

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

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CASE NUMBER: 2020CV34319

Plaintiff(s): ERIC COOMER, Ph.D.

v.

Defendant(s): DONALD J. TRUMP FOR PRESIDENT, INC.; SIDNEY POWELL; SIDNEY POWELL, P.C.; DEFENDING THE REPUBLIC, INC.; 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; and NEWSMAX MEDIA, INC.

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Case Number: 2020 CV 034319

Courtroom/Division: 409

DEFENDANT MALKIN'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Court's October 25, 2021 Order, as modified on December 12, 2021, Defendant Michelle Malkin hereby submits her Proposed Findings of Fact and Conclusions of

Law. Defendant Malkin has joined in the Certain Defendants' Joint Proposed Findings of Fact and Conclusions of Law filed on December 17, 2021.

The Court hereby adopts and enters the following findings:

FINDINGS OF FACT

1. Ms. Malkin is a journalist who has worked for NBC News, the L.A. Daily News, and the Seattle Times, has penned a nationally syndicated newspaper column for two decades, and worked for several cable TV stations. Ex. 703, Malkin, M. Dep. Tr., dep. tr. p. 48:8-48:16. At the time of the at-issue events, she was an independent contractor with a show on Newsmax and covered stories through a variety of mediums, including interviews livestreamed on social media.

2. On November 9, 2020, Dr. Coomer became aware that Facebook posts attributed to him were being circulated on social media, including on Joe Oltmann's Conservative Daily podcast. OAN553, Coomer, E. Dep. Tr., dep. tr. pp. 15:16-16:8. These posts referenced Dr. Coomer's political views in general, and his views of Donald Trump and his reelection bid in particular. *Id.*; *see also* Pl.'s Ex. A. On November 9 or 10, 2020, Dr. Coomer began receiving death threats and started deleting Facebook posts. OAN553, dep. tr. pp. 40:1-40:3 and 43:5-43:10.

3. On November 11, Ms. Malkin was contacted by an attorney and friend who informed her that she should pay attention to Joe Oltmann's reporting on election integrity. Ex. 703, dep. tr. pp. 10:24-11:20; *id.* at Ex. 25, p. 61. Ms. Malkin was aware that Mr. Oltmann was a tech-savvy local businessman with similar ideological views to her own, but she was not a listener to his podcast nor affiliated with any of his entities. *Id.* at dep. tr. pp. 10:13-10:15, 10:16-10:20 and 15:1-15:6. Ms. Malkin was unaware of any information that would establish that Mr. Oltmann had a reputation for dishonesty. Ex. 700, Malkin Aff. at 2, ¶6. Ms. Malkin began following Mr. Oltmann on Twitter, reviewed information he had posted there, and listened to portions of his

podcasts on election integrity issues. Ex. 703, dep. tr. pp. 11:2-12:12. She did not specifically remember if Dr. Coomer was discussed in the materials she reviewed. *Id.*

4. On November 12, 2020, Mr. Oltmann contacted Ms. Malkin via text message. *Id.* at Ex. 25, pp. 12-13. At 4:40 p.m., Ms. Malkin invited him to appear on her livestream the following afternoon. *Id.* at pp. 13-14. The following morning at 4:43 a.m., Mr. Oltmann advised that his Twitter account had been suspended, that he “filed an affidavit with the Trump administration”, and that he could do a livestream. *Id.* at pp. 15-17. Ms. Malkin opted to “give him a platform to talk about what it is he knew that had caused him to be banned.” Ex. 703, dep. tr. p. 16:18-16:22. At 6:21 a.m., Ms. Malkin asked if Mr. Oltmann was available at 10:00 a.m. *Id.* at Ex. 25, pp. 17-18. Mr. Oltmann agreed to appear on the livestream. *Id.*

5. Ms. Malkin did not have advanced knowledge of what Mr. Oltmann would say, although she knew it would involve Dominion. Ex. 703, dep. tr. p. 26:6-26:10. Just prior to the livestream commencing, Mr. Oltmann emailed Ms. Malkin zip files containing Facebook posts that Mr. Oltmann attributed to Dr. Coomer. *Id.* at dep. tr. p. 18:2-18:4. Ms. Malkin recalled seeing Dr. Coomer’s name on Twitter the day before but could not remember the specific context. *Id.* at dep. tr. p. 30:11-30:16. Ms. Malkin did not research Dr. Coomer before the livestream, but she had familiarity with Dominion and electronic voting systems. *Id.* at dep. tr. pp. 34:14-35:13.

