

<p>COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: January 10, 2024 7:32 PM FILING ID: E38F2BB284223 CASE NUMBER: 2023CA1235</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>APPEAL FROM: District Court, Denver County, State of Colorado Honorable David H. Goldberg, Judge 2021CV33632</p>	
<p><b>Plaintiff-Appellee</b> Eric Coomer, Ph.D.</p> <p>vs.</p> <p><b>Defendants-Appellants</b> Salem Media of Colorado, Inc., et al.</p>	
<p><b>Attorneys for Appellee</b> Charles J. Cain, No. 51020 <a href="mailto:ccain@cstrial.com">ccain@cstrial.com</a> Bradley A. Kloewer, No. 50565 <a href="mailto:bkloewer@cstrial.com">bkloewer@cstrial.com</a> Zachary H. Bowman, No. 21PHV6676 <a href="mailto:zbowman@cstrial.com">zbowman@cstrial.com</a> David E. Jennings, No. 54643 <a href="mailto:djennings@cstrial.com">djennings@cstrial.com</a> <b>CAIN &amp; SKARNULIS PLLC</b> P. O. Box 1064 Salida, Colorado 81201 719-530-3011 /512-477-5011 (Fax)</p>	<p style="text-align: center;"><b>Court of Appeals Case Number 2023CA1235</b></p>
<p><b>ANSWER BRIEF OF PLAINTIFF-APPELLEE ERIC COOMER, Ph.D.</b></p>	

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, counsel certifies that:

This Answer Brief does not comply with the applicable word limits set forth in C.A.R. 28(g). This Answer Brief contains 18,184 Words as calculated by Microsoft® Word for Mac, Version 16.80 (23121017), License: Microsoft 365 Subscription.

This Answer Brief complies with the requirements set forth in C.A.R. 28(b).

The undersigned acknowledges that Appellee's Answer Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*/s/ Charles J. Cain*  
Charles J. Cain, No. 51020

## TABLE OF CONTENTS

	<b>Page</b>
CERTIFICATE OF COMPLIANCE .....	i
TABLE OF CONTENTS .....	ii
INDEX OF AUTHORITIES .....	v
ISSUES ON APPEAL.....	xii
INTRODUCTION.....	1
PROCEDURAL HISTORY .....	4
STATEMENT OF THE CASE .....	7
A.    Dr. Eric Coomer.....	7
B.    The 2020 Presidential Election.....	8
C.    Randy Corporon.....	9
D.    Salem Media of Colorado, Inc.....	9
E.    Joseph Oltmann.....	10
F.    Corporon’s involvement with fabrication of the Coomer claims .....	17
G.    Lies in the Oltmann Affidavit.....	18
H.    Salem’s spreads the lie.....	21
I.    Salem’s Role.....	38
J.    Dr. Coomer’s injuries and damages.....	41

SUMMARY OF THE ARGUMENT .....	42
ARGUMENT .....	44
I. The District Court applied the correct standard of review to competent evidence .....	44
A. Standard of review and preservation of appeal.....	44
B. Application of Colorado’s anti SLAPP statute and its corresponding burden of proof .....	45
II. Dr. Coomer established a reasonable likelihood of success on his claims for defamation.....	50
A. Standard of review and preservation of appeal.....	50
B. Reviewable evidence .....	51
C. Roles of Defendants.....	51
D. Prima facie evidence of defamation.....	55
E. Protestations of good faith are insufficient.....	64
F. Fair Report Privilege.....	66
G. Defendants knew what they were going to publish .....	69
III. Dr. Coomer established a reasonable likelihood of success on his claims for intentional infliction of emotional distress .....	70
A. Standard of review and preservation of appeal.....	70
B. Prima facie evidence of intentional infliction of emotional distress .....	70

IV. Dr. Coomer established a reasonable likelihood of success on his claims  
for conspiracy..... 75

A. Standard of review and preservation of appeal..... 75

B. Prima facie evidence of conspiracy ..... 75

CONCLUSION ..... 79

CERTIFICATE OF SERVICE..... 79

## INDEX OF AUTHORITIES

Cases	Page
<i>Adams v. Frontier Broad. Co.</i> , 555 P.2d 556 (Wyo. 1976).....	69
<i>Ampex Corp. v. Cargle</i> , 27 Cal. Rptr. 3d 863 (Cal. Ct. App. 2005).....	49
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	49
<i>Archer v. Farmer Bros. Co.</i> , 70 P.3d 495 (Colo. App. 2002).....	70
<i>Baral v. Schnitt</i> , 376 P.3d 604 (Cal. 2016).....	45, 47, 48
<i>Broker’s Choice of Am., Inc. v. NBC Universal, Inc.</i> , 861 F.3d 1081 (10th Cir. 2017).....	49
<i>Brown v. Petrolite Corp.</i> , 965 F.2d 38 (5th Cir. 1992).....	59, 60, 65
<i>Burns v. McGraw-Hill Broad. Co., Inc.</i> , 659 P.2d 1351 (Colo. 1983).....	56, 60 63
<i>Celle v. Filipino Rep. Enters., Inc.</i> , 209 F.3d 163 (2d Cir. 2000).....	59
<i>Colo. Cmty. Bank v. Hoffman</i> , 338 P.3d 390 (Colo. 2013).....	75, 76
<i>Coomer v. Donald J. Trump for President, Inc.</i> , Case No. 2020CV034319, Denver County District Court.....	4, 5, 29, 24

<i>Coomer v. Lindell et al.</i> , No. 22-cv-01129-NYW-SKC (D. Colo.) .....	43
<i>Coomer v. Make Your Life Epic LLC et al.</i> , No. 21-cv-03440-WJM-KLM (D. Colo.).....	43, 48
<i>Culpepper v. Pearl St. Bldg. Inc.</i> , 877 P.2d 877 (Colo. 1994).....	74
<i>Curtis Publ’g Co. v. Butts</i> , 388 U.S. 130 (1967).....	60, 63
<i>Creekside Endodontics, LLC v. Sullivan</i> , 527 P.3d 424 (Colo. App. 2022) .....	44, 47
<i>Diversified Mgmt., Inc. v. Denver Post, Inc.</i> , 653 P.2d 1103 (Colo. 1982).....	58
<i>Donaldson v. Am. Banco Corp. Inc.</i> , 945 F. Supp. 1456 (D. Colo. 1996).....	72
<i>Eastwood v. National Enquirer, Inc.</i> , 123 F.3d 1249 (9th Cir. 1997).....	65
<i>Edward v. Ellis</i> , 287 Cal. Rptr. 3d 467 (Cal. Ct. App. 2021) .....	49
<i>Ellis v. Buckley</i> , 790 P.2d 875 (Colo. App. 1990) .....	72
<i>Eramo v. Rolling Stone, LLC</i> , 209 F. Supp. 3d 862 (W.D. Va. 2016) .....	59, 60
<i>Fashion 21 v. Coal. For Humane Immigrant Rights of L.A.</i> , 12 Cal. Rptr. 3d 493 (Cal. Ct. App. 2004) .....	51
<i>Ferraro v. Convercent, Inc.</i> , No. 17-CV-00781-RBJ, 2017 WL 4697499 (D. Colo. Oct. 19, 2017) .....	77

<i>FilmOn.com Inc. v. DoubleVerify Inc.</i> , 439 P.3d 1156 (Cal. 2019) .....	45
<i>Fresquez v. Trinidad Inn, Inc.</i> , 521 P.3d 399 (Colo. App. 2022) .....	50, 51
<i>Gilmore v. Jones</i> , 370 F. Supp. 3d 630 (W.D. Va. 2019) .....	60
<i>Gordon v. Boyles</i> , 99 P.3d 75 (Colo. App. 2004) .....	63
<i>Han Ye Lee v. Colorado Times, Inc.</i> , 222 P.3d 957 (Colo. App. 2009) .....	71, 72
<i>Harris v. City of Seattle</i> , 152 Fed. App'x 565 (9th Cir. 2005).....	60
<i>Harte-Hanks Commc'ns, Inc. v. Connaughton</i> , 491 U.S. 657 (1989).....	58, 60, 61
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988).....	70, 71
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979).....	68
<i>In re Lipsky</i> , 411 S.W.3d 530 (Tex. App.—Fort Worth 2013, no pet.) .....	48
<i>Jankovic v. Int'l Crisis Grp.</i> , 822 F.3d 576 (D.C. Cir. 2016) .....	59
<i>Keohane v. Stewart</i> , 882 P.2d 1293 (Colo. 1994).....	56

<i>Kieu Hoang v. Phong Minh Tran</i> , 274 Cal. Rptr. 3d 567 (Cal. Ct. App. 2021) .....	46
<i>King v. Whitmer</i> , Case No. 2:20-cv-13134 (Dist. Ct. Mich.).....	67
<i>Kuhn v. Trib.-Republican Pub. Co.</i> , 637 P.2d 315 (Colo. 1981).....	60, 63
<i>Lee v. State Farm Mut. Auto. Ins. Co.</i> , 249 F.R.D. 662 (D. Colo. 2008).....	77
<i>Lewis v. McGraw-Hill Broad. Co., Inc.</i> , 832 P.2d 1118 (Colo. App. 1992) .....	58, 59
<i>Lohrenz v. Donnelly</i> , 223 F. Supp. 2d 25 (D.D.C. 2002) .....	59
<i>L.S.S. v. S.A.P.</i> , 523 P.3d 1280 (Colo. App. 2022) .....	<i>passim</i>
<i>Mackall v. JPMorgan Chase Bank, N.A.</i> , 356 P.3d 946 (Colo. App. 2014) .....	70
<i>Mass v. Martin Marietta Corp.</i> , 805 F. Supp. 1530 (D. Colo. 1992).....	72
<i>McIntyre v. Jones</i> , 194 P.3d 519 (Colo. App. 2008) .....	49, 50, 55
<i>Meiter v. Cavanaugh</i> , 580 P.2d 399 (Colo. App. 1978) .....	71
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990).....	56
<i>Montoya v. Bebenssee</i> , 761 P.2d 285 (Colo App. 1988) .....	71, 72

<i>Moses v. Diocese of Colo.</i> , 863 P.2d 310 (Colo. 1993).....	53
<i>Paulson v. State Farm Mut. Auto. Ins. Co.</i> , 867 F. Supp. 911 (C.D. Cal. 1994) .....	74, 75, 78
<i>People v. Sa’ra</i> , 117 P.3d 51 (Colo. App. 2004) .....	43
<i>People v. Weiss</i> , 133 P.3d 1180 (Colo. 2006).....	46
<i>Phoenix Trading, Inc. v. Loops LLC</i> , 732 F.3d 936 (9th Cir. 2013).....	50
<i>Quigley v. Rosenthal</i> , 43 F. Supp. 1163 (D. Colo. 1999).....	58
<i>Quigley v. Rosenthal</i> , 327 F.3d 1044, 1062 (10th Cir. 2003).....	58, 66, 68
<i>Resol. Tr. Corp. v. Heiserman</i> , 898 P.2d 1049 (Colo. 1995).....	78
<i>Rugg v. McCarty</i> , 476 P.2d 753 (Colo. 1970).....	72
<i>Salazar v. Pub. Tr. Inst.</i> , 522 P.3d 242 (Colo. App. 2022) .....	<i>passim</i>
<i>Schneider v. Midtown Motor Co.</i> , 854 P.2d 1322 (Colo. App. 1992) .....	76, 77
<i>Scott R. Larson, P.C. v. Grinnan</i> , 488 P.3d 202 (Colo. App. 2017) .....	50

<i>Solano v. Playgirl, Inc.</i> , 292 F.3d 1078 (9th Cir. 2002).....	65
<i>Spacecon Specialty Contractors, LLC v. Bensinger</i> , 782 F. Supp. 2d 1194 (D. Colo. 2011).....	59
<i>Spacecon Specialty Contractors, LLC v. Bensinger</i> , 713 F.3d 1028 (10th Cir. 2013).....	59
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968).....	59, 61
<i>Sweetwater Un. High Sch. Dist. v. Gilbane Bldg. Co.</i> , 434 P.3d 1152 (Cal. 2019).....	51
<i>Tender Care Veterinary Ctr., Inc. v. Lind-Barnett</i> , 2023 COA 114 .....	47
<i>Tonnessen v. Denver Pub. Co.</i> , 5 P.3d 959 (Colo. App. 2000).....	66
<i>U.S. Dominion, Inc. et. al. v. Fox News Network, LLC</i> , Case No. N21C-03-257, (Sup. Ct. Del.) .....	54, 55
<i>Walker v. Van Laningham</i> , 148 P.3d 391 (Colo. App. 2006).....	75
<i>Wells v. Liddy</i> , 186 F.3d 505 (4th Cir. 1999).....	59
<i>Williams v. Dist. Ct., Second Judicial Dist., City &amp; Cnty. of Denver</i> , 866 P.2d 908 (Colo. 1993).....	55
<i>Wilson v. Cable News Network, Inc.</i> , 444 P.3d 706 (Cal. 2019).....	47
<i>Woodbridge Condo. Ass’n, Inc. v. Lo Viento Blanco, LLC</i> , 490 P.3d 598 (Colo. App. 2020).....	51

<i>Wyatt v. Union Mortg. Co.</i> , 598 P.2d 45 (Cal. 1979) .....	77
<i>Young v. CBS Broad., Inc.</i> , 151 Cal. Rptr. 3d 237 (Cal. Ct. App. 2012) .....	49
<i>Zimmerman v. Al Jazeera Am., LLC</i> , 246 F. Supp. 3d 257 (D.D.C. 2017) .....	59

**Statutes**

C.R.C.P. 242.19(c) .....	68
C.R.S. § 13-20-1101 .....	6
C.R.S. § 13-20-1101(1)(b) .....	7, 45
C.R.S. § 13-20-1101(2)(a)(I)-(IV) .....	47
C.R.S. § 13-20-1101(3)(a).....	47

**Rules**

C.R.E. 104(a).....	57
C.R.E. 602 .....	57
C.R.E. 701 .....	57
C.R.E. 702 .....	57

**Other**

RESTATEMENT (SECOND) OF TORTS § 611 .....	67, 68
---	--------

## **ISSUES ON APPEAL**

- I. Whether the District Court applied the correct standard of review.
- II. Whether the District Court correctly determined that Dr. Coomer had established a reasonable likelihood of success on his defamation claims.
- III. Whether the District Court correctly determined that Dr. Coomer had established a reasonable likelihood of success on his intentional infliction of emotional distress claims.
- IV. Whether the District Court correctly determined that Dr. Coomer had established a reasonable likelihood of success on his civil conspiracy claims.

