DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202	DATE FILED: November 3, 2021 10:31 PM CASE NUMBER: 2020CV34319
Plaintiff(s) ERIC COOMER v. **Defendant(s)** DONALD J TRUMP FOR PRESIDENT INC et al.	⚠ **COURT USE ONLY** ⚠
	Case Number: 2020CV34319 Division: 409 Courtroom:

Order:Defendants Herring Networks, Inc., d/b/a One America News Network, and Chanel Rion's Motion Seeking an Evidentiary Hearing Pursuant to People v. Schreck

The motion/proposed order attached hereto: ACTION TAKEN.

Motion ruled upon during hearing held on October 13 and 14, 2021.

Issue Date: 11/3/2021

MARIE AVERY MOSES
District Court Judge

<table>
<tr><td>DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO

Address of Court: 1437 Bannock Street
Denver, CO 80202</td><td rowspan="2">▲ COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiff: ERIC COOMER, Ph.D.

v.

Defendants: DONALD J. TRUMP FOR PRESIDENT, INC., et al.</td></tr>
<tr><td>Attorneys for defendants Herring Networks, Inc., d/b/a One America News Network, and Chanel Rion:
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Courtroom: 409</td></tr>
<tr><td colspan="2">DEFENDANTS HERRING NETWORKS, INC., D/B/A ONE AMERICA NEWS NETWORK, AND CHANEL RION’S MOTION SEEKING AN EVIDENTIARY HEARING PURSUANT TO PEOPLE V. SCHRECK</td></tr>
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Pursuant to CRE 403, CRE 702, and *People v. Shreck*, 22 P.3d 68 (Colo. 2001), defendants Herring Networks, Inc., d/b/a One America News Network ("OAN"), and Chanel Rion (the "OAN Defendants"), through their attorneys, file this Motion Seeking an Evidentiary Hearing on the qualifications of plaintiff Eric Coomer's four purported experts (the "Motion") or, alternatively, an order *in limine* excluding any argument relying on the declarations of the four purported experts because the Court has not made any findings as to their relevance, reliability or that CRE 403 has been satisfied.

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

When Dr. Coomer filed his Omnibus Response to Defendants' anti-SLAPP motions on September 17, 2021, he attached (along with many other documents) declarations from four purported experts who render opinions on election security and technology, intellectual property and social media, journalism ethics, and the QAnon movement: J. Alex Halderman, Doug Bania, Frederick W. Brown, Jr., and Mike Rothschild. The Court has since denied the OAN Defendants' September 22, 2021 motion to strike these declarations, stating that it would "entertain evidentiary objections to evidence presented at the hearings on October 13th & 14th." (September 22, 2021 Order, p. 1). But the Court then entered an order yesterday stating that "[t]he Court will not be weighing the evidence presented by the parties or resolving conflicting factual claims" at the hearings on October 13 and 14. (October 11, 2021 Order, p. 2). As a matter of Colorado law, the testimony from Dr. Coomer's four purported experts should not be considered until the Court has either conducted an evidentiary hearing or made findings as to the relevance and reliability of the

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so-called expert testimony. Accordingly, the Court should set an evidentiary hearing or enter an order *in limine* excluding any argument relying on the declarations of the four purported experts.

II. Argument

The Colorado Supreme Court has firmly established the standard for evaluating expert testimony, requiring what is known as a "*Shreck* hearing" to determine the admissibility of expert testimony. *Shreck*, 22 P.3d at 68. The admissibility of expert testimony is governed by CRE 702 and CRE 403. *Id.; see also Kutzly v. People*, 422 P.3d 838, 841 (Colo. 2019). "[A]dmissibility of expert testimony requires that the testimony be relevant and reliable, and that the probative value of the evidence not be substantially outweighed by any of the countervailing considerations contained in CRE 403." *Id.*; *see also People v. Rector*, 248 P.3d 1196, 1201 (Colo. 2011). "A party may move the trial court to conduct a pretrial evidentiary hearing, i.e., a *Shreck* hearing, to decide the admissibility of an expert witness's proposed testimony." *Kutzly*, 422 P.3d at 841 (citing *Rector*, 248 P.3d at 1201). "A trial court need not conduct a *Shreck* hearing if there is sufficient information to make an admissibility determination without one, but ***the trial court must nonetheless address the testimony and make specific findings regarding its challenged admissibility***." *Kutzly*, 422 P.3d at 841 (emphasis added); *Rector*, 248 P.3d at 1201. "If the trial court fails to make a specific finding, then it abuses its discretion in not holding a *Shreck* hearing unless the record not only supports admission of the contested testimony, but virtually requires it, or if Colorado has already properly accepted the basis of the expert's testimony." *Id.*

In evaluating the purported experts, "the focus of a trial court's inquiry should be on the reliability and relevance of the scientific evidence, and that such an inquiry requires a determination as to (1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury." *Shreck*, 22 P.3d at 78. "[W]hen a

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trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case." *Id.* In deciding whether an expert should be permitted to provide certain opinions, the Court must also consider CRE 403's limitations on the admissibility of evidence. *See People v. Battigalli-Ansell*, 493 P.3d 376, 384 (Colo. Ct. App. 2021); *see also* C.R.E 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.").

