DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO** 1437 Bannock Street, Room 256 Denver, CO 80202 Phone: (303) 606-2300	DATE FILED: April 30, 2021 4:27 PM FILING ID: 95C64B267700A CASE NUMBER: 2020CV34319
ERIC COOMER, Plaintiff, v. **DONALD J. TRUMP FOR PRESIDENT,** et al. **Defendants**.	▲ COURT USE ONLY ▲
Attorneys for Defendant, Rudolph Giuliani: Geoffrey N. Blue (32684), gblue@gesslerblue.com Scott E. Gessler (28944), sgessler@gesslerblue.com Gessler Blue LLC 7350 E Progress Pl., Suite 100 Greenwood Village, CO 80111 Tel: (303) 906-1050	Case Number: 2020CV34319 Division:
SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S. § 13-20-1101	

Conferral: The undersigned counsel has conferred with Plaintiff's counsel regarding this motion. Plaintiff opposes the relief sought. [1]

[1] Giuliani brings this motion subject to his motion to dismiss for lack of personal jurisdiction and expressly reserving his rights in this regard. The jurisdictional challenge is currently before the Court and Giuliani believes that the Court's ruling on that Motion will moot this Motion because, by dismissing for lack of personal jurisdiction, the Court will not be able to rule on the merits of Plaintiff's claims. However, because of the Court's Order dated March 23, 2021, requiring all Defendants to file any special motions to dismiss by April 30, 2021, Giuliani brings this Motion to preserve his rights under C.R.S. § 13-20-1101 should the Court find that it has personal jurisdiction over Giuliani. *Cf. Wakefield v. Brit. Med. J. Publ'g Grp., Ltd.*, 449 S.W.3d 172, 183 (Tex. App.—Austin 2014) (holding that defendant does not

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Defendant Rudolph Giuliani, ("***Defendant***" or "***Giuliani***"), hereby moves the Court to dismiss Plaintiff Eric Coomer's ("***Plaintiff***" or "***Coomer***") First Amended Complaint ("***FAC***" or "***Amended Complaint***") with prejudice as to Giuliani, pursuant to C.R.S. § 13-20-1101

PRELIMINARY STATEMENT

Defendant Rudolph Giuliani is a nationally known public servant, having served as the U.S. Attorney for the Southern District of New York, the mayor of New York City, and just after the November 3, 2020, Election ("***Election***"), was retained by Defendant Donald J. Trump for President, Inc. ("***Trump Campaign***") to investigate multiple instances of voting irregularities, some of which involved voting technology companies colloquially referred to as "***Dominion***" and "***Smartmatic***". Ex. C at ¶¶ 2-3.

While virtually all of Defendant's public commentary on these issues related to questioning the integrity and reliability of the voting machines and software used in the election (as well as problems inherit with mail-in voting), Plaintiff has based his entire lawsuit against Defendant on one snippet (the "***Election Statements***") of a press conference delivered on November 19, 2020, in Washington, D.C. (the "***Press Conference***") pertaining to litigation over the Election ("***Election Litigation***") that made only cursory reference to Coomer. *See* FAC at ¶ 64; Exhibit A-1 (transcript of Press Conference). As is apparent from Election Statements—both literally and contextually—

waive personal jurisdiction by filing Anti-SLAPP motion subject to personal jurisdiction challenge in light of strict timing requirements of Anti-SLAPP statute).

they were made by Giuliani in his capacity as an attorney for the Trump Campaign's legal team, informing the public of pending and expected issues in the Election Litigation, which were of the utmost public concern. Therefore, the protections of the C.R.S. § 13-20-1101, commonly known as Colorado's Anti-SLAPP statute (the "Statute") apply to Coomer's action against Giuliani.

Pursuant to the Statute, Coomer must demonstrate that he has a "reasonable likelihood" that he "will prevail on the claim[s]" (see C.R.S. § 13-20-1101(3)(a)) against Giuliani for defamation, intentional infliction of emotional distress, civil conspiracy, injunction, and retraction (the "***SLAPP Claims***") (*see* FAC at ¶¶ 82-99). As discussed below, because Coomer cannot make this showing and because, as a matter of law, Giuliani has defenses that Coomer cannot overcome, the Court should dismiss the SLAPP Claims with prejudice and award Giuliani his attorney's' fees incurred in defending the SLAPP Claims.

