DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 Phone Number: (720) 865-8301	DATE FILED: April 30, 2021 10:44 AM FILING ID: 533688209791C CASE NUMBER: 2020CV34319
Plaintiff: Eric Coomer, Ph.D., Defendants: Donald J. Trump for President, Inc.; Sidney Powell; Sidney Powell, P.C.; Rudolph Giuliani; Joseph Oltmann; FEC United; Shuffling Madness Media, Inc. dba Conservative Daily; James Hoft; TGP Communications LLC dba The Gateway Pundit; Michelle Malkin; Eric Metaxas; Chanel Rion; Herring Networks, Inc. dba One America News Network; and Newsmax Media, Inc.	▲ COURT USE ONLY ▲
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SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S. § 13-20-1101 OF DEFENDANTS SIDNEY POWELL AND SIDNEY POWELL, P.C.

Defendants Sidney Powell and Sidney Powell, P.C.[1] submit the following special motion to dismiss pursuant to C.R.S. § 13-20-1101. Powell brings this motion subject to her motion to dismiss for lack of personal jurisdiction and expressly states that she does not intend to waive that defense. As set forth in Powell's motion to extend the time limit for filing this motion, this motion will be moot if the Court grants the pending Rule 12(b)(2) motion, and Powell had hoped the Court would rule on the jurisdictional issue prior to the extended deadline for this motion. In its April 27, 2021 notice, however, the Court stated that it would reserve the jurisdictional motions for Judge Moses to take up after May 24, 2021. Powell asserts this motion only if the Court finds it has personal jurisdiction over her. *Cf. Wakefield v. Brit. Med. J. Publ'g Grp., Ltd.*, 449 S.W.3d 172, 183 (Tex. App. 2014) (holding that defendant does not waive personal jurisdiction by filing anti-SLAPP motion subject to personal jurisdiction challenge in light of strict timing requirements of anti-SLAPP statute).

CERTIFICATE OF CONFERRAL The undersigned has conferred with counsel for Plaintiff. Plaintiff opposes this motion.

I. INTRODUCTION

In 2019 the General Assembly enacted C.R.S. § 13-20-1101, the Colorado anti-SLAPP statute. The statute authorizes a defendant who has been sued on account of exercising her right to petition or her right of free speech to file a special motion to dismiss early in the case. The purpose of the law is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government **to the maximum extent permitted by law**." C.R.S. § 13-20-

[1] Sidney Powell is the sole owner of her personal services corporation Sidney Powell, P.C., and the analysis set forth herein applies to them equally. Declaration of Sidney Powell ("Powell Dec."), ¶ 2. Accordingly, Sidney Powell and Sidney Powell, P.C, shall generally be referred to herein collectively as "Powell."

1101(1)(b) (emphasis added). Plaintiff's complaint against Powell falls squarely within the law. Plaintiff seeks to trammel Powell's right to petition government for redress of grievances, and he seeks to squelch her right to speak freely on matters of serious and national public concern. Accordingly, the Complaint against Powell should be dismissed.

II. STANDARD OF REVIEW

A. The General Statutory Standard and Procedures

The anti-SLAPP statute is relatively new and Colorado case law interpreting it is developing. However, Colorado modeled its statute on California's anti-SLAPP law. *See* Calif. Code of Civ. Proc. § 425.16. Accordingly, Powell will frequently refer to case law interpreting California's statute as persuasive authority for interpreting the Colorado statute.

Under the statute, "[a] cause of action against a person arising from **any act** of that person in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue is subject to a special motion to dismiss . . ." C.R.S. § 13-20-1101(3)(a) (emphasis added). The statute sets forth four examples of acts that fall within its protections. C.R.S. § 13-20-1101(2)(a).

Powell emphasized the bolded text in the above quotation because in regard to Defendant Eric Metaxas's Special Motion to Dismiss, the parties argued whether Mr. Metaxas's acts fell within one of the specific examples enumerated in the text. That argument was unnecessary. A defendant's acts need not fall within one of the examples for the statute to be applicable. The examples are just that, i.e., examples, not an exhaustive list. The statute plainly states a cause of action arising from "any act" in

furtherance of a person's petition or speech rights on a public issue is subject to a motion to dismiss. It goes on to state that such an act "includes" the examples set forth in subsection 13-20-1101(2)(a). The "word 'includes' is a word that is meant to extend rather than limit. *People v. Patton*, 425 P.3d 1152, 1156 (Colo.App. 2016); *see also Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975) ("include" is ordinarily used as a word of extension or enlargement). As set forth below, the acts for which Powell has been sued fall squarely within at least two of the examples enumerated in the text. But even if they did not, it would not matter. The only thing that matters is that her acts fall within the category of "**any act** . . . in furtherance of [her] right of petition or free speech," on a public issue, and, as set forth below, they do.

When a defendant's actions were taken in furtherance of her constitutional rights, the burden then shifts to the plaintiff to establish "that there is a reasonable likelihood that the plaintiff will prevail on the claim." C.R.S. § 13-20-1101(3)(a). A few weeks ago in the case of *Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc*., 273 Cal. Rptr. 3d 831 (2021), *review denied (Apr.21, 2021)*, the California Court of Appeals reiterated this two-step analysis for anti-SLAPP motions:

> When a party moves to strike a cause of action under the anti-SLAPP law, a trial court evaluates the special motion to strike by implementing a two-prong test: (1) has the moving party made a threshold showing that the challenged cause of action arises from protected activity, and, if it has, (2) has the non-moving party demonstrated that the challenged cause of action has minimal merit by making a *prima facie* factual showing sufficient to sustain a judgment in its favor?