## INTRODUCTION

1. This defamation case is unprecedented in Colorado history. Over several months in late 2020 and early 2021, a Denver based radio station owned by Salem Media of Colorado, Inc. (Salem), 710 KNUS (KNUS), published over a hundred defamatory statements accusing Eric Coomer, Ph.D. (Dr. Coomer) of rigging the 2020 presidential election (the Election). These publications were primarily sponsored by Randy Corporon (Corporon), Republican National Committee (RNC) Committeeman for the State of Colorado and one of the hosts on KNUS, but the relentless campaign spread across numerous programs for months on end.

2. The lies that Salem published again and again arise from demonstrably false claims of a Douglas County-based podcaster and conspiracy theorist named Joe Oltmann (Oltmann). Shortly after the results of the Election were called, Oltmann texted his friend and legal counsel Corporon to tell him about a story he planned to begin telling that proved the Election was rigged. Oltmann claimed that on some unspecified date months before the Election, he had “infiltrated” an “Antifa conference call” where he claims he heard an anonymous speaker refer to another anonymous speaker as “Eric,” who the first anonymous speaker identified as “the Dominion guy.” Oltmann paraphrased the anonymous “Eric” as joking that

“Trump’s not going to win, I made f-ing sure of it. Hahaha.” Oltmann claims he googled “Eric Dominion Denver Colorado” after this call, and identified Dr. Coomer, former Director of Strategy and Security for Dominion Voting Systems, as the Eric in question. After the Election was called for Joe Biden, Oltmann claimed he suddenly remembered overhearing the plot to rig the Election months prior.

3. These are all lies, but Salem presented them as fact. Virtually every aspect of Oltmann’s story is provably false, and was provably false at the time that he and Corporon set out to spread it across Colorado. In fact, the evidence at this point shows that Corporon directed Oltmann to fabricate evidence to bolster those claims. The surface-level absurdity of the allegations did not deter Salem, however, who over the next two months published at least 128 defamatory statements about Dr. Coomer despite having no corroborating evidence to support the allegations and despite Salem’s knowledge that the claims had been disproven by reliable sources.

4. The evidence already compiled in this case, before any discovery has even occurred, is overwhelming. Dr. Coomer directed the district court to a spreadsheet of at least 128 separate defamatory statements published by Salem, CF, pp. 1,138-63, as well as 119 published statements demonstrating actual malice. CF, pp. 1,164-83. His response to Defendants’ anti-SLAPP motions to dismiss was supported by sworn testimony from J. Alex Halderman, one of the nation’s leading

experts in election security. CF, pp. 1,039-62. Dr. Halderman addressed the inherent implausibility of the lies about Dr. Coomer, as well as the technical impossibility of allegations promoted by Corporon and others. The response was also supported by sworn affidavits of fact witnesses Craig Silverman and Heidi Beedle. Silverman described his own experience as a former Salem host of being cancelled in the middle of one of his shows when he made commentary critical of President Trump that Salem did not endorse. CF, pp. 1,029-38. For her part, Beedle testified to the objective falsity of key portions of the affidavit that Corporon and Oltmann drafted accusing Dr. Coomer of rigging the Election. CF, pp. 995-1,002. Dr. Coomer produced his own sworn declaration denying the countless criminal accusations leveled at him on the Salem airwaves for months on end. CF, pp. 742-68. This enormous body of evidence is too voluminous to address in this brief.

5. Despite repeatedly inviting a lawsuit from Dr. Coomer on air, nowhere in Defendants' Opening Briefs do they argue the lies and false criminal accusations they published about him time and time again were true, nor can they. Instead, Defendants persist in their now years-long pattern of delay by any means necessary, in this case through repetition of failed arguments, misstatements of law, and a desperate refusal to acknowledge the facts. Dr. Coomer has filed multiple lawsuits in an effort to set the record straight, and every court addressing these claims has

denied efforts to dismiss them. This Court too should deny Defendants' frivolous, dilatory appeal, and finally allow the truth to come out.

### **PROCEDURAL HISTORY**

6. On November 13, 2021, Plaintiff Dr. Eric Coomer filed his Original Complaint asserting claims for defamation, intentional infliction of emotional distress (IIED), conspiracy, and injunctive relief against Salem and Corporon. *See generally* CF, pp. 3-57.

7. Dr. Coomer's allegations against Salem and Corporon are substantially the same. They published false statements that Dr. Coomer participated in an alleged Antifa call; stated on that alleged call that he intended to subvert the Election; and then did subvert the results of the Election. Their defamatory statements caused him severe emotional and physical distress, as well as harm to his reputation, privacy, safety, earnings, and other unspecified pecuniary interests. CF, pp. 742-68.

8. On January 11, 2021, Corporon filed a Motion for Change of Venue, wherein he sought to have the case transferred to Arapahoe County. CF, pp. 72-75. Salem joined in that motion the following day. CF, pp. 76-78. The Motion for Change of Venue raised arguments that were virtually identical to arguments Corporon had previously raised in related proceeding *Coomer v. Donald J. Trump for President, Inc. et al*, Case No. 2020CV034319 (*Coomer v. DJTFP et al*), after

another Motion to Change Venue had already been denied.<sup>1</sup> Counsel for Salem was fully apprised of those multiple failed efforts just months prior before multiple judges in the Denver District Court.<sup>2</sup> On April 19, 2021, the Court again rejected Defendants' attempt to change venue. CF, pp. 130-35.

9. On May 3, 2021, Salem and Corporon filed Motions to Dismiss pursuant to C.R.C.P. 12(b)(5). CF, pp. 153-66. Following the *Coomer v. DJTFP et al.* playbook, they also filed a Motion for More Definite Statement pursuant to C.R.C.P. 12(e). As with their Motion to Change Venue, the Motion for More Definite Statement raised arguments identical to those that had just been rejected by another division of the Denver District Court. CF, pp. 142-52, 167-69. Given the quantity of defamatory statements at issue, the Motion for More Definite Statement effectively requested a 258-claim complaint that would necessarily constitute

---

<sup>1</sup> See *Coomer v. DJTFP et al.*, Case No. 2020CV034319, Order Denying Defendants' Joint Motion to Change Venue (J. Moses, June 1, 2021). Corporon also serves as counsel for Defendants James Hoft and TGP Communications, Inc. dba The Gateway Pundit, and had filed a virtually identical Motion to Transfer Venue in that proceeding over a month after the Court had *already denied the same motion* filed by Joseph Oltmann. *Id.*; see also Order Denying Motion to Change Venue (J. Johnson, Mar. 4, 2021). As such, the Motion to Transfer Venue in this proceeding constituted the *third* attempt to raise arguments that had already been rejected by multiple judges in a closely related proceeding.

<sup>2</sup> Salem's counsel of record in this proceeding also represents defendant Eric Metaxas in *Coomer v. DJTFP et al.*, Case No. 2020CV034319.

several hundred pages of duplicative pleadings. CF, pp. 144-50. The Court again denied both motions on August 15, 2022. CF, pp. 548-64.

10. On October 7, 2022, 328 days after Plaintiff filed his Complaint and nearly two months after the Court had rejected their Motions to Dismiss Pursuant to C.R.C.P. 12(b)(5), Salem and Corporon filed Motions to Dismiss pursuant to C.R.C.P. § 13-20-1101. CF, pp. 606-67. In a 136-page order issued roughly five months prior, the Denver District Court had already rejected the same efforts in a *Coomer v. Donald J. Trump for President, Inc.* See CF, pp. 326-465.

11. On November 29, 2022, the Court held a hearing on Defendants' Motions to Dismiss pursuant to C.R.S. § 13-20-1101. CF, pp. 1,235-37. On June 9, 2023, the District Court denied Defendants' anti-SLAPP motions. CF, pp. 1,414-33.

12. On June 30, 2023, Corporon filed a Motion for Extension of Time to File Answer to Complaint, up to and including July 21, 2023. CF, pp. 1,446-49. On July 21, his extended deadline to file an answer to the complaint, Corporon instead filed a Notice of Appeal. CF, pp. 1,460-71.

13. On October 18, 2023, Corporon filed a Motion for Extension of Time to File Opening Brief in this proceeding. On October 25, 2023, Dr. Coomer responded to that Motion, noting the years of deliberate delay that had preceded it, and noting the ongoing threats and harassment that Dr. Coomer remains subject to

as a result of the lies spread by Defendants in this case. On October 31, 2023 Salem similarly joined in requesting an additional 35 days to file its Opening Brief. The Court granted that Motion on November 3, 2023, noting that “No further extension will be allowed absent extraordinary circumstances.”

### **STATEMENT OF THE CASE**

14. The General Assembly enacted the anti-SLAPP statute “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 *and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury.*” C.R.S. § 13-20-1101(1)(b) (emphasis added). Contrary to Defendants’ assertions, this case squarely falls into the latter category; it is a meritorious lawsuit for demonstrable injury and precisely the type of case that the General Assembly expressly sought to protect. Here, Defendants’ malicious and outrageous defamatory statements destroyed Dr. Coomer’s career in elections and led to him receiving credible death threats that continue to this day. Dr. Coomer has the right to hold Defendants accountable for their actions.

#### **A. Dr. Eric Coomer**

15. Dr. Coomer is a private individual. CF, p. 746. At the time of the Election, Dr. Coomer was privately employed by Dominion Voting Systems

(Dominion) as the Director of Product Strategy and Security. CF, pp. 742-46. Dominion provided election equipment and services to governmental bodies in at least thirty different states during the Election. CF, p. 746. Dr. Coomer, as an employee of Dominion, assisted with these services. CF, pp. 745-46. Neither Dominion nor Dr. Coomer were governmental employees, and they did not control the Election or the governmental bodies they were assisting. *Id.*

## **B. The 2020 Presidential Election**

16. In the weeks leading up to the Election, former president Donald Trump (Trump), his campaign, his agents, and many of his supporters began alleging widespread voter fraud and conspiracy theories to explain his projected loss. CF, pp. 746-47. The propagation of these theories continued even after the Election results were announced in President Biden's favor on November 7, 2020. CF, p. 747.

17. All allegations of election fraud have been firmly rejected by credible sources. CF, pp. 10-12, 243, 1,043-46. By December 9, 2020, state elections officials tasked with verifying the Election and vote counts had certified the Election results across all fifty states and the District of Columbia. CF, p. 10. Congress counted the electoral votes, and on January 6, 2021, former vice president Mike Pence declared Joe Biden the winner of the Election. *Id.*

**C. Randy Corporon**

18. Corporon is the founder of the Arapahoe County Tea Party, as well as the RNC Committeeman for the state of Colorado. CF, p. 993. In addition to being a licensed attorney, Corporon is also a talk radio host on 710 KNUS.

19. Corporon served as counsel for Oltmann throughout many of the publications at issue in this dispute. CF, p. 907. In that role, he worked closely with Sidney Powell and Jenna Ellis to draft the Oltmann affidavit (the Affidavit). CF, pp. 962, 1,139; EX Hearing, pp. 28-30, 478. At no point in the entirety of Corporon's Opening Brief does he acknowledge his essential, behind the scenes role in developing Oltmann's fabricated claims or his efforts to gain a national audience for Oltmann and his lies.

**D. Salem Media of Colorado, Inc.**

20. Salem is the local subsidiary of the national media company Salem Media Group. CF, pp. 1,033-34. It owns multiple Denver based radio stations including, as relevant here, KNUS. CF, pp. 1,033-34.

21. KNUS promotes itself as "conservative news talk" and publishes a variety of both local and national talk radio programs. CF, p. 1,032. The local programming includes shows hosted by Corporon, George Brauchler, Peter Boyles, Matt Dunn, Deborah Flora, and others. *See generally* CF, pp. 751-63, 1,138-83.

22. KNUS has had a history of controversial publications and associations. This history includes involvement with alleged neo-Nazis and Proud Boys, as well publication of inflammatory rhetoric from former hosts. CF, pp. 15, 1,037. Throughout these controversies, KNUS has traditionally taken swift action to halt publication of statements it does not ratify and endorse. *Id.*

23. Salem also has a track record of quickly stopping speech it does not ratify or endorse. As one notable example, KNUS cancelled the program of long-time host Craig Silverman in the middle of an episode when he persisted in criticizing then-President Trump during his first impeachment inquiry. CF, pp. 1,036-37. Silverman provided a sworn declaration in this case detailing his experiences there, as well as his familiarity with the “Medved Rule,” by which Salem hosts understood they were expected to always support former President Trump, or risk consequences. CF, p. 1,033.

**E. Joseph Oltmann**

24. Oltmann was a business owner and political activist based in Colorado during the relevant period. CF, p. 631. He is a co-host for the Conservative Daily

podcast, which broadcasts from Colorado and publishes daily podcasts on various online platforms. CF, p. 635.

25. Oltmann was actively involved in political events and rallies in support of Trump and the Colorado Republican Party. CF, p. 634. He began advancing various allegations of fraud leading up to the Election, including claims that public health measures in response to the COVID-19 pandemic were intended to allow for election fraud, and various claims of ballot harvesting. CF, pp. 335, 885-87.

26. As the results for the Election began to come in and Trump's loss became clear, Oltmann again began advancing allegations of fraud to explain the loss. CF, pp. 335-36, 983-86.

27. On November 9, 2020, after the results of the Election were called for President Joe Biden, Oltmann co-hosted a Conservative Daily Podcast. CF, pp. 769-900. On that podcast, Oltmann alleged to have learned almost two months earlier of a conspiracy to elect the president of the United States. CF, pp. 787-89. Oltmann claimed he gained this information while infiltrating an "Antifa call" with unknown and unverified participants. *Id.* He alleged one of the unknown participants was referred to as "Eric" and "the Dominion guy." *Id.* Oltmann paraphrased this "Eric" as stating on the call, "Don't worry about the election, Trump is not gonna win. I made f-ing sure of that." CF, p. 789. Oltmann claimed

to have subsequently identified the speaker by Google searching the terms “Eric,” “Dominion,” and “Denver Colorado.” CF, pp. 789, 1,005. He then identified Dr. Coomer as the alleged speaker, CF, pp. 789, and accused him of “controlling elections,” while disclosing Dr. Coomer’s name, his photograph, and his place of employment. CF, pp. 772, 782, 789-94. The substance of Oltmann’s statements alleged that Dr. Coomer participated in this alleged Antifa call; that he stated on this call his intent to subvert the presidential election; and that he then did in fact subvert the Election. Dr. Coomer unequivocally denies these allegations. CF, pp. 749-50.