6. During the livestream, Mr. Oltmann described an alleged call he participated in where an individual identified as “Eric from Dominion” stated “Trump is not going to win, I made F’ing sure of that, ha-ha-ha....” Ex. 701, dep. tr. p. 5:10-5:22. Other than Dr. Coomer, Ms. Malkin was not aware of the identities of anyone else on the alleged call. Ex. 703, dep. tr. p. 71:15-71:22.

7. After the livestream, Ms. Malkin became aware of Dominion’s subsequent denials of any election irregularities, as covered by other news organizations, but did not reach out to them for additional comment. Ex. 703, dep. tr. pp. 70:15-71:11.

8. On November 24, 2020, Ms. Malkin inquired whether Mr. Oltmann could pre-tape an interview for her Newsmax show, Sovereign Nation, the following day. *Id.* at Ex. 25, pp. 41-42. Mr. Oltmann agreed. During the second interview, Mr. Oltmann again described the alleged Antifa phone call. Ex. 702, dep. tr. p. 8:20-8:24. Ms. Malkin subsequently stated:

Now, I think it's important to make explicit that at this point, at least publicly, there's no evidence that Eric Coomer made good on his threat. The point is that given all of the patents that he's held, the enormous amount of experience that he's had in the voting software and automated voting machine industry at both Sequoia and Dominion, certainly suggests that he has the ability to carry out on this threat or this braggadocio that you heard directly on this Antifa phone call.
Id. at p. 11:2-11:11.

CONCLUSIONS OF LAW

I. Statements at Issue.

9. “The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.” *Vogel v. Felice*, 127 Cal.App. 4th 1006, 1017, 26 Cal.Rptr.3d 350, 359 (2005) (citing *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5, 284 Cal.Rptr. 244)). As such, this Court disregards “any evidence or argument concerning statements not explicitly set forth in the complaint.” *Id.* Plaintiff alleges in the First Amended Complaint that, “[d]uring the MalkinLive interview, Oltmann again falsely alleged that Dr. Coomer was an anonymous Antifa activist on a purported call Oltmann claimed to have infiltrated well before the election.” Am. Compl., p. 29, ¶58. Plaintiff also alleges that Ms. Malkin’s introduction to the Sovereign Nation episode, her introduction to Mr. Oltmann’s segment specifically, and her observations about Dominion’s market share are defamatory. *Id.* at pp. 30-

31, n. 70. Plaintiff has also included a series of tweets and retweets made by Ms. Malkin promoting her interview with Mr. Oltmann. *Id.* at p. 30, n. 69.

10. Plaintiff has not identified a defamatory statement made by Ms. Malkin. The tweets are promotional materials that appear to either be correct (it is accurate to categorize Dr. Coomer's social media posts as containing pro-Antifa, anti-police rhetoric) or links to articles where Ms. Malkin did not actually type the text ("Denver Business Owner: Dominion's Eric Coomer is an Unhinged Sociopath"). Ex. 703, dep. tr. pp. 80:16-81:11. The introductions to various segments are mere previews of what the show is about and what Mr. Oltmann will generally be discussing. None of these statements are defamatory.

11. Plaintiff provided the Court with a chart of allegedly defamatory statements made by Ms. Malkin. Ex. A-1. These statements were not pled in the Complaint, but the Court has reviewed them. Many of the statements are either indisputably true or, even if they were false, are not defamatory. This includes:

a. Ms. Malkin explaining why Mr. Oltmann was being interviewed. Ex. A-1 – Pub. 5, Time 1:20; *id.* at Pub. 41, Time 6:05; *id.* at Time 10:34. This is not defamatory.

b. Mr. Oltmann discussing the steps he took to research who "Eric from Dominion" was. *Id.* at Pub. 5, Time 5:15. This is not in dispute. In fact, Plaintiff has argued that this lack of research – a mere Google search – by Mr. Oltmann is evidence of the improbability of his story. Making the audience aware of the level of research he performed is not defamatory to Dr. Coomer and, if anything, would allow the audience to better assess the merits of Mr. Oltmann's narrative.

c. Ms. Malkin discussing Dominion's market share, which is not in dispute. *Id.* at Time 13:40.

