Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-009417 12/19/2023

HONORABLE JAY RYAN ADLEMAN

CLERK OF THE COURT
L. Gilbert
Deputy

STEPHEN RICHER

DANIEL D MAYNARD

v.

KARI LAKE, et al.

GREGG P LESLIE

TIMOTHY A LASOTA
JENNIFER JAYNE WRIGHT
JUDGE ADLEMAN

MINUTE ENTRY

The Court has reviewed all of the filings associated with **(1)** Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure; and **(2)** Defendants' Motion to Dismiss Pursuant to A.R.S. § 12-751. The Court is additionally familiar with the procedural history of this case.

The Court has further considered the arguments of the parties at the time of the hearing on December 19, 2023. At the conclusion of the hearing, the Court took the matter under advisement and promised to issue a ruling in due course. This is that ruling.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Stephen Richer[1] has initiated this defamation action against Defendants Kari Lake, Save Arizona Fund, Inc., and Kari Lake for Arizona. The dispute pertains to statements purportedly made by Defendant Lake and her campaign in the aftermath of the November 2022 gubernatorial election (***see*** FAC at ¶¶ 1-10).[2]

Plaintiff asserts that Defendants have "repeatedly and falsely" accused him of illegal acts giving rise to Defendant Lake's defeat in the election. More specifically, Plaintiff has identified two particularized categories of allegedly defamatory statements. These include **(1)** that Plaintiff was responsible for intentionally printing misconfigured ballots that could not be read by the on-site tabulators at voting locations; and **(2)** that Plaintiff intentionally inserted 300,000 illegal ballots into the Maricopa County vote count (***see*** FAC at ¶¶ 14-15).

Plaintiff further asserts that – with actual malice – Defendants published these allegedly defamatory statements during speeches, interviews, and through their social media accounts. The First Amended Complaint includes numerous examples in which Defendants apparently published their allegations against him in the weeks following the election (***see generally*** FAC at ¶¶ 16-103).

The totality of the referenced statements identified in the First Amended Complaint would be far too extensive to identify here; however, the Court will include two prominent examples by way of illustration. The first example relates to allegations regarding the misconfigured ballots, and pertains to statements ostensibly made by Defendant Lake during her speech at the "Save Arizona Rally" on January 29, 2023. She purportedly stated the following:

> "[W]e're supposed to have a 20-inch image on a 20-inch ballot, but Richer and, Richer and Gates and their crew printed a 19-inch image, the wrong image on the ballot, so that the tabulators would jam all day long. That's exactly what happened.

[1] Plaintiff has brought this action in his individual capacity.

[2] Plaintiff filed his First Amended Complaint (FAC) in order to add Defendant Lake's husband Jeffrey Halperin to the litigation. Plaintiff subsequently filed a "corrected" FAC in order to resolve certain inaccuracies in the internal numbering of paragraphs. Given that the FAC is now the operative pleading in this matter, the Court's citations will refer to the "corrected" filing that was submitted on September 13, 2023.

> They did not want us to notice this …. You know, the only person, the only thing they wanted to notice this was the tabulators so that they would jam and spit out ballots, which is exactly what happened all day on Election Day. Ballots got spit out. They got spit out over and over again. Let's show those two again, these two men.[3]
>
> Richer and Gates intentionally printed the wrong image on the ballot on Election Day so that those ballots would intentionally be spit out of the tabulators …. Well these guys are really, really terrible at running elections but I found out they're really good at lying."

See FAC; at Appendix A (entry #1).

The second example arises from the same event and pertains to Defendants' accusations regarding 300,000 illegal ballots:

> "First of all, let's start with 300,000 ballots with zero chain of custody – I'm going to explain this in slow motion – real, in easy terms for the simpletons in the media back there. Testimony from our whistleblowers down at Runbeck proves that. 300,000 ballots lacked chain of custody.
>
> For those of you who don't understand what chain of custody is, it is basically the law that ensures that illegal ballots don't get counted and don't infect our elections. And we know that 300,000 illegal ballots, because they didn't have chain of custody, were counted in the final total.