28. The nature and severity of Oltmann’s allegations have escalated. He has denigrated Dr. Coomer by referring to him as “garbage,” “trash,” “evil,” and a “sociopath”; monitored Dr. Coomer’s activities and stated, “I have people in Salida that literally are following him around and saying, ‘Alright, Joe. Here’s where he’s at next. Here’s where he’s at next. I found him. He’s staying in this basement, up here. Oh, he’s at this house now,” CF, pp. 343, 1,104, 1,110; posted and shared photos of Dr. Coomer’s house, CF, p. 343; encouraged his audience to harass Dr. Coomer with statements such as “I want everybody to put on their social media account, ‘Where is Eric Coomer?’” CF, pp. 343, 933; and repeatedly called for violence, including calling for civil war, and repeatedly asserting that Dr. Coomer could be put to death for treason. CF, p. 353. Oltmann has even bragged about

harassing and threatening Dr. Coomer's friends and acquaintances, demanding incriminating information and promising retribution if they did not deliver. CF, p. 343.

29. Oltmann has no evidence in support of his allegations against Dr. Coomer. He did not know Dr. Coomer and had no personal knowledge of Dr. Coomer at the time of the alleged Antifa call. CF, pp. 747-50. He has not disclosed any witness with personal knowledge that identified Dr. Coomer on the alleged Antifa call, and has not identified any expertise or reliable methodology with which he identified Dr. Coomer on the alleged Antifa call. CF, pp. 747-50, 913-45. Instead, his allegations against Dr. Coomer were based on his unreliable speculation of an alleged Google search. CF, pp. 204. Similarly, Oltmann has no personal knowledge of any election fraud involving Dr. Coomer, CF, pp. 1,003-09; has not disclosed any witness with personal knowledge of any election fraud committed by Dr. Coomer, CF, pp. 912-31, 1,010-14; and has offered no evidence of election fraud committed by Dr. Coomer, CF, pp. 1,003-09. Moreover, Oltmann has not identified any expertise in elections systems with which to identify election fraud. *Id.* Instead, his allegations of fraud were based on his speculation of Dr. Coomer's Facebook posts and his employment with Dominion, neither of which include evidence of election fraud. CF, pp. 1,005-08. The Facebook posts themselves are limited to

Dr. Coomer's personal and political beliefs, which have no probative value as to the allegations made. CF, pp. 764-67; EX Hearing, pp. 31-111.

30. Otherwise, Oltmann's allegations are based on anonymous sources—specifically unknown and unverified speakers on an “Antifa call” Oltmann allegedly infiltrated. CF, pp. 912-31, 1,010-14. Only after Dr. Coomer filed suit did Oltmann claim to have personal knowledge of other participants on the purported call. However, the witnesses Oltmann directly or indirectly identified have denied any knowledge of such a call, denied any knowledge of the statements Oltmann alleged occurred on the call, and denied any knowledge of Dr. Coomer on such a call. CF, pp. 995-1,002. Regardless, Oltmann's alleged knowledge of some participants does not impute knowledge of the relevant unknown and unverified speakers on which Defendants based their claims. Those alleged speakers remain anonymous.

31. Oltmann's allegations regarding the alleged Antifa call itself have varied. Oltmann initially provided no explanation for how he infiltrated the alleged Antifa call. CF, pp. 787-88. He then claimed to have gained access from a Colorado Springs based journalist, Heidi Beedle. CF, pp. 1,004-05. Beedle, however, has stated she has no knowledge of the alleged call and Oltmann's allegations. CF, pp. 995-1,002. Oltmann has since acknowledged his claim that she was on the call was a “wild guess.” CF, pp. 922-23. He now claims another unnamed Antifa

member gave Oltmann access to the call but has refused to disclose the alleged witness's name. CF, pp. 912-31. Oltmann has not identified when the purported call occurred, at times placing the call in mid-to late-September, CF, p. 927, and at times stating it occurred on or about the week of September 27, 2020. CF, p. 1,004.

32. A screenshot Oltmann allegedly took of the Google search of the terms "Eric," "Dominion," and "Denver Colorado" is falsely dated September 26, 2020, which would place the Google search before the call. CF, pp. 953, 1,048-49. Oltmann has provided no record evidence of the call itself, such as electronic records contemporaneously made that list identifying information such as the date, time, or method of the call. CF, pp. 346, 983-86, 1,010-14. Instead, Oltmann has provided undated notes he alleges he took during the call. CF, pp. 1,010-14. Similarly, the method of communication has also changed with Oltmann first alleging it was a phone call only to now allege it was a Zoom call. CF, pp. 5, 794, 913. Oltmann has no recording of the call despite having allegedly accessed it to investigate Antifa. CF, pp. 844-45.

33. By contrast, Dr. Coomer unequivocally denies Oltmann's allegations. CF, pp. 749-50, 763-64; EX Hearing, pp. 144-46, 207-11. Dr. Coomer has averred under oath that he did not participate in any alleged call; he did not state an intent to subvert the Election in any alleged call; and he did not take any actions to subvert

the Election. *Id.* Dr. Coomer proffered sworn statements of witnesses that Oltmann directly or indirectly identified in relation to the alleged call that similarly deny Oltmann's allegations. *See generally* CF, pp. 995-1,002.

34. Dr. Coomer provided the District Court with expert testimony showing that Oltmann's allegations of voter fraud against Dr. Coomer were not possible as Dominion machines are not capable of bulk adjudication and that private safeguards and multiple independent layers of security at the local, state, and federal levels all either prevent such manipulation or would make any such attempted manipulation easily discoverable. *See generally* CF, pp. 1,039-62. Dr. Halderman, a nationally-recognized election security expert, provided the District Court with examples of how Dr. Coomer sought to improve transparency in the vote adjudication process to make fraud *easier to detect*, as well as evidence that the Defendants' vote rigging allegations were always "implausible, consisting of wild speculation, readily debunked claims, and incoherent technical assertions, and months of subsequent investigations and audits have both failed to vindicate their theories and added further evidence that the election outcome was correctly decided." CF, p. 1,042.

**F. Corporon's involvement with fabrication of the Coomer claims**

35. At no point do either Corporon or Salem's Opening Briefs acknowledge or discuss Corporon's close involvement with fabricating the Coomer story or his long-running personal relationship with Oltmann, but the Court should not overlook these significant facts. Far from being a passive reporter who was simply apprising his audience of things he had heard in the news, Corporon was an active participant in fabricating the story about Dr. Coomer that he and Oltmann subsequently promoted as widely as they possibly could.

36. Corporon and Oltmann have known each other for at least five years. CF, p. 477. Their paths crossed in the summer of 2020, when Oltmann attended a pro-police rally organized by Corporon on July 17, 2020, and also attended by Oltmann's co-defendant Michelle Malkin. Violence broke out at the event, which Oltmann subsequently discussed on his podcast on July 21, 2020, where he promised there would be more violence at the next rally. This prediction came to fruition when Oltmann's organization FEC United organized a "Patriot Muster" rally on October 10, where one of the participants was shot and killed by a bodyguard for a 9News reporter. CF, p. 20; EX Hearing, pp. 40:21-41:18.

37. Oltmann was also well-known at KNUS, where his company, PIN Business Network, regularly advertised. CF, pp. 39, 757.

38. Throughout the early days of Oltmann's evolving claims about Dr. Coomer, Corporon served as his counsel. CF, p. 907. Oltmann texted Corporon days before his first publication about Coomer to tell him what he planned to say. CF, p. 478. Corporon was watching in real time as Oltmann subsequently published those claims to his Conservative Daily audience for the very first time. CF, p. 22. He then invited Oltmann to speak at the Arapahoe County Tea Party meeting that he chaired. CF, pp. 26, 1,123. In the following days, Corporon worked with Jenna Ellis to draft the affidavit that they would all later claim as cover for their own publications. CF, pp. 962, 1,139; EX Hearing, pp. 28-30, 478.

39. In addition to connecting Oltmann with Jenna Ellis and Sidney Powell, Corporon also promoted Oltmann's story to other outlets. For example, Corporon reached out to Jim Hoft, owner of The Gateway Pundit, to encourage him to speak with Oltmann. CF, p. 994. The Gateway Pundit then published numerous defamatory articles about Dr. Coomer. CF, pp. 968-73. Hoft then went on to make numerous appearances on KNUS. CF, pp. 758, 762, 1,165, 1,182.

#### **G. Lies in the Oltmann Affidavit**

40. The Oltmann Affidavit that Corporon and Ellis drafted for Sidney Powell is rife with demonstrable falsehoods that were provably false at the time the Affidavit was written. Most notably, the Affidavit contains references to a Google

screenshot of the search terms “Eric Dominion Denver Colorado” that Oltmann claimed he had taken on September 26, 2020. CF, pp. 1,005. According to Oltmann, this screenshot was “evidence” that he had begun looking into the anonymous “Eric” from the supposed “Antifa call” several weeks before the Election. CF, pp. 1,005-06. These portions of the affidavit are lies.

41. In reality, Oltmann fabricated the supposed Google screenshot on November 11, 2020, two days *after* his first public claims about Dr. Coomer. This fabrication did not become apparent to Dr. Coomer until after Oltmann had already provided sworn testimony that the September 26, 2020 date indicated on the image of the screenshot was accurate. CF, p. 926. But it cannot be. Also included in the image is a Google “doodle,” which is a unique image commissioned by Google and occasionally used on their homepage to commemorate certain dates. CF, p. 1,048. In this instance, the doodle visible in the image is from Veterans’ Day, or November 11, 2020. CF, pp. 953, 1,048-49.

42. The screenshot is relevant because Oltmann has claimed that he made the image for Sidney Powell on the advice of his counsel at the time, Corporon. CF, pp. 906-07. The extent of Corporon’s involvement in this knowing fabrication of material evidence, which he knew would be used in multiple federal lawsuits for purposes of overturning the presidential election, remains uncertain. What is certain,

however, is that prior to the anti-SLAPP hearing, Corporon's counsel provided Dr. Coomer with a draft affidavit that Corporon himself intended to submit as evidence in his defense. When Corporon subsequently submitted the Affidavit, it was identical to the prior draft except for the removal of a single sentence which read: "I did not participate in the creation of or the decision to create or re-create a screenshot of Google search results." EX Hearing, pp. 478-79; TR (11/29/22), pp. 20:11-23:20. Corporon subsequently "corrected" this telling edit, but his excuses before the District Court were not credible. *Id.* at 93:22-94:20.

43. The Affidavit also claimed that another participant on the "Antifa call" was Heidi Beedle, a journalist who had covered Oltmann's political group FEC United in the past. CF, pp. 1,004-05. But Beedle was not on any "Antifa call," and neither Oltmann, Corporon, nor anyone at Salem ever contacted her to see if she had been. CF, pp. 995-1,002. Under oath, Oltmann would go on to admit that his claim Beedle was on the call was a "wild guess." CF, pp. 922-23. Oltmann's claims about the call have since evolved to now avoid all mention of Beedle.

44. Similarly, Oltmann's claim of having conducted "ARIMA analysis"<sup>3</sup> to demonstrate the Election was stolen is also a lie. Oltmann has never produced this supposed analysis, nor has he ever referred to or relied on that claim since his Affidavit. As Dr. Halderman noted in his report, "Oltmann's statement is remarkable in that it clothes vague and unsubstantiated reasoning in scientific-sounding terms." CF, p. 1,052. Dr. Halderman stated that in his experience, "this is a red flag that indicates claims are likely based on quackery and junk science." *Id.* The extent to which Oltmann was relying on the advice of counsel to inflate his claims and assert the existence of evidence where there was none remains unclear. As his attorney, however, it is a reasonable inference that Corporon knew this claim was unsupported.

#### **H. Salem spreads the lie**

45. Salem downplays discussion of the publication of Oltmann's lies across *multiple* Salem programs for months on end. In reality, Corporon was just one of many hosts who repeated the lies about Dr. Coomer.

---

<sup>3</sup> Autoregressive integrated moving average (ARIMA), is a statistical analysis model that uses time series data to either better understand a data set or to predict future trends.

46. Corporon and Ellis finalized Oltmann's Affidavit on November 13, and Corporon had him on as a guest for several hours the next day, November 14. CF, pp. 1,139-42; EX Hearing, p. 478. From the start, Corporon vouched for Oltmann's credibility and the factual accuracy of the lies he was about to tell. He made clear that he knew what Oltmann was going to say, and that it was neither opinion nor hyperbole. He also affirmed that the purpose of his interview with Oltmann was to present evidence that the Election had been rigged. He stated:

The reason I know he's serious, the reason I know this is not some kind of publicity stunt, or to try to keep people's hopes up falsely, that there were such shenanigans in this election that it should not be certified, no way, no how, until all of the investigations and opportunities to find and present evidence are done, and Joe is part of that evidence now. Yesterday, we polished up an affidavit and sent it directly to Jenna Ellis, Donald Trump's [attorney], actually, she sent it to me, because she put it together after conversations with him, and I reviewed it and cleaned it up.

CF, p. 1,139.

47. In addition to recounting the false narrative about the "Antifa call" and the statements the anonymous "Eric" supposedly made on that call, CF, pp. 1,139-40, the interview went on to include other falsehoods about

Dr. Coomer that were not included in the Affidavit.<sup>4</sup> As one example, Oltmann claimed that Dr. Coomer was “a shareholder at Dominion.” CF, p. 1,141. This is false, and was provably false at the time. CF, pp. 26, 743-45. Corporon insisted to the audience that Oltmann was presenting facts that proved the Election was rigged, and that Eric Coomer had rigged it. He described Dr. Coomer as being “100% enmeshed in the Antifa organization,” CF, p. 1,139, and stated that “he actually made a statement that he had solved this problem for Antifa and the left of getting rid of Donald Trump, and that adds seriousness to what we’re already concerned about.” CF, p. 1,140. He concluded by stating, “Joe, what you have done and exposed may save the republic, or at least save the possibility of having an honest outcome to this election.” *Id.*

48. That Corporon knew Oltmann was making false claims *at the time when he was making them* is evident from that very first interview. For example, Oltmann stated:

When I did the research on that call, and I gathered the information, I actually just put “Eric” into Google search. This is how it all started. “Eric Dominion Denver Colorado.” That was it, right? And when it came up it came up Eric Coomer. I mean, I actually went through and

---

<sup>4</sup> As with other publications discussed below, the litany of false claims that Salem published for hours on end in this first interview is too lengthy to recount here. At least twenty defamatory statements from that November 14 interview can be found at CF, pp. 1,139-42.

made sure I had screenshots of it, obviously. But that's how it started, where I put it aside, and when I started getting deeper into it at the time, way back before in September, right, or early October.

