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<p>District Court, City and County of Denver, Colorado The Hon. Marie Avery Moses Case Number: 2020CV34319</p>	
<p>ERIC COOMER, Ph.D. Plaintiff/Appellee, v. RUDOLPH GIULIANI, Defendant/Appellant.</p>	<p>Court of Appeals Case No.: 2022CA843</p>
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<p>OPENING BRIEF</p>	

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I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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X For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Geoffrey N. Blue
Geoffrey N. Blue

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QUESTION PRESENTED

Did the trial court err when it denied Giuliani's Special Motion to Dismiss?

STATEMENT OF THE CASE

I. Introduction.

Rudy Giuliani spoke at a press conference during which he and other attorneys laid out the litigation plan for the Trump Campaign as it challenged the 2020 presidential election (the "Election"). As part of his remarks, he repeated a statement made by Joseph Oltmann ("Oltmann"), that Eric Coomer ("Coomer") had bragged that he made sure Donald Trump would not win the election. In response, Coomer, previously a senior employee at Dominion, sued Giuliani, among others, for defamation and related claims, alleging extensive damages, despite the fact that not a single defendant alleged he actually succeeded in rigging the election against Trump and in favor of Joe Biden. Giuliani's statements are absolutely protected by the litigation privilege, and Coomer is unable to prove by clear and convincing evidence that Giuliani's statement that Coomer said he rigged the election was false and that Giuliani made the statement with actual malice. This case should be dismissed.

II. Nature of the Case and Proceedings Below.

This is a case of litigation as intimidation, and the courts should not permit it to succeed.

On December 22, 2020, amid ongoing investigations and pending lawsuits concerning Election fraud across the country, including some that had relied upon Oltmann’s allegations about Coomer, Coomer filed this lawsuit against multiple defendants, including Giuliani.¹ The Amended Complaint alleges defamation, intentional infliction of emotional distress, and civil conspiracy against all Defendants.²

Giuliani filed a motion to dismiss based on personal jurisdiction, which the trial court improperly denied. All defendants then filed special motions to dismiss pursuant to Colorado’s Anti-SLAAP statute, C.R.S. § 13-20-1101, *et seq.* (the “Anti-SLAAP Motions”). Coomer moved for an order granting him discovery to respond to the Anti-SLAAP Motions. Judge Rappaport initially denied that request. Judge Moses, upon taking over the case *sua sponte* invited Coomer to move to reconsider Judge Rappaport’s order, which Coomer did. Judge Moses then reversed Judge Rappaport’s order and permitted Coomer to engage in what the trial court called limited discovery, but which was in fact extensive discovery. After discovery was completed, including the taking of the depositions of all the parties, Coomer filed his omnibus response to the Anti-SLAAP Motions. After a hearing, the court denied those motions, and this

¹ CF, pp. 3-54.

² CF, pp. 151-215.

appeal followed.

III. Statement of Facts.

This case arises in the context of concerns regarding election security that had persisted since the 2016 General Election and the allegations that Russia hacked our election equipment to influence that election. These concerns continued into 2019 and 2020, culminating with the 2020 presidential election and the circumstances of this case. Coomer now seeks damages because of this political dispute to intimidate and dissuade other republicans from speaking out about election irregularities and fraud in the future.

A. Concerns with the security of Dominion election machines before the press conference at which Giuliani made his statements.

After three years of hype about the debunked narrative that Russia had hacked the 2016 election, on December 6, 2019, Democratic Senators Elizabeth Warren, Amy Klobuchar, and Ron Wyden, and Democratic Congressman Mark Pocan, expressed public concerns regarding the vulnerability of American elections, specifically referencing Dominion Voting Systems (“Dominion”), in an open letter sent to the founders of H.I.G. Capital, LLC, which owned one of the three large vendors dominating the election technology market.³ The Election Security Letter

³ CF, pp. 4102-4106 (the “Election Security Letter”).

claimed that election “security experts have noted for years that our nation’s election systems and infrastructure are under serious threat.”⁴ It further noted that: “researchers recently uncovered previously undisclosed vulnerabilities in ‘nearly three dozen backend election systems in 10 states;’”⁵ South Carolina voters reported that voting machines “switched their votes after they’d inputted them”; and canners in Missouri had rejected paper ballots.⁶ Finally, it reported on an “improbable” outcome in 2019 election in which the Democratic candidate only received 164 out of 55,000 votes cast in an election in Pennsylvania.⁷ It concluded with a warning that such systems are vulnerable to manipulation: “These problems threaten the integrity of our elections and demonstrate the importance of elections systems that are strong, durable, *and not vulnerable to attack.*”⁸

On January 24, 2020, the Texas Secretary of State determined that Dominion’s voting system was insufficiently secure to be certified for use in Texas.⁹ The Texas Dominion Report specifically raised concerns about whether the Dominion machines were “safe from fraudulent or unauthorized manipulation.”¹⁰

⁴ CF, p. 4124.

⁵ CF, p. 4126.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (emphasis added).

⁹ CF, pp. 19254-19256 (the “Texas Dominion Report”).

¹⁰ CF, p. 19255.

On October 11, 2020, a federal judge in Georgia expressed deep reservations about Dominion’s voting system and the security of the voting machines.¹¹ While denying a motion for preliminary injunction requiring hand counting of paper ballots, the Court expressed concerns with Dominion machines:

But the Court cannot part with that message alone. The Court's Order has delved deep into the true risks posed by the new BMD voting system as well as its manner of implementation. These risks are neither hypothetical nor remote under the current circumstances. The insularity of the Defendants' and Dominion's stance here in evaluation and management of the security and vulnerability of the BMD system does not benefit the public or citizens' confident exercise of the franchise. *The stealth vote alteration or operational interference risks posed by malware that can be effectively invisible to detection, whether intentionally seeded or not, are high once implanted, if equipment and software systems are not properly protected, implemented, and audited.* The modality of the BMD systems' capacity to deprive voters of their cast votes without burden, long wait times, and insecurity regarding how their votes are actually cast and recorded in the unverified QR code makes the potential constitutional deprivation less transparently visible as well, at least until any portions of the system implode because of system breach, breakdown, or crashes. Any operational shortcuts now in setting up or running election equipment or software creates other risks that can adversely impact the voting process.

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

¹¹ *Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1341 (N.D. Ga. 2020) (finding security risks and deficits in Dominion’s systems were neither “hypothetical nor remote”).

*future does not bode well.*¹²

This is the environment in which Americans went to the polls in November 2016.

B. Oltmann alleges he heard Coomer brag that he is going to make sure Trump will not win the election.

On or around September 25, 2020, Oltmann, a Colorado businessman and host of the “Conservative Daily” podcast, gained access to a conference call comprised of left-wing political activists.¹³ Oltmann heard the activists discussing the possibility that President Trump may win re-election.¹⁴ Oltmann testified that, someone identified as “Eric,...the Dominion guy” spoke up and bragged to the participants: “Don’t worry about the election, Trump is not gonna win. I made f-ing sure of that. Hahahaha.”¹⁵

On approximately the same day, Auon’tai “Tay” Anderson, a left-wing political activist, a Black Lives Matter leader, and a member of the Denver Public Schools Board, hosted a conference call to discuss the BLM response to purported harassment of attendees at recent protests. Anderson does not deny that Coomer was on the call and does not deny that Oltmann was on the call. Anderson’s timeframe and general description of his call matches Oltmann’s description of the Conference Call.¹⁶

¹² *Curling*, 493 F. Supp. 3d at 1341-42.

