DISTRICT COURT, COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202	DATE FILED: December 21, 2021 8:18 AM FILING ID: 21F296FC93688 CASE NUMBER: 2020CV34319 ▲COURT USE ONLY▲
Plaintiff: ERIC COOMER Defendants: DONALD J. TRUMP FOR PRESIDENT, INC., Et al.	Case # 20-CV-34319 Div. 409
Attorney for Defendants Joseph Oltmann, FEC United, and Shuffling Madness Media, Inc. d/b/a Conservative Daily Andrea M. Hall THE HALL LAW OFFICE, LLC P.O. Box 2251 Loveland, CO 80539 (970) 419-8234 andrea@thehalllawoffice.com Atty. Reg. #: 036410	

DEFENDANTS JOSEPH OLTMANN/FEC UNITED, INC./SHUFFLING MADNESS MEDIA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Court's Orders of October 14, 25, and December 5, 2021, Defendants Joseph Oltmann, FEC United, Inc. and Shuffling Madness Media, Inc. hereby tender their Proposed Findings of Fact and Conclusions of Law for the Court's convenience.

These Defendants hereby incorporate by reference the Certain Defendants' Joint Proposed Findings of Fact and Conclusions of Law as if set forth fully herein.

DEFENDANTS' SPECIAL MOTION TO DISMISS

Colorado's Anti-SLAPP statute, §13-20-1101 (2021), provides substantive protection from defamation lawsuits, such as this one, arising out of "acts 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," which a Plaintiff may overcome only by satisfying the heavy burden of demonstrating to this Court that he is "likely to succeed on the merits" of his claims once the Defendant has brought a special motion to dismiss.

While it also contains certain procedural protections, the statute's fundamental protection is substantive. The statute incorporates an interlocutory appeal provision, which is, effectively, a "right not to be tried", Abney v. United States, 431 U.S. 651 (1977)(interlocutory appeal from non-final judgment will lie where right not to be tried is at issue); *Mitchell v. Forsyth*, 472 U.S. 511 (1985)("it makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one.") It "shifts the burden of proof to the plaintiff to show his claims are likely to succeed" and it is long settled that the allocation of [the] burden of proof is substantive and controlled by state law. *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943). Similarly, the statute provides for an award of "attorneys' fees and costs to a prevailing defendant, and such statutory provisions are substantive in nature as well. *Bill's Coal Co. v. Board of Public Utilities,* 887 F.2d 242, 246 (10th Cir. 1989) Colorado has articulated the important, substantive state interests furthered by the Anti-SLAPP statute. C.R.S. § 13-20-1101(1)(a), (b), and it provides a defendant with substantive rights to expeditious and economical disposition of an action aimed to muzzle speech or punish the expression of an unpopular, or opposing, point of view in a matter of public interest, and to protect the defendant from discovery and trial until the merits of the plaintiff's claims have been determined, and reviewed by an appellate court.

FINDINGS OF FACT REGARDING JOSEPH OLTMANN

In the summer of 2020, Joseph Oltmann was conducting an FEC United meeting when he was approached by a young man who claimed to be a long-time ANTIFA member who wanted to distance himself from the organization. At the time, Mr. Oltmann, suspicious that the man might be a provocateur, responded politely and turned away. *Ex 306, p. 42, l. 9-p. 43, l. 8.* The man, who called himself "R.D." proved to be persistent, and Mr. Oltmann agreed to meet over coffee. R.D. was unwilling to meet Oltmann in a coffee shop, so they met in a park and talked. *Ex 306, p. 43, ll. 9-16; p. 60, l. 10-p. 61, l. 5.* R.D. told Oltmann that he was deeply involved in ANTIFA, had family members who were also involved, but no longer agreed with the confederacy's mission and wanted to get away from the culture. Mr. Oltmann discussed an alternate path with R.D., but the conversation was generally personal. *Ex 305, p. 46, l. 17-p. 48, l. 10.*

In September, 2020, R.D. and a companion attended another FEC meeting, and R.D. sought Oltmann out. He could give Mr. Oltmann access to an ANTIFA meeting, he told Oltmann, and offered to assist him in gaining that access so that Oltmann could attempt to discover whether some of the local journalists who were targeting him were involved in the group and its operations. Due to a busy schedule, Mr. Oltmann was unable to take advantage of the offer immediately, but finally, in mid-to-late September, R.D. and Mr. Oltmann did infiltrate a conference call, using R.D.'s identity, and Oltmann listened in for about forty-five minutes. *Ex 306, p. 59, l. 21- p. 60, l. 1; p. 63, ll. 2-6.*

