DISTRICT COURT, COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202	DATE FILED: October 4, 2021 11:00 AM FILING ID: 8063AD6C39A4A CASE NUMBER: 2020CV34319 ▲COURT USE ONLY▲
Plaintiff: ERIC COOMER Defendants: DONALD J. TRUMP FOR PRESIDENT, INC., Et al.	Case # 20-CV-34319 Div. 409
Attorney for Defendants Joseph Oltmann, FEC United, and Shuffling Madness Media, Inc. d/b/a Conservative Daily Andrea M. Hall THE HALL LAW OFFICE, LLC P.O. Box 2251 Loveland, CO 80539 (970) 419-8234 andrea@thehalllawoffice.com Atty. Reg. #: 036410	

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

Defendants, Joseph Oltmann, FEC United, Inc., and Shuffling Madness Media, Inc., by and through their attorney, The Hall Law Office, LLC, hereby submit their Reply in Support of their Special Motion to Dismiss, pursuant to § 13-20-1101, C.R.S. (2021), stating as follows:

To avoid unnecessary repetition, and in the interest of judicial economy, these Defendants submit a combined reply in support of their Special Motion to Dismiss, in compliance with the Court's Order of September 17, 2021, allowing each defendant fifteen pages for its Reply. This combined reply is significantly less lengthy than the permitted forty-five pages.

ARGUMENT

The Plaintiff's claims arise directly from the Defendants' alleged conduct which is, insofar as any acts are proved, expressly protected under § 13-20-110(2)(a)(III),(IV), C.R.S. (2021). Under the statute, each Defendant is entitled to be dismissed unless the Plaintiff can establish a likelihood of prevailing on his claims, by competent, admissible, evidence, and a clear and convincing burden of proof.

The Plaintiff cannot make the showing of likelihood, because he attempts to avail himself of incompetent and inadmissible evidence to sustain his burden, because, for two of the Defendants, he demonstrates no specific acts which subject them to liability, and because he cannot demonstrate actual malice with regard to any. Because the outrageous conduct claim also turns on the Plaintiff's proof of actual malice, and because the civil conspiracy claim cannot stand alone, these claims must also be dismissed, and because the equitable remedy he seeks, a prior restraint, is constitutionally prohibited, no claim survives.

I. BECAUSE THE CLAIMS ARISE FROM PROTECTED CONDUCT, THE ANTI-SLAPP STATUTE APPLIES TO THESE CLAIMS, AND THE PLAINTIFF MUST ESTABLISH A LIKELIHOOD THAT HE WILL PREVAIL ON THE MERITS OF HIS CLAIMS, BY COMPETENT, ADMISSIBLE EVIDENCE

Like California's nearly-identical statue, Colorado's Anti-SLAPP statute, § 13-20-1101, C.R.S. (2021), was enacted to "safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law…" § 13-20-1101(1)(b). The statute expressly applies to "any other conduct or communication in furtherance of the…constitutional right of free speech in connection with a public issue or an issue of public interest." § 13-20-1101(2)(a)(III).

Under California's statute, to invoke the protection of the anti-SLAPP statute, a defendant must merely make a prima facie showing that plaintiff's cause of action arises from any act of defendant in furtherance of the right of petition, and/or the right of free speech in connection with a public issue. (§ 425.16, subd. (b)(1)[1]; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-43.) Subsections (e)(3),(4) extend protection to: (3) 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; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

To survive a special motion to dismiss under § 13-20-1101(3)(a), C.R.S. (2021), the Plaintiff must make a showing that "there is a reasonable likelihood that [he] will prevail on the claim." California's Anti-SLAPP Statute, Code Civ. Proc., § 425.16(b)(1) contains the same standard. In *Hicks v. Richard* (2019) 39 Cal.App.5th 1167, 1177, the court held that a plaintiff's anti-SLAPP "burden was similar to that of a party opposing a motion for summary judgment. He had to demonstrate his claims were both legally sufficient and supported by evidence that, if credited, would be sufficient to sustain a favorable judgment.". To meet the second prong (, a plaintiff establishes a "prima facie case" through admissible evidence that amounts to a "showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93. "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.'" "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

[1] "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 or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that plaintiff has established that there is a probability that plaintiff will prevail on the claim."

judgment if the evidence submitted by the plaintiff is credited." *Id. Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 (2002))

Antifa, public unrest and the hijacking of peaceful public protests by extreme right and extreme left groups, the 2020 Presidential Election, and American Election Security are all matters of immense public interest, and the Plaintiff's contention that Mr. Oltmann's speech was not "in connection with a public issue or an issue of public interest" is incredible. Whether or not the Plaintiff is a public, private, or limited-purpose public figure, is irrelevant.

Public issues and interests are very broadly construed, ranging from discussions of child molestation in youth groups, *M.G. v. Tim Warner, Inc.,* 89 Cal.App. 4th 623, 629 (2001), to talk radio show hosts ridiculing contestant on Who Wants to Marry a Millionaire, *Seelig v. Infinity Broadcasting Corp.,* 97 Cal.App. 4th 798, 806-07 (2002)(noting that no qualitative assessment of the issue's significance is appropriate). It is "any issue in which the public is interested" even when it is insignificant. *Nygard, Inc. v. Uusi-Kerttula,* 159 Cal.App. 4th, 1027, 1042 (2008), "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", including an online publication. *Wilbanks v. Wolk,* 121 Cal.App. 4th 883, 897 (2001); *Barrett v. Rosenthal,* 146 P.3d 510, 514 n. 4 (2006).

In *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, (1971), a plurality of the Supreme Court adopted a standard which extended the *New York Times* rule to "all discussion and communication involving matters of public or general concern."

> freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

403 U.S. at 41 (quoting *Thornhill v. Alabama,* 310 U.S. 88 (1940)). The security of elections over which machines, rather than people, are given oversight, is plainly an "exigency" of our period, as are the

character of the individuals to whom we entrust those elections. Antifa, and its subversion of peaceful public protests is similarly an "exigency of our period".

