DISTRICT COURT, DENVER COURT, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	DATE FILED: December 17, 2021 6:42 PM FILING ID: 83DE37485C2DF CASE NUMBER: 2020CV34319
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, PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant, Donald J. Trump for President, Inc. ("The Campaign"), by and through its counsel, John S. Zakhem, Eric R. Holway, and the law firm of Jackson Kelly PLLC, hereby submits the following Proposed Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The 2020 Presidential election (the "2020 Election") was one of the most closely-followed and contentious presidential elections in modern American history. Prior to, and immediately following, the 2020 Election, there were widespread allegations of voter fraud, ballot manipulation, and general election irregularities.

2. The Campaign was concerned about election fraud as early as 2016 and was actively investigating and litigating these concerns in the months leading up to the 2020 Election. FAC at ¶ 63. The Campaign began filing lawsuits related to unlawful state voting law changes in the summer of 2020.[1]

3. At the time of the 2020 Election, Dominion Voting Systems ("Dominion") was a voting equipment and software company that provided election services in a majority of states across the country. Plaintiff, Eric Coomer, was the Director of Product Strategy and Security for Dominion. As an employee of Dominion, Plaintiff assisted with providing election-related services to the numerous counties and states that utilized Dominion's software.

4. According to Defendant Oltmann, he participated in a Zoom conference call with self-described progressive activists and supporters of the "Antifa" movement (the "Zoom Call"), during which he claimed to have heard an individual on the call, who was identified as "Eric from Dominion," tell other participants on the call not to worry about the 2020 Election because he "made fucking sure" Donald Trump would not win.

5. Following the Zoom call, Defendant Oltmann conducted research into "Eric from Dominion," which led him to discover Eric Coomer of Dominion Voting Systems. In his

[1] *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814 (D. Mont. 2020); *Donald J. Trump for President, Inc. v. Murphy*, Case No. 3:20-cv-10753, filed on August 18, 2020 (D. NJ. 2020); *Donald J. Trump for President, Inc. v. Cegavske*, Case No. 2:20-cv-01445-JCM-VCF, filed on August 4, 2020 (D. Nev. 2020).

research, Defendant Oltmann also uncovered a motivation for Plaintiff to rig the 2020 Election against Donald Trump – Facebook posts that were highly critical of President Trump, his supporters, and anyone who voted for him. Additionally, Defendant Oltmann found an explanation for why Plaintiff would have been on the Zoom Call with Antifa supporters – an "Antifa Manifesto," which Plaintiff had posted to his personal Facebook page.

6. Defendant Oltmann began sharing his story and his research with various media outlets and political pundits, many of whom aired their interviews with Defendant Oltmann and published his story on their websites, blogs, and social media pages, including Twitter. On November 13, 2020, Defendant Oltmann provided a sworn affidavit ("Oltmann Affidavit"), certifying under penalty of perjury that his report of the Zoom Call was true and accurate.

7. Given widespread claims of irregularities and fraud surrounding the 2020 Election, The Campaign retained attorney Rudy Giuliani to investigate the claims and pursue litigation on its behalf. Defendant Giuliani became aware of the media reports regarding Defendant Oltmann's account of the Zoom Call and Plaintiff's Facebook posts that tied him to extreme leftist groups, such as Antifa. *See* Exhibit 402, Declaration of Rudolph Giuliani, ¶ 3, April 29, 2021. The Trump legal team also learned alarming facts about voting machines and technologies used in the 2020 Election related to Dominion and its predecessors, Sequoia and Smartmatic. *Id.* at ¶ 4.

8. On November 9, 2020, Defendant Giuliani, on behalf of The Campaign, filed a lawsuit in the Middle District of Pennsylvania related to the constitutionality of Pennsylvania's election practices with respect to the counting of votes cast in the 2020 Election. *See Donald J. Trump for President, Inc. v. Boockvar*, Case No. 4:20-cv-02078-MWB (M.D. Penn.).