See FAC; at Appendix A (entry #1).

* * *

Defendants have now filed two (2) separate but interrelated motions to dismiss all of Plaintiff's defamation claims in this matter. Plaintiff opposes both motions in their entirety. The Court will analyze these motions in the following sections of this ruling.

[3] During the speech, it appears as though a photograph of Plaintiff was prominently on display for the benefit of the audience (***see*** FAC at ¶ 20).

II. PLAINTIFF HAS SET FORTH SUFFICIENT FACTUAL ALLEGATIONS TO WITHSTAND DISMISSAL PURSUANT TO RULE 12(B)(6).

It is well established that the narrow question presented by a motion to dismiss for failure to state a claim is whether the facts alleged in a complaint are sufficient "to warrant allowing the [plaintiff] to attempt to prove [its] case." ***Coleman v. City of Mesa,*** 230 Ariz. 352, 363, 284 P.3d 863, 874 (2012). Dismissal is permitted only when a "plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." ***Fidelity Security Life Ins. Co. v. State Department of Ins.,*** 191 Ariz. 222, 224, 954 P.2d 580, 582 (1998).

Additionally, a motion to dismiss requires the trial court to accept all material facts alleged by the nonmoving party as true. ***See Acker v. CSO Chevira,*** 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997); ***Lakin Cattle Co. v. Engelthaler,*** 101 Ariz. 282, 284 419 P.2d 66, 68 (1966).

Finally, it is firmly established that our courts follow a notice pleading standard. ***See*** Rule 8, Arizona Rules of Civil Procedure; ***Cullen v. Auto-Owners Insurance Co.,*** 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). A complaint that states only legal conclusions – without supporting factual allegations – does not comply with the notice pleading standard. ***Id.***

A. Defamation and its First Amendment considerations

The United States Supreme Court has definitively concluded that "libel can claim no talismanic immunity from constitutional limitations," and must therefore "be measured by standards that satisfy the First Amendment." ***See New York Times v. Sullivan,*** 376 U.S. 254, 269 (1964); ***see also Milkovich v. Lorain Journal Co.,*** 497 U.S. 1, 2 (1990).[4]

Consistent with this notion, the trial court must perform an important gatekeeper role in order to safeguard First Amendment principles in defamation cases. ***See, e.g., Rogers v. Mroz,*** 252 Ariz. 335, 341-342, 502 P.3d 986, 992-993 (2022); ***Yetman v. English,*** 168 Ariz. 71, 79, 811 P.3d 323, 331 (1991). This requires the Court – in matters of both public and private concern – to examine the alleged defamatory statements in their proper context. ***Id.***

With this in mind, Arizona law notes that a viable defamation claim exists when **(1)** the defendant makes a false statement concerning the plaintiff; **(2)** the statement is defamatory; **(3)** the statement is published to a third party; **(4)** the statement is made with actual malice; and **(5)** the plaintiff was damaged as a result of the statement. ***See Harris v. Warner,*** 255 Ariz. 29, 32, 527 P.3d 314, 317 (2023); ***see also Peagler v. Phoenix Newspapers, Inc.,*** 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1997); ***Turner v. Devlin,*** 174 Ariz. 201, 203-204, 848 P.2d 286, 288-289 (1993).

[4] The Arizona Constitution has its own provision intended to guarantee free expression. ***See*** Ariz. Const. Art. 2 § 6.

Finally, Arizona law requires that in order "to establish a defamation claim on matters of public concern: **(1)** the assertion must be provable as false; and **(2)** the statement must be reasonably perceived as stating actual facts about an individual, rather than imaginative expression or rhetorical hyperbole." ***Rogers v. Mroz,*** 252 Ariz. 335, 341, 502 P.3d 986, 992 (2022)(citing ***Yetman v. English,*** 168 Ariz. 71, 75-76, 811 P.3d 323, 327-328 (1991)); ***see also Milkovich v. Lorain Journal Co.,*** 497 U.S. 1, 21 (1990).[5]

In view of these principles, the Court will consider the viability of Plaintiff's allegations set forth in the First Amended Complaint.