During the call, Oltmann believed he was able to identify a local (Colorado Springs) journalist/activist who had targeted him, learned of some enemies the callers identified, and plans to harm those enemies, including, in particular, a Joseph, "Joey" Camp, whom some of the callers referred to as a "rat". *Ex 306, p. 52, ll. 9-18; p. 76, l. 7-p. 77, l. 10.* During that same call, someone

asked what are we going to do if "Trump" wins. Another caller said, in effect, "Don't worry about the election. Trump is not going to win. I made fucking sure of that. Hahaha.". *Ex 306, p. 167, ll. 14-17; Ex 316.* Someone asked who made the comment, and another caller said, "Eric, the guy from Dominion". The callers continued to discuss recruiting, logistics, and planned upcoming events, and Oltmann finally left the call before the meeting concluded. *Ex 306, p. 65, l. 4 – p. 70, l. 4; p. 72, l. 1-p. 83, l. 1.*

While the Plaintiff denies having been present on an "Antifa call", Plaintiff's witness, Tay Anderson, has stated that a conference call for Black Lives Matter occurred on September 25, 2020. Mr. Oltmann's notes reflect that a "Tay" was present on the call, with a question mark followed by "This guy is Antifa??" *Ex 306, Bates 207.* Mr. Anderson states that he was the "administrator" of the call, and "generally familiar" with all of the call participants, but does not state that he was the "chair", (a Zoom meeting can continue when the host leaves the call, unless the host is the "chair" and fails to designate another individual) or that he was present for the entirety of the call. Thus, while Mr. Oltmann characterizes the call as an "Antifa" call, his characterization of the call and statements of what he observed are not directly contradicted by either the Plaintiff's Declaration nor Mr. Anderson's and, indeed appear to be confirmed, at least in part, by the Anderson Declaration. *Plaintiff's Ex U*

Mr. Oltmann made notes during the call, and testified that he set about attempting to identify and locate Mr. Camp, and attempting to learn who the "Eric the Dominion guy" might be. Mr. Oltmann testified that he is a data expert, with more than a decade of experience in the area, beginning at Ernst & Williams, remaining through the Ernst & Young merger, and leaving to start a company, PIN Business Network, which has grown to be one of the largest first-party data

aggregators in the nation. and servicer for other companies. *Ex 306, p. 8, ll. 13-24, p. 9, ll. 12-21, p. 11,1. 4-p. 12, l. 2.*

As Mr. Oltmann explained it, "[w]e can pretty much tell everything about you, including what kind of devices you use as far as cell phones, what's your IP addresses, how long you spend on certain sites. It's pretty creepy. It's kind of invasive. But we take PII, which is personal identifiable information. We strip it away and we develop what are called unique identifiers of people, which makes it so that we don't put anybody at risk." *Ex 306, p. 13, l. 19-14, p. 4.* Investigating the electronic footprint of a given individual is "very much in my wheelhouse." *Ex 305, p. 14, ll. 8-11.*

On September 26, the day after Anderson swears the call took place, Oltmann's Google search for "Eric Dominion Denver Colorado" suggested Eric Coomer, and Oltmann quickly found videos made by Eric Coomer as a representative of Dominion Voting Systems. *Ex 306, p. 126, ll. 8-13.* From those videos he was able to compare the voice, cadence, and diction, and he then learned that Eric Coomer was a Berkley-educated PhD. nuclear engineer and adjudged it incredible that such a person would have been on the September call or made the statement he heard, and suspended his investigation. *Ex 306, p. 56, l. 1-p. 57, l. 7.*

Mr. Oltmann testified that he continued to investigate the suspected ANTIFA journalists through the fall of 2020, and in early November, went elk hunting with a friend in southern Colorado. *Ex 306, p. 120, l.6 – p. 121, l. 10.* On Friday night, November 6, he received an article about election irregularities in Georgia, which he found troubling, and convinced him to do some research. *Ex 306, p. 121, l. 13-23, p. 123, ll. 11-16.* He began to dig down into Dominion and Eric Coomer, and soon discovered Eric Coomer's old social media posts, his patents, his contacts with election officials, and became deeply disturbed by what he found. *Ex 306, p. 123, l. 24 – p.*

127, l. 5; Ex 317. On November 6 or 7, he received screenshots of Mr. Coomer's Facebook pages, verified that account, and determined to his satisfaction that the posts were consistent with an ANTIFA supporter, and inconsistent with Dr. Coomer's public image. *Ex 306, p. 151, l. 4-p. 155, l. 14.* He also discovered the Plaintiff's affidavit in the case against Dominion in Georgia[1] and his bio submitted to the Colorado Secretary of State in 2015 by Dominion. He also obtained a document entitled "Draft notes" describing Dr. Coomer's testimony to Arizona election officials. *Ex 315, p. 53, l. 20 – p. 55, l. 17; p. 58, ll. 1 – 23.*

