

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

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CASE NUMBER: 2020CV34319

ERIC COOMER, Ph.D.,  
Plaintiff

vs.

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

**COURT USE ONLY**

Case Number: 2020CV34319

Division Courtroom: 409

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Court’s October 25, 2021, Order, Defendants Donald J. Trump for President, Inc, Sidney Powell, Sidney Powell, P.C., Defending the Republic, Inc., Rudolph Giuliani (“Giuliani”), James Hoft, Joseph Oltmann, and TGP Communications LLC dba The Gateway Pundit submitted a joint filing of proposed findings of fact and conclusions of law for the purpose of avoiding repetition in their respective briefs (“Joint Submission”). In addition to the Joint Submission, Giuliani submitted his individual submission (“Giuliani Submission”). The Court hereby adopts and enters the following findings of fact and conclusions of law from the Giuliani Submission:

### **I. FINDINGS OF FACT**

1. Just after the November 3, 2020, Election (“Election”), Giuliani was retained by Donald J. Trump for President, Inc (the “Trump Campaign”). Ex. 402 at ¶ 2. Giuliani was the head of the Trump Campaign’s legal team. *Id.* He began the process of investigating what he perceived as voting irregularities in the Election. *Id.* Prior to November 3, 2020, he was unfamiliar with Plaintiff Eric Coomer (“Dr. Coomer”), Dominion Voting Systems (“Dominion”), or Smartmatic (“Smartmatic”). *Id.*

2. At some point during Giuliani’s legal team’s investigation into the Election (which included voting security issues with Dominion and Dominion’s history with Smartmatic) he and his team became aware of media reports circulating regarding Dr. Coomer and allegations that Dr. Coomer had been overheard telling a radical leftist group words to the effect that Dr. Coomer had ensured that Trump would lose the Election. *Id.* at ¶ 3.

3. Giuliani perceived this to mean that Dr. Coomer used his position at Dominion to rig the software or machines to manipulate the Election results. *Id.* Giuliani

was also made aware that Dr. Coomer was alleged to have ties to radical leftist groups, such as Antifa. *Id.*

4. Around this same time frame, Giuliani had learned what he perceived as alarming facts about voting machines and voting technologies used in the 2020 Election, including: (1) information alleging that Smartmatic had ties to Venezuela and the Chavez regime; (2) information alleging that Smartmatic had attempted to operate in the U.S. through a subsidiary called Sequoia Voting (“Sequoia”); (3) information alleging that the U.S. Government had raised concerns regarding Smartmatic operating Sequoia given its ties to Venezuela and unknown ownership; (4) information alleging that Dominion had acquired Sequoia from Smartmatic after Smartmatic decided to divest from Sequoia rather than fully comply with an investigation by the U.S. Government; (5) information alleging that with the Sequoia acquisition, Smartmatic acquired Dr. Coomer who worked for Sequoia as “Vice President of Research and Product Development”; (6) information alleging that Dominion had a software licensing agreement with Smartmatic; (7) allegations of voting irregularities with Dominion machines/software that had switched votes from Trump to Biden (Ex. 403); (8) evidence that Texas had rejected Dominion due to security concerns (Ex. 920); and (9) allegations raising significant nationwide concern over the security of Dominion machines and software that existed prior to the Election. Ex. 402 at ¶ 4; Ex. 405.

5. Giuliani was aware of these facts prior to the November 19, 2020, press conference in Washington, D.C. (“Press Conference”) as a result of he and his legal team’s investigation into the Election. Ex. 400; Ex. 401; Ex. 402 at ¶ 5. At the time Giuliani made the statements in the Press Conference (“Giuliani Election Statements”)

regarding Dr. Coomer, he believed them to be true. *Id.* Giuliani had seen evidence of Dr. Coomer's social media postings which Giuliani perceived as vehemently anti-Trump. *Id.*; Exs. 903; 906.

6. Based on that corroborating evidence, Giuliani believed he had no reason to doubt the credibility of the witness testimony of Joseph Oltmann (Ex. 900) that was being widely reported at the time regarding Dr. Coomer's alleged statements that he had programmed Dominion machines or software to rig the Election. Ex. 402 at ¶ 6.

7. At the time Giuliani made the Giuliani Election Statements, the Trump Campaign had already filed a suit in Michigan to challenge the Election and was planning to file more suits in contested states alleging, among other things, that the results of the Election were tainted based on security issues with Dominion machines and/or software. *Id.* at ¶ 7.

8. The litigation on file at the time of the Press Conference was styled Case 1:20-cv-01083-JTN-PJG, *Donald J. Trump for President, Inc., et al. v. Jocelyn Benson, et al.* in the United States District Court for the Western District of Michigan (the "Michigan Lawsuit"). Ex. 403. In the Original Complaint [Doc. 1] filed in that case on November 11, 2020, the Trump Campaign specifically complained of Dominion voting technologies and requested that no votes in Antrim County, Michigan that were tabulated using Dominion technologies be certified. *Id.* at ¶¶ 60-64; Prayer.