B. Plaintiff has set forth sufficient facts tending to demonstrate that the disputed statements are provable as false.

The Court primarily considers whether these statements are "provably false," *i.e.*, whether a finder of fact might ultimately determine their truth or falsity. ***See Turner v. Devlin,*** 174 Ariz. 201, 208, 848 P.2d 286, 293 (1993); ***Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991)(provable falsity depends upon whether the statement raises an "empirical question a fact-finder can resolve").

As indicated previously, the First Amended Complaint has organized the disputed statements into two separate categories. Those categories include: **(1)** that Plaintiff was responsible for intentionally printing misconfigured ballots; and **(2)** that Plaintiff intentionally inserted 300,000 illegal ballots into the Maricopa County vote count (***see*** FAC at ¶¶ 14-15).

The Court will address each of these categories of statements below.

1. <u>Statements regarding ballot size/tabulators</u>

Plaintiff alleges that – in the aftermath of the election – Defendant Lake and her campaign repeatedly stated that he was responsible for manipulating the size of the ballot image in order to impact the results of the election. In addition to the "Save Arizona Rally" previously cited, the First Amended Complaint provides additional examples. Among those examples, the FAC includes Defendant Lake's podcast interview on February 20, 2023:

> [W]e have the proof and the evidence …. This is what's in our case. They printed intentionally the wrong image on the ballot, knowing that 75% of the people showing up on Election Day were voting for me. They intentionally print the wrong image on the ballot so it jams the tabulator.

[5] Although not pertinent at this procedural juncture, any determination of the aforementioned requirements would be subject to enhanced appellate review. ***Id.***

(***see*** FAC at ¶¶ 61-64).[6]

The First Amended Complaint further identifies a subsequent interview from February 22, 2023, which included the following statement from Defendant Lake:

> I mean talk about diabolically genius if you want to mess with Election Day…. [T]hey did it in a way that was so subtle that the good people of Arizona who showed up to vote on Election Day they wouldn't even detect it. They made the image on the ballot just a little bit smaller than normal and when that got fed into the tabulator machine the tabulator read it as a paper jam and that's why a quarter of a million ballots were spit out.

(***see*** FAC at ¶ 69).

* * *

In the Court's view, Defendant Lake's statements are "provably false" under prevailing Arizona law. ***See Turner v. Devlin,*** 174 Ariz. 201, 208, 848 P.2d 286, 293 (1993); ***Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991). In other words, Defendant Lake's statements purport to announce objective facts pertaining to the size of the ballots and the intentional conduct of Plaintiff Richer. Depending upon the nature of any available evidence at a trial, a jury could determine whether those statements were either true or false. ***Id.***

Plaintiff offers well pled factual allegations to support his assertion that any statements regarding ballot manipulation are false and defamatory. The factual allegations in the First Amended Complaint include the following: **(1)** Plaintiff Richer and the Maricopa County Recorder's Office are not responsible for Election Day operations;[7] and **(2)** the independent report overseen by former Chief Justice Ruth McGregor did not find any evidence of intentional misconduct involving Election Day ballots.[8]

At this stage of the proceedings, Arizona law requires the trial court to accept the truth of Plaintiff's well pled factual allegations. ***See Acker v. CSO Chevira,*** 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997); ***Lakin Cattle Co. v. Engelthaler,*** 101 Ariz. 282, 284 419 P.2d 66, 68 (1966).

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[6] During the course of the interview, "they" ostensibly referred to Stephen Richer and Bill Gates.

[7] ***See*** FAC at ¶ 105.

[8] ***See*** FAC at ¶¶ 121-123. The Court has reviewed the entirety of Chief Justice McGregor's investigative report. As a public record, it does not constitute a matter outside the pleadings for purposes of Rule 12(b)(6), Arizona Rules of Civil Procedure. ***See Coleman v. City of Mesa,*** 230 Ariz. 352, 356, 284 P.3d 863, 867 (2012).

