DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO Address of Court: 1437 Bannock Street Denver, CO 80202	DATE FILED: October 11, 2021 12:52 PM FILING ID: A59AB061BB54B CASE NUMBER: 2020CV34319
Plaintiff: ERIC COOMER, Ph.D. v. **Defendants**: DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*	▲ **COURT USE ONLY** ▲
Attorneys for defendants Herring Networks, Inc., d/b/a One America News Network, and Chanel Rion: Richard A. Westfall, No. 15295 Westfall Law, LLC 5842 W. Marquette Drive Denver, Colorado 80235 Telephone: (720) 904-6022 Email: rwestfall@westfall.law Blaine C. Kimrey (*Pro Hac Vice*) Jeanah Park (*Pro Hac Vice*) Bryan K. Clark (*Pro Hac Vice*) Julia L. Koechley (*Pro Hac Vice*) Vedder Price P.C. 222 N. LaSalle Street, Suite 2600 Chicago, Illinois 60601 Telephone: (312) 609-7500 Facsimile: (312) 609-5005 Email: bkimrey@vedderprice.com jpark@vedderprice.com bclark@vedderprice.com jkoechley@vedderprice.com	Case Number: 2020CV034319 Courtroom: 409

DEFENDANTS HERRING NETWORKS, INC., D/B/A ONE AMERICA NEWS NETWORK, AND CHANEL RION'S MOTION FOR PARTIAL RECONSIDERATION

Pursuant to C.R.C.P. 121 § 1-15(11), defendants Herring Networks, Inc., d/b/a One America News Network, and Chanel Rion (the "OAN Defendants"), through their attorneys, respectfully move the Court for partial reconsideration of the Order entered on October 8, 2021 (the "Order") regarding the OAN Defendants' Motion to Set Aside the Omnibus Protective Order and to Unseal Court Records Designated as Protected or Suppressed (the "Motion").

Certification Pursuant to C.R.C.P. 121 § 1-15(8): Undersigned counsel has conferred with counsel for Dr. Coomer, who opposed the relief requested.

In support of this motion, the OAN Defendants state as follows:

I. Introduction

The Colorado Rules of Civil Procedure provide that motions to reconsider are permitted where there has been "a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice." C.R.C.P 121 § 1-15(11). While the OAN Defendants appreciate and agree with the Court's October 8, 2021 Order setting aside the Omnibus Protective Order entered on September 24, 2021, they write to address the Court's assertions of improprieties by the OAN Defendants and ask that the Court reconsider those issues with the benefit of additional information, strike those portions of the Order that unfairly threaten the OAN Defendants with sanctions, and grant the OAN Defendants' request that the Court unseal immediately the documents identified in **Exhibit A**.

The OAN Defendants did not misrepresent any court proceedings or misconstrue Colorado procedures. Rather, the OAN Defendants made only an innocent misstep, which is not realizing that some pleadings were filed as suppressed without counsel's knowledge. Given new lead and new local counsel's quick transition into this matter because of the dire illness of prior lead counsel for the OAN Defendants, any errors in designating documents as suppressed were both innocent and understandable (and have now been cured by filing on the public docket those pleadings previously erroneously suppressed). The OAN Defendants also disagree that their reply brief was intended to "intimidate" anyone. Accordingly, the OAN Defendants respectfully request that the Court reconsider its assertions that the OAN Defendants engaged in misconduct (which the OAN Defendants did not do).

II. Relevant background

The OAN Defendants retained Vedder Price P.C. as lead counsel in this matter in late August 2021 after their prior lead counsel, Bernard Rhodes of Lathrop GPM, suffered significant health problems that necessitated his withdrawal from this case (as well as all others). The Court

granted *pro hac vice* admission to four Vedder Price attorneys on September 9, 2021, but when Mr. Rhodes' colleague Stephen Dexter of Lathrop GPM withdrew his appearance on September 25, 2021, the Vedder Price attorneys lost their access to the docket as parties of record (even though Richard Westfall replaced Mr. Dexter as local counsel). Even now, no Vedder Price attorney has full party access to the docket.

Mr. Westfall and Vedder Price have engaged in significant efforts to restore that access, including refiling the four *pro hac vice* motions that were already granted (at the direction of the Court). In the meantime, however, lead counsel at Vedder Price has been fully reliant on Mr. Westfall and his paralegal, Christy Orzulak, to file documents in this case and to receive documents in this case that do not appear on the public docket. *See* Declaration of Christy Orzulak, attached as **Exhibit B**, at ¶¶ 4-5.

