

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80523 Phone Number: (720) 865-8301</p>	<p>DATE FILED: December 17, 2021 5:00 PM FILING ID: 515783BEE7853 CASE NUMBER: 2020CV34319</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff: Eric Coomer, Ph.D.,</p> <p>Defendants: 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.</p>	<p>Case Number: 2020CV34319</p> <p>Courtroom 409</p>
<p><b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b></p> <p><b>REGARDING DEFENDANTS</b></p> <p><b>SIDNEY POWELL AND SIDNEY POWELL, P.C.</b></p>	

## I. FINDINGS OF FACT

1. Sidney Powell is the sole owner of her personal services corporation Sidney Powell, P.C. Findings and Conclusions Appendix (“APP.”) 2 (Powell Dec. ¶ 2). Accordingly, Sidney Powell and Sidney Powell, P.C, shall generally be referred to herein collectively as “Powell.”
2. Certain Defendants have submitted Joint Proposed Findings of Fact and Conclusions of Law (“Joint Filing”). Powell has adopted the Joint Filing, including, but not limited to, those specific paragraphs of the Joint Filing cited herein.
3. On December 6, 2019, less than a year before the 2020 election, Senators Elizabeth Warren, Amy Klobuchar, and Ron Wyden and Congressman Mark Pocan sent a letter to Dominion Voting Systems, Inc. (“Dominion”) equity holders in which they expressed grave reservations regarding the vulnerability of elections in the United States. Joint Filing ¶¶ 11-12.
4. On January 24, 2020, the Texas Secretary of State’s office found the Dominion voting system was insufficiently secure to be certified for use in the state. This decision was based in part on concerns that the machines were not “safe from fraudulent or unauthorized manipulation.” Ex. 920, p. 2; Joint Filing ¶¶ 8-9.
5. On March 26, 2020, the HBO documentary *Kill Chain* premiered. Ex. 911. The parties have stipulated to the Court’s review of this documentary and the Court has done so. The Court has considered the statements in *Kill Chain* not for the truth of the matters asserted but for the purpose of their effect on the subjective mental state of those defendants who were aware of the statements and how that affects application of the actual malice standard.
6. Among the numerous election security vulnerabilities demonstrated in *Kill Chain* were the following:

(a) Harri Hursti, one of the foremost experts in election security, performed a hoax in 2005 in which he altered votes on a voting machine produced by Diebold AccuVote. The hack demonstrated that Diebold's claim that votes could not be changed was false. Diebold was acquired by Dominion in 2010. According to the documentary, the vulnerabilities identified by Hursti were never fixed and these same machines were planned for use in many states in the 2020 election. As discussed below in paragraph 8, Mr. Hursti submitted a Declaration in the *Curling* litigation.

(b) At Nevada's Def Con, the world's largest hacking convention, attendees experimented with current voting machines and discovered, among other revelations, that votes could have been altered remotely, even from a car driving past a polling place

(c) Jake Stauffer, a cyber security expert hired by the state of California to review their voting machines, revealed that he discovered basic and alarming security flaws that hackers could easily exploit.

(d) Statistician Philip Stark, who created a method for "risk-limiting audits," found that a single machine at a polling place in a heavily Democratic district in Georgia showed only Republican wins. Stark ran a simulation that found the likelihood of this anomaly to be one in a million.

7. *Kill Chain* also revealed that serious concerns about election security and the manipulation of voting machines were a bi-partisan issue at a national level in 2020. Senators James Lankford (R-OK), Mark Warner (D-VA), Ron Wyden (D-OR) and Amy Klobuchar (D-MN) were interviewed, all of whom expressed reservations about our nation's election security.

8. Approximately one month prior to the 2020 election, on October 11, 2020, federal judge Amy Totenberg expressed deep concerns about the security of the Dominion election system the State of Georgia planned to use for the 2020 election and entered appropriate relief in *Curling v. Raffensperger*, 493 F.Supp.3d 1264 (N.D. Ga. 2020). Joint Filing ¶¶ 2-7, 9. Powell was aware of the holding in *Curling* and in fact attached a Declaration submitted by Harri Hursti in that case on August 24, 2020, to the complaint she filed in Georgia shortly after the election. See Ex. 907 (Part 1, pp. 53-54; 155-88).

