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STATE OF MINNESOTA

COUNTY OF KANDIYOHI

DISTRICT COURT

EIGHTH JUDICIAL DISTRICT

Case Type: Civil Other/ Miscellaneous

Steve Quest,

Plaintiff,

v.

Nicholas Rekieta and Rekieta Law, LLC,

Defendants.

Court File No. 34-CV-23-12
Honorable Judge Jennifer Fischer

DEFENDANTS NICHOLAS REKIETA AND REKIETA LAW, LLC'S SPECIAL MOTION TO DISMISS PURSUANT TO COLO. REV. STAT. § 13-20-1101

Plaintiff Steve Quest a/k/a Montagraphy, Montagraph, and Monty is a Colorado "entertainer, artist, and video producer." Complaint, § II. (He uses the other three names as "stage names" or "screen names") Among Plaintiff's works is a video entitled "*Little Piggy and the Umbrella Man*," in which Plaintiff both stars and directs. In that movie, he threatens to rape, and seemingly murders, a teenage girl.[1] This movie garnered significant attention, because of its shocking content.

In 2019 Quest made a legal threat against YouTuber "Mister Metokur" regarding Metokur's commentary[2] about a lawsuit he filed against an individual named Jake Morphonios regarding commentary on the film and related allegations of Quest's pedophilia. Mr. Rekieta appeared on Metokur's program to discuss the legal threat over this horrific work.[3]

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[1] See https://archive.org/details/little-piggy-and-the-umbrella-man and https://www.imdb.com/title/tt7285944/

[2] Rekieta discussed this on a livestream with Metokur on June 29, 2019. *See* drumr828, "Mister Metokur and Nick Rekieta stream on Montagraph (June 29, 2019), available at: https://www.youtube.com/watch?v=77vBeWJuX24.

[3] In a filing Quest submitted in this litigation, he stated that third parties have been publishing videos about him and his "Montagraph" name since 2010. (Response to Motion to Dismiss in *Morphonios* case, attached as **Exhibit 1**, at 4).

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Nicholas Rekieta is a Minnesota attorney and a popular "lawsplainer," who hosts an online video program wherein he discusses legal proceedings.[4] It is not the dry analysis one might find on CNN, but rather it is made to be entertaining. As characterized by Plaintiff, "[i]n addition to offering legal advice and analysis, Defendant Nicholas Rekieta engages in hyperbole and comedy." Complaint, § III. That fact is both true and fatal to Quest's claims.

Defendants Nicholas Rekieta and Rekieta Law, LLC (collectively, "Defendants") hereby file their Special Motion to Dismiss Plaintiff Steve Quest's Complaint pursuant to Colorado's Anti-SLAPP law, Colo. Rev. Stat. § 13-20-1101. A choice of law analysis shows that Colorado law, including its Anti-SLAPP law, applies to Quest as a Colorado resident. Quest's Complaint is premised entirely on Defendants' communications in furtherance of the exercise of their constitutional right of free speech in connection with an issue of public interest, and the claims in the Complaint are meritless. The Colorado Anti-SLAPP law is applicable through this motion, which is functionally a motion for summary judgment, under Minn. R. Civ. P. 56. The claims should be dismissed, and Defendants should be awarded their fees.

1.0 FACTUAL BACKGROUND

1.1 Plaintiff's Reputation

Plaintiff Steve Quest describes himself as "an entertainer, artist, and video producer," who uses the names Montagraphy, Montagraph, Monty, and Octoberreignz. Complaint at ¶ II. His IMDB page identifies him as the writer, director, and "Rapist" in the short film "Little Piggy and the Umbrella Man," and as "Roy Warren Marshall AKA Steve Quest" in "Keyboard Commandos Must Die." *See* Montagraph IMDB page, attached as **Exhibit 2**.[5] He "[o]ften uses checkerboard imagery and young children in his work." *Id.* The AV Club even has a page dedicated to his "Keyboard Commandos Must Die" film. *See* AV Club page on "Keyboard Commandos Must Die," attached as **Exhibit 3**.[6] Plaintiff has 70.8 thousand subscribers and over 1.2 million views on his YouTube channel. *See* Montagraph YouTube "About" page, attached as **Exhibit 4**.[7]

[4] Rekieta Law, LLC, is Mr. Rekieta's law firm. "Rekieta Law" is separately the name of Mr. Rekieta's show, but it is not produced by the firm—rather it is so named because it is typically Rekieta discussing law. Defendants do not understand why the law firm was sued, as Plaintiff has never been a client and the firm is separate from the online video program. It is a failure of Defendants' diligence at best or a bad faith effort to wrongly attempt to pursue an insurance payout at worst.

[5] Available at: https://www.imdb.com/name/nm9217446/.

[6] Available at: https://www.avclub.com/film/reviews/keyboard-commandos-must-die-2018.

[7] Available at: https://www.youtube.com/@Montagraph/about

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A defamation plaintiff seeks compensation for damage to their reputation. However, just like in any case, it is imperative to consider the Plaintiff's condition before the Defendant's actions. Suffice to say that if this case were about damage to a vehicle, the Plaintiff would be dragging a car out of a smash up derby contest, and seeking to be compensated for a scuff that Rekieta may have put on it when the driver ran into him on a public street. Or if he were here seeking compensation for an injury, he would be here after being beaten up by an MMA fighter, and then seeking redress for Rekieta throwing a paper airplane in his general direction. While Montagraph may not be an all-purposes libel-proof plaintiff, he certainly comes to this court with a host of pre-existing conditions – namely a well-established and well-tarnished reputation.

As Montagraph, Plaintiff is known as a "Colorado torture porn and snuff film producer" who makes angry calls to corporate CEOs and celebrities. Timothy Holmseth, "*Child torture film producer threatens to call ABC about Roseanne – for praising Pentagon Pedophile Task Force*," TIMOTHY CHARLES HOLMSETH REPORTS (Oct. 27, 2019), attached as **Exhibit 5**.[8] Montagraph/Octoberreignz has also been accused of having murdered JonBenet Ramsay in Boulder, Colorado. *See, e.g.*, Chase Kage, "*Montagraph & Jonbenet Ramsey Connection?*" YouTube (Jul. 31, 2022)[9]; "Chapter 14B: Little Piggy and the Umbrella Man," Reddit (Oct. 28, 2021), attached as **Exhibit 6**;[10] "/222/ EXPOSED. WELCOME TO WONDERLAND," THE GIPSTER (July 29, 2015), attached as **Exhibit 7**.[11] A January 21, 2022 video accused Quest of grooming a 15 year old boy. *See* Steve's Quest for Failure, "Montagraph Groomed a 15 YR OLD Boy, Mighty-Buffoon," YouTube (Jan. 21, 2022).[12] In 2018 and 2019, Quest was accused of having his juvenile record for abusing a 9 year old boy sealed. *See* Diligent Escape, "Grampa Creepy Touch," YouTube (Jul. 9, 2019);[13] *see also* Feb. 22, 2018 Twitter post by @Mayson1543, attached as **Exhibit 8**.[14] Another YouTube personality "drumr828" created a multi-part video series on Quest in response to Quest threatening and stalking him. *See, e.g.,* drumr828, "The Dark Side

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[8] Available at: https://timothycharlesholmseth.com/child-torture-film-producer-threatens-to-call-abc-about-roseanne-for-praising-pentagon-pedophile-task-force/.

[9] Available at: https://youtu.be/rGFrKnZGkTU

[10] Available at: https://www.reddit.com/r/JonBenetPatRamsey/comments/qi0kbg/chapter_14b_little_piggy_and_the_umbrella_man/

[11] Available at: http://thegipster.blogspot.com/2015/07/222-exposed.html

[12] Available at: https://www.youtube.com/watch?v=7vHXdHCXy-M

[13] Available at: https://www.youtube.com/watch?v=W58pNfvrYAo.

[14] Available at: https://twitter.com/mayson1543/status/966800562367934464?s=46&t=s6n_yqPcH1CbLiDEdVIYSQ.

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of Montagraph (The Montagraph Saga Part 3)," YouTube (June 9, 2019).[15] People have reported Quest's family members' criminal backgrounds and how this reflects on Quest. *See, e.g.,* Joel X, "Montagraph's Older Sibling, Wayne Eric Marshall," SOCIAL MEDIA'S MOST WANTED (Nov. 29, 2020), attached as **Exhibit 9**.[16] Others reported on Quest's involvement in a campaign of harassment toward one of the parents of a victim of the tragic 2013 Sandy Hook school shooting. *See, e.g.,* "Who is YouTube's Montagraph & Agent19," Hoaxers & Trolls (July 22, 2016), attached as **Exhibit 10**.[17] He injected himself into the extremely public debate on COVID-19 vaccines by posting videos of himself calling and threatening public health officials, including Anthony Fauci. *See, e.g.,* August 29, 2021 tweet by @Henrik_Palmgren, attached as **Exhibit 11**;[18] December 28, 2022 tweet by @wyliepanda, attached as **Exhibit 12**.[19]

Online forum Kiwi Farms contains a 16-page long thread, started in 2019, discussing the Plaintiff and accusations against him of pedophilia, the "Little Piggy and the Umbrella Man" film, having sex with a watermelon, and other troubling or bizarre behavior. *See* "Steve Quest / Montagraph / Roy Warren Marshall / 'Dale Ellis Bennett' / 'Umbrella Man' / 'Elite Rule' / 'OctoberReignz' / 'ImYourGhost' – Elderly schizophrenic troll with decades of history pretending to be a member of intel communities," KIWI FARMS (June 29, 2019), attached as **Exhibit 13**.[20] Since 2019, various users of the video streaming website BitChute have posted dozens of videos about Quest, discussing topics such as his films, his dubious claims that he is involved in U.S. intelligence agencies, and inquiring as to whether Quest is a pedophile. *See* BitChute search results for #Montagraph, attached as **Exhibit 14**.[21] A simple search on Twitter for the term "Montagraph" shows numerous third parties writing about Quest, both insulting and praising him over a period of years. *See* Twitter top post search results for "Montagraph," attached as **Exhibit 15**.

