widespread voter fraud through the illicit use of voting machines are a matter of public concern and, Coomer's participation in this activity through the use of Dominion's voting machines invites public scrutiny to this public issue.

Indeed, Coomer has been the front man for Dominion over the past decade, soliciting publicity, business, and status in the international voting machine community. He has deliberately and intentionally made himself a public figure to benefit the profitability of Dominion, and has intentionally made himself a public authority on the issue of automated voting security. He has appeared in numerous public fora, giving interviews and opinions designed to influence public perception of the safety and security of Dominion's machines, and his own patents and stock prices, and has made public appearances before legislative committees on behalf of both Dominion and himself, at the state and national level. *See e.g. Curling v. Raffensperger*, 2020 WL 5994029, at *17 (N.D. Ga. Oct. 11, 2020) (Coomer acted as testifying witness for Dominion in support of State of Georgia in major voting rights litigation).[10]

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[10] As Director of Product Strategy and Security for Dominion, Coomer has appeared at election security forums, such as one hosted by the U.S. Cybersecurity & Infrastructure Security Agency. *See* https://us-cert.cisa.gov/sites/default/files/2019-09/2019_Cybersecurity_Summit_Agenda_S508C_13.pdf. Coomer is the interface between Dominion and local election officials. *See Curling*, 2020 WL 5994029, at *9 n.23. He regularly makes presentations to election officials in open meetings (see https://www.youtube.com/watch?v=UtB3tLaXLJE, https://www.youtube.com/watch?v=BbCmq0jPUxY&t=447s) and has provided support to state officials in the form of testimony explaining how the system works and how Dominion coordinates with election officials. *See Curling*, at *10 (noting that Georgia officials relied on Coomer's testimony on cybersecurity issues); Associated Press, "Lawyers spar over Georgia voting machine glitch, planned fix," September 29, 2020; Niesse, Mark, "Fix coming to Georgia touchscreens to restore missing Senate candidates," *Atlanta Journal Constitution*, September 28, 2020. Coomer has plainly "injected himself" into public controversies about election security and the Dominion voting systems. Moreover, a hallmark of a public figure is its access to the press and its ability to counteract false statements. *Gertz*, 418 U.S. at 344. The fact that Coomer was quoted on issues related to election security prior to the allegedly defamatory statements weighs strongly in favor of this finding. *See Thompson v. Nat'l Catholic Reporter Pub. Co.*, 4 F. Supp. 2d 833, 838 (E.D. Wis. 1998) (executive who had access to media and was quoted on matters related to the controversy was limited purpose public figure). Coomer clearly has access to the media given the publication of his OpEd in the Denver Post on December 8, 2021, denying election fraud took place. Dominion provides voting systems for numerous states or localities, *see Curling*, at *7, for which, as noted above, Coomer serves as primary interface. Coomer designed key voting systems and wrote the code for them. *Id.* at *9 n.23. In *Curling*, he effectively spoke on Georgia's behalf. *Id.* at *9. Thus, it is clear that his role in elections "is likely to attract or warrant scrutiny by members of the public." *Young v. CBS Broad., Inc.*, 212 Cal. App. 4th 551, 560 (3d Dist. 2012); *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (actual malice applies where the plaintiff's role "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it"). Effective supervisory authority over such a critical aspect of voting procedure certainly "warrant[s] scrutiny" by the public.

Notably, Coomer became a national public figure due to Oltmann shining a spotlight on Coomer and reporting by others ***before*** any reporting by Defendants.

In sum, given that this lawsuit involves a matter of public concern and also that Coomer is a "public figure," he must prove more than just "negligence" to meet to prevail on this claim. Coomer must but has not and cannot demonstrate facts sufficient to show a likelihood of proving by clear and convincing evidence that Defendants' statements about him were made with "actual malice."

2. Coomer Has No Reasonable Likelihood of Prevailing on His Intentional Infliction Claim.

Like the Defamation claim, Coomer has no reasonable likeliness of prevailing on his Intentional Infliction of Emotional Distress claim. As a preliminary matter, this claim is also subject to the Anti-SLAPP Statute, as it arises out of OAN's and Rion's furtherance of their right of free speech in connection with a public issue—OAN's broadcast of a television program in which three allegedly defamatory statements were made. FAC ¶ 88.

For a plaintiff to prevail on an intentional infliction of emotional distress claim, the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Gordon v. Boyles*, 99 P. 3d 75, 82 (Colo. 2004) (citing *Rugg v. McCarty*, 476 P. 2d 753, 756 (Colo. 1970).

In *Gordon*, the plaintiff (a police officer) alleged that a radio host had said that the plaintiff had stabbed someone and engaged in an extramarital affair. *Id.* at 78. The court concluded that these statements were defamatory. However, the *Gordon* court held that the

accusation that someone had stabbed another, or engaged in an affair, were insufficient to sustain a claim for intentional infliction of emotional distress. *Id* at 82.

