DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80523 Phone Number: (720) 865-8301	DATE FILED: December 17, 2021 5:00 PM FILING ID: 2614594C4B2C4 CASE NUMBER: 2020CV34319 ▲ COURT USE ONLY ▲
Plaintiff: Eric Coomer, Ph.D., 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.	Case Number: 2020CV34319 Courtroom 409

CERTAIN DEFENDANTS' JOINT PROPOSED 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, Joseph Oltmann, FEC United, Shuffling Madness Media, Inc, James Hoft, TGP Communications LLC dba The Gateway Pundit, Michelle Malkin, and Eric Metaxas submitted a joint filing of proposed findings of fact and conclusions of law for the purpose of avoiding repetition in their respective briefs. The Court hereby adopts and enters the following findings of fact and conclusions of law from that joint filing:

I. JOINT FINDINGS OF FACT

1. In 2020, Plaintiff Dr. Eric Coomer was employed as Director of Product Strategy and Security for Dominion Voting Systems, Inc. ("Dominion"). Exhibit A, ¶ 9.

2. In *Curling v. Raffensperger*, 493 F.Supp.3d 1264 (N.D. Ga. 2020), the plaintiffs challenged the implementation of a voting system supplied to the State of Georgia pursuant to the terms of the state's contract with Dominion. *Id*., at 1269. In their challenge, the plaintiffs asserted that Dominion's voting system suffered from major cybersecurity vulnerabilities. *Id*.

3. The *Curling* plaintiffs sought a preliminary injunction preventing the use of the Dominion voting system in the 2020 election. *Id*. The court held three days of hearings on the plaintiffs' motion. *Id*. at 1268. Significantly, Georgia relied on Dr. Coomer's testimony, to address some of the significant cybersecurity issues raised by the plaintiffs. *Id*. at 1278.

4. In his testimony Dr. Coomer "acknowledged the potential for compromise of the operating system, by exploiting a vulnerability, that could allow a hacker to take over the voting machine and compromise the security of the voting system software," and he

acknowledged that "all computers can be hacked with enough time and access." *Id*. at 1286-87. *See also Id*. at 1283 ("Defendants do not appear to actually dispute that cybersecurity risks are significant in the electoral sphere.").

5. On October 11, 2020 – nearly one month prior to the election – the court entered its ruling on the plaintiffs' motion. *Id*. at 1342. The court held that the plaintiffs had presented enough evidence to establish a substantial likelihood of success on the merits of their claim that their voting rights were in danger of being infringed and that injunctive relief was warranted. *Id*. at 1335, 1339.

6. The following statements in the court's order are relevant:

> Amidst the many other serious concerns facing the public in this challenging era, issues surrounding election system security, reliability, fairness, and the correct counting of votes continue on the forefront of citizen concerns.

Id. at 1268.

> . . . cybersecurity risks and vulnerabilities of digital election systems ha[ve] emerged as a major concern of national leadership and as well as prominent computer engineering and cybersecurity experts and academic organizations.

Id. at 1274.

"[T]his array of experts and subject matter specialists provided a huge volume of significant evidence regarding the security risks and deficits in the [Dominion] system."

Id. at 1278

> Plaintiffs' challenge to the State of Georgia's new ballot marking device QR barcode-based computer voting system and its scanner and associated software **presents serious system security vulnerability and operational issues that may place Plaintiffs and other voters at risk of deprivation of their fundamental right to cast an effective vote** that is accurately counted.

Id. at 1340 (emphasis added).

> The Court's Order has delved deep into the true risks posed by the new BMD voting system as well as its manner of implementation. These risks are neither hypothetical nor remote under the current circumstances. The insularity of the Defendants' and Dominion's stance here in evaluation and management of the security and vulnerability of the BMD system does not benefit the public or citizens' confident exercise of the franchise. **The stealth vote alteration or operational interference risks posed by malware that can be effectively invisible to detection, whether intentionally seeded or not, are high once implanted, if equipment and software systems are not properly protected, implemented, and audited**.