It is also relevant to consider the extent to which the Plaintiff entered the proverbial boxing ring with the Defendant. In this case, the Plaintiff has certainly gone to great lengths to pick a fight with Rekieta. Rekieta

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[15] Available at: https://www.youtube.com/watch?v=WiQ2i01I58o.

[16] Available at: https://socialmediasmostwanted.com/family-of-montagraph-aka-steve-quest-aka-roy-warren-marshall-aka-elite-rule-aka-octoberreignz/.

[17] Available at: https://trutherhoaxers.blogspot.com/2016/07/who-is-youtube-montagraph-agent19.html.

[18] Available at: https://twitter.com/Henrik_Palmgren/status/1432226834943467521?s=20.

[19] Available at: https://twitter.com/wyliepanda/status/1608113666972614657?s=20.

[20] Available at: https://kiwifarms.net/threads/steve-quest-montagraph-roy-warren-marshall-dale-ellis-bennett-umbrella-man-elite-rule-octoberreignz-imyourghost.57918/

[21] Available at: https://www.bitchute.com/hashtag/montagraph/.

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was first exposed to Quest following a June 2019 livestream he participated in with Metokur regarding Montagraph and a frivolous lawsuit he filed against Jake Morphonios. Declaration of Nicholas Rekieta ("Rekieta Dec."), attached as **Exhibit 16**, at ¶¶ 8-9. Following this livestream, Quest called Rekieta to discuss the livestream, which started a month-long campaign of harassment in which Quest tried to contact numerous third parties, made multiple "meme" images of Rekieta, sent several chat messages mocking or insulting Rekieta during a livestream, and created several of his own YouTube videos complaining about Rekieta, all to harm Rekieta personally and professionally. *Id*. at ¶¶ 11-14. Quest also made a video mentioning several YouTubers he threatened to visit personally in December 2019, including Rekieta. *Id*. at ¶ 15.

This is the Plaintiff that is before the Court, and this is the reputation he claims Rekieta tarnished.

1.2 Defendants' Programming

Defendant Nicholas Rekieta is a Minnesota attorney. *Id*. at ¶ 3. He practices law under Rekieta Law, LLC, which he founded on July 5, 2019. *See* Rekieta Law, LLC Articles of Organization, attached as **Exhibit 17** (Articles of Org). It is a professional firm, providing Rekieta's licensed services under Minn. Rev. Stat. § 319B.06, and, per the statute, it provides no other services. *See* Rekieta Dec. at ¶ 4.

In 2011, Rekieta created a YouTube channel. Rekieta Dec. at ¶ 5. In 2017, Rekieta became an online video personality, making "lawsplaining" videos, originally addressing the matter of *Ouzounian, et al. v. Herrera, et al.,* Index No. 656779/2017 (New York Cty., N.Y., filed Nov. 6, 2017). *Id*. Although the channel uses the "Rekieta Law" moniker, the Rekieta Law, LLC, entity does not own or operate it. *Id*. at ¶ 6. Rather, as set forth on the relevant YouTube channel's readily accessible "About" page, it is owned by a separate entity, Rekieta Media, LLC. *See id*.; Rekieta Law YouTube "About" page, attached as **Exhibit 18**.[22] The content also broadcasts on other video services, like Rumble. Rekieta Dec. at ¶ 7; *see* https://rumble.com/c/RekietaLaw.

As Rekieta explains within the first minute of his first video, he offers his self-described "pretentious" opinion, while drinking heavily (there, a bottle of 15-year-old Bowmore single malt scotch). *See* Rekieta Law, "Rekieta Law – Breakdown: Maddox v. Dick Masterson #1," YouTube (Nov. 16, 2017).[23] As part of his

[22] Available at: https://www.youtube.com/c/RekietaLaw/about
[23] Available at: https://www.youtube.com/watch?v=DN4JCo4bjnM

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entertainment, Plaintiff has even commented that he does not know if Rekieta (who he publicly calls "Drunkieta") "can even stay sober long enough to practice law." *See* Montagraph, "Live Testimony from Drunkieta Drunksplaining the Facts," YouTube (Oct. 9, 2022).[24] Rekieta's rhetoric is, not infrequently, "inflammatory," with Rekieta having told a reporter "The language of hyperbole is fun." Kevin Featherly, "Filings: Attorney helped build 'online hate factory,'" MINNESOTA LAWYER (Nov. 19, 2019), attached as **Exhibit 19**.[25] His program rose to great popularity in 2022 with his coverage of the Kyle Rittenhouse and Johnny Depp/Amber Heard trials. *See* "Rekieta Law Joins Rumble Exclusives," TIPRANKS (Jan. 4, 2023), attached as **Exhibit 20**.[26]

1.3 The Statements at Issue

Quest identifies six[27] videos containing allegedly actionable statements, though he does not attach them or provide their location.[28]

1.3.1 The October 6, 2022 Video

Quest alleges Rekieta "made various false statements of a sexual nature about Plaintiff" in an October 6, 2022 livestream with Megan Fox,[29] and specifically alleges that Rekieta said "Plaintiff was a 'retarded man,' suggested Plaintiff had sex with a watermelon, and that Plaintiff has stated he routinely 'fists himself.'" Amended Complaint at ¶¶ VI & XXVI.

Rekieta appears at approximately 1:49:00 of the video. At approximately 2:32:40 to 2:33:36, Rekieta says that there is a person commenting in the chat on the livestream who is a "retarded man." Declaration of Alex J. Shepard ("Shepard Dec."), attached as **Exhibit 21**, at ¶ 25. He says "Hi, Monty, you still fucking watermelons, you weirdo? . . . I very explicitly remember Montagraph stating publicly and openly that he

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[24] Available at: https://www.youtube.com/watch?v=qV3sTV7MhFA

[25] Available at: https://minnlawyer.com/2019/11/19/filings-attorney-helped-build-online-hate-factory/

[26] Available at: https://www.tipranks.com/news/press-releases/rekieta-law-joins-rumble-exclusives

[27] The original Complaint identifies 3 videos, published on October 6, 13, and 18, 2022. Complaint at ¶¶ VI to VIII. The Amended Complaint addresses five videos, including the October 6 and 13 videos. It is unclear whether Quest still premises any of his claims on the October 18 video, but this Motion will address that video all the same.

[28] The videos are documents "embraced by the complaint," which are not matters outside the pleadings. *Greer v. Professional Fiduciary, Inc*., 792 N.W.2d 120, 126-27 (Minn. App. 2011). Even if this were a common motion to dismiss for failure to state a claim, they could be considered.

[29] *See* "The RumbleStream: Troon Squad Silencing Opposition with Big Tech's Help," Rumble (Oct. 6, 2022), available at: https://rumble.com/v1muxaf-the-rumblestream-troon-squad-silencing-opposition-with-big-techs-help.html.

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routinely fists himself. And I don't know why anybody would do that, but he's like 'I do that, and uh, that's what I love to do. That's actually all I do, and my entire life is just revolving around when the next time I can fist myself is. I can't get enough of it, I'm like reaching in and I try to extend my fingers while they're in there, too.'" *Id*. Then, at approximately 2:33:50-2:34:09, he says "See, **what I just did was deliver a dry joke about what Montagraph said**, but if you remember my previous statement about having sex with a watermelon, that wasn't a joke. That was actually on video. And, that's, I'm not, like, there's no, like, punchline here, that was real" (emphasis added). *Id*. At 2:38:50-2:38:55, Rekieta says, in relaying his first experience with Plaintiff, who called Rekieta, with Rekieta disclosing that he perceived Plaintiff to have a "learning disability" based on Plaintiff's repeated mispronunciation of the name "Metokur." *Id*. Then, at 2:39:20-2:39:40 Rekieta says "And then he just vanished for years. I can only presume that he was fisting himself the entire time, the new Goatse[31]. … There are some strange people out there, and Monty would lick all of them." *Id*. To the extent that anything here was false, it does appear that the video shows conduct may have been with a *honeydew* melon and not a *watermelon* – however, this should be of no legal concern, unless there is something reputationally different about misidentifying what kind of produce was used.

1.3.2 The October 13, 2022 Video

Next in the Amended Complaint, Plaintiff alleges Rekieta, on October 13, 2022, "accused Plaintiff of disgusting crimes against children, pedophilia," and "then, stated Plaintiff 'should probably be shot in the fucking head,'" specifically alleging that "Rekieta stated 'Plaintiff has always been into sucking little boy cock which is weird, but that's his thing. Look, I'm not here to stop him, I'm just saying, he should probably be shot in the fucking head. Montagraph, you're a fucking faggot,[32] everybody knows you're a faggot. Clip this all you want and sue me if you want you fucking child molesting fucking faggot. Do that. How about you try that." Amended Complaint at ¶¶ VII & XXVI. Rekieta makes the quoted statements at approximately 5:50:20 into

[31] "Goatse" is an internet meme of a sexual nature that involves an image of a man with a stretched anus. Defendants' counsel can supplement the record in the off-chance the Court or Plaintiff believe such is necessary. However, the Defense sincerely hopes that such is not made necessary.

