DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Denver, Colorado 80523	DATE FILED: January 6, 2022 6:05 PM FILING ID: BAD6A64FA1C45 CASE NUMBER: 2020CV34319
ERIC COOMER, Ph.D., Plaintiff vs. DONALD J. TRUMP FOR PRESIDENT, INC., et al., Defendants.	▲ COURT USE ONLY ▲
Michael W. Reagor, No. 22027 Christopher P. Seerveld, No. 17985 Dymond ● Reagor, PLLC 8400 E. Prentice Ave., Suite 1040 Greenwood Village, Colorado 80111 Phone: (303) 734-3400; Fax: (866) 861-7066 mreagor@drc-law.com; cseerveld@drc-law.com Attorneys for Defending the Republic, Inc.	Case Number: 2020CV34319 Courtroom 409
DTR'S REPLY IN SUPPORT OF MOTION TO RECONSIDER RULING REGARDING CONSIDERATION OF DTR'S LACK OF EXISTENCE IN RULING ON SPECIAL MOTION TO DISMISS	

Defending the Republic, Inc. (hereinafter "DTR"), by and through undersigned counsel, hereby replies in support of its motion to reconsider.

1. Preliminary Matters. Plaintiff's response contains thirty-nine footnotes in less than 12-point font in violation of C.R.C.P. 10(d)(2)(II)("No less than twelve (12) point font shall be used for all documents, including footnotes"). This is typical of Plaintiff's pleadings, which if accepted would allow him to skirt the page limit requirements. Plaintiff's reliance on immaterial newspaper articles and reference to a federal subpoena allegedly issued to DTR as part of a criminal probe raise ethical issues under the Court's Civility Order (10/11/2021) and CO ST RPC Rule 4.5 (a)(threatening criminal charges to obtain advantage in a civil matter). DTR requests that the Court strike these references from Plaintiff's response.

2. **Grounds for Reconsideration.** Under C.R.C.P. 121, §1-15(11) a motion to reconsider must allege a manifest error of fact or law that clearly mandates a different result or

other circumstance resulting in manifest injustice. Here, the Court errs in law and fact by *sua sponte* ruling that it will not consider DTR's lack of existence in ruling on DTR's special motion to dismiss ("Motion"). However, the Anti-SLAPP statute ("Statute") clearly provides that Plaintiff has the burden of pleading facts showing liability. Further, the court erred by holding that the formation issue "was not raised in a manner that would provide the Plaintiff an opportunity to respond fully." In fact, Plaintiff raised the issue in his response to which DTR appropriately replied, and the Court held a hearing where Plaintiff responded to the issue.

If relief is sought on allegations arising from protected activity, the burden shifts to the Plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. *Baral v. Schnitt*, 376 P.3d 604, 617 (Cal. 2016); C.R.S. § 13-20-1101(3)(a)("a reasonable likelihood that the plaintiff will prevail on the claim"). "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).

The First Amended Complaint bases DTR's liability on *respondeat superior* for Ms. Powell's protected statements but does not plead any facts showing that DTR existed at the time of Ms. Powell's statements. The question under the Statute is not when DTR plead its corporate existence,[1] but whether Plaintiff plead facts showing DTR existed at the relevant time. Plaintiff's

[1]Because Plaintiff's complaint is subject to a special motion to dismiss under C.R.S. 13-20-1101(3)(a), no Answer from DTR is yet due in which DTR would respond to the allegations of the complaint and plead defenses, like lack of corporate existence.

response raises but fails to prove DTR existed at the time of Powell's alleged statements. Therefore, Plaintiff fails to establish a reasonable likelihood that he will prevail on the claim.

On April 30, 2021, DTR filed the Motion. On June 8, 2021, the Court allowed Plaintiff to depose DTR. *Order,* p. 3 (06/08/2021). During DTR's August 4, 2021 deposition, Plaintiff raised the corporate existence issue in the context of a Lou Dobb's tweet which mentions a website allegedly in existence before DTR's incorporation. *Hearing Exhibit 101, Depo,* p. 20:5-25; 21:1-25; 22:1-17. Through questioning, Plaintiff proved that Defending the Republic, Inc. was incorporated on December 1, 2020 (marking as Plaintiff's Exhibit L-1 a "Texas Secretary of State information re Defending the Republic") and that the website, DefendingTheRepublic.org, referenced in a Fox News Lou Dobb's tweet (marked as Plaintiff's Exhibit L-2), was affiliated with LDFFTAR, "the Legal Defense Fund for the American Republic," which is NOT DTR. *Id*.