Id. at 1341 (emphasis added).

> **The Plaintiffs' national cybersecurity experts convincingly present evidence that this is not a question of 'might this actually ever happen?' – but 'when it will happen,'** especially if further protective measures are not taken. Given the masking nature of malware and the current systems described here, if the State and Dominion simply stand by and say, 'we have never seen it,' the future does not bode well.

Id. at 1342 (emphasis added).

7. The Court has considered the statements regarding Dr. Coomer and Dominion made by the federal district court in *Curling v. Raffensperger*, *supra*, 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 in relation to the actual malice standard.

8. 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. Specifically, the Deputy Secretary of State wrote:

> The examiner reports identified multiple hardware and software issues that preclude the Office of the Texas Secretary of State from determining that the Democracy Suite 5.5-A system satisfies each of the voting-system requirements set forth in the Texas Election Code. Specifically, the examiner reports **raise concerns about whether the Democracy Suite 5.5-A system is suitable for its intended purpose; operates efficiently and accurately; and is safe from fraudulent or unauthorized manipulation**. Therefore, the Democracy Suite 5.5-A system and corresponding hardware

> devices do not meet the standards for certification prescribed by Section 122.001 of the Texas Election Code.

Exhibit 920 (emphasis added).

9. In *Curling v. Raffensperger*, the court quoted verbatim the passage from the Texas Secretary of State's report set forth in paragraph 8 in support of its decision. *Id*., 493 F.Supp.3d at 1281 n.32.

10. The Court has considered the statements made by the Texas Secretary of State's office 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 in relation to the actual malice standard.

11. 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 seeking information regarding Dominion. Exhibit 405. In their letter, these members of Congress expressed grave reservations regarding the vulnerability of elections in the United States. They stated, inter alia,

> Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat.
>
> However, voting machines are reportedly falling apart across the country as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.
>
> In 2018 alone 'voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana.' In addition, researchers recently uncovered previously undisclosed vulnerabilities in 'nearly three dozen backend election systems in 10 states.'

Id.

12. The Court has considered the statements made by Senators Warren, Klobuchar, and Wyden and Congressman Pocan for the purpose of their effect on the subjective mental state of those defendants who were aware of the statements in relation to the actual malice standard.

13. Dominion provides election support services across the United States, including from initial project implementation through election set-up, ballot layout, multiple language audio, machine set-up and system testing. Exhibit A, ¶ 9. Dominion provided election-related services to at least thirty different states during the 2020 Presidential election. *Id*. In his capacity as Director of Product Strategy and Security for Dominion, Plaintiff was involved in many of the support services provided by Dominion to its governmental clients up to, during, and after the 2020 Presidential election. *Id*.

14. Dr. Coomer is an expert in voting system technology and holds a number of patents in the field. Ex. 915-19.

15. Dr. Coomer has been an active participant in the development of the Institute of Electrical and Electronics Engineers (IEEE) common data format for elections systems, as well as the working group for developing standards for risk-limiting audits for election results. Exhibit A, ¶ 4. In 2018, he was invited to join the Cyber Security Task Force assembled by the National Association of Secretaries of State. *Id*. He developed Dominion's Coordinated Vulnerability Disclosure Program in conjunction with several third-party industry researchers in 2020. *Id*.

16. On December 8, 2020, Dr. Coomer published an OpEd in the Denver Post concerning the statements that had been made about him. Exhibit 904.