[32] While the undersigned counsel does not approve of this slur, it is quite cavalierly thrown around on Rekieta's show. In fact, the undersigned first heard of Rekieta when Rekieta used this slur to describe the undersigned's law partner. Rather than bring a baseless lawsuit over it, the undersigned scolded Rekieta for it, and since then, things have been friendly between them.

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the program,[33] after having been drinking for nearly six hours. Shepard Dec. at ¶ 26. He made the statements after being prompted by a commenter and in discussing emails from Plaintiff. *Id*. He then proceeds to answer a commenter's question about the etiquette of squeezing the boobs of one's wife. *Id*.

1.3.3 The October 18, 2022 Video

Third, in the Complaint, Plaintiff alleges Defendants published a video on October 18, 2022, "where a meme of guns (AK47s) pointed at Plaintiff's head accompanied by [Rekieta] making false statements about Plaintiff," once again with no mention of what statements Rekieta allegedly made. Complaint at ¶ VIII. A discussion of Montagraph, prompted by another guest, began at approximately 3:51:50-3:54-25,[35] relaying the story of Plaintiff calling him on his phone, discussing Plaintiff calling Rekieta "a member of the sweaty sausage squad" and stating "the most important thing is that he had sex with a watermelon on camera." Shepard Dec. at ¶ 27.

1.3.4 The October 28, 2022 Video

The next video, new to the Amended Complaint, was published on October 28, 2022.[36] Quest alleges that Rekieta said Quest was '"making a snuff film, about a kid,"' that Quest "made such a film," that Rekieta was "suggesting Plaintiff 'made a nasty movie about a kid . . . and that's why Plaintiff does not have a good name,"' that Rekieta said '"nobody goes, huh, who's Steve Quest? Who's this Montagraph? Oh, he's a fine upstanding citizen. Nobody. Nobody does,"' and '"bro, I'll take my name over yours. Your good name is garbage, and that's no joke. That's the straight talk."'

To provide some context, from approximately 0:16:20 to 0:25:00 in the video, Rekieta discusses a frivolous bar complaint Quest filed against him based on many of the statements alleged to be defamatory in the Amended Complaint (including the claims of Quest being a "retard" and having sex with a watermelon) and the Minnesota Bar's written decision not to take any action in response. From approximately 0:25:10 to 0:26:00, Rekieta says that his video programming is "frankly, late night shock radio, to much extent, like Howard Stern before he became a coward . . . It allows me to mix in news, comedy, levity, personal reality,

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[33] *See* "The LawTube Drama Grift-oRama with Drex!," Rumble (Oct. 13, 2022), available at: https://rumble.com/v1nqkfm-the-lawtube-drama-grift-o-rama-with-drex.html.

[35] *See* "Darrell Brooks Trial Day 9 (Just the Afternoon, Though)," Rumble (Oct. 18, 2022), available at: https://rumble.com/v1olbzu-darrell-brooks-trial-day-9-just-the-afternoon-though.html

[36] *See* "Thursday Fan Mail Surprise! Also, Twitter Trash Removed," Rumble (Oct. 28, 2022), available at: https://rumble.com/v1q9f4i-thursday-fan-mail-surprise-also-twitter-trash-removed.html.

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satire, and it's all this mishmash of things." Shepard Dec. at ¶ 28. At approximately 0:32:20, when repeating allegations in one of Quest's bar complaints mentioning statements about sexual acts with a child, Rekieta says "Monty, this is obviously satire, you weirdo." *Id*.

From approximately 0:40:35 to 0:43:45, Rekieta makes the statements mentioned in the Amended Complaint. He notes that Quest is watching the livestream and trying to defend his name in the comments, which prompts Rekieta to say:

> You don't have a good name, Montagraph. You know you don't . . . you have an image and branding problem . . . This is not a criticism . . . Everything I said about you, the real stuff like the watermelon (which is still weird), **and the joke stuff, like the kid stuff** (which is still weird), people can reasonably form those opinions about you because you made that really weird fucking movie. And there are articles written about that really weird fucking movie, the snuff film of the kid that you made, that one, that you bragged about . . . Monty, you've got a real image problem on that issue because of what you made . . . nobody goes, "huh, who's Steve Quest? Who's this Montagraph? Oh, that's a fine upstanding citizen." Nobody does. Because of how you act and what you do and what you say . . . But bro, I'll take mine over yours. Your good name is garbage, and that's no jokes. This is straight talk right to you . . . .

Id. Rekieta then reiterates that he is not making these statements as an attack on Quest, but rather as brand management advice – that is, a discussion of his pre-existing tarnished reputation.

1.3.5 The December 22, 2022 Video

Quest alleges that Rekieta, in a December 22, 2022 video,[37] stated '"Monty [Plaintiff] is a fucking retard,' 'you're [Plaintiff] dumb, 'Monty [Plaintiff] you don't make any money. You're a weird broke person on the internet. I'd love to see your damages,' '[Plaintiff] made a couple movies, and one of his movies is so derided as being pedophilic and violent . . . There are videos about it . . . He got removed from every streaming and broadcasting service there was because this is creepy shit with kids."'

At approximately four hours into the video, with Rekieta having been drinking during the entire stream, Rekieta begins to talk about the instant lawsuit. From approximately 4:18:00 to 4:19:05, in the context of discussing whether the amount in controversy requirement for federal diversity might be present, and thus removal of this case to federal court might be appropriate, Rekieta says:

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[37] *See* "Friday Funtime with: Camelot, Potentially Criminal, Runkle, Legal Vices, joe Ball, Drex, and Jokes," Rumble (Dec. 24, 2022), available at: https://rumble.com/v224km0-friday-funtime-with-camelot-potentially-criminal-runkle-legal-vices-joe-bal.html.

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> I would love for him to prove any damages at all, that would be great. Monty, you don't make any money. You're a weird broke person on the internet . . . Montagraph, on these subjects, may actually be libel-proof . . . Montagraph made a couple movies. And one of his movies is so derided as, like, being pedophilic and violent that, like, there are videos about it, it couldn't be distributed, I think he got removed from every streaming and broadcasting service there was, because everyone was, you know, this is creepy shit with kids, man. Like, everything I've said about Montagraph, it's all based on a reasonable understanding of his online persona that he has put out.

Shepard Dec. at ¶ 29.

1.3.6 The January 11, 2023 Video

Finally, quest complains of a video Rekieta published on his YouTube channel on January 11, 2023[38] "in which he called Plaintiff a 'retard'" and that '"the ADA had assigned Defendant Nicholas Rekieta a retard who has gone rogue (joking that Plaintiff is a retard assigned by the ADA to oversee Defendants' business)."'

At approximately 0:55:00 to 0:56:22 in this livestream, Rekieta says that he will be:

> covering my lawsuit against the retard very soon . . . I don't want to just cover me all the time, although I am a narcissist, so I like that. Uh, we'll see. But, yes, the ADA has sent me a letter that says that their retard went rogue. They're gonna send me a new one, a new retard that I have to cater to and pander to, even though I already have one, still, in my locals chat . . . my channel's gotten big enough that I need two. So, they're gonna send me a new one. I asked for one that just won't drool on the carpet, like, that's my only request. I'll accommodate them, I'll build ramps that they can fall off of or whatever, it doesn't bother me. But, uh, since my one has gone rogue, I will be covering that very soon.

Shepard Dec. at ¶ 30. Rekieta does not mention Quest by any of his names in this video.

In his cause of action for defamation, Plaintiff alleges Rekieta "caused to be published . . . that Plaintiff engaged in criminal conduct, is a pedophile, pervert, and whose life is worthless and should be ended." Complaint at ¶ X. In his Amended Complaint, Quest goes on to allege that Rekieta said that "Plaintiff is a faggot, that Plaintiff 'sucks little boys' cocks,' that Plaintiff has created a 'snuff film' starring a female child actor, that Plaintiff created a 'snuff film' starring a male child actor, and that Plaintiff is a 'retard.'" Amended Complaint at ¶ XXVI. None of these statements are actionable.[39]

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[38] *See* "Guns and Courts: Societal Struggle to Reconcile Freedom; ALSO SCOTUS on 2020 Election Lawsuit," Rumble (Jan. 11, 2023), available at: https://rumble.com/v24u3lo-guns-and-courts-societal-struggle-to-reconcile-freedom-also-scotus-on-2020-.html.

[39] In his default judgment motion, Plaintiff argues "Defendant continues to defame Plaintiff every time an archived episode is watched." (Motion at 7). This is a patently erroneous statement of the law. "The 'single publication' rule provides that any one edition of a book or newspaper, even if distributed to a multitude, constitutes one publication that may support only one cause of action." *Nunes v. Lizza*, 12 F.4th 890, 899-900

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2.0 LEGAL STANDARD

Colorado's Anti-SLAPP statute provides a mechanism for early dismissal of meritless claims targeted at specific categories. As this motion is treated as one for summary judgment, as noted below, the main question is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03; *J.E.B. v. Danks*, 785 N.W.2d 741, 746 (Minn. 2010).

