

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202</p>	<p>DATE FILED: December 27, 2021 2:38 PM FILING ID: 5B637EB72A1B2 CASE NUMBER: 2020CV34319</p>
<p>ERIC COOMER, Ph.D., Plaintiff</p> <p>vs.</p> <p>DONALD J. TRUMP FOR PRESIDENT, INC., et al., Defendants</p>	<p style="text-align: center;">☐ COURT USE ONLY ☐</p>
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<p style="text-align: center;">PLAINTIFF'S RESPONSE TO DTR'S MOTION TO RECONSIDER RULING REGARDING CONSIDERATION OF DTR'S LACK OF EXISTENCE IN RULING ON SPECIAL MOTION TO DISMISS</p>	

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Eric Coomer, Ph.D. (Dr. Coomer) files his Response to Defending the Republic, Inc.'s (DTR) Motion to Reconsider Ruling Regarding Consideration of DTR's Lack of Existence in Ruling on Special Motion to Dismiss (Motion) and asks the Court to deny the Motion as it fails to establish grounds for reconsideration or review of its untimely arguments or evidence asserted in reply. Regardless, the legal arguments and evidence raised fail to establish a basis for application of the anti-SLAPP statute or overcome Dr. Coomer's prima facie evidence in support of his claims. And, as detailed below, very recently the validity of DTR's corporate formation and fundraising has been recently called into question by law enforcement and investigative reporting, and discovery is necessary in the post-SLAPP discovery to determine the facts surrounding the entity and its agents.

I. PROCEDURAL BACKGROUND

1. On December 22, 2020, Dr. Coomer filed his Original Complaint asserting claims for defamation, intentional infliction of emotional distress, conspiracy, and injunctive relief against Defendants Joseph Oltmann (Oltmann), FEC United, Inc. (FEC United), Shuffling Madness Media, Inc. dba Conservative Daily (SMM, and together with Oltmann and FEC United, Oltmann, et al.), James Hoft (Hoft), TGP Communications LLC dba The Gateway Pundit (TGP, and together with Hoft, Hoft-TGP), Michelle Malkin (Malkin), Eric Metaxas (Metaxas), Chanel Rion (Rion), Herring Networks, Inc. dba One America News Network (OAN, and together with Rion, OAN-Rion), Newsmax Media, Inc. (Newsmax), Sidney Powell, Sidney Powell, P.C.

(Powell, P.C., and together with Sidney Powell, Powell), Rudolph Giuliani (Giuliani), and Donald J. Trump for President, Inc. (Trump Campaign).¹ On February 4, 2021, Dr. Coomer filed his First Amended Complaint, adding Defendant DTR.²

2. Dr. Coomer's allegations against each defendant are generally the same: their publication of false statements that Dr. Coomer participated in an alleged Antifa conference call; stated on that alleged call that he intended to subvert the 2020 presidential election; and then did subvert the results of the 2020 presidential election caused him severe emotional and physical distress, as well as harm to his reputation, privacy, safety, earnings, and other unspecified pecuniary interests.³

3. Several Defendants sought and obtained extensions of their deadlines to file responsive pleadings, largely without objection from Dr. Coomer, including DTR.⁴ Beginning in mid-February 2021, Defendants filed C.R.C.P. 12(b)(2) and 12(b)(5) motions to dismiss for lack of personal jurisdiction and/or failure to state a claim. At this time, DTR filed a C.R.C.P. 12(b)(2) motion for lack of personal jurisdiction.⁵ DTR did not raise arguments or evidence challenging its liability for acts of its agent taken prior to its formation. The parties also sought and obtained additional extensions of their deadlines

¹ See generally Orig. Compl.

² See First Am. Compl. at ¶ 14.

