DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO Address of Court: 1437 Bannock Street Denver, CO 80202	DATE FILED: October 4, 2021 9:00 AM FILING ID: 6A78E5F1E0F74 CASE NUMBER: 2020CV34319
Plaintiff: ERIC COOMER, Ph.D. v. **Defendants**: DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*	▲ **COURT USE ONLY** ▲
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DEFENDANTS HERRING NETWORKS, INC., D/B/A ONE AMERICA NEWS NETWORK, AND CHANEL RION'S REPLY IN SUPPORT OF THEIR SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S. § 13-20-1101

CONTAINS CONFIDENTIAL INFORMATION
ACCORDING TO OMNIBUS PROTECTIVE ORDER

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I. Introduction

As does his lawsuit generally, plaintiff Eric Coomer's anti-SLAPP response brief ("Response") essentially mocks the Colorado anti-SLAPP statute. On May 21, 2021, Judge Rappaport soundly reasoned, "Anti-SLAPP laws are designed 'to prevent SLAPPs [strategic lawsuits against public participation] by ending them early and without great cost to the SLAPP target.'" May 21, 2021 Order, p. 2 (citing *Equilon Enterprises v. Consumer Cause, Inc.*, 52 P.3d 685, 693 (Cal. 2002)). But this Court reversed Judge Rappaport's well-reasoned discovery stay, and several months of wide-ranging discovery ensued at great expense to Defendants. And now Dr. Coomer has filed not only his 150-page Response, but also 182 exhibits totaling 10 gigabytes of data (equivalent to about 5,100 pages and more than 50 hours of audio and video files, most of which have nothing to do with OAN or Rion).[1] Dr. Coomer apparently hopes to overwhelm the Court with the sheer size of his Response — in an effort to mask its lack of any meaningful substance, particularly as to OAN and Rion.

Despite his brief's length, Dr. Coomer's legal analysis lumps all Defendants together as if they're a monolith. But OAN (as a national news media company) and Rion (as OAN's chief White House correspondent) are fundamentally distinct from the other defendants. OAN and Rion diligently covered a controversy with dramatic global implications whose genesis preceded any statements by OAN or Rion. The Court should analyze each defendant independently.

Setting aside the attempted "shock and awe" of Dr. Coomer's bloated briefing, Dr. Coomer actually confirms key facts supporting the allegedly defamatory statements by OAN and Rion. As such, Dr. Coomer has affirmatively shown the absence of any false or defamatory statements by

[1] OAN and Rion incorporate by reference the evidentiary objections in their Motion to Strike and for Extension filed on September 22, 2021. (Filing ID D98938CEAED81). As set forth in that brief, the Court should strike the nine declarations submitted by Dr. Coomer.

OAN or Rion, as well as the absence of actual malice by them.

Dr. Coomer also ignores his own fatal credibility problems. For instance, Dr. Coomer initially denied authorship of his profane, violent, offensive, and extremely left-wing Facebook broadcasts, only to later admit in *New York Times Magazine* that he ***lied*** about not being the author of those posts.[2] In his deposition on September 23, 2021, Dr. Coomer made numerous additional admissions that doom his case and validate the reporting done by OAN and Rion. *See* Deposition of Eric Coomer ("Coomer Dep."), attached as **Exhibit A**.[3]

Coomer's defamation claims against OAN and Rion are particularly flawed because of the special protections afforded to a free press covering matters of global concern. The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). It offers the highest protection to speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Indeed, such speech is "at the heart of the First Amendment's protection," *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), and "occupies the highest rung of the hierarchy of First Amendment values," *Connick v. Myers*, 461 U.S. 138, 145 (1983), because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). That principle applies with even greater force to news coverage and commentary on matters of public concern because the First Amendment protects not only freedom of speech, but also freedom of the press and is

[2] In one of many efforts to circumvent the 150-page briefing "limit," Dr. Coomer, in his declaration but not in his brief, limply attempts to rationalize his about-face on his Facebook posts as a misunderstanding. (Response, Exh. A, ¶ 51). But his lie followed by his admissions speak for themselves.

[3] Because of citations to the Coomer Deposition and other information covered by the Omnibus Protective Order, OAN and Rion have filed this brief under seal. However, as stated in their motion challenging those confidentiality designations (Filing ID C4B754893D0BD), sealing this content is inappropriate under Colorado's sunshine law.

"intended to give to liberty of the press" the "broadest scope that could be countenanced in an orderly society." *Bridges v. California*, 314 U.S. 252, 265 (1941).

Accordingly, OAN's and Rion's anti-SLAPP motion should be granted, the claims against OAN and Rion should be dismissed with prejudice, and OAN and Rion should be awarded their fees and costs for being forced by Dr. Coomer to defend their First Amendment rights in the context of a very public and newsworthy controversy.

II. Anti-SLAPP discovery has confirmed that Dr. Coomer's case has no merit, and the Response omits or diminishes the significance of key facts.

