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DISTRICT COURT, DENVER COUNTY, COLORADO
1437 Bannock Street,
Denver, CO 80202

ERIC COOMER, Ph.D.,
Plaintiff

vs.
DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C., RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY, JAMES HOFT, TGP COMMUNICATIONS LLC dba THE GATEWAY PUNDIT, MICHELLE MALKIN, ERIC METAXAS, CHANEL RION, HERRING NETWORKS, INC. dba ONE AMERICA NEWS NETWORK, DEFENDING THE REPUBLIC,

Defendants

COURT USE ONLY

Case Number: 2020CV34319

Division:

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DEFENDANT ERIC METAXAS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Eric Metaxas, through Gordon Rees Scully Mansukhani, LLP, hereby submits

his proposed findings of fact and conclusions of law as follows:

Plaintiff has alleged claims against Defendant Metaxas for defamation, intentional infliction of emotional distress, civil conspiracy and injunctive relief. Defendant Metaxas has filed a special motion to dismiss pursuant to C.R.S. § 13-20-1101. In support of his special motion, Metaxas argues Plaintiff cannot establish prima facie claims because his speech is protected by the First Amendment, and there is no clear and convincing evidence of actual malice. Having reviewed the pleadings related to the motion and heard argument, this Court enters the following FINDINGS and CONCLUSIONS:

Background:

This case arises out of statements Defendant Metaxas made while conducting an interview on his radio show, The Eric Metaxas Show. Metaxas is a New York Times bestselling author who, approximately five years ago, began hosting a talk show. His show is published on YouTube and syndicated radio. He does not profess to be a journalist, he does not act as a journalist, and he has testified that he is not a journalist. In reviewing the website for the show, it is clear that he is not reporting on news stories. *See* https://metaxastalk.com. Metaxas developed his show as a variety show, and he addresses broad topics, including comedy, books, authors, theater, human interest, and current events. Metaxas identifies himself as a conservative Christian, and his show is syndicated by a conservative Christian syndicating broadcast, but he engages guests regardless of their political or religious beliefs. The Eric Metaxas Show is a question-and-answer show where Metaxas interviews guests and interjects hyperbole, hypotheticals, reprise, and his own opinions. Metaxas promotes his show through Twitter.

The interview at issue in this case occurred on November 24, 2020 and related to election

interference in the 2020 national election. At the time, there was substantial media coverage of the 2020 presidential election, and the legitimacy of the election's outcome. Many voters believed the outcome of the election was valid; many voters doubted the integrity and outcome of the election.

In the midst of this political and media environment, while the country was embroiled in the debate over election integrity, Defendant Metaxas hosted Joe Oltmann as a guest on his radio talk show. During the interview, Oltmann recounted his experience infiltrating an alleged Antifa conference call and overhearing another participant on the call make statements about his intention to interfere with the 2020 presidential election. During the interview, Oltmann also described how he determined that the speaker was Plaintiff Eric Coomer, then Director of Product Strategy and Security at Dominion Voting Systems. Throughout the interview, Metaxas reacted to Oltmann's statements and provided colorful commentary.

In his Exhibit A-1, a chronological compilation of all statements Plaintiff alleges are defamatory, Plaintiff identifies certain of Metaxas' statements. The November 24, 2020 episode of Metaxas' talk show appears at publication line 36 of Plaintiff's exhibit A-1 and Metaxas' statements first appear on line 87 of Plaintiff's exhibit. According to Plaintiff, there were at least 35 prior publications and 86 prior public statements about him before Metaxas hosted Oltmann on his talk show. These publications include, but are not limited to:

- November 9, 10, 11, and 12, 2020: Conservative Daily episodes hosted by Oltmann
- November 13, 2020: Malkin interview of Oltmann; TGP Defendants article on Coomer; Hoft YouTube interview with Oltmann
- November 14, 2020: Corporon radio interview with Oltmann; TGP Defendants article on Coomer

- November 15, 2020: Flora radio interview with Oltmann; Fox News interview with Giuliani; Malkin tweet about Coomer
- November 16, 2020: Conservative Daily episode hosted by Oltmann; Malkin tweet about Coomer; TGP Defendants' article on Coomer
- November 17, 2020: Rion and OANN tweets about Coomer; Boyles radio interview with Oltmann
- November 19, 2020: Conservative Daily episode hosted by Oltmann; Powell and Giuliani press conference; Malkin tweets about Coomer
- November 20, 2020: Conservative Daily episode hosted by Oltmann; Newsmax interview with Powell; Fox News interview with Powell
- November 21, 2020: OANN "Dominion-izing the Vote" segment; Corporon radio interview with Oltmann

Based on the chronology, Metaxas was the last defendant to make any statements about Plaintiff. At the time Metaxas hosted Oltmann as a guest on his talk show, Oltmann's story was published on multiple platforms, including national news and media platforms and it was already a story of national attention.