*Id.*

49. Corporon *knew* this was a lie. He *knew* that Oltmann did not take a screenshot of Google search results in September because he had advised Oltmann to create the screenshot for Sidney Powell *just three days before*. CF, pp. 901-07. Nonetheless, Corporon went on to repeatedly promote this interview on his personal Twitter account, where he utilized the hashtags “#DominionVotingSystems” and “#AntifaTerrorists.” *See* CF, pp. 956-67.

50. Other Salem hosts then booked Oltmann for their own shows. The next day, Oltmann appeared for another lengthy interview on the Deborah Flora Show. Flora confirmed that she had heard Oltmann's interview with Corporon the day before and therefore knew what claims he was going to make on her show. CF, p. 1,142. Oltmann repeated the lies about the “Antifa call,” as Flora knew he would. CF, pp. 1,143-44.

51. On multiple instances, Flora and Oltmann made clear that they were presenting evidence that the Election had been rigged, and that Eric Coomer had

rigged it.<sup>5</sup> For example, Oltmann described Dr. Coomer as “having his finger on the scales of a U.S. election,” CF, p. 1,145, and said, “It doesn’t matter who you voted for. They decided who won this.” CF, p. 1,144. He said, “You have USA Today, you have major news networks that are actually saying there is no fraud . . . And the scary thing for me is that I actually have proof.” *Id.* Flora affirmed the accuracy of Oltmann’s lies and repeated them for her audience, stating, “Just had Joe Oltmann on the line. In a nutshell, go back and listen to the show, 710knus.com. Joe Oltmann, a brave man that is stepping forward with information that Eric Coomer, who is the Dominion Voting Systems Director of Strategy and Security. I trip over it because it is such a wrong title for him.” CF, p. 1,146. She emphasized the significance of Oltmann’s claims when she called her audience to action, stating:

This is the person that is behind the Dominion Voting System. It is time for every citizen of this country, Democrat, Republican, in between, to demand accountability and a clear examination of why we are giving our sacred vote to a company like Dominion that is owned in Canada.

*Id.*

52. By that afternoon, the Coomer story had spread further within the KNUS studio, with host Matt Dunn stating on air, “We’ve got Soros in this. We got

---

<sup>5</sup> *See generally*, CF, pp. 1,142-46. Dr. Coomer was referenced numerous times in this interview by name.

this Coomer guy, the Denver guy, who's written these screeds in favor of Antifa and anti-Trump and he's all into it. Probably tied to an agency in some way or another. What an absolute mess, ladies and gentlemen." *Id.*

53. The drumbeat continued days later, when Oltmann appeared for his first interview with Peter Boyles on November 17. Here again, the substance of Oltmann's claims about Dr. Coomer was known to Boyles (and Salem producers) beforehand, and was the reason that Oltmann was invited on as a guest in the first place. As he did in virtually every instance, Oltmann assured the audience that "what [he] found was not rumors. Not innuendo." CF, p. 1,147. Oltmann then repeated his lies about the "Antifa call" and the Google screenshot. *Id.* He stated, "The part about my story that's true is everything is true. Every part of it's true. I was on that call. Eric was on that call. Eric said that he fixed the election." CF, p. 1,148. Oltmann ended the interview by admitting to the campaign of terror and harassment he had unleashed on Dr. Coomer, stating, "He's a ghost. I had somebody go to his house in Salida. He is a ghost." *Id.*

54. Boyles had Oltmann back on the air the next day, November 18. Oltmann repeated the "Antifa call" story, and confirmed that he had been working with Sidney Powell and the Trump legal team, stating, "I have been in contact with the Trump team . . . I wanted to just make sure that all of the information I provided

was truthful, accurate, and could provide them with enough information to lift up the skirt on Eric Coomer and others in the organization.” CF, p. 1,149. Oltmann described Dr. Coomer as “frankly sociopathic,” CF, p. 1,150, and stated that, “This is a massive, massive, massive, putting your finger on the scales of the election in our country.” CF, p. 1,149.

55. Even when Oltmann was not a guest, Salem repeatedly republished his claims. For example, on November 20, Corporon and Boyles discussed how Dr. Coomer had rigged the Election. Corporon stated:

If you literally have a software company that has the intention of one of their main experts, one of their main masterminds, the nuclear physicist Eric Coomer, who is an antifa activist according to his social media ... There is your motive . . . . The flipping of a switch, and I mean, Joe Oltmann has talked to you about this, and he established the motive for Eric Coomer of course.

CF, p. 1,150.

56. Corporon then confirmed his close coordination with Sidney Powell and her legal team, stating:

I’ve got some Sidney Powell lawyers here in town. Dominion is located, one of their offices right in downtown Denver, and of course the story on Eric Coomer and his social media ties to Antifa broke right out here, from Denver, and so their lawyers are out here meeting with witnesses, piles of documents, my conference room has been taken over.

*Id.*

57. The next day, Salem published a lengthy interview between Corporon and Oltmann, where both men expanded on their prior claims, adding new levels of both falsehood and certainty to their allegations. “I don’t want to recap the whole story, I want to try and advance it,” Corporon stated, while repeating the “Antifa call” story. *Id.* Oltmann directed the audience to the likely founder of the QAnon conspiracy theory, Ron Watkins, aka CodeMonkey, stating, “There’s a guy named Code Monkey out there on Twitter. The guy is brilliant. The kid is brilliant.” CF, p. 1,151. He then affirmed the accuracy of an indisputably false story about Dominion servers supposedly being “raided” in Germany, stating, “First of all, the raid did happen. It is true. It did not happen by the army, so there are some misnomers on how that exists. But it is absolutely true. And frankly, it is true to the best of my knowledge talking to people within the government environment.” *Id.*

58. In this vein of self-assuredness, Corporon and Oltmann cold called former Republican Secretary of State Wayne Williams. After hearing Oltmann describe some of his theories about vote rigging, Williams responded, “Sir, I’m not sure what your familiarity with Colorado is, but you’re just flat out wrong on that.” CF, p. 1,174; TR (11/29/22), pp. 68:15-70:18.

59. Host Matt Dunn kept up the onslaught on the Salem airwaves the next day, again discussing Dr. Coomer in Oltmann's absence. "Why would this Coomer guy . . . the local guy, the pro-antifa guy. Why would he be vanishing himself? I think they're sitting on something big. The question is, can we get it? Oh let's pray the truth prevails in this, ladies and gentlemen." CF, p. 1,167. In reality, Dr. Coomer was not "vanishing" himself. He had gone into hiding in fear for his life as a result of the tidal wave of death threats that Defendants' lies had provoked. CF, p. 754.

60. Days later, on November 28, Corporon had Michelle Malkin<sup>6</sup> on as a guest, where he again discussed Oltmann's lies about Dr. Coomer. During the interview, Corporon acknowledged his awareness of the death threats that were then being directed at Dr. Coomer and other Dominion employees, but insisted to his audience those true claims were actually lies:

They've cleared out ... They put up a disclaimer that says, 'Well it's because we're under attack, you know, we're being threatened.' It's such a lie. That's what the left does. They try to threaten people out of a position that they don't like.

CF, p. 1,152.

---

<sup>6</sup> Michelle Malkin is a co-defendant with Oltmann in *Coomer v. DJTFP et al*, Case No. 2020CV034319.

61. Just an hour later, Corporon interviewed Matt Crane, former Republican County Clerk for Arapahoe County and current Chair of the Colorado Clerks Association. Unlike either Corporon or Oltmann, Crane actually knows Dr. Coomer. He assured Corporon that the claims Salem was constantly publishing about Dr. Coomer were not credible, and were in fact technically impossible. “I’ve known Eric for a long time,” he said:

I’ve known where he’s at on politics for long time, but I’ve never had any reason in working with him in a professional capacity to doubt his ethics. And not only that. It’s not just that, Randy. To get certified by the Federal Election Assistance Commission, you have to go through a certification process. They look at the code, they look at the hash values, they dig down into those systems looking for anything nefarious.

*Id.*

62. Undeterred by the reliable sources that had provided various bases on which to determine that his claims about Dr. Coomer were false, and apparently unconcerned by his knowledge that Oltmann’s claims relied on fabricated evidence that he himself likely played a role in orchestrating, Corporon tripped down. The next week, on December 5, Corporon started his show by making another false claim about Dr. Coomer, stating, “If you’re doing any homework at all, and it’s just not that hard, to find out that they have tied Chinese money, significant Chinese money

to Dominion. They've tied Eric Coomer and Dominion to George Soros and some of his nefarious projects out there." CF, p. 1,176.

63. Oltmann continued his lengthy attacks on Dr. Coomer, conclusively stating, "Our elections in our country are not safe." CF, p. 1,153. Both men lamented that Dr. Coomer was not enduring even more harassment as a result of their lies, stating:

Oltmann: Everyone should be concerned about the fact this is the man that is one of the largest shareholders of Dominion Voting Systems, holds all the patents, and yet we're not talking about him. Why are they not talking about him, Randy, why?

Corporon: Well, I don't expect anything from the corrupt, coordinated Democrat media machine any more. That's sort of to be expected. What bothers me is that there aren't more Republicans, people in positions of power, people with platforms for influence, pushing out this message.

*Id.*

64. Oltmann also appeared on The George Show, hosted by former Arapahoe County District Attorney George Brauchler. Brauchler started his show by confirming that he knew the story Oltmann would be telling on air, and by reminding the audience Oltmann's company, PIN Business Network, was a paying advertiser on Salem, stating:

We'll finish up with our buddy Joe Oltmann. Joe of course is not only a business sponsor for our great show, but if you've listened to Randy Liberty Esquire Corporon, after me, you know that Joe has been paying

particular attention and really participating, if you will, in trying to figure out what went wrong with this election.

CF, p. 1,166.

65. Oltmann insisted on the factual accuracy of his claims, and assured the audience that they were neither opinion nor hyperbole. He stated, “This isn’t just me, this isn’t just hyperbole. This isn’t me just talking about this. These are documented facts.” CF, p. 1,154. He then leveled a series of outlandish and baseless criminal accusations at Dr. Coomer. Brauchler affirmed Oltmann’s legitimacy for his audience, as evidenced by the following exchange:

Oltmann: My problem is, why isn’t the DOJ, why isn’t the FBI investigating some of these irregularities? Why is it that I can do research on Eric Coomer, who is not just a strategy and security guy, and he’s in our state, I can do research on him and find shadow companies and things that he does overseas, and financial connections to the Soros organization, and very seedy operations and people. How is it that I can find that stuff for the DOJ and the FBI can’t? I find that what we’re up against right now is an establishment that is destroying the integrity of our elections.

Brauchler: Joe, this is such an important topic and such fascinating stuff that you’ve found.

CF, p. 1,155.

66. This entire exchange was completely made up. Oltmann had not “found” any of those things. Former District Attorney Brauchler had aided and abetted another round of his advertiser’s dangerous lies.

67. On December 10, Corporon tweeted a link from his personal Twitter account to a fact check from Dominion Voting Systems, CF, p. 964, again demonstrating his knowledge of the falsity of his claims and his familiarity with reliable sources that had refuted them.

68. Two days later, Salem again published Corporon discussing Dr. Coomer in Oltmann's absence, this time with Republican State Representative Dave Williams. CF, p. 1,155.

69. The following week, on December 19, Salem kept up its relentless campaign, with Corporon hosting Oltmann for yet another lengthy interview attacking Dr. Coomer. Oltmann and Corporon both claimed to welcome the prospect of being sued by Dr. Coomer.<sup>7</sup> "I'm hoping that he actually does legally do something because I would love to have the opportunity to shatter the guy in court," CF, p. 1,155, Oltmann stated. Corporon agreed, stating:

Yeah when I punch lefties in the mouth, figuratively, and then you get the threats coming back, I always just say, "Please, file that lawsuit, because I really look forward to sitting down with that deposition, you know?"

*Id.*

---

<sup>7</sup> Upon getting their wish, both Oltmann and Corporon have spent years in constant efforts to stave off discovery and delay Dr. Coomer's lawsuits by any means necessary.

70. Oltmann then launched into another baseless personal attack on

Dr. Coomer, stating:

As much research as I've done about Eric Coomer, and as many people as I've interviewed from people that are friends with him to people that are in his community that have done work with him, in the Salida community, not one person has said that this person is a decent human being. Not one. Matter of fact, the word that they've used is sociopath, they've used the word that he's insane, and they've used the words that he is literally a disgusting bully. So I don't know anyone that can say that he is a good human being. As many times as I've tried to find somebody that would say something nice about him, even his friends, they can't say anything nice about him other than that hey the guy is brilliant, but he's absolutely insane. This is the guy that has his finger on our elections.

CF, p. 1,156.

71. Dr. Coomer filed suit against Oltmann and fourteen other individuals and entities the next day. His complaint affirmatively denied the false claims against him, provided evidence to refute them, and detailed the relentless campaign of death threats he had been enduring since Oltmann and Corporon embarked on their campaign against him.<sup>8</sup>

72. In late December, Corporon hosted several days straight of programming on KNUS. On December 26, he spoke with a former Colorado legislator who lived in Salida. He again acknowledged his familiarity with the death

---

<sup>8</sup> See *Coomer v. DJTFP et al*, Case No. 2020CV034319.

threats being directed at Dr. Coomer, then denied them. “Speaking of Eric Coomer, who lives in Salida, Colorado, let’s be joined by former Colorado state senator Bruce Cairns.” CF, p. 1,156. Cairns implicitly affirmed the effectiveness of Corporon’s campaign to destroy Dr. Coomer’s reputation, responding, “You just took the wind out of my sails. Eric Coomer lives in Salida?” *Id.* “Yeah, he sure does,” Corporon responded. “Well, he claims he’s in hiding now because of all the right wing threats on his life, because you know, that’s how we roll, right? Not!” *Id.* In reality, Dr. Coomer was in hiding because of all the right wing threats on his life. CF, pp. 750, 754, 758.