³ See First Am. Compl. at ¶¶ 51-56 (Oltmann, et al.); ¶¶ 57, 60 (Hoft-TGP); ¶ 58 (Malkin); ¶ 59 (Metaxas); ¶ 61 (OAN-Rion); ¶ 62 (Newsmax); ¶¶ 64-70 (Powell et al.); ¶¶ 64-65 (Giuliani); ¶¶ 63-70 (Trump Campaign); ¶¶ 72-81 (damages).

⁴ See Mar. 11, 2021 Order.

⁵ See DTR C.R.C.P. 12(b)(2) Mot., filed Mar. 29, 2021.

to respond and reply.⁶ After all motions were fully briefed, the C.R.C.P. 12(b)(2) motions were denied.⁷ The C.R.C.P. 12(b)(5) motions remain pending.

4. On February 25, 2021, Dr. Coomer and Newsmax jointly requested an extension of the 63-day deadline to file a special motion to dismiss pursuant to Colorado's anti-SLAPP statute, C.R.S. § 13-20-1101. At the request of the parties, Newsmax's deadline was extended an additional 35 days to April 30, 2021. Several other parties subsequently filed motions for extensions of their own anti-SLAPP deadlines, including DTR, which were granted.⁸ The Court eventually extended the anti-SLAPP deadline for all Defendants to April 30, 2021.⁹

5. Metaxas was the only Defendant to file his anti-SLAPP motion in accordance with the original statutory deadline. On March 4, 2021, Dr. Coomer filed a motion seeking limited discovery for use in responding to Metaxas's motion. After oral argument, the Court found good cause for limited discovery and granted Dr. Coomer's discovery motion. Dr. Coomer similarly sought and was eventually granted limited discovery as to all parties. In response, Powell and Oltmann, et al. sought limited discovery of Dr. Coomer, which was also granted.¹⁰

⁶ See Mar. 5, 2021 Order (Pl. Resp. to Powell 12(b)(2) Mot.); Mar. 16 Order (Pl. Resp. to OAN-Rion 12(b)(2) and 12(b)(5) Mot.); Mar. 30, 2021 Order (Powell 12(b)(2) Reply); Apr. 19, 2021 Order (Giuliani 12(b)(2) Reply); Apr. 27, 2021 Order (Giuliani 12(b)(2) Reply); Apr. 27, 2021 Order (Pl. Resp. to Trump Campaign 12(b)(2) and 12(b)(5) Mot.); May 21, 2021 Order (Pl. Resp. to Hoft-TGP 12(b)(2) and 12(b)(5) Mot.); May 21, 2021 Order (Trump Campaign 12(b)(2) and 12(b)(5) Reply).

⁷ See Jun. 21, 2021 Order.

⁸ See Mar. 26, 2021 Order.

⁹ See Mar. 24, 2021 Order.

¹⁰ See Sept. 7, 2021 Order.

6. On April 30, 2021, the remaining Defendants filed their special motions to dismiss, including DTR.¹¹ Again, at this time, DTR did not raise arguments or evidence challenging its liability for acts of its agent taken prior to its formation. Following several months of limited discovery, Dr. Coomer filed his Omnibus Response to all Defendants' arguments and affirmative defenses.¹² Dr. Coomer's Omnibus Response was directly responsive to the arguments and evidence raised by Defendants in their special motions to dismiss. However, Dr. Coomer anticipated Defendants filing additional arguments and evidence in reply and timely asserted objections to such arguments or evidence being considered.¹³

7. On reply, several Defendants attempted to expand the scope of their original arguments, including DTR. Specifically, DTR raised for the first time arguments challenging its liability for the acts of Powell prior to its formation and attempted to offer additional evidence in support.¹⁴

8. On October 13-14, 2021, the Court heard oral argument on all Defendants' special motions. As DTR clarified in its special motion to dismiss, this hearing was not

¹¹ See Oltmann, et al. anti-SLAPP Mot.; Hoft-TGP anti-SLAPP Mot.; Malkin anti-SLAPP Mot.; OAN-Rion anti-SLAPP Mot.; Giuliani anti-SLAPP Mot.; Powell anti-SLAPP Mot.; DTR anti-SLARPP Mot.; Trump Campaign anti-SLAPP Mot.

