COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203 On Appeal from the Denver District Court, Judge Ross B.H. Buchanon 2021CV33715	DATE FILED: September 30, 2022 7:18 PM FILING ID: B8FF8332DF464 CASE NUMBER: 2022CA774
Plaintiff-Appellant: CHAD BURMEISTER v. Defendants-Appellees: KYLE CLARK and TEGNA, INC.	***COURT USE ONLY***
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OPENING BRIEF OF APPELLANT

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CERTIFICATE OF COMPLIANCE

In accordance with Colorado Appellate Rule ("C.A.R.") 28(a)(1), the undersigned hereby certifies that this Opening Brief of Appellant complies with all requirements of C.A.R. 28 and C.A.R. 32. Appellant used Microsoft Office Word to prepare this Opening Brief. This Opening Brief uses a proportionally spaced face (Times New Roman, 14-Point). The total number of words, as measured by the word count of the word-processing system used to prepare the brief, is 8,240.

By: */s/ Dan Ernst*

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STATEMENT OF THE ISSUES

Plaintiff-Appellant, Chad Burmeister ("Burmeister") presents the following issues for review:

1. Do Burmeister's pleadings and evidence establish a "reasonable likelihood", as that legal standard is properly understood pursuant to Colorado's newly enacted anti-Strategic Lawsuit Against Public Participation ("anti-SLAPP") statute C.R.S. § 13-20-1101, sufficient to withstand Defendants' special motion to dismiss?

2. Did the District Court err when it found that Defendants' statements about Burmeister were substantially true?

3. Did the District Court err when it found that despite Defendants' statements having been shown to constitute *defamation per se* (for which damages are presumed), that Burmeister's claim is subject to dismissal because he failed to show they were "*materially* false" because the damage done to his reputation was already done by his own Facebook posts?

4. Did the District Court err when it resolved disputed issues of fact (and thereby deprived Burmeister of his constitutional rights to trial by jury) where the Court, *inter alia*, determined that challenged statements were not "materially false" because "any negative connotations stemming from Defendants' publications, were

already present due to Plaintiff's decision to publicly post to his public-facing Facebook page that he attended the events at the Capitol on January 6, 2021", that "any reputational damage incurred by Plaintiff was primarily caused by his own decision to publicly post a photograph and caption which average members of the public understood indicated that he was proud of either being, or being with, the '[f]irst guy to storm the capital [sic] today'", and that "Plaintiff's Facebook is full of references to QAnon"?

5. Did the District Court err when it found that Burmeister failed to make a sufficient (*i.e.*, *prima facie*) showing of Defendants' malice to withstand a C.R.S. § 13-20-1101 motion to dismiss?

STATEMENT OF THE CASE

This is an action for defamation. Burmeister is a private individual. Defendant-Appellee Kyle Clark ("Clark") anchors 9News (KUSA-TV) in Denver, Colorado ("9NEWS") and is the managing editor of *Next with Kyle Clark* ("*Next*"), a television program that airs weeknights at 6 p.m. Defendant-Appellee Tegna, Inc. ("Tegna") operates 64 television stations and two radio stations in 51 markets across the United States, including 9NEWS. Tegna reaches 41.7 million television households, or approximately 39 percent of all TV households nationwide, and 75 million adults each month across its digital platforms. Across Twitter, Facebook and Instagram, Tegna stations have over 32 million social media followers.

On January 7, 2021, during a broadcast segment of *Next* and in an accompanying online article, Clark and Tegna published multiple false and defamatory statements of or concerning Burmeister, including that Burmeister:

(1) "storm[ed] the U.S. Capitol to interrupt a Congressional challenge to the Electoral College results. [And participated in] [t]he violent and arrogant actions of this attack (scaling walls, breaking windows)";

(2) that Burmeister admitted and "claimed to storm the [United States Capitol] building" on January 6, 2021; and

(3) that Burmeister was "boasting [and bragging] about what was happening".

On November 22, 2021, Burmeister initiated this action by filing a complaint, asserting a single claim for defamation against Clark and Tegna ("Defendants"). On December 30, 2021, Clark and Tegna filed a special motion to dismiss pursuant to C.R.S. § 13-20-1101(3)(a), Colorado's newly enacted anti-SLAPP statute. Burmeister filed an opposition to Clark and Tegna's motion that included his sworn declaration that he did not enter the U.S. Capitol, did not participate in any violent actions, did not attack anyone, did not scale walls, or break any windows, but rather, that he participated in a peaceful march from the Ellipse to the Capitol and posted on-line his political opinions. After the special motion was fully briefed, the District Court heard oral argument at a hearing held on February 25, 2022. Clark and Tegna asserted that dismissal of Burmeister's

complaint was proper as he was unable to establish a reasonable likelihood that he would prevail on his defamation claim. The District Court granted Clark and Tegna's special motion to dismiss.

Burmeister appeals the District Court's Order entered March 28, 2022, granting Clark and Tegna's special motion to dismiss. The Court of Appeals has jurisdiction pursuant to C.R.S. §13-4-102(1), C.A.R. 1(a)(1), and C.A.R. 3(a). The March 28, 2022 Order is final under C.R.C.P. 54(b).

Facts and Procedural History

A. Parties

Chad Burmeister is married with two children. In 2017, he founded ScaleX.ai, a company that delivers artificial intelligence and automation services to companies looking to augment their sale teams and increase sales pipelines. Burmeister was voted by the American Association of Inside Sales Professionals as a Top 25 Inside Sales Leader for 10 years in a row. He was former leader of sales teams at multiple companies including: Cisco-WebEx, Riverbed Technology, ON24, RingCentral, and ConnectAndSell. Burmeister graduated from Loyola Marymount University with an MS in Computer Information Sciences. Until Clark and Tegna published the false and derogatory statements at issue in this action, Burmeister enjoyed an untarnished reputation. *See* CF, p.143-144, Declaration of Chad Burmeister, ¶¶ 3-4.