9. The 2020 election occurred on November 3, 2020. APP. 3 (Powell Dec. ¶ 6). Late in the evening of November 3, 2020, the news media reported that President Trump was leading in the swing states where the election would be decided in the Electoral College. *Id.* Powell was extremely concerned about reports that a massive number of votes had come in for Mr. Biden only in the middle of the night after voting counting had reportedly stopped. Exhibit 901, p. 56, 4-20. In the days that followed, the media reported that Mr. Biden had gained on and ultimately passed Mr. Trump in these states. APP. 3 (Powell Dec. ¶ 6). On November 7, 2020, most national media organizations projected that Mr. Biden had won the election. *Id.*

10. Mathematicians and statisticians almost immediately began contacting Powell with evidence of algorithms applied to the vote and statistical and mathematical impossibilities evident in the vote changes and results. APP. 3 (Powell Dec. ¶ 7). Powell became increasingly concerned that Mr. Biden's come-from-behind victory was statistically impossible and began investigating the matter. *Id.* Powell became convinced that there were serious questions about the integrity of the election and began working to prepare the lawsuits she would begin filing on November 25, 2020. *Id.*

11. Powell viewed a November 13, 2020 interview between Michelle Malkin and Joseph Oltmann (“Oltmann”) in which Oltmann referred to Plaintiff. APP. 3 (Powell Dec. ¶ 8).

Exhibit F-1 is a video of this interview.

12. Oltmann also provided a copy of his November 13, 2020 affidavit (Exhibit 900) to Powell. APP. 3 (Powell Dec. ¶ 9). Oltmann executed this affidavit under penalty of perjury. Ex. 900.

13. Many of the key claims Oltmann made in his affidavit are undisputed. Oltmann claimed he participated in what he referred to as an Antifa meeting “on or about September 27, 2020. Ex. 900, p. 1. Plaintiff’s witness Tay Anderson states a meeting of political activists occurred on September 25, 2020. APP. 7 (Anderson Dec. ¶ 10). Oltmann claimed the participants in the meeting were political activists. APP. 36 (Oltmann Stmt. 65:14-22). Mr. Anderson agrees. APP. 7 (Anderson Dec. ¶ 10). Oltmann estimated there were 19 people on the meeting. APP. 34 (Oltmann Stmt. 63:12-19). Mr. Anderson agrees there were 15-20 Participants. APP. 7 (Anderson Dec. ¶ 10). Oltmann testified the meeting was held via Zoom. APP. 41 (Oltmann Depo. 15:18-19). Mr. Anderson agrees. APP. 7 (Anderson Dec. ¶ 10). Oltmann asserted Black Lives Matter activists were involved in the meeting. APP. 59 (Oltmann Stmt, 68:12-14). Mr. Anderson agrees. APP. 6-7 (Anderson Dec. ¶¶ 4,10). Oltmann asserted that Mr. Anderson participated in the meeting. Oltmann APP. 39 (Oltmann Stmt. 84:12-21). Mr. Anderson agrees and even stated that he was the one who organized the meeting. APP. 7 (Anderson Dec. ¶ 10). Oltmann asserted that an individual named Joey Camp was discussed extensively at the meeting APP. 37-38 (Oltmann Stmt. 82:19-83:25). Mr. Anderson agrees. APP. 7 (Anderson Dec. ¶ 9). Oltmann claimed

the participants in the meeting were very upset with Joey Camp. APP. 37-38 (Oltmann Stmt. 82:19-83:25). Mr. Anderson agrees. APP. 7 (Anderson Dec. ¶ 9).

14. Critically, the parties do not dispute that Oltmann researched Eric from Dominion the day after the September 25, 2020 meeting. Oltmann stated that during the meeting, someone identified as Eric began to speak, and someone else said Eric was the “Dominion guy.”

Ex. 900, p. 2. The affidavit then states, “I wrote down his [i.e., Eric’s] name and started to do some research into him.” . . . I started with a simple google search; Keywords: “Eric,”

“Dominion,” “Denver” Colorado.” The fifth result in organic search returned: Dominion Voting Systems | Employee Profiles, Emails, Mutual . . . FULL PROFILE. Eric Coomer’s

photo . . .”<sup>3</sup> *Id.* Oltmann saved a screenshot of this Google search. Exhibit 902. Dr. Coomer does not dispute that Oltmann searched “Eric from Dominion” on September 26, 2020 or the authenticity of Ex. 902. APP. 50-51 (Coomer Depo. 100:15-101:5).