Dr. Coomer spends 71 pages outlining his purported understanding of the facts but fails to address the very public lies that Dr. Coomer told related to his Facebook broadcasts. After the antifa call in which defendant Joseph Oltmann heard Dr. Coomer say he had ensured that President Trump would not win reelection in 2020, Mr. Oltmann gained access to Dr. Coomer's Facebook page. That Facebook page revealed numerous radical, profane, violent, police-hating, Trump-bashing posts showing Dr. Coomer's deep loathing of Trump and sympathy for antifa. *See* Coomer Dep., Exh. P23, attached as **Exhibit B**. The Facebook posts confirmed that Dr. Coomer held views consistent with the comment Mr. Oltmann heard on the antifa call. *See* Deposition of Chanel Rion ("Rion Dep."), **Exhibit C**, 118:11-20. For instance, on July 21, 2016, Dr. Coomer published on Facebook to approximately 300 "friends" that "[o]nly an absolute FUCKING IDIOT could ever vote for that wind-bag fuck-tard FASCIST RACIST FUCK" and stated that his opinions were his own and "not necessarily the thoughts of my employer, though if not, I should probably find another job . . . Who wants to work for complete morons?" Exh. B, p. 0072.

On December 8, 2020, Dr. Coomer wrote a guest editorial in *The Denver Post*. *See* Editorial attached as **Exhibit D**.[4] In that editorial, he said in no uncertain terms: "***[A]ny posts*** on social media channels purporting to be from me have also been fabricated." *Id.* (Emphasis added.) Dr. Coomer later reiterated in an interview with the *Ark Valley Voice* that "his Facebook account was dormant for about three and a half years,[5] until the George Floyd murder. At that point he began posting here and there. ***He was not the author of the wild posts being circulated***." *See* Article attached as **Exhibit E** (emphasis added).

But on August 24, 2021, *New York Times Magazine* published a stunning and devastating admission from Dr. Coomer in a profile about him: "***the Facebook posts were, in fact, authentic***." *See* Article attached as **Exhibit F** (emphasis added).[6] Dr. Coomer told the *Times* that "he believed every word of what he said on Facebook, but when colleagues later asked him what he was thinking, he was frank: He ***had screwed up***." *Id.* (Emphasis added.) This means not only that the Facebook posts providing factual background for the segments published by OAN and Rion were accurate, but also that Dr. Coomer had lied about them to curtail the fallout.

In the *Times* profile, Dr. Coomer still maintained that he never joined an antifa call, but information submitted with the Response ***confirms*** key aspects of a call that match Mr. Oltmann's description. In numerous podcasts, news reports, and his deposition in this case, Mr. Oltmann described listening via Zoom to a call in late September 2020 among antifa leaders. *See* Deposition of Joe Oltmann ("Oltmann Dep."), attached as **Exhibit G**, at 15:18-19, 51:16-24, 71:10-15. He

[4] Pursuant to Colo. R. Evid. 902(6), newspaper articles are self-authenticating documents. To the extent there is any argument that these statements are hearsay, they are admissions by Dr. Coomer that are admissible under Colo. R. Evid. 801(d)(2). Moreover, Dr. Coomer authenticated the article in his deposition. (Coomer Dep. 43:22-44:3).

[6] Dr. Coomer confirmed this article — and the authenticity of the Facebook posts — in his deposition. (Coomer Dep., 17:7-15, 36:9-15).

was not focused on (or familiar with) Dr. Coomer before the call, but rather joined the call to identify antifa journalists. *Id.* at 50:7-10. Mr. Oltmann noted that the call focused in part on right-wing activist Joey Camp. *Id.* at 76:10-20.

The Declaration of Individual 1, attached as Exhibit U to the Response, begins by noting that Individual 1 encountered Camp at a protest on ***September 23, 2020***. (Response, Exh. U, ¶ 8). Individual 1 then ***admits*** that he (a leader in the Black Lives Matter community) hosted a Zoom conference call on ***September 25, 2020*** that 15-20 activists joined to discuss escalating tactics from Camp. (*Id.*, ¶ 10). This is an exact match to the call described by Mr. Oltmann, and the call occurred ***one day*** before Mr. Oltmann first searched Google for "Eric," "Dominion," and "Denver" on ***September 26, 2020***. (Oltmann Dep., 72:1-8).[7] There can be no doubt that this is the call that formed the basis for Mr. Oltmann's future statements.

It is not surprising that Individual 1 and others on the call might deny that they are "antifa," but a collection of left-wing activists discussing how to counter efforts by a right-wing activist would fit Mr. Oltmann's definition of antifa. *See* Oltmann Dep., 41:14-18 (describing an antifa member as "[a] radical leftist that communicates openly with other radical leftists that stand for antifa being antifascist. . . [t]ypically white extremist liberals"). Thus, based on the evidence provided ***by Dr. Coomer himself***, an antifa call (as that would be defined by Mr. Oltmann) ***did*** happen.[8]

[7] In the deposition, Mr. Oltmann authenticated a "screenshot" of his search, which has been produced in discovery. (Oltmann Dep., 72:1-8). That screenshot is attached as **Exhibit H**.