Specifically, the Colorado Anti-SLAPP statute provides a substantive immunity from suit for claims based, *inter alia*, on "(2)(III) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or (IV) Any other conduct or communication in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Colo. Rev. Stat. § 13-20-1101. A claim that arises from such conduct must be dismissed under the statute "unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." *Id*. at § 13-20-1101(3)(a). Unlike an ordinary motion to dismiss which is constrained to the four corners of the complaint, in deciding an Anti-SLAPP motion "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *Id*. at § 13-20-1101(3)(b). This statute "closely resembles" California's Anti-SLAPP law, Cal. Code Civ. Proc. § 425.16, and so Colorado courts look to California Anti-SLAPP case law in interpreting their own law. *See L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 20 (2022).

Deciding an Anti-SLAPP motion is a two-step process. In the first step, the movant must make "a threshold showing that the conduct underlying the plaintiff's claim falls within the scope of the anti-SLAPP statute – that is, that the claim arises from an act 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue." *Id*. at ¶ 21.

If the movant meets this burden, then we proceed to the second step of the analysis, where the court "reviews the pleadings and affidavits and determines whether the plaintiff has established a 'reasonable

(8th Cir. 2021) citing Restatement (Second) of Torts § 577A(3) (Am. L. Inst. 1977); *see Living Will Ctr. v. NBC Subsidiary, Inc.*, 857 P.2d 514, 518 (Colo. App. 1993) (adopting Second Restatement § 577A) (reversed on unrelated grounds in *NBC Subsidiary (KCNC-TV) v. Living Will Ctr*., 879 P.2d 6 (Colo. 1994)).

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likelihood [of] prevail[ing] on the claim."' *L.S.S.*. at ¶ 22. Colorado courts, like California courts, have interpreted the "reasonable likelihood" language to mean that Anti-SLAPP motions are treated as summary judgment motions, rather than something akin to a preliminary injunction motion where the court must weigh competing evidence. *Id*. at ¶¶ 23-24; *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016).

3.0 LEGAL ARGUMENT

3.1 Colorado Law Applies to Plaintiff's Claims

Plaintiff is a Colorado Citizen. Complaint at ¶ II. Defendants are a Minnesota resident and Minnesota entity. *Id*. at ¶ I. Minnesota and Colorado each have their own law governing Plaintiff's claims and Minnesota enacted its own Anti-SLAPP statute, Minn. Stat. §§ 554.01-554.05.[40] When deciding which state's law to apply, the first consideration is whether applying one state's law over another would be outcome determinative. *Schumacher v. Schumacher*, 676 N.W.2d 685, 689 (Minn. Ct. App. 2004). Here, as the Minnesota statute does not cover the claims at issue, the choice of law is outcome determinative, and so the court must decide which state's laws apply. Colorado has the most significant relationship to this dispute, and so its substantive laws should apply.

3.1.1 Colorado Law Applies Under the Most Significant Relationship Test

It is well-established that the law of the plaintiff's domicile is the proper law to apply in a multi-state defamation case. Section 150 of the Restatement applies to claims involving multistate defamation. It provides that "[t]he rights and liabilities that arise from defamatory matter in any . . . aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Restatement (Second) Conflict of Laws § 150(1). "The most significant relationship approach is applied to resolve a variety of choice-of-law issues." *State v. Castillo-Alvarez*, 836 N.W.2d 527, 538 n.6 (Minn. 2013) (collecting cases). This test is especially appropriate where the traditional choice of law analysis, outlined below, is "difficult to apply when

[40] However, that statute only protects a narrow range of conduct and speech that "is genuinely aimed in whole or in part at procuring favorable government action," which does not apply here. Minn. Stat. § 554.01(6). Minnesota found that its Anti-SLAPP law is unconstitutional because its burden-shifting framework violated the right to a jury trial. *Mobile Diagnostic Imaging v. Hooten*, 889 N.W.2 27, 35 (Minn. Ct. App. 2016); *Leiendecker v. Asian Women Unity of Minn.*, 895 N.W.2d 623, 637-38 (Minn. 2017). The Colorado statute suffers no such problem, as it does not shift a burden nor does it require weighing of competing evidence.

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a rule is not purely procedural or purely substantive." *Id*.

The Restatement further states that "[w]hen a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state." Restatement (Second) Conflict of Laws § 150(2). Thus, there is a presumption that the law of the state of the plaintiff's domicile will apply unless some other state "has a greater interest in the determination of the particular issue." *Id*.[41]

Courts have held that publication on the internet constitutes "aggregate communication," *i.e.*, communication to the general public occurring simultaneously in multiple jurisdictions. *See, e.g., Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1131 (9th Cir. 2006) (internet publication is form of "aggregate communication" intended for broad public audience similar to print media); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 100 (2d Cir. 2003) ("When people post information onto a website available to the public, they 'distribute' or 'give away' the information"). Applying the Restatement (Second) here, the state with the most significant relationship to the allegedly defamatory publication is the place of Plaintiff's domicile, Colorado. *See Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 471 (E.D. Pa. 2010) ("[T]he majority of courts confronted with this choice of law question have found that the plaintiff's domicile should control since this is the forum with the greater interest"). Because Plaintiff was domiciled in Colorado the Restatement calls for the application of Colorado law.

This case almost perfectly matches *Jaisinghani v. Capital Cities/ABC*, 973 F. Supp. 1450 (S.D. Fla. 1997). In that case, under the "significant relationship" analysis, the Southern District of Florida applied California defamation law because the plaintiff was domiciled in California, and had a more significant

[41] *See also Ratner v. Kohler*, 2018 U.S. Dist. LEXIS 30761, at *11-12 (D. Haw. Feb. 26, 2018) (applying CA law in HI because plaintiff was a CA resident); *Watkins v. CNN, Inc.*, 2018 U.S. Dist. LEXIS 71003, at *10 (D. Md. Apr. 25, 2018) (applying Restatement to hold that plaintiff's residence has the most significant relationship); *Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343, 353 (D. Mass. 2017) ("there is effectively a presumption that the law of the state of the plaintiff's domicile will apply" unless another state has a greater interest in determination of a particular issue); *Haywood v. St. Michael's Coll.*, 2012 U.S. Dist. LEXIS 177468, at *21-22 (D. Vt. Dec. 14, 2012) (applying North Carolina law to a claim in Vermont because Plaintiff was A North Carolina resident); *Gray v. St. Martin's Press, Inc,* 1999 U.S. Dist. LEXIS 24181, at *4 (D.N.H. June 8, 1999) (applying VA law to a claim in NH because that is where the plaintiff resided); *Tobinick v. Novella*, 848 F.3d 935 (11th Cir. 2017) (affirming application of California Anti-SLAPP statute to California plaintiff even though the forum was Florida).

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relationship with California than any other state.

Adelson v. Harris, 973 F. Supp. 2d 467 (S.D.N.Y. 2013), is also analogous. There, the Southern District of New York applied the Nevada Anti-SLAPP law because the plaintiff was a Nevada citizen, the plaintiff's business was based in Nevada, and "Nevada has an interest in protecting its citizens from tortious conduct." *Id*. at 477-478. The same thing happened in *Tobinick v. Novella*, 108 F. Sup. 3d 1299, 1304 (S.D. Fla. 2015), where the court applied the most significant relationship test and found that California's Anti-SLAPP law applied to a plaintiff with its principal place of business in California because most, if not all, of its alleged harm must have been felt in California. It seems that any time a court is confronted with a defendant seeking the employment of an Anti-SLAPP statute from the *plaintiff's* home state, courts have applied the Anti-SLAPP law, even when the state in which the court sits does not have one.

As in *Adelson*, where the plaintiff was a Nevada party, Quest is from Colorado. With regard to the place where the injury occurred, it is impossible for Quest to have suffered injury anywhere but Colorado. "When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state." *Restatement (Second) of Conflict of Laws* § 150(2). The same logic applies as to his intentional distress claims; where, other than his place of residence, could Quest have suffered such distress? Indeed, Quest alleges emotional distress caused by third parties stalking and following him at his Colorado home. Amended Complaint at ¶ XXVII. Quest does not allege any connection whatsoever to Minnesota; Colorado has the most significant relationship with this dispute, and so Colorado law applies.[42]

3.1.2 Alternatively, Colorado Law Applies Under Minnesota's Traditional Choice of Law Analysis

If the Court chooses to apply Minnesota's traditional choice of law analysis to Quest's claims, then the Court must first "consider whether the law of both states can be constitutionally applied," meaning the non-forum state '"must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."' *Jepson v. General Casualty Co.*, 513

[42] While there would be no basis to apply Colorado's choice of law rules here, the outcome would be the same if the Court did. Colorado also uses the most significant relationship test. *AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 509 (Colo. 2007).

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N.W.2d 467, 467-70 (Minn. 1994) (quoting *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Here, it is neither arbitrary nor fundamentally unfair for the law of the state where the plaintiff is from and was injured to govern the claims—in fact, most courts find that defamation law and anti-SLAPP law of the plaintiff's state apply. *See* footnote 41, *supra*.

The next step of the choice-of-law analysis is application of the five factors set out in *Milkovich v. Saari*, 203 N.W.2d 408 (1973). These are: (1) predictability of result;[44] (2) maintenance of interstate and international order; (3) simplification of the judicial task;[45] (4) advancement of the forum's governmental interest; and (5) application of the better rule of law.[46] *Id*. at 412.