73. Over the next several days, Corporon discussed Dr. Coomer’s lawsuit repeatedly and at length. He also repeatedly promoted an article that had just been published by his clients Jim Hoft and The Gateway Pundit, whose title was “WAKE UP AMERICA! Bold Billionaire Offers \$1 Million Bounty for Dominion’s, Eric Coomer’s Comeuppance.” CF, pp. 968-73, 1,157. He stated:

You are going to get a kick out of this story that I’m going to tell you about the way the Gateway Pundit is reacting to getting sued by Dominion executive Dr. Eric Coomer, someone whose ties to Antifa and elsewhere were exposed by me on this radio station, put into an affidavit and sent to the Trump team.

CF, p. 1,157.

74. In another acknowledgement that he knew there was no evidence whatsoever actually tying Dr. Coomer to any act of election fraud, Corporon promoted the Gateway Pundit “bounty” article stating:

Do you want to make a quick million dollars? All you have to do is provide actual, factual information that Dominion Voting Systems flipped votes, and you get a million dollars. I’m not kidding you. This billionaire offers a million-dollar bounty for Dominion’s Eric Coomer.

*Id.*

75. When he was not busy promoting the million dollar bounty for Dr. Coomer’s comeuppance, Corporon took every opportunity to deride Dr. Coomer’s defamation complaint. “I’ve heard Joe Oltmann respond to this lawsuit, and he ain’t scared. Nor should he be. I’ve read this lawsuit now from front to back.” CF, p. 1,182. “I’ve gotta tell you, I’ve gone through this 52-page lawsuit, and I don’t think it stands up.” CF, p. 1,158. “If you’re shivering in your timbers because you’ve been sued by Dr. Eric Coomer, I’d be glad to hear about why.” CF, p. 1,160.

76. Despite his familiarity with Dr. Coomer’s complaint, Corporon persisted in publishing additional lies about Dr. Coomer, falsely claiming that he had a recording of Dr. Coomer “explaining how changing the votes is a feature, not a bug.” *Id.* Discussing the adjudication of ambiguous ballots, which has been a feature of election administration for decades and for which Dr. Coomer had worked

on securing patents for more transparent and auditable technology, CF, pp. 1,054-57, Corporon impliedly accused Dr. Coomer of fraud, stating “The people at these adjudication stations can determine the meaning of the ballot. Well now imagine if that power was placed in the hand of somebody who, oh I don’t know, wanted to influence the outcome of the election.” CF, p. 1,161. When a Republican poll watcher called into Corporon’s show to explain that he was completely misrepresenting the actual process of adjudication, Corporon hung up on her and moved on. CF, p. 1,181. As explained in Dr. Halderman’s Declaration, the prospect of rigging a presidential election through adjudication is inherently implausible. CF, pp. 1,043-57.

77. Corporon also repeatedly reminded his audience of his claimed desire to also be sued, assuring them that “I’m a lawyer, so I’m not afraid of lawsuits. It doesn’t, you know, I don’t have to hire anybody to defend me. And I’d love to be sued by Eric Coomer. I would enjoy that deposition.” CF, p. 1,160. He challenged Dr. Coomer directly on air, stating:

If there’s nothing to hide, Eric Coomer, if there’s nothing to hide, Dominion Voting Machines, then just turn them over. Just show up and actually testify at some of these state legislatures. Don’t file your bogus defamation and civil conspiracy and intentional infliction of emotional distress because you outed me Eric Coomer as an Antifa thug. Don’t play those games.

CF, p. 1,161.

78. Weeks later, Corporon kept up his false confidence, stating, “I’m not fearful of Dominion cases. I’m not fearful of Eric Coomer cases, because discovery is a bitch for the other side.” CF, p. 1,162. In an on-air interview with his client Jim Hoft of the Gateway Pundit a week later, Corporon insisted on the importance of litigation to expose the truth about the 2020 election. He stated:

I’m sorry that people have to get sued, and of course, the big lawsuits, they put these billion dollar numbers on them and just scare the crap out of everybody, but it’s very important that these lawsuits proceed through the courts, that discovery actually happens, and that people be made aware of the challenges ahead for the midterm elections and the next presidential election as well. The courts are going to be the only places that the truth can actually come out, eventually.

CF, p. 1,163.

79. Hoft pretended to agree, stating, “I agree with you 100%, Randy. Excellent point.” *Id.*

80. On this point, Corporon and Hoft were telling the truth. This Court, like the District Court below, should give Defendants their wish and allow discovery to proceed so that “people be made aware of the challenges ahead” and “that the truth can actually come out.”

### **I. Salem’s Role**

81. After the attack on the U.S. Capitol on January 6, 2021, media outlets across the country began acknowledging their role in spreading the lies that had sent

the country into turmoil. Salem's rival, Cumulus Media, for example, sent a memo to all of its on air radio hosts telling them to stop spreading lies that the Election had been rigged. CF, p. 760; TR (11/29/22), pp. 89:18-89:16.

82. On January 14, 2021, Peter Boyles announced his next guest, who was joining him to discuss the Cumulus memo. "Our guest is Phil Boyce, who is my boss, Senior Vice President of Salem." CF, p. 760. Boyles stated, "There's lawsuits coming. We both know it. We've watched what's happened to Fox." CF, p. 760; TR (11/29/22), p. 89:13-14. Boyce was nonchalant. He took responsibility for the content published by Salem, and assured the audience that he took action with his hosts when circumstances warranted, stating:

I don't ever send out a mass email to all my hosts and threaten them with firing. That would be a chilling thing. Can you imagine Dennis Prager or Sebastian Gorka or Charlie Kirk getting a memo like that from me? I don't need to because I am diligent when I hire somebody and give them that microphone. I hire smart people who are normal, who get it, who understand it, and they're not going to go off half-cocked and say something they shouldn't ... And if they do say something wrong, they should be dealt with. I deal with my talent all the time on a one on one basis, not on a mass threatening email.

CF, p. 760; TR (11/29/22), pp. 89:15-90:4.

83. Just two days later, on January 16, 2021, a caller called in to warn Corporon about the lies he was spreading, stating, "But they can still sue, and they can still drag you into court and they can still get their money. And that's what Peter

Boyles is warning you about.” CF, p. 1,162. Corporon responded by expressly citing the comments from Boyce as affirming that he had Salem’s blessing to continue defaming Dr. Coomer with impunity. He stated:

Well that’s true, and I’m glad to hear someone like Phil Boyce ... saying that I trust my hosts to talk about things that they know. For instance, if I talk about Eric Coomer being an Antifa thug, that’s because I’ve seen his social media, or what’s purported to be his social media. If I talk about him being someone who treats the adjudication function of Dominion Voting machines as a feature rather than a bug, that’s because I’ve heard him say it.

*Id.*

84. Months later, in the days after Newsmax, Inc. had settled with Dr. Coomer and issued a public retraction and apology to Dr. Coomer, CF, p. 46, Peter Boyles rightly acknowledged KNUS’s central responsibility for spreading the lies about Dr. Coomer. He stated:

And all of the stuff really is generated here in Colorado. There’s not much outside of Colorado that is not a part of this lawsuit . . . And Dominion’s, head of production and security, I think his name is Eric Coomer ... And he sued Newsmax in December here in Colorado over claims that he took part in an antifa conference call. This has been said so many times on this radio station.

CF, p. 1,165.

85. As the conversation proceeded, both Boyles and his producer discussed the centrality of the Coomer claims to broader election fraud narrative, as well at KNUS’s unique role in spreading those lies to the world:

Producer: And Denver and Colorado is at the center of this.

Boyles: The epicenter.

Producer: Dominion is based in Denver.

Boyles: And a lot of it, as they say, a river runs through it. A river runs through this studio. Right through this studio. I don't know what's going to happen, but I can tell you this much. If these people continue to run the Colorado Republican Party<sup>9</sup> with this mindset, we're beat.

CF, p. 1,166.

86. Minutes later, Boyles continued the theme, stating, "The center of conspiracy theories is all here. A river runs through it. This stuff all generates at this radio station and comes through this radio station . . . A list of people remain, and many of them appear here at this radio station again and again and again." *Id.*

#### **J. Dr. Coomer's injuries and damages**

87. Neither Corporon nor Salem have retracted their publications regarding Dr. Coomer, and they all remain publicly available to this day. *See* CF, pp. 724, 1,442. As noted above though, Salem hosts have acknowledged the constant stream of lies they published for months on end. This recognition, however, did not retract the claims about Dr. Coomer or apologize for the harm they had caused.

---

<sup>9</sup> Corporon is the RNC Committeeman for the State of Colorado.

88. As a direct consequence of Defendants' false statements, Dr. Coomer faced an onslaught of harassment and credible death threats against himself, his family, and his home. CF, pp. 750-51, 767-68. Defendants' conduct has caused Dr. Coomer severe emotional distress, including anxiety and depression for which he has sought medical treatment. CF, p. 767. Defendants' conduct has also destroyed Dr. Coomer's ability to continue working in elections, resulting in lost wages and other harm. CF, pp. 767-68.

### **SUMMARY OF THE ARGUMENT**

89. The Colorado anti-SLAPP statute serves a limited purpose. It is intended to provide a procedural mechanism at the beginning of a case to review and dismiss frivolous litigation. This case is not frivolous, and dismissal is not warranted here. Defendants knowingly or recklessly perpetuated a baseless conspiracy that Dr. Coomer fraudulently elected the president of the United States. Defendants had no credible basis with which to make these accusations; purposefully ignored or avoided credible sources refuting the accusations; and conspired to advance those damaging accusations to undermine the legitimacy of the Election, while promoting their own financial and political ends. These false claims have resulted in devastating consequences for Dr. Coomer, including invasion of his privacy, threats to his security, and defamation of his reputation across the country. Dr. Coomer's

claims are his only chance to redeem his name and reputation. Defendants' efforts to foreclose those claims misstate the bounds of constitutional protections, the purpose and application of the anti-SLAPP statute, and the egregious defamatory conduct at issue.

90. The District Court properly determined that Dr. Coomer had established prima facie evidence in support of his claims. Every court to have reviewed the legal and factual sufficiency of Dr. Coomer's related claims has found the same.<sup>10</sup> Defendants' efforts to overcome the District Court's Order are unsupported. The District Court applied the correct standard of review. When assessing whether Dr. Coomer had established a reasonable likelihood of success on his claims, the District Court properly reviewed the actionable statements at issue and the context in which they were made and determined Defendants had culpably published false statements of fact concerning Dr. Coomer. The District Court reviewed evidence reflecting the recklessness with which Defendants published their

---

<sup>10</sup> See CF, pp. 326-465 (*Coomer v. DJTFP et al.*, No. 2020cv34319 (Denver Dist. Ct. May 13, 2022)), 1,386-413 (*Coomer v. Lindell et al.*, No. 22-cv-01129-NYW-SKC, 2023 WL 2528624 (D. Colo. Mar. 15, 2023)), 1,347-72 (*Coomer v. Make Your Life Epic LLC et al.*, No. 21-cv-03440-WJM-KLM, 2023 WL 2390711 (D. Colo. Mar. 7, 2023)), 1,414-33; see also *People v. Sa'ra*, 117 P.3d 51, 55-56 (Colo. App. 2004) (A court may take judicial notice of the contents of court records in a related proceeding).

statements. It determined the statements and conduct at issue could support claims for defamation, IIED, and civil conspiracy. Dr. Coomer requests this Court affirm the District Court's findings and allow his claims to proceed.

## **ARGUMENT**

### **I. The District Court applied the correct standard of review to competent evidence.**

#### **A. Standard of review and preservation of appeal**

91. Dr. Coomer agrees review of the District Court's denial of Defendants' special motions to dismiss is de novo.<sup>11</sup> *Salazar v. Pub. Tr. Inst.*, 522 P.3d 242, 248 (Colo. App. 2022); *L.S.S. v. S.A.P.*, 523 P.3d 1280, 1285 (Colo. App. 2022); *Creekside Endodontics, LLC v. Sullivan*, 527 P.3d 424, 431 (Colo. App. 2022). Dr. Coomer agrees that Corporon and Salem preserved challenges to the District Court's standard of review as to clear and convincing evidence. However, neither Defendant preserved the issue regarding prima facie review itself; rather, in their anti-SLAPP motions and replies, Defendants merely challenged whether Dr. Coomer made the prima facie showing required to defeat their motions.<sup>12</sup>

---

<sup>11</sup> Given the nature of this review, Dr. Coomer's Answer Brief directs the Court to prima facie evidence in support of all elements of his claims.

<sup>12</sup> CF, pp. 611-12, 617, 645-46, 1,192-93.

**B. Application of Colorado’s anti-SLAPP statute and its corresponding burden of proof**

92. Anti-SLAPP laws serve a limited purpose—to dismiss frivolous claims targeting constitutional rights. These laws were enacted specifically to combat SLAPPs—strategic lawsuits against public participation, which are brought with the intent to chill a person’s exercise of their constitutional rights. *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1160 (Cal. 2019). They provide a procedural mechanism to be invoked in limited circumstances early in a case for the purpose of dismissing meritless claims. *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016) (“The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early state, *meritless* claims arising from protected activity”). However, they do not bar meritorious—or even marginal—claims.

93. Colorado’s newly enacted anti-SLAPP statute is limited to dismissing meritless claims arising from protected activity and, otherwise, expressly requires courts to “protect the rights of persons to file meritorious lawsuits for demonstrable injury.” C.R.S. § 13-20-1101(1)(b). There is limited authority in Colorado construing and applying its terms. Three recent decisions by other divisions of this Court, however, are especially germane: *Creekside*; *L.S.S.*; and *Salazar*. Nonetheless, because the anti-SLAPP statute was modeled on California’s

anti-SLAPP statute, which has nearly identical terms, case law interpreting and applying the California anti-SLAPP statute is persuasive for purposes of interpreting and applying the Colorado anti-SLAPP statute. *L.S.S.*, 523 P.3d at 1285; *see also People v. Weiss*, 133 P.3d 1180, 1187 (Colo. 2006) (“Although not binding as precedent, we may look to decisions of other jurisdictions for persuasive guidance on matters that are of first impression to us.”). As such, Colorado has adopted California’s interpretation that the statute imposes a two-step analysis. *L.S.S.*, 523 P.3d at 1285-86.