9. On November 19, 2020, Defendant Giuliani and other members of the Trump legal team held a press conference at the Republican National Committee in Washington, D.C. (the "Press Conference"), to update the media and members of the public regarding the status of their investigation into the allegations of election fraud and forthcoming litigation arising out of those efforts. The Trump legal team intended the Press Conference to serve as an "opening statement" for the legal actions the team intended to file in the coming days and what the team expected the evidence to show in the 2020 Election litigation. *See* Exhibit 402, Declaration of Rudolph Giuliani, ¶ 7.

10. The presentation of evidence included Defendant Oltmann's report and the Oltmann Affidavit, which attested to the accuracy of the story. Also present at the Press Conference were individuals who were not members of the Trump legal team, such as Sidney Powell, but whose efforts in this area were closely aligned with that of The Campaign. Plaintiff alleges that certain statements made at the Press Conference by Defendants Giuliani and Powell are attributable to The Campaign and constitute defamation; however, Defendant Powell was not an attorney for, or representative of, The Campaign. *See* Plaintiff's Exhibit J-1, R. Giuliani Dep. Trns., 26:11-13, Aug. 14, 2021; Declaration of Sidney Powell (Powell Findings and Conclusions Appendix, APP0002-0004), ¶ 5, Apr. 28, 2021.

11. Regardless, at the time of the Press Conference, Defendant Giuliani had already filed litigation contesting the results of the 2020 Election, and Defendants Giuliani and Powell were planning to file additional lawsuits in contested states alleging, among other things, that the results of the 2020 Election were tainted based on security issues with Dominion voting machines and/or software. *See* Exhibit 402, Declaration of Rudolph Giuliani. On November 25,

2020, Defendant Powell filed lawsuits in Federal District Courts in both Michigan and Georgia related to fraud in the 2020 Election and challenging the election results.[2] On December 1, 2020, Defendant Powell filed similar lawsuits in Federal District Courts in Wisconsin and Arizona.[3]

12. Throughout this time, Donald Trump continued to update the American people and his campaign's supporters regarding the issues of the pending litigation relating to circulating allegations of election fraud.

13. The only "tweet" from Donald Trump that mentioned Plaintiff (albeit indirectly) was on November 21, 2020, in which Donald Trump "re-tweeted" links to a multi-part investigative news story published by Defendant OAN, entitled "Dominion-izing the Vote." *See* Exhibit PEX RRR, Donald Trump's Tweet – Dominion-izing the Vote Part 2. "Dominion-izing the Vote" included a segment in which Defendant Oltmann was interviewed regarding the Zoom Call in which he heard "Eric from Dominion" claim to have rigged the 2020 Election against Donald Trump. In "Dominion-izing the Vote," Defendant Oltmann also discussed the Facebook posts he uncovered in which Plaintiff was critical of Donald Trump and posted the "Antifa Manifesto."

14. Donald Trump's son, Eric Trump, also utilized Twitter to provide updates on the litigation efforts and the allegations of election fraud. The only tweet sent out by Eric Trump that mentioned Plaintiff was a "re-tweet" on November 17, 2020, in which Eric Trump tweeted a link to an already published news story from Defendant TGP. In that "tweet," Eric Trump included a direct quote from the story, writing, "Eric Coomer – Dominions Vice President of

[2] *Pearson, et. al. v. Kemp, et. al.*, Case No. 1:20-cv-04809-TCB. Filed November 25, 2020 (N.D. Ga.); *King, et. al. v. Whitmer, et. al.*, Case No. 2:20-cv-13134-LVP-RSW, filed November 25, 2020 (E. Mich.).
[3] *Feehan, et. al. v. Wis. Elections Comm'n, et. al.*, Case No. 2:20-cv-01771, filed on December 1, 2020 (E.D. Wisc.); *Bowyer, et. al. v. Ducey, et. al.*, Case No. 2:20-cv-02321-DJH, filed on December 2, 2020 (D. Ariz.).