The maintenance of interstate and international order factor "addresses whether applying Minnesota law would manifest disrespect for [Colorado] or impede in the interstate movement of people and goods. Evidence of forum shopping or evidence that application of one state's laws would promote forum shopping, would be an attempt to evade, and would indicate disrespect for, [Colorado] law." *Schumacher*, 676 N.W.2d at 690-91 (Minn. App. 2004).[47] "Minnesota does not have an interest in encouraging forum shopping . . . ." *Jepson*, 513 N.W.2d at 471-72. This factor "requires deference to a sister state's legal rules when that sister state has a substantial concern with the problem, even when the forum state also has an identifiable interest." *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 590 N.W.2d 670, 673 (Minn. App. 1999). Here, it would be disrespectful to Colorado not to apply its Anti-SLAPP law to one of its citizen's claims. Minnesota does not

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[44] This factor "addresses whether the choice of law was predictable *before* the time of the transaction or event giving rise to the cause of action." *Danielson v. Nat'l Supply co.*, 670 N.W.2d 1, 7 (Minn. App. 2003) (emphasis in original). As a Colorado resident, Quest was, or should have been, well aware of Colorado's Anti-SLAPP law and that it would apply to his claims here. There is no surprise to Quest in applying Colorado law.

[45] This factor "is not particularly relevant where the competing laws are straightforward and 'the law of either state could be applied without difficulty.'" *Schumacher v. Schumacher*, 676 N.W.2d 385, 691 (Minn. App. 2004) (quoting *Jepson*, 513 N.W.2d at 472). There is nothing especially complex about applying Colorado defamation and Anti-SLAPP law, and thus this Court can apply it without difficulty.

[46] This factor looks at "the rule that made 'good socio-economic sense for the time when the court speaks.'" *Jepson*, 513 N.W.2d at 473 (quoting Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584, 1588 (1966)). However, this factor "is addressed only when the other four factors are not dispositive as to which state's laws should be applied." *Schumacher*, 676 N.W.2d at 691-92. Colorado's law is objectively better. Minnesota's Anti-SLAPP statute is limited to "conduct or speech that is genuinely aimed … at procuring favorable government action" (Minn. Rev. Stat. § 554.03), whereas Colorado's protects a broader range of First Amendment-protected speech. Thus, Colorado law applies.

[47] The court in *Schumacher* dealt with an Iowa statute that conferred immunity to owners of domesticated animals that injured others. The court reasoned that failure to apply this Iowa statute would encourage forum shopping and indicate disrespect for Iowa law, as anyone harmed by a domesticated animal in Iowa owned by a non-Iowa resident would simply sue in the owner's state of residence to evade this immunity. *Id*. at 691.

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have a comparable law, and refusing to apply Colorado's statute would encourage forum-shopping. If the law is not applied to Colorado plaintiffs, then Colorado residents would be free to evade this law and its protections by filing meritless claims in other states. If the Colorado legislature chose to limit how its citizens could prosecute frivolous defamation claims, then the Plaintiff's quarrel should be with the Colorado legislature – not with this Court applying the correct choice of law.

The advancement of the forum's governmental interest factor looks at which law would "most effectively advance a 'significant interest of the forum state,"' and is meant to ensure that Minnesota courts are not required to apply laws that are "inconsistent with Minnesota's concept of fairness and equity." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455 (Minn. App. 2001). In deciding this factor, a court should consider the public policy of both forums. *Lommen v. City of East Grand Forks*, 522 N.W.2d 148, 152 (Minn. App. 1994). While "Minnesota places great value in compensating tort victims," *Jepson*, 513 N.W.2d at 472, Quest is not a Minnesota resident. Even if he were, applying Colorado law here does not impact Plaintiff's ability to recover; if his claims are meritorious, they will not be dismissed by this Motion. If Plaintiff's claims are not meritorious, however, then applying Colorado law will allow Defendants to dismiss these claims early, and recover the expense of doing so, and would serve the Colorado policy of not permitting Coloradans from filing frivolous claims designed to burden the lawful use of First Amendment rights. Minnesota does not have an interest in allowing out-of-state plaintiffs with meritless defamation claims to drag Minnesota residents through protracted litigation. Colorado, meanwhile, explicitly has an interest in "encourag[ing] continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process." Colo. Rev. Stat. § 13-20-1101(1)(a).

3.2 Plaintiff's Complaint is Premised Entirely on Protected Conduct

3.2.1 Defendants' Statements were on Matters of Public Concern

Defendants' statements about Quest, addressing allegations of pedophilia,[48] are on matters of public

[48] Neither the Complaint nor motion for default judgment highlight any other allegedly false statement. Although Quest takes issue with being called a "faggot." False claims of homosexuality are not defamatory. *See Stern v. Cosby*, 645 F. Supp. 2d 258, 273-74 (S.D.N.Y. 2009) (summarizing progress in society over time and not recognizing a statement regarding homosexuality to be defamatory). And, Quest does not appear to argue that Mr. Rekieta's opinion that Quest should be shot in the head is anything other than opinion. It is not something that can be proven true or false. *See, e.g., S. Middlesex Opportunity Council, Inc. v. Town of*

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concern. "Generally, a matter is of public concern whenever 'it embraces an issue about which information is needed or is appropriate,' or when 'the public may reasonably be expected to have a legitimate interest in what is being published." *Lawson v. Stow*, 327 P.3d 340, 346 (Colo. App. 2014) (quoting *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 17 (Colo. App. 1996)).[49] Here, Colorado courts show no hesitation in deeming the types of allegations about Quest to be in the public interest. *See, e.g., Miles v. Ramsey*, 31 F. Supp. 2d 869, 875 (D. Colo. 1998) (child murder investigation matter of public concern for purposes of defamation claims arising from article in tabloid newspaper indicating that neighbor is pedophile); *Shoen v. Shoen*, 292 P.3d 1224, 1229-30, 2012 COA 207 (Colo. App. 2012) (defendant's statement in television interview that plaintiff was "capable" of arranging murder of his brother's wife implicated matter of public concern); accord *People v. Quintero,* B166338, 2004 Cal. App. Unpub. LEXIS 7247, at *44 (Aug. 3, 2004) (noting "widespread news coverage and public concern regarding pedophiles"); *Avalos v. Rodriguez*, 2020 Cal. App. Unpub. LEXIS 6489, * (Oct. 5, 2020) (finding that statements during press conference alleging sexual abuse of young children at public school were protected under California Anti-SLAPP law).

This is not a case of Rekieta making an off-handed accusation at a random person on the internet. Quest's extremely concerning videos, sexual aberrance, and likely pedophilia had all been discussed in many communities on the internet for years before Rekieta's statements. *See* Section 1.1, *supra*. Weighing in on an existing years-long discussion regarding a person's pedophilia constitutes a contribution to an existing issue of public concern. Similarly, as discussed in Section 3.3.1.1, *infra*, Quest is and was a public figure on these topics at the time of Rekieta's statements. Furthermore, many of the complained-of statements added in the Amended Complaint are discussing Quest specifically in the context of Quest's instant lawsuit or frivolous bar complaints

Framingham, 752 F. Supp. 2d 85, 119-20 (D. Mass. 2010) ("a statement about the probabilities of future events, and one that was not capable of being proved false at the time" is "unambiguously an expression of opinion"); *Keohane v. Wilkerson*, 859 P.2d 291, 301 (Colo. App. 1993) (finding that statements being phrased in the form of hypotheticals tends to negate impression that they are factual assertions); *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001) (holding that a "remark that [plaintiff] was going to 'f--- [other drivers] over' is a prediction of a future event and is not capable of verification").

[49] Under California law, which Colorado courts look to for guidance regarding its Anti-SLAPP statute, a statement can be on an issue of public interest, and thus be protected, even if it is part of a personal dispute between the parties and is only heard by a relatively small group of people. *See Geiser v. Kuhns*, 515 P.3d 623, 631- (Cal. 2022) (finding that protest attended by a few dozen people and staged by defendants evicted by plaintiffs "to protest unfair and deceptive practices" of the plaintiff was protected because it implicated a public issue (there, nationwide home foreclosures), even though it implicated private dispute between the parties).

he previously filed against Rekieta. To Rekieta's audience, developments in legal proceedings against him are certainly of public concern. This is especially so when the Plaintiff has entered the proverbial boxing ring with the Defendant, as discussed above in Section 1.1.

3.2.2 Defendants' Statements Were Published in a Place Open to the Public

The statements at issue were all published through online video services. These types of services constitute a "public forum." *See, e.g., United States v. Jeffries*, No. 3:10-CR-100, 2010 U.S. Dist. LEXIS 125665, at *28-30 (E.D. Tenn. Oct. 22, 2010) (discussing YouTube video); *Card v. Pipes*, 398 F. Supp. 2d 1126, 1136 (D. Or. 2004) (finding website to be a "place open to the public or public forum"); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4, 51 Cal. Rptr. 3d 55, 146 P.3d 510 (2006) ("Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute."). Even Plaintiff admits the "videos and livestreams can be seen anywhere in the world by anyone with computer access." Complaint at § V. Thus, there should be no question this element is met. The Anti-SLAPP statute applies to the claims at issue.

3.3 Plaintiff's Claims are Meritless

Having satisfied the first prong of the Anti-SLAPP statute, the question before the Court is whether the claims have a reasonable likelihood of success, *i.e.* whether they survive summary judgment. None of the three claims do. They neither meet the requisite elements of the claims, nor do they survive Constitutional scrutiny, *i.e.,* Quest has no evidence of actual malice.