94. First, courts must determine whether the statute applies. Under this step, the movant bears the initial burden to show the anti-SLAPP statute applies to a plaintiff’s claims. *Id.* at 1285; *Kieu Hoang v. Phong Minh Tran*, 274 Cal. Rptr. 3d 567, 578 (Cal. Ct. App. 2021). The statute identifies four specific acts that constitute protected activity under the statute, which include: (1) statements “made before a legislative, executive or judicial proceeding or any other official proceeding authorized by law;” (2) statements “made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official proceeding authorized by law;” (3) statements “made in a place open to the public or a public forum in connection with an issue of public interest;” and (4) “[a]ny other conduct or communication in furtherance of the exercise of the

constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” C.R.S. § 13-20-1101(2)(a)(I)-(IV).

95. Second, if the statute applies, then the plaintiff must establish that there is a reasonable likelihood that the plaintiff will prevail on each claim to which the statute applies. C.R.S. § 13-20-1101(3)(a). Given the recency of this statute’s enactment, there remains some conflict between divisions of this Court regarding the plaintiff’s burden of proof. *Compare L.S.S.*, 523 P.3d at 1285-86, *and Creekside*, 527 P.3d at 431, *with Salazar*, 522 P.3d at 248; *see also Tender Care Veterinary Ctr., Inc. v. Lind-Barnett*, 2023 COA 114, ¶ 14 n.2. California’s more developed body of case law offers guidance in resolving this conflict. *L.S.S.*, 523 P.3d at 1286 n.3 (finding “reasonable likelihood” under the Colorado anti-SLAPP statute is synonymous with “reasonable probability” under the California anti-SLAPP statute). In California, courts recognize the plaintiff’s burden of proof is low and requires a plaintiff merely show that a legally sufficient, or prima facie, factual basis exists for his claims. *See, e.g., Baral*, 376 P.3d at 608-09; *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 718 (Cal. 2019) (finding the plaintiff “need not prove her case to the court; the bar sits lower, at a demonstration of ‘minimal merit’”) (citations omitted). In evaluating whether a plaintiff has made a prima facie showing, courts accept the plaintiff’s evidence as true and limit their evaluation of a

“defendant’s showing only to determine if it defeats the plaintiff’s claims as a matter of law.” *Baral*, 376 P.3d at 608-09. Courts do not weigh the evidence or resolve conflicting factual claims. *Id.* This is the applicable standard of review, which was recognized and applied by other divisions of the Court in *L.S.S.* and *Creekside*, and by the District Court.<sup>13</sup> Other states likewise only require a prima facie showing of evidence to defeat dismissal under the anti-SLAPP statute. *See, e.g., In re Lipsky*, 411 S.W.3d 530, 543 (Tex. App.—Fort Worth 2013, no pet.).

96. *Salazar* is inconsistent with this body of case law. There, another division of the Court turned to other procedures—motions to dismiss, motions for summary judgment, and motions for preliminary injunctions—to construct a standard of review. *Salazar*, 522 P.3d at 248 (finding “[w]e neither simply accept the truth of the allegations nor make an ultimate determination of their truth. Instead, ever cognizant that we do not sit as a preliminary jury, we assess whether the allegations and defenses are such that it is reasonably likely that a jury would find for the plaintiff.”). Regardless, even were the *Salazar* standard of review to apply, Dr. Coomer has met his burden of proof. *See infra* ¶¶ 106-113; 128-133; 136-142.

---

<sup>13</sup> This is the standard that has also been accepted in federal district court’s applying Colorado law. *Coomer v. Make Your Life Epic LLC et al.*, 2023 WL 2390711, at \*3.

97. Ordinarily claims with the requisite minimal merit proceed. *L.S.S.*, 523 P.3d at 1288. However, courts take into consideration the applicable burden of proof at trial when determining whether the plaintiff has established a probability of prevailing. *Id.* In the context of a defamation claim based on a statement concerning a public official, public figure, or a matter of public concern, that claim is subject to heightened protection at trial by requiring a plaintiff to prove the elements of falsity and actual malice by clear and convincing evidence. *McIntyre v. Jones*, 194 P.3d 519, 524 (Colo. App. 2008); *see also Broker's Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1110 (10th Cir. 2017). Thus, at this stage of the proceeding, a plaintiff must only establish a reasonable probability that he will be able to produce clear and convincing evidence of falsity and actual malice at trial. *L.S.S.*, 523 P.3d at 1288-89; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Edward v. Ellis*, 287 Cal. Rptr. 3d 467, 474 (Cal. Ct. App. 2021) (the burden of establishing a probability of prevailing in response to an anti-SLAPP motion is not high); *Young v. CBS Broad., Inc.*, 151 Cal. Rptr. 3d 237, 245 (Cal. Ct. App. 2012); *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 868-89 (Cal. Ct. App. 2005).

In its Order denying Defendants' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5), the District Court held that this case arises from a matter of public concern. CF, pp. 555-56. In denying Defendants' subsequent anti-SLAPP Motion

to Dismiss, the Court affirmed that prior holding and held that the anti-SLAPP statute, therefore, applies to this case. CF, pp. 1,419-20.

## **II. Dr. Coomer established a reasonable likelihood of success on his claims for defamation.**

### **A. Standard of review and preservation of appeal**

98. Dr. Coomer agrees Defendants preserved and raised challenges to Dr. Coomer's defamation claims, which are reviewed de novo. *Salazar*, 522 P.3d at 248; *see generally* CF, pp. 606-61. This generally includes review of affirmative defenses preserved on appeal. *See Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 941-42, n.6 (9th Cir. 2013) (considering an affirmative defense in review of an anti-SLAPP motion to dismiss). However, review of a privilege is generally a mixed question of law and fact. *McIntyre*, 194 P.3d at 529. "A mixed question of law and fact involves the application of a legal standard to a particular set of evidentiary facts in resolving a legal issue." *Scott R. Larson, P.C. v. Grinnan*, 488 P.3d 202, 209 (Colo. App. 2017) (citations omitted). This Court reviews questions of law de novo. *People in Interest of A.N-B.*, 440 P.3d 1272, 1277 (Colo. App. 2019). And this Court reviews a district court's factual findings for clear error. *Fresquez v. Trinidad Inn, Inc.*, 521 P.3d 399, 404 (Colo. App. 2022). Under the clear error standard, this Court will not disturb a district court's factual findings unless they find no support in the

record. *Id.*; see also *Woodbridge Condo. Ass’n, Inc. v. Lo Viento Blanco, LLC*, 490 P.3d 598, 606 (Colo. App. 2020).

### **B. Reviewable evidence**

99. Corporon falsely asserts that “only admissible evidence may be presented to prove that Coomer has established clear and convincing evidence that he will prevail on his defamation claim.” Corporon OB, p. 28. This is not accurate. At this stage of the proceeding, evidence merely must be “capable of being admitted at trial, i.e., evidence which is competent, relevant and not barred by a substantive rule.” *Sweetwater Un. High Sch. Dist v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1160-63 (Cal. 2019) (citing *Fashion 21 v. Coal. For Humane Immigrant Rights of L.A.*, 12 Cal. Rptr. 3d 493 (Cal. Ct. App. 2004)); see also *L.S.S.*, 523 P.3d at 1288 (“We conclude that in order to withstand a special motion to dismiss where a showing of actual malice will be required at trial, a plaintiff must establish a probability that they *will be able to produce* clear and convincing evidence of actual malice at trial.”) (Emphasis added).

### **C. Roles of Defendants**

100. As a preliminary matter, it is important to note the logical impossibility, as well as the legal inconsistency, of arguments raised by Salem with respect to their liability in this case. On the one hand, Salem asserts that it cannot be held

responsible for the conduct of any of the numerous individuals named throughout this case<sup>14</sup> whose statements KNUS published for months on end because, allegedly, one of them was an independent contractor.<sup>15</sup> Salem OB, pp. 16-20. Just pages later, however, Salem asserts that, as an entity, it can only be held liable through the actions of individuals, and therefore liability can never attach to the hundreds of defamatory lies they published to the KNUS audience. Salem OB, pp. 21-25. In sum, Salem would have this Court believe that KNUS was completely uninvolved with any of the content that KNUS published for months on end. This is unsupportable. Salem producers necessarily published every statement at issue here. Had they not, no one would have heard them. The Court should not be misled.

101. As the district court rightly noted, even the single contract that Salem disclosed at this very early stage in litigation, before discovery has even commenced, confirmed that Salem had oversight and discretion over the publications of its

---

<sup>14</sup> Salem impliedly faults Dr. Coomer for not yet having access to discovery that would produce some specific names in management that they suggest were omitted. Evidence of Senior Vice President Boyce's comments on the matter, including his acknowledgement that "lawsuits [were] coming," were presented at the anti-SLAPP hearing. *Infra* ¶¶ 81-86. Other Salem producers were also identified by name in the Silverman Declaration. CF, pp. 1,036-37. The prima facie evidence at this juncture suggests that Plaintiff will be capable of identifying further evidence by the time of trial.

<sup>15</sup> The only evidence presented for this proposition is a single contract between Corporon and Salem.

different hosts. CF, pp. 1,427-28. In relevant part, Corporon's contract expressly states his "creative control" is "subject to the reasonable approval of the General Manager and the General Manager's designee and compliance with applicable law." CF, p. 664. This contract of course has no bearing on the relationship between Salem and any of the other hosts that published content defaming Dr. Coomer, such as Boyles, Brauchler, Flora, and potentially others. The contractual basis on which those publications are similarly subject to Salem's approval was never argued or disclosed to the district court.

102. Salem principally argues that it cannot be held liable for intentional torts of independent contractors "unless they are committed with the intent of furthering the employer's business." Salem OB at p. 18 (*citing Moses v. Diocese of Colo.*, 863 P.2d 310, 329 n.27 (Colo. 1993)). But here, they were. As discussed above, and as confirmed by the Declaration of Craig Silverman, CF, pp. 1,032-37, Salem can and does regularly exercise that discretion to dictate the content it publishes, and it does so to cater to the specific tastes of its audience. The Silverman Declaration, which names Salem producers Brian Taylor and Kelly Michaels as two individuals who exercise that discretion, further demonstrates that Salem producers are listening to their hosts' productions in real time, are familiar with their content, and take the substance of their publications into account when determining whether

to allow publication of certain topics to proceed. CF, pp. 1,036-37. Silverman, who was also an independent contractor, was pulled off the air *in the middle of his show* when he said something that Salem producers did not approve of. *Id.*

103. Salem cannot publicly present itself as “conservative talk radio” and simultaneously deny that its business model includes the publication of content that its listeners want to hear. Then, as now, content that promoted lies about the Election was extremely popular and profitable. Moreover, Oltmann’s business was *itself* a paying advertiser on Salem. CF, pp. 39, 757. There is a straight line from promotion of his lies to Salem’s bottom line. And, as discussed above, Corporon at least publicly stated that he understood Salem management had *expressly authorized* him to defame Dr. Coomer. At this early stage, before any discovery has even occurred, this prima facie evidence is sufficient to suggest that Dr. Coomer will be able to produce clear and convincing evidence of Salem’s liability at trial.

104. Fox News made a similarly cynical effort to outsource responsibility for its publication of election lies to third parties like Sidney Powell and Mike Lindell, or to its own hosts such as Maria Bartiromo and Lou Dobbs. The Court in that proceeding denied that Motion to Dismiss, and this Court should affirm the same result here. *See generally, U.S. Dominion, Inc. et. al. v. Fox News Network, LLC,*

Case No. N21C-03-257, Order Denying Defendants’ Motion to Dismiss (Sup. Ct. Del. Dec. 16, 2021).

**D. Prima facie evidence of defamation**

105. To prevail on a claim for defamation, a plaintiff must prove: (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.” *Williams v. Dist. Ct., Second Judicial Dist., City & Cnty. of Denver*, 866 P.2d 908, 911 n.4 (Colo. 1993). Again, when a claim involves a matter of public concern, a plaintiff is additionally required to prove falsity and actual malice. *McIntyre*, 194 P.3d at 524; *see also Broker’s Choice of Am., Inc.*, 861 F.3d at 1110 (recognizing truth is strictly a defense unless the plaintiff is a public official, figure, or matter of public concern where heightened constitutional protections apply).

106. As to the first element, Dr. Coomer proffered prima facie evidence that Defendants made defamatory, false statements of fact concerning Dr. Coomer. They also repeatedly hosted Oltmann on their programs to make the same statements. These statements include allegations that “Eric” the “the Dominion guy” participated in an Antifa call; said he made “f-ing sure” that “Trump is not gonna win [the

presidential election];” and that he was in fact “controlling the elections.” *See, e.g.,* CF, pp. 1,140-41. There is no dispute that these statements were made about Dr. Coomer, who was expressly identified numerous times. *See, e.g.,* CF, pp. 1,140-41.

107. For a statement to be actionable as defamatory, it must at least express or imply a verifiably false fact about the plaintiff. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990); *Burns v. McGraw-Hill Broad. Co., Inc.*, 659 P.2d 1351, 1360 (Colo. 1983). Statements of opinion can also be actionable if they imply provably false facts or rely upon stated facts that are provably false. *Milkovich*, 497 U.S. at 20. In deciding whether a statement expressed or implied a false statement of fact, courts consider the entire statement, the context in which it was made, and whether a reasonable person would conclude that the statements at issue expressed or implied a false fact. *Burns*, 659 P.2d at 1360. The reasonable person standard does not require that a majority of the community consider the statement defamatory, but, instead, a substantial and respectable minority of the community. *Keohane v. Stewart*, 882 P.2d 1293, 1299 n.9 (Colo. 1994).