¹² See Pl's Omnibus Resp., Sept. 17, 2021.

¹³ See Pl's Omnibus Resp. at ¶ 152.

¹⁴ See DTR anti-SLAPP Reply, Oct. 4, 2021, at 2-8, 11.

an evidentiary hearing.¹⁵ On October 14, 2021, Plaintiff expressly objected to DTR's untimely attempt to raise new arguments for the first time in its reply.¹⁶

9. At the conclusion of the October 13-14, 2021 hearing, the Court instructed the parties to submit their proposed evidence, objections to opposing parties' evidence, and replies to those objections within 45 days. On November 29, 2021, Plaintiff timely filed the evidentiary chart, wherein he expressly objected to DTR's attempt to introduce new arguments in its reply.¹⁷

10. The Court in its December 5, 2021 Order Regarding Plaintiff's Responses to All Defendants' Objections found DTR's argument challenging liability based on its formation was raised for the first time in its reply brief and, as such, not considered for purposes of DTR's special motion to dismiss.¹⁸

II. ARGUMENT

A. *DTR fails to establish grounds for reconsideration.*

11. While permitted, motions to reconsider interlocutory orders of the Court are disfavored and only granted in limited circumstances. C.R.C.P. 121 § 1-15. By rule, a party moving for reconsideration must show more than a disagreement with the Court's decision. *Id.* Such a motion must allege a manifest error of law or fact that clearly mandates a different result or other circumstances resulting in manifest injustice. *Id.* It

¹⁵ See DTR anti-SLAPP Mot. at 5.

¹⁶ See Exhibit 1, Oct. 14, 2021 Hrg. Tr. at 460:3-461:15. This exhibit contains the unofficial transcript of the proceedings obtained from Veritext Legal Solutions. The official transcript was ordered by Plaintiff's counsel on November 5, 2021, but has not yet been finalized by the FTR reporter.

¹⁷ See Pl.'s Resp. to all Defs.' Obj., Nov. 29, 2021, at 1-2,

¹⁸ See Dec. 5, 2021 Order at 1 (citing *People v. Czemyrski*, 786 P.2d 1100, 1107 (Colo. 1990)).

is not intended to revisit issues already litigated or raise issues that could have been raised in prior briefing. *See People v. Schaufele*, 325 P.3d 1060, 1068 (Colo. 2014) (Boatright, J. concurring); *Steele v. Law*, 78 P.3d 1124, 1128 (Colo. App. 2003). Instead, grounds warranting reconsideration include intervening changes in law; previously unavailable evidence; or the need to correct misapprehension of facts or controlling law. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). None of these grounds are present here.

12. Instead, DTR's grounds for reconsideration primarily re-urge the Court to consider the arguments and evidence it raised for the first time in its reply brief in support of its special motion to dismiss. *See generally* DTR Mot. to Reconsider. This does not involve a change in law or unavailable evidence. Rather, the argument and evidence DTR wants considered involve the timing of its formation—a matter that DTR has known since before this lawsuit was filed and did not raise in the 79 days between when it was served with notice and when it was required to file its special motion to dismiss.¹⁹ *See* Affidavit of Service for DTR, dated Feb. 10, 2020; *see also* Mar. 26, 2020 Order (extending the deadline to file DTR's special motion to dismiss to April 30, 2020). Special motions to dismiss must be filed within sixty-three days after service of the complaint. C.R.S. § 13-20-1101(5). Yet, DTR did not seek leave from the Court to raise additional arguments or evidence in its reply, which are in effect a new special motion to dismiss. *See Kunysz v. Sandler*, 146 Cal. App. 4th 1540, 1543 (2007) (affirming order denying anti-SLAPP motion filed after the deadline where defendant failed to seek leave of the court to file the