Colorado, in keeping with its broader protections for speech than the First Amendment requires, takes a very broad view of the sphere:

> The boundaries of public concern cannot be readily defined, but must be determined on a case-by-case basis. Generally, 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." *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 118, 1121 (Colo.App. 1992)
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> *Williams v Continental Airlines, Inc.,* 943 P.2d 10, 17 (Colo. App. 1996)

"Somewhat more specifically, a matter is of public concern when 'it can be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Shoen v. Shoen,* 2012 COA 207 ¶ 30 (quoting *McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008)). *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106, 1109 n.1 (Colo. 1982). *See also, Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351 (Colo. 1983) (details of a marital dispute, when relevant to the potential impact of dangerous occupations upon family life); *Walker v. Colo. Springs Sun, Inc.*, 538 P.2d 450 (Colo.), cert. denied, 423 U.S. 1025 (1975) (dispute between property owner and antique dealer, when relevant to public interest in failure of legal system to intervene in such disputes); *Lawson v. Stow*, 327 P.3d 340, 347-48, 2014 COA 26 ¶¶ 23-26 (statements made to public employees charged with investigating child abuse alleging such abuse are a matter of public concern); *Smiley's Too, Inc. v. Denver Post Corp.*, 935 P.2d 39 (Colo. App. 1996), cert. denied (1997) (article about retailer's business practices that affected many consumers and involved a consumer affairs agency); *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118 (Colo. App. 1992) (broadcast report of prior arrest record of person arrested for shoplifting); *Seible v. Denver Post Corp.*, 782 P.2d 805 (Colo. App.), cert. denied (1989) (allegations of attempts to evade handicapped accessibility requirements of city building code).

The Defendants' statements, if any, and all of the Plaintiff's claims, clearly arise from protected speech, and are "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 any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

II. THE BULK OF THE EVIDENCE SUBMITTED BY THE PLAINTIFF IN HIS REPLY IN OPPOSITION IS INCOMPETENT OR INADMISSIBLE, AND MAY NOT BE CONSIDERED BY THE COURT.

The Plaintiff attached affidavits from alleged experts to his Response, each of which violates C.R.C.P. 26, C.R.C. P. 56(a), and C.R.E. 702, 703. The affidavits are from alleged "experts", previously undisclosed, are improperly prejudicial as undisclosed, incompetent under Rule 56, and conclusory and disqualifying under C.R.E. 702 and 703.

C.R.C.P. 26(a)(2)(B) mandates that expert witness disclosures be made by each party, that retained experts provide, in pertinent part, written reports including a complete statement of all opinions and the basis and reasons therefor, a list of the information considered in arriving at the opinion, together with copies of any exhibit which will be used to support the opinion. The expert opinion must be disclosed at least days 126 in advance of trial, (26)(a)(2)(C)(I) the opposing party is entitled to take the expert's deposition, 26(b)(4), and to provide a rebuttal expert (26)(a)(2)(C)(III).

The Rules of Civil Procedure clearly prohibit a party's attempt to use previously-undisclosed expert testimony, and Rule 37(c)(1) requires that undisclosed expert testimony be stricken, if the failure to make a timely disclosure is not harmless. *Cook v. Fernandez-Rocha*, 168 P.3d 505 (Colo. 2007);*Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973 (Colo. 1999). Here, the Defendants are gravely prejudiced, because they are unable, in ten days, to secure, prepare, and deliver proper opinions from opposing

experts, or even to investigate or challenge the witnesses' alleged expertise. The Plaintiff offers no substantial justification for the non-disclosure, and the affidavits should not be allowed.

Even if the Defendants were not gravely prejudiced by the Plaintiff's non-disclosure of the alleged experts, their affidavits are improper and incompetent, under C.R.C.P. 56(a), which requires affidavits to be supported by "such facts as would be admissible in evidence." Conclusory affidavits are incompetent, and insufficient to raise a genuine issue of material fact. *Raygor v. Board of County Comm'rs,* 21 P.3d 432, 437 (Colo.App. 2000); (citing *People v. James,* 694 P.2d 356 (Colo. 1984)).

Exhibit N, Brown, while it has little applicability to Mr. Oltmann, and none to FEC or SMM, improperly opines on areas outside even his alleged expertise, expresses wholly improper conclusions of the law, and contains opinion which does not disclose the facts on which it relies. For instance: "*Oltmann's concern about antifa is, in my opinion at least, excessive to the point of obsession. ¶62, "I have said—somewhat reluctantly, because I do not pretend to know what motivates people—that Defendants have displayed "reckless disregard for the truth," an element of malice. ¶133, And, in my opinion, their failure to report on widely accepted, verifiable information that conflicts with their assumptions, may legitimately be characterized as a reckless disregard for the truth ¶ 134,"* , etc. Mr. Brown has no disclosed expertise in either psychological diagnosis or the law, and even if he were a legal scholar, his opinion is grossly improper. "Although opinion testimony is not objectionable merely because it embraces an ultimate issue of fact, CRE 704, an expert may not usurp the function of the court by expressing an opinion of the applicable law or legal standards." *People v. Rector,* 248 P.3d 1196, 1203 (Colo. 2011).

Exhibit O, Halderman, is similarly replete with unsupported and unreferenced opinion, *e.g., "Defendants' vote-rigging allegations were always implausible, consisting of wild speculation, readily debunked claims, and incoherent technical assertions, ¶7; Dr. Coomer was not a public figure prior to Defendants' conduct, ¶ 8; Defendants ignored these authorities and instead chose to promote incredible conspiracy theories, such as those advanced by Defendant Joseph Oltmann ¶ 21; Oltmann began to advance wildly speculative theories that Dr. Commer had*

personally engaged in a criminal conspiracy, ¶ 22; It is implausible on its face that Dr. Coomer ever made such a statement, ¶ 25; It would have been the height of cartoonish buffoonery to claim to a large group that such a scheme was in the works, ¶ 25," etc.

Exhibit P, Rothschild, opines at virtually every paragraph without disclosing the basis for his opinion, or the evidence on which he relies for his opinions. A tiny fraction includes, "*In particular, the originator of the most dangerous claims against Dr. Eric Coomer was Joe Oltmann, who is deeply embedded in the QAnon movement., ¶ 9, One was Joe Oltmann, who may have already identified Dr. Coomer as what he thought was a perpetrator of the fraud through his position with Dominion, and worked backwards to tie him to it, using the supposed "antifa conference call."¶ 12, The troll communities that birthed QAnon specialize in organized online harassment. ¶ 26, Colorado conspiracy theorist Joe Oltmann has multiple connections to QAnon, even though he is far from being its most visible promoter, ¶ 35"*, etc.