Clark anchors 9NEWS and is the anchor and managing editor of *Next*. 9News launched *Next* in 2016 as an alternative to traditional newscasts. *Next* has been Denver's most-watched newscast since 2018.

Tegna (NYSE: TGNA) is a Delaware corporation, headquartered in Tysons, Virginia. Tegna operates 64 television stations and two radio stations in 51 markets across the United States, including 9News (KUSA-TV) in Denver, Colorado. Tegna claims to be the largest owner of Big Four affiliates in the top 25 markets among independent station groups. Tegna represents that it reaches 41.7 million television households, or approximately 39 percent of all TV households nationwide, and that it reaches 75 million adults each month across its digital platforms. Across Twitter, Facebook and Instagram, Tegna stations have over 32 million social media followers. *See* CF, p.143, Declaration of Chad Burmeister, ¶2; see also CF, p.4, Complaint, ¶¶ 4-5).

B. Material Facts

On January 7, 2021, during a broadcast segment of *Next* and in an accompanying online article, Plaintiff Burmeister was accused by Defendants of "storm[ing] the U.S. Capitol to interrupt a Congressional challenge to the Electoral College results. [And participating in] [t]he violent and arrogant actions of this attack (scaling walls, breaking windows)". *See* CF, p.198, Order Re: Defendant's Special Motion, p.2 (citing Motion ¶14). Plaintiff avers in his declaration that he

merely listened to Trump's speech at the Ellipse and then participated in the peaceful march to the Capitol; he did not enter the Capitol, he did not take action to interrupt Congress' proceedings, he did not participate in violent actions, he did not attack anyone, he did not scale any walls, and he did not break any windows. *See* CF, p.143, Declaration of Chad Burmeister, ¶6.

The District Court below found that, "Following the events of January 6th, Colorado State Representative Mark Baisley made an online post on Twitter, suggesting that **the events** were not the actions of supporters of President Trump, but rather were the actions of anti-Trump protesters affiliated with Antifa, stating,

> It does not make any sense to me that Trump patriots would storm the U.S. Capitol to interrupt a Congressional challenge to the Electoral College results. The violent and arrogant actions of this attack (scaling walls, breaking windows) matches the signature of Antifa rioters. I hope that many arrests are made and identities of the sponsors revealed."

CF, p.198 (emphasis added).

The Court below further found that Defendants "published statements and photos posted on Plaintiff's public Facebook page to demonstrate that pro-Trump supporters participated in the January 6th events for the purpose of discrediting Representative Baisley's contention related to Antifa's involvement in those events." CF, p.198 (citing Clark Declaration, ¶¶ 7-20).

The January 6th "**events**" that are referenced by the Court below and in the broadcast referenced above here constitute criminal conduct, *i.e.*, storming the

Capitol to obstruct Congressional proceedings, violent attacks, scaling walls and breaking windows. Falsely imputing those criminal acts to Burmeister thus constitutes defamation per se. *See Gordon v. Boyles*, 99 P.3d 75, 79 (Colo. App. 2004) ("publications … are defamatory per se because each imputes a criminal offense."); *see also, id.* ("Plaintiffs first argue that Boyles's statements are defamatory per se because they allege criminal activity or serious sexual misconduct. We agree.").

Clark and Tegna also published the following statements of or concerning Burmeister:

- Burmeister "claimed to storm the [Capitol] building";
- Burmeister was at the Capitol "boasting about what was happening";
- Burmeister posted the following message on Facebook, "bragging" that he was the "first guy to storm the capitol today":

In his complaint, Burmeister alleges that Clark and Tegna's statements are materially false. Burmeister asserts that he never claimed that he "stormed the [Capitol] building" – Clark and Tegna made that up – and that he never boasted or bragged about the rioting of January 6, 2021 – Clark and Tegna made that up too. Burmeister explains in his complaint that never told Clark and never posted that ***he*** was the "first guy to storm the capital [sic]" on January 6, 2021. Rather, Burmeister posted a photo of himself with another individual. That other individual signaled "first" or "#1" with his hand and finger. Clark and Tegna used the photograph to convey the false impression that Burmeister was the "first guy" to have stormed the Capitol building. By representing that Burmeister later "changed the caption" of the post to read "Peaceful march to the capital", and by highlighting the alleged change for viewers, Clark and Tegna imply and insinuated that Burmeister was duplicitous and guilty and was covering his tracks. Burmeister alleges that Clark and Tegna's statements caused reasonable readers to think significantly less favorably of Burmeister than they would have if they knew the truth. *See* CF, p.143, Declaration of Burmeister ¶2; CF, p.7, Complaint ¶11.

Viewed in context and as a whole, Burmeister claims that Clark and Tegna's statements are defamatory because they accuse Burmeister, directly or indirectly, of committing the crimes of sedition, insurrection, obstruction of an official proceeding, trespassing, disorderly conduct and other Federal and State crimes, and

imply that he is traitorous, disloyal to the United States, odious and contemptuous. *See* CF, p.143, ¶2; CF, p.7-8, ¶12.

