DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	DATE FILED: April 30, 2021 4:38 PM FILING ID: DF2073E2CBE79 CASE NUMBER: 2020CV34319
Plaintiff: ERIC COOMER, Ph.D. v. **Defendants**: DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C., DEFENDING THE REPUBLIC, INC., RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADDNESS 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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DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S MOTION TO DISMISS PURSUANT TO C.R.S. § 13-20-1101

Defendant Donald J. Trump for President, Inc. (the "Trump Campaign"), by and through its legal counsel, Jackson Kelly PLLC, hereby submits the following Motion to Dismiss. In further support of its Motion, Defendant states as follows:

Certification Pursuant to C.R.C.P. 121, Section 1-15(8)

The undersigned hereby certifies that he has conferred with Plaintiff's counsel. Plaintiff

opposes this Motion and the relief requested herein.

STATEMENT OF THE CASE

The 2020 Presidential election was one of the most watched and discussed matters of public interest in American history. Following the election, a national conversation began regarding election integrity and allegations of election interference. In fact, numerous lawsuits were filed, and investigations initiated relating to allegations of voter fraud across the country. These lawsuits and investigations were of great public interest and were discussed and debated by American citizens throughout the country.

Plaintiff filed suit on December 22, 2020, against Donald J. Trump for President, Inc. ("Trump Campaign") and 16 other Defendants. On February 4, 2021, Plaintiff filed an Amended Complaint, alleging defamation, intentional infliction of emotional distress, and civil conspiracy. Plaintiff's claims derive entirely from statements made and actions taken regarding the investigation and litigation focused on the 2020 Presidential election - a critical matter of public concern. Plaintiff seeks to punish the Trump Campaign for exercising its First Amendment rights to petition and speak freely. As established below, the Trump Campaign and its alleged agents cannot be held liable for the subject statements or publications. Therefore, Plaintiff's First Amended Complaint should be dismissed.

STANDARD OF REVIEW

In 2019, the Colorado legislature enacted C.R.S. § 13-20-1101, which is referred to as the anti-SLAPP Act (Strategic Litigation Against Public Participation) (the "Act"). The Act provides an expedited process for the courts to dismiss strategic lawsuits against public participation. "The general assembly finds and declares that it is in the public interest to encourage continued

participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process." C.R.S. § 13-20-1101(1)(a). The purpose of the Act 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. § 13-20-1101(1)(b).

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue is subject to a special motion to dismiss unless the court determines that the plaintiff has established that there is a reasonable likelihood that plaintiff will prevail on the claim." C.R.S. § 13-20-1101(3)(a). "In making the determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." C.R.S. § 13-20-1101(3)(b).

An act in furtherance of a person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue includes: (1) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law; (2) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body of any other official proceeding authorized by law; (3) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or (4) Any other conduct or communication in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or issue of public interest. C.R.S. § 13-20-1101(2)(a)(I-IV).

The Act was modeled after California's anti-SLAPP law[1], which was enacted in 1993. Because the Act is "relatively new and untested, and given that it tracks California's statute almost exactly, it is appropriate to draw from the more well-established body of authority interpreting California law." *Stevens v. Mulay*, Case No. 19-cv-01675-REB-KLM, 2021 WL 1153059 at *2 (D. Colo. March 26, 2021); *Addison Insurance Company v. Michael Veverka*, Case No. 1:19-CV-030080-RBJ, 2020 WL 6468542 (D. Colo. February 11, 2020).

Resolution of an anti-SLAPP motion involves two steps: First, the defendant has the initial burden of showing that the lawsuit, or a cause of action in the lawsuit, arises from activity that is protected under the Anti-SLAPP law. C.R.S. § 13-20-1101(3)(a)(A); C.C.P. § 425.16 (b)(1); *Tamkin v. CBS Broadcasting, Inc.*, 193 Cal. App. 4th 133, 142 (Cal. App. 2011). The burden then "shifts to the plaintiff to demonstrate a probability of prevailing" on the claim. *Digerati Holdings, LLC v. Young Money Ent't,* 194 Cal. App. 4th 873, 884 (Cal. App. 2011). If the plaintiff cannot meet this burden, the objectionable pleadings must be stricken.