15. Based on the undisputed evidence summarized in paragraphs 13 and 14, the Court finds that Oltmann’s account of the September 2020 meeting and his Google search of Eric from Dominion are true in the following respects:

- (a) The meeting occurred on September 25, 2020.
- (b) The participants in the meeting were political activists.
- (c) There were approximate 15-20 participants.
- (d) The meeting was conducted via Zoom.
- (e) Black Lives Matter activists participated in the meeting.
- (f) Tay Anderson participated in the meeting.
- (g) Joey Camp was discussed extensively at the meeting.
- (h) The participants were upset with Joey Camp.

(i) The day after the meeting Oltmann Googled “Eric Dominion Denver Colorado,” and Exhibit 902 is a screenshot of that search.

16. The court finds that the only material disputed fact regarding Oltmann’s account of the September 25, 2020 meeting is Oltmann’s assertion that he performed his September 26, 2020, Google search in response to the following exchange during the meeting:

Someone identified as ‘Eric’ began to speak. Someone asked who Eric was, and someone else replied ‘he is the Dominion guy’ [paraphrased].

Eric then began to speak after being told to continue, but was interrupted and asked by someone, ‘What are we going to do if Trump wins this fucking election?’

Eric responded, ‘Don’t worry about the election. Trump is not going to win. I made fucking sure of that.. Hahaha’

Ex. 900, p. 2.

17. The only reasonable (indeed, the only plausible) explanation for Oltmann’s September 26, 2020 Google search is that something about “Eric from Dominion” had recently piqued his interest. It would be unreasonable to find that Oltmann performed an internet search regarding “Eric” from “Dominion” for no particular reason and it is merely a staggeringly improbable coincidence that he happened to perform the search the day after the September 25, 2020 activist meeting. As a matter of common sense, if someone has provided information that has been proven to be correct in several particulars, “he is more probably right about other facts,” including the facts that are critical to the matter. *Illinois v. Gates*, 462 U.S. 213, 244 (1983) (internal quotation marks omitted), *citing Spinelli v. United States*, 393 U.S. 410, 427 (1983), White, J. *concurring*, (“because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts.”).

18. Accordingly, the Court finds that Plaintiff has failed to adduce evidence that would meet his burden of establishing that Oltmann's account regarding the exchange quoted from his affidavit in paragraph 16 is not substantially true.

19. Exhibit 903 consists of several posts from Dr. Coomer's Facebook account. Oltmann discussed some of these posts in his interview with Michelle Malkin on November 13, 2020. Ex. F-1 (time 11:05 to 33:30). He also provided copies of the posts to Powell. APP. 53-54 (Powell Depo. 37:25-38:7).

20. Astonishingly, the Director of Product Strategy and Security for a national voting systems company put the following on Facebook: "I'm GLAD you're dead. I hope it was painful . . ." Ex. 903, p. 2. "Pigs [i.e., police officers] for Slaughter." *Id.* p. 7. "Dead Prez." *Id.*, p. 8. "Fuck the USA." *Id.* p. 9. "N.W.A. fuck the police." *Id.* p. 10. "Body Count-Cop Killer." *Id.* p. 11. MDC Dead Cops. *Id.* p. 12. "Fuck you Britain." *Id.*, p. 13. In an extended statement, Dr. Coomer wrote:

If you are planning to vote for that autocratic, narcissistic, fascist ass-hat blowhard and his christian jihadist VZP pic, UNFRIEND ME NOW! . . . Only an absolute FUCKING IDIOT could ever vote for that wind-bag fuck-tard FASCIST RACIST FUCK! . . . Seriously, this fucking ass-clown stands against everything that makes this country awesome! . . . I am not . . . willing to stand by and watch this great country be taken over by fascists . . .

*Id.* pp. 15-16. Dr. Coomer asserted he would not work for an employer that did not share the view of President Trump he expressed in this post. APP. 46-47 (Coomer Depo. 68:21-69:1).

Finally, Dr. Coomer posted a document entitled the "Antifa Manifesto" to his Facebook page. Ex. 903 pp.3-6.

21. Dr. Coomer stands by his posts to this day. APP. 48 (Coomer Depo. 70:1-5). He insists the posts were "appropriate." APP. 49 (Coomer Depo. 85:11-23).

22. Dr. Coomer admits that after Oltmann's account of the September 2020 meeting began to spread, he deleted his Facebook posts. APP. 16-17 (Coomer Dec. ¶ 19). He understood that the posts were evidence that could possibly be used to implicate him in wrongful conduct, so he got rid of them. APP. 45 (Coomer Depo. 43:5-19).