[8] Five individuals referenced in the Response are given confidential treatment. This is notable because the applicable Protective Order states that "the Court has determined that information concerning ***the identity of persons involved in the alleged 'Antifa conference call'*** at issue in this case (referred to herein as Confidential Information) is highly relevant to the claims at the heart of this suit and is discoverable." (Emphasis added). Thus, Dr. Coomer's treatment of these five individuals suggests that they were, or Dr. Coomer believes they may have been, on the antifa call. Individuals 1, 3, and 4, all of whom were in Mr. Oltmann's notes as possibly being on the call, apparently have denied being on any "antifa call," but Individual 1 has specifically described a

III. Argument

A. The anti-SLAPP statute applies.

The Colorado anti-SLAPP statute applies — if it did not apply, Dr. Coomer should have briefed that legal question months ago, without engaging in extensive "anti-SLAPP discovery." Judge Rappaport presumed application of the anti-SLAPP law in denying discovery to Dr. Coomer. *See* May 21, 2021 Order. And in the Court's Order reversing Judge Rappaport and allowing discovery, the Court applied the anti-SLAPP standards, with no argument from Dr. Coomer that the statute did not apply. *See* June 8, 2021 Order.

As Dr. Coomer acknowledges, the anti-SLAPP statute applies to an "act in furtherance of a person's right of petition or free speech," including "any written or oral statement or writing made . . . in a public forum in connection with an issue of public interest." C.R.S. § 13-20-1101. Questions about the adequacy of Dominion voting machines and their use in elections were publicly debated long before the 2020 presidential election. In 2017, Georgia voters filed a lawsuit regarding the security of Dominion machines, and in October 2020, the federal judge in that case credited testimony from an "array of experts and subject matter specialists [that] provided a huge volume of significant evidence regarding the security risks and deficits in the [Dominion] system," finding that those risks were neither "hypothetical nor remote." *Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1278, 1341 (N.D. Ga. 2020). Similarly, in January 2020, the state of Texas refused to certify Dominion's system, questioning whether it "is safe from fraudulent or unauthorized manipulation." *See* **Exhibit I**.[9] A more robust history of the controversies involving Dominion can be found in the Counterclaim filed by Sidney Powell against Dominion in *U.S. Dominion, Inc.*,

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call on September 25, 2020, that matches the description of what Mr. Oltmann refers to as the antifa call, and Individuals 3 and 4 have ***not*** denied being on that same call (whether labeled as "antifa," "BLM," or "liberal"). *See* Response, Exhs. Q and T.

[9] The Court can take judicial notice of public documents pursuant to Colo. R. Evid. 201.

et al. v. Powell, et al., Case No. 21-cv-00040 (D.D.C.), attached as **Exhibit J**, at pp. 32-37.

In the context of these public controversies, rather than shying from the spotlight, Dr. Coomer "invited public scrutiny." (Response, ¶ 166). *See DiLeo v. Koltnow*, 613 P.2d 318, 322 (Colo. 1980); *Lewis v. McGraw-Hill Broad. Co., Inc.*, 832 P.2d 1118, 1122-23 (Colo. App. 1992). Like the plaintiffs in *DiLeo* and *Lewis*, Dr. Coomer was not an average employee; he was and is a public figure who has made numerous public appearances to speak about and advocate for Dominion. *See* Motion, p. 21, n. 10 (describing multiple public appearances by Dr. Coomer on behalf of Dominion). Contrary to Dr. Coomer's argument, his behavior was entirely distinguishable from the plaintiff in *Quigley v. Rosenthal*, 326 F.3d 1044, 1059-61 (10th Cir. 2003), or other similar cases cited by Dr. Coomer, in which the statements were made against a "person with which the general public had [no] contact." Dr. Coomer was, and had been for years, a public advocate for Dominion, particularly when issues arose about election security. For example, in 2018, Dr. Coomer "was invited to join the Cyber Security Task Force assembled by the National Association of Secretaries of State." (Response, Exh. A, ¶ 4). He also has been "an active participant in the development of the Institute of Electrical and Electronics Engineers (IEEE) common data format for elections systems" and "developed Dominion's Coordinated Vulnerability Disclosure Program in conjunction with several third-party industry researchers in 2020." (*Id.*). Dr. Coomer then doubled down on his solicitation of public scrutiny after the 2020 election, giving inaccurate interviews and publishing a false editorial. *Supra* p. 4. As in *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1105-08 (Colo. 1982) (which Dr. Coomer calls the "seminal Colorado case on matters of public concern," Response, ¶ 164), there is a nexus between the public and Dr. Coomer's work as head of security for an election company that was facing public scrutiny (before the 2020 election), giving rise to a public interest

separate and apart from the alleged defamation.

But even if there was not public interest in Dr. Coomer's actions before the 2020 election, there was certainly public interest in his activities before ***OAN and Rion*** reported on the controversy. The claims against OAN and Rion must be evaluated in light of the unique facts and law relevant to them. In the Defamatory Statement Spreadsheet submitted with the Response, Dr. Coomer identified ***20 different statements*** by various individuals and media outlets before OAN and Rion ever reported on Dr. Coomer. (Resp., Exh. A-1). Thus, regardless of whether there was a public interest in Dr. Coomer before the 2020 election (and there was), there undoubtedly was a public interest in Dr. Coomer when OAN and Rion first reported on him on November 17, 2020. OAN and Rion did nothing to manufacture that public interest.

Accordingly, the challenged statements by OAN and Rion involve core First Amendment speech made on issues of pre-existing public interest, and the anti-SLAPP statute applies. For Dr. Coomer to suggest otherwise demonstrates once again that he simply is not credible.