"In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78–79 (Cal. 2002) (citing *Equilon Enterprises v. Consumer Cause, Inc*., 29 Cal.4th 53, 67-68 (Cal. 2002)). For the defendant to prevail on an anti-SLAPP motion, there must be a threshold showing that the plaintiff's cause of action arises from a "protected activity." *Corcept Therapeutics, Inc. v. Rothschild*, 339 F. App'x 789, 790–91 (9th Cir. 2009) (citing *Vargas v. City of Salinas*, 205 P.3d 207 (Cal. 2009).

Thus, to maintain the suit, Plaintiff must prove a reasonable likelihood that he will prevail

[1] https://coloradofoic.org/anti-slapp-bill-advances-in-the-colorado-legislature/

on his claims. *Balla v. Hall*, 59 Cal. App. 5th 652, 671 (Cal. App. 2021) (citing *South Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th 634, 657 (Cal. App. 2011)).

ARGUMENT

As set forth in more detail below, Plaintiff's claims are barred pursuant to C.R.S. § 13-20-1101, *et seq*. The statements and actions attributed to the Trump Campaign are protected under the First Amendment rights to petition and speak freely. The claim for defamation, as well as the ancillary claims of intentional infliction of emotional distress and civil conspiracy, are all predicated on the same protected statements and actions. Consequently, Plaintiff has the burden to establish by competent and admissible evidence a probability he will prevail on his claims. Plaintiff cannot meet this burden. The anti-SLAPP statute broadly prohibits any claim, however captioned or fashioned, designed to discourage or punish the free exercise of a protected right. C.R.S. § 13-20-1101(2)(a)(I-IV). Plaintiff's text-book SLAPP suit is precisely the type of retaliatory and frivolous litigation the Colorado Legislature sought to deter, and it must be dismissed pursuant to C.R.S. § 13-20-1101(3)(a).

Additionally, the Trump Campaign and its alleged agents are immune from liability under the Communications Decency Act (CDA), because the content allegedly posted on Twitter originated from a third-party report, and the post was made without knowledge or reason to know the underlying report was defamatory. Therefore, Plaintiff's claims should be dismissed on these grounds as well.

The Trump Campaign is entitled to its attorneys' fees and costs, pursuant to C.R.S. § 13-20-1101(4)(a).

I. Plaintiff's Claims Arise from the Trump Campaign's First Amendment Rights to Petition and Speak Freely and are, Therefore, Subject to a Motion to Dismiss.

In passing the anti-SLAPP Act, the Colorado legislature condemned - in the strongest possible terms - lawsuits, such as this one, brought to chill participation in matters of public significance. C.R.S. § 13-20-1101(1)(a). "While SLAPP suits masquerade as ordinary lawsuits such as defamation…they are generally meritless suits." *Sheley v. Harrop*, 9 Cal. App. 5th 1147, 1160–61 (Cal. App. 2017) (citing *Simpson Strong-Tie Co., Inc. v. Gore* 49 Cal. 4th 12, 21 (Cal. 2010)). Plaintiff's claims arise, simply and entirely, from a report by Defendant Joseph Oltmann ("Oltmann"), after he infiltrated an ANTIFA conference call and heard Plaintiff state that he made sure Donald Trump would not win the election. *See* Plaintiff's First Amended Complaint ("FAC") ¶ 6. Plaintiff reportedly said: "Don't worry about the election, Trump is not gonna win. I made f-ing sure of that. Hahahaha." *Id.* ¶ 52. Plaintiff alleges that Defendant Oltmann's report and alleged defamatory statements were then disseminated and published and became the subject of comment by numerous individuals and media platforms. *Id.* ¶¶ 4, 8. The Colorado Legislature expressly intended statements and actions such as these, to be protected expressions and has thus prohibited lawsuits such as this one. C.R.S. § 13-20-1101, *et seq*. (The constitutional protections of free speech and petition extend, without qualification, to "any…statement or writing…" made in furtherance of a protected activity.)

Plaintiff also incorrectly claims Defendants Rudy Giuliani ("Giuliani") and Sydney Powell ("Powell") are representatives of the Trump Campaign, and as such Plaintiff argues the Trump Campaign is vicariously liable for their statements via actual or apparent authority. FAC ⁋ 11, n.2. The Trump Campaign hereby incorporates, by reference, the arguments refuting any such agency relationship contained in its Motion to Dismiss, as if fully set forth herein. *See* Trump Campaign's Motion to Dismiss at 14-16.