108. In reviewing the entire statements and the context in which they were made, Defendants alleged that Dr. Coomer participated in an Antifa call, stated on that call that he intended to subvert the presidential election, and then that he did in

fact subvert the presidential election. *See generally* CF, pp. 1,138-42, 1,148, 1,150-63. As the District Court recognized, these are verifiable facts. Dr. Coomer either participated in the call or he did not; he either made the statement or he did not; and he either committed election fraud or he did not. Dr. Coomer has unequivocally declared that these statements are false. CF, pp. 749-50. That declaration is direct, testimonial evidence from a witness with personal knowledge. For purposes of the anti-SLAPP statute, Dr. Coomer's evidence is accepted as true. *L.S.S.*, 523 P.3d at 1286. Even were this evidence weighed, no competent evidence controverts it. The only evidence Defendants have proffered in support of their allegations against Dr. Coomer is Oltmann's uncorroborated testimony. Yet, Oltmann had no personal knowledge of Dr. Coomer that would allow Oltmann to identify him on the alleged Antifa call; no personal knowledge of any election fraud committed by Dr. Coomer; and no expertise with which to form the allegations made. CF, pp. 1,003-09. Moreover, Oltmann has acknowledged that the anonymous "Eric" on the call was only identified by another anonymous speaker who he cannot identify or verify. CF, pp. 912-31, 1,010-14. Oltmann is not a competent witness, and his testimony is rank speculation. *See* C.R.E. 104(a), 602, 701, 702. While Oltmann claims to believe his allegations, his subjective beliefs alone are not evidence. Similarly, any inferences—which must be made in

Dr. Coomer's favor—must be based on provable facts, which Defendants never presented. There is no other alleged witness and there is no other competent evidence that supports Oltmann's allegations against Dr. Coomer.

109. As to the second element, there is no dispute that there is prima facie evidence that Defendants published the defamatory statements against Dr. Coomer to third parties. These publications were made across numerous media platforms including radio broadcasts and social media posts.

110. As to the third element, there is prima facie evidence that Defendants published their defamatory statements with actual malice. *Quigley v. Rosenthal*, 43 F. Supp. 1163, 1180 (D. Colo. 1999), *aff'd in part, rev'd in part*, 327 F.3d 1044 (10th Cir. 2003) (“Failure to investigate obvious sources of refutation or corroboration of statements, especially when there is no time-pressure on their publication, may indicate not only negligence, but the higher standard of actual malice.”). Actual malice “requires at a minimum that the statements were made with reckless disregard for the truth.” *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989); *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1110-11 (Colo. 1982). To prove actual malice, “the plaintiff must demonstrate that the defendant in fact entertained serious doubts as to the truth of the statement . . . or acted with a high degree of awareness of its probable falsity.” *Lewis v. McGraw-*

*Hill Broad. Co., Inc.*, 832 P.2d 1118, 1122-23 (Colo. App. 1992). Reckless disregard “cannot be fully encompassed in one infallible definition” and is not limited to specific bases. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). Instead, actual malice can be inferred from objective circumstantial evidence, which can override a defendant’s protestations of good faith. *Brown v. Petrolite Corp.*, 965 F.2d 38, 46-47 (5th Cir. 1992). Circumstantial evidence of actual malice can include when a story is fabricated by a defendant or is the product of his imagination<sup>16</sup>; when a defendant relies on anonymous sources<sup>17</sup>; when a defendant has reason to know that a source is unreliable<sup>18</sup>; when the allegations made are so inherently improbable that only a reckless person would publish them<sup>19</sup>; when a

---

<sup>16</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968).

<sup>17</sup> *Id.*; *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 872 (W.D. Va. 2016).

<sup>18</sup> *St. Amant*, 390 U.S. at 732; *Celle v. Filipino Rep. Enters., Inc.*, 209 F.3d 163, 190 (2d Cir. 2000); *Wells v. Liddy*, 186 F.3d 505, 542–43 (4th Cir. 1999); *Zimmerman v. Al Jazeera Am., LLC*, 246 F. Supp. 3d 257, 283 (D.D.C. 2017); *Jankovic v. Int’l Crisis Grp.*, 822 F.3d 576, 590 (D.C. Cir. 2016).

<sup>19</sup> *St. Amant*, 390 U.S. at 732; *Spacecon Specialty Contractors, LLC v. Bensinger*, 782 F. Supp. 2d 1194, 1201 (D. Colo. 2011), *aff’d sub nom. Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028 (10th Cir. 2013); *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 46 (D.D.C. 2002), *aff’d.*, 350 F.3d 1272 (D.C. Cir. 2003).

defendant intentionally avoids the truth<sup>20</sup>; when a defendant's allegations conform to a preconceived storyline<sup>21</sup>; and when a defendant has an incentive or motive to make the defamatory statements.<sup>22</sup> All of these bases are present here.

111. The United States Supreme Court analyzed evidence sufficient to establish actual malice in *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967). There, the court analyzed a case involving allegations that the athletic director for the University of Georgia conspired to rig the football game with the University of Alabama. *Id.* at 135-36. These allegations were based on a witness to an alleged telephone conversation between the athletic director for Georgia and the coach for Alabama that outlined Georgia's offensive plays and how Georgia planned to defend in advance of the game. *Id.* at 136. While the allegations necessitated an investigation given the seriousness of the charges and injury that would result, the publisher relied solely on an affidavit from the witness to the alleged call and conducted no additional investigation. *Id.* at 157-58. The publisher did not review

---

<sup>20</sup> *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 693 (1989); *Kuhn v. Trib.-Republican Pub. Co.*, 637 P.2d 315, 319 (Colo. 1981); *Burns v. McGraw-Hill Broad. Co., Inc.*, 659 P.2d 1351, 1361 (Colo. 1983).

<sup>21</sup> *Harris v. City of Seattle*, 152 Fed. App'x 565, 568 (9th Cir. 2005); *Gilmore v. Jones*, 370 F. Supp. 3d 630, 674-75 (W.D. Va. 2019); *Eramo*, 209 F. Supp. at 872.

<sup>22</sup> *See Brown v. Petrolite Corp.*, 965 F.2d 38, 47 (5th Cir. 1992).

the witness's alleged notes of the call; interview other witnesses allegedly present when the call occurred; review the game itself to see if the allegations were accurate; or determine whether Alabama adjusted its plans based on the alleged call. *Id.* It neither assigned nor consulted a football expert to assess the allegations. *Id.* There was evidence the publisher was motivated to publish the allegations as part of a policy intended to change its image, and it assigned writers to assist on the story that were separately involved in another libel action involving the Alabama football coach. *Id.* Further, no subsequent investigation was made after the athletic coach informed the publisher that the allegations were untrue. *Id.* at 169-170. The United States Supreme Court found this evidence sufficient to establish actual malice as the publisher recklessly disregarded the truth. *Id.* Subsequent decisions have upheld the court's analysis. *St. Amant*, 390 U.S. at 732; *see also Harte-Hanks Comm'ns Inc.*, 491 U.S. at 692-93.

112. The facts at issue in *Curtis* are also analogous to the facts at issue here. As in *Curtis*, the allegations of fraud in this case are premised on a purported witness to a call. CF, pp. 787-89, 1,004-06. Similarly, here there is reason to question the reliability of the witness. Oltmann had no personal knowledge of the allegations made against Dr. Coomer. CF, pp. 747-50, 1,003-09. Oltmann did not know Dr. Coomer. CF, p. 747-50. Instead, Oltmann premised his allegations against

Dr. Coomer on unknown and unverified speakers on an alleged phone call. CF, pp. 912-31, 1,010-14. Oltmann identified no expertise or reliable means with which he subsequently identified the speakers on the alleged call. CF, pp. 1,004-08. Oltmann identified no expertise in election systems or evidence to support his allegations against Dr. Coomer. CF, pp. 1,004, 1,046-52. There is prima facie evidence that Oltmann fabricated his allegations. *See* CF, pp. 901-07, 953, 1,048-49, 1,147. Further, like *Curtis*, the allegations here necessitated an investigation and corroborating evidence given the seriousness of the charges. CF, pp. 787-89, 1,004-06. Yet, neither Oltmann nor any of the Salem hosts that promoted his claims obtained witnesses or evidence in support of their allegations or consulted with experts on election systems to confirm their allegations. *See* CF, pp. 1,159, 1,170; EX Hearing, p. 479. Instead, they disregarded credible sources of information that refuted their allegations, including statements by CISA and former U.S. Attorney General Barr that there was no evidence of widespread fraud, as well as statements by Wayne Williams and Matt Crane that Oltmann's allegations were not plausible. CF, pp. 10-12, 1,174-75. There is prima facie evidence that the allegations against Dr. Coomer were inherently improbable considering the lack of evidence supporting Oltmann's claims, the extensive evidence disproving all claims of election fraud, and the implausible nature of the

allegations against Dr. Coomer, particularly with respect to the adjudication function of Dominion technology. *See generally* CF, pp. 743-46, 1,039-62. The allegations against Dr. Coomer conformed to a preconceived storyline of fraud that Corporon, Oltmann, and Salem advanced leading up and after the Election. *See generally* CF, pp. 747-63. Further, there is evidence that Salem had political and financial incentive to defame Dr. Coomer, both to support Trump and to gain favor with a paying advertiser. CF, pp. 39, 757, 1,032-37. This evidence is sufficient to support a finding of actual malice. *Curtis*, 388 U.S. at 157-58; *see also Burns*, 659 P.2d at 1361-62; *Kuhn v. Trib.-Republican Publ'g Co.*, 637 P.2d 315, 319 (Colo. 1981).

113. As to the fourth element, the publications are actionable irrespective of special damages. “If a libelous communication is defamatory per se, damage is presumed, and a plaintiff need not plead special damages.” *Gordon v. Boyles*, 99 P.3d 75, 79 (Colo. App. 2004). A statement is defamatory per se if the defamatory meaning is apparent from its face. *Id.* Statements that impute a criminal offense or a matter incompatible with the individual’s business, trade, profession, or office are defamatory on their face. *Id.* Whether a statement is defamatory is a question of law. *Id.* Here, Defendants published statements that alleged Dr. Coomer fraudulently elected the president of the United States by compromising election voting systems. *See generally* CF, pp. 1,138-83. These statements imputed a

criminal offense. Further, given that Dr. Coomer was employed as the Director of Product Strategy and Security for a company that provided voting equipment and support services to states across the United States, the statements also imputed a matter incompatible with Dr. Coomer's profession. *Id.* As such, the statements are defamatory per se, and Dr. Coomer is not required to prove special damages. However, even were special damages to apply, there is prima facie evidence that Dr. Coomer has suffered serious emotional distress, pecuniary loss, and other damages that were caused by the defamatory statements. CF, pp. 767-68.

114. For the foregoing reasons, Dr. Coomer established a reasonable likelihood that he will prevail on his claims for defamation against Defendants.

**E. Protestations of good faith are insufficient**

115. Neither Corporon nor Salem actually argue that the lies they published about Dr. Coomer partaking in an Antifa call, claiming on that call to have rigged the Election, and actually rigging the Election are true. Nor could they. These claims are unequivocally false and there has never been any evidence to support them. While acknowledging that the actual malice standard expressly encompasses "reckless disregard for the truth" in addition to "knowledge of falsity," both

Defendants overlook the former in favor of the latter.<sup>23</sup> As a result, both insist that they are insulated from liability because, they claim, they did not know that their statements were false at the time of their publications. The law does not recognize this defense in the manner Defendants argue it does.

116. Actual malice can be inferred from objective circumstantial evidence, which can override a defendant's protestations of good faith. *See Brown v. Petrolite Corp.*, 965 F.2d 38, 46-47 (5th Cir. 1992). "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors' actions we try to understand their motives." *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1087 (9th Cir. 2002) (*quoting Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997)).

117. The rationale behind allowing a jury to assess actual malice through the lens of circumstantial evidence is well grounded. If Defendants could simply hide behind their willingness to blindly believe anything at all as long as it conformed to

---

<sup>23</sup> Corporon erroneously claims that counsel for Dr. Coomer "admitted" that Corporon "actually believed" the statements to be true." Corporon OB p.16 (citing Tr. 11/29/22, 81:14-19). Reference to the record disproves this assertion. Counsel stated that Corporon's statements "suggest[ed] that he really believes the claims are true." Context shows this statement was to demonstrate that Corporon was presenting what purported to be facts, not opinions.

their preconceived narratives, then the law would reward willful ignorance and insulate the most reckless publishers from accountability. Instead, Courts have identified a number of factors that evidence reckless disregard for the truth as being sufficient to satisfy an actual malice inquiry.

#### **F. Fair Report Privilege**

118. Corporon relies heavily on his assertion of the fair report privilege. Corporon OB, 17-18. This reliance is misplaced. “[U]nder the common law doctrine of fair report, reports of in-court proceedings containing defamatory material are privileged if they are fair and substantially correct, or are substantially accurate accounts of what took place.” *Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 964 (Colo. App. 2000). However, the doctrine may not protect statements “beyond” the allegations in a complaint, or statements about allegations in a complaint being true and asserted as matter of fact. *Quigley v. Rosenthal*, 327 F.3d 1044, 1062 (10th Cir. 2003).

119. In reciting the few instances where claims about Dr. Coomer were ever raised in a judicial proceeding, Corporon’s use of the passive voice is telling. When he describes lawsuits that “were filed” in Michigan, Georgia, Wisconsin, and Arizona, he is referring to lawsuits *that Sidney Powell filed*. No other lawsuit in the country, despite more than sixty lawsuits challenging the Election results, ever

mentioned Dr. Coomer. The Court that heard the case Powell filed in Michigan, *King v. Whitmer*, described it as “a historic and profound abuse of the judicial process,” and went on to refer Powell for disbarment. CF, p. 14. The Sixth Circuit Court of Appeals later affirmed more than \$152,000 in sanctions against Powell.

120. As even Corporon admits, those lawsuits were all filed weeks *after* Salem had already published dozens of defamatory statements about Dr. Coomer.<sup>24</sup> Reference to those complaints further undermines the defense. Powell falsely claimed, for example, that Dr. Coomer stated, “Don’t worry Trump won’t win the election, we fixed that.”<sup>25</sup> She also claimed that Dr. Coomer had made “twitter posts with violence threatened against President Trump.” Neither Corporon nor Oltmann (nor anyone else at Salem) ever made these claims. As a result, the publications at issue here do not constitute a “substantially accurate account” of those legal pleadings. Furthermore, Colorado courts “consistently adhere[] to the original Restatement rule which precludes a defamation defendant from invoking the judicial

---

<sup>24</sup> The Michigan and Georgia cases were filed on November 25, 2020, whereas the subsequent Wisconsin and Arizona cases were filed on December 1, 2020. The Complaint describes numerous defamatory statements published on November 14, 15, 17, 18, 20, and 21.