¹⁹ Similarly, DTR did not raise these arguments under C.R.C.P. 12.

motion or provide grounds for late filing). Instead, it waited over 157 days after filing its special motion to raise the argument and evidence in its reply briefing. At no point has DTR offered any explanation or support for this delay. As such, these new arguments and evidence are time-barred. *See, e.g., Platypus Wear, Inc. v. Goldberg*, 166 Cal. App. 4th 772, 782-88 (2008) (reversing order granting leave to file anti-SLAPP motion after the deadline); *Olsen v. Harbison*, 134 Cal. App. 4th 278, 283-84 (2006) (affirming order denying leave to file anti-SLAPP motion after the deadline); *Morin v. Rosenthal*, 122 Cal. App. 4th 673, 678-82 (2004) (affirming order denying leave to file anti-SLAPP motion after the deadline).

13. As the appellate court found in *Steele*, there has been no mistake here, except perhaps the one committed by DTR in failing to timely raise its arguments and evidence. *See* 78 P.3d at 1128. This is insufficient to support reconsideration of the Court's December 5 Order.

B. DTR fails to establish grounds for review of arguments or evidence raised for the first time in its reply brief.

14. As an initial matter to clarify the procedural background, the Court did not *sua sponte* enter its December 5, 2021 Order. Rather, it addressed the objection Dr. Coomer timely made in his Omnibus Response in anticipation of Defendants raising arguments and evidence in their replies, as well as the leave for consideration DTR implicitly sought by raising arguments and evidence for the first time in its reply.²⁰

²⁰ DTR's reliance on *In re Marriage of Aldrich* is misplaced as it involved an evidentiary hearing on a motion to modify child support in which the moving party argued the Court should *sua sponte* determine issues the party did not raise on statutory guideline factors given its obligation to ensure the best interests of the child. *See* 945 P.2d 1370, 1376-77 (Colo. 1997). There, the Colorado Supreme Court found that the trial

See Pl.'s Omnibus Resp. at ¶152; DTR anti-SLAPP Reply at 2-7. Further, the October 13-14, 2021 hearing on the special motions to dismiss was not an evidentiary hearing. As DTR has recognized, this hearing was a “non-evidentiary hearing for legal argument concerning the motion and not a ‘mini-trial’ in which testimony and exhibits are received by the Court.” See DTR anti-SLAPP Mot. at 5 (instead, recognizing that the anti-SLAPP statute provides a “summary-judgment-like” procedure where review is determined on pleadings and “supporting and opposing affidavits” in briefs). That the Court reserved its determination of objections to evidence until after the October 13-14, 2021 hearing neither transformed the hearing into an evidentiary hearing nor granted DTR leave to raise untimely arguments or evidence. See Sept. 22, 2021 Order; Oct. 14, 2021 Minute Order. Similarly, Dr. Coomer’s index of exhibits filed prior to the hearing was not “additional evidence” but, rather, evidence he had offered in his Omnibus Response. See Pl.’s Omnibus Response Index of Exhibits, Sept. 17, 2021; Pl.’s Index of Hearing Exhibits, Oct. 10, 2021. DTR’s misstatements regarding the procedural background fail to provide a basis in support for its late-filed arguments and evidence.

15. Instead, the Court’s December 5, 2021 Order denying consideration of the arguments and evidence DTR raised in its reply is well supported under the law. While the anti-SLAPP statute was recently enacted with limited authority interpreting its terms, there is ample authority regarding summary judgment, which is comparable in review. See *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016) (describing the anti-SLAPP statute as

court was not required to consider arguments the parties did not raise. See *id.* In contrast, this case involves a non-evidentiary hearing, with a determination based on briefing and evidence therein, where a party seeks consideration of untimely arguments and evidence raised.