A. The Statements at Issue Constitute Protected Speech.

All of the statements and actions cited by Plaintiff arise from the Trump Campaign's constitutionally protected speech and right to petition and are thus subject to Colorado's anti-SLAPP statute. Plaintiff makes the following allegations against the Trump Campaign:

> a) President Trump's son and campaign surrogate, Eric Trump tweeted a photo of Dr. Coomer alongside this false claim. "Eric Trump's November 17 tweet falsely attributed the quote to Dr. Coomer and linked a Gateway Pundit article identifying "Denver Business Owner" Oltmann as its source for allegations against Dr. Coomer and Dominion.

FAC ¶ 8, ¶ 63.

> b) The Trump Campaign lawyers identified Dr. Coomer in a nationally televised press conference where they described him as a "vicious, vicious man" who "is close to ANTIFA" and falsely claimed that Dr. Coomer "specifically says that they're going to fix this election" and that he "had the election rigged for Mr. Biden."

FAC ¶ 8.

> c) OANN and Rion went on to broadcast false allegations of the statements and actions Oltmann attributed to Dr. Coomer of election fraud, including a three-part report focusing on Dominion and Dr. Coomer, which President Trump retweeted to his followers.

FAC ¶ 61.

> d) On November 20, 2020, Sidney Powell was a guest on Newsmax with host Howie Carr, and he asked her if the allegations against Dr. Coomer were true. She responded, "Yes…We have an affidavit to that effect, and we have the - I think we have a copy of the call."

FAC ¶ 62, n. 88.

> e) The Trump Campaign refused to accept the results [of the election] and instead turned to allegations of fraud, when President Trump tweeted, "We are up BIG, but they are trying to STEAL the Election. We will never let them do it."

FAC ¶ 63, n. 99.

f) On November 19, 2020, at a press conference at the Republican National Committee in Washington D.C., Sydney Powell stated:

> Speaking of Smartmatic's leadership, one of the Smartmatic patent holders, Eric Coomer, I believe his name is, is on the web as being recorded in a conversation with ANTIFA members, saying that he had the election rigged for Mr. Biden, nothing to worry about here, and he was going to, they were going to f--- Trump. His social media is filled with hatred for the President, and for the United States of America as a whole, as are the social media accounts of many other Smartmatic people.

FAC ¶ 64.

g) At the same press conference on November 19, 2020, Defendant Giuliani stated:

> By the way, the Coomer character, who is close to Antifa, took off all of his social media, haha, but we kept it. We've got it. The man is a vicious, vicious man. He wrote horrible things about the President. He is completely-he is completely biased. He is completely warped. And, he specifically says, that they are going to fix this election. I don't know what you need to wake up to do your job, and inform the American people, whether you like it or not, of the things they need to know. This is real. It is not made up.

FAC ¶ 64.

h) On November 20, 2020, Powell appeared on Mornings with Maria on FOX and stated, "We've got Eric Coomer admitting on tape that he rigged the election for Biden and hated Trump…We have pictures of him in other countries helping people rig elections. So he's got a long history of accomplishing the result that they want accomplished. I'm sure that it's for money."

FAC ¶ 67, n. 117.

The statements attributed to the Trump Campaign are protected under the United States and Colorado Constitutions; therefore, Defendant cannot be held liable. The Colorado

Constitution provides greater protection of free speech than does the First Amendment. *In re Marriage of Newell*, 192 P.3d 529, 535 (Colo. App. 2008) (citing *Lewis v. Colorado Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo.1997)).

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the Court, shall determine the law and the fact.

Colo. Const., art. II, Sec. 10.

> In the interest of ensuring uninhibited, robust, and wide-open debate on matters of public concern, courts have recognized that full constitutional protection should be given to a statement of opinion relating to matters of public concern, even if, on its face, that statement contains a false factual assertion, but cannot reasonably be interpreted as stating actual facts about an individual.

Arrington v. Palmer, 971 P.2d 669, 672 (Colo. App. 1998), as amended on denial of reh'g (Dec. 24, 1998) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

Further, it has long been established that presidential elections are quintessential matters of public concern. *Mauff v. People*, 123 P. 101, 103 (Colo. 1912) ("It is a matter of general public concern that, at all elections, such safeguards be afforded."); *see Johnson v. Bradley*, 4 Cal. 4th 389, 409 (Cal. 1992) (The integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern.)

