DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City and County Building 1437 Bannock Street Denver, Colorado 80202	DATE FILED: April 30, 2021 5:16 PM FILING ID: 4FA0873979D0D CASE NUMBER: 2020CV34319
Plaintiff(s): ERIC COOMER, Ph.D. **v.** **Defendant(s): DONALD J. TRUMP FOR PRESIDENT, INC.; SIDNEY POWELL, SIDNEY POWELL, P.C.; DEFENDING THE REPUBLIC, INC.; 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** ▲ Case Number: 2020 CV 034319 Courtroom/Division: 409
Attorneys for Defendant Michelle Malkin: Franklin D. Patterson, No. 12058 Gordon A. Queenan, No. 49700 Patterson Ripplinger, P.C. 5613 DTC Parkway, Suite 400 Greenwood Village, Colorado 80111 Telephone: 303/741-4539 Facsimile: 303/741-5043 E-mail: fpatterson@prpclegal.com gqueenan@prpclegal.com	

DEFENDANT MICHELLE MALKIN'S SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S. §13-20-1101

Defendant Michelle Malkin, by and through her attorneys, Patterson Ripplinger, P.C., hereby submits the above-captioned Motion and, in support thereof, states as follows:

CONFERRAL

This Motion is opposed.

INTRODUCTION

Ms. Malkin moves the Court to dismiss the claims against her pursuant to C.R.S. §13-20-1101, Colorado's Anti Strategic Lawsuit Against Public Participation ("Anti-SLAPP") statute. In November 2020, Ms. Malkin hosted a livestream broadcast on several social media platforms and a Newsmax television show, Sovereign Nation, in which Defendant Joseph Oltmann repeated the allegedly defamatory statements that are at the heart of this lawsuit – that he participated in a September 2020 phone call during which Plaintiff Eric Coomer, Dominion Voting Systems, Inc.'s ("Dominion") Director of Product Strategy and Security, stated he had made sure Donald J. Trump would not win the 2020 Presidential Election. *Accord* Am. Compl. at 29, ¶58, *with id.* at 39, ¶62. Plaintiff contends Mr. Oltmann's statements were false and has asserted claims of defamation, intentional infliction of emotional distress ("IIED"), and civil conspiracy against Ms. Malkin. His claims are untenable.

The United States Supreme Court has held that:

> [S]peech on matters of public concern … is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (*internal citations omitted*). The 2020 Presidential Election and issues related to its validity dominated the news cycle for months. Dominion provided election services to most states. Am. Compl. at 20, ¶45. A person claiming to have firsthand

knowledge of a Dominion executive's bias against a candidate or intent to influence the election is of public interest. Journalists must be able to cover important, if unpopular, viewpoints and interview sources regarding matters of public interest without fear of legal retaliation. These concerns are the reason why the Colorado legislature enacted additional statutory protections for this type of speech. As Plaintiff cannot show he has a reasonable likelihood of prevailing, the claims against Ms. Malkin should be dismissed.

LEGAL STANDARDS AS TO C.R.S. §13-20-1101

C.R.S. §13-20-1101(3)(a) provides a mechanism for defendants to file a special motion to dismiss in connection with "[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 or the state constitution in connection with a public issue…." To defeat such a motion, the plaintiff must establish "a reasonable likelihood that [he] will prevail on the claim." *Id.* at (3)(a). As other parties have observed, Colorado's statute is relatively new and there is a dearth of authority interpreting it. *See, e.g.,* Def. Metaxas' C.R.S. §13-20-1101 Mot. at 4. Colorado's statute is modeled after California's and, there, the courts employ a two-step burden shifting analysis. The moving party must show the act giving rise to the claims asserted by the plaintiff "arises from an act in furtherance of the right of free speech" and, once that burden is met, the onus is on the plaintiff to show a reasonable likelihood of prevailing on the merits. *See Tamkin v. CBS Broad., Inc.*, Cal.App. 4th 133, 142 (2011).

