DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street RM 256 Denver, CO 80202	DATE FILED: April 30, 2021 9:17 PM FILING ID: 5103965FC2420 CASE NUMBER: 2020CV34319
ERIC COOMER, *Plaintiff*, vs. DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C., RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY, JAMES HOFT, TGP COMMUNICATIONS LLC dba THE GATEWAY PUNDIT, MICHELLE MALKIN, ERIC METAXAS, CHANEL RION, HERRING NETWORKS, INC. dba ONE AMERICA NEWS NETWORK, and NEWSMAX MEDIA, INC., *Defendants*.	▲ COURT USE ONLY ▲
John C. Burns, #21PHV6433 BURNS LAW FIRM P.O. Box 191250 Saint Louis, MO 63119 Telephone: 314-329-5040 Facsimile: 314-282-8136 E-mail: tblf@pm.me Randy B. Corporon, Esq. Dane E. Torbenson, Esq. Kevin J. Farrell, Esq. Brian E. Lewis, Esq. Joanna T. Floribus, Esq. Law Offices of Randy B. Corporon, P.C. 2821 S. Parker Rd., Suite 555 Aurora, CO 80014 *Attorneys for Defendants James Hoft and TGP Communications d/b/a The Gateway Pundit*	Case No. 2020CV34319 Div. 409

MOTION TO DISMISS PURSUANT TO C.R.S. § 13-20-1101 BY DEFENDANTS JAMES HOFT AND TGP COMMUNICATIONS, LLC d/b/a THE GATEWAY PUNDIT

Defendants James Hoft (Hoft) and TGP Communications, LLC d/b/a The Gateway Pundit (TGP) ("Defendants," collectively), by and through undersigned counsel, hereby submit the following Motion to Dismiss. In further support of its Motion, Defendants state as follows:

Certification Pursuant to C.R.C.P. 121, Section 1-15(8)

Pursuant to C.R.C.P. Rule 121, section 1-15(8), undersigned counsel certifies that he conferred with Plaintiff's counsel regarding this motion and is advised that the Plaintiff objects, though no grounds for the objection were provided.

I. INTRODUCTION

"The ability to have a political opinion in this country is a protected right."

- *First Amended Complaint, par. 55.*

Plaintiff alleges Defendants defamed him – but he doesn't identify discrete, specific defamatory statements. Cf., *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 31, 53 Cal. Rptr. 3d 752 (3d Dist. 2007) (Anti-SLAPP motion granted where plaintiff failed to plead a legally sufficient defamation claim, noting the complaint was a "paradigm of vagueness, and does not even come close to the specificity required to state an actionable libel claim"). Plaintiff's First Amended Complaint (FAC or Complaint) is full of conclusory allegations of falsity and malice, unsupported by any competent evidence – let alone the *clear and convincing* evidence Plaintiff needs to survive the instant Motion. The Complaint contains no credible or plausible **factual** allegations that the allegedly defamatory "statements" made by Defendants were false or made with reckless disregard of their truth. In truth, all of Defendants' statements regarding Mr. Coomer were known by them to be true when made, and they continue to know them to be true today. Affidavit of Hoft and TGP, at par. 15. More than this, and as more fully described below, all of Defendants' statements are absolutely protected by the First Amendment, because Plaintiff has not and cannot show clear and

convincing evidence of actual malice.

At all relevant times Mr. Coomer was the Director of Product Strategy and **Security** for Dominion Voting Systems (Dominion). The thrust of his Complaint, as to Defendants, appears to be that Defendants defamed him by interviewing Defendant Joe Oltmann, and by reporting on allegations of election fraud in the 2020 election (Election), generally. *See for, e.g.*, FAC, at note 79. Plaintiff argues without evidence that the notion of election fraud is "baseless," and asserts his own *conspiracy theory*: that all of the Defendants in this case conspired against him, personally, as a premeditated plot to challenge the Election's integrity. Yet, Defendants were not the only ones who worried about election integrity – or Dominion – before, during, and after the Election. A recent poll indicates that 51% of American voters believe cheating likely affected the outcome of the Election.[1]

Indeed, in the months and years leading up to the Election, journalists, and government officials and agencies voiced serious concerns about the reliability and security of the of voting systems – including those sold by Dominion. Appendix at § I & II. In fact, the State of Texas specifically declined to utilize Dominion's products over fears of election security on **three** separate occasions: 2013, 2019, and 2020.[2]

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[1] *Election Integrity: 62% Don't Think Voter ID Laws Discriminate*, Rasmussen Reports, April 13, 2021.

[2] See https://www.sos.texas.gov/elections/laws/dominion.shtml (last accessed April 29, 2021); see also https://www.washingtonexaminer.com/politics/officials-raised-concerns-for-years-about-security-of-us-voting-machines-software-systems (last accessed April 29, 2021).