Id., 273 Cal. Rptr. 3d 831, 837 – 38 (internal citations and quotation marks omitted; cleaned up).

The term "*prima facie*" evidence means evidence that is sufficient to establish a fact unless disproved or rebutted. *Application for Water Rts. of Well Augmentation*

Subdistrict of Cent. Colorado Water Conservancy Dist., 435 P.3d 469, 475 (Colo. 2019), *quoting Black's Law Dictionary* (10th ed. 2014).

At the second stage of the analysis, a plaintiff has the burden of establishing – not merely alleging – facts. For this reason, a plaintiff may not rest on his pleadings. "An anti-SLAPP motion is an evidentiary motion. Once the court reaches the second prong of the analysis, it must rely on admissible evidence, not merely allegations in the complaint or conclusory statements by counsel." *Finton Constr., Inc. v. Bidna & Keys APLC*, 190 Cal. Rptr. 3d 1, 11 (Cal.App. 2015). This is a "summary-judgment-like" standard. *Stevens v. Mulay*, 2021 WL 1153059, at *3 (D. Colo. Mar. 26, 2021), *quoting Lefebvre v. Lefebvre*, 131 Cal. Rptr. 3d 171, 174 (2011).

Turning to procedural matters, the statute states that all discovery is stayed upon the filing of a special motion to dismiss, and the stay remains in effect until entry of an order ruling on the motion. C.R.S. § 13-20-1101(6).[2] Finally, the statute refers to a "hearing" at which the motion will be decided. The statute contemplates, however, that the issue will be joined by pleadings and "supporting and opposing affidavits stating the facts upon which the liability or defense is based." Sheila K. Hyatt and Stephen A. Hess, 4 *Colo. Prac., Civil Rules Annotated R 12* (5th ed.), *quoting* C.R.S. § 13-20-1101 (3)(b). Thus, the statute appears to contemplate 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 Quintanilla v. West*, 534 S.W.3d 34, 42 (Tex. App. 2017) (trial court does not hear live testimony on special motion to dismiss), *rev'd on other grounds*, 573

[2] The stay may be lifted for limited specified discovery upon a motion showing good cause. *Id*. No such motion has been filed in this case.

S.W.3d 237 (Tex. 2019) and *Pena v. Perel*, 417 S.W.3d 552, 556 (Tex. App. 2013) (same).

B. Plaintiff Cannot Overcome Powell's Litigation Privilege Defense

A plaintiff can prevail against an anti-SLAPP motion only if he demonstrates "that there is a reasonable likelihood that [he] will prevail on the claim." C.R.S. § 13-20-1101(3)(a). This is impossible if the defendant has an absolutely dispositive defense. The statute states that the Court shall makes its determination based not only on asserted liability, but also on any asserted defense. C.R.S. § 13–20–1101(3)(b). California courts have long held that the litigation privilege may be asserted as a defense in an anti-SLAPP motion.[3] In *Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc., supra,* for example, the court held that to "defeat an anti-SLAPP motion, [the party asserting the claim] must overcome any substantive defenses that exist." *Id.*, 273 Cal. Rptr. 3d at 840. Thus, the litigation privilege is relevant to the second step in the anti-SLAPP analysis if it presents a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing. *Id.*

III. PLAINTIFF'S CLAIMS MUST BE DISMISSED UNDER THE ANTI-SLAPP STATUTE

A. Alleged Facts Upon Which Plaintiff's Claims Are Based[4]

Plaintiff has alleged that at a November 19, 2020 news conference held in Washington, D.C., Powell stated Plaintiff was in a recorded conversation with Antifa members saying he had rigged the 2020 presidential election for Mr. Biden and that his

[3] *See Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal.Rptr.2d 830 (Cal.App. 1996) (defendant's prelitigation communication was privileged and trial court did not err in granting motion to strike under the anti-SLAPP statute).

[4] Powell's summary of Plaintiff's allegations in this section should not be construed as admitting the allegations.

social media account was filled with hatred for President Trump. Plaintiff's First Amended Complaint ("Complaint") ¶ 64. He alleges the Trump Campaign and its representatives made these statements knowingly, recklessly, and without credible evidence, that they took no steps to verify the allegations, and that they made these statements in furtherance of a conspiracy in support of their political ends. Complaint, ¶ 65.

Plaintiff states that Powell made appearances in the national media to disseminate false statements about Plaintiff. Complaint, ¶ 66. In particular, Powell appeared on "The Howie Carr Show" and stated that Plaintiff was in a recorded conversation with Antifa members saying he had rigged the 2020 presidential election for Mr. Biden. *Id*. Powell stated Plaintiff had disappeared and Dominion had closed its offices in Denver and Toronto. *Id*. These statements were false; Powell had not made any attempt to verify them, they were unsupported by credible evidence, and they were published recklessly. *Id*. On November 20, 2020, Powell made similar allegations about Plaintiff in an interview with Maria Bartiromo. Complaint, ¶ 67. Powell also allegedly appeared on several other national broadcasts to raise allegations of voter fraud and falsely link Plaintiff to those allegations. March 23, 2021 Declaration of Eric Coomer, ¶ 9.

Powell filed lawsuits in Arizona, Georgia, Wisconsin, and Michigan (the "Lawsuits") in which, according to Plaintiff, he was a central figure. Complaint, ¶ 70. In particular, in these lawsuits Powell alleged, based on information provided by Joseph Oltmann, that Plaintiff had engaged in a conspiracy to rig the 2020 presidential election. *Id*.