Because Ms. Orzulak was new to the case, she filed some documents as "suppressed" that the attorneys at Vedder Price did not request to be "suppressed." (*Id.* at ¶ 7). And because Vedder Price did not have full access to the docket, the OAN Defendants' attorneys did not recognize that these documents had been suppressed by Ms. Orzulak at filing. Counsel thought that the Court and/or its Clerk had suppressed the documents, in part because so many documents in this case have been treated as confidential — the OAN Defendants have identified 59 such filings. *See* Exh. A.

On October 7, 2021, the Court entered an Order in this case, denying Vedder Price associate Julia Koechley's updated unopposed *pro hac vice* admission motion (even though Ms. Koechley had already been admitted and the updated motion was filed per direction by the Court because Vedder Price had lost full party docket access after Lathrop GPM withdrew as counsel for the OAN Defendants in this case). (Exh. B, ¶ 6). In this Order, the Court noted its concerns about suppressed filings by the OAN Defendants and that Ms. Koechley's updated *pro hac vice*

application should not have been filed as suppressed. (*Id.*). This is the first time Ms. Orzulak became aware of her mistake (Exh. B, ¶ 7) and the first time the attorneys at Vedder Price knew that these documents had been filed by Ms. Orzulak as suppressed.

At 4:17 p.m. MT on October 7, 2021 (i.e., shortly after the Court entered the October 7, 2021 Order), Ms. Orzulak contacted the Court's Clerk and advised that she had made the clerical error of filing certain documents as "suppressed" and that there was no malicious intent behind this error. (Exh. B, ¶ 8). She also asked that the Court be apprised of her innocent mistake and apologized for the inconvenience. (*Id.*). The Court's clerk advised that she would advise the Court of Ms. Orzulak's call. (*Id.*). Ms. Orzulak re-filed the following documents on the public docket: (i) Joinder to Defendants Joseph Oltmann, FEC United, Inc. and Shuffling Madness Media Inc. d/b/a Conservative Daily's Response in Opposition to Plaintiffs Second Motion for Sanctions Pursuant to CRCP 37; (ii) Out-of-State Counsel's Updated Unopposed Verified Motion Requesting *Pro Hac Vice* Admission (B. Kimrey); (iii) Out-of-State Counsel's Updated Unopposed Verified Motion Requesting *Pro Hac Vice* Admission (J. Park); (iv) Out-of-State Counsel's Updated Unopposed Verified Motion Requesting *Pro Hac Vice* Admission (B. Clark); and (v) Out-of-State Counsel's Updated Unopposed Verified Motion Requesting *Pro Hac Vice* Admission (J. Koechley); (vi) Reply in Support of Their Motion for Partial Reconsideration of the Court's September 22, 2021 Order; and (vii) Motion to Set Aside the Omnibus Protective Order entered pursuant to C.R.C.P. 26(c) and to Unseal Court Records Designated as Protected or Suppressed. (*Id.* at ¶¶ 7, 9).

III. The OAN Defendants did not misrepresent Court proceedings.

In the October 8, 2021 Order, the Court took issue with the OAN Defendants' description of the proceedings because of (1) the manner in which the OAN Defendants described the Court's sealing of plaintiff Eric Coomer's deposition, and (2) the OAN Defendants' understanding of how

their Motion came to be suppressed. Neither point reasonably suggests any sort of misconduct or intentional misrepresentations by the OAN Defendants.

With respect to the sealing of Dr. Coomer's deposition, it is indisputable that the Court designated the deposition confidential *sua sponte*. No party, not even Dr. Coomer himself, sought to have the deposition treated as confidential. Yet the Court sealed the deposition in its September 7, 2021 Order and then did so again in its September 24, 2021 Omnibus Protective Order. Moreover, the September 24, 2021 Omnibus Protective Order made crystal clear that it "supersedes all prior protective orders entered in this matter." Thus, it would not have made sense for the OAN Defendants to refer to prior protective orders in seeking to set aside the September 24, 2021 Omnibus Protective Order. And the Court reiterated its *sua sponte* sealing of Dr. Coomer's deposition ***after*** the deposition had occurred.

In Colorado, there is a presumption of openness on the public docket, *see Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996) ("[U]nless there exists a legitimate reason for non-disclosure, any member of the public is entitled to review all public records. There is no requirement that the party seeking access must demonstrate a special interest in the records requested."), and no party made any effort before September 24, 2021, to hide Dr. Coomer's deposition from public view. For the Court, on its own, to a seal a defamation plaintiff's deposition is extraordinary, particularly where the defamation plaintiff is litigating in the press and participated willingly in a profile-piece interview on the topic of the litigation in *New York Times Magazine.*[1] This is the practice that the OAN Defendants called into question in their Motion, and the Court ultimately agreed and lifted the seal on the Dr. Coomer's deposition. There was no

[1] *See* https://www.nytimes.com/2021/08/24/magazine/eric-coomer-dominion-election.html (last visited October 9, 2021).

misrepresentation of the Court proceedings related to sealing Dr. Coomer's deposition by the OAN Defendants.