C.R.E. 702 and 703 govern expert testimony. Rule 702 permits an expert to offer his opinion under certain circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

C.R.E. 702. Similarly, Rule 703 sets forth the circumstances in which an expert may rely upon information obtained by third parties or other evidence that might itself be inadmissible:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Fed. R. Evid 703 is identical. However, the "overriding limitation on expert testimony is the requirement that under Rules 701 and 702 of the Rules of Evidence, opinions must be helpful to the trier of fact, and where an expert's declaration is conclusory or without foundation, it is unreliable, and inadmissible. *Knight v. Kirby Inland Marine, Inc.,* 482 F.3d 347, 355 (5th Cir. 2007). Hearsay is not

admissible, and Rule 703 does not "allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion." *Loeffel Steel Products, Inc. v. Delta Brands, Inc.,* 387 F.Supp. 2d 794, 808 (N.D. Ill 2005). *Brace v. U.S*., 72 Fed. Cl. 337, 352 (2006) ("[A] testifying expert may rely upon facts or data made known to the expert before the hearing and even may rely upon opinions, if reasonably relied upon by experts in the particular field. However, the *ipse dixit* of that reliance does not make those facts, data or opinions true, particularly where, as here, they are derived largely from hearsay.")

The declarations of the undisclosed lay witnesses, Exhibits Q, T, and U, are improper, prejudicial, unjustifiable, and should be stricken. The Plaintiff, knowing he would solicit these affidavits, deliberately failed to notify the Defendants, and attempts to sandbag them. "[S]andbagging is antithetical to notions of judicial economy and procedural fairness" *People v. Valera-Castillo,* 2021 COA 91, ¶ 25 (citing *State v. Valdez,* 2006 UT 39, ¶ 44 140 P.3d 1219, 1233-34). The purpose of discovery is to eliminate surprise at trial, and preclusion of evidence, even in a criminal trial, is an appropriate judicial response to deliberate sandbagging. *Taylor v. Illinois,*

> The determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court." *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1363 (7th Cir. 1996). A district court need not make explicit findings concerning the existence of a substantial justification or the harmlessness of a failure to disclose. *United States v. $ 9,041,598.68*, 163 F.3d 238, 252 (5th Cir. 1998). Nevertheless, the following factors should guide its discretion: 1) the prejudice or surprise to the party against whom the testimony is offered; 2) the ability of the party to cure the prejudice; 3) the extent to which introducing such testimony would disrupt the trial; and 4) the moving party's bad faith or willfulness. *See Newman v. GHS Osteopathic Inc.*, 60 F.3d 153 (3d Cir. 1995) (quoting *Bronk v. Ineichen*, 54 F.3d 425, 428 (7th Cir.1995)); *Cf. $ 9,041,598.68*, 163 F.3d at 252 (enumerating a similar list of factors to determine whether inclusion of last-minute evidence is harmless); *Smith v. Ford Motor Co.*, 626 F.2d 784, 797 (10th Cir. 1980) (applying these four factors to determine whether the district court abused its discretion in allowing testimony not specified in the pretrial order).
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> *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999)

The Defendants' objections to specific exhibits are enumerated below:

PX 104 11-24-20 text to Jim Hoft- *unauthenticated hearsay - CRE 901, 802*
PX 105 08-02-21 Oltmann Telegram post re connected to Ron Watkins *unauthenticated hearsay, irrelevant – CRE 901, 802, 401*
PX 106 03-26-21 Halderman analysis of Antrim County Election Incident *unauthenticated hearsay, irrelevant*
PX 107 November 2020 Michigan Oversight Committee Report *unauthenticated hearsay, irrelevant*
PX 109 November 2020 emails re Lyons - *unauthenticated hearsay*
PX 111 11-12-20 CISA Statement *unauthenticated hearsay, irrelevant*
PX 131 Joseph A. Camp posting *unauthenticated hearsay, irrelevant*
B-7 10-12-20 CO Times Recorder: Conservative Group Behind Deadly "Patriot Muster" Rally Working Closely With Colorado GOP – *incompetent, self-serving hearsay*
B-12 12-05-20 Oltmann Parler post- *unauthenticated hearsay*
PX 112 Deposition notice for FEC United *irrelevant*
PX 113 DE Secretary of State information re FEC United *unauthenticated hearsay, irrelevant*
PX 114 0265_fecunited_Donald J Trump for President email search results- *irrelevant*
PX 115 Photo of broken phone - *irrelevant*
PX 91-Notice of SMM-*irrelevant*
PX 92 CO Secretary of State Filing; Statement of Trade Name for Reporting Entity *unauthenticated hearsay, irrelevant*
PX 93 CO Secretary of State Filing; Statement of Trade Name Withdrawal *unauthenticated hearsay, irrelevant*
PX 116-Deposition notice-*irrelevant*
PX 117 DE Secretary of State information re Shuffling Madness Media *unauthenticated hearsay, irrelevant*
PX 119 Conservative Daily home page *unauthenticated hearsay, irrelevant*
PX 120 12-23-20 Conservative Daily donate *unauthenticated hearsay, irrelevant*
PX 121 03-23-18 Conservative Daily archives *unauthenticated hearsay, irrelevant*
PX 124 Advocacy to Action home page *unauthenticated hearsay, irrelevant*
PX 125 datalead Max Mcguire profile *unauthenticated hearsay, irrelevant*
PX 128 Max McGuire LinkedIn *unauthenticated hearsay, irrelevant*
PX 129 09-08-14 Conservative Daily webpage: Advocacy to Action *unauthenticated hearsay, irrelevant*
PX 132 09-08-14 Conservative Daily webpage: Advocacy to Action *unauthenticated hearsay, irrelevant*
D-6 PX 137 Oltmann research re Coomer[3] *duplicate PX 108*
PX 75 06-10-20 text correspondence between Joseph Oltmann and James Hoft-*irrelevant, CRE 403*
PX 76- *irrelevant*
PX 77- *irrelevant*
PX 78- *unauthenticated hearsay*
PX 79- *unauthenticated hearsay*
PX 80- *unauthenticated hearsay*
PX 81-*irrelevant*
PX 82-*irrelevant*
PX 83- *irrelevant*
PX 84- *unauthenticated hearsay, irrelevant*
Px 85- *unauthenticated hearsay*
EX A 11-09-20 email from Lindsay Oakley to OANN Producers re Reminder!!! *unauthenticated hearsay, irrelevant*
EX B 01-06-21 email from Lindsay Oakley to OANN Producers re Capitol Hill News *unauthenticated hearsay, irrelevant*
EX C 01-14-21 email from Lindsay Oakley to OANN Producers re Notes from Meeting *unauthenticated hearsay, irrelevant*
EX D 02-11-21 OANN Contact Form *unauthenticated hearsay, irrelevant*
EX E 03-01-21 email from Lindsay Oakley to OANN Producers re "former president trump" *unauthenticated hearsay, irrelevant*
W-1 07-02-21 Advance Democracy, Inc. Reports: Threats Against Eric Coomer on Twitter *unauthenticated hearsay, irrelevant*