THE ALLEGATIONS AGAINST MS. MALKIN

Plaintiff alleges that on November 13, 2020, Ms. Malkin "hosted an interview with Oltmann" on YouTube[1] where he stated "that Dr. Coomer was an anonymous Antifa activist on a purported call Oltmann claimed to have infiltrated" during which Dr. Coomer said "Don't worry about the election, Trump is not gonna win. I made f-ing sure of that." *Accord* First. Am. Compl., at 29, ¶58, *with id.* at 25-26, ¶52. Plaintiff contends Ms. Malkin had no evidence that, two months earlier, Dr. Coomer made these oral statements or that the "alleged election fraud actually occurred" and, as such, she should not have allowed Mr. Oltmann on her YouTube livestream. *Id.* at 29, ¶58. Plaintiff further alleges that on November 28, 2020, Ms. Malkin interviewed Mr. Oltmann on Sovereign Nation where he again reiterated the narrative about the Antifa call and Dr. Coomer's statements. *Id.* at 39, ¶62. Plaintiff contends that Ms. Malkin "consciously set out to establish that Dr. Coomer did in fact subvert the election and perpetuate this fraud." *Id.* at 30-31, ¶58. This is objectively false. Ms. Malkin has attached complete transcripts of both interviews for the Court's review. *See* Ex. A-1, MalkinLive Election Update Transcript and A-2, Nov. 28, 2020 Sovereign Nation Transcript. As discussed below, the story reported on was bias at Dominion and that Dr. Coomer purportedly made a threat to influence the election, but Ms. Malkin cautioned her viewers: "I think it's important to make explicit that at this point, at least publicly, there's no evidence that Eric Coomer made good on his threat." Ex. A-2, dep. tr. p.11:2-11:4.

[1] The interview was broadcast on YouTube, Periscope, and Facebook. Ex. A-1, dep. tr. p.2:23-2:24.

ARGUMENT

I. A Journalist's Interviews About Matters Relating To The 2020 Presidential Election Fall Within The Protections of C.R.S. §13-20-1101.

The threshold inquiry is whether Ms. Malkin's interviews of Mr. Oltmann were "in furtherance of a person's right of … free speech…." C.R.S. §13-20-1101(2)(a). To assist the Court in analyzing this issue, the General Assembly delineated topics entitled to additional protection, including, but not limited to "[a]ny written or oral statement or writing made": (1) "in connection with an issue under consideration or review by a legislative, executive, or judiciary body or any other official proceeding authorized by law;" (2) "in a place open to the public or in a public forum in connection with an issue of public interests;" or (3) "in furtherance of free speech in connection with a public issue or issue of public interest." *Id.* at (2)(a)(II)-(IV). Moreover, "[g]enerally, a matter is of public concern whenever it embraces an issue about which information is needed or is appropriate, or when the public may reasonably be expected to have a legitimate interest in what is being published." *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 17 (Colo.App. 1996).

There is not a credible dispute that Ms. Malkin's interviews of Mr. Oltmann fall within these categories of protected speech, as they addressed concerns about Dominion's market share, anti-Trump bias harbored by Dominion's Director of Product Strategy and Security, and a threat to the validity of some of the election results. *Id.* As Plaintiff observed, "[o]ver 60 separate lawsuits" were brought by the sitting President of the United States regarding the validity of the election. Am. Compl., at 22, ¶50. The Third Circuit Court of Appeals issued a decision in one of these cases weeks after Ms. Malkin's first interview of Mr. Oltmann, and one day before the second interview. *Id.* at 23, ¶50. The validity of the 2020 Presidential Election and aspects of individual state elections were under review by numerous courts and interviews related to this topic fall within

the first and third topic delineated by the legislature. *Accord id., with* C.R.S. §§13-20-1101(2)(a)(II) and (IV). The interviews were conducted "in a place open to the public or in a public forum in connection with a public issue or issue of public interest" – a publicly broadcast social media livestream and a news program. *Accord id. with* Am. Compl., at 29, ¶58 and 30, n.70. Those are appropriate places for discourse on topics of public interest.