As for the assertion in the OAN Defendants' reply brief that the Motion was sealed by the Court, this was the result of the misunderstanding outlined above, and the OAN Defendants apologize, again, for this innocent mistake. The Motion was not supposed to be suppressed, but there was a clerical error in doing so. Because Vedder Price did not have access to the party docket showing how suppressed documents had been filed, Vedder Price concluded that the Court had suppressed this document automatically. This is a reasonable conclusion, given that dozens of documents have been automatically "suppressed" or "protected" in this case. *See* Exh. A. This was a mistake and not a nefarious effort to hide information — indeed, the OAN Defendants would like to see the docket fully open to the public. Among other documents, Ms. Orzulak filed four *pro hac vice* motions under seal, which obviously creates no strategic advantage for the OAN Defendants. To suggest otherwise would be nonsensical.

Once the Court entered its October 7, 2021 Order on Ms. Koechley's *pro hac vice* motion, flagging the unnecessary sealing of the information, Ms. Orzulak promptly re-filed the erroneously suppressed documents publicly as Filing IDs FA5B431D4E222, 9A5225FE807AA, DB730634B4821, 46E7E99E65106, 562EA1B47FCF5, B9EAF95E6523D, and 3F5C201A5F888. She also called the Court's Clerk to explain the issue on the afternoon of October 7, 2021. (Exh. B, ¶¶ 7-8). For the Court to see those filings and receive Ms. Orzulak's explanation of what happened, only to then proceed to suggest that this innocent mistake was some form of intentional misconduct would be unfair and unreasonable.

IV. The OAN Defendants did not use their pleadings to attempt to intimidate others.

The passage in the OAN Defendants' reply brief that appears to concern the Court is one in which the OAN Defendants correctly point out that Dr. Coomer's reputation is obviously at

issue in this case and character evidence will be admissible at trial. This is simply a statement of fact and applicable law intended to rebut Dr. Coomer's cavalier argument that his deposition testimony is irrelevant because it is "inadmissible character evidence." The statement is not intended to "intimidate" anyone, but rather explain to Dr. Coomer that his position is incorrect. Dr. Coomer filed this lawsuit and directly put his reputation into question — he has no right to feel "intimidated" when the defendants explore or comment on his reputation.

V. The OAN Defendants did not misapprehend state-wide procedures regarding access to court records and transcripts.

The docket in this case makes clear that many documents are "Protected" or "Suppressed" that should not be. The OAN Defendants have identified ***59 filings*** that have been hidden from the public view after being so designated, but as reflected in the attached chart, none of those documents should still be considered confidential — and the majority of them never should have been treated as confidential to begin with. *See* Exh. A. The Court and/or the Clerk has consistently gone too far in applying Chief Justice Directive 05-01 as Amended October 18, 2016. Section 4.60 of Directive 05-01 designates the type of information that should be deemed "Protected" and should be redacted from public filings. But most, if not all, of the documents on the Court's docket that have been flagged as "Protected" do not contain ***any*** of the categories of information set forth in Section 4.60. *See* Exh. A. Moreover, Section 3.09 establishes that "Protected" documents should be "accessible to the public . . . ***after*** redaction." (Emphasis added). It is evident from the docket that there has been no effort to make redacted versions of "Protected" documents available to the public (to the extent there is anything to redact). There are "Protected" documents on the docket from as early as February 25, 2021 that remain entirely unavailable on the public docket. *See* Exh. A. This is precisely the type of concealment that the OAN Defendants sought to address in the Motion.

The Court points to Chief Justice Directive 05-03 as Amended June 9, 2021 to conclude

that it is appropriate for public court transcripts to be "suppressed" from the public docket because members of the public must order transcripts from the Court reporter. But nothing in Directive 05-03 suggests that a transcript that has ***already been purchased*** by a party and prepared by the court reporter must be concealed from public view if it is filed as an attachment to a future brief. The clear goal of Directive 05-03 is to ensure that court reporters are compensated for their time in preparing transcripts, but it is unreasonable to read Directive 05-03 as requiring any member of the public who wishes to view the transcript to purchase a new transcript.

Accordingly, the OAN Defendants did not misapprehend the applicable rules.

