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DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	
Plaintiff: ERIC COOMER, Ph.D. v. **Defendants**: DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C., DEFENDING THE REPUBLIC, INC., RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADDNESS 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, and NEWSMAX MEDIA, INC.	▲ COURT USE ONLY ▲
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**DEFENDANT, DONALD J. TRUMP FOR PRESIDENT, INC.'S,
REPLY IN SUPPORT OF ITS
MOTION TO DISMISS PURSUANT TO C.R.S. § 13-20-1101**

Defendant Donald J. Trump for President, Inc. ("The Campaign"), by and through its legal counsel, Jackson Kelly PLLC, hereby submits the following Reply in Support of its Motion to Dismiss Pursuant to C.R.S. § 13-20-1101:

I. The anti-SLAPP statute most definitely applies in this case.

Despite Plaintiff's unfounded contentions to the contrary, Defendant has undoubtedly met

its burden of establishing that the anti-SLAPP statute applies to the statements attributed to The Campaign. All of the alleged defamatory statements and publications Plaintiff attributes to The Campaign concern the 2020 Presidential election and mounting claims of voter fraud within The Campaign and the public at large. The election, which is quintessentially a matter of public interest, was one of the most controversial, watched, and talked about matters of public interest in American history. The national news was entrenched in discussions of allegations of voter fraud. This was not only a matter of public interest; it was the matter of public interest, and no credible argument can be made to the contrary.

The court must consider the "content, form, and context of [the defendant's] statements to determine whether they address a matter of public concern." *Shoen v. Shoen*, 292 P.3d 1224, 1231 (Colo. App. 2012). Public concern "is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public" at the time of publication. *Id*. "[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.'" *Id.*, *citing McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008). 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." *Shoen*, at 1229; *Smiley's Too, Inc. v. Denver Post Corp.,* 935 P.2d 39, 42 (Colo. App. 1996).

Surely this Court suffered through the endless news cycle on this very subject along with the rest of the nation and the world. Regardless of political viewpoint, it is inconceivable to consider this subject as anything other than a matter of public concern.

Despite Plaintiff's contentions to the contrary, it is the matter or issue being discussed, not

the specific individual referenced, that must be a matter of public interest. "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." *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 43 (1971). Colorado courts have expressly adopted *Rosenbloom. See Walker v. Colorado Springs Sun,* 188 Colo. 86, 538 P.2d 450 (1975); *Diversified Mgmt., Inc. v. Denver Post, Inc.,* 653 P.2d 1103, 1110 (Colo. 1982). Furthermore, as discussed in detail below, the alleged defamatory statements and publications relate to issues that were already under judicial consideration. *See*, *e.g.*, *Donald J. Trump for President, Inc. v. Boockvar,* case 4:20-cv-02078-MWB, filed November 9, 2020, USDC for the Middle District of Pennsylvania. Therefore, the anti-SLAPP statute unquestionably applies to the alleged statements and publications attributed to The Campaign, and the burden shifts to Plaintiff to establish a likelihood of success on his claims.

II. Plaintiff cannot establish a likelihood of success of his claims.

a. Plaintiff's claims are completely barred by the defenses asserted

Having met our burden of establishing that the anti-SLAPP statute applies, the burden shifts to Plaintiff. Because he cannot overcome the defenses raised, Plaintiff cannot establish a likelihood of success on the merits of his claims.

i. The litigation privilege bars liability for the statements allegedly made by Defendants Powell and Giuliani.

Defendant hereby incorporates pages 5 through 10 of Defendant's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5) and C.R.C.P. 12(b)(2) (April 16, 2021, filing ID No.