Public Significance:

Metaxas contends his interview of Oltmann concerned a "matter[] of public significance." C.R.S. § 13-20-1101(1)(a). In evaluating whether something is a matter of public significance,

> [C]ourts look to certain specific considerations, such as whether the subject of the speech or activity "was a person or entity in the public eye' or 'could affect large numbers of people beyond the direct participants"; and whether the activity "occur[red] in the context of an ongoing controversy, dispute or discussion," or "affect[ed] a community in a manner similar to that of a governmental entity."

FilmOn.com Inc. v. DoubleVerify Inc. (2019) 7 Cal.5th 133, 145-46, 246 Cal.Rptr.3d 591, 598 (citations omitted); *see also Barrett v. Univ. of Colo. Health Sciences Center*, 851 P.2d 258, 263 (Colo. App. 1993) ("[A] matter is of public concern when it can be fairly considered as relating to any matter of political, social, or other concern of the community[.]").

The United States Supreme Court has long recognized that a national election is a matter of public importance. In *Burroughs v. United States*, 290 U.S. 534, 545 (1934), the Court said, "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." Likewise, in *Anderson v. Celebreeze*, 460 U.S. 780, 794-95 (1983), the Court said, "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the votes in the Nation." Thus, the fact that the statements at issue concerned a national election and election integrity weighs heavily in favor of finding that Metaxas' interview concerned a matter of public significance.

Plaintiff has argued that because Dominion is a private company and he was privately employed, the statements at issue do not relate to a matter of public significance. Plaintiff was the Director of Product Strategy and Security at Dominion Voting Systems. Dominion provided election technology and election support services to "at least 30 different states during the 2020 Presidential election." Plaintiff's Omnibus Response, ¶ 1. Plaintiff individually developed technology produced by Dominion; provided "election support services across the United States, including from initial project implementation through election set-up, ballot layout, multiple language audio, machine set-up, and system testing[;]" and assisted with election related services

across the country during the 2020 presidential election. *Id.* Plaintiff's work at Dominion could affect a large number of people beyond" those who used Dominion technology. *FilmOn.com Inc.*, 7 Cal.5th at 145-46, 246 Cal.Rptr.3d at 598.

Plaintiff and Dominion were providing election technology and election support in the context of a Presidential election. While Plaintiff may not have been a government officer, the voting technology he developed and his work during the presidential election affected communities "in a manner similar to that of a government entity." *FilmOn.com Inc.*, 7 Cal.5th at 145-46, 246 Cal.Rptr.3d at 598. Plaintiff and Dominion chose to compete for contracts with public entities to provide voting technology and voting support services. *See Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F.Supp. 947, 957 (D.D.C. 1976) ("Plaintiff has many interests other than the defense industry, but choses to compete for defense contracts…. These wholly voluntary acts place plaintiff in the center of the controversy explored in the …article[.]"); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 570 (Ariz. 1970) ("By assuming the position that he held, Dombey invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention."). By developing voting technology and providing election support, Plaintiff assumed a traditional government function and "surrendered any legitimate expectation of anonymity with regard to the manner in which he performed" his work. *Id.* Plaintiff voluntarily exposed himself to scrutiny.