Finally, Plaintiff alleges that "Defendants" (presumably including Powell) collectively advanced a story that the result of the 2020 presidential election was fraudulent, that Plaintiff participated in the fraud, Complaint, ¶ 71, and that Defendants' conduct has caused Plaintiff harm. *Id*.

B. Plaintiff's Claims

Plaintiff has asserted the following claims against Powell:

Defamation, Complaint, ¶¶ 82-86; Intentional Infliction of Emotional Distress, Complaint, ¶¶ 87-89; and Civil Conspiracy, Complaint, ¶¶ 90-94. In addition, Plaintiff has asserted a "claim" for "Preliminary and Permanent Injunction." Complaint, ¶¶ 95-98. Though pleaded as a claim for relief, the requested injunction is a remedy, not a substantive claim for relief. *Wibby v. Boulder Cty. Bd. of Cty. Commissioners*, 409 P.3d 516, 519 n.2 (Colo.App. 2016).[5]

C. Powell's Acts Were in Furtherance of Her Constitutional Rights in Connection with a Public Issue

Powell easily satisfies step one of the two-step anti-SLAPP analysis, because all of the acts attributed to her by Plaintiff were taken in furtherance of her First Amendment rights to petition for redress of grievances and free speech with regard to a serious and important public issue. Plaintiff's claims against Powell are based on alleged acts that fall within three categories:

[5] Even if a request for an injunctive remedy were considered a separate substantive claim, it would make no difference, because the request subsumes a requirement that a plaintiff show either actual success on the merits of a substantive claim (permanent injunction) or a likelihood of success (preliminary injunction). *Korean New Life Methodist Church v. Korean Methodist Church of the Americas*, 474 P.3d 143, 149 (Colo.App. 2020).

1. At a November 19, 2020 news conference covered by the national media, Powell stated that Plaintiff was "on the web" as being in a recorded conversation with Antifa members saying he had rigged the 2020 presidential election for Mr. Biden.

2. Powell appeared in a number of national media interviews in which she discussed these claims.

3. Powell filed the Lawsuits in which Plaintiff was a central figure.

Whether a matter is "of public concern" is a question of law for the Court. *McIntyre v. Jones*, 194 P.3d 519, 525 (Colo. App. 2008). "Matter of public concern" is defined extremely broadly to include any matter "relating to any matter of political, social, or other concern to the community." *Id*.

Whether the 2020 presidential election was tainted by fraud is certainly a matter of public concern. Nevertheless, Plaintiff previously contended that the anti-SLAPP statute did not apply to Mr. Metaxas because Plaintiff personally is not "the election," and Plaintiff pled that Mr. Metaxas' statements were garden variety torts against him personally and not protected constitutional activity. Plaintiff's April 7, 2021 *Response*, 19-20. Plaintiff's argument fails, and it has no application to Powell.

The California Supreme Court rejected this exact tactic in *Navellier v. Sletten*, 52 P.3d 703 (2002). In that case, the Court held that the "anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning. *Id*., 52 P.3d at 711 (emphasis in the original). Thus, a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through "artifices of pleading," to characterize an action as a garden variety tort claim when in

fact the claim is predicated on protected speech or petitioning activity. *Hylton v. Frank E. Rogozienski, Inc*., 99 Cal. Rptr. 3d 805, 809-10 (2009). Accordingly, courts disregard the labeling of the claim. *Trilogy at Glen Ivy Maint. Assn. v. Shea Homes, Inc.*, 185 Cal. Rptr. 3d 8, 12 (2015). Instead, they examine the principal thrust or gravamen of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies. *Id*.

A transcript of the November 19, 2020 news conference cited in the Complaint is attached as Exhibit A ("Press Trans."). Even a cursory review of the transcript reveals that the thrust of Powell's statements concerned her claims that the 2020 elections were tainted by foreign influence and election fraud. *See* Powell's opening statement (Press Trans, 27:16 to 36:19) in which she laid out her claims and discussed evidence supporting those claims. Nevertheless, Plaintiff implies that Powell's statements did not concern matters of public concern and implausibly suggests that the thrust of Powell's statements were about him, a private citizen, and not the elections. Complaint, ¶ 64. This is not true. Powell spoke 1,972 words in her opening statement. Of those words, a mere 88 (4.5%) even alluded to Plaintiff. She mentioned Plaintiff's name only once in describing the allegations made by Joseph Oltmann in his affidavit.

Thus, in reviewing the record as a whole, Powell's statements were about whether the elections were tainted by fraud and foreign interference. The single isolated reference to Plaintiff was in the context of evidence supporting her statements. Focusing myopically on a tiny, isolated snippet of the record, as Plaintiff bids the Court to do, is not the proper analysis.[6] Whether a statement addresses a matter of public concern must be determined within the context of the whole record, not an isolated snippet extracted

[6] While the thrust of Powell's statements was not about Plaintiff, she did mention him once. Even conceding this, Plaintiff's argument fails, because Plaintiff's actions were themselves matters of public concern and not purely private as Plaintiff contends.

from the record. *See Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Therefore, Plaintiff's argument fails.

It can hardly be argued that Powell's comments did not concern a public issue. At the November 19, 2020 press conference she put it this way: "This is a massive well-funded, coordinated effort to deprive we the people of the United States of our most fundamental right under the Constitution to preserve this republic that we all cherish. It is of the greatest concern. It is the 1775 of our generation and beyond." Press Trans, 53:8-13. Whether fraud and foreign influence tainted the 2020 presidential election was a matter of vast public interest that dominated the nation's news for months on end. The very fact that Powell's statements were covered so extensively in the national media conclusively establishes that the statements concerned public issues.