In short, the Court finds that Plaintiff has set forth actionable defamation claim(s) with respect to Defendant Lake's statements in which she accuses him of misconduct regarding the intentional use of misconfigured ballots on Election Day. ***See Turner v. Devlin,*** 174 Ariz. 201, 208, 848 P.2d 286, 293 (1993); ***Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991).

2. <u>Statements regarding the insertion of 300,000 illegal ballots</u>

Plaintiff further alleges that Defendant Lake is liable for defamation as a result of her accusations that he purportedly inserted 300,000 illegal ballots into the Maricopa County vote count in an effort to undermine the election. In addition to the previously-referenced "Save Arizona Rally," Defendant Lake provided an interview in which she apparently stated the following:

> "[T]hey couldn't steal it by just throwing in 300,000 bogus ballots with no chain of custody, which they did. They had to sabotage Election Day.

(***see*** FAC at ¶ 62).[9]

Again, the Court finds this category of statement(s) to be "provably false" under the standards established by Arizona law. ***See Turner v. Devlin,*** 174 Ariz. 201, 208, 848 P.2d 286, 293 (1993); ***Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991). Similar to Defendant Lake's statements regarding ballot size, her statements regarding the existence of 300,000 fraudulent early voting ballots is subject to empirical data that could be considered by a jury. As such, these statements are actionable under Arizona law. ***See Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991).

The First Amended Complaint sets forth well-pled factual allegations in order to support Plaintiff's claims that these statements are false and defamatory. The FAC asserts that the early voting ballots broke in favor of Defendant Lake.[10] Even more significantly, the FAC cites to the election contest litigation, in which the trial court found "nothing to substantiate [Lake's] claim of intentional misconduct" and that the ballot insertion claims were similarly unproven. The

[9] This claim was repeated in subsequent interviews and online postings (***See*** FAC at ¶¶ 62-71, 106-108). Although certain statements do not identify Plaintiff by name, this is not a necessary prerequisite under Arizona law. ***See Rogers v. Mroz,*** 252 Ariz. 335, 339, 502 P.3d 986, 990 (2022); ***see also*** Restatement (Second) of Torts § 563 cmt. e ("it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended").

[10] ***See*** FAC at ¶¶ 106-108.

subsequent appellate proceedings ratified the trial court's findings with respect to the fraudulent ballot claims.[11]

As indicated earlier, this Court is required to accept the truth of Plaintiff's factual allegations in its consideration of the motion to dismiss. ***See Acker v. CSO Chevira,*** 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997); ***Lakin Cattle Co. v. Engelthaler,*** 101 Ariz. 282, 284 419 P.2d 66, 68 (1966). Plaintiff's well pled factual allegations suggest that the alleged defamatory statements are "provably false." ***See Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991).

For all of these reasons, the Court finds that Plaintiff has set forth actionable defamation claim(s) with respect to the accusations surrounding Plaintiff's alleged insertion of 300,000 fraudulent ballots into the Maricopa County vote count. ***See Turner v. Devlin,*** 174 Ariz. 201, 208, 848 P.2d 286, 293 (1993); ***Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991).

C. Defendant Lake's statements do not constitute mere rhetorical hyperbole.

Defendants argue that dismissal is required because the disputed statements constitute nothing more than imaginative expression or rhetorical hyperbole. ***See Rogers v. Mroz,*** 252 Ariz. 335, 341, 502 P.3d 986, 992 (2022)(citing ***Yetman v. English,*** 168 Ariz. 71, 75-76, 811 P.3d 323, 327-328 (1991)); ***see also Milkovich v. Lorain Journal Co.,*** 497 U.S. 1, 21 (1990). The Court disagrees with this contention.

Several well known cases from the United States Supreme Court provide this Court with prominent examples of imaginative expression and rhetorical hyperbole. ***See, e.g., Greenbelt Cooperative Publishing Association, Inc. v. Bresler,*** 398 U.S. 6, 7 (1970)(use of term "blackmail" in description of negotiation tactics not actionable as slander or libel); ***Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin,*** 418 U.S. 264, 268 (1974)(use of terms "traitor" and "scab" in labor dispute deemed not to be representations of fact and therefore not actionable as defamation); ***Hustler Magazine, Inc. v. Falwell,*** 485 U.S. 46, 50 (1988)(ad parody not actionable because it "could not reasonably have been interpreted as stating actual facts about the public figure involved").