- d. Discussing the content of Dr. Coomer's Facebook page and the fact that his social media presence was being deleted, facts that are not in dispute. *Id.* at Time 15:59.
- e. Discussing Dr. Coomer not being a liberal undergrad, which is true. *Id.* at Time 22:00.
- f. Referencing unhinged rantings of a lunatic, which is hyperbole. *Id.*
- g. An interview recap that is not defamatory. *Id.* at Time 31:06; *Id.* at Pub. 41, Time 11:23.
- h. Promotional tweets that are not defamatory. *Id.* at Pub. 6 and Pub. 8.
- i. A promotional tweet quoting Mr. Oltmann and describing Dr. Coomer's social media post as containing anti-police rhetoric, which is true. *Id.* at Pub. 7.
- j. Ms. Malkin discussing election hacking occurring across the world, which is not defamatory to Dr. Coomer. *Id.* at Pub. 41, Time 0:10 and 12:45.
- k. Ms. Malkin stating that there is no public evidence that Dr. Coomer acted on his alleged claim to keep Donald Trump from winning the election but suggesting that he may have the expertise to carry out such a threat. *Id.* at Time 15:05. This is not defamatory.
- l. Mr. Oltmann discussing how he disseminated information about Dr. Coomer. *Id.* at Time 16:03. The communications themselves are conceivably defamatory, but Mr. Oltmann describing the medium through which he disseminated information is not.
- m. Mr. Oltmann discussing alleged efforts to whitewash Dr. Coomer's social media presence. *Id.* at Time 16:52. This is not defamatory and is not in dispute. Dr. Coomer admits deleting his social media posts.

12. Overall, the thrust of Plaintiff's claims is not that Ms. Malkin made defamatory statements but that she allowed Mr. Oltmann to do so on her livestream and show.

II. The at-issue statements fall within the anti-SLAPP statute because the statements involve matters of public interest.

13. The Court finds that the allegedly defamatory statements made on Ms. Malkin's livestream and show fall within the ambit of C.R.S. §13-20-1101, as they are statements or writings "made in a place open to the public or a public forum in connection with an issue of public interest" and are communications "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." C.R.S. §§13-20-1101(2)(a)(III)-(IV); Certain Defendants' Joint Proposed Findings of Fact and Conclusions of Law, pp. 10-12, ¶¶30-33. The Court disagrees with Plaintiff that Ms. Malkin created this controversy. By his own admission, he was receiving death threats days before Ms. Malkin interviewed Mr. Oltmann, so clearly this matter was in the public domain. Further, there is no evidence that Ms. Malkin invented the at-issue narrative in order to inject Dr. Coomer into the public domain. Thus, Plaintiff has the burden of establishing via clear and convincing evidence that the statements were false, and that Ms. Malkin published the statements with actual malice.

III. Plaintiff has not met his burden of establishing actual malice.

a. Failure to research or interview other sources is not evidence of actual malice.

14. Actual malice is not established by a journalist relying on a single source. *Fink v. Combined Commc'ns Corp.*, 679 P.2d 1108, 1111 (Colo.App. 1984); *New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966) ("[T]he protection of the first amendment is not limited to statements whose validity are beyond question or which reflect an objective picture of the reported events. While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a

single source even though they reflect only one side of the story without fear of libel prosecution by a public official.”). In *Connor*, the New York Times was sued for publishing an article on Alabama racial conditions that addressed, in part, the alleged conduct of one of the City Commissioners of Birmingham Alabama. *Connor*, 365 F.2d at 568. In rejecting the plaintiff’s claim, the Court observed:

Every challenged statement has been traced to an identified source. There is no evidence that any of the sources have denied giving the questioned information to Salisbury, that Salisbury twisted or misstated the information given him, or that Salisbury either knew or had clear grounds to suspect that the statements might be false. All that the evidence reveals is that Salisbury relied on one or two persons for each statement and that some of these people were actively involved in the events which were the subject of the article. This certainly does not constitute ‘reckless disregard for the truth.’