PROCEDURAL POSTURE

Coomer filed his Original Complaint on December 22, 2020. He purported to serve Giuliani on December 30, 2020, through an associate, however, this associate was not authorized to accept service on Giuliani's behalf and did not provide the suit to Giuliani. Ex. B at ¶ 1. Giuliani did not even learn of this suit until approximately March 11, 2021. *Id.* On February 4, 2021, Plaintiff filed the Amended Complaint ("FAC"). Giuliani was never served with the Amended Complaint. *See id.* Nevertheless, Giuliani became aware of this suit and quickly filed a motion to dismiss for lack of personal jurisdiction on March 23, 2021, that is pending before this Court.

In the Amended Complaint, Plaintiff alleges that Giuliani made defamatory statements against Plaintiff at the Press Conference. FAC at ¶ 64; Ex. A-1 at 49:14-23. Although Plaintiff references "other statements" Giuliani allegedly made regarding Coomer, he does not specifically identify them and instead references media appearances by Giuliani wherein Coomer suggest statements concerning him were made. *See* FAC at 64 n. 107. However, these media appearances all dealt with Dominion and/or Smartmatic and did not target or refer to Coomer individually. *See id.*; Ex. B at ¶ 4.

SUMMARY OF ARGUMENT

The Court should grant this Motion for at least three (3) reasons. First, Giuliani's Election Statements are privileged. Second, even if Giuliani's Election Statements are not privileged, Coomer cannot, as a matter of law, demonstrate that the Elections Statements were made with actual malice. Third, and finally, Coomer cannot demonstrate all of the other essential elements of his SLAPP Claims.

ARGUMENT AND AUTHORITIES

I. The Anti-SLAPP Statute Generally.

The purpose of the Statute is "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). 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); *compare also* C.R.S. § 13-20-1101 *with* CALIF. CODE OF CIV. PROC. § 425.16 (the "***California Statute***").

Under the Statute, "[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). As will be discussed below, the Election Statements qualify for protection under the Statute because they either fall within the specifically enumerated examples in the Statute or they otherwise constitute acts "in furtherance of [Giuliani's] right of petition or free speech," on a public issue.

If Giuliani successfully makes a *prima facie* showing that the SLAPP Claims arise from protected activity, the burden then shifts to Coomer to establish "that there is a reasonable likelihood that [he] will prevail on the [SLAPP Claims]." C.R.S. § 13-20-1101(3)(a); *see also Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 142 (2011). This requires Coomer to "demonstrate a probability of prevailing" on the SLAPP Claims. C.R.S. § 13–20–1101(3)(a); *Tamkin*, 193 Cal. App. 4th at 142. That probability of prevailing includes a "*prima facie* factual showing" sufficient to demonstrate that Coomer could obtain a judgment on the SLAPP Claims. *See Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc.*, 59 Cal. App. 5th 995, 1004 (2021), *review denied* (Apr. 21, 2021) (collecting cases). Thus, Coomer has the burden of establishing—not merely alleging—that each element of the SLAPP Claims is legally sufficient and factually substantiated. *Id.* This Motion is an evidentiary one and to survive it Coomer "must produce evidence that would be admissible at trial". *HMS Cap., Inc. v. Laws. Title Co.*,

118 Cal. App. 4th 204, 212 (2004). This is a standard substantially similar to summary judgment. *See Mulay*, 2021 WL 1153059, at *3.

The Statute also clearly provides for the Court to consider defenses to the SLAPP Claims because it refers to the Court making a "determination" of any "defense" based on pleadings and evidence. *See* C.R.S. § 13–20–1101(3)(b). Therefore, "[t]o defeat an anti-SLAPP motion, [a plaintiff] must overcome any substantive defenses that exist." *Trinity Risk Mgmt.,* 59 Cal. App. 5th at 1006. Finally, the Statute refers to a "hearing" at which the motion will be decided. C.R.S. § 13–20–1101(5). The Statute, however, contemplates that the issue will actually be resolved by pleadings and "supporting and opposing affidavits." *See* C.R.S. § 13–20–1101(3)(b). Thus, the Statute contemplates a non-evidentiary hearing for legal argument concerning the motion and not a "mini-trial" in which testimony and exhibits are received by the Court.[2]

II. The Statute Applies To The SLAPP Claims.

To determine that the Statue applies to the SLAPP Claims, the Court need look no further than Coomer's Amended Complaint. All of Coomer's claims against Giuliani are based

