DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Denver, CO 80202	DATE FILED: October 4, 2021 8:44 AM FILING ID: A878DA8A4EC9B CASE NUMBER: 2020CV34319
ERIC COOMER, Ph.D., Plaintiff vs. DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C., RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY, JAMES HOFT, TGP COMMUNICATIONS LLC dba THE GATEWAY PUNDIT, MICHELLE MALKIN, ERIC METAXAS, CHANEL RION, HERRING NETWORKS, INC. dba ONE AMERICA NEWS NETWORK, DEFENDING THE REPUBLIC, Defendants	**COURT USE ONLY** Case Number: 2020CV34319 Division:
Attorneys for Defendant Eric Metaxas: Thomas B. Quinn, #17955 Margaret Boehmer, #45169 Kendra Stark (*Pro Hac Vice*) **GORDON REES SCULLY MANSUKHANI LLP** 555 Seventeenth Street, Ste. 3400 Denver, Colorado 80202 (303) 534-5160 tquinn@grsm.com mboehmer@grsm.com kstark@grsm.com	

SUPPLEMENTAL REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS

Defendant Eric Metaxas, through Gordon Rees Scully Mansukhani, LLP, submits this supplemental reply in support of his special motion to dismiss:

Introduction

Metaxas hosts a talk show that is distributed over the radio, on YouTube, and by podcast. On his talk show, Metaxas engages in long form conversations with guests he believes his audience would find interesting. Metaxas hosts an opinion show, and not a news program:

> Q: Would it be fair to characterize the show as a combination of some news or current events and opinion?
>
> A: I couldn't say news or current events. There are times when I will dip into that, but if I were – if somebody asked me about the show, I wouldn't say – I wouldn't use the word "news" ever. Opinion, my opinion comes into it because I'm interviewing people, and I'm not playing the role of a journalist. So I say – I just react to the – to the people. So I just want to make sure that I'm answering your – your questions clearly because I just don't think in those categories. So, if anything, opinion, certainly not news.

Exhibit A, Metaxas Dep. Tr. at 13:10-24.

On November 24, 2020, in the midst of a national debate on election integrity related to the 2020 presidential election, Metaxas had Joe Oltmann as a guest on his show. Oltmann recounted his personal experience of infiltrating an Antifa conference call and overhearing statements made by Eric Coomer regarding election integrity. Oltmann shared his experience and represented the truth of what he was saying: "So this isn't all made up…. This is absolute fact." Exhibit B, Transcript of November 24, 2020 at 30:15-17. Metaxas reacted and provided his opinion in response to Oltmann recounting his personal experience.

In December 2020, Coomer sued Metaxas for defamation, intentional infliction of emotional distress, civil conspiracy, and injunctive relief. Plaintiff targets certain of Metaxas' opinions and reactions as allegedly defamatory, but as is made clear through his omnibus response to Metaxas and other defendants' anti-SLAPP motions to dismiss, his criticism is about Metaxas' public position on issues related to election fraud in the 2020 presidential election. *See, e.g.,*

Response, ¶¶ 62, 63, 68; Response Exhibits G-4, G-5, G-6, G-7, G-8, G-9.

Colorado's anti-SLAPP law was enacted to "encourage continued participation in matters of public significance" so that participation is not "chilled through abuse of the judicial process." C.R.S. § 13-20-1101(1)(a). Plaintiff's Response and his focus on Metaxas' engagement in the debate about election integrity and election fraud establish his intent is to chill public debate on a matter of national importance. Additionally, Plaintiff placed himself in a position of public significance related to the national election through his role in developing and implementing voting technology and election services in more than 30 states. As such, Plaintiff's claims fall within Colorado's anti-SLAPP law. Further, while Plaintiff's Response identifies out of context many statements made by Metaxas, he fails to establish that any statements are defamatory or that Metaxas engaged in a civil conspiracy. As such, Plaintiff's claims against Metaxas should be dismissed pursuant to C.R.S. § 13-20-1101.

Argument

I. This case addresses issues of substantial public significance.

Plaintiff argues that because Dominion is a private company and he is "privately employed," Dominion's development and provision of voting technology, and his role at Dominion, are not matters of public concern. This position is inconsistent with nearly a century of case law regarding the public significance of national elections, as well as with Plaintiff's provision of a traditional government function. *See* U.S. Const. Amend. XII. Dominion provided election technology and election support services to "at least 30 different states during the 2020 Presidential election." Response, ¶ 1. Plaintiff individually developed some of the technology produced by Dominion; provided "election support services across the United States, including from initial

project implementation through election set-up, ballot layout, multiple language audio, machine set-up, and system testing[;]" and assisted with election related services across the country during the 2020 presidential election. *Id.* Plaintiff, through his role as Director of Product Strategy and Security, placed himself in a position of public significance related to the 2020 presidential election.