On November 9, 2020, Mr. Oltmann reported the call and remarks he had witnessed in September, and the information he had amassed since then on his Conservative Daily podcast and shared that information with One America News Network. He began the podcast stating that he was going to expose someone within Dominion Voting Systems who was "so far left, and is controlling elections", "and his fingerprints are in every state". *Ex 315, p. 4, ll. 11-13.* Oltmann's co-host Max McGuire stated in the introduction that they would discuss "a man who works at Dominion – their head of election security and how closely connected he is with Antifa - *Ex 315, p. 5, l. 22-p. 6, l. 7.* Mr. Oltmann then explained how he became focused on Antifa, *Ex 315, p. 17, l. 12- p. 19, l. 18,* how he got on the September phone call, *Ex 315, p. 19, l. 19-p. 20, l. 7,* and what he heard there, *Ex 315, p. 20, l. 2 – p. 21, l. 7.* "As the call carried on, a person who called himself Eric was on the call. Now, I can't tell you if it was the same Eric, but I'm going to tell you how it led me to gather the rest of this information…" *Ex 315, p. 20, ll. 8-11.* "Someone interrupts, asks, 'who's Eric'? "Eric is the Dominion guy." *16:37.* Somebody actually interrupts first, says 'what are we going to do if f-ing Trump wins? And he responds, and I'm paraphrasing this, don't worry about the election, Trump is not gonna win; I made f-ing sure of

[1] *Curling v. Raffensberger,* 1:17-cv-02989 (N.D.Ga.)

that, hahaha." *Ex 315, p. 20, l. 18- p. 21, l. 6.* "very boisterous. And compared to what I remember hearing in his other videos. I think it's a match, but I can't be sure, so I'm going to put that out there, but I can be sure of everything else I'm about to share with you". *Ex 315, p. 21, LL. 10-15.* Oltmann and McGuire discussed the possibility that the speaker was "joking" or "bragging", *Ex 315, p. 26, l. 15 – p. 27, l. 14,* and did not foreclose that possibility. Oltmann commented, "even if he says that, some of the information he put on his page, no state in this entire country should use Dominion Voting Systems ever again once they hear this." *Ex 315, p. 27, ll. 16-20.* He showed screenshots of some of the Plaintiff's Facebook pages, particularly those involving profane anti-Trump diatribes, *p., 28, l. 17 – p. 30, l. 1; p. 32, l. 25 – p. 33, l. 18,* expressions of support for Antifa, *p. 36, l. 6 – p. 39, l. 11,* (noting "the call that he (Coomer) was supposedly on where someone said Eric from Dominion" *p. 35, ll. 13-16*), anti-police posts including "fuck the police", *p. 40, ll. 17-22*, celebrating the killing of police officers, *p. 45, l. 24 – p. 45, l. 15,* "fuck the USA", *p. 43, ll. 1-4,* documents he had obtained concerning Dr. Coomer, including his expert declaration in the *Raffensperger* case in U.S. District Court (N.D. Ga) *p. 55, l.2 – p. 56, l. 9 ,* the bio included in Dominion's submission to the Colorado Secretary of State, *p. 57, l. 6 – p. 58, l. 22,* draft notes in Phoenix, AZ for his testimony before the election certification advisory committee, *p. 59, ll. 9-23,* his statements to Georgia election officials concerning a "glitch" in the 2020 pre-election testing, *p. 61, l. 14 – p. 63, l. 9,* his patents, *p. 64, l. 22 – p. 66, l. 7,* a post made during the 2016 election on November 8 in which he stated, "#2016results #widemargins #norecounts…from a professional standpoint, it's my one and only hope for tonight." *p. 101, l. 23 – p. 103, l. 21* . Based on what he had seen, Oltmann said "I don't think Eric Coomer should ever work in elections again…you can't have someone like that that has any sort of integrity in what they're doing" *p. 113, ll. 7-10.*

Within days, his life had been threatened, and he discovered that Dr. Coomer's internet presence was being scrubbed. *Ex 306, p. 119, l. 11-p. 120, l. 19; p. 144, ll. 6-12; Ex 310, p.16, l. 1- p. 19, l. 1.* He reported this four days later during an interview with Ms. Malkin, *Plaintiff's Exhibit F-3, p. 28, ll. 1-9,* when he repeated the podcast information, showed the same documents, and gave the same explanation for how he had researched who "Eric the Dominion Guy" was. *Id., p. 3, l. 10 – p. 26, l. 2.* He also explained what he meant by, "we're coming for you"; "we're going to make sure everyone knows who you are." *Id, p. 7, ll. 19-21.* He was contacted by the Trump Campaign about the information he had disclosed and asked to provide any further information he had, which led to him providing an affidavit on November 13. *Ex 306, p. 158, l. 16 – p. 160, l. 7.* The threats continued and he felt compelled to hire bodyguards as he was followed to and from his home. *Ex 306, p. 38, l. 6 – p. 39, l. 18; Ex 316.*