Importantly, Texas rejected Dominion's machines, *inter alia*, because of the machines' vulnerability to hacking. According to Texas election examiners, "[w]ithout question, one or more of the components of the 5.5-A System **can be connected to an external communication network and this can only be avoided if the end-user takes the proper precautions to prevent such a connection**." Appendix, at § I.5 at 4 (emphasis added). "The ethernet port is active … during an election. It should be disabled when the machine is put into voting mode by the poll worker. **This is an unnecessary open port during the voting period and could be used as an attack vector**." Appendix at § I.5(a) at 3 (emphasis added). "The flaws and questionable design choices that were identified through this exam that indicate the system is not suitable for the purpose for which it is intended and therefore cannot be certified for use in Texas and under Texas Election Code 122.001(a)(2). **In addition, the potential security vulnerabilities that were identified in the exam indicate that the system may not be safe from fraudulent or unauthorized manipulation,** and therefore cannot be certified for use in Texas under Texas Election Code 122.001(a)(4)." Appendix § I.5(d) at 5 (emphasis added).

In a challenge brought against the State of Georgia and Dominion, and decided just before the Election, the court clearly stated that evidence showed glitches in Dominion's ballot-marking devices would not only prevent the detection of errors in counting and recording votes but could be dangerously susceptible to hacking.[3]

Initially, the media reported that the machines could not connect to the internet. Dominion CEO John Poulos testified before Congress that *poll workers* could not connect the machines to the internet during the election, despite hundreds of affidavits from eye-witnesses to the voting irregularities stating otherwise. See https://www.theepochtimes.com/mkt_app/some-dominion-machines-can-connect-to-the-internet-ceo-acknowledges_3620741.html (last accessed April 29, 2021). However, cybersecurity expert Col. (ret.) Phil Waldron testified before legislators in Arizona on November 30, 2020 that the Dominion user manual guides users on how to connect to the internet, and that the machines, used by multiple states, were connected to the internet during the election:

> "Our teams looked at spirographs on the Dominion network on Election Day and showed the increased web traffic, internet traffic on Election Day for dominion servers. … In a nutshell, these systems are not what you've been told, if you been told anything. They are connected to the internet. There is no transparency of how the voter information is processed, moved, and stored. And, as a matter of fact, these companies have refused to allow any type of inspection into their code and they always decry, 'It's our IP, it's our IP protection."

https://www.theepochtimes.com/dominion-systems-were-connected-to-internet-during-election-cybersecurity-expert_3598854.html (last accessed April 29, 2021).

Interestingly, after the election, a video surfaced of **Plaintiff Eric Coomer** explaining to an election board that the machines *certainly could be connected to the internet*. See https://twitter.com/JovanHPulitzer/status/1345830256234651653?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1345830256234651653%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.thegatewaypundit.com%2F2021%2F01%2Fnew-video-shows-dominions-eric-coomer-admitting-voting-machines-wireless-support-networks%2F (last accessed April 29, 2021); ***see also*** https://www.thegatewaypundit.com/2021/01/new-video-shows-dominions-eric-coomer-admitting-voting-machines-wireless-support-networks/ (last accessed April 29, 2021).

[3] See *Curling v. Raffensperger*, 2020 WL 5994029 at * 335 (N.D. Ga. Oct. 11, 2020) ("the evidence shows that the Dominion BMD [Ballot Marking Device] does not produce a voter verifiable paper ballot … thus, … voters must cast a BMD-generated ballot that … has the potential to contain information regarding the voter's choices that does not match what they enter on the BMD … or could cause a precinct scanner to improperly tabulate their votes). The Raffensperger court also noted Dominion's obstructionism in discovery and worried about its product safety (id., at *58):

> The Court's Order has delved deep into the true risks posed by the new [Dominion voting system as well as its manner of implementation. These risks are neither hypothetical nor remote under the current circumstances. The insularity of the Defendants' and Dominion's stance here in evaluation and management of the security and vulnerability of the BMD system does not benefit the public or citizens' confident exercise of the franchise. The stealth vote alteration or operational interference risks posed by malware that can be effectively invisible to detection, whether intentionally seeded or not, are high once implanted …
>
> The Plaintiffs' national cybersecurity experts convincingly present evidence that this is not a question of 'might this actually ever happen?' – but 'when it will happen,' especially if further protective measures are not taken. Given the masking nature of malware and the current systems

Even elected Democratic officials had concerns about Dominion. For example, in December of 2019, members of Congress launched an investigation[4] into Dominion and two of its competitors, which were collectively responsible for nearly all voting machines in the nation. Appendix at § I.4. The Congressional delegation wrote to Dominion, expressing their concern that the nation's election systems and infrastructure were under grave threat.[5]

In the aftermath of the Election, the Georgia Senate Judiciary Subcommittee on Elections issued a public report on December 17, 2020, discussing election irregularities, and finding that the Election was so thoroughly compromised, any reported results must be viewed as untrustworthy.[6] Famously, this report was approved during a live-streamed public hearing on December 30, 2020.