The United States Supreme Court has long recognized that a national election is a matter of public importance. In *Burroughs v. United States*, 290 U.S. 534, 545 (1934), the Court said:

> While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.

Likewise, in *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983), the Court said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation."

Plaintiff and his former employer were providing election technology and election support services in the context of a Presidential election. Like the presidential electors referenced in *Burroughs*, while Plaintiff may not have been an officer or agent of the federal government, the voting technology he developed and his assistance with the 2020 Presidential election amounted to an exercise of a federal function. Further, the technology and processes that states implement in the context of a Presidential election are akin to the state-imposed restrictions in *Anderson* in that that they also implicate a uniquely important national interest. Plaintiff was in a position of public significance and public concern due to his work in developing and implementing voting

technology and voting processes for a national election in over 30 states long before Oltmann first mentioned his name.

Further, the fact that Plaintiff may have been employed by a company in the private sector is irrelevant to the Court's analysis because Plaintiff and his company were performing traditional public services. In his employment with Dominion, Plaintiff chose to compete for contracts with public entities to provide voting technology and voting support services. *See Martin Marietta Corp. v. Evening Start Newspaper Co.*, 417 F. Supp. 947, 957 (D.D.C. 1976) ("Plaintiff has many interests other than the defense industry, but choses to compete for defense contracts. It also choses to entertain persons connected with the military. These wholly voluntary acts place plaintiff in the center of the controversy explored in the October 31 article and the series of which it was a part."); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 570 (Ariz. 1970) ("By assuming the position that he held, Dombey invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention."). By voluntarily choosing to provide these types of services, Plaintiff "surrendered any legitimate expectation of anonymity with regard to the manner in which he performed in his positions, his relationship with executives of the governmental agencies and the other matters with which" Metaxas' talk show were concerned. *Id.*

Generally speaking, "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[.]" *Barrett v. Univ. of Colo. Health Sciences Center*, 851 P.2d 258, 263 (Colo. App. 1993). Election integrity and the debate over election integrity fall within this category, regardless of whether Plaintiff agrees or disagrees with Metaxas' position and beliefs. Plaintiff's employment and the actions he has taken

in his employment are matters of concern to the community.

Plaintiff is also a limited purpose public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). "A person may be a public figure for a limited purpose where that person 'voluntarily injects himself or is drawn into a particular public controversy,' thereby 'assum[ing] special prominence in the resolution of public questions.'" *McIntyre v. Jones*, 194 P.3d 519, 527 (Colo. App. 2008) (quoting *Gertz*, 418 U.S. at 351). Plaintiff individually developed and patented voting technology. He promoted, demonstrated and sold that technology to states and counties across the country. This included participating in voting technology expos that were published by public entities, like Chicago Elections, on publically available websites, like YouTube. *See, e.g.*, Voting Equipment Expo: Dominion Voting Systems Presentation, posted Apr. 14, 2017, available at https://www.youtube.com/watch?v=YLIS68YfMYU (last visited Oct. 2, 2021). Plaintiff was the public face of Dominion on the issues of voting technology and voting integrity. As such, he voluntarily injected himself into the significant public issues surrounding election fraud. Thus, Metaxas' statements were protected statements addressing a matter of public significance and about a limited purpose public figure, and Colorado's anti-SLAPP law applies.

II. Plaintiff has failed to establish prima facie cases for his claims.

A. Plaintiff has failed to establish a prima facie case for defamation.

1. Metaxas' statements are constitutionally protected.

Plaintiff has isolated several of Metaxas' statements and concluded that such statements are defamatory. When Metaxas' statements are viewed in context, it is clear that they are non-actionable and Plaintiff cannot establish a prima facie case for defamation. *Keohane v. Stewart*, 882 P.2d 1293, 1299 (Colo. 1994) (when assessing whether a statement is defamatory, the court

must consider the context of the entire statement and the circumstances surrounding the statement). The use of loose, figurative, or hyperbolic language, particularly in the context of a commentary talk show such as Metaxas', cannot give rise to a defamation claim. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990). Further, gross overgeneralizations, or the use of colorful and exaggerated terms, cannot form the basis of a defamation claim. *Keohane*, 882 P.2d at 1301.