Hearsay is not admissible unless a rule or statute provides otherwise. *Pueblo of Jemez v. Untied States,* 366 F.Supp. 3d 1234, 1237 (10th Cir. 2018); *People v. Rojas,* i181 P.3d 1216, 1218 (Colo.App. 2008)("Absent an exception, hearsay is not admissible.").

> It has long been recognized that a news article, if offered for the truth of its assertions, is hearsay and is inadmissible in nearly all circumstances. *See United States v. Abel,* 258 F.2d 485 (2d Cir. 1958) (news article attributing statements to Commissioner of Immigration and Naturalization is inadmissible hearsay *aff'd,* 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); *United States v. Nacrelli,* 468 F. Supp. 241 (E.D. Pa. 1979) (newspaper account of incident in which co-conspirator allegedly threatened defendant was inadmissible hearsay), *aff'd,* 614 F.2d 771 (3rd Cir. 1980); *Watford v. Evening Star Newspaper Co.,* 211 F.2d 31 (D.C. Cir. 1954) (trial court properly excluded hearsay account of accident and of offer by official of defendant to pay medical expenses).
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> The same is true here. The news articles were offered to prove the truth of the reporters' statements that defendant gave certain explanations for his behavior. As such, they were inadmissible hearsay and should not have been admitted.

People v. Morise, 859 P.2d 247, 251 (Colo.App. 1993). The Plaintiff's hearsay evidence, including newspaper and similar material, meets none of the exceptions to the hearsay rule, and are inadmissible

It is "well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment." *T.D. v. Patton,* 2149 F.Supp.3d 1297 *25 (D. Colo. 2014)(quoting *Orsi v. Kirkwood,* 999 F.2d 86, 92 (4th Cir. 1993)). Authentication is a precondition to admissibility. CRE 901(a); *People v. Huehn,* 53 P.3d 733, 736 (Colo. App. 2002). The Plaintiff's unauthenticated evidence is inadmissible.

Evidence which is irrelevant is inadmissible. *CRE 402; People v. Martinez,* 2020 COA 141 ; *United States v. Caraway,* 534 F.3d 1290, 1301 (10th Cir. 2008), and evidence which is substantially more prejudicial than probative is not admissible. *CRE 403, FRE 403 identical; Huddleston v. United States,* 485 U.S. 681, 691-91 (1988); *Uptain v. Huntington Lab, Inc.,* 723 P.2d 1322, 1335 (Colo. 1986).

III. THE PLAINTIFF MUST MAKE A PRIMA FACIE SHOWING OF ACTUAL MALICE

As previously noted, it is irrelevant whether the Plaintiff is a private individual, public figure, or limited-purpose public figure. The First Amendment and Colorado law make no distinction where matters of significant public interest are at issue. If the statement involves a matter of public concern, the plaintiff must prove both actual malice and the falsity of the statement by clear and convincing evidence.

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

Gertz v. Robert Welch, Inc., 418 U.S. 29, 43 (1974); *Williams, supra,* 653 P.2d at 1106 ("The matters involved here are alleged widespread and ongoing land-development schemes of questionable propriety. Not all of the lots were yet sold; consequently, the "public" contained a number of potential buyers who had an abiding interest in the matter.").

"[A] defendant's anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for the claims or 'when no evidence of sufficient substantiality exists to support a judgment for the plaintiff.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001). "A public figure in a defamation case cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not." *Kaelin v. Globe Comm. Corp.,* 162 F.3d 1036, 1039 (9th Cir. 1998)(internal citations omitted); *accord, Fry v. Lee,* 2013 COA 100 ¶ 61.

III. THE PLAINTIFF CANNOT MAKE A PRIMA FACIE SHOWING THAT FEC UNITED OR SHUFFLING MADNESS MEDIA DEFAMED HIM, INFLICTED EMOTIONAL DISTRESS UPON HIM, OR CONSPIRED WITH OTHERS TO DO EITHER, CANNOT ESTABLISH THAT MR. OLTMANN ACTED WITH ACTUAL MALICE, AND CANNOT MAKE A PRIMA FACIE SHOWING THAT HE IS ENTITLED TO INJUNCTIVE RELIEF WHICH IS CONSTITUTIONALLY PROHIBITED.

The Plaintiff must make the threshold showing against each defendant, or the defendant must be dismissed. He cannot, by naming defendants as a group, escape his burden of proof as to each,

individually. The Plaintiff has made no showing of Defendant FEC's liability for any action, and no showing of Defendant Shuffling Madness Media's liability. These defendants must be dismissed.

By means of largely incompetent or inadmissible evidence, the Plaintiff attempts to meet his burden of showing that Joseph Oltmann is liable for defamation and, by extension, outrageous conduct and civil conspiracy, but he cannot meet that burden. Mr. Oltmann is entitled to dismissal.