Defendants' above-mentioned statements caused readers to think significantly less favorably of Burmeister than they would have if they knew the truth—that he merely participated in a peaceful march and did not enter the Capitol building to riot and obstruct Congressional proceedings, did not violently attack anyone, did not smash windows or scale walls. The evidence presented by Burmeister shows that, in fact, Defendants' statements were understood to convey the false claim that Burmeister was among those who rioted in the Capitol and were instantly understood to convey a defamatory meaning causing Burmeister to be held up for shame and public scorn, *e.g.*:

> https://twitter.com/MountainsStars/status/1359965186543681538
> ("The Colorado CEO who posted he was the first to storm the Capitol got multiple rounds of bailout money. As far as I know, he hasn't been arrested yet");
>
> https://twitter.com/MountainsStars/status/1347618480548286465
> ("How many of those storming the Capitol got taxpayer-funded bailout $$, like Coloradan Chad Burmeister's ScaleX?");
>
> https://twitter.com/espeyraunza/status/1347377673501368321
> (Burmeister was "lying about what he did at the capitol");
>
> https://twitter.com/nickatech/status/1347379505380417536
> ("Hopefully you referred through the link FBI posted @KyleClark");
>
> https://twitter.com/ScratchCatering/status/1347381446076485632
> ("I heard the FBI is seeking leads on who these terrorists were! Oh, Hey @FBI here you go!");

https://twitter.com/CRobertBuchanan/status/1347368476051050497
("Hey @Infusionsoft you might want to rethink doing business with this guy");

https://twitter.com/InstanaHQ/status/1347612392205602817
("We do not have a working relationship with Chad Burmeister or ScaleX, and have requested for any reference to Instana be removed from their website. We denounce terrorism of any kind, all forms of violence as well as enticing others to violence");

https://twitter.com/WesleyDavis/status/1347383346209443840
("Gotta wonder how all these professionals on his company's page are going to feel about supporting domestic terrorism … #DomesticTerrorist");

On professional networking site *LinkedIn*, where Burmeister was a member, users who heard and viewed Tegna's false statements published some of the most vicious comments about Burmeister:

https://www.linkedin.com/posts/alansaldich_normally-i-stay-away-from-political-commentary-activity-6753427709843656704-2aIv/
("Normally I stay away from political commentary on LinkedIn, but today I'd like to highlight the actions of a former colleague, Chad Burmeister … who participated in the seditious takeover of the capitol on Wednesday. I have severed my connection with him here, and encourage all who are connected with him to do the same. It's disgraceful. If you want to watch the video, it's part of this: [hyperlink to Clark/Tegna broadcast]");

https://www.linkedin.com/posts/samschooley_kyle-clark-on-twitter-activity-6753396403533438977-TYF5/
("Shameful. Working with Scale-X means supporting terrorists. LinkedIn you need to deplatform these terrorists. I call on my entire network and community to boycott Chad and Scale-X and call on LinkedIn to ban him from this platform. Thank you KUSA-TV, 9NEWS and [@KyleClark] for breaking this story. #terrorism #AttackontheCapitol #boycott #BoycottScaleZ");

https://www.linkedin.com/feed/update/urn%3Ali%3Aactivity%3A6753382654877425664/?actorCompanyId=27109395

> ("I was shocked this morning to learn that Chad Burmeister (founder/CEO of ScaleX.ai) … was one of the thousands of domestic terrorists who gleefully stormed the US Capitol building on January 6.").

CF, p. 143, ¶2; CF, p. 6-7,¶¶14-15.

Burmeister's complaint alleges that he suffered actual injury and special damages as a result of the publication and republication of Clark and Tegna's statements, including insult, embarrassment, humiliation, mental anguish and suffering, pain, injury to personal and professional reputation, diminution in the value of his shares of ScaleX.ai, loss of speaking and other engagements, costs incurred to repair and defend his reputation, loss of business and income, career damage, loss of opportunity to advance, impaired and diminished earning capacity and loss of future earnings. CF, p.143, ¶2, CF, p.11, ¶18; CF p.151-152, ¶¶9,20.

As mentioned above, the Court below found explicitly that the broadcast was made for "the purpose of discrediting Representative Baisley's contention related to Antifa's involvement" in violent attacks, breaking windows, scaling walls, and interruption of Congress' proceedings. *See* CF, p.198. This finding alone provides sufficient evidence to establish, *prima facie*, that Defendants acted recklessly. One cannot reasonably discredit Baisley's statement by showing that a pro-Trumper participated in a peaceful march and posted his political opinions. But, that is what Burmeister did and the pictures he posted were from that march.

But because Defendants were interested and motivated in discrediting a local politician, they used Burmeister as a pawn in that goal and paid no regard at all to Plaintiff's well-being in publishing thier story falsely attributing to him participation in the riots. At least *prima facie*, this constitutes a reckless act on the part of Defendants with respect to Plaintiff's well-being.

Instead of asking whether Plaintiff proffered evidence sufficient to establish a prima facie showing that Defendants acted recklessly with respect to his well-being, the Court below held that, "Plaintiff cannot demonstrate that he is reasonably likely to produce clear and convincing evidence that Defendants published with actual malice", CF, p.201, that is a higher standard than required to withstand the extreme sanction of dismissal pursuant to the anti-SLAPP statute.

Plaintiff has satisfied his burden to establish that his claim for defamation is not "entirely without merit" and/or to make a *prima facie* showing that Defendants' accusations of criminality against him, which constitute defamation per se, were false and reckless. As explained below in the Legal Standards section, such a showing is sufficient to withstand an anti-SLAPP motion to dismiss, and thus the Court below was in error when it granted Defendants' motion.

