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| <p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202</p> | <p>DATE FILED: October 4, 2021 10:48 AM FILING ID: D754293DF4354 CASE NUMBER: 2020CV34319</p> |
| <p>ERIC COOMER, Ph.D., Plaintiff</p> <p>vs.</p> <p>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 THEGATEWAY PUNDIT, MICHELLE MALKIN, ERIC METAXAS, CHANEL RION, HERRING NETWORKS, INC. dba ONE AMERICA NEWS NETWORK, and NEWSMAX MEDIA, INC., Defendants</p> | <p style="text-align: center;">COURT USE ONLY</p> <hr/> <p>Case Number: 2020CV34319</p> <p>Division Courtroom: 409</p> |
| <p><i>Attorneys for Defendant, Rudolph Giuliani:</i></p> <p>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</p> <p>Joseph Sibley (admitted <i>pro hac vice</i>) Camara & Sibley LLP 1108 Lavaca St., Ste 110263 Austin, TX 78701 Tel: (713) 966-6789</p> | |
| <p style="text-align: center;">DEFENDANT RUDOLPH GIULIANI'S REPLY BRIEF IN SUPPORT OF SPECIAL MOTION TO DISMISS PURSUANT TO COLO. REV. STAT. § 13-20-1101</p> | |

Defendant Rudolph Giuliani, (“*Defendant*” or “*Giuliani*”), hereby files his Reply Brief in support of his Special Motion to Dismiss (“*MTD*”) Plaintiff Eric Coomer’s (“*Plaintiff*” or

“Coomer”) First Amended Complaint (“*FAC*” or “*Amended Complaint*”) with prejudice as to Giuliani, pursuant to COLO. REV. STAT. § 13-20-1101.

JOINDER IN OTHER DEFENDANTS’ REPLIES/OBJECTIONS

Giuliani hereby joins all arguments raised in the Reply Briefs of all other Defendants (Donald J. Trump For President, Inc., Sidney Powell, Sidney Powell, P.C., Joseph Oltmann, FEC United, Shuffling Madness Media, Inc. d/b/a Conservative Daily, James Hoft, TGP Communications LLC d/b/a The Gateway Pundit, Michelle Malkin, Eric Metaxas, Chanel Rion, and Herring Networks, Inc. d/b/a One America News Network) filed on October 4, 2021, including, but not limited to, any objections to evidence filed by said Defendants to Plaintiff’s evidence submitted in support of his Omnibus Response to all Defendants’ Special Motions to Dismiss pursuant to COLO. REV. STAT. § 13-20-1101 (“*Omnibus Response*”).

OVERVIEW OF REPLY POINTS

The Omnibus Response contains 150 pages of argument and thousands of pages of exhibits. Apparently, Plaintiff believes that by including a voluminous library of “evidence” that this will compensate for the lack of evidentiary quality necessary to demonstrate the “*prima facie* factual showing” to survive the MTD. Despite having been granted copious amounts of discovery to enable him to survive the MTD, Plaintiff has failed to elicit any evidence that would negate the fatal defects in his claims: (1) that Giuliani made the Election Statements¹ during or in preparation for pending legal proceedings; and (2) that Giuliani did not make the Election Statements with actual knowledge of their alleged falsity. Moreover, there is no

¹ All capitalized terms not specifically defined herein shall bear the same meaning as in the MTD.

evidence that Giuliani had any “meeting of the minds” with any other Defendant to defame Plaintiff.

While Giuliani may be one of the most well-known names involved in this case, his Election Statements regarding Plaintiff were nothing more than a few sentences that merely repeated what many in the media were already reporting about Plaintiff and which a witness was willing to swear to under oath. Some of these Election Statements—such as the occurrence of an Antifa conference call prior to the Election—were later corroborated by Plaintiff’s own admissions. The Court must review Giuliani’s Election Statements and state of mind when he made the Statements independent of any alleged conduct by the other Defendants. If the Court does so, then Plaintiff’s claims against Giuliani should be dismissed.