a “summary-judgment-like procedure). There, courts have found that “an issue not raised by the moving party in the motion or brief cannot serve as the basis for summary judgment because the non-moving party is not put on notice as to the need to present evidence concerning that issue.” *Wallman v. Kelley*, 976 P.2d 330, 332 (Colo. App. 1998) (reversing summary judgment of claims based on challenges raised in reply briefing); *Antelope Co. v. Mobil Rocky Mountain, Inc.*, 51 P.3d 995, 1001 (Colo. App. 2001). This rule has also been applied to other motions at the trial court level as well as with briefs at the appellate level. *See, e.g., City of Lakewood v. Armstrong*, 419 P.3d 1005, 1012 (Colo. App. 2017); *In re Marriage of Dean*, 413 P.3d 246, 252 (Colo. App. 2017); *Krol v. CF & I Steel*, 307 P.3d 1116, 1123-24 (Colo. App. 2013); *Colo. Korean Ass’n v. Korean Senior Ass’n of Colo.*, 151 P.3d 626, 629 (Colo. App. 2006); *Flagstaff Enter. Constr., Inc. v. Snow*, 908 P.2d 1183, 1185 (Colo. App. 1995); *Czemerynski*, 786 P.2d at 1107. Federal authority has applied this rule. *See Herbert v. Nat’l Acad. of Sci.*, 974 F.2d 192, 196 (D.C. Cir. 1992); *AAR, Inc. v. Nunez*, 408 Fed. App’x 828, 830 (5th Cir. 2011); *U.S. v. Feinberg*, 89 F.3d 333, 340-41 (7th Cir. 1996). Similarly, California authority has applied this rule. *See Tropio v. Dixieline Builders Fund Control*, No. D056127, 2011 WL 2930204, at *8-9 (Cal. App. 2011).²¹ DTR’s efforts to challenge the law underlying the Court’s December 5, 2021 Order are unsupported and rely on inapposite authority.²²

²¹ Although unpublished, the appellate court in *Tropio* both applies this rule in the anti-SLAPP context and provides a detailed analysis of California authority applying this rule in the summary judgment and appellate context.

²² None of the anti-SLAPP cases DTR cites address untimely evidence submitted in reply briefs, let alone support DTR’s assertion that the Court must consider such evidence. *See Salazar v. Pub. Trust Inst.*, No. 20cv33689, District Court, City and Cnty. of Denver, State of Colorado, Mar. 10, 2021 Order at *2-23; *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.D.C. 2016), *as amended* (Dec. 13, 2018); *Mindys*

16. Further, an underlying purpose of this rule is to preserve a nonmovant's due process rights. *See Tropio*, 2011 WL 2930204, at *8 (citing *San Diego Watercrafts, Inc. v. Wells Fargo Bank*, 102 Cal. App. 4th 308, 316 (2002)). Due process requires a party to be fully advised of the issues to be addressed and to be given adequate notice of what facts it must rebut in order to prevail. *See id.* As such, this rule is applicable in the context of the anti-SLAPP statute, which provides for the dismissal of claims. *See Baral*, 376 P.3d at 608 (finding the anti-SLAPP statute provides a procedural mechanism to dismiss meritless claims arising from protected activity); *see also Sweetwater Un. High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1161-63 (Cal. 2019) (finding the anti-SLAPP statute is not intended to abort meritorious claims). By its terms, the anti-SLAPP statute provides due process with notice and timing requirements surrounding motions and responses. *See* C.R.S. § 13-20-1101(3), (5). Without such requirements, parties could exploit this procedure so as to dismiss meritorious claims. By raising new arguments and evidence in its reply brief, DTR deprived Dr. Coomer of adequate notice and the opportunity to respond.²³ Consideration of these arguments and evidence without adequate notice and response risks the dismissal of Dr. Coomer's meritorious claims. In contrast, denying consideration merely denies review of DTR's arguments and

Cosmetics, Inc. v. Dakar, 611 F.3d 590, 598-99 (9th Cir. 2010); *Sweetwater Un. High Sch. Dist.*, 434 P.3d at 1158; *Tuchscheer Dev. Enters. Inc. v. San Diego Unified Port Distr.*, 106 Cal. App. 4th 1219, 1237 (2003). In fact, the only authority DTR cites for the assertion that it was permitted to raise arguments and evidence outside of its special motion to dismiss involves a trial proceeding with no reference to review under the anti-SLAPP statute. *See Padilla v. Ghuman*, 183 P.3d 653, 658 (Colo. App. 2007) (affirming trial court's award of unpled damages based on evidence presented at trial).