U.S. Engineering – 'Don't worry about the election, Trump's not gonna win. I made f*cking sure of that!'"

15. The Campaign's representative, Sean Dollman, testified that neither Donald Trump nor Eric Trump were representing The Campaign or acting in their official campaign capacities at the time they "re-tweeted" these third-party reports. *See* Exhibit 200, S. Dollman Dep. Trns., Vol. 1, 19:13-21:3, 56:19-23, Aug. 9, 2021. The "re-tweets" came from their respective personal Twitter accounts, not their campaign accounts.

CONCLUSIONS OF LAW

I. Standard of Review

16. In 2019, Colorado enacted C.R.S. § 13-20-1101, the anti-Strategic Litigation Against Public Participation Act, also known as the "anti-SLAPP Act." The Act allows someone defending a claim to file a "special motion to dismiss" to remove allegations of wrongdoing that are based upon the defending party's exercise of constitutionally-protected activity and provides an expedited process for courts to dismiss strategic lawsuits against public participation.

17. "The general assembly finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process." C.R.S. § 13-20-1101(1)(a). The purpose of the Act is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law." C.R.S. § 13-20-1101(1)(b).

18. The operative language in the anti-SLAPP statute is that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of

petition or free speech under the United States constitution or the state constitution in connection with a public issue is subject to a special motion to dismiss unless the court determines that the plaintiff has established a reasonable likelihood that the plaintiff will prevail on the claim." C.R.S. § 13-20-1101(3)(a).

19. The statute specifically defines "an act in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue" as, *inter alia*: "[a]ny written or oral statement or writing made in connection with an issue under consideration or review by a…judicial body or any other official proceeding authorized by law"; "[a]ny written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"; and "any conduct or communication in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or issue of public interest." C.R.S. § 13-20-1101(2)(a)(II-IV).

20. As the plain language of the statute provides, and as well-established in other jurisdictions with a virtually identical anti-SLAPP act, a plaintiff cannot assert a cause of action against a defendant on account of the defendant's statements related to an ongoing lawsuit or made in anticipation of a lawsuit, nor can a plaintiff assert a cause of action on account of a defendant's statements made concerning an issue of public interest.

21. Anti-SLAPP motions involve a two-step process. First, the defendant must make a *prima facie* showing that the lawsuit arises from activity that is protected under the anti-SLAPP law. C.R.S. § 13-20-1101(3)(a). "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of

petition or free speech." *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78-78 (Cal. 2002) (citing *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67-68 (Cal. 2002)).[4]

22. If the defendant can show that Plaintiff's lawsuit, or a cause of action in the lawsuit, arises from a protected activity, the burden then "shifts to the plaintiff to demonstrate a probability of prevailing on the claim." C.R.S. § 13-20-1101(3)(a). *See also Tamkin v. CBS Broadcasting, Inc.*, 193 Cal.App.4th 133, 142 (2011). If the plaintiff cannot meet this burden, the objectionable pleadings must be stricken. *See Digerati Holdings v. Young Money Ent't*, 194 Cal.App.4th 873, 884 (2011).

II. The Anti-SLAPP Statute Applies to Plaintiff's Claims Against The Campaign

23. Here, the Court finds that the conduct that forms the basis for Plaintiff's claims against The Campaign are all acts in furtherance of The Campaign's right of petition or free speech, as defined in the statute.

24. Plaintiff seeks to hold The Campaign liable for: (1) statements made by Defendants Giuliani and Powell during their participation in the Press Conference to present evidence of fraud in the 2020 Election (FAC ¶ 64); and (2) "re-tweets" by former president Donald Trump and his son, Eric Trump, sharing articles and videos from third-party sources regarding alleged fraud in the 2020 Election. These activities fall under the category of "acts in furtherance of a person's right or petition or free speech under the United States constitution or the state constitution in connection with a public issue" as that term is defined by C.R.S. § 13-20-1101(2)(a).