Plaintiff seeks to hold the Trump Campaign responsible for a "tweet" former President Donald Trump allegedly posted, in which he stated, "We are up BIG, but they are trying to STEAL the Election. We will never let them do it." FAC ¶ 63, n. 99.[2] Notably, this 'tweet' does not

[2] The complete Twitter post reads: "We are up BIG, but they are trying to STEAL the Election. We will never let them do it. Votes cannot be cast after the Polls are closed!"

reference Plaintiff or Dominion; it is merely an expression of Mr. Trump's opinion in the context of a hotly contested presidential campaign. *Lane v. Arkansas Valley Pub. Co.,* 675 P.2d 747, 750–53 (Colo. App. 1983) ("…comments made in the context of a hotly contested political campaign should not be judged by the same standard as those made in other contexts."). Plaintiff also alleges that Eric and former President Donald Trump "tweeted" a photo of Plaintiff next to Defendant Oltmann's allegedly false claim, along with a link to a news article identifying Oltmann as its source. FAC ¶ 63. These acts were in furtherance of Eric and Donald Trump's right of free speech. *Taus v. Loftus,* 40 Cal. 4th 683 (Cal. 2007) (holding that a published article and the investigation conducted in connection with the article, including an interview, constituted protected activity). Indeed, even if Defendant Oltmann completely fabricated the ANTIFA conference call and subsequent investigation, the Trumps' alleged actions are protected. *Id.*

Moreover, the statements and actions taken by Defendants Giuliani and Powell, and attributed to the Trump Campaign, are protected under the anti-SLAPP statute. FAC ¶¶ 8, 62, 64, 67. The anti-SLAPP law by its terms, "includes not merely actual exercises of free speech rights but also conduct that furthers such rights." *Doe v. Gangland Prods., Inc.,* 730 F.3d 946, 953 (9th Cir. 2013) (citing *Hilton v. Hallmark Cards,* 599 F.3d 894, 903 (9th Cir. 2010). Moreover, "pre-publication or pre-production acts such as investigating, newsgathering, and conducting interviews constitute conduct that furthers the right of free speech." *Gangland Prods., Inc.,* 730 F. 3d at 953 (citing *Taus,* 40 Cal. 4th at 727–29; *Lieberman v. KCOP Television, Inc.,* 110 Cal. App. 4th 156, 164-65 (Cal. App. 2003) (internal citation omitted)).

Finally, alleged derogatory statements made by Defendant Giuliani regarding Plaintiff's character are protected speech. FAC ¶ 64; *Burns v. Denver Post, Inc.,* 606 P.2d 1310 (Colo. App.

1979) *quoting* Restatement (Second) of Torts § 566 and § 566 comment c (1976). When Defendant Giuliani referred to Plaintiff as a "vicious, vicious man" who is "warped," he was commenting on statements Plaintiff posted to his Facebook page. FAC ¶¶ 53, 54, 64. Pure opinion cannot be defamatory, regardless of whether the issue is of private or public concern. *Sall v. Barber*, 782 P.2d 1216, 1218 (Colo. App. 1989).

For the reasons stated above, the actions attributed to the Trump Campaign through its alleged agents were clearly protected by the First Amendment in connection with issues of public concern. Accordingly, the Trump Campaign has met its burden pursuant to C.R.S. § 13-20-1101 *et seq.*

B. Defendants Giuliani and Powell's Statements are Protected Under the First Amendment Right to Petition.

In addition to being protected free speech, Defendants Giuliani and Powell's statements are also protected under the First Amendment right to petition. The First Amendment guarantees the right of the people to petition the government for a redress of grievances. U.S. Const. Amend. I. "Citizen access to the institutions of government constitutes one of the foundations upon which our republican form of government is premised. The right to petition has been characterized as one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *Protect Our Mountain Env't, Inc. v. Dist. Ct. In & For Jefferson Cty.*, 677 P.2d 1361, 1364–65 (Colo. 1984) (citing *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967)).