[2] Like Colorado, the Texas Anti-SLAPP statute (the "***Texas Statute***") was also modeled on and is substantially similar to the California Statute and, also like Colorado, Texas courts look to California for guidance on the construction of Texas's Statute. *See, e.g., Kinney v. BCG Att'y Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *8 (Tex. App.—Austin Apr. 11, 2014). Texas courts have held that a provision of the Texas Statute that was almost identically worded to C.R.S. § 13–20–1101(3)(b) mandates that the trial court **should not conduct** an evidentiary hearing. *See Quintanilla v. West,* 534 S.W.3d 34, 42 (Tex. App.—San Antonio 2017) (stating that "[t]he trial court does not hear live testimony" in considering a TCPA motion to dismiss), *rev'd on other grounds*, 573 S.W.3d 237 (Tex. 2019) and *Pena v. Perel*, 417 S.W.3d 552, 556 (Tex. App.—El Paso 2013) (same).

on the Election Statements,[3] which Coomer admits are as follows:

> By the way, the Coomer character, who is close to Antifa, took off all of his social media, haha, but we kept it. We've got it. The man is a vicious, vicious man. He wrote horrible things about the president. He is completely – he is completely biased. He is completely warped. And, he specifically says, that they are going to fix this election. I don't know what you need to wake up, to do your job, and inform the American people, whether you like it or not, of the things they need to know.

FAC at ¶ 64; Ex. A-1 at 49:14-23. In construing language virtually identical to the Statute, the Texas Supreme Court has held that where the allegations in a plaintiff's pleadings bring a claim within the scope of the Statute, the movant has met its initial burden of demonstrating the applicability of the Statute. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

Here, the Election Statements unquestionably stem from Giuliani's exercise of his constitutional right to freedom of speech. Coomer complains of oral statements made by Giuliani in connection with allegations of corruption by Dominion/Coomer regarding voting technology used in the Election. This falls squarely within the plain text of the Statute which protects "[a]ny 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. § 13-20-1101(2)(a)(III).

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[3] Coomer claims in his Amended Complaint that there were "other previous statements" Giuliani allegedly made about Coomer. *See* FAC at ¶ 64 at n. 107. However, these are clearly statements concerning Smartmatic and Coomer's employer, Dominion. None of the statements referenced mention or otherwise were specifically directed to Coomer. An employee of a corporation is not defamed because that employee's corporation is allegedly defamed. *See Lininger v. Knight*, 123 Colo. 213, 226 P.2d 809, 809-13 (1951) (holding night club owner who sued an individual that had complained about the club to the board of county commissioners was not defamatory *per se* because the statements referred to the club but did not specifically defame the owner). Coomer has pleaded for defamation *per se*, so he cannot use statements about his employer to support his claim. FAC at ¶¶ 820-86.

That the Election and any issues related to the integrity of the Election could be anything other than a matter of "public interest" is simply ludicrous.

In Colorado, a matter of public interest is defined extremely broadly to include any matter relating to any matter of political, social, or other concern to the community. *See McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008). In determining whether statements involve a matter of public concern, courts analyze "the content, form, and context of the statements, in conjunction with the motivation or 'point' of the statements as revealed by the whole record." *Id.* (quoting *Barrett v. Univ. of Colo. Health Sciences Center*, 851 P.2d 258, 263 (Colo. App. 1993)). Here, the Election Statements were given at the Press Conference where Giuliani began by introducing the Trump Campaign's legal team and what he believed his team's multi-week investigation expected to show. Ex. 1-A at 3:11-17. Giuliani talked about what he expected his legal team would be able to prove in court regarding this evidence. *Id.* at 27:6-7. Defendant Powell then discussed Dominion, Smartmatic, and the allegations that were already being reported in other media outlets regarding Coomer. *Id.* at 27:8-36:19. Jenna Ellis, another attorney for the legal team, made it clear that this Press Conference was the "opening statement" as to what they expected to prove at a trial on the merits. *Id.* at 37:15-24. It was after these statements and in this context that Giuliani made the Election Statements that involved Coomer and about which Coomer complains. These were unquestionably statements of public interest and importance.

In addition, in anticipation of Coomer's potential argument that the subset of statements concerning Coomer are not concerning the Election (not that this makes any

difference considering Coomer was reported to have made statements admitting to manipulating election results, which are in and of themselves matters of public interest), this argument flies in the face of the "in connection" with language of the Statute, which only requires the statements at issue be "connected" to a matter of public interest.[4] In fact, this argument was expressly rejected in *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). In that case, the plaintiffs argued the California Statute did not apply to statements made at a press conference because "their cause of action targeted only some of the content of [defendant's] press conference". *Id.* at 149. Focusing on the "in connection with" language in the California Statute, the *Pott* court held that the defendant's public statements at the press conference "were indisputably 'statements' made in ... a public forum in connection with an issue of public interest" regardless of whether every word spoken at the Press Conference was necessarily a matter of public concern. *Id.*

Because Giuliani has satisfied step one of the Statute, Coomer is required to produce admissible evidence showing a factual and legal basis for each element of the SLAPP Claims and also demonstrate that he can overcome Giuliani's defenses to those Claims.