SUMMARY OF THE ARGUMENT

In their special motion to dismiss, Clark and Tegna conceded that Burmeister sufficiently alleged that the statements constitute defamatory per se,

and that Burmeister suffered damages. The issues before the District Court on their special motion to dismiss, Defendants argued, were (a) whether Defendants' statements were "materially" false, and (b) whether Defendants published the statements with actual malice. The burden was on Burmeister to show a "reasonable likelihood" that he would prevail on these issues.

The District Court found that Clark and Tegna's statements were not materially false and that Clark and Tegna did not publish the statements with actual malice. The District Court erred. Burmeister's pleadings and evidence establish a "reasonable likelihood", as that legal standard is properly understood, sufficient to withstand Defendants' motion to dismiss under Colorado's newly enacted C.R.S. § 13-20-1101.

STANDARD OF REVIEW

The Court of Appeals reviews *de novo* a trial Court's grant of a special motion to dismiss pursuant to Colorado's anti-SLAPP statute. *See Salazar v. Public Trust Institute*, 2022 WL 4241948, at * 3 (Colo. App. 2022) (unpublished) ("To the extent our resolution of this appeal turns on interpretation of the anti-SLAPP statute, our review is de novo.") (citation omitted).

As the Court below explains, because the statute is relatively new, there are no binding cases in Colorado interpreting C.R.S. § 13-20-1101(3), and therefore

the Court "finds case law interpreting the provisions of California's anti-SLAPP legislation instructive in analyzing the Colorado statute." (CF, p.199)

In *Stevens v. Mulay*, 2021 WL 1300503 (D.Colo. 2021), the U.S. District Court of Colorado held that only suits which "lack even minimal merit" should be dismissed pursuant to anti-SLAPP motions, quoting *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 387 (Cal. App. 2003) favorably as follows:

> "[u]nder the statute, a cause of action that arises from protected speech or petitioning and lacks even minimal merit should be stricken."

The California Supreme Court in *Navellier v. Sletten*, 29 Cal. 4th 82, 88–89 (2002) affirms that only suits which "lack even minimal merit" should be dismissed pursuant to an anti-SLAPP motion:

> Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.

The Ninth Circuit in *Manzari v. Associated Newspapers Ltd*,. 830 F3d 881, 887 (9th Cir 2016) (quoting *Overstock.com*, 151 Cal.App.4th 688 (2007)) held similarly, that "[o]nly a cause of action that lacks even minimal merit constitutes a SLAPP".

The Court of Appeal in *Wilcox v. Sup Ct*, 27 Cal.App 809 816-17 (1994) explains that SLAPP suits have been characterized as 'generally meritless suits

brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.'

Procedurally, an anti-SLAPP motion is often analyzed along two prongs, and the Court below uses this 'two-prong approach' when determining whether or not Defendants' motion should be granted. According to this approach, Defendants must prove that the Complaint targets their political civil rights, the right to petition or the right to speak freely on public matters. That is the 'first prong' which, if not satisfied, rules out the granting of an anti-SLAPP motion.

The 'second prong' of the analysis, according to *Stevens v. Mulay*, at *5, is that Plaintiff must "demonstrate a probability of prevailing" on the claim[1], and to clarify that standard cites *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 142 (2011) as follows:

> Only a cause of action that satisfies both parts of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit —is a SLAPP, subject to being stricken under the statute. (citing *Navellier, supra*)

The California Supreme Court in *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) clarifies the standard as follows:

> [I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only … demonstrate that the complaint

[1] As the Court below explains (CF, p.199) Section 13-20-1101 is strikingly similar to Cal. Civ. Proc. Code § 425.16, California's anti-SLAPP legislation. The primary difference between the two statutes is that Colorado's statute requires a plaintiff to show "a reasonable likelihood" of prevailing on a claim, while California's statute requires a showing of "probability."

> 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.

(Emphasis added) (citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548).

The Court of Appeal in *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1087 (2001), holds similarly:

> If the defendant makes that showing, the burden shifts to the plaintiff to establish a probability he or she will prevail on the claim at trial, i.e., to proffer a prima facie showing of facts supporting a judgment in the plaintiff's favor.

Burmeister may avoid dismissal if he establishes a "reasonable likelihood" by proffering a prima facie showing of facts that he will prevail on his claim.

As the Court recently ruled in *Salazar*, to determine whether a plaintiff has shown a "reasonable likelihood" or "reasonable probability" of prevailing on his claim, the Court considers "the pleadings and the supporting and opposing affidavits … We neither simply accept the truth of the allegations nor make an ultimate determination of their truth. Instead, ever cognizant that we do not sit as a preliminary jury, we assess whether the allegations and defenses are such that it is reasonably likely that a jury would find for the plaintiff." *Salazar*, 2022 WL 4241948 at * 4; *see id. Mitchell v. Twin Galaxies, Inc.*, 70 Cal.App.5th 207, 285 (Cal. App. 2021) ("To show a probability of prevailing, the opposing party must demonstrate the claim is legally sufficient and supported by a sufficient prima facie

showing of evidence to sustain a favorable judgment if the evidence it has submitted is credited."); *Briganti v. Chow*, 42 Cal.App.5th 504, 254 Cal.Rptr. 909, 914 (Cal. App. 2019) ("we agree with the trial court's conclusion that Briganti's showing 'is adequate to establish a prima facie claim for defamation. The statements complained of – that she had been indicted, that she was a convicted criminal, and that she had stolen the identities of thousands of people – are plainly defamatory in character and would tend to expose their subject 'to hatred, contempt, ridicule, or obloquy.'")

The Court in *Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 37 Cal. App. 4th 855, 866–67 (1995) states the standard succinctly:

> The lower court must consider the challenged plaintiff's affidavits for the purpose of determining whether sufficient evidence has been presented to demonstrate a prima facie case.