FEC UNITED - DEFAMATION CLAIM

The Plaintiff cannot make a prima facie showing that FEC United is liable for any defamation. His attempts to link FEC United to the broadcasts he complains of do not establish liability. He has adduced no evidence that any advertisement on Conservative Daily was authorized by FEC United's Board, which makes all decisions for the entity. *Deposition of FEC United, p. 14:6-19, Exhibit A* Further, even if the banner advertisements were, in fact, authorized, Section 230 of the Communications Decency Act, 47 U.S.C. § 230, shields an advertiser for liability for online publications by others: "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230 provides that no website that relies on user-generated content "shall be treated as the publisher or speaker of any information provided by another information content provider." FEC is immune from liability as a publisher, speaker, or advertiser, absent a showing that it altered or manipulated content. *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997) (rejecting argument that Section 230 left "distributor liability intact" and holding AOL immune even though it had notice of unlawful nature of the postings); *Universal Commc'n. Sys, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) ("Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content.")

While Mr. Oltmann founded FEC United, he does not run it. At the time of his deposition, he served as chairman of the board, but there is no evidence that he served in that capacity at the time of the November 9 broadcast, or the other broadcasts complained of. FEC has recently undergone a

restructuring, with the replacement of its president, and various board members, *Exhibit A, p. 13, l. 21; p. 20, ll. 3-18,* and the Plaintiff did not inquire or attempt to ascertain who the board members or chairpersons were at the time of the broadcasts he claims were defamatory.

Similarly, the Plaintiff makes no showing of either agency, actual or apparent, or *respondeat superior* liability. Although the Plaintiff has pled, in an unverified Amended Complaint, that Mr. Oltmann acted as an agent for FEC United, and repeated that allegation in his Response to the Defendants' Special Motion to Dismiss, the allegation is merely conclusory, and insufficient to withstand a motion to dismiss. *Warne v. Hall,* 373 P.3d 588, 594 (Colo. 2016) Under the plausibility standard, facts pleaded as conclusory statements are not entitled to the assumption that they are true. *Warne*, ¶¶ 9, 27, and, in order to survive a motion to dismiss for failure to state a claim, factual allegations supporting the claim cannot be conclusory. *Id; N.M. v. Trujillo,* 2017 CO 79, 397. P.3d 370). The Plaintiff also makes the unsupported allegation that "Oltmann's entities are completely intertwined with his defamatory campaign against Dr. Coomer." *Response at ¶ 23,* and that Mr. Oltmann discusses or introduces FEC United, and uses the FEC United to communicate with others, including other defendants, he adduces no evidence either that Oltmann is authorized to do so, that Oltmann was a board member or chairman at any time prior to September 9, 2021, or that any of the email communications between Oltmann and others using an FEC United email address were defamatory.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM
CIVIL CONSPIRACY CLAIM
INJUNCTIVE RELIEF CLAIM

The Plaintiff has not alleged **a single act** of FEC United's by which it intentionally inflicted emotional distress upon him, conspired with others to defame and inflict emotional distress upon him, or which entitles him to injunctive relief against FEC United. He has adduced no evidence of any

such act. He cannot make a prima facie showing that FEC United is liable for any of the conduct he claims.

Because the Plaintiff's claims against all defendants arise directly from speech on matters of public concern, they are subject to dismissal pursuant to § 13-20-1001, C.R.S. (2021), when the Plaintiff has brought a meritless lawsuit against FEC United. The Plaintiff has wholly failed to demonstrate, by **any** competent evidence, that FEC United is liable for tortious conduct under any theory. FEC United is entitled to be dismissed from this action pursuant to § 13-20-1101(3)(a), C.R.S. (2021).

SHUFFLING MADNESS MEDIA, INC., DEFAMATION CLAIM

The Plaintiff pled no theory of liability in his Amended Complaint, beyond "on information and belief Joseph Oltmann owns a business, Shuffling Madness Media, Inc., which registered the trade name and upon information and belief operates under the Conservative Daily" *Verified Complaint ¶ 51.* He has produced no evidence to support this allegation. Plaintiff also alleges, in his Response to Defendants' Special Motion to Dismiss, that SMM "until very recently conducted business under the trade name Conservative Daily" *Response ¶ 5,* citing SMM's deposition in support of this allegation. However, the deposition testimony directly contradicts his assertion:

> Q. Well, did Shuffling Madness Media turn Conservative Daily over to Paula Zoom, LLC, at some point?
> A. I don't remember that far back, but it could have. I think this was an effort to separate -- the more success that the businesses had, we wanted to get away from anything that had to do with politics. So I think that's the whole concept behind it. And the more we matured through growing as an organization, the -- the -- got told by, you know, our accounting firms and things like that, that we had to make sort of Separations so we'd have that assurance, make the Separations so that we could go out and do the things that were necessary in order to raise capital for some of the entities.
> Q. Okay. Was Politizoom owned by Shuffling Madness Media?

> A. Yes. And, again, if you go back to the Wayback Machine, we started the organization in – CD Solutions in June of 2018. On January of 2019, we wanted a clean break on making sure that everything was separated and that we had a year to year on financials.
> So if you actually go to the January 18, 2019, which is the first screenshot that shows up, you will see, again, that it shows copyright 2019, CD Solutions, Inc., all rights reserved, terms of service, using the same service that you just used to show me 2018 --

Deposition of Shuffling Madness Media, Exhibit B, p. 23, l. 23 -p. 24, l. 24. The unrebutted evidence is that there zero connection exists between Conservative Daily and SMM, *Id., p. 18, ll. 8-14,* that Conservative Daily was transferred to CD Solutions in 2018, *Id., p. 15, l. 19-p. 16, l. 12,* that SMM held and licensed the trade name only, *Id., p. 18, l. 18-p. 19, l. 2,* and that SMM had no control of Conservative Daily. *Id. p. 20, ll. 13-15.*

The Plaintiff has wholly failed to demonstrate, by **any** competent evidence, that Shuffling Madness Media, Inc. is liable for defamation under any theory. Shuffling Madness Media, Inc. is entitled to be dismissed from this action pursuant to § 13-20-1101(3)(a), C.R.S. (2021).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM
CIVIL CONSPIRACY CLAIM
INJUNCTIVE RELIEF CLAIM

The Plaintiff has not alleged **a single act** by Shuffling Madness Media, Inc. which inflicted emotional distress upon him, by which Shuffling Madness Media, Inc. conspired with others to defame and inflict emotional distress upon him, or which entitles him to injunctive relief against Shuffling Madness Media, Inc. He has adduced no evidence of any such act. He cannot make a prima facie showing that Shuffling Madness Media, Inc. is liable for any of the conduct he claims.