992DD3DD6BD23) by reference as if fully set forth herein. The Campaign has established that the litigation privilege, as defined by Colorado jurisprudence, applies to the alleged defamatory statements concerning election fraud and subsequent election fraud litigation. Plaintiff argues that the litigation privilege does not apply to the alleged defamatory statements made by Powell and Giuliani because they were made to the public, and Powell, Giuliani and The Campaign lacked good faith in pursuing litigation. But the litigation privilege is not limited to statements made to parties connected to litigation; it includes communications to potential plaintiffs, who might have an interest in or otherwise be connected to the litigation. *Aminokit Laboratories, Inc. v. Reinan*, 15CA0933, August 4, 2016 (unpublished), attached hereto as **Exhibit A.** Moreover, the good faith contemplation of litigation relating to the alleged defamatory statements is demonstrated by the various lawsuits filed by Powell and The Campaign for election fraud.

Plaintiff's continued reliance on *Seidl v. Greenhouse Mortg. Co.*, 30 F. Supp. 2d 1292 (D. Colo. 1998) as demonstrating that the litigation privilege does not apply to statements made to the public is misplaced. Subsequent Colorado courts have deliberately chosen not to adopt the holding in *Seidl* and instead held that publicizing proposed or pending litigation can serve an important purpose to alert those that may have an interest in, or otherwise be connected to, said litigation. *See Begley v. Ireson*, 399 P.3d 777, 782 (Colo. App. 2017); **Exhibit A** at 10. There is no requirement that the communication related to the subject matter of proposed or pending litigation be made exclusively to those connected to the litigation. *See* **Exhibit A** at 9.

The voters and audience of the alleged defamatory statements were not merely concerned observers, as in *Seidl*. Rather, these were concerned citizens and potential plaintiffs who might "have an interest in or otherwise be connected to the suits" filed. *Aminokit,* at 10. Because the

alleged defamatory statements attributed to The Campaign were directed toward recipients, public and private, that might be connected to past and future litigation investigations or lawsuits regarding election fraud, they are protected under the litigation privilege. *See Buckhannon v. US W. Commc'ns, Inc*., 928 P.2d 1331 (Colo. App. 1996).

Plaintiff further misapplies the "good faith" standard of the litigation privilege. The good faith standard does not require the allegations themselves be in asserted in good faith; rather the litigation must have been considered or contemplated in good faith. A prelitigation communication is privileged if it relates to litigation that is "contemplated in good faith". *Begley v. Ireson*, 399 P.3d 777, 781 (Colo. App. 2017) (*citing Merrick v. Burns, Wall, Smith & Mueller, P.C.,* 43 P. 3d 712, 714 (Colo. App. 2001). Thus, one court's determination regarding the veracity of allegations asserted by Powell in one of the lawsuits filed is wholly irrelevant to the application of the litigation privilege. The fact that lawsuits were, in fact, filed within days of the November 19, 2020, press conference demonstrates the good faith intent to instituting legal proceedings.[1]

Plaintiff relies on *Awai* in support of his argument against application of the litigation privilege, despite the fact that it makes no reference to the litigation privilege. *Awai v. Kotin,* 872 P. 2d 1332, 1336 (Colo. App. 1993). Relying upon the application of the quasi-judicial immunity improperly narrows the scope of the litigation privilege, as the former extends only to those functions intimately related and essential to the judicial decision-making process. To the contrary, the litigation privilege encompasses all communications preliminary to a judicial proceeding that

[1] *See*, *e.g.*, *Pearson v. Kemp,* case 1:20-cv-04809-TCB, filed November 25, 2020, USDC, Northern District of Georgia, Atlanta Division; *King v. Whitmer,* case 2:20-cv-13134-LVP-RSW, filed November 25, 2020, USDC Eastern District of Michigan; *Feehan v. Wisconsin Elections Commission,* case 2:20-cv-01771-PP, filed December 1, 2020, USDC Eastern District of Wisconsin; and *Bowyer v. Ducey,* case 2:20-cv-02321-DJH, filed December 2, 2020, USDC District of Arizona.

have some relation to the proceeding. *Begley*, 399 P.3d at 782.