Consequently, under *Gordon*, the alleged conduct by OAN and Rion falls woefully short of meeting the "outrageous" element of a claim for intentional infliction – as it must given that OAN and Rion did not defame Coomer in the first place. Here, Coomer claims that OAN broadcast a television program in which three allegedly defamatory statements were made. These statements, on their face do not come close to amounting to going "beyond all possible bounds of decency." *Id*. at 82.

Moreover, even if there was a reasonable likelihood that Coomer could prove the requisite "outrageous conduct" and he cannot, this claim also is trumped by the First Amendment. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988) (First Amendment is a defense to state claim for intentional infliction of emotional distress.).

For these reasons, Coomer cannot show that there is a reasonable likelihood of prevailing on his intentional infliction of emotional distress claim.

3. Coomer Has No Reasonable Likelihood of Prevailing on His Conspiracy Claim.

Coomer's civil conspiracy claim is also subject to the Anti-SLAPP Statute, as it is predicated on OAN's broadcast of a television program containing three allegedly defamatory statements. FAC ¶ 92, 93.

Civil conspiracy is not an independently actionable claim. *Colorado Community Bank v. Hoffman*, 338 P. 3d 390, 397 (Colo. App. 2011) (citing *Bd. Of Cnty. Commis v. Park Cnty. Sportsmen's Ranch, LLP*, 271 P. 3d 562, 572 (Colo. App. 2013). Conspiracy claims are derivative of other actionable claims. *Id*. Thus, in *Hoffman*, when the underlying claims were

disposed of a summary judgment the civil conspiracy claims were automatically dismissed as derivative. *Id*.

There are five elements required to establish civil conspiracy in Colorado. There must be: two or more persons (or corporations); (2) an object to be accomplished; (3) a meeting of the minds on the object or a course of action; (4) one or more overt acts; and (5) damages. *Walker v. Van Laningham*, 148 P. 3d 391, 396 (Colo.App. 2006) (citing *Jet Courier Serv., Inc. v. Mulei*, 771 P. 2d 486, 502 (Colo. 1989)).

In the instant case, Coomer generally alleges that there was some undefined conspiracy that the election had been stolen from Mr. Trump. *See*, *e.g.*, FAC at ¶ 1. But this has nothing to do with the purported conspiracy alleged in the FAC.

Coomer may be a conspiracy theorist, but his vague conspiracy theory fails to support a conspiracy claim. *Walker* at 396. Coomer suggests that all of the defendants agreed, with each other, that they would create a false narrative about the election and then an objective of this agreement was to defame and inflict distress upon Coomer. FAC at ¶ 61. However, Coomer does not come close to alleging a single fact that would meet the third element of a conspiracy claim, *i.e.*, some meeting of the minds between OAN/Rion, on the one hand, and one or more of the other persons or entities that reported on Oltmann's claims about Coomer, on the other hand, much less to defame him as part of some wider collective scheme to reelect President Trump. The allegations do nothing more than describe the normal course of a news story—one person or entity investigates and reports, and others follow.

Consequently, Coomer has no likelihood of prevailing on this Civil Conspiracy claim.

4. Absent His Other Claims, Coomer Cannot Prevail On His Injunctive Relief Claim.

Coomer's Fourth Cause of Action seeks an injunction against all defendants, including OAN and Rion, "to remove all Defendants' defamatory statements upon final adjudication of the claims at issue." FAC at ¶ 98. Injunction is not a separate claim, however, but rather a remedy ancillary to a substantive claim upon which a litigant prevails on the merits, or, in the case of a preliminary injunction, shows a likelihood of prevailing. *See Dallnan v. Ritfer*, 225 P.3d 610, 621 n. 11 (Colo.App. 2010). Like Coomer's other causes of action, this one is also subject to the Anti-SLAPP Statute, as it is predicated on OAN's broadcast of a television program in which three allegedly defamatory statements were made. FAC ¶ 96, 97.

Because Coomer's independent causes of action fail, as demonstrated above, this additional cause of action for injunctive relief necessarily fails as well.

V. CONCLUSION

Based on the foregoing, it is respectfully submitted that OAN's and Rion's Anti-SLAPP Motion be granted in its entirety, discovery with respect to OAN and Rion be stayed, and OAN and Rion be awarded their fees as permitted by the Anti-SLAPP Statute.[11]

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[11] In other states that have anti-SLAPP statutes, documentation of reasonable attorney's fees is generally submitted by separate motion for approval of the amount of the award. *See e.g.*, *American Humane Ass'n v. Los Angeles Times Communications*, 92 Cal. App. 4th 1095, 1103–1104 (2001) (holding that documentation of fees could be submitted in separate, later-filed motion because "the moving defendant will be able to more accurately document the fees and costs actually incurred if the amount is fixed at a later date"). Accordingly, in the event that OAN and Rion prevail on this Motion, they will present evidence, including relevant invoices, of their attorney's fees and costs in connection with the defense of Coomer's claims to date.

Respectfully submitted this 30th day of April 2021.

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CERTIFICATE OF SERVICE

I certify that on April 30, 2021, a true and accurate copy of the foregoing document were e-served via ICCES on all counsel of record.

/s/ Robie Atienza-Jones