²³ DTR's efforts to conflate limited discovery with notice of specific legal challenges made and evidence offered in support in a special motion to dismiss has no basis in law or fact. *See* DTR Mot. to Reconsider at 2.

evidence for purposes of the anti-SLAPP statute—a result owed to DTR’s own dilatory filing. DTR will have more than sufficient opportunity to raise these arguments at a later stage of the proceeding with a motion for summary judgment or at trial.

17. Because DTR has failed to provide any explanation for its late filing or support for review of the arguments and evidence raised in its reply, Dr. Coomer requests the Court deny DTR’s motion to reconsider. In the limited event the Court does consider DTR’s untimely arguments and evidence, Dr. Coomer alternatively requests the Court provide him the opportunity to respond, including, but not limited to, offering the supplemental evidence attached herein. For example, it has recently come to light that federal prosecutors with the U.S. attorney’s office for the District of Columbia have issued a grand jury subpoena demanding financial records from Powell and DTR as part of a criminal probe.²⁴ Prosecutors are reportedly seeking records going back to November 1, 2020.²⁵ Subsequent reporting further indicates that an investigation by the Florida Department of Agriculture in June 2021, had prompted Powell to disclose that she had received an undisclosed amount of compensation from DTR.²⁶ Under oath in this

²⁴ See Isaac Stanley-Becker et. al., *Prosecutors demanded records of Sidney Powell’s fundraising groups as part of criminal probe*, WASH. POST, Nov. 30, 2021, <https://www.washingtonpost.com/politics/2021/11/30/sidney-powell-defend-the-republic-criminal-probe/> (noting that “[Powell] began asking for donations as early as Nov. 10, 2020, a week after the election, telling viewers of the ‘Lou Dobbs Tonight’ show on Fox Business that she had started a website called defendingtherepublic.org where they could donate.”)

²⁵ *Id.*

²⁶ Emma Brown et. al., *Sidney Powell group raised more than \$14 million spreading election falsehoods*, WASH. POST, Dec. 6, 2021, https://www.washingtonpost.com/investigations/sidney-powell-defending-republic-donations/2021/12/06/61bdb004-53ef-11ec-8769-2f4ecdf7a2ad_story.html (“In that application, Defending the Republic projected contributions of \$7.2 million during the fiscal year ending Sept. 30. It disclosed that Powell received an unspecified amount of compensation from the organization.”)

proceeding, 25 days after the Florida filing,²⁷ Powell denied that she had already been compensated by DTR, stating instead that “I certainly hope we will.”²⁸ Other reporting has indicated that the incorporation papers filed by DTR in Texas, upon which DTR relies for its untimely argument here, may themselves have been fraudulently filed, and are also the subject of an ongoing federal criminal investigation.²⁹ As a result, the legal significance of these documents themselves remains unclear. Pending resolution of this uncertainty, the Court should not now rely on those documents as a basis for dismissing Plaintiff’s claims against DTR.

C. Even were DTR’s new argument and evidence considered for purposes of its special motion to dismiss, it fails to establish the anti-SLAPP statute applies or overcome Dr. Coomer’s prima facie evidence.