On September 17, 2021, Plaintiff filed his response to the Motion attaching DTR's full deposition transcript, Exhibits L-1 and L-2, and specifically discussed the formation issue. *See DTR's Motion to Reconsider; Response, Plaintiff's Index of Exhibits*, p. 8 and *Exhibits L-1 and L-2*. Plaintiff was aware of the formation issue, investigated DTR's date of formation, and used DTR's certificate of incorporation as an exhibit in Plaintiff's response. Plaintiff's response argues, incorrectly, that "[a DTR] website appears to have been established as early as November 10 and was promoted on Fox News' Lou Dobbs Tonight." *Response*, ¶ 102. The response attaches Plaintiff's affidavit incorrectly stating that "Powell began promoting **DTR** [a legal entity] prior to the November 19 press conference," [i.e., prior to DTR's corporate formation] citing Exhibit L-2 as proof. *Response, Coomer Affidavit, ¶ 33.* This averment is pure speculation without any factual

support and is in fact contradicted by the only evidence adduced on the matter: Exhibit L-2 referencing a **website** "DefendingTheRepublic.**org,**" linked to LDFFTAR, **not** the legal entity Defending The Republic, Inc. The Response admits that "[t]he lines were blurred as to when Powell was acting individually, on behalf of the Trump Campaign, Defending the Republic, or her law firm." *Response* ¶ 102 (emphasis added).[2] Now, Plaintiff ignores these facts in order to avoid the obvious conclusion, that DTR cannot be vicariously liable for an alleged tort committed predating its existence.

Plaintiff also had opportunity to further address the issue during the October 13-14, 2021 hearing. *Exhibit 1,* Oct 14, 2021 Hrg Tr. at 460:22-25; 461:1-2. Plaintiff's protestations fly in the face of the facts. Plaintiff was aware of the issue, conducted discovery regarding the issue, and attempted to rebut the issue in his response brief, all prior to the filing of DTR's reply brief. Moreover, Plaintiff fails to demonstrate any prejudice resulting to him in any way. To avoid the obvious defect in his pleading and his inability to state a claim against DTR under the Statute, he reverts to all manner of innuendo and baseless protestation.

Plaintiff argues that DTR stated at the hearing that it was not an evidentiary hearing. *Response*, ¶ 8. DTR merely joined the chorus of defendants in pointing out that under the Statute, the hearing was not supposed to be an evidentiary hearing, but that Plaintiff has tried to make it into an evidentiary hearing. The second step of analysis under the Statute has been described as a "summary-judgment-like procedure" where the court does not weigh evidence or resolve

[2] Powell never represented the Trump Campaign.

conflicting factual claims but limits its inquiry to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. The Court evaluates the defendant's showing only to determine if it defeats plaintiff's claim as a matter of law. *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019).

On October 4, 2021, DTR replied to Plaintiff's response, his affidavit, and his corporate formation Exhibits L-1 and L-2, all of which addressed the corporate existence issue. DTR's reply used and cited **Plaintiff's** own response brief Exhibit L-1 as proof of DTR's corporate formation on December 1, 2020 (remarked as Exhibit 100). *Reply*, p. 3. Therefore, the Court errs by refusing to consider DTR's lack of existence on grounds that "DTR did not plead this issue until October 4, 2021," since DTR's October 4 reply only addressed the argument raised **in Plaintiff's response**. This is the very purpose of a reply brief. *WLW Realty Partners, LLC v. Cont'l Partners VIII, LLC*, 360 P.3d 1112, 1116 (Mont. 2015)("The purpose of a reply brief is to respond to arguments raised in a response brief; we will not fault a party for waiting until the reply brief to respond to an argument or evidence that was first raised in a response brief").