FINDINGS OF FACT REGARDING THE OLTMANN ENTITY DEFENDANTS

Shuffling Madness Media, Inc (SMM). is a management company which Oltmann created to manage investments and buy other companies. *Ex 306, p. 17, l. 22-18, l. 4.* It processes payments made on the Conservative Daily website, *Ex 305, p. 13, ll. 1-15.* Conservative Daily was controlled by SMM from 2012 until 2018, and SMM continued to license the trade name until 2020. *Ex. 305, p. 15, ll. 19-24; p. 18, l. 18 – p. 19, l. 6.* SMM had no involvement in the November 9 podcast, has no employees or contractors in common with CD Solutions, and one common shareholder, Max McGuire. *Ex 305, p. 26, l. 1-p. 27, l. 9.* SMM receives no donations from Conservative Daily, and no funds from any of Conservative Daily's activities. *Ex 305, p. 27, l. 21-p. 28, l. 10.*

FEC United was formed by Mr. Oltmann in the summer of 2020 and approved as a 501(c)(4) non-profit in October, 2020. *Ex 300, p. 12, ll. 2-12.* It has a six-member board, *Ex 300,*

p. 13, ll. 4-5, with Mr. Oltmann serving as chairman, but all decisions regarding FEC's actions must be made by the board. *Ex 300, p.* 14, ll. 2-3, ll. 6-19. At one time, FEC had an agreement to advertise on Conservative Daily, but did not honor its contract due to insufficient income. *Ex 300, p. 18, l. 12-p. 19, l. 13.* It is unclear whether FEC advertised on Conservative Daily in November, 2020, or after that date. *Ex. 300, p. 19, l. 23-p. 20, l. 2, p. 26, l. 5-p. 27, l. 2.* Mr. Oltmann together with some hundred other individuals, had an FEC United email address that was grandfathered in after the 501(c)(4) status was obtained, which he used generally. *Ex 300, p. 20, l. 23 – p. 21, l. 20.* FEC President *pro tem* Stuart Butler testified that FEC United was unaware of the topics covered on Conservative Daily Podcasts until after the fact, *Ex 301, p. 24, ll. 6-10,* and had no knowledge of Eric Coomer or Dominion Voting Systems prior to the November 11 podcast and did not publish, authorize, or ratify any statements concerning either. *Ex 301, p. 31, ll. 7 – 16.* There is no evidence that the FEC Board of Directors authorized Mr. Oltmann to promote FEC United on his own podcasts, or on any appearance he made with Ms. Rion, Ms. Malkin, Mr. Hoft, Mr. Metaxas, or on any of the Defendants' programs. Neither has the Plaintiff produced evidence that the FEC United Board took any action to ratify any statement made by Mr. Oltmann.

CD Solutions, Inc., which is not named as a defendant in this action, was formed in June of 2018 to serve as an umbrella for all political activities and separate from those other entities in which Oltmann is a shareholder. *Ex 304, p. 9, ll. 3-12; Ex 305, p. 24, ll. 15-16.* CD solutions acquired Conservative Daily from PolitiZoom on June 12, 2018, *Ex 304, p. 11, ll. 3-24.* All the funds from Conservative Daily's operations flow to CD Solutions, which owns the copyright. *Ex. 304, p. 15, l. 14 – p. 17, l. 2.* CD Solutions has testified that it is responsible for the podcast content. *Ex. 304, p. 21, l. 24 – p. 22, l. 1.*

LEGAL STANDARD APPLICABLE TO A SPECIAL MOTION TO DISMISS

To prevail on a special motion to dismiss under § 13-20-1101, C.R.S. (2021), the Plaintiff must establish a "reasonable likelihood of success on the merits of his claims". Subsection (3) provides:

> 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 that there is a reasonable likelihood that the plaintiff will prevail on the claim

The Plaintiff contends that he is a private individual and that the Anti-SLAPP statute does not apply to the Defendants' defamatory statements; the Defendants contend that Oltmann's November 9, 2020 podcast, and the statements contained in that podcast concerning Dominion Voting Systems' Director of Election security, were "in connection with a public issue" and that he was exercising his right of free speech in making the podcast. The Court must make a threshold determination concerning these issues in determining the applicability of § 13-20-1101.