9. Giuliani intended to make the alleged statements from Dr. Coomer part of the Trump Campaign's legal presentation of evidence to challenge the Election results. Ex. 402 at ¶ 7. Giuliani's purpose of the Press Conference was to announce what the Trump Campaign's legal team expected the evidence to show in the litigation over the

Election that had already been filed in Michigan and which the Trump Campaign's legal team was preparing to file in other contested states. *Id.*

10. Co-Defendant Sidney Powell also spoke at the Press Conference with Giuliani. Ex. 400. She filed suit specifically referencing Dr. Coomer's alleged statements on November 25, 2020. Ex. 400 at A-3.

11. Dr. Coomer was the subject of public controversy regarding the allegations made by Defendant Oltmann (Ex. 900) no later than November 9, 2021. Ex. 906.

12. The Court finds no evidence that, prior to November 9, 2021, Giuliani had any discussion with any other Defendant regarding Dr. Coomer.

13. The Court further finds that, after November 9, 2021, there is no evidence that Giuliani reached an agreement or plan to disseminate false statements of fact of and concerning Dr. Coomer.

14. The Court finds that the Giuliani Election Statements were made by him during the pendency of litigation, namely the Michigan Lawsuit, over the reliability of Dominion voting technologies. Ex. 403. The Court further finds that the Giuliani Election Statements were related to these legal proceedings.

15. The Court further finds that there is no evidence to contravene Giuliani's uncontroverted testimony that he had formed a belief that he intended to file litigation on behalf of the Trump Campaign that incorporated the allegations about Dr. Coomer that Giuliani discussed at the Press Conference. Therefore, the Court accepts Giuliani's uncontroverted testimony to this effect as true.

16. Giuliani had never heard of Dr. Coomer prior to becoming part of the Trump legal team. Ex. 402 at ¶ 2. Giuliani did not complain about either Dominion or Smartmatic prior to the Election. *Id.*

## II. CONCLUSIONS OF LAW

### A. Litigation Privilege

17. Colorado recognizes that certain statements—regardless of their alleged defamatory character or whether they are true or false—are privileged and thus non-actionable. One such privilege is the litigation privilege. Statements made by an attorney during or in preparation for pending legal proceedings are absolutely privileged so long as the remarks have some relation to the proceeding. *See Begley v. Ireson*, 2017 COA 3, ¶ 13 (“*Begley I*”); *Club Valencia Homeowners Ass’n, Inc. v. Valencia Assocs.*, 712 P.2d 1024, 1027 (Colo. App. 1985). This absolute privilege exists “to encourage and protect free access to the courts for litigants and their attorneys.” *Begley I* at ¶ 13; *see also Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112, 1117 (Colo. 1990).

18. The Court concludes, as a matter of law, that because the Giuliani Election Statements were made during the pendency of litigation, he was managing that included challenging the reliability of Dominion voting technologies (the Michigan Lawsuit) and because these statements were related to the pending Trump Campaign legal proceedings in which Giuliani represented the Trump Campaign, that the Giuliani Election Statements were absolutely privileged.

19. Alternatively, to the extent the Giuliani Election Statements were only “pre-litigation” statements, a litigation privilege still applies if (1) the statement is related to prospective litigation and (2) the prospective litigation is contemplated in good faith.

*Begley I*, 2017 COA 3, at ¶ 17; *see also Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712, 714 (Colo. App. 2001) (“Communications preliminary to a judicial proceeding are protected by absolute immunity only if they have some relation to a proceeding that is actually contemplated in good faith.”). This privilege applies to any cause of action that is based on conduct protected by the litigation privilege. *Belinda A. Begley & Robert K. Hirsch Revocable Tr. v. Ireson*, 490 P.3d 963, 969-70 (Colo. Ct. App. 2020) (“*Begley II*”). The “good faith” test is not determined by the merits of any such litigation or its success but inquires as to whether the intention to file the litigation is in good faith. *Visto Corp. v. Sproqit Techs., Inc.*, 360 F. Supp. 2d 1064, 1069 (N.D. Cal. 2005) (“It is the contemplation of litigation that must be in good faith, not the merits of the actual litigation itself that animates the litigation privilege.”); *Begley II*, 2020 COA 157, at ¶ 54 (*citing id.*). Whether the privilege applies is a question of law for the trial court. *Club Valencia*, 712 P.2d at 1027.

20. Having no contravening evidence, the Court must accept as true Giuliani’s testimony that, at the time Giuliani made the Giuliani Election Statements, he had planned to file litigation on behalf of his client, the Trump Campaign, that would specifically incorporate the allegations regarding Dr. Coomer into Election Litigation. The Court therefore concludes as a matter of law that Giuliani’s Election Statements regarding Dr. Coomer are protected by the qualified pre-litigation privilege. *See Begley II*, 2020 COA 157, at ¶ 45 (holding declaration of attorney coupled with corroborating evidence, timing of events, and fact that litigation was actually filed is sufficient evidence to establish the absolute litigation privilege).