Because the Plaintiff's claims against all defendants arise directly from speech on matters of public concern, they are subject to dismissal pursuant to § 13-20-1001, C.R.S. (2021), when the

Plaintiff has brought a meritless lawsuit against Shuffling Madness Media, Inc.. The Plaintiff has wholly failed to demonstrate, by **any** competent evidence, that Shuffling Madness Media, Inc. is liable for tortious conduct under any theory. Shuffling Madness Media, Inc. is entitled to be dismissed from this action pursuant to § 13-20-1101(3)(a), C.R.S. (2021).

JOSEPH OLTMANN DEFAMATION CLAIM

Whether the Plaintiff was on the September, 2020 call is ultimately immaterial. In order to prevail, he must show that even if Mr. Oltmann's report was false, it was made "with the knowledge that the statement was false or with reckless disregard of whether it was false or not." *Denver Publ. Co. v. Bueno,* 54 P.3d 893, 906 n. 10 (Colo. 2002). "Reckless disregard" is "a high degree of awareness for probable falsity or serious doubt as to the truth" *Dominguez v. Babcock,* 727 P.2d 362, 366 (Colo. 1986); "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *In re Green,* 11 P.3d 1078, 1085 n.4 (Colo. 2000) (quoting *St. Amant v. Thompson,* 390 U.S. 727 ,731 (1968).

> Recklessness implies a higher degree of culpability than negligence. A failure to exercise ordinary or reasonable care in ascertaining the truth of published material does not, standing alone, constitute recklessness. Such failure, however, may be considered as an element of recklessness. *The gist of the meaning of recklessness is that these Defendants had a high degree of awareness that the statements published were probably false.* (emphasis added).

Diversified Management, supra, 632 P. 2d at 1109, (approving Colorado jury instruction and adopting *St. Amant* standard).

The Plaintiff cannot make this showing. He claims that Oltmann fabricated his report, *Reply, ¶ 197* citing the Brown, Halderman, and Rothschild affidavits but those affidavits do not support this assertion. Brown opines on journalistic principles (and makes legal conclusions, which he claims no expertise to make, and which are wholly improper), but does not say what Plaintiff suggests. Further,

his opinions on journalistic integrity, which might be appropriate for academic instruction, or the use of editorial committees tasked with determining what standards a media organization should adopt, do not inform the legal "actual malice" standard, particularly in Colorado, because the legal definition of "actual malice" is untethered to aspirational standards adopted by media organizations. Insofar as Mr. Brown's opinions apply to Mr. Oltmann, he is not, in his personal capacity, a journalist; he is a technology entrepreneur, and only when he acts in a representative capacity as a journalist should those standards be applicable. He has testified that he did the investigation into Coomer as a private individual:

> Q. Did CD Solutions perform any type of investigation prior to these allegations being made on the podcast into whether or not Dr. Coomer actually held shell corporations or offshore corporations?
> A. CD Solutions in its capacity did not, no. Me, in my personal capacity, I did --
> THE REPORTER: I'm sorry. There was overlap. Can you say that again, please.
> A. So CD Solutions did not. Myself in my personal capacity did, yes

Deposition of CD Solutions, p. 40, l.19-41, l. 3, Exhibit C

Halderman opines on election security issues, and provides no basis for his unsupported opinion that Oltmann must have been an election security expert to make a report of what he witnessed, and the equally-unsupported assertion that "it is implausible on its face that Dr. Coomer ever made such a statement." (Halderman apparently does not comprehend time linearity, as he opines that Mr. Oltmann should have credited election security experts who opined, weeks after Oltmann's report, that they considered election hacking claims to be 'unsubstantiated or not credible' ¶ 21). Further, Halderman's own affidavit, by suggesting that an election security expert should, in his opinion, have recognized that Coomer's statement about election tampering was inherently impossible to accomplish, and then opining that Mr. Oltmann has no such expertise, undercuts any inference of

actual malice, his improper, and unsupported (by anything but his 'opinion') allusion to "indicators of charlatanism", ¶ 29 notwithstanding.

Finally, there is Rothschild, a self-denominated "expert", because he is the author of two books, one in 2021 purports to tell the "true story" of QAnon; **The Storm is Upon Us**, a work which could clearly use a bit of flogging, as it is currently #64,845 on Amazon's list. The other is a masterwork by this "master journalist", **THE WORLD'S WORST CONSPIRACIES,** Arcturus, 2020, in which he authoritatively reports that the CIA Operation, COINTELPRO [the decade-long anticommunist counterintelligence

> at the Ballroom, and Hagan testified they weren't involved. Regardless, all three were quickly convicted and sent to prison.
>
> In the next decade, information became public about the CIA's COINTELPRO project – an organized and well-funded effort to infiltrate and disrupt civil rights organizations. Possible CIA involvement with the Nation of Islam, along with the bizarre behaviour of Malcolm's security, the laxness of the NYPD and Hagan's shifting stories would all point towards Malcolm's death deserving a re-examination. But the case was never re-opened. Ultimately, until the government releases the extensive files it has on Malcolm X, it will be impossible to entirely debunk the conspiracy theories that the CIA had something to do with his death. But little has come out in the intervening decades that proves the three men convicted weren't involved, as Hagan had already confessed (then recanted), and the others were named by numerous witnesses.

operation conducted by the **FBI**] may be tied to Malcom X's assassination, opines here, without **any** evidence, that Oltmann relied on QAnon for conspiracy theories, but has no evidence that Oltmann's report was fabricated. His affidavit, which is an unsupported, paid-to-order smear job of every defendant, simply does not address "actual malice".

The Plaintiff also cites to conclusory allegations in his unverified, Amended Complaint, but those conclusory allegations are legally worthless, here. *Hall v. Warne, supra.* His citation to West Virginia and Fifth Circuit cases holding that anonymous sources support an inference of actual malice are similarly unpersuasive here, because Mr. Oltmann was the source of the report.