23. From the Malkin interview, Powell knew that Dr. Coomer was scrubbing his internet profile. Oltmann said "If he is not guilty, why is he scrubbing the internet?" Ex. F-1, timestamp. 16:08 to 16:40.

24. On December 8, 2020, Coomer wrote an op-ed in the Denver Post. Ex. 904. In his op-ed Dr. Coomer falsely claimed that "any posts . . . purporting to be from me have been fabricated." *Id.* p. 3. Dr. Coomer now admits that his Facebook posts made public by Oltmann were authentic. APP. 44 (Coomer Depo. 39:13-24).

25. Dr. Coomer knew about Oltmann's allegations on November 9, 2020. APP. 14-15 (Coomer Dec. ¶ 15). Dr. Coomer had access to media channels of communication as evidenced by the op-ed he published in the Denver Post. Ex. 904. Nevertheless, Dr. Coomer did not issue a denial of Oltmann's allegations until December 8, 2020, one month after he learned about them on November 9, 2020.

26. After he learned of Oltmann's account of the September 2020 meeting, Dr. Coomer went "into hiding." APP. 16 (Coomer Dec. ¶ 19). Attempts to contact him by other defendants were unsuccessful. APP. 57 (Rion Depo. 89:13-24).

27. Plaintiff has adduced no evidence that in November 2020, Powell should have known that Oltmann was an inherently unreliable source. Indeed, even Dr. Coomer admits that in November 2020, Oltmann was an "apparently successful private businessman." Omnibus Response to Special Motions to Dismiss ("Response") ¶ 5.

28. At a press conference held on November 19, 2020, Powell made the following statements:

Speaking of Smartmatic's leadership, one of the Smartmatic patent holders, Eric Coomer I believe his name is, is on the web as being recorded in a conversation with Antifa members, saying that he had the election rigged for Mr. Biden, nothing to worry about here, and he was going to, they were going to f— Trump. His social media is filled with hatred for the President, and for the United States of America as a whole, as are the social media accounts of many other Smartmatic people.

Ex. A-1.

29. On November 20, 2020, Powell made the following statements in an interview with Howie Carr:

Carr: Let me ask you about this guy Eric Coomer. He works for Dominion, he's a Berkeley, California, University of California grad. He's the one who was allegedly, there's a, he was on a conference call or something, a zoom with Antifa. And he said, supposedly, don't worry about Trump, I've already made sure he's going to lose the election. Is that true, for starters?

Powell: Yes.

Carr: It's true. You have that?

Powell: It's true. We have an affidavit to that effect and I think we have a copy of the call.

Carr: Where is Eric Coomer now?

Powell: He has disappeared. And also Dominion has shuttered up both of their offices in Canada where they shared an office floor with a George Soros entity, and they have moved their office in Denver. And of course I'm sure there was a lot of document shredding and things quote lost end quote in that process. The FBI should have moved on all of this immediately. All of the voting machines should have already been impounded. The software should have been secured and examined. I am so livid with law enforcement in this country that I can't see straight.

Carr: So what happens when you mention Coomer and he or his lawyers says, 'Well he was just bragging. You have no proof that he actually

fixed the election. He just, that's just bar room talk.' What are you going to say? What's the comeback?

Powell: Well it's called a confession in a court room. It's called a confession.

Ex. A-1.

30. On November 20, 2020, Powell made the following statements in an interview with Maria Bartiromo:

We've got Eric Coomer, as you said, admitting on tape that he rigged the election for Biden and hated Trump. We've got their social media posts. We've got all kinds of evidence that is mathematically irrefutable.

Ex. A-1.

31. Powell filed lawsuits challenging the election in Georgia and Michigan on November 25, 2020. Exhibits 907 and 908. She filed similar lawsuits in Wisconsin and Arizona on December 1 and 2, 2020. Exhibits 909 and 910. Each of these lawsuits contained hundreds of pages of pleading and supporting documentation. Ex. 907-910.

32. On November 29, 2020, the United States District Court for the Northern District of Georgia entered a TRO in the case brought by Powell. Ex. 923. A TRO may be entered only if a party demonstrates substantial likelihood of success on the merits. *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1320 (N.D. Ga. 2020). Accordingly, the Court finds that on November 29, 2020, the federal district court made a preliminary finding that Powell's action had a substantial likelihood of success.