A defendant's actions underlying the cause of action are protected under the anti-SLAPP law if they were: (1) in furtherance of defendant's right to petition or speak freely; and (2) made in connection with a public issue. *Tamkin*, 193 Cal. App. 4th at 142-43. While the Colorado courts have not analyzed the intersection of anti-SLAPP laws and the litigation privilege, the litigation

privilege is absolute. *Hoffler v. Colorado Dep't of Corr*., 27 P.3d 371, 373 (Colo. 2001) (the litigation privilege provides absolute immunity from subsequent civil damages liability to individuals who are playing "an integral part of the judicial process).

California courts have interpreted anti-SLAPP laws to encompass the litigation privilege. This interpretation has created robust protections for statements and actions taken during and prior to official judicial proceedings. *Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc*., 59 Cal. App. 5th 995, 1004–05 (Cal. App. 2021), review denied (Apr. 21, 2021); *see Digerati Holdings, LLC*, 194 Cal. App. 4th at 886–887 (Cal. Ct. App. 2011) ("Statements made before an 'official proceeding' or in connection with an issue under consideration or review by a…judicial body…are not limited to statements made after the commencement of such a proceeding.…[S]tatements made in anticipation of a court action or other official proceeding may be entitled to protection under the anti-SLAPP statute."); *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1115 (Cal. 1999)) ([T]he anti-SLAPP statute protects conduct "involving statements that implicate First Amendment speech or petition rights…made either 'before' any legally authorized legislative, executive, judicial or other official proceeding, or 'in connection with issues under review by' any such official proceeding…"); *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1268 (Cal. App. 2008) (A prelitigation communication is privileged if it "relates to litigation that is contemplated in good faith and under serious consideration.").

Here, Plaintiff seeks to hold the Trump Campaign liable for: (1) Defendant Powell using national news platforms to discuss her litigation efforts (FAC ¶¶ 62, 67); (2) Defendants Giuliani and Powell participating in a national press conference on November 19, 2020, to inform the public about ongoing litigation efforts regarding the 2020 election (FAC ¶ 64); and (3) Defendant

Powell's litigation efforts regarding the 2020 election (FAC ¶ 70).

The Trump Campaign began filing lawsuits[3] during the summer of 2020 to challenge unlawful changes to state voting laws. Defendant Giuliani was involved with a lawsuit filed in Pennsylvania on November 9, 2020. *See e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, Case No. 4:20-cv-02078-MWB, (M.D. Penn.). Under the backdrop of the 2020 election, this lawsuit challenged the constitutionality of Pennsylvania election practices.

Additionally, Defendant Powell filed lawsuits in Georgia, Michigan, Wisconsin, and Arizona relating to the 2020 election. The Michigan and Georgia lawsuits[4] were filed on November 25, 2020, seeking relief from alleged election fraud involving software and hardware from Dominion. FAC ¶ 70. The Wisconsin and Arizona lawsuits[5] were filed on December 1, 2020, and December 2, 2020, respectively. Similar allegations were lodged against Dominion software and hardware used in Wisconsin and Arizona during the 2020 election. *Id.* ¶ 70.

Plaintiff alleges that statements were made "in a nationally televised press conference, during which Defendants Giuliani and Powell described Plaintiff as a 'vicious, vicious, man' who is 'close to Antifa' and falsely claimed that Plaintiff 'specifically says that they're going to fix this election' and that he 'had the election rigged for Mr. Biden.'" FAC ¶ 64. Plaintiff concedes the Trump Campaign was concerned about election fraud as early as 2016 and was actively investigating these concerns in the months leading up to the 2020 Presidential election. *Id*. ¶ 63.

[3] *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814 (D. Mont. 2020); *Donald J. Trump for President, Inc. v. Murphy*, Case No. 3:20-cv-10753, filed on August 18, 2020 (D. NJ. 2020); *Donald J. Trump for President, Inc. v. Cegavske*, Case No. 2:20-cv-01445-JCM-VCF, filed on August 4, 2020 (D. Nev. 2020).
[4] *Pearson, et al., v. Kemp et al*., Case No. 1:20-cv-04809-TCB, filed November 25, 2020 (N. D. Ga); *King, et al., v. Whitmer, et al*., Case No. 2:20-cv-13134-LVP-RSW, filed November 25, 2020 (E. Mich.).
[5] *Feehan, et al., v. Wis. Elections Comm'n, et al*., Case No. 2:20-cv-01771-PP, filed on December 1, 2020 (E.D. Wisc); *Bowyer, et al., v. Ducey, et al*., Case No. 2:20-cv-023210DJH, filed on December 2, 2020 (D. Ariz.).