Finally, Plaintiff "voluntarily injected himself … into a particular public controversy," thereby "assum[ing] special prominence in the resolution of public questions" long before Oltmann appeared as a guest on Metaxas' talk show. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,

345 (1974). Plaintiff individually developed and patented voting technology. He promoted, demonstrated and sold that technology to states and counties across the United States. This included participating in voting technology expos that were hosted by public entities and published on publically available websites like YouTube. Further, Plaintiff was featured in the HBO documentary "Kill Chain: The Cyber War on America's Elections," which was released on March 5, 2020. OAN Ex. 544. According to HBO, the documentary "takes a deep dive into the weaknesses of today's election technology, an issue that is little understood by the public or even lawmakers." *See* "Kill Chain: The Cyber War on America's Elections," https://www.hbo.com/documentaries/kill-chain-the-cyber-war-on-americas-elections. Plaintiff was a person "in the public eye," specifically on the public controversy surrounding weakness in election technology, several months, if not years, before Oltmann appeared as a guest on Metaxas' talk show. 7 Cal.5th at 145-46, 246 Cal.Rptr.3d at 598.

The Court finds that that the Metaxas interview concerned a matter of public significance. C.R.S. § 13-20-1101(1)(a). The statements at issue concerned a national election, and Plaintiff's role with Dominion "implicate[d] a uniquely important national interest." *Anderson*, 460 U.S. at 794-95. For these same reasons, the Court finds that Plaintiff is a public figure at least for the limited purposes of election technology, election security, and weaknesses in election technology.

Defamation:

The Court next evaluates whether Metaxas' statements arise from protected speech. *See Tamkin v. CBS Broad., Inc.*, 193 Cal.App.4th 133, 142 (2011). Opinion commentary on matters of public importance are protected speech. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990). Metaxas argues that this is particularly true in the context of shows such as his, which he

defines as a commentary talk show. In evaluating whether challenged speech involves a matter of opinion commentary, courts under similar circumstances have applied a three-factor totality of the circumstances test addressing: "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative and hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being true or false." *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157 (9th Cir. 2021) (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995)).

The broad context of Metaxas' show makes it more likely that his audience was expecting him to share his opinion rather than asserting objective fact. *See Maddow*, 8 F.4th at 1157. As Metaxas testified, he reacts to his guests, and offers his opinions during his interviews. The nature of Metaxas' show supports that he is not a "journalist," and the tenor of the show invites and encourages him to share his opinions with his listeners. *Id.* This tenor carried through to the interview during which Metaxas made the disputed statements, supporting the conclusion that "a reasonable viewer would have understood that [Metaxas] was expressing [his] opinion." *Id.* at 1158. Further, given the broad context of his statements as reactionary, a reasonable listener would understand Metaxas' statements as colorful commentary driven by what his guest was saying, rather than factual assertions about Plaintiff.

Having determined the first factor weighs in favor of finding Metaxas' statements constituted opinion commentary, the Court next examines the context and content of the statements, analyzing the language used and the reasonable expectations of the audience. A "[f]amiliar rhetorical device" or "colloquial or hyberbolic use" of language is incapable of being defamation. *Hogan v. Winder*, 762 F.3d 1096, 1108 (10th Cir. 2014). Gross overgeneralizations,

or the use of colorful and exaggerated terms, cannot form the basis of a defamation claim. *Keohane v. Stewart*, 882 P.2d 1293, 1301 (Colo. 1994). Further, "[i]t has long been the law that simply invoking a criminal act or accusing a person of a crime does not transform an otherwise nonfactual statement into a factual assertion if the accusation, in light of the surrounding context, is 'rhetorical hyperbole[.]" *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 182 (S.D.N.Y. 2020). "Such accusations of crimes are also unlikely to be defamatory when, as here, they are made in connection with debates on a matter of public or political importance." *Id.* These types of statements "deserve the highest protection. *Id.* at 183 (citing *Milkovich*, 497 U.S. at 19).

In *McDougal*, the Southern District of New York addressed similar allegations to Plaintiff's allegations against Metaxas. The plaintiff brought a slander claim after she was allegedly defamed on the program "Tucker Carlson Tonight," which airs on Fox News Channel. In a December 10, 2018 episode of Tucker Carlson Tonight, Carlson and his guests discussed a story about the plaintiff's acceptance of money in exchange for the rights to her story about an affair with Donald Trump. During the discussion, Carlson referred to the story as a "classic case of extortion" and described the payments as "extortion payments." In granting Fox News' motion to dismiss, the court held that "Mr. Carlson's invocation of 'extortion' against Ms. McDougal is nonactionable hyperbole, intended to frame the debate[,]" and as such, "the statements are not actionable." *McDougal*, 489 F.Supp.3d at 183-84.