Ms. Malkin is aware that Dr. Coomer claims in other briefs that *he* was not a public issue prior to Mr. Oltmann publicizing his narrative. That is an untenable distinction. In *Lewis v. McGraw-Hill Broad. Co.*, a plaintiff had sued J.C. Penney, seeking $15 million on the basis that she had been discriminated against and unnecessarily detained at a department store. 832 P.2d 1118, 1121 (Colo.App. 1992). A news program reported that she had a criminal record, but it was a different individual with the same name. *Id.* Plaintiff sued the news outlet. *Id.* The Colorado Court of Appeals held that news coverage regarding a plaintiff's criminal record "involved a subject matter of sufficient public concern to implicate First Amendment protections" as the "newscast emerged in the context of a persistent and concededly public controversy over J.C. Penney's policies towards minorities…." *Id.*

Here, the security and validity of U.S. elections have been of public interest for years, be they concerns about the 2020 Presidential Election or concerns about foreign interference in the 2016 Presidential Election. Dominion, via its leadership and employees, chose to provide high profile "election related services to at least thirty different states during the 2020 presidential election." First Am. Compl., at 20, ¶45. Dr. Coomer chose to take a leadership role at Dominion as the "Director of Product Strategy and Security". *Id.* at ¶43. This decision resulted in him being the public face of Dominion. *See* Newsmax's Special Motion to Dismiss, at 16, n.7 (enumerating

Dr. Coomer's numerous public appearances on behalf of Dominion prior to his alleged participation in the at-issue Antifa call arising). The decision to be involved in high profile matters can result in a person, or aspects of the person's life, being part of the public discourse related to that larger matter just like in *Lewis*. Plaintiff ignores the fact that public[2] bias within the leadership of a major election service provider is, in and of itself, a newsworthy event. Many corporations have policies restricting what employees can post on social media because the employees' views may be attributed to their employer. That is particularly the case with high level positions like Dr. Coomer's. Yet Dr. Coomer – an executive in the business of providing services intended to ensure elections are fair – chose to be very vocal about the fact that he did not want one of the candidates to win an election his company was playing a major role in. That is of public interest.

II. Plaintiff Cannot Meet His Burden Of Showing A Reasonable Likelihood Of Success On His Defamation Claim Against Ms. Malkin.

Defamation has four elements, with a fifth added for situations where a "matter of public concern" is involved. *Lewis*, 832 P.2d at 1122-23. The elements are: "(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on part of the publisher; and (4) either actionability of the statement irrespective of special damages to the plaintiff caused by publication 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). For matters of public concern, the plaintiff needs to establish "by clear and convincing evidence that the defendant published the defamatory statement with actual malice, with knowledge of falsity or in reckless

[2] Plaintiff claims that his Facebook profile could only be accessed by 300 or so friends and, therefore, "[n]one of it was public." Am. Compl. at 27, ¶54. It is difficult to accept the notion that statements published to the equivalent of an audience in a packed movie theater were intended to be kept private.

disregard of the truth" – meaning the defendant "entertained serious doubts as to the truth of the statement, or acted with a high degree of its probable falsity." *Lewis*, 832. P.2d at 1122-23. Plaintiff cannot establish a likelihood of meeting this burden as to this last element.

Plaintiff alleges that Ms. Malkin had the requisite mindset because of "the unreliability of her source…." Am. Compl. at 29, ¶58. It is unclear what this means. Plaintiff describes Mr. Oltmann as "a political activist and supporter of President Trump with ambitions of creating a political movement" who founded a "nonprofit organization, FEC United, allegedly to restore and secure constitutional protections he perceived as under attack, which includes a paramilitary civilian defense group." *Id.* at 24, ¶51. Plaintiff's First Amended Complaint is sixty-five pages long, but there are no allegations regarding Mr. Oltmann having a reputation for dishonesty that would have put Ms. Malkin on notice that he fabricated this narrative. *See, generally, id.* The only substantive allegations of dishonesty pertain to Dr. Coomer. *Id.*at 24, ¶51. Being a right-of-center political activist, a Second Amendment advocate, or being displeased with the state of the country does not mean one is *per se* unreliable.

Plaintiff next alleges that Ms. Malkin had the requisite mindset for defamation because of "the lack of credible evidence in support of these allegations…." Am. Compl. at 29, ¶58. Again, this relies on the assumption that Mr. Oltmann is an unbelievable source without explaining why. Mr. Oltmann stated he personally participated in this call and heard the at-issue statements. *See, e.g.*, Ex. A-1, dep. tr. pp.4:15-5:23. The same day of Ms. Malkin's initial interview, Mr. Oltmann completed a sworn affidavit under penalty of perjury attesting to his narrative. *See* Sidney Powell's Special Motion to Dismiss, Ex. F. That is evidence that would be admissible in court. *See* C.R.E. 602 (providing that evidence must be "introduced sufficient to support a finding that [the witness]

has personal knowledge of the matter. Evidence to prove personal knowledge may … consist of testimony of the witness himself."). Plaintiff is imposing a higher evidentiary standard for news programs than trial courts. That is unworkable, which is why "a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution." *Fink v. Combined Commc'ns Corp.*, 679 P.2d 1108, 1111 (Colo.App. 1984). Ms. Malkin conducted a live interview of a source professing to have personal knowledge of oral statements that took place months earlier. Short of an audio recording of the conversation, it is unclear what other evidence Ms. Malkin should have unearthed.