During the hearing, one of the experts providing testimony hacked into a polling location – even though it was not supposed to be possible – **and demonstrated the machines were connected to the internet where they should not have been, and with that access, it was possible to alter vote totals – in real time**.[7]

Because of widespread voting irregularities during the Election,[8] Defendants sent teams of journalists to Michigan, Georgia, and Arizona to investigate voter fraud, file dozens of FOIA

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described here, if the State and Dominion simply stand by and say, "we have never seen it," the future does not bode well.

[4] Senators Warren, Klobuchar and Wyden, and Representative Pocan.

[5] "Researchers recently uncovered previously undisclosed vulnerabilities in 'nearly three dozen backend election systems in 10 states. And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, '[n]othing went right on Election Day. Everything went wrong. That's a problem.' These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack." *Id*., at 2-3; see also Appendix at § I.4, 15 and 16.

[6] http://www.senatorligon.com/THE_SENATE%20JUDICIARY%20SUBCOMMITTEE_FINAL%20REPORT.PDF (last accessed April 29, 2021).

[7] https://livestream.com/accounts/26021522/events/8730585/videos/215443723 (see time stamps 4:46:00 – 4:50:00) (last accessed April 29, 2021).

[8] *See generally*, Peter Navarro, The Navarro Report https://peternavarro.com/the-navarro-report/ (last accessed April 29, 2021).

requests costing thousands of dollars, conduct eye-witness interviews,[9] and review evidence, including hundreds of affidavits of witnesses. Affidavit of Hoft and TGP, at pars. 4-5. Defendants have written about, and commissioned others to write about these investigations at great length and expense. *Id*. Defendants have given dozens of interviews, wrote their own report on the evidence of election fraud in the Election, and have even guest lectured on the topic at a college. Additionally, Defendants have published hundreds of articles about fraud and irregularities in the Election at www.thegatewaypundit.com.[10]

Defendants' journalistic investigation of Election irregularities has been costly in time and resources – but it has also made them a target of malicious lawfare enterprises, such as the case at bar, as well as fascist purges[11] by a public/private partnership[12] of the government, social justice warriors, and social media firms. Affidavit of Hoft and TGP, at pars. 7-8.

For example, after receiving and reviewing hundreds of hours of video surveillance footage, Defendants uncovered 3:30 a.m. footage which proved that a number of eyewitnesses were completely correct – tens of thousands of votes were illegally counted in Detroit. Until Defendants published this footage, the media acted in lockstep denying that the "late night ballot dump" ever occurred.[13] However, angered by Defendants' temerity in publishing the raw surveillance footage

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[9] One eye-witness was, in fact, a Dominion whistleblower. See https://www.thegatewaypundit.com/2020/11/whistleblower-dominion-staffer-saw-detroit-voter-fraud/?ff_source=Twitter&ff_campaign=websitesharingbuttons (last accessed April 29, 2021).

[10] See, for e.g.: Appendix § III, at 89-97

[11] https://www.thegatewaypundit.com/2021/02/not-satisfied-twitter-suspension-gateway-pundit-sleeping-giants-founder-matt-rivitz-calls-shopify-cancel-tgp-account/ (last accessed on April 29, 2021) (zealot activist encouraging and coordinating with corporations to deplatform/cancel Defendants).

[12] For example, newly released FOIA documents show that Google, Facebook, and Twitter coordinated with the Biden Campaign and the California Secretary of State during the Election. https://www.foxbusiness.com/technology/ca-big-tech-biden-censorship-judicial-watch

[13] This is one of a **legion** of similar articles, https://www.politifact.com/factchecks/2020/nov/05/blog-posting/no-evidence-ballots-were-smuggled-detroit-counting/ (last accessed April 29, 2021).

on its platform, disproving the mainstream narrative, Twitter promptly and permanently banned Defendants.[14]

The notions that Election irregularities and/or voter fraud may have occurred are not inherently baseless or unreliable. As discussed, supra, more than half the country believes Election irregularities occurred. In interviewing Defendant Joe Oltmann and publishing articles about his allegations, Defendants did nothing wrong and, as discussed more fully below, their speech is fully protected by the First Amendment. Despite this, many powerful elements of society – including Mr. Coomer and whatever lawfare entity is almost certainly funding his suit – are trying desperately to chill the speech of those they disagree with, politically.

Plaintiff is either a public official or a public figure for the purposes of the First Amendment and defamation law. Because he has marshaled no competent evidence that Defendants published their statements with actual malice, and cannot, the Court must dismiss his suit in its entirety.

II. ANTI-SLAPP – LEGAL STANDARD

In 2019, Colorado's General Assembly enacted the State's first Anti-SLAPP statute, C.R.S. § 13-20-1101 (hereinafter "Statute"). The Statute was and is designed 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". C.R.S. § 13-20-1101(1)(b). An anti-SLAPP motion may be brought against an entire complaint. *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 356, 42 Cal. Rptr. 2d 464 (2d Dist. 1995); *Rivera v. First DataBank, Inc*., 187 Cal. App. 4th 709, 115, 115 Cal. Rptr. 3d 1 (4th Dist. 2010)

[14] https://www.thegatewaypundit.com/2021/02/gateway-pundit-suspended-twitter-announcing-video-tcf-center-fraud-will-released-coming-days/ (last accessed April 29, 2021); see also https://www.thegatewaypundit.com/2021/02/tcf-video-got-gateway-pundit-banned-twitter-tgps-jim-hoft-joins-jack-posobiec-oan-discuss-explosive-report-video/

Specifically, the Statute allows a defendant to file a special motion to dismiss for claims arising from the "act in furtherance of a person's right to 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." C.R.S. § 13-20-1101(1), (3)(a)-(c).