Unlike the aforementioned triumvirate of cases, however, the alleged statements in this case *cannot* be classified merely as "descriptive" language. In point of fact, Defendant Lake's statements regarding improper 19-inch ballots and/or the existence of 300,000 fraudulent ballots may be discerned by a factfinder as either true or false when considered in the light of any available evidence. These statements constitute assertions of fact that are actionable under prevailing Arizona law. ***See Rogers v. Mroz,*** 252 Ariz. 335, 341, 502 P.3d 986, 992 (2022); ***Milkovich v. Lorain Journal Co.,*** 497 U.S. 1, 21 (1990).

[11] ***See*** FAC at ¶¶ 109-120.

D. Plaintiff has set forth sufficient factual allegations of actual malice.

Arizona law defines "actual malice" as a statement made with knowledge of its falsity or with reckless disregard for its truth or falsity. ***See, e.g., Peagler v. Phoenix Newspapers, Inc.,*** 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1997); ***Lewis v. Oliver,*** 178 Ariz. 330, 335, 873 P.2d 668, 673 (App. 1993).

For the purpose of this ruling, it is sufficient to note that Plaintiff has supported his defamation claims with assertions of actual malice. The First Amended Complaint includes well pled facts including but not limited to: **(1)** Defendants' accusations that Plaintiff intentionally engaged in unlawful acts for the purpose of "sabotaging" the election;[12] **(2)** that Defendants published their accusations with knowledge of falsity and/or with reckless disregard for the truth;[13] **(3)** that Defendants had a financial motivation to solicit donations in connection with their defamatory statements;[14] **(4)** that Defendants engaged in falsehoods as part of a pre-election narrative;[15] and **(5)** that Defendants continued these allegations even after in the aftermath of their unsuccessful election contest.[16]

In short, Plaintiff has set forth sufficient factual allegations that Defendants' statements were made with actual malice. ***See, e.g., Peagler v. Phoenix Newspapers, Inc.,*** 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1997); ***Lewis v. Oliver,*** 178 Ariz. 330, 335, 873 P.2d 668, 673 (App. 1993).

E. Issue preclusion does not create a basis for dismissal.

Defendants separately maintain that Plaintiff's claim is barred by principles of issue preclusion. The Court disagrees with this assertion.

Issue preclusion is a judicial doctrine that prevents a party from relitigating an issue or fact that was decided in a prior judgment. ***See, e.g., Hancock v. O'Neil,*** 253 Ariz. 509, 512, 515 P.3d 695, 698 (2022); ***Crosby-Garbotz v. Fell,*** 246 Ariz. 54, 55, 434 P.3d 143, 144 (2019). Issue preclusion may apply only in cases where **(1)** the issue at stake is the same in both proceedings;

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[12] ***See*** FAC at ¶¶ 14-20.

[13] ***See*** FAC at ¶¶ 104-123.

[14] ***See*** FAC at ¶¶ 124-135.

[15] ***See*** FAC at ¶¶ 136-142.

[16] ***See*** FAC at ¶¶ 65-103; and ¶¶ 109-123.

(2) the issue was actually litigated and determined in a valid and final judgment; **(3)** the opposing party had a full and fair opportunity to litigate the issue; and **(4)** the issue was essential to the judgment. ***See Legacy Foundation Action Fund v. Citizens Clean Elections Commission,*** 254 Ariz. 485, 492, 524 P.3d 1141, 1148 (2023); ***Chaney Building Co. v. City of Tucson,*** 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986).