[4] Because this law "is relatively new and untested," courts in Colorado may look to California case law interpreting California's anti-SLAPP statute since Colorado's law "tracks California's statute almost exactly." *See Stevens v. Mulay*, 2021 WL 1153059 at *2, n. 7 (D. Colo. Mar. 26, 2021).

A. The statements at issue were all connected to an issue under consideration by a judicial body and were thus a "protected activity" under C.R.S. § 13-20-1101(2)(a)(II).

25. There is disagreement between the parties as to whether the alleged defamatory statements were made in connection with a matter of "public interest." As to The Campaign's Special Motion to Dismiss, the Court need not decide whether the statements were in connection with a matter of public interest because the Court finds that the statements attributed to The Campaign were made in connection with issues under consideration or review by a judicial body and thus under the protection of C.R.S. § 13-20-1101(2)(a)(II).

26. It is undisputed that, at the time the statements were made, litigation had already been filed in Pennsylvania challenging the results of the 2020 Election. Additional lawsuits had already been planned and were indeed filed within days of the Press Conference.

27. The entire purpose of the Press Conference was to present an "opening statement" to the American people outlining the evidence the lawsuits would bear out. *See* Exhibit 402, Giuliani Decl. ¶ 7. No more than 6 days after the Press Conference, the first lawsuits were filed in Georgia and Michigan. The lawsuits in Arizona and Wisconsin were filed approximately one week after that. Each of these lawsuits specifically alleged voting system fraud and manipulation by Dominion. The statements that form the basis of Plaintiff's claims were all connected to these issues through Plaintiff who, in his role as Director of Product Strategy and Security at Dominion, had a clear motive to alter the results of the 2020 Election. These statements, therefore, were all connected to issues in front of a judicial body and within the protections of the anti-SLAPP statute pursuant to C.R.S. § 13-20-1101(2)(a)(II).

28. The same is true of Donald Trump's and Eric Trump's "re-tweets." Each of the "re-tweets" contained links to stories regarding Dominion, which was at the center of the lawsuits filed. These stories mentioned Plaintiff in his role at Dominion as it related to the potential for fraud in Dominion's voting machines and election software. These "re-tweets" likewise fall within the protections of the anti-SLAPP statute. *Id.*

29. While the Court notes that only one lawsuit in Pennsylvania had been filed at the time the statements that form the basis of Plaintiff's claims were made, this fact does not weigh on the Court's finding that the statements were related to subsequent lawsuits under subsection (2)(a)(II). The clear meaning of the statutory language has been considered by California courts, which have found that statements made prior to the filing of litigation, in anticipation of such litigation, are protected under the anti-SLAPP statute. *See Briggs v. Eden for Hope & Opportunity*, 19 Cal. 4th 1106 (1999) (assisting tenant in pre-litigation investigation was protected as connected to a judicial proceeding, regardless of whether it was a matter of public interest); *Dowling v. Zimerman*, 85 Cal. App. 4th 1400 (2001) (pre-litigation correspondence in preparation for litigation is protected, regardless of whether it was regarding a public interest).

30. There is no "public interest" requirement for finding that the statements fall within the purview of the anti-SLAPP Act under subsection (2)(a)(II). California courts have ruled that the plain meaning of the statute is that the "public interest" limitation *only* applies to the third and fourth kinds of "acts in furtherance" (i.e. subsections (2)(a)(III) and (IV)) due to the explicit inclusion of a "public interest" facet to those classifications. The court in *Dowling* stated: "the Legislature, when enacting section 425.16, expressed in the statute's preamble a desire 'to encourage continued participation in matters of public significance' (§ 425.16, subd.

(a)) [this] does not imply the Legislature intended to impose, in the statute's operative sections, an across-the-board 'issue of public interest' pleading requirement." *Briggs*, 19 Cal. 4th at 1118.