**B. Actual Malice**

21. Evidence of bias standing alone, is insufficient to demonstrate actual malice. *See Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1042-43 (10<sup>th</sup> Cir. 2013). Even a motive to cause harm to another is insufficient, by itself, to show actual malice. *See id.*

22. Further, that a reasonably prudent person would have investigated before publishing a defamatory statement does not evidence actual malice. *Lewis v. McGraw-Hill Broad. Co.*, 832 P. 2d 1118, 1123 (Colo. App. 1992). Rather, the plaintiff must demonstrate that the defendant in fact—not hypothetically or “should have done so”—entertained serious doubts as to the truth of the statement. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

23. Dr. Coomer can only establish Giuliani acted with actual malice by proving one of three circumstances: (1) he fabricated the story, it was the product of his imagination, or was based wholly on an unverified anonymous telephone call to him; (2) his allegations are so inherently improbable that only a reckless man would have put them in circulation; or (3) there were obvious reasons to doubt the veracity of the informant or the accuracy of the reports about Dr. Coomer. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

24. Because the allegations regarding Dr. Coomer did not originate with Giuliani and were not based on a wholly unverified or anonymous telephone call, the Court holds as a matter of law the first circumstance does not apply.

25. The Court has found that multiple allegations of the possibility of compromising election technology, specifically Dominion, were in circulation many

months before the Press Conference, including in reporting by Newsmax and OAN. In particular, United States Senators such as Elizabeth Warren highlighted their concerns with Dominion prior to the 2020 election in an open letter sent in 2019. Based on these facts, the Court holds as a matter of law that the allegations against Dr. Coomer were not so inherently improbable that only a reckless man would recirculate Defendant Oltmann's report of Dr. Coomer's alleged admissions regarding manipulation of the Election during a call with persons alleging espousing "Antifa" ideology. Therefore, as a matter of law, the second circumstance does not apply.

26. The Court has found that there were multiple statements by other individuals of which Giuliani was aware such as Defendant Oltmann's report of Dr. Coomer's alleged admissions regarding manipulation of the Election during a call with persons alleging espousing "Antifa" ideology prior to the Press Conference. The Court also finds that Giuliani was aware of Dr. Coomer's social media postings that could be perceived as sympathetic to the "Antifa" ideology. Accordingly, the Court does not find that, at the time of the Press Conference, there is any evidence that Giuliani, in fact, entertained serious doubts about the truth of his Election Statements regarding Dr. Coomer.

27. As a matter of law, the Court concludes that Giuliani did not make the Giuliani Election Statements with actual malice or reckless disregard for the truth.

### **C. Conspiracy**

28. Civil conspiracy is not an independently actionable tort cause of action. *Colorado Community Bank v. Hoffman*, 338 P. 3d 390, 397 (Colo. App. 2011) (citing *Bd. Of Cnty. Commis v. Park Cnty. Sportsmen's Ranch, LLP*, 271 P. 3d 562, 572 (Colo. App.

2013)). Conspiracy claims are derivative of other actionable tort claims. *Hoffman*, 338 P. 3d at 397. To prove conspiracy as to Giuliani, Dr. Coomer must demonstrate that Giuliani had a meeting of the minds with some other Defendant to engage in one of the underlying tort claims he has pleaded. See *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). Evidence of such an agreement must be presented by Dr. Coomer and will not be inferred. *Id.*

29. Dr. Coomer has presented no direct evidence of a conspiracy including Giuliani to defame Dr. Coomer or commit any other tortious conduct against Dr. Coomer.

30. The only evidence Dr. Coomer presents to support a conspiracy between Giuliani and any other defendant are: that the Defendants may have shared an ideology and an objective of challenging the 2020 Election prior to the Press Conference and that republishing Oltmann’s allegations regarding manipulation of the Election during a call with persons alleging espousing “Antifa” ideology might have been helpful toward that objective. These facts are insufficient evidence to prove a “meeting of the minds” and thus a conspiracy. See *United States ex rel. PCA Integrity Assocs., LLP v. NCO Fin. Sys., Inc.*, No. CV 15-750 (RC), 2020 WL 686009, at \*30 (D.D.C. Feb. 11, 2020) (dismissing conspiracy claim subject to heightened pleading standard where, like here, plaintiff only alleged a shared conspiratorial objective).

31. The Court concludes that Dr. Coomer’s evidence is insufficient to prove a meeting of the minds of occurred between Giuliani and any other Defendant or person to commit any tortious conduct against Dr. Coomer.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2021.

BY THE COURT

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District Court Judge