(citing *Hung v. Wang*, 8 Cal. App. 4th 908, 933–34 (1992)). And also held that:

> In making this judgment, the trial court's consideration of the defendant's opposing affidavits does not permit a weighing of them against plaintiff's supporting evidence, but only a determination that they do not, *as a matter of law,* defeat that evidence.

(citing *Rowe v. Sup.Ct.,* 15 Cal.App.4th 1711, 1723 (1993).

This is all to say that, to withstand an anti-SLAPP motion to dismiss requires Plaintiff whose cause of action is subjected to that special motion to simply demonstrate by affidavit a prima facie showing, and that defendant's opposing affidavits do not as a matter of law defeat Plaintiff's prima facie showing.

The Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), provides guidance as to what constitutes a prima facie showing:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

There is sufficient evidence before this Court to establish, *prima facie*, that Defendants statements were false, derogatory and injurious and that Defendants acted recklessly.

The Court in *Manzari, supra* at 892, explains the 'minimal merit' required to withstand an anti-SLAPP motion requires Plaintiff merely to raise sufficient evidence to raise a question for a jury to conclude that Defendant acted recklessly:

> Recognizing that California law requires only 'minimal merit' to withstand initial dismissal under the anti-SLAPP statute, we hold that Manzari has raised sufficient factual questions for a jury to conclude that the Daily Mail Online acted with reckless disregard for the defamatory implication in its article on the Los Angeles porn industry shut-down.).

The Ninth Circuit in *Dakar*, 611 F3d 590, 598 (9th Cir 2010) puts it as follows:

> The term reasonable probability in the anti-SLAPP statute has a specialized meaning. The statute requires only a minimum level of legal sufficiency and triablity. Indeed, the second step of the anti-SLAPP inquiry is often called the 'minimal merit prong.'

Defendants' motion should not have been granted because Plaintiff's case is not "entirely lacking in merit" and the Court below erred in making factual determinations that should be left to the jury.

ARGUMENT, CONTENTIONS AND REASONING

Personal reputation derives from the common consent of humankind and has ancient roots. The common law powerfully supports it. A person's reputation is a value as old as the Pentateuch and the Book of Exodus, and its command as clear as the Decalogue: "Thou shall not bear false witness against thy neighbor." The personal interest in one's own good name and right to an unimpaired reputation surpasses economics, business practices or money. It is a fundamental part of personhood, of individual standing and one's sense of worth. *Lawnwood Medical Center, Inc. v. Sadow*, 43 So.2d 710, 729-732 (Fla. 4th DCA 2010). In *Rosenblatt v. Baer*, the United States Supreme Court emphasized that:

> 'Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.' The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty … Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

383 U.S. 75, 92-93 (1966); *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-12 (1990) ("Good name in man and woman, dear my lord, Is the immediate jewel of their souls") (quoting WILLIAM SHAKESPEARE, OTHELLO, act 3 scene 3). In Colorado, the law treats defamation with the utmost seriousness. *See*, the Court in *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994) which held as follows:

> [P]rotection of a person's reputation reflects no more than our basic concept of the essential dignity and worth of every human being and recognizes that once an individual's reputation is damaged, it is extremely difficult to restore.

And furthermore, that:

> Defamatory statements are so egregious and intolerable because the statement destroys an individual's reputation: a characteristic which cannot be bought, and one that, once lost, is extremely difficult to restore.

Keohane, at 1298.

"Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., Concurring). The press has no "special immunity from the application of general laws", nor does it have a "special privilege to invade the rights and liberties of others." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). The press has no right to "invent facts" or to "comment on the facts so invented" and, thereby, convince readers that the invented facts are true. Simply put:

> "[l]iberty of the press is not license, and newspapers have no privilege to publish falsehoods or to defame under the guise of giving the news. It is held that the press occupies no better position than private persons publishing the same matter; that it is subject to the law, and if it defames it must answer for it."

Williams Printing Co. v. Saunders, 113 Va. 156, 73 S.E. 472, 477 (1912) (numerous citations and quotations omitted); *Dexter v. Spear*, 7 F. Cas. 624-625 (1st Cir. 1825) (Story, J.) ("No man has a right to state of another that which is false and injurious to him. A fortiori no man has a right to give it a wider and more

mischievous range by publishing it in a newspaper. The liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libelous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation. There can be no right in printers, any more than in other persons, to do wrong."); *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 865 N.E.2d 746, 767 (Mass. 2007) ("No one would disagree with the importance of upholding the freedom of the press. Nor would anyone disagree about the media's right (and duty) to examine the affairs of the judicial branch of government and to criticize activities of judges and other court officials that do not meet the high standards expected of judges and the courts. The press, however, is not free to publish false information about anyone (even a judge whose sentencing decisions have incurred the wrath of the local district attorney), intending that it will cause a public furor, while knowing, or in reckless disregard of, its falsity.").

In order to plead a defamation claim under Colorado law, where the statements involve matters of public concern, a plaintiff must allege that the statements were: (1) defamatory, (2) materially false, (3) concerning the plaintiff, (4) published to a third party, (5) published with actual malice, and (6) caused actual or special damages. *Brokers' Choice of Am. v. NBC Universal, Inc.*, 861 F.3d 1081, 1109 (10th Cir. 2017). Clark and Tegna agree that the statements are

defamatory, that they concern Burmeister, that they were published to a third party, and that the statements caused damage. Because the pleadings and evidence, including Burmeister's sworn declaration, establish a reasonable likelihood that a jury would find in Burmeister's favor on the second and fifth elements of his claim – material falsity and actual malice – the final order should be reversed and this case remanded for a trial on the merits.