If the Court does not do so—because Giuliani is the least involved of all the Defendants—the Court would by necessity be holding there is *prima facie* evidence that all of the Defendants conspired to and, in fact did, defame Plaintiff. This would be nothing short of a “legal miracle,” as there is no evidence of such a conspiracy. The Court should not engage in a “one size fits all” analysis of the Defendants’ special motions to dismiss. Giuliani cannot be held accountable for the conduct of other Defendants—even assuming those Defendants did anything wrongful. When viewed through the protective lens of the First Amendment, the MTD should be granted and failing to do so would be intrude on Giuliani’s freedom of speech.

POINTS OF REPLY

I. Objections To Plaintiff’s “Evidence”.

In addition to his joinder in the other Defendants’ evidentiary objections as noted above, Giuliani makes the following specific evidentiary objection to evidence included by Plaintiff in his Omnibus Response.

Plaintiff cites Carol Leonnig & Philip Rucker, *I ALONE CAN FIX IT: DONALD J. TRUMP’S CATASTROPHIC FINAL YEAR*, 344 (Penguin Press, 2021) for the proposition that Giuliani had a “pre-conceived” narrative to defame Plaintiff. This publication makes a claim from an anonymous source that Giuliani told President Trump to “just declare victory on election night.” *See* Omnibus Response at p. 8, n. 4. This cannot be offered for the truth of the matter asserted under Colo. R. Evid. 802 because it is an unsworn out of court statement (indeed the anonymous quote is hearsay within hearsay). Plaintiff has not and cannot demonstrate any exceptions to the hearsay rule that would make this information admissible.

II. The Alleged Knowledge/Actions Of The Trump Campaign Cannot Be Imputed To Giuliani.

In the Omnibus Response, Plaintiff “incorporates by reference” the portion of the Response against the Trump Campaign as argument/evidence that the MTD should be denied. But most of the section on the Trump Campaign has nothing to do with any actions of Giuliani. There is no theory plead in the FAC that would impose liability on an attorney (agent) for the actions of his client (principal) where the agent was not personally involved. For example, what President Trump and/or the Trump Campaign said regarding fraud in the Election has nothing to do with Giuliani. *See* Omnibus Resp. at p. 67. What Giuliani said regarding fraud in the Election in general (election fraud in Pennsylvania) has nothing to do with Plaintiff or the Election Statements regarding Plaintiff.² Moreover, Defendant Powell’s statements—whether or not on behalf of the Trump Campaign—cannot be attributed or imputed to Giuliani. Omnibus Resp. at ¶ 110.

² It appears to be true that Philadelphia has a history of voter fraud as recently as 2017 and 1993. See <https://www.newsweek.com/fact-check-does-philadelphia-have-rotten-historyelection-integrity-trump-claims-1545650> (last visited May 26, 2021).

Plaintiff also references a memo created by the public relations team of the Trump Campaign (the “*Campaign Memo*”) that purports to discount some of Oltmann’s allegations regarding Coomer.³ Omnibus Resp., p. 68. Plaintiff admits that Giuliani never received or saw the Campaign Memo prior to making the Election Statements.⁴ Omnibus Resp. at ¶ 110.

Plaintiff can cite no authority—because there is none—that the knowledge of a principal is imputed to the agent (as opposed to the converse, which is widely recognized in the law). Therefore, whatever “knowledge” is supposedly represented by the Campaign Memo cannot be imputed to Giuliani because it is undisputed that Giuliani never saw or received the Campaign Memo prior to making the Election Statements. Accordingly, the actions of the Trump Campaign (or Defendant Powell) cannot be imputed to Giuliani and the knowledge of Trump Campaign cannot be imputed to him. Only Giuliani’s Election Statements and Giuliani’s actual knowledge are relevant to the question of Giuliani’s state of mind for purposes of the litigation privilege and actual malice questions.