¹³ CF, p. 5872 (the “Conference Call”).

¹⁴ CF, pp. 5872-5873.

¹⁵ *Id.* at 5873.

¹⁶ CF, pp. 10897-10900.

Oltmann researched “Eric...the Dominion guy.” He discovered Coomer’s Dominion employee profile and some of Coomer’s social media posts, which revealed intense anti-Trump sentiment and support for extreme causes.¹⁷

While the election was close, especially in a few key states, on November 4th, most major news organizations called the presidential race for Mr. Biden.

After the Election, suspicions of voter fraud shifted from a Democrat talking point to a Republican concern, and Oltmann began reporting on his podcast what he had heard on the Conference Call.¹⁸ Michelle Malkin (“Malkin”) interviewed Oltmann and multiple media sources, including Gateway Pundit, Newsmax, and OAN, published his story about what he heard on the Conference Call and Coomer’s anti-Trump and inflammatory social-media posts.¹⁹ He also executed a sworn affidavit attesting to these facts.²⁰

On November 21, 2020, OAN broadcast “Dominion-izing the Vote,” where Oltmann was interviewed, recounting the Conference Call and describing Coomer’s Facebook posts.²¹

¹⁷ CF, pp. 19934, 4566-4568, 8487 (85:19-22).

¹⁸ CF, pp. 4569, 8785 (18:19-35:1).

¹⁹ CF, pp. 9288-9299, 9595-9605, 9824-9827.

²⁰ CF, pp. 5872-5877.

²¹ CF, p. 9878.

C. Investigations of election fraud and filed litigation.

Giuliani was the head of the Trump Campaign's legal team²² and was heavily involved on the Campaign's behalf in a lawsuit filed in Pennsylvania on November 9, 2020, challenging the constitutionality of Pennsylvania's election practices.²³

Giuliani oversaw a team of investigators, including Colonel Phil Waldron and others at Allied Security Operations Group, and attorneys investigating allegations of election fraud.²⁴

Giuliani became aware of Oltmann and the Conference Call and tasked investigators to look into Oltmann's claims. Giuliani also learned of Coomer's anti-Trump Facebook posts, which revealed an antipathy toward Donald Trump and an affinity for, if not affiliation with, extremist left-wing groups such as Antifa²⁵

D. Giuliani makes statements regarding Coomer at the November 19, 2020, Press Conference.

On November 19, 2020, Giuliani participated in a press conference discussing the Trump Campaign's investigation into election fraud and its strategy to challenge

²² CF, pp. 4910, 9988 (139:14-18).

²³ See e.g., *Donald J. Trump for President, Inc. v. Boockvar*, Case No. 4:20-cv-02078-MWB, (M.D. Penn. 2020).

²⁴ CF, pp. 9958 (19:25-20:14), 9969 (62:3-11), 9964 (44:23-45:2).

²⁵ CF, pp. 9964 (44:23-45:2), 9967 (54:20-55:8), 9969 (62:3-11); CF, p. 10005 (¶5).

the Election, including pending and potential lawsuits (“Press Conference”).²⁶

The Trump Campaign had already filed a lawsuit in Michigan, 1:20-cv- 01083-JTN-PJG, *Donald J. Trump for President, Inc., et al. v. Jocelyn Benson, et al.*, which questioned Dominion machines in Antrim County, Michigan.²⁷ In the days leading up to the Press Conference, Giuliani was working 22-hour days.²⁸ Despite those long hours, Giuliani spent up to two hours talking with staff about the results of their investigations into Coomer and learning what they knew about Coomer from their investigation.²⁹

The Press Conference was an “opening statement” to the American electorate, all of whom had an interest in the integrity of the election.³⁰ About Coomer, Giuliani said:

Good afternoon and thank you very much for coming. This is representative of our legal team. We’re representing President Trump and we’re representing the Trump Campaign. When I finish, Sidney Powell and then Jenna Ellis will follow me.

....

And, by the way, the Coomer character who is close to Antifa took off all of his social media. Ah-ah, but we kept it, we’ve got it. The man is a vicious, vicious man. He wrote horrible things about the President. He is

²⁶ CF, pp. 195-197, ¶ 64, n. 105; CF, pp. 10077-10149.

²⁷ CF, pp. 4888-89, 4897.

²⁸ *Id.*

²⁹ CF, p. 9965(47:10-23).

³⁰ CF, pp. 4911-12.

completely – he is completely biased. He’s completely warped and he specifically says that they’re gonna fix this election.

I’ve tried a hundred cases. I prosecuted some of the most dangerous criminals in the world. I know crimes. I can smell them. You don’t have to smell this one. I can prove it to you 18 different ways.³¹

Giuliani also discussed concerns about election integrity and Dominion in Georgia, Arizona, New Mexico and Virginia.³² A copy of Oltmann’s sworn affidavit supporting the allegations about Coomer were made available to the press.³³

E. Various lawsuits were filed challenging the election and others were contemplated.

On November 25, 2020, Sidney Powell (“Powell”) filed lawsuits in Michigan,³⁴ and Georgia,³⁵ challenging the election results. She filed similar lawsuits in Wisconsin,³⁶ and Arizona.³⁷ Every lawsuit alleged voting system manipulation by Dominion and included allegations regarding Coomer.

³¹ CF, pp. 8319-8320 (the “Election Statement”).

³² CF, pp. 10099-10100 (23:17-24:2-24).

³³ CF, pp. 4660, 10108 (32:4-13).

³⁴ *King v. Whitmer*, case 2:20-cv-13134-LVP-RSW, U.S.D.C. Eastern District of Michigan; CF, p. 2893-2967.

³⁵ *See Pearson v. Kemp*, case 1:20-cv-04809-TCB, U.S.D.C., Northern District of Georgia; CF, p. 2242- 2345.

³⁶ *Feehan v. Wisconsin Elections Commission*, case 2:20-cv-01771-PP, filed December 1, 2020, U.S.D.C. Eastern District of Wisconsin; CF, pp. 3727-3778.

³⁷ *Bonyer v. Ducey*, case 2:20-cv-02321-DJH, filed December 2, 2020, U.S.D.C. District of Arizona; CF, pp. 4186-4238.

Despite intending to file additional lawsuits in Arizona, New Mexico and Virginia, based on security issues with Dominion,³⁸ the strategy changed, and the Trump Campaign gave “up on the courts....”³⁹

SUMMARY OF THE ARGUMENT

The trial court erred in finding that Coomer presented sufficient admissible evidence to satisfy his burden under the anti-SLAAP statute.

First, the trial court erred by not finding that Coomer failed to prove by clear and convincing evidence the falsity of the Election Statement and that the Statements were made with actual malice, as required by the First Amendment. The trial court restated the Election Statement from “he specifically says that they’re gonna fix this election,” to an allegation that Coomer actually fixed the election. Accordingly, the court did not even address the proper statement. Coomer did not present clear and convincing evidence that this statement was false. He also did not show by clear and convincing evidence that Giuliani was aware or should have been aware that it was false.