Whether the matter involved is of public concern is a question of law for the court. *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975). The statute does not define a "public issue", but Colorado's appellate courts have done so.

> The scope of a matter of legitimate concern to the public is not limited to `news' in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement, or enlightenment when the public may reasonably be expected to have a legitimate interest in what is being published."
>
> This formulation can be read to suggest that a defamatory statement addresses a matter of public concern whenever it embraces an issue about which information is needed or is appropriate. *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328(1975).

Lewis v. McGraw-Hill Broadcasting Co., Inc., 832 P.2d 1118, 1121 (Colo. App. 1992). "Speech involves matters of public concern when it can be fairly considered as relating to any matter of

political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Butler v. Bd. of Cty. Comm'rs for San Miguel Cty.*, 920 F.3d 651, 655-56 (10th Cir. 2019) (quoting *Lane v. Franks*, 573 U.S. 228, 241 (2014)); *see also Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1181 (10th Cir. 2018) ("Matters of public concern are issues of interest to the community, whether for social, political, or other reasons." (internal quotation marks omitted)).

Here, the November 9, 2020 podcast on Conservative Daily concerned election security and what Mr. Oltmann asserted was a plan, attempt, or intention to interfere in the integrity of the vote, and about which the provision of information was appropriate. Mr. Oltmann alleged both that Dr. Coomer had been present on a September, 2020 "Antifa" call where he announced that he interfered with the 2020 presidential election, and that Dr. Coomer was the director of Dominion Voting Systems' election security, that he had made Facebook posts, which Oltmann showed, supporting Antifa, indicating contempt toward then-President Trump and citizens who voted for Mr. Trump, including an extremely profane Facebook post regarding voting for Mr. Trump in which he stated, "Though they are not necessarily the thoughts of my employer, though if not, I should probably find another job ..." *Ex. 312, Bates 72,* and that as a result of the Plaintiff's biases, no Dominion Voting Systems Machines should be used anywhere in America. The Court therefore holds that the statements were made in connection with a public issue, and that whether the Plaintiff was a private, public, or limited-purpose public figure is unnecessary for the Court to determine.

The parties do not seriously dispute that the November 9, 2020 podcast, or the subsequent statements Mr. Oltmann made to Michelle Malkin, Jim Hoft, OANN/Chanel Rion, Sidney Powell, Eric Metaxas, and others, were acts by Mr. Oltmann in furtherance of his right of free speech,

generally, and the Right to Petition, with regard to Ms. Powell, as protected by the First Amendment. The Court determines that they were, and that the Defendants' statements and the Plaintiff's claims fall within the parameters of § 13-20-1101, C.R.S. (2021).

THE PLAINTIFF MUST SHOW A REASONABLE LIKELIHOOD OF PROVING BOTH FALSITY AND ACTUAL MALICE, BY CLEAR AND CONVINCING EVIDENCE.

A plaintiff claiming defamation must first establish that the allegedly defamatory statements are false, because, under Colorado law, "substantial truth" is a complete defense to the action. *Brokers ' Choice of Am*., *Inc*. *v*. *NBC Universal*, *Inc*., 861 F.3d 1081, 1110 (10th Cir. 2017) (quoting *GomEx 306 v*. *McLaughlin*, 504 P.2d 337, 338-39 (Colo. 1972))(. The plaintiff must establish falsity by clear and convincing evidence. *Lawson v. Stow*, 327 P.3d 340, 346 (Colo. App. 2014)(citing *Diversified Mgmt., Inc. v. Denver Post, Inc.,* 653 P.2d 1103, 1106-09 (Colo. 1982). *see also Air Wisc. Airlines Corp. v. Hoeper* , 571 U.S. 237, 246 (2014) ("[W]e have long held that actual malice requires material falsity.")

The Plaintiff has denied being on an "Antifa" call in September, 2020, but has not established, even by his own testimony, that he was not on a call which Mr. Oltmann might denominate an "Antifa" call. Dr. Coomer has never testified that he was a participant on a Black Lives Matter call, and could, therefore, state that he was not a participant in any "Antifa" matter, despite having participated in the call on September 25, 2020. Both Mr. Oltmann's notes and Mr. Anderson's Declaration establish that such a call took place. *Ex 308.* Neither does Mr. Anderson's Declaration establish that Mr. Oltmann's statements were materially false, because it is carefully-worded and does not expressly deny the possibility that Mr. Oltmann heard what he reported. Further, there is no evidence of any means by which Mr. Oltmann could have known that "Tay

(This guy is Antifa?)", *Ex 308, Bates 207,* was on the call he reported, because the Plaintiff did not disclose the existence of that witness until long after Mr. Oltmann disclosed his notes.