Additionally, Plaintiff erroneously relies upon *Keier* in support of his argument that statements of suspected election fraud, made in anticipation of judicial proceedings involving election fraud, are irrelevant to determining whether the litigation privilege applies. *Keier* dictates that when examining whether allegedly defamatory statements have some relation to a judicial proceeding, the court should consider the occasion of the statements, in addition to the content. *Keier Advert., Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1043-44 (10th Cir. 1990). The occasion during which the subject communications in this case were made was an ongoing investigation of election fraud and active election fraud litigation. Thus, *Keier* supports applying the litigation privilege to the subject statements.

As Plaintiff acknowledges, to be protected by the litigation privilege, the statements must merely have some relation to a proceeding that is contemplated in good faith and under serious consideration. *Begley*, 399 P.3d at 782. "The pertinency required is not technical legal relevancy, but rather a general frame of reference and relation to the subject matter of the litigation." *Club Valencia Homeowners Ass'n, Inc. v. Valencia Assoc.*, 712 P.2d 1024, 1027 (Colo. App. 1985). The litigation privilege "embraces anything that possibly may be relevant." *Id.*

Prior to the occasion when the alleged defamatory statements were made, The Campaign was actively pursuing legal action involving allegations of voter fraud.[2] The alleged defamatory statements informed citizens and government officials of ongoing and anticipated litigation efforts and further investigation into voter fraud. In fact, Plaintiff concedes in his Complaint that over 60

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[2] *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar,* case 4:20-cv-02078-MWB, filed November 9, 2020, USDC for the Middle District of Pennsylvania.

lawsuits were brought by The Campaign and its supporters across the country to address widespread allegations of voter fraud, and that The Campaign used national platforms to inform voters of its litigation efforts. There are no grounds to reliably dispute the relation of the election fraud investigations and the election fraud lawsuits.

Furthermore, the fact that The Campaign did not bring a complaint against Plaintiff personally, or refer to Plaintiff's actions in its complaints, in no way precludes a finding of good faith in pursuing election fraud claims generally. Powell, The Campaign, and Guiliani on The Campaign's behalf, considered and filed numerous lawsuits based upon the election fraud investigation, thus demonstrating that the related litigation was contemplated in good faith and was given serious consideration. Accordingly, The Campaign cannot be held directly or vicariously liable for the alleged defamatory statements.

ii. The Communications Decency Act ("CDA") bars any liability for Eric and Donald Trump's re-publications of third-party content.

First and foremost, Eric and Donald Trump were not part of The Campaign, nor were they acting as representatives of The Campaign when they made the subject Twitter posts. *See* **Exhibit B**, Depo. of Campaign corporate representative, Sean Dollman, Vol. 1 at 19:13-21:3; 56:19-23. Furthermore, The Campaign is immune from liability under the CDA because the subject posts are republished statements from another content provider. Plaintiff argues that CDA immunity does not apply to these posts because Eric and Donald Trump were original publishers of the subject statements; however, the subject Twitter posts themselves clearly demonstrate that Eric and Donald Trump merely republished the content of a third party.

Donald Trump allegedly republished the original title of a One America News ("OAN") newscast, including a link to the newscast and a snapshot identifying the source as OAN. Eric

Trump allegedly republished direct statements from Defendant Oltmann's report regarding Plaintiff's claim that he made sure Donald Trump would not win the 2020 election, as demonstrated by the report itself. Eric Trump also provided a direct link to the source from which the republished statements were obtained. The "tweets" do not contain additional commentary by Eric Trump or Donald Trump, despite Plaintiff's arguments to the contrary. Notably, Plaintiff does not identify any specific statements allegedly made by Eric Trump or Donald Trump that were not obtained from the cited third-party sources. The subject "tweets" merely re-posted the content of third-party news reports – something done by millions of people every day on numerous social media platforms.

Section 230(c)(1) of the CDA provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider." 47 U.S.C. § 230(c)(1). An "interactive computer service" is defined as any system where multiple users can access a single server. 47 U.S.C. § 230(f)(2). Thus, essentially everyone on the internet is either a user or provider of "interactive computer services."