Further, Mr. Oltmann provided screenshots from Dr. Coomer's Facebook page which lend support to his narrative. For example, on July 21, 2016, Dr. Coomer posted an expletive laden "rant" regarding his negative views of then-candidate Trump and those who may vote for him, followed by the disclaimer:

> [T]hese opinions are rational, and completely my own. They are based in reason and highly credible. Though they are not necessarily the thoughts of my employer, though if not, I should probably find another job.… Who wants to work for complete morons? None of my personal opinions affect my professional conduct or attitudes. I am non-partisan. I am not, however, willing to stand by and watch this great country be taken over by fascists without saying something, anything.

Ex. A-3. These are or were[3] Dr. Coomer's views of the *possibility* of a Donald Trump presidency in 2016. *Id.* It is not difficult to believe that someone this hostile to the prospect of Mr. Trump being elected to a first term would be even more agitated about the prospect of a second term and might state he was taking action to stop what he viewed as another four years of "fascism." *Id.*

[3] Dr. Coomer has not disputed that he made the social media posts that Mr. Oltmann obtained. Am. Compl., at 27, ¶54.

Indeed, in late 2020, Dr. Coomer posted: "Just f***ing vote! And if you voted for a fascist – friend, family, or foe, f***ing un-trump me. I've got no truck for racists". Ex. A-4. The gap between Dr. Coomer's social media posts and the statements made during the alleged Antifa call is not particularly large.

Moreover, it is important to carefully examine the allegedly defamatory statement – Mr. Oltmann's claim that Dr. Coomer said during a phone call, "Trump is not gonna win. I made f-ing sure of that." Am. Compl., at 26, ¶52. Plaintiff has not explained why Dr. Coomer *saying* that is inherently improbable. Plaintiff appears to be taking issue with the conclusion that was jumped to by people other than Ms. Malkin – that Dr. Coomer's undenied bias and amorphous claim of taking undefined action to make sure Mr. Trump was not reelected was conclusive evidence that he had rigged the election. But during the Sovereign Nation broadcast, Ms. Malkin stated: "I think it is important to make explicit that, at this point, at least publicly, *there is no evidence that Eric Coomer made good on his threat*." Ex. A-2, dep. tr. p.11:2-11:4 (*emphasis added*). Discussions of Dr. Coomer's social media posts and alleged threat to impact the election is not defamatory simply because others reached a conclusion despite Ms. Malkin stating the available evidence did not support that conclusion and she observed, "So many questions, Joe, and we're only getting started." *Id.* at dep. tr. p.12:22-12:23. Dr. Coomer's admitted and alleged conduct raised questions that merited coverage and further investigation. The fact that some were unwilling to wait for that investigation to be completed does not make the initial coverage defamatory.

Ms. Malkin's conduct does not give rise to a defamation claim. She conducted a live, initial interview on social media of a person professing to have personal knowledge about an issue of public interest. She conducted a second interview where that person again stated what they

professed to have personal knowledge of and their ultimate conclusion, and Ms. Malkin expressly warned that the evidence did not support that conclusion. To hold journalists liable for the conclusions guests or audiences draw – particularly when the journalist is saying the conclusion is not supported – is not a workable standard. The chilling effect on journalists would be staggering because they would need to account for how everyone might misinterpret what was said. They would always face liability if people speculated about what the evidence that was actually presented meant. Such a standard is inconsistent for speech that "occupies the highest rung of the hierarchy of First Amendment values…." *Snyder*, 562 U.S. at 452. Plaintiff's defamation claim should be dismissed.

III. Plaintiff's IIED Claim Fails As Plaintiff Can Neither Establish Interviewing A Source Is Outrageous Nor Establish That Ms. Malkin Acted With The Requisite Scienter.