The Court cannot find that Dr. Coomer has established material falsity by even a preponderance of the evidence, let alone that he is reasonably likely to do so by clear and convincing evidence.

The Plaintiff must next establish a reasonable likelihood that he can prove actual malice by clear and convincing evidence.

> The Colorado Supreme Court has extended the actual malice standard to defamatory statements about private individuals when the statements involve a matter of public concern. *Walker*, 538 P.2d at 457; see also *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo.1982). This standard requires a plaintiff to show the defamatory statement "was known by the declarant to be false or was made with reckless disregard for its truth." *Quigley*, 327 F.3d at 1058; accord N*ew York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Spacecon Specialty Contractors, LLC v. Bensinger, 713 F.3d 1028, 1034-35 (10th Cir. 2013). *See also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("false statements made with [a] high degree of awareness of their probable falseness"); *St. Amant v. Thompson*, 390 U.S. 727, 731, (1968) (requirement "that the defendant in fact entertained serious doubts as to the truth of his publications"; "so inherently improbable that only a reckless man would have put them in circulation").

Prior to the Colorado General Assembly's passage of the Anti-SLAPP statute in 2009, the Colorado Supreme Court held that "[w]ere not summary judgment granted in proper cases the threat of protracted litigation might have a chilling effect upon the full and free exercise of the First Amendment sought to be protected by *New York Times v. Sullivan* and its progeny." *DiLeo v. Koltnow,* 200 Colo. 119, 613 P.2d 318, 323 (1980), and the statutory standard and procedure for determining a special motion to dismiss is akin to the summary judgment standard.

To prevail on a motion for summary judgment in Colorado, where actual malice is at issue, the Plaintiff must establish reckless disregard by producing clear and convincing evidence demonstrating that defendant, in fact, entertained serious doubts as to the truth of his publication. *Manuel v. Fort Collins Newspapers, Inc.*, 661 P.2d 289 (Colo.App. 1982) (citing *St. Amant, supra*; *Burns, supra.* "Clear and convincing evidence" is that evidence which is stronger than a "preponderance of the evidence" and which is unmistakable and free from serious or substantial doubt. *DiLeo, supra,* 200 Colo. at 121 (quoting Colorado Jury Instructions (2d ed.) § 3:2). Where a plaintiff fails to show with "convincing clarity" that the defendants acted with actual malice, summary judgment must be granted. *Manuel, supra*. In *Bose Corp*. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the Supreme Court held that judges in such cases have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Id.*, at 514. *See also, Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 668 (1989)(a reviewing court may not look to a jury's verdict to determine whether actual malice was demonstrated by clear and convincing evidence, but must conduct an independent review)[2]

The Plaintiff argues that the Defendants' failure to investigate more fully, to seek a comment from him or Dominion Voting Systems, to conclusively establish his identity, or to provide an unbiased report is evidence of actual malice, and that his implications concerning the Plaintiff were further defamatory statements. However, failure to investigate, and negligence, are "constitutionally insufficient to show the recklessness that is required". *Sullivan, supra; Beckley*

[2] "In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," *Bose*, 466 U.S., at 499-500, the reviewing court must "`examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect,'" *New York Times Co.*, 376 U.S., at 285 (quoting *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946))

Newspapers Corp. v. Hanks, 389 U.S. 81 (1967). The Plaintiff must demonstrate a reasonable likelihood of proving, by clear and convincing evidence, that Mr. Oltmann entertained serious doubts as to the truth of his statements. "That a reasonably prudent person would not have published the defamatory statements or would have investigated before publishing does not suffice." *Lewis, supra,* 832 P.2d at 1123. "[I]ll will toward the plaintiff, or Ex 306d motives, are not elements of the *New York Times* standard." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52 n. 18 (1971) (opinion of Brennan, J.). Accord, *Rosenblatt* v. *Ex 306er*, 383 U.S. 75, 84 (1966); *Garrison* v. *Louisiana*, 379 U.S. 64, 73-74, 77-79 (1964); *Henry* v. *Collins*, 380 U.S. 356 (1965); *Greenbelt Cooperative Publishing Assn*. v. *Bresler*, 398 U.S. 6, 9-11 (1970).

Neither does a publisher's "adversarial stance" or bias serve to prove actual malice. *Spacecon, supra,* 713 F.3d at 1043 (citing *Harte–Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 665 (1989); *Tavoulareas v. Piro,* 817 F.2d 762, 795 (D.C.Cir. 1987). Further, while truthful statements which carry a defamatory implication can be actionable, Colorado does not recognize libel by innuendo when it concerns a public figure. *Pietrafeso v. D.P.I*, 757 P.2d 1113 (Colo. App. 1988). Because *Peitrafeso* was decided under the actual malice standard, which applies to matters of public interest, by extension, libel by innuendo will not lie in a case involving matters of public concern.