B. Dr. Coomer can't prevail on the merits of his defamation claim.

Given that the anti-SLAPP statute applies, Dr. Coomer bears the burden of establishing a reasonable likelihood that he will prevail on each of his claims. C.R.S. § 13-20-1101(3)(a). Dr. Coomer must show a *prima facie* basis for his claims. *Baral v. Schnitt*, 376 P.3d 604, 608-09 (Cal. 2016). The Court must engage in a "summary-judgment like procedure" to evaluate all available evidence and decide whether Dr. Coomer has met his burden. *Id.* at 608. Dr. Coomer has not.

To prevail, Dr. Coomer would need to establish his claim by "clear and convincing" evidence, which the Colorado Supreme Court has held to be the constitutionally required standard. *Diversified*, 653 P.2d at 1109. And in California, the state after which Colorado modeled its anti-SLAPP statute, plaintiffs are required to present "clear and convincing evidence" of actual malice to survive an anti-SLAPP motion. *See, e.g. Hu & Assocs., LLC v. New Life Senior Wellness Ctr.,*

LLC, 2018 WL 8755870, *6 (C.D. Cal. Dec. 10, 2018); *Christian Rsch. Inst. v. Alnor*, 148 Cal. App. 4th 71, 84 (2007); *Reed v. Gallagher*, 248 Cal. App. 4th 841, 862 (2016).

Dr. Coomer cannot establish his claim by "clear and convincing evidence" because (1) Dr. Coomer cannot demonstrate false and defamatory statements, (2) Dr. Coomer cannot demonstrate actual malice, and (3) Dr. Coomer's claims are barred by the incremental harm doctrine.

1. There is no *prima facie* evidence of falsity or defamatory meaning in statements made by OAN and/or Rion concerning Dr. Coomer.

The Court suggested in both the July 2 and July 7, 2021 hearings that there was evidence of "probable falsity" of Mr. Oltmann's alleged statements, but OAN and Rion urge the Court to closely reexamine those conclusions in light of the evidentiary record. The evidence ***presented by Dr. Coomer*** confirms many of the details in the antifa call that Dr. Coomer claims never happened, and the admissions by Dr. Coomer in the *Times* article and in his deposition confirm facts in support of the allegedly defamatory statements by OAN and/or Rion and demonstrate that Dr. Coomer lacks credibility. The Court should find that there is no *prima facie* evidence of falsity or defamatory meaning relating to any statements by OAN or Rion.

Dr. Coomer's Response, through the "Defamatory Statement Spreadsheet," attempts to increase the number of allegedly defamatory statements at issue, but this is not appropriate. Colorado courts have held that the content of the alleged defamation must be pled with particularity. *Martinez v. Winner*, 548 F. Supp. 278, 307 (D. Colo. 1982); *Walters v. Linhof*, 559 F. Supp. 1231, 1234 (D. Colo. 1983). Accordingly, Dr. Coomer was required to plead ***in his complaint*** the specific language that he claims is defamatory as to each defendant.

The Complaint identifies only the following allegedly defamatory statements by OAN and/or Rion:

1. "On November 17, 2020, OANN Chief White House Correspondent Chanel Rion published false statements regarding Dr. Coomer, tweeting 'Dominion Director of

Strategy and Security, #EricCoomer: "Trump won't win. I made F***ing sure of that."""[10] (Compl., ¶ 59).

2. "Chanel Rion, Dominion-izing the Vote, Nov. 21, 2020, YOUTUBE (saying 'In Coomer's case, he was in a position of power to actually act on his rage against Trump and Trump voters. What does he mean when he says "Trump won't win. I made f-ing sure of that." Nothing?')." (Compl., n.74).

3. "Top Dominion Exec: Trump Is Not Going to Win. I Made F**ing Sure of That, Nov. 29, 2020, YOUTUBE (publishing Oltmann saying 'Eric Coomer was this, you know, he's not just Antifa, he was responsible for putting his finger on the scales of our election' and adding '***If*** Coomer is investigated and found to have indeed tampered with a presidential election, such an action could be tried for treason. Unfortunately, the question is, will the FBI step up to investigate?')." (Compl., n.74) (emphasis added).

The Complaint also includes hyperlinks to multiple OAN segments that had nothing to do with Dr. Coomer, or even Dominion. (Compl., n.76). But even if the Complaint could be read as alleging that all statements by OAN and/or Rion about Dominion were defamatory against Dr. Coomer (as Dr. Coomer seems to suggest at pp. 56-58 of the Response, where he goes on at length about the contents of "Dominion-izing the Vote" and an interview with Ron Watkins that does not mention Dr. Coomer), those claims must be dismissed because the statements about ***Dominion*** are not defamatory as to ***Dr. Coomer***. *See Stump v. Gates*, 777 F. Supp. 808, 826 (D. Colo. 1991); *Deatley v. Allard*, 2015 WL 134271, *5 (D. Colo. Jan. 9, 2015). If it is Dr. Coomer's position that statements about Dominion are also statements about him, he must plead evidence supporting that conclusion to establish defamation *per se*. *See also Lininger v. Knight*, 123 Colo. 213, 221 (1951). Bottom line, allegedly defamatory statements about Dominion are not "of and concerning" Dr. Coomer because Dominion and Dr. Coomer are not synonymous. *See, e.g., Provisional Gov't of Republic of New Afrika v. Am. Broad. Companies, Inc.*, 609 F. Supp. 104, 108 (D.D.C. 1985) ("[S]tatements which refer to an organization do not implicate its members."). In fact, Dr. Coomer no longer works for Dominion (and may have been fired because of this controversy).