In CV2022-095403, Kari Lake brought her election contest action against numerous governmental actors including but not limited to the Maricopa County Recorder's Office. When that action was unsuccessful, the Maricopa County Defendants sought an award of sanctions pursuant to A.R.S. § 12-349. In the Court's discretion, it declined to impose attorney's fees against Lake in that matter (***see*** Court's minute entry in CV2022-095403; dated 5/26/23).[17]

On the basis of the prior sanctions ruling, Defendants now assert that Plaintiff is effectively barred from bringing the defamation action. Defendants seemingly argue that – because the prior trial court did not identify the election contest as a frivolous legal proceeding – Plaintiff cannot now pursue his defamation action. In the Court's view, this attenuated assertion does not square with prevailing Arizona law. ***See Legacy Foundation Action Fund v. Citizens Clean Elections Commission,*** 254 Ariz. 485, 492, 524 P.3d 1141, 1148 (2023); ***Chaney Building Co. v. City of Tucson,*** 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986).

In the present case, Plaintiff has brought specified defamation claims that were never "actually litigated" in the sanctions proceedings. The prior litigation solely involved the election contest pertaining to the gubernatorial election. The election contest did not address the defamatory nature of Defendant Lake's *statements* in the aftermath of that election. Issue preclusion is inapplicable under these circumstances. ***See, e.g., Hancock v. O'Neil,*** 253 Ariz. 509, 512, 515 P.3d 695, 698 (2022); ***Crosby-Garbotz v. Fell,*** 246 Ariz. 54, 55, 434 P.3d 143, 144 (2019).[18]

For these reasons, the Court finds that issue preclusion does not bar Plaintiff from bringing his defamation claims here. ***Id.***

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[17] As the parties are aware, A.R.S. § 12-349 generally permits the Court to impose an award of attorney's fees against a party that brings or defends a claim without substantial justification. A trial court has broad discretion with respect to such an issue. ***See Harris v. Reserve Life Insurance Co.,*** 158 Ariz. 380, 384, 762 P.2d 1334, 1338 (App. 1988).

[18] As Plaintiff points out, issue preclusion is improper for the additional reason that Mr. Richer was involved in the prior litigation on behalf of the Maricopa County Recorder's Office. He has initiated these proceedings in his individual capacity. It is equally true that the sanctions ruling was not "essential" to the prior judgment. Issue preclusion does not serve to preclude the current litigation. ***See Crosby-Garbotz v. Fell,*** 246 Ariz. 54, 57, 434 P.3d 143, 146 (2019).

* * *

The Court has considered the factual allegations contained in the First Amended Complaint. Having done so, the Court finds – as a matter of law – that Plaintiff's allegations are sufficient to state a claim upon which relief may be granted. ***See Coleman v. City of Mesa,*** 230 Ariz. 352, 363, 284 P.3d 863, 874 (2012); Rule 12(b)(6), Arizona Rules of Civil Procedure.

III. DEFENDANTS HAVE NOT SET FORTH A PRIMA FACIE BASIS FOR DISMISSAL PURSUANT TO A.R.S. § 12-751.

As the parties are aware, Arizona law provides a statutory mechanism under A.R.S. § 12-751 for litigants to challenge the filing of an action that improperly seeks to retaliate or prevent a person from engaging in "the lawful exercise of a constitutional right." ***Id.***

As the Court has already determined in its prior analysis, however, Plaintiff has set forth sufficiently well pled allegations to state an actionable claim for defamation pertaining to the two categories of statements identified above. In other words, Plaintiff has set forth a factual and legal basis – consistent with First Amendment principles – to bring his defamation claims against these Defendants. ***See generally New York Times v. Sullivan,*** 376 U.S. 254, 269 (1964); ***see also Milkovich v. Lorain Journal Co.,*** 497 U.S. 1, 2 (1990).