Despite significant discovery, Plaintiff has failed to establish that Metaxas' statements are defamatory. Rather, discovery has established that Metaxas' statements were remarks on his perceptions, or statements of "hyperbolic joke effect," (Ex. A at 64:2-9) made in connection with a national debate on a matter of public and political importance. As such, Metaxas' statements "deserve the highest protection." *McDougal v. Fox News Network, LLC,* 489 F.Supp.3d at 183 (S.D.N.Y. 2020); *see also Milkovich*, 497 U.S. at 19.

Plaintiff has relied on sound bites of Metaxas' statements, such as the use of the words "Unabomber," "criminal," or "anti-American," but when viewed in context these are clearly nothing more than Metaxas' perceptions or reactions in response to what his guest is relaying. For example, Metaxas' statements all have an element of hypothetical and opinion commentary:

> Q: Had you drawn this conclusion that Dr. Coomer wanted to use his position to make sure Donald Trump is – is not elected? Had you reached that conclusion just through your – your interview with Joe Oltmann to that point?
>
> A: To some extent, there's an element of the hypothetical in what I'm saying. But whatever opinion I had was formed in the course – most of it was formed in the course of the interview, which is why I'm so astonished as he talks. (Ex. A at 74:8-17).
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> ***
>
> Q: So did you intend for your listeners to understand that actions taken by Dr. Coomer were evil?
>
> A: Well, again, I'm going with what my guest is saying, and I don't have any reason to

think he's making it up. So even in that statement, it – it has an element of hypothesis. (Ex. A at 76:6-12).

Plaintiff seeks to hold Metaxas liable for his perceptions and reactions in response to Oltmann's recount of an event he experienced. Metaxas had no reason to not believe Oltmann, and his statements were made during a time of debate and controversy regarding election integrity. *Id.* at 41: 2-4 ("In my opinion, there's nothing more controversial, then or now, than what happened in the 2020 election."). Plaintiff may be displeased with Metaxas' use of colorful or over exaggerated language, but his displeasure does not rise to the level of defamation. Plaintiff has failed to establish a distinction between Metaxas' statements and the types of statements protected as constitutionally protected in cases like *Milkovich* and *McDougal*. As such, Plaintiff cannot establish a prima facie case for defamation.

Because Plaintiff's defamation claim is the basis of his intentional infliction of emotional distress claim, Plaintiff's failure to establish a prima facie defamation claim is detrimental to his intentional infliction of emotional distress claim. Therefore, Plaintiff's intentional infliction of emotional distress claim must also be dismissed.

2. There is no evidence of actual malice.

Plaintiff's defamation claim against Metaxas also fails because he cannot establish actual malice. A defamation plaintiff cannot recover unless he proves "by clear and convincing evidence that the defendant published the defamatory statement with actual malice, with knowledge of falsity or in reckless disregard for the truth." *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1122-23 (Colo. App. 1992). Importantly as it relates to Metaxas, the fact "[t]hat a reasonably prudent person … would have investigated before publishing does not suffice." *Id.* Rather, Plaintiff must demonstrate Metaxas "entertained serious doubts as to the truth of the statement, or acted

with a high degree of awareness of its probable falsity." *Id.* Plaintiff has no evidence of actual malice, let alone evidence that meets the heightened clear and convincing evidence standard.

First, any argument that Metaxas violated an obligation to investigate Oltmann's story must be disregarded as failure to investigate is not a basis for actual malice. *Lewis,* 832 P.2d at 1123. Further, Metaxas had no reason to investigate because there were no red flags about what Oltmann said:

> Q: Other than your follow-up questions to Mr. Oltmann, you did no investigation to verify his allegations, right?
>
> A: We don't have the budget or the bandwidth or the time, I think I said that earlier, to – to do that kind of a thing, unless it were, you know – unless there were a particular red flag or reason to doubt somebody or something that they said, yeah. (Ex. A at 76:22-77:9).

Second, throughout his deposition, Metaxas repeatedly testified that he had no reason to doubt Oltmann or his story:

> Q: Did you ever consider the possibility that what Mr. Oltmann was saying was not true?
>
> A: That's a very hypothetical question. I think I have to consider that no matter whom I'm speaking with. But it wouldn't occur to me in any particular way unless I would have remarked on it, you know, which I didn't. So I would assume that I'm following what he's saying, generally speaking, and not thinking he's making it up. (Ex. A at 76:13-21).
>
> ***
>
> Q: When you're interviewing Mr. Oltmann, did you give any consideration to the possibility that what Mr. Oltmann was saying wasn't true?
>
> A: [W]henever I'm talking to somebody, I think hypothetically, I want to make sure they're telling the truth. So – but it's – you know, it's my job as I'm interviewing somebody to be responsible, to try to hear what they're saying in context. It didn't occur to me that he was – he was doing anything but kind of reporting what he'd experienced. (Ex. A at 77:17-78:11).