[10] That Dr. Coomer would say something like this — given what he broadcast on Facebook — is completely consistent with his penchant for incendiary, over-the-top, profane, extremist ranting.

Thus, Dr. Coomer's claims against OAN and Rion relate ***only*** to Statements 1, 2 and 3 above. Dr. Coomer claims that these statements (1) allege that Dr. Coomer was on an antifa call, (2) allege that Dr. Coomer threatened to undermine the integrity of the election, and (3) allege that Dr. Coomer actually did influence the election. (Response, ¶ 188). As to the third point, this is plainly incorrect. Statement 1 clearly does not allege that Dr. Coomer influenced the election. Statement 2 simply makes the truthful factual assertion that Dr. Coomer "was in a position of power to actually act" with respect to the election and asks the very legitimate question of how the reported statement made during the antifa call should be interpreted. And Statement 3 raises the question of what would happen ***if*** Dr. Coomer were found to have tampered with the election.

Dr. Coomer's claims against OAN and Rion therefore come down to whether an "antifa call" occurred and what was said on that call. Regardless of whether there was a call (and all evidence points to the fact that there was), saying someone participated in an antifa call is not defamatory. Indeed, most Americans — including Dr. Coomer — consider themselves to be "antifascist." *See* Coomer Dep., 108:1-2 ("Q: Are you antifascist? Dr. Coomer: Absolutely."). Moreover, Dr. Coomer maintains that antifa is not an organization to which someone could be a member. *Id*. at 34:5-12. And he stated in his deposition that he does not know what antifa is. *Id.* at 111:7-8 ("I don't know what Antifa refers to."). It is difficult to imagine how Dr. Coomer can credibly claim to have been defamed by a word he cannot define. What is or is not an "antifa call" is inherently subjective and not capable of defamatory meaning. *Seelig v. Infinity Broad. Corp*., 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108 (2002) (reversing lower court's denial of anti-SLAPP motion and finding statement that participant was a "big skank" was not actionable because it was too vague to be proven true or false).

Dr. Coomer argues that the occurrence of the antifa call is "a simple statement of fact" that

is "verifiably false" (Response, ¶ 188), but the reality is to the contrary. As set forth *supra* pp. 4-5, the evidence submitted with the Response actually ***confirms*** key aspects of the call. The only remaining points of dispute are whether Dr. Coomer participated and whether he said what Mr. Oltmann has quoted him as saying. Dr. Coomer claims that he did not participate in an antifa call (whatever that means to him) (Response, Exh. A, ¶ 18), but he importantly does ***not*** deny having been on the September 25, 2020 call with Individual 1. In fact, he acknowledges that he spent a portion of that day "on conference calls" and says only that he did not "participate in any 'Antifa' conference call on that day." (Response, Exh. A, ¶ 40). Individual 1 also does not deny that Dr. Coomer was on the call. He only claims that "no one mentioned 'Eric from Dominion'" during the call and he does "not know Eric Coomer, nor have I ever met him." (Response, Exh. U, ¶¶ 11-12). And Individual 1 apparently did not know who all of the participants on the call were, given that he did not know Mr. Oltmann was on the call — and he could not have identified Dr. Coomer if he did not even know Dr. Coomer, as he attests. Thus, despite months of discovery, Dr. Coomer has only managed to ***confirm*** that the call described by Mr. Oltmann occurred, and Dr. Coomer has failed to provide any evidence that he was not on the call (whether it be called an "antifa call," a "BLM call," a "beware Joey Camp call," or anything else).

Both Dr. Coomer and Individual 1 claim that Dr. Coomer made no statements in the call about the election, but both are known liars. With respect to Individual 1, a charitable explanation could be that he simply did not hear the statement — Individual 1 has produced no notes from the call that would contradict Mr. Oltmann's contemporaneous notes. But Individual 1 also has credibility problems. The same day his Declaration was submitted to the Court, Individual 1 was censured by the school board on which he sits after an investigation concluded Individual 1 had flirted online with a 16-year-old student and made coercive and intimidating social media posts.

See **Exhibit K**. And days later, hundreds of high school students in Individual 1's school district staged a walkout to force his resignation and at least one editorial board for a Denver newspaper has called for his resignation. *See* **Exhibits L, M**.

As for Dr. Coomer, he has significant motivation to lie about the statements made during the call, and he has already proven himself to be dishonest, having lied about his Facebook posts before coming clean in the *Times*. *Supra*, p. 4. Moreover, the suggestions in the Response that Dr. Coomer could not have been on the call because he would not "be welcome or trusted amongst individuals affiliated with Antifa" as a man in "his 50's with a PhD" (Response, p. 4 and Ex. Q, ¶ 19) are flawed. The declaration submitted by Dr. Coomer on this point amounts to inappropriate expert testimony and should be disregarded. *See* Colo. R. Evid. 704; *Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. Ct. App. 2000) (noting that an expert may not usurp the function of a court by expressing an opinion of the applicable law or legal standards). Regardless, this line of argument is unreasonable because (1) antifa is not a defined group with an established membership (Coomer Dep., 34:5-12), (2) Dr. Coomer's aggressive, profane, violent, antifa-supporting, extremely left-wing Facebook posts suggest that he would be very comfortable in whatever Mr. Oltmann considered to be an antifa call (Oltmann Dep., 41:14-18), and (3) Dr. Coomer has in fact described himself as being "antifascist," and Dr. Coomer admits that "antifa" is a truncation of "antifascist." (Coomer Dep., 108:1-23).