At the time of the November 19, 2020 press conference, Defendants Giuliani and Powell were already exercising their constitutional right to petition the government. FAC ⁋⁋ 64, 70. Indeed, when Plaintiff filed the present lawsuit, he was aware Defendants Giuliani and Powell had cumulatively filed five lawsuits regarding the 2020 election. *Id.* ⁋ 70. Statements made during a press conference regarding investigations into allegations of election fraud and ongoing litigation efforts constitute speech on an issue of public concern that is subject to the protections of the First Amendment. *Lieberman,* 110 Cal. App. 4th at 164. *See also M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623, 629 (Cal. App. 2001) (Major societal ills are issues of public interest.); *Briscoe v. Reader's Digest Association, Inc.* 4 Cal. 3d 529, 536 (Cal. 1971) (News reports concerning current criminal activity serve important public interests.) In making the alleged statements, Defendants Giuliani and Powell were exercising their respective rights to petition.

Plaintiff seeks to punish Defendants Giuliani and Powell, and by extension the Trump Campaign, for their government-petitioning activities, as well as for their public speech regarding the 2020 election. These statements are protected pursuant to the Colorado anti-SLAPP statute. Plaintiff cannot silence Defendants Giuliani and Powell or the Trump Campaign simply because he does not like the message.

II. As a Matter of Law, Plaintiff Cannot Show a Probability of Prevailing on the Merits of His Claims.

The Trump Campaign and its alleged agents have met their burden of showing their conduct was protected by the anti-SLAPP statute; thus, the burden shifts to Plaintiff "to show, by competent and admissible evidence, that he would probably prevail" on the merits of his claims. *Macias v. Harwell,* 55 Cal. App. 4th 669, 675 (Cal. App. 1997). Plaintiff must do so "by competent and admissible evidence within [his] personal knowledge," and not the sort of conclusory

assertions contained in Plaintiff's FAC in this action. *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 654 (Cal. App. 1996).

A. Plaintiff Cannot Prove Actual Malice.

"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); *see also, Gordon v. Boyles*, 99 P.3d 75, 78-9 (Colo. App. 2004). If the alleged defamatory statement involves a matter of public concern, the First Amendment places an additional burden upon the plaintiff to prove that the statement was also made with "actual malice." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). "Generally, a matter is of public concern whenever it embraces an issue about which information is needed or is appropriate." *Smiley's Too, Inc. v. Denver Post Corp.*, 935 P.2d 39, 42 (Colo. App. 1996).

In order for a statement to be made with actual malice, the defendant must have made the statement with knowledge of its falsity or with reckless disregard to its truthfulness. *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450, 457 (Colo. 1975). To establish malice, plaintiff must show with convincing clarity, that is, produce clear and convincing evidence, that the defamation was published with actual knowledge of its falsity or in reckless disregard for its truth or falsity. *Seible v. Denver Post Corp.*, 782 P.2d 805, 808 (Colo. App. 1989) (citing *St. Amant v. Thompson*, 390 U.S. 727 (1968); *DiLeo v. Koltnow*, 613 P.2d 318 (Colo. 1980)). Reckless disregard exists when the defendant, in fact, entertained serious doubts about the truth of his

publication. Seible, 782 P.2d at 808 (citing *St. Amant v. Thompson, supra; Burns v. McGraw–Hill Broadcasting Co.*, 659 P.2d 1351 (Colo. 1983)). This heightened standard was adopted because a simple negligence standard would have a chilling effect that would be more harmful than the possibility that a defamed individual would go uncompensated. *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982). 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).

The statements attributed to the Trump Campaign relate to the 2020 presidential election, which is unquestionably a matter of public concern. *Mauff*, 123 P. at 103. Therefore, in order for Plaintiff to maintain a claim for defamation against the Trump Campaign, Plaintiff must show that the Trump Campaign made the subject statements "with actual malice, with knowledge of falsity or in reckless disregard of the truth." *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1122–23 (Colo. App. 1992).

Plaintiff does not specify how Defendants Giuliani and Powell acted with actual malice when they made the statements that are the subject of this suit. Instead, Plaintiff makes conclusory allegations directed to all 17 defendants claiming actual malice, baldly stating: "Defendants published these statements with actual malice." FAC ¶ 85.