III. The Election Statements Were Privileged.

[4] Moreover, as discussed *infra*, the Election Statements were also made in connection with Giuliani's right to petition because the Election Statements were made as "opening statements" to the Election Litigation—some of which was already pending over the Dominion machines/technology—further warranting not only application of the Statute, but also litigation privilege which serve as an absolute bar to Coomer's SLAPP Claims. *See In re Foster*, 253 P.3d 1244, 1251 (Colo. 2011) ("Litigation is one of the essential mechanisms by which citizens can exercise their right to petition.").

Colorado recognizes that certain statements—regardless of their alleged defamatory character or whether they are true or false—are privileged and thus non-actionable. One such privilege is the litigation privilege. Statements made by an attorney during or in preparation for pending legal proceedings are absolutely privileged so long as the remarks have some relation to the proceeding. *See Begley v. Ireson*, 2017 COA 3, ¶ 13 ("***Begley I***"); *Club Valencia Homeowners Ass'n, Inc. v. Valencia Assocs.*, 712 P.2d 1024, 1027 (Colo. App. 1985). This absolute privilege exists "to encourage and protect free access to the courts for litigants and their attorneys." *Begley I* at ¶ 13; *see also Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112, 1117 (Colo. 1990). Here, the Election Statements were made by Giuliani while his client—the Trump Campaign—was already in litigation complaining of Dominion voting technologies and machines. Ex. A-2 at ¶ 60-61, 64, Prayer at B(2); Ex. C at ¶¶ 2-3 (Giuliani was the head of Trump Campaign's legal team). Therefore, the privilege applies to the Election Statements because, as discussed below, there is no question that the Election Statements regarding Coomer—a technology officer of Dominion—were related to the Trump Campaign's efforts to challenge the Michigan election results based, in part, on the unreliability of Dominion machines/technologies. As such, the privilege serves as an absolute bar to all of the SLAPP Claims as a matter of law.

However, to the extent that Coomer argues that the Election Statements were only "pre-litigation" statements, the privilege still applies. The privilege attaches to an attorneys' pre-litigation statements if (1) the statement is related to prospective litigation and (2) the

prospective litigation is contemplated in good faith. *Begley I,* 2017 COA 3, at ¶ 17; *see also Merrick v. Burns, Wall, Smith & Mueller*, P.C., 43 P.3d 712, 714 (Colo. App. 2001) ("Communications preliminary to a judicial proceeding are protected by absolute immunity only if they have some relation to a proceeding that is actually contemplated in good faith."). This privilege applies to any cause of action that is based on conduct protected by the litigation privilege. *Belinda A. Begley & Robert K. Hirsch Revocable Tr. v. Ireson*, 2020 COA 157, ¶¶ 20-26, *reh'g denied* (Nov. 25, 2020) ("***Begley II***"). Whether the privilege applies is a question of law for the trial court. *Club Valencia*, 712 P.2d at 1027.

In the instant case, there is no question that the litigation privilege applies to the Election Statements, whether viewed as "in-litigation" or "pre-litigation" statements. As discussed above, the Election Statements were made in the Press Conference where a legal team was announcing the results of an investigation into voting irregularities and what they expected the evidence to show in the existing and forthcoming litigation. Ex. 1-A at 3:11-17; 27:6-7; 27:8-36:19; and 37:15-24. Coomer's purported statements regarding manipulating the Election results were already being widely reported by multiple media outlets prior to the Press Conference, which was held on November 19, 2020. *See* FAC at ¶¶ 57-63 (collecting numerous stories on Oltmann's allegations and Coomer's radical politics). In fact, it was 10 days prior to the Press Conference, on November 9, 2020, when the first disclosure of Coomer's alleged statements regarding manipulating the Election were broadcast on Defendant Oltmann's podcast. FAC at ¶ 52. Coomer immediately became a newsworthy figure because he was publicly disclosed as "Director of Product Strategy and Security" for

Dominion, the company which was accused of having compromised election machines and software that provided election services across the country during the 2020 Election. FAC at ¶¶ 43-45. The Election Statements regarding Coomer and his possible involvement with manipulation of the Election were "related" to the prospective—and existing—litigation over the Dominion software and machines used in the Election as discussed at the Press Conference, because they addressed publicly available information that linked him and his purported efforts to illegally sway the election to the Dominion software and machines.