II. JOINT CONCLUSIONS OF LAW

A. The Anti-SLAPP Statute

17. In 2019 the General Assembly enacted C.R.S. § 13-20-1101 (the "Anti-SLAPP Statute"). Because the statute is relatively new and untested, Colorado courts look to the more well-established body of authority interpreting the California law for guidance since the Anti-SLAPP Statute "tracks California's statute almost exactly." *See Stevens v. Mulay*, 2021WL 1153059, at *2, n. 7 (D. Colo. 2021); *compare* C.R.S. § 13-20-1101 with CALIF. CODE OF CIV. PROC. § 425.16

18. The purpose of the Anti-SLAPP Statute 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).

19. Under the statute, "[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 . . ." C.R.S. § 13-20-1101(3)(a).

20. An "act of [a] person 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" as that phrase is used in the statute shall be referred to herein as a "protected act." That statute states that protected acts include:

> (a) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law;
>
> (b) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official proceeding authorized by law;

> (c) Any 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; or
>
> (d) Any other conduct or communication in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

C.R.S. § 13-20-1101(2)(a).

21. A defendant's act need not fall within one of these specific examples for the act to be a protected act. The statute states that protected acts include the specific examples set forth in subsection 13-20-1101(2)(a). The "word 'include' is a word that is meant to extend rather than limit." *People v. Patton*, 425 P.3d 1152, 1156 (Colo.App. 2016); *see also Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975) ("include" is ordinarily used as a word of extension or enlargement).

22. In summary, a protected act is any statement, conduct or communication in furtherance of a person's exercise of their constitutional rights of petition or free speech in connection with a public issue or an issue of public interest.

B. Standard of Review

23. When a defendant has engaged in protected activity, the burden shifts to the plaintiff to establish "that there is a reasonable likelihood that the plaintiff will prevail on the claim." C.R.S. § 13-20-1101(3)(a).

24. The California Court of Appeals has described this two-step analysis under the Anti-SLAPP Statute as follows:

> When a party moves to strike a cause of action under the anti-SLAPP law, a trial court evaluates the special motion to strike by implementing a two-prong test: (1) has the moving party made a threshold showing that the challenged cause of action arises from protected activity, and, if it has, (2) has the non-moving party demonstrated that the challenged cause of action

> has minimal merit by making a *prima facie* factual showing sufficient to sustain a judgment in its favor?

Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc., 273 Cal. Rptr. 3d 831, 837-38 (Cal.App. 2021), *review denied (Apr.21, 2021),* 273 Cal. Rptr. 3d 831, 837 – 38 (internal citations and quotation marks omitted; cleaned up).

25. The term "*prima facie*" evidence means evidence that is sufficient to establish a fact unless disproved or rebutted. *Application for Water Rts. of Well Augmentation Subdistrict of Cent. Colorado Water Conservancy Dist*., 435 P.3d 469, 475 (Colo. 2019), *quoting Black's Law Dictionary* (10th ed. 2014). To meet this burden, a plaintiff must adduce admissible evidence – not mere conclusory or self-serving statements by counsel or plaintiff. *Finton Constr., Inc. v. Bidna & Keys APLC*, 190 Cal. Rptr. 3d 1, 11 (Cal. App. 2015).

26. A plaintiff can prevail against an anti-SLAPP motion only if he demonstrates "that there is a reasonable likelihood that [he] will prevail on the claim." C.R.S. § 13-20-1101(3)(a). The statute provides that in making its determination of a special motion to dismiss, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability **or defense** is based." C.R.S. § 13–20–1101(3)(b) (emphasis added). Thus, to "defeat an anti-SLAPP motion, [the party asserting the claim] must overcome any substantive defenses that exist." *Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc*., 273 Cal. Rptr. 3d 831, 840 (Cal.App. 2021), *review denied (Apr.21, 2021).*

C. Plaintiff's Burden to Prevail Against Anti-SLAPP Motion

27. As a division of this Court has noted, "section 1101(3)(a) clearly establishes a burden on a plaintiff at the outset of a case – which is higher than a Rule 12(b)(5)

plausibility test." *Salazar v. Public Trust Institute*, Case No. 2021CV33689, Denver, Colorado District Court (March 10, 2021 Order, p. 4).