A. MATERIAL FALSITY

In a defamation action under Colorado law, the plaintiff must show the statement is not only false, but "materially" false. *Bustos v. A&E Networks*, 646 F.3d 762, 764, 767 (10th Cir. 2011). As to the element of falsity, "[t]he common law of libel takes but one approach ... regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-517 (1991). "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Id.* Therefore, "[a] statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* at 517 (quoting R. Sack, *Libel, Slander, and Related Problems* 138 (1980)); *Bustos*, 646 F.3d at 765 ("To qualify as *material* the alleged misstatement must be likely to cause reasonable people to think

'significantly less favorably' about the plaintiff than they would if they knew the truth").

The pleadings and evidence in this case establish that Burmeister never stormed the United States Capitol building, and never claimed that he did.[2] Burmeister's photograph has never appeared on the FBI's website of persons who made unlawful entry into the U.S. Capitol building and who committed various other unlawful activities on January 6, 2021. Unlike the plaintiff in *Bustos*, Burmeister did not actually participate in the storming of the Capitol or in any of the riots outside the Capitol or in any planning of these events. Clark and Tegna's statements, when read in the context of the broadcast/article as a whole, would likely cause reasonable people to think significantly less favorably about Burmeister than they would if they knew the truth. Clark and Tegna's accusations, therefore, are materially false. *See, e.g.*, *Farmland Partners, Inc. v. Rota Fortunae*, 2020 WL 12574993, at * 20 (D. Colo. 2020) ("The Court finds that these statements, in the context of the Article as a whole asserting that FPI was facing a substantial risk of insolvency and that its shares were 'uninvestible,' 'would have produced a different effect on the mind of the reader from that which the pleaded

[2] In their special motion, p. 19, Clark and Tegna represented to the Court that "Clark never declared, either on-air or online, that *Burmeister claimed* that *he* had 'stormed' the Capitol." Contrary to this representation, the very first paragraph of the online article states that Burmeister "**claimed to storm the [Capitol] building**".

truth would have produced'"); *Anderson v. Colorado Mountain News Media, Co.*, 2019 WL 6888275, at * 5 (D. Colo. 2019) ("Defendants contend that reasonable people would not think significantly less favorably about Plaintiff if they knew that investors—as opposed to the SEC—alleged that Plaintiff violated the securities laws. The Court disagrees."); *see Bustos*, 646 F.3d at 767 ("Comparing the challenged defamatory statement (membership in the Aryan Brotherhood) to the truth (conspiring with and aiding and abetting the Aryan Brotherhood), we cannot see how any juror could find the difference to be a material one—that is, likely to cause a reasonable member of the general public to think significantly less favorably of Mr. Bustos"); *Nunes v. W.P. Company*, 2021 WL 3550896, at * 4 (D. D.C. 2021) ("A reasonable juror could conclude that there is a material difference between stating that Nunes had made a claim supported by evidence (that the Obama administration had undertaken intelligence activities related to individuals involved in the Trump campaign) and stating that Nunes had made a baseless claim (that the Obama administration had wiretapped Trump Tower). A reasonable juror could therefore conclude that the article was materially false because it stated that Nunes had made such a baseless claim (when he had not).").

B. <u>ACTUAL MALICE</u>

When, as here, a statement involves a matter of public concern, a defamation plaintiff is held to the higher standard of demonstrating that the speaker acted with

actual malice, as opposed to mere negligence. *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1042-1043 (10th Cir. 2013) ("The motivation behind a publication is a factor to consider in determining whether the evidence shows a publisher acted with actual malice."). "The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration." *Herbert v. Lando*, 441 U.S. 153, 164 fn. 12 (1979). Actual malice requires proof that the publisher had a subjective awareness of either falsity or probable falsity of the defamatory statement, or acted with reckless disregard of the its truth or falsity. Although actual malice is subjective, a "court typically will infer actual malice from objective facts." *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 183 (2nd Cir. 2000) (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189, 196 (1st Cir. 1982) ("whether [the defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it

would be rare for a defendant to admit such doubts."), *aff'd*, 466 U.S. 495 (1984)). Because actual malice "is a matter of the defendant's subjective mental state, revolves around facts usually within the defendant's knowledge and control, and rarely is admitted," *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 927 (2nd Cir. 1987), a defendant cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

In order to establish actual malice, the facts should provide evidence of "negligence, motive and intent such that *an accumulation of the evidence and appropriate inferences* supports the existence of actual malice." *Celle*, 209 F.2d at 183 (quoting *Bose Corp.*, 692 F.2d at 196 (emphasis added by *Celle* Court); *see id. Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2nd Cir. 1969) (emphasis added) ("There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity."); *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) ("A publisher may not escape liability for defamation when it takes words out of context and uses them to convey a false representation of fact.").