The Court is persuaded by the reasoning and holding in *McDougal*. Metaxas' statements generally fall into the categories of opinion, rhetorical hyperbole, and non-literal commentary associated with a matter of significant public discourse, namely election fraud and the legitimacy of the 2020 presidential election. Metaxas made his statements "with an element of hypothetical"

based on his perceptions that were "formed in the course of the [Oltmann] interview." Metaxas Dep. Tr. at 74:13-17. Oftentimes, Metaxas chose "words for joke effect or hyperbolic joke effect." *Id.* at 64:2-9. In short, Metaxas' statements were used to frame, or provide non-literal commentary to the Oltmann interview. Plaintiff may be displeased with Metaxas' use of colorful or over exaggerated language, however, Metaxas' use of "loose, figurative, or hyperbolic language … negates the impression" that the contested statements were assertions of fact. *Milkovich*, 497 U.S. at 21; *see also Maddow*, 8 F.4th at 1160.

Further, Metaxas' audience was provided with the underlying facts on which he was offering his opinion. "When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." *Maddow*, 8 F.4th at 1160 (quoting *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995)). Here, Metaxas' statements were all responsive to Oltmann's description of his personal experience. The underlying basis of Metaxas' statements, or the "stated facts," were provided by Oltmann throughout the interview. Metaxas' remarks and reactions are merely his expression of opinion based on what Oltmann represented as factual, firsthand experience. His audience could accept or reject his opinion based on their own evaluation because Oltmann's story is distinguishable from Metaxas' commentary. *Id.*

Lastly, the Court considers whether the facts implied by Metaxas' statements "are susceptible of being proved true or false." *Maddow*, 8 F.4th at 1160. The contested statements, when taken in isolation, are capable of verification because either Plaintiff was on the alleged

Antifa conference call or he was not. However, Colorado courts have never imposed a duty to investigate, particularly in matters such as this where the statements concern a matter of public significance. *See Lewis v. McGraw-Hill Broadcasting Co., Inc.*, 832 P.2d 1118, 1122-23 (Colo. App. 1992). Therefore, although the third factor leans in favor of a finding that Metaxas' audience could conclude his statements implied an assertion of objective fact, it does so through imposition of a duty that Colorado courts have explicitly not placed on media personalities such as Metaxas.

Two of the factors "negate the impression that the statement is an assertion of objective fact." *Maddow*, 8 F.4th at 1160. The third factor tilts slightly the other direction, but this Court is not willing to impose upon Metaxas a duty the Colorado Court of Appeals has explicitly rejected. In sum, Metaxas' contested statements fall within "the 'rhetorical hyperbole' [that] had traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

The Court finds that Metaxas' statements during his interview with Oltmann are constitutionally protected opinion, used in combination with rhetorical hyperbole and non-literal commentary intended to react to Oltmann's story. Metaxas' statements deserve the highest protection under the First Amendment and Colorado's anti-SLAPP statute. Under the guidance of *Milkovich*, *Hogan*, *McDougal*, and *Maddow*, the Court finds that Metaxas' statements were not defamatory and they are not actionable.

Metaxas also argues that Plaintiff's defamation claim against him fails because Plaintiff has failed to establish a prima facie case of actual malice. Plaintiff argues that he is not required to establish actual malice because he is not a public figure and the statements about him did not concern a matter of public concern. The Court has already determined that the statements at issue concerned a matter of public concern. The Court has also already determined that Plaintiff was a

public figure, at least for the limited purposes of election technology and election security. Thus, Plaintiff is required to establish actual malice.

A defamation plaintiff cannot recover unless he proves "by clear and convincing evidence that the defendant published the defamatory statement with actual malice, with knowledge of falsity or in reckless disregard for the truth." *Lewis*, 832 P.2d at 1122-23. The fact "[t]hat a reasonably prudent person … would have investigated before publishing does not suffice." *Id.* Rather, Plaintiff must demonstrate Metaxas "entertained serious doubts as to the truth of the statement, or acted with a high degree of awareness of its probable falsity." *Id.*

The Court rejects Plaintiff's argument that Metaxas demonstrated actual malice by failing to investigate Oltmann's story. Failure to investigate is not a basis for actual malice. *Id.*

Plaintiff was granted pre-hearing limited discovery in this matter. A primary purpose of this limited discovery was to establish a prima facie case for actual malice under the clear and convincing evidence standard. The discovery fails to establish by clear and convincing evidence that Metaxas made his statements with actual malice. Metaxas repeatedly testified that he had no reason to doubt Oltmann or his story. It did not occur to Metaxas that Oltmann "was doing anything but kind of reporting what he'd experienced." Metaxas Dep. Tr. at 77:17-78:11.