VI. The Court should order the Clerk to unseal any documents now deemed to be open as a result of the Court's Order.

Although the Order correctly set aside the Omnibus Protective Order entered on September 24, 2021, it didn't provide any guidance for how the currently "Protected" and "Suppressed" documents should be made public. The OAN Defendants believe that requiring the parties to refile all formerly sealed documents on the public record would be an inefficient exercise that would further muddle the docket (but if that's what the Court wants, that needs to be clear to the parties). Moreover, given that the Court has already warned and threatened the OAN Defendants several times in the past month,[2] the OAN Defendants are concerned about filing something publicly that

[2] *See* Transcript of hearing on September 17, 2021, attached as **Exhibit C**, 16:13-17 ("Mr. Kimrey, I'm going to interrupt you, because you are new to this. We have had a great run so far of no *ad hominem* type attacks during these conferences. So if he can keep things as professional as possible, I would appreciate it."); September 22, 2021 Order ("The Court notes that Defendants Herring Networks, Inc., D/B/A One America News Network, and Chanel Rion's Motion to Strike and For Extension of Reply Briefing Deadline and Hearing on Their Special Motion to Dismiss Pursuant to C.R.S. §13-20-1101 contains information that is subject to the Court's July 19, 2021 Protective Order. Yet, Defendants did not redact such information from their Motion as required by the July 19, 2021 Protective Order. The Court takes this opportunity to remind all parties of the importance of compliance with the July 19, 2021 Protective Order."); October 7, 2021 Order ("Since October 1, 2021, counsel for Defendants Herring Networks and Chanel Rion have engaged in the practice of filing all pleadings as 'Suppressed'--claiming that they are required to do so under the Court's Omnibus Protective Order dated September 24, 2021--even where there is absolutely no legitimate ground for concluding that such pleading is covered by the Omnibus Protective Order. This updated motion for *pro hac vice* admission is such an improperly filed pleading. It is not clear to the Court whether this is a clerical error, or if counsel is flagrantly

the Court might deem subject to "Protection" or "Suppression." Accordingly, the OAN Defendants request that the Court and/or Clerk make public all of the documents identified in Exhibit A because (1) they were sealed because they referred to Dr. Coomer's deposition, (2) they were sealed because of alleged revelation of people on, or information about, the antifa call, or (3) none of the applicable court procedures justify ongoing sealing.

VI. Conclusion

For the foregoing reasons, the OAN Defendants request that the Court reconsider its positions about purported improprieties by the OAN Defendants, strike those portions of the October 8, 2021 Order that unfairly threaten the OAN Defendants with sanctions, and grant the OAN Defendants' request that the Court and/or Clerk render public immediately the documents identified in **Exhibit A**.

misrepresenting the scope of the Omnibus Protective Order."); October 8, 2021 Order ("Counsel for Defendants Herring Networks and Chanel Rion are cautioned that repeated improper conduct may subject counsel to sanctions including those available under C.R.C.P. 11 or C.R.C.P. 107, a referral to appropriate disciplinary bodies, and/or revocation of pro hac vice admissions pursuant to C.R.C.P. 205.3(5).").

The OAN Defendants disagree with all of these admonishments and are very concerned about the Court's potentially trying to set a record intended to unfairly disqualify or constrain the OAN Defendants' counsel. In light of that, the OAN Defendants ask the Court to clarify how its October 8, 2021 Order should be carried out so that the OAN Defendants can avoid further unfair admonishment and threats by the Court. The parties and the public have a right to know whether the Court is going to remove "Protected" and "Suppressed" designations to the 59 items at Exhibit A, whether the parties should refile some or all those materials as public, or whether the Court would like to follow some other course to allow the sun to shine fully on this litigation.

Respectfully submitted October 11, 2021,

BY: s/ Richard A. Westfall
Richard A. Westfall, No. 15295
5842 W. Marquette Drive
Denver, Colorado 80235
Telephone: (720) 904-6022
Email: rwestfall@westfall.law

By: s/ Blaine C. Kimrey
Blaine C. Kimrey (*Pro Hac Vice*)
Jeanah Park (*Pro Hac Vice*)
Bryan Clark (*Pro Hac Vice*)
Julia L. Koechley (*Pro Hac Vice*)
Vedder Price P.C.
222 N. LaSalle Street, Suite 2600
Chicago, Illinois 60601
Telephone: (312) 609-7865
Facsimile: (312) 609-5005
Email: bkimrey@vedderprice.com
jpark@vedderprice.com
bclark@vedderprice.com
jkoechley@vedderprice.com

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October 2021, a true and correct copy of the foregoing was electronically served via the Integrated Colorado Courts E-Filing System (ICCES) and has been e-served via ICCES on all counsel of record.

s/ Richard A. Westfall