The plain reading of the CDA demonstrates that Twitter is an "interactive computer service" and Eric and Donald Trump were "users" of that service who republished "information provided by another content provider." *See* 47 U.S.C. § 230(c)(1); 47 U.S.C. § 230(f)(2). Thus, pursuant to the CDA, The Campaign is comprehensively immunized from liability for Eric and Donald Trump's re-publication of third-party content. *Barrett v. Rosenthal,* 146 P.3d 510, 529 (Cal. 2006).

b. Plaintiff's defamation claim fails on its face, as Plaintiff cannot establish that The Campaign acted with actual malice.

As established above, the alleged defamatory statements indisputably pertained to a matter

of public concern. Accordingly, Plaintiff must prove that The Campaign published the alleged defamatory statements with actual malice. *McIntyre,* 194 P.3d at 524. Plaintiff's defamation claim – and all ancillary claims based upon it – fail as a matter of law, because Plaintiff cannot establish that The Campaign acted with actual malice. The Campaign hereby incorporates, by reference, Defendant Powell's Reply brief, including all exhibits attached thereto, as if fully set forth herein.

In essence, Plaintiff's argument is that all theories of voter fraud in the 2020 presidential election have *now* been "debunked"; therefore, the alleged defamatory statements were published with actual malice. This argument is logically flawed. First, not only has no claim been "debunked," no witnesses have been heard in any court in which Powell's case alleging fraud were brought. Further, the issue in this case is not whether there was fraud in the election, or whether President Biden was the legitimately-elected president. Rather, the issue is whether The Campaign acted with actual malice toward the Plaintiff at the time its alleged agents republished reports that Plaintiff stated he made sure President Trump wouldn't win the election. Second, the standard is not one of hindsight, but rather one of foresight – i.e., at the time the alleged agents of The Campaign re-published the subject reports, were they acting with actual malice toward Coomer? They were not. They were relying on statements sworn under penalty of perjury and public interviews.

None of the statements made or actions taken by The Campaign or its alleged agents come even remotely close to "actual malice". To the contrary, Eric Trump and Donald Trump merely "tweeted" links to Defendants OAN and The Gateway Pundit's nationally-distributed news stories regarding Mr. Oltmann's first-hand report, which he has affirmed under oath in both an affidavit and sworn testimony.

Plaintiff contends that The Campaign's internal email exchange somehow supports his claim that The Campaign acted with actual malice. It does nothing of the sort. Mr. Oltmann's report was that Plaintiff, as Director of Strategy and Security of Dominion Voting Systems: (1) participated in an "Antifa conference call"; and (2) made a statement during that call that he made sure President Trump would not win the election. The internal memorandum, does not even mention, much less disprove, either of these claims. The focus of The Campaign's internal memorandum and supporting research is "Dominion, Smartmatic, Sequoia And Venezuela", hence title of the memorandum. *See Dominion, Smartmatic, Sequoia And Venezuela*, attached hereto as **Exhibit C**, at TC-00000019. The only discussion of Eric Coomer is in the context of addressing "internet rumors" that he has ties to Antifa. *See id.* at 00000030. The memo and corresponding email string indicate that the research was conducted very quickly, on or before November 13, 2020, which is the date Mr. Oltmann confirmed his first-hand report with a sworn affidavit. The memo also suggests that The Campaign had not yet received the approximately 80 pages of Plaintiff's incendiary and vicious Facebook posts, which provide ample evidence in support of Mr. Oltmann's report.

Furthermore, The Campaign has expressly rejected the conclusion that Plaintiff has no ties to Antifa. *See* **Exhibit B** at 53:25-54:4. "I wouldn't say that the campaign knew that he didn't have any ties to Antifa." *Id.* at 52:7-9. "There's a lot of evidence within the Facebook; and I don't know if, like, they didn't see that information. But there's a lot of things where I wouldn't say that Coomer is not a member of Antifa, and I wouldn't say that..." *Id.* at 52:12-18. "So, no, I don't think - - I don't think that there is no evidence that he is absolutely not tied to Antifa." *Id.* at 53:1-3. In fact, at the time of the statements attributed to The Campaign, there was substantial evidence

of Plaintiff's ties to, and alignment with, Antifa.

c. Plaintiff's IIED and civil conspiracy claims fail as a matter of law.