Id. at 576.

15. Here, Ms. Malkin relied on two sources: Mr. Oltmann and the Facebook posts that lend credence to aspects of his narrative. *See, generally*, Ex. 701 and 702. The Facebook posts support the notion that Dr. Coomer is vocally anti-Trump and did not want him to be reelected. *See, e.g.*, OAN500 at 0001, 0072. Mr. Oltmann described a call that he professed to have personal knowledge of where Dr. Coomer allegedly made the at-issue statements. Ex. 701, dep. tr. p. 5:10-5:22. Given the nature of video interviews, there was no real capacity for Ms. Malkin to twist or misstate what Mr. Oltmann said. The audience had an opportunity to hear what he had to say directly and, unlike a newspaper article, evaluate his credibility directly. All of Mr. Oltmann’s statements are either from his claimed personal knowledge or his opinions about his alleged observations.

16. Plaintiff has not identified any evidence that would have alerted Ms. Malkin that Mr. Oltmann’s narrative was false or that he was generally dishonest. At most, Plaintiff has presented evidence that Mr. Oltmann and Ms. Malkin share common political ideologies and that

would motivate one or both to push a narrative delegitimizing the 2020 Presidential Election. The Court cannot agree that Mr. Oltmann's political ideology is enough to render him an unreliable source on this topic.

17. In addition, actual malice is not established by showing that a journalist failed to exhaust potential avenues of information. *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1123 (Colo.App. 1992) (“Malice cannot be inferred solely from the combination of the report being false and the failure of defendants in not checking all possible sources of corroboration or verification.”); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (“[F]ailure to investigate will not alone support a finding of actual malice....”). The only other participant in the call Mr. Oltmann identified was Dr. Coomer. Even if Ms. Malkin had contacted Dr. Coomer, and even if he agreed to speak with her – an uncertain proposition given he was receiving death threats and her affiliation with Newsmax – and even if he denied the story was true, and Ms. Malkin still published the interviews, it would not support a finding of actual malice. *Seible v. Denver Post Corp.*, 782 P.2d 805, 809 (Colo.App. 1989) (“A reporter is not required to accept denials of wrongdoing as conclusive, or to prefer them over apparently creditable accusations.”). It is very common for individuals accused of wrongdoing to deny it and that cannot serve as a total bar to a story being published.

18. Ms. Malkin conceded that she did not contact Dominion or Dr. Coomer for comment, but she testified that she was aware of Dominion's stance on this issue from other news coverage. Ex. 703, dep. tr. pp. 70:15-71:11. The Court cannot say that failing to contact Dominion, or an agent of Dominion, in this context supports a finding of actual malice.

19. Lastly, Plaintiff contends that Ms. Malkin did not sufficiently question Mr. Oltmann's narrative. This raises an interesting question of whether the alleged failure to

sufficiently probe the veracity of an interviewee's statements can be a substitute for actual malice. Accepting such an argument would place an untenable burden on journalists, who would potentially be liable for statements made by guests simply because they did not ask, or did not think to ask, "the right questions". This, in turn, raises questions about whether a journalist can interview, say, an expert, unless they have the requisite threshold of knowledge to engage them in a spirited debate on a topic. The issue of whether Ms. Malkin sufficiently questioned Mr. Oltmann is separate and apart from whether she knew his statements were false and does not give rise to a finding of actual malice.

b. Failing to meet journalistic ethics is not evidence of actual malice.