18. The arguments and evidence DTR asserts in its reply go to the merit of Dr. Coomer’s claims. However, DTR bears the initial burden of showing the anti-SLAPP statute applies to Dr. Coomer’s claims. *See Kieu Hoang v. Phong Minh Tran*, 60 Cal. App. 5th 513, 524-25 (2021). DTR’s special motion to dismiss failed to meet this burden. *See* Pl.’s Omnibus Resp. at § VI(A). Similarly, the new arguments and evidence DTR asserts surrounding its formation do not establish conduct constituting protected activity

²⁷ *See* Exhibit 2, at p. 2.

²⁸ *See* Pl.’s Omnibus Resp., Ex. K-1, Powell, July 20, 2021 Depo. Tr. at 101:16-102:6.

²⁹ Murray Waas, *Sidney Powell filed false incorporation papers for non-profit, grand jury finds*, THE GUARDIAN, (Dec. 3, 2021), <https://www.theguardian.com/us-news/2021/dec/03/sidney-powell-filed-false-incorporation-papers-for-non-profit-grand-jury-finds> (“Incorporation papers Powell filed with the Texas Secretary of State on 1 December 2020 for Defending the Republic (DTR), listed only three people as comprising the group’s initial board: Powell herself, the Georgia attorney Linn Wood; and Brannon Castleberry, a Beverly Hills-based businessman and consultant. The federal grand jury has reviewed extensive documentation that neither Wood nor Castleberry ever consented to serve on DTR’s board. One of the two men has said he wasn’t notified, even after the fact, that Powell had named him as a board member. The grand jury is investigating whether Powell misrepresented the makeup of her board in an effort to attract more donors.”)

under the anti-SLAPP statute. *See* DTR anti-SLAPP Reply at 2-7. Therefore, consideration of DTR’s untimely arguments and evidence is unnecessary and its motion should be denied accordingly.

19. Even were DTR’s untimely arguments and evidence considered, they fail to overcome Dr. Coomer’s prima facie evidence in support of his claims. There is evidence that Sidney Powell was an authorized agent of DTR at the time she defamed Dr. Coomer;³⁰ that Powell made representations and solicited donations on behalf of DTR during that time;³¹ that DTR accepted these donations and continued to perpetuate Powell’s representations of election fraud;³² and that DTR has not removed, corrected, or retracted any of the defamatory statements made by Powell on its behalf.³³ This is sufficient to support a finding of liability against DTR. *See Cheney v. Hailey*, 686 P.2d 808, 811 (Colo. App. 1984) (recognizing entity was vicariously liable for agent’s tortious conduct); RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006). Significantly, DTR has not

³⁰ *See* Pl.’s Omnibus Resp. at Ex. L-1, DTR, Aug. 4, 2021 Depo. Tr. at 13:10-17, 14:11-13; *see also* Pl.’s Resp. to DTR 12(b)(2) Mot. at ¶¶ 14-15.

³¹ *See, e.g.*, Pl.’s Omnibus Resp. at Ex. K-5 (promoting the “Kraken” suits and seeking donations on behalf of DTR), Ex. L-2 (showing DTR website was promoted on Lou Dobbs Tonight as early as Nov. 10, 2020); *see also* Pl.’s Resp. to DTR 12(b)(2) Mot. at ¶¶ 14-15.

³² *See* Pl.’s Omnibus Resp. at Ex. K-5; Ex. L-1, DTR, Aug. 4, 2021 Depo. Tr. at 46:11-15; *see also* Powell anti-SLAPP Mot. at 23 (claiming Oltmann’s allegations are true); Powell anti-SLAPP Reply at 1-5 (same); DTR anti-SLAPP Mot. at 1 (incorporating Powell’s anti-SLAPP motion by reference), 22 (claiming “Powell had good reason to give credence to Mr. Oltmann’s claims”); DTR anti-SLAPP Reply at 1 (incorporating Powell’s anti-SLAPP reply by reference), 2 (claiming Oltmann’s testimony continues to be supported by “significant other information”).