33. Dr. Coomer contends that if Powell had done a more thorough investigation, she would have known that it was inherently implausible to believe he would have made the statement attributed to him by Oltmann. See, e.g., Response, ¶ 192. The Court rejects this assertion. Dr. Coomer does not identify what facts about his background make Oltmann's claim inherently implausible. To the contrary, there are facts that lend additional credibility to

Oltmann's claim. Exhibit 906 is an article *New York Times Magazine* article dated August 24, 2021. This article reveals that Dr. Coomer is a heavily tattooed former skinhead with half-inch holes in his ears who spoke freely on the internet about his mental health disorder, jail time, DUIs, and struggles with heroin and cocaine. Coomer admits that he in fact said everything the *New York Times* article quoted him as saying. APP. 43 (Coomer Depo. 36:16-20).

34. Plaintiff has adduced no evidence that Powell ever said that Dr. Coomer actually rigged the 2020 presidential election. In all of the statements Plaintiff alleges to have been defamatory, Powell said that evidence she had been given stated **Dr. Coomer said** he had rigged the election. Powell did not say Dr. Coomer followed through and actually rigged the election. Accordingly, the Court finds that Powell never stated that Dr. Coomer in fact rigged the 2020 election.

35. Powell has acknowledged that she misspoke when she said there was a recording of the September 2020 meeting. APP. 55 (Powell Depo. 82:8-15). And she corrected her pleadings. *Id.* There is nothing defamatory about mistakenly stating that a recording existed. Moreover, Oltmann immediately publicly acknowledged he had no recording. *Id.* Indeed, in his own Complaint, Dr. Coomer stated that on November 9, 2020, Oltmann publicly acknowledged he had no recording of the meeting. First Amended Complaint ("FAC") ¶¶ 6 and 60. Accordingly, Dr. Coomer was not harmed by Powell's mistake of referring to a recording.

36. Powell reviewed the manual for the Dominion voting system which describes a process by which votes could be transferred to "adjudication," and adjudicated votes subsequently assigned to particular candidates. She referred to this process as evidence in her lawsuits. Ex. 907, Part 1, p. 39

## II. CONCLUSIONS OF LAW

### A. The Anti-SLAPP Statute Applies

37. Powell incorporates the discussion of the Anti-SLAPP statute from the Joint Filing. Joint Filing ¶¶ 17-34. Plaintiff's cause of action against Powell arises from acts of hers that were in furtherance of her right to free speech under the United States and Colorado constitutions that were in connection with a public issue. For the reasons set forth in the Joint Filing, the Anti-SLAPP Statute applies in this case.

### B. Plaintiff Claims Powell Defamed Him When She Said that He Said He Rigged the 2020 Election

38. Plaintiff alleges that Powell made defamatory statements about him at: (a) a press conference held on November 19, 2020; (b) a November 20, 2020 interview with Howie Carr; and (c) a November 20, 2020 interview with Maria Bartiromo. First Amended Complaint ¶¶ 64, 66, 67. Plaintiff alleges the statements quoted at length in Finding of Fact ("FOF") 28 to 30 were the defamatory statements. Ex. A-1. As set forth in FOF 28 to 30, the thrust of these statements is that Powell said that during the September 2020 meeting, Dr. Coomer said he rigged the 2020 election.

39. In his Complaint, Plaintiff also alleged that certain statements Powell made in lawsuits filed in Arizona, Georgia, Wisconsin, and Michigan, were defamatory. Complaint ¶ 70. Apparently, however, Plaintiff has come to realize that Powell's statements concerning him in these lawsuits are protected under the litigation privilege and has withdrawn any claims based on statements made in the lawsuits. Specifically, in his Response, Plaintiff stated: "Dr. Coomer's claims are [not] based on statements made in those lawsuits." Response, ¶ 222.

### C. Plaintiff's Defamation Claim Fails Because Powell's Statements Were Substantially True

40. Powell incorporates the discussion of the law of defamation from the Joint Filing. Joint Filing ¶¶ 35-48. As set forth in FOF 15-18, it is more likely than not that Oltmann's claim is true that during the September 25, 2020, Zoom call, Dr. Coomer bragged to his fellow political activists that he had rigged the election. It follows that Powell's quotation of that statement is also true in all material respects. Substantial truth is an absolute defense to a defamation claim. *Lindemuth v. Jefferson Cty. Sch. Dist. R-1*, 765 P.2d 1057, 1058 (Colo. App. 1988). Accordingly, Plaintiff will not be able to overcome Powell's substantial truth defense to his defamation claim and has failed to establish a reasonable likelihood of success on the merits of his claim. Even if Oltmann's statement were not true, as set forth in more detail below, the fact that Powell had substantial reliable evidence, including Oltmann's sworn statement, makes it impossible for Plaintiff to establish she acted with actual malice.