31. The *Briggs* majority decision clarifies that clauses (I) and (II) of subdivision (2)(a) of Colorado's anti-SLAPP statute protect conduct involving statements that implicate First Amendment speech or petition rights and are made either "before" any legally authorized legislative, executive, judicial or other official proceeding, or "in connection with issues under review by" any such official proceeding, and a defendant who brings a special motion under this section to strike a lawsuit that arises from such protected conduct is not required to plead and prove that the defendant's statements involved an issue of public interest.

32. Assuming *arguendo* there is no "issue of public interest, the plain meaning of the statute and California courts' resounding rejection of the argument asserted by Plaintiff demonstrates that the anti-SLAPP Act still applies.

B. Even in the alternative, the Court finds that the statements were made in connection with a matter of public interest and thus were "an act in furtherance of a person's right of petition or free speech."

33. Notwithstanding the above, there can be no dispute that the statements made concerned a matter of public interest.

34. The Court finds that the allegedly defamatory statements were made in connection with the 2020 Election and were related to widespread allegations of voter fraud and ballot manipulation that arose out of that election. These matters were of public interest as a matter of law and thus fall squarely within the purview of subsections (2)(a)(III)-(IV). It has long been established that presidential elections are quintessential matters of public concern. *Mauff v. People*, 123 P. 101, 103 (Colo. 1912) ("it is a matter of general public concern that, at

all elections, such safeguards be afforded."); *see Johnson v. Bradley*, 4 Cal. 4th 389, 409 (1992) (the integrity of the electoral process is a statewide concern).

35. All of the alleged defamatory statements and publications Plaintiff attributes to The Campaign concerned the 2020 Election and mounting claims of voter fraud by The Campaign and the public at large. The 2020 Election 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.

36. The statements alleged by Plaintiff in the Amended Complaint were all "connected to" this matter of public interest. The statements involved a top executive at one of the largest election management companies in the world who had a clear motive to manipulate the results of the 2020 Election and made statements about doing just that in a clear threat to the legitimacy of the 2020 Election and the democratic process.

III. Thus, the statements that underlie Plaintiff's claims against The Campaign fall squarely within the definition of an "act in furtherance of a person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue" under C.R.S. § 13-20-1101(2)(a)(III)-(IV). Plaintiff failed to establish a "reasonable likelihood that [he] will "prevail on the claims" against The Campaign.

37. Having determined that the alleged conduct falls within the protections of the anti-SLAPP Act, the Court next addresses whether Plaintiff has satisfied his burden of establishing a "reasonable likelihood that [he] will prevail on the claim." C.R.S. § 13-20-1101(2)(a). The Court finds that, as to his claims against The Campaign, Plaintiff has failed to meet this burden.

A. Plaintiff did not demonstrate a "reasonable likelihood" of prevailing on his defamation claim.

38. "In Colorado, the elements of a cause of action for defamation are: (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." *McIntyre v. Jones*, 194 P.3d 519, 523-24 (Colo. App. 2008).

39. Here, because the alleged defamatory statements involve a matter of public concern, Plaintiff must also prove that the statements were made with "actual malice." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). "Generally, a matter is of public concern whenever it embraces an issue about which information is needed or is appropriate." *Smiley's Too, Inc. v. Denver Post Corp.*, 935 P.2d 39, 42 (Colo. App. 1996). Because the allegedly defamatory statements attributed to The Campaign all embrace allegations of voter fraud and misconduct in the 2020 Election, the Court finds that the statements made were a matter of public concern. *See Mauff*, 123 P. at 103.

1. The Litigation Privilege

40. Plaintiff cannot prevail on his defamation claim related to the statements made by Defendant Giuliani because he cannot overcome the litigation privilege. Statements made "during or in preparation for pending legal proceedings are absolutely privileged so long as the remarks have some relation to the proceeding." *Belinda A. Begley & Robert K. Hirsch Revocable Tr. v. Ireson*, 490 P.3d 963 (Colo. App. 2020); (hereafter *Begley II*) (citing *Begley v. Ireson*, 399 P.3d 777 (2017) (*Begley I*); *Club Valencia*, 712 P.2d at 1027)).