An "act in furtherance of a person's right of petition or free speech" is defined broadly under the Statute, including but not limited to: "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." C.R.S. § 13-1101(2)(a)(III).

If a defendant establishes that his actions were taken in furtherance of his constitutional rights of free speech, the burden then shifts to the plaintiff to establish that he or she has a "reasonable likelihood" of prevailing on the claim[s]. C.R.S. § 13-20-1101(3)(a).

In making this determination of Plaintiff's 'reasonable likelihood' of prevailing, a Court will "consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." C.R.S. § 13-20-1101(3)(b).

The Statute and legal analysis closely follows California's Anti-Slapp law. *See* Calif. Code of Civ. Proc. §425.16. Because Colorado's caselaw is sparse – as noted, the Statute is less than two (2) years old – and California's Anti-Slapp law is verbatim the same as the Statute, we believe and herein treat California caselaw interpreting California's statute as persuasive authority for interpreting the Statute. Because the Law "is relatively new and untested" Colorado courts look to the "more well-established body of authority interpreting the California law" for guidance since the Anti-SLAPP Law "tracks California's statute almost exactly". *See Stevens v. Mulay*, No. 19-CV-01675-REB-KLM, 2021 WL 1153059, at *2, n. 7 (D. Colo. Mar. 26, 2021).

Because the Statute applies to Plaintiff's claim of defamation against the Defendants, and because Plaintiff's pleadings and heretofore nonexistent affidavits of support cannot demonstrate **any** likelihood of success – much less a reasonable likelihood of success – this Court must grant Defendants special joint motion to dismiss.

THE STATUTE: PRONG ONE

To determine that the Statute applies to the SLAPP claims we look first to section (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…" C.R.S. § 13-20-1101(3)(a).

An "act in furtherance of a person's right of petition or free speech" is defined as **including**: "(III) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or (IV) **Any other** conduct or communication in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issues or an issue of public interest." C.R.S. § 13-1101(2)(a)(III)-(IV) (emphasis added).

In Colorado, a matter of public interest or public concern is defined broadly to include any matter relating to any matter of political, social or other concern to the community. *McIntyre v. Jones,* 194 P.3d 519, 525 (Colo. App. 2008), see also *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) see also *McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008) (public

interest or concern is defined extremely broadly to include any matter relating to any matter of political, social, or other concern to the community).

Notwithstanding the merits of the claims, which Defendants will address in further detail in prong two, it is clear in reading Plaintiff's allegations made with respect to the Defendants in ¶57 and 60 – and the lengthy footnotes – all of the allegedly defamatory matters concerned: (1) written or oral statements; (2) were published or disseminated exclusively online and/or via social media, all of which are public forums; and (3) related to the legitimacy of the 2020 Presidential Election.

All of the allegedly defamatory statements about Plaintiff Coomer emanate directly from his role with Dominion Voting Systems. Were Coomer merely another self-aggrandizing, unhinged anti-Trumper with a Facebook account, no one would have even known his name. Rather, his involvement in this case wholly emanates from his involvement with Dominion, and his alleged ability to interfere with the 2020 Presidential Election.

In other words, all the statements made by Defendants deal directly with the 2020 Presidential Election and the legitimacy thereof, an inherently public matter.

THE STATUTE: PRONG TWO

Given that Defendants' acts were and are clearly the type of protected activity the Statute explicitly delineates and broadly contemplates, the burden and legal analysis now shift to the plaintiff.

Specifically, Plaintiff Coomer must demonstrate that there is a "reasonable likelihood that [he] will prevail on the claim. C.R.S. § 13-20-1101(3)(b).

In interpreting this second prong, a California court in *Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc.* 273 Cal. Reptr. 3d 831 (2021), *review denied (Apr. 21, 2021)* explicated the analysis:

> When a party moves to strike a cause of action under the anti-SLAPP law, a trial court evaluates the special motion to strike by implementing a two-prong test: (1) has the moving party made a threshold showing that the challenged cause of action arises from protected activity, and, if it has, (2) has the non-moving party demonstrated that the challenged cause of action has minimal merit by making a *prima facie* factual showing sufficient to sustain a judgment in its favor? *Id.* At 837-38 (internal citations and quotation marks omitted)

The term *prima facie* factual showing means evidence that is sufficient to establish a fact unless disproved or rebutted. *Application for Water Rts. of Well Augmentation Subdistrict of Cent. Colorado Water Conservancy Dist.*, 435 P.3d 469, 475 (Colo. 2019), *quoting Black's Law Dictionary* (10th ed. 2014).