³³ *See* Pl.’s Omnibus Resp. at Ex. V-1, Demand for Retraction.

disputed Powell's authority as its agent.³⁴ Instead, DTR argues without support that its date of corporate formation precludes its liability.³⁵

20. However, the avoidance or delay of corporate formalities does not preclude DTR's liability as there is evidence that DTR ratified Powell's actions.³⁶ *See Hayutin v. Gibbons*, 338 P.2d 1032, 1036 (Colo. 1959) (defining "ratification" as "the adoption and affirmance, either expressly or by implication by one person of the prior act of another which did not bind him but which was done or professed to be done on his account, whereby the act is given effect as though originally authorized"). Further, there is evidence that DTR is liable for Powell's conduct as her alter ego. *See In re Philips*, 139 P.3d 639, 646 (Colo. 2006) (recognizing reverse veil piercing when (1) a corporate entity and insider are alter egos; (2) justice requires recognizing the substance of the relationship over form; and (3) an equitable result is achieved). Here, the facts DTR relies on to avoid liability are also prima facie evidence of either its ratification of Powell's actions or its role as Powell's alter ego, including the timing of DTR's formation in contrast with Powell's actions, representations, and solicitation of funds prior to and after that formation.³⁷ This is sufficient to show either adoption and affirmation by DTR or an

³⁴ *See generally* DTR anti-SLAPP Mot.; DTR anti-SLAPP Reply.

³⁵ None of the cases cited by DTR in its anti-SLAPP Reply involve an unformed entity and its agents soliciting business (here, donations) as if fully formed. *See Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 32-34 (Colo. 1997) (citing agency principles, generally); *Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 14-15 (Colo. App. 2010), *as modified on denial of reh'g* (Apr. 1, 2010) (same); *Coopers & Lybrand v. Fox*, 758 P.2d 683, 684-85 (Colo. App. 1988) (involving promoter's contract); *Miser Gold Mining & Milling Co. v. Moody*, 86 P. 335, 336 (Colo. 1906) (same); *Knox v. First Sec. Bank of Utah*, 196 F.2d 112, 115-16 (10th Cir. 1952) (applying Utah law and involving promoter's contract).

³⁶ *See supra* at n.30-33.

³⁷ *See id.*

indistinction between Powell and DTR for purposes of liability.³⁸ There is also evidence of potential intermingling of funds, failure to comply with various reporting requirements, and accusations of financial malfeasance by former DTR officers and members of its board of directors.³⁹

21. As such, DTR's Motion should be denied as it has failed to establish grounds for reconsideration or review of untimely arguments and evidence submitted in its reply brief. Further, the untimely arguments and evidence DTR asserts fail to establish protected activity under the anti-SLAPP statute or overcome the prima facie evidence in support of Dr. Coomer's claims.

PRAYER

For these reasons, Plaintiff Dr. Eric Coomer respectfully requests that the Court deny Defendant Defending the Republic's Motion to Reconsider Ruling Regarding Consideration of Defending the Republic's Lack of Existence in Ruling on Special Motion to Dismiss. Dr. Coomer further requests such other and further relief to which he may be justly entitled.

Respectfully submitted,

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Zachary H. Bowman, No. 21PHV6676

³⁸ *See id.*

³⁹ *See generally* Emma Brown et. al., *Sidney Powell group raised more than \$14 million spreading election falsehoods*, WASH. POST, Dec. 6, 2021, https://www.washingtonpost.com/investigations/sidney-powell-defending-republic-donations/2021/12/06/61bdb004-53ef-11ec-8769-2f4ecdf7a2ad_story.html

Thomas M. Rogers III, No. 28809
Mark Grueskin, No. 14621
Andrew Ho, No. 40381

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Defending the Republic Inc.'s Motion to Reconsider Ruling Regarding Consideration of Defending the Republic's Lack of Existence in Ruling on Special Motion to Dismiss has been served on all parties receiving notice through ICCES on this 27th day of December 2021.

_____/s/ Charles J. Cain_____
Charles J. Cain