**D. Plaintiff's Defamation Claim Fails Because Powell's Statements Were Not Actionable as a Matter of Law**

41. In *NBC Subsidiary, Inc. v. The Living Will Center*, 879 P.2d 6 (Colo. 1994), the court stated:

[*Milkovich v. Lorain Journal Co.*, 497 U.S. 1(1990),] unquestionably excludes from defamation liability not only statements of rhetorical hyperbole – the type of speech at issue in the *Bressler-Letter Carriers-Falwell* cases – but also statements clearly recognizable as pure opinion **because their factual premises are revealed**. Both types of assertions have an identical impact on readers – neither reasonably appearing factual – and hence are protected equally under the principles espoused in *Milkovich*.

*Id.* at 12 (emphasis added; internal citation omitted). In summary, when a defendant provides the facts underlying the challenged statements, it is clear that the challenged statements represent her own interpretation of those facts, which leaves the reader free to draw his own conclusions. Powell never stated or implied that she had independent knowledge regarding Dr. Coomer's claim to have rigged the election. As set forth in

FOF 28-30, she referenced the evidence she had – in particular Oltmann’s November 13, 2020 affidavit. Accordingly, Powell’s statements are not actionable as a matter of law under the *NBC Subsidiary, Inc. v. The Living Will Center* doctrine.

**E. Plaintiff Has Failed to Establish a Prima Facie Case of Actual Malice by Clear and Convincing Evidence.**

42. Plaintiff has the burden of showing Powell acted with actual malice. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). To meet this burden, he must demonstrate that when Powell made her statements, she subjectively had a “high degree of awareness” that her statements were probably false. *Id.*, quoting *Garrison v. State of La.*, 379 U.S. 64, 74 (1964). Plaintiff has no such evidence.

43. Powell made the allegedly defamatory statements on November 19 and 20, 2020. FOF 28-30. The issue before the Court, therefore, is whether Plaintiff has adduced sufficient evidence to demonstrate that he has a “reasonable likelihood” of meeting his burden of proving by clear and convincing evidence that Powell acted with actual malice on those dates. To do this he must demonstrate that – given the information Powell had on those dates – she had a “high degree of awareness” that her statements were probably false. Plaintiff has no evidence demonstrating this.

44. On November 19 and 20, 2020, Powell knew that that there was a bipartisan consensus that reached to the highest levels of government that the United States election system – including specifically hardware and software provided by Dominion – had substantial security vulnerabilities that raised concerns about whether Dominion machines were “safe from fraudulent or unauthorized manipulation.” FOF, 3, 4. In particular, she knew: (a) On December 6, 2019, Senators Elizabeth Warren, Amy Klobuchar, and Ron Wyden and Congressman Mark Pocan sent a joint letter expressing grave reservations

regarding the vulnerability of elections in the United States. Joint Filing ¶¶ 11-12. (b) On January 24, 2020, the Texas Secretary of State’s office found the Dominion voting system was insufficiently secure to be certified for use in the state. Joint Filing ¶¶ 8-10. (c) On March 26, 2020, the HBO documentary *Kill Chain* premiered, in which substantial evidence was presented that the United States election system has numerous substantial vulnerabilities. FOF ¶¶ 5-7. Significantly, the most prominent speaker in *Kill Chain*, Harri Hursti, submitted a Declaration in *Curling*, which Powell attached to her own pleading. FOF 8 (d) On October 11, 2020 – less than a month before the election – the federal district court for the Northern District of Georgia issued its opinion in *Curling v. Raffensperger*, in which the federal judge expressed deep reservations about the security of Dominion’s voting system and partially granted a TRO. Joint Filing ¶¶ 2-7. (e) From her review of Dominion manual, Powell had learned of an “adjudication” process by which votes could be allocated to a chosen candidate. FOF ¶ 36. Dr. Coomer’s own voting systems expert admits Dominion’s system has security weaknesses. Exhibit O, Halderman Dec. ¶ 9. Indeed, in his testimony in *Curling*, Dr. Coomer himself acknowledged the potential for compromise of the operating system. *Id.*, 493 F.Supp.3d 1287-87. The Court concludes that a reasonable person who had reviewed this information would have agreed with the Judge Totenberg when she expressed deep reservations about the security of the Dominion system in *Curling*. It follows that Plaintiff has not adduced clear and convincing evidence that Powell actually doubted that such security vulnerabilities existed when she made her statements.