The second prong of the § 3(a) and 3(b) analysis thus turns on whether Plaintiff has established facts, not merely pled them.

California courts follow a similar analysis: "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).

The second prong of the analysis is a "summary-judgment-like" standard. *Stevens v. Mulay*, 2021 WL 1153059, at *3 (D. Colo. Mar. 26, 2021), *quoting Lefebvre v. Lefebvre*, 131 Cal. Rptr. 3d 171, 174 (2011).

Plaintiff has burden of showing that the challenged statement was published with clear and convincing evidence of actual malice. *McGarry v. University of San Diego*, 154 Cal. App. 4th 97, 123, 64 Cal. Rptr. 3d 467 (4th Dist. 2007).

Thus the hearing on the second prong of the Statute's analysis necessitates the court look to Plaintiff's factual pleadings themselves, to see what **evidence** – not simply mere allegations or conclusory statements – Plaintiff establishes or adduces.

III. ARGUMENT: ANTI-SLAPP PRONG ONE

A. The SLAPP Statute Applies to All Claims Against Defendants Because They All Relate to Statements Regarding a Matter of Public Concern.

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." *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); see also *McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008) (public interest or concern is defined extremely broadly to include any matter relating to any matter of political, social, or other concern to the community).

Here, all relevant statements Plaintiff allegedly stated by Defendants were in the context of Defendants' ongoing investigations into election irregularities. Defendants interviewed Defendant Joe Oltmann about his claimed experiences infiltrating ANTIFA,[15] and his research regarding Plaintiff. Defendants have interviewed dozens of individuals about similar topics.[16] Defendants

[15] ANTIFA is the American variant of a global left-wing "anti-fascist" political movement, including domestic autonomous groups which self-identify as being part of the Antifa movement *See also* Kyle Shielder, Gabriel Nadales, Erin Smith, Matthew Vadum, and J. Michael Waller, Unmasking ANTIFA: Five Perspectives On a Growing Threat., pages 2020. (Discussing ANTIFA's organization and structure, with the cell being the primary unit). ANTIFA also refers to a loose confederation of far-left-wing smaller cells, sometimes called 'affinity groups', that coordinate to undertake criminal actions and activity that include disruption of events, counter-protesting, agitation, pressuring employers to terminate individuals, and infiltration. These groups generally espouse far-left wing ideological goals and aims, and generally speaking has a favorable disposition to Communism and the violent means and methods necessary to achieve that political system. Typically the group members wear all-black.

[16] See, for e.g., Appendix §III., at 89-97.

also republished Coomer's *own statements* which he himself posted to social media.

These are obviously statements of public interest and importance. A substantial portion of the public would find Mr. Coomer's worldview to be anti-American and radical, and would be disturbed that he was placed in charge of the **security** of one of the largest election systems companies operating in the United States. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). At a minimum, the statements are "connected" to a matter of public interest, and this is sufficient for the purposes of SLAPP Statute "public concern." *Pott v. Lazarin*, 47 Cal. App. 5th 141, 148–49, (2020), *as modified on denial of reh'g* (May 21, 2020), *review denied* (Aug. 19, 2020).

Defendants' statements were clearly regarding matters of public concern. Accordingly, Mr. Coomer is required to marshal competent evidence establishing a legal basis for each element of his claims – but also he must demonstrate that he can overcome Defendants defenses to those claims. To date he has failed to do so, and his Complaint should be subject to scrutiny under the Statute and dismissed in its entirety.

IV. ARGUMENT: ANTI-SLAPP PRONG TWO

A. The Complaint Fails for Legal Insufficiency

"In order to successfully resist a special motion to strike, a plaintiff must state and substantiate a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 31 (2007) (internal citations and quotes omitted). If the pleadings are not adequate to support a cause of action, the plaintiff has failed to carry his burden in resisting the motion. *Id.* "The general rule is that the words constituting an alleged libel must be specifically

identified, if not pleaded verbatim, in the complaint." *Id*. (internal citations and quotes omitted).

In the present case, Plaintiff has failed to specifically identify any defamatory statements about him made by Defendants. **Plaintiff's vaguely point to Defendants' articles, without identifying the actionable statements**. FAC, 28-29; 34-36. As pled, Plaintiff asks Defendants and the Court to intuit a cause of action for him. Cf. *Gilbert v. Sykes*, 147 Cal. App. 4th at 32 (plaintiff's allegations were a "paradigm of vagueness," and did not come close to the specificity required to state an actionable libel claim). Accordingly, Plaintiff's causes against Defendants fail, and the Court should dismiss the suit.