Here, a *Shreck* hearing is necessary for the Court to evaluate the totality of the circumstances related to each of the four purported experts. Absent such a hearing, the Court will be unable to adequately evaluate the reliability and relevance of the expert methodologies at issue. But if the Court does not conduct a *Shreck* hearing, it is ***required*** to make specific findings regarding the challenged admissibility of the evidence, and no expert evidence should be considered until the Court does so. *Kutzly*, 422 P.3d at 841. Should the Court choose to forgo the *Shreck* hearing, the evidentiary record currently before the Court shows that arguments relating to the opinions of the four purported experts should be barred. None of the witnesses has engaged in any sort of "scientific" process requiring unique expert qualifications, multiple purported experts lack any meaningful qualifications to serve as an expert in a court of law, and much of the proposed testimony is irrelevant (but is intended to be prejudicial — for example, Mr. Bania hopes to generate sympathy for Plaintiff by noting how often he has been threatened online (but making no connection to Defendants) (*see* Bania Declaration ¶ 12) and Mr. Rothschild hopes to taint Defendants by associating them (erroneously) with the QAnon movement. (*See* Rothschild Declaration ¶ 4 ("In this declaration, I intend to establish how QAnon is tied to the defendants in this case. . . . I also intend to show the parallels between the harassment and crimes of QAnon believers at large and the harassment directed toward Dr. Coomer.") Mr. Halderman similarly

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attempts to taint the defendants by accusing them of "spread[ing] lies and distortions to undermine the legitimate winner [of the 2020 election] and advance their own political ends." (Halderman Decl. ¶ 58.) And Mr. Brown outright accuses the defendants of acting with actual malice. (Brown Decl. ¶ 133.) ("Defendants have displayed 'reckless disregard for the truth,' an element of malice.")

Moreover, the declarations of Dr. Coomer's purported experts improperly attempt to prove an ultimate legal conclusion, that is, that the OAN Defendants acted with actual malice when they reported on the information provided to them by sources such as defendant Joseph Oltmann. *See, e.g., Rector*, 248 P.3d at 1203; *Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. Ct. App. 2000). For example, Mr. Brown, Plaintiff's purported "journalism ethics" expert, testifies that he read the depositions of OAN Chief White House Correspondent and defendant Rion and OAN President Charles Herring and observes that Ms. Rion failed to adhere to "that key journalistic principle that you should give the subject of a negative story a voice in the story too, to defend himself or herself." (Brown Decl. ¶ 32). And as noted above, Mr. Brown also usurps the role of the factfinder by concluding that "one element of malice—'reckless disregard for the truth'—is apparent in the facts as I have reviewed them." (*Id.* ¶ 14). Mr. Halderman, Dr. Coomer's purported election security expert, opines that the "Defendants" (without specifying which defendants he is referring to) ignored the conclusions of election security experts and public officials and "advanced baseless conspiracy theories." (Halderman Decl. ¶ 7). Mr. Bania, Plaintiff's purported social media expert, attaches an unauthenticated report published by "Advance Democracy, Inc." and purports to testify about Dr. Coomer's alleged damages, opining that nearly 9,000 "QAnon-related Twitter accounts" mentioned Dr. Coomer by name and that many of them contained "violent and threatening language" directed at Dr. Coomer. (Bania Decl. ¶ 12). Finally, Mr. Rothschild, Dr.

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Coomer's purported expert on the QAnon movement, provides 87 paragraphs of testimony strongly implying that defendant Rion lied under oath in her deposition and that the OAN Defendants acted with reckless disregard for the truth because, according to Mr. Rothschild, one of the OAN Defendants' sources is an unreliable conspiracy theorist and the OAN Defendants should have known better. (Rothschild Decl. ¶¶ 49-64, 84-86). None of this testimony is appropriate expert testimony under CRE 702.

III. Conclusion

For the foregoing reasons, the Court should set an evidentiary hearing on the qualifications of Dr. Coomer's four purported experts or, alternatively, issue an order *in limine* excluding any argument relying on the declarations of the four purported experts.

Respectfully submitted October 12, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th 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

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