Contrary to the Plaintiff's assertion that "Oltmann's story was premised on anonymous sources" *Reply, ¶ 197,* it was not. It was premised on what he witnessed, personally. Similarly, Mr. Oltmann did not require "relevant credentials or official verification" of what he personally witnessed in order to report it, publicly, privately, to anyone he chose.

Citing the same affidavits, the Plaintiff asserts that Mr. Oltmann "conducted no legitimate investigation of his story and purposefully avoided the truth of it", *Reply, ¶ 197,* but the affidavits, again, do not say this, and even if they did, they are the opinions of unknown, unexamined paid witnesses, and not competent evidence. The fact is that Mr. Oltmann did perform a meaningful investigation, as the Plaintiff well knows, the result of which was a voice identification of Coomer, and sufficient background information to support any reasonable person's assessment that Coomer was a deeply-disturbed, out-of-control, individual, whose publication of his skinhead, drug-addicted, criminal past, (all of which was, ostensibly, unknown to Dominion), including his decision to publish, without shame or apology, an account of the rape and abuse of his then-wife, hatred and scorn for the United States and Christianity, whose continually-expressed hatred for Donald Trump, threats to "friends" who had the temerity to disagree with him in any political matter, his repeated expressions of admiration for Antifa, continual publication, with approbation, of references to killing police officers (Body Count – Cop Killer, *Bates 24*, The Exploited – Fuck the USA, Bates 21, MDC-Dead Cops, *Bates 25*, NWA-Fuck the Police, Bates 22, 26, Dead Prez-Cop Shot Bates 20, the 4-Skins-ACAB, *Bates 23*, Pigs for Slaughter, *Bates 17*…) *Oltmann Disclosures, Bates Numbers 1-80, Exhibit D, Bates Numbers 81-198, Exhibit J, Coomer posting Exhibit K.*

Plaintiff goes on to assert that "Oltmann had no evidence in support of his story", *Reply, ¶ 197,* which is also untrue. The Plaintiff has Mr. Oltmann's contemporaneous notes, which memorialize the important points in the call. *Oltmann Disclosures, Bates Numbers 199-203, Exhibit E.*

The Plaintiff also claims that "Oltmann's story is built on an alleged Google search of anonymous speakers from an unrecorded call that he claims to have infiltrated", *Reply, ¶ 197,* not mentioning that the evidence Mr. Oltmann disclosed to the Plaintiff contains an irrebutable Google search made on September 26, 2020, for "Eric dominion denver colorado", the same search and different results on November 12, 2020, a list of videos Oltmann watched in September, 2020 to compare the individual on the call with Eric Coomer, articles he consulted about Dominion, and other videos he watched which featured Eric Coomer, all, with the exception of the second Google search, before he made the initial report on November 9, 2020. *Oltmann Disclosures, Bates Numbers 199-203, Exhibit F.*

The Plaintiff contends that Mr. Oltmann "then kept this alleged call secret for two months months—despite almost daily podcasts—only to remember *after* the election and *after* advancing other election fraud theories." *Reply, ¶ 197.* However, this is not true, either. Mr. Oltmann discussed the call with numerous individuals prior to his initial report on November 9, two of which have provided sworn statements concerning when he discussed the call with them. *Declaration of Jonathan Tiegen, Exhibit G;; Declaration of Gordon Beckstead, Exhibit H..*

Plaintiff continues: "Oltmann's financial motivations in these allegations were apparent", *Reply, ¶ 197,* citing to some affidavit or other which is some alleged expert's unsupported opinion, and not competent evidence, and his own unverified complaint. No affidavit establishes that Mr. Oltmann profited from this, Coomer's unsworn complaint is not evidence, and Mr. Oltmann's testimony directly contradicts this assertion. *Exhibit C, p. 19, l. 8-p. 20, l. 2.*

Plaintiff asserts, "the story he advanced involves facially impossible election interference", *Reply, ¶ 197,* but election interference is not what Oltmann reported: he reported that a speaker on the call, Eric the Dominion guy, whom he had determined was Eric Coomer, stated his intention to

interfere in the election, some six weeks prior to the election, and did not state the means by which he intended to do so. *Transcript, July 7, 2021, p. 12, l. 9-13, l. 19; 56, l. 12-60, p. 3, Exhibit I.*

Plaintiff next asserts, that "Oltmann had a preconceived storyline of election fraud and desire to prove it…began advancing various baseless allegations of elections [sic] fraud...sought another baseless conspiracy to explain that loss, this one centered on Dr. Coomer." *Reply, ¶ 197.* The Plaintiff apparently relies on Rothschild and/or Halderman to support this allegation, but neither does, even in their incompetent and improper affidavits. Neither mentions any such allegation by Mr. Oltmann prior to his initial November 9 report.

The Plaintiff's penultimate allegation is perhaps the most remarkable, given what has been uncovered about his "political motivations and general ill will", which he claims, with great outrage, is not credible evidence that he would **actually** interfere in an election to ensure that the primary object of his vitriol, Donald Trump, was defeated. Again, he purports to rely on the Rothschild and/or Halderman Affidavits for evidence of this, but again, neither contains a single concrete example of either, prior to November 9, 2020.

Finally, Plaintiff alleges that Mr. Oltmann (if, in fact, he is included among the non-specific 'Defendants') failed to contact Dr. Coomer and disregarded reliable sources with actual election expertise refuting the allegations, none of which yet existed on November 9, 2020. Further, the Plaintiff cannot seriously wonder why a witness to Dominion Voting Machine's director of security's statement of intention to interfere in an election, wouldn't simply call the guy up to get confirmation, which, of course, were it he who made that statement, he would immediately confirm. In fact, Dr. Coomer continues to deny that he was a participant to this day.