B. Plaintiff Eric Coomer is Both a Public Official and a Public Figure.

*a. Plaintiff is a **public official** for the purposes of the First Amendment and Defamation Law.*

Plaintiff is the Director of Product Strategy and **Security** at one of three companies which controls the majority of election logistics in the United States, and which operated elections in twenty-eight (28) states during the Election.[17] The operation of the means by which the public elects the President of the United States, its representatives, and decides its laws, is manifestly a **primary** public function in a democracy. The Supreme Court has recognized that even private individuals can perform public duties. For example, in *Rosenblatt v. Baer*, the Court defined a public officials, for First Amendment purposes, as "those persons who are in a position significantly to influence the resolution of public issues." 383 U.S. 75, 85-87 (public *officials "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," and their position "has such apparent importance that the public has an independent*

[17] Defendants ask the Court to take judicial notice of Dominion's Complaint in *US Dominion, Inc., et al. v. My Pillow, Inc., et al*. 1:21-cv-00445 (D.D.C.), at par. 157, in which Dominion describes itself as a "company that provides local election officials with tools they can use to run elections." Dominion "sells voting technology services to elected officials from both political parties" in a majority of states across the country." Dominion claims that in the Election, 28 states "administered their elections by using Dominion's tabulation devices to count paper ballots."

interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees…"; see also *Gray v. Udevitz*, 656 F.2d 588 (10th Cir. 1981); *Young v. CBS Broadcasting, Inc*., 212 Cal.App.4th 551 (2012) (court-appointed conservator deemed a public official for purposes of defamation liability). **Public Officials** must show actual malice to recover for defamation. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). As the director of security for a firm which facilitated the Presidential Election in 28 states, and facilitated elections in many others as well, Plaintiff is a public official.

b. *Plaintiff is a **public figure** for the purposes of the First Amendment and Defamation Law.*

As previously discussed *supra*, this case involves matters which are of obvious public concern. Given that the alleged matter is of public concern, then the First Amendment places an additional burden on the plaintiff to show that the statements in question were made with **actual malice**. *Rosenbloom v. Metromedia, Inc*., 403 U.S. 29, 43 (1971). Colorado recognizes this to be so, even where the statements involve matters of "general interest." *Diversified Management, Inc. v. Denver Post, Inc*. 653 P.2d 1103, 1106 (Colo.1982)(quoting *Rosenbloom v. Metromedia, Inc*.). Accordingly, Plaintiff is a public figure.

C. Plaintiff Has Not and Cannot Make a Prima Facie Case for Actual Malice Defamation.

Whether public official or public figure, to Survive this Motion Plaintiff must demonstrate by *clear and convincing evidence* (see *Gilbert v. Sykes*, 147 Cal. App. 4th at 26; see also *Seible v. Denver Post Corp.,* 782 P.2d 805, 808 (Colo. App. 1989) (citing *St. Amant v. Thompson,* 390 U.S. 727 (1968)) that Defendants defamed him with actual malice. That is, he must prove that Defendants either **knew** their statements were either (a) false and defamatory, or else (b) published

the statements with reckless disregard for the truth. Plaintiff has failed to provide competent evidence of either 'a' or 'b' in his Complaint. And, as discussed in detail, *supra*, conclusory allegations are impermissible for defamation actions, given the enactment of Colorado's Anti-SLAPP statute. *Gilbert v. Sykes*, 147 Cal. App. 4th at 32. As discussed *infra*, the are no admissible facts by which Plaintiff can demonstrate actual malice.

a. Defendants' statements are opinions protected by the First Amendment; Defendants reasonably relied upon Defendant Oltmann's statements.

Defendants own and operate a political news and opinion blog. Affidavit of Hoft and TGP, at par. 1. As discussed, *supra*, immediately following the election, Defendants deployed multiple investigative teams to Michigan, Georgia, and Arizona because of the public's interest in Election irregularities. Affidavit of Hoft and TGP, at pars. 3-4. Defendants or their agents interviewed dozens of eye-witnesses, reviewed hundreds of hours of video surveillance videos, reviewed hundreds of affidavits, and filed dozens of FOIA requests. Affidavit of Hoft and TGP, at pars. 4-6, 8.

On or about November 16, 2020, Defendants conducted an audio interview of Defendant Joe Oltmann and wrote about his alleged experiences and research. Affidavit of Hoft and TGP, at par. 10. Oltmann is a successful businessman in the Denver area. *Id*., at 9. In granting the interview and placing himself before the public as he did, Oltmann took extraordinary risks for himself, his family, and his business. *Id*., at . Oltmann told Defendants that as a result, he and his family are under constant private security contractor protection. *Id*., at 11-12. The Court is free – just as the broader public was, and still is – to listen to the audio interview to judge Mr. Oltmann's credibility.[18] However, the fact that he was willing to take such risks to come forward with his research suggests

[18] See interview recording at https://www.thegatewaypundit.com/2020/11/denver-business-owner-dominions-eric-coomer-unhinged-sociopath-internet-profile-deleted-erased-audio/ (last accessed April 29, 2021).

a modicum of credibility on its own. Cf., *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (One who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted recklessly); see also *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard"). Any statement Plaintiff attributes to Defendants – although his Complaint is poorly pleaded – are clearly within the context of an **obvious** political internet blog offering opinions about a public official and public figure in the context of a matter of enormous public concern.

b. Defendants' statements are privileged because they did not imply allegations of undisclosed defamatory facts.