The only remaining question under a "pre-litigation" analysis—and again, Giuliani strongly contends that the "in litigation" privilege is applicable—is whether Giuliani made the Election Statements in good faith. This means only that Giuliani had a then-existing good faith belief that he intended to pursue election litigation on behalf of the Trump campaign on issues pertaining to compromised voting systems or software and Coomer's potential involvement. *See Visto Corp. v. Sproqit Techs.*, Inc., 360 F. Supp. 2d 1064, 1069 (N.D. Cal. 2005) ("It is the contemplation of litigation that must be in good faith, not the merits of the actual litigation itself that animates the litigation privilege."); *Begley II*, 2020 COA 157, at ¶ 54 (citing *id.*). The "good faith" test is not determined by the merits of any such litigation or its success. *Id.*

Here, the following facts are not disputable: (1) Giuliani represented the Trump Campaign in connection with Election challenges (Ex. C at ¶¶ 2-3);[5] (2) the Trump Campaign

[5] In fact, at the time of the Press Conference, Giuliani was already involved in Election Litigation that was filed on November 9, 2020, in Pennsylvania. *See e.g., Donald J. Trump for*

did, in fact, bring more suits over the Election in multiple states (FAC at ¶ 50); (3) the Election Litigation brought by the Trump Campaign involved complaints regarding Dominion machines **and was pending at the time of the Press Conference** (Ex. A-2 at ¶ 60-61, 64, Prayer at B(2)); and (4) these issues more specifically made their way into litigation filed only six days later in Georgia on November 25, 2020, by Defendant Powell[6] **that pleads the allegations contained in Giuliani's Election Statements *specifically regarding Coomer*** (Ex. A-3).

When Giuliani made the Election Statements, he was aware of: (1) media reports regarding Coomer's alleged radical leftist and anti-Trump views and affiliations (Ex. C at ¶ 3); *see also* https://www.theamericanconservative.com/articles/the-extremist-at-dominion-voting-systems/ (last visited 4/29/21)); (2) allegations that Coomer had disclosed to a radical leftist group that he had been involved in rigging Dominion machines to assist President Biden in winning the Election (Ex. C at ¶ 3); (3) information that Smartmatic had ties to Venezuela

President, Inc. v. Boockvar, No. 4:20-CV-02078, 2020 WL 6821992, at *3 (M.D. Pa. Nov. 21, 2020) ("Although this case was initiated less than two weeks ago…" and listing Giuliani as counsel for Trump Campaign) (subsequent history omitted). The Court can also take judicial notice of any documents or matters referred to by Plaintiff in his Amended Complaint or which are matters of public record. *See Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents referenced on complaint). Moreover, webpages cited to herein from newspapers or periodicals should be deemed self-authenticating pursuant to COL. R. EVID. 902(6). *Cf., e.g., White v. City of Birmingham, Ala.,* 96 F. Supp. 3d 1260, 1274 (N.D. Ala. 2015), as amended (May 27, 2015) (noting *sua sponte* that news articles from Huntsville Times website (AL.com) "could be found self-authenticating at trial" despite being digital and not in paper print).

[6] Powell was part of the Trump team at the time of the Press Conference and Election Statements.

and the Chavez regime (https://maloney.house.gov/media-center/press-releases/smartmatic-announces-sale-sequoia-voting-systems (last visited 4/28/21)); (4) information that Smartmatic had attempted to operate in the U.S. through a subsidiary called Sequoia Voting ("***Sequoia***") (*id.*); (5) information that the U.S. Government had raised concerns regarding Smartmatic operating Sequoia given its ties to Venezuela and unknown ownership (*id.*); (6) information that Dominion had acquired Sequoia from Smartmatic after Smartmatic decided to divest from Sequoia rather than fully comply with an investigation by the U.S. Government (*id.*) and also acquired Coomer who worked for Sequoia as "Vice President of Research and Product Development" (*see* https://www.wired.com/2009/10/sequoia/ (last visited 4/28/21)); (7) information that Dominion had a software licensing agreement with Smartmatic (*see Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, No. CIV.A. 7844-VCP, 2013 WL 1821608, at *2 (Del. Ch. May 1, 2013) ("When the parties entered into the License Agreement, Dominion intended to focus its efforts on Canada and the United States. Smartmatic would focus on emerging international markets.") (internal citations omitted); (8) allegations of voting irregularities with Dominion machines/software that had switched votes from Trump to Biden (*see* https://www.freep.com/story/news/politics/elections/2020/11/06/antrim-county-vote-glitch-software-update/6194745002/ (last visited 4/27/21)); (9) evidence that Texas had rejected Dominion due to security concerns (see https://www.sos.state.tx.us/elections/forms/sysexam/jan2019-hurley.pdf (last visited (4/28/21)); (10) evidence of significant nationwide concern over the security of Dominion