On the other hand, Mr. Oltmann has told a consistent truth, with many of the details now corroborated by Dr. Coomer. As Mr. Oltmann testified under oath, "It's not a story. It's what happened. So it's not a story. It's exactly what happened." *See* Deposition of FEC United, attached as **Exhibit N**, at 25:25-26:2. Even with four months of discovery and 500 pages of exhibits, Dr. Coomer has failed to give *prima facie* evidence of falsity or defamatory meaning.

2. There is no *prima facie* evidence of actual malice.

Given that this press coverage was and still is a matter public concern, *supra* p. 6, Dr. Coomer must establish actual malice to prevail on his defamation claim. The Colorado Supreme Court has held that "first amendment values would be better honored by adopting the same definition of 'reckless disregard' in cases involving public officials, public figures, ***and matters of public or general concern.***" *Diversified*, 653 P.2d at 1106. (Emphasis added). Although Dr. Coomer wishfully contends that the actual malice standard does not apply (Response, ¶ 194), Dr. Coomer sought — and the Court granted — anti-SLAPP discovery for the express purpose of establishing actual malice.[11] *See* June 8, 2021 Order, at p. 3. That simply confirms what is obvious: The actual malice standard applies because this case involves a matter of public concern.

Dr. Coomer also is a public figure because of his public activities on behalf of a highly public election company ***before*** the controversy arose surrounding the 2020 election. "In determining whether a person is a public figure, a court must examine the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Diversified*, 653 P.2d at 1107. In this case, as set forth *supra* pp. 6-7, Dr. Coomer was heavily and publicly involved in the controversy surrounding Dominion that existed before the 2020 election. Indeed, part of Dr. Coomer's argument that he could not have been on the antifa call is that he spent the weeks leading up to the election giving public testimony in the *Curling v. Raffensperger* litigation. (Response, Exh. A, ¶ 40). Given his very public role in defending Dominion from concerns about election security, it is inconceivable that Dr. Coomer is not, at minimum, a limited public figure on the issues of election security and integrity involving Dominion. *See Gertz v. Robert Welch,*

[11] Notably, although Dr. Coomer only sought discovery on actual malice and conspiracy issues, Dr. Coomer inappropriately used anti-SLAPP discovery to address the other elements of his claims.

Inc., 418 U.S. 323, 351 (1974) (defining a limited purpose public figure as one who "voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues"); *Lewis*, 832 P.2d at 1122 ("Limited purpose public figure status focuses on two questions: the threshold question of whether the defamatory statement involves a matter of public concern and, more importantly, whether the level of plaintiff's participation in the controversy invites scrutiny.").

Dr. Coomer's Facebook activity also belies the notion that he was "private" on matters of public concern, like the election. Dr. Coomer regularly broadcast his thoughts on politics and the election to an audience of more than 300 people who were not under his control. As noted in the *Times* article, "any one of Coomer's 'friends'— and he had several whom he knew to be Trump supporters — could have taken screenshots of his posts and sent the information along to someone who could use it." *See* Exh. E. Dr. Coomer, purportedly an expert in digital security, should have known that broadcasting his thoughts to an audience of 300 individuals was no more "private" than posting a billboard on the highway. Accordingly, by any test, Dr. Coomer should be treated as a public figure (particularly as to this very public controversy).

Thus, both as a matter of public concern and because Dr. Coomer is a public figure, he must make a *prima facie* case of actual malice to avoid dismissal. The Colorado Supreme Court has applied "the *St. Amant* definition of 'reckless disregard' in cases involving matters of public or general concern, as well as in cases involving public officials and public figures." *Id.* at 1110. The U.S. Supreme Court in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), held that reckless disregard could be found only if there was "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." No such evidence exists here, and Dr. Coomer's claims against OAN and Rion thus fail at the anti-SLAPP stage.

Relying largely on inappropriate and inadmissible "expert" testimony, Dr. Coomer tries to establish actual malice based on alleged bias or alleged lack of journalistic ethics. OAN was not biased in its legitimate, hard-news reporting, but even if it were, bias is not equivalent to actual malice. *See Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1043 (10th Cir. 2013) ("[A] publisher's 'adversarial stance' may be 'fully consistent with professional, investigative reporting' and is not necessarily 'indicative of actual malice.'"). Additionally, OAN was ethical in its reporting, but, even if it weren't, ethical lapses do not equate to actual malice. *See OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 56 (D.D.C. 2005) (granting motion to dismiss that an expert's claim that defendant violated journalistic ethics supports a finding of "at most . . . negligence or bad journalism not actual malice"). Accordingly, Dr. Coomer's attacks on OAN and Rion (which have nothing to do with this case and include an affidavit from a former employee with an axe to grind because he was fired) are irrelevant.