Plaintiff has failed to make a showing of a likelihood of success on the merits of his Intentional Infliction of Emotional Distress (IIED) and civil conspiracy claims as to The Campaign. As a starting point, Plaintiff's claims for IIED and civil conspiracy are derivative of, and entirely based on, Plaintiff's defamation claim, which fails for the reasons set forth above and in The Campaign's underlying Motion. "The [litigation] privilege not only shields attorneys from defamation claims arising from statements made during the course of litigation, but it also bars other non-defamation claims that stem from the same conduct." *Buckhannon,* 928 P.2d at 1335 (citing *Barker v. Huang,* 610 A.2d 1341 (Del.1992) (absolute privilege extended to plaintiff's claims of intentional infliction of emotional distress).

Plaintiff identifies only three instances of conduct on the part of The Campaign, which he claims were defamatory. See Response at 66-72. This conduct constitutes the sole basis for his IIED claim. Aside from conclusory allegations directed generically at all "Defendants", and bare arguments of counsel, Plaintiff has wholly failed to establish how the instances of conduct alleged against The Campaign constitute conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Hewitt v. Pitkin County Bank & Trust Co.*, 931 P.2d 456, 459 (Colo. App. 1995); *see also Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1350 (Colo. 1988).

Negligent conduct alone is never enough to sustain a claim for Outrageous Conduct. *Culpepper v. Pearl Street Bldg., Inc.*, 877 P.2d 877 (Colo. 1994). Thus, to the extent Plaintiff alleges that The Campaign negligently published defamatory material (*see* Response at 111-119),

this is wholly insufficient to sustain Plaintiff's IIED claim.

Rather than argue specific instances of extreme and outrageous conduct, Plaintiff relies on a single Colorado Case, *Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957 (2009), in support of the proposition that publishing defamatory material may constitute outrageous conduct. The Plaintiff in *Han Ye Lee* was a private Korean woman who witnessed her husband being murdered on Memorial Day in 2001. The Defendant, the *Colorado Times*, was a Korean newspaper that authored and published an article accusing the Plaintiff of helping set her husband's killer free by failing to testify at the murder trial.

Han Ye Lee is clearly distinguishable from this case. Unlike the plaintiff in *Han Ye Lee*, who was a private citizen, the Plaintiff in this case is a public figure and was a principal in the 2020 Presidential Election. His work for Dominion was well known, he is the inventor of its patented technology – specifically the adjudication process, and he frequently gave presentations in public forums regarding election security. Further, unlike the information published by the Defendant in *Han Ye Lee*, which the Court found came from an unreliable source, the information shared by The Campaign was based upon a report supported by research, a sworn affidavit, and multiple articles already published by news organizations across the country. The information was disseminated, necessarily in short order, to apprise the public and government officials of the progress of The Campaign's investigation into election irregularities and allegations of election fraud. Simply put, there was nothing "extreme and outrageous" about sharing such information and there has been no finding that the information shared was not true. Instead of *Han Ye Lee*, the Court should look to *Gordon v. Boyles*, 99 P.3d 75 (Colo. App. 2004), which is more analogous and instructive to the case at hand. In *Gordon*, the Colorado Court of Appeals considered whether

a radio talk show host's defamatory statements accusing a police officer of a criminal offense (stabbing another police officer) and serious sexual misconduct (engaging in an extramarital affair), shared publicly over the air waves over the span of multiple days, constituted outrageous conduct. The Court held that even under these circumstances, while the conduct may have been defamatory, it was not enough to rise to the level of "extreme and outrageous" to support a claim for IIED. *Id*. at 82.