The First Amendment protects, *inter alia*, "rhetorical hyperbole," "vigorous epithets," and "loose, figurative language. Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990). Further, Section 566 of the Restatement (Second) of Torts states: "A defamatory communication may consist of a statement in the form of an opinion, **but a statement of this nature is actionable only if it implies the allegations of <u>undisclosed</u> defamatory facts as the basis for the opinion**." (Emphasis added). See also *TMJ Implants, Inc. v. Aetna, Inc*., 498 F.3d 1175, 1186 (10th Cir. 2007). Colorado has adopted the Section 566 of the Restatement. *Keohane v. Stewart*, 882 P.2d 1293, 1298 (Colo.1994), cert. denied, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 882 (1995).

Defendants' interview of Mr. Oltmann was very candid and leaves nothing unstated for anyone listening. Defendants' articles showcase the same plainness. Readers are free to take it or leave it for whatever they deem its value.

In *Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002), Gennifer Flowers sued James Carville and George Stephanopoulos for defamation after they claimed she lied about her affair

with Bill Clinton and "doctored" secretly recorded phone calls from Clinton. The Court explained that in the case of a public figure, "unless the defendants knew the news reports were probably false or had some obvious reason to doubt their accuracy, their reliance is protected by the First Amendment." *Id*., at 1129. In such case, a defendant is merely expressing nondefamatory opinions.

In the instant case, as in *Flowers*, Plaintiff must prove by admissible, clear, and convincing evidence, that Defendants **knew** either Joe Oltmann's allegations or their own blog articles were probably false or had some **obvious** reason to doubt their accuracy, their reliance is protected by the First Amendment. Plaintiff has failed to marshal such evidence.

In *Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2009), a retail store owner sued a syndicated radio talk show host for defamation. The talk show featured the host interviewing callers who faced consumer problems. There, the host interviewed a disgruntled customer of the retail store. The customer made a number of defamatory statements about the retail store. *Id*. At 984-85. Based on her comments, the host offered advice and, taking her comments at face value, agreed with her defamatory assessment about the retail store, and even called them liars. *Id*. At 984. Critically, the court noted the context of the interview: the consumer had called into a radio talk show to narrate her story on the air – **"[i]t was clear to all that [host] had no independent knowledge of the complaint at this point."** *Id*., at 988 (emphasis added). Citing to *Flowers*, the court held that the host's comments were only actionable if he knew that the consumer's statements were probably false or had some obvious reason to doubt their accuracy. *Id*. At 989. The court found the plaintiff had not presented evidence to meet that burden.

In the instant case, Defendants are similar to the radio host in *Gardner*. Defendants interviewed Mr. Oltmann just as they would interview any other person who purported to be a witness to Election irregularities. Affidavit of Hoft and TGP, at par. 13, 19. As in *Gardner*, **it was**

obvious to listeners that Defendants had no independent knowledge of Mr. Oltmann's claims and never claimed to possess such knowledge. Any weaknesses in Mr. Oltmann's logic or reasoning in his interview, if any, were plainly and honestly available for anyone to consider or disregard. Defendants were not then, and are not now, aware of any credible evidence disproving Mr. Oltmann's statements in his interview, let alone any of their own. Affidavit of Hoft and TGP, at par. 14-15. Defendants knew Mr. Oltmann's statements and their own to be true when published, and they know them to be true today. Id. Defendants found him credible then; they find him credible, now. Plaintiff has presented no admissible evidence demonstrating otherwise, nor can he.

In *Young v. CBS Broadcasting, Inc*., 212 Cal.App.4th 551 (2012), a court appointed conservator sued CBS for a telecast report in which CBS "dramatized" allegations of theft and battery while she served as the conservator of an elderly woman. *Id*., at 555. In *Young*, the conservatee made a number of allegations which, if false, would be defamatory. *Id*., at 563. For example, the conservatee alleged the conservator: stole from her, threatened her, trespassed against her, and committed battery upon entering her property. *Id*. ("CBS's surreptitious filming of Young, presented in the context of these criminal allegations, further conveyed the image that Young was a criminal").

The court noted that the conservator denied all of the accusations in her interview before the broadcast aired, but because she was a public figure, denials alone do not establish malice. Id. (quoting *Harte-Hanks Communications v. Connaughton*, 491 U.S. at 692, fn. 37 (1989) ("The press need not accept denials however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error"); citing also to Smolla, Law of Defamation 2d ed. 2009) § 3:65.50, p. 3-96, fn. omitted) ("A denial only serves to buttress a case for actual malice when there is something

in the content of the denial or supporting evidence produced in conjunction with the denial that carries a doubt-inducing quality").