45. On November 19 and 20, 2020, Powell knew that Dr. Coomer was an expert in voting system technology and even holds a number of patents in the field. Joint Filing ¶ 13-15. Plaintiff has not adduced clear and convincing evidence that Powell actually doubted the

statements she made were true. If anyone were in a position to exploit security vulnerabilities in the United States election system, it would be Dr. Coomer.

46. On November 19 and 20, 2020, Powell knew that: (a) Oltmann had provided a sworn affidavit under penalty of perjury attesting to the statement made by Dr. Coomer in the September 2020 meeting. FOF ¶ 12-13. (b) Oltmann had told his story to Michele Malkin, a nationally prominent journalist with decades of experience. FOF ¶ 11. (c) There was no reason to believe that Oltmann was an inherently unreliable source. FOF ¶ 27. (d) Even though he was an executive of a company providing systems for election security in key swing states, Dr. Coomer was a passionate progressive who expressed an extreme loathing of President Trump. FOF ¶ 19-21. (e) Oltmann's story had been in the national news for several days, and Dr. Coomer had not issued any denial. FOF ¶ 25. (e) Dr. Coomer had been scrubbing his internet profile, indicating a guilty conscience. FOF ¶ 23.

47. Plaintiff asserts that it was inherently implausible to accuse him of bragging to his fellow political activists that he had rigged the election. But Dr. Coomer told the *New York Times* he was the “perfect villain” for those who had reservations about the integrity of the 2020 election. APP. 60-61 (Coomer Depo. 91:12-92:8). Plaintiff understands he was the “perfect villain” because his own words and conduct made it reasonable for people to believe what Oltmann said was true. The Court concludes that based on the information that Powell had at the time she made her statements, it was entirely plausible for her to believe Dr. Coomer would say what Oltmann said he said. Certainly, Plaintiff has not demonstrated that he has a reasonable likelihood of proving by clear and convincing evidence that Powell had a high degree of awareness that it was probably false that Dr. Coomer had made the brag.

48. Based on the conclusions set forth in paragraphs 44 to 47, the Court concludes that Plaintiff's defamation claim fails because he has not demonstrated that he is reasonably likely to meet his burden of producing evidence that proves by clear and convincing evidence that Powell acted with actual malice when she made her statements.

**F. Plaintiff's Claims are Barred by the Litigation Privilege**

49. The litigation privilege has two aspects, one absolute and one conditional. Statements made by an attorney during a pending legal proceeding are absolutely privileged. *Begley v. Ireson*, 399 P.3d 777, 780 (Colo.App. 2017) ("*Begley I*"). Prelitigation statements are conditionally privileged if (1) the statement relates to prospective litigation, and (2) the prospective litigation is contemplated in good faith. *Id.*, 399 P.3d at 781.

50. The allegedly defamatory statements were made on November 19 and 20, 2020. FOF ¶¶ 28-30. Powell filed four lawsuits consisting of hundreds of pages of pleadings and supporting documentation on November 25, 2020 and December 1 and 2, 2020. FOF ¶¶ 31-32. Thus, the statements were prelitigation statements and "conditional privilege" analysis is applicable.

51. The first condition is met because the statements relate to the litigation Powell filed. Indeed, in paragraph 70 of his Complaint, Plaintiff states Powell quoted the allegedly defamatory statements in the four lawsuits.

52. The second condition is also met. On November 19 and 20, 2020, Powell was not only contemplating filing the four lawsuits, but she was obviously in the process of preparing the complaints and supporting documentation (consisting of hundreds of pages) for filing just a few days later.