The Plaintiff in *Gordon* was not a private citizen going on about her daily life, but a public law enforcement professional, charged with enforcing the law in the community. In this sense, the Plaintiff in *Gordon* is more analogous to the Plaintiff here, who was an election professional who contracted with multiple states across the country and was charged with ensuring fair and free elections through the use of his company's voting systems. Many other Colorado courts have ruled similarly to the court in *Gordon*, declining to find a claim for IIED for simply publishing allegedly defamatory material, finding that such claims are not enough to rise to the level of "extreme and outrageous."[3]

Finally, Plaintiff has failed to put forth any evidence to establish the crucial second element of his IIED claim: that The Campaign, in sharing the newsworthy information with its supporters, knowingly caused or intended to cause emotional distress to the Plaintiff. As explained above, there were a host of reasons for sharing the information – campaigning, fundraising, and updating

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[3] *See Lindemuth v. Jefferson County School Dist. R-1*, 765 P.2d 1057, 1058-59 (Colo. App. 1988) (defendant's reference to plaintiff as a "child molester" insufficient to constitute outrageous conduct); *Brooks v. Paige*, 773 P.2d 1098, 1102 (Colo. App. 1988), cert. den., 1989 (outrageous conduct in a public persona defamation context found not actionable); *Dorr v. C.B. Johnson, Inc.*, 660 P.2d 517 (Colo. App. 1983) (Employer who allegedly converted the property of an employee injured while in the course of employment, failed to return the employee's phone calls when he was released from the hospital, failed to provide transportation home from the hospital, filed an accident report containing false and libelous statements regarding the employee's driving, published slanderous statements about the employee, and delayed the employee's workmen's compensation, was found not to have engaged in conduct so extreme and outrageous as to permit recovery on a claim for intentional infliction of emotional distress).

the public on the status of its lawsuits and investigations. There is no evidence or indication that The Campaign shared the information with the intent to cause Plaintiff harm, and Plaintiff has articulated none in his Response. Rather, Plaintiff's harm, if any, is caused by Plaintiff's own words, deeds, and hatred evinced by his many social media posts.

The standard for IIED is narrow and exacting, and Plaintiff has failed to show a likelihood of success on the merits of his claim. None of the statements or actions identified by Plaintiff and attributed to The Campaign are extreme or outrageous. For these reasons, Plaintiff has failed to meet his burden with respect to his IIED claim and the Court must grant The Campaign's anti-SLAPP motion with regard to this claim.

Regarding Plaintiff's civil conspiracy claim, similar to his defamation and IIED claims, the conduct at the center of his civil conspiracy claim likewise fails. Most glaringly, Plaintiff has failed to provide evidence of a meeting of the minds amongst the participants in the alleged conspiracy. There was no conspiracy; the Defendants did not coordinate or agree to do anything with respect to Plaintiff.[4]

At the outset, at the time of the press conference on November 19 2020, Giuliani was an attorney for the Trump Campaign, and, with very limited exceptions not applicable here, attorneys and their clients cannot be held liable for conspiring.[5] As to the remaining defendants, Plaintiff must, at a minimum, show a course of conduct and other circumstantial evidence providing some

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[4] **<u>Exhibit D</u>**, Depo. of Campaign corporate representative, Sean Dollman, Vol. 2 at 27:20-22; 38:2-5; 45:16-20; 47:7-23; 50:9-16.

[5] *See Astarte, Inc. v. Pacific Indus. Sys., Inc.*, 865 F. Supp. 693, 708 (D. Colo. 1994); *Heffernan v. Hunter*, 189 F.3d 405, 413 (3rd Cir. 1999); 1 R. Mallen & J. Smith, LEGAL MALPRACTICE § 6.5 at 680 (2006 ed.). *See also Fraidin v. Weitzman*, 611 A.2d 1046, 1078-80 (Md. App. 1992); *Salaymeh v. InterQual, Inc.*, 508 N.E.2d 1155, 1158 (Ill. App. 1987); *Worldwide Marine Trading Corp. v. Marine Transport Serv., Inc.*, 527 F. Supp. 581, 583-85 (E.D. Pa. 1981).

indicia of agreement in an unlawful means or end to prevail on a claim for civil conspiracy. *Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1327 (Colo. App. 1992); *Scott v. Hern*, 216 F.3d 897, 918 (10th Cir. 2000). A complaint alleging conspiracy must allege specific facts showing agreement and concerted action among defendants. *Breidenbach v. Bolish*, 6 F.Supp.2d 1161, 1167 (D. Colo. 1998).