28. This Court agrees with Judge Myers that a plaintiff's burden under the Anti-SLAPP Statute is higher than the Rule 12(b)(5) plausibility test. Thus, the plausibility test set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) is not applicable. To prevail against an anti-SLAPP motion, a plaintiff need demonstrate more than mere plausibility of his claims. He must demonstrate that he has a reasonable likelihood of prevailing on those claims. The applicable standard is summarized in *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590 (9th Cir. 2010):

> Reasonable probability in the anti-SLAPP statute has a specialized meaning. The statute requires only a minimum level of legal sufficiency and triability. Indeed, the second step of the anti-SLAPP inquiry is often called the 'minimal merit' prong. To establish 'minimal merit,' the plaintiff need only 'state and substantiate a legally sufficient claim.' Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. . . . The applicable burden is much like that used in determining a motion for nonsuit or directed verdict, which mandates dismissal when no reasonable jury could find for the plaintiff. **The court does not weigh the credibility or comparative probative strength of competing evidence, but should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.**

Id., 611 F.3d at 598–99 (9th Cir. 2010) (emphasis added; citations and quotations omitted).

29. A plaintiff who has a reasonable likelihood of prevailing on a claim under a preponderance burden of proof might not have a reasonable likelihood of prevailing under a clear and convincing burden of proof. Indeed, the whole point of a higher burden of proof is to make it more difficult for a plaintiff to prevail. Obviously, therefore, when

a plaintiff bears a heightened burden of proof, a court must take that heightened burden into account when determining whether the plaintiff has a reasonable likelihood of prevailing. This Court also agrees with Judge Myers regarding this issue: "'The precise question the court must ask [in determining an anti-SLAPP motion] is whether a jury properly instructed on the law, **including any applicable heightened fault and proof requirements**, could reasonably find for the claimant on the evidence presented.'" *Salazar v. Public Trust Institute*, *supra*, at p. 9, *quoting*, *Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016), *as amended* (Dec. 13, 2018) (emphasis added). *See also*, *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 871 (Cal. App. 2005) (courts must consider the pertinent burden of proof in ascertaining whether the plaintiff has shown a probability of prevailing on anti-SLAPP motion).

30. The requirement that heightened proof requirements must be taken into account in determining anti-SLAPP motions presents a substantial obstacle for plaintiffs in cases implicating constitutionally protected speech where actual malice must be proved by clear and convincing evidence. In *Christian Rsch. Inst. v. Alnor*, 55 Cal. Rptr. 3d 600 (Cal. App. 2007), the court described this obstacle as follows:

> Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' Accordingly, a reviewing court is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry. The constitutional responsibility of independent review encompasses far more than an exercise in ritualistic inference granting. **Independent review is applied with equal force in considering whether a plaintiff has established a probability of demonstrating malice by clear and convincing evidence in opposing an anti-SLAPP motion.**

Id, 55 Cal. Rptr. 3d at 613 (emphasis added; internal citations and quotation marks omitted; cleaned up).

D. The Anti-SLAPP Statute Applies, Because Defendants' Statements About Dr. Coomer Involved Matters of Public Concern

31. For the Anti-SLAPP Statute to apply, the allegedly harmful statements must have been made "in connection with a public issue." C.R.S. § 13-20-1101(3)(a). A court must consider the "content, form, and context of [the defendant's] statements to determine whether they address a matter of public concern." *Shoen v. Shoen*, 292 P.3d 1224, 1231 (Colo. App. 2012). Carparelli, J., *concurring, citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 761 (1985). Public concern "is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public" at the time of publication. *Id*. "[A] matter is of public concern when 'it can be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Id*., *citing McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008). Generally, a matter is of public concern whenever "it embraces an issue about which information is needed or is appropriate," or when "the public may reasonably be expected to have a legitimate interest in what is being published." *Shoen*, at 1229; *Smiley's Too, Inc. v. Denver Post Corp*., 935 P.2d 39, 42 (Colo. App. 1996).