All of the statements attributed to Powell by Plaintiff concerned these public issues. Powell Dec. ¶ 3. Statements regarding matters of public concern are protected by the First Amendment. *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 603 (Colo. 1999), *citing Pickering v. Board of Educ*., 391 U.S. 563, 574 (1968). Therefore, Powell's acts were in furtherance of her right to free speech protected by the Constitution.

Moreover, when Powell filed the Lawsuits, she was acting in furtherance of her First Amendment right to petition the government for redress of grievances, because "[l]itigation is one of the essential mechanisms by which citizens can exercise their right to petition." *In re Foster*, 253 P.3d 1244, 1251 (Colo. 2011). "Thus, the right of citizens to access courts of law to resolve disputes is a fundamental tenet of the First Amendment,

one of our most treasured liberties under the Bill of Rights, and a cornerstone of our republican form of government." *Id*.

In summary, there is not the slightest doubt that Powell's acts that are the subject of Plaintiff's Complaint were taken in furtherance of her rights of petition and free speech under the federal and state constitutions in connection with a public issue. Therefore, as a matter of law Powell's conduct falls squarely within the text and intent of the first step of the analysis under Colorado's anti-SLAPP statute.

D. Powell's Statements Were Immunized Under the Litigation Privilege

Powell's actions were taken in furtherance of her constitutional rights. The burden therefore shifts to Plaintiff to establish "that there is a reasonable likelihood that he will prevail" on his claims. C.R.S. § 13-20-1101(3)(a). Given the undisputed facts, as a matter of law, Plaintiff cannot meet this burden.

To start, Plaintiff's claims based on statements Powell made in the Lawsuits fail. These statements are immunized by the litigation privilege, the application of which is a matter of law for the Court. *Club Valencia Homeowners Ass'n, Inc. v. Valencia Assocs.*, 712 P.2d 1024, 1027 (Colo. App. 1985). When, as here, the privilege applies it is **absolute**. *Id*. The privilege applies when the judicial communications that are the basis of a plaintiff's claim "have some relation to the proceeding." *Belinda A. Begley & Robert K. Hirsch Revocable Tr. v. Ireson*, __ P.3d __, 2020 WL 6495076, 2020 COA 157, ¶ 15 ("*Begley II*").

Although the privilege was created to protect participants in judicial proceedings from liability for defamatory communications, it also applies in other tort contexts. *Begley II*, ¶ 21. Indeed, in an anti-SLAPP case, the California Court of Appeals held that

when it applies, the privilege immunizes from any tort liability whatsoever except for malicious prosecution:

> [T]he privilege is now held applicable to any communication, whether or not it amounts to a publication, and **all torts** except malicious prosecution. Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation. The breadth of the litigation privilege cannot be understated. **It immunizes defendants from virtually any tort liability** (including claims for fraud), with the sole exception of causes of action for malicious prosecution.

Finton Constr., Inc., *supra*, 190 Cal. Rptr. 3d at 10-11 (internal citations and quotation marks omitted; cleaned up; emphasis added).

The complaints and supporting documents filed in the Lawsuits are attached as Exhibits B, C, D and E. As the Court can see, all the statements set forth in the Lawsuits related to the proceedings. None of the statements made in the Lawsuits was unrelated to the claims Powell asserted on behalf of her clients. Powell Dec. ¶ 4. Accordingly, the statements Powell made in the Lawsuits are immunized by the litigation privilege, and therefore, as a matter of law, Plaintiff cannot establish a reasonable likelihood that he will prevail on his claims based on those statements.

Not only are the statements Powell made in the Lawsuits themselves immunized under the litigation privilege, but the statements she made at the press conference and in her media appearances are also immunized. This is because the litigation privilege attaches to an attorney's prelitigation statements if (1) the statements are related to prospective litigation; and (2) the prospective litigation is contemplated in good faith, *Begley II*, ¶ 16. The "relatedness" criterion is construed extremely broadly:

> To be privileged, an attorney's allegedly tortious statement 'must have been made in reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it.' *Club Valencia*, 712 P.2d at 1027. 'The pertinency required is not technical legal relevancy, but rather a general frame of reference and relation to the subject

> matter of the litigation.' *Id*. The litigation privilege 'embraces anything that possibly may be relevant.' *Id*. And, '[**a]ll doubt should be resolved in favor of its relevancy or pertinency. No strained or close construction will be indulged to exempt a case from the protection of privilege**.' *Id*. at 1027-28.

Begley II, ¶ 34 (emphasis added).

Powell's statements satisfy these criteria. Powell directs the Court's attention to Exhibit A, the transcript of the November 19, 2020 press conference. From the very first line of the transcript, it is clear that the subject of the discussion was not merely related to the prospective litigation; it was almost exclusively about the prospective litigation. "The Trump campaign gave an update **on their legal challenges to the election results** from the headquarters of the Republican National Committee." Press Trans, 3:4-7 (emphasis added). Attorney Rudolph Giuliani spoke first at the press conference, and he outlined in extensive detail concerns about election fraud and possible court challenges to election results. Press Trans, 3:11 to 27:15. Powell spoke second, and she summarized evidence she had gathered that the 2020 presidential election was tainted by election fraud and foreign interference and stated her intention to go to court to prove it. Press Trans, 27:16 to 36:19. Finally, attorney Jenna Ellis discussed plans to go to court and prove the allegations. Press Trans, 37:6 to 43:3. Significantly, Ms. Ellis stated:

> So what you've heard now is basically an opening statement. This is what you can expect to see **when we get to court** to actually have a full trial on the merits, to actually show this evidence in court and prove our case.