3.3.1 Plaintiff's Defamation Claims are Meritless

It may upset Quest, but Rekieta calling him a pedophile is not actionable in defamation. Under Colorado law, the elements of a defamation claim are: "(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to a least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." *SG Interests I, Ltd. v. Kolbenschlag*, 452 P.3d 1, 6 (Colo. App. 2019). If, however, the plaintiff is a public figure, the plaintiff's burden of proof is changed in three ways: "1. The plaintiff must prove the statement's falsity by clear and convincing evidence, rather than a mere preponderance. 2. The plaintiff must prove by clear and convincing evidence that the speaker published the statements with actual malice. 3. The plaintiff must establish actual damages, even if the statement is defamatory per se."

S.A.P., 2022 COA 123 at ¶ 36 (citing *Zueger v. Gross*, 343 P.3d 1028, 1035 (Colo. App. 2014)).[50] Under Colorado law, the actual malice standard also applies to statements regarding private figures if "the matter involved is of public or general concern." *Ramsey v. Fox News Network, L.L.C.*, 351 F. Supp. 2d 1145, 1147 (D. Colo. 2005). The requirement to show actual malice by clear and convincing evidence is created by the U.S. Constitution, as numerous federal courts have reiterated. *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984); *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 849 (8th Cir. 2002); *Nunes v. Lizza*, 12 F.4th 890, 895 (8th Cir. 2021); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995).

The Amended Complaint does a better job of the original Complaint in identifying the allegedly actionable statements, but it is still flawed in that it fails to provide any surrounding context for the statements, as it quotes individual words piecemeal out of several hours-long videos. "Minnesota law has generally required that in defamation suits, the defamatory matter be set out verbatim." *Moreno v. Crokston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn. 2000). When "the complaint contains no specific facts relating to [a party's defamation claim] . . . the proper course is dismissal of these claims." *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1011 (8th Cir. 2005), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (en banc). Colorado, meanwhile, has adopted the federal *Iqbal/Twombly* standard, which requires a complaint to allege facts that state a plausible claim for relief. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). Under either standard, the complaint must be dismissed.

Plaintiff alleges Rekieta "made various false statements of a sexual nature about Plaintiff" on October 6, 2022, with no attempt to identify which statements were actionable. Complaint at ¶ VI. Plaintiff alleges Rekieta "accused Plaintiff of disgusting crimes against children, pedophilia," again without identifying any particular statements, and "then, stated Plaintiff 'should probably be shot in the fucking head'" on October 13, 2022. Complaint at ¶ VII. Plaintiff alleges Defendants published a video "where a meme of guns (AK47s) pointed at Plaintiff's head accompanied by [Rekieta] making false statements about Plaintiff" on October 18, 2022, once again with no mention of what statements Rekieta allegedly made. Complaint at ¶ VIII. In his cause of action for defamation, Plaintiff alleges Rekieta "caused to be published . . . that Plaintiff engaged in criminal

[50] Should the Court not believe Colorado law applies, summary judgment remains warranted under Minnesota law alone. There is no significant difference between Colorado and Minnesota public-figure defamation law. *See MacDonald v. Brodkorb*, 939 N.W.2d 468, 475 (Minn. Ct. App. 2020) (setting forth elements).

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conduct, is a pedophile, pervert, and whose life is worthless and should be ended. Complaint at ¶ X. In the Amended Complaint, Quest includes quotes from five of the complained-of videos but fails to include any factual allegation that any of the specific statements at issue are even false. Amended Complaint at ¶ XXVI. As pleaded, these allegations are not sufficient. Moreover, none of the allegations are properly addressed to Rekieta Law, LLC, which is a law firm, notwithstanding that Rekieta separately uses that name for his program. The law firm did not make any of the statements nor publish them.

However, assuming the allegations are sufficient, none of the statements at issue are actionable. Statements about Quest being a pedophile, a child molester, a "retard," or a "faggot" are rhetorical hyperbole, which does not provide a basis for a claim. *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013) (observing "mere vituperation and abuse" and "rhetorical hyperbole" to be non-actionable); *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) (stating that "even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made [under] circumstances in which 'an audience may anticipate efforts by the parties to persuade others to their position by use of epithets, fiery rhetoric or hyperbole"); *Flowers v. Carville*, 310 F.3d 1118, 1127 (9th Cir. 2002) (finding that references to tabloid articles as "trash," "crap," and "garbage" were not actionable); *Phantom Touring v. Affiliated Publ'ns*, 953 F.2d 724, 728, 730-31 (1st Cir. 1992) (finding that theatre review calling a production "a rip-off, a fraud, a scandal, a snake-oil job" was "obviously protected hyperbole" incapable of being proven false). Under Colorado law, a court must examine the entire statements claimed to be actionable, not just the individual words and phrases. *Fry v. Lee*, 408 P.3d 843, 851 (Colo. App. 2013) (finding that reference in an article to a "charge" of perjury, when viewed in context, would be interpreted as a mere allegation by a third party, and not a criminal charge). It must also "consider the impression created by the words as well as the general tenor of the conversation or article from the point of view of the reasonable person." *Keohane v. Wilkerson*, 859 P.2d 291, 296-97 (Colo. App. 1993).

One need not have Ed McMahon, as Plaintiff suggested in his default motion, for video programming to be generally non-actionable, rhetorical hyperbole. "The First Amendment requires neither politeness nor fairness." *Pullum v. Johnson*, 647 So. 2d 254, 258 (Fla. 1st DCA 1994). These are shows on which Rekieta and his guests are frequently drunk. Profanity and vulgarity are rampant. While Rekieta discusses legal issues, it is not a sober analysis, so to speak. These are marathon programs, with Rekieta's statements appearing after

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many hours and many libations. Merely calling someone a pedophile does not make it automatically defamatory per se. *See, e.g.*, Lora Kolodny, "Elon Musk found not liable in 'pedo guy' defamation trial," CNBC (Dec. 6, 2019), attached as **Exhibit 21**.[51] As discussed in footnote 48, *supra*, the term "faggot" cannot be defamatory in this context. Nor can the term "retard." *See, e.g., Sternberg v. Spirit Airlines, Inc.*, No. 19-61115-CIV-SMITH, 2020 U.S. Dist. LEXIS 39449, *8 (S.D. Fla. Mar. 5, 2020) (holding that "[t]he statement 'retarded jews,' though offensive, is not a defamatory statement but rather a 'rhetorical hyperbole' that 'cannot reasonably be interpreted as stating actual facts about an individual'").

Similarly, Fox News prevailed on a defamation claim where the plaintiff was accused of extortion on the basis that the Tucker Carlson program was non-actionable, rhetorical hyperbole. *McDougal v. Fox News Network, LLC*, 489 F. Supp. 3d 174, 183-84 (S.D.N.Y. 2020). As the court there discussed:

> This "general tenor" of the show should then inform a viewer that he is not "stating actual facts" about the topics he discusses and is instead engaging in "exaggeration" and "non-literal commentary." Fox persuasively argues, … that given Mr. Carlson's reputation, any reasonable viewer "arrive[s] with an appropriate amount of skepticism" about the statements he makes. Whether the Court frames Mr. Carlson's statements as "exaggeration," "non-literal commentary," or simply bloviating for his audience, the conclusion remains the same—the statements are not actionable."

Id. (citations omitted). Tucker Carlson is not alone—he is in the company of Rachel Maddow:

> Although MSNBC produces news, Maddow's show in particular is more than just stating the news—Maddow "is invited and encouraged to share her opinions with her viewers." In turn, Maddow's audience anticipates her effort "to persuade others to [her] position[] by use of epithets, fiery rhetoric or hyperbole." Therefore, the medium through which the contested statement was made supports Maddow's argument that a reasonable viewer would not conclude the statement implies an assertion of fact.

Herring Networks, Inc. v. Maddow, 8 F.4th 1148, 1157 (9th Cir. 2021) (citations omitted; affirming anti-SLAPP dismissal arising from claim Herring was "paid Russian propaganda").

Like Tucker Carlson, Rekieta is engaged in non-literal commentary and bloviation. Like Rachel Maddow, Rekieta uses epithets and fiery rhetoric and hyperbole. His viewers come for the drunken rants. They don't have an expectation that he always knows all the legal issues—Rekieta's own legal practice ventured nowhere near the nuanced issues involved in the Kyle Rittenhouse murder trial. That didn't stop him

[51] Available at https://www.cnbc.com/2019/12/06/unsworth-vs-musk-pedo-guy-defamation-trial-verdict.html.

from providing his analysis throughout, right and wrong. It is abundantly clear from the context of these videos and Rekieta's tenor that he is using these terms as insults and jokes, not factual assertions. For example, Quest claims that Rekieta saying Quest "routinely fists himself" in the October 6 video is defamatory, while ignoring that Rekieta immediately thereafter says "See, what I just did was deliver a dry joke about what Montagraph said." He also ignores that, in the October 28 video, Rekieta explicitly says that he is joking about the "kid stuff," *i.e.*, the statements about Quest being a pedophile or child molester. When the speaker makes such a clear disclaimer of a statement not being factual, a plaintiff cannot selectively insist to the contrary.