32. It has long been recognized by the state and federal courts that the integrity of elections is a matter of vital public concern. *See 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 (Cal. 1992) (The integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern.); In *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (the importance of a presidential

election "cannot be too strongly stated"). Indeed, in *Curling v. Raffensperger*, 493 F. Supp. 3d 1264 (N.D. Ga. 2020), the court specifically held that the issues of election security in the 2020 election implicated by Dominion election software are matters of public interest. Specifically, the court stated: "Amidst the many other serious concerns facing the public in this challenging era, issues surrounding election system security, reliability, fairness, and the correct counting of votes continue on the forefront of citizen concerns." *Id*. at 1268.

33. Despite Plaintiff's contentions to the contrary, it is the matter or issue being discussed, not the specific individual referenced, that must be a matter of public interest. "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." *Rosenbloom v. Metromedia*, Inc., 403 U.S. 29, 43 (1971). Colorado courts have expressly adopted *Rosenbloom*. *See Walker v. Colorado Springs Sun*, 188 Colo. 86, 538 P.2d 450 (1975); *Diversified Mgmt., Inc. v. Denver Post, Inc*., 653 P.2d 1106, 1110 (Colo. 1982).

34. Citing *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003), Plaintiff argues that because Dominion is a private company and he is privately employed, Dominion's development and provision of voting technology, and his role at Dominion, are not matters of public concern. The Court is not persuaded. In *Quigley*, the court held that statements made by an attorney for a civil rights group at a press conference and on a radio show alleging the plaintiffs were anti-Semitic and engaged in anti-Semitic

harassment did not involve a matter of public concern under Colorado law. *Id*., 327 F.3d at 1058–61. The court acknowledged that, under Colorado law, an allegation of racial or ethnic discrimination likely involves a matter of public concern, it nevertheless concluded the allegations of discrimination at issue in the case did not. The court based this holding on the fact that the allegations were not asserted against an individual with which the general public had contact, and therefore there was no concern "that members of the public were likely to be harmed . . ." *Id*. at 1061. The holding in *Quigley* is not applicable to this case. Instead, this case is more akin to *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028 (10th Cir. 2013). In that case the defendant made a documentary in which he alleged the plaintiff had engaged in ethnically discriminatory labor practices. The plaintiff argued that the film did not involve a matter of public concern, because its messages occurred in a private context against a private company. The court noted that Colorado courts have held a statement involves a matter of public concern "if its message has the potential to impact many members of the public or the public as a whole." 713 F.3d at 1036, *citing Diversified Mgmt., Inc. v. Denver Post, Inc*., 653 P.2d 1103, 1108 (Colo. 1982) (public contained a number of potential buyers who had interest in alleged land fraud) and *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118 (Colo. App. 1992) (public had interest in racially discriminatory policies of private retailer). The court then held that the defendant's statements did involve a matter of public concern because "[l]ike in *Diversified Management*, the public includes current and potential employees, business owners, and government officials who have an abiding interest in matters discussed in the film." *Id*. at 1037. The court also noted that the form of the statements (screening of film in context of discussion regarding significant social

issues) indicated the film was not published in a purely private context. *Id*. The court distinguished *Quigley*, noting that in that case the allegations were not made against a company with which the general public had contact and thus exposure to discrimination and abuse. In this case the messages concerning alleged election fraud fall squarely within *Spacecon Specialty Contractors*. It can hardly be argued that such a message does not have "the potential to impact many members of the public or the public as a whole." Moreover, as in *Spacecon Specialty Contractors*, the form of the statements in this case (news reports; press conferences) indicate that the matter was not one of purely private concern. Accordingly, the Court concludes that the allegations regarding potential election irregularities directed at Plaintiff involved a matter of public concern.

E. Elements of Defamation Claim

35. 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).

36. If the alleged defamatory statement involves a matter of public concern or a public figure, the plaintiff must also prove the statement was made with "actual malice." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Colorado courts have expressly adopted *Rosenbloom*. *See Walker v. Colorado Springs Sun*, 188 Colo. 86, 538 P.2d 450 (1975); *Diversified Mgmt., Inc. v. Denver Post, Inc*., 653 P.2d 1103, 1110 (Colo. 1982).