Press Trans, 37:13-18 (emphasis added).

Powell's assertion of the litigation privilege is thus obviously not a *post hoc* effort to shoehorn conduct into the legal formula. At the time the statements were made everyone understood they were an "opening statement" in prospective litigation.

The same is true of statements made in Powell's media appearances. Powell's November 14, 2020 appearance on the Fox News program *Justice with Judge Jeanine* is typical. Powell Dec. ¶ 5. As the below screen-capture makes clear, the very purpose of her appearance was to discuss the topic "Trump's Election Legal Fight Continues":

Id.

In all of her media appearances, Powell discussed her concerns about election fraud, the evidence she had to support those claims, and her intention to assert those claims in our courts on behalf of the people of this country who saw their votes disappear. *Id*. Thus, it is clear that the statements Powell made at those appearances also satisfy the "related to prospective litigation." Therefore, the first element of the test is met.

The second element – which requires that the prospective litigation is contemplated in good faith – is met as well. The issue of good faith may be resolved as a matter of law, as it was in *Begley II*, where there is no genuine issue of material fact regarding the defendant's good faith contemplation of litigation. *Begley II*, 2020 COA 157, ¶¶ 46-7; 56.

In this case, the evidence that Powell contemplated the prospective litigation in good faith is far greater than that which was found sufficient to establish good faith as a matter of law in *Begley II*. Powell made all of her statements in good faith contemplation of litigation. Powell Dec. ¶ 6. The 2020 election occurred on November 3, 2020. *Id*. Late in the evening of November 3, 2020, the news media reported that President Trump was leading in the states where the election would be decided in the Electoral College. *Id*. In an unprecedented event, vote counting stopped suddenly in multiple key cities in swing states. *Id*. And in the days that followed, the media reported that Mr. Biden had gained on and ultimately passed Mr. Trump in these states. *Id*. On November 7, 2020, most national media organizations projected that Mr. Biden had won the election. *Id*. The morning after the election, mathematicians and statisticians began contacting Powell with evidence of algorithms applied to the vote and statistical and mathematical impossibilities evident in the vote changes and results. Powell Dec. ¶ 7. Powell became increasingly concerned that Mr. Biden's come-from-behind victory was statistically impossible and began investigating the matter. *Id*. Powell became convinced that there were serious questions about the integrity of the election and began working to prepare the lawsuits she began filing on November 25, 2020. *Id*.

Powell knew nothing of Plaintiff prior to November 13, 2020, when Michelle Malkin interviewed Joseph Oltmann in a nationally distributed interview, and Mr. Oltmann referred to Plaintiff in that interview. Powell Dec. ¶ 8. Powell became aware of Plaintiff's possible role in skewing the 2020 election from this interview and Mr. Oltmann's affidavit which was executed that same day. *Id*.[7]

[7] In his sworn declaration, Plaintiff stated that Powell mentioned him in an interview with Chanel Rion on One America News Network on November 5, 2020. March 23, 2021 Declaration of Eric Coomer, ¶ 9.

Powell filed the first of the massive Lawsuits in Georgia on November 25, 2020. See Exhibit B. Thus, the issue before the Court is whether Powell was in good faith contemplating filing that lawsuit in the **thirteen days** between November 13, 2020 – when she learned of Plaintiff's possible role in election fraud from the Malkin interview – and November 25, 2020 when she filed the Georgia lawsuit.

Exhibit B is the Georgia complaint and supporting exhibits. The complaint is 104 pages long and contains numerous detailed factual allegations supporting the claims asserted. There are 475 pages of supporting documents attached to the complaint, including affidavits from 22 witnesses. Powell filed another lawsuit on November 25, 2020, in Michigan. See Exhibit C. That filing also contains hundreds of pages of pleadings and exhibits. Powell filed the Wisconsin lawsuit on December 1, 2020 (Exhibit D) and the Arizona lawsuit on December 2, 2020. Exhibit E. These cases contain a similar volume of documents. The sheer volume and complexity of the documents Powell filed in two lawsuits on November 25 and two more shortly thereafter precludes the conclusion that she was not even contemplating filing the Lawsuits a mere thirteen days earlier when she learned of Plaintiff's possible role in the election fraud based on the Oltmann evidence discussed in his interview with Michelle Malkin.

As if all of that were not enough, Powell's November 14, 2020 appearance on Fox News is dispositive of the good faith issue. As discussed above, on that date Powell appeared on Fox News for the specific purpose of discussing the topic "Trump's Election Legal Fight Continues." It should go without saying that if Powell were on national television discussing the election "legal fight" on November 14, 2020, there

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This is false. Powell Dec1. ¶ 8, Powell did not know of Plaintiff's possible role in election fraud as outlined in Joseph Oltmann's sworn affidavit until November 13, 2020. *Id*. Therefore, it would have been impossible for her to discuss that matter on November 5, 2020 and she did not. *Id*.

cannot be the slightest doubt that she was contemplating that fight the previous day when she learned of Plaintiff's possible role in the matter.

Plaintiff has argued that because the Lawsuits were unsuccessful, they were not brought in good faith. As the *Begley II* court noted, however, this is a *non sequitur*:

> [T]here is a difference between bad faith and lack of success on a claim. As the district court explained, "[w]hile it is, of course, true that claims brought in bad faith must be, by definition, meritless, it does not follow that because a claim is meritless, it was contemplated in bad faith." Put another way, nothing in the definition of good faith requires success on the merits of the filed litigation. *See Visto Corp.*, 360 F. Supp. 2d at 1069 ('It is the *contemplation* of litigation that must be in good faith, not the merits of the actual litigation itself that animates the litigation privilege.).