The only purported evidence Plaintiff puts forth in his attempt to show an "agreement" is not "evidence", but rather speculation, innuendo, and argument of counsel, inviting the Court to infer an agreement among the Defendants. Courts, however, are not permitted to infer facts sufficient to demonstrate an agreement necessary to form a conspiracy; rather, "evidence of such an agreement must be presented by the Plaintiff." *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). Here, Plaintiff has put forth no *evidence* of any agreement between The Campaign and anyone else.

First, Plaintiff argues that the Court can infer a meeting of the minds based on the fact that the conduct at issue was "overtly public." This, however, is no evidence of an agreement such that it can support a claim for civil conspiracy. Simply being aware of another party's actions is not sufficient evidence to prevail on a claim for civil conspiracy. *See McKibben v. Chubb*, 840 F.2d 1525 (10th Cir. 1988).

Second, Plaintiff alleges, without evidentiary support, that "each Defendant entered the same agreement with Oltmann to publish the same defamation." But Plaintiff has failed to identify any evidence, circumstantial or otherwise, that The Campaign entered into any agreements with, or even met, Oltmann. No such evidence exists, and this unsubstantiated statement cannot support Plaintiff's claim for civil conspiracy against The Campaign.

Third, the fact that the Defendants "shared motivations" is not evidence of a meeting of the minds, nor is it circumstantial evidence that an agreement existed among actors in the alleged conspiracy. Each of the Defendants in this case worked in some capacity or another to investigate irregularities in the 2020 Presidential Election and each was motivated to uncover evidence of wrongdoing with respect to the same. When such evidence was indeed uncovered, each had a motivation, independent of each other, to share such information with the public. Similar motivation in and of itself is not evidence of an agreement among the parties to defame the Plaintiff.

Fourth, Defendant's statement that "each of the Defendants published the defamation with similar actual malice" is conclusory, not supported by the evidence, refuted above, and not evidence of an agreement such that it can support Plaintiff's civil conspiracy claim.

Finally, Plaintiff alleges that evidence of an agreement between the parties existed because the Defendants "have yet to retract the statements." Of course, to support his civil conspiracy claim, any agreement must have been made prior to the defamation. Evidence of what the defendants have or have not done since the start of litigation cannot serve as evidence of a pre-existing agreement.

The "evidence" of an agreement put forth by Plaintiff in his Response is speculation - not facts. Plaintiff has failed to identify any conspiracy involving The Campaign and anyone else, such that he can satisfy the third element of his civil conspiracy claim. Plaintiff's civil conspiracy claim does not rise above the speculative level, and Plaintiff has failed to present a likelihood of success on the merits on this claim. Accordingly, the Court must grant The Campaign's anti-SLAPP motion with respect to Plaintiff's civil conspiracy claim against The Campaign.

WHEREFORE, Donald J. Trump for President, Inc. respectfully renews its request that this Court enter an order: (1) dismissing Plaintiff's First Amended Complaint, with prejudice; (2) awarding Defendant all costs and attorneys' fees incurred to date; and (3) award Defendant such other and further relief as this Court deems appropriate.

Respectfully submitted this 4th day of October, 2021.

JACKSON KELLY PLLC

/s/ Eric R. Holway
John S. Zakhem, Esq. #30089
Eric R. Holway, Esq. #49263

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of October, 2021, a true and correct copy of the foregoing was served via Colorado Court's E-filing System to all counsel of record.

/s/ Mi Vo
Mi Vo