Second, the trial court erred by not finding that Coomer failed to prove by clear and convincing evidence that Giuliani’s statements were not protected by the

³⁸ CF, p. 10099-10100 (23:17-24:24); CF, p. 19212 (¶ 7).

³⁹ CF, p. 9978 (99:2-14).

litigation privilege. The trial court first improperly found that Giuliani was not contemplating pending litigation in good faith when the evidence all shows that he was. Then it found that any good faith was undone by Giuliani's purported actual malice (which was actually not proven with clear and convincing evidence). However, the litigation privilege is a complete privilege providing complete immunity and not a qualified privilege, and, therefore, actual malice does not vitiate the immunity.

Third, the trial court incorrectly found that Coomer presented a prima facie case regarding his remaining claims against the Campaign for Intentional Infliction of Emotional Distress ("IIED"), Civil Conspiracy, and the "claim" for Permanent Injunction/Retraction. In doing so, the trial court failed to apply the clear and convincing standard required by the First Amendment.

Finally, the Court incorrectly found a conspiracy among all the defendants when Coomer did not present a single piece of admissible evidence showing a meeting of the minds or an agreement between them.

Coomer presented no admissible evidence, much less clear and convincing evidence, that the Election Statement was false, that Giuliani had knowledge of the alleged falsity of the Election Statement or should have known that it was false (*i.e.*, acted with actual malice) or that the litigation privilege does not apply. Any one

of these three failures is enough to reverse the trial court’s decision, and Giuliani has shown all of them.

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

The issues presented in this Opening Brief were preserved by Giuliani filing his Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101 (“Anti-SLAPP Motion”) on April 30, 2020.⁴⁰ An order denying a special motion to dismiss is appealable pursuant to C.R.S. § 13-20-1101(7). And such an order is subject to *de novo* review.⁴¹

ARGUMENT

I. Coomer’s Defamation Claim Against Giuliani Must be Dismissed Pursuant to the Anti-SLAAP Statute.

A. Preservation of Issue on Appeal and the Standard of Review.

Giuliani preserved this issue by filing the Anti-SLAPP Motion.⁴² An anti-SLAAP Motion is reviewed *de novo* by the appellate court, and denial of a motion must be based supported by evidence with “convincing clarity.”⁴³

⁴⁰ CF, p. 4767.

⁴¹ *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 21. *Flatley v. Mauro*, 39 Cal.4th 299, 325 (2006). *See also Seltzer v. Barnes*, 182 Cal.App.4th 953, 961 (2010) (“Whether...the anti-SLAPP statute applies and whether the plaintiff has shown a probability of prevailing are both legal questions which [this court] review[s] independently on appeal.”).

⁴² CF, pp. 4767-4789.

⁴³ *Walker*, 188 Colo. at 101.

B. First Amendment Standard.

Coomer's claims are subject to the clear and convincing evidence burden of proof under the First Amendment.⁴⁴ The trial court properly determined that the Anti-SLAPP statute applies to this case.⁴⁵ Because Giuliani demonstrated a protected activity, the burden shifted to Coomer to show there is a probability that he will prevail on his claims.⁴⁶ He must do so by meeting the clear and convincing standard required by the First Amendment.⁴⁷

The trial court erred by failing to take this heightened burden into account. The trial court ruled in Coomer's favor despite his inability to meet the heightened burden – allowing him to succeed based solely on a prima facie case. However, the Statute is clear, to defeat an anti-SLAPP motion, a plaintiff must show a “reasonable likelihood that [he] will *prevail*.”⁴⁸ And to prevail he must meet the heightened burden of clear and convincing evidence.

⁴⁴ *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). *See also*, Colo. Const., art. II, §10.

⁴⁵ CF, p. 21759.

⁴⁶ *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67.

⁴⁷ *Annette F. v. Sharon S.*, 119 Cal.App.4th 1146, 1166-67 (2004); *Robertson v. Rodriguez*, 36 Cal.App.4th 347, 358 (1995) (in determining whether the plaintiff has established actual malice, the court must “bear in mind the *higher clear and convincing standard of proof*”) (emphasis added).

⁴⁸ C.R.S. § 13-20-1101 (3)(a) (emphasis added). Statutes requiring plaintiffs to establish only a *prima facie* case highlight that this is a higher burden for Coomer to

This standard means courts must measure the plaintiff’s evidence against the defendant’s contradictory evidence: “In making its determination, the court shall consider the pleadings and supporting *and opposing affidavits* stating the facts upon which the liability . . . is based.”⁴⁹ The statutory language requires assessing the merits of plaintiff’s evidence weighed against the defendant’s evidence, otherwise, why consider opposing affidavits?

The First Amendment protects the polity’s right to engage in debate and errs on the side of permitting speech as opposed to punishing defamatory statements: “Political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”⁵⁰ Even “speculative commentary on matters of public concern is critical to the ‘uninhibited, robust, and wide-open’ public debate essential to a

clear. *See e.g.* Kan. Stat. Ann. § 60-5320(d) (2020); Or. Rev. Stat. § 31.150(3) (2019); Tex. Civ. Practice & Remedies Code Ann. § 27.005(c) (West 2021).

⁴⁹ C.R.S. § 13-20-1101 (3)(b) (emphasis added). *See also Gordon v. Boyles*, 9 P.3d 1106, 1120 (Colo. 2000) (holding that “the trial court must weigh the evidence presented at the pretrial hearing to determine whether the newsperson’s statements were probably false...” as part of the balancing test required by C.R.S. §13-90-119(3)(c)).

⁵⁰ *McCutcheon v. Fed. Election Com’n*, 572 U.S. 185, 203 (2014); *Mcintyre v. Ohio Elections Com’n*, 514 U.S. 334, 357 (1995).

democratic society,⁵¹ because it constitutes ‘a means of fueling a national discourse’ and stimulates ‘public pressure for answers from those who know more.’”⁵²

For a brief period, the Supreme Court extended the *New York Times* rule to statements “involving matters of public or general concern,” regardless of whether the subject was a public figure: “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”⁵³ However, two years later, the Supreme Court reverted to a negligence standard while allowing the states to adopt the *Rosenbloom* standard.⁵⁴ Colorado did in fact adopt the *Rosenbloom* standard extending the protections of *New York Times* to statements about matters of public concern.⁵⁵ As such, on a matter of public concern, to succeed on a defamation claim a plaintiff must prove with “clear and convincing evidence” that the speaker spoke knowing the statement was false or in “reckless disregard for whether it was true or not.”⁵⁶

⁵¹ See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁵² *Keobane v. Stewart*, 882 P.2d 1293, 1300–01 (Colo. 1994) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 35 (1990), (Brennan, J., dissenting)).

⁵³ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 (1971) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

⁵⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973).

⁵⁵ *Walker vs. Colorado Springs*, 538 P.3d 450, 457, 459 (Colo. 1975).

⁵⁶ *Walker*, 538 P.3d at 457; *Diversified Management v. Denver Post*, 653 P.2d 1103, 1109-10 (Colo. 1982).

C. The Trial Court Failed to Hold Coomer to the Exacting Standard Required by the First Amendment.

Coomer did not satisfy his burden to present clear and convincing evidence (not merely prima facie evidence) that the Statements: (1) were false; and (2) made with “actual malice.” Clear and convincing evidence requires a finding that a fact or proposition is “highly probable,” and the trier of fact has “no serious or substantial doubt.”⁵⁷

1. Coomer Failed to Present Clear and Convincing Evidence of the Falsity of Giuliani’s Statements.

Initially, the Court erred by finding the “substance of the statements” showed that Giuliani alleged that Coomer “did in fact subvert the election.”⁵⁸ However, the trial court cannot substitute its own interpretation of a statement for the actual words. At no point did Giuliani state that Coomer was successful, he said:

And, by the way, the Coomer character who is close to Antifa took off all of his social media. Ah-ah, but we kept it, we’ve got it. The man is a vicious, vicious man. He wrote horrible things about the President. He is completely – he is completely biased. He’s completely warped and he specifically says that they’re gonna fix this election.

⁵⁷ CJI-Civ. 3:2 (CLE ed. 2021).

⁵⁸ CF, p. 21738.

I've tried a hundred cases. I prosecuted some of the most dangerous criminals in the world. I know crimes. I can smell them. You don't have to smell this one. I can prove it to you 18 different ways⁵⁹

The only factual statement about Coomer is that Coomer said he would fix the election. The trial court substituting its strawman version of the Election Statement is improper and should be reversed and disregarded.⁶⁰

Regardless, the trial court merely found Coomer presented a prima facie case that the Election Statements were false; it did not find that Coomer had shown with clear and convincing evidence it was false. To do so the trial court accepted as “uncontroverted” Coomer’s denial while ignoring Defendants’ contrary evidence.

The burden of proving falsity by clear and convincing evidence is on the plaintiff.⁶¹ Clear and convincing evidence is “evidence which is stronger than a ‘preponderance of the evidence’ and which is unmistakable and free from serious or substantial doubt.”⁶² Coomer has the burden of proof, and therefore he must show with “clear and convincing evidence” that he did say “that [he’s] gonna fix this election” during a phone call of left-wing activists (the “Conference Call”). He offered no alibi for the time of the Conference Call, other than to state that he spent

⁵⁹ CF, pp. 8319-8320.

⁶⁰ CF, p. 21738.

⁶¹ *McIntyre v. Jones*, 194 P.3d 519, 528 (Colo. App. 2008); *Lawson v. Stow*, 327 P.3d 340, 348 (Colo. App. 2014).

⁶² *DiLeo v. Koltnow*, 613 P.2d 318, 323 (Colo. 1980).

most of his days “[l]eading up to and during the week of September 27, 2020” (which was a Wednesday) in court or on the phone – but he did not provide evidence that he could not have been participating in the Conference Call.⁶³ He provided no other evidence that the call did not happen. He merely denied participating in any such call.

On the other hand, it is uncontroverted that a conference call with BLM activists occurred on September 25, 2020.⁶⁴ While Coomer denies participating “in any ‘Antifa’ conference call on that day (or any other day),” he provides no other evidence to support his denial.⁶⁵ Oltmann, on the other hand, presented a screenshot from September 26, 2020, the day after the BLM call, in which he Googled the terms “Eric,” “Dominion,” and “Denver, Colorado.” He testified that the call occurred within a few days of that screenshot.⁶⁶ Oltmann took contemporaneous notes of the call.⁶⁷

⁶³ CF, p. 8421.

⁶⁴ *See* CF, p. 10899.

⁶⁵ CF, p. 8421, ¶ 40.

⁶⁶ CF, p. 8484 (72:1-5).

⁶⁷ CF, pp. 8469 (13:21-24), 9589 (Oltmann’s notes).

Coomer's Facebook posts, which he admitted are authentic, are consistent with someone who would participate in such a call and make the statements attributed to him.⁶⁸

Coomer's denial compared to Oltmann's (and Giuliani's) evidence does not meet his burden under the law of defamation and the anti-SLAAP statute of proving by clear and convincing evidence that he was not on the Conference Call and that he did not say "that [he's] gonna fix this election" during it. Clear and convincing evidence is "evidence which is stronger than a 'preponderance of the evidence' and which is unmistakable and free from serious or substantial doubt."⁶⁹ A reasonable jury could certainly conclude that the Conference Call occurred and that Coomer made the statements Giuliani attributed to him. Thus, because Coomer failed to show that the falsity of was unmistakable and free from serious or substantial doubt,"⁷⁰ Coomer did not meet his burden.

⁶⁸ See CF, pp. 8423-8425 (admission), 8036 (admission that "the Facebook posts were, in fact, authentic"), 4571-4584 (Facebook posts).

⁶⁹ *DiLeo v. Koltnow*, 613 P.2d 318, 323 (Colo. 1980).

⁷⁰ *Id.* at 323.

2. Coomer Failed to Present Clear and Convincing Evidence that the Campaign Acted with Actual Malice.

a. *Actual Malice Standard*

Actual malice means the declarant made a false statement of fact, either with knowledge of its falsity or in reckless disregard thereof.⁷¹ *Walker* held that “when a defamatory statement has been published concerning a matter of public or general concern, the publisher of the statement will be liable only if he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.”⁷² Even “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting” will not suffice to establish actual malice.⁷³

Evidence of bias and motive to cause harm is not enough to find actual malice.⁷⁴ A defendant must be shown to have actually “entertained serious doubts as to the truth of his publication.”⁷⁵ Actual malice requires subjective awareness of probable falsity; that there be proof that the defendant had serious doubts about the

⁷¹ *New York Times*, 376 U.S. at 280.

⁷² *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 98.

⁷³ *Harte-Hanks Communs v. Connaughton*, 491 U.S. 657, 663-64 (1989); *see also Newton v. NBC*, 930 F.2d 662, 669 (9th Cir. 1990) (even “extreme departure from accepted professional standards...will not suffice to establish actual malice”).

⁷⁴ *See Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1042-43 (10th Cir. 2013).

⁷⁵ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

accuracy of the statements before making them.⁷⁶ This requires proof that the statements were made with “a high degree of awareness of their probable falsity.”⁷⁷ Ultimately, actual malice is an “almost impossible” standard for a plaintiff to meet.⁷⁸

b. There was no malice because Giuliani reasonably believed his statements.

Coomer failed to present clear and convincing evidence that Giuliani entertained serious doubts about the truth of the statements or had a high degree of awareness of their probable falsity. The trial court relied heavily on sources that allegedly debunked allegations of voter fraud. However, Giuliani’s statements were *not* that Coomer rigged the election, but that Coomer bragged that he had rigged the election. The Court’s reliance on information that challenged the allegations of fraud in the election or Coomer’s ability to rig the Dominion voting machines is a resort to a strawman argument. By conflating the allegation that Coomer stated he had made sure Trump would not win with an allegation that Coomer had in fact made sure Trump would not win, the Court failed to address the actual issue at hand.

Even if the trial court was correct in its phrasing of the issue, it is still based on faulty logic.

⁷⁶ *Id.* at 731-733.

⁷⁷ *Garrison v. La.*, 379 U.S. 64, 74 (1964).

⁷⁸ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J. concurring).

What is at issue is not whether there was actual fraud in the Election, but the state of mind of Giuliani *at the time of the Election Statement*. A “court should weigh the evidence known to the defendant...*at the time that the defendant published the defamatory statement*. That is, proving that a [statement] was false after publication does not establish that the defendant knew or should have known the information was false.”⁷⁹ The Court did not address what Giuliani knew at the time he made the Election Statement but focused on evidence from *after* the Election Statement that could not have affected Giuliani’s state of mind in making it.

Further, there were sufficient allegations of voter fraud leading up to the Election Statement to justify it. Allegations of election fraud were prevalent and under investigation, and allegations of compromised election technology – Dominion’s in particular – were circulating months, and even years before Giuliani made the Elections Statements.⁸⁰ In 2019 Democratic Senators Elizabeth Warren, Amy Klobuchar, and Ron Wyden, and Democratic Congressman Mark Pocan highlighted concerns with Dominion in the Election Security Letter.⁸¹ The State of Texas decided Dominion’s product was at risk of hacking when it rejected it for its

⁷⁹ *Gordon*, 9 P.3d at 1120 (citations omitted)(emphasis added).

⁸⁰ CF, pp. 4102-4106; CF, pp. 19254-19256.

⁸¹ CF, p. 4102-4106.

election equipment. And a judge in Georgia expressed deep concerns about the security of the Dominion machines.

The contrary evidence either came after the Election Statements (the statements by Attorney General Barr) or Giuliani did not see it because it was not given to him before he made the Election Statement (the Trump Campaign memorandum).⁸²

Giuliani did investigate the claims prior to the Press Conference by, for instance, tasking Allied Security Operations Group with investigating Oltmann's allegations.⁸³ Giuliani also reviewed Coomer's Facebook posts prior to the Press Conference which showed Coomer's alignment, if not allegiance, with Antifa.⁸⁴ Giuliani found no reason to disregard Oltmann and his affidavit.⁸⁵

The Court makes much of Giuliani's purported short amount of time spent on Coomer before the Press Conference, however the evidence shows that Giuliani spent almost 2 hours in discussions with others who he had tasked with researching the allegations about Coomer.⁸⁶ This is not "virtually no time investigating

⁸² CF, p. 10497 (62:19-63:24). *See also* CF, p. 8319.

⁸³ CF, pp. 9963-9966, (40:14-43:19; 46:15-20; 48:10-49:21; 51:22-53:6).

⁸⁴ CF, pp. 4911, 9966-9967 (52:13-19; 54:20-55:11); 4571-4574.

⁸⁵ CF, p. 4911, ¶ 6.

⁸⁶ CF, p. 9965 (47:10-23).

Coomer,”⁸⁷ especially for lead counsel in a legal project the size of the Trump Campaign’s challenges of the election.

Further, second-guessing Giuliani’s investigation does not show malice, because even “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting” will not suffice to establish actual malice.⁸⁸

Moreover, allegations regarding Coomer did not originate with Giuliani, the Trump Campaign or from a wholly unverified or anonymous source. They were based on a reliable source with first-hand knowledge who swore an affidavit, under the penalty of perjury, which precludes a finding of actual malice.⁸⁹

In fact, Giuliani had no obligation to do an independent investigation because Oltmann’s allegations were published in the press and supported by an affidavit.⁹⁰

⁸⁷ CF, p. 21738, ¶ 91.

⁸⁸ *Harte-Hanks Communs*, 491 U.S. at 663-64; *see also Newton*, 930 F.2d at 669 (even “extreme departure from accepted professional standards...will not suffice to establish actual malice”).

⁸⁹ *See e.g., St. Amant*, 390 U.S. at 730-31 (holding that televised reading of another’s affidavit, containing allegedly defamatory statements, does not constitute actual malice even when the reader relies solely upon the affidavit and makes no attempt to verify the accusations).

⁹⁰ *Murray v. Bailey*, 613 F. Supp. 1276, 1280–81 (N.D. Cal. 1985) (holding that failure to independently investigate accusations and reliance on a person with first-hand knowledge, was not done with “reckless disregard”; in fact, it was not even unreasonable).

Reliance on reputable sources precludes, as a matter of law, a finding of actual malice.⁹¹

Coomer failed to prove by clear and convincing evidence that Giuliani spoke with actual malice.

D. The Trial Court Erred by not Recognizing that Giuliani’s Election Statements were Privileged.

Giuliani preserved this issue by raising it in his Anti-SLAPP Motion,⁹² his reply in support of the Anti-SLAAP Motion,⁹³ and by the trial court’s Anti-SLAAP Order.⁹⁴

Colorado recognizes that statements made by an attorney relating to pending litigation are absolutely privileged if they relate to the litigation.⁹⁵ If they are made about pending legal proceedings, they are privileged if the future litigation is contemplated in good faith.⁹⁶ This absolute privilege exists “to encourage and protect free access to the courts for litigants and their attorneys.”⁹⁷ The privilege serves “to afford litigants the utmost freedom of access to the courts to preserve and defend

⁹¹ *Id.*; *St. Amant*, 390 U.S. at 730-31.

⁹² CF, p. 4775.

⁹³ CF, p. 14359.

⁹⁴ CF, p. 21797.

⁹⁵ See *Begley v. Ireson*, 2017 COA 3, ¶ 13 (“*Begley I*”); *Club Valencia v. Valencia Associates*, 712 P.2d 1024, 1027 (Colo. App. 1985).

⁹⁶ See *Begley I* at ¶ 13; *Club Valencia*, 712 P.2d at 1027. See also *Merrick v. Burns, Wall, Smith & Mueller*, P.C., 43 P.3d 712, 714 (Colo. App. 2001).

⁹⁷ *Begley I* at ¶ 13; see also *Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112, 1117 (Colo. 1990).

their rights and to protect attorneys during the course of their representation of clients.”⁹⁸

This absolute privilege applies to any causes of action, including Coomer’s ancillary claims for relief, that are based on conduct protected by the litigation privilege, not just defamation.⁹⁹

The litigation privilege applies to the Election Statements, whether viewed as “in-litigation” or “pre-litigation” statements. As discussed above, the Election Statements were made in the Press Conference discussing the investigation of voter fraud and existing and potential in Georgia, Arizona, Virginia, and New Mexico.¹⁰⁰

The trial court relied on *Burke v. Greene*,¹⁰¹ for the proposition that “even where the [litigation] privilege applies in a defamation suit, it can be lost by a finding of actual malice.”¹⁰² However, *Burke* does not stand for that proposition. It did not analyze the litigation privilege, which is an absolute privilege, but analyzed the qualified privilege to make statements to law enforcement, which is a qualified privilege.¹⁰³ In fact, the *Burke* court expressly rejected the defendants’ argument that their

⁹⁸ *Club Valencia*, 712 P.2d at 1027 (citations omitted).

⁹⁹ *Belinda A. Begley & Robert K. Hirsch Revocable Tr. v. Ireson*, 2020 COA 157, ¶¶ 20-26, *reh'g denied* (Nov. 25, 2020) (“*Begley II*”).

¹⁰⁰ CF, pp. 19099–19169.

¹⁰¹ *Burke v. Greene*, 963 P.2d 1119 (Colo. App. 1998).

¹⁰² CF, p. 21794, ¶ 210.

¹⁰³ *Burke*, 963 P.2d at 1122.

statements were absolutely privileged finding them protected only by a qualified privilege.¹⁰⁴

A qualified privilege “can be lost by showing that a defendant communicated a defamatory statement known to be false or made with a reckless disregard of its veracity.”¹⁰⁵ Contrarily, the litigation privilege is absolute and affords a speaker “complete immunity” and “protects a lawyer from liability in an action irrespective of his purpose in publishing the defamatory mater, his belief in its truth, or even his knowledge of its falsity.”¹⁰⁶ The absolute immunity in the litigation privilege serves to “afford litigants the utmost freedom of access to the courts to preserve and defend their rights *and to protect attorneys during the course of their representation of clients.*”¹⁰⁷

When analyzing whether statements are related to litigation, the courts do not use a strict relevance standard, but instead is a “general frame of reference and relation to the subject matter of the litigation.”¹⁰⁸ Anything that might possibly be relevant is protected by the privilege, and “[a]ll doubt should be resolved in favor of

¹⁰⁴ *Id.*

¹⁰⁵ *McIntyre v. Jones*, 194 P.3d 519, 529 (Colo. App. 2008).

¹⁰⁶ Rest. (2nd) Torts §586, cmt. a., *see also Club Valencia*, 712 P.2d at 1027-28 (citing Rest. (2nd) Torts §586, cmt. a.). *Aminokit Laboratories, Inc. v. Reinan*, 15CA0933, *5-6 (Colo. App., August 4, 2016); CF, pp. 14195-14207.

¹⁰⁷ *Club Valencia*, 712 P.2d at 1027 (emphasis added).

¹⁰⁸ *Id.*, citing Rest. (2nd) Torts §586, cmt. c and *Smith v. Hatch*, 271 Cal. App. 2d 39, 76 Cal. Rptr. 350 (1969).

its relevancy or pertinency. No strained or close construction will be indulged to exempt a case from the protection of privilege.”¹⁰⁹

The Election Statements were related to the Michigan Litigation involving Dominion because they were about Coomer bragging that he fixed the election for Joe Biden and the security and integrity of the Dominion machines was at issue in that case.¹¹⁰ Further, Coomer was Dominion’s “Director of Product Strategy and Security” and could have a direct impact on whether the Dominion software was secure. As in *Club Valencia*, where the court found that statements about a homeowner were related to litigation involving the homeowners’ association, statements about Coomer are related to litigation about Dominion and the security of its systems. Therefore, the Election Statements about Coomer bragging that he had insured that Trump would not win (by manipulating the Election) were “related” to the prospective—and existing—litigation over the Dominion software and machines used in the Election as discussed at the Press Conference.

The only remaining question under a “pre-litigation” analysis—and again, Giuliani strongly contends that the “in litigation” privilege is applicable—is whether Giuliani had a then-existing good faith belief that he and the Trump Campaign to

¹⁰⁹ *Id.*

¹¹⁰ *See, generally*, CF, p. 4868; *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020).

file litigation.¹¹¹ The “good faith” test is not determined by the merits of any such litigation or its success.¹¹²

Here, the following facts are not disputable: (1) Giuliani represented the Trump Campaign;¹¹³ (2) the Trump Campaign had filed litigation in Michigan prior to the Press Conference;¹¹⁴ (3) the Trump Campaign did initiate additional lawsuits over the Election in multiple states;¹¹⁵ (4) the Election Litigation included concerns regarding Dominion machines;¹¹⁶ and (5) these issues made their way into litigation filed only six days later in Georgia on November 25, 2020, by Defendant Powell,

¹¹¹ See *Visto Corp. v. Sproqit Techs., Inc.*, 360 F. Supp. 2d 1064, 1069 (N.D. Cal. 2005) (“It is the contemplation of litigation that must be in good faith, not the merits of the actual litigation itself that animates the litigation privilege.”); *Begley II*, 2020 COA 157, at ¶ 54 (citing *Id.*).

¹¹² *Id.*

¹¹³ CF, p. 4910, ¶¶ 2-3. The Court can also take judicial notice of any documents or matters referred to by Plaintiff in his Amended Complaint or which or matters of public record. See *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents referenced on complaint). Moreover, webpages cited to herein from newspapers or periodicals should be deemed self-authenticating pursuant to COL. R. EVID. 902(6).

¹¹⁴ CF, p. 4868; *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *3 (M.D. Pa. Nov. 21, 2020) (“Although this case was initiated less than two weeks ago...” and listing Giuliani as counsel for Trump Campaign) (subsequent history omitted).

¹¹⁵ CF, p. 172, ¶ 50.

¹¹⁶ CF, p. 21-22, ¶¶ 60-61, 64; CF, p. 4897.

who was part of the Trump team at the time of Giuliani made the Election Statements.¹¹⁷

When Giuliani made the Election Statements that Coomer complains of, he was aware of: (1) media reports regarding Coomer’s alleged radical leftist and anti-Trump views and affiliations;¹¹⁸ (2) allegations that Coomer had boasted to a radical leftist group that he had rigged Dominion machines to keep Donald Trump from winning the Election;¹¹⁹ (3) information that Smartmatic had ties to Venezuela and the Chavez regime;¹²⁰ (4) information that Smartmatic had attempted to operate in the U.S. through a subsidiary called Sequoia Voting (“*Sequoia*”);¹²¹ (5) information that the U.S. Government was concerned about Smartmatic operating Sequoia given its ties to Venezuela and unknown ownership;¹²² (6) information that Dominion had acquired Sequoia from Smartmatic after Smartmatic divested from

¹¹⁷ CF, pp. 4900-4903.

¹¹⁸ CF, p. 4910 at ¶ 3); *see also* Darryl Cooper, The Extremist at Dominion Voting Systems, Nov. 16, 2020, <https://www.theamericanconservative.com/articles/the-extremist-at-dominion-voting-systems/> (last visited 12/11/2022).

¹¹⁹ CF, p. 4910, ¶ 3.

¹²⁰ Systematic Announces Sale of Sequoia Voting Systems, Nov. 8, 2007, <https://maloney.house.gov/media-center/press-releases/smartmatic-announces-sale-sequoia-voting-systems> (last visited 12/11/2022).

¹²¹ *Id.*

¹²² *Id.*

Sequoia rather than comply with an investigation by the U.S. Government;¹²³ (7) information that Dominion acquired Coomer with Sequoia where he was “Vice President of Research and Product Development”;¹²⁴ (7) information that Dominion had a software licensing agreement with Smartmatic;¹²⁵ (8) allegations of machines/software switching votes from Trump to Biden;¹²⁶ (9) evidence that Texas rejected Dominion due to security concerns;¹²⁷ (10) evidence of Democrat concerns about the security of Dominion machines and software prior to the Election;¹²⁸ and (11) evidence of Coomer’s extreme anti-Trump views.¹²⁹

¹²³ *Id.*

¹²⁴ See Kim Zetter, In Industry First, Voting Machine Company to Publish Source Code, Oct. 27, 2009, <https://www.wired.com/2009/10/sequoia/> (last visited 12/11/2022).

¹²⁵ See *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, No. CIV.A. 7844-VCP, 2013 WL 1821608, at *2 (Del. Ch. May 1, 2013) (internal citations omitted).

¹²⁶ See Paul Egan, Antrim vote glitch: Expert shares how county mistakenly flipped from red to blue, Nov. 7, 2020, <https://www.freep.com/story/news/politics/elections/2020/11/06/antrim-county-vote-glitch-software-update/6194745002/> (last visited 12/11/2022).

¹²⁷ See [Correspondence from Brandon Hurly to Keith Ingram, Director of Elections, Texas Secretary of State, Feb. 15, 2019, https://www.sos.state.tx.us/elections/forms/sysexam/jan2019-hurley.pdf](https://www.sos.state.tx.us/elections/forms/sysexam/jan2019-hurley.pdf) (last visited (12/11/2022)

¹²⁸ See, e.g., Frank Bajak, US election integrity depends on security challenged firms, Oct. 29, 2018, <https://apnews.com/article/f6876669cb6b4e4c9850844f8e015b4c> (last visited 12/11/22).

¹²⁹ CF, p. 176, ¶ 53-540; CF, p. 4825 (32:4-13).

All of this, coupled with Oltmann’s allegations regarding Coomer, led Giuliani to believe in good faith that there were significant issues of voting irregularities that needed to be investigated and challenged.¹³⁰ These concerns echoed those of prominent members of the Democratic Party who had lodged complaints about the security and integrity of voting machines and voting technologies in the months prior the 2020 Election.¹³¹

When Giuliani made the Election Statements: (1) Election Litigation was already pending regarding Dominion machines; and (2) more litigation was filed just days after the Press Conference making the same allegations against Coomer that Giuliani made in the Election Statements. This, when coupled with the corroborating evidence discussed above serves to demonstrate further that Giuliani had a good faith belief that he intended to both maintain the existing Election Litigation and pursue further litigation at the time that he made the Election Statements.¹³²

The trial court dismissed Giuliani’s good faith contemplation of litigation by

¹³⁰ CF pp. 4910-4912 at ¶¶ 2-7.

¹³¹ *Murray v. Bailey*, 613 F. Supp. at 1280–81 (publisher’s failure to independently investigate the published accusations, and its full reliance on the person with first-hand knowledge, was not done with “reckless disregard”; in fact, it was not even unreasonable).

¹³² *See Begley II*, 2020 COA 157, at ¶ 45 (holding declaration of attorney coupled with corroborating evidence, timing of events, and fact that litigation was actually filed is sufficient evidence to establish the absolute litigation privilege).

ignoring Defendants' evidence to the contrary.¹³³ This is error. First, *Begley I*, does not stand for the proposition that pre-litigation statements that lack evidentiary support are not made in good faith. *Begley* merely requires a showing of good faith intent to file the prospective litigation when assessing pre-litigation statements.¹³⁴ Second, Giuliani did not say that Coomer had in fact manipulated the Dominion machines, he merely said that Coomer *bragged* that he would do so.¹³⁵ Third, even if Giuliani had said Coomer fixed the election, and again he did not, all the evidence saying the election was not fixed or tainted by fraud came after he made the Election Statement.

For these reasons, it was perfectly reasonable for Giuliani to believe that Coomer had actually made the statements he attributed to him. In other words, Coomer is unable, and did not, show that Giuliani did not have a good faith intention to file future litigation by clear and convincing evidence.”¹³⁶

Therefore, even if *Begley I* requires evidentiary support for a pre-litigation statement, which it does not, there is such support. And, more importantly, Coomer has not shown by clear and convincing evidence that Giuliani did not contemplate litigation in good faith.

¹³³ CF, p. 21797, ¶ 215.

¹³⁴ *Begley I*, 399 P.3d at 782.

¹³⁵ CF, p. 9992 (154:10-15).

¹³⁶ *Walker*, 538 P.3d at 457; *Diversified Management*, 653 P.2d at 1109-10.

II. The Trial Court Erred in Finding that Coomer was Likely to Prevail on His Intentional Infliction of Emotional Distress (“IIED”) Claim.

A. Preservation of Issue on Appeal and the Standard of Review.

Giuliani preserved this claim for relief by filing his Special Motion to Dismiss.¹³⁷ The Court reviews this decision *de novo*, because this is the standard of review for an anti-SLAPP motion decision.¹³⁸

B. The Trial Court Impermissibly Allowed Coomer to Meet a Lower Burden of Proof on His IIED Claim.

The trial court impermissibly only required Coomer to make a prima facie showing that Giuliani engaged in extreme and outrageous conduct.¹³⁹ However, First Amendment limitations on defamation claims “apply equally to ancillary tort claims which might arise from the publication of an allegedly defamatory statement.”¹⁴⁰ The IIED Claim is predicated on the Election Statements and, therefore, Coomer must meet the strictures of the Anti-SLAPP statute and the First Amendment.

¹³⁷ CF, p. 4767.

¹³⁸ *Salazar*, 2022 COA 109M

¹³⁹ CF, pp. 21802-21803, ¶ 225; 21811-21812 ¶ 252.

¹⁴⁰ *Lewis v. McGraw Hill Broadcasting Co., Inc.*, 832 P.2d 1118, 1124–25 (Colo. App. 1992). *See, also, Fry v. Lee*, 408 P.3d 843, 855 (Colo. App. 2013); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (requiring a showing of actual malice on a claim for intentional infliction of emotional distress by reason of publications); *Miles v. Ramsey*, 31 F. Supp. 2d 869, 880 (D. Colo. 1998) (dismissing the plaintiff’s ancillary tort claims related to failed defamation claim).

Coomer has not shown with clear and convincing evidence that Giuliani acted with actual malice.¹⁴¹ The trial court improperly required Coomer merely to make a prima facie showing of actual malice, ignoring the heightened burden of proof required.¹⁴² Giuliani had substantial evidence supporting his Election Statements, and Coomer's (and the trial court's) contradictory evidence does not show by clear and convincing evidence that Giuliani acted with actual malice.¹⁴³

Coomer's IIED claim must be dismissed pursuant to C.R.S. § 13-20-1101.

III. The Trial Court Erred in Finding Coomer Was Likely to Prevail on His Civil Conspiracy Claim.

A. Preservation of Issue on Appeal and the Standard of Review.

Giuliani preserved this claim for relief by filing his Special Motion to Dismiss.¹⁴⁴ The Court reviews this decision *de novo*, because this is the standard of review for an anti-SLAPP motion decision.¹⁴⁵

¹⁴¹ *Supra* §III(2).

¹⁴² CF, pp. 21802-21803, ¶ 225; 21811-21812, ¶ 252.

¹⁴³ *Supra* §III(2).

¹⁴⁴ CF, p. 4767.

¹⁴⁵ Salazar, 2022 COA 109M.