41. For the litigation privilege to apply, the statements "must have been made in reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it." *Club Valencia*, 712 P.2d at 1027. "The pertinency required is not technical legal relevancy, but rather a general frame of reference and relation to the subject matter of the litigation." *Id*. The litigation privilege "embraces anything that possibly may be relevant." *Id*. "All doubt should be resolved in favor of its relevancy or pertinency. No strained or close construction will be indulged to exempt a case from the protection of privilege." *Id*. at 1027-28.

42. Well before the alleged defamatory statements were made, The Campaign was actively pursuing legal actions, including recounts in Wisconsin and Georgia, as well as other litigation related to the 2020 Election. Shortly after the Press Conference, lawsuits were filed in four additional states.

43. Plaintiff argues that Defendant(s) Powell and/or Giuliani lacked good faith in pursuing future litigation and thus the litigation privilege does not apply. Plaintiff bases his argument on the fact that some of the lawsuits were dismissed after the statements were made. But the subsequent disposition of the lawsuits that were ultimately filed is irrelevant to whether the statements were made in good faith anticipation of litigation. The only requirement is that the litigation itself be *considered* or *contemplated* in good faith. Here, litigation was certainly contemplated in good faith at the time of the Press Conference, because it was ultimately filed within days after the Press Conference.

44. As the court in *Begley II* noted, "there is a difference between bad faith and lack of success on a claim… '[w]hile it is, of course, true that claims brought in bad faith must be, by

definition, meritless, it does not follow that because a claim is meritless, it was contemplated in bad faith.' Put another way, nothing in the definition of good faith requires success on the merits of the filed litigation.'" *Begley II* at ¶ 54.

45. Plaintiff urges the Court to rely on *Seidl v. Greenhouse Mortg. Co.*, 30 F. Supp. 2d 1292 (D. Colo. 1998), but the Court declines to do so, opting instead to follow multiple subsequent courts that have chosen not to adopt the holding in *Siedl* but have 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, i.e. Begley I*, 399 P.3d at 782. There is no requirement that the communication related to the subject matter of the proposed or pending litigation be made exclusively to those connected to the litigation.

46. Plaintiff's reliance on *Keier* is also misplaced. *Keier* provides 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.

47. Prior to the occasion when the statements were made, The Campaign was actively pursuing legal action involving allegations of voter fraud. The statements informed citizens, the media, and government officials of ongoing and anticipated litigation efforts and further investigation into voter fraud. Over 60 lawsuits were filed by The Campaign and its supporters

across the country to address allegations of voter fraud, and The Campaign used its national platform to inform voters of its efforts.

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

2. The Communications Decency Act

49. Plaintiff's defamation claim also fails because Plaintiff cannot overcome the protections afforded under the Communications Decency Act ("CDA"), which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

50. The CDA grants broad immunity to users of interactive computer services who post or publish material or information that originated from another source, unless the person "independently 'knew or had reason to know'" the statements were defamatory. *Barrett v. Rosenthal*, 146 P.3d 519, 513, 525 (Cal. 2006). "Congress has comprehensively immunized republication by individual Internet users." *Id.* at 529. "Plaintiffs who contend they were defamed in an internet posting may only seek recovery from the original source of the statement." *Id.* at 513.

51. Neither Eric nor Donald Trump were the original publishers of the alleged defamatory statements posted on their respective Twitter pages.

52. Plaintiff argues that the content contained in Eric Trump's "tweet" was independent from the linked article and that he was an "original publisher" of this content. Having reviewed the "tweet" and the linked article, however, the Court rejects this argument. The content contained in Eric Trump's "tweet" was a direct quote from the article linked to in the "tweet," and Eric Trump specifically cited Defendant Oltmann as the source of the information. Nothing in the CDA deems copying and pasting material from an already published article actionable.