Importantly, the conservator argued that CBS should have known that the conservatee was suffering from memory and cognitive impairment. Id., at 565. The conservator argued on the grounds of those impairments that CBS' reliance on the conservatee was unreasonable. *Id*. However, the court noted that *the CBS reporter had interviewed the conservatee personally, and he could assess for himself whether she was suffering from obvious memory impairment*. *Id*. In addition, the medical records contained some evidence the conservatee was not impaired. *Id*. The court found that given the conflicting picture of the conservatee, it could not say CBS' reliance upon the conservatee was reckless. *Id*.

The conservator also argued CBS was at fault for not interviewing other persons with knowledge of the events. *Id*., at 566. The court found the evidence showed CBS *did* attempt to interview additional persons, but not of the respective witnesses would speak with him on grounds of confidentiality. *Id*. The court also noted that, pursuant *to St. Amant v. Thompson*, 390 U.S. at 731, the failure to investigate, even when that failure is unreasonable, does not by itself prove actual malice. *Id*. (noting, "[e]ven if [reporter] had contacted all possible witnesses, many of them would likely not have spoken with him due to the confidential nature of their relationship with the conservatee"). The court held that the conservator was a public official for the purposes of defamation law, and the plaintiff was failed to present evidence of actual malice.

The present case is highly analogous to *Young*. Plaintiff's vigorous denial of any statements of Oltmann or Defendants does not establish actual malice. As a matter of their First Amendment rights, Defendants are not *required* to attribute any credibility to Plaintiff's denials. What's more, there is nothing in Plaintiff's Complaint or any other denial that independently induces doubt in

Defendants' statements.

Plaintiff essentially argues that the entire notions of irregularities and voter fraud in the Election are inherently unreliable and incredible. *If that's so, more than half of the country disagrees with him*.[19] Other people who consider Election fraud plausible include the lawyer who wrote the book on fraud and corruption at the United States Department of Justice and prosecuted numerous election lawsuits all over the country,[20] America's Mayor, and the former President of the United States. Even were Plaintiff to argue Mr. Oltmann were cognitively impaired, or a malicious zealot, and therefore unreliable, Defendants considered evidence beyond Mr. Oltmann's interview. Defendants were unable to interview Mr. Coomer because he was impossible to locate after the election. Affidavit of Hoft and TGP, par. 20. However, Defendants also interviewed numerous forensic, cybersecurity, and other experts about the likelihood that Dominion's systems were compromised during the Election. *Id*., at 16. All of these experts provided arguments and evidence that the results were disrupted. *Id*. Defendants also considered and published articles about counter-arguments from government officials and news outlets. *Id*., at 17. Defendants continue to investigate the Election to the present date, and will for the foreseeable future. Id., at 18. Defendants interviewed Mr. Oltmann as they would any other Election witness, and they presented the factual basis for all of their statements. *Flowers*, at 1129 ("when a speaker outlines the factual basis for his conclusion, his statement is protected").

c. Plaintiff's failure to provide competent evidence of malice or material falsity.

Plaintiff offers no factual, admissible evidence demonstrating Defendants knew any of their statements were false or carried any doubts about the accuracy of their statements at the time they

[19] See note 1, *supra*.
[20] Sidney Powell, Conviction Machine: Standing Up to Federal Prosecutorial Abuse. Encounter Books, 2020. See also Sidney Powell, Licensed to Lie: Exposing Corruption at the Department of Justice. 2018.

were published. This is an insurmountable barrier for Plaintiff – but it's only the beginning of his challenge, here.

Whereas truth was formerly a defense to a defamation claim, in the present state of First Amendment jurisprudence, the plaintiff must plead prove **material falsity** – in Colorado, by *clear and convincing* evidence. *Broker's Choice of America, Inc. v. NBC Universal, Inc*., 861, F.3d 1081, 1110 (10th Cir. 2017). Just as Plaintiff provides no competent evidence to demonstrate actual malice, Plaintiff also fails to marshal evidence of **material falsity**.

d. Defendants' statements are protected First Amendment criticisms and inquiries into Plaintiff's fitness for his role as a public official.

The Supreme Court long ago announced that The First Amendment constitutes a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[21] *New York Times Co. v. Sullivan*, 376 U.S. at 270, 279-80. As part of this commitment, the Constitution permits citizens to criticize, question, or challenge the fitness of public officials for the trust placed in them by society. But, a citizen's rights go beyond this. So long as the criticism or charge is not made with actual malice, the speech is guaranteed by the First Amendment. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971) ("As a matter of Constitutional law, a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's **fitness for office** for purposes of application of [actual malice]") (emphasis added).

Considered in the context of the Election, and widespread concerns of election fraud, and considering the utter lack of evidence of malice – actual or otherwise – Defendants' statements are absolutely protected speech under the First Amendment. Accordingly, Plaintiff's Complaint must

[21] Indeed, even Plaintiff can agree with that. "The ability to have a political opinion in this country is a protected right." First Amended Complaint, par. 55.

be dismissed.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff has failed to demonstrate credible, competent evidence indicating Defendants defamed him with actual malice. There are no facts he could show which would establish this. Because of this, the Court should and must dismiss his suit in its entirety.

Dated: April 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ John C. Burns
JOHN C. BURNS