Dr. Coomer provides a laundry list of issues he has with the way Mr. Oltmann went about gathering his information (Response, ¶ 197), but Dr. Coomer provides no case law indicating that these considerations are evidence of actual malice. And Dr. Coomer fails to show how ***OAN and Rion***, after the events became public in multiple other national publications, exhibited actual malice.[12] Dr. Coomer only alleges, in broad and conclusory terms, that Defendants failed to "investigate and corroborate the allegations before publishing them." (Response, ¶ 199). But Dr. Coomer's own investigation in this case shows this is false. A national cable news network publishing on a daily schedule cannot possibly be expected to engage in the level of effort Dr. Coomer has futilely engaged in here, and Dr. Coomer's Response shows that even if OAN and

[12] In fact, when asked at his deposition to identify the right-wing commentators whom he claimed had spread election disinformation, ***he did not mention Rion or anyone else associated with OAN***. *See* Coomer Dep., 44:12-17.

Rion had done so, they would have ***affirmed*** Mr. Oltmann's reliability, affirmed the truth of his allegations about Dr. Coomer's vile Facebook posts, affirmed Mr. Oltmann's allegations about a call that could reasonably be cast as an "antifa call," and affirmed Dr. Coomer as a far-left-wing radical with the power and motive to influence the election (and the lack of self-control to suggest (perhaps facetiously but nevertheless recklessly) that he had in fact done so). *See Gomba v. McLaughlin*, 180 Colo. 232, 236 (1972) (holding that the existence of substantial truth depends on whether the publication as a whole "produces a different effect upon the reader than that which would be produced by the literal truth of the matter").

Moreover, the facts gathered in discovery show that OAN and Rion engaged in significant thought and effort before reporting on Dr. Coomer. OAN and Rion did not rush any segment to air, even as other defendants and media outlets nationwide covered the same news. Indeed, the special on "Dominion-izing the Vote" was in the works long before Mr. Oltmann's November 9 podcast about Dr. Coomer. *See* Deposition of Charles Herring ("Herring Dep."), attached as **Exhibit O**, at 11:22-16:8, 26:8-32:20, 71:12-25, 117:6-118:1; Rion Dep., at 12:8-13:17, 18:22-19:7, 115:2-7, 117:15-17. OAN and Rion did not hear about Dr. Coomer and craft a narrative, but rather learned additional information about apparent biases held by a high-ranking Dominion employee that were consistent with their other reporting. *See* Rion Dep., 74:20-75:20. OAN and Rion then followed their usual practices and review and written approval sign-off procedures. *See* Herring Dep., 47:21-48:3, 159:14-161:19; Rion Dep., 63:4-17.[13]

[13] Dr. Coomer attempts to improperly rely on the declaration of retired journalist Frederick W. Brown, Jr. (who purports to provide expert testimony despite not having been presented as an expert) to argue that OAN should have reported its segments differently. These arguments are improper legal opinions on actual malice and without merit. It also is ironic that Brown spent his career at *The Denver Post*, which failed to identify the clear false statements in Dr. Coomer's editorial about himself before it was published. *Supra*, p. 4.

OAN sought opportunities to interview Dr. Coomer, but at that time he had gone into hiding and OAN could not locate him. *See* Herring Dep., 18:17-24, 28:10-29:2; Rion Dep., 89:13-90:13. Moreover, as Dr. Coomer has acknowledged, Dr. Coomer greeted at least one individual attempting to talk to him with a shotgun, meaning there was significant risk associated with seeking comment from him. *See* Response, Exh. A, ¶ 20 ("In one instance, someone came to my house while I was home and started shouting through the door at me and asking about election fraud. I warned him that I was armed with a shotgun and that he was trespassing and told him to leave immediately."). And regardless, "it is well settled that there is no requirement that the publication report the plaintiff's side of the controversy." *Curto v. N.Y. Law Journal*, 144 A.D.3d 1543, 1544 (N.Y. App. Div. 2016).

Dr. Coomer's argument for actual malice boils down to this: Dr. Coomer does not believe OAN and Rion did enough to investigate Mr. Oltmann's claims and corroborate them. As shown above, this is not true.[14] But even if it were, failure to investigate before publishing does not establish reckless disregard for the truth. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). And lack of support (which OAN and Rion have in spades, especially after all of the lies and admissions by Dr. Coomer) also does not come close to actual malice, which requires something akin to outright fabrication. *St. Amant*, 390 U.S. at 732. Dr. Coomer can provide no *prima facie* evidence of actual malice (and certainly no "clear and convincing" evidence), and the Complaint should be dismissed with prejudice against OAN and Rion.

3. Dr. Coomer's claims are barred by the incremental harm doctrine.

Even if Dr. Coomer had *prima facie* evidence of false, defamatory statements and actual

[14] Additional details about the extensive investigation are set forth in OAN's and Rion's Response to Plaintiff's Motion for Sanctions (File ID 24C55AB2C9077), at pp. 7-12, which is incorporated by reference here.

malice (which he does not), Dr. Coomer's claims still would be barred by the incremental harm doctrine. "[W]hen unchallenged or nonactionable parts of a particular publication are damaging, another statement, though maliciously false, may not be actionable because it causes no harm beyond the harm caused by the remainder of the publication." *Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 965 (Colo. Ct. App. 2000).