Coomer cites *Kuhn v. Tribune-Republican Pub. Co.*, 637 P.2d 315 (Colo. 1981), for the proposition that Colorado law holds that failure to corroborate an allegation equates to "actual malice", but it is more nuanced that he would have the Court believe. The full quote is, "in this context [where

legitimate sources of corroboration were readily available] a reporter's failure to pursue the most obvious available sources of possible corroboration or refutation may clearly and convincingly evidence a reckless disregard for the truth." *Id.* at 319. The more complete holding was:

> When one fails to contact and question obvious available sources of corroboration, fabricates specific facts appearing in a story, and writes the story in a manner calculated to invite a factual inference that the newspaper has uncovered governmental corruption and bribery, one knowingly risks the likelihood that the statements and inferences are false and thereby forfeits First Amendment protections.

Id. Here, there were no disinterested public officials or "official, credible sources", to approach for confirmation or refutation. The only individual who could have confirmed his presence on the call was Eric Coomer, and it is vanishingly unlikely, given his lucrative position at Dominion, that he would have done so. The law doesn't require a reporter who witnessed an assassination and recognized the assassin to call that individual for confirmation before reporting what s/he saw.

The Plaintiff cannot establish a reasonable probability of success on the merits, because he cannot establish a reasonable probability of showing actual malice with convincing clarity from the evidence he has brought forward at this point. Mr. Oltmann is entitled to dismissal of the defamation claim.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM
CIVIL CONSPIRACY CLAIM
INJUNCTIVE RELIEF CLAIM

A public figure must prove actual malice to prevail on a claim for outrageous conduct. *Hustler Magazine v. Falwell,* 485 U.S. 46 (1968); *Brooks v. Paige*, 773 P.2d 1098, 1102 (Colo.App. 1988). Because the Plaintiff must make the same prima facie showing of actual malice to avoid dismissal of his claim for intentional infliction of emotional distress, and cannot do so, the claim must be dismissed.

The civil conspiracy claim, for defamation and intentional infliction of emotional distress, similarly fails. A claim for civil conspiracy is a derivative cause of action under Colorado Law. If the acts constituting the underlying wrong do not provide the basis for an independent cause of action,

there is no cause of action for the conspiracy itself. ***Double Oak Constr., L.L.C.***, 97 P.3d 140; ***Condo v. Conners***, 271 P.3d 524 (Colo.App.), *aff'd,* 266 P.3d 1110 (Colo. 2011). The Plaintiff must make the prima facie showing of probable success on the issue of actual malice required by § 11-20-1101(), C.R.S. (2021) to proceed on a claim for civil conspiracy arising from the defamation and IIED claims. When he cannot, the conspiracy claim is extinguished. For that reason, the conspiracy claim must be dismissed.

Finally, because the basis for the Plaintiff's claim for injunctive relief is the alleged defamation and **consequent** intentional infliction of emotional distress, if he cannot prevail on those claims, he cannot prevail on his claim for injunctive relief.

The First Amendment prohibits prior restraints on speech. For more than three centuries, Anglo-American jurisprudence has condemned the judicial prohibition of future speech, Brief for Historians Alfred L. Brophy et al. as Amici Curiae Supporting Petitioners, Tory v. Cochran, 544 U.S. 734 (2005) (No. 03-1488), 2004 WL 2582553, at *11 (tracing the preemption by the Star Chamber of defamation claims from ecclesiastical courts) "[L]iberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." WILLIAM BLACKSTONE, **COMMENTARIES ON THE LAWS OF ENGLAND** 151 (1769) (alteration in original). "Equity will not enjoin a libel" *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001); *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991) ("[T]he maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law."); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1092 (C.D. Cal. 2012) ("never in the 216 year history of the First Amendment has the Supreme Court found it necessary to uphold a prior restraint in a defamation case…").

The United States Supreme Court has hewed closely to the proscription. *Near v. Minnesota,* 283 U.S. 697, 707 (1931)(It is "no longer open to doubt that the liberty of the press and of speech[] is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 390 (1973)("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) ("[S]tatements [that speech is unprotected by the First Amendment] must be taken in context ... and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all.'"); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989)("[O]ur cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove [speech] from circulation."); *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("permanent injunctions . . . that actually forbid speech activities are classic examples of prior restraints" because they impose a "true restraint in future speech."). The Court has never permitted the injunction of future speech, regardless of the harm, or degree of harm claimed. Punishment after the fact, whether via criminal sanctions, fines, or damages is permissible; prior restraint is not.

The First Amendment prohibits the remedy the Plaintiff seeks, and it may not be granted, irrespective of the showing he makes.

IV. ATTORNEY FEES MUST BE AWARDED TO A DEFENDANT WHO PREVAILS ON A SPECIAL MOTION TO DISMISS.

Section 13-20-1101(4)(a), C.R.S. (2021) provides that a prevailing defendant is entitled to recover the defendant's attorney fees and costs. Whenever a defendant in Colorado prevails on a motion to dismiss a tort claim, s/he is entitled to recover fees and costs, and this provision simply conforms the Anti-SLAPP statute to Colorado Law. Section 13-17-201, C.R.S. (2021) provides:

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12 (b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action. This section shall not apply if a motion under rule 12 (b) of the Colorado rules of civil procedure is treated as a motion for summary judgment and disposed of as provided in rule 56 of the Colorado rules of civil procedure.

A fee and cost award is mandatory under 13-17-201 when a trial court dismisses an action under C.R.C.P. 12(b). *Barnett v. Denver Publ'g Co.*, 36 P.3d 145 (Colo. App. 2001)(dismissal of complaint alleging defamation for failure to show material falsity); *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92¶ 59 (statute unequivocally mandates award). These Defendants reserve further argument until such time as the issue is ripe.

CONCLUSION

Wherefore, Defendants FEC United, Inc., Shuffling Madness Media, Inc., and Joseph Oltmann respectfully request that their Special Motion to Dismiss be Granted, and that they be dismissed as defendants in this case.

Respectfully submitted this 4th day of October, 2021

By: Andrea M. Hall

Attorney for Defendants Oltmann/FEC United/Shuffling Madness Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2021, I electronically filed **DEFENDANTS JOSEPH OLTMANN/FEC UNITED, INC./SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY'S COMBINED REPLY IN SUPPORT OF THEIR SPECIAL MOTION TO DISMISS, PURSUANT TO § 13-20-1101, C.R.S.** with the Clerk of the Court using the ICCES electronic filing system, which will send an electronic copy of this filing to all counsel of record.

Andrea M. Hall