<sup>25</sup> See, e.g., *King v. Whitmer*, Case No. 2:20-cv-13134 (Dist. Ct. Mich.), Complaint for Declaratory, Emergency, and Permanent Injunctive Relief (Nov. 25, 2020) at ¶ 153.

proceedings privilege on the basis of a filed complaint alone.” *Quigley v. Rosenthal*, 327 F.3d at 1062 (citing RESTATEMENT (SECOND) OF TORTS § 611).

121. Just as importantly, the publications at issue here went far beyond anything Powell claimed in her lawsuits. She never asserted, for example, that Dr. Coomer was a “major shareholder” of Dominion, that he had “financial connections to the Soros organization,” that he was “frankly sociopathic,” or that “not one person has said that this person is a decent human being.” And, as discussed, Defendants presented those claims as statements of fact, *not* as allegations.

122. In any case, the only reason Sidney Powell mentioned Dr. Coomer at all is because of the series of knowing falsehoods and fabricated evidence that Corporon and Jenna Ellis assisted Oltmann in compiling. “Those charged with defamation cannot, by their own conduct, create their own defense.” *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).<sup>26</sup>

---

<sup>26</sup> For her part, Ellis went on to stipulate to discipline under C.R.C.P. 242.19(c), where she admitted that she had made a “misrepresentation” when on November 20, 2020, she stated, “We have affidavits from witness, we have voter intimidation, we have ballots that were manipulated, we have all kinds of statistics that show that this was a coordinated effort of all of these states to transfer votes either from Trump to Biden, to manipulate the ballots, to count them in secret.” CF, pp. 1,373-82.

**G. Defendants knew what they were going to publish**

123. Both Defendants cite to *Adams v. Frontier Broad. Co.*, 555 P.2d 556 (Wyo. 1976), for the proposition that statements made on a live radio show are not actionable. In *Adams*, the Court addressed the case of an anonymous caller to a live radio show who read a statement that allegedly defamed the plaintiff. The Court noted that, “The standard of actual malice assumes in both of its aspects (publication with actual knowledge of falsity and while entertaining doubts as to the truth) an opportunity on the part of the publisher to form some conclusion as to falsity or doubts as to truth.” *Id.* at 564.

124. This case is readily distinguishable. Oltmann was not some anonymous one-time caller. He was a repeat, in studio guest, who was invited on KNUS multiple times for the express purpose of repeating his claims about Dr. Coomer. Salem hosts repeatedly acknowledged they were familiar with the substance of his claims before they invited him on air. These hosts also repeated the lies themselves. Salem therefore had many weeks of “opportunity ... to form some conclusion as to falsity or doubts as to truth.”

**III. Dr. Coomer established a reasonable likelihood of success on his claims for intentional infliction of emotional distress.**

**A. Standard of review and preservation of appeal**

125. Dr. Coomer agrees review of the District Court's denial of Defendants' special motions to dismiss his IIED claims is de novo. *Salazar*, 522 P.3d at 248. Further, Dr. Coomer agrees Defendants preserved challenges to Dr. Coomer's IIED claims, at least to the extent they are based on the underlying defamation. *See* CF, pp. 629, 659-60.

**B. Prima facie evidence of intentional infliction of emotional distress**

126. To prevail on an IIED claim, a plaintiff must prove the defendant: (1) engaged in extreme and outrageous conduct; (2) acted recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) caused the plaintiff severe emotional distress. *Mackall v. JPMorgan Chase Bank, N.A.*, 356 P.3d 946, 955 (Colo. App. 2014) (citing *Archer v. Farmer Bros. Co.*, 70 P.3d 495, 499 (Colo. App. 2002), *aff'd*, 90 P.3d 228 (Colo. 2004)). Further, IIED claims premised on defamatory publications are subject to the same constitutional protections for public speech as applied to claims for defamation. *See Hustler Magazine, Inc. v. Falwell*,

485 U.S. 46, 50-52 (1988). As such, a plaintiff must also prove falsity and actual malice when the claims at issue involve a matter of public concern. *See id.*

127. Defendants' challenges to Dr. Coomer's IIED claims focus primarily on the actual malice issues addressed above in the defamation section. Dr. Coomer presents the analysis for both Defendants together for this claim because the general facts and circumstances are similar for each.

128. As to the first element, Dr. Coomer proffered prima facie evidence that Defendants engaged in extreme and outrageous conduct. Extreme and 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!'" *Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957, 963 (Colo. App. 2009). Courts have found allegations of extreme and outrageous conduct sufficient when the statements at issue defame, denigrate, harass, or threaten the plaintiff. *See, e.g., Han Ye Lee*, 222 P.3d at 963-65 (finding a newspaper's unverified statements that a wife failed to testify in her husband's murder trial outrageous); *Meiter v. Cavanaugh*, 580 P.2d 399, 401 (Colo. App. 1978) (finding a tenant's statements suggesting a special influence in judicial proceedings and mocking a landlord's serious physical condition outrageous); *Montoya v. Bebensee*, 761 P.2d 285, 286-90 (Colo App. 1988) (finding alleged bad faith reports of child

abuse by an unlicensed mental health provider outrageous); *Ellis v. Buckley*, 790 P.2d 875, 877 (Colo. App. 1990) (finding accusations of theft against an employee with no evidence outrageous); *Rugg v. McCarty*, 476 P.2d 753, 754-56 (Colo. 1970) (finding requests for payment and threats to garnish wages without a judgment outrageous); *Donaldson v. Am. Banco Corp. Inc.*, 945 F. Supp. 1456, 1465-66 (D. Colo. 1996) (finding derogatory comments by a supervisor to pregnant employees outrageous); *Mass v. Martin Marietta Corp.*, 805 F. Supp. 1530, 1543-44 (D. Colo. 1992) (finding racial slurs in an employment setting outrageous). Such a finding is not necessarily predicated on a pattern of conduct.

129. This is best illustrated in *Han Ye Lee*. There, a plaintiff sued a newspaper for causing her severe emotional distress with a defamatory newspaper article that falsely reported that she declined to testify in her husband's murder trial. *Han Ye Lee*, 222 P.3d at 964. The article implied that the plaintiff was disloyal to her husband and impugned her integrity. *Id.* Further, the evidence established that the defendants published the article recklessly and without verifying the information. *Id.* The court in *Han Ye Lee* explained that a reasonable jury could find such defamatory statements by a newspaper article were extreme and outrageous. *Id.*

130. Like *Han Ye Lee*, Defendants have impugned Dr. Coomer's integrity and reputation by alleging Dr. Coomer conspired to defraud the American public from democratically electing their next president. It is difficult to comprehend statements more extreme and more damaging than the ones the Defendants have made regarding Dr. Coomer, especially given the fact that Dr. Coomer's professional career was in election services. There is evidence Defendants repeatedly, without evidence, falsely accused Dr. Coomer of overturning the presidential election. *See generally* CF, pp. 1,138-83. These allegations, *inter alia*, imputed criminal conduct, accused Dr. Coomer of being mentally ill, a sociopath, and claimed that "not one person has said that this person is a decent human being." *See* CF, pp. 1,138-58. Further, there is evidence that Defendants' allegations incited threats of real violence against Dr. Coomer by, *inter alia*, disclosing his likely presence in the small town of Salida, demanding he be held accountable, and promoting a million dollar "bounty" for his "comeuppance." *See* CF, pp. 750-51, 932-33, 944-45, 968-73. This is sufficient to establish a prima facie showing that the Defendants' defamatory statements were extreme and outrageous.

131. As to the second element, there is prima facie evidence that Defendants acted recklessly and with the intent to cause Dr. Coomer severe emotional distress. CF, pp. 767-68. Intent exists when a defendant engages in conduct with the purpose

of causing severe emotional distress to another person or knows that his conduct is certain or substantially certain to have that result. *Culpepper v. Pearl St. Bldg. Inc.*, 877 P.2d 877, 882-83 (Colo. 1994). Recklessness exists when, at the time of the conduct, a defendant knew or reasonably should have known that there was a substantial probability that his conduct would cause another severe emotional distress. *Id.* Given the nature and scope of Defendants' defamation, there is prima facie evidence they knew or should have known there was a substantial probability that their conduct would cause Dr. Coomer severe emotional distress. *See* CF, pp. 1,138-83. In fact, Defendants repeatedly published statements acknowledging the death threats directed at Dr. Coomer, and that he had been forced into hiding. CF, pp. 960, 1,152, 1,155-57, 1,161. Rather than temper or cease their relentless lies about him, however, they doubled down and insisted to their audience that Dr. Coomer was making it all up. *Id.*

132. As to the third element, there is prima facie evidence that Dr. Coomer has suffered severe emotional distress, including anxiety and depression, for which he has sought medical treatment, and he has experienced lost wages and other negative harm from the severe emotional distress caused by Defendants' statements. CF, pp. 767-68; *see also Paulson v. State Farm Mut. Auto. Ins. Co.*, 867 F. Supp. 911, 919 (C.D. Cal. 1994) (noting that, in order to establish severe emotional

distress, the plaintiff must “prove that he suffered objective symptoms of distress.”). Because Dr. Coomer has suffered objective and verifiable symptoms of distress, he has made a prima facie showing for this element.

133. For the foregoing reasons, Dr. Coomer established a reasonable likelihood that he will prevail on his claims for IIED against all Defendants.

**IV. Dr. Coomer established a reasonable likelihood of success on his claims for conspiracy.**

**A. Standard of review and preservation of appeal**

134. Dr. Coomer agrees review of the District Court’s denial of Defendants’ special motions to dismiss his conspiracy claims is de novo. *Salazar*, 522 P.3d at 248. Further, Dr. Coomer agrees Defendants preserved challenges to Dr. Coomer’s claims, at least to the extent they are based on the underlying defamation. CF, pp. 629, 650.

**B. Prima facie evidence of conspiracy**

135. To prevail on a claim for civil conspiracy, a plaintiff must prove five elements: “(1) two or more persons, and for this purpose a corporation is a person; (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 based on underlying unlawful conduct. *See Colo.*

*Cnty. Bank v. Hoffman*, 338 P.3d 390, 397 (Colo. 2013). Here, Dr. Coomer has premised his conspiracy claims on his claims for defamation and intentional infliction of emotional distress.

136. Defendants' challenges to Dr. Coomer's civil conspiracy claims are primarily limited to the actual malice issues addressed above and the evidence of an agreement between the Defendants. Dr. Coomer presents the analysis for both Defendants together for this claim because the general facts and circumstances are similar for each.

137. As to the first three elements, Dr. Coomer proffered prima facie evidence that the Defendants agreed with each other, by words and conduct, to defame Dr. Coomer.<sup>27</sup> These were all agreements between two or more persons. The object to be accomplished was to undermine the legitimacy of the Election by defaming and intentionally inflicting emotional distress on Dr. Coomer. There is prima facie evidence of a meeting of the minds on this object and the respective course of action. These agreements extended to both Defendants in this case.<sup>28</sup>

138. Dr. Coomer does not need to prove express agreement to establish conspiracy. *See Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1326-27

---

<sup>27</sup> CF, pp. 747-63, 907, 994, 1,032-37, 1,138-83; EX Hearing, pp. 28-30, 477-79.

<sup>28</sup> *Id.*

(Colo. App. 1992). Rather, conspiracy may be implied by course of conduct or other circumstantial evidence providing some indicia of agreement. *Id.* at 1327; *Ferraro v. Convercent, Inc.*, No. 17-CV-00781-RBJ, 2017 WL 4697499, at \*5 (D. Colo. Oct. 19, 2017). Indeed, because few, if any, “smoking guns” are ever discovered, most conspiracy claims are established by circumstantial evidence. *See Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 669 (D. Colo. 2008) (“Circumstantial evidence is not only permissible in determining whether there is illicit conduct or agreement, it is indeed the usual and customary basis for doing so. Direct evidence is seldom available, and few so called ‘smoking guns’ are ever discovered. What individuals actually do—and perhaps more significantly what they do not do—is more probative.”). As such, an agreement to conspire may “be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.” *Wyatt v. Union Mortg. Co.*, 598 P.2d 45, 52 (Cal. 1979). “Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator.” *Id.*

139. Under this legal framework, the Court may conclude that Dr. Coomer has made a prima facie showing that Defendants conspired with each other in this case. CF, pp. 962, 1,139; EX Hearing, pp. 28-30, 478. As stated above, this conspiracy is unique among conspiracies in that the agreement to delegitimize the

results of the Election in the event former president Trump lost were overtly public. *See generally*, CF, pp. 747-63. Allegations questioning the legitimacy of the Election occurred both prior to and after the Election and were led by former president Trump, his campaign, and his supporters. *See, e.g.*, CF, pp. 747-63. There is evidence that the Defendants were not only aware of, but participated in these efforts, advancing various allegations of fraud, which included allegations that Dr. Coomer subverted the Election. CF, pp. 962, 1,139; EX Hearing, pp. 28-30, 478.

140. As to the fourth element, there is prima facie evidence that Defendants did defame and intentionally inflict emotional distress on Dr. Coomer, which are unlawful tortious acts. *See generally* CF, pp. 1,138-83; *see also Resol. Tr. Corp. v. Heiserman*, 898 P.2d 1049, 1054-55 (Colo. 1995).

141. As to the fifth element, there is prima facie evidence that Dr. Coomer has suffered severe emotional distress caused by the Defendants' defamation and intentional infliction of emotional distress. *See* CF, pp. 767-68; *see also Paulson*, 867 F. Supp. at 919. Because Dr. Coomer has suffered objective and verifiable symptoms of distress, he has made a prima facie showing for this element.

142. For the foregoing reasons, Dr. Coomer established a reasonable likelihood that he will prevail on his claims for conspiracy against Defendants.

## CONCLUSION

The primary issue before this Court is whether Dr. Coomer's claims have sufficient merit to proceed. The District Court recognized that Dr. Coomer had met this burden. Dr. Coomer requests this Court affirm that ruling. These claims are the only real means with which Dr. Coomer has to redeem his reputation and advance the truth. As discussed above, this appeal is simply another frivolous, dilatory effort to keep the truth concealed at all costs. Dr. Coomer prays this Court affirm the Order of the District Court in full, and for any other and further relief to which he may be justly entitled.

Respectfully submitted this 10th day of January 2024.

*/s/ Charles J. Cain*

---

Charles J. Cain, No. 51020  
**COUNSEL FOR APPELLEE**  
**ERIC COOMER, Ph.D.**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief has been served on all parties receiving notice through ICCES on this 10th day of January 2024.

*/s/ Charles J. Cain*

---

Charles J. Cain, No. 51020