Id., ¶ 54 (emphasis in the original).

In summary, the statements in the Lawsuits themselves are immunized pursuant to the absolute litigation privilege. The other statements attributed to Powell by Plaintiff were related to prospective litigation that Powell was contemplating in good faith, and therefore those statements are immunized as well. Accordingly, **all of Powell's statements** are absolutely immunized, and **all of Plaintiff's claims** (defamation, outrageous conduct, and civil conspiracy) are barred by the litigation privilege as a matter of law.

E. Plaintiff Cannot Show Actual Malice

In addition to being barred by the litigation privilege, Plaintiff's claims are barred because Powell's statements are not actionable under the First Amendment. "In Colorado, the elements of a cause of action for defamation are: (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the

plaintiff caused by the publication." *McIntyre v. Jones*, 194 P.3d 519, 523–24 (Colo. App. 2008). If the alleged defamatory statement involves a matter of public concern, as this case does, then the First Amendment places an additional burden on the plaintiff to prove that the statement was made with "actual malice." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

Plaintiff has argued that his defamation claims are not subject to dismissal under the anti-SLAPP statute because defamation is categorically not protected under the Constitution. This is not correct. It is true that "purely private" defamation is not protected by the Constitution. *People v. Ryan*, 806 P.2d 935, 938 (Colo. 1991). However, the Supreme Court has rejected the view that all defamation is beyond First Amendment protection. *Id*., *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 84 (1964). In cases such as this involving a matter of public concern, even if a statement is defamatory, it is not actionable unless the plaintiff proves the statement was made with actual malice. *Id*.

Plaintiff therefore has the burden of showing not only that Powell's statements were false and defamatory (which Powell denies), but also that she made them with actual malice. For a statement to be made with actual malice, a defendant must have made the statement with knowledge of its falsity or with reckless disregard to its truthfulness. *Fry v. Lee*, 408 P.3d 843, 848 (Colo.App. 2013). Actual malice can be shown if the defendant "entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity." *Id*. Whether allegedly defamatory language is constitutionally privileged is a question of law. *NBC Subsidiary, Inc. v. The Living Will Center*, 879 P.2d 6, 11 (Colo. 1994).

In considering the malice issue in connection with an anti-SLAPP motion, courts must take into account the pertinent burden of proof. *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 869 (2005). To prevail on this claim, Plaintiff must ultimately demonstrate actual malice by clear and convincing evidence. *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1105 (Colo. 1982) (malice must be proven with "convincing clarity"). Clear and convincing evidence means evidence that is "highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). At the anti-SLAPP stage, a plaintiff is required to establish a reasonable probability that he will be able to produce at trial clear and convincing evidence of actual malice. *Young v. CBS Broad., Inc.*, 151 Cal. Rptr. 3d 237, 245 (2012). In this case, Plaintiff cannot meet this burden.

Plaintiff has adduced no facts that meet this standard. Powell relied on sworn declarations to support the statements she made concerning Plaintiff. Powell Dec. ¶ 9. In particular, the Oltmann affidavit was sworn "under penalty of perjury." *See* Exhibit F. *See also* the dozens of affidavits supporting the complaints filed in the Lawsuits. Exhibits B through E.

In her Georgia complaint in particular, Powell referenced the vulnerabilities of Dominion election software under consideration in the pending case of *Curling v. Raffensperger*, 2020 WL 5994029 (N.D. Ga. Oct. 11, 2020). Exhibit B, ¶ 112. In that case the United States District Court for the Northern District of Georgia stated a number of things that are critical to this matter:

> [Dr. Coomer, i.e, the Plaintiff in this case] further acknowledged the potential for compromise of the operating system, by exploiting a vulnerability, that could allow a hacker to take over the voting machine and compromise the security of the voting system software.

Curling v. Raffensperger, 2020 WL 5994029, at *17 (N.D. Ga. Oct. 11, 2020).

> The Texas Secretary of State's Office found this same Dominion 5.5-A version should be denied certification for use in Texas elections on this basis: 'The examiner reports identified multiple hardware and software issues that preclude the Office of the Texas Secretary of State from determining that the Democracy Suite 5.5-A system satisfies each of the voting-system requirements set forth in the Texas Election Code. Specifically, the examiner reports raise concerns about whether the Democracy Suite 5.5-A system is suitable for its intended purpose; operates efficiently and accurately; *and is safe from fraudulent or unauthorized manipulation*. . . .'

Id., 2020 WL 5994029, at *12 n.32 (emphasis in the original).

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

Id., 2020 WL 5994029, at *57 (emphasis added).

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

Id., 2020 WL 5994029, at *58 (emphasis added).

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

Id. (emphasis added).

Plaintiff wants to pretend that Mr. Oltmann's claims of election fraud involving Dominion software are absurd on their face and would not be believed by any reasonable person. Complaint, ¶ 71 (defendants' information was "inherently unreliable"). This is plainly untrue. The thrust of the court's statements in *Curling* (which was decided a month **before** the election) was that a United States district court judge harbored profound concerns about the security of Dominion software and its vulnerability to outside hacking. Indeed, the court noted that the Texas Secretary of State had denied certification of the software for this reason. Powell reviewed many of the same documents the judge reviewed. Powell Dec. ¶ 10. If a federal judge came away from these documents with grave concerns about the security of Dominion software, Powell's concerns about the same topic are far from reckless. Indeed, they are indisputably reasonable.