53. Plaintiff has argued that because the Lawsuits were unsuccessful, they were not brought in good faith. This is not correct. The fact that a claim fails does not mean it was contemplated in bad faith. *Belinda A. Begley & Robert K. Hirsch Revocable Tr. v. Ireson*, 490 P.3d 963, 975 (Colo. App. 2020). Nothing in the definition of good faith requires success on the merits of the filed litigation. *Id.* Plaintiff argues that because Powell has been sanctioned in one of the four cases, all four of the cases could not have been contemplated in good faith. This is not true as a matter of law or logic. Moreover, it is not true as a matter of fact. The Georgia federal court actually entered a TRO. FOF ¶ 32. Under Georgia law, a court may not issue a TRO unless it finds there is probability of success on the merits. FOF ¶ 32. Though the claims ultimately failed, there is no indication they were filed in bad faith, and there was even a preliminary indication that the Georgia claim might succeed.

54. Plaintiff has cited a 1998 federal case, *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292 (D. Colo. 1998), for the proposition that the litigation privilege does not apply to statements made at a press conference. This case is inapplicable because it predates the establishment of the conditional privilege for prelitigation statements by the Colorado Court of Appeals. *Begley I*, 399 P.3d at 781 (no Colorado court has previously analyzed the application of the privilege to prelitigation statements). The more recent cases immunize prelitigation statements made by attorneys to the press so long as the statements are calculated to reach those who might have an interest in the litigation. *See Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*, 814 F. Supp. 2d 1033, 1040-41 (S.D. Cal. 2011) (press release sent to thousands of recipients protected by privilege); *see also Tacopina v. O'Keeffe*, 645 Fed.Appx. 7, 8 (2d Cir. 2016) (statement to press privileged); *Feist v. Paxfire, Inc.*, 2017 WL 177652, at \*5 (S.D.N.Y. Jan. 17, 2017) (same); *Norman v. Borison*,

17 A.3d 697, 711 (Md. App. 2011) (same). In this case, every voter in the nation had an interest in knowing about the allegations in the lawsuits. *See Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (In the context of a presidential election, “state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.”). Accordingly, the privilege immunizes Powell’s statements directed at those voters.

**G. Plaintiff’s Intentional Infliction of Emotion Distress Claim Fails**

55. Dr. Coomer’s intentional infliction of emotional distress claim is derivative of his defamation claim and fails for the same reasons that his defamation claim fails.

56. A plaintiff must prove actual malice to establish an intentional infliction claim when the plaintiff’s statements are protected by the First Amendment. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (public figure may not recover for the tort of intentional infliction of emotional distress by reason of publications without showing that the publication contains a false statement of fact which was made with actual malice). As set forth above, Dr. Coomer has not presented clear and convincing admissible evidence of actual malice against Powell.

57. Additionally, to prevail on this claim, the conduct at issue must “go beyond all possible bounds of decency, and to be regarded as atrocious.” *Gordon v. Boyles*, 99 P. 3d 75, 82 (Colo. 2004). Dr. Coomer has neither alleged nor proved any act by Powell that would meet this standard.

**H. Plaintiff’s Conspiracy Claim Fails**

58. “To establish a civil conspiracy in Colorado, a plaintiff must show: (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) an unlawful overt act; and (5) damages as to the proximate result.” *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995). Dr. Coomer has not presented any evidence that there was a “meeting of the minds” between Powell and any other defendant. In fact, Dr. Coomer has not even identified a single communication among the defendants that could have enabled such a “meeting of the minds.” Therefore, there is no evidence that Powell acted in concert with any other defendant.

59. Nothing Dr. Coomer has described about Powell’s conduct is different from any attorney investigating a claim, announcing the evidence she has gathered, and filing a lawsuit. There is no evidence of any conspiracy. Lawyers and judges routinely rely on sworn affidavits, and they must be able to do so.

60. Moreover, because Dr. Coomer’s other claims fail (as set forth above), there is no “unlawful overt act,” and therefore his conspiracy claim also fails. Civil conspiracy is a derivative cause of action that is not actionable *per se*. *Double Oak Const., L.L.C. v. Cornerstone Dev. Int’l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003).

**I. An Injunction is a Remedy, Not a Claim**

61. Because Dr. Coomer cannot make an adequate showing on any of his other claims, his injunctive relief claim (which is not a freestanding claim) fails as well. *See Wibby v. Boulder County Board of County Commissioners*, 409 P.3d 516, n. 2 (Colo. App. 2016) (noting that injunctive relief is a remedy, not a substantive claim for relief).

**J. Conclusion**

62. For the reasons set forth above, all of Plaintiff’s claims against Powell fail, and his Complaint against her is dismissed with prejudice. Powell may file a claim for fees and costs pursuant to the Anti-SLAPP Statute.