Plaintiff's discovery demonstrates a complete absence of evidence that Metaxas hosted Oltmann as a guest on his talk show while entertaining serious doubts about the truth of Oltmann's

statements or possessing a high degree of awareness of the falsity of Oltmann's statements. Plaintiff's response on the issue of actual malice is argument, and not the evidence necessary to establish a prima facie case, by clear and convincing evidence, that Metaxas demonstrated actual malice.

3. Metaxas' decision not to retract is irrelevant to his anti-SLAPP motion.

Plaintiff's Response places significant focus on his August 2021 demand for retraction and Metaxas' unwillingness to retract his statements. Plaintiff's arguments related to his demand for retraction are irrelevant to Metaxas' anti-SLAPP motion because Plaintiff's demand for retraction has no bearing on whether he can establish a prima facie case for defamation. A defendant's retraction or non-retraction goes to the issue of damages, but cannot be considered when evaluating conduct or liability. *Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957, 965-66 (Colo. App. 2009). Plaintiff has failed to establish Metaxas' statements were defamatory, therefore, he is not entitled to damages. Any references or arguments related to Plaintiff's demand for retraction have no bearing on the outcome of Metaxas' anti-SLAPP motion.

B. Plaintiff has failed to establish the existence of a conspiracy.

Plaintiff's Response similarly does nothing to establish Metaxas was involved in a civil conspiracy. To prove a civil conspiracy, Plaintiff must establish five elements: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful overt acts, and (5) damages. *Walker v. Van Laningham*, 148 P.3d 391, 396 (Colo. App. 2006). "The court will not infer the agreement necessary to form a conspiracy; evidence of such agreement must be presented by the plaintiff." *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). Metaxas disputes that Plaintiff can establish any element of a civil

conspiracy. However, the Court does not need to address whether any unlawful acts or damages occurred because Plaintiff cannot establish a prima facie case that there was an agreement between Metaxas and any other defendant.

Metaxas hosted Oltmann as a guest on his show on November 24, 2020. Prior to hosting Oltmann on the show, Metaxas did not speak with Oltmann aside from arranging the date of his appearance (Ex. A at 21:1-9), he had not heard of Oltmann (*id.* at 21:10-16), he had not seen the Malkin interview (*id.* at 18:7-17), and he was not aware that Giuliani or Powell had discussed Plaintiff at a November 19, 2020 event (*id.* at 18:18-19:10). Metaxas has not talked to Oltmann since the November 24, 2020 show, and the show was the only time they talked.

> Q: Have you talked to Mr. Oltmann since the show?
>
> A: No. No, I have not.
>
> Q: Was that the only time you talked to him?
>
> A: I really – I'm pretty sure that would have been the only time I had any communication with him during the 30 or 40 minutes of the show, yeah.
>
> Q: Before you went on the air, did you do some sort of interview with him?
>
> A: We don't do that. It's just not – it's usually not necessary. I just want to kind of have a free flowing conversation, and I want the guest to kind of tell my audience the story. So we don't have the time or the inclination to kind of get the story before the story, so I just kind of jumped in. So I didn't have any conversation with him, no. (Ex. A at 22:8-23:1).

Metaxas has also not had any conversations with any other defendants or non-defendants regarding Plaintiff. *Id.* at 47:15-49:15. Therefore, Plaintiff cannot establish the existence of any agreement between Metaxas and any other defendant, including Oltmann, and Plaintiff cannot establish a prima facie case on his civil conspiracy claim.

C. Plaintiff is not entitled to injunctive relief.

Because Plaintiff has failed to establish a prima facie defamation claim, he is not entitled to injunctive relief. Therefore, Plaintiff's injunctive relief claim must be dismissed.

Conclusion

For the foregoing reasons, as well as the arguments and authorities in Metaxas' Motion, Reply, and Sur-reply, Plaintiff's Amended Complaint should be dismissed pursuant to C.R.S. § 13-20-1101.

Dated this 4th day of October, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 4, 2021, a true copy of the above and foregoing was electronically filed through ICCES which will send notification to all counsel of record.

/s/ Fran Aragon Eaves
For Gordon Rees Scully Mansukhani, LLP