F. Defamation Claims Must be Pled With Particularity

37. Dr. Coomer has submitted a "Defamation Spreadsheet" as an exhibit. Exhibit A-1. By means of this spreadsheet, Dr. Coomer has attempted to increase the number of allegedly defamatory statements at issue in this case. This is not appropriate. The content of an allegedly defamatory statement must be **pled** with particularity. C.R.C.P. 8 is similar to its federal counterpart. As such, Colorado courts may turn to federal precedent for guidance in interpreting the rule. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1192 (Colo. 2005). Federal courts have consistently interpreted Fed. R. Civ. P. 8(a) to require that defamation claims be pled with particularity. *See, e.g., Eagle Air Med Corp. v. Sentinel Air Med. All., LLC*, 2019 WL 6879252, at *2 (D. Utah 2019); *see also Vogel v. Felice*, 26 Cal. Rptr. 3d 350, n.3 (Cal.App. 2005) (in anti-SLAPP case, words constituting an alleged defamation must be specifically identified in the complaint). Accordingly, Dr. Coomer was required to plead in his complaint the specific language that he claims is defamatory as to each defendant. He cannot amend his complaint in an exhibit. The Court will address only those allegedly defamatory statements specifically set forth in the Complaint.

G. The First Amendment Implements a Profound Commitment to Robust Debate

38. The First Amendment implements a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The protection offered by the First Amendment is at its strongest for speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Id.*, 562

U.S. at 452 (*quoting Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

H. The Clear and Convincing Standard Imposes a Heavy Burden

39. As noted above, the resolution of the anti-SLAPP motions must take into consideration any heightened burden of proof, such as the clear and convincing burden implicated when constitutionally protected speech is at issue. This requirement imposes a heavy burden far in excess of the preponderance standard. *Christian Rsch. Inst. v. Alnor*, 55 Cal. Rptr. 3d 600, 611 (Cal.App. 2007) (applying standard in anti-SLAPP case). The burden requires a finding of high probability. *Id*. The evidence must be so clear as to leave no substantial doubt. *Id*. The evidence must be sufficiently strong to command the "unhesitating assent of every reasonable mind." *Id*.

I. The Actual Malice Standard Applies

40. The actual malice standard applies in this case because, as discussed at length above, the Defendants' statements about Plaintiff involved a matter of public concern. Where, as here, the statements involve "a matter of public concern," the plaintiff cannot prevail absent proof, by clear and convincing evidence, "that the defendant published the defamatory statement with actual malice". *See Lewis v. McGraw-Hill Broad. Co.*, 832 P. 2d 1118, 1122-23 (Colo. App. 1992). In addition, Dr. Coomer's status as a limited purpose public figure provides a separate and independent reason for the requirement that he must prove actual malice to prevail on his claims. Colorado cases that have engaged in a limited purpose public figure analysis have applied the United States Supreme Court's definition of limited purpose public figure set out in *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974). *See Diversified Management, Inc. v. Denver Post, Inc*., 653 P.2d

1103, 1105 (Colo.1982); *DiLeo v. Koltnow*, 613 P.2d 318, 321-22 (1980). The court in *Gertz* identified a limited purpose public figure as one who "voluntarily injects [himself] or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id*., 418 U.S. at 351. Such a person has achieved "special prominence in the resolution of public questions." *Id*. Limited purpose public figure status focuses on two questions: the threshold question of whether the defamatory statement involves a matter of public concern and, more importantly, whether the level of plaintiff's participation in the controversy invites attention and comment. *Id*. 418 U.S. at 345.