53. As mere distributors/re-publishers of the alleged defamatory content, who, as explained above, neither knew, nor had reason to know, that the statements were defamatory, there can be no liability under the CDA and, accordingly, The Campaign cannot be held vicariously liable for those tweets.

3. Actual Malice

54. In addition to being unable to overcome the above defenses of The Campaign, Plaintiff has failed to show a reasonable likelihood of prevailing on his defamation claim because he cannot establish that The Campaign acted with actual malice.

55. In order for a statement to be made with actual malice, the defendant must have made the statement with knowledge of its falsity or with reckless disregard to its truthfulness. *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450, 457 (Colo. 1975). Plaintiff must present clear and convincing evidence that the defamatory statements were published with actual knowledge of their falsity, or in reckless disregard for their truth or falsity. *Seible v. Denver Post*

Corp., 782 P.2d 805, 808 (Colo. App. 1989) (internal citations omitted). Reckless disregard exists when the defendant, in fact, entertained serious doubts about the truth of his publication. *Seible*, 782 P.2d at 808 (internal citations omitted).

56. Plaintiff has put forth no evidence that The Campaign acted with "knowledge of falsity or in reckless disregard of the truth" in making the subject statements. At the time the statements were made, there was mounting evidence that Dominion's voting machines had miscounted presidential election ballots. There was evidence that Plaintiff, a top-level executive at Dominion, despised Donald Trump and had a strong motivation to ensure he lost the 2020 Election. And, most importantly, there was the Oltmann Affidavit, in which he claimed to have heard Plaintiff brag on a Zoom call with like-minded people that he had, in fact, rigged the 2020 Election.

57. Plaintiff argues that because the theories of voter fraud have since been debunked, the statements were made with actual malice. The Court finds this logic flawed. Plaintiff misapprehends the issue in his defamation claim, which is not whether there actually was fraud in the 2020 Election, but whether The Campaign acted with actual malice *at the time it published the allegedly defamatory material*. This standard is not one of hindsight, but foresight. Plaintiff has presented no evidence that The Campaign re-published the allegedly defamatory material with actual malice.

58. The Court further finds that Plaintiff presented no evidence of actual malice with respect to the "tweets" sent out by Eric and Donald Trump. The "tweets" simply disseminated information that had already been published on social media. Eric Trump's "tweet" included information from a primary source, who had already attested to its accuracy. Donald Trump's

"tweet" simply forwarded an already published news story regarding allegations of election fraud. At the time of the "tweets," Donald Trump was the presidential incumbent who was engaged in public debate regarding the security of the 2020 Election.

59. Neither of the subject "tweets" demonstrate knowing falsity or reckless disregard to the truth, because there was no reason at the time to doubt that the content of the stories were true and accurate. There were substantial questions surrounding the accuracy of Dominion's voting machines at the time the statements were published, and the stories were based on a first-hand account, supported by the Oltmann Affidavit, regarding a top-level Dominion executive, who had both the motivation and means to rig the election. The Court does not find that either Eric Trump or Donald Trump knew of the articles' falsity or that either individual had a reckless disregard for the truth when they "tweeted" the articles to their followers.

60. Plaintiff argues that a memorandum from The Campaign demonstrates that Donald Trump, Eric Trump, and Defendant Giuliani should have known that the content of their statements/publications was false, but the Court finds nothing in the memorandum to demonstrate this. Defendant Oltmann's report was that Plaintiff participated in a conference call and made a statement that he rigged the 2020 Election. The internal memorandum does not even mention either of these claims. The focus of the memo was on "Dominion, Smartmatic, Sequoia, and Venezuela." The only discussion of Plaintiff was in the context of addressing "internet rumors" that he (and others at Dominion) had ties to Antifa. The memo indicated that the research was conducted on or before the date Defendant Oltmann confirmed his first-hand account of the Zoom call in the Oltmann Affidavit. The memo also suggests that The Campaign had not yet received the 80 pages of incendiary and vicious Facebook posts by Plaintiff, which

provided ample evidence in support of Defendant Oltmann's report. Despite the conclusions reached in the memo regarding Plaintiff, the memo expressly confirmed that Plaintiff had posted an "Antifa Manifesto" on his Facebook page, evidencing at least some ties to the group.