Add to this the fact that Plaintiff's hatred for and rage against Donald Trump is well documented. Powell Dec. ¶ 11. For example, as was attested in Mr. Oltmann's affidavit, Plaintiff's Facebook page was packed with attacks on Mr. Trump. *Id*. These attacks – which specifically mention Antifa – were so extreme and full of hatred and vitriol, that a reasonable person could conclude Plaintiff had become unhinged.[8] See Exhibit G.[9] A man who harbored a passionate hatred for Donald Trump was an executive at a voting software company whose product a federal judge had just found was

[8] Plaintiff has noted that that he was merely exercising his First Amendment rights. This is ironic coming from a Plaintiff suing a defendant who was exercising her First Amendment rights. But more importantly, it misses the point. No one disputes that Plaintiff has a constitutional right to express his breathtakingly extreme hatred and rage. But Plaintiff's intense hatred and rage unquestionably have an impact on the actual malice inquiry as set forth above.

[9] A mere sample from Exhibit G: "If you are planning to vote for that autocratic, narcissistic, fascist ass-hat blowhard and his Christian jihadist VP pic, UNFRIEND ME NOW! No, I'm not joking. … Only an absolute F[**]KING IDIOT could ever vote for that wind-bag fuck-tard FASCIST RACIST F[**]K! …" Ex. G, p. 7.

vulnerable to hacking. Powell had good reason to give credence to Mr. Oltmann's sworn claims. She was certainly not reckless in doing so.

Plaintiff's efforts to impugn the various declarations as unreliable and attack the veracity or reliability of various declarants are beside the point. Journalists usually repeat statements from sources (usually unsworn, often anonymous) on whom they rely for their stories, and sometimes those statements turn out not to be true.[10] Yet much of the protection afforded to the press by *New York Times v. Sullivan* would be lost if newspapers and television stations could be drawn into long court battles designed to deconstruct the accuracy of sources on which they relied. Journalists must be free to rely on sources they deem to be credible without being second-guessed by plaintiffs who believe that the journalists should have been more skeptical.

Lawyers involved in fast-moving litigation concerning matters of transcendent public importance, who rely on sworn declarations and other corroborated evidence, are entitled to no less protection. If malice is to be judged by the kind of hindsight proffered by Plaintiff, it will eviscerate *New York Times v. Sullivan*. Fortunately, the protections provided by the First Amendment are far more robust. As the Supreme Court stated in *St. Amant v. Thompson*, 397 U.S. 727 (1968), reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. Instead, there must be sufficient evidence to permit the conclusion that the defendant in fact subjectively entertained serious doubts as to the truth of his publication. *Id*., at 731.

Plaintiff has come nowhere close to meeting this daunting standard. He has demonstrated no facts that would show that Powell knew her statements were false (assuming *arguendo* that they were indeed false, which Powell disputes). Nor has

[10] Powell does not concede that any of the information upon which she relied was untrue.

Plaintiff demonstrated any facts showing that she "in fact entertained serious doubts as to the truth of h[er] publication." Indeed, she believed the sworn affidavits upon which she relied were credible then and she believes that now. Powell Dec. ¶ 12. She was so confident of her evidence that she filed the Lawsuits based on those sworn declarations.

Powell has been practicing law for 43 years. Powell Dec. ¶ 13. She understands completely her duty under Rule 11 to ensure that any complaint she files is well grounded in fact and warranted by law. *Id*. She has never harbored the slightest doubt that the complaints she filed in the Lawsuits met that standard. *Id*. Those complaints are supported by hundreds of pages of documents. And given the information Powell had (especially the information described by the federal court in *Curling*), she reasonably believed she met, indeed far exceeded, the Rule 11 standard, which precludes any conclusion that she acted with actual malice.

Plaintiff also asserts that Powell had improper motives for making the statements at issue, claiming that she did so to raise funds or for some other improper reason. Plaintiff offers no facts to support these scurrilous allegations and, in any event, ill-will or improper motive are not elements of the actual malice standard and are insufficient, in and of themselves, to establish actual malice. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 281 (1974). An alleged profit motive in particular has no bearing on the issue. As the Supreme Court has noted, the allegedly defamatory statements at issue in *New York Times v. Sullivan* were published as part of a paid advertisement. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

In summary, Plaintiff has failed to present facts establishing that Powell acted with actual malice. Therefore, his claims are barred by the First Amendment.

F. Powell's Statements of Opinion are Not Actionable

The United States Supreme Court has recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on [public figures]."[11] *New York Times v. Sullivan*, 376 U.S. at 270. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. State of La*., 379 U.S. 64, 74-5 (1964). Consequently, courts have consistently ruled that political speech "is entitled to the fullest possible measure of constitutional protection." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984).

Statements of opinion are constitutionally protected and cannot be actionable defamation. *Lawson v. Stow*, 327 P.3d 340, 348 (Colo.App. 2014). To be entitled to full constitutional protection as an expression of opinion, the statement must not contain a provably false factual connotation or, if it does, it must not be such that it could reasonably be interpreted as stating actual facts. *Id.* Whether a particular statement constitutes fact or opinion is a matter of law for the Court. *Brooks v. Paige*, 773 P.2d 1098, 1100 (Colo. App. 1988).

Of particular importance in evaluating the actionability of a statement is whether the underlying facts on which it is based have been disclosed. In *NBC Subsidiary, Inc. v. The Living Will Center*, 879 P.2d 6 (Colo. 1994), the Colorado

[11] Plaintiff, as a high-ranking executive of Dominion, was a limited purpose public figure. Whether a person is a limited purpose public figure involves two inquiries: whether the defamatory statements involve a matter of public concern, and whether the level of the plaintiff's participation invites scrutiny. *Zueger v. Goss*, 343 P.3d 1028, 1035-36 (Colo. App. 2014), *quoting Lewis v. McGraw-Hill Broad. Co*., 832 P.2d 1118, 1122 (Colo. App. 1992). Both requirements are fulfilled here. Not only does this case involve a matter of public concern, but also Dominion's products and services had already been subject to scrutiny well before the matters giving rise to this action transpired, and Plaintiff played a central role in that controversy. *See Curling v. Raffensperger, supra*, in which the Court referred to Dr. Coomer 52 times.