Here, an accumulation of facts and evidence demonstrates a "reasonable likelihood" that Clark and Tegna published the statements with knowledge of

falsity or reckless disregard for the truth. First, like the plaintiff in *Palin v. New York Times Company*, 482 F.Supp.3d 208, 219 (S.D.N.Y. 2020), Burmeister points to the plain language of the statements themselves. *Dalbec*, 828 F.2d at 927 ("the plain language of the … statement strongly supports the inference that it was made with knowledge of its falsity."); *Krusen v. Moss*, 174 A.D.3d 1180, 1182, 105 N.Y.S.3d 607 (2019) (the "specific statements at issue" – that plaintiff was "pilfering free gas from taxpayers" – supported finding of actual malice). In assessing Clark and Tegna's subjective doubts as to the truth of the publications, the Court may look at "the defendant's own actions or statements [and] the inherent improbability of the story." *Celle*, 209 F.2d at 183 (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C Cir. 1988)). Given Burmeister's stature as a successful Colorado businessman and father, the fact that he was not arrested on January 6, 2021 – or at any time thereafter – and his express denial that he "broke any laws", Clark and Tegna's statements about Burmeister storming the Capitol building with the insurrectionist mob and publicly admitting to doing so is inherently improbable. The inherent improbability of the statements is prima facie evidence of reckless disregard for the truth. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("Professions of good faith will be unlikely to prove persuasive, for example, … when the publisher's allegations are so inherently improbable that only a reckless man would have put them in

circulation."); *US Dominion, Inc. v. Powell*, 554 F.Supp.3d 42, 63 (D. D.C. 2021) ("a reasonable juror could conclude that the existence of a vast international conspiracy that is ignored by the government but proven by a spreadsheet on an internet blog is so inherently improbable that only a reckless man would believe it."); *Stern v. Cosby*, 645 F.Supp.2d 258, 279 (S.D.N.Y. 2009) ("printing a claim that Birkhead and Stern had sex would be a way to make it to the top of the bestseller list, and a reasonable jury could find that Cosby ignored the inherently improbable nature of the Statement in her zeal to write a blockbuster book"); *Zuckerbrot v. Lande*, 75 Misc.3d 269, 167 N.Y.S.3d 313, 335-336 (N.Y.Sup. 2022) (defendant leveled "inherently improbable" accusations, like the claim that "Zuckerbrot and her family dispatched 'people' to follow, intimidate, and potentially 'physically harm'" defendant).

Second, Burmeister alleges that Clark and Tegna fabricated facts and falsely attributed statements to Burmeister that he never made. *St. Amant*, 390 U.S. at 732 ("Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination"); *Miller v. Watkins*, 2021 WL 924843, at * 18 (Tex App. 2021) ("If Miller indeed fabricated her allegations, then she by definition entertained serious doubts about them and had a high degree of awareness of the statements' falsity"). In his declaration, Burmeister expressly denies that he ever "claimed" to storm the

Capitol building. Clark and Tegna fabricated this statement and falsely attributed it to Burmeister. *See* CF, p.147. Paragraph 10 of the "Statement of Undisputed Material Facts" in Clark and Tegna's motion to dismiss falsely represents that on "January 6, 2021, Burmeister was among the supporters of President Trump who 'stormed' the Capitol building". Clark and Tegna offer no evidence to support this "Undisputed" statement **because there is no evidence**. Indeed, the "Undisputed Material Fact" is a total fabrication. *See* CF, p. 147-148

Burmeister did not storm the Capitol building. He did not confront any Capitol Police Officer or any other members of law enforcement outside the Capitol. Clark and Tegna's statements are completely made up. Burmeister peacefully walked with a group of roughly 1 million Americans from The Ellipse (President's Park South) where the Stop the Steal Rally was held to the Capitol building. *See* CF, p.147-148 (responding to paragraph 10 of Defendants' statement of undisputed material fact).

There are no official or unofficial reports of Burmeister storming the Capitol building. Burmeister has never been questioned by law enforcement. The FBI told Burmeister's lawyer that they did not need to speak with Burmeister. Any investigation conducted by Clark or Tegna was grossly inadequate and supports a prima facie showing of recklessness disregard as to the affect of their broadcast on Plaintiff's well-being.

Third, Clark and Tegna had a motive to lie. Clark was only interested in discrediting Republican Rep. Mark Baisley and, in the process, proving that Trump-supporters, like Burmeister, carried out the attacks on January 6, 2021. The purpose of the January 7, 2021 broadcast and article was to quickly counter the narrative presented by Rep. Baisley that "Antifa carried out Wednesday's attacks on the U.S. Capitol". Clark and Tegna hurried publication and avoided due diligence. Clark and Tegna's motive in publishing the statements and the fact that they purposefully employed a deficient verification process supports an inference of actual malice. *Farmland Partners Inc. v. Fortunae*, 2021 WL 1978739, at * 2 (D. Colo. 2021). Clark and Tegna also failed to corroborate key allegations, such as the identity of the "first guy to storm the capital today", even though the broadcast was not under time pressure to be published.[3] Clark and Tegna also failed to pursue obvious available sources of possible corroboration or refutation, including the FBI, Capitol Police and/or D.C. Police. Clark's failure to verify defamatory statements meant that many of the asserted "facts" were merely fabrications. As an experienced reporter, Clark was keenly aware that the events of January 6, 2021 were emotionally and politically super-charged, and that the statements, when viewed in the context of an "insurrection" and invasion of our

[3] Exhibit 11 to Defendants' motion to dismiss (*see* CF, p.79) reveals that Clark did not know the identity of the "man in the photo". In spite of that lack of knowledge, Clark went on air and stated that Burmeister (as opposed to the "man in the photo") bragged that he was the "first guy to storm the capital today".