Further, the language Metaxas used demonstrates his purpose was not to bring harm to Plaintiff, but to inform his listeners about issues surrounding election integrity. For example, Plaintiff's Amended Complaint quotes Metaxas as stating in his interview with Oltmann: "[A]nd so that's why I'm so glad to be speaking with you and getting this information out[.]" Am. Compl, ¶ 59, fn. 74. This type of statement clearly demonstrates that the purpose of the interview was to inform the public about a matter of public concern.

Despite conducting discovery into the issue of actual malice, there is a complete lack of evidence that Metaxas "entertained serious doubts as to the truth of [Oltmann's] statement[s]" or "acted with a high degree of awareness of [the statements'] probable falsity." *Lewis*, 832 P.2d at 1122-23.

The Court finds that Plaintiff has not established a prima facie case that Metaxas acted with actual malice. The Court also finds that any argument Plaintiff offered does not meet the heightened clear and convincing evidence standard required to establish actual malice.

Based on the foregoing, the Court concludes that Plaintiff has failed to establish a prima facie case of defamation against Metaxas.

Civil Conspiracy:

The Court next addresses Plaintiff's civil conspiracy claim. To prove a civil conspiracy, Plaintiff must establish five elements: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful overt acts, and (5) damages. *Walker v. Van Laningham*, 148 P.3d 391, 396 (Colo. App. 2006). "The court will not infer the agreement necessary to form a conspiracy; evidence of such agreement must be presented by the plaintiff." *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). Metaxas argues Plaintiff cannot establish the existence of an agreement between Metaxas and any other defendant.

Metaxas hosted Oltmann as a guest on his show on November 24, 2020. Prior to hosting Oltmann on the show, Metaxas did not speak with Oltmann aside from arranging the date of his appearance. Metaxas Dep. Tr. at 21:1-9. Metaxas had not previously heard of Oltmann (*id.* at 21:10-16), he had not seen prior interviews of Oltmann (*id.* at 18:7-17), and he was not aware that Defendants Powell or Giuliani had discussed Plaintiff at a November 19, 2021 event (*id.* at 18:18-

19:10). Metaxas has not talked to Oltmann since the November 24, 2021 interview, and the show was the only time they talked. *Id.* at 22:8-23:1. Metaxas has also not had conversations with any other defendants or non-defendants regarding Plaintiff. *Id.* at 47:15-49:15.

Plaintiff asks the Court to infer the existence of a conspiracy, apparently based upon shared beliefs among the defendants. The Court will make no such inferences. Plaintiff was given the opportunity to conduct limited discovery into his civil conspiracy claim, and the discovery conducted against Metaxas fails to establish the existence of a conspiracy including Metaxas.

The Court finds Plaintiff has failed to provide sufficient evidence of an agreement to defame Plaintiff between Metaxas and any other defendant. The Court concludes that Plaintiff has failed to establish a prima facie case of civil conspiracy against Metaxas.

Intentional Infliction of Emotional Distress and Injunctive Relief:

Finally, the Court addresses Plaintiff's claims for intentional infliction of emotional distress and injunctive relief. Plaintiff's defamation claim forms the nexus of his intentional infliction of emotional distress claim and injunctive relief claims. The Court has previously concluded that Plaintiff has failed to establish a prima facie case for defamation. Because Plaintiff has failed to establish a prima facie case for defamation, his intentional infliction of emotional distress and injunctive relief claims similarly fail. The Court concludes that Plaintiff has failed to establish prima facie cases for intentional infliction of emotional distress and injunctive relief against Metaxas.

For the foregoing reasons, Defendant Eric Metaxas' *Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101* is GRANTED.

Dated this 17th day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 17, 2021, a true copy of the above and foregoing was electronically filed through ICCES which will send notification to all counsel of record.

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