While the Plaintiff has demonstrated that Mr. Oltmann entertained some doubt that the individual on the call was he, Mr. Oltmann stated that he was not entirely certain of the individual's identity in his initial broadcast on November 9, 2020. In the affidavit he provided for Ms. Powell, Mr. Oltmann explained in detail how he arrived at his identification, and conclusion, setting out the research results and documents on which he had relied. Given those explanations, the Court cannot find that Mr. Oltmann entertained serious doubts about the identity of the individual he heard on the September, 2020 call.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS/OUTRAGEOUS CONDUCT

The Plaintiff's claim for intentional infliction of emotional distress or outrageous conduct alleges that they "perpetrated a criminal conspiracy against every American citizen to overturn the results of the presidential election", "branded Dr. Coomer a traitor and made him a pariah", and that Mr. Oltmann directly made terroristic threats against Dr. Coomer, calling on people to harm him", which he claims drove him into hiding, caused him to endure death threats, and cost him his career. *Amended Complaint ¶ 88, Declaration of Eric Coomer dated September 17, 2021 ¶ 53.*

The Plaintiff alleges that Mr. Oltmann threatened him and revealed personally identifying information about him:

> *See* Joseph Oltmann (@Joeoltmann), PARLER (Dec. 6, 2020) ("Blow this shit up. Share, put his name everywhere. No rest for this shitbag. Eric Coomer, Eric Coomer, Eric Coomer . . . Eric we are watching you . . .")

Amended Complaint, ¶ 74, n. 132. He further alleges that Mr. Oltmann revealed personally identifying information about him.

> "I want everybody to put out on their social media account, 'Where is Eric Coomer?' I found him. Just want you to know I found him . . . I have pictures of him coming out of hiding . . . I know he drives a truck. I know his truck is parked at his house.").

Amended Complaint, ¶ 74, n. 133

> They certify this election and we go to war . . . Now it's time we fight. And when I mean fight I don't mean yelling it's not fair. I mean we fight these communist, marxist lying shitbags. That means Eric Coomer never has peace and we smash each and every voting machine in every state that uses them. We will not be silenced by a bunch of BLM and Antifa communist asshats. It's time we take back our America by any and all means necessary . . .
>
> . . . Eric Coomer, you are a traitor. We are coming for you and your shitbag company. We are coming for Antifa and we are coming for your politician friends. Share this . . . share Eric's name . . . If they certify the electors today after this audit, we have an obligation to forcibly remove them all. This is not a drill, our country is not their evil playground. God is at the wheel, but we are the warriors that must do the work of men to repel evil. These people are evil, and they are liars, cheats and thieves out to take what they did not earn or deserve. Where will you stand?

Amended Complaint, ¶ 78.

> . . . Eric Coomer. I'm never going to stop. You have no idea what information I have or how your loose lips and arrogance is your ultimate weakness. By the time I am done … and I will never talk about the "krakken" that is stupid. What I will talk about is truth. See you later, and your unhinged lawyers . . . see those shitbags too. Good night. God is at the wheel and blood is in the water.

Amended Complaint, ¶ 80.

The Supreme Court provided a general definition of a "true threat", in *Virginia v. Black*, 538 U.S. 343, 359 (2003): "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group." The Tenth Circuit has interpreted *Black*'s definition to "require that the speaker want the recipient to believe that the speaker intends to act violently" *U.S. v. Heineman*, 767 F.3d 970, 976 (10th Cir. 2014). As the Supreme Court has noted, "[t]he language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 58 (1966), is often vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969)

> The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

United States v. Alvarez, 567 U.S. 709, 729-30 (2012). Thus, even a speaker's "contemptible statements" will find First Amendment protection, particularly in the political arena, unless they communicate a serious expression of intent to commit an act of violence against the individual or group which is the intended recipient. The Court cannot find that the statements allegedly made by Mr. Oltmann identify an unlawful act of violence he intended to commit; while "watching you" and "coming for you", which he explained as "make sure everyone knows who

you are", may be alarming to a reasonable person, they do not describe specific acts of unlawful violence that a reasonable recipient would understand as expressions of intent to commit a specific violent act. *See also, People v. Of,* 17SC116, 464 P.3d 717 (Colo. 2020)(adopting the *Virginia v. Black* standard in delinquency proceeding).

Secondly, the Court cannot find that the Defendant's publication of the fact that the Plaintiff drives a truck or has pictures of the Plaintiff at his location, without more, constitutes conduct sufficiently outrageous as a matter of law to present an actionable claim. *Coors Brewing Co. v. Floyd,* 978 P.2d 663, 666 (Colo. 1999).