nation's Capitol, had an instantaneous opprobrious connotation. The use of terms – such as "storming the Capitol building" – with obvious pejorative connotations without underlying factual support is further evidence of Clark and Tegna's reckless disregard. *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1361-1362 (Colo. 1983) (citing *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319 (Colo. 1981) ("Actual malice may be inferred by the finder of fact if an investigation is grossly inadequate."); *Beyer Laser Center, LLC v. Polomsky*, 2017 WL 818659, at * 9 (D. Colo. 2017) ("the Court holds that Plaintiffs sufficiently allege that Defendant acted with actual malice, because his investigation of the facts was grossly inadequate."); *Mondragon v. Adams County School Dist. No. 14*, 2017 WL 733317, at * 14 (D. Colo. 2017) ("Mr. Sanchez acted willfully and wantonly and with actual malice by 'purposefully pursuing a course of action' that he knew was likely to result in negative employment consequences to Dr. Mondragon."); *Hertz v. Luzenac America, Inc.*, 2006 WL 1028865, at * 25 (D. Colo. 2006) ("The record is devoid of evidence that Luzenac, before accusing Mr. Hertz of misappropriation, undertook to ascertain whether it had any secret information capable of misappropriation … The jury must determine whether Luzenac's ignorance was willful; whether Luzenac's decision-makers entertained serious doubts as to the secrecy of the information is a fact question."). Further, by publishing and republishing the statements, Tegna knowingly abandoned its own

journalistic standards and integrity in broadcasting and principles of ethical journalism. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 161 (1967) ("Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse"). Tegna did not seek the truth or report it. Rather, Tegna betrayed the truth in a short-term quest to sensationalize news about the January 6 "insurrection". *Tomblin v. WCHS-TV8*, 2011 WL 1789770, at * 5 (4th Cir. 2011) (unpublished) ("on the question of whether WCHS-TV8 deliberately or recklessly conveyed a false message to sensationalize the news and thus to provide factual support for a finding of malice, there are disputed facts").

Finally, Burmeister contends that Clark and Tegna harbored ill-will towards Burmeister and were eager to blame the insurrection on him and other Trump supporters. This provides further evidence from which a jury could find actual malice. *Zuckerbrot*, 75 Misc.3d at 297, 167 N.Y.S.3d at 336 (defendant's "alleged personal animus toward Zuckerbrot provides further circumstantial evidence of actual malice."); *see Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989) ("[I]t cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry"); *Celle*, 209 F.3d at 186

("Plaintiff introduced sufficient circumstantial evidence to establish clearly and convincingly that defendant Pelayo entertained serious doubts about the truth of the headline 'US judge finds Celle 'negligent.' This conclusion is based in part on evidence indicating ill will and personal animosity between Celle and Pelayo at the time of publication"); *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 315 fn. 19 (5th Cir. 1995) ("[E]vidence of ill will can often bolster an inference of actual malice.").

In *Kuhn,* the plaintiffs, public officials, sued for defamation for newspaper articles that claimed that certain ski areas were chosen for government use because such ski areas provided ski passes for the personal use of the plaintiffs. *Kuhn,* 637 P.2d at 316. A jury verdict was entered for the plaintiffs, but the court of appeals reversed. The Colorado Supreme Court found that a finder of fact could infer actual malice if an investigation is grossly inadequate. *Id.* at 319 (citing *Curtis Publishing Co.*, 388 U.S. 130 (1967)). The *Kuhn* Court found that given this standard, a jury could conclude that the reporter in that case acted with actual malice. The reporter admitted that he had no basis for most of his erroneous statements and that he failed to take the time to corroborate most of the allegations in the article (despite the fact that there was no urgency to publish the article). And while the reporter verified that the department had received free ski passes, with no factual support the reporter wrote that the plaintiffs personally received ski

passes. *Kuhn*, 637 P.2d at 317. Reporting such statements under these facts amounted to fabrication; the reporter simply made up the portion of the story that stated that the plaintiffs personally received ski passes. "In this context, a reporter's failure to pursue the most obvious available sources of possible corroboration or refutation may clearly and convincingly evidence a reckless disregard for the truth." *Id.* at 319 (citation omitted). As in *Kuhn*, Clark and Tegna made up material facts out of whole cloth, including that Burmeister "claimed to storm the [Capitol] building" and that he "boasted" about the events of January 6, 2021. *See ExpertConnect, LLC v. Fowler*, 2020 WL 3961004, at * 3 (S.D.N.Y. 2020) (plaintiff alleged that the defendants "'engaged in a concerted effort to deliberately disparage the business reputations of Fowler, Parmar, and Strafluence with false statements' that they had committed a serious crime and were under investigation. These statements were made 'with full knowledge of their falsity' because '[t]here has never been any criminal action commenced against Fowler or Parmar, no investigation of any sort and, to be sure, no allegations of criminal conduct.'").

C. ISSUES OF FACT

In deciding the issues of material falsity and actual malice, the District Court improperly usurped the role of the jury and substituted itself as "fact-finder". For instance, the Court decided (a) that "the challenged statement that Plaintiff's

Facebook is full of references to QAnon, is merely a rational observation related to the content of Plaintiff's Facebook posts", (b) that "any negative connotations stemming from Defendants' publications, were already present due to Plaintiff's decision to publicly post to his public-facing Facebook page that he attended the events at the Capitol on January 6, 2021", and (c) that "any reputational damage incurred by Plaintiff was primarily caused by his own decision to publicly post a photograph and caption which average members of the public understood indicated that he was proud of either being, or being with, the '[f]irst guy to storm the capital [sic] today'"?

Each of these matters was disputed by evidence presented by Burmeister in his declaration. Each of these matters involve questions of fact, including causation – issues that are universally left to juries. The District Court erred in deciding these factual issues on a motion to dismiss.

CONCLUSION AND REQUEST FOR RELIEF

The District Court erred. For the reasons stated above and at oral argument, the Court of Appeals should reverse the District Court's Order granting Clark and Tegna's motion to dismiss, and remand the case for a trial on the merits of Burmeister's claim of defamation.

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Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 30, 2022, I caused Appellant's Opening Brief to be filed electronically with the Clerk of the Court using the ICCES System, which will send notice of such filing to counsel for the Appellee.

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