machines and software that existed prior to the Election (*see , e.g.,* https://apnews.com/article/f6876669cb6b4e4c9850844f8e015b4c (last visited 4/28/21)); and (11) evidence of Coomer's social media and other postings espousing extreme anti-Trump views (FAC at ¶ 53-54).

All of this, coupled with the allegations regarding Coomer, led Giuliani to believe in good faith that there were significant issues of voting irregularities that needed to be investigated. Ex. C at ¶¶ 2-7. Giuliani had never heard of Coomer prior to becoming part of the Trump legal team. *Id.* at ¶ 2. Therefore, there was no "pre-conceived narrative" prior to the Election regarding Coomer. In fact, there is no evidence that Giuliani or any member of the Trump Campaign's legal team had complained about either Dominion or Smartmatic prior to the Election. Rather, it was prominent members of the ***Democratic Party*** who had lodged complaints about the security and integrity of voting machines and voting technologies in the months prior the 2020 Election. *See, e.g., https://www.warren.senate.gov/imo/media/doc/H.I.G.%20McCarthy,%20c%20Staple%20Street%20letters.pdf* (December 2019 letter from Senators Warren, Klobuchar, Wyden, and Congressman Pocan – all Democrats) (last visited 4/28/21).

Giuliani made the Election Statements regarding Coomer at the Press Conference because the evidence (as discussed above) that Giuliani uncovered in the weeks immediately after the Election revealed that Coomer, Dominion, and Smartmatic, among others, were parties central to the Election Litigation that was had already been filed and was being pursued.

When Giuliani made the Election Statements: (1) Election Litigation was already pending regarding Dominion machines; and (2) more litigation was filed just days after the Press Conference making the same allegations against Coomer that Giuliani made in the Election Statements. All of these facts, including the corroborating evidence discussed above and Giuliani's Declaration demonstrating good faith (attached hereto as Ex. C), serve to demonstrate that Giuliani had a good faith belief that he intended to both maintain the existing Election Litigation and pursue further litigation at the time that he made the Election Statements. *See Begley II*, 2020 COA 157, at ¶ 45 (holding declaration of attorney coupled with corroborating evidence, timing of events, and fact that litigation was actually filed is sufficient evidence to establish the absolute litigation privilege). Accordingly, the SLAPP Claims are barred by the litigation privilege as a matter of law.

IV. Coomer Cannot Establish Actual Malice.

Even if the Election Statements were not privileged, Coomer has another insurmountable problem to maintain his SLAPP Claims. 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 published the defamatory statement with actual malice", which entails knowledge of falsity or with reckless disregard for the truth. *See 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.[7] *Id.* Clearly, as discussed above with respect to the

[7] Coomer is also a limited purpose public figure as to matters relating to Dominion and voting technologies. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-47 (1974). He has

applicability of the Statute, election integrity is a matter of public concern: "[i]t is a matter of general public concern that, at all elections [all qualified electors be able to vote and have their votes counted and that no person who is NOT a qualified elector be permitted to vote]." *Mauff v. People*, 123 P. 101, 103 (Colo. 1912).

That a reasonably prudent person would not have published a defamatory statement or would have investigated before publishing does not evidence actual malice. *Lewis*, 832 P. 2d at 1123. Rather, the plaintiff must demonstrate that the defendant in fact—not hypothetically or "should have done so"—entertained serious doubts as to the truth of the