III. Plaintiff Produces No Evidence Raising A Fact Question On Giuliani’s State Of Mind For Actual Malice Or Litigation Privilege.

In his MTD, Giuliani demonstrated that he made the Election Statements believing that Plaintiff’s alleged statements would be part of the Election Litigation and set forth his state of mind as to the plausibility of Plaintiff making the statements alleged as well as the larger issue of the possibility of manipulation of election software, an issue that had been on the radar of

³ It is important, however, that the Court keep in perspective that Giuliani is not accused of stating that Plaintiff did, in fact, “fix” the Election or was involved in the alleged “fixing”, but merely that Plaintiff claimed on a call that Dominion had “fixed” the Election.

⁴ And even if he had, so what? Giuliani is not required to simply agree with some unnamed person at the Trump Campaign’s conclusions. Moreover, seemingly at odds with the conclusion drawn by the Campaign Memo, it appears undisputed that Plaintiff—at minimum—was a sympathizer with Antifa based on his social media posts defending Antifa and appearing to have special knowledge of the Antifa movement. See Ex. M-1 to Omnibus Resp. at TC00000032.

multiple members of the Senate and Congress—mainly all Democrats—for quite some time. Plaintiff entirely fails to raise any fact issue on these points, much less the “*prima facie*” showing necessary to survive the MTD.

First, Plaintiff argues that Giuliani had a “preconceived” plan to allege election fraud, of which the allegations regarding Plaintiff would become part of the story. Omnibus Resp. at ¶ 118. The evidence for this is an anonymous source in a “tell all” book. As discussed above, this is hearsay within hearsay and is inadmissible. Even if it were, however, this would merely show Giuliani had a preconceived plan to claim election fraud in general. He could not have had a preconceived plan to make false claims specifically about Plaintiff because there is no evidence Giuliani was even aware of who Plaintiff was. Giuliani could not have “preconceived” that Oltmann would make his allegations and Giuliani would believe them. This is absurd.

Second, Plaintiff complains that Giuliani spent little time “investigating” the claims Oltmann made regarding Plaintiff. Omnibus Resp. at ¶ 126. That a person failed to investigate before publishing does not evidence actual malice. *See Lewis v. McGraw-Hill Broad. Co.*, 832 P. 2d 1118, 1123 (Colo. App. 1992). 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 statement. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Plaintiff’s “could of,” “should of,” “would of” known better arguments are insufficient as a matter of law to prove actual malice.

Next, Plaintiff complains that one of Giuliani’s sources for information about the integrity of the 2020 Election—Phil Waldron (“*Waldron*”)—was unreliable. Omnibus Resp. at ¶ 127. To prove this, Plaintiff has proffered the supposed expert testimony of J. Alex Halderman. *Id.* However, notwithstanding the merits of Plaintiff’s claims or his expert’s

testimony, the fact that an *expert* is required to “investigate” and prove the veracity of the issues discussed in the Election Statements proves that Giuliani *could not have known* that the Election Statements were false. Giuliani was relying on Waldron—who purported to have specialized knowledge—to corroborate his claims. Plaintiff’s complaint is, essentially, that Giuliani relied on his expert and not on Plaintiff’s. This demonstrates the impossibility of Plaintiff meeting his heavy actual malice burden. Regardless, the information that Coomer presents is information he developed now, not information that Giuliani had at the time he made the Election Statements.

As to the litigation privilege issue, Plaintiff claims that “Giuliani filed no litigation involving [Plaintiff]”. Omnibus Resp. at ¶ 134. This statement is inaccurate and, even if true, is not relevant to whether the litigation privilege. As discussed in the MTD, the Trump Campaign—Giuliani’s client who he served as head of litigation for—had, in fact, already filed suit in Michigan alleging issues with Dominion. MTD at Ex. A-2 at ¶¶ 60-61, 64, Prayer at B(2); MTD at Ex. C at ¶¶ 2-3. The Election Statements need only be pertinent to the issues (Dominion) raised in that litigation and, of course, they were. Moreover, and in any event, Giuliani only needed to, in good faith, believe that the issued regarding Coomer would become part of the Election Litigation, regardless of whether they ultimately made it into a specific pleading. Plaintiff has no evidence that this was not the case.