Eric Trump's alleged Twitter post merely disseminated information to his social media followers from a primary source, who had previously attested to its accuracy, regarding a matter of public concern. Likewise, the Twitter posts allegedly made by Donald Trump, in which he tweeted about a stolen election and republished news content regarding the stolen election (FAC ¶¶ 61, 63) must be analyzed in the political context in which they were made. At the time of his

posts, Donald Trump was the presidential incumbent who was unquestionably permitted to engage in a public debate regarding issues surrounding the election, including election fraud. There must be "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Arrington v. Palmer*, 971 P.2d 669, 673 (Colo. App. 1998) (citing *Lane v. Arkansas Valley Publishing Co.*, 675 P.2d 747, 750 (Colo.App.1983)).

The Trump Campaign and its alleged agents had every reason to rely on the accuracy of Defendant Oltmann's reports regarding Plaintiff. Defendant Oltmann, host of Conservative Daily Podcast and CEO of PIN Business Network, claimed to have personally witnessed the subject exchange during the ANTIFA conference call. As such, the report upon which all of Plaintiff's claims are founded came from a primary source. Furthermore, Defendant Oltmann prepared a sworn affidavit in which he attested to the statements Plaintiff reportedly made during an ANTIFA conference call. *See* Joseph Oltmann's Sworn Affidavit, dated November 13, 2020, attached hereto as **Exhibit A**.

None of the statements made or actions taken by the Trump Campaign or its alleged agents comes even remotely close to "actual" malice. There is simply no truth to Plaintiff's allegation that all 17 Defendants to this action made allegations "unsupported by evidence". FAC ¶ 85. Therefore, Plaintiff cannot establish a prima facie claim for defamation under the circumstances, and Plaintiff's First Amended Complaint must be dismissed.

B. Donald Trump is Immune from Liability Relating to the Subject Twitter Posts.

Plaintiff cannot establish a probability of prevailing on his claims against the Trump Campaign for "tweets" made by Donald Trump during the course of his presidency. As a preliminary matter, Donald Trump is entitled to absolute immunity from damages liability

predicated on actions taken in his official capacity during his tenure as President of the United States. *See Nixon v. Fitzgerald,* 457 U.S. 731 (1982).

Additionally, under the Westfall Act, "tort actions may no longer be maintained against federal employees in their individual capacities where the alleged tort was committed within the scope of employment." *See Operation Rescue Nat. v. United States*, 975 F. Supp. 92, 104 (D. Mass. 1997), aff'd, 147 F.3d 68 (1st Cir. 1998). "[T]he Westfall Act provides immunity for 'any employee of the Government while acting within the scope of his office or employment.'" 975 F. Supp at 103. (citing 28 U.S.C. § 2679(b)(1)). *See also Aversa v. United States.,* 99 F.3d 1200 (1st Cir. 1996) ("The Westfall Act provides that a federal employee is immune if he or she acted 'within the scope of his office or employment.'"). "This is true even where, as in the case of an action for defamation, the doctrine of sovereign immunity precludes governmental liability." 975 F. Supp. at 101 (citing *United States v. Smith,* 499 U.S. 160, 165–67, (1991)).

As the President of the United States, Donald Trump was a federal employee. Additionally, his Twitter account ("@realDonaldTrump") was an official government account at the time the subject posts were made. *See Knight First Amend. Inst. at Columbia Univ. v. Trump,* 928 F.3d 226, 231-2 (2019) (cert. granted, judgement vacated, and remanded on other grounds 141 S. Ct. 1220 (2021)). Donald Trump was acting within the scope of his employment when he allegedly made the subject posts from his official account on Twitter. Accordingly, Donald Trump is immune from liability under the Westfall Act. 28 U.S.C. § 2679(b)(1); 975 F. Supp at 101, 103; 99 F.3d 1200. Thus, the Trump Campaign cannot be held vicariously liable for these alleged defamatory statements.

C. Because Plaintiff's Ancillary Claims are Predicated on Protected Statements, They Must Be Dismissed.

A plaintiff's failure to succeed on his defamation claim establishes he cannot succeed upon "all claims whose gravamen is the alleged injurious falsehood of a statement." *Blatty v. N. Y. Times, Co.*, 42 Cal. 3d 1033, 1042 (Cal. 1986). Accordingly, "the collapse of [plaintiff's] defamation claim spells the demise of all other causes of action...aris[ing] from the same publication." *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 34 (Cal. 2007).