An IIED claim requires Plaintiff to establish that "(1) the defendant(s) engaged in extreme and outrageous conduct; (2) recklessly or with intent of causing severe emotional distress; and (3) causing the plaintiff severe emotional distress." *Mackall v. JPMorgan Chase Bank, N.A.*, 356 P.3d 946, 955 (Colo. 2014). In addition, as to publications giving rise to IIED claims, Plaintiff must show actual malice. *Lewis*, 832 P.2d at 1124-25. Further, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957, 963 (Colo.App. 2009). Although there is not a precise standard, "[g]enerally, liability for outrageous conduct exists when the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id.*

Plaintiff continues to beat the drum that Mr. Oltmann was lying and Ms. Malkin should have known it. But it is not outrageous to interview a source claiming to have firsthand knowledge about a topic of public interest. Plaintiff also cannot show Ms. Malkin acted with actual malice. Indeed, a review of the transcripts of the interviews show that Ms. Malkin carefully navigated a serious issue and, again, clarified for the audience that there was no evidence Dr. Coomer influenced the election. Ex. A-2, dep. tr. p.11:2-11:4.

IV. Plaintiffs' Conspiracy Claim Fails Because It Is Nothing But Legal Conclusions.

To establish a claim of civil conspiracy, 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) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Walker v. Van Laningham*, 148 P.3d 391, 396 (Colo.App. 2006). Conspiracy is a derivative claim and hinges on the viability of the defamation and IIED claims. *Colo. Cnty. Bank v. Hoffman*, 338 P.3d 390, 397 (Colo. 2013). As those claims fail, so too must the conspiracy claim.

Further, even if the other claims were viable, the conspiracy claim is not. It is predicated on the notion that if a guest makes similar statements on multiple news outlets or shows, there is a conspiracy among the hosts and networks to "defame and inflict emotional distress upon Plaintiff." Am. Compl., at 61, ¶91. This is nonsense. Mr. Oltmann claimed to have personal knowledge about a topic of public interest. Ms. Malkin thought her viewers should be aware of what he had to say. Having a guest in common across multiple media outlets is not evidence of a conspiracy. It just further underscores the immense public interest in the 2020 Presidential Election. Taking Plaintiff's allegations to their logical extreme, anyone who retweets a defamatory tweet is conspiring not only with the original author but also everyone who recirculates the

defamatory statement. Plaintiff has not explained what the link is between Ms. Malkin and the other defendants that would give rise to a civil conspiracy. *See, generally,* Am. Compl. The conspiracy claim must be dismissed.

CONCLUSION

Journalists are permitted to publish stories based on the accounts of a single source professing to have personal knowledge. To hold otherwise would require journalists to meet a higher evidentiary burden then what is required to present evidence in a court of law. Dr. Coomer's quarrel is with Mr. Oltmann, not Ms. Malkin. Exercising her First Amendment-protected free speech and free press rights as a journalist, Ms. Malkin expressly stated that the story was that the director in charge of security at Dominion was biased against President Trump and had allegedly made amorphous claims about making sure he was not reelected. Ms. Malkin expressly cautioned that there was no evidence that Dr. Coomer had interfered with the election. The fact that other defendants, or members of the public, believe that Dr. Coomer did, in fact, influence the election does not make Ms. Malkin's coverage defamatory. Plaintiff's claims all hinge on the notion that it was too ridiculous to believe Dr. Coomer would *say* he made sure President Trump would not win his reelection bid. But in social media posts that he acknowledges he authored and published, Dr. Coomer has a track record of being very vocally anti-Trump, to the point where it is not particularly difficult to believe that he would make this sort of aggressive statement. As a matter of clear and fundamental public concern, this story related to election integrity merited constitutionally-protected media coverage and further investigation, and does not support Plaintiff's claims against Ms. Malkin. These claims must be dismissed.

DATED this 30th day of April, 2021.

Respectfully submitted,

PATTERSON RIPPLINGER, P.C.

s/ Gordon A. Queenan
Franklin D. Patterson, No. 12058
Gordon A. Queenan, No. 49700
Attorneys for Defendant Michelle Malkin

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2021, a true and correct copy of the above and foregoing **DEFENDANT MICHELLE MALKIN'S SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S. §13-20-1101** was served upon all counsel of record via Colorado Courts E-Filing.

s/ Terri A. Taylor
Terri A. Taylor