41. In his employment with Dominion, Plaintiff chose to compete for contracts with public entities to provide voting technology and voting support services. In *Dombey v. Phoenix Newspapers, Inc*., 724 P.2d 562 (Ariz. 1970), the court considered a situation in which a plaintiff had sought, received, accepted and struggled to keep appointments as an insurance agent of record for a large county and administrator of deferred compensation programs for its employees. *Id*. at 570. While he was not employed by and received no direct benefits from the public body, he did receive significant and valuable benefits because of his position. *Id*. He made recommendations resulting in substantial expenditures of public funds. *Id*. The court held that that he was a limited purpose public figure because he "invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention." *Id*. The analysis in Dombey applies with even more force to Dr. Coomer. Instead of seeking, receiving, and struggling to keep mere insurance contracts in his role at Dominion, Dr. Coomer solicited numerous states

to purchase vitally important election hardware and software. As such, he invited public scrutiny and should have expected that the manner in which he performed his duties would expose him to public and media attention.

42. Moreover, Dr. Coomer's roles as (1) an active participant in the development of the Institute of Electrical and Electronics Engineers common data format for elections systems, and (2) a participant in the Cyber Security Task Force assembled by the National Association of Secretaries of State, placed him in a position inviting public scrutiny.

43. In *Curling v. Raffensperger*, 493 F.Supp.3d 1264 (N.D. Ga. 2020), Dr. Coomer testified on behalf of the State of Georgia. *See Id*. at 1283 ("[Georgia] presented the BMD system's cybersecurity as reliable and fortified [] based on the testimony of Dr. Coomer as Dominion's Director of Product Strategy and Security . . ."). This role also invited public scrutiny.

44. Finally, a hallmark of a public figure is his access to the press and his ability to counteract false statements. *Gertz, supra*, 418 U.S. at 344 ("public figures usually enjoy significantly greater access to the channels of effective communication"). *See also Thompson v. Nat'l Catholic Reporter Pub. Co*., 4 F. Supp. 2d 833, 838 (E.D. Wis. 1998) (executive who had access to media and was quoted on matters related to the controversy was limited purpose public figure). Dr. Coomer clearly has access to the media as demonstrated by the publication of his OpEd in the Denver Post on December 8, 2020, denying election fraud took place.

45. The Court holds that Dr. Coomer was a limited purpose public figure for purpose of First Amendment analysis.

I. The "Actual Malice" Standard Requires Reckless Disregard for the Truth

46. For a statement to be made with actual malice, a defendant must have made the statement with knowledge of its falsity or with reckless disregard as to its truthfulness. *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1122-23 (Colo. App. 1992); *Fry v. Lee*, 408 P.3d 843, 848 (Colo.App. 2013).

J. "Actual Malice" Requires Proof of Subjective Awareness of "High Degree of Probable Falsity"

47. Actual malice is a subjective standard. *Makaeff v. Trump Univ., LLC*, 26 F. Supp. 3d 1002, 1008 (S.D. Cal. 2014). Thus, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant **in fact** entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added). In *St. Amant*, the court explained why it rejected an objective "reasonable person" standard in favor of a subjective standard:

> [T]he reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* [*v. Sullivan*] and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. . . . [It] is essential that the First Amendment protect some erroneous publications as well as true ones.

Id. at 731-32.

48. In summary, therefore, to demonstrate actual malice Plaintiff must adduce evidence sufficient to show that he will be able to prove by clear and convincing

evidence that defendants were **subjectively aware** that their statements about him were probably false. As the court stated in *St. Amant*, a plaintiff must show the statement was made with a "high degree of awareness" of "probable falsity." *Id.*, 390 U.S. at 731. A plaintiff may adduce circumstantial evidence of such awareness, such as a failure to investigate, anger and hostility toward the plaintiff, or reliance on sources known to be unreliable or known to be biased against the plaintiff. *Young v. CBS Broad., Inc.*, 151 Cal. Rptr. 3d 237, 245-46 (Cal. App. 2012). But "such evidence is relevant only to the extent that it reflects on the **subjective attitude**" of the defendant. *Id.*, 151 Cal. Rptr. 3d at 246 (emphasis added). Proof of ill will or failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. *Id.*

Dated this _____ day of _____ 2021.

BY THE COURT

_____
District Court Judge