Colorado courts have held that alternative torts cannot be used to evade constitutional requirements for defamation actions. *E.g., Fry v. Lee*, 408 P.3d 843 (Colo. App. 2013); *Lewis,* 832 P.2d at 1124 (affirming summary judgment dismissing negligence and infliction of emotional distress claims based on defamation claim's failure to show actual malice.); *see also, Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56 (1988) ("public figures...may not recover for the tort of intentional infliction of emotional distress by reason of publications...without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'"); *Miles v. Ramsey*, 31 F. Supp. 2d 869, 880 (D. Colo. 1998) (dismissing the plaintiff's ancillary tort claims related to failed defamation claim).

"Plaintiff may not avoid the strictures of defamation law by artfully pleading their defamation claims to sound in other areas of tort law." *Vackar v. Package Mach. Co.,* 841 F. Supp. 310, 315 (N.D. Cal. 1993). First Amendment limitations on defamation claims "apply equally to ancillary tort claims which might arise from the publication of an allegedly defamatory statement." *Lewis,* 832 P.2d at 1124–25.

Plaintiff's ancillary claims of intentional infliction of emotional distress and civil conspiracy rely on the same protected statements as the claim for defamation. FAC ¶¶ 84, 88, 92, 93. Consequently, these claims should be barred.

D. The Trump Campaign and its Alleged Agents are Immune from Liability under the CDA for Posts Made on Twitter.

Under the Communications Decency Act ("CDA"), "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

The CDA grants broad immunity to the user of an interactive computer service who posts or publishes material or information that originated from another source, unless the person "independently 'knew or had reason to know'" the statements were defamatory. *Barrett v. Rosenthal*, 146 P.3d 510, 513, 525 (Cal. 2006). "Congress has comprehensively immunized republication by individual Internet users." *Id.* at 529.

Eric Trump was not the primary publisher of the alleged defamatory content posted on his Twitter page. FAC ¶ 63, n.101. Eric Trump merely posted statements from Defendant Oltmann's report that included Plaintiff's claim that he had made sure Donald Trump would not win the 2020 election, along with a link to a related news article. *Id.* Eric Trump even cited Defendant Oltmann as the source of the content. "[P]laintiffs who contend they were defamed in an internet posting may only seek recovery from the original source of the statement." *Barrett*, 146 P.3d at 513. As a mere distributor/re-publisher of the alleged defamatory content, who neither knew nor had reason to know the statements were defamatory, Eric Trump is immune from liability under the CDA. Therefore, the Trump Campaign has no vicarious liability for these alleged defamatory statements.

III. The Trump Campaign is Entitled to an Award of Costs and Attorneys' Fees.

Pursuant to C.R.S. § 13-20-1101(4)(a), a defendant who prevails on a special motion to

dismiss is entitled to recover the defendant's attorney fees and costs. Accordingly, if this Motion is granted, the Trump Campaign must be awarded its costs and reasonable attorneys' fees incurred defending this lawsuit.

CONCLUSION

Plaintiff's First Amended Complaint is a classic SLAPP suit, brought to punish the Trump Campaign and its alleged agents for exercising their respective rights to petition and speak freely. Plaintiff cannot demonstrate a probability that he will prevail on his asserted claims, because he cannot establish that the Trump Campaign or its alleged agents acted with actual malice. Additionally, the Trump Campaign and its alleged agents are immune from liability under the CDA for the posts Eric Trump allegedly made on Twitter, because the content originated from another source, and he did not know or have reason to know that Defendant Oltmann's underlying report was defamatory. Therefore, Plaintiff's claims should be dismissed with prejudice.

WHEREFORE, Donald J. Trump for President, Inc. respectfully requests that this Court enter an order: (1) dismissing Plaintiff's First Amended Complaint, with prejudice; (2) awarding Defendant all costs and attorneys' fees incurred to date; and (3) award Defendant such other and further relief as this Court deems appropriate.

Respectfully submitted this 30th day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of April, 2021, a true and correct copy of the foregoing was served via Colorado Court's E-filing System to the following:

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