61. The Campaign's representative, Sean Dollman, confirmed this in his deposition when he stated: "I wouldn't say that the campaign knew that he didn't have any ties to Antifa…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." Exhibit 200, S. Dollman Dep. Trns., Vol. 1, 53:25-54:4, 52:12-18, April 9, 2021.

62. None of the statements made or actions taken by The Campaign or its agents satisfies the "actual malice" standard. Therefore, Plaintiff has failed to establish a reasonable likelihood of prevailing on his defamation claim against The Campaign.

IV. Plaintiff failed to establish a likelihood of success on his Intentional Infliction of Emotional Distress (IIED) and Civil Conspiracy Claims

63. Plaintiff has failed to make the requisite showing of a likelihood of prevailing on the merits of his IIED and civil conspiracy claims as to The Campaign. Because Plaintiff's IIED and civil conspiracy claims are derivative of, and entirely dependent upon, his defamation claim, these claims fail for the reasons set forth above. "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." *Buchannon*, 982 P.2d at 1335 (internal citations omitted).

64. The Court notes that 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). And

for the same reasons set forth above, the Court finds that The Campaign and its agents did not make the subject statements with reckless disregard for the truth. The Court also finds that Plaintiff failed to put forth any evidence that The Campaign knowingly caused or intended to cause emotional distress to Plaintiff.

65. Regarding Plaintiff's civil conspiracy claim, the Court finds that Plaintiff has failed to present evidence of a meeting of the minds amongst the participants in the alleged conspiracy. The testimony has demonstrated that The Campaign did not coordinate nor agree with any other party to do anything with respect to Plaintiff. *See* Exhibit 201, S. Dollman Dep. Trns., Vol. 2, 27:20-22, 38:2-5, 45:16-20, 47:7-23, 50:9-16, Aug. 13, 2021. And, as to Plaintiff's argument that The Campaign conspired with Defendant Giuliani, the Court finds this argument unpersuasive, because attorneys and their clients cannot be held liable for conspiring. *See Astarte, Inc. v. Pacific Indus. Sys., Inc.*, 865 F. Supp. 693, 708 (D. Colo. 1994); *Heffernan v. Hunter*, 189 F.3d 405, 413 (3d Cir. 1999).

66. With respect to the other Defendants, the Court finds no indicia of agreement in an unlawful means or end that would show a reasonable likelihood of prevailing on this claim. The Court finds Plaintiff's purported "evidence" of a civil conspiracy to be nothing more than speculation and conjecture, which is insufficient to support a claim for civil conspiracy. *See Breidenbach v. Bolish*, 6 F.Supp.2d 1161, 1167 (D. Colo. 1998) (a complaint alleging conspiracy must allege specific facts showing agreement and concerted action among defendants).

CONCLUSION

The Court hereby finds that Plaintiff's claims against The Campaign arise out of acts taken by The Campaign in furtherance of its right of petition and free speech under the U.S.

Constitution or the state constitution in connection with a public issue, as defined in C.R.S. § 13-20-1101(2)(a)(I)-(IV). The Court further finds that Plaintiff has failed to establish a reasonable likelihood that he will prevail on his claims against The Campaign. Accordingly, the Court GRANTS The Campaign's Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101 in its entirety and dismisses, with prejudice, the claims against The Campaign in Plaintiff's Amended Complaint. The Court further finds that The Campaign is entitled to recovery of its reasonable attorney fees and costs incurred in the defense of this matter, pursuant to C.R.S. § 13-20-1101(4)(a).

Respectfully submitted this 17th day of December 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of December 2021, a true and correct copy of the foregoing was served via Colorado Court's E-filing System to all counsel of record.

/s/ Angela Maher
Angela Maher, Paralegal