20. Plaintiff also contends that Ms. Malkin did not meet journalistic ethical standards. Mr. Brown's affidavit provides an overview of journalistic ethics, including codes of conduct adopted by various news entities, as well as his analysis of the pertinent allegations in this matter. Regarding Ms. Malkin, he states "we see an over-reliance on hunches and potential problems and not enough effort to get a range of reasonable explanations. That is not keeping with ethical journalistic practice." Pl.'s Ex. N, p. 37, ¶78. Mr. Brown also focuses on the notion that Ms. Malkin did not sufficiently research Mr. Oltmann's narrative, did not sufficiently scrutinize his narrative, and did not investigate other sources of corroboration. The Court has already addressed why these issues are not evidence of actual malice.

21. Looking at this through the lens of journalistic ethics does not change that conclusion. As discussed above, a journalist can fail to meet journalistic standards without acting with actual malice. As other courts have observed, failing to meet journalistic standards is "at most ... negligence or bad journalism, not actual malice." *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F.Supp.2d 20, 56 (D.D.C. 2005). Plaintiff is effectively arguing for a lower bar for journalists to

be liable for defamation. Such a holding would be contrary to well-established precedent affording journalists protection.

c. Mr. Oltmann’s narrative is not too incredible to be believed by Ms. Malkin.

22. The question before the Court is whether Mr. Oltmann’s claim that Dr. Coomer *said* “Trump is not going to win, I made F’ing sure of that, ha-ha-ha” was so improbable that Ms. Malkin must have entertained serious doubts about its veracity. Ex. 701, dep. tr. p. 5:10-5:22. The Court finds that Mr. Oltmann’s narrative does not rise to that level of improbability.

23. During the initial livestream, it became apparent that Dr. Coomer had made a series of statements on social media that could be viewed as worse than the statements attributed to him by Mr. Oltmann. These posts show Dr. Coomer was willing to use profanity, like the alleged speaker on the call. These posts show that Dr. Coomer had strong, negative views about the prospect of a second term under former President Trump, like the alleged speaker on the call. These posts show that Dr. Coomer was willing to share those views, like the speaker on the call. Dr. Coomer’s social media posts were made after he had an opportunity for editing and self-reflection. *See* OAN500 at 0072-0073 (reflecting the post was made and then edited twice). It is not difficult to believe that the person who drafted, posted, edited, and re-edited the at-issue statements – with his name attached – could have made the anonymous oral statements attributed to him by Mr. Oltmann.

24. Plaintiff has argued that Antifa is not a singular organization that has calls, so the story is obviously untrue. However, Ms. Malkin testified that she had been covering Antifa in Denver, Colorado Springs, and across the country....” Ex. 703, dep. tr. p. 97:6-97:7. She testified that rather than being a monolithic entity, there are cell organizations, like Rose City Antifa, that have formal structures, formal meetings, and formal recruitment. *Id.* at dep. tr. p. 97:8-97:24.

Plaintiff has presented no evidence that Ms. Malkin's testimony was inaccurate or established that Ms. Malkin had reason to believe that a call involving local activists was an unbelievable event.

25. Plaintiff has presented no evidence to establish that Ms. Malkin had "a high degree of awareness of ... the probable falsity" of Mr. Oltmann's statements and, thus, Plaintiff has not met his burden of establishing by clear and convincing evidence that Ms. Malkin acted with actual malice. As such, the defamation and intentional infliction of emotional distress claims against Ms. Malkin is dismissed pursuant to C.R.S. §13-20-1101.

26. The conspiracy claim is simply unsupported by any evidence. At most, she conducted an interview and then passed along Mr. Oltmann's contact information to another defendant. Further, conspiracy is a derivative claim and hinges on the viability of the defamation and IIED claims. *See, e.g., Colo. Cnty. Bank v. Hoffman*, 338 P.3d 390, 397 (Colo. 2013). As those claims did not survive, the conspiracy claim fails as well.

27. Lastly, Plaintiff has not made the requisite showing that he is entitled to injunctive relief.

28. For the foregoing reasons, Defendant Michelle Malkin's Special Motion to Dismiss Pursuant to C.R.S. §13-20-1101 is GRANTED.

Respectfully submitted,

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s/ Gordon A. Queenan

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2021, a true and correct copy of the above and foregoing **DEFENDANT MALKIN'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served upon counsel of record via Colorado Courts E-Filing.

s/ Terri A. Taylor _____

Terri A. Taylor