In his MTD, Giuliani laid out the chronology of how he became aware of Plaintiff and the allegations surrounding Plaintiff’s alleged statements during an Antifa conference call prior to the 2020 Election. Similar to the FAC, Plaintiff’s Omnibus Response lays out a similar chronology: (1) Defendant Oltmann originated the allegations that Plaintiff was involved in an Antifa conference call wherein Plaintiff made claims suggesting Dominion was going to “fix”

the Election (Omnibus Resp., pp. 13-15); (2) Oltmann's allegations were then broadcast by Defendants Malkin, OAN, Metaxas, Hoft and the Gateway Pundit (Omnibus Resp. at ¶ 8). Giuliani has testified that he was aware of these reports and had no reason to doubt their truth prior to making his Election Statements. As a matter of law, there is no evidence that Giuliani knew all of the persons who spoke before him on Plaintiff were lying and, without that evidence, Plaintiff cannot satisfy the actual malice standard. Accordingly, the MTD should be granted.

IV. Common Objective Or Ideology Is Not Evidence Of Meeting Of The Minds.

Plaintiff claims that he has properly adduced evidence of a conspiratorial meeting of the minds between Oltmann and Giuliani (as well as the other Defendants). Omnibus Resp. at ¶ 211. This is an extremely strange argument to make given that Plaintiff sings the continual refrain against Giuliani of "failing to contact Oltmann" as part of the hypothetical "investigation" Giuliani should have engaged in. If Giuliani never spoke to Oltmann, how could he have conspired with him and reached a "meeting of the minds" to republish Oltmann's statements? Plaintiff's flawed arguments on Giuliani's supposed "actual malice" negate the possibility that he conspired with Oltmann.

In essence, Plaintiff's argument is that because all of the Defendants are "right wing" or GOP sympathizers who disputed the validity of the 2020 Election, then this is evidence of a conspiracy to defame Plaintiff in order to accomplish the objective of overturning the 2020 Election. However, the fact that defendants may share an ideology and an objective of challenging the 2020 Election and the fact that republishing Oltmann's allegations regarding Plaintiff might be helpful to that end, are insufficient evidence to prove conspiracy. *See United States ex rel. PCA Integrity Assocs., LLP v. NCO Fin. Sys., Inc.*, No. CV 15-750 (RC), 2020 WL 686009, at *30 (D.D.C. Feb. 11, 2020) (dismissing conspiracy claim subject to heightened

pleading standard where, like here, plaintiff only alleged a shared conspiratorial objective). Plaintiff has only presented evidence that all of the Defendants—despite some never speaking to each other—were all on the “same team.” But Plaintiff must show more. He must show that the Defendants all agreed to the same “game plan” of running the “defame Coomer” play.

Pointing out that they all allegedly defamed Coomer is not evidence that they conspired to do so. Otherwise, every viral misinformation feed would be a “conspiracy” of all of those who engaged in it. Plaintiff shows—at best—multiple “copycat” torts against him. But those copycat torts by individuals living in different states who never communicated with one another are not evidence *per se* of a meeting of minds to commit the torts. There is no evidence of conspiracy that rises above speculation and surmise. As such, the conspiracy claim must be dismissed.

CONCLUSION

FOR THE FOREGOING REASONS, and as discussed more completely in the MTD, the Court should grant the MTD, dismiss with prejudice Coomer’s Complaint pursuant to C.R.S. § 13-20-1101, award Giuliani his reasonable attorney’s fees and costs, and order such other relief as the Court deems appropriate.

Dated this 4th day of October, 2021.

GESSLER BLUE, LLC

s/ Geoffrey N. Blue _____

Attorneys for Defendant, Rudolph Giuliani:

