IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No.: 1:23-cv-01463

AMERICAN MUCKRAKERS PAC, INC., a foreign entity, and DAVID B. WHEELER, an individual, North Carolina resident;
Plaintiffs

v.

LAUREN OPAL BOEBERT, an individual and Colorado resident, and JOHN DOES (1-25);
Defendants.

RESPONSE TO DEFENDANT BOEBERT'S MOTION TO DISMISS UNDER F.R.C.P. 12(b)(6) AND/OR SPECIAL MOTION TO DISMISS UNDER COLORADO'S ANTI-SLAPP STATUTE

COME NOW PLAINTIFF DAVID B. WHEELER an individual and AMERICAN MUCKRAKERS PAC, INC. a North Carolina nonprofit corporation (collectively "Plaintiffs") to submit their response to Defendant Boebert's motions to dismiss under F.R.C.P. 12(b)(6) and/or C.R.S. § 13-20-1101 ("Motion"), respectfully requesting this Court allow Plaintiffs leave to amend their Complaint to cure any defects in the pleading found by the Court to impede the efficient prosecution of this matter by failing to sufficiently state a legally cognizable claim or otherwise warrant dismissal of a claim due to any curable defect.

<u>CERTIFICATION OF CONFERRAL ON PROPOSED MOTION TO AMEND</u>

Plaintiffs' counsel conferred with counsel for Defendant Boebert seeking consent to amend the complaint to cure potential defects raised in the Motion, including but not limited to adding more specific allegations of damages caused by Defendant's interference in Plaintiffs' contracts,

prospective professional activity and defamation. Counsel for Defendant informed Plaintiffs' counsel that Plaintiffs' proposed Motion for Leave to Amend pursuant F.R.C.P. Rule 15 would be opposed as would Plaintiffs' request that such a motion be briefed and determined on a "Forthwith" schedule. Thus, rather than submit those two disputed motions given the impracticability of the briefing schedule entailed, Plaintiffs submit their Response herein and respectfully request an opportunity to cure any defects found by the Court after analyzing Defendant's Motion, Plaintiffs' following Response, and the record herein after the Hearing on Defendant's Motion.

BACKGROUND

Plaintiffs did not bring this suit to get Representative Boebert to "shut-up" and deter her from exercising her free-speech rights by imposing costs through a meritless suit. The facts are quite the opposite, it is Defendant who took action to "shut-up" Plaintiffs through maliciously defaming their reputation as news reporters, intentional economic interference with Plaintiffs' contractors, advertisers, vendors and other sources of income, and "abuse of judicial process" (as the term is used in C.R.S. § 13-20-1101(1)(a)) to silence and deter Plaintiffs from participating during the crucial months (June – October) of the election season through the use of the Court's authority in a Temporary Restraining Order to silence Plaintiffs (*see* **Exhibit A** attached to hereto, true and correct copy of Affidavit of David B. Wheeler, ¶¶ 11-12, and Attachments 3-4 thereto, Defendant's Petition for Temporary Protective Order ("TRO") and its Dismissal a month later), through the use of federal Executive authority to deter Plaintiffs from reporting on her by initiating a Federal Elections Committee ("FEC") investigation soon after the TRO was vacated (*see* **Exhibit A**, ¶¶ 9-10, Attachment 1, FEC letter; and Attachment 2, its Dismissal two months later), and through threats of litigation made against Plaintiffs and their donors (*see* Complaint ¶¶ 68-74, and Exhibit J6 to the Complaint (threatening to impose "substantial legal liability [on Plaintiffs] and

each donor to the organization who chose to fund the effort knowing it would result in defamation.")(emphasis added). Plaintiffs also have reason to believe that Representative Boebert used her office's authority and influence over media organizations to attempt to silence Plaintiffs, and believe that this allegation will be supported by discovery of the documents requested in the attached draft subpoena (to be sent only after this Court's approval after ruling on Defendant's herein Motion for Stay of Discovery). *See* **Exhibit B**, Draft Subpoena to Fox News Corp.

Plaintiffs' work is reporting on politicians. Plaintiffs have made a good deal of news reporting on Rep. Boebert, including recently when Plaintiffs' scoops regarding Rep. Boebert's behavior at the Denver production of the musical Beetlejuice were picked up by myriad national and international news-media publishers, and in the Summer of 2022 when various news-media publishers reported Plaintiffs' well-corroborated scoops that Rep. Boebert had used illegal drugs including methamphetamine, that she had worked as a paid escort and that she had two abortions.

In response to these stories in the Summer of 2022, Defendant launched a campaign out of her Congressional office, with all the authority and influence that entails, intending to destroy Plaintiff's reputation through malicious defamation, to destroy Plaintiffs' economic well-being by concerted action targeting their donors, vendors, advertisers and other sources of income, and to use Defendant's influence over media companies to silence the stories and prevent Plaintiffs from participating in public fora to speak on matters of public concern. *See* **Exhibit A**, ¶¶ 1-50; *see also,* Compliant, p.1-24. The herein action is Plaintiffs' attempt to seek the protection of law against Defendant's wrongful actions and remedy for the injury and damages they caused. Rather than justifying dismissal with prejudice at this early stage, C.R.S. § 13-20-1101 was enacted with the explicit purpose "to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 1101(1)(b).

Indeed, C.R.S. § 13-20-1101 was enacted to protect people in Plaintiffs' position in the circumstances of this case; the statute explicitly declares its intent to protect "the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government" (§1101(1)(b)) from "be[ing] chilled through abuse of the judicial process." (§1101(1)(a)). "Abuse of judicial process" under Colorado law includes (1) filing a claim for a temporary restraining order for "an ulterior purpose.… that is, use of a legal proceeding in an improper manner" resulting in damages (*Palmer v. Diaz,* 214 P3d 546, 550 (Colo. App. 2009)); (2) initiating an FEC inquiry "the primary purpose of … [which] was to harass the plaintiff or effectuate some other improper objective; and … to affect adversely a legal interest of the plaintiff." (*Boyer v. Health Grades, Inc*., 2015 CO 40, ¶ 9) (holding that the POME framework for analyzing abuse of process claims applies to both administrative and judicial processes alike); and (3) issuing threats of litigation to chill a person's free speech on matters of public concern. *See L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 44 ("the threat of protracted litigation could have a chilling effect on the constitutionally protected right of free speech").

Plaintiff contends that Defendant did all three. *See* **Exhibit A**, ¶¶ 9-12, 30, 36; *see also* Complaint, ¶¶ 18(a), 34, 46 and 68-71 (threatening Plaintiffs and anyone who may donate to Plaintiff with lawsuit). In addition to the use of her own authority and influence as a U.S. Representative, Defendant Boebert sought to commandeer the authority of the Colorado Courts to issue an injunction restraining Plaintiffs' exercise of their rights to free speech on matters of public interest (*i.e.,* on her generally and specifically her use of illegal drugs, abortions, and work as an escort). Defendant also sought to commandeer the authority of the FEC to inflict reputational and economic damages against Plaintiffs by initiating an action that was eventually dismissed, but publicly disclosed to cause further reputational damage to Plaintiffs. Moreover, Defendant used

the threat of litigation to simultaneously inflict economic and reputational damages upon Plaintiffs, repeatedly stating that Mr. Wheeler is a proven liar and offering as proof a sarcastic statement, "Yeah, I made it all up!" said by one of Plaintiffs' multiple sources corroborating their reports of Rep. Boebert's conduct. *See* **Exhibit A**, ¶¶ 23, 26; *see also* Complaint, ¶¶ 18(b), 31-32, 34(2), 46, 54, 56, Exhibits K, N2 to the Complaint, and ¶ 61 along with Exhibits B, J1, J4, J6, R5, R6, R7 to the Complaint.

Rep. Boebert's concerted, malicious and intentional attacks on Plaintiffs' profession and business had as its goal the use of power to thwart Plaintiffs' exercise of first amendment rights to free speech and participation in government. The Court in *L.S.S. v. S.A.P.,* makes it a point to call out the possibility that plaintiffs may also find protection under the anti-SLAPP law (*Id.,* ¶ 18), and Plaintiffs herein respectfully request this Court use its authority to bring the statute to bear in protecting Plaintiffs' rights to speak freely on matters of public concern free from "abuse of judicial process" by Defendant.

LEGAL STANDARDS, AUTHORITY AND ARGUMENT

RESPONDING TO MOTION TO DISMISS PURSUANT C.R.S. § 13-20-1101

"[B]ecause Colorado's anti-SLAPP law is relatively new and untested, and given that it tracks California's statute almost exactly, it is appropriate to draw from the more well-established body of authority interpreting the California law." *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 20 (quoting *Sevens v. Mulay*, 2021 WL 1153059, at *2 n.7 (D. Colo. Mar. 26, 2021) (unpublished order)). Guidance can also be drawn from Colorado Courts' applications of the "POME framework" announced in the seminal case *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984), because "Colorado's anti-SLAPP law 'codified and expanded the POME

framework'." *Moreau v. United States Olympic & Paralympic Comm.*, 641 F. Supp. 3d 1122, 1137 n.15 (D. Colo. 2022) (quoting *L.S.S.*, ¶ 17).

In *Stevens v. Mulay*, 2021 WL 1300503 (D.Colo. 2021), the U.S. District Court of Colorado held that only suits which "lack even minimal merit" should be dismissed pursuant to anti-SLAPP motions, quoting *Weinberg v. Feisel,* 2 Cal. Rptr. 3d 385, 387 (Cal. App. 2003) favorably as follows:

> "[u]nder the statute, a cause of action that arises from protected speech or petitioning and lacks even minimal merit should be stricken."

The California Supreme Court in *Navellier v. Sletten*, 29 Cal. 4th 82, 88–89 (2002) affirms that only suits which "lack even minimal merit" should be dismissed pursuant to an anti-SLAPP motion:

> Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.

The Ninth Circuit in *Manzari v. Associated Newspapers Ltd,*. 830 F3d 881, 887 (9th Cir 2016) (quoting *Overstock.com*, 151 Cal.App.4th 688 (2007)) held similarly, that "[o]nly a cause of action that lacks even minimal merit constitutes a SLAPP". The Court of Appeal in *Wilcox v. Sup Ct*, 27 Cal.App 809 816-17 (1994) explains that SLAPP suits have been characterized as 'generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.'

Plaintiffs' Complaint is not "lacking even minimal merit" such that it should be summarily dismissed with prejudice under the anti-SLAPP statute. The allegations are detailed, supported by extensive documentation and Plaintiff's sworn affidavit attached hereto as **Exhibit A**.

A more formal analysis of anti-SLAPP special motions provides the Court a 'two-prong' approach to determine whether or not a special motion should be granted. In the 'first prong,'

Defendants must prove that the Complaint targets their constitutionally protected rights to speak freely on matters of public concern.

Plaintiffs are not filing this suit to prevent Rep. Boebert from exercising her rights to constitutionally protected free-speech. Defendant asserts that her statements calling Plaintiff a liar are constitutionally protected under the First Amendment as non-actionable "hyperbole" (Motion § 1.3). However, her repeated assertion that Plaintiffs knew their news stories to be false because "their source told them in a text, and I quote, this story is made up!" (see *e.g*. Complaint ¶ 61, Exhibits B, J1, J4, J6, K, R5-7) is not mere "loose, figurative, or hyperbolic language" – it is **a provably false claim** asserting that Plaintiffs' source told them that the information she provided about Rep. Boebert concerning her drug use, abortions and escort work was "made up". As Defendant knew from the context of this source's communication, this was a sarcastic statement. As Defendant also knew, the statement was made in reference to Rep. Boebert's driving an ATV drunk and causing an accident. As Defendant further knew, Plaintiffs had multiple corroborating sources for their news stories about her drug use, abortions and escort work.

The Court in *Milkovich* distinguishes this type of accusation of intentional lying that is "sufficiently factual that it is susceptible to being proved true or false" from "the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 21, 110 S. Ct. 2695, 2707 (1990). As in the case of Milkovich, in this matter "[a] determination whether petitioner lied in this instance can be made on a core of objective evidence" (*Id.*) and thus Defendant's accusation against Plaintiffs -- that they knowingly published false news stories -- is actionable. The Court in *Milkovich* makes explicit that this type of defamatory statement is not protected by a constitutional privilege "to ensure the freedom of expression

guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative." *Id; see also, TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1186 (10th Cir. 2007) (following *Milkovich*); *see also, Keohane v Stewart,* 882 P.2d 1293, 1297 (Colo. 1994) ("The Burns standard was subsequently fortified by *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990), which eliminated the arbitrary distinction between statements of fact and statements of opinion. The respondents assert that because their communications are statements of opinion, they are constitutionally protected speech. We are not persuaded."); *see also, McIntyre v. Jones,* 194 P.3d 519, 528 (Colo. App. 2008) ("A statement may not be actionable at all because of the constitutional protection accorded to certain matters of opinion (i.e., statements which do not contain a provably false factual connotation or which cannot reasonably be interpreted as stating actual facts") (*citing Milkovich* at 20-21, and *Keohane*, 882 P.2d at 1298-99).

Since Defendant cannot show that Plaintiff is targeting her constitutionally privileged free speech, the 'first prong' of the analysis is not satisfied and this rules out granting of Rep. Boebert's anti-SLAPP motion.

The 'second prong' of the analysis, according to *Stevens v. Mulay,* at *5, is that Plaintiff must "demonstrate a probability of prevailing" on the claim, and to clarify that standard cites *Tamkin v. CBS Broad., Inc.,* 193 Cal. App. 4th 133, 142 (2011) as follows:

> Only a cause of action that satisfies both parts of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit —is a SLAPP, subject to being stricken under the statute. (citing *Navellier, supra*)

The California Supreme Court in *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) clarifies the standard as follows:

> [I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only … demonstrate that the complaint is both legally sufficient and supported by a sufficient **prima facie showing** of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.

(Emphasis added) (citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548).

The Court of Appeal in *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1087 (2001),

holds similarly:

> If the defendant makes that showing, the burden shifts to the plaintiff to establish a probability he or she will prevail on the claim at trial, i.e., to proffer a **prima facie** showing of facts supporting a judgment in the plaintiff's favor.

Plaintiffs may avoid dismissal if they establish a "reasonable likelihood" by proffering a prima facie showing of facts to support their claims.

As the Court ruled in *Salazar*, to determine whether a plaintiff has shown a "reasonable likelihood" of prevailing on his claim, the Court considers "the pleadings and the supporting and opposing affidavits … We 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." *Salazar*, 2022 WL 4241948 at * 4; *see id. Mitchell v. Twin Galaxies, Inc.*, 70 Cal.App.5th 207, 285 (Cal. App. 2021) ("To show a probability of prevailing, the opposing party must demonstrate the claim is legally sufficient and supported by a sufficient prima facie showing of evidence to sustain a favorable judgment if the evidence it has submitted is credited."); *Briganti v. Chow*, 42 Cal.App.5th 504, 254 Cal.Rptr. 909, 914 (Cal. App. 2019) ("we agree with the trial court's conclusion that Briganti's showing 'is adequate to establish a prima facie claim

for defamation. The statements complained of – that she had been indicted, that she was a convicted criminal, and that she had stolen the identities of thousands of people – are plainly defamatory in character and would tend to expose their subject 'to hatred, contempt, ridicule, or obloquy.'")

The Court in *Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 37 Cal. App. 4th 855, 866–67 (1995) states the standard succinctly:

> The lower court must consider the challenged plaintiff's affidavits for the purpose of determining whether sufficient evidence has been presented to demonstrate a prima facie case.

(citing *Hung v. Wang*, 8 Cal. App. 4th 908, 933–34 (1992)). And also held that:

> In making this judgment, the trial court's consideration of the defendant's opposing affidavits does not permit a weighing of them against plaintiff's supporting evidence, but only a determination that they do not, *as a matter of law,* defeat that evidence.

(citing *Rowe v. Sup.Ct.,* 15 Cal.App.4th 1711, 1723 (1993).

This is all to say that, to withstand an anti-SLAPP motion to dismiss requires Plaintiff whose cause of action is subjected to that special motion to simply demonstrate by affidavit a prima facie showing, and that defendant's opposing affidavits do not as a matter of law defeat Plaintiff's prima facie showing.

The Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), provides guidance as to what constitutes a prima facie showing:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

There is sufficient evidence before this Court to establish, *prima facie*, that Defendant made knowingly false, derogatory and injurious statements when she repeatedly claimed that Plaintiffs published news stories about her while being aware that, "It was all made up." Defendant Boebert

knew that the "It was all made up!" quip was a sarcastic remark, and nevertheless used it to maliciously defame Plaintiffs as liars—or at the least, there is evidence in the record here which makes a prima facie showing that Defendant made her statement knowing she was being misleading.

The Court in *Manzari, supra* at 892, explains the 'minimal merit' required to withstand an anti-SLAPP motion requires Plaintiff merely to raise sufficient evidence to raise a question for a jury to conclude that Defendant acted recklessly:

> Recognizing that California law requires only 'minimal merit' to withstand initial dismissal under the anti-SLAPP statute, we hold that Manzari has raised sufficient factual questions for a jury to conclude that the Daily Mail Online acted with reckless disregard for the defamatory implication in its article on the Los Angeles porn industry shut-down.).

The Ninth Circuit in *Dakar*, 611 F3d 590, 598 (9th Cir 2010) puts it as follows:

> The term reasonable probability in the anti-SLAPP statute has a specialized meaning. The statute requires only a minimum level of legal sufficiency and triablity. Indeed, the second step of the anti-SLAPP inquiry is often called the 'minimal merit prong.'

Defendant's motion should not be granted because Plaintiffs have provided the Court a prima facie showing of facts and evidence sufficient to determine that the case is not "entirely lacking in merit." This Court is not asked or authorized to make a factual determinations as to whether Defendant Boebert knew that she was being deceitful when she used Ms. Hooper's sarcastic remark to impugn the integrity of Plaintiffs; that should be left to the jury, all the court need do is determine whether there is a "reasonable likelihood" that a jury could so find.

RESPONDING TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Contrary to what Defendant's Motion asserts, there is no absolute immunity from defamation liability provided candidates during an election campaign under Colorado law. Rather, Colorado Courts have adopted the extensive protections for speech relating to "matters of public

concern" announced in *New York Times v. Sullivan. See, e.g., McIntyre v. Jones*, 194 P.3d 519, 524 (Colo. App. 2008), which held as follows:

> If, however, the statement involves a matter of public concern or pertains to a public official or public figure, the plaintiff must prove the falsity of the statement by clear and convincing evidence. [citations omitted]. Likewise, the plaintiff in such a case must prove that the defendant published the statement with actual malice -- that is, with actual knowledge that the statement is false or with reckless disregard for whether the statement is true; proof that the defendant was negligent in ascertaining the truth of the statement is insufficient. [citations omitted] And, a plaintiff in such a case must establish actual damages to maintain the action, even where the statement is defamatory per se. [citations omitted].

This is to say that to ultimately prevail in their defamation claim under Colorado law, Plaintiffs must prove by a preponderance of evidence that Defendant made (1) a defamatory statement concerning Plaintiffs, (2) published it to a third party, and (3) caused actual damages; and prove by clear and convincing evidence that (4) Defendant was incorrect to say that Plaintiffs knowingly published false news-stories about her, and that (5) Defendant knew she was incorrect when she said this. But to survive a 12(b)(5) motion for failure to state a claim, Plaintiffs must merely plead "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face,'" *Warne v. Hall*, 2016 CO 50, ¶ 1, (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

"To be defamatory, a statement need only prejudice the plaintiff in the eyes of a substantial and respectable minority of the community." *Tonnessen v. Denver Publ'g Co*., 5 P.3d 959, 963 (Colo. App. 2000). Whether a statement is defamatory is a question of law. *Gordon v. Boyles*, 99 P.3d 75, 79 (Colo. App. 2004) (citing *Walker v. Associated Press*, 160 Colo. 361, 417 P.2d 486 (1966)). Defendant's statement accusing Plaintiff, a news reporter, of intentionally lying would tend to prejudice the community against him, thus the Court may determine she made a defamatory statement about Plaintiffs. *See, e.g., NBC Subsidiary (KCNC-TV) v. Living Will Ctr.,* 879 P.2d 6,

9 (Colo. 1994) (citing *Milkovich supra,* at 18, ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."). Defendant didn't just publish the defamatory statement to *a third party*, she broadcast to *millions of people* the statement that Plaintiffs "published false statements knowing they were completely fabricated" (Complaint ¶ 41b, *also* ¶ 60), and that "they knew them to be false. Their source told them in a text, and I quote, this story is made up." (*Id.* ¶ 46). Plaintiffs specify in their Complaint the actual damages they suffered. *Id.* ¶¶ 63-64, 74-79, 81-82. Plaintiffs explain in their Complaint at ¶¶ 31, 54, 56 that Defendant knew the phrase "I made it all up!" was a sarcastic statement that she intentionally manipulated to mislead her audience. That is to say, it is false that Plaintiffs published stories they knew were "made up" and Defendant knew her statement that they did so was false.[1] In short, Plaintiffs' plead sufficient facts, when taken as true, to establish a plausible claim for defamation. Defendant's motion to dismiss Plaintiffs' defamation claim should be denied.

Defendant's Motion relies on the assumption that Plaintiffs "fail to allege any actionable defamatory statements" to argue that Plaintiffs' claims for civil conspiracy, commercial disparagement, and trade libel must also be dismissed. *See* Motion, p. 20-21. Since the Motion is incorrect that the "First Amendment shield against a claim of defamation" (Motion, p.20) under Colorado law bars Plaintiffs' claim against the above-referenced statements that Defendant made with actual malice, Defendant's motion to dismiss these other claims should also be denied.[2]

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[1] "Actual malice" is a term of art in defamation law, meaning "with actual knowledge that the statement is false or with reckless disregard for whether the statement is true" *McIntyre v. Jones*, 194 P.3d 519, 524 (Colo. App. 2008).

[2] Defendant doesn't challenge Plaintiffs' tortious interference with contract and tortious interference with prospective advantage claims, and so those claims of Plaintiffs' Complaint should also survive this Motion.

Finally, the matter before the Court in *Buentello v. Boebert* can be materially distinguished from the herein case. First of all, that case sought "the extraordinary remedy of a preliminary injunction," relating to Representative Boebert's use of her Twitter account which may be granted "only when the movant's right to relief is clear and unequivocal" *Buentello,* 545 F. Supp. 3d 912, 915 (D. Colo 2021); whereas this is a case for damages. In *Buentello,* the Court held that:

> it is unclear what cause of action Ms. Buentello relies on as a basis to enjoin Representative Boebert from violating the Constitution. Ms. Buentello suggests that there exists an implied cause of action under the Constitution for equitable remedies. But Ms. Buentello cites no decision of any court enjoining a member of Congress in her official capacity; nor has the Court found any.

Defendants here do not argue that Plaintiffs' claims are similarly mysterious. It is however, mysterious how Defendant's Motion comes to the conclusion that the ruling in *Buentello* stands for the proposition that "Representative Boebert's statements during a political campaign cannot give rise to First Amendment liability as a matter of law." Motion p. 22.

CONCLUSION

Plaintiffs filed their claims with this Court seeking remedy of the reputational and economic damage caused by Defendant's malicious defamation, intentional interference with donor contracts, vendors, advertisers, agencies, organizations and media companies, and violations of Plaintiffs' first-amendment rights, respectfully requesting an award for damages and injunctive relief mandating removal, retraction and correction of the effect of Boebert's defamatory statements against Plaintiffs. These are not the type of meritless claims used to deter and punish persons from exercising their rights to petition and participate in government that the anti-SLAPP law was enacted to combat. To the contrary, it's the type of actions taken by Representative Boebert to inflict injury and economic damages upon Plaintiffs for having the temerity to exercise their free speech rights to criticize her that C.R.S. § 13-20-1101 was enacted to prevent.

WHEREFORE, Plaintiffs respectfully request that Defendant's Rule 12(b)(5) Motion to dismiss each of their claims be denied, that their Special Motion pursuant C.R.S. § 13-20-1101 be denied, that attorneys fees be awarded Plaintiff pursuant to C.R.S. § 13-20-1101, and that the Court Order the automatic stay on discovery be lifted.

Respectfully submitted this 29th day of September, 2023

By: *_/s Dan Ernst_________________*

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 29th day of September, 2023, the foregoing was filed electronically through the court's CM/ECF system, causing all parties or counsel to be served by electronic means.

/s/ Dan Ernst
Dan Ernst, Esq.