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admitted to working with election officials across the country on behalf of Dominion regarding election issues. FAC at ¶ 55; *see also* https://youtu.be/BbCmq0jPUxY (Coomer giving presentation on YouTube (last visited 4/28/21)). He has also testified as an expert witness in regard to voting technologies. *See Curling v. Raffensperger*, No. 1:17-CV-2989-AT, 2020 WL 5994029, at *10, *17 (N.D. Ga. Oct. 11, 2020) (noting that Coomer is a testifying expert witness for Dominion in support of State of Georgia in major voting rights litigation). Coomer's involvement in the *Curling* litigation drew press coverage over the controversy in Georgia that predated the Election. *See, e.g.,* https://www.ajc.com/politics/fix-upcoming-to-georgia-touchscreens-to-restore-missing-senate-candidates/ASEWAGDAR5DFPGW2OPULV4N3JY/ (last visited 4/28/21); https://apnews.com/article/technology-senate-elections-georgia-elections-voting-machines-af357b7ab7145033f11ee34a1bbf4a3c (last visited 4/28/21). Coomer has also 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 (last visited 4/28/21). Thus, Coomer has injected himself into a public issue (election technologies for U.S. elections) and has invited public commentary. *See Gertz*, 418 U.S. at 342-47. In addition, Coomer was already the subject of a public controversy at the time Giuliani made the Election Statements regarding him as is evidenced by Coomer's own admissions recited herein regarding national news outlets reporting on the revelations from Oltmann, which all occurred independent of Giuliani's own conduct. Coomer must bear the full brunt of the First Amendment as a limited purpose public figure and the public scrutiny that comes with it, requiring him to demonstrate actual malice for any defamation claim.

statement. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Coomer cannot possibly meet this high standard based on all of the evidence discussed above and Giuliani's Declaration. *See* discussion of good faith *supra* and Ex. C. Further, the fact that, in Colorado, Coomer must carry this high burden with a "clear and convincing evidence" burden of proof makes Coomer's evidentiary burden even more impossible. *Lewis*, 832 P. 2d at 1122-23; *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1105 (Colo. 1982) (malice must be proven with "convincing clarity"). Clear and convincing evidence means evidence that is "highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). At the anti-SLAPP stage, a plaintiff is required to establish a reasonable probability that he will be able to produce at trial clear and convincing evidence of actual malice. *Young v. CBS Broad., Inc.*, 212 Cal. App. 4th 551, 563 (2012).

Coomer will likely argue that Giuliani's political affiliations show bias and thus motive to defame him. However, this type of evidence, standing alone, is insufficient to demonstrate actual malice. *See Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1042-43 (10th Cir. 2013). In fact, even a motive to cause harm to another is insufficient, by itself, to show actual malice. *See id.* Rather, a plaintiff can only potentially establish actual malice by proving one of three circumstances: (1) "[A] story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call"; (2) [T]he publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation"; or (3) "[T]here are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant*, 390 U.S. at 732.

As outlined above, and in Giuliani's attached Declaration (Ex. C), the "story" regarding Coomer was already widely reported and so neither Giuliani nor his imagination could have been its "inventor." The story was also not based wholly on an anonymous telephone call as Coomer himself admits, since he accuses Oltmann of being the original source of the story in his Amended Complaint. Giuliani details in his Declaration why he believed the allegations regarding Coomer and this belief is corroborated with multiple sources of evidence. *See* discussion *supra* regarding and Ex. C. Finally, for the same reasons, there was nothing "inherently improbable" about an accusation that Coomer—a highly educated man reputedly having a vitriolic hatred for Trump who was involved in the technics of Dominion's machines and technology—had, ***in fact***, done what multiple government officials, politicians, journalists, and experts had warned about for years prior to the 2020 Election ***was possible*** to do: manipulate election results. If a belief in Russian hackers manipulating our elections is plausible, then surely it is plausible to believe an election could be manipulated by a brilliant scientist with reported ties to the radical left (Coomer) who was acquired from another company (Smartmatic) that refused fully comply with a U.S. government investigation into *that* company's reputed ties to radical leftist regimes.

Because the Election Statements were about an issue of public concern and because Coomer "is a limited purpose public figure on these issues, the Constitution requires he bear a heavy burden to show the Election Statements are actionable." Coomer simply cannot bear this heavy burden with the clear and convincing evidence necessary. Accordingly, this is an

independent reason to grant this Motion.[8]

V. Coomer Cannot Satisfy The Other Elements Of The SLAPP Claims.

Even if Coomer could circumvent the litigation privilege and actual malice roadblocks to his SLAPP Claims, he still is unable to otherwise demonstrate the merits of his claims.