Supreme Court applied this test in determining that two broadcasts stating that the plaintiff's living-will package was a "scam," and that the plaintiff's customers had been "totally taken" were not actionable. *Id*., 879 P.2d at 7-8. The Court stated:

> [*Milkovich v. Lorain Journal Co*., 497 U.S. 1(1990),] unquestionably excludes from defamation liability not only statements of rhetorical hyperbole – the type of speech at issuein the *Bressler-Letter Carriers-Falwell* cases – but also statements clearly recognizable as pure opinion **because their factual premises are revealed**. Both type of assertions have an identical impact on readers – neither reasonably appearing factual – and hence are protected equally under the principles espoused in *Milkovich.*

Id. at 12 (emphasis added; internal citation omitted). This makes sense, because when a defendant provides the facts underlying the challenged statements, it is clear that the challenged statements represent his own interpretation of those facts, which leaves the reader free to draw his own conclusions. *Bauman v. Butowsky*, 377 F. Supp. 3d 1, 11 at n. 7 (D.D.C. 2019), *quoting Adelson v. Harris*, 973 F. Supp. 2d 467, 490 (S.D.N.Y. 2013). Powell disclosed the underlying facts upon which her statements were based – i.e., Mr. Oltmann's sworn affidavit – and therefore those statements constitute protected opinions.

G. Plaintiff's Intentional Infliction of Emotional Distress and Civil Conspiracy Claims Fail on Independent Grounds

As noted above, all of Plaintiff's tort claims are barred by the absolute litigation privilege. Plaintiff's intentional infliction of emotional distress (i.e. outrageous conduct) and civil conspiracy claims also fail on independent grounds. The elements of outrageous conduct are that (1) the defendant engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) caused the plaintiff severe emotional distress." *Zueger v. Goss*, 343 P.3d 1028, 1037 (Colo.App. 2014). The level of outrageousness required to establish liability

is very high. "The conduct must be so extreme in degree as to go beyond the bounds of decency and be the type that would be regarded as atrocious and intolerable in civilized community." *McCarty v. Kaiser-Hill Co., LLC*, 15 P.3d 1122 (Colo. App. 2000). Outrageous conduct claims are more likely to be cognizable when the defendant has engaged in a pattern of conduct. *Rawson v. Sears Roebuck & Co*., 530 F. Supp. 776, 780 (D. Colo. 1982). "[V]ery few fact situations give rise to a cognizable claim for intentional infliction of emotional distress." *Id*. It does not exist here. Indeed, Plaintiff's outrageous conduct claim is based entirely on the allegedly defamatory statements, and in that respect are merely a recasting of the same claim in different terms.[12]

Turning to this case, shotgun assertions that undifferentiated "defendants" engaged in non-specific conduct do not even state a claim for relief. *Pierson v. Orlando Reg'l Healthcare Sys., Inc*., 619 F. Supp. 2d 1260, 1272 (M.D. Fla. 2009), *aff'd*, 451 F. App'x 862 (11th Cir. 2012). Far less do such assertions constitute a *prima facia* factual case. Bare assertions of this type should be dismissed as a matter of law. *See Rich v. Bent Cty*., 122 F. Supp. 2d 1175, 1182 (D. Colo. 2000) (granting summary judgment on outrageous conduct claim because plaintiff did not come forward with any facts in support of her bare allegation that defendants engaged in extreme and outrageous conduct.).

Plaintiff has also failed to assert a *prima facia* claim for civil conspiracy. To establish a civil conspiracy claim, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act, and (5) damages as the proximate result. *Nelson v. Elway*, 971

[12] As such, the outrageous conduct claim is also based on Powell's constitutionally protected petition and speech activities and part one of the anti-SLAPP analysis.

P.2d 245, 250 (Colo. App. 1998), *citing Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486 (Colo.1989). Civil conspiracy is a derivative cause of action that is not actionable *per se*. *Double Oak Const., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003). If the acts alleged to have constituted the underlying wrong provide no cause of action, then there is no cause of action for the conspiracy itself. *Id*. That is the case here. Powell's acts were constitutionally protected petition and speech activities, and therefore they cannot constitute the basis of a civil conspiracy claim. Moreover, Plaintiff has adduced no specific facts to establish that Powell had any meeting of the minds with any of the other defendants concerning him.

IV. CONCLUSION

For these reasons, none of Plaintiff's claims against Powell has any basis in fact or law. In truth, Powell's specific acts are legally protected under the First Amendment and Colorado's anti-SLAPP statute. Plaintiff has not asserted any specific facts that would establish any of the elements of any of his claims, which are based on nothing but conclusory assertions, innuendo, and speculation. He has, therefore, not established that he has a reasonable likelihood of prevailing on his claims, and his case against Powell should be dismissed.

/s/ Barry K. Arrington
_____
Barry K. Arrington
Attorney for Sidney Powell and Sidney Powell, P.C.

CERTIFICATE OF SERVICE

The undersigned certifies that on April 30, 2021, a true and correct copy of the foregoing was served via the Colorado Courts' efiling system on counsel of record.
/s/ Barry K. Arrington
_____
Barry K. Arrington