In this case, the segments published about Dr. Coomer's statements in the antifa call also referred to his violent, profane, offensive, left-wing Facebook posts, which Dr. Coomer has now ***admitted*** in the *Times* and in his deposition were his posts.[15] The Facebook posts show extreme bias for someone who was in a significant position of power and control at one of the companies charged with supplying voting machines for American elections. Regardless of whether the antifa call occurred as Mr. Oltmann has credibly testified under oath and penalty of perjury, the confirmed Facebook posts from Dr. Coomer would have had the same impact on his reputation and career prospects — indeed, it is difficult to imagine how Dominion or any voting machine company could employ someone with such unhinged partisan biases, which likely is why Dr. Coomer lied about his Facebook postings and why Dr. Coomer no longer works for Dominion. The Facebook posts show Dr. Coomer to be a vile, profane, craven, and dangerous extremist. Moreover, Dr. Coomer's lies about his Facebook posts show that he lacks credibility. Put simply, Dr. Coomer is solely responsible for destroying Dr. Coomer's reputation.

The antifa call is thus inconsequential to Dr. Coomer's reputation, and neither OAN nor Rion ever said Dr. Coomer actually rigged the election (nor are they alleged by Dr. Coomer to have done so). But even if OAN and/or Rion had said that, it would have done no more damage to Dr. Coomer than the damage he's done to himself on Facebook, in *The Denver Post*, in the *Ark*

[15] This argument was not raised in OAN and Rion's original motion because at that time, Dr. Coomer had not yet made his startling admissions to the *Times* and in his deposition in this case.

Valley Voice, and in *New York Times Magazine*. Nor would such a statement do any more damage than Dr. Coomer has done to himself by bringing this SLAPP and inadvertently revealing further his malevolent, spiteful, dishonest, and dangerous character. The claims against OAN and Rion therefore fail under the incremental harm doctrine and should be dismissed with prejudice.

C. Dr. Coomer cannot make a *prima facie* showing of intentional infliction of emotional distress claim.

Dr. Coomer acknowledges, as he must, that a plaintiff must prove actual malice to establish an intentional infliction of emotional distress ("IIED") claim when the plaintiff is a public figure. (Response, ¶ 201). *See also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) ("We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'"). As set forth above, Dr. Coomer cannot make a *prima facie* showing of actual malice by clear and convincing evidence. *Supra* pp. 14-18. Accordingly, this claim fails for the same reason as Dr. Coomer's defamation claim.

Additionally, to prevail on an IIED claim, the conduct at issue must "go beyond all possible bounds of decency, and to be regarded as atrocious." *Gordon v. Boyles*, 99 P. 3d 75, 82 (Colo. 2004). Given the confirmed Facebook posts by Dr. Coomer and the fact that numerous aspects of the antifa call have now been confirmed, OAN and Rion cannot be said to have engaged in any such conduct. This claim should also be dismissed against OAN and Rion, with prejudice.

D. Dr. Coomer cannot make a *prima facie* showing of conspiracy.

Despite claiming that he needed anti-SLAPP discovery to uncover details of the so-called "conspiracy" (June 8, 2021 Order, p. 3), Dr. Coomer has presented no facts to support the existence of a conspiracy among any defendants, and particularly with respect to OAN and Rion. Nothing

Dr. Coomer has described about OAN and Rion's conduct — running newsworthy segments about a matter of public interest after it has been covered by various other media entities — is different from any other scenario where a major news story breaks and various networks cover it. By Dr. Coomer's logic, every major network must be involved in a "conspiracy" with the President each time the State of the Union speech occurs and then is reported. The fact that multiple individuals and news outlets chose to discuss and cover the same newsworthy issue is not a conspiracy, and Dr. Coomer's theory to the contrary is nonsensical (and extremely dangerous to a free press).

Moreover, because Dr. Coomer's other claims fail (as set forth above), he cannot assert a claim for conspiracy. *See W. & English Sales Ass'n v. Gc Merch. Mart LLC,* 2020 Colo. Dist. LEXIS 4610, *26 (Colo. D. Ct. Dec. 29, 2020) ("A conspiracy is a derivative claim, not independently actionable."). Accordingly, this claim should be dismissed, with prejudice.[16]

E. Dr. Coomer cannot make a *prima facie* showing for injunctive relief.

Because Dr. Coomer cannot make a *prima facie* showing on any of his other claims, his injunctive relief claim (which isn't really a freestanding claim) fails as well. *See Wibby v. Boulder County Board of County Commissioners*, 409 P.3d 516, n. 2 (Colo. App. 2016) (noting that injunctive relief is a remedy, not a substantive claim for relief). Because all of Dr. Coomer's claims are without merit, this claim should be dismissed against OAN and Rion as well.

IV. Conclusion

Dr. Coomer's Complaint should be dismissed with prejudice as to OAN and Rion, and OAN and Rion should be awarded their fees and costs under the anti-SLAPP statute.[17]

[16] The allegation that OAN reporter Christina Bobb worked collaboratively with the Trump Campaign (Response, ¶¶ 123-125) has no bearing on this claim because, among other reasons, Dr. Coomer has presented no evidence that Bobb did any work on matters related to Dr. Coomer. (Herring Dep., 112:22-25). And Dr. Coomer has alleged no defamatory statements by Ms. Bobb.

[17] OAN and Rion submit this 21-page brief based on their pending unopposed motion for leave to file an anti-SLAPP reply of this length. (File ID C095E95D380A2).

Respectfully submitted on October 4, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October 2021, a true and correct copy of the foregoing was electronically served via the Integrated Colorado Courts E-Filing System (ICCES) and has been e-served via ICCES on all counsel of record.

s/ Richard A. Westfall