B. The Civil Conspiracy Claim Fails Because it is Derivative and Coomer's Other Claims Fail.

Civil conspiracy is not an independently actionable cause of action.¹⁴⁶ Here, Coomer's civil conspiracy claims is based on his defamation and IIED claims for relief. Because those fail, so does his Civil Conspiracy Claim.

C. The Civil Conspiracy Claim Fails Because Coomer Failed to Prove a Meeting of the Minds by Giuliani With Any Other Defendant.

Coomer failed to assert, and the Court did not cite, any evidence of an agreement to defame Coomer.¹⁴⁷

The trial court's conspiracy finding consist of a single paragraph in which the Court combined all defendants other than Oltmann and summarily found that they "cooperated and fed off one another."¹⁴⁸ The trial court did not cite a single piece of evidence in support of this conclusion and pointed to no evidence of an agreement between the Campaign and any other party.

To establish a reasonable likelihood of prevailing on his conspiracy claim, Coomer must put forth evidence of *an agreement* on a course of conduct. The court cannot "infer the agreement necessary to form a conspiracy; evidence of such an

¹⁴⁶ *Colorado Community Bank v. Hoffman*, 338 P.3d 390, 397 (Colo. App. 2011) (citing *Bd. Of Cnty. Comm's v. Park Cnty. Sportsman Ranch, LLP*, 271 P.3d 562, 572 (Colo. App. 2013)).

¹⁴⁷ *See Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995).

¹⁴⁸ CF, p. 21819 at ¶ 273.

agreement must be presented by the plaintiff.”¹⁴⁹ Sharing purported conspiratorial objective fails to meet this burden without evidence of an actual agreement.¹⁵⁰ Simply making similar statements on a matter of public concern is insufficient evidence of any agreement among the speakers.

Notably, in another case arising from the Election, the U.S. District Court for the District of Columbia dismissed a conspiracy claim where the counterclaimant “fail[ed] to adequately allege an agreement.”¹⁵¹ In *MyPillow*, the Court noted, in the context of a RICO claim, the plaintiff had failed to allege that the purported conspirators “communicated, met, or otherwise coordinated” with each other, and therefore failed to show that the defendants shared a common purpose.¹⁵²

There must be some “events, conversations, or documents indicating an agreement or meeting of the minds among the alleged co-conspirators.”¹⁵³ No such events, conversations, or documents exist in the record.

¹⁴⁹ *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995); see also *More v. Johnson*, 568 P.2d 437, 440 (Colo. 1997).

¹⁵⁰ *United States ex rel. PCA Integrity Assocs., LLP v. NCO Fin. Sys.*, Civil Action No. 15-750 (RC), 2020 U.S. Dist. LEXIS 23337, at *99 (D.D.C. Feb. 11, 2020).

¹⁵¹ *US Dominion, Inc. v. MyPillow, Inc.*, Civil Action No. 1:21-cv-0445 (CJN), 2022 U.S. Dist. LEXIS 90530, at *15 (D.D.C. May 19, 2022).

¹⁵² *Id.*

¹⁵³ *Id.* at *21. See also *Telluride Real Estate Co. v. Penthouse Affiliates, LLC*, 996 P.2d 151, 155 (Colo. App. 1999) (holding that, although they recovered on their underlying

The only evidence presented by Coomer to support a conspiracy claim is the Defendants' shared ideology and belief the election was tarnished by fraud. By this logic there are tens of thousands of co-conspirators across the nation. That publishing the Elections statements may have been helpful toward that objective is insufficient to prove a "meeting of the minds" and thus, Coomer's conspiracy claim fails as a matter of law.¹⁵⁴

While it is true an agreement to conspire can be shown through circumstantial evidence, there must be evidence.¹⁵⁵ Here the trial court cited to no "indicia of agreement" between Giuliani and any other defendant, merely stating conclusively that "All defendants cooperated and fed off one another."¹⁵⁶ This is insufficient.

claims, plaintiffs "had not established a meeting of the minds on the object or course of action, i.e., that the realty agents not be paid").

¹⁵⁴ See *Telluride Real Estate*, 996 P.2d at 155. See also *United States ex rel. PCA Integrity Assocs., LLC v. NCO Fin. Sys., Inc.*, No. 15- 750 (RC), 2020WL686009, *30 (D.D.C. Feb. 11, 2020) (dismissing conspiracy claim subject to heightened pleading standard where, like here, plaintiff only alleged a shared conspiratorial objective).

¹⁵⁵ *Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1327 (Colo. App. 1992) ("There must be some indicia of agreement in an unlawful means or end." citing *Martinez v. Winner*, 548 F. Supp. 278 (D. Colo. 1982)).

¹⁵⁶ CF, p. 21819 at ¶ 273.

IV. The Trial Court Erred in Finding Coomer Was Likely to Prevail on His Claim for Injunctive Relief.

A. Preservation of Issue on Appeal and the Standard of Review.

Giuliani preserved this claim for relief by filing his Special Motion to Dismiss.¹⁵⁷ The Court reviews this decision *de novo*, because this is the standard of review for an anti-SLAPP motion decision.¹⁵⁸

B. Coomer is Not Entitled to Injunctive Relief.

An injunction is not a claim for relief, but a remedy ancillary to a substantive claim upon which a litigant prevails on the merits or, in the case of a preliminary injunction, shows a likelihood of prevailing.¹⁵⁹

Despite the facts that a request for injunctive relief is not a claim and Coomer has yet to file a motion for injunctive relief, the trial court held that Coomer is entitled to injunctive relief.¹⁶⁰ However, it is unclear what relief the court could grant. No court may order Giuliani to issue a retraction.¹⁶¹ Because Giuliani cannot “remove” the Election Statements, injunctive relief is simply impossible and, therefore, must be denied. At the very least, it was premature for the trial court to

¹⁵⁷ CF, p. 4788.

¹⁵⁸ *Salazar*, 2022 COA 109M.

¹⁵⁹ See *Dallman v. Rifter*, 225 P.3d 619, 621, n.11 (Colo. App. 2010); *Wibby v. Boulder Cty. Bd. Of Cty. Commissioners*, 409 P.3d 516, 519, n.2 (Colo. App. 2016).

¹⁶⁰ CF, p. 21822 at ¶ 280.

¹⁶¹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

substantively analyze this “claim” for relief, since Giuliani had not yet been given an opportunity to present argument on why the harm resulting from the requested injunctive relief would outweigh any harm to Coomer.

CONCLUSION

For the reasons above, this Court should reverse the trial court’s Order and direct the trial court to enter a new order granting the Campaign’s Motion in its entirety and awarding the Campaign its reasonable attorneys’ fees and costs incurred below and for this appeal as allowed under C.R.S. § 13-20-1101(4)(a).

REQUEST FOR ATTORNEYS’ FEES

Pursuant to C.R.S. § 13-20-1101(4), the Campaign requests an award of attorney fees and costs incurred in this matter to be proven later.

Respectfully submitted this 13th day of December 2022,

GESSLER BLUE LLC

s/ *Geoffrey N. Blue*
Geoffrey N. Blue

Attorney for Appellant Rudolph
Giuliani

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2022, I electronically filed the foregoing with the Clerk of the Court using the CCES system, which notified all parties and their counsel of record.

s/Joanna Bila
Joanna Bila, Paralegal