In his Amended Complaint, Quest tries to plead around Rekieta's statements clearly being non-actionable opinion or hyperbole, alleging that Rekieta "usually defames Plaintiff with a 'straight face,'" and that "[n]othing about most of his defamatory conduct suggests humor, levity, or that he's joking." Amended Complaint at ¶ XXVI. First, this allegation is sanctionably false, as a cursory inspection of the videos (identified above but not in either of the Complaints) makes clear. The October 6, 2022 video Quest complains about even has Rekieta explicitly stating that he is joking about Quest. But even if that were not the case, humor does not require the humorist to disclose the fact that they are joking. As *The Onion* expertly articulated in a recent amicus brief before the Supreme Court, satire outright requires that a humorist make jokes and absurd statements with a straight face. *See Novak v. City of Parma, Ohio*, No. 22-293, Brief of *The Onion* as *Amicus Curiae* in Support of Petitioner (Oct. 3, 2022).[52] And regardless of delivery, the words of the videos themselves preclude any rational argument that Rekieta is making factual assertions. For example, Quest complains of Rekieta's statement in the January 11 video that Quest is a "retard" sent by the ADA. The Court may take judicial notice of the facts that (1) the ADA is a statute, not a regulatory agency; (2) there is no government agency that assigns mentally disabled people to monitor the activities of American citizens (or anyone else, for that matter); and (3) it is *agonizingly* obvious that Rekieta is joking in this video, even though he may not be laughing at his own jokes. Quest simply does not like being the butt of Rekieta's jokes – probably no more than Rekieta likes it when Quest makes jokes about him – Rekieta just doesn't file frivolous claims against Quest for these jokes. *See* Rekieta Dec. at ¶¶ 8-15.

[52] Available at: https://www.supremecourt.gov/DocketPDF/22/22-293/242292/20221003125252896_35295545_1-22.10.03%20-%20Novak-Parma%20-%20Onion%20Amicus%20Brief.pdf.

Quest cannot otherwise meet the element of falsity. Truth is a complete defense to a defamation action and "true statements, however disparaging, are not actionable." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). "If the statement is true in substance, minor inaccuracies of expression or detail are immaterial. A statement is substantially true if it would have the same effect on the mind of the reader or listener as that which the pleaded truth would have produced. The plaintiff has the burden of proving falsity in order to establish a successful defamation claim." *McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013) (citations omitted). A simple review of the videos produced by "Montagraph" would lead any reasonable person to find Plaintiff certainly has pedophilic tendencies. For example, in the "Little Piggy and the Umbrella Man" video, Quest, as the star and director, *repeatedly threatens a child with rape*. Essentially all of the numerous commenters who have weighed in on this video have noted that it has, at a bare minimum, very troubling undertones of sexualizing minors. *See* Section 1.1, *supra*. Plain and simple, Quest has a shocking history of sexualizing children, which is part of his pre-existing reputation. Even if Quest never had a young male's penis in his mouth, had Rekieta provided his audience with all of the precise details,[53] they would come away believing that calling Quest a pedophile is a fair comment.

Quest insists it was defamatory to say he had sex with a watermelon, but this is a substantially true statement. Since at least 2019, there has been video of Quest available online showing him poking holes into a honeydew melon,[54] placing a wig on the melon, and then enthusiastically digitally stimulating the melon. **Exhibit 13**. Quest may quibble about whether digital penetration of a watermelon counts as having sex with one, but Rekieta's statement is at the very least a reasonable characterization of this video. (although, as noted, it does appear that it might be a honeydew, and not a watermelon).

Finally, Quest claims it was defamatory for Rekieta to say he made a "snuff film" involving minors. This, too, is a true statement. His "Little Piggy and the Umbrella Man" video shows a child tied up in a basement while a masked man makes threatening and sexual comments about her. Near the end of the video, the masked figure says "it's time for you to have your lights turned out," followed by the child pleading for

[53] While he did not show the Umbrella Man film itself, Rekieta referenced it in both the October 28 and December 22 videos and noted how a reasonable person could view it and come away with the impression that Quest is a pedophile.

[54] The video appears to show that it is a honeydew melon, rather than a watermelon, that is the object of Quest's affections. Rekieta apologizes for this error, but only a melon-fingering afficionado would consider the difference material.

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her life, the screen going dark, and the sound of a gunshot. Quest can disagree with whether this meets the legal definition of a "snuff film" (Rekieta does not contend anyone actually died in filming), but it was very much shot and composed like one and numerous other online commenters have referred to it as one.

3.3.1.1 Defendants Did Not Publish with Actual Malice

Quest is a public figure. "There are three categories of public figures: an involuntary public figure, an all-purpose public figure, and a limited-purpose public figure. An involuntary public-purpose figure is one who becomes a public figure through no purposeful action of his or her own and is an exceedingly rare classification. An all-purpose public figure is generally described as a celebrity or a prominent social figure." *Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 495 (Minn. Ct. App. 2002) (citation omitted); *accord Zueger v. Goss,* 2014 COA 61, ¶¶ 24-29, 343 P.3d 1028, 1035-36 (Colo. Ct. App. May 8, 2014). Critical to this analysis is the nature and extent to which a plaintiff participates in the relevant public controversy. *Id*. at 1036. And, once a public figure, always a public figure. *Shoen v. Shoen*, 2012 COA 207, ¶ 26 n.5, 292 P.3d 1224, 1230 (Colo. Ct. App., Nov. 21, 2012) (collecting cases). Whether a plaintiff is a public figure is a question of law for the Court to determine. *Gross*, 343 P3d at 1035. This is not a factual determination for a jury.

Quest has trade names and is an entertainer, artist, and a producer. Complaint, § II. He invites critique and commentary, therefore, as to his public works of "art." In fact, all of the statements at issue referred to "Montagraph"—if Plaintiff suffered any damages, it was through his well-known *nom de plume*, and it would have to be sufficiently well-known to devolve to Quest's real name. But, generally, the damage was allegedly done to his public persona, which has public figure status on account of his film-making career, his thousands of followers and over 1 million views on YouTube, and the years-long online discussion of Quest and his bizarre and troubling behavior. *See* Section 1.1, *supra*. By Quest's own account, third parties have been publishing videos about him and his "Montagraph" name since 2010. **Exhibit 1** at 4.

Because Quest is a public figure, as noted above, he must show that the Defendants made the statements with "actual malice."[55] Actual malice for these purposes is not about ill will; rather it means that the statement was published "with knowledge that it was false or with reckless disregard of whether it was

[55] Even if Quest were not a public figure, he would be required to show actual malice because, as explained in Section 3.2.1, *supra*, Rekieta's alleged statements were in connection with an issue of public concern. *Ramsey*, 351 F. Supp. 2d at 1147.

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false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). In this context, "reckless conduct is not measured by whether a reasonably prudent man would have published." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Instead, "the defendant must have made the false publication with a high degree of awareness of . . . probable falsity, or must have entertained serious doubts as to the truth of his publication." *Harte-Hanks v. Connaughton*, 491 U.S. 657, 667 (1989) (internal quotations and citation omitted). A plaintiff can establish actual malice if the defendant "entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity." *Fry v. Lee*, 2013 COA 100, ¶ 21, 408 P.3d 843 (Colo. App. 2013); *see also Harte-Hanks*, 491 U.S. at 667. "[I]ll will and bad motive toward the plaintiff are not elements of actual malice." *Fink v. Combined Communications Corp.*, 679 P.2d 1108, 1111 (Colo. App. 1984). Mere evidence that a media defendant did not investigate properly does not rise to the level of actual malice. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153-54 (1967) (plurality opinion); *New York Times*, 376 U.S. at 287. Even an erroneous interpretation of the facts does not meet the standard. *See Time v. Pape*, 401 U.S. 279, 292 (1971) ("it is essential that the First Amendment protect some erroneous publications as well as true ones") (quoting *St. Amant v. Thompson*, 390 U.S. at 732).

When a plaintiff must ultimately show actual malice by clear and convincing evidence, "the plaintiff must establish a probability that they will be able to produce clear and convincing evidence of actual malice at trial" to withstand an Anti-SLAPP motion. *S.A.P.*, 2022 COA at ¶¶ 42-44. Summary judgment is thus appropriate where a plaintiff fails to "show[] by convincing clarity that the defendants published the [statements] with actual malice." *Id*. at ¶ 43 (citing *DiLeo v. Koltnow*, 613 P.2d 318, 232 (Colo. 1980)); *see Bose Corp. v. Consumers Union*, 466 U.S. at 511. Here, there is only a conclusory allegation in Paragraph X of the Complaint that the statements were knowingly false or made with reckless disregard for their truth. Quest alleges no facts regarding Defendants' state of mind or knowledge. Mr. Rekieta sincerely believes "Montagraph" is a pedophile. Rekieta Dec. at ¶ 19. He also believes, because he viewed direct evidence of it, that "Montagraph" had sex with a melon and created what he considers a snuff film featuring a minor. *Id*. at ¶¶ 17-22. He is aware of no information to the contrary, beyond the unsworn statements in the pleadings, and was not aware of any such information at the time the statements were made. *Id*. at ¶ 28.