Additionally, the Court finds that Defendants have not satisfied their burden of establishing prima facie proof that Plaintiff initiated the legal action as a means of deterring the lawful exercise of free expression. ***See*** A.R.S. § 12-751(B).[19]

In making this determination, the Court finds that Plaintiff's lawsuit is limited in scope to any alleged statements suggesting **(1)** that Plaintiff was responsible for intentionally printing misconfigured ballots; and **(2)** that Plaintiff inserted 300,000 illegal ballots into the Maricopa County vote count.[20]

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[19] The statutory scheme indicates that motions filed under the auspices of A.R.S. § 12-751 may be summarily denied in the absence of prima facie proof that the action was motivated by an improper purpose. As the Court noted during oral argument, however, the order directing Plaintiff to respond to the motion was *not* intended to signal any findings that Defendants had satisfied their statutory burden of proof in this matter. To the contrary, the Court merely intended to review the briefing of *both* parties before making any determination regarding the allegations contained within the First Amended Complaint (***see*** Court's minute entry dated 8/25/23).

[20] It is conceivable that – at a prospective trial – the parties may seek to admit other statements evincing proof of actual malice (or a lack thereof), but the Court need not address such considerations at this preliminary stage of the proceedings.

With this limitation in mind, the Court is satisfied that the disputed statements – if indeed they are "provable" as false and defamatory – would be undeserving of the protections associated with our First Amendment principles. ***See generally New York Times v. Sullivan,*** 376 U.S. 254, 269 (1964); ***see also Milkovich v. Lorain Journal Co.,*** 497 U.S. 1, 2 (1990); ***Turner v. Devlin,*** 174 Ariz. 201, 208, 848 P.2d 286, 293 (1993); ***Yetman v. English,*** 168 Ariz. 71, 81, 811 P.3d 323, 333 (1991); ***Rogers v. Mroz,*** 252 Ariz. 335, 341, 502 P.3d 986, 992 (2022); ***Harris v. Warner,*** 255 Ariz. 29, 32, 527 P.3d 314, 317 (2023).[21]

In the absence of any prima facie evidence that the lawsuit was brought for an improper purpose, Defendants' statutory motion to dismiss will be summarily denied. ***See*** A.R.S. § 12-751(B); ***BLK III, LLC v. Skelton,*** 252 Ariz. 583, 585, 506 P.3d 812, 814 (App. 2022).[22]

IV. CONCLUSION AND ORDERS

For all of the foregoing reasons, the Court finds that **(1)** Plaintiff has stated a claim upon which relief may be granted; and **(2)** Defendants have failed to establish a prima facie basis for relief pursuant to A.R.S. § 12-751. With this in mind, Defendants' motion(s) to dismiss will be respectfully denied.

Accordingly,

IT IS ORDERED DENYING Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure;

IT IS FURTHER ORDERED DENYING Defendants' Motion to Dismiss Pursuant to A.R.S. § 12-751;

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[21] It is worth noting that Defendants cite to Plaintiff's social media statement that was posted concurrently with the filing of the lawsuit. In the posting, Plaintiff indicates that he is "suing Kari Lake" to "put an end to the false statements." (***see*** Defendants' motion; at Exhibit A). In the Court's view, Plaintiff's social media posting does nothing more than allege that he is the object of false and defamatory statements. Standing alone, the social media posting does not establish prima facie evidence of a motivation inconsistent with our First Amendment principles. ***See*** A.R.S. § 12-751(B).

[22] Given the nature of the Court's rulings contained herein, it is not necessary to address additional disputes raised by the parties, *i.e.*, whether Plaintiff constitutes a state actor for purposes of the statute, and/or whether the statutory scheme violates certain provisions of the Arizona Constitution.

IT IS FURTHER ORDERED DENYING Defendants' Expedited Motion to Stay Discovery;[23] and

IT IS FURTHER ORDERED directing the parties to meet and confer in an effort to provide the Court with a proposed Amended Scheduling Order no later than **January 19, 2024**.[24]

[23] Given the Court's finding that Defendants have failed to satisfy their prima facie burden under the statute, there is no lawful basis to order a stay of discovery. ***See*** A.R.S. § 12-751(E).

[24] According to the Joint Report, the parties indicated their disagreement as to the propriety of any discovery prior to the determination of Defendants' motion(s) to dismiss. Given that the Court has now ruled on those motions, it seems proper for the parties to address their scheduling needs in good faith and to submit an Amended Proposed Scheduling Order for the Court's review and consideration.