Finally, the Court does not find that Mr. Oltmann's reference to Dr. Coomer as a "traitor" constitutes a statement of fact that he committed a "criminal conspiracy against every American citizen to overturn the results of the presidential election", as alleged. Treason is defined under 18 U.S.C. § 2381: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason…" Thus, Mr. Oltmann's reference to Dr. Coomer as a "traitor" does not indicate that he engaged in a criminal conspiracy concerning the election.

The First Amendment protects against hyperbolic rhetoric, particularly in the political arena, and however overheated or uncivil a reasonable person might find it. The Supreme Court addressed this issue in *Letter Carriers* v. *Austin*, 418 U.S. 264, 284-286 (1974) finding that use of the word "traitor" against a union "scab" was not a basis for a defamation action, because it was "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members". The Court finds that Mr. Oltmann's statement that Dr. Coomer is a "traitor" was, rather than a statement of fact asserting that he had levied war

against the United States or adhered to its enemies, an "expression of the contempt felt" by Oltmann and his listeners for Dr. Coomer's alleged behavior.

THE CIVIL CONSPIRACY CLAIM

The civil conspiracy claim arises from the defamation and intentional infliction of emotional distress claims. *Amended Complaint ¶ 91.* It is derivative of those claims and dependent on them. Civil conspiracy is a derivative cause of action that is not actionable per se. *Double Oak Construction, L.L.C., v. Cornerstone Development Int'l, L.L.C.,* 97 P.3d 140, 146 (Colo.App.2003).

Under Colorado law, civil conspiracy requires that a plaintiff 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, and only for damage caused by a tortious act. *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995)

A court may not infer the agreement necessary to form a conspiracy; evidence of such an agreement must be presented by the plaintiff. *Id.* (citing *More v. Johnson*, 193 Colo. 489, 494, 568 P.2d 437, 440 (1977)). The Plaintiff has produced no competent, credible, evidence of a meeting of the minds between any two or more defendants on the object or course of conduct or the object to be accomplished. He has not demonstrated by clear and convincing evidence that the Defendants agreed to defame him or agreed to inflict emotional distress upon him. Thus, the Court cannot find that his claim survives the special motion to dismiss.

THE CLAIMS FOR INJUNCTIVE RELIEF

The Plaintiff seeks a preliminary injunction against the Defendants, ordering "Oltmann, FEC United, Conservative Daily, and their officers, agents, servants, employees and attorneys" to cease "threatening or encouraging acts of violence, intimidation or coercion against Dr. Coomer"

and further ordering "these Defendants to remove any publication of threats, intimidation, personal information or coercion made against Dr. Coomer." *Amended Complaint,* ¶¶ *95-98.* The Defendants argue that the requested injunction would constitute a prior restraint, which is vague, overbroad, and offensive to the First Amendment.

Under Colorado law, no injunction may issue unless the movant has demonstrated: (1) A reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane,* 648 P.2d 648, 653-54 (Colo. 1982) *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004)(noting that a permanent injunction requires success on the merits of the case). Further, a prior restraint, while not absolutely prohibited, is presumptively unconstitutional, and the movant must have an interest of the "highest order" it seeks to protect, the restraint must be the narrowest available to protect that interest; and the restraint must be necessary to protect against an evil that is great and certain, and cannot be mitigated by less intrusive measures. *In re People v. Bryant,* 94 P.3d 624, 628 (Colo. 2004)(internal citations omitted).

The Defendants argue, correctly, that the Plaintiff has made no showing of the required factors under *Rathke*. Thus, the Court is not empowered to grant a preliminary injunction, let alone a prior restraint.

CONCLUSION

Because the Court cannot find that the Plaintiff has demonstrated a substantial likelihood of proving his defamation claim by clear and convincing evidence, the Defendants' Special Motion to Dismiss must be granted. The outrageous conduct and civil conspiracy claims are derivative of, and dependent on, the defamation claim, and so, too must be dismissed. The Court finds that the Plaintiff has not made the required showing for any form of injunctive relief, particularly an injunction in the form of a prior restraint. The Special Motion to Dismiss is Granted.

Pursuant to C.R.S. § 13-20-1101(4)(a), the Court awards the Defendants their reasonable attorneys' fees and costs.

Respectfully submitted this 17th day of December, 2021

By: /s/ Andrea M. Hall
Andrea M. Hall
Attorney for Defendants Oltmann/FEC
United/Shuffling Madness Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2021, I electronically filed **DEFENDANTS JOE OLTMANN/FEC UNITED/SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** with the Clerk of the Court using the ICCES electronic filing system, which will send an electronic copy of this filing to all counsel of record.

/s/ Andrea M. Hall