1. Intentional Infliction of Emotional Distress.

For a plaintiff to prevail on an Intentional Infliction of Emotional Distress claim ("***IIED***"), 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). Even adopting Coomer's claim that the Election Statements accuse Coomer of a crime this does not constitute outrageous conduct. *See id.* (a radio host's allegation that a Denver police officer stabbed another officer outside of a bar was defamatory *per se* but did not constitute outrageous conduct). IIED claims are more likely to be cognizable when the defendant has engaged in a pattern of conduct. *Rawson v. Sears Roebuck & Co.*, 530 F. Supp. 776, 780 (D. Colo. 1982). Giuliani, here, is accused

[8] While the actual malice standard is ordinarily discussed with respect to defamation actions, Colorado courts have held that alternative torts cannot be used to evade constitutional requirements for defamation actions. *See e.g., Fry v. Lee*, 408 P.3d 843 (Colo. App. 2013); *Lewis*, 832 P.2d at 1124 (affirming summary judgment dismissing negligence and infliction of emotional distress claims based on defamation claim's failure to show actual malice.); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) ("public figures. . . may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'"). Therefore, Coomer must show actual malice as to all of the SLAPP Claims, not just the defamation claim.

of one statement regarding Coomer. "[V]ery few fact situations give rise to a cognizable claim for intentional infliction of emotional distress." *Id.*

This is not such a situation. Even if Giuliani's Election Statements were defamatory of Coomer, they were not "outrageous" for IIED purposes. Accordingly, Coomer cannot satisfy the "outrageousness" element of his IIED claim as a matter of law.

2. <u>Conspiracy</u>.

Civil conspiracy is not an independently actionable tort cause of action. *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 tort claims. *Hoffman*, 338 P. 3d at 397. For example, in *Hoffman*, when the underlying claims were disposed of via summary judgment, the civil conspiracy claims were automatically dismissed as derivative of and dependent on the dismissed claims. *Id.* Because the other SLAPP Claims should be dismissed, so should the conspiracy claims.

However, even if any of independent tort against Giuliani survived this Motion, the conspiracy claim must still be dismissed. Coomer did not allege in his Complaint, and cannot show with any other facts, that Giuliani had any meeting of the minds with any other Defendant to engage in any unlawful conduct, which he is required to do under Colorado law. *See Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). Evidence of such an agreement must be presented by the plaintiff and will not be inferred. *Id.* Coomer simply did not and cannot plausibly plead or factually prove these elements. Accordingly, this claim must be dismissed

as well.

3. <u>Injunction/Retraction</u>.

Coomer's remaining SLAPP Claims seek an injunction against and retraction by all Defendants, "to remove all Defendants' defamatory statements upon final adjudication of the claims at issue." FAC at ¶ 98. Injunction and retraction are not separate claims, however, but rather remedies 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); *Wibby v. Boulder Cty. Bd. of Cty. Commissioners*, 409 P.3d 516, 519 n. 2 (Colo. App. 2016). Even if these requests for injunction and retraction were considered separate substantive claims, it would make no difference, because the requests subsume a requirement that a plaintiff show either actual success on the merits of a substantive claim (permanent injunction) or a likelihood of success (preliminary injunction). *Korean New Life Methodist Church v. Korean Methodist Church of the Americas*, 474 P.3d 143, 149 (Colo. App. 2020). Similarly, if Coomer has no defamation claim, there can be no basis for the Court to order a retraction.

Regardless, and in any event, however they are characterized, like Coomer's other SLAPP Claims, these claims are also subject to the Statute, as they are predicated on the Election Statements. Accordingly, the must also be dismissed under the Statute.

<u>CONCLUSION</u>

Giuliani contends the Court does not have personal jurisdiction over him for this action and the case should be dismissed on this basis. Alternatively, however, the Court should

dismiss the SLAPP Claims pursuant to C.R.S. § 13-20-1101 with prejudice because Coomer cannot produce evidence of each essential element of his SLAPP Claim or overcome Giuliani's defenses. Should the Court reach and rule on this Motion, Giuliani requests that the Court order further proceedings to award attorneys' fees pursuant to the Statute.

FOR THESE REASONS, the Court should grant this motion, dismiss with prejudice Coomer's Complaint pursuant to C.R.S. § 13-20-1101, award Giuliani his reasonable attorney's fees and costs pursuant to C.R.S. § 13-20-1101, and order such other relief as the Court deems appropriate.

Respectfully submitted this 30th day of April 2020,

GESSLER BLUE LLC

s/ *Geoffrey N. Blue*
Geoffrey N. Blue

Certificate of Service

I certify that on this 30th day of April 2021, the foregoing was electronically served to all parties on their counsel of record via ICCES.

By: *s/ Joanna Bila*
Joanna Bila, Paralegal