Further, sufficiency of evidence arguments can be raised at any time, including on appeal. *McCoy v. People*, 442 P.3d 379, 388 (Colo. 2019)(appellate courts review sufficiency of evidence claims de novo, even when raised for the first time on appeal). The substantive issue here, that an entity cannot be liable for an act predating its existence, is purely legal and can be raised at any time in the anti-SLAPP context, including on appeal. *City of Colton v. Singletary*, 142 Cal. Rptr. 3d 74, 95 (Cal. App. 2012)(prosecutorial exemption to anti-SLAPP statute was a purely legal issue which may be raised for the first time on appeal).

Plaintiff's due process argument also fails. First, there is no constitutional notice issue raised by these facts, and Plaintiff provides no authority for his novel argument. More importantly, Plaintiff has had every fair opportunity to consider, research, brief, address and consider the legal defect defeating his claim against DTR. Plaintiff was advised of the corporate existence issue when he raised it at deposition and in his response. Plaintiff also had opportunity to fully litigate the issue at a hearing on the special motions. But Plaintiff did not rebut DTR's arguments at the hearing; rather, he asked the Court to grant him more discovery opportunity, in hopes of somehow saving his claim. At the hearing, Plaintiff had no objection to DTR's exhibits specifically related to the formation issue. *Plaintiff' Responses to All Defendants' Objection*, p. 185 (11/29/2021).[3]

3. Plaintiff's "New" Evidence and Arguments Don't Save His Claims Against DTR. Plaintiff violates the principle relied on in his own response by attempting to present new evidence after the hearing in this case. He cites *Washington Post* and *The Guardian* articles, which are hearsay, alleging inadmissible allegations which have nothing to do with DTR's corporate formation date or this lawsuit. There is no dispute DTR was incorporated AFTER Powell's alleged statements, and nothing obviates this fact.

[3] *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) is inapposite: the 10th Circuit considers motions to reconsider filed after entry of judgment as Rule 59(e) motions for new trial, not motions for reconsideration, and provides a non-exclusive list of grounds for a new trial. *Servants of the Paraclete*, 204 F.3d at 1012.

Plaintiff makes various new arguments at footnotes 30 through 33, citing the same tired exhibits and arguments. At footnote 32 Plaintiff even cites arguments of counsel in pleadings in this case as "evidence" supporting his prima facie case.

Plaintiff argues ratification, citing his footnotes 30 to 33, which have nothing to do with ratification by DTR of Powell's statements and which in any case were not "done or professed to be done on [a non-existing DTR's] account." *Hayutin v. Gibbons*, 338 P.2d 1032, 1036 (Colo. 1959). Plaintiff argues corporate veil piercing, which is an extraordinary remedy and is discouraged when alternative remedies, like *respondeat superior* and agency law, are available. *In re Philips*, 139 P.3d 639, 647 (Colo. 2006). In support, Plaintiff cites "generally DTR anti-SLAPP Mot.; DTR anti-SLAPP Reply," which do not discuss outside reverse veil piercing but contain arguments of counsel. Plaintiff's footnotes 30-33 do not support piercing a corporate veil before it even exists. Plaintiff's bald statements are not supported by any evidence and are not plead in the First Amended Complaint. Plaintiff's footnotes simply fail to show DTR adopted or affirmed statements Powell allegedly made before incorporation. The problem with Plaintiff's arguments is that he does not litigate on the basis of the law, but rather wants to litigate in the court of public opinion based on news reports.

Plaintiff's other cites are distinguishable. *Platypus Wear, Inc. v. Goldberg*, 83 Cal. Rptr. 3d 95, 99-107 (Cal. App. 2008) involved an *ex parte* request to file an anti-SLAPP motion two years after the complaint and three months before trial. *Olsen v. Harbison*, 35 Cal. Rptr. 3d 909, 912 (Cal. App. 2005) involved an anti-SLAPP motion filed nine months after service of the Second Amended Complaint claiming failure of legal counsel to consider application of the SLAPP

procedure). *Morin v. Rosenthal*, 19 Cal. Rptr. 3d 149, 152-153 (Cal. App. 2004) held that the time to refile an anti-SLAPP motion was not tolled pending a motion to transfer to another district.

WHEREFORE, Defending the Republic requests the Court reconsider its December 5, 2021 Order and consider Defending the Republic's formation date in determining the special motion to dismiss.

Respectfully submitted this 6th day of January, 2022.

Dymond Reagor, PLLC

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 6, 2022, a true and correct copy of the foregoing was served via ICCS on counsel of record.

/s/ Christopher P. Seerveld___