Even now, Rekieta is not required to believe Quest's protestations to the contrary. *See Harte-Hanks*,

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491 U.S. at 691 n.37 ("[T]he press need not accept denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." (quotation marks omitted)); *Contemporary Mission, Inc. v. New York Times Co.*, 665 F. Supp. 248, 270 (S.D.N.Y. 1987) ("Publication in the face of a denial by plaintiffs of a statement's truth does not demonstrate actual malice"), aff'd, 842 F.2d 612 (2d Cir. 1988)).[56] Simply put, Quest has no evidence of actual malice, let alone clear and convincing evidence. *See Biro v. Condé Nast*, 807 F.3d 541, 546 (2d Cir. 2015) (finding that, *inter alia*, lack of allegations that *New Yorker* had reason to doubt unnamed sources, meant that plaintiff failed to plausibly allege actual malice).

Additionally, because Quest is a public figure, he must show actual damages, as noted above. Although he generically pleads lost income, wages, and money (Amended Complaint at ¶ XIII), he pleads no specifics and offered nothing in support of his default motion. Neither can Quest actually prove such damages; he suffered no quantifiable harm on account of Rekieta. "[A] plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject." *Guccione v. Hustler Mag., Inc*., 800 F.2d 298, 303 (2d Cir. 1986). Rekieta's statements did not come from out of the blue; Quest's reputation was already in the gutter. *See* Section 1.1, *supra*.

Thus, the Anti-SLAPP motion should be granted and summary judgment awarded to Defendants on the defamation claim.

3.3.2 Plaintiff's IIED Claim is Meritless

Quest claims Defendants are liable to him for intentional infliction of emotional distress. The elements of an IIED claim under Colorado law are "(1) the defendant engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) causing the plaintiff severe emotional distress." *Green v. Qwest Servs. Corp.*, 155 P.3d 383, 385 (Colo. App. 2006).[57] Conduct is actionable if it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

[56] Quest also claims that Rekieta is liable for his statements because he did not retract or apologize for them. Amended Complaint at ¶ XXVI. But declining to withdraw allegedly defamatory statements has nothing to do with whether those statements are actionable, and in any event Quest does not allege that he sent a request for retraction before filing suit.

[57] The law of Minnesota as to the elements of the claim is the same. *See Iacona v. Schrupp*, 521 N.W.2d 70, 73 (Minn. Ct. App. 1994).

decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Destefano v. Grabrian*, 763 P.2d 275, 286 (Colo. 1988). The threshold issue of whether a plaintiff has alleged sufficiently outrageous conduct is a question of law, and the court must consider the totality of the defendant's conduct in doing so. *Green*, 155 P.3d at 385.

A defendant's conduct will only be found actionable in the most "extremely egregious" circumstances. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). For example, the court in *Floyd* found that instructing an employee to conduct an illegal undercover narcotics investigation, laundering money to fund an investigation, and then firing the employee as a scapegoat to cover up their involvement in criminal activity was not sufficiently outrageous to support an IIED claim. *Id*. at 666.

Mere false accusations (even assuming, *arguendo*, they are false) do not qualify as extreme and outrageous conduct. *See Bodett v. CoxCom, Inc.*, 366 F.3d 736, 747-48 (9th Cir. 2004) ("Arizona courts have typically found false accusations alone not enough to constitute an intentional infliction of emotional distress"); *Peterson v. Eder*, 2001 Mass. Super. LEXIS 649 (Mass. Super. Ct., Dec. 27, 2001) ("Gossiping and spreading stories are petty human commonplaces neither so outrageous in character nor so extreme in degree 'as to go beyond all possible bounds of decency, to be regarded as atrocious and utterly intolerable in a civilized community'") (quoting *Foley v. Polaroid Corp.*, 400 Mass. 82, 508 N.E.2d 72, 82 (1987)), aff'd on other grounds, 68 Mass. App. Ct. 1103, 860 N.E.2d 49 (Mass. App. Ct. 2006). Thus, even accusations of crimes and sexual misconduct are insufficient to qualify as outrageous conduct. *See, e.g., Gordon v. Boyles*, 99 P.3d 75, 82 (Colo. App. 2004) (accusation of stabbing a police officer and of infidelity); *see also Carraway v. Cracker Barrel Old Country Store, Inc.*, No. 02-2237, 2003 U.S. Dist. LEXIS 12326, at *14 (D. Kan. July 16, 2003) (spreading of false rumors to former coworkers and customers that "plaintiff stole money, used drugs, had a drinking and/or gambling problem and was [a] lesbian" was not "extreme and outrageous"); *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992) (accusations of conspiracy, perjury, and falsification of records in labor dispute did not meet the standard for extreme and outrageous conduct); and *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85 (Tex. App. 1996) (accusation of misappropriating church funds was not extreme and outrageous conduct). Quest does not allege Rekieta engaged in any conduct other than insulting him and providing unflattering opinions. As a matter of law, this is insufficient to support an IIED claim. Indeed,

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neither YouTube, Rumble, nor the Minnesota Bar found Rekieta's conduct to be extreme or outrageous.

Neither is there any evidence of recklessness or intent to injure Quest. The statements were not "directed at" Quest, as the tort requires. *Dornfeld v. Oberg*, 503 N.W.2d 115, 119 (Minn. 1993); *Bradshaw v. Nicolay*, 765 P.2d 630, 632 (Colo. App. 1988). Rekieta was entertaining his audience and there is no suggestion Quest would ever have heard most of the statements. As a result, Quest cannot meet the elements of this claim and the motion must be granted.

Moreover, in *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), the Supreme Court held that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress" without showing that the false statement of fact was made with actual malice, as set forth in *Sullivan*. As a threshold matter, therefore, just as Quest cannot establish actual malice with respect to his defamation claim, so, too, does this claim fail.

3.3.3 Plaintiff's NIED Claim is Meritless

Quest cannot recover for negligent infliction of emotional distress. Claims sounding in negligence cannot meet the First Amendment's actual malice requirement. *Anderson v. Colo. Mt. News Media, Co.*, Civil Action No. 18-cv-02934-CMA-STV, 2019 U.S. Dist. LEXIS 217201, at *18-19 (D. Colo. Dec. 18, 2019). The actual malice test will "apply equally to ancillary tort claims which might arise from the publication of an allegedly defamatory statement." *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1124-25 (Colo. App. 1992) (addressing negligence claim).

Even in the absence of the actual malice test, Quest cannot succeed on this claim. "To establish the claim, a plaintiff must show that the defendant's negligence created an unreasonable risk of physical harm and caused the plaintiff to be put in fear for his or her own safety, that this fear had physical consequences or resulted in long-continued emotional disturbance, and that the plaintiff's fear was the cause of the damages sought. The plaintiff must also show that he or she either suffered physical injury or was in the 'zone of danger.'" *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489, 496-97 (Colo. App. 2011); accord *Aromashodu v. Swarovski N. Am.*, 981 N.W.2d 791, 799 (Minn. Ct. App. 2022).[58]

[58] Although under Minnesota law, one who establishes a claim for defamation need not prove zone of danger, Quest fails in his defamation claim. *Bohdan v. Alltool Mfg. Co.*, 411 N.W.2d 902, 907 (Minn. App. 1987), rev. denied (Minn. Nov. 13, 1987). Even if he could, Quest fails to meet the other elements of the claim.

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The wrongful conduct Plaintiff identifies for this claim is Defendants' "failure to act, redact, apologize, or attempt to withdraw defamatory statements and suggestions that Plaintiff should be killed," and that such actions "were in direct violation of Plaintiff's rights as a human being." Complaint at ¶ XXI. In his Amended Complaint, he adds the new allegation that Rekieta's statements "caused followers and devotees of Defendants to search for, find, then stalk Plaintiff, come to his home, follow him in vehicles as Plaintiff drove a motor vehicle, then to publish pictures and videos of Plaintiff while driving." Amended Complaint at ¶ XXVII. Quest makes no claim of physical consequences and he was never in any zone of danger.

Quest makes the conclusory allegation that he was placed in a zone of danger by virtue of the actions of third parties, but this does not support an IIED or NIED claim. It is the *defendant's* alleged conduct that must place a plaintiff in the zone of danger, not the action of unrelated third parties. Quest's theory appears to be similar to that in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982), where the Supreme Court held that a speaker could not be found liable for the speech of third parties unless he authorizes, ratifies, or directly threatens unlawful activity. Quest does not allege that Rekieta instructed or encouraged any of his viewers to engage in this alleged conduct, nor is there any allegation that these unidentified third parties have an agency relationship with Rekieta, or that Rekieta's statements had a tendency to cause such third parties to act. A review of Rekieta's statements lays bare the deficiency in this claim, which cannot be cured through amendment. He does not meet the elements of this claim; summary judgment should be awarded and the Anti-SLAPP motion granted.

4.0 CONCLUSION

Quest makes himself seem like a pedophile. *See* Section 1.1, *supra*. Rekieta is entitled to use the image Quest created for himself as part of his entertainment program. Defendants have no subjective doubt as to the statements made and Plaintiff cannot offer sufficient evidence to meet his burdens. Summary judgment should be granted to Defendants and they should be awarded their fees under the Colorado Anti-SLAPP statute.

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ACKNOWLEDGEMENT REQUIRED BY MINN. STAT. § 549.211, SUBD. 1

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat. § 549.211, if factual contentions and legal arguments contained in this pleading are unwarranted or presented for an improper purpose or are lacking in evidentiary support.

Date: February 13, 2023 */s/ Nicholas Henry*

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CERTIFICATE OF SERVICE

I, Bill Rohla, e-filed a copy of this document by uploading it to the Court's e-file system on February 13, 2023, which sends service to registered users, including all other counsel of record in this cause. */s/ Bill Rohla*